INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Riverside Coffee, LLC

v.

Republic of Nicaragua

(ICSID Case No. ARB/21/16)

PROCEDURAL ORDER No. 7

DECIDION ON THE RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

Members of the Tribunal
Dr. Veijo Heiskanen, President of the Tribunal
Mr. Philippe Couvreur, Arbitrator
Ms. Lucy Greenwood, Arbitrator

Secretary of the Tribunal
Ms. Sara Marzal Yetano

20 December 2023

I. PROCEDURAL HISTORY

1. On 24 August 2023, the Claimant informed the Tribunal that, due to the sudden demise of Mr. Melvin Winger and the unavailability of lead counsel for the Claimant for medical reasons, the Parties had agreed to extend the deadlines for the second round of written submissions in the arbitration and that the Claimant had agreed to waive its right to submit a rejoinder on jurisdiction.

2. The Claimant also explained that counsel for the Respondent had indicated an intention to file an application for security for costs at a later stage and that the Claimant did not concur "*with the timeliness or appropriateness of such a motion, but its formal position would need to await receipt of the motion, should the tribunal grant leave for it*."

3. On 25 August 2023, the Respondent objected to the Claimant's comments on the anticipated application for security for costs.

4. On the same day, the Claimant replied to the Respondent's objection and requested that the Tribunal require the Respondent to "*file an application for leave for its proposed motion and that such an application should not be entertained until after the submission of Riverside's Reply Memorial, now rescheduled for November 3, 2023.*"

5. On 28 August 2023, the Tribunal confirmed the Parties' agreement to amend the procedural calendar. As to the Claimant's request that the Respondent "*be required to file an application for leave for its proposed motion and that such an application should not be entertained until after the submission of Riverside's Reply Memorial*," the Tribunal noted that there was no basis either in the ICSID Arbitration Rules or in Procedural Order No. 1 for granting the Claimant's request. However, the Tribunal added that, if the Respondent "*choose[d] to file such an application in the circumstances described in Mr Appleton's email, the Tribunal [would] address the procedural timetable regarding the application after hearing the Claimant.*"

6. On 4 October 2023, the Respondent submitted its Application for Security for Costs (the "**Application**").

7. On 5 October 2023, as indicated in its decision of 28 August 2023, the Tribunal invited (i) the Claimant to propose a procedural timetable for the briefing of the Respondent's Application and (ii) the Respondent to subsequently comment on the Claimant's proposal.

8. On 10 October 2023, the Claimant submitted its proposed procedural calendar for the briefing of the Application. In addition, the Claimant filed a motion to dismiss the Application already at that juncture.

9. In view of the Claimant's motion to dismiss, on 11 October 2023, the Tribunal invited the Respondent to include any comments it might have on the Claimant's motion to dismiss in its response to the Claimant's proposed timetable.

10. On 12 October 2023, the Respondent submitted its comments on both the motion to dismiss and the proposed procedural schedule for the briefing of the Application.

11. On 15 October 2023, the Tribunal rejected the Claimant's motion to dismiss the Application on a *prima facie* basis and without any further briefing and adopted a timetable for the briefing of the Respondent's Application.

12. In accordance with the timetable adopted by the Tribunal:

    (a) On 10 November 2023, the Claimant filed its response to the Application (the "**Response**");

    (b) On 17 November 2023, the Respondent filed its Reply to the Claimant's Response (the "**Reply**"); and

    (c) On 24 November 2023, the Claimant filed its Rejoinder to the Respondent's Reply (the "**Rejoinder**").

13. Having deliberated, the Tribunal now issues this procedural order setting out its reasoned decision on the Application.

