DE BRAUW
BLACKSTONE
WESTBROEK

Date: 5 January 2024

Arbitral Tribunal:
Ms. Claudia Salomon
Prof. Nassib G. Ziadé
Mr. José Emilio Nunes Pinto

REPLY TO CLAIMANT'S RESPONSE TO APPLICATION FOR SECURITY FOR COSTS

in the arbitration between:

Abdallah Andraous

Claimant

Counsel: Lindeborg Counsellors at Law, Charles Kotuby

against:

Kingdom of the Netherlands

Respondent

Counsel: Ministry of Foreign Affairs of the Kingdom of the Netherlands, De Brauw Blackstone Westbroek N.V.

1 INTRODUCTION

1. The present brief is submitted in reply to Andraous' Response (the "Response") to the Application for Security for Costs (the "Application") filed by the Kingdom of the Netherlands ("the Kingdom"). The Kingdom respectfully submits that the Response confirms that an order for security for costs is warranted in this case.

2. First, Andraous does not dispute that there is a serious risk that he has insufficient assets to pay the Kingdom's costs once the large debt owed by him under the judgments by the Curaçao Court of First Instance and the Curaçao Court of Appeal (the "Curaçao judgments") is enforced on his assets. He has also not provided any insight into his assets that could show otherwise, having previously chosen not to respond to the Kingdom's letters requesting such information.

3. The Curaçao judgments require Andraous, on appeal, to pay Ennia over USD 117 million, an amount that is likely to increase when a court-appointed quantum expert determines the extent of Andraous' liability for other unlawful conduct. Andraous does not allege (let alone demonstrate) that he has assets in an amount exceeding USD 117 million. In these circumstances, there is not merely a possibility, but a serious risk that the Kingdom will not have its costs reimbursed if costs are awarded in its favour.

4. Second, Andraous' inability to pay the Kingdom's costs is not the result of Andraous not being a large multi-national company, as he incorrectly suggests. It is the result of Andraous' unlawful conduct, for which the competent courts have held him liable and require him to compensate Ennia. The Kingdom cannot be expected to accept non-recourse for its costs because of a claimant's prior unlawful conduct and resulting debts.

5. The suggestion that the Curaçao judgments are somehow the result of the Kingdom's conduct, such that they must be disregarded for security for costs purposes, is without any basis. The Curaçao judgments determine that Andraous is liable for unlawful conduct committed by him well before the CBCS became involved in Ennia as of the Emergency Regulation adopted in July 2018. Andraous rightly does not allege in the Response (nor has he alleged in the Notice of Arbitration) that the Curaçao judgments themselves amount to a denial of justice, and they clearly do not.

6. For the same reasons the Tribunal is not asked to prejudge the merits of this case by deciding on the Application. As per Andraous' Notice of Arbitration, the merits of the case relate to the enactment of the Emergency Regulation and the CBCS' subsequent conduct after July 2018. By contrast, all the Application asks

is for the Tribunal to take the Curaçao judgments into account as evidence of Andraous' improper business conduct and large corresponding debts incurred well before the CBCS' involvement as of July 2018.

7. Third, Andraous has in the Response not substantiated that an order to provide security would preclude him from continuing this arbitration. Andraous refers to hypothetical situations where a security for costs order "could" preclude a claimant from doing so, but has not explained (let alone demonstrated) that that would be the case for him in these proceedings. Rather, the fact that Andraous has engaged counsel at significant hourly rates for an arbitration that would in his view last several years, suggests that Andraous presently does not lack the means to put up security, nor that an order would preclude him from continuing this arbitration.

8. Even assuming that some unexplained impediment would cause Andraous difficulty to put up security, he is at liberty to apply to the Tribunal and have that impediment assessed. The suggestion that an order to post security will raise an issue of access to justice is under any circumstance incorrect, as Andraous may at any time seek to enforce his alleged rights before the Dutch courts under Article 9(2)(a) of the bilateral investment treaty between Lebanon and the Kingdom (the "BIT"), where in his view no security for costs can be ordered against him (and where no indemnity costs orders can be awarded to begin with). Andraous has not alleged, nor has any basis to allege, that the Dutch courts would be insufficiently independent to hear his alleged BIT claims as expressly provided for in Article 9(2)(a) of the BIT.

9. Having chosen to submit the dispute to arbitration under Article 9(2)(d) of the BIT, i.e. arbitration under the UNCITRAL Rules which entails significantly higher costs for the Kingdom than a proceeding in the Dutch courts, Andraous must equally accept that he can be ordered to post security for costs. Given Andraous' record of improper business conduct and large outstanding debts, such an order is warranted as absent security, it is a certainty that the Kingdom will not have recourse for its costs.

