INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lotus Proje Akaryakıt Enerji Madencilik Telekominikasyon İnşaat Sanayi Taah. Ve Tic. A.Ş.

v.

Turkmenistan

(ICSID Case No. ARB/24/13)

PROCEDURAL ORDER NO. 3
Decision on the Respondent's Request for Security for Costs

Members of the Tribunal
Ms. Meg Kinnear, President of the Tribunal
Ms. Lucy Greenwood, Arbitrator
Mr. John M. Townsend, Arbitrator

Secretary of the Tribunal
Mr. Govert Coppens

April 28, 2025

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. The Claimant, Lotus Proje Akaryakıt Enerji Madencilik Anonim Şirketi ("**Lotus**" or "**Claimant**"), is a Turkish incorporated company that was involved in the construction of power systems in Turkmenistan.[1]

2. Lotus is wholly owned by Lotus Holding Anonim Şirketi ("**Lotus Holding**"), which in turn is wholly owned by Mr. Erdal Çelik ("**Mr. Çelik**"). Lotus was declared bankrupt on November 24, 2016, and remains under bankruptcy administration in Türkiye.[2]

3. ICSID registered the Request for Arbitration ("**RFA**") in this matter on May 20, 2024. In the RFA, Lotus alleges that Turkmenistan ("**Respondent**" or "**Turkmenistan**") breached its obligations under the Energy Charter Treaty, causing loss or damage to Lotus of "no less than EUR 100,000,000.00."[3]

4. The Tribunal was constituted on January 23, 2025, and the First Session was held on February 19, 2025.

5. Procedural Order No. 1, including the Parties' agreed procedural calendar, and Procedural Order No. 2 on confidentiality and transparency, were issued on February 27, 2025.

6. On March 7, 2025, the Respondent filed a Request for Security for Costs (the "**SFC Request"** or "**Request**") with its Exhibits (R-0001 to R-0016) and Legal Authorities (RL-0001 to RL-0029). The Request is based on Rule 53 of the ICSID Arbitration Rules 2022 ("**AR 53**"), which are the applicable Rules in this matter.

[1] **Request for Arbitration** ("**RFA**"), April 13, 2024, para. 5.

[2] **Respondent's Application for Security for Costs**, March 7, 2025 ("**Application**"), paras. 2, 3, 38; **Ex. R-0003**, Turkish Trade Registry Gazette, December 6, 2016; **Ex. R-0004**, 1st Commercial Court of First Instance, Decision No. 2016/711, November 24, 2016; **Ex. R-0008**, Turkish Trade Registry Gazette, November 16, 2016; **Claimant's Response to Respondent's Application for Security for Costs**, April 4, 2025 ("**Response**"), paras. 16-25.

[3] **RFA**, para. 156(b).

7. On April 4, 2025, the Claimant filed a Response to the SFC Request (the "**SFC Response**" or "**Response**") with its Exhibits (C-0034 to C-0053) and Legal Authorities (CL-0001 to CL-0014).

8. The Tribunal held a hearing on the SFC Request via video conference on April 16, 2025 (the "**Hearing**"). Participating in the Hearing were Ms. Meg Kinnear, Ms. Lucy Greenwood, and Mr. John M. Townsend (the Tribunal Members); Mr. Govert Coppens (the ICSID Tribunal Secretary); Mr. Alp Tokeşer, Mr. Berk Tüzüner, Mr. Tuğberk Dekak, Mr. Sercan Polat, and Mr. Baver Mert (Counsel for the Claimant); Mr. Ali Gursel, Mr. John Branson, Mr. Carlos Guzmán Plascencia, Ms. Isabel Manfredonia, Ms. Olha Madaan, and Ms. Kate Maguire (Counsel for the Respondent); and Ms. Dawn Larson (the Court Reporter).

9. At the request of the Tribunal, each Party submitted its proposed text for the dispositive provision of an order in this matter on April 18, 2025.

