In the matter of an arbitration pursuant to the

Netherlands-Slovenia Republic BIT

and the

Energy Charter Treaty

before a tribunal constituted in accordance with the

1976 UNCITRAL Rules

between

SLOVENIA COAL COMPANY ('SCC') and SCC HOLDING ('SCCH')

and

REPUBLIC OF SLOVENIA ('Slovenia')

PROCEDURAL ORDER NO. [XX]

DECISION ON THE RESPONDENT'S REQUEST FOR SECURITY FOR COSTS

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15 October 2021

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I. INTRODUCTION

1. The present Procedural Order No. [XX] (the **Order**) is made in an arbitration before the Tribunal constituted under the 1976 UNCITRAL Rules (the **UNCITRAL Rules**) pursuant to: (i) the Netherlands-Slovenia Republic BIT (the **BIT**); and (ii) the Energy Charter Treaty (the **ECT**, and together with the BIT, the **Treaties**).

2. The Claimants are (i) Slovenia Coal Company (**SCC**, or **Claimant No. 1**) – a company incorporated under the laws of the Republic of Slovenia; and (ii) Slovenia Coal Company Holding (**SCCH**, or **Claimant No. 2**) – a company incorporated under the laws of Netherlands (together, the **Claimants**). The Respondent is the Republic of Slovenia (**Slovenia**). The Claimants and the Respondents together will be referred to as the **Parties**.

3. The dispute between the Parties concerns the Respondent's alleged breaches of the fair and equitable standard of the Treaties in the context of a new legislation introduced by the Respondent to regulate the renewable energy sector in 2019 (the **Renewables Law**).

4. The Order sets out the Tribunal's analysis and decision on the Respondent's Request for Security for Costs submitted on 28 July 2021 in which the Respondent requested the Tribunal to order the Claimant to issue security for costs in the amount of EUR 15 million (**SfC Request**).

5. The Order is based on the Tribunal's understanding of the record, as it presently stands. Nothing in the Order shall pre-empt any later finding

of fact or conclusion of law. The Tribunal's decision may be revisited if relevant circumstances were to change.

6. The Tribunal will refrain from addressing in the Order, issues that are not relevant to the SfC Request. All remaining issues, including the Respondent's objection to the jurisdiction of the tribunal, will be addressed in the Final Award basis the future pleadings of the Parties, as appropriate.

II. RELEVANT PROCEDURAL HISTORY

7. In December 2020, the Claimants filed their Memorial on Merits (the **Claimants' Memorial**).

8. In May 2021, Respondent filed its Counter-Memorial on Merits and Objections to Jurisdictions (the **Respondent's Counter-Memorial**).

9. On 28 June 2021, Respondent filed the Request for Security for Costs against the Claimants in the amount of EUR 15 million.

10. In mid-July, around two weeks after the filing of the SfC Request, Claimants submitted their response to the Respondent's Request for Security for Costs (the **Response to SfC Request**)

III. RESPONDENT'S REQUEST FOR SECURITY FOR COSTS

1. Respondent's Position

The prospects of success for the claim(s) and defence(s)

11. Respondent states that Claimants' claims are frivolous and would certainly fail since the Claimants could not have had a legitimate expectation that the tax rebate would remain in effect indefinitely,

more so when SCCH acquired its holding after the rebate came into effect. Respondent adds that the disputed measures, including the measures undertaken by criminal courts were in exercise of the Respondent's sovereign powers.

Claimants' [in]ability to satisfy an adverse costs award

12. Respondent argues that there is a likelihood that its costs in the present arbitration would not be met for the following reasons: (i) SCCH is a shell holding company with no assets other than its shareholding in SCC; (ii) SCC no longer has any assets after the criminal seizure; (iii) there is a risk that a costs award will go unmet, which is compounded by the fact that both Claimant Nos. 1 and 2 are not based in London, England, the seat of arbitration.