2 THE TRIBUNAL HAS THE AUTHORITY TO GRANT SECURITY FOR COSTS

10. As set out in the Application,[1] the Tribunal has the authority to order security for costs. The basis for such an order lies in Article 9(2)(d) of the BIT, which contains the Kingdom's offer to resolve disputes under the BIT by arbitration "under the UNCITRAL Rules".[2]

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1 Application, para. 7.

2 **Exhibit CLA-001**, Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands (signed on 2 May 2002, entered into force on 1 March 2004).

11. As also set out in the Application,[3] pursuant to Article 26(1) of the UNCITRAL Rules, the Tribunal has the power to order a party to post security for costs.[4]

12. This does not appear to be in dispute. Andraous agrees that "tribunals have indeed interpreted Article 26 as broad enough to cover, or at least not exclude, interim measures in the form of security for costs applications filed by the Respondent State".[5] Andraous also cites further cases in support of this position, and alleges there is a "uniform and clear" standard applicable to security for costs applications under the UNCITRAL Rules.[6]

13. Thus, tribunals such as the *Tennant Energy v. Canada* tribunal – which Andraous relies on in his Response – have held that they have "the power under Article 26 of the UNCITRAL Rules to order security for costs in this arbitration."[7] The *Tennant Energy v. Canada* tribunal came to that conclusion notwithstanding the fact that the applicable investment treaty (NAFTA) did not contain an explicit provision on security for costs.[8]

14. This also dispels Andraous' suggestion – based solely on an article written by his counsel – that an order for security for costs would constitute an impermissible "'resolutive condition' on Respondent's unconditional consent to arbitrate".[9] It is not a condition to, but part of, the Kingdom's consent to arbitrate that such arbitration take place under the UNCITRAL Rules, including the authority under Article 26 of those rules for security for costs to be ordered by way of interim measure.

3 THE REQUESTED SECURITY SATISFIES THE LEGAL STANDARD

15. As set out in the Application,[10] an order for security for costs is warranted where (a) there is a reasonable risk that the applicant will not recover costs awarded in its favour if it prevails in the arbitration (necessity), and (b) such an order is not disproportionally harmful to the counterparty (proportionality).

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3 Application, para. 7.

4 **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro 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, paras. 187-191, **Exhibit RL-001**, *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 11, 14 July 2023, para. 91; **Exhibit CLA-028**, *Pugachev v. Russia* (Interim Award, 7 July 2017) UNCITRAL, para. 372; **Exhibit CLA-030**, *South American Silver Limited v. Bolivia* (Procedural Order No. 10, 11 January 2016) PCA Case No. 2013-15, para. 52.

5 Response, para. 11.

6 Response, paras. 11 and 12, fn. 24.

7 **Exhibit CLA-027**, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 171.

8 **Exhibit CLA-027**, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 168.

9 Response, para 6.

10 Application, para. 8.

16. According to Andraous, a successful application for security for costs must satisfy four slightly different criteria, namely that: (i) there is a *prima facie* reasonable possibility that the respondent will prevail in the case; (ii) there is a likelihood of harm not adequately reparable by an award of damages without the order; (iii) the potential harm without the order substantially outweighs the harm that the claimant would likely incur; and (iv) the condition of urgency is met.

17. While the Kingdom submits that the standard as set out in the Application is applicable, in the sections that follow, the Kingdom will set out that the requested security satisfies the legal standard advocated by either Party.

3.1 The requested security is necessary

18. As set out in the Application, this dispute presents exceptional circumstances that give rise to a serious risk that the Kingdom will not be able to recover its costs in these proceedings if awarded in its favour. In particular, the Application sets out:

(a) Andraous' improper business conduct for his own benefit and to the detriment of creditors, as shown by a track record of misappropriating and shifting assets of companies over which Andraous held influence – a pattern of conduct which was established in detailed judgments from the Curaçao Court of First Instance and the Curaçao Court of Appeal;[11]

(b) Andraous' shifting of personal assets for the benefit of himself and his close circle to the detriment of creditors;[12]

(c) The large outstanding amounts which Andraous owes under the Curaçao judgments, and which are likely to further increase;[13] and

(d) The uncertainty surrounding Andraous' financial situation, as a result of his refusal to disclose any information as to his ability to meet an adverse costs award despite repeated requests by the Kingdom.[14]

19. In the Response, instead of shedding any light on his financial situation, Andraous has sought to deny that his financial situation is relevant for the assessment of the Application.[15]

20. In doing so, Andraous misrepresents the Kingdom's position as "focus[ing] solely on the economic situation of the investor".[16] This is not the case, as the four items

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11 Application, Section 3.1.
12 Application, Section 3.2.
13 Application, Section 3.3.
14 Application, Section 3.4.
15 Response, para. 19.
16 Response, para. 20.

outlined above show. The starting point of the Application is Andraous' improper and unlawful business conduct to the detriment of creditors.

