

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bay View Group LLC and The Spalena Company LLC

v.

Republic of Rwanda

(ICSID Case No. ARB/18/21)

**PROCEDURAL ORDER NO. 6
ON THE RESPONDENT'S REQUEST FOR SECURITY FOR COSTS**

Members of the Tribunal

Rt. Hon. Lord Phillips KG, PC, President of the Tribunal
Mr. J. Truman Bidwell, Jr., Arbitrator
Ms. Barbara Dohmann QC, Arbitrator

Secretary of the Tribunal

Mr. Alex B. Kaplan

September 28, 2020

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I. PROCEDURAL HISTORY

1. On August 19, 2020, the Respondent submitted its Application for Security for Costs (the “Application”). The Application included as Exhibits R-244 and R-245 letters dated July 23 and August 7, 2020 exchanged between counsel bearing on the Application.
2. On September 9, 2020, the Claimants submitted their Observations on the Respondent’s Application for Security for Costs (the “Observations”).
3. On September 11, 2020, the Respondent submitted its Response to the Claimants’ Observations (the “Response”).
4. That same day, after reviewing the Response, the Claimants informed the Secretary of the Tribunal via email that they rely on their Observations of September 9, 2020 and will not file a rejoinder to the Response.

II. SUBMISSIONS OF THE PARTIES

A. THE RESPONDENT’S POSITION

5. The Respondent requests that the Tribunal order security for costs to “preserve and protect its right to recover on a costs award in the event that it is successful in this arbitration.”¹ According to the Respondent, the Tribunal has the authority to order such a provisional measure under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1).²
6. The Respondent states that ICSID Arbitration Rule 39(1) sets two requirements for an order for security of costs, namely: “(a) identification of the rights to be preserved and the measures requested to preserve those rights; and (b) a demonstration that the requested measures are necessary to preserve those rights under the circumstances.”³
7. The Respondent principally relies on the reasoning in *Herzig v. Turkmenistan*, which concluded that security for costs should be ordered in exceptional circumstances only, and

¹ Application, ¶ 3.

² Application, ¶¶ 5-8.

³ Application, ¶ 10.

that three factors (the “*Herzig* factors”) needed to be satisfied to establish such circumstances: (i) impecuniosity; (ii) third-party funding; and (iii) a non-requirement that the third-party funder meet any adverse costs award.⁴ The Respondent recognizes that the existence of third-party funding alone is not sufficient to satisfy the exceptional circumstances requirement.⁵

8. Although the Respondent is cognizant that the *Herzig* decision has since been reconsidered by the same tribunal, it observes that the tribunal has not “resiled from” or “reconsidered its detailed reasoning regarding tribunals’ ability to order security for costs.”⁶ For the Respondent, the reconsideration of the *Herzig* decision is irrelevant to the Application.⁷ The Respondent asserts that the *Herzig* factors are amply met as set out below.

(i) The Respondent believes that the Claimants are no longer functioning other than as Claimants to this arbitration and are insolvent

9. According to the Respondent, it appears that “the Claimants’ only investments were their operations in Rwanda, through NRD, which are no longer operational.”⁸ The Respondent also infers that the Claimants are insolvent, impecunious, and non-operational because they have refused in *inter partes* correspondence to provide information or evidence relating to their “solvency and / or financial position.”⁹

(ii) The claim appears, in fact, to be funded by Mr. Marshall, who has assumed (informally) the role of a third-party funder, or by a third-party funder on his behalf

10. The Respondent surmises that, because Mr. Marshall is the president of both BVG and Spalena, and the sole director of BVG, he is the sole beneficial owner of, or has a significant

⁴ Application, ¶12 (citing *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, January 27, 2020 (“*Herzig v. Turkmenistan*”) (RL-168), ¶¶ 48, 50, 56-57).

⁵ Application, ¶¶ 16-17.

⁶ Response, ¶¶ 4-7.

⁷ Response, ¶ 8.

⁸ Application, ¶ 23.

