INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

NiQuan Energy LLC and NiQuan Energy Trinidad Limited

v.

Trinidad and Tobago

(ICSID Case No. ARB/24/17)

PROCEDURAL ORDER NO. 3
On the Respondent's Request for Security for Costs

Members of the Tribunal
Dr. Laurent Levy, President of the Tribunal
Dr. Stanimir Alexandrov, Arbitrator
Prof. Zachary Douglas KC, Arbitrator

Secretary of the Tribunal
Mr. Oladimeji Ojo

Assistant to the Tribunal
Dr. Magnus Jesko Langer

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2 June 2025

I. PROCEDURAL BACKGROUND

1. On 20 January 2025, the Respondent filed an Application for Security for Costs pursuant to Rule 53 of the 2022 ICSID Arbitration Rules and in accordance with Annex B of Procedural Order No. 1, as amended (the "Application").

2. On 24 January 2025, the Claimants transmitted a letter to the Tribunal by which they put on record their objection to the length of the Application, which they argued raises "concerns under the principle of equal treatment".

3. On 18 February 2025, the Claimants filed their Response to the Application (the "Response").

4. On 26 February 2025, the Respondent filed its Additional Comments on the Application (the "Reply").

5. On 4 March 2025, the Claimants filed their Additional Comments on the Application (the "Rejoinder").

6. On 20 March 2025, the Claimants submitted a letter enclosing Exhibit C-85 – Release and Satisfaction of Judgment dated 18 March 2025. In that letter, the Claimants sought to introduce this new evidence in support of their Reply.

7. On 27 March 2025, the Respondent transmitted a letter which (i) alleged that the Claimants were in breach of Procedural Order No. 1, (ii) requested the Tribunal to clarify the scope of paragraph 18.3 of Procedural Order No. 1, and (iii) responded to the substance of the Claimants' position in relation to Exhibit C-85.

8. On 1 April 2025, the Tribunal communicated to the Parties its decision to partly grant the Application. It stated in relevant part as follows:

> "*Paragraphs 3 and 4 of Rule 53 require that the Tribunal consider all relevant circumstances when deciding on the Application, including the Claimants' ability and willingness to comply with an eventual adverse costs order, the effect of providing security for costs on the Claimants' ability to pursue their claims, the conduct of the Parties and the existence of third-party funding.*
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> *Having considered the arguments of the Parties and the record as it presently stands, the Tribunal deems that, due to the financial situation of the Claimants and the fact that the third-party funder is not liable for adverse costs, there is a serious risk, at least at this juncture, that the*

> *Respondent may never recover its costs should it prevail in this arbitration and should the Tribunal decide that the Claimants must bear some or all of the Respondent's costs. In these circumstances, the Tribunal decides that the Claimants must provide security for costs in the amount of USD 2 million by the time of the filing of their Memorial on the Merits, i.e. 6 June 2025. The Tribunal deems that this amount strikes a proper balance between the need to preserve the Claimants' ability to pursue their claims and the contingent right of the Respondent to recover at least part of the legal costs incurred in this arbitration. As for the form of security, the Tribunal decides that the Claimants may provide the security by way of either an ATE insurance, an unconditional and irrevocable bank guarantee from a reputable bank in the US or in Western Europe, an assumption of liability for adverse costs by its third party funder, a deposit in an escrow account, or in a different form agreed by the Respondent or approved by the Tribunal. The Parties are invited to liaise in this respect and keep the Tribunal apprised about the outcome of their discussions. Finally, the Tribunal notes that, in the event the Claimants prevail in this arbitration, upon renewed request for that relief, it will consider ordering the Respondent to bear the costs associated with posting the security*".[1]

9. The Tribunal added that it would provide a reasoned decision later.

10. Regarding the Respondent's request on the scope of paragraph 18.3 of Procedural Order No. 1, the Tribunal stated as follows:

> "*The Tribunal does not believe it necessary to set forth at this juncture its understanding of the scope of paragraph 18.3, other than to say that it applies to the filing of additional documents after the last written submissions on a given matter, as identified in paragraph 16.3. Here, even if the Claimants arguably should have first sought leave to file the additional exhibit C-85, the Tribunal sees nothing untoward in putting that exhibit in the record considering that it post-dates the Claimants' last submission on the Application, that it concerns a live issue debated between the Parties in the context of the Application, and that the*

[1] Email to the Parties of 1 April 2025.

> *Respondent had an opportunity to comment on that exhibit and the Claimants' letter of 20 March 2025*".

11. After summarizing the Parties' positions (Section II), the Tribunal provides the reasoning (Section III) for its decision (Section IV).

II. PARTIES' POSITIONS

A. RESPONDENT'S POSITION

12. The Respondent's request for security for costs reads as follows:

> "*498.1* Amount of security*: US$ 6.25 million*
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> > *498.1.1 This amount covers the RTT's estimated costs from inception to completion of these proceedings, and is broken down as follows: US$ 4 million for Steptoe's legal fees and expenses; US$ 1 million for The Legal Consultancy's legal fees and expenses; US$ 750,000 for the RTT's quantum expert's fees and expenses; and US$ 500,000 for the RTT's share of the Tribunal and ICSID's fees and expenses.*
> >
> > *498.1.2 In this regard, it must be noted that the Claimants' preliminary indication of their damages is in an amount "no less than USD 423 million". Further, this arbitration has a somewhat lengthy timetable, lasting almost 2.5 years from the date of the RFA (May 2024) to the date of the hearing (October 2026). Further, like the Claimants, the RTT is represented by experienced counsel at major firms. In these circumstances, the above-estimate of the RTT's fees is entirely justified.*
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> *498.2* Form of security*: An unconditional and irrevocable bank guarantee, or such other form of security as the Tribunal may consider appropriate.*

> *498.3* Issuer of security*: A first-class international bank headquartered in the European Union or the United States of America.*
>
> *498.4* Duration of security*: Until the earliest of the following dates: **(i)** the date on which Claimants fully comply with a costs decision in favour of the RTT; **(ii)** the date on which the RTT successfully collects on the security (which step the RTT would intend to commence within no less than 30 days after any decision on costs issued by the Tribunal in favour of the RTT); or **(iii)** the date on which the Tribunal finally determines that it will not issue a costs decision in favour of the RTT.*
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> *498.5* Party that is to bear the cost of the security*: Claimants.*
>
> *498.6* Time limit for Claimants to comply*: 30 days.*
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> *498.7* Consequence of non-compliance*: If the Claimants fail to provide security within the stated period, the proceedings shall be stayed until it is posted. Further, the RTT shall have liberty to apply for discontinuance under AR53(6).*
>
> *498.8* Other specific requirements*: None*".[2]

