IN THE MATTER OF AN ARBITRATION UNDER

THE AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF SLOVENIA AND THE KINGDOM OF THE NETHERLANDS, 1996;
THE ENERGY CHARTER TREATY, 1994; and
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976

- between -

1. SLOVENIA COAL COMPANY HOLDING;
2. SLOVENIA COAL COMPANY
("CLAIMANTS")

- and -

THE REPUBLIC OF SLOVENIA
("RESPONDENT")

PROCEDURAL ORDER NO. ___ (*draft*)

DECISION ON THE RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

Tribunal

XXXXX (Presiding Arbitrator)
XXXXX
XXXXX

15 October 2021

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2.	*Manuel García Armas et. al. v. Venezuela* (PCA Case No. 2016-08), Decision on Respondent's Request for Provisional Measures (20 June 2018)	*Manuel García Armas v. Venezuela*
3.	*South American Silver Limited (Bermuda) v. Bolivia* (PCA Case No. 2013-15), Procedural Order No. 10 (11 January 2016)	*South American Silver v. Bolivia*
4.	*RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs (13 August 2014)	*RSM Production v. Saint Lucia*
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II. BRIEF FACTUAL BACKGROUND:

1. Slovenia Coal Company Holding ("Claimant no. 1") and Slovenia Coal Company ("Claimant no. 2") [collectively –"Claimants"], are subsidiaries of Charbon de France ("CDF"), which is a French company majority owned by the French State that owns and operates coal power plants directly and through its subsidiaries.
2. In 1994, CDF acquired Claimant no. 2., a company incorporated in Slovenia that owned and operated a coal power plant in Slovenia ("Respondent"). According to the Claimants, this acquisition was considered crucial to Respondent's energy needs (after the break-up of Yugoslavia). As a result, the Claimants argue, the Respondent Government granted an important tax rebate to Claimant no. 2 to attract foreign investment. In 2003, CDF restructured its holding in Claimant no. 2, through a Dutch special purpose vehicle – Slovenia Coal Company Holding (Claimant no. 1).
3. In 2019, Respondent 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 At the same time, the Renewables Law repealed all tax and other incentives given to "dirty energy" projects, including Claimant no. 2's tax rebate. While the Renewables Law did not cause Claimant no. 2 to shut down immediately, it cut deeply into its profit margin and jeopardized its future.

III. PROCEDURAL HISTORY:

4. In January 2020, Claimants submitted their Request for Arbitration under the Netherlands – Slovenia Republic Bilateral Investment Treaty ("BIT") as well as the Energy Charter Treaty ("ECT").

5. In December 2020, Claimants submitted their Memorial on the Merits and in May 2021, Respondent submitted their Counter-Memorial on the Merits and Objections to Jurisdiction.
6. On 28 June 2021, Respondent submitted its request for security for costs against both Claimants in the amount of EUR 15 million. Two weeks later, Claimants submitted their response to Respondent's security for costs application.

IV. PARTIES' SUBMISSIONS:

1. RESPONDENT'S POSITION:

7. Respondent at the outset, submits that this tribunal lacks jurisdiction *ratione voluntatis* because:
   (a) 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;
   (b) 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.
   (c) At no point, Respondent provided its consent for the present arbitration for the claims alleged by Claimants.
8. Regarding the nature of claims, Respondent terms them as "frivolous" since Claimants could not have had a legitimate expectation that the tax rebate would remain in effect indefinitely. Without prejudice, Respondent submits that, it exercised its legitimate right to use its tax powers in its national interest (i.e., to promote Respondent's energy autonomy and to fight climate change).
9. Furthermore, Respondent submits that its criminal court measures are entirely legitimate and cannot be called into question since Claimant no. 1's acquisition of Claimant no. 2 had been procured by paying bribes to Respondent's Government officials at the time.
10. Respondent demonstrates that there is a likelihood that its costs in this arbitration will not be met for the following reasons:
    (i) Claimant no. 1 is a shell holding company with no assets other than its shareholding in Claimant no. 2.