II. THE PARTIES' REQUESTS FOR RELIEF

10. The Respondent requests that the Tribunal:

    (a) Order the Claimant to provide security for costs ("**SFC**") of USD 3 million through an unconditional and irrevocable bank guarantee or a deposit in escrow within 14 days after the Tribunal's order and that the Claimant maintain such security until the proceeding concludes;

    (b) Order that the posting and maintenance of such security be a condition of continuing the arbitration pursuant to AR 53(6); and

    (c) Order the Claimant to reimburse all costs and expenses related to the SFC Request.[4]

11. The Claimant requests that the Tribunal:

[4] **Application**, para. 61. See also the Respondent's proposed order on the Application, April 18, 2025.

(a) Dismiss the Respondent's Request for SFC; and

(b) Order the Respondent to bear the costs associated with the Request for SFC in the final award.[5]

III. THE PARTIES' POSITIONS

A. THE RESPONDENT'S POSITION

12. The Respondent submits that SFC is warranted in this case based on the criteria in AR 53(3).[6] It has advanced the following evidence and argument in support of this assertion.

13. First, the Respondent argues that the Claimant is and will remain unable to comply with an adverse decision on costs because it is bankrupt.[7] The only asset available to the bankruptcy administrator is the claim of Lotus in this arbitration.[8]

14. Turkmenistan emphasizes that "a minor claim" of EUR 300,000.00 triggered Lotus' bankruptcy in 2016, and that 170 creditors subsequently sought to register their bankruptcy claims in an aggregate amount exceeding USD 17.8 million.[9] It claims that Mr. Çelik, the owner of Lotus Holding, sought to file the largest single claim, contending he owns more than 73% of Lotus' liabilities and all residual distributions from the bankruptcy.[10]

15. The Respondent places substantial weight on the fact that Lotus required third-party funding ("**TPF**") to finance this arbitration.[11]

[5] **Response**, para. 132. See also the Claimant's proposed order on the Application, April 18, 2025.
[6] **Application**, paras. 1, 20.
[7] **Application**, paras. 2-3, 22, 24; **Ex. R-0003**, Turkish Trade Registry Gazette, December 6, 2016.
[8] **Application**, paras. 3, 22.
[9] **Application**, paras. 3, 22; **Ex. R-0005**, List of Creditors of Lotus Proje Akaryakıt Enerji Madencilik Anonim Şirketi.
[10] **Application**, para. 41; **Ex. R-0005**, List of Creditors of Lotus Proje Akaryakıt Enerji Madencilik Anonim Şirketi, lines 58 and 61.
[11] **Application**, paras. 4, 25-33.

16. The Claimant's contract with the funder, SSL Danışmanlık Hizmetleri Ltd Şti ("**SSL**"), makes SSL liable for an enumerated list of arbitration expenses, but does not expressly list liability for an adverse cost award. The Claimant argues that an adverse costs award would be covered by the final item in the enumerated list which makes the funder liable for: "[A]ny unforeseen expenses related to the arbitration proceedings."[12] The Respondent argues that nothing in the wording of the funding contract can reasonably be construed as covering an obligation to pay adverse costs.[13]

17. The Respondent argues that an April 3, 2025, letter from SSL submitted with the Claimant's Response[14] also fails to commit SSL to payment of adverse costs, noting that "[a]t no point in this letter does SSL even mention an adverse Cost Award."[15] In the Respondent's view, none of the evidence advanced by the Claimant establishes that SSL has assumed responsibility for payment of adverse costs.

18. The Respondent states that in any event, there is no evidence that SSL is financially able to fulfil an order to pay adverse costs. It notes that SSL is not an established litigation funder: it was created in 2019 with capital of less than USD 2,000; its owner has no apparent track record in litigation financing; and its sole project appears to be funding this arbitration.[16]

19. While SSL adopted a corporate resolution on March 18, 2025, to increase its capitalization by TRY 10,000,000.00 (roughly USD 260,000), the bulk of this capital increase (TRY 9,250,000.00) is only scheduled to be paid within 2 years after the resolution.[17]

[12] **Application**, paras. 4, 25-26; **Ex. R-0002**, Lawsuit Financing Agreement between Lotus and SSL, July 19, 2023, para. 5.

