UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
ARBITRATION RULES (1976)

ABDALLAH ANDRAOUS

Claimant

v.

KINGDOM OF THE NETHERLANDS

Respondent

PROCEDURAL ORDER NO. 3

DECISION ON SECURITY FOR COSTS

Arbitral Tribunal

Ms. Claudia Salomon (Presiding Arbitrator)
Prof. Nassib G. Ziadé
Mr. José Emilio Nunes Pinto

Secretary of the Tribunal

Mr. Felipe Aragón

Representative of ICSID

Mr. Alex B. Kaplan

28 November 2024

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I. INTRODUCTION

1. Mr. Abdallah Andraous ["**Claimant**"] initiated these proceedings by Notice of Arbitration dated 7 February 2023[1] against The Kingdom of the Netherlands ["**Respondent**"], under the Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands, signed on 2 May 2002, which entered into force on 1 March 2004 [the "**Lebanon-Netherlands BIT**" or the "**Treaty**"]; and pursuant to the 1976 UNCITRAL Arbitration Rules ["**UNCITRAL Rules**"] and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [the "**UNCITRAL Transparency Rules**"].[2] Claimant and Respondent shall be jointly referred to as the **Parties**.

2. As described below, this Procedural Order No. 3 ["**PO 3**"] sets forth the Tribunal's reasons for denying Respondent's Request for Security for Costs ["**Request**"].

II. PROCEDURAL BACKGROUND

3. On 5 December 2023, Respondent submitted its Request, with Exhibits R-001 to R-008 and legal authorities RL-001 to RL-009.

4. On 12 December 2023, the Tribunal invited Claimant to file a response to the Request.

5. On 22 December 2023, Claimant submitted its Response to the Request ["**Response**"], with exhibits C-033 to C-035 and legal authorities CL-001 to CL-053.

6. On 28 December 2023, Respondent sought leave from the Tribunal to file a reply to the Response.

7. On that same day, the Tribunal granted the Parties an opportunity to file a second round of submissions regarding the Request.

8. On 5 January 2024, Respondent submitted its reply ["**Reply**"].

[1] Notice of Arbitration of 7 February 2023, Amended Version ["**Notice of Arbitration**"].
[2] Terms of Appointment, para. 23.

9. On 19 January 2024, Claimant submitted its rejoinder ["**Rejoinder**"], with additional legal authorities CL-054 to CL-057.

10. On 22 February 2024, Claimant submitted its Statement of Claim, together with exhibits C-036 to C-089 and legal exhibits CLA-058 to CLA-230.

11. On 22 May 2024, Respondent submitted its Statement of Defence on Jurisdiction, with exhibits R-010 to R-052 and legal authorities RL-010 to RL-061.

12. On 30 August 2024, the Tribunal communicated its decision to reject Respondent's Request, with reasons to follow.

13. On 1 October 2024, Claimant submitted its Reply on Jurisdiction, together with exhibits C-090 to C-115 and legal exhibits CLA-231 to CLA-262.

14. Having deliberated and taking into consideration the arguments and evidence submitted by the Parties, the Tribunal now provides its reasons for its decision.

1. FACTUAL BACKGROUND TO THE DISPUTE

15. The Tribunal will provide a succinct account of the facts underlying the dispute, based on the Parties' main submissions, without prejudging the Parties' cases.

16. The Tribunal takes note that, in its Reply on Jurisdiction, Claimant requested the Tribunal to disregard Section 2 of Respondent's Statement of Defence on Jurisdiction, where it provides a "factual background to the jurisdictional objections."[3]

17. Respondent's account of the facts of this case, as detailed in its Statement of Defence, provide the grounds on which Respondent bases its jurisdictional objections. Additionally, together with Claimant's summary of the factual background of the case set forth in its Notice of Arbitration and Statement of Claim, it offers the Tribunal the context within which the request security for costs is made. Accordingly, the Tribunal sees no

[3] Reply on Jurisdiction, para. 6, citing to Statement of Defence on Jurisdiction, para. 10; See also Reply on Jurisdiction, para. 137 (i).

reason to exclude from the record Section 2 of Respondent's Statement of Defence on Jurisdiction.

18. In any case, any determination of the facts in considering Respondent's Request is made on a *prima facie* and *pro tem* basis and is subject to a complete review after the Parties have filed all their pleadings and submitted the relevant evidence.

Claimant

19. Claimant is a French-Lebanese national,[4] who held a shareholding interest in Ennia Caribe Holding NV ("**Ennia Holding**"), the holding company of an insurance group in Curaçao, composed of Ennia Zorg NV, Ennia Leven NV and Ennia Shade NV [the "**Insurers**"]. The Insurers serve 50% of the insurance market in Curaçao representing approximately 50,000 policyholders.[5]

20. The group also has other investment vehicles not directly related to the insurance business:

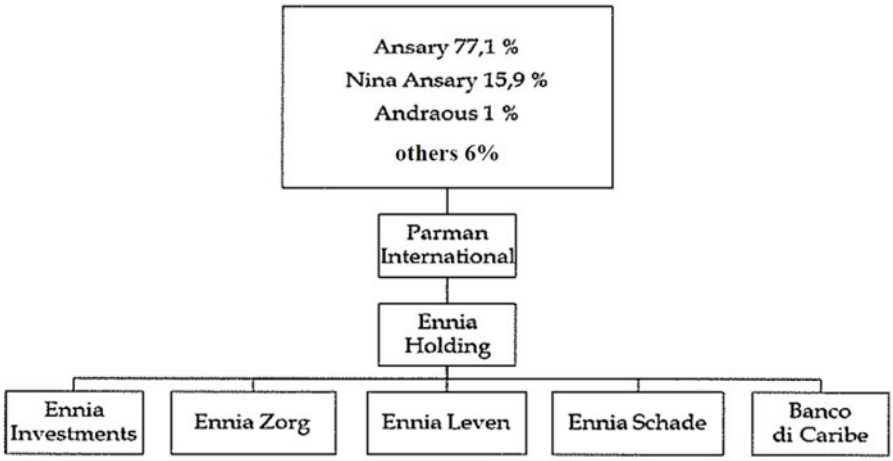
- EC Investment BV ["**Ennia Investments**"]: an investment vehicle through which the Insurers would make certain investment to generate returns for the policyholders. Around 2018, the Insurers had made loans to Ennia Investments in exchange for fixed interest payments for this purpose. Around that time, Ennia Investments held USD 280 million in cash and marketable securities.[6]

- Parman International BV ["**Parman**"], a holding company above Ennia Holding, which in turn held two assets unrelated to the insurance business, Banco di Caribe NV ["**Banco di Caribe**"] and Sun Resorts Ltd. NV ["**Sun Resorts**"], that were contributed to the capital of Ennia Holding.[7]

[4] Statement of Claim, para. 5. Between 2000 and 2023 Claimant was also a national of the Kingdom of the Netherlands.
[5] Notice of Arbitration, paras. 3, 10.
[6] Notice of Arbitration, para. 11.
[7] Notice of Arbitration, para. 12.

