INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BSG Resources Limited

v.

Republic of Guinea

(ICSID Case No. ARB/14/22)

PROCEDURAL ORDER No. 3

Respondent's Request for Provisional Measures

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Professor Albert Jan van den Berg, Arbitrator
Professor Pierre Mayer, Arbitrator

Secretary of the Tribunal
Mr. Benjamin Garel

Assistant to the Tribunal
Dr. Magnus Jesko Langer

---

25 November 2015

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND

1. The present order deals with an application filed by the Republic of Guinea (the "Respondent" or "Guinea") on 30 April 2015 (the "Application"), by which the Respondent requested that the Tribunal order (i) on the basis of Article 28(1) of the ICSID Arbitration Rules (the "Arbitration Rules"), that BSG Resources Limited (the "Claimant" or "BSGR") bear all the cost advances during the pendency of these proceedings and reimburse the first advance paid by the Respondent, (ii) on the basis of Article 39(1) of the Arbitration Rules, a provisional measure requiring the Claimant to post security for costs in the form of an irrevocable guarantee in the amount of € 3 million, and (iii) that BSG bear all costs incurred in connection with the Application. The Application was accompanied with 51 factual exhibits (Exhs. R-1 to R-51) and 11 legal authorities (Exhs. RL-1 to RL-11).

2. In conformity with the procedural schedule set in paragraph 26.2 of Procedural Order No. 1, the Claimant filed its response to the Application on 5 June 2015 (the "Response"), in which it requested the Tribunal to reject the Respondent's requests and to award it the costs incurred for responding to the Application. The Claimant further stated that, in its view, the Application was straightforward and did not require a hearing, although it remained at the disposal of the Tribunal for further oral explanations at a hearing if required. The Response was accompanied with 47 factual exhibits (Exhs. C-28 to C-74) and 26 legal authorities (Exhs. CL-3 to CL-28).

3. The Respondent filed its reply on 12 June 2015 accompanied with 13 factual exhibits (Exhs. R-52 to R-64) (the "Reply"). In addition to reiterating its requests for advance payments and security for costs, the Respondent further indicated that factual exhibits C-68 to C-74 were confidential, thus requesting these exhibits as well as paragraph 60 of the

Response not to be published as long as the criminal investigation in Guinea was ongoing.[1] The Respondent did not ask for a hearing on the Application.

4. The Claimant filed its rejoinder on 19 June 2015 accompanied with 6 factual exhibits (Exhs. C-75 to C-80) and one legal authority (Exh. CL-29) (the "Rejoinder"), in which it reiterated its position as set out in the Response.

5. On 11 August 2015, the Claimant sent a letter to the Tribunal seeking leave to file one additional legal authority into the record, namely the Decision on the Parties' Requests for Provisional Measures dated 23 June 2015 in ICSID Case No. ARB/14/14 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (the "*Eurogas* decision"). In compliance with ICSID's email of 14 August 2015, the Claimant filed the *Eurogas* decision together with brief comments on 21 August and the Respondent provided its comments on 28 August.

II. POSITIONS OF THE PARTIES

1. Position of the Respondent

6. The Application contains two requests: that the Claimant pay all advances for the Tribunal's and the Centre's fees and expenses, including the reimbursement of the Respondent's first advance payment in the amount of US$ 125'000 (a. below); and that the Tribunal order the Claimant to post security for costs in the amount of € 3 million (b. below).

7. With reference to other ICSID cases, the Respondent submits that, notwithstanding the Tribunal's lack of competence to entertain the merits of the Claimant's case, the Tribunal

[1] Reply, ¶¶ 60 and 107, point 3.

has *prima facie* jurisdiction to order the requested measures on the basis of Article 28(1)(a) and 39(1) of the Arbitration Rules.[2]

8. Regarding more specifically the request for security for costs, the Respondent relies on *RSM v. St. Lucia* and *Phoenix v. Czech Republic* to argue that it has a legitimate interest in obtaining such security even if the Tribunal were to lack competence *ratione materiae* over the dispute, since the Tribunal's award denying jurisdiction could hold the Claimant liable for all the costs generated by the present proceedings.[3]

a. Advances on costs

9. On the basis of Articles 61(2) of the ICSID Convention, Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations, and Article 28(1)(a) of the Arbitration Rules, the Respondent requests that the Tribunal order the Claimant to pay all cost advances during these present proceedings and to reimburse the first advance payment of US$ 125'000 made by the Respondent. In reply to the Claimant's argument that the Respondent has twice consented to pay half of the advances on costs (by paying the first advance and accepting Article 10.1 of Procedural Order No. 1), the Respondent contends that those facts have no repercussion on its request, which was announced at the first session held on 23 April 2015 (the "First Session") and thus before Procedural Order No. 1 was issued.[4]

10. According to the Respondent, the Tribunal has discretionary power to decide "at any time" on the apportionment of the fees and expenses of the Tribunal as well as the charges of the Centre.[5] Such power should be exercised when there is "good cause".[6] Contrary to the Claimant's view, the "good cause" criterion established in *RSM v. St. Lucia* should not be mistaken for the particular circumstances of that case.[7] For the Respondent, three grounds

---

[2] Application, ¶ 10, referring to *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on provisional measures requested by the Parties, 25 September 2001, ¶¶ 6-8 (Exh. RL-1); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, Claimant's Request for Provisional Measures, 1 July 2003, ¶ 6 (Exh. RL-2); *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/05, Decision on Provisional Measures, 6 April 2007, ¶ 29 (Exh. RL-3), quoting *Holiday Inn S.A. et al. v. Morocco*, ICSID Case No. ARB/72/1, Decision of 2 July 1972; Reply, ¶ 11.

provide good cause for the Claimant to pay all cost advances in the present proceedings, namely (i) the exploitation of these arbitral proceedings by the Claimant, (ii) the health crisis in connection with the Ebola outbreak in Guinea, and (iii) the lack of merit of the Claimant's claims.