[13] **Transcript**, 34:1-14; 76:1–77:21.

[14] **Ex. C-0034**, Letter from third-party funder SSL, April 3, 2025.

[15] **Transcript**, 35:9–38:12.

[16] **Application**, paras. 27-28; **Ex. R-0006**, "SSL Danışmanlık Hizmetleri Limited Şirketi", B2BHINT, March 24, 2024; **Ex. R-0007**, AppsCon, Contact Page for Danışmanlık Hizmetleri; **Transcript**, 31:2–34:7.

[17] **Transcript**, 39:4-11; **Ex. C-0046**, Turkish Trade Registry Gazette (excerpt), March 18, 2025 (concerning SSL's capital increase).

Based on these facts, the Respondent argues that SSL is a shell company that could not afford to pay an adverse costs award, even if it were willing to do so.

20. The Respondent also notes that SSL is beyond the Tribunal's jurisdiction as a non-party to the case. Nor does the Respondent have privity with SSL, and hence it may be difficult to compel SSL to pay a cost award.[18]

21. Second, the Respondent argues that the Claimant would be *unwilling to pay* an adverse costs award. It alleges that the claims in this case are "factually identical" to claims made in a 2017 ICSID case initiated by Lotus Holding, the parent company of Lotus.[19] The *Lotus Holding* case was suspended for a lengthy period due to that claimant's inability to pay advances. Ultimately, the *Lotus Holding* case was dismissed in April 2020 for manifest lack of legal merit, with a costs award of USD 983,100.98 in favour of Turkmenistan. Lotus Holding has not complied with that award.[20]

22. Turkmenistan argues that the failure of Lotus Holding to comply with the 2020 costs award establishes that Lotus would not comply with an adverse costs award in this case.[21] Although Lotus is a separate legal entity from Lotus Holding, the Respondent contends that the non-compliance of Lotus Holding can be attributed to Lotus under AR 53(3)(b) given that these entities share a common owner (Mr. Çelik) who is the ultimate beneficial owner of both companies, that Lotus has been wholly owned by Lotus Holding since 2007, and that the underlying facts in both arbitrations are identical.[22]

23. The Respondent also notes its experience in unrelated investment arbitrations. Turkmenistan has prevailed on the merits in four such cases but has been unable to recover

[18] **Transcript**, 34:8–35:1.

[19] **Ex. RL-0017**, *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, April 6, 2020; **Application**, paras. 7, 37.

[20] **Application**, paras. 2, 7, 34-40.

[21] **Application**, paras. 17-19, 34-40.

[22] **Application**, paras. 38-40.

the costs awarded in its favour in any of them.[23] In one of these cases, the Supreme Court of Türkiye refused to enforce the award because Türkiye had not designated a court for enforcement of ICSID awards. Turkmenistan also recounts two examples of TPF financing being withdrawn during the arbitration, leaving it with unrecoverable costs.[24]

24. Third, with respect to the effect of an order for SFC on the Claimant's *ability to pursue the claim*, the Respondent argues that AR 53(3)(c) requires an assessment of the balance of harm as between the Parties. It submits that in this case the harm to the Respondent of not ordering SFC outweighs the harm of requiring the Claimant to post reasonable security.[25]

25. The Respondent notes that, even if it prevails in this case, it would be futile to pursue costs against a bankrupt Lotus.[26] It also notes the risk of TPF being withdrawn mid-case, leaving the Respondent unable to recover its costs.[27]

26. Turkmenistan asserts that Lotus cannot reasonably argue that its ability to pursue its claim will be affected by SFC because it has already secured arbitration funding. In this respect, the Respondent likens the cost of paying a reasonable security to the cost of advances – a cost of the arbitration and not a constraint on access to justice.[28] It cites cases under the 2006 ICSID Rules and the UNCITRAL Rules holding that posting security in a reasonable amount is not an undue burden on a third-party funded Claimant and should not be considered a constraint on access to justice.[29]

[23] **Application**, para. 56.

[24] **Application,** para. 55; **Transcript**, 22:13–25:10.

