United Nations Commission on International Trade Law
Arbitration Rules 1976

Abdallah Andraous
- Claimant -

v

Kingdom of the Netherlands
- Respondent -

Rejoinder to Response to Application for Security for Costs

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19 January 2024

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1. Claimant hereby submits a brief response to Respondent's Reply (the "**Reply**") relating to its Application for Security for Costs (the "**Application**"), which was submitted on 5 January 2023. This Rejoinder comprises this submission plus Claimant's additional legal exhibits **CLA-054 to CLA-057**.

2. While Respondent's Reply was longer than its original application,[1] Claimant sees no need to respond in detail as it is largely reiterative of points Respondent has already made. As such, the Application merely increases costs for both Parties; Claimant tries to limit those with this (limited) Rejoinder and further refers to what it has said in its Response to the Application for Security for Costs (the "**Response**"), especially in Section III (on an interim costs award).

3. In sum, Respondent goes to great lengths to convince this tribunal not to "prejudge the merits of this case by deciding on the Application."[2] After this admonishment, however, it does exactly that, in the clothes of this "security for costs" application. An entire section of its Reply is proffered for the merits conclusion that Respondent did not cause Claimant's financial distress,[3] and at least a full 18 paragraphs in its initial Application and at least 9 in its Reply are dedicated to extolling the findings of its own courts as the "the best possible evidence"[4] of Claimant's alleged "unlawful" conduct.[5] By bootstrapping *ipse dixit* to the very judicial decisions being challenged as part of an international delict,[6] Respondent asks this Tribunal to prejudge the propriety of those judicial decisions to justify and award for security for costs – all before the first substantive pleading in the case has been filed. If these decisions were deemed to be "the best possible evidence" of anything – especially something as core as Claimant's alleged "unlawful" conduct[7] – then the entire regime of investment arbitration would be a hollow shell.[8]

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[1] Despite Email from Respondent to the Tribunal dated 28 December 2023 [redacted]. On such "new allegations", see paragraph 3 below.

[2] Reply, para. 6. See also paras. 25, 53.

[3] Reply, paras. 22-28.

[4] Reply, paras. 29 et seq.

[5] Application, paras. 4, 16, 21-22; Reply, paras. 3-5, 20, 21, 23-24, 28, 32-34, 36.

[6] See Notice of Arbitration at paras. 26-28, 37-39, 67-68.

[7] Application, paras. 4, 16, 21-22; Reply, paras. 3-5, 20, 21, 23-24, 28, 32-34, 36.

[8] See **Exhibit CLA-054**, Vienna Convention on the Law of Treaties, Art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); **Exhibit CLA-055**, *Burlington v. Ecuador* (Decision on Liability, 14 December 2012) ICSID Case No. ARB/08/5, para. 410 (holding that "[i]f the international tribunal adjudicating the dispute were bound by the decision of an organ that forms part of one of the parties to

4. Compounding this error, Respondent tries to lower *and then shift* the heavy burden it faces to justify interim relief. It suggests that it need only show the "plausib[ility]" of success,[9] and cannot do anything more because it "cannot be expected to disprove a case that has not yet been made, nor can the Tribunal asses[s] [*sic*] it."[10] But this is exactly the critical point, for the opposite reason Respondent makes it. A domestic judicial finding does not alone carry the burden of imposing an atextual financial gateway to international adjudication; the moving party must show much more.

5. When all is said and done, this entire costly exercise is an attempt by the Respondent to smear the Claimant at the beginning of the case[11] (not least by addressing the Claimant simply by its last name rather than having the courtesy to call him *Mr.* Andraous). The Application and now the Reply are rife with half-truths, misrepresentations and defamatory statements made without the neutral adjudicatory and evidentiary process that this arbitration is supposed to provide.[12] To the extent Claimant has attempted to briefly rebut those statements in its last submission, Respondent blames Claimant for "seeking to relitigate" these decisions of the Curaçao courts.[13] This is patently absurd in the present circumstance, which is of Respondent's own making. *Respondent* moved for security and Claimant responded in kind to dispel any mischaracterisation of the evidence so early in the case. The former cannot blame the latter for doing so (especially not as long as documents