13. Relying on Rule 53 of the 2022 ICSID Arbitration Rules, the Respondent argues that:

    a. there are reasonable grounds to believe that the Claimants will not be able to comply with an adverse decision on costs;

    b. there are reasonable grounds to believe that the Claimants will not be willing to comply with an adverse decision on costs;

    c. there is no access to justice issue if an order for security for costs is granted;

    d. the Claimants' case is frivolous and abusive; and

[2] Application, paras. 1 and 498.

e. based on the circumstances in this case, the balance of interests weighs in favor of issuing an order for security for costs.[3]

14. The Respondent argues that the 2022 ICSID Arbitration Rules introduced a new approach to security for costs.[4] In summary, it submits that:

a. prior to the publication of the 2022 ICSID Arbitration Rules, ICSID tribunals ordered security for costs as a provisional measure, which required establishing (i) a right needing to be preserved, (ii) necessity, (iii) urgency, and (iv) the existence of exceptional circumstances.[5]

b. as reflected in ICSID's Proposals for Amendment of the ICSID Rules, including Working Papers 1-6 ("ICSID Working Papers"),[6] Rule 53 changes the procedure and the applicable test for security for costs such that (i) an applicant no longer has to show that it has a right in need of preservation, (ii) there is no longer a requirement that the order sought be necessary and/or urgent, and (iii) there is no general requirement for exceptional circumstances;[7]

c. there was no stated intention in the ICSID Working Papers that the procedure under Rule 53 contain any general rules as to the standard of proof and, instead, applications are to be determined on a case-by-case basis;[8]

d. the decision on security for costs in *José Alejandro Hernández Contreras v. Republic of Costa Rica (II)* ("*Contreras II"*) reflects the understanding that the introduction of Rule 53 is a rejection of the requirements and case law which were applicable under the 2006 ICSID Arbitration Rules;[9] and

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3 Application, paras. 5-10.

4 Application, paras. 386-472.

5 Application, paras. 388-430.

6 ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 1* (**RL-19**); ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 2* (**RL-21**); ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 3* (**RL-23**); ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 4* (**RL-25**); ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 5* (**RL-26**); ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 6* (**RL-28**).

7 Application, paras. 435-438.

8 Application, paras. 440-441.

9 Application, paras. 452-470; *José Alejandro Hernández Contreras v. Republic of Costa Rica (II)*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, 2 May 2024 (**RL-17**).

e. in *Contreras II*, the tribunal adopted a "*real risk*" standard of proof which is a lower threshold than under the 2006 ICSID Arbitration Rules.[10]

15. The Respondent asserts that the over-arching principles for an application for security for costs under Rule 53 are that:

a. Rule 53 is a standalone provision which is independent of the 2006 ICSID Arbitration Rules;

b. the Tribunal must consider "*Five Factors*", namely (i) the applicant's ability to comply with an adverse decision on costs, (ii) its willingness to comply, (iii) the effect that providing security for costs would have on that party's ability to pursue its claim or counterclaim, (iv) the parties' conduct, and (v) any other relevant circumstances;[11]

c. the existence of third-party funding is relevant to a Tribunal's assessment and, importantly, whether as part of that arrangement, that party has obtained third-party coverage to pay any adverse decision on costs;[12]

d. the threshold for the Tribunal's decision is a balancing of the parties' interests, and the "*exceptional circumstances*" threshold no longer applies;[13] and

e. case law or decisions made under the 2006 ICSID Arbitration Rules are of limited assistance to the Tribunal in interpreting Rule 53 because, in adopting Rule 53, ICSID's Member States revised the overarching principles and abandoned the "exceptional circumstances" threshold.[14]

16. Relying on these over-arching principles, the Respondent submits that the facts in this case warrant the granting of this Application based on the application of the "*Five Factors*" identified above. In response to the Claimants' arguments that Rule 53 is simply a codification of pre-existing case law, the Respondent highlights the exclusion

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10 *José Alejandro Hernández Contreras v. Republic of Costa Rica (II)*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, 2 May 2024, para. 45 (**RL-17**).

11 Application, para. 471.2.

12 Application, para. 471.3.

13 Application, para. 471.4.

14 Application, para. 471.6.

of a reference to "*exceptional circumstances*" from Rule 53 and the decision on security for costs in *Contreras II.*[15]

17. The Respondent also criticizes the Claimants' reliance on Mr. Rubin's Commentary on Rule 53, as it fails to account for later developments in the drafting of Rule 53, and argues that:

> "*AR53's drafting history (including but not limited to that repeated above) establishes that ICSID abandoned the old* 'exceptional circumstances*' threshold. That test cannot be found in the text of AR53. Further: (i) not one of ICSID's Member States proposed retaining the* 'exceptional circumstances' *threshold; and (ii) to the contrary, various States (including the United States) and ICSID itself made clear that the threshold under the new rule should be lower*".[16]

(1) The Claimants are not able to Comply with an Adverse Decision on Costs

18. The Respondent submits that "*there are* 'reasonable grounds to believe' *(further or alternatively, a* 'real risk'*) that the Claimants will not be able to comply with an adverse decision on costs*".[17]

19. According to the Respondent, Rule 53 requires the Tribunal to consider the Claimants' ability to comply with an adverse decision on costs, and in so doing, to consider all relevant circumstances, including the existence of third-party funding.[18]

20. The Respondent recalls in this context that ICSID Working Papers support the proposition that Rule 53 is intended to cover a wide range of factual circumstances.[19]

21. For the Respondent, the following circumstances establish either "*reasonable grounds to believe*" or "*a real risk*" that the Claimants will not be able to comply with an adverse decision on costs in this case:

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15 Reply, para. 2, 16-17 and 29-30; *José Alejandro Hernández Contreras v. Republic of Costa Rica (II)*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, 2 May 2024 (**RL-17**).

16 Emphasis omitted. Reply, paras. 23-24; N. Rubins, *"Part 3: ICSID Arbitration Rules, Chapter VII: Costs [Rules 50-53]",* in R. Happ & S. Wilske (eds), *ICSID Rules and Regulations 2022: Article by Article Commentary (Verlag CH Beck oHG, 2022), Rule 53* (**CL-9**).