(i) The Claimant's exploitation of the arbitral proceedings

11. According to the Respondent, the Claimant's conduct shows that it seeks to prolong the proceedings as much as possible, as part of its media campaign targeting the Respondent's intention to reattribute the mining rights in dispute.[8] The Respondent points to various examples, such as a series of public statements made since 2013 by BSGR containing threats to resort to arbitration; the Claimant's misleading press statement of 7 May 2014 indicating that it had "filed" a request before ICSID; and a piece published in the Sunday Times on 1 June 2014, based exclusively on BSGR's declarations.[9] In addition, the Claimant has announced its intention to start new proceedings against Guinea on the same facts as the case at hand.[10]

12. The Respondent further submits that the Claimant has shown a "dilatory attitude" and has seized every opportunity to delay the proceedings since it filed its Request for Arbitration.[11] Moreover, despite the fact that the Claimant had stated in the Request for Arbitration that it intended to request provisional measures to prevent the Respondent from disposing of the disputed mining rights, it was unable to respond to the Tribunal's related

---

3 Application, ¶¶ 12-13, referring to *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶ 59 (Exh. RL-4) and *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/05, Award, 15 April 2009, ¶¶ 145-152.
4 Reply, ¶ 15.
5 Application, ¶¶ 18-24; Reply, ¶ 14.
6 Application, ¶ 24, referring to *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶ 76 (Exh. RL-4)
7 Reply, ¶¶ 19-25.
8 Application, ¶¶ 26-27.
9 Reply, ¶¶ 37-38; Exhs. R-53 to R-55.
10 Reply, ¶ 39; Exh. R-56.
11 Application, ¶¶ 35-36; Reply, ¶ 33.

question at the First Session, thus confirming that the Claimant was not facing a situation of urgency.[12]

13. In sum, the Respondent submits that there is a persistent incoherence between the Claimant's aggressiveness in its public declarations and its wait-and-see approach towards these arbitral proceedings.[13] In the Respondent's view, it should not have to bear the costs of a procedure which the Claimant is manifestly protracting so as to foster its media campaign.[14]

(ii) The Respondent's budgetary constraints due to the Ebola crisis

14. For the Respondent, the exploitation of these proceedings by the Claimant is compounded by the fact that Guinea's "precarious" financial situation has been put under increasing strain by the Ebola crisis.[15] While it acknowledges that its development prospects are positive,[16] Guinea is ranked among the Heavily Indebted Poor Countries and Least Developed Countries by the International Monetary Fund, the World Bank and the United Nations.[17] In 2012, more than half of the population lived below the poverty line and extreme poverty reached 18%. In 2013, Guinea's GDP was US$ 6.144 billion and, while the growth rate was projected to reach 4,5% in 2014, the Ebola crisis resulted in halving that rate.[18]

15. The Respondent further explains that since 2010 the country has undergone reforms to foster good governance in the natural resources sector, and reached the "completion point" allowing it to benefit from debt relief measures.[19] Notwithstanding this, Guinea is suffering from the violent Ebola epidemic requiring substantial financial resources. Specifically,

12 Application, ¶ 37; Reply, ¶ 34.
13 Reply, ¶ 41.
14 Application, ¶ 39.
15 Application, ¶ 40.
16 Reply, ¶ 43.
17 Application, ¶ 41; Exhs, R-18 and R-19.
18 Application, ¶¶ 42, 45.
19 Application, ¶¶ 43-44.

Guinea had to set aside US$ 70 million in 2014.[20] While the Respondent has shown its disposition that this arbitration be conducted in an orderly fashion, by paying the cost advances requested so far, it claims that the sums required for conducting the present arbitration would be put to better use in financing the fight against poverty and the Ebola epidemic.[21]

16. In response to the Claimant's criticisms on Guinea's handling of the Ebola crisis and the retention of two international law firms to represent its interests in these proceedings, the Respondent dismisses both arguments as inappropriate, imprudent and inapposite.[22]

(iii) The Respondent's serious defense on the merits

17. For the Respondent, the reallocation of advances is further justified because it has "serious elements" for its defense on the merits, in particular in light of the exceptionally strong evidence that BSGR obtained the disputed mining rights through an intricate "corruption scheme", confirmed by sound proof and Ms. Touré's witness statements.[23] Whereas the Claimant contends that Ms. Touré's written testimony is contradicted by evidence given by third parties, the Respondent rejects the Claimant's interpretation of that evidence. Moreover, the depositions filed by the Claimant are part of confidential criminal proceedings, in which the Claimant is not involved and to which it should have no access. Given the impact which the publication of these depositions could have on the ongoing criminal investigation, the Respondent requests that Exhs. C-68 to C-74 and paragraph 60 of the Claimant's Response not be published.[24]

18. The Respondent submits that the seriousness of the issues before the Tribunal is confirmed by the multiplicity of criminal proceedings concerning the same acts of corruption which

[20] Application, ¶¶ 45-46.
[21] Application, ¶ 48.
[22] Reply, ¶¶ 45-48.
[23] Application, ¶ 51; Reply, ¶¶ 53-62.
[24] Reply, ¶¶ 59-61.

are currently pending in the United States, Switzerland and the United Kingdom.[25] In addition, BSGR's partner Vale S.A. has begun an arbitration against BSGR at the London Court of International Arbitration[26] and Rio Tinto, the first holder of the disputed mining rights, has started proceedings against BSGR in the United States.[27]