⁹ Application, ¶¶ 24-26.

interest in, both Claimants.¹⁰ Therefore, the Respondent advances two theories. Either the Claimants are “funded by Mr. Marshall or by a third-party on his behalf” or they have a “contingency arrangement with their lawyers such that they are not required to fund all, or perhaps any, of their ongoing legal costs.”¹¹

(iii) Because the claim has been brought by the Claimants and not by Mr. Marshall, it can be reasonably be inferred that Mr. Marshall, or any third-party funder on his behalf, is not required to pay any adverse costs award

11. According to the Respondent, satisfying the first two *Herzig* factors, as shown above, “would be enough in this case.”¹²
12. The Respondent argues that “it is to be inferred that Mr. Marshall is using the Claimants as a shield against an adverse costs award in the event that the claims are not successful” because there is no evidence to the contrary, nor does there appear to be liability for the third-party funder.¹³
13. The Respondent contends that “the absence of proof that the third-party funder is required to meet any adverse costs award” should persuade the Tribunal to order security for costs, reiterating that the Claimants have refused to provide financial information to demonstrate their solvency.¹⁴
14. In the Response, the Respondent clarifies that it does not opine that the Claimants are required to establish that they have the financial resources to satisfy a costs award, nor does it request the Tribunal to order the Claimants to produce documents proving they can comply with an adverse costs award.¹⁵ Instead, it is the position of the Respondent that the *Herzig* factors having been satisfied, a provisional measure of security for costs is warranted.

¹⁰ Application, ¶ 27.

¹¹ Application, ¶ 28.

¹² Application, ¶ 29.

¹³ Application, ¶ 30.

¹⁴ Application, ¶¶ 31-32.

¹⁵ Response, ¶ 3.

15. It is recognized by the Respondent that the facts in this case differ from those in *Herzig*, where there was an explicit provision in the funding contract that prevented liability of the third-party funder for any adverse costs award, because “there appears to be no formal third-party funding contract whatsoever.”¹⁶ However, in the Respondent’s view, the risk that the *de facto* funder avoids liability “is plainly even higher in the present case.”¹⁷

(iv) An adverse costs order against the Claimants is likely because the Respondent has good prospects of succeeding in its defense

16. Though it is not a factor enumerated in *Herzig*, the Respondent also asks the Tribunal to consider the likelihood that “it will in due course order the Claimants to pay the Respondent’s costs of this arbitration,” relying on Article 2 of the Chartered Institute of Arbitrators’ International Arbitration Practice Guidelines on Applications for Security for Costs.¹⁸

17. According to the Respondent, the Claimants’ claims are “wholly unmeritorious and should not have been made,” as the Claimants have not established a breach of contract nor a breach of the USA-Rwanda BIT. In the Respondent’s view, its defence against those claims is “highly likely to succeed.”¹⁹

18. Further, the Respondent argues that it is “particularly inequitable for the third-party funder ... to avoid paying any adverse costs order” since these costs will eventually be borne by the Respondent’s “taxpayer citizens,” especially in light of the delay of the hearing.²⁰

(v) The request

19. The Respondent requests the Tribunal to order the Claimants to post a security of £1,500,000, which is half of the costs the Respondent estimates to incur during the

¹⁶ Application, ¶ 33.

¹⁷ *Ibid.*

¹⁸ Application, ¶ 35 (citing Chartered Institute of Arbitrators, “International Arbitration Practice Guideline: Applications for Security for Costs” (“CIA Guideline”) (RL-172), Art. 2).

¹⁹ Application, ¶ 36.

²⁰ Application, ¶¶ 37-38.

proceeding.²¹ Specifically, the Respondent requests the Tribunal to grant the following relief:

[1.] Order the Claimant and/or Mr. Marshall personally to post security in the amount of £1,500,000, to be deposited into an escrow account or provided as an unconditional and irrevocable bank guarantee within 14 days of the Tribunal's order;

[2.] Order 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;

[3.] Order the Claimant to pay all costs in respect of the Respondent's Request; and

[4.] Grant any further relief to Rwanda as it may deem appropriate.²²

B. THE CLAIMANT'S POSITION

20. According to the Claimants, the Respondent fails to satisfy the “exceptionally high burden,” required for an order of security for costs nor did it present evidence or a credible basis for its request, referring to the Application as a “thinly-veiled tactical maneuver designed to settle a meaningful, full hearing on the merits.”²³

(i) Legal standard

21. In the Claimants' view, the relevant legal standard is not derived from *Herzig*, a decision that was rescinded on June 9, 2020. Instead, the Claimants rely on the legal standard for provisional measures set out in *RSM v. Saint Lucia*, which held that (i) there must be a right in need of protection, (ii) the circumstances require that the provisional measures be ordered to preserve such a right, necessitating a showing of urgency and that those

²¹ Application, ¶¶ 39-40.