17 Application, para. 477.

18 Application, para. 474.

19 Application, para. 475.

a. *Lack of Sufficient Assets* – the Respondent argues that the history of the project demonstrates the lack of adequate financing and states that "*the Claimants were constantly chasing third-party funding, which never materialized; indeed at one stage, NETL even claimed that its operations were financed by* 'extended vendor financing'*,* i.e. *not paying its debts*".[20] According to the Respondent, this lack of assets resulted in the failure to pay sums owed to UD, judgments issued against NiQuan Energy Trinidad Limited's ("NETL") and NETL being subject to winding up proceedings and its assets placed in receivership.[21] The Respondent also asserts that the Claimants' only asset is the GTL Plant which, per the Request for Arbitration "*has a higher decommissioning and disassembly cost than scrap value*".[22]

b. *Third-Party Funder* – the Respondent states that the Claimants' claim in this proceeding is funded by a third-party funder, as evidenced by the Claimants' Notice of Third-Party Funding dated 13 November 2024. According to the Respondent, this fact proves "*that the Claimants do not have sufficient assets to satisfy a potential costs award*" because "*if they did, it is highly unlikely that they would have sought funding for this claim, given the costs inherent to doing so*".[23] The Respondent also argues that the use of a third party funder is the result of the Claimants' running out of funds to pay for the continued pursuit of this proceeding.[24]

c. *No Third-Party Coverage* – the Respondent mentions the absence of any obligation by the third-party funder to pay any costs award or a security for costs order, as well as the absence of any insurance or other provision to cover an adverse costs order or a security for costs order.[25]

d. *Terms of Third-Party Funding* – the Respondent states that the terms of the Claimants' third-party funding arrangement, and in particular, that the funder assumed an obligation to pay counsel's fees directly means that "*the claimant [sic] ha[ve] in effect engineered* 'security' *for the benefit of their own counsel*" and "*lends a great deal of weight to the RTT's request for an SFC order as it*

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20 Application, paras. 476.2.

21 Application, paras. 476.2, 197, 287, 289, 327, 331, 339.

22 Application, paras. 476.3 (footnote omitted); Request for Arbitration, para. 115.

23 Application, paras. 476.5

24 Reply, paras. 146-150.

25 Application, para. 476.6; Baker McKenzie's Email to the RTT's Counsel Team, dated 4 December 2024 (**R-136**); Baker McKenzie's Email to the RTT's Counsel Team, dated 3 January 2025 (**R-137**).

> *indicates a lack of ability on the part of the Claimants to pay the costs of its own counsel, let alone those of the RTT*".[26]

22. The Respondent advocates for a shifting burden of proof, under which the applicant bears the burden to establish a reasonable basis to believe the claimant is impecunious, upon which that burden shifts to the claimant to prove its ability to meet an adverse decision on costs.[27]

23. The Respondent further argues that it is not relevant that there are multiple claimants and that "*it cannot simply be assumed that they will each bear the full costs awarded jointly and severally* […]".[28] In any event, NiQuan Energy LLC's ("NELLC") lack of sufficient assets to satisfy a potential costs award is demonstrated by (i) NETL breaches of payment plans, (ii) NELLC's failure to ensure NETL honored those debts, (iii) the GTL Plant being the only significant asset of the Claimants, and (iv) the fact that both Claimants are funded by a third party.[29] In the Respondent's view, "[a]*t the very least, these matters establish a* 'reasonable basis' *to believe that both Claimants are impecunious, such that the burden has shifted to the Claimants to prove their ability to meet any adverse decision on costs* (reference omitted)".[30]

24. Regarding NELLC's alleged assets, the Respondent submits that (i) NELLC's Management Accounts show that it does not have sufficient assets and (ii) that its liabilities exceed its assets.[31] In support of this proposition, the Respondent refers to the allegedly unpaid settlement agreements and judgment garnishment orders between NELLC and Mr. Eberhard Lucke.[32]

(2) The Claimants are not willing to Comply with an Adverse Decision on Costs

25. The Respondent submits that Rule 53(4) requires the Tribunal to consider all relevant circumstances in assessing a party's willingness to comply with an adverse costs award. The Respondent also relies on ICSID's Working Papers to argue that the circumstances which the Tribunal may consider include (i) a history of non-compliance with legal

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26 Application, para. 476.7.

27 Reply, paras. 92-96.

28 Reply, paras. 100-102.

29 Reply, para. 109.

30 Reply, para. 109.

31 Reply, paras. 119-136; NELLC's September 2024 Management Accounts (**C-63**).

32 Reply, paras. 137-144.

orders, (ii) structuring the business to avoid an adverse costs award and (iii) more general conduct.[33]

26. In this instance, the Respondent submits that (i) NETL's failure to honor payment plans,[34] (ii) the court judgments already made against NETL, (iii) a security for costs order made by the High Court of Trinidad and Tobago,[35] and (iv) the absence of third-party coverage for an adverse decision on costs are all circumstances that establish the Claimants' unwillingness to comply with an adverse costs award.[36] The Respondent invites the Tribunal to consider these circumstances in the context that the Claimants do not have sufficient assets to pay an adverse costs award.

27. The Respondent adds that the Tribunal may order security for costs even where there are no reasons to doubt the party's willingness to pay an adverse decision on costs.[37]

(3) Ordering Security for Costs would not affect the Claimants' Ability to Pursue their Claims

28. The Respondent submits that Rule 53(3)(c) requires the Tribunal to consider the effect that granting security of costs will have on the Claimants' ability to pursue their claim.[38]

29. At the core of this consideration is access to justice, and the need to balance the Parties' competing interests. As such, this factor does not only concern whether an order of security of costs is made but could also "*be relevant in guiding the tribunal as to the terms on which security is ordered*".[39]

30. In this case, the Respondent asserts that there are no access to justice issues and the question is what effect, if any, an order of security for costs would have on the Claimants' ability to pursue their claims.[40] In support of this proposition, the

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33 Application, para. 479; ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 2* (**RL-21**); ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 3* (**RL-23**).

