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20 February 2013

PCA Case No. AA406: 1. GUARACACHI AMERICA, INC. (U.S.A.) 2. RURELEC PLC (UNITED KINGDOM) v. THE PLURINATIONAL STATE OF BOLIVIA

Dear Members of the Tribunal,

In accordance with the Tribunal's directions in Procedural Order No. 12, Guaracachi America, Inc. (***GAI***) and Rurelec PLC (***Rurelec***, and together with GAI, the ***Claimants***) submit their response to the Plurinational State of Bolivia's (***Bolivia*** or ***Respondent***) application for security for costs of 12 February 2013 (the ***Application***). For the reasons set out in this letter, the Respondent's Application is without legal or factual merit and must be rejected.

An application for an interim measure under the 2010 UNCITRAL Arbitration Rules is governed by Article 26. Article 26(3) provides that:

> [t]he party requesting an interim measure . . . 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.[1]

Based on these rules, Bolivia must establish[2] at a minimum that (i) there is a reasonable possibility that it will succeed on its defenses; (ii) there is a reasonable possibility that it will receive a costs award in its favor;[3] (iii) the Claimants are unwilling or unable to pay such a costs

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1 UNCITRAL Arbitration Rules, Article 26(3) (emphasis added).

2 *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**, ¶ 5.17 ("It is . . . beyond doubt that the burden to demonstrate why a tribunal should grant such an application is on the applicant"); *Emilio Agustin Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, **Exhibit CL-183**, ¶ 10 ("The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application").

3 *See Emilio Agustin Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2., 28 October 1999, **Exhibit CL-183**, ¶¶ 16–17 ("This claim contains several hypothetical situations. One, whether the Respondent will prevail and two, whether the Tribunal will deem the Claimant's case to be of such nature as to require it to pay the Respondent the costs and expenses that it will incur"). The Respondent has quoted Article 42(1) of the UNCITRAL Rules that "[t]he costs of the arbitration shall *in principle* be borne by the unsuccessful party or parties" (emphasis added) without quoting the second sentence that "the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case." The decision to award the costs of an arbitration remains completely within the discretion of the arbitral tribunal in the 2010 UNCITRAL Rules.

award if granted;[4] and (iv) that the harm prevented by the Respondent's requested measure would substantially outweigh the countervailing burden on the Claimants.[5]

Precisely due to these strict requirements, granting an application for security for costs in investment treaty arbitration is unprecedented. This explains why there is a dearth of legal authority in the Application, as Bolivia relies only on a 2005 journal article regarding security for costs in international commercial arbitration (which fails to support its position, as explained below) and a one-page client note about the same issue from Arnold & Porter in 2006 that includes no internal citations of any kind.[6] Indeed, tribunals have reiterated that security for costs could only be justified, if at all, in an extraordinary situation. For example, the *Commerce Group* annulment committee stated that "the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced."[7] Likewise, the tribunal in *Libananco v. Turkey* declared that "it would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all."[8] No such circumstances exist in the instant proceeding.

Bolivia bases its Application on two factual premises, while simply *assuming* without *proving* that it will succeed on its defenses and subsequent request for costs. Bolivia's first

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4 *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**, ¶ 5.18 ("In cases of security for costs, Arbitrators (and courts in jurisdictions which are prepared to make such an order) will rarely think it right to grant such an application if the party whom security is sought appears to have sufficient assets to meet such an order, and if those assets would seem to be available for its satisfaction."). *See also Victor Pey Casado v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures, 25 September 2001, **Exhibit CL-184**, ¶ 89; P. Friedland, *Provisional Measures and ICSID Arbitration*, 2 Arb. Int'l. 335, 348 (1986), **Exhibit CL-182** (noting that the *Atlantic Triton v. Republic of Guinea* tribunal rejected an application to post security where it had not been proven that the claimant was in liquidation).

