

**IN THE MATTER OF AN ARBITRATION UNDER THE 1976 RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

-between-

1. SLOVENIA COAL COMPANY

2. SCC HOLDING

(the “Claimants”)

-and-

THE REPUBLIC OF SLOVENIA

(the “Respondent”, and together with the Claimants, the “Parties”)

**DECISION ON THE REPUBLIC OF SLOVENIA’S REQUEST
FOR SECURITY FOR COSTS**

Members of the Tribunal

Presiding Arbitrator

First Co-Arbitrator

Second Co-Arbitrator

15 October 2021

I. INTRODUCTION

1. The present Order is made in an arbitration between Slovenia Coal Company (**SCC**) and SCC Holding (**SCCH**) and, together with SCC, the **Claimants**) and the Republic of Slovenia (**Slovenia** or the **Respondent**), pursuant to (i) the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Slovenia and the Kingdom of Netherlands, which entered into force on 1 August 1998 (the **Netherlands-Slovenia BIT**); (ii) the Energy Charter Treaty, which entered into force on 16 April 1998 (the **ECT**); and (iii) the Arbitration Rules of the United Nations Commission in International Trade Law, as adopted in 1976 (the **UNCITRAL Rules**).
2. This Order sets out the Tribunal's analysis of and decision on the Respondent's request for security for costs filed on 28 June 2021.

II. RELEVANT PROCEDURAL HISTORY

3. In January 2020, the Claimants filed a Request for Arbitration under the Netherlands-Slovenia BIT and the ECT, alleging *inter alia* that the Respondent had breached those agreements' fair and equitable treatment standard.
4. In the following months, the Tribunal was constituted pursuant to the UNCITRAL Rules and chose London, United Kingdom, as the seat of arbitration.
5. In December 2020, the Claimants submitted their Memorial on the Merits.
6. In May 2021, the Respondent filed its Counter-Memorial on the Merits and Objections to Jurisdiction.

7. On 28 June 2021, the Respondent submitted a request for security for costs against both Claimants (the **Request**), seeking security in the amount of EUR 15 million.
8. Two weeks later, the Claimants filed their response to the Request (the **Response**), requesting that the Tribunal dismiss the Request in full.

III. SUMMARY OF THE PARTIES' ARGUMENTS

3.1 The Respondent's Position

9. The Respondent advances three arguments in support of the Request: (i) the Claimants' claims are frivolous and have no merits; (ii) it is likely that any costs it is awarded in this arbitration would not be met; and (iii) it is fair to order security for costs in the circumstances of this case.
10. First, the Respondent contends that the Claimants' claims are frivolous and will fail. This is so, the Respondent alleges, because it merely exercised its legitimate right to regulate tax issues and the Claimants "could not have had any legitimate expectation that the tax rebate would remain in effect indefinitely." As to the measures effected by its criminal courts, the Respondent alleges that there were entirely legitimate.
11. Second, the Respondent submits that it is likely that any costs it is awarded in this arbitration would not be met. In support of this position, the Respondent contends that (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 of its assets and bank accounts in Slovenia; and (iii) the Claimants are not incorporated at the seat of arbitration,
12. Third, the Respondent alleges that an order for security for costs would be fair in the specific circumstances of the case. In particular, the Respondent

emphasizes that it has never consented to arbitrate with the Claimants and that the Claimants are being funded by their parent company, Charbon de France (**CDF**), which is in fact the ‘real plaintiff’ in this arbitration (unlike the Claimants who are not the true party with interests in the dispute).

3.2 The Claimants’ Position

13. First, regarding the Respondents’ contention that the Claimants’ claims are frivolous, the Claimants contend that the likelihood of success should be irrelevant when deciding applications for security for costs. In any event, the Claimants allege that they have made a *prima facie* case of breach of the treaties and intend to claim a further breach as a result of the criminal seizure ordered by the Respondents’ criminal courts. Moreover, the Claimants submit that the Respondents’ objections to jurisdiction are frivolous.
14. Second, with regard to the Claimants’ alleged inability to meet the costs that Slovenia will incur in this arbitration, the Claimants acknowledge that neither of them has sufficient assets to meet the security requested by Slovenia. However, the Claimants submit that this does not justify an order for security for costs for the following reasons: (i) the Respondent assumed the risk of arbitrating with SCCH; (ii) the change in circumstances with respect to SCC’s financial situation is exclusively attributable to the wrongful criminal seizure ordered by Slovenia’s criminal courts; and (iii) contrary to the Respondents’ contention, the Claimants’ place of incorporation is irrelevant.
15. Third, the Claimants contest the Respondents’ contention that an order for security for costs would be fair in the circumstances of the case. The Claimants submit that such an order would stifle their claims as they do not have the capacity to provide a security in the amount requested by the

Respondent. Moreover, while acknowledging that they are being funded by CDF, the Claimants contend that the existence of third-party funding is irrelevant for the purpose of determining security for costs requests.