19. While the Respondent concedes that the Tribunal is not called upon at this stage to rule on the merits of its arguments, it submits that there can be "no doubt" that its defense rests on serious arguments and conclusive evidence.[28] At any rate, the "exceptional circumstances" presented in the previous paragraphs constitute at the very least "good cause" justifying the Respondent's request on advance payments.[29]

b. Security for costs

20. Guinea also requests security for costs in the amount of € 3 million so as to preserve the Respondent's right to recover the expenses incurred in connection with these proceedings.[30]

21. The Respondent argues that the Application meets the relevant test and that the Tribunal is competent under Article 47 of the ICSID Convention and Article 39(1) of the Arbitration Rules[31] because (i) the requested measure aims at preserving the right of Guinea to the reimbursement of its costs, (ii) in circumstances rendering such preservation necessary and

25 Application, ¶ 53; Reply, ¶¶ 65-66.
26 Application, ¶ 54.
27 Application, ¶ 55.
28 Application, ¶ 57; Reply, ¶ 67.
29 Application, ¶¶ 58-59.
30 Application, ¶ 60.
31 Application, ¶¶ 62-65, referring to *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.5 (Exh. RL-7); Reply, ¶ 71.

(iii) it is urgent.[32] Finally, the Respondent submits that the requested amount is reasonable (iv).

(i) The preservation of the right to the reimbursement of the Respondent's costs

22. The Respondent submits that the possibility of recovering its costs at the end of arbitral proceedings is a procedural right that may find protection by way of provisional measures. As confirmed by the *RSM* tribunal, the hypothetical nature of a costs award is not a bar to ordering provisional measures.[33] The restrictive interpretation of *Maffezini v. Spain*, relied upon by the Claimant to show that hypothetical future rights are too speculative to merit protection, has been plainly rejected by ICSID tribunals since.[34]

23. In the Respondent's view, the evidence of corruption creates a real probability that the Claimant will be ordered to pay the Respondent's costs at the end of the proceedings.[35]

(ii) Exceptional circumstances make security for costs necessary

24. The Respondent acknowledges that the provisional measure requested is rarely granted and requires "exceptional circumstances", although no rules define such circumstances. The tribunal in *RSM v. St. Lucia* distinguished clearly between the test of "exceptional

---

32 Application, ¶ 67, referring to *Quiborax S.A., Non Metallic Minerals S.a. and Allan Fosk Kaplùn v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 1 February 2010, ¶ 113 (Exh. RL-8); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, Provisional Measures, 8 July 2014, ¶ 69 (Exh. RL-9).

33 Application, ¶¶ 68-69, referring to *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶ 66 (Exh. RL-4).

34 Reply, ¶ 83-86, referring to *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on provisional measures requested by the Parties, 25 September 2001, ¶¶ 46, 48, 80 (Exh. RL-1); *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.8 (Exh. RL-7); *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶ 72 (Exh. RL-4).

35 Application, ¶ 70.

circumstances" and the actual facts of a given case that may meet that test. Different sets of facts may therefore meet the test.[36]

25. Security for costs, so says the Respondent, has been deemed necessary in the face of a proven risk of default.[37] ICSID tribunals have accepted that exceptional circumstances existed in case of (i) insolvency, financial difficulties or insufficient assets, (ii) a single claimant, as opposed to cases with several claimants which may be found jointly liable for the reimbursement of costs, (iii) corporate restructuring, or (iv) third party funding.[38]

26. For the Respondent, there are three circumstances that, combined, amount to a real risk that the Claimant will not comply with a potential order for costs:

- First, the corporate structure and financial situation of BSGR imply a risk of insolvency as a result of the lack of transparency regarding the assets of this holding company.[39]

- Second, the Claimant's ability to honor a potential award on costs is questionable given the multiple proceedings pending against the Claimant, which will presumably end before the present arbitration. The Respondent argues that BSGR is "probably" going to be held liable for millions of US dollars in two proceedings and that criminal investigations in the United States may lead to the indictment of the company or its representatives. Other investigations in the United Kingdom and Switzerland will also have an impact on the financial situation of BSGR. In

36 Reply, ¶ 75-80.
37 Application, ¶ 72.
38 Application, ¶ 73, citing *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶¶ 5.20-5.24 (Exh. RL-7); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, ¶ 48 (Exh. CL-18) and *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶¶ 82-83 (Exh. RL-4).
39 Application, ¶¶ 74-75; Reply, ¶¶ 91-92.

addition, the Claimant has carried out frequent recapitalizations as a result of the high debt of some of its subsidiaries.[40]

- Third and last, the Respondent refers to the attitude of Mr. Beny Steinmetz, the ultimate beneficiary of the Claimant, towards his tax obligations and notes the investigations of the Israeli authorities regarding unpaid taxes. The Respondent also claims that Mr. Steinmetz has already started to shield his assets to avoid the enforcement of this Tribunal's award.[41]

27. In the light of these circumstances, the Respondent requests that the Tribunal order the Claimant to post security for costs in the form of an irrevocable bank guarantee.[42]

28. As regards the *Eurogas* decision, Guinea asserts that it confirms the Tribunal's power to grant a bank guarantee as security for costs when there is a risk that the Claimant will become insolvent.[43] While the tribunal in *Eurogas* decided against granting security and found that a claimant's financial difficulties are not necessarily exceptional circumstances, the facts here go beyond the financial difficulties of the Claimant and Mr. Steinmetz. They include (i) the fact that BSGR is the sole Claimant; (ii) the unusual accumulation of multiple arbitration and litigation proceedings (including criminal proceedings) against the Claimant, which could result in awards of several hundred million dollars; (iii) Mr. Steinmetz's conduct, such as his tax evasion maneuvers; and (iv) the Claimant's intent to file a second ICSID arbitration against Guinea.[44] In the Respondent's submission, all these facts constitute particular circumstances "without precedent" and justify an order for security.[45]

40 Application, ¶¶ 76-77; Reply, ¶¶ 93-97.
41 Application, ¶¶ 78-79; Reply, ¶¶ 98-100.
42 Application, ¶ 83.
43 Respondent's comments on the *Eurogas decision*, ¶ 11.
44 Respondent's comments on the *Eurogas decision*, ¶¶ 5-8.
45 Respondent's comments on the *Eurogas decision*, ¶ 11.