II. THE PARTIES' REQUESTS FOR RELIEF

14. The Respondent requests that the Tribunal:

> *a. Order the Claimant to provide, within 14 days of the Tribunal's order, security for Respondent's costs of these proceedings in the amount of US$ 4 million:*
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> *i. in the form and terms indicated in Annex 1 of Respondent's application; or*
>
> *ii. alternatively, in form of a guarantee from Mr. Carlos Rondón and Mrs. Melva Winger de Rondón as the ultimate beneficial owners of Riverside and enforceable under the laws of Colorado providing that they will be jointly liable for any award of costs in favor of the Republic of Nicaragua up to the amount of US$ 4 million; or*
>
> *iii. alternatively, in any other form and terms the Tribunal deems appropriate.*
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> *b. In case of non-compliance by the Claimant, to [sic] order the suspension of the proceedings for ninety (90) days, or any time period deemed reasonable by the Tribunal; and*
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> *c. Should the Claimant fail to comply within the ordered suspension period, to [sic] order the discontinuance of the proceedings with prejudice and award Nicaragua all costs and fees incurred in the defense of this arbitration as of the date of such award, subject to an appropriate rate of interest; and*
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> *d. Order Claimant to comply fully with Respondent's Requests Nos. 11, 12, 13, and 15 within 7 days of the Tribunal's order including, in the event no documents are produced in response to such order, to provide a certification signed by Claimant's counsel (i) that diligent efforts have been made to find such documents; (ii) detailing such diligent efforts; and (iii) confirming that such documents either do not exist or cannot be found despite diligent efforts to obtain them; and*

e. Order Claimant to bear the costs of this Application.[1]

15. The Claimant requests that the Tribunal grant the following relief:

> *a) Dismissal of Nicaragua's Application for Security for Costs; and*
>
> *b) An award in favor of Riverside on a full indemnity basis for its costs, disbursements, and all expenses incurred in the defense of this Application for legal representation and assistance, including financing, plus interest, and costs; and*
>
> *c) Such other and further remedies that this Tribunal considers appropriate.*[2]

III. THE PARTIES' POSITIONS

16. The Tribunal will summarize below the Parties' positions without attempting to be exhaustive. The Tribunal has considered the Parties' submissions and the underlying evidence and legal authorities, including those that are not specifically mentioned in the following summary.

A. THE RESPONDENT'S POSITION

i. The Tribunal's Authority and the Applicable Standard

17. The Respondent submits that the Tribunal has the authority to order security for costs as a provisional measure under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39,[3] and that for the Tribunal to grant the Application, the Respondent "*must prove the existence of exceptional circumstances, urgency and necessity*."[4] According to the Respondent, there is no disagreement between the Parties on this point.

18. The Respondent further notes that pursuant to ICSID Arbitration Rule 39(1), a request for a provisional measure must specify (i) the rights to be preserved; (ii) the measures the

[1] Reply, ¶49.
[2] Response, ¶347; Rejoinder, ¶139.
[3] Application, ¶5; Reply, ¶11.
[4] Reply, ¶11.

recommendation of which is requested; and (iii) the circumstances that require such measures.[5]

19. While Rule 53 of the 2022 ICSID Arbitration Rules is not applicable to this case, the Respondent argues that it reflects the practice under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 and may provide guidance to the Tribunal.[6]

20. The Respondent contends that recent arbitral jurisprudence may support an alternative formulation of the standard, such that the party seeking an order of security for costs must show (1) that the application is necessary or sufficiently urgent to impose an interim monetary measure on the counterparty; (2) that the counterparty would be incapable of paying the eventual cost award in the event the applicant prevailed in the proceeding; and (3) that an order of security for costs would be proportionate to the risk of failing to pay costs and not unduly burdensome to the counterparty.[7]

21. Although the Respondent is basing its Application mainly on the standards under the ICSID Arbitration Rules of 2006, it argues that the Application is properly grounded "*under any of these three complementary formulations of the security for costs standard.*"[8]

ii. <u>The Respondent's Right to Recover a Costs Award Must Be Preserved by Requiring the Claimant to Provide Adequate Security</u>

22. The Respondent submits that ICSID tribunals have consistently held that the right to an enforceable costs award is a right entitled to protection under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1).[9]

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[5] Application, ¶¶5-6.
[6] Application, ¶7.
[7] Application, ¶10, citing *Manuel García Armas and Others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9; Decision on the Respondent's Request for Provisional Measures, 20 June 2018 ("***Manuel García Armas v. Venezuela***"), ¶ 205 (RL-0123); *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 11, 14 July 2023, ¶ 91 (RL-0124).
[8] Application, ¶11.
[9] Application, ¶12, citing *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020 ("***Dirk Herzig v. Turkmenistan***"), ¶52 (RL-0122); and *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 v. Saint Lucia***"), ¶74 (RL-0125).

