

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ESKOSOL S.P.A. IN LIQUIDAZIONE

Claimant

and

ITALIAN REPUBLIC

Respondent

ICSID Case No. ARB/15/50

PROCEDURAL ORDER NO. 3
(Decision on Respondent's Request for Provisional Measures)

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal

Prof. Brigitte Stern, Arbitrator

Prof. Dr. Guido Santiago Tawil, Arbitrator

Secretary of the Tribunal

Mr. Francisco Abriani

12 April 2017

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I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

1. As noted in the Tribunal’s prior Decision on Respondent’s Application under Rule 41(5), dated March 20, 2017, this case concerns a dispute submitted to ICSID under the Energy Charter Treaty and the ICSID Convention, involving claims by Eskosol S.p.A. *in liquidazione* (“**Eskosol**” or the “**Claimant**”) against the Italian Republic (“**Italy**” or the “**Respondent**”). The background information and procedural history of the dispute is not repeated herein, except as relevant to Italy’s Request for Provisional Measures Under Rule 39(1), filed on January 18, 2017 (the “**Request**”).
2. With respect to the Request, by letter of January 23, 2017, the Tribunal invited the Parties to suggest a briefing schedule by January 30, 2017. By letter of January 30, 2017, Eskosol requested that the Tribunal suspend any further briefing on the Request until Italy paid its share of the first advance deposit. Italy did not respond to the Tribunal’s January 23, 2017 invitation to suggest a briefing schedule on the Request.
3. On February 8, 2017, the Tribunal held a hearing to address Italy’s then-pending Rule 41(5) application. During that hearing, the Parties agreed that the current Request would be addressed in one round of submissions, with Eskosol’s response due on March 3, 2017.¹ As potentially relevant to the Request, Eskosol also confirmed that it is pursuing this claim with the use of external funding.² By letter of February 10, 2017, the Tribunal informed the Parties that it agreed to fix March 3, 2017, as the deadline for Eskosol’s submission of its response to the Request.
4. On February 13, 2017, ICSID confirmed that it had received Italy’s payment of its share of the first advance deposit.
5. On March 3, 2017, Eskosol filed its “Response to Respondent’s Request for Provisional Measures” (the “**Response**”).

¹ Hearing Transcript, February 8, 2017, at 145:4-14.

² Hearing Transcript, February 8, 2017, at 125:1-7; *see also* Response, ¶ 8.

II. ITALY’S REQUEST FOR PROVISIONAL MEASURES

6. In its Request, Italy asks the Tribunal to:
- (a) Direct Eskosol to post an irrevocable bank guarantee or analogous security in the amount of \$250,000 [the “**Security Application**”];
 - (b) Direct Eskosol to submit Exhibits C-005 and C-006 in their integrity to permit the Respondent and the Tribunal to get confirmation whether a funding third party did commit itself to cover Eskosol[’s] costs of these proceedings [the “**Disclosure Application**”].
 - (c) In the event third party funding is confirmed, and as an alternative to (a), direct Eskosol to procure from such third party – proved to have demonstrably adequate assets – a legally binding undertaking to pay any costs order entered against Eskosol.³
7. Eskosol, in turn, argues that Italy’s Request should be rejected for the following reasons:
- First, the Tribunal lacks the authority to order security for costs. Second, and more importantly, even if such authority were deemed to exist, Italy’s Request should fail because it does not satisfy the exacting requirements for such orders to be made Third, Eskosol already has an after-the-event insurance policy (the “**ATE Insurance**”) in respect of potential adverse costs for up to €1 million that is more than sufficient to address Italy’s request “*for analogous security in the amount of \$250,000 as security for costs.*”⁴
- Finally, as Eskosol already disclosed that it has external funding here, Italy’s request for document production has become moot and thus should be dismissed.⁵
8. The Parties’ respective arguments are summarized in turn below.

³ Request, Section V.

⁴ Response, ¶ 2 (quoting Request, Section V(a)).

⁵ Response, ¶ 3.