[25] **Application,** paras. 45-56.

[26] **Application**, para. 51.

[27] **Application**, paras. 53-55.

[28] **Application**, paras. 48-50; **Transcript**, 14:8-18.

[29] **Application**, paras. 48-50; **Ex. RL-0023**, *Tennant Energy LLC v. Government of Canada,* PCA Case No. 2018-54 (UNCITRAL), Procedural Order No. 4, February 27, 2020; **Ex. RL-0003**, *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6, April 13, 2020 ("***Kazmin v. Latvia***"); **Ex. RL-0025**, *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 11, July 14, 2023.

27. The Respondent also argues that obtaining a bank guarantee would cost "only a small fraction" of the USD 3 million SFC it has requested.[30] Further, it argues that the cost of posting security can be addressed in the Tribunal's ultimate award on costs and may even be awarded to the Claimant if it succeeds in this arbitration.[31] In short, it submits that the "Claimant can be made whole, but Respondent cannot be made whole" without an SFC order.[32]

28. Turkmenistan also argues that the amount of SFC requested is reasonable in the circumstances. It points to empirical studies demonstrating an average cost of USD 4.7 million for respondents in investment arbitration.[33] It also cites the costs awarded to Turkmenistan in the four cases which it won – these ranged from USD 1 million; USD 1.102 million; USD 1.747 million; to USD 11.2 million.[34]

29. The Respondent dismisses the relevance of other sources of funds identified by the Claimant: monies contractually withheld by Turkmenistan and prioritization of an investment award in bankruptcy.[35]

30. Fourth, the Respondent argues that the *conduct of the Parties* supports an order of SFC. It notes its own prompt payment of advances in this case and its track record of compliance with adverse awards in other cases.[36]

---

[30] **Transcript**, 19:7-19.

[31] **Transcript**, 21:9–22:11.

[32] **Transcript**, 40:14-19.

[33] **Application**, para. 57; **Transcript**, 97:6–99:7.

[34] **Application**, para. 56; **Ex. R-0011**, T. Fisher, "Russian telecoms investor loses claim against Turkmenistan", Global Arbitration Review, June 15, 2023; **Ex. R-0012**, *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, March 8, 2016; **Ex. R-0013**, *Turkmenistan v. Içkale İnşaat Limited Şirtketi*, 12th Civil Chamber of the Supreme Court of Türkiye, Decision No. 2021/4586, November 10, 2020; **Ex. R-0014**, L. Peterson, "An UNCITRAL tribunal declines jurisdiction over a joint treaty claim brought against Turkmenistan by a series of unrelated claimants (*Erhas Dis Ticaret Ltd. Sti. and others*)", IA Reporter, June 23, 2015; **Ex. R-0015**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, July 2, 2013; **Ex. R-0016**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015.

[35] **Transcript**, 39:13–41:9.

[36] **Application**, para. 59.

31. The Respondent also notes that the Claimant delayed bringing this case for 4 years after the *Lotus Holding* award, contributing to increased interest on any damages that might be awarded.[37]

32. Finally, the Respondent argues that whether the conduct of Turkmenistan may have caused Lotus to declare bankruptcy is irrelevant to an SFC Request and that consideration of this conduct would be tantamount to prejudging the merits of the case.[38]

B. THE CLAIMANT'S POSITION

33. The Claimant disputes the facts, the legal analysis and the conclusions urged by the Respondent.

34. Lotus provides additional facts concerning its bankruptcy. It has become subject to the process for ordinary liquidation, and the bankruptcy administration was appointed on December 8, 2022. Each claim must be reviewed by the bankruptcy administration and may be admitted; rejected but appealed to Turkish commercial courts; rejected with no further appeal possible; or rejected due to the absence of bankruptcy fees. This process is ongoing.[39]

35. To date, approximately TRY 19,409,398.04 (USD 515,000) in claims have been admitted. Other claims have been finally rejected (TRY 647,062,745.64 in total) while still others have been rejected with the potential for later admission due to appeals (TRY 100,632,281.15) or payment of bankruptcy fees (TRY 582,154.71). If the bankruptcy administration loses the cases currently on appeal, the total claims would be approximately USD 3,175,000 (TRY 120,623,833.36). Lotus notes this is significantly less than the USD 17.8 million debt suggested by the Respondent.[40]

[37] **Application**, para. 60.