(iii) The requested measure is urgent

29. Relying on case law, the Respondent submits that the urgency requirement is satisfied when the preservation of the Respondent's rights cannot await the issuance of the award.[46] An order for security for costs is urgent given the need to protect the applicant's right to obtain reimbursement of its costs, prior to the issuance of the award. *In casu*, the multiple parallel proceedings and the manifold elements of corruption justify that the Claimant post security for costs.[47] The Respondent further notes that the Claimant has not disputed that the urgency requirement is met.[48]

(iv) The requested amount is reasonable

30. Finally, the Respondent vouches for the reasonableness of the requested guarantee in the amount of € 3 million. It corresponds to the Respondent's estimated fees and expenses in this arbitration in light of its complexity and the procedural calendar.[49] In any event, the Respondent would only call on the guarantee for the amount of costs which the Tribunal may allocate to it.[50]

c. Costs relating to the Application

31. The Respondent asks the Tribunal to order the Claimant to bear all costs related to the Application.[51]

46 Application, ¶ 84, citing *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶ 76 (Exh. RL-11).
47 Application, ¶ 87.
48 Reply, ¶ 102.
49 Application, ¶¶ 88-89.
50 Reply, ¶ 105.
51 Application, ¶ 90; Reply, ¶ 107.

2. Position of the Claimant

32. For the Claimant, the Respondent's Application is "wholly misconceived, without merit and a regrettable waste of resources", lodged in the hope of painting a "picture of distress" so as to form a "lasting impression" on the Tribunal, thus seeking to "subconsciously predispose it on the merits".[52] The sole circumstance on which the Respondent relies to support its requests, far from being extreme or exceptional, is a general risk that the Claimant will be unwilling or unable to pay costs. Yet this risk "is inherent in any arbitration or litigation and it has never before justified the grant of measures that Guinea is seeking here."[53] The only case in ICSID history where similar requests have been granted is *RSM v. St. Lucia*, in which there was a specific and proven risk of non-payment. By contrast, the Respondent's application is not based on incontrovertible evidence but on mere speculation and conjecture.[54]

a. Advances on costs

33. For the Claimant, if the Respondent's request on advances is upheld, this would require the Tribunal to set aside ICSID standard practice and the presumption enshrined in Article 14(3)(d) of the ICSID Administrative and Financial Regulations that each Party bears half of the advances on costs.[55] While the Claimant accepts that the Tribunal may apportion advances as a matter of discretion, it notes that such power has been used only once in over 400 ICSID arbitration cases, in circumstances that were "substantially different" from those here.[56]

34. The *RSM v. St. Lucia* tribunal held that a different allocation of advance payments must rest on a "good cause" and found that the combination of four specific circumstances

52 Response, ¶¶ 2-3.
53 Rejoinder, ¶ 3.
54 Rejoinder, ¶¶ 4-6.
55 Response, ¶ 10.
56 Response, ¶ 12.

justified altering the allocation of advance payments. In essence, that tribunal found that RSM's record concerning payment of administrative expenses in two prior ICSID proceedings (failure to pay advances on costs and failure to pay costs awarded against it) raised substantial doubts about its willingness and/or ability to pay an award of costs. It also found that RSM was impecunious and third party funded, which constituted "good cause" to change the allocation of advances.[57] None of these circumstances exist in the present case, since BSGR (i) has no track record of failing to pay advances on costs, (ii) has no track record of failing to pay costs awarded against it, (iii) is not impecunious, and (iv) is not funded by a third party.[58] In addition, none of the three circumstances put forward by the Respondent "come[] even close" to the circumstances prevailing in *RSM v. St. Lucia*.[59] The Claimant further argues that, contrary to the Respondent's understanding, it does not assert that the conditions in *RSM v. St. Lucia* are the only ones under which cost advances may be reallocated. Rather, it has analyzed those specific circumstances to show their exceptional nature and how high a threshold has been set.[60]

35. The Claimant also points to the fact that the Respondent's request, brought up during the First Session, contradicts its prior consent to pay its share of the first advance without reservation as well as the absence of any qualifications when filing its comments to Article 10.1 of draft Procedural Order No. 1.[61] The discretionary power of an arbitral tribunal to reallocate advances other than in equal shares allows it to reassess the situation when circumstances change; in the present case, each of the circumstances now invoked by the Respondent "was well-known to it from the start of this arbitration."[62]

---

57 Response, ¶¶ 14-20, referring to *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Provisional Measures, 12 December 2013, ¶¶ 68-74 (Exh. CL-5).
58 Response, ¶ 21.
59 Response, ¶ 22.
60 Rejoinder, ¶ 15.
61 Response, ¶ 11; Rejoinder, ¶¶ 9-12.
62 Rejoinder, ¶ 10.