A. The Security Application

1. Italy's position

a. The power to order security for costs

9. Italy grounds its application on Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1). It contends that “[i]t is undisputed that, in general, an ICSID tribunal has the authority to order provisional measures to preserve a party’s right,” but admits that “some controversy has arisen whether orders to request security for costs could be granted.”⁶ In its view, however, such power “has now been fully admitted by a large number of ICSID tribunals.”⁷
10. In Italy’s view, the granting of an order for provisional measures is subject to two conditions: “(i) that a right in need of protection exists, and (ii) that the circumstances require that the provisional measures be ordered to preserve such right, *‘which necessitates a showing that the situation is urgent and the requested measure are [sic] necessary to prevent irreparable harm to the party’s right to be protected’*.”⁸ Italy contends that, here, the provisional measure is requested “for the protection of its right to claim reimbursement of the costs it is incurring in the course of this phase of the arbitration.”⁹
11. Italy argues that both substantive and procedural rights are protected by Rule 39(1).¹⁰ It also contends that its request for reimbursement is part of its defense, and that it is directly

⁶ Request, ¶ 22.

⁷ Request, ¶ 23. Italy relies on the statement in *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, August 13, 2014, Exhibit RL-028, ¶ 48 (*RSM v. Saint Lucia*), that “a large number of ICSID tribunals have ruled that a measure requesting the lodging of security for costs does, generally, not fall outside an ICSID tribunal’s power provided exceptional circumstances exist” (Request, ¶ 23). Italy also cites *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, Exhibit RL-029, ¶ 57 (*Libananco v. Turkey*); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/06, Decision on Respondent’s Application for Security of Costs, October 14, 2010, Exhibit RL-030, ¶ 5.16 (*Grynberg v. Grenada*); and *Victor Pey Casado, Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, September 25, 2001, Exhibit RL-031, ¶ 88 (*Pey Casado v. Chile*).

⁸ Request, ¶ 24 (emphasis in the Request).

⁹ Request, ¶ 25.

¹⁰ Request, ¶ 26, quoting *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 66: “Costs decisions, while contingent upon the tribunal’s ultimate and final decision on the merits and the exercise of its discretion to grant cost reimbursement, are nonetheless part of the arbitral process the integrity of which deserves protection by Article 47 ICSID Convention and ICSID Arbitration Rule 39.”

linked to the relief requested, namely the dismissal of the claim for manifest lack of legal merit and the reimbursement of the expenses necessary for its defense.¹¹

12. Italy also relies on *RSM v. Saint Lucia* to reject the idea that, in order to be protected, a right must be actual at the time of the request:

The Tribunal finds that the right to be preserved by a provisional measure need not already exist at the time the request is made. Also future or conditional rights such as potential claim for cost reimbursement qualify as “rights to be preserved”. The hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures.¹²

b. The granting of security for costs in the instant case

13. Italy argues that “an order for security for costs must be required by the circumstances.” In its view, in this case there is a “material risk that a cost award will not be complied with,” a risk that it deems more serious than the one considered by the tribunal in *RSM v. Saint Lucia*, where the tribunal granted the security for costs order.¹³
14. Italy contends that “the very fact that Eskosol has been declared into bankruptcy ... confirm[s] that it would not have sufficient financial resources to compensate the Respondent for its undue costs.”¹⁴ It also contends that where a claimant is funded by a third party, “the risk that the cost award would not be complied with would become more material and serious, and the need for security for costs even more urgent.”¹⁵

¹¹ Request, ¶ 27.

¹² Request, ¶ 29, quoting *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 72. Italy also relies on *Grynberg v. Grenada*, Exhibit RL-030, ¶ 5.8.

¹³ Request, ¶¶ 31-33. Italy relies on the following passage from *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 82: “[...] contrary to the situation in previous ICSID cases where tribunals have denied the application for security for costs (*inter alia*) because there was no evidence concerning the financial situation of the opposing party, it has been established to the satisfaction of the Tribunal that Claimant does not have sufficient financial resources. Whereas it has previously been held that such financial limitations as such do not provide a sufficient basis for ordering security for costs, the circumstances of the present case are different. In particular Claimant’s consistent procedural history in other ICSID and non-ICSID proceedings provide compelling grounds for granting Respondent’s request.”

¹⁴ Request, ¶ 34.

¹⁵ Request, ¶¶ 35-36. See also *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 83: “Moreover, the admitted third party funding further supports the Tribunal’s concern that Claimant will not comply with a cost award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent

15. Italy invokes the declaration of Eskosol’s insolvency by the Brindisi bankruptcy tribunal, and contends that the tribunal’s findings establish that “the value of [Eskosol’s] assets is extremely low in respect of the outstanding exposure to creditors.”¹⁶ Specifically, Italy quotes the Brindisi tribunal as follows:

In primis, with regard to the quantitative limit indicated in the last paragraph of Article 15 of the bankruptcy law on the procedure for the purposes of dealing with defaults, it should be noted that in the present case, the amount of debt by far exceeds €30,000.00.

