

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC

v.

Democratic Republic of Timor-Leste

(ICSID Case No. ARB/15/2)

PROCEDURAL ORDER NO. 2
DECISION ON RESPONDENT'S APPLICATION FOR PROVISIONAL MEASURES

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President
Mr. Stephen Jagusch, Arbitrator
Professor Campbell McLachlan QC, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell

Assistant to the Tribunal

Mr. Rahul Donde

13 February 2016

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I. SUBJECT MATTER OF THIS ORDER

1. The present Order addresses an application for provisional measures in the form of security for costs submitted by the Democratic Republic of Timor-Leste (the “Respondent”) on 18 October 2015 (the “Application”), which is opposed by Lighthouse Corporation Pty Ltd (“Lighthouse”) and Lighthouse Corporation Ltd, IBC (“Lighthouse IBC”) (together, the “Claimants” or “Lighthouse Entities”). In the Application, the Respondent seeks the following relief from the Tribunal:

- a. a recommendation that the Lighthouse entities provide security for Timor-Leste’s costs in the arbitration (initially for Timor-Leste’s estimated costs up to the Tribunal’s decision on bifurcation [sic] and, in the event that the arbitration proceeds, with such security to be supplemented by a further appropriate amount);
- b. a recommendation that the Lighthouse entities provide such security in the form of an on-demand bank guarantee in the amount of US\$201,628.49 or amount to be determined to be held by the solicitors for Timor-Leste and dealt with by demand in the event that an order of the Tribunal awarding costs to Timor-Leste remains unpaid 30 days after the date of any such order; and
- c. a stay of the arbitration until the Lighthouse entities comply with these recommendations.¹

2. In his Second Witness Statement Mr. Liam Prescott gave the following additional indications about the amount of the security sought:

The Respondent’s adoption of the narrow approach to jurisdiction (and the revision of my estimate) means that Timor-Leste seeks security to be provided initially in the amount of US\$115,776.71 (Stage 1 [up to the Tribunal’s decision on bifurcation]). Should security be recommended by the Tribunal and should the proceeding continue thereafter, Timor-Leste would apply, following the Tribunal’s decision on bifurcation, to resume its

¹ Application, ¶13.

application for security and at that time seek the next stage of security to reflect the Tribunal's decision.²

3. The Claimants request the Tribunal to deny the Application in the following terms:

[T]he Claimants respectfully request that the Tribunal decide that:

- a. the Respondent's Application for Provisional Measures be rejected; and
- b. the Respondent pay the Claimants' costs incurred in defending the Application.³

II. PROCEDURAL BACKGROUND

4. On 16 December 2014, the Claimants filed a Request for Arbitration with ICSID.
5. In accordance with Article 36 of the ICSID Convention, the ICSID Secretary-General registered the Request for Arbitration on 14 January 2015 and so notified the Parties. In the Notice of Registration, the Secretary-General invited the parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.
6. On 7 August 2015, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention. Its Members are Professor Gabrielle Kaufmann-Kohler (Swiss), President, appointed by the co-arbitrators; Mr. Stephen Jagusch (New Zealand), appointed by the Claimants; and Professor Campbell McLachlan (New Zealand), appointed by the Respondent.
7. By letter of 14 August 2015, the Respondent's counsel notified the Tribunal that:

our client anticipates that it will make an application for security in respect of its costs pursuant to Rule 39(1) of the ICSID Rules. Our client is conscious of the need to make such an application expeditiously.

² Reply, ¶34; Second Witness Statement of Mr. Liam Prescott, ¶45.

³ Observations, ¶96; Rejoinder, ¶20.

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8. In response, on 26 August 2015, the Tribunal informed the Parties that the procedural modalities relating to such an application would be discussed during the first session of the Tribunal.
9. At the same time, the Tribunal provided the Parties with a draft agenda for the first session and a draft procedural order addressing the conduct of the proceedings. The Parties were invited to confer and provide comments on these drafts which they did on 29 September 2015.
10. The first session was held by teleconference on 6 October 2015. During the conference, the Tribunal and the Parties discussed procedural matters, including the timetable relating to the Respondent's forthcoming application for provisional measures. The Parties agreed to a schedule of written pleadings on such an application. They also agreed that an oral hearing would be held, possibly by teleconference or video link, on a date to be determined.
11. On 9 October 2015, the Respondent submitted the Application, including the witness statements of Ms. Kate Elizabeth Teixeira and Mr. Liam Thomas Prescott, Exhibits R-1 to R-82, and Legal Authorities RL-1 to RL-27.
12. That same day, the Tribunal invited the Claimants to submit their observations on the Application (by 6 November 2015), in accordance with the schedule agreed by the Parties.
13. On 13 October 2015, the Tribunal issued Procedural Order No. 1 concerning the procedural matters addressed during the first session. The Procedural Timetable was provided to the Parties in draft form on the same date and subsequently finalized. In particular, on 2 November 2015, the Tribunal confirmed that the hearing on the Application would be held by teleconference or video link on 21 December 2015.
14. By letter of 2 November 2015, the Claimants requested an extension, until 17 November 2015 to file their observations on the Application. Upon the invitation of the Tribunal, the Respondent commented on 4 November 2015, informing the Tribunal that it agreed to the extension and would consent to giving the Claimants until 20 November 2015 to file their observations. In addition, the Respondent proposed that the Tribunal permit a short second

round of written submissions. The Claimants responded to this proposal on the same day, opposing a further round of written submissions.