34 Application, paras. 149-153, 156-159, 162-169, 175-179, 207-208, 215, 230, 248-254, 264, 267 and 480.1.

35 Application, paras. 182-183, 278, 307, 312, 319-320, 322-329, 332-333 and 480.1.

36 Application, paras. 476.6 and 480.2.

37 Application, para. 481.

38 Application, para. 482.

39 Application, para. 483 (footnote omitted).

40 Application, para. 484.

Respondent contends that the Claimants' claims are frivolous and that the failure of their investment is attributable to the Claimants' own conduct.[41]

31. The Respondent adds that Rule 53(3)(c) only seeks to protect access to justice for cases brought in good faith. Since the claims are frivolous, they are not brought in good faith.[42]

(4) The Claimants' Conduct Warrants Ordering Security for Costs

32. The Respondent submits that Rule 53(3)(d) requires the Tribunal to consider the conduct of the parties.[43]

33. Relying on ICSID's Working Papers, the Respondent asserts the following conduct "*militate[s] in favour of ordering security*":[44]

a. the claims are frivolous and therefore are abusive;

b. the Respondent paid its share of the advances on costs;

c. there are no instances of misconduct on the part of the Respondent, or any other instances of misconduct (save for the allegation of abuse of process) on the part of the Claimants; and

d. the Claimants' financial circumstances.[45]

34. In assessing the above cumulative factors, the Respondent summarizes its assessment of the relevant factors as follows:

> "*On the one hand, there are* 'reasonable grounds to believe*' (further or alternatively, a* 'real risk*') that the Claimants will not be able and/or willing to comply with an adverse decision on costs. In particular, the Claimants do not have sufficient assets to satisfy a potential costs award (indeed, their assets are held by a receiver); they are funded by a third-party funder; they have failed to obtain third-party coverage for an adverse decision on costs; the limited funding terms which have been disclosed raise further concerns; and the Claimants have an*

41 Application, paras. 484.2-484.3.

42 Reply, paras. 46-49.

43 Application, para. 485.

44 Application, para. 487.

45 Application, para. 487.

> *extensive history of failing to honour debts (including, in particular, judgment debts and costs orders), and are subject to winding up proceedings. On the other hand, no '*access to justice*' issues arise here because the claims asserted by the Claimants are '*frivolous*', and the Claimants are the authors of their current financial circumstances, not the RTT; in any event, as in* ***Contreras II****, the Claimants' right to pursue their claims would not be impaired because they have funding for their claims. Further, to the extent that '*access to justice*' issues do arise (which is denied), they are outweighed by the considerable risks that the RTT faces in recovering its costs of these proceedings*".[46]

35. The Respondent finally rejects the Claimants' argument that arguing the frivolity of the claim amounts to misconduct.[47]

36. Given the above, the Respondent submits that its Application meets the threshold under Rule 53.

B. CLAIMANTS' POSITION

37. The Claimants argue that the Application is a "*non-starter*", and they request that it "*be dismissed with costs*" or, alternatively:

> *"that the amount and form of security granted be modified in accordance with the section set out immediately above* [paragraphs 112-115 of the Response]*, and that the Tribunal's order specify that the Respondent will be liable for the full costs of posting the security in the event it is not called*".[48]

38. As a preliminary matter, the Claimants submit that the Respondent's submissions to the effect that the claim is frivolous are premature and do not assist the Application. They argue that the Tribunal "*cannot prejudge the issues to be determined in this case, and accordingly must assume that the versions of events alleged by each of NETL and the RTT as to the reasons for NETL's impecuniosity are equally plausible. In other words, NETL's impecuniosity cannot in and of itself weigh one way or the other in the Tribunal's assessment of the SFC Application*".[49]

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46 Application, para. 491 (emphasis in the original).

47 Reply, para. 192.

48 Response, para. 116.

49 Response, para. 5; Rejoinder, paras. 61-69.

39. The Claimants further highlight that NELLC does not suffer from the impecuniosity highlighted by the Respondent in relation to NETL and continues to operate as a going concern. Further, NELLC has substantial assets, and it is pursuing a second GTL plant opportunity with backing from existing investors and financiers.[50]

40. Regarding the legal standard for ordering security for costs, the Claimants argue that Rule 53 codified the existing practice of investment tribunals and did not change the position under the previous rules. In addition, the fact that Rule 53 omits to mention the requirements of urgency and necessity does not mean that those factors are no longer relevant.[51] On this basis, the Claimants assert that precedents issued prior to the introduction of Rule 53 remain relevant and essential.[52]

41. The requirement under Rule 53 to consider "*all relevant circumstances*" and "*all evidence adduced in relation to such circumstances*" implies a need to conduct a factual analysis on a case-by-case basis, rather than an assessment based on a fixed list of requirements.[53] The Claimants rely on ICSID Working Paper No. 2 in support of the proposition that the circumstances identified in Rule 53 are not intended to restrict the Tribunal but to empower it to consider other factors that may be relevant.[54]

42. The Claimants criticize the Respondent's reliance on *Contreras II* since (i) that decision does not directly address the weight to be given to pre-existing decisions, and does not contain an analysis of, or commentary on, the relevant case law, and (ii) the reasoning in that decision is inherently contradictory as it fails to consider 2 of the 4 circumstances listed in Rule 53.[55]

43. The Claimants assert that the circumstances listed in Rule 53 have featured in decisions of Tribunals prior to the introduction of Rule 53 and have been included as guidance for Tribunals rather than as a determinative standard.[56]

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50 Response, paras. 6 and 87.

51 Rejoinder, paras. 26-30.

52 Response, para. 12; Rejoinder, para. 15.

53 Response, paras. 14-15.

54 ICSID, *Proposals for Amendment of the ICSID Rules: Working Paper 2* (**RL-21**).

55 Rejoinder, paras. 31-41.

56 Response, paras. 17-19; Rejoinder, paras. 19-21.

44. The Claimants further submit that Rule 53 does not lower the threshold but articulates the same high standard to grant security for costs and therefore should not be applied in a vacuum.[57]

(1) The Claimants can Comply with an Adverse Costs Order

45. The Claimants submit that:

a. no single circumstance under Rule 53, alone, is sufficient to warrant ordering security for costs. However, showing impecuniosity is a threshold issue which, if unproven, is fatal since none of the other circumstances could then justify granting security for costs;[58]

b. Rule 53(3)(a) does not require an overall assessment of the Claimants' financial standing. Instead, the Respondent is required to provide compelling evidence that the Claimants have no means to satisfy an adverse costs award. This is a burden the Respondent bears, and which the Tribunal cannot satisfy by "*baseless crystal ball gazing*" or "*guesswork*";[59]

c. the standard of proof is to show "*clear evidence*" rather than "*reasonable doubt*"[60] and the Respondent has failed to meet this standard;[61]

d. the burden the Claimants bear is to disprove their alleged inability to pay an adverse costs order, not to provide certainty that an adverse costs order would be met;[62]

e. security for costs orders are only made in cases that "*involved claimants that failed to provide any real evidence of assets or creditworthiness that would rebut an allegation of impecuniosity*",[63] whereas the Claimants here have shown evidence of assets, sufficient to rebut the Respondent's allegations of impecuniosity;[64] and

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57 Response, paras. 21-23.