5 UNCITRAL Arbitration Rules, Article 26(3)(a).

6 W. Gu, *Security for Costs in International Commercial Arbitration*, Journal of International Arbitration (Kluwer Law International 2005 Volume 22 Issue 3), **Exhibit RL-132**, pp. 167–205; J.E. Kalicki, *Security for Costs in International Arbitration* (TDM 2006, Volume 3, Issue 5), **Exhibit RL-133**. Needless to say neither article includes a reference to any investment treaty tribunal that has granted security for costs.

7 *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**, ¶ 45.

8 *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, **Exhibit CL-147**, ¶ 57.

premise is that Rurelec is not in a position to finance its own costs in this arbitration.[9] The second is that GAI is a "shell company" without substantial business activities.[10] Even if these premises were accepted as true (which they are not as will be explained below), investment treaty tribunals have refused to grant security for costs in similar circumstances.

For example, in *Commerce Group v. El Salvador*, the claimants acknowledged they were in financial difficulties and were unable to pay their first advance on costs (which they did only after a stay of the proceeding).[11] Despite these circumstances, the tribunal found no compelling reason to grant security, especially as it might have impacted the claimants' right to seek annulment of the underlying award.[12] Analogously, in *Hamester v. Ghana*, the claimant was unable to meet an advance on costs and explained to the tribunal that the claimant was "effectively reliant on others to fund the current dispute proceeding before ICSID."[13] Ghana applied for security for costs as a result of this admission.[14] The *Hamester* tribunal rejected Ghana's application as "there was a serious risk that an order for security for costs would stifle the Claimant's claims" and that the only purpose of such an order would be to cancel an upcoming hearing, which was impracticable in the tribunal's view.[15] As the *RSM v. Grenada II* tribunal stated, "it is . . . doubtful that a showing of an absence of assets alone would provide a sufficient basis for [an order for security for costs]."[16]

Nor is it a ground for security for costs that the claimant is a special-purpose vehicle. The *Libananco v. Turkey* tribunal recognized that many entities in investment treaty cases are "investment vehicle[s] created or adapted specially for the purpose of the investment transaction

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9 Application, Section 2.1.

10 *Ibid.* at Section 2.2.

11 *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**, ¶ 48.

12 *Ibid.* at ¶¶ 51–53.

13 *Gustav FW Hamester GmbH & CO KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **Exhibit R-8**, ¶ 14.

14 *Ibid.* at ¶ 15.

15 *Ibid.* at ¶ 17.

16 *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**, ¶ 5.19.

that has in the meanwhile become the subject of dispute."[17] There is no particular reason why such investment vehicles should be required to provide security for costs to States *per se*.

The Claimants need not rely exclusively on this broad base of case law, as there are no factual grounds that support Bolivia's Application. Bolivia does not even attempt to argue in its Application that it is likely to succeed on the merits and to be awarded its costs. Respondent's success is, in fact, an unlikely possibility considering that (a) this is a case involving an admitted uncompensated expropriation; and (b) Bolivia's jurisdictional objections are unfounded, and for the most part would not result in the dismissal of the case as a whole. Moreover, the Claimants have met every advance on costs,[18] paid for counsel and experts, and complied with the Tribunal's orders. They will continue to do so in the future.

Furthermore, although Bolivia's Application attempts to cast aspersions on Rurelec's financial health, Bolivia has ignored the fact that Rurelec recorded profits of £1.76 million and £16.39 million in the two most recent audited annual reports, in 2011 and 2010 respectively.[19] These profits were notwithstanding the devastating impact of the uncompensated expropriation of its Bolivian business in 2010. Bolivia focuses narrowly on a loss of £100,000 in Rurelec's latest interim accounts, which is misleading.[20]

Bolivia also fails to understand the nature of the financing received by Rurelec. As the Claimants observed in their response to Bolivia's document production request on 15 February 2013, Bolivia has mischaracterized the Claimants' funding arrangements. The exhibit to which Bolivia refers expressly states that "the [loan proceeds] will be used to invest in Rurelec's

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17 *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, **Exhibit CL-147**, ¶ 59.

18 *See Únete Telecomunicaciones S.A. and Clay Pacific S.R.L.* v. *Republic of Ecuador* (UNCITRAL), Procedural Order No. 5, 29 September 2010, **Exhibit CL-148**, ¶ 51 (holding that the claimant's timely payment of the advance on the tribunal's costs precluded the tribunal from inferring that the claimant was insolvent and militated against an order for security for costs).