...

Finally, because the defendant company is in liquidation and of the obvious lack of assets to cope with the amount of debt, one cannot even abstractly refer to a future capacity to generate sufficient income to cover the debt situation.¹⁷

16. Italy asserts that, in this context, its chances of recovering the costs incurred in this procedure would be put at serious risk, “if not made factually impossible.”¹⁸
17. Italy also grounds its application on the suspicion (subsequently confirmed by Eskosol) that Eskosol is relying on financing by third parties, whom Italy contends would not be bound by an award on costs.¹⁹ Italy’s suspicions regarding third-party funding were premised in part on the basis of the resolution of the Italian bankruptcy judge authorizing Eskosol’s initiation of this arbitration, which (as submitted by Eskosol) contained “material portions omitted” that appeared to suggest the judge understood the arbitration would entail no costs and no commitment on the part of Eskosol.²⁰

with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent’s favor.”

¹⁶ Request, ¶ 9.

¹⁷ Request, ¶¶ 9-10, citing Exhibit R-001, p. 2, ¶ 6 and p. 3, ¶ 3.

¹⁸ Request, ¶ 11.

¹⁹ Request, ¶ 12.

²⁰ Request, ¶¶ 12-15. Italy cites, in particular, the following passages of the judge’s resolution, emphasizing the portions omitted by Eskosol in its submission: “having considered that it did not occur any obstacle for the requested authorization (besides, consisting in the mere formal activities to execute the mandate and [OMITTED]) ... For these reasons, authorizes the receiver Dr. Contardi to subscribe [OMITTED] and to give mandate to the law firm indicated in the request.” (Exhibit C-005)

18. Italy argues that “the need for a provisional measure as a matter of urgency is due in particular to the fact that once an award is rendered, the tribunal will have no power to order a funding third party to undertake a commitment to secure payment of costs to the Respondent.”²¹ In particular, the urgency of the Request – at the time it was filed – was said to be connected to the pendency of Italy’s Rule 41(5) application, because of a concern that “in case its 41(5) objection is upheld,” there would be no further opportunity in the case to seek protection of any costs award in its favor.²² The implication was that the specific amount of the security sought in the Request – \$250,000 – was connected to the level of costs Italy had or would incur “during this first phase of the proceedings,” up through the Tribunal’s decision on Italy’s Rule 41(5) application. Italy did not specify what, if any, additional level of security it might wish in the event that application were denied and the case continued into further phases.

2. *Eskosol’s position*

a. *The power to order security for costs*

19. Eskosol asserts that Article 47 and Rule 39(1) allow a tribunal to recommend provisional measures to preserve the respective rights of either party. It argues, however, that “Italy has no right *per se* to be awarded its costs here.”²³ In its view, Italy’s request presumes that it will prevail in this matter and that costs will be awarded to it. Italy’s “right” to be awarded its cost “is thus speculative at best, and not a concrete right that is the appropriate subject of an Article 47 and Rule 39 application.”²⁴

20. Eskosol contends that Article 47 and Rule 39(1) do not grant the Tribunal authority to impose a security for costs order on Eskosol. It also notes that while some decisions “have departed from the wording of Article 47 and Rule 39 and accepted the power to order security; others have held the opposite conclusion.”²⁵

²¹ Request, ¶ 18. See also ¶¶ 16-17.

²² Request, ¶ 11.

²³ Response, ¶ 12.

²⁴ Response, ¶ 12.

²⁵ Response, ¶ 14, citing *Emilio Agustin Maffezini v. Spain*, ICISD Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999, Exhibit RL-032, ¶¶ 12-15 (*Maffezini v. Spain*).