(ii) Claimant no. 2 no longer has any assets after the criminal seizure. Moreover, Claimants acknowledge that neither of the Claimants has sufficient assets to meet the security requested by Respondent.

(iii) As conceded by Claimants themselves, the present arbitration is being funded by a third party - CDF (Claimant's parent company). However, it is unclear whether any funding arrangement obliges CDF to pay for costs.

(iv) CDF being 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.

(v) 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).

Therefore, Respondent requests this tribunal to order a security for costs against both Claimants in the amount of EUR 15 million.

2. CLAIMANTS' POSITION:

11. At the outset, Claimants assert that Respondent assumed the risk of arbitrating with Claimant no. 1 as it has always been a holding company for Claimant no. 2 (including when Respondent consented to arbitration with Claimant no. 2). Without prejudice, Claimant submits that Respondent's application for security for costs is untimely (as the arbitration is now at an advanced phase). Respondent at this stage, cannot use its objections to jurisdiction (which they claim are frivolous) to force through a security for costs order.

12. Claimants note that a likelihood of its success in merits phase of the hearing, should be irrelevant to any security for costs application. However, it substantiates that the Renewables Law', as approved by Respondent's Parliament violated *interalia* Fair & Equitable Treatment' standard and consequently breached both the Netherlands-Slovenia BIT and ECT.

13. The change in circumstances with respect to Claimant no. 2 is due to Respondent 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. Claimants elaborate that the actions of Respondent's criminal courts are a further breach of its treaty obligations.

14. Claimants admit that they are being funded by a third-party –CDF, and also acknowledge that Claimants do not have the capacity to provide such a security (although they do not mention whether CDF could meet such an order). However, they submit that merely because its claims are being funded by a third party is irrelevant for security for costs purpose.

15. Claimants submit that in international arbitrations, neither the place of incorporation of the party against whom security is ordered nor any National Rules of Civil Procedure such as English Rules of Civil Procedure in the present case are relevant. Claimants conclude by requesting the tribunal to dismiss Respondent's application of security for costs whose sum has not been justified.

V. TRIBUNAL'S ANALYSIS:

16. At the outset, the Tribunal emphasizes that this decision is made on the basis of the Tribunal's understanding of the record as it presently stands. Nothing contained herein shall pre-empt any later finding of fact or conclusion of law. Further, the Tribunal's decision could be revisited if relevant circumstances were to change or new evidence is led by either of the parties.

1. POWER TO ORDER SECURITY FOR COSTS:

17. The Tribunal first confirms its existing authority to order security for costs. This authority rests on Article 26 of the UNCITRAL Arbitration Rules, which authorizes a tribunal to grant a precautionary measure as it deems "necessary" to grant it. As evidenced by many tribunals adjudicating investment disputes under the UNCITRAL Rules, this discretionary power has been considered in an application for security for costs as a precautionary measure.[1]

[1] *Tennant Energy v. Canada,* para.171; *Manuel García Armas v. Venezuela*, para. 186; *South American Silver v. Bolivia*, para. 52.

2. APPLICABLE LEGAL STANDARD:

18. The Tribunal considers that the applicable test for evaluating an application of security for costs under Article 26 of the UNCITRAL Rules, has been set out in the case of *Manuel García Armas v. Venezuela*,[2] as four limbs:

(i) Whether there is, prima facie, a reasonable prospect that the tribunal will issue an award in favour of the Respondent including its costs of legal representation (fumus boni iuris);
(ii) Whether harm not adequately reparable by an award of damages may be caused if the measure is not ordered;
(iii) Whether such harm would substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(iv) Whether the measure requested is of such urgency that it cannot be postponed until the issuance of the award.