Whether an order for security for costs is fair

13. Respondent, relying on its objections to jurisdiction of the Tribunal, contends that an order for security for costs is fair given that Slovenia never consented to arbitrate with the Claimants. Respondent adds that the arbitration is being funded by a third-party to the arbitration – the Claimant's parent company, Charbon de France ("**CDF**") – and it is unclear if the terms of the funding agreement (if any) oblige CDF to pay for adverse costs in this arbitration. Respondent also invokes the application of the Civil Procedure Rules, 1998 according to which costs should be ordered where the named plaintiffs (here, the Claimants) are not the true party with interests in the dispute (CDF).

2. Claimants' Position

The prospects of success for the claim(s)

14. Claimants, on the other hand, contend that likelihood of success for the claim(s) and defence(s) is irrelevant to any security for costs application. In the alternative, Claimants affirm that they have already made out a *prima facie* case for the breach of the Treaties and that the actions of the Respondent's criminal courts are a further breach of its obligations under the Treaties.

Claimants' [in]ability to satisfy an adverse costs award

15. Claimants admit that neither Claimant No. 1 nor Claimant No. 2 has sufficient assets to meet the security requested by the Respondent. However, Claimants contend that argue that the Respondent had assumed the risk of arbitrating with SCCH, which has been a holding company for SCC even at the time of Respondent's agreement to arbitrate with SCC. Claimants argue that the change in financial circumstances that the SfC Request is premised on, is the result of Respondent's actions alone and that the criminal seizure is a sham and has no basis other than the evidence of two low-level government officials who appeared as witness in the criminal investigations. Claimants also contend that the place of incorporation of the party against whom security is ordered is irrelevant in international arbitration.

Whether an order for security for costs is fair

16. Claimants argue that a security for costs order would be unfair since it would unduly stifle the Claimants' claims for not being able to provide such a security. Claimants add that the fact that they are funded by a third-party to the arbitration is irrelevant for a decision on the SfC Request. In the alternative, Claimants' object to the SfC Request for the following reasons: (i) Respondent's SfC Request is untimely given that the arbitration is now at an advanced phase; (ii) Respondent cannot use its objections to jurisdictions to force through a security for costs order; (iii) the Civil Procedure Rules, 1998 are irrelevant in international arbitration; and (iv) Respondent has failed to justify the EUR 15 million requested security amount which is exorbitant.

IV. TRIBUNAL'S ANALYSIS

17. This arbitration is governed by (i) the Terms of Reference/Procedural Order No. [1] (including any amendments); and (ii) the UNCITRAL Rules. In addition to the above, (iii) the mandatory rules of the *lex arbitri,* i.e. the Arbitration Act, 1996, also govern this arbitration. The Tribunal's authority to order security for costs stems from Article 26 of the UNCITRAL Rules. While Article 26 of the UNCITRAL Rules does not expressly grant the tribunal the authority to order security for costs, several investment tribunals have relied on this broad discretionary power to order interim measures, to order security for costs.[1]

[1] *Pugachev* v. *The Russian Federation*, Interim Order, *Ad hoc* arbitration under the UNCITRAL Rules (1976), 7 July 2017; *García Armas and Others* v. *Venezuela*, Procedural Order No. 9 Decision on the Respondent's Request for Provisional Measures, PCA, UNCITRAL Rules (1976), 20 June 2018; *RSM* v. *St. Lucia*, Decision on Saint Lucia's Request for Security for Costs, ICSID, 13 August 2014.