21. Relying on Judge Nottingham’s dissenting opinion in *RSM v. Saint Lucia*, Eskosol contends that there is no reason for a tribunal to ignore the terms of Article 47 and Rule 39 to create a procedural entitlement that the ICSID framework does not envisage. In its view, doing so “would allow respondent-States to stifle claims, thus betraying the overall purpose and objective of the ICSID Convention.”²⁶
22. Eskosol agrees with Italy that the granting of an order for provisional measures requires a showing that the situation is urgent and that the requested measures are necessary to prevent irreparable harm.²⁷ It contends, however, that according to ICSID case law a tribunal can order a measure “only if the harm spared the petitioner exceeds greatly the damage caused to the party affected by it,” and that these measures protect only “imminent harm, not potential or hypothetical harm.”²⁸
23. Eskosol finally argues that, while Italy concedes that an order for security for costs requires the existence of extraordinary circumstances, such circumstances cannot be grounded simply on the basis of a claimant’s lack of funds.²⁹ Eskosol relies on a series of decisions to the effect that: “(1) access to ICISD should not be conditional upon a claimant furnishing security for costs; and (2) a risk of non-payment of costs due to impecuniosity does not of itself satisfy the extraordinarily high burden to order security for costs.”³⁰ It distinguishes the situation in *RSM v. Saint Lucia*, where “[t]he findings of the majority [of the tribunal]

²⁶ Response, ¶¶ 17; *see also id.*, ¶¶ 15-16, citing *RSM v. Saint Lucia* (dissent).

²⁷ Response, ¶ 20.

²⁸ Response, ¶ 21, citing *Burimi S.R.L. and Eagle Games S.H.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, Exhibit CL-088, ¶ 35 (*Burimi v. Albania*).

²⁹ Response, ¶ 32.

³⁰ Response, ¶ 33; *see also id.*, ¶¶ 34-39. Eskosol relies on the following passage from *Burimi v. Albania*: “[e]ven if there were more persuasive evidence than that offered by the Respondent concerning the Claimants’ ability or willingness to pay a possible award of costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed.” (Exhibit CL-088, ¶ 41). Eskosol also relies on *EuroGas Inc. and Belmond Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Decision on the Parties’ Requests for Provisional Measures, June 23, 2017, Exhibit CL-090, ¶¶ 111, 123 (*EuroGas v. Slovak Republic*); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, Exhibit CL-091, ¶ 17 (*Hamester v. Ghana*); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICISD Case No. ARB/09/17, Decision on El Salvador’s Application for Security for Costs, September 20, 2012, Exhibit CL-089, ¶ 45 (*Commerce Group v. El Salvador*); *Libananco v. Turkey*, Exhibit RL-029, ¶¶ 58-59; and *RSM v. Saint Lucia*, Exhibit RL-028, ¶¶ 30-31.

were influenced by an abusive pattern of conduct on the part of the claimant, RSM,” and where RSM had refused twice to make required payments in ICSID proceedings.³¹

b. The granting of security for costs in the instant case

24. Eskosol argues that, even if the Tribunal finds that it has the power to order security for costs, in the instant case “it is neither urgent nor necessary to prevent irreparable harm to Italy’s rights,” and there are no extraordinary circumstances requiring the imposition of this exceptional measure.³²
25. According to Eskosol, the harm caused by the lack of payment of an award is “by its own nature ... highly hypothetical,” as it requires two conditions to be met: the moving party must prevail in the proceedings, and the tribunal must decide to shift costs, which is discretionary under the ICSID framework.³³ By contrast, Eskosol asserts, “the harm caused to a claimant is actual and could well prevent it from having access to justice,” and therefore an order for security for costs can only be granted in “truly exceptional cases.”³⁴
26. Eskosol argues that Italy cannot show in this case that security for costs is necessary to prevent irreparable harm, because it already has obtained the ATE insurance, which makes the risk of non-payment of an award non-existent or extremely limited.³⁵ Eskosol notes that the coverage in the ATE Insurance (€1 million) significantly exceeds the amount of security sought by Italy, while security in the terms sought by Italy (an irrevocable bank guarantee) would increase the financial burden that Eskosol will have to bear to pursue its case.³⁶
27. Moreover, an order for security for costs would be inappropriate in this case because Italy’s application rests on the fact that Eskosol is bankrupt. In Eskosol’s view, its need to resort to third-party funding is the result of the bankruptcy, and the bankruptcy ultimately is the result of Italy’s internationally wrongful actions, which form the basis of its complaints in

³¹ Response, ¶ 39.

³² Response, ¶¶ 19, 32.

³³ Response, ¶¶ 22, 30.

³⁴ Response, ¶¶ 23, 43.

³⁵ Response, ¶¶ 24, 30.