²² Application, ¶ 41.1-41.4.

²³ Observations, ¶ 2.

measures are necessary to prevent irreparable harm, and (iii) the tribunal must not prejudice the dispute.²⁴

22. What is more, the Claimants point to case law—*Herzig and Tennant Energy v. Canada*—to argue that the provisional measure of security for costs is “exceptional” and “extremely rare.” As such, the Respondent bears the high burden of establishing “exceptional circumstances.”²⁵
23. The Claimants opine that, although it is not well settled what constitutes “exceptional circumstances,” they urge the Tribunal to follow other tribunals and consider (i) impecuniosity, (ii) the existence of third-party funding, (iii) whether a third-party funding agreement disclaims liability for an adverse costs award, (iv) a track record of not complying with cost orders, and (v) whether the Claimants exercised improper behaviour.²⁶
24. Further, the Claimants request the Tribunal to consider the overall fairness, specifically whether awarding security for costs impedes the Claimants’ access to justice and whether the Claimants’ claimed impecuniosity was caused by the Respondent.²⁷
25. The Claimants also object to the lack of timeliness of the Application, as it was not made “as early as possible,” urging the Tribunal to “consider that [an untimely application] unfairly disadvantages the other party and refuse the application unless there is good reason for the delay.”²⁸ Finally, the Claimants rely on the Chartered Institute of Arbitrators’ International Arbitration Practice Guideline on Applications for Security for Costs, when they contend that the Tribunal may not prejudice or predetermine the merits of the case in deciding the Respondent’s Application.²⁹

²⁴ Observations, ¶¶ 9-10 (citing *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Respondent’s Request for Security for Costs, August 13, 2014 (“*RSM v. Saint Lucia*”) (RL-171), ¶ 58).

²⁵ Observations, ¶ 10 (citing *Herzig v. Turkmenistan* (RL-168), ¶ 50; *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 6, May 6, 2020 (“*Tennant Energy v. Canada*”) (CL-088), ¶ 23).

²⁶ Observations, ¶ 11.

²⁷ Observations, ¶ 12.

²⁸ Observations, ¶ 13.

²⁹ Observations, ¶ 14 (citing CIA Guideline (RL-172), Art. 4).

(ii) The Respondent fails to address the appropriate legal standard

26. According to the Claimants, the Application “ignores the standard” set out in ICSID Arbitration Rule 39(1) because it does not address urgency nor irreparable harm, coming only close when it refers to the delay of the hearing, which was “caused by an international pandemic that has restricted the ability of the Tribunal, Parties, and witnesses to adequately prepare for and hold hearings.”³⁰
27. The Claimants argue that “[a]t no point during the course of the scheduled proceedings leading toward the hearing on the merits did Respondent determine that it needed to seek security for the costs being incurred.”³¹ Further, the Claimants contend that the delay, “not caused by actions or inactions for which Claimants are responsible,” did not result in any “previously unplanned events or unanticipated expenses.”³²
28. The Respondent’s argument that “[i]t was reasonable (and sensible) for Respondent to wait to consider the pleadings and evidence relevant to the question of the Claimants’ current (and historic) financial position before making this application” is dismissed by the Claimants, who find that this “flies in the face of the requirement that such an application be made as early as possible.”³³
29. The Claimants assert that the Respondent also failed to satisfy the irreparable harm requirement because its “only attempt to show some kind of harm ... is its argument that Rwandan taxpayers will be forced to pay Respondent’s legal fees,” which would lead to States obtaining security for costs in almost every case with nothing more than a bare bones request.³⁴ Besides, the Claimants allege that Rwandan taxpayers have not borne the Respondent’s legal expenses because of the Respondent’s expropriations of the Claimants’ assets that remain in the Respondent’s possession.³⁵

³⁰ Observations, ¶¶ 15-16.

³¹ Observations, ¶ 17.

³² *Ibid.*

³³ Observations, ¶ 19 (citing Application, ¶ 4).

³⁴ Observations, ¶ 21.

³⁵ Observations, ¶ 22.