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the dispute, this purpose would be seriously jeopardized, if not defeated."); Exhibit CLA-056, *Chevron v. Ecuador (II)* (Opinion of Jan Paulsson, 12 March 2012) PCA Case No. 2009-23, UNCITRAL ("If an international tribunal declares a domestic legal act to have been unlawful as a matter of international law, that domestic legal act will be a nullity for international law purposes. If an act is a nullity under international law, that nullity will have e*rga omnes* effect - i.e. it will be a nullity for all states, not just for the state that produced the legal act.") (footnotes omitted).

[9] Reply, paras. 54, 55.

[10] Reply, para. 55.

[11] Response, para. 40.

[12] See, for example, *without citing a single piece of evidence*, Reply, para. 56, first bullet point ("His Lebanese nationality is not his dominant and effective nationality.") (on which see also footnote 24 below). With regard to the allegation in Reply, para. 30(i), on the sale of S&S, for example, while the Curaçao Court of Appeal used PwC's April 2016 report and not PwC's June 2014 valuation, the latter should have been determinative as the conversion happened in June 2014 (before the drop in the price of oil which significantly affected the value of S&S, an oilfield equipment company). With regard to the allegation in Reply, para. 30(ii), the valuation by CBRE only concerned the *buildings* on Mullet Bay (the "Towers at Mullet Bay"). The Curaçao Court of Appeal, aware of the difference in valuations, ordered a new appraisal (see Exhibit RL-008-DUTCH, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 11.26, 11.73), which the CBCS is vehemently against knowing that it will lead to a valuation in line with the Claimant's. While these observations should be sufficient to show that Respondent's allegations cannot be relied upon at this stage, these will be further addressed in the Statement of Claim.

[13] Reply, para. 29.

to prove Claimant's case are not furnished – to which Respondent continues to object vigorously[14]).

6. As the Tribunal approaches a decision on Respondent's Application, there are a number of legal and factual points that the Tribunal need to bear in mind:

   a. Regarding the Tribunal's authority to grant security for costs,[15] Respondent misrepresents Claimant's position. Claimant does *not* agree that the Tribunal has the explicit power to order a party to post security for costs, especially in these procedural and factual circumstances.[16] What Claimant *does* accept is that "tribunals have indeed interpreted Article 26 as broad enough to cover, or at least not exclude, interim measures in the form of security for costs applications filed by the Respondent State"[17] *where the applicable legal standard* – also misrepresented by Respondent[18] – *is met*.[19] Moreover, Respondent does not address Claimant's observation, citing the UNCITRAL Commentary, that Article 26 only applies to authorise security for the protection of the party potentially *subject to* the requested interim measures (here the Claimant, not Respondent).[20] In sum, *there is no right that needs to be protected*.[21]

   b. Regarding the applicable test,[22] even if there is no requirement of *prima facie* jurisdiction for security for costs (*quod non*[23]),[24] Respondent's argument that it need only prove a "reasonable possibility of a costs award" to justify relief

[14] Email from Respondent to Claimant dated 9 November 2023; Letter from Respondent to the Tribunal dated 14 November 2023, pp 1-3.

[15] Reply, paras. 10-14.

[16] Reply, paras. 11-12.

[17] Response, para. 11; Reply, para. 12.

[18] Application, paras. 8-14.

[19] Response, para. 12.

[20] Response, para. 9.

[21] Exhibit CLA-023, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, para. 117.

[22] Reply, paras. 38-40.

[23] Exhibit CLA-023, *Jochem Bernard Buse v. Republic of Panama* (Decision on Respondent's Application for Security for Costs, 5 November 2019) ICSID Case No. ARB/17/12, paras. 104-105. See also more generally: Exhibit CLA-057, *Sergei Paushok et al. v. Mongolia* (Order on Interim Measures, 2 September 2008) UNCITRAL, para. 45.