58 Rejoinder, paras. 51-52.

59 Rejoinder, para. 53.

60 Rejoinder, para. 55.

61 Rejoinder, paras. 94-102.

62 Rejoinder, para. 60.

63 Rejoinder, para. 58.

64 Rejoinder, paras. 103-109.

f. the fact that another third party, such as a parent company has undertaken to cover a potential costs award is a valid consideration; NELLC also states its willingness to enter an undertaking to cover NETL's portion of any adverse costs award.[65]

46. The Claimants submit that the Respondent has failed to show that both NELLC and NETL are unable to comply with an adverse costs order.[66] For them, this failure is "*fatal*" to the Application.[67] Regarding NETL's impecuniosity, the Claimants assert that NETL's financial circumstances are the result of the alleged indirect expropriation by the Respondent.[68] The Claimants also assert that they did not use a third-party funder because they do not have sufficient assets to satisfy an adverse costs award. Instead, they submit that NELLC could have advanced the claim without funding and in fact did so until 8 November 2024.[69]

47. According to the Claimants, the ultimate question to be answered is whether, without security, it would be impossible to enforce and collect upon an adverse costs award. This means that, if one claimant can comply with a potential costs award, there is no risk that would make a security for costs order necessary.[70] This is so, because the Tribunal has the power under Rule 52(1) of the 2022 ICSID Arbitration Rules to award costs on a joint and several liability basis.

48. For the Claimants, there is no reason to believe that it would not be possible to enforce a costs award against NELLC. They argue that the Respondent has not satisfied its burden to demonstrate impecuniosity, and so it has not and cannot shift to the Claimants the burden to demonstrate their ability to satisfy a costs award.[71]

49. The Claimants also argue that the use of a third-party funder is not in itself evidence of impecuniosity or a basis for granting security for costs.[72] They state that "*the use of third party funding has becoming increasingly common in arbitrations, and a claimant may have any number of reasons for preferring to go down this route rather than*

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65 Rejoinder, paras. 97-98.

66 Response, para. 27.

67 Response, para. 27.

68 Response, para. 84.

69 Response, paras. 90-92.

70 Response, paras. 28-29.

71 Response, paras. 29-33.

72 Response, paras. 39-45.

depleting its own funds or using other debt or equity financing to pay fees connected to legal proceedings".[73]

50. Moreover, the exclusion of liability for an adverse costs award in a third-party funding arrangement only presents an issue if that exclusion creates a "*certainty*" that a costs award would not be enforced.[74] The Claimants submit that, as with the obligation to show impecuniosity of both Claimants, the Respondent has failed in this regard as well.

(2) The Claimants are Willing to Comply with an Adverse Costs Order

51. The Claimants submit that the Respondent is obliged to show clear evidence that they may refuse or be unable to pay an adverse costs award. Mere speculation would not be sufficient to discharge that burden.[75] As to the kind of evidence which would be relevant, the Claimants agree with the Respondent that "*only examples of a party's actual prior conduct can serve as evidence that the party would indeed be unwilling to satisfy a future costs award*".[76]

52. In this regard, the Claimants suggest that NELLC could have relied on NETL's independent standing as an investor to bring the claims in order to protect itself from any liability for an adverse costs award.[77] Both NETL and NELLC have shown their willingness to pay costs in other proceedings involving the Respondent.[78] As regards NETL's refusal to pay gas invoices, those invoices are in dispute, and so this circumstance cannot be a factor in weighing either for or against security for costs.[79]

53. Moreover, the fact that (i) the funding arrangement does not include coverage for an adverse costs award, and (ii) Baker & McKenzie's fees are paid directly by the funder, are of no moment because NELLC has the ability to comply with an adverse costs award, and the approach to counsel fees is standard, rather than a measure introduced in consideration of the Claimants' financial standing.[80]

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73 Response, para. 39 (footnote omitted).

74 Response, para. 45.

75 Response, para. 48.

76 Response, para. 49 (footnote omitted).

77 Response, paras. 85-86 and 98.

78 Response, para. 98(b).

79 Response, para. 98(c).

80 Response, paras. 93-94.

54. The Claimants add that NELLC's willingness to provide an undertaking indicates also a willingness to comply with an adverse costs award.[81]

55. Finally, regarding debts owed to Mr. Eberhard Lucke, the Claimants assert that their indebtedness to Mr. Lucke has been satisfied.[82]

(3) Providing Security for Costs would Stifle the Claimants' Ability to Pursue their Claims

56. The Claimants argue that the Application conflates the analysis required under Rule 53(3)(c) of the 2022 ICSID Arbitration Rules with an assessment of the merits of the claims, and that such a preliminary assessment is not permitted at this stage of the proceeding.[83] At this juncture, the Tribunal is limited to undertaking its analysis without any prejudgment.[84]

57. Relying on *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v Bolivia*,[85] the Claimants contend that they would suffer negative consequences should they have to divert sums from their other businesses to satisfy a security for costs order. The Tribunal should weigh this risk against the risk that an adverse costs award would not be satisfied in due course.[86]

58. This balancing exercise is relevant, even if the Tribunal were to be satisfied that the Claimants are either unable or unwilling to pay an adverse costs award.[87] In carrying out this exercise, the Claimants submit that the Tribunal "*should examine the proportionality of the requested amount and form of security and exercise discretion to make any necessary adjustment where the amount requested is excessive*".[88]

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81 Rejoinder, paras. 97 and 112(a).

82 Rejoinder, paras. 110-111; Claimants' letter dated March 20, 2025, which states in relevant part that "*the debt owing to Mr Lucke was minor and has been dealt with by NELLC in the ordinary course*"; Release and Satisfaction of Judgment dated 18 March 2025 (**C-85**).

83 Response, paras. 52-53.

84 Response, para. 56.

85 *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019 (**CL-10**).

86 Response, para. 58

87 Response, para. 58.

88 Response, para. 59.

59. The Claimants submit that the balance of convenience weighs in their favor and that an order for security for costs in this proceeding may affect their ability to pursue their claims, as follows:

> "[…] *it should not be made to divert resources from its Vert GTL Project which at present is its only way of generating revenue to recover from the impact of the RTT's destruction of the GTL Plant. The substantive cost of security may ultimately be a factor leading NiQuan to withdraw its claims in this arbitration to focus its efforts on Vert GTL Project. Indeed, NETL already abandoned its interim relief application before the RTT Courts in view of the security it was ordered to provide in those proceedings. The Tribunal cannot disregard that a decision to grant the requested security could have the same effect in these proceedings*".[89]

60. In this context, the Claimants invite the Tribunal to consider that the cost of an ATE insurance may amount to USD 4.2 million.[90] They contend that the Respondent's estimate of the costs of USD 1.56 million is understated and add that the comparison of the cost of the ATE insurance to the amount of the claim is misguided since the claim represents monies already lost by the Claimants.[91]

(4) The Parties' Conduct Militates Against Ordering Security for Costs

61. The Claimants submit that the only conduct the Tribunal ought to consider for the purposes of an assessment under Rule 53(3)(d) must be unrelated to the merits of the claims and cannot involve a preliminary determination of the issues in dispute.[92]

62. For them, the relevant conduct may include (i) a track record of non-payment of costs awards in prior proceedings, (ii) improper behavior, such as conduct which interferes with the proceedings, (iii) evidence of moving or hiding assets, and (iv) other evidence of bad faith or improper behavior.[93] Moreover, the Tribunal should assess the conduct of both Parties, not just that of the Claimants.[94]

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89 Response, para. 105.