15. On 6 November 2015, the Tribunal confirmed the extended time limit of 20 November 2015 for the Claimants' observations on the Application. The Tribunal also informed the Parties that it would decide whether a short second round of written submissions would be useful after receiving the first round and would give appropriate instructions at that time.
16. On 20 November 2015, the Claimants filed their Observations on the Application, including the witness statements of Messrs. Albert Jacobs, James Podaridis, Sean Magee and Alan Fraser, Exhibits C-1 to C-32, and Legal Authorities CL-1 to CL-9 (the "Observations").
17. On 23 November 2015, the Tribunal advised the Parties that it had decided to allow a brief second round of written submissions. The Respondent was invited to submit a reply within ten days, and the Claimants were invited to submit a rejoinder ten days thereafter. The Tribunal limited the submissions to eight pages.
18. At the same time, the Tribunal confirmed that the hearing on the Application would be held by teleconference and provided the Parties with the following agenda for the hearing:
 1. Respondent's oral argument – 20 minutes (maximum)
 2. Claimants' oral argument – 20 minutes (maximum)
 3. Tribunal's questions and parties' answers
 4. If it wishes, Respondent's closing argument – 5 minutes (maximum)
 5. If they wish, Claimants' closing argument – 5 minutes (maximum)
19. On 3 December 2015, the Respondent requested an extension until 5 December 2015 to file its reply. The Claimants did not object and the Tribunal therefore granted the Respondent's request. The Tribunal also noted that the Claimants would be granted a commensurate extension if they were to request it.
20. On 5 December 2015, the Respondent filed its Reply to the Claimants' Observations on the Application, together with the Witness Statement of Mr. Russell John Slocomb and the

Second Witness Statement of Mr. Liam Thomas Prescott and Exhibits R-83 to R-100 (the “Reply”).

21. On 8 December 2015, the Claimants complained with the Tribunal about the length of the Reply and requested an extension of time for their rejoinder. The Respondent did not agree with the Claimants’ assertions, but had no objection against the extension sought. On 9 December 2015, the Tribunal confirmed that the filing date for the rejoinder was extended to 16 December 2015.
22. On 16 December 2015, the Claimants filed their Rejoinder on the Respondent’s Application for Provisional Measures, including the Second Witness Statement of Mr. Albert Jacobs and Exhibits C-33 to C-53 (the “Rejoinder”).
23. On 20 December 2015, the Respondent requested that the scheduled teleconference hearing on provisional measures be postponed due to the sickness of one of its counsel. The President of the Tribunal informed the Parties that, under the circumstances, the Tribunal was inclined to grant the postponement, subject to any compelling objection by the Claimants. In response, the Claimants proposed that, rather than postpone the hearing, the Tribunal proceed to decide the Application based on the written submissions. The Respondent, in turn, objected to this proposal.
24. On 21 December 2015, the Tribunal informed the Parties that the hearing would be rescheduled and proposed a new date for the teleconference. Based on the Parties’ responses, on 23 December 2015, the Tribunal confirmed that the rescheduled hearing would be held by teleconference on 21 January 2016.
25. The hearing on the Application was held as rescheduled on 21 January 2016 by teleconference. The following persons participated in the teleconference:

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TRIBUNAL	
Prof. Gabrielle Kaufmann-Kohler	President
Mr. Stephen Jagusch	Arbitrator
Prof. Campbell McLachlan	Arbitrator

ASSISTANT TO THE TRIBUNAL	
Mr. Rahul Donde	Assistant

ICSID SECRETARIAT	
Ms. Lindsay Gastrell	Secretary of the Tribunal

CLAIMANTS	
Prof. Chester Brown	7 Wentworth Selborne Chambers, Essex Court Chambers, Maxwell Chambers, University of Sydney
Mr. Tony Johnson	Johnson Winter & Slattery
Mr. Nicholas Briggs	Johnson Winter & Slattery
Albert Jacobs	Lighthouse Corporation Pty Limited, Lighthouse Corporation Limited, IBC

RESPONDENT	
Mr. Shane Doyle QC	Level 27 Chambers, Fifth Floor Selborne Chambers, Essex Court Chambers
Mr. Jonathan Kay Hoyle	11th Floor St James Hall Chambers
Mr. Liam Prescott	DLA Piper
Mr. Joel Borgeaud	DLA Piper
Mr. Arndt Herrmann	DLA Piper
His Excellency, Mr. Abel Guterres	Ambassador Extraordinary and Plenipotentiary

26. At the hearing, the Tribunal heard the Parties' oral arguments in accordance with the agenda provided on 23 November 2015. An audio recording was made, and a court reporter prepared a written transcript of the recording. Copies of the recording and the transcript were subsequently distributed to the Tribunal and the Parties.
27. On 28 January 2016, the Claimants sought leave to file a legal authority that had not entered the public domain until after the hearing. In response, on 1 February 2016, the

Tribunal informed the Parties that it had all the necessary information to issue the decision and did not wish to receive further materials.

28. Based on the Parties' submissions, the Tribunal deliberated and reached the decision set forth in Section V below.

III. THE PARTIES' POSITIONS

A. Respondent's Position

29. The Respondent submits that the Tribunal should grant the Application and order the Claimants to post security for costs in the requested amount because, based on the available evidence, it is clear that the Claimants do not have the ability or the willingness to satisfy an order for costs. According to the Respondent, the Claimants' lack of assets and their history of misrepresentations and other conduct justify this relief sought.
30. Addressing the applicable legal principles, the Respondent submits that the Tribunal has the power to grant the Application pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.⁴ In modern ICSID cases, tribunals have accepted the principle that provisional measures contemplated by Article 37 and Rule 39 encompass contingent procedural rights such as pre-award security.⁵
31. The right which the Respondent seeks to protect is its procedural right to an award of costs.⁶ According to the Respondent, defending this arbitration will require it to expend significant sums of money, which would cause damage to the State, especially given that

⁴ Application, ¶¶20-21; Reply, ¶2.