- Stewart & Stevenson ["**S&S**"], a US company focused on the oil and gas sector, at the relevant time controlled by the majority shareholder of the group.[8]

21. The corporate structure with the main entities of the group ["**Ennia Group**"] is as follows:[9]



22. Claimant has been managing director of Parman since 7 July 2005. In December 2011, he was allotted shares in Parman for his past and continuing services. Additionally, Claimant was the director of Ennia Holding, Ennia Investments and the Insurers, until 4 July 2018.[10]

The original structure of the Ennia Group

23. In 2005 and 2006, Mr. Hushang Ansary – who would become the majority shareholder of the Ennia Group of companies – acquired its majority interest in Ennia Holding, which in turn held the Insurers. To do so, on 20 December 2005, through his holding company Parman, he first acquired 50.1% of the shares in Banco di Caribe. He would later make a capital increase of Banco di Caribe of NAf 98.5 million by contributing shares he held in another company, Sun Resorts.[11]

[8] **Exhibit C-027**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, para. 2.55.
[9] Notice of Arbitration, para. 10.
[10] Notice of Arbitration, para. 13; Statement of Claim, para. 18.
[11] **Exhibit C-027**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 2.15.

24. On 5 January 2006, Banco di Caribe acquired Ennia Holding from its majority owner, Delta Lloyd Antilles NV:[12] and Banco di Caribe contributed the Sun Resorts shares to Ennia Holding for a value of NAf 100 million,[13] thus structuring the Ennia Group as a vertical concern.[14]

25. On 20 July 2006, Mr. Ansary established Ennia Investments as a subsidiary of Ennia Holding. Ennia Investments became responsible for all investments of the Ennia Group, using the funds of the Insurers, creating intercompany receivables between the Insurers and Ennia Investments (or Ennia Holdings)[15], and channeling these investments into other companies related to the group such as S&S and Sun Resorts.[16]

CBCS's request for the change in the corporate structure

26. On 11 March 2009, the Central Bank of Curaçao and St. Maarten ["**CBCS**"] requested the Ennia Group to change its corporate structure, stating that:[17]

> "From a supervisory perspective it is imperative to increase the transparency within the [Banco di Caribe]-group. Therefore, you should restructure [Banco di Caribe]- group by separating the banking entities, the insurance entities, and the nonbanking/ insurance entities from each other. This means that [Ennia Holding] is no longer allowed to be a subsidiary of [Banco di Caribe] […].
>
> The capital of the (immediate) parent company of the separated entities must at all times equal the sum of the capital of all its immediate subsidiaries. Furthermore, all supervised subsidiaries must be adequately capitalized and meet all our supervisory guidelines at all times. […]."

[12] **Exhibit C-027**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 2.10-2.13.
[13] **Exhibit C-027**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 2.15.
[14] Notice of Arbitration, para. 16.
[15] **Exhibit C-027**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 2.18.
[16] **Exhibit C-027**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 2.19-2.22.
[17] **Exhibit C-044**, Letter from the CBCS to BDC dated 11 March 2009; **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, para. 2.24.

27. The corporate structure was then amended to have Ennia Holding as the parent company, with the Insurers and Banco di Caribe as subsidiaries, as depicted in para. 21 *supra*.[18]

The CBCS's concerns regarding solvability of the Insurers

28. In 2015, the CBCS raised concerns regarding the solvability requirements of the Insurers. The assets of the Insurers consisted in a substantial extent of intercompany receivables against Ennia Holding and Ennia Investments. In the CBCS's view, this was not in compliance with the solvency regulations, and it urged the Ennia Group to remedy this situation and cease the issuance of loans from the Insurers to Ennia Holding and Ennia Investments.[19]

29. On 4 August 2016, the CBCS requested Ennia to implement certain measures such as avoiding further loans to and receivables from affiliated entities and repaying or reducing existing loans within a period of not more than three years. The CBCS granted the Ennia Insurance Companies a period of three years, until August 2019, to restructure their investments [the "**Grace Period**"].[20]

30. Between 2016 and 2018 the CBCS and the Ennia Group held discussions to address the situation and considered options for restructuring the group, to bring it back to the solvency requirements set by the CBCS.[21] Within these consultations, on 31 May 2018, Ennia Holdings adopted the Restructuring Agreement, with a proposal for the restructuring.[22]

31. On 22 June 2018, Ennia Investments, represented by Claimant, and S&S, represented by Mr. Ansary, signed an **Investment Management Agreement**, by which S&S would manage USD 250 million of Ennia Investments in return for an interest of 6.5% p.a. An initial transfer of funds of USD 100 million would be made, with the remaining funds to

[18] **Exhibit C-045**, Letter from [redacted] (BDC) to the CBCS dated 9 April 2009.
[19] **Exhibit C-016**, Curaçao Court of First Instance, Parma International B.V. v Central Bank of Curaçao and St Maarten, Judgment of 31 January 2019, ECLI:NL; OGEAC:2019:15, paras. 2.6-2.7.
[20] **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, para. 2.42; **Exhibit RL-008,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 3.42; **Exhibit C-047**, Letter from the CBCS to Ennia dated 4 August 2016, pp 2-3.
[21] **Exhibit C-16**, Curaçao Court of First Instance, Parma International B.V. v Central Bank of Curaçao and St Maarten, Judgment of 31 January 2019, ECLI:NL; OGEAC:2019:15, paras. 2.8-2.10.
[22] **Exhibit C-9**, Restructuring Agreement dated 31 May 2018.

be transferred on later dates. On that same day Ennia Investments transferred USD 100 million to S&S pursuant to the Investment Management Agreement.[23]

32. The documents in the file suggest that this transaction may have prompted the CBCS to revoke the license to the Insurers on 13 July 2018,[24] prior to the expiry of the Grace Period.

The Emergency Declaration

33. On 4 July 2018, at the request of the CBCS, the Curaçao Court of First Instance ["**Court of First Instance**"] pronounced a declaration of emergency ["**Emergency Declaration**"] under Article 60 of the National Insurance Supervision Ordinance [the *Landverordening Toezicht Verzekeringsfedrijf*, hereinafter the "**LTV**"], on the grounds that, according to the CBCS:[25]

- The Ennia Group had serious solvency deficit;
- The assets belonging to the group were being withdrawn from the supervision of the CBCS through Ennia Holding and Ennia Investments; and
- The ultimate shareholders of the Ennia Group were failing to comply with the CBCS's instructions to remedy the situation.

34. To safeguard the interests of the Insurers' creditors (the policyholders), the Court of First Instance adopted an emergency scheme under Article 60 of the LTV, whereby the CBCS would take control of the Ennia Group to restructure it to restore the solvency ratios.[26]

[23] **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, para. 2.47.
[24] **Exhibit C-16**, Curaçao Court of First Instance, Parma International B.V. v Central Bank of Curaçao and St Maarten, Judgment of 31 January 2019, ECLI:NL; OGEAC:2019:15, paras. 2.11-2.13; **Exhibit C-13**, Curaçao Court of First Instance, Central Bank of Curaçao and St Maarten v ENNIA Caribe Holding N.V. et al., Judgment of 4 July 2018, ECLI:NL: OGEAC:2018:160, para. 3.2; **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, para. 2.49. See also Statement of Defence, paras. 46-47.
[25] **Exhibit C-13**, Curaçao Court of First Instance, Central Bank of Curaçao and St Maarten v ENNIA Caribe Holding N.V. et al., Judgment of 4 July 2018, ECLI:NL: OGEAC:2018:160, para. 3.5.
[26] **Exhibit C-13**, Curaçao Court of First Instance, Central Bank of Curaçao and St Maarten v ENNIA Caribe Holding N.V. et al., Judgment of 4 July 2018, ECLI:NL: OGEAC:2018:160, paras. 3.7-3.10 and 4.1-4.3.