[38] **Application**, paras. 23-24; **Ex. RL-0007**, *José Alejandro Hernández Contreras v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/22/5, Procedural Order No. 2, May 2, 2024 (excerpt) (English translation) ("***Contreras v. Costa Rica***"), paras. 47-48.

[39] **Response**, paras. 16-38.

[40] **Response**, paras. 2, 23-25; **Transcript**, 53:7-12.

36. Lotus challenges Turkmenistan's assertion that the bankruptcy claims of Lotus Holding and Mr. Çelik will likely be admitted. To the contrary, it states that Lotus Holding, Mr. Çelik, and a Dubai affiliate named Lotus Enerji FZE sought to register receivables with the bankruptcy administration, but their claims were rejected. These rejections are now final, as all potential for appeal has been exhausted or abandoned.[41]

37. As a result, Lotus Holding and Mr. Çelik have no say in the bankruptcy, which is administered under Turkish law, and have no say in the conduct of this arbitration. Lotus Holding and Mr. Çelik could only benefit from an award in this case after all other creditors are satisfied, in their capacity as direct and indirect shareholders of Lotus.[42]

38. Lotus adds that Turkmenistan sought to register bankruptcy claims arising from contractual penalties and tax receivables at issue in the RFA.[43] These claims were rejected by the bankruptcy administration and are currently on appeal. Collectively they are worth more than TRY 100,000,000 and would make Turkmenistan the largest creditor of Lotus if admitted. Lotus speculates that this is an attempt by the Respondent to gain control of the bankruptcy administration and terminate this arbitration, or alternately that it contradicts the Respondent's position on the riskiness of collecting its costs. Either way, Lotus argues this is a salient fact that should have been disclosed in the Request for SFC and is relevant to the circumstances assessed under AR 53(3).[44]

39. Lotus contradicts the Respondent's assertion that SSL is not a viable source for payment of an adverse costs award. Although it acknowledges that the funding contract has no express language concerning responsibility for adverse costs, Lotus submits that SSL's

[41] **Response**, paras. 26-30; **Transcript**, 50:2-14.
[42] **Response**, paras. 2, 11, 36-38.
[43] **Response**, paras. 26-30 and fns. 38-39.
[44] **Response**, paras. 26-30.

contractual responsibility for "any unforeseen expenses related to the arbitration proceedings" includes an adverse costs award.[45]

40. Additionally, Lotus submitted a letter from SSL dated April 3, 2025, with its Response which asserts that the funding agreement "protects the Respondent from any cost-related prejudice in the event of a cost award in its favor. SSL stands firmly behind its financial and legal undertakings."[46] As a result, Lotus maintains that SSL is committed to pay any adverse costs in this case.

41. Lotus argues that SSL's capitalization and recent entry into the arbitration funding market is irrelevant to AR 53 and that SSL is a credible funder. It explains that SSL is a "new company formed to fund international arbitration cases that are not usually funded by the big funders, such as claims of bankrupt companies or cases against States that are regarded as risky respondents."[47] It also recounts that several funders were carefully vetted by the bankruptcy administration before selecting SSL.[48]

42. While Lotus agrees that SSL was constituted with a small amount of capital, it notes that SSL recently raised TRY 10,000,000 in capital. The bulk of this capital infusion (TRY 9,250,000) is due in 24 months at the latest, which Lotus suggests is consistent with the expected date for an award from the Tribunal.[49]

43. Counsel for Lotus could not verify the Respondent's characterization of the cost of SFC as *"de minimus*", noting that it did not have this information and that it would be difficult to provide a globally applicable number in any event.[50]

[45] **Response**, paras. 2, 12-15, 94; **Ex. R-0002**, Lawsuit Financing Agreement between Lotus and SSL, July 19, 2023, para. 5; **Transcript**, 61:19–62:2.