16. Finally, the Claimants submit that, in any event, (i) the Respondent's application is untimely, and (ii) the Respondent has failed to justify the amount of the requested security (i.e., EUR 15 million), which is exorbitant.

IV. THE TRIBUNAL'S ANALYSIS

4.1 The power of the Tribunal to order security for costs

17. None of the Parties contest the power of the Tribunal to order security for costs and such power is further supported by (i) the broad wording of Art. 26(1) UNCITRAL Rules,¹ and (ii) decisions from prior UNCITRAL tribunals.² Thus, the Tribunal is satisfied that it has the power to order security for costs in the present proceedings.

4.2 The applicable legal standard to grant security for costs

18. The Tribunal now turns to the legal standard applicable to grant security for costs under Art. 26 UNCITRAL Rules. While the Parties did not expressly address the requirements that must be met, the Tribunal considers that guidance can be found in previous decisions by tribunals and in the Guidelines on Applications for Security for Costs issued by the Chartered Institute of Arbitrators (**CIArb Guidelines**).³ In this respect, the Tribunal finds that an order for security for costs can be granted when:⁴

- the tribunal has *prima facie* jurisdiction, and the respondent has a *prima facie* reasonable possibility of success on the merits (i.e., *prima facie* case);

¹ Art. 26(1) UNCITRAL Rules provides that a tribunal “may take any interim measures it deems necessary in respect of the subject-matter of the dispute”.

² See *Sergei Viktorovich Pugachev v. Russia*, Interim Award, 7 July 2017, paras. 371-373; *García Armas v. Venezuela*, Procedural Order No. 9, 20 June 2018, para. 186; *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 171.

³ Both Parties made express reference to, and relied on, the CIArb Guidelines. Thus, even though the Tribunal is not bound by the CIArb Guidelines, they serve as useful guidance for the Tribunal’s analysis.

⁴ See *Tennant v. Canada*, para. 172; *García Armas v. Venezuela*, para. 191; *SAS v. Bolivia*, Procedural Order No. 10, 11 January 2016, para. 57; *Orlandini v. Bolivia*, Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs, 9 July 2019, para. 140.

- the applicant would likely suffer harm not adequately reparable by an award of damages without the order (i.e., necessity);
- the respondent's potential harm without the order substantially outweighs the harm that the claimant would likely incur from the order (i.e., proportionality); and
- the measure sought is urgent (i.e., urgency).

19. Moreover, in relation to the necessity, proportionality and urgency of the measure, the *jurisprudence constante* of investment tribunals holds that security for costs can only be ordered where there are exceptional circumstances.⁵

4.2.1 *Prima facie* jurisdiction and reasonable possibility of success on the merits

20. In their submissions, the Parties made various detailed arguments concerning the merits of their respective claims, defences, and jurisdictional objections. At this preliminary stage of the proceedings, the Tribunal is neither required nor prepared to make detailed findings on the merits of the Parties' substantive claims and defences or jurisdictional objections. Suffice to say that, based on a *prima facie* determination, none of the arguments appear frivolous or vexatious.

21. Therefore, without prejudging neither the jurisdictional objections raised by the Respondent nor the merits of each Party's case, the Tribunal is *prima facie* satisfied (i) that it has jurisdiction over the dispute, and (ii) that the Respondent has a reasonable possibility of success on the merits.

⁵ *Tennant v. Canada*, para. 173; *Orlandini v. Bolivia*, para. 149; *SAS v. Bolivia*, para. 68.