1. The applicable legal standard for an order of security for costs

18. The Tribunal is of the view that the starting point of an analysis on the legal standard applicable for evaluation of the SfC Request are the rules governing this arbitration, as outlined above. The Tribunal disagrees with the Respondent on the application of "English civil procedure rules" to this arbitration, as they do not constitute mandatory rules of the *lex arbitri* i.e., the Arbitration Act, 1996. Neither does it agree 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*", as argued by the Respondent. On the contrary, historical evidence suggests that investment tribunals have ordered security for costs only in extreme and exceptional circumstances, reflecting a cautious approach to such requests by investment tribunals.[2]

19. Article 26 of the UNCITRAL Rules (the 1976 version) does not provide for a precise standard for evaluation of a request for interim measures and provides wide discretion to the tribunal to "*take any interim measures it deems necessary*". However, the 2010 and 2013 revisions to the UNCITRAL Rules provide for the tests of (i) a *prima facie* case on merits; balance of convenience; and irreparable injury while evaluating a

[2] *RSM* v. *St. Lucia*, Decision on Saint Lucia's Request for Security for Costs, ICSID, 13 August 2014; *Kazmin* v. *Latvia*, Procedural Order No. 6 (Decision on the Respondent's Application for Security for Cost), ICSID, 13 April 2020; *Dirk Herzig* v. *Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, ICSID, 27 January 2020; *García Armas and Others* v. *Venezuela*, Procedural Order No. 9 Decision on the Respondent's Request for Provisional Measures, PCA, UNCITRAL Rules (1976), 20 June 2018.

request for grant of interim measures. Further, several UNCITRAL investment tribunals have suitably modified the above tests while dealing with security for costs applications, given that applications such as the present one raise crucial issues of access of justice that are not typical to other forms of interim measures.[3] These additional fact-specific considerations include, among others: (i) a condition of urgency; (ii) a party's proven financial difficulties and the likelihood of non-satisfaction of an adverse costs decisions; (iii) the presence of a third-party funder to the arbitration; (iv) a party's history of non-payment of cost awards in prior arbitrations; (iv) a party's bad faith or improper behaviour, including evidence of such party moving or disposing assets to defeat or delay the enforcement of a potential costs decision. The Tribunal considers that it is the cumulative effect of all these factors which explains the rather "exceptional circumstances" in which security for costs orders have been granted in investment arbitrations. Although not binding to this arbitration, the Tribunal also finds the Chartered Institute of Arbitrators' Guidelines for Applications for Security for Costs, 2016 (the "**CIArb Guidelines**") to be of assistance and deems it to be a useful tool to evaluate the SfC Request.

[3] *Pugachev* v. *The Russian Federation*, Interim Order, *Ad hoc* arbitration under the UNCITRAL Rules (1976), 7 July 2017; *García Armas and Others* v. *Venezuela*, Procedural Order No. 9 Decision on the Respondent's Request for Provisional Measures, PCA, UNCITRAL Rules (1976), 20 June 2018; *Guaracachi* v. *Bolivia*, Procedural Order No. 14 (Security for Costs), PCA, UNCITRAL Rules (1976), 11 March 2013; *South American Silver* v. *Bolivia*, Procedural Order No. 10 (Security for Costs), PCA, UNCITRAL Rules (2010), 11 January 2016; *Paushok* v. *Mongolia*, Order on Interim Measures, *Ad hoc* arbitration under the UNCITRAL Rules (1976), 2 September 2008.

2. Whether the tribunal should order security for costs

20. The Tribunal agrees with the Claimants that "*likelihood of success should be irrelevant for any security for costs*" application despite "reasonable possibility of success on the merits" and "*prospects of success for the claim*" being relevant considerations for grant of interim measures/security for costs under the UNCITRAL Rules (as revised in 2013) and CIArb Guidelines, respectively.[4] The Tribunal deems it neither necessary, nor appropriate, to make any determination on this issue to decide the SfC Request. Such assessment of a "*prima facie case on merits*" or "*prospects/likelihood of success for the claim*" is always a complex hypothetical exercise even with the benefit of the Parties' full pleadings and should be avoided at all costs to not risk pre-judging the issues in consideration before this Tribunal.[5] The Tribunal also considers jurisdiction, *prima facie* or otherwise, to be of no relevance for an evaluation of the SfC Request.[6]

