

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Burimi S.R.L. and Eagle Games SH.A.

Claimants

v.

Republic of Albania

Respondent

(ICSID Case No. ARB/11/18)

Procedural Order No. 2

(Provisional Measures Concerning Security for Costs)

Rendered by an Arbitral Tribunal composed of:

Mr. Daniel M. Price, President

Prof. Bernardo M. Cremades, Arbitrator

Prof. Ibrahim Fadlallah, Arbitrator

Secretary of the Tribunal:

Marco Tulio Montañés-Rumayor

Date: May 3, 2012

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I. PROCEDURAL HISTORY

1. On July 12, 2011, the International Centre for Settlement of Investment Disputes (ICSID) registered a Request for Arbitration submitted by Burimi S.R.L. and Eagle Games SH.A., (the “Claimants”) against the Republic of Albania (the “Respondent”). The Request for Arbitration was filed on the basis of the dispute-settlement provisions of the Agreement for the Promotion and Protection of Investments (the BIT) between the Republic of Italy and the Republic of Albania.
2. On November 22, 2011, the Arbitral Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention. Its members are: Daniel M. Price (U.S.), President, appointed by the Chairman of the Administrative Council in accordance with Article 38 of the ICSID Convention; Bernardo M. Cremades (Spain), appointed by the Claimants; and Ibrahim Fadlallah (Lebanon/France), appointed by the Respondent.
3. On March 30, 2012, the Respondent filed a request for provisional measures concerning security for costs (the “Respondent’s Request”) pursuant to Article 47 of the ICSID Convention. On the same day, the Respondent submitted objections to jurisdiction pursuant to ICSID Arbitration Rule 41(1) and a request for bifurcation.
4. Pursuant to ICSID Arbitration Rule 39(4), the Tribunal invited the Claimants to file their observations on the Respondent’s Request by April 9, 2012. On April 3, 2012, the Claimants requested an extension to file their observations by April 13, 2012. On the same day, the Tribunal granted the extension.
5. Accordingly, on April 13, 2012, the Claimants filed their observations (the “Claimants’ Observations”) on the Respondent’s Request, as well as a counter-application for provisional measures concerning security for costs (the “Claimants’ Request”). The Claimants also submitted their response to the Respondent’s request for bifurcation on this date.
6. On April 17, 2012, the Tribunal held a first session with the Parties by telephone conference.
7. Pursuant to ICSID Arbitration Rule 39(4), the Tribunal invited the Respondent to file its observations on the Claimants’ Request by April 23, 2012.
8. On April 18 2012, the Tribunal issued Procedural Order No. 1 and its Decision on Bifurcation.
9. On April 20, 2012, the Respondent filed its observations (the “Respondent’s Observations”) on the Claimants’ Request.

II. PARTIES' POSITIONS

A. The Respondent's Request

10. The Respondent argues that “[e]xceptional circumstances exist that would justify the issuance of a recommendation granting security for costs in ICSID proceedings.”¹ It further contends that it “would suffer irreparable harm should its request...be denied.”²

11. Respondent bases its Request on the fact that the Claimants “do not have sufficient funds to honour any resulting award on costs.”³

12. First, it argues that Claimant I, Eagle Games Sh.a. (i) does not own any assets; (ii) never generated any profit during its entire existence; and (iii) has been under suspension since December 3, 2010.⁴

13. Second, it asserts that Claimant II, Burimi S.r.l. “has never really generated any profits, which amounted to merely EUR 83 (eighty three) in 2008 and EUR 2,293 (two thousand two hundred ninety three) in 2009.”⁵

14. Finally, it avers that the Claimants’ funds “are likely not to be their own but those injected by Mr. Burimi and/or Ms. Leka, who are not parties to these proceedings.”⁶

15. Therefore, the Respondent requests the Tribunal “to order that Claimants provide security for costs, either in the form of deposit by Claimants in an escrow account supervised by the Tribunal or by the ICSID Secretariat, or alternatively, in the form of a guarantee, bond or similar instrument or in another form deemed appropriate by the Tribunal, in the amount of USD 400,000, representing the costs expected to be incurred by Respondent in defending against this action up to an Award on jurisdiction, and USD 1,000,000 should the matter proceed to the merits.”⁷

B. The Claimants' Observations on the Respondent's Request

16. The Claimants object to the Respondent's Request, arguing that they have sufficient funds and assets.

17. First, the Claimants have paid USD 125,000 (USD 25,000 of the administrative fee and USD100,000 of the first advance payment) to ICSID.

¹ Respondent's Request, para. 15.

² *Id.*, para. 22

³ *Id.*, para. 17 (“It is precisely for this reason that the Republic of Albania is requesting security for costs”).

⁴ *Id.*, para. 19.

⁵ *Id.*, para. 20.

⁶ *Id.*, para. 21.

⁷ *Id.*, para. 1.

18. Second, Eagle Games Sh.a.'s 2010 balance sheet (exhibit R-13) shows that "it has total assets of 13,614,761 Lek equal to EUR 96,527.67."⁸ The Claimants further argue that Eagle Games Sh.a.'s suspension of its business activities is "solely because of the unlawful conduct of the Republic of Albania that has constantly blocked and prevented it to operate on the market."