[24] According to Respondent, there is no *prima facie* jurisdiction (see its objections at Reply, para. 56), making its Application nugatory. Moreover, as will be set out in the Statement of Claim, all three jurisdictional objections are wrong and/or inapposite in this case.

materially elides the applicable standard. The test is not whether there is a "reasonable possibility *of a costs award*"[25] (which is a fusing of standards that Respondent has apparently pulled from whole cloth). The test is a multifaceted assessment that requires a "reasonable possibility *that the Respondent will prevail in the case,"*[26] *and then* a determination that Respondent would "likely suffer" without adequate security at this early stage, *and then* a showing of urgency.[27] Above all, Respondent cannot claim that security for costs falls under provisional measures (which do require urgency[28]) to then state that the requirement is not required for security for costs.[29] All of this equates, in the words of the Tribunal in *Tennant Energy*, to the requirement for "exceptional circumstances" before security will be granted.[30] Here, it is far too early to determine whether there will be an award against the Claimant, and *after that* an award on costs, and *after that* his refusal to pay.[31] Indeed, at this early stage of the case with almost nothing pled, if there is a "reasonable possibility of a costs award in favour of Respondent",[32] there is an equally reasonable possibility of a costs award in favour of Claimant. Exceptional circumstances is the standard for good reason— – to ensure that aggrieved investors are not saddled with a fee for admission just because the party being sued said so.[33]

[25] Reply, section 3.4.

[26] Reply, paras. 52-59.

[27] Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020, UNCITRAL, para. 172.

[28] See, for example, Exhibit RL-002-SPANISH, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9 (Decision on the Respondent's Request for Provisional Measures), 20 June 2018, para. 191; Exhibit CLA-057, *Sergei Paushok et al. v. Mongolia* (Order on Interim Measures, 2 September 2008) UNCITRAL, para. 45.

[29] Reply, para. 38.

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

[31] Furthermore, the fact that these proceedings have been bifurcated following Claimant's consent is not because the jurisdiction of this Tribunal should be seriously questioned before the issues is even plead. The agreement to bifurcate was a good faith offer on the part of Claimant to streamline and advance procedural efficiency by solving the parties' gridlock on the procedural timetable. To somehow use Claimant's good faith as evidence of its weakness is wholly improper.

[32] Response, section 3.4.

[33] Exhibit CLA-027, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020, UNCITRAL, para. 173 (justifying the "Exceptional circumstances" requirement because "security for costs orders raise specific access to justice issues that do not arise with other forms of provisional relief.").

c. Regarding the alleged proportionality of the Application, Respondent's argument is entirely circular. As a fee for admission to the investor-state regime it demands Claimant to "furnish information about his assets."[34] If they are ample, Respondent suggests, then the requested order is not disproportionate because Claimant has the resources to "proceed with this arbitration."[35] If they are not, then the disclosure demonstrates the necessity of the Order. Put simply, Respondent urges a "heads we win, tails you lose" dynamic at the outset of the case.

d. Regarding the Claimant's choice for UNCITRAL arbitration,[36] this is and has been largely in Respondent's own hands. Respondent – and not the Claimant – negotiated and signed the BIT, which gives Claimant the right to pursue arbitration (again, without any additional requirement for security for costs[37]).

e. Regarding Respondent's statement that it is incurring significant costs,[38] this is, again, a situation partly of its own making. It has instructed external counsel with a disproportionally large team (all the while having its own in-house legal team which has itself been enlarged since the start of the proceedings). Claimant cannot be blamed for this decision and be expected to backstop the consequences.

7. Claimant respectfully requests the Tribunal to:

(i) dismiss Respondent's Application; and

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

[redacted]

[redacted]

[redacted]

[34] Reply, para. 45.

[35] Reply, para. 44.

[36] Reply, paras. 7-9.

[37] Response, para. 6.

[38] Reply, para. 66.

Respectfully submitted,

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[signed]

19 January 2024