23. The Respondent further argues that investment treaty tribunals have held that, in order to protect such right, it is not necessary for the Tribunal to pre-judge the merits or even to determine at this stage whether a costs award is "likely." It is sufficient for the Tribunal to conclude that the party seeking security has a "plausible defense" against the counterparty's case.[10] The Respondent asserts that in this case it has shown – at a minimum – a plausible case.[11]

iii. The Respondent Seeks Reasonable Security in the Form of a Bank Guarantee

24. The Respondent seeks an order requiring the Claimant to provide an unconditional and irrevocable bank guarantee for an amount of USD 4 million from a first-class international bank according to the model attached as Annex 1 to its Application.[12]

25. The Respondent argues that the requested security is appropriate given the costs already incurred by the Respondent (USD 2.2 million in legal fees), and in light of available data as to the total fees typically incurred by respondent States in investment arbitration proceedings.[13]

26. Furthermore, the Respondent notes that investment treaty tribunals have repeatedly concluded that an irrevocable bank guarantee, such as the one requested by the Respondent, is the least burdensome form of security. Unlike other forms of security, obtaining a bank guarantee ordinarily will not require the Claimant to put up the full value of the ordered security but only partial collateral required by a guaranteeing bank.[14]

[10] Application, ¶13, citing *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on the Respondent's Application for Security for Costs, 13 April 2020 ("***Kazmin v. Latvia***"), ¶ 28 (RL-0120); *RSM v. Saint Lucia*, ¶ 74; and *Manuel García Armas v. Venezuela*, ¶ 205.
[11] Application, ¶13. In this regard, the Respondent refers the Tribunal to its Counter-Memorial, § II.
[12] Application, ¶14.
[13] Application, ¶¶15-17. The Respondent refers to a study according to which average State fees and costs for defending an ICSID arbitration where the claimant has sought between USD 250 million and USD 1 billion is USD 5.4 million, excluding the tribunal's costs. M. Hodgson, Y. Kryvoi, D. Hrcka, British Institute of International and Comparative Law, *2021 Empirical Study: Damages and Duration in Investor-State Arbitration*, Figure 39 (RL-0136).
[14] Application, ¶19.

iv. The Circumstances in this Case Justify the Security for Costs

27. The Respondent agrees with the Claimant that an order for security for costs requires exceptional circumstances. According to the Respondent, this requirement is met in the present case.[15]

28. However, the Respondent disagrees with the Claimant's characterization of how the requirement of exceptional circumstances should be and has been interpreted in arbitral jurisprudence, including in cases such as *Orlandini v. Bolivia* and *Tennant v. Canada*.[16] Contrary to what is suggested by the Claimant, the Respondent contends that the circumstances described in *Tennant v. Canada* are merely "*non-cumulative examples of circumstances that would individually establish the necessary exceptional circumstances.*"[17]

29. In broad terms, the Respondent refers to three types of circumstances in support of its Application.

30. First, the Respondent argues that the Claimant has substantially and unnecessarily increased the Respondent's legal costs by (1) submitting several substantive requests and motions to the Tribunal outside the procedural calendar, which have been all summarily rejected; (2) filing an extraordinarily long Memorial and set of document requests; and (3) sending requests and proposals to the Respondent's counsel only to later withdraw such requests or proposals.[18]

[15] Reply, ¶12.
[16] Reply, ¶12, referring to the Response, ¶168, where the Claimant cites *Tennant Energy v. Canada*, Procedural Order No. 4, 27 February 2020 ("***Tennant v. Canada***"), ¶ 174 (CL-0301-ENG) and *Orlandini v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019 ("***Orlandini v. Bolivia***"), ¶142 (CL-0293-ENG).
[17] Reply, ¶13. The Respondent further argues that the decisions in *Orlandini v. Bolivia* and *Tennant v. Canada* confirm that a claimant's improper behavior in the proceedings at issue, such as that which interferes with the efficient and orderly conduct of the proceedings, is proof of exceptional circumstances.
[18] Application, ¶¶25-26.