19 2011 Annual Report of Rurelec PLC, **Exhibit C-362**, p. 18, line "Profit/(loss) for the year from continuing operations"; 2010 Annual Report of Rurelec PLC, **Exhibit C-181**, p. 22, line "Profit/(loss) for the year".

20 Application, ¶ 10. *But see* Rurelec's positive working capital in 2012 Interim Report of Rurelec PLC, **Exhibit R-110**, p. 4 (current liabilities subtracted from current assets – "trade and other receivables" and "cash and cash equivalents"); 2011 Annual Report of Rurelec PLC **Exhibit C-362**, p. 20 (current liabilities subtracted from current assets – "trade and other receivables" and "cash and cash equivalents").

programme of investment in thermal power in Chile and hydro power in Peru".[21] This funding is clearly not directed to "cover[ing] the costs of this arbitration", as Bolivia suggests.[22]

As for GAI, the issue of whether it has substantial business activities has been fully pleaded in the Claimants' jurisdictional submissions,[23] and is in any event irrelevant in light of Rurelec's status as an ongoing concern.

Finally, there is the issue of the equity of such an order in this case.[24] The Claimants' investment in Guaracachi was nationalized and the Claimants have demonstrated in this proceeding that their most important investment was subject to an uncompensated taking, among other internationally wrongful acts. To the extent that the Claimants have weathered financial challenges, they are the result of Bolivia's unlawful conduct. In such circumstances, security for costs in investment treaty arbitration would hinder claimants from seeking redress under an investment treaty at a time when they are most vulnerable, especially in the case of large-scale nationalizations. The burden on the Claimants would therefore far outweigh any potential benefit to Bolivia.

Bolivia's conduct in this arbitration must also be taken into account in assessing its Application. As one of the articles cited by the Respondent explains "a respondent must show good faith by paying his own portion of administrative fees before a security for costs application could be entertained [otherwise] the respondent might be deemed to have 'unclean hands' and be deprived of the right to raise the defense of *cautio judicatum solvi*."[25] Moreover, the article continues: "[t]ribunals have taken into account the 'timing' factor in judging a respondent's conduct: generally, an application for security should be made as early as possible [. . .] . An application close to the hearing will look more like an attempt to stifle the claim."[26] In this arbitration, Bolivia has previously failed to appoint counsel and pay its advance on the

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21 Press Release, "Rurelec completes $15.45 million Fund Raising", 2 July 2012, **Exhibit R-101**, p. 1.

22 Application, Section 2.3. The Spanish original reads: "Como Bolivia manifestó en su Memorial de Contestación, mediante una Nota de Prensa del 2 de julio de 2012, Rurelec informó haber obtenido financiación para cubrir los costos de este arbitraje por parte de un tercero (no identificado) . . . ."

23 Claimants' Counter-Memorial on Jurisdiction, Section IV.B; Claimants' Rejoinder on Jurisdiction, Section IV.B.

24 UNCITRAL Arbitration Rules, Article 26(3)(a)

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

26 *Ibid*. at p. 195.

Tribunal's costs on a timely basis, or provide the required translations of its pleadings, thereby increasing Claimants' costs. It has even harassed a consultant to Claimants' experts. Moreover, Bolivia made its Application nearly a year after it received the Statement of Claim, and a month and a half before a long-planned hearing is set to begin. By this Application, Bolivia yet again attempts to prevent the resolution of this case before an international arbitral tribunal. Such behavior is a relevant factor in the Tribunal's consideration.

Therefore, the Tribunal should reject Bolivia's Application in its entirety. The Respondent has not met its burden of proof that such an exceptional preliminary measure is necessary or justified in this arbitration. The Claimants also request that the Tribunal award them the costs and fees associated with filing this response to the Application, with interest, at the appropriate stage of the proceeding.

Yours sincerely,

Nigel Blackaby
Noah Rubins

Encl(s)

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