21. Additionally, Andraous has raised certain defences in relation to the Curaçao judgments. In the below sections, the Kingdom responds to the suggestion that it is somehow responsible for Andraous' improper and unlawful business conduct (Section 3.1.1), Andraous' attempt to re-litigate the findings of the Curaçao courts (Section 3.1.2) and the incorrect suggestion that the Curaçao judgments are merely "interlocutory" (Section 3.1.3).

3.1.1 The Kingdom is not responsible for Andraous' unlawful conduct

22. In the Response, Andraous alleges that, ultimately, "every instance of Claimant's alleged 'financial distress' relied upon by Respondent to seek security for costs was an instance caused by Respondent's own actions" and that granting security for costs would allow the Kingdom to take advantage of "[its] own wrong".[17] This is incorrect.

23. First, the several instances of unlawful conduct committed by Andraous, which the two Curaçao judgments establish and which are listed in the Application,[18] took place well before the CBCS became involved in Ennia through the adoption of the Emergency Regulation in July 2018. In particular:

- The sale of Ennia's interest in S&S to Parman Capital Group LLC ("Parman Capital") for "a much too low price",[19] for which Andraous was held liable in an amount of USD 117 million,[22] took place in June 2014, years before the Emergency Regulation of July 2018.[20]

- Andraous' involvement in large dividend payments and other distributions from Ennia to Parman International B.V. ("PIBV") on account of a deficient valuation of Mullet Bay occurred in the period 2009 through 2015,[21] long before the Emergency Regulation of July 2018.

- Andraous' unlawful payments to consultants for services rendered to Hushang Ansary ("Ansary") rather than Ennia (which nevertheless paid

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17 Response, para. 26.
18 Application, para. 16.
19 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 10.36.
20 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 10.36 and 13.2.
21 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.26.

for them) occurred in the period between 2014 and June 2018,[22] i.e. up to four years before the Emergency Regulation of July 2018.

- Andraous' approval of the personal use of private jets by Ansary, his co-shareholder in PIBV, at Ennia's expense to holiday destinations in the US, the Bahamas and Europe that had "no connection whatsoever with the business operations of Ennia",[23] occurred in the period 2008 through 2017, i.e. up to a decade before the Emergency Regulation of July 2018.[24]

24. The Kingdom was not involved in any way in Andraous' unlawful conduct, and certainly did not "cause" that conduct.

25. For the same reasons the Tribunal is not asked to prejudge the merits of this case when deciding on the Application. As per the Notice of Arbitration, the merits of the case relate to the adoption of the Emergency Regulation in July 2018 and the CBCS' subsequent conduct. As explained in the first substantive paragraph of the Notice of Arbitration, "[t]his application is a consequence of the decision of the [CBCS] to take over [Ennia], in which the Claimant has a shareholding",[25] with the Notice of Arbitration alleging that "by way of a supervision order [i.e. the Emergency Regulation], the CBCS took over [Ennia]"[26] and referring to the "CBCS's takeover in 2018".[27] By contrast, the Curaçao judgments evidence Andraous' improper business conduct and large corresponding debts incurred years before the CBCS' involvement as of July 2018.

26. Second, there is likewise no "wrong" committed by the Kingdom in relation to the judgments from the Curaçao courts. The Curaçao proceedings were and are being conducted in accordance with the applicable due process norms. Andraous has had every opportunity to present his case before independent judges, twice: in first instance and again in a *de novo* appeal before a three-member panel. Both courts have rendered extensively reasoned judgments establishing Andraous' liability.

27. Indeed, neither in the Response nor in the Notice of Arbitration does Andraous allege that the Curaçao courts have exhibited reproachable conduct, nor does he argue that the judgments amount to a denial of justice so as to make them

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22 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 12.20 and 12.76(b).
23 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 12.54.
24 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 12.55 and 12.76(f).
25 Notice of Arbitration, para. 3.
26 Notice of Arbitration, para. 9.
27 Notice of Arbitration, paras. 30 and 39.

unlawful under international law. Rightly so, as there is nothing in these judgments that amounts to a denial of justice.

28. There is accordingly no basis to disregard the judgments and the large debt and unlawful conduct of Andraous that they establish for purposes of this security for costs application. To the contrary, judgments from the Dutch courts establishing a debt of a Dutch national (Andraous) under Netherlands law for unlawful conduct that occurred within the Kingdom, are the best possible evidence of the existence of such debt and unlawful conduct.

3.1.2 Andraous' attempt to re-litigate the Courts' findings of his improper business conduct is without merit

29. In his Response, Andraous also seeks to re-litigate certain findings of the Curaçao judgments cited in the Application. This security for costs application is not the forum to do so. Andraous has had extensive opportunity, twice, to make allegations and present evidence before the Curaçao courts. Indeed, the points he is raising now have all been considered and assessed by the Curaçao courts, where they have been rejected for lack of merit.