⁵ Application, ¶20, citing RL-14, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No.2: Decision on Provisional Measures dated 28 October 1999, ¶9; RL-17, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures dated 25 February 2001, ¶88; RL-13, *Libananco Holdings Co Ltd v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated 23 June 2008, ¶¶57-58; RL-9, *Commerce Group Corp. and San Sebastian Gold Mines, Inc v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs dated 20 September 2012, ¶45; RL-23, *Rachel S. Grynberg, RSM Production Corporation and others v. Republic of Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs dated 14 October 2010, ¶5; RL-10, *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Decision on Provisional Measures dated 23 June 2015, ¶¶119-123; Reply, ¶2.

⁶ Application, ¶23.

Timor-Leste is one of the poorest countries in the world.⁷ Respondent has a right to protect itself against such economic damage by seeking reimbursement of its costs through a costs award. However, according to the Respondent, without an order for security for costs, “any such monetary award will be rendered entirely futile and its enforcement entirely moot”.⁸

32. The Respondent recognizes that provisional measures in the ICSID system are an “exceptional remedy” and that cases in which security for costs will be recommended must be “compelling”.⁹ To show that exceptional circumstances exist, an applicant must establish that (i) the measure sought is necessary, meaning it is required to prevent “irreparable harm”; and (ii) the granting of the measure is urgent and must be dealt with before the final award.¹⁰ It must also show that its underlying case is a “plausible, seriously arguable” one.¹¹ In making a determination, tribunals focus on whether the facts of each particular case justify an exceptional remedy of pre-award security.¹²
33. According to the Respondent, it is indeed the critical point of contention in this matter whether the facts justify an order for security.¹³ The Respondent submits that the available objective evidence makes clear that such an order is justified, in particular because, it alleges:
- (i) “the Lighthouse entities have made numerous false statements about their assets and standing and are controlled by an individual with a record of misleading conduct and involvement in inappropriate corporate behaviour”¹⁴; and
 - (ii) “it may be inferred that the Lighthouse entities are impecunious, of no substance and designed to be judgment-proof and the controlling mind of the Lighthouse

⁷ Application, ¶77;

⁸ Application, ¶87; Reply, ¶33.

⁹ Application, ¶¶26, 70; Reply, ¶3; Tr. 28:15-29:2.

¹⁰ Application, ¶¶27-30, citing *inter alia* RL-6, *Burlington Resources Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Procedural Order No. 1 dated 29 June 2009, ¶75; RL-8, Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd Ed. 2009), p. 776.

¹¹ Tr. 14:4-10.

¹² APP Reply, ¶6.

¹³ Reply, ¶6.

¹⁴ Application, ¶9.b.

entities will not take any steps to ensure that they honour any award made against them”.¹⁵

34. The Respondent supports its position with a number of other allegations,¹⁶ including in particular:

- (i) Lighthouse, incorporated in Australia, and Lighthouse IBC, incorporated in Seychelles, are shell companies with nominal share capital.¹⁷ They manifestly lack assets and have no capacity to satisfy an award on costs.¹⁸ The Lighthouse Entities have no discernible business presence nor physical offices (although the Lighthouse website indicates a “corporate address”, “legal chambers” and a “development and research address”).¹⁹ There is no evidence that they have employees (although the Lighthouse LinkedIn page suggests more than 50, and the company has represented that two individuals, who apparently never worked for the company, held the roles of “Auditor in Chief” and “General Counsel, Legal Affairs”).²⁰
- (ii) Lighthouse is wholly-owned by Lighthouse Capital Properties Pty Ltd (“Lighthouse Capital”), an Australian corporation, which is in turn wholly owned by Albert Jacobs.²¹ Neither company has ever had other shareholders. Mr. Jacobs is the sole director of both companies. While there is no evidence as to who owns Lighthouse IBC, it is known that Mr. Jacobs is its sole director. Thus, “for current purposes, the Claimants are Mr Jacobs and Mr Jacobs is the Claimants”.²²

¹⁵ Application, ¶9.c.

¹⁶ Although the Tribunal has carefully considered each allegation, they need not be repeated here.

¹⁷ Application, ¶¶9.c, 50, citing R-13, International Business Companies Act (Cap 100A); National Property Ownership Report (Lighthouse, Lighthouse IBC), 22 July 2015.

¹⁸ Application, ¶¶50-63; Reply, ¶¶8-9, 33.

¹⁹ Application, ¶¶51-55; Reply, ¶23.

²⁰ Application, ¶¶62-63, R-32, Printouts of websites and annual reports (Mr James Podaridis), 29 September 2015; R-33, Printouts of websites and Supreme Court of Victoria decision (Mr Emmanuel Panourakis), 29 September 2015.

²¹ Application, ¶75.d, citing R-14, Current and historical company extract (Lighthouse), 4 September 2015; R-19, Current and historical company extract (Lighthouse Capital), 4 September 2015.

²² Reply, ¶30.

- (i) Mr. Jacobs has a history of many corporate dealings, involving companies with nominal share capital and no assets, mostly in the catering industry.²³ At least four of the companies he controlled have been deregistered by the corporate regulator for failing to submit required reporting.²⁴ Mr. Jacobs also controls companies that have “materially misstated their experience, financial standing and capacity”.²⁵ Mr. Jacobs has personally held himself out to hold certain qualifications and affiliations in statements that have proven false.²⁶ Indeed, he admits to misrepresenting his qualifications in marketing material concerning the Claimants’ alleged standing as oil traders.²⁷
- (iii) Mr. Jacobs created the Lighthouse Entities in 2008 and 2009, apparently for the purpose of dealing with Timor-Leste.²⁸ In these dealings, particularly in promotional materials and correspondence, the Claimants (and Mr. Jacobs) made material misrepresentations about their experience, finances and capacity. These included statements that:
- Lighthouse had three decades of professional experience serving blue chip corporations and governments, when in fact it was not incorporated until 2008;²⁹
 - the “Lighthouse Group” had annual turnover of more than USD 2 billion, which the Claimants have admitted to be false;³⁰
 - Lighthouse had “representative offices” worldwide, whereas they have none;³¹

²³ Application, ¶¶37-45, 80.