(i) The Claimant's alleged exploitation of the arbitral proceedings

36. The Claimant denies that it has launched these proceedings in support of its media campaign to retain its mining rights. The motivation to retain its mining rights is not inappropriate, since restitution is an admissible remedy under both international and Guinean law. Moreover, public announcements are legitimate means used to preserve the *status quo* and avoid the aggravation of the dispute.[63]

37. In addition, BSGR denies that it manipulates the media and contends that it has found itself in the center of a "media storm". Its press releases are not meant to exert pressure, but rather to restore its corporate image and tell its side of the story.[64]

38. It further submits that its conduct in the arbitration has been perfectly reasonable and denies that it is seeking to protract these proceedings. [65]

39. As regards the Respondent's allegation that the Claimant is duplicating proceedings, the Claimant admits that two of its subsidiaries have issued a Notice of Dispute on 9 April 2015, which is legally justified under the Zogota Base Convention. The Claimant denies that this constitutes abusive behavior and pledges that it "will make every effort to consolidate or otherwise align the proceedings so as to conduct the arbitration(s) as cost and time efficient[ly] as possible."[66]

---

63 Response, ¶¶ 23-28, referring to Article 35 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (Exh. CL-6); *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, para. 46 (Exh. CL-7); *PNG Sustainable Development Program Ltd. v. Papua New Guinea*, ICSID Case No. ARB/13/13, Decision on Provisional Measures, 21 May 2015, ¶ 155 (Exh. CL-8); and Articles 1304 and 850 of the Guinean Code on Civil, Economic and Administrative Procedures (Exhs. CL-9 and CL-10); *Holiday Inn S.A. et al. v. Morocco*, ICSID Case No. ARB/72/1, Order of 2 July 1972, pp. 136-137 (Exh. CL-11); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Procedural Order No. 9, 6 September 2005, ¶ 45 (Exh. CL-12); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, Claimant's Request for Provisional Measures, 1 July 2003, ¶ 2 (Exh. RL-2); Rejoinder, ¶ 21.

64 Response, ¶¶ 31-32; Rejoinder, ¶¶ 33-42.

65 Response, ¶¶ 36-43; Rejoinder, ¶¶ 23-31.

66 Rejoinder, ¶ 44.

(ii) The Respondent's alleged budgetary constraints

40. The Claimant fails to see the relevance of the Respondent's allegation that its financial means are limited, since the Respondent does not argue that it cannot cover the costs of arbitration, but that they would be "better used" to deal with Ebola instead.[67]

41. The Claimant further stresses the promising economic forecast for Guinea and casts doubts on the handling and impact of the Ebola crisis.[68] The Respondent has failed, so says BSGR, to submit a "well proven case" that it cannot otherwise pay its advances, and therefore there is no justification to depart from the general principle that each Party should bear its own advances.[69]

(iii) The Respondent's alleged serious defense

42. For the Claimant, the fact that the Respondent may have a plausible defense "is a very long way from justifying dispensing with the principle of equal allocation of advances on costs".[70] Just as the *Maffezini* tribunal rejected security for costs based on the allegation of a strong defense, it would be improper here to prejudge the Respondent's corruption allegations by requiring the Claimant to pay all advances.[71]

43. The Claimant denies any wrongdoing or corruption and disputes Ms. Touré's witness statements, which it describes as unreliable and contradictory.[72] In connection with the other pending proceedings, neither BSGR nor Mr. Steinmetz or any of BSGR's employees or agents were the subject of the proceedings in the United States, the United Kingdom or

---

67 Response, ¶ 44.
68 Response, ¶¶ 45-46; Rejoinder, ¶¶ 45-49.
69 Response, ¶ 47.
70 Response, ¶ 48.
71 Response, ¶¶ 49-50, referring to *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶¶ 19-21 (Exh. CL-14); *Guaracachi America and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, 11 March 2013, ¶ 8 (Exh. CL-15).
72 Response, ¶¶ 52-64.

Switzerland. Further, BSGR's joint venture partner Vale, so the Claimant says, most likely initiated LCIA proceedings against BSGR to protect its position.[73]

44. In its Rejoinder, the Claimant added that it would not deal in that submission with Guinea's request that paragraph 60 of the Response and Exhs. C-68 to C-74 not be published, but reserved the right to do so in correspondence between the parties and the Tribunal. The Claimant did, however, note that the Respondent's concern about the integrity of the ongoing investigations could not be taken seriously when the Respondent itself published Ms. Touré's witness statement of 2 December 2013 on its website.[74]

45. In sum, the Claimant maintains that the Respondent has failed to show "exceptional circumstances" and "good reason" to obtain the relief it seeks, and the Tribunal should accordingly deny the request on advance payments.[75]

b. Security for costs

46. The Claimant accepts the Tribunal's competence to grant security for costs, but argues that in accordance with unanimous ICSID case law, security can only be granted in "exceptional circumstances", if not "in the most extreme case".[76] Eight of the nine ICSID tribunals requested to grant security for costs found no exceptional circumstances and denied the requests. They held that the applicant had to produce "hard and concrete

73 Response, ¶¶ 65-67.
74 Rejoinder, ¶ 54, footnote 28.
75 Response, ¶¶ 68-73.
76 Response, ¶ 75, referring to *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶ 10 (Exh. CL-14); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on provisional measures requested by the Parties, 25 September 2001, ¶ 86 (Exh. RL-1); *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.17 (Exh. RL-7); *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 34 (Exh. CL-16); *Guaracachi America and Rurelec v. Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, 11 March 2013, ¶ 6 (Exh. CL-15); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶ 57 (Exh. CL-17); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, ¶ 45 (Exh. CL-18).

evidence" as opposed to mere assertions and speculation.[77] The only case in which security was granted was *RSM v. St. Lucia*, in which the claimant had repeatedly demonstrated its unwillingness and inability to pay costs and was funded by a third party. It is the cumulative effect of these facts that led the *RMS* tribunal to its stand-alone decision.[78]