35. Parman petitioned the Court of First instance for interim measures suspending the Emergency Declaration and ordering the CBCS to engage in consultations with the Ennia Group to find an amicable solution; on 31 January 2019, the Court of First instance dismissed this application.[27]

36. To this date, the supervision and control of the CBCS over the Ennia Group continues.[28]

37. Claimant asserts that the CBCS has spent around USD 16.5 million in legal fees at the expense of Ennia's funds, without restructuring or solving the situation; in fact, according to Claimant, the solvency deficit has increased since the CBCS took control of the companies.[29]

38. Further, Claimant argues that the CBCS has refused to share with the former directors and shareholders of the Ennia Group the financial statements, resolutions and decisions taken since the takeover in 2018, leaving the shareholders and Ennia Group's directors in the dark with respect to the management and financial situation of the companies.[30]

39. Claimant argues that the Ennia Group was in compliance with the solvability requirements and there was no need or urgency to adopt the Emergency Declaration. It adduces a 2016 Asset Liability Management Study[31] which would show that the Ennia Group's solvency was sound, with a solvency ratio above 100%.[32] Claimant further asserts that there was never imminent, real and substantial harm to the creditors: all policyholders have been paid on time – except for two of them, according to the Emergency Declaration.[33] In Claimant's view, any alleged solvency issues was entirely due to the horizontal structure imposed by the CBCS in 2009 that created intercompany accounts.[34]

[27] **Exhibit C-16**, Curaçao Court of First Instance, Parma International B.V. v Central Bank of Curaçao and St Maarten, Judgment of 31 January 2019, ECLI:NL; OGEAC:2019:15, para. 5.
[28] Notice of Arbitration, paras. 29-30.
[29] Notice of Arbitration, para. 30.
[30] Notice of Arbitration, para. 39; Statement of Claim, para. 47 (x).
[31] **Exhibit C-5**, Asset Liability Management Study 2016.
[32] Notice of Arbitration, para. 31.
[33] Notice of Arbitration, para. 34.
[34] Notice of Arbitration, para. 31.

40. And in any case, Claimant asserts that the solvency issue adduced by the CBCS could have swiftly been resolved through the restructuring that the Ennia Group agreed to undertake in the May 2018 Restructuring Agreement.[35]

The liquidation of assets of the Ennia Group

41. The CBCS has undertaken actions to liquidate some of the assets of the Ennia Group:

42. First, in June 2022 the CBCS sold the Banco di Caribe to United Group Holding BV ["**United**"].

43. Claimant alleges that the owner of United is a local businessman with close ties to the Managing Director of the CBCS, [redacted]; and that the transaction was made for NAf[36] 120 million, well below Banco di Caribe's book value of NAf 180 million. According to Claimant, Banco di Caribe was solvent and profitable, and there was no reason to make that sale pursuant to those terms.[37]

44. Second, the CBSC has the intention of selling Mullet Bay, a 67.7 hectares plot of land in St. Maarten, which includes a hotel and a golf course, and that is one of the main assets of Sun Resorts, which is one of the companies that is part of the Ennia Group.[38]

45. Claimant asserts that the CBSC wrongfully considers the value of Mullet Bay to be artificially high. While the Ennia Group values the plot in an amount ranging from USD 292 million in December 2006 to USD 419 million in June 2019, the CBSC considered a significant lower value of USD 96.4 million in January 2021.[39] Claimant also argues that the CBSC is seeking to sell Mullet Bay to a third party for a low price with an expropriatory intent.[40]

[35] Notice of Arbitration, para. 33.
[36] Netherlands Antillean guilder.
[37] Notice of Arbitration, paras. 42-43; Statement of Claim, paras. 72-76.
[38] Notice of Arbitration, para. 44.
[39] Notice of Arbitration, para. 46.
[40] Notice of Arbitration, para. 50; Statement of Claim, paras. 83-97.

The 2021 Judgment

46. Under the control of the CBSC, the Ennia Group companies sued the former directors and shareholders of the group, for damages estimated at over NAf 1.1 billion[41] (approximately USD 550 million), as a result of their alleged unlawful conduct pertaining to the management and supervision of the Group and of the Insures' funds. According to Ennia (now controlled by the CBSC), the former directors and shareholders had transferred the Insures' funds to entities not controlled by the Insurers nor supervised by the CBSC, to make not sufficiently secured investments not suitable for an insurer. Ennia further argued in these proceedings that the Insurers assumed all the risk of the operations while yielded no benefit from those transactions. Further, the directors extracted funds from Ennia in the form of capital withdrawals, dividend, or unrelated expenses in prejudice of the Insurers.[42]

47. On 29 November 2021, the Court of First Instance issued a judgment [the "**2021 Judgment**"] concluding that the former directors and shareholders had breached their special duty of care incumbent on directors and supervisors of insurance companies and had caused significant damages to Ennia, for which they were liable.[43]

48. Claimant was held jointly and severally liable with other co-defendants to pay approximately NAf 237 million.[44]

49. Claimant and his co-defendants appealed the decision and on 12 September 2023, the Curaçao Court of Appeal issued its ruling [the "**2023 Judgment**"] concluding that:

- Claimant is jointly and severally liable to pay USD 117 million for sales of shares in S&S held by the Ennia Group at a price below market price;[45]

[41] **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, p. 2.
[42] **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 4.1-4.2.
[43] **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 5.148-5.149.
[44] **Exhibit C-27**, Court of First Instance of Curaçao, ENNIA Caribe Holding N.V. et al. v Hushang Ansary et al., Judgment of 29 November 2021, Case No. CUR201903842/3843/3796/3844/3845/3846, paras. 5.149 and 6.1-6.7.
[45] **Exhibit RL-008,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 13.2.

- Claimant is liable for unlawful distribution of dividends based on the overvaluation of Mullet Bay. A court-appointed expert would determine the final compensation owed;[46]

- Claimant is jointly and severally liable to pay USD 316,044 for his conduct with respect to amounts improperly paid by Ennia to advisors who did not rendered services to the companies of the group.[47]

- Claimant is jointly and severally liable for Ennia Investments' damages consisting of the fixed costs associated with travel expenses not related to the Ennia's business. A court-appointed expert would determine the final compensation owed.[48]

50. To this date, the CBCS's intervention of the Ennia Group is ongoing.[49]

51. On 11 April 2024, the CBCS and the government of Curaçao and Saint Maarten signed an outline agreement to continue with the restructuring of the Ennia Group.[50]

2. CLAIMANT'S CLAIMS

52. In this arbitration, Claimant requests the Tribunal:[51]

- Declare that Respondent breached its Treaty obligations;

- Order Respondent and the CBCS to cease its plans for the sale and further depletion of assets of Ennia, including but not limited to Mullet Bay;

- Order Respondent and the CBCS to abstain from negotiations and consultations with third parties that would prevent the enforcement of the Treaty and the award Claimant seeks;

[46] **Exhibit RL-008,** Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 11.39, 13.3.
[47] **Exhibit RL-008,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 12.76(b).
[48] **Exhibit RL-008,** Curaçao Court of Appeal, Judgment of 12 September 2023, para. 12.56 and 12.76(f).
[49] Notice of Arbitration, paras. 29-30.
[50] **Exhibit R-013**, Central Bank of Curaçao and Sint Maarten Press Release regarding the Ennia Resolution: Signing of the Outline Agreement, 11 April 2024.
[51] Notice of Arbitration, para. 93; Statement of Claim, para. 178.