²⁴ Application, ¶43 (Lighthouse Solutions Pty Ltd, Lighthouse Café Australia Pty Ltd, Citicapital Corporation Pty Ltd and Trendline Images Pty Ltd).

²⁵ Application, ¶84.b. Respondent notes that in information provided to the public, Lighthouse uses names associated with other companies that do in fact have a public profile in the energy sector, such as “Lighthouse Petroleum” (like the U.S. company Lighthouse Petroleum Inc, which has hydrocarbon exploration licences) and “Lighthouse Energy” (like the U.S. energy services company). Application, ¶57.

²⁶ Application, ¶47; R-0009 R-0065, R-0066, R-0067, R-0068, R-0069, R-0070.

²⁷ Reply, ¶28, citing First Witness Statement of Mr. Jacobs, ¶78. Respondent also points out that there has been a default judgment entered against Mr. Jacobs in the Magistrates Court of Victoria. Application, ¶49; Reply, ¶¶21-22.

²⁸ Application, ¶75.f.

²⁹ Application, ¶5.a; 66.

³⁰ Application, ¶5.f; 75.h.

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- Lighthouse IBC was a subsidiary of Seaways NV, a company with significant fuel infrastructure projects, which Mr. Jacobs now denies ever stating;³²
 - Lighthouse had vast experience in the energy sector, but there is no record of Lighthouse participating in any commercial energy project or the sale/distribution of energy;³³
 - Lighthouse had affiliations and relationships with major energy companies, yet there is no evidence of any of the purported relationships; the “certificates” from BP and Petronas that Mr. Jacobs provided with his Witness Statement are unconvincing and insufficient;³⁴ and
 - Lighthouse had an exclusive agency agreement with Cummins to supply Cummins generators in Timor-Leste, when in fact Lighthouse has never been a Cummins distributor, as evidenced by the witness statements of Cummins executives.³⁵
- (iv) Mr. Jacobs has continued to make statements in this arbitration that are either misleading or false, including his purported evidence regarding Cummins, AES Energy Corporation and DonOilGaz.³⁶
- (v) The Lighthouse Entities “have been structured to be judgement-proof”.³⁷ In particular, Mr. Jacobs and Lighthouse Capital are not parties to this arbitration and there could be no recourse against them in enforcing a costs award.³⁸ Further, Lighthouse is the trustee of Jacobs Family Trust (“JFT”), meaning that even if it

³¹ Application, ¶¶5.d, 68.

³² Application, ¶5.g; Reply, ¶14.

³³ Application, ¶¶5.c, 58, 66.

³⁴ Application, ¶¶5.e, 68; Reply, ¶16.

³⁵ Application, ¶¶5.h, ¶69; Witness Statement of Kate Elizabeth Teixeira, General Counsel of Cummins South Pacific, ¶¶22, 29-42, 53-54. According to Respondent, under “very suspicious circumstances” Lighthouse executed a Cummins Commercial Trading Supply Application and Terms of Trading Agreement, nominating Timor-Leste as guarantor and purporting to sign on its behalf. Application, ¶69

³⁶ Reply, ¶31. See Reply, ¶¶8-25.

³⁷ Application, ¶9.c; Reply, ¶30.

³⁸ Application, ¶79.

did have assets, they would be held in trust for JFT and its beneficiaries, which are not party to this arbitration either.³⁹

(vi) Mr. Jacobs “has in the past taken steps to prevent the satisfaction or to remove assets from [those] available to satisfy court judgment”, in particular in relation to the insolvency of Lighthouse Solutions Pty Ltd.⁴⁰ Indeed, he “has taken steps to put assets out of the Claimants’ name in connection with these proceedings”.⁴¹

35. According to the Respondent, these facts, established by the evidence, are exceptional and compelling, warranting the requested provisional measure.⁴² Indeed, an order for pre-award security is thus said to be both necessary and urgent.

36. With respect to the element of necessity, it is evident, the Respondent asserts, that it will suffer harm without security for its costs: when it seeks to enforce any cost awards against the Claimants, it is “not merely possible but probable” that it will be faced with a corporate shell with no ability or intent to respond.⁴³

37. In this regard, the Respondent accepts that the absence of assets alone is insufficient justification for an order for security; something more is needed.⁴⁴ However, the Respondent asserts that its request is based on the complete lack of assets “in conjunction with the cumulative evidence of a consistent pattern of conduct and statements on the part of Mr. Jacobs, the sole guiding mind of the Claimants, that is materially misleading and, in a number of cases, false”.⁴⁵ Indeed, “it can be inferred that the Lighthouse entities seek to arbitrate their claims as an extension of their previous attempt to take advantage of having misled Timor-Leste.”⁴⁶ For the Respondent, these facts taken together demonstrate a

³⁹ Application, ¶78. See Tr. 62:2-63:10 (Question of Professor McLachlan to Claimants’ counsel).

⁴⁰ Application, ¶45; Reply, ¶¶19-22; Tr. 29:14-19.

⁴¹ Tr. 29:14-19.

⁴² Application, ¶70; Reply, ¶¶3; 34.