30. Moreover, even if Andraous' attempts to re-litigate the judgments could be entertained in the context of the present application, they are without basis:

(i) In relation to the sale of S&S to Parman Capital for far too low a price, Andraous refers to "reports by PriceWaterHouse Coopers".[28] Such reports were extensively considered by the Court of Appeal. In fact, the Court of Appeal used these reports as evidence for the fact that S&S was sold "at a price that was far too low".[29] As the Court of Appeal notes, "in a valuation report that PwC had prepared on 25 April 2016 at the request of S&S, PwC arrives at an equity value of S&S between USD 690 and 770 million, which amounts to a valuation between USD 219 and USD 252 million for the 40%-interest of [Ennia]."[30] The Court of Appeal considered PwC's valuation (along with one other independent third-party valuation) to be a reflection of an "objective valuation" for which S&S should have been sold to Parman Capital,[31] and noted that S&S had in fact been sold to Parman Capital for USD 117 million below that valuation.[32]

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28 Response, para. 23(i).

29 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 10.25.

30 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 10.31.

31 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 10.32.

32 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 10.33.

It is further incorrect for Andraous to suggest that the Curaçao Court of First Instance did not rule on the sale of S&S and that "the matter was brought up for the first time before the Court of Appeal".[33] The Curaçao Court of First Instance held that the sale of S&S to Parman Capital "seriously prejudiced" Ennia's interests and was entered into despite much higher valuations existing at the time.[34]

(ii) In relation to the payment of dividends and distributions to PIBV on account of the deficient valuation of Mullet Bay, the Curaçao courts have likewise considered Andraous' defense that a "valuation was performed every two years" in relation to Mullet Bay.[35] The Court of Appeal rejected this defense, observing that all of these valuations were prepared by a local "sole proprietorship", whose sole staff was "not a member of any association of appraisers".[36] The Court of Appeal refers to these valuations as "superficial in nature", "insufficiently verifiable" and "rais[ing] further questions".[37] Ultimately, the Court of Appeal finds that the reports "offer entirely inadequate explanations for the significant increase in value [of Mullet Bay] over a period of a few months",[38] and that they are "too brief and too unsubstantiated to reasonably be used for the purpose for which they were used", namely a valuation of Mullet Bay in the books of Ennia of up to USD 422 million.[39]

The Court of Appeal also found that Andraous actively intervened so as to procure these high valuations: when a new international land valuation expert (CBRE) had determined a far lower value of Mullet Bay (namely USD 36 million), Andraous terminated the engagement of CBRE and sought a different valuator to perform the task.[40] When Ennia's accountant (KPMG) questioned the resulting valuation, KPMG was fired, and a different accounting firm (Baker Tilly) instructed. Baker Tilly would later in 2021 receive a disciplinary sanction for having been insufficiently critical with regard to the valuation of Mullet Bay.[41]

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33 Response, para. 23(i).

34 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment of 29 November 2021, para. 5.67; **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 10.2(ii) and (iii).

35 Response, para. 23(ii).

36 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.14.

37 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.14.

38 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.14.

39 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.19

40 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.22.

41 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.38.

(iii) In relation to the payment of Ansary's personal advisors from Ennia resources, Andraous' defense that the advisors "were working for Ennia and not Mr Ansary" was likewise considered by the Curaçao courts. The Curaçao Court of Appeal judgment found that there was no evidence that the services rendered by these advisors had benefitted Ennia, and that they had instead benefited Ansary.[42] Andraous' suggestion that terminating the contracts would have been more costly than continuing to pay for these advisors, even if true, is beside the point given that these costs should not have been for Ennia's account at all.

(iv) In relation to the payment of private plane trips to holiday destinations from Ennia resources, Andraous admits that there was no evidence before either of the Curaçao courts that "Ennia paid its share only" of those private plane trips. Andraous' unsubstantiated allegation that he may be able to furnish such evidence after all is hypothetical, and no basis to assume that both Curaçao courts erred.[43]

(v) In relation to the transfer of USD 100 million from Ennia to S&S, the Curaçao Court of First Instance held that the transfer had been made despite several warnings by CBCS that Ennia's solvency was at risk.[44] Specifically, Ennia was cautioned against loaning amounts to unregulated related parties (which were suffering large losses) and that funds should be transferred back to the insurers (Ennia Caribe Schade N.V., Ennia Caribe Zorg N.V. and Ennia Caribe Leven N.V.), so they could satisfy any (short-term) payment obligations.[45]

Against that background, the transfer of USD 100 million to a related entity instead of to the insurers did not make "good business sense" but, rather, caused a threat to Ennia's policy holders (i.e. its creditors). As held by the Curaçao Court of First Instance, the investment policies of Ennia under Ansary, Andraous and others was such that "the interests of [Ennia] and its policy holders were no longer paramount".[46] That the deposit was subsequently returned to Ennia is beside the point: the money should not have been transferred out of Ennia to begin with.