19. Both the parties to the present proceedings have relied on the Chartered Institute of Arbitrators' Guideline for Applications for Security for Costs (CIArb Guidelines), which provides that a tribunal should consider the following matters in adjudicating whether to make an order for security for costs:[3]

(i) Prospects of success of the claim(s) and defence(s) *(Article 2)*;
(ii) Claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award *(Article 3)*; and
(iii) Whether it is fair in all of the circumstances to require one party to provide security for the other party's costs *(Article 4)*.

20. The above-mentioned CIArb Guidelines also note that the above-mentioned list is not exhaustive and arbitrators should also take into account any other additional considerations they may consider relevant to the particular situation of the parties and the circumstances of the arbitration.[4] The Tribunal notes that three pointers of the CIArb Guidelines overlaps with the first three limbs of *Manuel García Armas v.*

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[2] *Manuel García Armas v. Venezuela,* para. 191; *Tennant Energy v. Canada,* para.172.
[3] Chartered Institute of Arbitrators'Guideline for Applications for Security for Costs'2015 [CIArb Guidelines], as revised on 29 November 2016, Article 1, para. 2, available at: https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015securityforcosts.pdf?sfvrsn=16.
[4] *Supra,* Article 1, paragraph 3.

Venezuela test. However, the Tribunal also considers the fourth limb – 'urgency' in the 'fairness' test of CIArb Guidelines.

3. BURDEN OF PROOF:

21. As mentioned above, the Tribunal notes that applications for Security for Costs are predominantly a fact-specific enquiry with unique circumstances of each case assessed on a high standard of "exceptional circumstances" discharged with appropriate burden of proof. This is reason why out of nearly 70 known applications filed since December 1984, only four requests for security for costs have been granted (till date based on publicly available case record) in investment arbitrations brought under the ICSID, ICSID Additional Facility and UNCITRAL Arbitration Rules.[5]

22. It is generally the norm that the party requesting for provisional measures such as security for costs, should bear the burden of proving the same.[6] However, in cases where the claimant-investor if being funded by a third-party funder, the burden and onus of proof shifts between the parties based on unique circumstances as decided by various tribunals in the past.[7]

4. FACTUAL ANALYSIS:

23. At the outset, the Tribunal cannot agree with the Claimants on its argument that Respondent's application for security for costs is untimely or delayed, since there is neither a significant departure from the adopted CIArb Guidelines forthcoming from the available case materials, nor an unjustified delay.[8] The Tribunal also cannot agree with the Claimants that, Respondent is estopped from using its jurisdictional objections to force through a security for costs order at this stage, because there is no academic scholarship/literature or established

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[5] *RSM Production v. Saint Lucia*; *Manuel Garcia Armas v. Venezuela*; *Dirk Herzig (Unionmatex) v. Turkmenistan*; *Eugene Kazmin v. Latvia*.

[6] *Manuel Garcia Armas v. Venezuela*, para. 242.

[7] *RSM Production v. Saint Lucia*, Assenting Opinion of Gavan Griffith QC, paras. 8 and 18; *South American Silver v. Bolivia*, para. 74; *Manuel Garcia Armas v. Venezuela*, paras. 246 and 248; *Tennant Energy v. Canada,* para. 178; *Eugene Kazmin v. Latvia*, para. 48.

[8] CIArb Guidelines, Commentary to Article 4, para 1(c); Bay View and Spalena v. Rwanda, para. 63.

jurisprudence by investment arbitral tribunals under the UNCITRAL Rules to that effect.

24. The Tribunal considers the test laid down in *Manuel García Armas v. Venezuela* (with the language used in the ClArb Guidelines) for the factual analysis below:

(A) WHAT ARE THE PROSPECTS OF SUCCESS OF THE CLAIM(S) AND DEFENCE(S):

25. Claimants argue that the Renewables Law, as approved by Respondent's Parliament violated *interalia* Fair & Equitable Treatment' standard and consequently breached both the Netherlands-Slovenia BIT and the ECT. Respondent has sought *interalia* to use its objections of *ratione voluntatis* of Intra-EU BIT termination and corruption allegations in the investment to demonstrate that this tribunal lacks jurisdiction to adjudicate this dispute. The Tribunal notes that at this stage, a determination on Respondent's jurisdictional objections is not yet made.