47. The Claimant submits that the recent *Eurogas* decision fully supports its position that security for costs should not be ordered but in exceptional, if not extreme, situations, adding to the series of negative ICSID decisions referred to in the Response and Rejoinder. The *Eurogas* decision confirms that a tribunal should not make a finding of exceptional circumstances "lightly"; that security cannot be granted on the ground of the claimant's financial hardship; and that an allegedly serious defense on the merits is irrelevant.[79]

(i) There are no exceptional circumstances justifying security for costs

48. The Claimant's view is that its corporate structure is neither unusual nor exceptional. Moreover, the Claimant has been doing business in and with the Guinean Government since 2006. It had the same corporate structure when it was granted the mining rights. If this did not pose a problem then, it cannot reasonably be invoked to justify the security request now. Furthermore, as explained in *Libananco v. Albania*, the fact that an investor is

---

77 Response, ¶¶ 76-77; referring to *Emilio Agustin Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 (Exh. CL-14); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on provisional measures requested by the Parties, 25 September 2001 (Exh. RL-1); *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/06, Award, 2 August 2006, ¶¶ 12-13 (Exh. CL-23); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Procedural Order No. 9, 28 February 2007, referred to in Award of 27 August 2008, ¶ 41(Exh. CL-24); *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID No ARB/06/08, Decision on Preliminary Issues, 23 June 2008, ¶¶ 57-60 (Exh. CL-17); *RSM Production Corporation et al. v. Government of Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶¶ 5.16- 5.25 (Exh. RL-7); *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶¶ 38-41 (Exh. CL-16); *Commerce Group. & San Sebastian Gold Mines, Inc v. Republic of El Salvador*, ICSID Case No. ARB/09/07, Decision on El Salvaldor's Application for Security for Costs, 20 September 2012, ¶¶ 45 and 47-54 (Exh. CL-18)..

78 Response, ¶¶ 79-84, referring to *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Provisional Measures, 12 December 2013, ¶¶ 78-80, 83, 86 and Assenting Reasons attached to the Security for Costs Decision of Dr Gavan Griffith, ¶ 10 (Exh. CL-5).

79 Claimant's comments on the *Eurogas decision*, ¶¶ 3-5.

a shell company without sufficient assets of its own is not a sufficient ground to order security.[80]

49. In addition, the Claimant dismisses the suggestion that its structure would allow it to transfer assets to other companies of the group to frustrate the enforcement of an award as a mere conjecture based on hypothetical presumptions.[81]

50. Moreover, BSGR argues that there is no direct relationship between an alleged lack of transparency of Guernsey holding companies and an inability or unwillingness to pay.[82]

51. The Claimant submits that the risk of non-payment "is built on speculation and doom scenarios only."[83] Indeed, it has an excellent credit history and has never defaulted on its financial obligations. As to its balance sheet, BSGR notes that its "total equity and total assets are close to US$ 700 million, with total liabilities just exceeding 10 million."[84] In respect of the legal proceedings pending against it, the Claimant contends that there is no evidence that it will lose those proceedings, nor that it would become insolvent if it lost. There is no requirement to account for the claims filed by Vale and Rio Tinto as liabilities. Moreover, the restructuring of loans within the BSGR group referred to by the Respondent does not establish a risk of non-payment as it involves companies that are not parties to these proceedings.[85]

52. In any event, ICSID jurisprudence shows that possible financial hardship of a claimant is a poor ground for requesting security for costs[86] and Guinea does not invoke cases in which a lower threshold was applied.

---

80 Response, ¶¶ 86-90; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶¶ 58-59 (Exh. CL-17).
81 Response, ¶ 91.
82 Rejoinder, ¶¶ 68-69.
83 Rejoinder, ¶ 86.
84 Response, ¶ 100.
85 Response, ¶ 104; Rejoinder, ¶¶ 79-84.
86 Response, ¶¶ 94-99, citing *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 41 (Exh. CL-16); *RSM Production Corporation et al. v.*

53. Finally, the Claimant insists that Mr. Steinmetz is not a party to these proceedings, he does not control BSGR's assets, and his personal financial affairs are therefore irrelevant. At any rate, so says the Claimant, the Respondent's allegations are false: Mr. Steinmetz's dispute with the Israeli tax authorities has been settled; he has not divested certain of his businesses "and even if he did, he did so for proper business or personal purposes completely unrelated to the present arbitration."[87]

(ii) Other considerations

54. The Claimant also submits that the Tribunal should not prejudge cost allocation. In support of this submission, it cites *Maffezini v. Spain*, *Libananco v. Turkey* and *Burimi v. Albania*, according to which security should not be ordered because it would imply speculating that the Respondent will ultimately be granted costs.[88]

55. BSGR also claims that there is an inherent and systemic risk in investment arbitration which derives from the fact the State has consented to arbitration with investors that may be ultimately unwilling or unable to pay cost awards.[89]

Grenada, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶¶ 5.19 and 5.20 (Exh. RL-7); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, ¶ 48 (Exh. CL-18); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on provisional measures requested by the Parties, 25 September 2001, ¶ 89 (Exh. RL-1); and *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶ 2 (Exh. RL-4).

87 Response, ¶¶ 106-109, citing *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.24 (Exh. RL-7); Rejoinder, ¶¶ 87-90.

88 Response, ¶¶ 115-118, citing *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶¶ 13; 15-18 (Exh. CL-14); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶ 59 (Exh. CL-17) and *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 47 (Exh. CL-16).

89 Response, ¶¶ 120-123, citing *Burimi v. Albania*, *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 49 (Exh. CL-16) and *RSM Production Corporation v. St. Lucia*, Assenting Reasons attached to the Security for Costs Decision of Dr Gavan Griffith, 13 August 2014, ¶¶ 2-3 (Exh. RL-4).