⁴³ Application, ¶86.

⁴⁴ Reply, ¶4.

⁴⁵ Reply, ¶4.

⁴⁶ Application, ¶90.

material risk that a costs award would never be satisfied and would therefore have no effect.⁴⁷

38. Respondent contends that such an outcome would render its valuable right to seek reimbursement of its costs in this arbitration null, thereby compromising the integrity of the arbitral process.⁴⁸ As stated by the tribunal in *RSM v. St. Lucia*:

The predominant objective of provisional measures is to protect the integrity of the proceedings. This integrity comprises both substantive and procedural rights. ... The right to seek reimbursement of one's costs in the case of a favourable award likewise constitutes a procedural right in that sense. Hence, there has to be an effective mechanism for protecting this right in order to render it meaningful.⁴⁹

39. With respect to the element of urgency, the Respondent asserts that the finances of Timor-Leste would suffer great damage if it were to expend significant sums in this arbitration without any real prospect of enforcing its right to seek reimbursement. Critically, “[t]hat damage is incurred now and will be irreparable where there is no ability to recover the expenditure later”.⁵⁰ The Respondent notes that it has treated this matter as urgent from the outset, raising its concerns as soon as reasonably practicable following the registration of the Request for Arbitration.⁵¹
40. In addition, the Respondent contends that it has met the requirement of showing that its underlying case is seriously arguable or plausible. In this context, during the hearing, the Respondent described its “core complaint” as follows:

Respondent ... was induced to enter into the contracts by conduct in which the Claimants presented themselves as having a gravitas, a history, an experience, the size and connections with standing in

⁴⁷ Application, ¶87; Reply, ¶33; Tr. 31:1-9.

⁴⁸ Application, ¶9.d, 88-90; Reply, ¶33.

⁴⁹ RL-23, *RSM Production v. Saint Lucia*, ICSID Case No. ARB/12/20, Decision on Saint Lucia's Request for Security for Costs dated 13 August 2014, ¶69.

⁵⁰ Application, ¶93.

⁵¹ Application, ¶92.

the oil production and supply business, which they simply didn't have and which, indeed, they don't now have.⁵²

41. According to the Respondent, the facts and objective evidence presented in its submissions show that these allegations are serious and certainly meet the standard of plausibility. Nevertheless, no prejudgment of the case is required to determine that security for costs is justified in this case; the need is demonstrated by the current factual circumstances.⁵³
42. Finally, the Respondent addresses the principle that a tribunal must be satisfied that there is at least a *prima facie* basis of jurisdiction in order to order provisional measures. Although the Respondent raises a number of jurisdictional objections, it suggests that the registration of the Request for Arbitration by the ICSID Secretary-General "provides a proper and sufficient basis for the Tribunal to order provisional measures", irrespective of its eventual decision on the jurisdictional objections.⁵⁴

B. Claimants' Position

43. The Claimants submit that the Application is "speculative, unfounded and should be rejected", and that the Respondent should be ordered to cover the costs which the Claimants incurred in defending it.⁵⁵ According to the Claimants, a request for provisional measures can be granted only in the most extreme cases, and the Respondent has clearly failed to establish that this is such a case. In any event, the Respondent's allegations are baseless; the Claimants are not impecunious and have sufficient assets to satisfy an award of costs in this arbitration.
44. Regarding the legal standard, the Claimants stress that provisional measures under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 are extraordinary measures that should be recommended only in limited circumstances, as acknowledged by the

⁵² Tr. 14:4-10.

⁵³ Reply, ¶32.

⁵⁴ Application, ¶96.

⁵⁵ Observations, ¶¶93, 96; Rejoinder, ¶20.

Respondent.⁵⁶ For the Claimants, two elements must be present: (i) the measure must be “necessary to avoid imminent and irreparable harm” and (ii) there is urgency.⁵⁷

45. With respect to pre-award security as a provisional measure, the Claimants highlight that security for costs has been ordered in only one ICSID case, *RSM v. St. Lucia*, and by only a majority of the tribunal.⁵⁸ While the Claimants acknowledge that “a small number of ICSID tribunals” have recognized their power to order pre-award security, the Claimants argue that “these decisions have been issued against a background of ICSID practice which either denied the existence, or was doubtful as to the existence, of a power to order security for costs”.⁵⁹ The Claimants point to a number of cases that have rejected requests for security. Reviewing past decisions on the issue of security for costs, the Claimants extract a number of considerations which they find relevant to the Application, including *inter alia*:

- (i) Security for costs “will not be granted in the ordinary course of ICSID arbitration”, but only in “the most extreme case”,⁶⁰
- (ii) A tribunal should avoid prejudging how it might use its discretion in allocating costs;⁶¹
- (iii) The Respondents’ interests must be balanced against the Claimants’ right to access to justice, and there is no requirement in the ICSID system that an investor demonstrate its solvency;⁶²

⁵⁶ Observations, Section B; Rejoinder, ¶18.

⁵⁷ Observations, ¶9, quoting CL-1, *Burimi SRL and Eagle Games v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No 2 dated 3 May 2012, ¶34.

⁵⁸ Observations, ¶10

⁵⁹ Observations, ¶¶10-15, citing CL-4 Paul Friedland, “Provisional Measures and ICSID Arbitration” (1986) 2 *Arbitration International* 335, 344-345, 347-348 (discussing the unpublished decision *Atlantic Triton Company Ltd v. Guinea*, ICSID Case No. ARB/84/1, Decision dated 18 December 1984); CL-5, *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No 2 dated 28 October 1999); CL-6, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures dated 25 February 2001.