90 Response, paras. 103-104.

91 Rejoinder, para. 116(a)-(d).

92 Response, paras. 61-62.

93 Response, para. 64.

94 Response, para. 66.

63. The Claimants contend that the Tribunal should consider that the Respondent addresses the merits of the underlying claims in its Application, which – so they say – seeks to provide it with "*an unfair procedural advantage*" and "*wastefully*" increases costs.[95]

64. In addition, the Respondent's inability to identify any instances of misconduct by the Claimants, other than arguing that the claims are frivolous, militates against upholding the Application.[96] According to the Claimants, "*making good an assertion that a claim is made in bad faith requires much more than a mere allegation that the merits of that claim are weak*".[97]

(5) Modalities for Security for Costs

65. The Claimants finally argue that the terms of the security requested by the Respondent are inappropriate.[98]

66. As to the amount of the security, the Claimants contend that the claimed amount is unsubstantiated, unreasonable and in any event excessive.[99] For them, the Tribunal should rely on what other tribunals have granted in other cases.[100]

67. As to the form of the security, the Claimants argue that they should not be restricted to providing a bank guarantee from a "*first-class international bank*". Instead, they submit that they should be able to provide security in the form of other equivalent financial instruments, including ATE insurance from a provider with good financial standing.[101]

68. The Claimants also argue that the time limit proposed by the Respondent is "*fanciful and unrealistic*". In their view, it will likely take several months to obtain ATE insurance or a similar instrument, and there would be no prejudice to the Respondent in being more flexible.[102] According to them, it would be appropriate to provide security by the time of the filing their Memorial on the Merits.[103]

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95 Response, paras. 69-77 and 109.

96 Response, para. 107.

97 Rejoinder, paras. 65-69.

98 Response, para. 112.

99 Response, para. 112.

100 Rejoinder, para. 130.

101 Response, para. 113; Rejoinder, para. 131.

102 Response, para. 114.

103 Rejoinder, para. 132.

69. Finally, the Claimants submit that the Respondent should bear the costs of obtaining the security, should the Tribunal not award any costs to the Respondent, or only a small portion of the costs claimed.[104]

III. TRIBUNAL'S ANALYSIS

A. LEGAL STANDARD

70. This arbitration is governed by the ICSID Convention and the 2022 ICSID Arbitration Rules. Rule 53 of the 2022 ICSID Arbitration Rules is a new rule on security for costs which provides in relevant part as follows:

> "(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.
>
> […]
>
> (3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:
>
> (a) that party's ability to comply with an adverse decision on costs;
>
> (b) that party's willingness to comply with an adverse decision on costs;
>
> (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
>
> (d) the conduct of the parties.
>
> (4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.
>
> (5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order".

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104 Response, para. 115; Rejoinder, para. 133.

71. It is undisputed that the Tribunal has the power and discretion to order security for costs, just as it has discretion to rule on the ultimate allocation of costs.

72. Through the inclusion of Rule 53 in the 2022 ICSID Arbitration Rules, the ICSID Contracting States decided that security for costs should no longer be considered as a provisional measure but assessed as a separate and distinct category with its own legal regime. It follows that, absent specific wording in Rule 53 of the 2022 ICSID Arbitration Rules, the requirements for provisional measures developed through arbitral case law, including the need to demonstrate the existence of exceptional circumstances, necessity and urgency, no longer apply when deciding whether to grant security for costs.[105]

73. In other words, while the Tribunal is of the view that security for costs should remain the exception and not become the rule, the exceptional circumstances standard that applies for provisional measures does not apply for security for costs in ICSID proceedings governed under the 2022 ICSID Arbitration Rules. This does not, however, mean that prior case law discussing security for costs under the previous arbitration rules is totally irrelevant when assessing this issue under the 2022 ICSID Arbitration Rules, since those cases continue to provide relevant insight into the circumstances that may require ordering security for costs.

74. The starting point is the presumption that the Parties act in good faith and that they will comply with any adverse cost decision. Notwithstanding, by accepting to arbitrate the dispute under the ICSID Convention, each Party must inevitably live with the risk that the opposing Party will not voluntarily comply with an adverse cost decision or be able to do so. This risk exists even if the Party ordered to pay costs can do so because it has sufficient financial means at its disposal but ultimately decides to disregard any adverse cost decision. That said, while it is not possible to eliminate this risk, the situation is different if the circumstances reveal the existence of a serious risk (or real risk to quote the standard used in *Contreras II*) that a Party may not or will not comply with an adverse cost decision.[106] In such cases, ordering security for costs may be justified,

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105 *José Alejandro Hernández Contreras v. Republic of Costa Rica (II)*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, 2 May 2024, paras. 40-42 (**RL-17**).

106 *José Alejandro Hernández Contreras v. Republic of Costa Rica (II)*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, 2 May 2024, para. 45 (**RL-17**) ("*The Tribunal considers that in order to determine a party's ability or inability to comply with an adverse costs decision there must be a real risk that the applicant for security for costs, in this case, the Respondent, will face difficulties in its attempt to enforce the decision in its favour, either because (i) the claimant does not have the solvency to pay the costs awarded or (ii) the claimant's assets would not be available to cover the costs*").

unless other circumstances militate for a different outcome, for instance, because doing so would raise access to justice concerns.

75. Paragraphs 3 and 4 of Rule 53 of the 2022 ICSID Arbitration Rules require that the Tribunal consider all relevant circumstances, including the Claimants' ability and willingness to comply with an eventual adverse costs order, the effect of providing security for costs on the Claimants' ability to pursue their claims, the procedural conduct of the Parties and the existence of third-party funding. While these factors are relevant to the Tribunal's assessment, they are not the only circumstances that may be considered. Indeed, arbitral tribunals have considered several other factors, including the fact that the third-party funding agreement excludes liability for adverse costs, a claimant's failure to pay counsel, the moving or hiding of assets to avoid any potential exposure to a cost order, and the assignment of the claim to a shell company shortly before initiating proceedings.[107]

76. In sum, the decision whether to order security for costs must be made on a case-by-case assessment of the particular facts of each case and in the light of the factors set forth in paragraphs 3 and 4 of Rule 53.