[46] **Ex. C-0034**, Letter from third-party funder SSL, 3 April 2025, p. 2; **Response**, paras. 13-15; **Transcript**, 63:6-22.

[47] **Response**, para. 97.

[48] **Response**, paras. 94-97, 110-115; **Transcript**, 67:18–68:3.

[49] **Ex. C-0046**, Turkish Trade Registry Gazette (excerpt), March 18, 2025 (concerning SSL's capital increase); **Transcript**, 60:1–61:8.

[50] **Transcript**, 88:4–89:19.

44. Lotus also confirmed that the obstacle to enforcement of ICSID awards in Türkiye was cured in February 2017 when Türkiye designated its competent courts for enforcement purposes.[51]

45. Overall, Lotus argues that the Respondent advances an overly simplified application of AR 53, in which the only relevant circumstances are the insolvency of the Claimant and the existence of third-party funding. Lotus submits that the evidence related to all four circumstances listed in AR 53(3) must be considered and that doing so should result in a refusal to order SFC.[52]

46. With respect to *ability to pay*, the Claimant asserts that both its own solvency and the potential for payment by a third party must be considered under this criterion.[53] While it admits it is insolvent, it points to other sources available to satisfy adverse costs. These include third-party funding,[54] funds retained by Turkmenistan under contract,[55] and the priority of an adverse costs award in bankruptcy administration.[56]

47. The Claimant notes that *willingness to comply* with an adverse costs order differs from ability to pay. It suggests that this objection would involve, for example, proof that the Claimant has taken intentional measures to avoid paying its debts.[57] No such evidence has been advanced in this case.[58]

48. Lotus emphasizes the importance of considering the impact of SFC on its *ability to pursue the claim.* It notes that the ICSID framework generally assumes that each party will fund itself during an arbitration (referring to AR 51, 52 and 59 and Administrative and Financial

[51] **Response**, paras. 98-101; **Ex. C-0047**, Letter from the Republic of Turkey to the ICSID Secretary-General, February 1, 20217 (regarding its designation pursuant to Article 54(2) of the ICSID Convention).

[52] **Response**, paras. 6-7, 42-50, 79.

[53] **Response**, paras. 51-52.

[54] **Response**, paras. 38, 94-110.

[55] **Response**, paras. 91-93.

[56] **Response**, paras. 51-52, 103-110.

[57] **Response**, paras. 53-56, citing **Ex. RL-0003**, *Kazmin v. Latvia*, para. 59; **Ex. CL-0005**, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2, Procedural Order No. 6, July 26, 2018, para. 40.

[58] **Response**, paras. 53-56.

Regulations 15 and 16), and that AR 53 is a narrow exception to this principle.[59] As a result, it suggests that SFC is exceptional in nature and requires the requesting party to prove a "concrete, substantiated risk."[60]

49. Lotus states that neither it nor the bankruptcy administration can afford to post SFC. It cautions that an order to post SFC could end the arbitration, depriving numerous individual creditors of money properly owed to them.[61]

50. In balancing the relative impact of SFC on Lotus and Turkmenistan, the Claimant notes that it seeks "to exercise its right to be heard in pursuit of the ultimate remedy for its creditors" whereas the Respondent is pursuing a "contingent right", conditional both on winning the case and being awarded its costs.[62]

51. Finally, Lotus emphasizes that AR 53(3)(d) relates to the *conduct of the parties* to the case, and not the conduct of unrelated entities. As Lotus Holding has had no relation to Lotus since the bankruptcy in November 2016, Lotus Holding's failure to pay the costs award in the 2020 ICSID case cannot be attributed to Lotus for the purposes of this application.[63]

52. Lotus notes that it duly included the funding agreement when it filed the RFA[64] and has met its financial obligations to date in this case.[65]

53. Lotus also urges the Tribunal to consider the alleged reason for its impecuniosity, namely the conduct of Turkmenistan. While it agrees with the Respondent that the outcome of the arbitration is a question of merits that cannot be adjudicated on an application for SFC, it asserts that the Tribunal should consider whether a *prima facie* case exists. Lotus argues