- Order Respondent to allow Claimant to access documents necessary for its claim, including all audited financial statements and asset liability management studies of Ennia Holdings and of the Insurers for the period 2017-2021; and

- Order Respondent to restore Claimant in its proprietary rights as per the date of the intervention, including compensation.

3. RESPONDENT'S JURISDICTIONAL OBJECTIONS

53. In its pleadings regarding the application for security for costs, Respondent advanced the jurisdictional objections that it wished to raise and that have been submitted with the Statement of Defence, namely that:[52]

- Claimant is not an "investor" under the Lebanon-Netherlands BIT because during the relevant time he was a Dutch-Lebanese national and his Lebanese nationality was not his dominant and effective nationality;[53]

- Claimant did not make a protected "investment" under the Lebanon-Netherlands BIT because his 1% indirect shareholding in Ennia Holding was allotted to him as compensation for work done in his capacity as Director of the Ennia companies, and thus it involved no contribution from Claimant;[54] and

- Claimant's salary and pension rights do not qualify either as protected "investments."[55]

[52] Reply, para. 56.
[53] Statement of Defence, paras. 2-5 and Chapter 3.
[54] Statement of Defence, paras. 6-8 and Chapter 4.
[55] Statement of Defence, paras. 9-10 and Chapter 5.

III. THE REQUEST FOR SECURITY FOR COSTS

1. RESPONDENT'S POSITION

54. Respondent requests that the Tribunal:[56]

> (a) order Claimant to provide, within 15 days from the order, security for any costs award that may be made in favor of Respondent 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 Claimant to provide evidence of solvency within 40 days such that both the Tribunal and Respondent are satisfied that Claimant will be able to meet prospective costs order(s) in these proceedings;
>
> (c) dismiss Claimant's request for an interim award on costs; and/or
>
> (d) order Claimant to undertake any other measures as the Tribunal deems fit.

1.1 THE TRIBUNAL'S AUTHORITY AND THE LEGAL STANDARD

55. Respondent asserts that the Tribunal is empowered to order a security for costs as an interim measure under Article 26(1) of the UNCITRAL Rules.[57]

56. In Respondent's view, the Tribunal should solely assess the following two circumstances to decide whether the security for costs is justified:[58]

57. First, to assess whether the measure is necessary in light of the reasonable risk that the applicant will not be able to recover the costs awarded in its favor, *i.e.*, the *necessity requirement*. Respondent asserts that prior investment tribunals have considered that there is a reasonable risk that the State applicant will not be able to recover the costs if there is evidence that:[59]

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[56] Reply, para. 58; See also Request, para. 40.
[57] Request, para. 7. Reply, paras. 11-12.
[58] Request, para. 8.
[59] Request, para. 10, with reference to **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, paras. 78, 81; **RL-004**, *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, Decision on the Responden's Application for Security for Costs, 13 April 2020, paras. 41, 59; **Exhibit RL-006**, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, para. 143.

- The claimant engaged in improper behavior or business practices;

- The claimant shifted or concealed assets in a way that it would limit their exposure to creditors; or[60]

- The claimant has a track-record of non-payment of costs awards or court orders in prior proceedings.

58. Second, to examine whether the security for costs order will disproportionally harm the counter-party, i.e., the *proportionality requirement*: the Tribunal must strike a balance between the prejudice caused to the applicant were the security for costs would not be granted, such as the inability to recover its costs; and the prejudice to the other party, such as its inability to pursue their claim and access to justice or denial thereof.[61]

59. Respondent submits that the above two criteria are sufficient for the Tribunal to award security for costs.[62] In any case, Respondent asserts that it also satisfies the two additional requirements that Claimant considers applicable for a security for costs to be successful, namely:[63]

60. First, there is a *prima facie* reasonable possibility that the applicant will prevail in the case.[64] Respondent acknowledges that certain investment tribunals have considered the *prima facie* requirement when assessing applications for security for costs;[65] however, it disagrees with Claimant that the applicant must show that it "will likely prevail on merits and quantum."[66] Rather, Respondent suggests that the proper standard is the showing of a reasonable possibility that an award be rendered in favor of the applicant.[67]

[60] Request, para. 12.
[61] Request, para. 13.
[62] Reply, paras. 15-17.
[63] Reply, para. 17
[64] See also Request, para. 9.
[65] Request, para. 9.
[66] Reply, para. 53, citing to Response, para. 15.
[67] Reply, para. 55, with reference to **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.

61. The urgency criterion, which, according to Respondent, is a general requirement for provisional measures but not similarly required in a security for costs application.[68] Respondent cites to the decision in *Dirk Herzig v Turkmenistan* where the tribunal considered that the urgency criterion was not essential when assessing a security for costs application.[69] In any event, Respondent asserts that its application for security for costs satisfies this requirement.[70]

1.2 THE REQUIREMENTS ARE MET IN THIS CASE

62. Respondent contends that in this case, the Tribunal should order security for costs because all requirements are met:

A. The necessity requirement

63. The security for costs is required because there is a risk that Respondent will not be able to recover its costs in this arbitration.

64. First, the 2021 and 2023 Judgments have confirmed that Claimant has previously incurred in improper business conduct, including misappropriation of assets to the detriment of creditors of the companies over which he had control:[71]

- Claimant was involved in the unlawful sales of shares in S&S held by the Ennia Group to Parman, at price way below market price. Claimant allowed this transaction to go forward despite there being a clear conflict of interest: he allowed Mr. Ansary – who was both shareholder of Parma and chairman of the board and of the executive committee in S&S – to set the low price for the transaction in prejudice to the Ennia Group creditors. For this unlawful act, Claimant was held liable, jointly and severally with Mr. Ansary and another officer to pay the Ennia Group USD 117 million.[72]. In response to Claimant's assertion that PWC was

[68] Reply, para. 38, with reference to **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.
[69] Reply, para. 40.
[70] See para. 82 *infra*.
[71] Request, para. 16, citing to **Exhibit RL-007**, Curaçao Court of First Instance, Judgment of 29 November 2021, para. 5.68; **Exhibit RL-008**, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 10.27, 10.30.
[72] Request, para. 16, citing to **Exhibit RL-008**, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 3.55, 3.68, 10.25-10.27, 10.63. See also Reply, paras. 18-21.

involved in the determination of the price of this transaction, Respondent asserts that the Court took into account the PWC report when arriving to its conclusions that the sale was done below market price.[73]

- Claimant improperly allowed the distribution of funds from Ennia Holding to Parman based on an overvaluation of Mullet Bay.[74] The Court of First Instance held that Claimant was liable to pay USD 104 million; and the Court of Appeal confirmed Claimant improper conduct and determined that the final compensation for which he is liable shall be determined by a court-appointed expert[75]. Contrary to what Claimant asserts, the Court did consider all of Claimant's defenses in this matter, including his arguments concerning the proper valuation methods for the real estate involved.[76]