⁶⁰ Observations, ¶27.b, quoting CL-6, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures dated 25 February 2001, ¶88.; CL-7, *Libananco Holdings Co Ltd v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated 23 June 2008, ¶57.

⁶¹ Observations, ¶27.6, citing CL-7, *Libananco Holdings Co Ltd v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues dated 23 June 2008, ¶59.

- (iv) The absence of assets alone does not warrant an order for security; there must be a “material and serious risk that a costs award would not be complied with”, shown for instance by an investor’s past failures to satisfy orders on costs in other proceedings;⁶³
- (v) A tribunal must be convinced that a claimant’s conduct “threatens the integrity of the proceedings, that their conduct amounts to abuse, or that it is being pursued in bad faith”,⁶⁴ and
- (vi) Third-party funding of a claim “may heighten any concern that the Claimants may not comply with a costs award, but ICSID practice on this issue is inconsistent”.⁶⁵

46. In light of these considerations, the Claimants contend that “the facts and circumstances of the present case simply do not justify an order for security”.⁶⁶ The Claimants deny the Respondent’s allegations regarding the Claimants’ lack of assets and Mr. Jacobs’ misrepresentations, arguing, *inter alia*, that:

- (i) The Claimants are not impecunious or without substance. Mr. Jacobs owns a 10% interest in Lighthouse DonOilGaz (“Lighthouse Don”) in trust on behalf of Lighthouse IBC.⁶⁷ Lighthouse Don has substantial assets, namely 85% of the shares in JugGeo (held in trust for Lighthouse Don), which has 12 subsoil licences to areas in Russia with proven commercially recoverable hydrocarbon reserves (three licences held in trust for Lighthouse Don and nine in the process of being

⁶² Observations, ¶27.c and h, citing CL-6, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures dated 25 February 2001, ¶86; CL-2, *RSM Production v. Saint Lucia*, ICSID Case No. ARB/12/20, Decision on Saint Lucia’s Request for Security for Costs dated 13 August 2014, ¶87.

⁶³ Observations, ¶27.f, quoting CL-2, *RSM Production v. Saint Lucia*, ICSID Case No. ARB/12/20, Decision on Saint Lucia’s Request for Security for Costs dated 13 August 2014, ¶77-82.

⁶⁴ Observations, ¶27.g, quoting CL-2, *RSM Production v. Saint Lucia*, ICSID Case No. ARB/12/20, Decision on Saint Lucia’s Request for Security for Costs dated 13 August 2014, ¶57. See Tr. 34:7-16.

⁶⁵ Observations, ¶27.i.

⁶⁶ Observations, ¶28.

⁶⁷ Observations, ¶¶91-92; First Witness Statement of Mr. Jacobs, ¶40.

transferred to it).⁶⁸ Based on the valuation of an independent expert, Lighthouse IBC's 10% stake in Lighthouse can be valued at USD 784,300,000.⁶⁹

- (ii) The Claimants currently have business premises in Melbourne and, consistent with the information on the Lighthouse website, have a “development and research address” on the Monash University Campus.⁷⁰ The address of “legal chambers” indicated on the website was previously the address of a barrister who acted as General Counsel for the Claimants.⁷¹ Indeed, Timor-Leste's Ambassador to Australia, Abel Guterres, attended a meeting at that location, as well as at the Claimants' previous Melbourne address.⁷²
- (iii) The Respondent's allegations in respect of the Claimants' dealings with and statements to Timor-Leste are baseless. In particular:
- The statement in the 2010 brochure indicating that Lighthouse has three decades of experience “is a reference to the experience of Lighthouse's close business partner, Seaways” and was included at the behest of Ambassador Guterres, who told Mr. Jacobs to highlight the experience of Lighthouse's conjunctive associations;⁷³
 - Mr. Jacobs and the Claimants do in fact have significant experience in the fuel supply business. For example, from 1999 to 2008, Mr. Jacobs worked for Seaways, NV, which “is predominately a trader of petroleum and hydrocarbon products”, and he later established AES Energy Corporation Pty Ltd. Further, the Claimants have entered into a joint venture and trade agreement with

⁶⁸ Rejoinder, ¶8, citing C-52, Letter from Vladimir D'Jamirze (Lighthouse DonOilGaz), 15 December 2015.

⁶⁹ Rejoinder, ¶¶6-10; C-0037, Professor Eduard Sianisyan, “Value Assessment of Fossil Minerals of Subsoil Area of the Rostov Region (Hydrocarbon Crude)” dated 14 December 2015.

⁷⁰ Observations, ¶¶46-47; ¶Rejoinder, ¶16.

⁷¹ Observations, ¶46.c.

⁷² Observations, ¶46.b and c.

⁷³ Observations, ¶¶39-43; First Witness Statement of Mr. Jacobs, ¶¶67-71.

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Kulla Exim, which operates an oil refinery in Kosovo and provides other fuel-related services;⁷⁴

- The Claimants concede that the brochure produced in December 2010 contained an incorrect statement that Lighthouse Group’s annual turnover was USD 2 billion, but the Claimants did not intend that version of the brochure to be provided to the Respondent; it was sent in error by Mr. Sean Magee of Zebra Fuels without the knowledge of Mr. Jacobs or the Claimants;⁷⁵
- The identification of “representative offices” around the world refers to the Claimants’ network of agents;⁷⁶
- The Claimants’ representations that they have affiliations or relationships with major energy companies are true, as shown by the fact that they are “approved contractual counterparties with British Petroleum and Petronas’s distribution company”;⁷⁷
- Mr. Jacobs himself has never represented that Lighthouse IBC was a subsidiary of Seaways NV, and when that statement was made in a letter from Mr. Magee to the Prime Minister of Timor-Leste, Mr. Jacobs made clear that it was incorrect;⁷⁸ and
- The Cummins Commercial Trading Supply Application and Terms of Trading Agreement was properly concluded on 21 October 2010 between the Claimants and Cummins South Pacific after a series of meetings and

⁷⁴ Observations, ¶¶31-36; First Witness Statement of Mr. Jacobs, ¶¶20-24.