³⁶ Response, ¶¶ 24-25, 30.

these proceedings. As a result, “it would be abhorrent for the Tribunal to permit Italy to benefit from its own misconduct by allowing Italy to impose even further financial burden upon Eskosol through a security for cost order.”³⁷

28. Eskosol further argues that, in the light of the ATE insurance, Italy’s argument that security for costs is needed as a matter of urgency is meritless. It also notes that the question of urgency requires the Tribunal to consider the likelihood of harm if the measure is not issued before the final award, and reiterates that Italy’s application is speculative in that it presumes that it will prevail on the merits and that it will obtain a costs award.³⁸
29. Eskosol also contends that no extraordinary circumstances exist in this case that justify an order for security for costs.³⁹ Eskosol’s bankruptcy of itself does not amount to an extraordinary circumstance that should lead the Tribunal to order security for costs. Moreover, Eskosol has not engaged in any abusive behavior (and Italy does not argue otherwise); rather, “an ATE insurance that protects Italy’s hypothetical interest is in place and Eskosol has timely paid its share of the advance on costs.”⁴⁰
30. Eskosol finally argues that a number of arbitral tribunals have confirmed that the presence of a third-party funder would not amount to an extraordinary circumstance requiring the imposition of security for costs.⁴¹ It notes that Italy has not provided any authority supporting its request that the third party funder provide a binding undertaking to pay any costs ordered against Eskosol, which should be rejected.⁴² In any event, says Eskosol, “while the third party funder has not agreed to be responsible for any eventual cost award directly, it has already taken measures that address this question,” as the ATE insurance

³⁷ Response, ¶ 26. Eskosol relies on the following passage of Dr. Griffith’s opinion in *RSM v. Saint Lucia*, Exhibit RL-028, Assenting Opinion (Griffith), ¶ 2: “That the claimant does not have funds to meet costs orders if unsuccessful is no reason to make orders for security. Commonly, this situation is contended to arise from the matters of complaint, and it would be inconsistent with the BIT entitlements for such financial issues arising from its lacks of funds to derogate from the investor’s treaty entitlements.”

³⁸ Response, ¶ 30, citing *Burumi v. Albania*, Exhibit CL-088, ¶ 36: “[T]he alleged harm is speculative, there is no basis for finding that the matter cannot await the outcome of an award.”

³⁹ Response, ¶ 32.

⁴⁰ Response, ¶ 40, distinguishing this case from the situation in *RSM v. Saint Lucia* (see Exhibit RL-028, ¶¶ 30-31).

⁴¹ Response, ¶ 41, citing *EuroGas v. Slovak Republic*, Exhibit CL-090, ¶ 123; and *Hamester v. Ghana*, Exhibit CL-091, ¶ 14.

⁴² Response, ¶ 45.

has been paid by the third party funder.⁴³ More generally, Eskosol argues that third party financing is in principle no different from any other funding mechanism, and a tribunal should not impose security for costs obligations on a funder unless it equally would have been willing to impose such obligations on a bank providing traditional loan financing to a party.⁴⁴

3. *The Tribunal's analysis*

31. The Tribunal begins by addressing the issue of authority. As a threshold matter, nothing in the Convention or the Rules, addressing an ICSID tribunal's authority to recommend provisional measures, suggests that this authority is limited only to certain types of measures, or alternatively stated, excludes certain types of measures. Requests for measures regarding security for costs are therefore not *ipso facto* beyond the scope of a tribunal's powers.⁴⁵
32. As with any provisional measure request, however, the starting point is identification of the particular "rights" that the applicant claims are appropriate to be preserved. Article 47 confines a tribunal's authority to a situation in which it finds that "the circumstances ... require" a particular measure to be taken "to preserve the respective rights of either party." Before one can examine what is "required" – an inquiry that is commonly understood to involve assessments of necessity, urgency and proportionality – it is important to examine the nature of the "rights," or entitlement, said to be in question.
33. In *RSM v. Saint Lucia*, the "right" sought to be preserved by the applicant was said to be a "right to claim reimbursement of the costs it incurs" in the arbitration, in the event it prevailed on the merits and the tribunal granted a claim for recovery of costs.⁴⁶ This was said to be "qualified as a *procedural* right ... and moreover as a *contingent* right which

⁴³ Response, ¶ 47.

⁴⁴ Response, ¶ 48.

⁴⁵ See *Grynberg v. Grenada*, Exhibit RL-030, ¶ 5.5 ("Neither Article 47, nor Rule 39 specify the type of provisional measure a Tribunal may recommend. This being the case, and subject to one caveat, a measure requiring the lodging of security for costs ... would not, as a matter of jurisdiction, appear to fall outside a tribunal's power. That is, unless such a measure cannot be said to relate to the preservation of the applying party's rights – the preservation of which is the only limiting factor on the nature of a permissible provisional measure.").