(iii) The Respondent has not identified “exceptional circumstances”

30. According to the Claimants, a tribunal is not required to grant security for costs, even if all *Herzig* factors are met.³⁶
- a. The Respondent has not met its burden to show that the Herzig factors have been satisfied*
31. The Claimants allege that the Respondent asks the Tribunal to shift the burden of proof from the Respondent to the Claimants with its argument that is “premised upon inferences” and based on the Claimants’ refusal to provide any documentation concerning financial information in *inter partes* correspondence.³⁷ According to the Claimants, they did not provide the requested information because the Respondent “is not entitled to it and Claimants were not required to provide it.”³⁸
32. Further, the Claimants contend that the deadline to request disclosure of the identities of their investors has passed, and that their current financial information might only be relevant “to the calculation of their damages during the second phase of this arbitration, which will occur *after* the hearings on the merits of the liability phase.”³⁹ Disclosure of such information would also put the investors at “grave and needless risk,” which the Claimants surmise from the death threats that were made against Mr. Marshall “in an effort to force Claimants to cease pursuing their rights to the Concessions.”⁴⁰
33. The Claimants rely on *Tennant Energy* to show that they are not required to provide financial information to the Respondent.⁴¹ In that case, the tribunal found that the burden is not on the claimant to prove that it has sufficient funds to meet an adverse costs order, adding that “document production is not a procedure usually given in anticipation of and to aid a party’s application for security for costs.”⁴²

³⁶ Observations, ¶ 23.

³⁷ Observations, ¶¶ 24-27.

³⁸ Observations, ¶ 27.

³⁹ Observations, ¶ 28.

⁴⁰ *Ibid.*

⁴¹ Observations, ¶¶ 29-32.

⁴² Observations, ¶¶ 31-32 (citing *Tennant v. Canada* (CL-088), ¶¶ 22-24).

34. The Claimants recognize that the Respondent did not explicitly request the Tribunal to order document production, but the Respondent “asks the Tribunal to infer that Claimants’ refusal to comply with its unilateral and unsubstantiated demand for documents after all pleadings have been submitted is evidence of Claimants[’] inability to pay an adverse costs award.”⁴³

35. Although, according to the Claimants, there is no legitimate basis that requires the Claimants to produce the information requested, the Claimants’ Counsel confirms that “there is no third-party funding agreement, no contingent fee agreement, and that Claimants are responsible for fees incurred in this matter.”⁴⁴ Therefore, the Claimants conclude that the Respondent failed to satisfy any of the *Herzig* factors.⁴⁵

b. The Respondent has failed to address any of the other factors that tribunals consider when deciding an application for request for security

36. As mentioned in above, the Claimants argue that tribunals consider other factors in addition to the *Herzig* factors. The Respondent, according to the Claimants, “does not address any of these factors.”⁴⁶

c. Herzig does not support the Respondent’s Application in any event

37. The Claimants observe that the Application “relies almost exclusively on the *Herzig* decision.” According to the Claimants, *Herzig* does not support the Application because (i) that decision was rescinded on June 9, 2020, (ii) the impecuniosity of the *Herzig* claimant was obvious since it was the insolvency administrator of a bankrupt German company, and (iii) Turkmenistan filed its request for security for costs one month after the claimant filed its memorial.⁴⁷

38. Further, the Claimants emphasize that the minority in *Herzig*, which “believed that the majority improperly ignored the claimant’s stated reason for bankruptcy: Turkmenistan’s

⁴³ Observations, ¶¶ 34-35.

⁴⁴ Observations, ¶ 36.

⁴⁵ Observations, ¶ 37.

⁴⁶ Observations, ¶ 38.

⁴⁷ Observations, ¶¶ 41-42.

bad acts,” explained that “impecuniosity is a merits issue that is ‘inextricably linked’ to the request for security,” and that “access to justice is significantly restricted if an award for security for costs is granted.”⁴⁸