26. The Tribunal shares the observations expressed in *EuroGas v. Slovakia* and *Millicom v. Senegal* that, at this stage only a prima facie review is envisaged while adjudicating a Provisional Measures application.[9] The Tribunal is also aware of its duty not to pre-judge the merits of the dispute in depth.[10]

27. Respondent's argument on corruption allegations in the investment does requires an in-depth analysis with evidence, which cannot be adjudicated at this stage. However, the issue of Intra-EU BIT termination on a prima facie level demonstrates that Respondent does have a prospect in challenging the jurisdiction of this Tribunal. Claimant's claim of breach of FET standard of treatment and its allegation of criminal proceedings as a breach of other treaty protections requires an in-depth analysis and cannot be done prima facie with the limited evidence on record.

28. Therefore, the Tribunal considers that prima facie, there is a reasonable possibility that at least some of Respondent's jurisdictional objections will succeed. However, this does not imply that the Tribunal has expressed its opinion on either of the following: (i) Bifurcation of the

[9] *EuroGas v. Slovakia*, paras. 69 and 71; *Millicom v. Senegal*, para. 42.
[10] *Manuel Garcia Armas v. Venezuela*, para.200; ClArb Guidelines, Article 2.

hearings (should it be requested by Respondent at a later phase); or (ii) Pending hearing on jurisdictional objections (which requires an in-depth analysis); or (iii) Respondent's prospects of recovering its costs of arbitration including representation costs [dependant on analysis of headings **(B)** and **(C)** below].

(B) WHETHER AN ADVERSE COSTS AWARD COULD BE SATISFIED BY THE CLAIMANT AND WHETHER CLAIMANTS' ASSETS ARE AVAILABLE FOR ENFORCEMENT OF AN ADVERSE COSTS AWARD:

29. Respondent demonstrates that there is a likelihood that its costs in this arbitration will not be met since Claimant no. 1 is a shell holding company with no assets other than its shareholding in Claimant no. 2 and the latter no longer has any assets after the criminal seizure.

30. As conceded by Claimants themselves, the present arbitration is being funded by a third party - CDF (Claimant's parent company). At this stage, the Tribunal notes that mere existence of a third-party funding arrangement and financial difficulties neither implies Claimant's inability to satisfy an adverse costs decision, nor constitute per se exceptional circumstances justifying reasons for grant of Security for Costs.[11]

31. However, Claimants' acknowledgement that it does not have sufficient assets to meet the security requested by Respondent, is not an established proof that a costs award could not be satisfied by any other means. On comparison, neither have the Claimants shown positively on whether any funding arrangement obliges CDF (its parent company) to pay for a costs award, nor Respondent has demonstrated Claimant's track record of non-payment of cost awards in prior proceedings, or moving/hiding assets to avoid any potential exposure to a cost award, or any other bad faith conduct.

32. In a similar situation of no express agreement by a third party-funder to cover costs of arbitration, the tribunal in *RSM Production v. Saint Lucia*,[12] had noted that:

[11] *EuroGas v. Slovakia*, para. 121; *Dirk Herzig (Unionmatex) v. Turkmenistan*, paras. 54 and 55.
[12] *RSM Production v. Saint Lucia*, para. 83.

"…. it as unjustified to burden Respondent 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"

33. However, the facts of the present case are distinguishable from that of *RSM Production Corporation v. Saint Lucia* where in the latter, the Claimant had a consistent procedural history of non-compliance (among many others) in other ICSID and non-ICSID cases proceedings which provided compelling grounds of "exceptional circumstances" for granting a security for costs decision.[13] Following the above dictum of *RSM Production Corporation v. Saint Lucia* to the present facts and circumstances does not arise since such "exceptional circumstances" has not been demonstrated by the Respondent.