⁴⁶ *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 63 (emphasis added); see also *id.*, ¶ 68 (referring to "Respondent's procedural right to claim reimbursement of its expenses," as "directly linked to the relief it requests" as part of its defense) (emphasis added).

only arises if and when the two conditions ... are met.”⁴⁷ To be analytically precise, however, what is really sought in such cases is not preservation of a right to “*claim*” reimbursement, or even to *obtain* a costs award as a consequence of such claim. Neither of these are obstructed in any way by the presence or absence of assets. Rather, what is really sought in these cases is an assurance that this pursuit will be *meaningful*, in the sense that there will be assets available at the end of the case against which to enforce any costs award. At issue is thus not truly a concern about a *procedural* right (to preserve a path to obtain a cost award), but instead an *outcome-related* worry about collection on such an award. This concern about collection is sometimes framed as part of a broader *right to effective relief*, considered to be part of the panoply of rights encompassed by the notion of procedural integrity.⁴⁸

34. Framed as about the *ability to obtain effective relief*, however, there are potential broader consequences to recognizing the existence of such a “right.” The Tribunal accepts that respondent States have genuine concerns about their ability to enforce an eventual costs award against unsuccessful claimants, and some States are starting to raise the possibility of reforms to the ICSID system to protect themselves more systematically.⁴⁹ But at the same time, such States would be unhappy to see a similar argument about a right to effective relief used against them, for example by claimants worried about collection risk associated with any final merits award of compensation. Article 53(1) of the ICSID Convention imposes an obligation on “*each party*” (States and investors alike) to “abide by and comply with the terms of the award,” and Article 54(1) obliges all Contracting States to “enforce the pecuniary obligations imposed by [an] award within its territories as

⁴⁷ *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 64 (emphasis in original).

⁴⁸ See *RSM v. Saint Lucia*, Exhibit RL-028, ¶ 66 (“Costs decisions ... are ... part of the arbitral process the integrity of which deserves protection”) and ¶ 69 (“the integrity of the proceedings ... comprises both substantive and procedural rights, such as, *e.g.*, the preservation of evidence. The right to seek reimbursement of one’s costs in the case of a favorable award likewise constitutes a procedural right in that sense. Hence there has to be an effective mechanism for protecting this right in order to render it meaningful.”) (emphasis added); see also *id.*, ¶ 67 (referencing the *Plama* tribunal’s observation that provisional measures “must relate to the requesting party’s ability to have its claims considered and decided by the Arbitral Tribunal and for any arbitral decision ... to be effective and able to be carried out”) (emphasis added).

⁴⁹ See T. Jones, “ICSID to explore protections against ‘judgment-proof claimants’,” *Global Arbitration Review*, October 21, 2016, available at <http://globalarbitrationreview.com/article/1069674/icsid-to-explore-protections-against-“judgment-proof-claimants”> (reporting ICSID press release promising, following a request from the Government of Panama, to “seek the input of member states and report on the issue” as part of its forthcoming rules amendment process).

if it were a final judgment of a court in that State.” But the Convention generally does not concern itself with *collection risk*, and indeed, Article 54(3) makes explicit that “[e]xecution of the award” is to be governed by national law, including (as confirmed in Article 55) national law related to the immunity of State assets.

35. Against this backdrop, therefore, there is something analytically curious about the notion that an ICSID tribunal, while not empowered to protect a claimant’s ability to collect on a possible merits award, nonetheless should intervene to protect a State’s asserted “right” to collect on a possible costs award.⁵⁰ For this reason, some tribunals have expressed doubt about whether there really is a “right” in play for security-for-costs that is entitled to protection under Article 47 and Rule 39(1).⁵¹ Others have found that there is such a protectable right, even if the standard for obtaining provisional measures to protect that right is an exacting one, requiring a demonstration of exceptional circumstances.⁵²
36. In this case, the Tribunal need not resolve this interesting question now, because even if in principle the “right” Italy asserts is one that would be deserving of protection in exceptional circumstances, Italy has not demonstrated that such circumstances exist. A

⁵⁰ See generally *Burimi v. Albania*, Exhibit CL-088, ¶ 49 (noting that the issue of non-payment is of concern both to respondents and claimants, since it occurs both with respect to damages awards against States and costs awards in their favor; the *Burimi* tribunal suggested that in this broader sense, non-payment “poses a systemic risk to the arbitration of international investment disputes”).