21. While the Tribunal agrees with the Respondent that there is at least some risk, if not a greater risk, that the Respondent's costs in this arbitration will not be met, the moot question before the Tribunal is whether such risk of non-satisfaction of an adverse costs order faced by the Respondent weighs more than the Claimants' right to pursue its claim. The SfC Request is founded on the following two key factors: (i)

[4] Article 26(3)(b), UNCITRAL Rules (as revised in 2013); Article 2, CIArb Guidelines.
[5] Pugachev *Pugachev* v. *The Russian Federation*, Interim Order, *Ad hoc* arbitration under the UNCITRAL Rules (1976), 7 July 2017; *Orlandini* v. *Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, PCA, UNCITRAL Rules (2013), 9 July 2019.
[6] *RSM* v. *St. Lucia*, Assenting Reasons of Gavan Griffith, ICSID, 12 August 2014.

that the Claimants have no assets as of today; and (ii) that this arbitration is being funded by the Claimants' parent company, CDF, where CDF's contractual obligation to pay for an adverse costs decision against the Claimants is doubtful.

22. The Tribunal considers that proven financial difficulties of a party[7] which leads to the risk of non-satisfaction of an adverse costs order, and the presence of a third-party funder are not by itself sufficient to warrant a security for costs order.[8] This is particularly significant in the present case given that the Claimants have only admitted inability to pay the requested EUR 15 million security, which the Tribunal considers to be unreasonably high going by current investment arbitration practice,[9] and not inability to pay for any adverse costs orders, in general. Further, the third-party funder in question is none other than Claimants' own parent company, one with a 'real' and significant interest in the Claimants. CDF cannot be equated with any modern-day independent arbitration financing firm with no 'real' interest, monetary or otherwise, in the Claimants other than the

[7] *RSM and Others* v. *Grenada*, Tribunal's Decision on Respondent's Application for Security for Costs, ICSID, 14 October 2010; *Libananco* v. *Turkey*, Decision on Preliminary Issues, ICSID, 23 June 2008.
[8] *Bay View* v. *Rwanda*, Procedural Order No. 6 on the Respondent's Request for Security for Costs, ICSID, 28 September 2020; *Tennant Energy* v. *Canada*, Procedural Order No. 4 (Interim Measures), PCA, UNCITRAL Rules (1976), 27 February 2020; *Dirk Herzig* v. *Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, ICSID, 27 January 2020; *García Armas and Others* v. *Venezuela*, Procedural Order No. 9 Decision on the Respondent's Request for Provisional Measures, PCA, UNCITRAL Rules (1976), 20 June 2018 *Orlandini* v. *Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, PCA, UNCITRAL Rules (2013), 9 July 2019.
[9] Apportionment of Costs, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, British Institute of International and Comparative Law and Allen & Overy, page 22.

resulting award. Neither does the Tribunal find any exceptional circumstances that justify an order of the exceptionally high EUR 15 million security requested by the Claimants in the present case. The Respondent has also failed to demonstrate any urgency or imminent harm to the Respondent should the SfC Request be rejected. The mere fact that the Claimants are not incorporated at the seat of arbitration is of no significance since any resulting costs award would be enforceable in the States of Netherlands and Slovenia, who are contracting parties to the New York Convention of 1958.

23. Even otherwise, the Tribunal finds it compelling that the two key factors above – the foundation to the Respondent's SfC Request are a product of the Respondent's own actions, whether legitimate or otherwise. The Tribunal strongly believes that independent of the legality and justiciability of the criminal seizures effected by the Respondent, requiring the Claimants to post such an exceptionally high security at this stage would lead to unfairly rewarding the Respondent for the precarious financial condition created by its own measures and thereby amount to a denial of access to justice to the Claimants. Put simply, such an order would effectively lead to a "*pay me EUR 15 million or forfeit the claim*" situation for the Claimants. However, that is not to say that a Respondent State be thwarted from taking legitimate sovereign actions for the fear that it might strip a foreign investor of the assets necessary to satisfy an adverse costs decision. The Tribunal reiterates that the rejection of the SfC Request at this stage does