⁷⁵ Observations, ¶¶60-66; Witness Statement of Mr. Magee, ¶¶29-30.

⁷⁶ Observations, ¶47; First Witness Statement of Mr. Jacobs, ¶¶35-36.

⁷⁷ Observations, ¶45, First Witness Statement of Mr. Jacobs, ¶39; C-2, Letter from BP Singapore Pte. Limited to ANZ Bank, 5 May 2010; C-3, Letter from Petronas Dagangan, 15 June 2012; C-4, Letter from Sirat Sidik (Miru Enterprise Sdn. Bhd.), 20 August 2013.

⁷⁸ Observations, ¶¶71-72.

negotiations between Mr. Jacobs and Cummins from September to October 2010.⁷⁹

- (iv) The “Respondent is ignorant of the true story of Lighthouse Solutions Pty Ltd” and therefore makes an unfounded allegation that Mr. Jacobs attempted to avoid a judgment against the company.⁸⁰ In reality, the judgment debt, which arose out of “proceedings that can only have been commenced in error”, was for only AUD 2,048.⁸¹ Further, the transfer of assets to which Respondent refers had nothing to do with the judgment and was concluded before Mr. Jacobs was served with the relevant demand letter.⁸²

47. The Claimants argue that these facts, when viewed in light of the considerations drawn from past ICSID decisions, demonstrate that this is not a “most extreme case” in which an order for security for costs would be justified.⁸³
48. Specifically, the Claimants assert that, although they are not required to establish their solvency, they have demonstrated that they do have substantial assets and the ability to satisfy an award on costs, should one be issued against them in this case.⁸⁴ According to the Claimants, the Respondent has wholly failed to show otherwise; for example, the Claimants have no record of failing to comply with orders for costs in any other proceedings. In addition, their claim is not being financed by a third-party funder.⁸⁵
49. The Claimants argue that the Respondent has failed to put forward convincing evidence of threat to the integrity of the proceedings or of abuse or bad faith. Rather, the Claimants view the Application as one that “relies in large part on speculation, inference, and unfounded allegations of fraud”.⁸⁶

⁷⁹ Observations, ¶¶48-59; First Witness Statement of Mr. Jacobs, ¶¶90-95; Witness Statement of Mr. Magee, ¶¶23-24.

⁸⁰ Observations, ¶75.

⁸¹ Observations, ¶77; First Witness Statement of Mr. Jacobs, ¶45.

⁸² Observations, ¶¶82-83.

⁸³ Observations, ¶95; Rejoinder, ¶18.

⁸⁴ Observations, ¶94.a.

⁸⁵ Observations, ¶94.b.

⁸⁶ Observations, ¶94.c.

50. In any event, according to the Claimants, the Application is speculative, as it presumes that the Respondent will prevail on the merits (which is far from assured given the Claimants' substantial claim), and that the Tribunal will decide to order costs under Article 61(2) of the ICSID Convention.⁸⁷

IV. ANALYSIS

A. Preliminary matters

51. At the outset, the Tribunal emphasizes that this decision is made on the basis of the Tribunal's understanding of the record as it presently stands. Nothing contained herein shall pre-empt any later finding of fact or conclusion of law. Further, the Tribunal's decision could be revisited if relevant circumstances were to change.

52. As a further preliminary matter, it is undisputed that the Tribunal has jurisdiction to rule on the present request, even though the Respondent has stated that it intends to challenge the Tribunal's jurisdiction. Indeed, it is generally accepted that an ICSID tribunal has jurisdiction to rule on provisional measures if there is a *prima facie* basis for jurisdiction. In this case, this basis is provided by the presence of an ICSID arbitration clause in Article 18(2) of the Lighthouse Energy Standard Terms and Conditions Applying to the Sale of Goods (October 2010)⁸⁸ referenced in the Fuel Supply Agreement and by the registration of the case by the ICSID Secretary-General.

B. Legal Framework

53. The Tribunal's power to grant security for costs as a provisional measure is undisputed. This power stems from Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, which read as follows:

⁸⁷ Observations, ¶4.

⁸⁸ Exhibit 5 to the Request for Arbitration.

Article 47

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.

* * *

**Rule 39
Provisional Measures**

(1) 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.

[...]

54. On the basis of these provisions and more particularly of ICSID Arbitration Rule 39, an application for provisional measures must specify “the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.” ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) be necessary, which implies the existence of a risk of irreparable or substantial harm; and (iii) be urgent.⁸⁹
55. ICSID jurisprudence also accepts that the applicant must establish the facts underlying these requirements with sufficient likelihood, without having to prove them.

C. Discussion

(i) Rights requiring preservation

56. The first requirement for provisional measures is that the latter seek to preserve rights of the applicant. These rights can be substantive or procedural in nature and need not

⁸⁹ See, for instance, RL-20, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Procedural Order No. 9, 6 September 2005, ¶38; RL-6, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶51.

necessarily exist at the time of the request. Indeed, the application may well serve to protect contingent rights.⁹⁰

57. Here, the rights sought to be protected are conditional in the sense that they rely on the occurrence of two hypothetical events (that the Respondent will prevail and that it will be awarded costs). This said, they meet the requirement set by ICSID jurisprudence as it is generally understood and was just recalled. Therefore, the Tribunal considers that the Application fulfills the requirement according to which it must seek to preserve rights of a party.