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42 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 12.21-12.24.

43 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 12.64, and 12.76(f).

44 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment of 29 November 2021, paras. 2.40, 5.40 and 5.42.

45 **Exhibit R-005-DUTCH**, Attachment request of Ennia against Andraous of 27 August 2020, paras. 12 and 13.

46 **Exhibit RL-007-DUTCH**, Curaçao Court of First Instance, Judgment of 29 November 2021, para. 5.43.

3.1.3 The Curaçao judgments establish Andraous' liability for large outstanding amounts

31. Finally, Andraous alleges in the Response that the Curaçao Court of Appeal judgment is merely "interlocutory", and that USD 316,044 is the only owed amount proven in this judgment.[47] This is incorrect.

32. First, in relation to the unlawful S&S transaction of 2014, the Curaçao Court of Appeal held that Andraous is liable to pay Ennia USD 117 million. As noted under the heading "Final Sum" at the end of the Court of Appeal judgment, "[t]he Court finds the claim of Ennia Investments (as legal successor to ECII) on S&S to be allowable in principle against Ansary, [redacted] and Andraous in the amount of USD 117 million."[48] This finding is final and not subject to further debate. While Andraous' request for mitigation of this obligation to pay damages remains to be addressed,[49] this has no bearing on the finding of liability. Considering the high threshold applicable to a mitigation defence – Curaçao law requires that an award of full compensation would result in "manifestly unacceptable" consequences[50] – the amount is unlikely to be mitigated in any substantial manner.

33. Second, in relation to the unlawful dividend and other distributions to PIBV, contrary to Andraous' dismissal of the Court of Appeal judgment as "not yet final", the finding of liability is final and not subject to further debate, with only the determination of quantum of damage being deferred to the assessment by a court-appointed expert.[51] As held in the Court of Appeal judgment, "[redacted] and Andraous are jointly and severally liable towards Ennia Holding for the improper fulfilment of duties during their time as directors."[52]

34. Third, in relation to the unlawful payments to consultants for services rendered to Ansary rather than Ennia, the Court of Appeal found Andraous liable for payments to [redacted] and [redacted] in the amount of NAf 455.000 and NAf 227.500 (or USD 316,044 in total),[53] as Andraous agrees.[54] This amount can increase in

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47 Response, paras. 23 and 24.

48 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 13.2.

49 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 10.63.

50 Curaçao Civil Code Book 6, Article 109(1): "If an award of full damages would lead to manifestly unacceptable consequences under the circumstances, including the nature of the liability, the legal relationship existing between the parties and their capacity to pay, the court may mitigate a legal obligation to pay damages."

51 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 11.39 and 13.3.

52 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.39.

53 **Exhibit RL-008-DUTCH,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 12.76(b).

54 Response, para. 24.

relation to the payments to PwC Houston following a further assessment by the court.[55]

35. Fourth, in relation to the excessive expenditures by Ennia to cover the personal use of private jets by Ansary, contrary to Andraous' dismissal of this issue as still before the Curaçao Court of Appeal, the finding of liability is final and not subject to further debate, with only the determination of quantum of damage being deferred to later assessment.[56] As the Court of Appeal held, '[redacted], [redacted] and Andraous are liable for Ennia Investments' damages during the period they were directors of Ennia Investments, consisting of the fixed costs associated with NetJets and the private flights to the extent that the costs for these were not reimbursed to Ennia Investments."[57]

36. In sum, the Court of Appeal judgment establishes that Andraous is liable for at least (a) USD 117 million in relation to the unlawful S&S transaction and (b) USD 316,044 in relation to the unlawful payments to consultants. Andraous does not allege – let alone demonstrate – that he has assets in an amount exceeding such amount. The Curaçao judgments also establish that Andraous is guilty of improper business conduct and has shifted or concealed assets to the detriment of creditors. Viewed separately or taken together, these exceptional circumstances illustrate that the requested security is necessary.[58]

37. Finally, Andraous' reference to the fact that collection of debts owed by another shareholder of PIBV, [redacted], has been suspended is irrelevant.[59] The liability of [redacted] (as a member of the supervisory board of Ennia Holding), was not considered proven by the Curaçao Court of Appeal. This is very different for Andraous, in relation to whom the Curaçao Court of Appeal established a liability of over USD 117 million,[60] with further damages to be determined by a court-appointed quantum expert.[61]

3.2 The requested security is urgent and prevents irreparable harm

38. While proof of urgency may be considered to be a requirement for provisional measures in general, arbitral case law is unclear that it is similarly required for applications for security for costs.[62] Even assuming an urgency requirement were to apply, tribunals have understood urgency to refer to a question that "cannot

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55 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, para. 12.76(b).
56 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, paras. 12.56 and 12.76(f).
57 **Exhibit RL-008-DUTCH**, Curaçao Court of Appeal, para. 12.76(f).
58 Application, paras. 10 and 12.
59 Response, para. 17.
60 See para. 36 above.
61 See above, Section 3.1.3.
62 **Exhibit RL-005**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH 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, para. 67.

await the rendering of the final award without running the risk of causing damage to Respondent that cannot be adequately compensated by way of damages".[63] This standard is met.