31. The Respondent provides a number of examples of the Claimant's conduct that are allegedly improper and abusive[19] and amount to the kind of exceptional circumstances that are regularly considered by investment treaty tribunals in ordering security for costs. [20]

32. Among the examples of conduct provided, the Respondent submits that the Claimant has failed to comply with several of the Tribunal's document production orders requiring compliance with key requests made by Nicaragua.[21] According to the Respondent, such *"deliberate attempt to conceal relevant documents further underscores Claimant's extraordinary conduct, as well as the necessity and urgency for ordering security for costs*."[22] The Respondent submits that the Claimant's conduct "*impedes Nicaragua's presentation of its defense*" and would "*accordingly welcome an additional order from the Tribunal compelling production for Respondent's Request Nos. 11, 12, 13, and 15*."[23] Should the Claimant refuse to produce any further documents, the Respondent would request adverse inferences at the appropriate time.[24]

33. Second, the Respondent argues that the limited documents produced by the Claimant in this case demonstrate that it would be unable to pay an adverse award on costs.[25]

34. In particular, the Respondent notes that the Claimant's bank account statements from December 2013 to December 2018 show that the Claimant never had more than US$55,000 in its account. Also, the Claimant's U.S. tax return for 2018 – the most recent financial information the Claimant disclosed – reveals that there was no cash in its accounts at the end of the tax year and only a balance of US$52,832 at the beginning of the tax year.[26]

35. According to the Respondent, the documents produced by the Claimant confirm that its only significant asset is Inagrosa, which is illiquid and cannot cover short-term debt obligations,

[19] The Respondent provides examples of this conduct in ¶¶29-46 of its Application and ¶¶6-10 and 14-18 of its Reply.
[20] Application, ¶¶21-22, 46.
[21] Application, ¶42.
[22] Application, ¶43.
[23] Application, ¶43.
[24] Application, ¶43.
[25] Application, ¶27.
[26] Application, ¶47; Reply, ¶38.

such as an adverse award of costs. Hence, the Respondent argues that the Claimant is essentially a hollow holding company for Inagrosa.[27]

36. The Respondent further observes that the capital accounts of the Claimant's partners are protected by the laws of Kansas and cannot be collected against to satisfy the Claimant's liabilities.[28] At the same time, the Claimant's tax returns show that its partners, including Mr. Melvin Winger and Ms. Mona Winger, have significant assets.[29]

37. The Respondent asserts that the documents produced evidence a deliberate strategy of using the Claimant's corporate form to shield its partners' underlying assets against a potential cost award.[30] The Respondent maintains that the recent decision of the arbitral tribunal in *Nord Stream 2 AG v. the European Union* highlights the difficulties faced by a respondent when enforcing an award of costs against a holding company whose partners have significant assets, which is the case here.[31]

38. The Respondent further notes that the Claimant has still not produced a single financial statement in breach of Procedural Order No. 6 and reserves the right to request that the Tribunal draw the appropriate adverse inferences.[32]

39. Third, the Respondent argues that on 30 June 2022, counsel for the Claimant disclosed that it was acting on a contingency fee basis. According to the Respondent, the arrangement also underscores the Claimant's inability to cover short term obligations, such as an adverse costs award, and is consistent with the Claimant's strategy of bringing its case only through a judgement-proof entity.[33]

[27] Application, ¶47; Reply, ¶40.
[28] Application, ¶47; Reply, ¶40.
[29] Application, ¶48; Reply, ¶40.
[30] Application, ¶48.
[31] Application, ¶49; Reply, ¶41.
[32] Application, ¶50.
[33] Application, ¶51.