4.2.2 Exceptional circumstances (i.e., necessity, proportionality and urgency)

22. The existence of exceptional circumstances must be assessed on a case-by-case basis. In this respect, tribunals have considered that a claimant's inability to pay a hypothetical award on costs and the existence of third-party funding constitute relevant factors to determine whether exceptional circumstances exist. However, tribunals have consistently confirmed that these two factors are in and of themselves insufficient to justify an order for security for costs and additional circumstances are required.⁶ Similarly, the CIArb Guidelines provide that a claimant's inability to satisfy an adverse costs award is a necessary but not a sufficient reason for requiring security for costs.⁷
23. Other relevant factors mentioned in the CIArb Guidelines or applied by prior investment tribunals include *inter alia*: (i) a claimant's bad faith conduct in the proceedings at issue, in particular the voluntary hiding of assets to avoid any potential exposure to a costs award;⁸ (ii) the fact that the deterioration of a claimant's financial situation was a normal commercial risk known at the inception of the relationship;⁹ (iii) a claimant's impecuniosity has been caused or contributed to by the conduct of the opposing party,¹⁰ and (iv) an order for security for costs would unjustly prevent a party from pursuing a genuine and legitimate claim.¹¹

⁶ *Orlandini v. Bolivia*, para. 144; *EuroGas v. Slovak Republic*, Procedural Order No. 3, 23 June 2015, para. 123.

⁷ CIArb Guidelines, Commentary on Article 3, p. 7, para. b).

⁸ *Tennant v. Canada*, para. 174; *Orlandini v. Bolivia*, para. 143. See also *SAS v. Bolivia*, para. 59.

⁹ CIArb Guidelines, Commentary on Article 3, p. 8, para. b).

¹⁰ CIArb Guidelines, Commentary on Article 4 Paragraph 1, p. 10, para. b). See also *Orlandini v. Bolivia*, para. 145.

¹¹ CIArb Guidelines, Commentary on Article 4 Paragraph 2, p. 11, para. a).

24. Regarding the **necessity** of the measure, the Tribunal considers that this requirement is met where there is a serious risk that the claimant will be unable to comply with an adverse costs award.

25. In this respect, the Respondent alleges, without contradiction, that “SCC no longer has any assets after the criminal seizure” and SCCH has “no assets other than its shareholding in SCC.” Furthermore, it is undisputed that the Claimants are being funded in this arbitration by CDF, their parent company, and there is no evidence before the Tribunal that there is any funding arrangement forcing CDF to pay for costs. In these circumstances, the Tribunal holds that there is a serious risk that the Claimants will be unable to comply with a costs award and that risk goes beyond the risk assumed by the Respondent when agreeing to arbitrate with the Claimants.

26. In view of the foregoing, the Tribunal concludes that the necessity requirement is met in the circumstances of this case.

27. Turning to the **proportionality** of the measure, the Tribunal considers that this requirement is met where there are exceptional circumstances (i) showing that the respondent’s interests substantially outweigh the claimant’s interests and (ii) justifying an order for security for costs. In this regard, the Tribunal finds that the circumstances of the case do not warrant such an order for the reasons set out below.¹²

28. First, the Claimants’ impecuniosity cannot be attributed to bad faith conduct on their part. Indeed, while it might be that SCCH is a shell holding company

¹² In this regard, the Tribunal does not find any support in prior decisions by tribunals for the Respondent’s contention that, when there is a serious risk that the claimant will be unable to comply with an adverse costs award, there should be “a presumption in favour of security for costs”.

with no assets other than its shareholding in SCC; there is no evidence on record demonstrating that the Claimants restructured their investment and incorporated SCCH for the purpose of hiding assets. To the contrary, the restructuring took place in 2003 (i.e., 17 years before the initiation of the present proceedings) and Slovenia was not only made aware of it but also approved it at that time.¹³

29. As to the Respondent's contention that CDF is the "real plaintiff" or, in other words, that the Claimants act as nominal claimants shielding CDF, which has funds and a commercial interest in the outcome of the dispute, the Tribunal considers that, on the specific facts of this case, this situation does not justify ordering security for costs. As outlined above, the present situation is not of the Claimants' own making and thus does not constitute *per se* exceptional circumstances.
30. Second, it is undisputed that the Claimants' financial difficulties, and the ensuing necessity to resort to third-party funding, result at least partly from the Respondent's decision to repeal the tax rebate and, most certainly, from the criminal proceedings that led to the seizure of all SCC's assets and bank accounts. These two measures adopted by the host State and their legality are at the core of the present proceedings.
31. In this regard, where, as here, the Claimants can make a *prima facie* case that their inability to pay a potential adverse costs award is caused by the allegedly wrongful conduct of the host State, an order for security for costs would (i) unfairly restrict the Claimants' ability to pursue legitimate

¹³ The Tribunal is mindful that the Respondent alleges that this approval was tainted by corruption, however, the Tribunal is neither required nor prepared to make any findings in this regard at this preliminary stage.

and genuine claims, and (ii) risk rewarding the State for its alleged violations of treaty obligations. In view of the foregoing, the Tribunal considers that the need to avoid such unfair result trumps the necessity to preserve the Respondent's hypothetical right to recover costs.