- Claimant unlawfully allowed Ennia to pay large amounts to advisors for services rendered not to the group, but to Mr. Ansary. He was held jointly and severally liable to pay USD 316,004 for this conduct.[77]

- Claimant allowed persons affiliated with the Ennia Group to charge excessive travel expenses to Ennia when these costs had nothing to do with the business.[78]

- Claimant – as a member of the investment committee of Ennia Investments – allowed the improper transfer of USD 100 million from this company to S&S, controlled by Mr. Ansary, with no benefit to Ennia Group or the policyholders.[79] It is irrelevant that the deposit was subsequently returned to Ennia Group; the money should have never been transferred out of the group.[80]

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[73] Reply, para. 30(i).
[74] Request, para. 16, citing to **Exhibit RL-008**, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 11.26, 11.39.; **Exhibit RL-007**, Curaçao Court of First Instance, Judgment of 29 November 2021, para. 5.105.
[75] Request, para. 16, citing to **Exhibit RL-008**, Curaçao Court of Appeal, Judgment of 12 September 2023, para. 11.39.
[76] Reply, para. 30(ii).
[77] Request, para. 16, citing to **Exhibit RL-008**, Curaçao Court of Appeal, Judgment of 12 September 2023, para. 12.29. See also Reply, para. 30(iii).
[78] Request, para. 16, citing to **Exhibit RL-008**, Curaçao Court of Appeal, Judgment of 12 September 2023, paras. 12.53-55.
[79] Request, para. 16, citing to **Exhibit RL-007**, Curaçao Court of First Instance, Judgment of 29 November 2021, paras. 5.42-5.43.
[80] Reply, para. 30(v).

65. All these determinations by the Curaçao courts confirm that Claimant has a track record of misappropriating and shifting assets of companies over which he holds influence, to the detriment of creditors.[81] In total, the Court of Appeal has determined that Claimant is liable to pay USD 117,316,044; an amount which is likely to increase, pending the quantum assessment of a court-appointed expert.[82]

66. Respondent rejects Claimant's assertion that the Judgments are not final:

- Respondent asserts that the finding with respect to the unlawful S&S transaction where Claimant was ordered to pay USD 117 million is final and not subject to further appeal, save for a mitigation request, which had no bearing on the liability finding. The mitigation request can only impact the quantum and in any event the threshold applicable is high, and thus, it is unlikely that the compensation owed will be significantly reduced.[83]

- With respect to the unlawful dividend distribution and the excessive expenditures by Ennia to cover personal use of private jets by Mr. Ansary, the finding on liability is also final; the only pending issue is the determination of the quantum by the court-appointed expert.[84]

- Finally, Claimant's reference to the fact that collection of debts owed by Ms. Nina Ansary, another shareholder of Parman, has been suspended in the US courts is irrelevant. The Curaçao Court of Appeal did not consider the liability of Ms. Nina Ansary proven.[85]

67. Second, in 2018, Claimant placed a sum of USD 500,000 out of his creditor's reach into a private trust fund – [redacted] – in the name of his son, through two loans of USD 250,000 each to the trust.

[81] Request, para. 17.
[82] Request, para. 23.
[83] Reply, para. 32.
[84] Reply, paras. 33 and 35.
[85] Reply, para. 37.

68. In light of these transactions, on 27 August 2020, the Ennia Group submitted an attachment request to the Court of First Instance requesting an order to freeze Claimant's assets, which was granted on 1 September 2020.[86]

69. Third, despite Respondent's requests to Claimant to provide adequate information regarding its assets to cover the cost of this arbitration, he has refused to share this information[87]. The only clarification given by Claimant is that he has no third-party funding arrangement that would meet an adverse costs order.[88]

70. In conclusion, Respondent asserts that the evidence of Claimant's improper business practices and his refusal to disclose its financial status, are sufficient to grant security for costs.[89]

Claimant's financial situation is not attributable to Respondent

71. Respondent rejects Claimant's assertion that his dire financial situation was caused by Respondent's unlawful conduct under the Treaty.

72. Respondent highlights that Claimant's unlawful business practices, which eventually led the Curaçao courts to establish his liability vis-à-vis the Ennia Group, occurred way before any involvement of the CBCS in the Ennia Group through the Emergency Declaration: the sale of Ennia's interests in S&S to Parman, the unlawful distribution of dividends from Ennia to Parman on account of a deficient valuation of Mullet Bay, Claimant's allowing payments from Ennia Group accounts to advisors for services rendered to Mr. Ansary and the traveling expenses allowed without connection to the business of the Group, all occurred prior to the CBCS's intervention of the Group in July 2018.[90]

73. Respondent also claims that there is no basis to disregard the conclusions of the Curaçao Courts with respect to Claimant's business practices because, in his Notice of Arbitration,

[86] Request, para. 19, citing to **Exhibit R-006**, Attachment order against Andraous of 1 September 2020.
[87] Request, paras. 24-27.
[88] Request, para. 26, citing to **Exhibit R-007**, Letter of the Ministry of Foreign Affairs to Claimant of 6 July 2023; **Exhibit R-008**, Letter of the Ministry of Foreign Affairs to Andraous of 9 October 2023.
[89] Request, paras. 29-32.
[90] Reply, paras. 22-23.

Claimant is not arguing he suffered a denial of justice by Respondent through these measures. In other words, Claimant does not challenge the conformity of the Curaçao courts' rulings with the Treaty.[91]

B. The proportionality requirement

74. Respondent asserts that the security for costs order would not disproportionately harm Claimant.

75. Respondent requests Claimant to provide a bank guarantee as security, which is the least burdensome form of security.[92] If later in the proceedings it is established that the security is no longer necessary, the bank guarantee may be revoked.[93]

76. The fact that Claimant has not engaged a third-party funder and that he has instructed counsel for these proceedings for the next 2.5 years, suggests that he has the financial means to pursue this arbitration and provide the security for costs.[94] Claimant has not explained why or how a security for costs would preclude him from continuing this arbitration.[95]

77. Even assuming that Claimant would lack the funds to put up a security for costs for the purposes of this arbitration, he is free to enforce his 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.[96]

78. Under these circumstances, Respondent asserts that there is no indication that Claimant's access to justice would be obstructed if ordered to post a bank guarantee of USD 3 million, an amount proportionate and in line with other amounts ordered by investment tribunals.[97]

[91] Reply, paras. 27-28.
[92] Request, para. 34; Reply, paras. 41, 47.
[93] Request, para. 35.
[94] Request, para. 36; Reply, para. 46.
[95] Reply, para. 44.
[96] Reply, para. 50.
[97] Request, paras. 36-37.

79. In the alternative, Respondent asks that the Tribunal order Claimant to provide satisfactory evidence of his assets in order to prove his ability to meet an adverse costs order.[98]

C. The *prima facie* requirement

80. Respondent asserts that there is a reasonable possibility that an award is rendered in its favor and that it will be awarded all or part of its costs. Respondent will put forward the following serious and substantial jurisdictional objections:[99]

- Claimant is not an "investor" under the Lebanon-Netherlands BIT because at the relevant time he was a Dutch-Lebanese national and his Lebanese nationality is not his dominant and effective nationality;

- Claimant did not make a protected "investment" under the Lebanon-Netherlands BIT because his 1% indirect shareholding in Ennia Holding was allotted to him as compensation for his work as director of the companies and involved no contribution from Claimant; and

- Claimant's salary and pension rights do not qualify either as protected "investments."