(ii) Risk of harm - Exceptional circumstances

58. The Respondent agrees that provisional relief can only be granted in exceptional circumstances. It also agrees that the mere lack of assets of the possible future debtor is not a sufficient reason to grant an order for security for costs.

59. As a general proposition in line with the requirement of irreparable or substantial harm, the Tribunal is of the view that an application for security for costs may only be granted in exceptional circumstances where there is a real risk that the claimant will not comply with a potential order for costs because it is unable or unwilling to do so. On the basis of the record as it presently stands, the Tribunal finds that the Respondent has not established the existence of such exceptional circumstances for the following main reasons.

60. First, there is no requirement in the ICSID system that a claimant must demonstrate its solvency. Nor did the Respondent establish in this case that the Claimants' assets are insufficient to meet a hypothetical future award of costs against the Claimants. The Claimants point out that Mr. Jacobs, the ultimate owner of the Claimants, holds a 10% interest in Lighthouse Don in trust on behalf of Lighthouse IBC. While the Respondent contests this position pointing out that the shares are presently held in the name of Mr.

⁹⁰ See, for instance, RL-23, *Rachel S. Grynberg, RSM Production Corporation and others v. Republic of Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs dated 14 October 2010, ¶5; RL-10, *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Decision on Provisional Measures dated 23 June 2015, ¶¶119-123; RL-17, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures dated 25 February 2001.

Djamirze and not by Mr. Jacobs, the Claimants have supplied some evidence in support of their position⁹¹ and made a representation that Mr. Jacobs has begun the process of transferring the shareholding to his name. The Claimants value Lighthouse IBC's 10% interest in Lighthouse Don at USD 784,300,000. It is true that there are real issues about the entitlement to, recoverability and valuation of this asset, as it in particular became clear during the hearing.⁹² Yet, it remains that at present the Respondent has not sufficiently shown that the Claimants lack any assets to pay a possible award of costs.⁹³

61. Second, even if it were assumed that the Claimants have insufficient assets, this would not be enough in and of itself. Something more is required. Here too, the Respondent has not convincingly demonstrated that “something more”.

- The Respondent observes that a default judgment was rendered against a Lighthouse entity and another one against Mr. Jacobs personally. However, none of these judgments, one for a debt of AUD 2,048 and the other for AUD 10,000, appears to concern the Claimants. The first judgment related to a debt of a company called “Lighthouse Construction”, an entity which has no connection with the Claimants. The second judgment seemed to deal with the debt of a former employee of one of Mr. Jacob's companies. This debt is also unrelated to the Claimants.
- The Respondent next alleges that Mr. Jacobs has in the past removed assets to avoid satisfying a judgment. The Claimants have given a plausible explanation in respect of this allegation – assets were transferred to a different company for reasons related to the Jacobs Family Trust and the transfer took place before Mr. Jacobs was served with the relevant demand letter.⁹⁴ Further, that a party may transfer its assets is neither exceptional nor sufficient to establish a risk of defaulting on a potential order for costs. This is especially relevant here as it has not been established that the Claimants have ever defaulted on any of their financial obligations.

⁹¹ Exhs. C-29, 33.

⁹² Tr. 52:11-62:21 (Questions of Professor Kaufmann-Kohler to Claimants' counsel) and 62:2-63:10 (Question of Professor McLachlan to Claimants' counsel).

⁹³ Observations, ¶¶46-47; ¶Rejoinder, ¶16.

⁹⁴ Observations, ¶¶82-83.

- Finally, while it alleges several instances of false statements and “materially misleading” conduct, the Respondent has failed to substantiate how these statements or conduct, if true, would be relevant for the Tribunal’s decision on security for costs. For instance, statements about the number of the Claimants’ employees or Mr. Jacobs’ qualifications and affiliations give no indications of the Claimants’ ability or willingness to pay. Equally unavailing for present purposes are the Claimants’ dealings with and statements to the Respondent at the time when it entered into the relevant contracts with the Respondent.
62. Third, an application for security for costs has only been granted once in an ICSID arbitration, namely in *RSM v Saint Lucia* by way of a majority decision. All the other known examples of requests for security for costs in ICSID arbitrations have been denied. Unlike the claimant in *RSM*, here, the Claimants have no record of failing to comply with orders for costs. To the contrary, the Claimants have complied with their obligation in terms of cost advances in these proceedings so far. Neither is their claim financed by a third-party funder as was the case in *RSM*. The Claimants expressly confirmed to the Tribunal at the hearing that no third party is funding their claim.⁹⁵ The exceptional circumstances in which an order for pre-award security was made in *RSM* are thus not present here.⁹⁶
63. On this basis, the Tribunal concludes that the facts invoked by the Respondent are insufficient as the record currently stands to show the “exceptional circumstances” required for an order for security for costs. In other words, the requirement of a risk of irreparable or substantial harm is presently not met. The Tribunal can thus dispense with reviewing the third requirement mentioned earlier, namely urgency.
64. As a result of this analysis, the Application is denied.

⁹⁵ Tr. 51:6-7 (Statement by Claimants’ counsel).

⁹⁶ CL-3, *EuroGas Inc. and Belmont Resources, Inc. v. Slovak Republic*, ICSID Case No ARB/14/14, Procedural Order No 3, Decision on the Parties’ Requests for Provisional Measures dated 23 June 2015.

V. DECISION

65. For the foregoing reasons, the Arbitral Tribunal:

- (1) Denies the Respondent's application that the Claimants post security for costs; and
- (2) Reserves its decision on the costs of this application for a later stage of these proceedings.

On behalf of the Tribunal,

[signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 13 February 2016