(iii) Security amount

56. The Claimant considers that € 3 million to defend an ICSID case is not necessarily a reasonable figure, although it does not find it a shocking amount either. It criticizes the Respondent for seeking security for the entire amount of its estimated fees at once, instead of proceeding in stages throughout the arbitration, which would be a more sensible approach.[90]

c. Costs relating to the Application

57. In line with its position that the Application is without merit, BSGR claims its costs to defend this request, irrespective of the outcome of the proceedings. In its Rejoinder, it notes that it awaits the Tribunal's directions as to the submission of its costs.[91]

III. ANALYSIS

58. This decision is made on the basis of the Tribunal's understanding of the record as it stands today. As a result, nothing herein shall preempt any later finding of fact or conclusion of law and any conclusion reached here could be revised if relevant circumstances were to change.

1. Cost advances

a. Legal framework

59. The rule in ICSID arbitration, as in many arbitration systems, is that the Parties pay the advances to finance the costs of the proceedings in equal shares and that the Tribunal determines the final allocation of costs in the award. Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations expresses this rule in the following terms:

90 Response, ¶ 124.
91 Rejoinder, ¶ 97.

> **Regulation 14**
> **Direct Costs of Individual Proceedings**
>
> [(3)(d)] in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, *each party shall pay one half of each advance* or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. […] (Emphasis added)

60. The ICSID legal framework allows for exceptions to this rule, which require an agreement of the Parties (there is none here) or a decision of the tribunal. The Parties do not dispute the Tribunal's power in this respect, and rightly so. It is based on Regulation 14(3)(d) just quoted and on ICSID Arbitration Rule 28, which reads as follows:

> **Rule 28**
> **Cost of Proceeding**
>
> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

61. Contrary to the Claimant's contention, the Tribunal considers that the request is admissible, although the Respondent did not raise it until the First Session and it knew since the start of the arbitration about the circumstances which it now invokes.

62. As was just seen, Regulation 14(3)(d) allows the Tribunal to deviate from the fifty-fifty apportionment of the advances which is the rule. This said, the ICSID legal framework provides no guidance on the test which the Tribunal should apply when considering allocating advances other than according to the fifty-fifty rule.

63. *RSM v. St. Lucia* is the only ICSID case that has accepted to change the fifty-fifty division of advances. The *RSM* tribunal considered that a variation from the fifty-fifty rule required showing good cause. While it added that this standard is less stringent than the "exceptional circumstances" threshold applied in connection with provisional measures, it explained that it "ha[d] no occasion here to conceive of and address what sort of circumstances might generally amount to "good cause" for varying the presumption that each Party advances one-half of ongoing administrative expenses."[92] It thus focused its analysis on the specific circumstances of the case and was led to alter the presumptive allocation of advances as a result of a combination of circumstances, specifically "(1) that Claimant's record concerning payment of these administrative expenses in two prior ICSID proceedings gives rise to substantial doubt about either its willingness or ability (or both) to pay any award of such expenses and (2) that, far from allaying these doubts, the circumstances of this proceeding thus far compound them."[93] Consequently, the tribunal found that there was a "reasonable inference" that the Claimant would never pay the costs unless it was required to pay in advance.[94]

b. Is there "good cause" to reallocate advances on costs?

64. The Tribunal agrees with the Parties that the "good cause" standard outlined in *RSM v. St. Lucia* should not be mistaken for the particular circumstances of that case. The latter are certainly not the only possible circumstances under which advances on costs may be allocated other than in equal shares. Still, an assessment of the circumstances of that case shows that a departure from the fifty-fifty apportionment cost advance must rest on strong grounds and can only prevail in exceptional circumstances.

92 *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Provisional Measures, 12 December 2013, ¶¶ 49-50 (Exh. CL-5).
93 *Ibid.*
94 *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Provisional Measures, 12 December 2013, ¶ 74 (Exh. CL-5).

65. The Tribunal considers that such exceptional circumstances do exist in the present case. This is not due to its assessment of the merits of this case. Indeed, at this very early stage of the arbitration, it is difficult for the Tribunal to assess the likelihood of success of the Respondent's defenses. Doing so would entail entering into the substance of the issues and prejudging the merits of the respective positions at an early stage without the benefit of a full record. This would undoubtedly be at best an unsatisfactory exercise.

66. Neither is the Tribunal's determination based on alleged dilatory tactic of BSGR. In fact, the Tribunal sees no indication of BSGR employing dilatory tactics in this arbitration in order to foster a media campaign to retain its mining rights. So far, the arbitration is unfolding at a normal pace for a complex investment arbitration. The examples cited by the Respondent do not show that the Claimant tries to put a spoke in the wheel.

67. Rather, the Tribunal's determination is based on the Respondent's argument pursuant to which, in view of its precarious situation, which is put under further strain due to the Ebola epidemic, its share of advances on costs of this arbitration should better go towards fighting the Ebola crisis and somewhat easing Guinea's budgetary constraints.

68. The Tribunal notes that Guinea is ranked among the Heavily Indebted Poor Countries and Least Developed Countries by the IMF, the World Bank, and the United Nations, with more than 50% of the population living below the poverty line and 18% in extreme poverty (2012 figures). It also notes that, in addition to human distress, the Ebola crisis has caused significant losses to the economy and hence to fiscal resources. It has also considerably reduced the development and growth perspectives of the country (see in particular Exhs. R-18, R-21 and R-22).