19. Third, Burimi S.r.l.'s balance sheet (exhibit R-14) illustrates that it has "total assets of EUR 498,527.00, which for itself give more than enough warranty."⁹ Moreover, Burimi S.r.l. has paid twice the minimum EUR 10,000 of share capital required under Italian law for a corporate entity.¹⁰

20. Accordingly, the Claimants request the Tribunal to dismiss Respondent's security for costs application.

C. The Claimants' Request

21. The Claimants argue that their request is "necessary"¹¹ because the Respondent has yet to pay the advance payment of USD 100,000 to ICSID. They further contend that the Tribunal needs to "ensure the coverage of the arbitration award and court costs."¹²

22. Therefore, the Claimants request the Tribunal to order that the Republic of Albania "deposit[] the security for the amount required by the claimants and therefore equal to EUR 7,593,863.75 (equal to \$ 9,980,107.44) as well as \$ 1,000,000 as an estimate of total expenditures in this proceeding, in the form of an escrow account to the order of the Court of Arbitration."¹³

D. The Respondent's Observations on the Claimants' Request

23. The Respondent objects to the Claimants' Request because in its view "there are no exceptional circumstances that create either a necessity, or an urgency to preserve Claimants alleged right for payment in case of a favourable monetary award being rendered."¹⁴

24. Moreover, the Respondent argues that "there cannot be any irreparable harm, a prerequisite to the issuance of any security, when a State potential debtor is concerned as the State necessarily has and will always have assets far in excess of the amounts at stake in this arbitration."¹⁵

⁸ Claimants' Request (unnumbered pages and paragraphs).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, penultimate paragraph ("It is of patent evidence that the guarantees are *necessary*...").

¹² *Id.*

¹³ *Id.*, last paragraph.

¹⁴ Respondent's Observations, para. 7.

¹⁵ *Id.*, para. 4.

25. The Respondent confirms that it paid its full advance on costs to ICSID on April 12, 2012, and that “the (timely) payment - or non-payment for that matter ... of its advance on costs is in and by itself utterly irrelevant for a decision on security.”¹⁶

26. Finally, it states that “there is no legal ground or precedent, in commercial or public international arbitration...for any such a measure [security for costs] against a Sovereign State before the issuance of any Award.”¹⁷

27. Therefore, the Respondent asks the Tribunal to dismiss the Claimants’ Request.

III. TRIBUNAL’S ANALYSIS

A. Legal Framework

28. The authority of ICSID tribunals to recommend provisional measures is governed by Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

29. Article 47 of the ICSID Convention provides:

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

30. Rule 39(1) of the ICSID Arbitration Rules further provides that:

“At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

31. Regarding the issue of costs, the following provisions are applicable. First, Article 61(2) of the ICSID Convention states that:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award.”

¹⁶ *Id.*, para. 6.

¹⁷ *Id.*, para. 4.

32. Furthermore, Rule 47(1) of the Arbitration Rules provides:

“The Award shall be in writing and shall contain:

[...]

(j) any decision of the Tribunal regarding the cost of the proceeding.”

33. Finally, Regulation 14(3)(d) of the Administrative and Financial Regulations reads as follows:

“(d) in connection with ...every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention...”

B. The Requirements for Provisional Measures

34. Provisional measures are “extraordinary measures” which should be recommended only in limited circumstances.¹⁸ Specifically, an order for provisional measures will be made only where such measures are (i) necessary to avoid imminent and irreparable harm and (ii) urgent.¹⁹

35. Measures are *necessary* when they are “required to avoid harm or prejudice being inflicted upon the applicant.”²⁰ In assessing necessity, tribunals usually weigh the interests of both parties and order the measure only if the harm spared the petitioner “exceeds greatly the damage caused to the party affected”²¹ by it. Provisional measures are not meant to protect against potential or hypothetical harm that could be caused by future actions.²² Rather, they are meant to protect the requesting party from *imminent* harm.²³

¹⁸ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999 [*Maffezini v. Spain*], para. 10.

¹⁹ See e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007 [*Occidental v. Ecuador*], para. 59; *Perenco Ecuador Ltd v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures of May 8, 2009 [*Perenco v. Ecuador*] para. 43; *Burlington Resources Inc. and others v. Republic of Ecuador and Petróleos del Empresa Estatal del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/5), Procedural Order No. 1 of June 29, 2009 [*Burlington v. Ecuador*], para. 51.

²⁰ *Burlington v. Ecuador*, para. 75.

²¹ *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on Provisional Measures of November 19, 2007, para.72. See also *Burlington v. Ecuador*, para. 82; *Occidental v. Ecuador*, para.93.

²² *Occidental v. Ecuador*, para. 89.