81. Respondent asserts that the proceedings have already been bifurcated to address these objections, and in its view, there is a reasonable possibility that it will prevail on one or more of these objections; and that an award on costs be rendered in Respondent's favor.[100]

D. The urgency requirement

82. Assuming the urgency criterion is applicable, Respondent sustains that it is satisfied in this case, because the security for costs cannot await the rendering of the final award: Respondent would incur costs thorough the proceedings that would ultimately be unable to recover; and the final award would not be capable of compensating Respondent's irreparable harm by way of additional damages.[101]

[98] Request, para. 39; Reply, para. 42.
[99] Reply, para. 56.
[100] Reply, paras. 57-59.
[101] Reply, paras. 38-39.

1.3 CLAIMANT'S ADDITIONAL DEFENSES

83. Claimant has argued that Respondent's application for security for costs would contravene the standards of protection contained in Articles 3(2) and 3(5) of the Treaty, pursuant to which a Lebanese investor should be accorded no less favorable treatment than Dutch investors; and to the extent possible, provisions of Dutch law that are more favorable than those of the Treaty should apply. These provisions are relevant because under Dutch law, security for costs is not generally allowed.

84. In response, Respondent asserts that this argument is misplaced: Articles 3(2) and 3(5) of the Treaty concern treatment of "investments," not procedural rules applicable to an arbitration under the Treaty. In any event, a Dutch national cannot seek protection under the Treaty; and Respondent has not agreed that other foreign investors will not have to provide security for costs if they commence an arbitration.[102]

85. Further, the Dutch Code of Civil Procedure concerns Dutch court proceedings only, and thus, is not applicable in this case, governed by the UNCITRAL Rules.[103]

1.4 THE TRIBUNAL SHOULD REJECT CLAIMANT'S REQUEST FOR AN INTERIM AWARD ON COSTS

86. Finally, Respondent asks the Tribunal to dismiss Claimant's request to sanction Respondent with an interim award on costs because Respondent's application for security for costs would have been allegedly made in bad faith and to delay these proceedings.

87. Respondent asserts that the application is unfounded and that its request is based on legitimate concerns regarding the possibility of recovering its arbitration costs from a counterparty with an appeal judgment in excess of USD 117 million.[104]

88. There is no indication that Respondent acted in bad faith by filing its application, nor that its request has delayed the proceedings or led to any changes in the procedural timetable.[105]

[102] Reply, para. 61.
[103] Reply, para. 62.
[104] Reply, para. 64.
[105] Reply, paras. 65-67.

2. CLAIMANT'S POSITION

2.1 THE TRIBUNAL'S AUTHORITY AND THE LEGAL STANDARD

89. Claimant argues that, under the applicable legal framework, the Tribunal is not expressly empowered to order security for costs:[106]

- The Lebanon-Netherlands BIT is silent regarding a security for costs order; in fact, the text of the Treaty suggests that security for costs is not allowed in proceedings instituted under the Treaty. Pursuant to Art. 9(2) of the Treaty, Respondent gave its "unconditional consent" to arbitrate disputes with Lebanese investors. A security for costs would be a condition limiting Respondent's consent to arbitrate disputes.[107]

- The UNCITRAL Rules and the Swiss International Arbitration Act grant the Tribunal the general authority to issue provisional measures, which in turn may be subject to the provision of security, but neither instrument offers guidance regarding the provision of security for adverse costs.[108]

90. Claimant acknowledges that some investment tribunals have considered that arbitral tribunal have the power to order security for costs under Article 26 of the UNCITRAL Rules but argues that the threshold for granting such measure is substantially higher than the one proffered by Respondent. Claimant asserts that the applicable standard is the one recently articulated by the tribunal in *Tennant Energy v. Canada*, where the applicant must prove exceptional circumstances and that it satisfies the following criteria:[109]

- the applicant would likely suffer harm not adequately reparable by an award of damages without the order;

- the applicant's potential harm without the order substantially outweighs the harm that the requested party would likely incur from the order;

[106] See Rejoinder, para. 6(a).
[107] Response, paras. 5-6.
[108] Response, para. 9.
[109] Response, para. 12, citing to **Exhibit CLA-027**, *Tennant Energy, LLC v. Canada* (Procedural Order No. 4, 27 February 2020) UNCITRAL, para. 173.

- there is prima facie a reasonable possibility that the applicant will prevail in the case; and

- the condition of urgency is met.

2.2 THE REQUIREMENTS ARE NOT MET IN THIS CASE

91. Claimant asserts that the requirements to grant a security for costs are not met in this case:

A. The necessity requirement

92. Claimant sustains that financial distress is not sufficient to satisfy the necessity requirement in the context of security for costs. Prior investment tribunals have looked at the *procedural conduct* of the investor and whether it has acted improperly in judicial or arbitration proceedings, for instance, by shifting assets to avoid costs award exposure, failing to pay outstanding advances for the arbitration costs or exhibiting otherwise bad faith conduct.[110]

93. In this case, there is no evidence that Claimant has engaged in this type of behavior. He has been timely making the payments for advance costs in these proceedings and has no prior delinquent behavior in payment in any other relevant proceedings.[111]

94. With respect to the Curaçao court rulings allegedly holding that Claimant has engaged in improper business conduct, Claimant asserts that these judgments are interim decisions and still subject to appeal. Further, Claimant is contesting the findings of the Curaçao court rulings in this arbitration,[112] *inter alia* because of the following reasons:

- Regarding the sales of shares in S&S for an allegedly low price, Respondent fails to mention that PWC was involved in the valuation of the transaction; further, Respondent's conclusions with respect to this transaction are solely based on the Curaçao court rulings (challenged in this arbitration), but has offered no additional independent experts or documentation to support its claims.[113]

[110] Response, paras. 19-21.
[111] Response, para. 21.
[112] Rejoinder, para. 3.
[113] Response, para. 23 (i).

- Regarding the valuation of Mullet Bay, Respondent fails to mention that the valuation by the former management of the Ennia Group was done every two years according to IFRS standards and confirmed by independent auditors. These valuations were provided to the CBCS on a yearly basis, which approved them until the takeover in 2018. And here, again, Respondent's only source is the rulings of its own courts, having failed to provide additional sources to substantiate its claim against Claimant of improper business practices.[114]

- With respect to the amounts paid to advisors for services allegedly rendered to Mr. Ansary, Claimant asserts that this is false: the services were provided to Ennia, and Claimant decided to continue paying these advisors until the end of their contract rather than terminating them prematurely and paying a significant fee.[115]

- Regarding the travel expenses, Claimant asserts that these cannot be substantiated because of the CBCS's intervention which denied Claimant access to the company documents.[116]

- On Respondent's allegations concerning the transfer of USD 100 million from Ennia Investments to S&S, Claimant asserts it was a deposit bearing interest of 6% p.a. that would have satisfied the 4% p.a. liability to pension policyholders, and this was to the benefit of Ennia. In any case, this deposit was returned to Ennia upon request of the CBCS.[117]

- Regarding Claimant's transfers to the [redacted], this was done in April 2018, long before any court case was stated against him. He transferred some amounts out of his life savings from personal revenue, which he was free to use as considered appropriate.[118]

[114] Response, para. 23 (ii).
[115] Response, para. 23 (iii).
[116] Response, para. 23 (iv).
[117] Response, para. 23 (v).
[118] Response, para. 24.

