# CIArb's Young Members Group Writing Competition 2021

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# Case Material and Rules

## Case Material

You are the President of an Arbitral Tribunal ruling under the 1976 UNCITRAL Rules in an investor-State arbitration seated in London, England. The Claimants in the arbitration are Slovenia Coal Company ("SCC") and SCC Holding ("SCCH"). The Respondent, the Republic of Slovenia ("Slovenia"), has submitted a request for security for costs and you must prepare a draft order for discussion with your co-arbitrators.

Below you will find the summary of relevant information prepared by your tribunal secretary (I) along with a brief rundown of the next steps (II).

### I. Summary of Relevant Information

For your ease of review, please find a brief summary of the case background (A) and the Parties' submissions on the security for costs application (B).

### A. Case Background

Charbon de France ("CDF") is a French company, majority owned by the French State, that owns and operates coal power plants directly and through its subsidiaries. In 1994, CDF acquired SCC, the second Claimant, a Slovene company that owned and operated a coal power plant in Slovenia. According to the Claimants, this acquisition was considered crucial to Slovenia's energy needs (after the break-up of Yugoslavia). As a result, the Claimants argue, the Slovene Government granted an important tax rebate to SCC to attract foreign investment. In 2003, CDF restructured its holding through a Dutch special purposes vehicle called SCCH, the first Claimant (CDF is not a party to the arbitration).

In 2019, however, the Slovene parliament approved new legislation regulating the renewable energy sector (the "Renewables Law"). One of the objectives of the Renewables Law was to encourage investment in the renewable energy sector. The Law did so by granting a tax rebate to renewable projects. At the same time, the Renewables Law repealed all tax and other incentives given to "dirty energy" projects, including SCC's tax rebate. While the Renewables Law did not cause SCC to shut down immediately, it cut deeply into its profit margin and jeopardized its future.

In January 2020, the Claimants submitted a Request for Arbitration under the Netherlands-Slovenia Republic BIT as well as the Energy Charter Treaty ("ECT"), alleging inter alia breach of those agreements' fair and equitable treatment standard. In the following months, the Tribunal was constituted pursuant to the 1976 UNCITRAL Rules. The Tribunal chose London, England as the seat of arbitration.

The Claimants submitted their Memorial on the Merits in December 2020, followed by Slovenia's Counter-Memorial on the Merits and Objections to Jurisdiction in May 2021. In the latter submission, Slovenia raised two objections to jurisdiction:

- It argued that the Tribunal lacked jurisdiction ratione voluntatis because

  > the Netherlands-Slovenia Republic BIT had been terminated by the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union and

  > in any event, the dispute resolution provisions of both the Netherlands-Slovenia BIT and the ECT became inapplicable after both Contracting States' accession to the EU in 2004.

- It also argued that SCCH's acquisition of SCC had been procured by corruption, as, it alleged, bribes were paid to Slovene Government officials at the time.

In May 2021, Slovene criminal courts ordered the seizure of SCC's assets and bank accounts held in Slovenia. This was the product of a criminal investigation that had begun apparently just two months earlier. In a letter to the Tribunal, the Claimants noted that they planned to update their case to include these actions as an independent breach.

**B. The Security for Costs Application**

On 28 June 2021, Slovenia submitted a request for security for costs against both Claimants in the amount of EUR 15 million. It advanced the following arguments:

- The Claimants' claims are frivolous and will fail. The Claimants could not have had a legitimate expectation that the tax rebate would remain in effect indefinitely (particularly, as SCCH acquired its holding after the rebate came into effect). Moreover, Slovenia was exercising its legitimate right

to use its tax powers in its national interest (here, to promote Slovenia's energy autonomy and to fight climate change). Similarly, its criminal court measures are entirely legitimate and cannot be called into question.

- There is a likelihood that Slovenia's costs in this arbitration will not be met:

  > SCCH is a shell holding company with no assets other than its shareholding in SCC.

  > SCC no longer has any assets after the criminal seizure.

  > The risk that a costs award will go unmet is compounded by the fact that both companies are not based at the seat of arbitration (London, England).

- In the circumstances of this case, a security for costs order is fair given that:

  > Slovenia never actually consented to arbitrate with the Claimants (as per its objections to jurisdiction),

  > the Claimants concede that the arbitration is being funded by a third party, their parent company CDF (although it is unclear whether any funding arrangement obliges CDF to pay for costs) and

  > CDF is the "real plaintiff" in this arbitration and, under English civil procedure rules, security for costs should be ordered where the named plaintiffs are not the true party with interests in the dispute.