40. The Respondent moreover contends that counsel for the Claimant has a history of bringing meritless claims against States.[34]

v. <u>The Security for Costs is Urgent and Was Requested Promptly</u>

41. The Respondent argues that its Application is urgent because the Claimant's "*erratic conduct has compounded its costs throughout these proceedings—so far resulting in approximately $2.2 million in fees—and shows no sign of stopping.*"[35]

42. The Respondent submits that, contrary to the Claimant's position, its Application was filed promptly. The Respondent notes that it gradually over time acquired the knowledge and suffered the unreasonable mounting costs that justify its Application.[36] According to the Respondent, the Claimant's "*continuing pattern of conduct—combined with its impecuniosity, as confirmed by its productions during the document production phase—establish the urgency of Nicaragua's Application in the manner anticipated by the tribunal in* <u>Kazmin</u>."[37]

43. The Respondent further contends that its good faith deferral of its Application from mid-August until beginning of October to accommodate the circumstances of the Winger family and of Mr. Appleton "*should by no means be taken as a delay in submitting its Application for security for costs*."[38]

[34] Reply, ¶¶28-29. The Respondent further points out that the Claimant was never serious about its quantum case. For the Respondent, this is shown by the Claimant's volatile position on its own damages, having voluntarily reduced the damages initially requested in its Opening Memorial by over 50% in its Reply Memorial. Reply, ¶30.
[35] Reply, ¶23.
[36] Reply, ¶21.
[37] Reply, ¶22, citing *Kazmin v. Latvia*, ¶29.
[38] Reply, ¶24.

vi. <u>The Respondent's Request for Security for Costs is Proportional</u>

44. The Respondent maintains that its right to security for costs "*far outweighs Riverside's burden to comply with a security for costs order,*"[39] considering (i) that the amounts sought and the type of warranty proposed by the Respondent are reasonable; and (ii) that the Claimant's partners appear to have substantial funds.[40]

45. The Respondent also observes that the Claimant is pursuing its claim based on a contingency fee arrangement with its counsel, who have presumably deferred receipt of legal fees throughout the pendency of the proceeding. Hence, the Respondent submits that a security for costs would not affect the Claimant's arrangement with its counsel and the Claimant would therefore be able to continue pursuing its claim.[41]

46. In contrast, according to the Respondent, it "*enjoys no such security.*"[42] If the Tribunal were to order an adverse costs award against the Claimant, the Respondent would be "*an unsecured creditor seeking to enforce that costs award against a judgment-proof limited liability corporation*."[43]

47. Finally, in response to the Claimant's argument that the requested bank guarantee is flawed, the Respondent contends that the proposed bank guarantee is standard and asks that the Tribunal order a security for costs in the form and terms that it deems appropriate.[44] However, "*strictly in the alternative,*" the Respondent would be willing to accept a formal written guarantee enforceable under Colorado law from the Claimant's ultimate beneficial owners—Ms. Winger de Rondón and Mr. Rondón—to the effect they jointly and personally accept liability for satisfying any future adverse costs award against Riverside up to the amount of USD 4 million.[45]

[39] Application, ¶52.
[40] Application, ¶52; Reply, ¶34
[41] Application, ¶54.
[42] Application, ¶55.
[43] Application, ¶55.
[44] Reply, ¶36.
[45] Reply, ¶37.

B. THE CLAIMANT'S POSITION

i. The Claimant's General Comments

48. The Claimant submits that provisional orders under Article 47 of the ICSID Convention are discretionary and that the Tribunal "*should not exercise its discretion to impose a security for costs order at this very late date in this arbitration*."[46] According to the Claimant, "[s]*hould the Tribunal grant Nicaragua's Application, it would not only undermine but potentially obliterate Riverside's right to access to justice by obstructing its ability to finance its defense through its principal asset*."[47]

49. The Claimant argues that, in any event, the Respondent has failed to establish the existence of exceptional circumstances necessary for an order for security for costs to be made, specifically the required elements of necessity, urgency and proportionality. Granting the Application would further "*severely prejudice Riverside*" and would therefore be disproportionate. According to the Claimant, the Application is also untimely and "*vexatious*."[48]

i. The Claimant Has Acted in Good Faith

50. The Claimant argues that it has acted in good faith. It has complied with each of the Tribunal's procedural orders, including orders for production of documents, is the proper claimant in this case and was not cognizant of the order of Nicaraguan courts when filing its complaint with the Tribunal in November 2022.

51. Specifically, the Claimant submits that it did not produce its financial statements because it has no obligation to prepare such statements under Kansas law, which does not require for a limited liability company such as the Claimant to prepare audited financial statements. As for Inagrosa's financial statements, there is no requirement for a private company such as Inagrosa to produce audited financial statements, and the Claimant has produced the

[46] Response, ¶43.
[47] Response, ¶16.
[48] Response, ¶44.

unaudited statements that were in its possession. The Claimant adds that it is also procedurally improper for the Respondent to make a request for production of documents in the context of an application for security for costs.