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[107] *Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Republic of Colombia*, ICSID Case No. ARB/20/7, Decision on Security for Costs, 27 September 2023, para. 85 (**CL-12**); *The Estate of Julio Miguel Orlandini-Agreda v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, para. 143 (**CL-10**); *X. SA v. A., B. and others, Handel/Industrie/und Gewerbekammer des Kantons Tessin*, Ccia-Ti Nr. 103/00, 25 July 2003, ASA Bulletin, Kluwer Law International 2010, Volume 28, Issue 1, para. 21 (**CL-36**).

B. DISCUSSION

77. The Tribunal deems that the Respondent has not sufficiently demonstrated that the Claimants would be unwilling to comply with an adverse decision on costs and it does not contend that the Claimants' procedural conduct in this arbitration militates in favor of security for costs. Indeed, as matters presently stand, there are no convincing elements showing that the Claimants structured their businesses or assets in such a way as to avoid an adverse costs order. Since the reasons for NETL's alleged failure to honor various payment plans to satisfy invoices for supplied gas is a matter in dispute in this arbitration, neither this circumstance nor the fact that NELLC allegedly failed to ensure that NETL honor its debts is sufficient to conclude that there is a serious risk that the Claimants would not comply with an adverse costs order.

78. The decisive factor that leads the Tribunal to order security for costs in this case is the financial situation of the Claimants combined with the fact that the third-party funder is not liable for adverse costs. While it may be true that the use of a third-party funder is not in itself evidence of impecuniosity or a basis for granting security for costs, the combination of these two factors – impecuniosity and resort to a third-party funder that is not liable for adverse costs – creates a serious enough risk that the Respondent may not recover its costs should it prevail in this arbitration and should the Tribunal decide that the Claimants must bear some or all of the Respondent's costs.

79. Here, the evidence as it presently stands suggests that the Claimants have insufficient assets or that the existing assets are not available to satisfy an adverse costs order.

80. It is undisputed that NETL is impecunious. Indeed, that company is in receivership and the only asset at its disposal is the GTL plant which is not operational and which the Claimants describe as having not even scrap value:

> "*Without a gas supply (which NiQuan could not get from any other source), the GTL Plant went from being a valuable asset to an asset which had higher decommissioning and disassembly cost than scrap value*".[108]

81. In other words, the only asset at NETL's disposal cannot serve to satisfy an adverse costs order.

82. As for NELLC, the evidence shows that it is a going concern with some assets, including intellectual property rights ("IPR"). However, that same evidence raises

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[108] Request for Arbitration, para. 115.

serious doubts whether those assets are either sufficient or sufficiently liquid to enable NELLC to satisfy an adverse costs order or the Respondent to enforce such an order.

83. NELLC's draft (unaudited) management accounts of 30 September 2024 show that it had total assets of USD 32 million in 2023 and USD 759 million in September 2024.[109] Notwithstanding, those numbers raise several concerns that the Claimants have not succeeded to dispel:

(1) Under the fixed assets category, the accounts mention USD 6.1 million for NETL's GTL plant, which is the asset in dispute in this arbitration and which, as noted above, the Claimants contend is currently worthless.[110] Accordingly, this asset cannot serve to satisfy an adverse costs order.

(2) The accounts mention USD 400 million for NELLC's investment in the Vert GTL plant in Louisiana.[111] However, NELLC has not yet acquired that plant. Although NELLC intends to acquire that plant for USD 10 million, the Claimants have not rebutted the Respondent's statement that NELLC has only managed to raise USD 500,000 to date.[112] This asset therefore cannot serve to demonstrate NELLC's ability to satisfy an adverse costs order. The fact that NELLC is said to have the backing of various banks or financial institutions (*i.e.* JMMB and Chiron) to raise the required funds to develop the Vert GTL project is insufficient to demonstrate that NELLC has the necessary assets in place, at least at this stage, to satisfy any adverse costs order.

(3) As for the two IPR invoked by the Claimants, they consist of a "*combined synthesis*" patent nominally valued at USD 1 million and a "*non-provisional patent*" to repurpose mothballed production facilities which NELLC registered on 3 July 2024, but which still has to be approved.[113] Although the Claimants assert that the accounts only show a notional book value, there is nothing to support their assertion that the patents are worth "*at least USD 30 million*".[114] In fact, it appears that NELLC only paid USD 250,000 for the combined synthesis patent and that two instalments in the amount of USD 750,000 remain unpaid.[115]

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109 NELLC's September 2024 Management Accounts (**C-63**).

110 NELLC's September 2024 Management Accounts, p. 3 (**C-63**).

111 NELLC's September 2024 Management Accounts, p. 3 (**C-63**).

112 Response, para. 87(f)-(g).

113 Response, para. 87(c); NELLC's September 2024 Management Accounts, pp. 3 and 11-12 (**C-63**); NELLC's filing of the NIS patent under the PCT, 3 July 2024 (**C-67**).

114 Response, para. 87(e).

115 NELLC's September 2024 Management Accounts, pp. 4 and 9, note 6 (**C-63**).

The Claimants' assertion that the patent was "*validly assigned to NELLC*" and that "*the deferred consideration*" did not affect the "*transfer of title*" is of no assistance here. Indeed, the accounts mention that the IPR have a "*net book value*" of USD 1 million "*until management is able to have an independent assessment of the patents*".[116] Significantly, even if the Tribunal were to accept at face value the Claimants' representation that those IPR are worth USD 30 million, those assets are illiquid, and it is therefore doubtful whether the Respondent could enforce any costs order against them.

(4) The intangible assets category also mentions USD 317,988,571 representing NELLC's interest in the dispute proceeds of this arbitration.[117] This "*contingent*" asset evidently cannot demonstrate an ability to pay an adverse costs order.

(5) The current assets category "*accounts receivable – NETL*" for USD 26.5 million relates to amounts owed by NETL, which is impecunious and in receivership.[118] Accordingly, that amount cannot serve to satisfy an adverse costs order.

(6) The current assets category "*investment in subsidiary*" amounting to USD 6.1 million mirrors the amount mentioned under item (1) above and cannot serve to demonstrate NELLC's ability to pay an adverse costs order.[119]

(7) As for the current assets category "*other receivables*" in the amount of USD 7.2 million, it relates to NELLC's legal fees in this arbitration and therefore cannot either serve to demonstrate its ability to pay an adverse costs order.[120]

(8) Finally, as the current assets category "*cash at banks*" shows, it appears that the only liquid asset at NELLC's disposal is the amount of USD 21,545.[121]

84. This evidence shows that NELLC's only assets are USD 250,000 for the combined synthesis patent and USD 21,545 in cash. Moreover, the accounts show that NELLC has liabilities in excess of USD 27 million, including USD 15.7 million in non-current

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116 NELLC's September 2024 Management Accounts, p. 12 (**C-63**).