95. Claimant finally emphasizes that the damages ordered by the Curaçao courts are not still final; the only amount proven and immediately enforceable is the USD 316,044 confirmed by the Court of Appeal.[119]

96. In any event, Claimant asserts that Respondent cannot rely on the Curaçao court rulings to substantiate its application for security for costs.[120] Claimant's financial situation was wrongfully caused by Respondent's breaches of the Treaty; and thus, Respondent cannot be allowed to discredit Claimant's solvency through its own courts in order to impose obstacles to Claimant's ability to pursue its claims in this arbitration.[121]

B. The proportionality requirement

97. Claimant argues that investment protection under the Treaty could be rendered nugatory if security for costs would be routinely required from aggrieved investors after they have suffered and raised their grievances. By requesting security for costs, Respondent is seeking to condition the arbitral proceedings, denying Claimant its inherent rights under the Treaty.[122]

98. Claimant asserts that an order for security for costs in the amount of USD 3 million would impose a disproportionate burden on Claimant, which would impair his ability to pursue his claims in this arbitration and impede his access to justice.[123]

99. Additionally, Claimant asserts that Respondent's argument is flawed: on the one hand, Respondent suggests that the security for costs would not impede Claimant from pursuing his claim because he has ample financial resources to pay his legal team; on the other hand, it suggests that Claimant does not have enough financial resources to cover this arbitration, and thus, the security for costs is necessary.[124]

[119] Response, para. 24.
[120] Rejoinder, para. 3.
[121] Response, para. 26.
[122] Response, paras. 28-30.
[123] Response, para. 33.
[124] Rejoinder, para. 6(c).

C. The *prima facie* requirement

100. Claimant asserts that Respondent has failed to meet this requirement: merely stating that there is a reasonable possibility that an award will be rendered in its favor is not sufficient to justify the relief sought.[125]

101. Respondent has to show a (i) "reasonably possibility that the Respondent will prevail in the case" and that Respondent would (ii) likely suffer without adequate security at this early stage.

102. In this stage of the proceedings, it is too early to determine whether (i) there will be an award on costs against Claimant; and (ii) whether Claimant will refuse to pay such award.[126]

103. Prior investment tribunals have dismissed similar applications when the respondent is unable to satisfy this requirement, because the inquiry invites them to prejudge an unpled on a lean factual record. Tribunals will usually dismiss this type of application at an early stage of the proceedings where there are "strongly contested matters in dispute."[127] In this case, Respondent's application for security for costs rests solely on the findings of the Curaçao courts. These rulings cannot carry the weight and probative value that Respondent suggests, precisely because they form part of the international delict that is being discussed in this arbitration.[128]

104. In this case, Claimant's alleged unlawful conduct, and other shareholders and directors with respect to the management of the Ennia Group is a contested issue and not yet settled. For instance, the collection of debts owed by [redacted], who instituted proceedings against the CBCS based on the same events, has been suspended by the US courts.[129]

[125] Response, para. 15.
[126] Rejoinder, para. 6(b).
[127] Response, para. 15, citing to **Exhibit CLA-042**, *Al-Warraq v. Indonesia,* Award on Preliminary Objections, 21 June 2012, UNCITRAL, para. 109.
[128] Rejoinder, paras. 3-4.
[129] Response, para. 17, citing to **Exhibit C-033**, *Nina Ansary v. Central Bank of Curaçao and Sint Maarten*, Complaint filed in the US Federal Court for the District of Columbia, 17 January 2023.

D. The urgency requirement

105. As a final point, Claimant asserts that Respondent is required to prove that the harm it seeks to avoid through the security for costs, is imminent.[130]

106. In this case, however, Respondent has failed to state or prove the urgency of the measure that it is requesting.[131]

2.3 ADDITIONAL DEFENSES

107. Claimant also argues that an order for security for costs would violate Respondent's substantive obligations under the Treaty:[132]

- Art. 3(2) of the Treaty provides that Respondent shall provide Lebanese investors with treatment not less favorable that accorded to its own investors; and

- Art. 3(5) of the Treaty confirms that provisions of Dutch and international law shall apply to disputes under the Treaty to the extent that they are more favorable to the investor than those of the Treaty.

108. Under Dutch Law, Dutch and Lebanese citizens cannot be ordered to pay security for Respondent's costs in local proceedings.[133] Therefore, security for costs can neither be allowed in a treaty-based arbitral proceeding against Respondent where, as here, Claimant seeks redress from Respondent's unlawful conduct under the Treaty.[134]

2.4 THE TRIBUNAL SHOULD ISSUE AN INTERIM AWARD ON COSTS AGAINST RESPONDENT

109. Claimant asserts that Respondent's application for security for costs is made in bad faith to delay or harass Claimant.[135]

110. In light of this, the Tribunal should render an interim award on costs in Claimant's favor immediately upon dismissing Respondent's application, in the amount of GBP 64,750.[136]

[130] Response, para. 38.
[131] Response, para. 39.
[132] Response, para. 35.
[133] Response, paras. 34, 36-37.
[134] Response, para. 34.
[135] Response, paras. 40-43.
[136] Rejoinder, para. 7.

IV. THE TRIBUNAL'S DECISION

111. As discussed above, Respondent requests that the Tribunal adopt an interim measure ordering Claimant to provide an irrevocable guarantee from a first-class international bank in the amount of EUR 3 million to cover Respondent's arbitration costs if the Tribunal finds for Respondent and orders Claimant to reimburse its costs. Claimant opposes the request.

112. In making its decision, the Tribunal will: address the Tribunal's authority to adopt an interim measure ordering the provision of a security for costs; and apply the applicable legal standard for awarding security for costs to the facts of this case.

1. THE TRIBUNAL'S POWER TO ORDER SECURITY FOR COSTS

113. Claimant's first defense against Respondent's request is that the Tribunal has no authority to issue an order compelling Claimant to provide security to cover Respondent's arbitration costs. Respondent rejects this proposition and contents a security for costs order falls within the scope of Article 26 of the UNCITRAL Rules.

114. The Lebanon-Netherlands BIT is silent on the issue of provisional measures or security for costs orders.

115. Article 26 of the UNCITRAL Rules empowers the Tribunal to adopt interim measures that "[…] it deems necessary in respect of the subject-matter of the dispute."

> "Article 26
>
> 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
>
> 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
>
> 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

116. Similarly, Art. 183 of the Swiss International Arbitration Act – applicable to this arbitration seated in Geneva, Switzerland – sets forth that:[137]

> "Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order interim measures or conservatory measures.
>
> If the party concerned does not comply voluntarily with the measure ordered, the arbitral tribunal or a party may request the assistance of the competent court. The court shall apply its own law.
>
> The arbitral tribunal or the state court may make the interim or conservatory measures subject to the provision of appropriate security."