39. According to the Claimants, “access to justice and the extent to which any impecuniosity is alleged to have been caused by the respondent are paramount in considering whether to award security for costs.”⁴⁹ Thus, the Claimants allege that the Tribunal must deny the Application, accept the Claimants’ arguments that any impecuniosity is due to the acts of the Respondent, and find that an award for security for costs “would severely restrict Claimants’ access to justice protected under the treaty.”⁵⁰

d. Overall fairness requires that the Tribunal deny the Application

40. The Claimants contend that, based on their earlier pleadings, the Respondent would be successfully “stifling Claimants’ legitimate and meritorious claims and benefiting from its bad acts,” unless the Tribunal denies the Application because “[a]n award for security for costs risks severely limiting Claimants’ access to justice.”⁵¹
41. The Claimants distinguish the present case from *Herzig* and *RSM* because, unlike the respondents in those cases, the Respondent waited until the Claimants “invested substantial amounts pursuing their claims,” surmising that it is “impossible to consider Respondent’s Application to be ‘prompt,’ ‘made at an appropriate time,’ or ‘as early as possible.’”⁵²
42. Further, the Claimants argue that, had they known that they faced a risk of having to provide security for costs at an early state of this arbitration, they “may have chosen a more affordable option for pursuing its [sic] claim, such as counsel who would work on a contingency basis ... seeking additional investors or alternative sources of funding, altering the scope of the claims, or, in the most extreme case, withdrawing their claims.”⁵³

⁴⁸ Observations, ¶ 43 (citing *Herzig v. Turkmenistan* (RL-168), ¶¶ 77-78).

⁴⁹ Observations, ¶ 47.

⁵⁰ *Ibid.*

⁵¹ Observations, ¶ 49-52.

⁵² Observations, ¶¶ 53-55.

⁵³ Observations, ¶ 57.

e. The Respondent improperly asks the Tribunal to prejudge the merits

43. The Claimants allege that the Tribunal may only consider the Application on a preliminary view of the relative merits of this case, limiting its preliminary examination in accordance with the Chartered Institute of Arbitrators' International Arbitration Practice Guideline on Applications for Security for Costs.⁵⁴
44. Since the Respondent, according to the Claimants, asks the Tribunal to consider questions that are “central to the merits on both Claimants’ claims and Respondent’s jurisdictional objections,” it would be an improper prejudgment of the merits for the Tribunal to entertain these questions and consider the facts contained therein.⁵⁵
45. The Claimants further contend that the Respondent is “running up fees” and is trying to “have the Tribunal consider its jurisdictional objection in advance of the hearings,” adding that the Respondent’s late filing of the Application “makes the Tribunal’s ability to preliminary review the merits without prejudging them nearly impossible” and that no determination of the merits should be made before the hearings scheduled in June 2021.⁵⁶

f. Conclusion

46. The Claimants request that the Tribunal deny the Application, award the Claimants their costs for responding to the Letter and for submitting the Observations.⁵⁷ Finally, the Claimants urge the Tribunal to “consider this motion to be vexatious, made in bad faith, and designed only to force Claimants to spend further costs.”⁵⁸

III. THE TRIBUNAL’S DECISION

A. PRINCIPLES

47. The Parties have referred the Tribunal to two previous authorities that deal with applications for security for costs in ICSID arbitrations (*Herzig v. Turkmenistan* and *RSM*

⁵⁴ Observations, ¶ 60 (citing CIA Guideline (RL-172), Art. 2).

⁵⁵ Observations, ¶¶ 61-62.

⁵⁶ Observations, ¶ 64.

⁵⁷ Observations, ¶¶ 65-66.

⁵⁸ Observations, ¶ 66.

v. Saint Lucia). The Tribunal has found both to be of assistance, particularly the latter, which itself made a detailed analysis of previous authority and was the first ICSID arbitration in which an order for security for costs was made. The fact that the decision in *Herzig* was subsequently rescinded does not invalidate the helpful analysis of the relevant principles in that case.

48. In each of those cases, the tribunals held that it had jurisdiction to make the Order sought,⁵⁹ pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. The Claimants implicitly accept that in this case the Tribunal has jurisdiction to make the Order sought.⁶⁰ They are right to do so. This Tribunal endorses the detailed reasoning on the point in *RSM*.
49. Further in both *Herzig* and *RSM*, the tribunals held that an applicant must demonstrate “exceptional circumstances” if an order for security for costs is to be justified.⁶¹ This Tribunal endorses that principle. It has been accepted by the Respondent.⁶² In his Assenting Reasons in *RSM*, Dr. Gavan Griffith commented that

*the risk to a State of a self-identifying investor claimant under a BIT having no funds to meet costs orders is inherent in BIT regimes. As a general proposition it may be said that a State party to a BIT has prospectively agreed to take claimant foreign investors as it finds them.*⁶³

The Tribunal considers that there is force in that observation. The fact that no application for security for costs in an ICSID arbitration had succeeded prior to *RSM* underlines the fact that the regime is one where such orders must be justified by exceptional circumstances.