39. Considering the serious risk that Andraous will not be able to pay an adverse costs award as the Curaçao Court of Appeal has already established he is liable towards Ennia for an amount of over USD 117 million, the Kingdom is seeking security for costs with the aim to ensure that it will still be able to collect on a favourable costs award when the large Curaçao judgments are enforced on Andraous' assets and the aforementioned risk materialises. This relief cannot await the rendering of a final award, because by that time the Kingdom will have incurred the costs yet will have no recourse against Andraous absent security.[64] Absent security, the Kingdom would incur harm that cannot be compensated by damages in a final award, i.e. irreparable harm.

40. As such, there is a logical relationship between the elements of necessity and urgency: if an order for security for costs is necessary, then it cannot await a final award, and is thus urgent. It is for that same reason that the *Dirk Herzig v. Turkmenistan* tribunal considered that the applicant did not need to prove an urgent need for security for costs.[65]

3.3 The requested security would not disproportionally harm Andraous, and there is in any event no issue of access to justice

41. As set out in the Application, the order for security for costs that the Kingdom is seeking would not disproportionately harm Andraous.[66] In particular, the requested security is:

(a) In a form that is the least burdensome to the counterparty, i.e. a bank guarantee, or alternatively, any other form of security that the Tribunal deems appropriate;

(b) Essential given the serious risk of non-recourse the Kingdom is facing because of Andraous' significant debt obligations established in the Curaçao court judgments, proven track record of behaviour detrimental to creditors, and his potential impecuniosity; and

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63 **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro 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, para. 241.

64 **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro 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, paras. 240-241.

65 **Exhibit RL-005**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH 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, para. 67.

66 Application, paras. 33-39.

(c) In a proportionate amount and in line with amounts ordered by previous tribunals.

42. Moreover, the Application includes as an alternative relief that Andraous be ordered to provide satisfactory evidence of his assets in order to prove his ability to meet an adverse costs order.[67]

43. The Response confirms that the requested security would not be disproportionate.

44. First, Andraous has not alleged that he is unable to proceed with this arbitration if ordered to put up security in the limited amount requested, nor does he provide substantiation for any such allegation assuming it had been made. Rather, his Response is limited to a hypothetical suggestion that this "could" be the case, without any factual substantiation.[68]

45. Moreover, not having furnished any information about his assets, Andraous has not shown that the requested security if ordered would preclude him from continuing this arbitration. In those circumstances, such an order is not disproportionate.

46. Second, [redacted] and alleges that he is able to pay the Tribunal and ICSID fees. This suggests that at present, with the Curaçao judgments not yet enforced on Andraous' assets, he is able to put up security to cover the further expenses that he asks the Kingdom to incur in this arbitration.

47. Third, as stated in the Application, prior tribunals have taken the view that bank guarantees represent the least burdensome form of security.[70] The security requested by the Kingdom does not require Andraous to escrow EUR 3 million in cash. Rather, he would incur the far lower expense of funding a bank guarantee.[71] In practice, financial institutions generally charge a small percentage of the total guaranteed amount. Andraous has not alleged that he is unable to make payment of such a limited amount, nor would that be credible in

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67 Application, paras. 39 and 40.
68 Response, paras. 27 and 33.
69 Response, para. 45(ii)(a).
70 **Exhibit RL-005**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH 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, para. 65; **Exhibit RL-004**, *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, para. 66.
71 **Exhibit RL-005**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH 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, para. 65.

view of the amounts he has agreed to pay his counsel. Neither has Andraous denied that, if so ordered, he could obtain a bank guarantee.

48. Should a demonstrable event occur that would prevent Andraous from obtaining a bank guarantee after the provision of such security is ordered, Andraous will be able to apply to the Tribunal to explain such circumstances.[72] As noted in para. 42 above, the Application already includes an alternative relief that Andraous be ordered to provide satisfactory evidence of his assets in order to prove his ability to meet an adverse costs order.