52. As for the Respondent's complaint that the Claimant has not produced its bank statements, the Claimant notes that the Respondent's request relates to documents that are 15-24 years old, and that it cannot produce documents it does not have. To the extent that the documents may still exist, they are in Inagrosa's premises in Nicaragua that are now under the control of the Respondent.

53. The Claimant submits that it is the proper Claimant, was entitled to bring the claim and had no obligation to bring it in the name of Melvin and Mona Winger. Riverside was the primary vehicle for the investment in Inagrosa, and the Claimant has not sought "*to shield its partners' underlying assets against a potential cost award*."[49]

54. The Claimant also denies that it was "*cognizant of the Judicial Order in July 2022 yet supposedly failing to disclose this act in Riverside's October 2022 Memorial*."[50] According to the Claimant, it became aware of the order only in November 2022, as the earlier information received by the Claimant's local corporate counsel was not sufficient "*to impart an understanding of the Judicial Order*."[51]

ii. <u>The Respondent's Application Does not Meet the Requirements for Granting a Security for Costs</u>

55. The Claimant submits that the three "*key tests*" for granting a security for costs are (i) the existence of exceptional circumstances; (ii) proof of urgency; and (iii) proof of necessity.

56. In addition, according to the Claimant, several ICSID tribunals have concluded that a security for costs "*is not available in an ICSID arbitration because the expectation of a future costs award is too hypothetical to be considered a 'right.*'"[52] The Claimant further refers to the

[49] Response, ¶121.
[50] Response, ¶127.
[51] Response, ¶128.
[52] Response, ¶146.

Queen Mary Third Party Funding Report, which states that "*the vast majority of tribunals required proof of abusive conduct before security for costs was ordered*."[53]

57. The Claimant argues that the Respondent's Application fails at the outset since the Claimant is not impecunious as its primary asset – the land at Hacienda Santa Fe – is currently valued at USD 98 million. The Claimant notes that, if the property is illiquid, it is the Respondent that has caused the illiquidity.

58. The Claimant maintains that, in any event, the Respondent has failed to demonstrate that exceptional circumstances exist in the present case. In particular, the Respondent has failed to show that the Claimant has not complied with the Tribunal's orders, or that it has otherwise acted in bad faith. According to the Claimant, the Respondent must demonstrate exceptional circumstances "*beyond a mere lack of funds to warrant further inquiry into the Claimant's funding terms much less the extraordinary remedy of security for costs*."[54] The Respondent has failed to do so.

59. The Claimant also argues that the Respondent's Application does not meet the requirement of urgency. Indeed, Nicaragua's Application is late since the Respondent was aware of the Claimant's contingency fee arrangement already since June 2022. The Respondent has failed to discharge its burden of proof regarding urgency.

60. The Claimant submits that the Respondent has failed to demonstrate necessity since a party has no entitlement to reimbursement of its costs, as determined by several investment treaty tribunals. According to the Claimant, "[t]*he harm caused by the lack of payment of an award is highly hypothetical*" since it depends on the Tribunal's exercise of its discretion to shift costs.[55] The Claimant points out that it has paid all requests for advances on time. The harm that the Claimant would suffer if the Application were granted clearly outweighs the harm that the Respondent would suffer.

[53] Response, ¶177.
[54] Response, ¶206.
[55] Response, ¶242.

61. The Claimant further submits that, as determined by investment treaty tribunals, impecuniosity is not an exceptional circumstance. According to the Claimant, "[w]*hile Riverside's financial standing has been impacted due to the situation with the occupation of its lands and the destruction of the operation of its Nicaraguan subsidiary, such matters do not justify a security-for-costs order when Riverside has complied with its commitments to date in this arbitration*."[56] On the contrary, "*a security for costs award would place an undue detrimental burden upon Riverside's access to justice in this arbitration*."[57]

62. Finally, the Claimant argues that the form of the draft bank guarantee provided by the Respondent is inappropriate as it would allow the Respondent to "*call upon the guarantee at any time in its exclusive judgment over any matter that could, in Nicaragua's self-judgment, constitute a violation of Procedural Order No. 2*."[58] The Claimant notes that there is no mention in the guarantee that Procedural Order No. 2 merely sets out the Tribunal's initial procedural schedule.

