

PCA CASE NO. 2011-17

IN THE MATTER OF AN ARBITRATION UNDER

A. THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

-and-

B. THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

-and-

C. THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

-between-

- 1. GUARACACHI AMERICA, INC.**
- 2. RURELEC PLC**

(the “Claimants”)

-and-

THE PLURINATIONAL STATE OF BOLIVIA

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

PROCEDURAL ORDER NO. 14
11 March 2013

A. REQUEST FOR *CAUTIO JUDICATUM SOLVI* (SECURITY FOR COSTS)

1. By application dated 12 February 2013, the Plurinational State of Bolivia, the Respondent in this arbitration, filed an application requesting *cautio judicatum solvi* (security for costs) to be provided by Claimants (the "Request"). The Claimants, by letter dated 20 February 2013, submitted a response to the Request asking the Tribunal to dismiss such application (the "Response").
2. Specifically, the Respondent has requested that the Tribunal require the Claimant to deposit, within a deadline of 15 days, the sum of US\$ 1.5 million with the PCA or to post a guarantee with a reputable US or UK bank of the same value, as decided by the Tribunal. The Respondent considers the requested amount to be a conservative estimate of its eventual costs over the course of this arbitration.

B. THE PARTIES' ARGUMENTS

3. In its Request, the Respondent argues, *inter alia*, that the Tribunal lacks jurisdiction over all of the claims. The Respondent therefore expects that the Tribunal will find in its favor and order the Claimants to reimburse the Respondent for all its costs and expenses incurred in defending against these claims. However, the Respondent alleges that the second Claimant, Rurelec, is in a precarious financial situation (as evidenced notably by its balance sheets and the fact that it has obtained third party funding) and would not be able to make payment of the Tribunal's eventual costs order (nor would its third party funder be liable to pay costs). As also set forth in its jurisdictional submissions, the Respondent also alleges that the first Claimant, Guaracachi America, is a "shell company" with no business activities or income and would also not be able to pay any order of costs against it. The Respondent concludes that this situation presents a potential "arbitral hit and run", "where the claimant's arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost," which has been "described by arbitrators and commentators alike as particularly compelling grounds for security for costs."¹
4. In their Response, the Claimants assert that this kind of request for security for costs is unprecedented in international investment arbitration. The Claimants focus on the fact that the strict and demanding criteria of Article 26 of UNCITRAL Arbitration Rules (2010) (the "UNCITRAL Rules") have not been met: the Respondent has not shown a reasonable possibility of succeeding on jurisdiction or merits and obtaining a costs award against the Claimants, nor that the Claimants are unwilling or unable to pay any eventual costs award. According to the Claimants, the Respondent misconstrues Rurelec's financial situation and the purpose behind the recent financing received: Rurelec's two most recent audited financial statements contradict the picture painted by the Respondent and the press statement cited by the Respondent acknowledges that "the [loan proceeds] will be used to invest in Rurelec's programme of investment in thermal power in Chile and hydro power in Peru." In addition, the

¹ J.E. Kalicki, *Security for Costs in International Arbitration*, 3(5) Transnational Dispute Management (2006), (Exhibit RL-133).

Claimants note that they, as opposed to the Respondent, have promptly paid all the advances requested by the Tribunal to date. On the other hand, the Respondent's delays and failure to pay the advance on costs shows a lack of good faith that should preclude their right to request *cautio judicatum solvi* (security for costs). Meanwhile, the Claimants refer to their jurisdictional submissions to rebut the allegation that Guaracachi America has no substantial business activities and consider that fact irrelevant in any event. Even assuming that the Respondent's factual allegations were true, the Claimants argue that such an order for security for costs would remain unprecedented in investment treaty arbitration and that tribunals have uniformly rejected similar applications.²

C. DECISION

5. The relevant sections of Article 26 state as follows:

"1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

[...]

*(c) Provide a means of preserving assets out of which a subsequent award may be satisfied;
or*

[...]

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."

6. Although investment treaty tribunals clearly hold the power to grant provisional measures, an order for the posting of security for costs remains a very rare and exceptional measure. Nevertheless, the lack of precedent – and the cautious approach to such requests suggested by the case law – does not limit the power of this Tribunal to grant such a measure. Article 26 of the UNCITRAL Rules expressly envisages this possibility, as even the Claimants appear to accept. It is thus clear that this arbitral tribunal has the

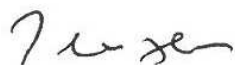
² *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs, 20 September 2012, (**Exhibit CL-149**); *Rachel S. Grynberg and others v. Government of Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs, 14 October 2010 (**Exhibit CL-185**); *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008 (**Exhibit CL-147**); *Gustav FW Hamester GmbH & CO KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 (**Exhibit R-8**).

authority to grant the requested *cautio judicatum solvi* (security for costs), provided that the Respondent, as the requesting party, is able to meet its burden of proof and satisfy the conditions of the aforementioned Article 26(3) of the Rules.

7. The Respondent has not, however, been able to supply evidence to justify the extraordinary measure that it requests. As a factual matter, the Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not. The Respondent's analysis of Rurelec's balance sheet and other related financial documents also does not sufficiently demonstrate that Rurelec will lack the means to pay a costs award or to obtain (additional) funding for that purpose. To the contrary, Rurelec appears to be an ongoing concern with assets beyond those involved in this arbitration and the Claimants have promptly paid all the requested deposits of costs with no suggestion that they have had trouble finding the necessary funds to do so.
8. Given the above, it is unnecessary to look at the issue of the Respondent's good faith – as measured by its payment of its share of the deposits of costs – as a pre-condition for the right to request security for costs (as suggested by one of the Respondent's authorities).³ Nor is it necessary for the Tribunal to analyze – in accordance with Article 26(3)(b) of the UNCITRAL Rules – whether there is a “*reasonable possibility that the requesting party will succeed on the merits of the claim.*” This can be a difficult hypothetical exercise, even with the benefit of the Parties' full written submissions. It is also unwise to risk even the most minor prejudgment of the case so close to the date of the final hearings. Such determinations are therefore best avoided unless absolutely necessary to come to a decision on the request for interim measures, which is not the case here.
9. The same goes for the analysis required by Article 26(3)(a) of the UNCITRAL Rules of the balance of inconvenience, to find whether the harm, if the measure is not granted, “*substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.*” The issue – analyzed by scholars and some tribunals – of the appropriate balance between the right of access to justice of entities that have been allegedly expropriated and the protection of States against alleged frivolous claims by parties who may not have sufficient assets to guarantee the payment of an adverse costs award is a serious issue. A decision on this issue is not, however, required on the facts of this case.
10. In accordance with the above conclusions, the Arbitral Tribunal decides to dismiss Respondent's request for security for costs.

The co-arbitrators have approved this order, signed only by the President.

11 March 2013



José Miguel Júdece
(President of the Tribunal)

³ W. Gu, *Security for Costs in International Commercial Arbitration*, 22(3) *Journal of International Arbitration* (2005) (Exhibit RL-132), pp. 194–95.