32. That said, the Tribunal emphasizes that its findings that the Claimants' financial difficulties are in fact not due to their bad faith conduct, but rather result from measures adopted by the Respondent does not prejudice the legality of such measures. Indeed, both Parties have addressed, and will have ample opportunity to address, this substantive issue in their written and oral submissions.

33. Finally, the Respondent's contention that the Claimants are not based at the seat of arbitration does not constitute additional circumstances justifying an order for security for costs, especially when the Claimants are incorporated in signatory States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

34. Regarding the **urgency** of the measure, the Tribunal considers that the measure must be of such urgency that it cannot be postponed until the issuance of the award. In this regard, while the Tribunal disagrees with the Claimants' contention that the Request is untimely, the Tribunal is not convinced that the Claimants may be in a better position to provide security for costs today than in the future.

35. In light of the above, the Tribunal holds that there are no exceptional circumstances justifying an order for security for costs at this stage of the proceedings. However, for the avoidance of doubt, the dismissal does not

preclude the Respondent from re-applying for security for costs should there be a change of circumstances.

V. DECISION

36. For the reasons set forth above, the Tribunal hereby decides to:

- (1) Deny the Respondent's request for security for costs; and
- (2) Reserve its decision regarding the costs of the Respondent's request for security for costs until a later stage in these proceedings.

Date: 15 October 2021

Seat of Arbitration: London, United Kingdom

Presiding Arbitrator

On behalf of the Tribunal

Explanatory Note

Dear Co-Arbitrators,

Please find attached with this Explanatory Note a draft Procedural Order (the **draft PO**), setting out the Tribunal's analysis of and decision on the Respondent's request for security for costs (the **Request**).

As you may recall, the most recent developments in this case are (i) the seizure of SCC's assets by Slovenia's criminal courts in May 2021, and (ii) the subsequent filing of the Request by the Respondent on 28 June 2021.

The Parties' respective positions and arguments are summarized in paragraphs 9-16 of the draft PO and essentially revolve around the following three issues:

- i. The Parties raised various detailed arguments concerning the merits of their respective claims, defences, and jurisdictional objections.
- ii. Regarding the Claimants' financial situation, the Parties' main disagreement focused on the causes, the surrounding circumstances, and the corresponding consequences that this financial situation should have on the Request.
- iii. Finally, the Parties outlined various additional circumstances rendering an order for security for costs fair or unfair in the present case.

Bearing in mind that none of the Parties contested the power of the Tribunal to order security for costs, paragraph 17 of the draft PO very briefly addresses and asserts our power to issue an order for security for costs.

Considering further that the Parties did not expressly address the requirements that must be met for the Tribunal to grant security for costs, but relied on the Guidelines on Applications for Security for Costs issued

by the Chartered Institute of Arbitrators (the **CI Arb Guidelines**), it seems sensible for us to derive the applicable standard both from (i) prior decision by investment tribunals, in particular UNCITRAL tribunals, and (ii) the CI Arb Guidelines (paragraphs 18–19 of the draft PO).

As to the core of the draft PO, i.e., the application of the legal standard to the specific facts of the case, I suggest that we refrain from addressing in too many details the Parties' arguments relating to our jurisdiction and the merits of the case as we have not yet been fully briefed on those issues and we should not prejudge them.

With regard to the necessity and proportionality requirements, it seems to me that the three following considerations are decisive and should lead us to deny the Request. First, the Claimants' impecuniosity does not result from any bad faith conduct and there is no evidence that they have been, or are, attempting to hide assets (paragraph 28 of the draft PO). Second, as a matter of fact, the deterioration in the Claimants' financial situation has, at least partly, been caused by the allegedly wrongful measures adopted by the Respondent (paragraph 30 of the draft PO). Third, an order for security for costs would prevent the Claimants from bringing their claims concerning the legality of such measures, claims which *prima facie* do not appear to be frivolous or vexatious (paragraph 31 of the draft PO). In my view, the above-mentioned considerations are compelling enough for us to refrain from possibly impeding the Claimants' access to justice, which trumps the necessity to preserve the Respondent's right to recover any costs it may be awarded.

As usual, comments on the draft Procedural Order, in particular on the legal reasoning, are welcome and appreciated. I look forward to hearing back from you as soon as possible and, in the meantime, remain available for any questions that you may have.

Yours sincerely,

Presiding Arbitrator