69. The Tribunal is of course aware that the Claimant has opposed these arguments and has in particular stressed that the Respondent has retained two international firms as counsel; that it has not stated that it was unable to pay the advances; that its economic prospects are improving; and that it is not managing the health crisis and aid funds in an efficient manner. While there may be truth in these arguments, they do not change the fact that

Guinea is one of the poorest countries in the world and that its budget is under major pressure as a result of the Ebola crisis. It is also true that respondent States do not have the initiative of starting arbitration proceedings. Rather, they are subject to the initiative and timing of the claimant, and it is true that investment arbitrations can place a non-negligible burden on the fiscal resources of States in low income economies.

c. Conclusion on advances

70. As a result of these exceptional circumstances, the Tribunal determines that BSGR shall bear 75% of the advances on costs and Guinea 25%. This apportionment shall apply as from the second advance, being specified that Guinea's first advance payment shall not be refunded. For the avoidance of doubt, this determination is without prejudice of the Tribunal's final decision on the allocation of costs.

2. Security for costs

a. Legal framework

71. The Tribunal's authority to grant security for costs as a provisional measure is undisputed by the Parties. This authority stems from Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, which read as follows:

> **Article 47**
>
> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.
>
> * * *
>
> **Rule 39**
> **Provisional Measures**
>
> (1) At any time after the institution of the proceeding a party may request that provisional measures for the preservation of its rights be

> recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> […]

b. Requirements for provisional measures

72. Under Rule 39, an application for provisional measures must specify "the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures." ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) be urgent, and (iii) be necessary, which implies the existence of a risk of irreparable or substantial harm.[95]

73. The Tribunal recalls that the applicant must establish the facts underlying the requirements with sufficient likelihood, without having to actually prove them at this stage of the proceedings.

74. While the requirements are undisputed, the Parties disagree on their fulfillment in this case. In particular, the Parties disagree on the Respondent's right deserving protection (i) and on necessity (ii). By contrast, the Parties do not dispute that the Tribunal has *prima facie* jurisdiction to rule on provisional measures, even though the Respondent has announced that it will raise an objection to the Tribunal's jurisdiction.

---

95 *See Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Procedural Order No. 9, 6 September 2005, ¶ 38 (Exh. CL-12); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 51; *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Provisional Measures, 26 February 2010, ¶ 113 (Exh. RL-8); *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Claimants' Application for Provisional Measures, 2 March 2011, ¶ 12.

(i) Rights requiring preservation

75. The Tribunal agrees with the Respondent that its conditional right to the reimbursement of the Claimant's costs deserves protection. As found by the tribunals of *Pey Casado v. Chile*, *RSM v. Grenada,* and *RSM v. St. Lucia*, the right to be preserved need not necessarily exist at the time of the request.[96] Therefore, while the Tribunal acknowledges that the right requiring preservation relies on two hypothetical events (that the Respondent will prevail in this arbitration and that it will be awarded costs), it nevertheless deems that the *prima facie* existence of a right has been established.

(ii) Existence of exceptional circumstances

76. The Parties agree that the provisional remedy requested can only be granted in circumstances of exceptional nature. These circumstances should display a real risk that the Claimant will not comply with a potential order for costs because it is unable or unwilling to do so.

77. The Tribunal finds that, in the present state of the record, the circumstances are not exceptional and consequently denies the request for the following reasons.

78. First, the Tribunal is of the view that the Claimant's structure, that of a holding company, is neither unusual nor exceptional. Similarly, the alleged lack of transparency and the fact that BSGR may transfer its assets do not appear exceptional nor do they pose an extraordinary risk of defaulting on a potential order for costs. This is in particular so as the Claimant asserts that it has never defaulted on its financial obligations, an assertion that has not been persuasively contested by the Respondent.

---

96 *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on provisional measures requested by the Parties, 25 September 2001, ¶¶ 46, 48, 80 (Exh. RL-1); *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.8 (Exh. RL-7); *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014, ¶¶ 72-73 (Exh. RL-4).

79. Second, the Tribunal cannot foresee how the multiple legal proceedings against the Claimant will end and how they may impact the financial condition of BSGR. Further, the recapitalization or restructuring of some subsidiaries do not in and of themselves say much about the finances of the group and the holding company. Moreover, the Tribunal notes the Claimant's statement that its equity and assets are close to USD 700 million and liabilities just exceed USD 10 million.

80. Third, the Tribunal agrees with the Claimant that Mr. Beny Steinmetz is not party to these proceedings and thus his personal finances – whatever they may be – appear irrelevant.

81. In view of these considerations, the Tribunal concludes that the requirement of necessity is not met. Since the requirements for provisional measures are cumulative, the Tribunal will dispense with examining whether the requirement of urgency is satisfied.

(iii) Conclusion

82. For all these reasons, the Tribunal considers that the Respondent has not established being entitled to an order for security for costs.

c. Costs

83. Each Party requests the Tribunal to order the opposing Party to bear the costs associated with the Application. The Tribunal finds it preferable to rule on costs at a later stage and thus reserves its decision. The Tribunal therefore makes no direction for further details of those costs at this time.

3. Final observations

84. This order is issued in the present state of the record and can be reopened if circumstances change materially.

85. The Tribunal notes that the issue of publication of certain exhibits and paragraph 60 of Claimant's Response shall be dealt with in a separate Procedural Order.

IV. ORDER

86. On this basis, the Arbitral Tribunal:

(1) Partially grants the Respondent's request that the Claimant pay the advances of arbitration costs;

(2) Determines that as from the second advance of costs, the Claimant shall bear 75% and the Respondent 25% of the requested advance, without prejudice to the final cost allocation;

(3) Denies the Respondent's request that the Claimant post security for costs;

(4) Reserves its decision on costs related to the Application for a later stage of these proceedings.

On behalf of the Tribunal

[Signed]

_____

Gabrielle Kaufmann-Kohler
President of the Tribunal