²³ *Id.*

36. *Urgency* is usually satisfied when “a question cannot await the outcome of the award on the merits.”²⁴

37. The burden of proving necessity and urgency falls upon the party requesting the provisional measures.²⁵

C. The Respondent’s Request

38. In the Tribunal’s view, the measure requested by the Respondent is neither necessary nor urgent.

39. The measure is not *necessary* because the harm it seeks to avoid is not imminent but contingent on future action or inaction by the Claimants, which the Respondent provides no persuasive evidence is likely to occur. Respondent “believes” that because the Claimants are legal persons “with no real activity,” and that the funds are “likely not to be their own”, “[t]hey *could* simply organize their bankruptcy when faced with an adverse award.”²⁶ The Tribunal is unwilling to find imminent danger of harm based on the Respondent’s speculation about the Claimants’ future conduct.

40. For similar reasons, the matter is not *urgent*. Because the alleged harm is speculative, there is no basis for finding that the matter cannot await the outcome of an award.

41. Even if there were more persuasive evidence than that offered by the Respondent concerning the Claimants’ ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed. Notably, there are no provisions in the ICSID Convention or the Arbitration Rules imposing such a condition, except the advance on costs under Administrative and Financial Regulation 14(3)(d). The Claimants met this requirement on January 11, 2012. After weighing the interests of both parties, the Tribunal rejects the Respondent’s Request.

42. The Tribunal notes the Respondent’s statement that “exceptional circumstances”²⁷ exist and thereby “security for costs should be granted by this Tribunal, *for the first time* in an investment dispute.”²⁸ The Tribunal would not shy away from ordering security costs for the first time, had the Respondent established that the circumstances of this case required the requested relief. Based on the

²⁴ *Burlington v. Ecuador*, para. 73. See also *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para.76.

²⁵ *Maffezini v. Spain*, para. 10.

²⁶ Respondent’s Request, para. 21.

²⁷ *Id.*, para. 15.

²⁸ *Id.*, para. 23.

facts presented, however, the Tribunal does not find compelling reasons to depart from the previous rulings of ICSID tribunals denying security for costs requests.²⁹

43. In light of the above, the Tribunal concludes that the Respondent has failed to demonstrate that an order for security for costs is justified in the present circumstances. Accordingly, the Tribunal rejects the Respondent's Request.

D. The Claimants' Request

44. Likewise, in the Tribunal's view, the Claimants have not met the burden of demonstrating necessity. According to the Claimants, their Request is *necessary* because the Respondent has failed to pay the USD 100,000 advance on costs to ICSID.³⁰ They further contend that "[t]his circumstance by itself reveals the serious difficulties of the respondent that could vanish all the efforts made by the applicants in case the request is accepted."³¹

45. The Tribunal notes that ICSID received the Respondent's payment on April 30, 2012. Therefore, the principal reason adduced by the Claimants for its requests is no longer present. In addition, as in the case of the Respondent's Request, the measures requested by the Claimants would protect against hypothetical harm ("*could* vanish all efforts") from uncertain, future actions, not imminent harm from actions likely to occur.

46. Furthermore, the Tribunal finds that the measures requested by the Claimants are not *urgent* because they can wait until the award is rendered. According to the Respondent, "there is no legal ground or precedent, in commercial or public international arbitration...for any such a measure against a Sovereign State *before the issuance of any Award*."³² The Claimants have not cited legal authority in support of the urgency criterion. In the Tribunal's view, the Claimants failed to meet their burden to demonstrate that the requested measures are urgent.

47. In any event, the Tribunal has the discretion to decide how and by whom the expenses of the parties in connection with the proceedings shall be paid pursuant to Article 61(2) of the ICSID

²⁹ *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea* (ICSID Case No. ARB/84/1), Decision of December 18, 1984; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26); *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001; *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008; *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Decision of November 5, 2008; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Government of Grenada* (ICSID Case No. ARB/10/6), Decision of October 14, 2010; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Decision of June 24, 2009; *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999.

³⁰ Claimants' Request.

³¹ *Id.*

³² Respondent's Observations, para. 4.

Convention. Such decision shall form part of the award. Therefore, the Tribunal finds that the measures requested by the Claimants are unwarranted at this stage of the proceeding.

48. In conclusion, the Tribunal finds that the Claimants have failed to demonstrate that their Request is justified in the circumstances. Accordingly, the Tribunal rejects the Claimants' Request.

49. The Tribunal acknowledges that non-payment of awards of damages or costs by respondents and claimants poses a systemic risk to the arbitration of international investment disputes. Too often, the rendering of an award results not in prompt payment but rather the beginning of a negotiation, or in some notable cases a willful refusal to honor the terms of the award and the provisions of the Convention. However, the Tribunal finds no reason in the circumstances of this case and at the present stage of this proceeding to intervene to ameliorate that systemic risk for the benefit of either party.

IV. ORDER

50. On this basis, the Arbitral Tribunal makes the following order:

- a. The Respondent has failed to prove that the circumstances of this case require provisional measures for security for costs. Accordingly, the Tribunal rejects the Respondent's Request.
- b. The Claimants have failed to prove that the circumstances of this case require provisional measures for security for costs. Accordingly, the Tribunal rejects the Claimants' Request.
- c. The allocation of costs are reserved for a later decision or award.
- d. This Order is without prejudice to all substantive issues in dispute and should not be considered as prejudging any issue of fact or law concerning jurisdiction or the merits of this case.

On behalf of the Tribunal

[signed]

Daniel M. Price
President