⁵⁹ *RSM v. Saint Lucia* (RL-171), ¶¶ 46-48; *Herzig v. Turkmenistan* (RL-168), ¶ 47.

⁶⁰ Observations, ¶ 2.

⁶¹ *RSM v. Saint Lucia* (RL-171), ¶¶ 52, 75; *Herzig v. Turkmenistan* (RL-168), ¶ 50.

⁶² Application, ¶ 16.

⁶³ Assenting Reasons of Arbitrator Gavan Griffith, August 12, 2014), ¶ 2 (contained in *RSM v. Saint Lucia* (RL-171).

50. The Claimants submit that an application for security for costs should normally be made as early as possible.⁶⁴ The Commentary on Article 4 of the CIA Guideline cited by the Claimants provides:

*Applications for security for costs should be made promptly, that is, as soon as the risk or facts giving rise to the application are known or ought to have been known. Arbitrators should consider whether an application has been made at an appropriate time. If the application is made after significant expense has been incurred, they may consider that this unfairly disadvantages the other party and refuse the application unless there is a good reason for delay.*⁶⁵

This makes sound sense. The Tribunal accepts the Claimants' proposition on this point.

51. The reason why the decision in *Herzig* was rescinded was that the claimant had found it impossible, by reason of its insolvency, to comply with the requirement to provide security for costs and that, on the claimant's case, the reason for its insolvency was the wrongful actions of the respondent that were the foundation of the claimant's claim in the arbitration. In those circumstances, it was not just to shut out the claim because the claimant was unable to provide security. The Claimants invoke this principle in the present case.⁶⁶
52. The Tribunal accepts, as a matter of principle, that where a respondent relies upon a claimant's impecuniosity as a ground for an order for security for costs, it can be seen as relevant to consider whether the respondent may be responsible for that impecuniosity.
53. The Respondent's submission that the Claimants' claims "are wholly unmeritorious and should not have been made"⁶⁷ raises a difficult issue of principle. The Respondent cites Article 2 of the CIA Guideline, which provides:

Taking great care not to prejudge or predetermine the merits of the case itself, arbitrators should consider whether, on a preliminary

⁶⁴ See para. 25 above.

⁶⁵ CIA Guideline (RL-172), pp. 10-11.

⁶⁶ Observations, ¶ 47.

⁶⁷ See para. 17 above.

*view of the relative merits of the case, there may be a need for security for costs.*⁶⁸

The Commentary adds:

When considering this issue arbitrators should be extremely careful not to prejudge or predetermine the merits of the case itself and should make it clear to the parties that they have not done so. The danger is that, if the arbitrators consider the merits of the case before the substantive hearing, they may compromise their impartiality and may disqualify themselves from proceeding further. Arbitrators should not consider the merits in detail, as it is unlikely that there will be adequate materials to do so and it would be a time-consuming and expensive exercise. Instead they should limit their preliminary examination to determine whether there is a prima facie claim made in good faith and a prima facie defence made in good faith.

*[...] If [...] they conclude that both parties have reasonably good arguable cases, they may consider that this factor is not helpful in determining whether an order for security is appropriate.*⁶⁹

54. The Tribunal has difficulty with these propositions. They appear to suggest that if, on a preliminary consideration of the merits, the Tribunal concludes that the claim is not made *bona fide*, or with a reasonable prospect of success, this is a factor that should weigh in favour of an order for security for costs. The Tribunal considers that, at least in an ICSID arbitration, the suggested approach is neither desirable nor viable. If the Tribunal gives a “preliminary” consideration of the claim and concludes that it does not seem *bona fide*, or to have any reasonable prospect of success, is the Tribunal to include this view in the reasons it gives for ordering security for costs? If it does not, it offends against the requirements of transparency. If it does, an application for its removal on the grounds of apparent bias would seem the inevitable consequence.
55. For these reasons, in considering this Application, the Tribunal has not considered it appropriate to make a preliminary evaluation of the prospects of success of the claim.

⁶⁸ CIA Guideline (RL-172), Art. 2.

⁶⁹ CIA Guideline (RL-172), pp. 5-6.