117. The Tribunal does not share Claimant's restrictive interpretation of the UNCITRAL Rules and the Swiss International Arbitration Act. The procedural legal framework applicable to this arbitration grants the Tribunal broad powers to ensure the effectiveness of its rulings and awards, including the possibility of issuing security for costs orders if required to ensure that its award on costs is enforceable.

118. Multiple investment arbitration tribunals have reached a similar conclusion.[138]

2. THE APPLICATION OF THE APPLICABLE STANDARD FOR ORDERING SECURITY FOR COSTS TO THE FACTS OF THE CASE

119. In considering whether to order security for costs, the Tribunal recognizes that the Parties have differing views regarding the standard which must be satisfied, with Respondent asserting that the Tribunal only consider necessity and proportionality, and Claimant asserting that the Tribunal must also consider whether there is a *prima facie* reasonable possibility that the applicant will prevail in the case and whether the need for an order is urgent.

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[137] **Exhibit CLA-010**, Swiss Federal Act on Private International Law, Art. 183.
[138] *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 52; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 57; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 de October 1999; *Commerce Group Corp. y San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, Decision on the Request for Security for Costs, 20 September 2012, para. 45; *Víctor Pey Casado y Fundación Presidente Allende v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 2 September 2001, para. 88; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg y RSM Production Corporation v. Granada*, ICSID Case No. ARB/10/6, Decision on the Request for Security for Costs, 14 October 2010, para. 5.16.

120. Here, as discussed below, Respondent has failed to satisfy the necessity requirement, thus rendering the need for the Tribunal to consider whether additional criteria must be satisfied, and if so, whether those additional criteria are satisfied.

121. A security for costs order is by its own nature an exceptional measure at the Tribunal's disposal to guarantee the integrity of the proceedings and the efficacy of the Tribunal's rulings on the allocation of costs.

122. A security for costs order is only warranted if the applicant establishes its need in light of a significant risk that the counterparty is unable or unwilling to satisfy a potential adverse costs award.

123. The majority of investment arbitration tribunals have considered that an extraordinary measure such as a security for costs be ordered only where there are *exceptional circumstances*[139] indicative of a party's inability or unwillingness to satisfy an adverse costs order, such as:

a. The party's proven impecuniosity and/or a lack of sufficient financial resources to comply with a costs order;[140]

b. The presence of a third-party funder,[141] especially where the funding agreement does not cover adverse costs;[142]

[139] *Eurogas v. Slovak Republic*, Decision on Request for Provisional Measures, para. 121; *Hope Services v. Cameroon*, Procedural Order No. 4, paras. 86-88; *RSM v. Saint Lucia*, Decision on Security for Costs, para. 86; *Ipek v. Turkey*, Procedural Order No. 7, para. 8.
[140] *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10), Decision on Security for Costs of 13 August 2014, paras. 83, 86; *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* ICSID Case No. ARB/18/35, Decision on Security for Costs dated 27 January 2020, paras. 57-60; *Manuel García Armas and others v. Bolivarian Republic of Venezuela* (PCA Case No. 2016-08), Procedural Order No. 9, Decision on Respondent's Request for Provisional Measures dated 20 June 2018, para. 247.
[141] *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10), Decision on Security for Costs of 13 August 2014, para. 86; *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* ICSID Case No. ARB/18/35, Decision on Security for Costs dated 27 January 2020, paras. 57-60.
[142] *Manuel García Armas and others v. Bolivarian Republic of Venezuela* (PCA Case No. 2016-08), Procedural Order No. 9, Decision on Respondent's Request for Provisional Measures dated 20 June 2018, paras. 246-245; *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* ICSID Case No. ARB/18/35, Decision on Security for Costs dated 27 January 2020, paras. 57-60.

c. The party's counsel against whom the order is being requested is operating on a contingency basis and is funding the arbitration;[143]

d. The party against whom the order is being requested has a track-record of failing to abide by costs orders;[144]

e. The party against whom the order is being requested has failed to pay former counsel;[145] and/or

f. The party against whom the order is being requested has engaged in improper behavior or business practices, for instance, shifting or concealing assets in a way that it would limit their exposure to creditors.

124. The Tribunal considers that, while the above criteria derived from the case law are useful, the decisions on security for costs are very case specific. The likelihood of a claimant not complying with a costs award against it, and the convenience of adopting a security for costs order, are to be determined with a careful consideration of the particular circumstances of each case.

125. In any event, the Tribunal is of the view that, in the context of investment arbitration, a party requesting security for costs must provide convincing evidence of the *exceptional circumstances* that warrant the adoption of such measure; otherwise, the protection under the investment treaty system could be rendered ineffective if investors who claim that their investment has been taken by the State would systematically be required to prove financial solvency or provide security for costs. These additional hurdles could impede legitimate redress and deny access to justice.

[143] *Jak Sukyas v. Romania* and *Edward Sukyas v. Romania*, as reported in Investment Arbitration Reporter, "Counsel funding arbitration is ordered to provide written undertaking that it will pay hypothetical adverse costs award in treaty dispute; request for disclosure is rejected" dated 17 February 2022.
[144] *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10), Decision on Security for Costs of 13 August 2014, para. 86.
[145] *Eugene Kazmin v. Republic of Latvia,* ICSID Case No. ARB/17/5, Procedural Order No. 6 dated 13 April 2020, paras. 31 *et seq*.

126. In this case, Respondent has failed to demonstrate the e*xceptional circumstances* identified above that would be indicative of Claimant's inability or unwillingness to satisfy an adverse costs order. Respondent has not provided evidence that Claimant:

- has acted improperly by shifting assets to avoid costs award exposure;
- has failed to pay outstanding arbitration or judicial costs orders or to pay former counsel;
- exhibited otherwise bad faith conduct or delinquent behavior in payment in any other relevant proceedings.

127. Moreover, as Respondent itself acknowledges, Claimant has not engaged a third-party funder, and he has instructed counsel for these proceedings for the next 2.5 years, suggesting that he has the financial means to pursue this arbitration. Notably, Claimant has made the requisite payments for advance costs in these proceedings. This point undermines the necessity for security for costs at this stage, instead suggesting that Claimant would be able to pay any adverse cost award if issued.

128. Respondent alleges, based on the Curaçao courts rulings, that Claimant is impecunious and has engaged in improper business practices.

129. The Tribunal, however, cannot reach that conclusion for two reasons:

130. First, the Tribunal takes note that the Curaçao court rulings are still subject to appeal and that, at this stage, the damages ordered by the Curaçao courts are not still final; the only amount proven and immediately enforceable is the USD 316,044 confirmed by the Court of Appeal.[146]

131. Second, Claimant is contesting the very findings of the Curaçao courts rulings in this arbitration. Therefore, the Tribunal cannot at this stage of the proceedings accept at face value the Curaçao courts' determinations.

[146] Response, para. 24.

V. DECISION

132. In light of the above, the Tribunal decides to:

a. Dismiss Respondent's application for security for costs; and

b. Defer its decision on Claimant's petition to be reimbursed the costs incurred as a consequence of the Kingdom of the Netherlands' application for security for costs to a later stage of the proceedings.

On behalf of the Tribunal

[redacted]

Claudia Salomon
Presiding Arbitrator
Date: 28 November 2024