not preclude the Respondent from modifying the SfC Request or even applying for security for costs at a later stage. Therefore, while the Tribunal is cognisant of the possibility that CDF may have no contractual risk to pay an adverse costs order, the Tribunal is reserved to reject the SfC Request, as it stands now. In view of the above, the Tribunal has decided to schedule a case management conference to consult with the Parties and CDF, on whom the Claimants are substantially dependent for funding this arbitration, on the next procedural steps to be taken to protect the rights of both Parties considering the changed circumstances in this arbitration, including steps on minimizing the costs of this arbitration.

V. DECISION

24. For the foregoing reasons, the Tribunal decides to:

a) REJECT Respondent's Request for Security for Costs; and

b) RESERVES issues of costs to be decided at a later stage.

London, England

15 October 2021

[signed]

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[X] (President)

on behalf of the Tribunal

Explanatory Note

Dear Co-Arbitrators,

Please see enclosed with this Explanatory Note a draft Procedural Order in relation to the Respondent's request for security for costs in the amount of EUR 15 million dated 28 July 2021.

The positions and arguments of both parties are outlined in Section III of the draft Procedural Order in paragraphs 11-16. In summary:

(i) Respondent argued that a security for costs order was warranted given that the Claimants have no assets as of today and that this arbitration was being funded by a third-party, the Claimants' parent company, CDF, where CDF's contractual obligation to pay for an adverse costs decision against the Claimants is doubtful.

(ii) Claimants argued that a security for costs for EUR 15 million was exceptionally high, which the Claimants could not meet at any cost, and that the change in financial circumstances of the Claimants is attributable to the Respondent's measures.

This is, in my opinion, not the run-of-the-mill security for costs application founded on the presence of a third-party funder to the arbitration. There are two variations to the recurring theme, one, that the change in financial circumstances of the Claimant is a direct consequence of the Respondent's actions, and second, that the third-party funder to the arbitration is the Claimants' own parent company, CDF, one with a real interest in this arbitration. The presence of these two variations makes the analysis even

more challenging. The moot question before us whether a Respondent's right to protect itself from the risk of an adverse cost decision not being weighs over a Claimant's legitimate right to pursue its claim.

What is at issue here is an attempt to strike the right balance between the Claimants' and Respondent's respective rights and protect the integrity of the proceedings. I have tried explaining in my opinion the reasons to reject the order. These reasons are self-explanatory. While I am mindful of the possibility that CDF may refuse to pay an adverse costs order, I find it gravely wrong to order security for costs for an application founded on the financial circumstance caused by the applicant. This is controversial and may even face the risk of prejudging the issue at consideration here. However, I am of the opinion that the above finding is only observation of fact, and not that of law, and therefore does not translate into legal liability for breach of the treaties in question here. It is an accepted fact that the material change in the Claimants' financial circumstances was a result of the criminal seizures ordered by the Respondent, whether legitimate or otherwise. While EUR 15 million is in itself an exceptionally high security and would unduly stifle the Claimants' claim, I am of the opinion that the decision does not preclude the Respondents from modifying the present request or applying for security for costs at a later stage. And here lies the balance in the parties' respective rights.

Having said that, I understand that the Claimants' precarious financial condition coupled with an uncertainty on CDF's obligations under the funding arrangement is not good news. In light to the above, I have proposed a case

management conference to be held with the parties and the CDF being present, in order to discuss the next procedural steps that need to be taken. I believe that such a step would help us better guage the situation at hand and accordingly decide on managing our duties as the tribunal.

As always, I appreciate your valuable comments on the draft. I look forward to hearing from both of you.

Yours sincerely,

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[X] (President)