[59] **Response**, paras. 57-79.
[60] **Response**, para. 59.
[61] **Response**, paras. 116-118.
[62] **Response**, para. 60.
[63] **Response**, paras. 39, 56, 80-81, 119.
[64] **Response**, para. 5.
[65] **Response**, paras. 97, 119-129.

that the facts in the RFA establish a *prima facie* case that Turkmenistan at least partially caused the bankruptcy of Lotus.[66]

54. Finally, Lotus alleges that Turkmenistan has a track record of delay and non-payment in investment arbitration generally, although it properly acknowledges that this is largely based on secondary sources.[67]

IV. THE TRIBUNAL'S ANALYSIS

55. AR 53 is a new provision in the 2022 ICSID Rules. It is a stand-alone rule governing security for costs and can be considered a complete code for addressing such requests.

56. AR 53 differs from prior ICSID Arbitration Rules, which did not specifically address SFC. Disputing parties requesting SFC under prior ICSID Rules relied on Article 47 of the ICSID Convention and Rule 39 of the 2006 ICSID Arbitration Rules (or their predecessor) governing provisional measures.[68]

57. Case law developed under the prior ICSID Rules required the requestor to establish "exceptional circumstances" justifying a provisional measure. This called for proof that: (a) there was a right in need of protection; (b) the situation was urgent; and (c) provisional measures were necessary to prevent irreparable harm.[69]

58. While SFC remains a form of provisional measure under Convention Article 47, the "exceptional circumstances" test generally used for provisional measures is no longer the applicable test for SFC. It has been displaced by the more specific test in AR 53.[70]

---

[66] **Response**, paras. 82-88.

[67] **Response**, paras. 125-129.

[68] The same provision is included in AR 63 of the Additional Facility Arbitration Rules of 2022: see **Ex. RL-0007**, *Contreras v. Costa Rica*, para. 40.

[69] **Application**, paras. 9-11; **Ex. RL-0002**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014 ("***RSM v. Saint Lucia***"), paras. 48, 59-62; **Ex. RL-0003**, *Kazmin v. Latvia*, para. 62.

[70] See **Ex. RL-0007**, *Contreras v. Costa Rica*, para. 40. On the test under the former rules, see **Ex. RL-0002**, *RSM v. Saint Lucia*, para. 48; **Ex. RL-0003**, *Kazmin v. Latvia*, paras. 28, 31, 61; **Ex. RL-0004**, *Manuel García Armas et al. v. Bolivarian Republic of*

59. Given the different approach in AR 53, disputing parties and tribunals should exercise caution in reaching conclusions based on cases decided under the prior rules. These cases are largely irrelevant to the assessment of SFC under AR 53.[71]

60. AR 53 allows a party to apply for SFC by filing its request with a statement of "the relevant circumstances" and the supporting documents (AR 53(1) & (2)). The burden of proving that SFC is warranted is on the requesting party.[72]

61. AR 53(3) sets out the legal test for an SFC request. It provides:

> *(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:*
>
> *(a) that party's ability to comply with an adverse decision on costs;*
>
> *(b) that party's willingness to comply with an adverse decision on costs;*
>
> *(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and*
>
> *(d) the conduct of the parties.*

62. As is clear from the phrase "shall consider" in AR 53(3), the Tribunal must address all the criteria in AR 53(3)(a) to (d) in deciding an SFC application. No single criterion is determinative. The tribunal in *Contreras v. Costa Rica* described the proper approach as follows: "…these circumstances must be evaluated systematically and cumulatively; in

Venezuela, PCA Case No. 2016-08, Procedural Order No. 9, June 20, 2018 (excerpt) (English translation), paras. 250-251; **Ex. RL-0012**, *Dirk Herzig as Insolvency Administrator over the assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020 ("***Herzig v. Turkmenistan***"), paras. 15-20, 23, 47.

[71] **Ex. RL-0007**, *Contreras v. Costa Rica*, paras. 40, 42, 44.