34. The two other cases in which security for costs was granted - *Manuel Garcia Armas v. Venezuela*[14] and *Dirk Herzig (Unionmatex) v. Turkmenistan,*[15] had a different factual scenario of the respective Claimants being funded by its third-part funders but had an explicit limitation on such funding for security for costs in its respective agreements. This is not similar to the facts and circumstances of the present case to draw a parallel reasoning since CDF (Parent company of Claimants) has neither agreed nor denied its liability for costs award.

35. Therefore, based on the available evidence at this stage and drawing an adverse inference from the Claimant's inability to demonstrate its funding arrangement for arbitration costs with its funder,[16] the Tribunal finds that Claimants do not possess assets (atleast in the Respondent country) for satisfaction and enforcement of an adverse costs decision (if awarded). However, this alone does not necessitate an order of Security for Costs in the present facts and circumstances since the 'proportionality' and 'fairness' may outweigh the financial inability as explained below.

(C) WHETHER IT IS FAIR IN ALL OF THE CIRCUMSTANCES TO REQUIRE CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S COSTS:

[13] *Supra*, para. 82.
[14] *Manuel Garcia Armas v. Venezuela*, paras. 194 and 198.
[15] *Dirk Herzig (Unionmatex) v. Turkmenistan*, paras. 57 and 62.
[16] ClArb Guidelines, Commentary to Article 3, para d.

36. In Tribunal's opinion, the present Security for Costs application needs to be adjudicated by balancing conflicting interests of both the parties.[17] The Tribunal is also conscious that granting a Security for Costs Order may stifle the merits of Claimant's case, which is yet to be adjudicated.[18] Therefore, while assessing 'proportionality' and 'fairness' of a security for costs application, this Tribunal quizzes the existence of "exceptional circumstances" from the available evidence on record.[19]

37. Considering that a hearing on jurisdictional objections and merits of the dispute in pending, the Tribunal notes an allegation of the Claimant (though not proved in detail) that the actions of Respondent state's criminal courts are a further breach of its treaty obligations, which has ultimately led to the present detrimental financial situation of Claimant. The Tribunal finds that this is a potential circumstance in weighing against 'fairness' and 'proportionality' of the measure sought by the Respondent.[20]

38. In *Tennant Energy v. Canada*,[21] the following inclusive list of "exceptional circumstances" (as laid down in *Orlandini v. Bolivia*[22]) were reiterated while considering a Security for Costs application: (i) Claimant's track record of non-payment of cost awards in prior proceedings; (ii) Claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) Evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or (iv) Other evidence of a claimant's bad faith or improper behaviour.[23]

39. The Tribunal notes that except for the criminal seizure of Claimants' assets, Respondent has neither demonstrated the urgency of the security for costs measure (absent such "exceptional circumstance") nor

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[17] ClArb Guidelines, Commentary to Article 1, para b; *Eugene Kazmin v. Latvia*, para. 61;
[18] ClArb Guidelines, Article 4(2) and Commentary to Article 4, para 2(a); *Orlandini v. Bolivia,* para. 145.
[19] ClArb Guidelines, Commentary to Article 4, para 1(a).
[20] ClArb Guidelines, Commentary to Article 4, para 1(b); *Orlandini v. Bolivia,* para. 145; *Dirk Herzig (Unionmatex) v. Turkmenistan*, para. 55.
[21] *Tennant Energy v. Canada,* paras. 173 and 174.
[22] *Orlandini v. Bolivia*, para.143.
[23] *Libananco v. Turkey*; *Commerce Group & San Sebastian v. El Salvador*; *South American Silver v. Bolivia*; *EuroGas v. Slovakia*; *RSM Production v. Saint Lucia*; *Eugene Kazmin v. Latvia*.

explained how such a relief cannot be postponed until the issuance of the award. The Tribunal also notes that Respondent has not justified the split up of the quantum of the requested amount as security for costs – EUR 15 million.