B. EVALUATION

56. The Respondent has submitted that it has demonstrated the same exceptional combination of factors that led to the respondent's initial success in *Herzig*. The Tribunal does not agree.
57. The first factor found to be relevant in *Herzig* was the insolvency of the claimant. This was not in doubt. The nominal claimant was the insolvency administrator for a bankrupt company. The second relevant factor was that the claim was being funded by a third-party professional funder ("the funder"). The third relevant factor was that the funder was providing its services on express terms that it would be under no liability in respect of any award of costs made against the funded party.
58. The *Herzig* tribunal held that the fact of third-party funding was not, of itself, sufficient to satisfy the requirement of exceptional circumstances.⁷⁰ Nor, of itself, was the fact that the claimant was insolvent.⁷¹ The tribunal held that it had no need to decide whether the combination of the two factors was sufficient to amount to exceptional circumstances. The factor that was, cumulatively, conclusive was the express agreement that the funder would not be liable in respect of a costs order against the claimant. This rendered it inevitable that any such order would not be satisfied.⁷²
59. In the present case the Claimants are not in liquidation. The Respondent submits that the Tribunal should infer that they are impecunious for two reasons: (i) they made no significant investment in Rwanda; (ii) they have declined the Respondent's request to provide evidence of their financial position.⁷³ As to the former, there is an issue between the Parties as to the amount of the Claimants' investment in Rwanda, which the Tribunal is not in a position to resolve at this point. Nor is it in a position to make findings in respect of allegations by the Claimants that valuable equipment owned by the Claimants, which formed part of their investment, was seized and has been retained by the Respondent.

⁷⁰ *Herzig v. Turkmenistan* (RL-168), ¶ 54.

⁷¹ *Herzig v. Turkmenistan* (RL-168), ¶ 55.

⁷² *Herzig v. Turkmenistan* (RL-168), ¶¶ 57-60.

⁷³ See para. 9 above.

60. The Claimants are correct in submitting that they were under no obligation to disclose documents evidencing their financial position. Their Counsel has, however, confirmed that they are themselves responsible for the fees in this matter. By this stage they will have incurred substantial legal costs and they have satisfied the request of the ICSID Secretariat in relation to the costs of the Arbitration. The Claimants have not, however, demonstrated that they will be in a position to discharge any cost order that may be made against them at the end of this Arbitration.
61. The Respondent asserts that the Claimants are being funded by Mr. Marshall, or by a third-party funder on his behalf, or under a contingency-fee agreement. In the light of the further assurances given by the Claimants' Counsel,⁷⁴ the latter two suggestions can be discounted. The Tribunal considers that it is at least possible that Mr. Marshall, as the *alter ego* of the Claimants, has been or is responsible for providing the Claimants with the funding that they need to pursue these proceedings. This would not be an unusual state of affairs. It is not unknown in ICSID arbitrations for a claimant company to be supported by a parent company that is not a party to the arbitration. The Tribunal does not accept, however, the submission that Mr. Marshall is to be equated with the funder in *Herzig* that had no interest in the activities of the claimant company and had concluded an express agreement that it would be under no liability in respect of any costs order made against the claimant.
62. At the end of the day, the only similarity that this case bears to *Herzig* is that there is a possibility that the Claimants will not have the means, should their claim fail, to satisfy any costs order that may be made against them. As was found in *Herzig*, that fact does not, of itself, amount to exceptional circumstances justifying the making of an order for security for costs.
63. There is a further factor that weighs against such an order. The Respondent has not brought its application promptly. The Respondent submits that it was reasonable (and sensible) for the Respondent to wait to consider the pleadings and evidence relevant to the Claimants' current (and historic) financial position before making this application.⁷⁵ The Tribunal does

⁷⁴ See para. 35 above.

⁷⁵ Application, ¶ 4.

not agree. The Tribunal does not believe that anything has been disclosed in the pleadings and evidence that bears on the matters relied upon by the Respondent in its application. The Respondent has permitted the Claimants to invest heavily in these proceedings before bringing its Application and the Claimants are justified in attacking the fairness of this course.

C. DECISION

64. For the reasons given, the Respondent's Application for Security for Costs is dismissed. The Tribunal reserves consideration of the Claimants' application for the costs in relation to it until the end of the Arbitration.

On behalf of the Tribunal,

[signed]

Rt. Hon. Lord Phillips KG, PC
President of the Tribunal
Date: September 28, 2020