IV. THE TRIBUNAL'S ANALYSIS

63. The Parties agree that the relevant provisions for the purposes of the present decision are Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), which set out the general rules for recommendation of provisional measures in ICSID arbitration.

64. Article 47 of the ICSID Convention provides:

> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

65. ICSID Arbitration Rule 39(1) further provides, in relevant part:

> *At any time after the institution of the proceedings, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the*

[56] Response, ¶302.
[57] Response, ¶305.
[58] Response, ¶330.

> *recommendation of which is requested, and the circumstances that require such measures.*
>
> … .

66. Thus, pursuant to Article 47 of the ICSID Convention, an ICSID tribunal may recommend provisional measures if "***the circumstances so require***." ICSID Arbitration Rule 39(1) similarly provides that the party requesting provisional measures "*shall specify … **the circumstances that require** such measures*." (Emphasis added.)

67. It is uncontested between the Parties that a party applying for a security for costs must establish, consistent with Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), as well as the jurisprudence of ICSID tribunals, the existence of "exceptional circumstances."

68. It is also uncontested between the Parties that, in light of the jurisprudence of ICSID tribunals, a party seeking interim relief must show that the requested measures are necessary, urgent and proportional.

69. The Tribunal notes the Claimant's argument that, under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), provisional measures are only available for the "preservation" of a party's rights. According to the Claimant, the expectation of a future cost award is too hypothetical to be considered a "right." The Claimant's position implies that an application for security for costs is not available at all in ICSID arbitration.

70. While early ICSID jurisprudence appears to provide some support for the Claimant's position, ICSID tribunals have predominantly taken the view that security for costs is in principle available in ICSID arbitration; however, the party applying for such measures must demonstrate the existence of exceptional circumstances within the meaning of Article 47 of

the ICSID Convention and ICSID Arbitration Rule 39(1).[59] The tribunal in *EuroGas v. Slovak Republic* summed up the position in these terms:

> *The Tribunal further notes that, as held in RSM v. Grenada, it is "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."*
>
> *As regularly held by ICSID arbitral tribunals, security for costs may only be granted in exceptional circumstances, "for example, where abuse or serious misconduct has been evidenced."*[60]

71. Similarly, in *Herzig v. Turkmenistan* the tribunal found that proving that the circumstances require a security for costs "*is the core challenge*," and that the respondent State "*bears the burden to demonstrate exceptional circumstances justifying the provisional measures sought*."[61] While noting that "*a party applying for security for costs must meet the high standard of 'exceptional circumstances*,'" the tribunal stressed that "*a party's impecunity, in and of itself, is not sufficient to meet the exceptional circumstances standard*."[62] The tribunal eventually granted, by majority, the respondent's application because *of "the explicit non-liability of the third-party funder for a costs award adverse to its funded party*."[63] In reaching its decision, the tribunal added that, while "*every party in arbitration faces some risk that it will be able to collect on a costs award, whether due to the opposing party's intransigence or insolvency*," "[h]*ere, however, because of the terms of the third-party funding contract,*

[59] *See, e.g., Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶¶41-42 (CL-294); *EuroGas Inc. and Belmont Resources v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, Decision on the Parties' Requests for Provisional Measures, 23 June 2015 ("***EuroGas v. Slovak Republic***"), ¶122; *Dirk Herzig v. Turkmenistan*, ¶47; *Kazmin v. Latvia*, ¶27, and *Libananco Holdings Co. Limited v. Turkey,* ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶ 57, (CL-0295-ENG).
[60] *EuroGas v. Slovak Republic*, ¶¶120-121 (footnotes omitted).
[61] *Dirk Herzig v. Turkmenistan,* ¶53.
[62] *Dirk Herzig v. Turkmenistan,* ¶¶50-55.
[63] *Dirk Herzig v. Turkmenistan*, ¶57. The *Dirk Herzig v. Turkmenistan* tribunal subsequently rescinded its order for security, based on the claimant's reconsideration request. See Christina Beharry, *Herzig v. Turkmenistan Requests for Security for Costs in ICSID Arbitrations Involving Third-Party Funded Insolvent Claimants*, ICSID Review - Foreign Investment Law Journal, Volume 36, Issue 1, pg. 17 (13 July 2021) (CL-0307-ENG).