49. Fourth, in any event the requested security does not pose an issue of access to justice. As Andraous rightly notes, access to justice requires that rights can be determined by "competent judicial, administrative or legislative authorities" and that there are "appropriate mechanisms for addressing claims".[73] Access to justice does therefore not require an arbitral authority to determine claims, certainly not exclusively.

50. Even assuming that Andraous would lack the means to put up security for purposes of this arbitration (in such form and amount as ordered by the Tribunal), he is at liberty to enforce his alleged BIT rights before the Dutch courts under Article 9(2)(a) of the BIT, where in his view no security for costs can be ordered against him (and where in any event no indemnity costs can be awarded).[74] Andraous has not alleged, nor has any basis to allege, that the Dutch courts would be insufficiently independent to hear BIT claims as expressly provided for in Article 9(2)(a) of the BIT.

51. In sum, any possible harm to Andraous would not outweigh the potential harm to the Kingdom without the order.

3.4 There is a reasonable possibility of a costs award in favour of the Kingdom

52. As noted in the Application, some tribunals have also considered whether *prima facie* there is a reasonable possibility that an award would be rendered in favour of the applicant.[75]

53. Even assuming such a requirement applies, it does not require a showing that the Kingdom "will likely prevail on merits and quantum", as Andraous suggests.[76] Such a standard would require the Tribunal to engage in an inappropriate pre-judgment of the merits. As held in *Nord Stream 2 v. EU*, "to decide otherwise

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72 **Exhibit RL-005**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH 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, para. 65.

73 Response, paras. 29 and 30.

74 Response, para. 36.

75 Application, para. 9.

76 Response, para. 15.

would require the Tribunal to pronounce itself on issues of liability, which would be inappropriate at this stage".[77]

54. Instead, tribunals have ordered security for costs on the basis that it was reasonably possible that an award in the applicant's favour be made.[78] Andraous has failed to cite authority for the proposition that an award in the applicant's favour must be "likely", with none of the three precedents cited by him containing support for this contention. For instance, in *RSM v. Santa Lucia* the tribunal ordered security on the basis that the Respondent's position was "at least plausible" and its future claim for costs was "not evidently excluded".[79]

55. Accordingly, it is sufficient – certainly at an early stage of the proceedings – that there is a reasonable possibility that an award be rendered in favour of the Kingdom, whether for lack of jurisdiction, merits or damage. This applies all the more where Andraous has not filed his Statement of Claim, and states that he is yet to share his first substantive submissions with the Tribunal.[80] The Kingdom cannot be expected to disprove a case that has not yet been made, nor can the Tribunal asses it.

56. In any event, the Kingdom submits that there is a reasonable possibility that (i) the Kingdom will prevail in these arbitration proceedings and that (ii) the Kingdom will be awarded all or a portion of its costs. Without presenting its arguments in full in this submission, the Kingdom intends to put forward a number of jurisdictional objections to Andraous' claims that are each of a serious and substantial nature.

- First, Andraous cannot be regarded as a protected 'investor' within the meaning of the BIT in a dispute against the Kingdom. As Andraous admits,[81] he is a Dutch-Lebanese national. His Lebanese nationality is not his dominant and effective nationality. As also held by the *García*

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77 **Exhibit RL-001**, *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 11, 14 July 2023, para. 92.

78 **Exhibit RL-001**, *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 11, 14 July 2023, para. 92; **Exhibit RL-003**, *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, para. 74; **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro 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, para. 204.

79 Response, para. 15; **Exhibit RL-003**, *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, para. 74.

80 Response, para. 43.

81 Notice of Arbitration, para. 62.

Armas v. Venezuela tribunal, this is a *prima facie* serious and substantial jurisdictional objection.[82]

- Second, Andraous does not hold a protected 'investment' with respect to Ennia. Andraous never 'made' an investment as required by the BIT. His 1% shareholding in PIBV, which in turn holds Ennia, was merely allotted to him, and involved no direction or contribution from Andraous. Nor can Andraous, as a 1% indirect shareholder in Ennia, have been intended to qualify as a protected investor with an investment within the meaning of the BIT. In fact, not having done so with the Notice of Arbitration, Andraous is yet to furnish proof that he actually holds shares in PIBV at all.

- Third, Andraous' claim to salary and pension rights does not qualify as a protected investment within the meaning of the BIT either. Neither salary nor pension rights are an investment within the ordinary meaning of that term, nor do they fall within the BIT's definition of investment.

57. There is at least a reasonable possibility that the Kingdom will prevail on one or more of these objections. Moreover, these proceedings have been bifurcated on the issue of jurisdiction as per the Parties' agreement and with the Tribunal's consent. Bifurcation would not have been appropriate had there been no such reasonable possibility.

58. Andraous' allegation that there would be a reasonable prospect of an award of costs against the Kingdom is incorrect and beside the point.[83] Andraous does not allege that the Kingdom offers insufficient recourse should an award in Andraous' favour be made, and is at liberty to make his own application to the Tribunal should this be any different.