40. Since no such "exceptional circumstance" or conduct of the Claimant is forthcoming from the available record in the present case, the Tribunal finds that it is not fair in all of the circumstances to require Claimant to provide security for Respondent's costs.

5. APPLICABILITY OF ENGLISH CIVIL PROCEDURE RULES AND SIGNIFICANCE OF PLACE OF INCORPORATION FOR SECURITY OF COSTS

41. Though the findings arrived as above, does not necessitate a decision on supplemental contentions raised by the parties under this heading, the Tribunal provides its reasoning in general (without a detailed legal analysis).

42. Respondent claims that CDF is the "real plaintiff" in this arbitration and thus, 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. On the contrary, Claimants submit that in international arbitrations, English Rules of Civil Procedure is irrelevant.

43. Considering that London is the seat of Arbitration in the present dispute, the Tribunal refers to a judgment in *Goknur v. Cengiz Aytacli*,[24] where Coulson L.J., summarised the relevant guidance for an Order of costs against a real party to the litigation, who either controlled or funded the company's pursuit or defence of the litigation to benefit personally. However, in investment arbitrations, it is not uncommon for a claimant company to be supported by its parent company that is not a party to the arbitration.[25] Therefore, the English Civil Procedure Rules may not be applicable here.

44. Respondent also raised concerns that a costs award will go unmet since both the parties are not based at the seat of arbitration. Claimants countered that in international arbitrations, place of incorporation of

[24] *Goknur v. Cengiz Aytacli,* para. 40.
[25] *Bay View & Spalena v. Rwanda*, para. 61.

the party against whom security is ordered, is irrelevant. Relying on the ClArb Guidelines, the Tribunal opines that discrimination on the grounds of foreign residence would be contrary to the fundamental principles of international arbitration which enables parties from different jurisdictions to choose where their disputes should be resolved.[26] However, location of the assets of a party may be a legitimate consideration since there could be a risk of unenforceability of a costs award in the foreign location of the assets, rather than the foreign residence of the party.[27]

VI. TRIBUNAL'S DECISIONS:

45. For the reasons given above, the Tribunal denies the Respondent's request of Security for Costs.

Date: 15 October 2021. **Place of Arbitration: London, England.**

Sd/-
XXXXXXX
(Presiding Arbitrator)

XXXXXXXX **XXXXXXXX**
(Arbitrator) **(Arbitrator)**

EXPLANATORY NOTE TO THE CO-ARBITRATORS:

1. As the Presiding Arbitrator, I decline to grant a Security for Costs for the Respondent. In my opinion, this is because Respondent has not discharged its burden of proving "exceptional circumstance" against Claimant, though it satisfies the first two requirements of the ClArb Guidelines fairly.
2. Though the previous three cases involving third-party funding arrangement: *RSM Production v. Saint Lucia; Manuel Garcia Armas v. Venezuela*; and *Dirk Herzig (Unionmatex) v. Turkmenistan*, had granted a Security for Costs, the present case is balanced on merits for both the parties. I believe, granting a Security for Costs in this case could frustrate Claimant's ability from pursuing its claims because of its present financial situation and may impact the Rule of Law obligation of investment arbitration tribunals.

[26] ClArb Guidelines, Commentary to Article 3, para f.
[27] ClArb Guidelines, Commentary to Article 3, para g.

3. I invite my fellow co-arbitrators to accept my findings and reasons, as mentioned in the Draft Procedural Order. However, if any or both of you wish to write your assenting opinion for my findings or write your dissenting opinion, I kindly request to do so at your earliest convenience and share the same with this Tribunal as expeditious as possible.
4. If both my fellow co-arbitrators agree with my findings and reasons, but express that the entire heading **5. APPLICABILITY OF ENGLISH CIVIL PROCEDURE RULES AND SIGNIFICANCE OF PLACE OF INCORPORATION FOR SECURITY OF COSTS**, is not necessary, we may unanimously not include it in our Procedural Order.

15 October 2021.

Sd/-
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(Presiding Arbitrator)