Turkmenistan faces not a risk but, on the basis of the factual record before it [i.e., including that the claimant was bankrupt], *a certainty that it could not collect a costs award*."[64]

72. An UNCITRAL tribunal, having reviewed the jurisprudence under both the UNCITRAL Arbitration Rules and the ICSID Convention, summarized the exceptional circumstances requirement in these terms:

> *The Tribunal agrees with the tribunal in* Orlandini v. Bolivia *that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behavior 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 costs award; or (iv) other evidence of a claimant's bad faith or improper behavior*.[65]

73. Having carefully considered the evidence before it, the Tribunal finds that the Respondent has failed to show that the circumstances of this case are such that they require the Claimant to post security for costs.

74. First, while the Claimant's impecuniosity would not, in itself, constitute an exceptional circumstance justifying a security for costs, it is an element to be taken into account, together with other elements, when determining whether exceptional circumstances exist. However, in light of the evidence before the Tribunal, the Tribunal is unable to agree that the Claimant is impecunious. While Hacienda Santa Fe, the Claimant's primary asset in Nicaragua, is relatively illiquid, the liquidity of the Claimant's assets cannot be considered, without more, a sufficient consideration for the purposes of establishing impecuniosity or indeed exceptional circumstances.

75. Second, the Respondent has not established any other circumstances that could be considered exceptional. There is no evidence before the Tribunal of any past misconduct on the part of the Claimant, such as attempts to avoid payment of cost awards in prior legal proceedings. Nor is the Tribunal persuaded that the conduct of the Claimant or its counsel in the present

[64] *Dirk Herzig v. Turkmenistan,* ¶59.
[65] *Tennant v. Canada*, ¶174.

arbitration constitutes an exceptional circumstance justifying an order for security for costs. The question of whether the Claimant's conduct has resulted in additional and unnecessary costs for the Respondent is a matter for costs submissions, not for an application for security for costs. The Tribunal takes no view on the matter. Nor has the Respondent produced any evidence suggesting that the Claimant is seeking to move or hide assets to avoid any potential exposure to a costs award.

76. In the circumstances, the Respondent's application for security for costs stands to be dismissed.

77. Separately, but as part of its Application for security for costs, the Respondent also requests that the Tribunal order the Claimant "*to comply fully*" with the Respondent's document production requests Nos. 11, 12, 13 and 15 "*within 7 days of the Tribunal's order*," with a "*certification*" by the Claimant's counsel (i) that the Claimant has made diligent efforts to find the requested documents; (ii) detailing such efforts; and (iii) confirming that such documents do not exist or cannot be found despite diligent efforts.

78. Having considered the matter, the Tribunal finds that there is no basis for such order at this stage of the proceedings. The Tribunal has already, in Procedural Order No. 6, made an order for the production of the documents in question, and there is no basis, and indeed it cannot be considered proper, that the Tribunal issue the same order twice. Both Parties have a continuing obligation to produce the documents ordered by the Tribunal, should any such documents be located at any stage of the present proceedings. Should either Party consider that the other Party has failed to comply with its document production obligations, the appropriate step for such Party is to request that the Tribunal draw an adverse inference. If either Party makes such a request, the other Party will be given an opportunity to respond. The appropriate time to address this issue is at the latest at the main hearing, currently scheduled for July 2024.

V. ORDER

79. In light of the above, the Tribunal orders as follows:

(a) The Respondent's application for security for costs is denied;

(b) The Respondent's request that the Tribunal order the Claimant to comply with the Respondent's document production requests Nos. 11, 12, 13 and 15 is denied; and

(c) The Tribunal's decision on costs is reserved.

On behalf of the Tribunal,

Dr. Veijo Heiskanen
President of the Tribunal
Date: 20 December 2023