⁵¹ See *Maffezini v. Spain*, Exhibit RL-032, ¶ 15 (“we are unable to see what present rights are intended to be preserved”); *RSM v. Saint Lucia*, Exhibit RL-028 (dissenting opinion), ¶ 1 (disagreeing with the majority that a security for costs order “is encompassed within the class of ‘provisional measures’ which may ‘be taken to preserve the rights’ of Respondent”); *Grynberg v. Grenada*, Exhibit RL-030, note 9 (dissenting opinion) (“the use of the words ‘preserve’ and ‘preserved’ in Article 47 and Rule 39 presupposes that the right to be preserved exists. Because Respondent has no existing right to an ultimate award of costs, the Tribunal is thus without jurisdiction”); see also L.E. Peterson, “In New Ruling, BIT Tribunal Holds That Alleged Right to Future Costs-Recovery is Not a Right Capable of Grounding an Interim ‘Security for Costs’ Request,” *Investment Arbitration Reporter*, September 26, 2016, available at <https://www.iareporter.com/articles/in-new-ruling-bit-tribunal-holds-that-alleged-right-to-future-costs-recovery-is-not-a-right-capable-of-grounding-an-interim-security-for-costs-request/> (reporting on unpublished decision in *Valla Verde Sociedad Financieras S.L. v. Venezuela*, ICSID Case No. ARB/12/18, Procedural Order No. 4 (September 21, 2016), reportedly disavowing the tribunal’s power to order provisional measures “to protect a right that as of yet does not exist”).

⁵² See *EuroGas v. Slovak Republic*, Exhibit CL-090, ¶¶ 121, 123 (“security for costs may only be granted in exceptional circumstances, “for example, where abuse or serious misconduct has been evidenced”; “financial difficulties and third-party funding ... do not necessarily constitute *per se* exceptional circumstances justifying ... an order of security for costs”); *Libananco v. Turkey*, Exhibit RL-029, ¶ 57 (concluding that “it would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all”); *RSM v. Saint Lucia*, Exhibit RL-028, ¶¶ 52, 54, 57; *Grynberg v. Grenada*, Exhibit RL-030, ¶¶ 5.9-5.16, 5.18 (majority decision); see also *Commerce Group v. El Salvador*, Exhibit CL-089, ¶¶ 42, 45 (finding similar authority, in the annulment context, from a Committee’s “inherent power” “[a]s the guardian of the integrity of the proceeding”).

recommendation of provisional measures should be issued only where doing so is *necessary* to preserve identified rights and *urgently* required for that purpose, in the sense that the requested measure is needed prior to issuance of an award. Tribunals also should ensure that the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them.⁵³

37. Here, Italy has not demonstrated that it is either necessary or urgent that Eskosol post security of \$250,000 for a potential costs award in Italy’s favor. The Tribunal accepts that Eskosol’s bankruptcy makes it unlikely that it could pay an eventual costs award directly from its own funds. The Tribunal is also not aware (at least as of now) of any terms in Eskosol’s third-party funding agreement that would require the funder to meet an eventual costs award rendered against Eskosol. However, the funder apparently has assisted Eskosol in obtaining the ATE Insurance policy,⁵⁴ with a commencement date of October 8, 2015, for the specific purpose of “protecting [Eskosol] from the risk of a potential adverse costs order or order for security for costs.”⁵⁵ The policy covers up to “1,000,000 Euro in the aggregate for Opponent’s Costs,” with “Opponent” identified as “Republic of Italy.”⁵⁶ In these circumstances, the amount presently sought by Italy as security is well below the threshold of Italy’s costs already addressed by the policy. Italy has not sought leave to comment on the mechanics or sufficiency of the ATE Insurance policy. There has been no showing of any imminent need for a different mechanism or to secure amounts beyond the levels of the ATE policy.

38. Moreover, even if later in these proceedings Italy could demonstrate that its potentially recoverable legal costs surpassed the €1 million threshold of the ATE policy, it still would have to demonstrate that protecting its potential ability to recover such additional costs would be proportionate, given the potential burden on Eskosol of arranging security of additional amounts. As noted above, proportionality is a critical part of any provisional

⁵³ See, e.g., *Burimi v. Albania*, Exhibit CL-088, ¶¶ 34-36 (citing prior cases).

⁵⁴ ATE Insurance, Exhibit C-008 (stating on its front cover that the policy was arranged by The Judge Limited, with QBE Insurance (Europe) Limited as the subscribing insurer).