59. Since there is at least a reasonable possibility that the Kingdom will prevail, there is also a reasonable possibility that an award of costs will be made in its favour, as per the rule contained in Article 40(1) of the UNCITRAL Rules that "the costs of arbitration shall in principle be borne by the unsuccessful party".[84] The ICSID cases cited by Andraous[85] are not relevant for these purposes since the ICSID Convention contains no such rule.

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82 **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro 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, para. 204.

83 Response, para. 16.

84 **Exhibit RL-002-SPANISH**, *Domingo García Armas, Manuel García Armas, Pedro 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, para. 205.

85 Response, para. 10 and fns. 20 and 21.

3.5 The requested security is not discriminatory

60. Finally, Andraous' references to Articles 3(2) and 3(5) of the BIT and to certain provisions of Dutch procedural law are misplaced in the context of the present security for costs application.

61. First, Article 3(2) of the BIT concerns treatment of 'investments', not procedural rules applicable to an arbitration under the BIT. Dutch investors cannot bring an investment treaty-based arbitration against the Kingdom at all, confirming that Article 3(2) does not apply to the procedural rules of an arbitration under the BIT. With respect to investors from other States, the Kingdom has not agreed that such investors will not have to provide security for costs if they commence arbitration proceedings against the Kingdom under a treaty. Article 3(5) of the BIT equally relates to the treatment of investments and is for the same reason not applicable to the procedure applicable to an arbitration under the BIT.

62. Second, Article 224 of the Dutch Code of Civil Procedure pertains to Dutch court proceedings only (where there is hardly a need for security for costs because an indemnity costs order can generally not be awarded under Dutch law). The provision does not deal with arbitrations under the UNCITRAL Rules (where indemnity costs orders can be awarded), and the provision certainly does not provide for a "more favourable" treatment for an UNCITRAL arbitration.

4 NO BASIS FOR AN INTERIM AWARD ON COSTS

63. At the closing of his Response, Andraous requests the Tribunal to "adequately sanction" the Kingdom for submitting the Application, alleging that it was submitted "in bad faith to delay or harass the opposing party".[86]

64. This accusation is unfounded. The Kingdom's attempts to gain clarity on Andraous' funding and assets are not harassment, but legitimate concerns around recourse on a party with an appeal judgment in excess of USD 117 million[87] outstanding against it. The Kingdom has repeatedly attempted to resolve these concerns without the Tribunal's involvement. Andraous could have avoided the Application by providing a satisfactory response to either of the Kingdom's letters,[88] but has instead refused to respond.

65. Likewise, the Application has not delayed the proceedings or led to any changes in the agreed timeline. To the contrary: the Kingdom had originally considered filing the Application together with a motion to bifurcate.[89] The Tribunal took note

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86 Response, paras. 41-44.
87 See para. 36 above.
88 **Exhibit R-007**, Letter of the Ministry of Foreign Affairs to Andraous of 6 July 2023; **Exhibit R-008**, Letter of the Ministry of Foreign Affairs to Andraous of 9 October 2023.
89 Preliminary hearing of 2 November 2023, Recording transcript, lines 331-334.

of this and indicated that the Kingdom should file the Application when it deemed appropriate if it considered the matter to be urgent.[90] As bifurcation was ultimately agreed upon between the Parties and consented to by the Tribunal, the Kingdom considered there was no reason to further delay the submission of the Application.

66. This is all the more so given that the Kingdom incurs costs to defend this arbitration on an ongoing basis that it will not be able to recoup from Andraous absent security.

67. Lastly, there is no indication of bad faith in the Application. To the contrary, the order sought by the Kingdom is reasonable, both in terms of amount and form.[91]

5 ORDER SOUGHT

68. On the basis of the foregoing, the Kingdom respectfully maintains its request that the Tribunal:

(a) order Andraous to provide, within 15 days from the order, security for any costs award that may be made in favour of the Kingdom in these proceedings in the form of an irrevocable guarantee from a first-class international bank in the amount of EUR 3 million or in such other form or amount as the Tribunal deems appropriate;

(b) in the alternative, order Andraous to provide evidence of solvency within 40 days such that both the Tribunal and the Kingdom are satisfied that Andraous will be able to meet prospective costs order(s) in these proceedings;

(c) dismiss Andraous' request for an interim award on costs; and/or

(d) order Andraous to undertake any other measures as the Tribunal deems fit.

Respectfully submitted on behalf of the Kingdom of the Netherlands.

[redacted]

Ministry of Foreign Affairs of the Kingdom of the Netherlands
De Brauw Blackstone Westbroek N.V.

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90 Preliminary hearing of 2 November 2023, Recording transcript, line 335.
91 See Section 3.3 above.