The Claimants response submitted two weeks later raises the following counter-points:

- The likelihood of success should be irrelevant to any security for costs application. In any event, the Claimants have made out a prima facie case of breach of the treaties. They also explain that the actions of Slovene criminal courts are a further breach of its treaty obligations.

- While they acknowledge that neither of the Claimants has sufficient assets to meet the security requested by Slovenia, the Claimants note that

  > Slovenia assumed the risk of arbitrating with SCCH as it has always been a holding company for SCC (including when Slovenia consented to arbitration with SCC;

  > the change in circumstances with respect to SCC is due to Slovenia alone because the criminal seizure order is a sham as it relies on nothing more than the evidence of two witnesses, low-level Government officials at the time; and

> in international arbitration, the place of incorporation of the party against whom security is ordered is irrelevant.

- A security for costs order would be unfair because it would stifle the Claimants' claims as they do not have the capacity to provide such a security (although they do not mention whether CDF could meet such an order). They argue that the fact that they are being funded by a third party is irrelevant for security for costs purpose.

- In any event:

> Slovenia's application is untimely (as the arbitration is now at an advanced phase);

> Slovenia cannot use its objections to jurisdiction (which they claim are frivolous) to force through a security for costs order;

> the rules of English civil procedure are irrelevant in international arbitration; and

> Slovenia has failed to justify the EUR 15 million requested security amount, which is exorbitant.

Both parties have relied on the Chartered Institute of Arbitrators' Guideline for Applications for Security for Costs, although Slovenia argues that there should be a presumption in favour of security for costs in investor-State arbitration where there is a risk that a party will not comply with an adverse costs decision.

**II. Next Steps**

The Tribunal has closed submissions on the security for costs application and you must now proceed to render a decision with your co-arbitrators. Your administrative secretary has agreed to prepare sections of the procedural order that touch upon procedural history and the Parties' arguments. You have agreed to provide your co-arbitrators with a first draft of the Tribunal's reasoning section of the procedural order. You agree with your arbitrators that this part of the order should not exceed five pages.

## Rules

The 2021 Writing Competition of the Chartered Institute of Arbitrators (CIArb") Young Members Group ("YMG") seeks to allow young practitioners to engage with substantive issues in international arbitration in a practical, real-life scenario.

## 1. Instructions

a. You are the Chair of a Tribunal. Following a pre-hearing conference call, your Tribunal Secretary has sent you the foregoing document (the "Case Material").

b. On the basis of the Case Material, please draft a procedural order addressing the issues in dispute between the parties in relation to the upcoming hearing ("Procedural Order") as well as an explanatory note to your co-arbitrators explaining your Procedural Order ("Explanatory Note") (together, a "Submission").

## 2. Participants

a. All participants must be under the age of 40 years old as of 15 October 2021.

b. All Submissions must be the original work of their authors.

c. Only one Submission may be made by competitor.

d. No submissions may be co-authored.

## 3. Editorial Guidelines

a. Submissions must be in the English language and use British English spelling.

b. Submissions must use Arial font size 12 for the text and Arial font size 10 for footnotes and be double-spaced with a one inch margin on all sides.

c. The reasoning section of the Procedural Order must not exceed five pages.

## 4. Deadline

a. All Submissions must be sent in word format to essay@ciarb.org before 11:00 PM London time on 15 October 2021.

b. Each participant should include his or her name, affiliation, location, and title on a separate cover page. The Submission itself should begin on the next page without the participant's name, affiliation or any other identifying details.

## 5. Selection of the Winner

a. Submissions will be judged inter alia on their ability to spot and resolve relevant issues, their succinctness, and their reasoning.

b. An Editorial Jury composed of Alexander G. Leventhal, Ana Gerdau de Borja, Noreen Kidunduhu, Kabir Dugal, Dharam Jumani, Trisha Mitra, and Amanda Lee will select five finalists.

c. An Honorary Jury composed of Nayla Comair-Obeid, Tafadzwa Pasipandoya, Maria-Irene Peruccio, Nikos Lavranos, and Jaroslav Kudrna will choose the winning submission from among the five finalists selected by the Editorial Jury.

**6. Prize**

a. The winner will be invited to speak at a CIArb YMG conference to be scheduled for a later date.

b. The winner will also be profiled in the CIArb YMG newsletter.

c. The five finalist Submissions shall be published on the CIArb YMG website.

**7. CIArb YMG Policy**

a. The CIArb YMG Steering Committee reserves the right to amend, modify, supplement, or interpret these rules at its sole discretion.

b. The Case Material, including all people, States, companies, locations and events, is fictional. Any resemblance to actual persons, places or events is unintended and coincidental.

c. The Case Material may not be reproduced without the prior written consent of the CIArb YMG Steering Committee.

d. Any questions or queries may be directed to essay@ciarb.org.