117 NELLC's September 2024 Management Accounts, pp. 3 and 15, note 14(1) (**C-63**).

118 NELLC's September 2024 Management Accounts, pp. 3 and 9, note 5 (**C-63**).

119 NELLC's September 2024 Management Accounts, p. 3 (**C-63**).

120 NELLC's September 2024 Management Accounts, pp. 3-4 (**C-63**).

121 NELLC's September 2024 Management Accounts, p. 3 (**C-63**).

liabilities (for loans and debts owed to related parties) and USD 10.2 million in "*accrued liabilities*" (for wages).[122]

85. Even if the Tribunal would not necessarily conclude that NELLC is impecunious, the Claimants' assertion that NELLC "*owns substantial assets*" is incorrect.[123] NELLC only has USD 21,545 in cash and, as regards the IPR, whatever their value, those assets are insufficiently liquid to be considered as assets the Respondent could target to satisfy any costs order in its favor. Moreover, even if the Respondent were to succeed in obtaining a court order to liquidate the IPR, it appears doubtful that they would suffice to satisfy an adverse costs order. These circumstances inevitably raise serious doubts whether NELLC has (or will have) sufficient assets to satisfy any adverse costs order. The evidence rather suggests that there are no likely prospects of NELLC paying an adverse costs order.

86. This situation is exacerbated by the fact that the Claimants resorted to a third-party funder that is not liable for adverse costs. Disputing parties may resort to third-party funding for a variety of reasons, including because they prefer using the resources at their disposal for other business opportunities. However, where an impecunious disputing party resorts to a third-party funder that is not liable for adverse costs, the opposing party is confronted with a serious risk that it will never recover its costs. The same is true of a disputing party that has insufficiently liquid assets even if it claims that those assets can serve to satisfy an adverse costs order. In these situations, it is not acceptable for that party to assert that it resorts to a third-party funder that is not liable for adverse costs because it prefers employing the assets at its disposal for other business opportunities, as NELLC appears to do in this case.[124] By proceeding in this way, the Claimants are in a situation where they may well reap all the benefits if they are successful in the arbitration but avoid any burden if they lose. This creates a procedural imbalance that is not adequately addressed by the Claimants' willingness to provide an "*express, irrevocable undertaking*" that NELLC intends to comply with any adverse costs order or cover NETL's portion of any adverse costs award.[125] In the circumstances, this imbalance can only be addressed through security for costs.

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122 NELLC's September 2024 Management Accounts, pp. 3-4 and 10-11, notes 7-9 (**C-63**).

123 Response, para. 105.

124 Response, paras. 39 and 105 ("*[T]he use of third party funding has becoming [sic] increasingly common in arbitrations, and a claimant may have any number of reasons for preferring to go down this route rather than depleting its own funds or using other debt or equity financing to pay fees connected to legal proceedings*" (footnote omitted); "*Although NELLC does have substantial assets, it should not be made to divert resources from its Vert GTL Project which at present is its only way of generating revenue to recover from the impact of the RTT's destruction of the GTL Plant*").

125 Rejoinder, paras. 7, 94(a), 97 and 112(a).

87. In sum, the Tribunal concludes that, due to the financial situation of the Claimants and the fact that the third-party funder is not liable for adverse costs, there is a serious risk, at least at this juncture, that the Respondent may not recover its costs should it prevail in this arbitration and should the Tribunal decide that the Claimants must bear some or all of the Respondent's costs.

88. The Tribunal does not believe that ordering security for costs raises unsurmountable access to justice concerns. Being funded by a third party ensures that the Claimants can pursue their claims. Moreover, the Claimants contend that they are able to raise millions on short notice based on the value of NELLC's patent rights, even if their preference would be to use any available funds for the Vert GTL project.[126] At the same time, considering the Claimants' assertion that their financial situation is, at least in part, due to the measures in dispute in this arbitration, as well as the fact that the Respondent's claim to recover its costs is dependent on it prevailing in this arbitration and the Tribunal's ultimate decision on the allocation of costs, the Tribunal deems that partly granting the Respondent's requested security strikes a proper balance between the need to preserve the Claimants' ability to pursue their claims and the contingent right of the Respondent to recover at least part of the legal costs incurred in this arbitration.

89. With these considerations in mind, and as communicated on 1 April 2025, the Tribunal decides that the Claimants must provide security for costs in the amount of USD 2 million by the time of the filing of their Memorial on the Merits, *i.e.* 6 June 2025.

90. As for the form of security, the Claimants may provide the security by way of either an ATE insurance, an unconditional and irrevocable bank guarantee from a reputable bank in the United States of America or in Western Europe, an assumption of liability for adverse costs by its third party funder, a deposit in an escrow account, or in a different form agreed by the Respondent or approved by the Tribunal.

91. The Tribunal further notes that, in the event the Claimants prevail in this arbitration, upon renewed request for that relief, it will consider ordering the Respondent to bear the costs associated with posting the security.

92. Finally, the Tribunal recalls that, pursuant to paragraph 8 of Rule 53 of the 2022 ICSID Arbitration Rules, it may at any time modify or revoke this order on its own initiative or upon either Party's request.

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[126] Rejoinder, para. 101(f) ("*However, even putting to one side the Vert GTL Project, as things stand NELLC is in any event able to raise millions of USD on short notice based on the value of its IPR rights*").

IV. DECISION

93. For the reasons set out above and in reliance on Rule 53 of the 2022 ICSID Arbitration Rules, the Tribunal:

a. Orders the Claimants to post security in the amount of USD 2 million by the time of the filing of their Memorial on the Merits, *i.e.* 6 June 2025, by way of either an ATE insurance, an unconditional and irrevocable bank guarantee from a reputable bank in the US or in Western Europe, an assumption of liability for adverse costs by its third party funder, a deposit in an escrow account, or in a different form agreed by the Respondent or approved by the Tribunal;

b. Specifies that its decision may be modified or revoked at any time upon request or *proprio motu*;

c. Reserves for a subsequent determination the costs associated with the Parties' respective submissions on the Respondent's request for security for costs; and

d. Dismisses all other requests.

For and on behalf of the Tribunal

[signature]

Dr. Laurent Levy

President of the Tribunal

Date: 2 June 2025