⁵⁵ ATE Insurance, Exhibit C-008, Recital C.

⁵⁶ ATE Insurance, Exhibit C-008, Schedule.

measures analysis, and a party seeking provisional measures must demonstrate that its need for the measures are not outweighed by the hardships to which the other party would be subjected if the measures are granted. This type of proportionality analysis would be particularly critical where the burden of a potential measure is one that is said to impinge, at least potentially, on a party's ability to pursue its claims or defenses at ICSID.⁵⁷ A tribunal should not lightly recommend a provisional measure that could impede access to justice.

39. For these reasons, Italy's request that the Tribunal "[d]irect Eskosol to post an irrevocable bank guarantee or analogous security in the amount of \$250,000" is hereby denied.⁵⁸ Italy's alternative request, that the Tribunal "direct Eskosol to procure from such third party – proved to have demonstrably adequate assets – a legally binding undertaking to pay any costs order entered against Eskosol,"⁵⁹ is also denied.

B. Disclosure Application

1. Italy's position

40. With its Security Application, Italy submitted also a Disclosure Application, alleging that "in order to protect its rights Italy needs to know whether the Claimant is funded by a third party and whether such third party would be financially sound as well as committed to execute a cost award adopted by the Tribunal against Eskosol."⁶⁰
41. In making the Disclosure Application, Italy relies on the decision adopted in *Muhammet Çap v. Turkmenistan*, where the tribunal granted the requested order for disclosure on the

⁵⁷ See *Hamester v. Ghana*, Exhibit CL-091, ¶ 17 (noting the tribunal's prior ruling that "there was a serious risk that an order for security for costs would stifle the Claimant's claims and that, in any event, it had not been shown that the measures requested were necessary and urgent"); *Grynberg v. Grenada*, Exhibit RL-030, ¶ 5.19 ("it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award"); *Burimi v. Albania*, Exhibit CL-088, ¶ 41 ("Even if there were more persuasive evidence ... concerning the Claimants' ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed."); *Commerce Group v. El Salvador*, Exhibit CL-089, ¶ 52 (expressing concern that a grant of security "might seriously affect the Applicant's right to seek annulment of the award").

⁵⁸ Request, Section V.

⁵⁹ Request, Section V.

⁶⁰ Request, ¶ 37.

basis, *inter alia*, that this information was needed by the respondent to file its request for security for costs.⁶¹

2. *Eskosol's position*

42. Eskosol contends that Italy's document production request is now moot "in the light of Eskosol's confirmation that it requires external funding to have access to justice here."⁶² It also notes that, "given the existence of the ATE insurance, the commercial soundness of the funder is immaterial to Italy's position."

43. Regarding the funder's commitment to execute a cost award, Eskosol's position is as summarized in Section II.A.2.b above.

3. *The Tribunal's analysis*

44. The Tribunal agrees with Eskosol that the issues raised by the Disclosure Application are largely moot, in that Eskosol has now answered Italy's initial question, namely "whether the Claimant is funded by a third party," as well as at least part of the second question, "whether such third party would be financially sound as well as committed to execute a cost award adopted by the Tribunal against Eskosol."⁶³ It is now clear that the funder has made arrangements to support any cost award against Eskosol up to the amount of €1 million. It is neither necessary nor urgent at this point to investigate whether the funder would be in a position to arrange (or willing to arrange) insurance coverage or other security for a potentially higher amount of costs. Such an investigation would be highly premature.

45. For these reasons, Italy's request for a provisional measure directing Eskosol to submit Exhibits C-005 and C-006 without redactions, "to permit ... confirmation whether a funding third party did commit itself to cover Eskosol[']s costs of these proceedings," is hereby denied.⁶⁴

⁶¹ Response, ¶ 40, citing *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, June 12, 2015, Exhibit RL-033, ¶¶ 8, 10, 12-13 (*Muhammet Çap v. Turkmenistan*).

⁶² Response, ¶ 50.

⁶³ Request, ¶ 37.

⁶⁴ Request, Section V.

III. ORDER

46. For the reasons set out above, the Tribunal:

- (1) Denies Italy's Request for Provisional Measures Under Rule 39(1), filed on January 18, 2017; and
- (2) Defers for a later stage of this case all requests for costs in connection with this application.

On behalf of the Tribunal

[Signed]

Jean Kalicki
President of the Tribunal
Date: 12 April 2017