[72] **Ex. RL-0007**, *Contreras v. Costa Rica*, para. 49.

other words, the mere existence of any single circumstance does not automatically require the Tribunal to grant the Application."[73]

63. As is also clear from the word "including" in AR 53(3), the criteria in AR 53(3)(a) to (d) are all relevant, but not exhaustive, considerations. While each must be addressed by a tribunal, parties may raise further considerations if they are apt in the specific case.

64. AR 53(4) addresses the evidentiary basis for an order for SFC. It states:

> *(4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.*

65. The distinction between AR 53(3) and AR 53(4) is especially important with respect to the effect of TPF on a request for SFC. AR 53(4) makes it clear that the existence of TPF is a fact to be considered in applying the test in AR 53(3). The existence of TPF is not a criterion in and of itself, and the existence of TPF without further relevant evidence does not compel an order for SFC.

66. The Tribunal has carefully considered the facts pleaded in this application in light of AR 53(3)(a) to (d). In terms of *ability to pay*, the Parties agree that the Claimant is bankrupt, and without assets other than its claim in this arbitration. As a result, Lotus would be unable to pay an adverse award of costs.

67. The Claimant argues that AR 53(3)(a) can be established by proof that a third party would pay an adverse cost award on its behalf. The Tribunal agrees that a Claimant can establish its ability to pay adverse costs by demonstrating that a third-party is ready, willing and able to do so on behalf of the Claimant.

[73] **Ex. RL-0007**, *Contreras v. Costa Rica*, para. 44.

68. In this case, the Claimant argues that SSL is liable to pay an adverse costs award, and hence the Claimant meets AR 53(3)(a). The Claimant seeks to establish this based on the terms of the funding contract and the April 3, 2025, letter of SSL.

69. The Tribunal finds it difficult to construe SSL's assumption of liability for "any unforeseen expenses related to the arbitration proceedings" as an undertaking to pay adverse costs should the claim be dismissed and costs awarded against the Claimant. The list in clause 5 of the funding contract recites typical arbitration costs but does not expressly include liability for an adverse costs award. Liability for adverse costs is of a different nature than the other items listed in clause 5 and would be a predictable cost for any funder to address should it be willing to take on such an expense.

70. Similarly, the Tribunal finds it difficult to construe the April 3, 2025, letter as an undertaking by SSL to pay adverse costs to the Respondent should the claim be dismissed and costs awarded against the Claimant. The assertion that "the Agreement not only supports Lotus Enerji in the pursuit of its claims but also protects the Respondent from any cost-related prejudice in the event of a cost award in its favor" expresses a conclusion but falls short of an undertaking.

71. Even if the TPF contract and the April 3, 2025, letter were sufficient to establish that SSL intended to be liable for adverse costs, they do not demonstrate that SSL has the financial capacity to fulfil this undertaking. To the contrary, the evidence suggests that SSL currently has minimal capital, has a planned infusion of less than USD 300,000 within the next 2 years, and does not have any other available sources of funding or business to fulfil an adverse award of costs. There is thus no evidence upon which the tribunal could conclude that SSL currently has the ability to pay costs or that it will have sufficient funds if ultimately called upon to do so at the conclusion of this arbitration.

72. The Tribunal also cannot find that the funds withheld in Turkmen contracts could be used to satisfy an adverse costs award. To the same effect, while a claim for costs might garner priority status in the Lotus bankruptcy, this would be of little practical assistance if there

were no assets in the bankruptcy. As a result, these alternative sources of funds do not establish the Claimant's ability to pay adverse costs in this case. In sum, neither the Claimant nor any other entity willing to pay on its behalf appear to have the ability to do so. As a result, it is not possible to find that Lotus can pay adverse costs now, or conceivably in the future, and thus it does not meet the criteria in AR 52(3)(a).

73. The second consideration under AR 53(3)(b) is *willingness to pay* an adverse award. The Respondent argues that Lotus Holding's non-compliance with a prior costs award is material evidence demonstrating that Lotus would not comply with an adverse decision on costs.[74] Certainly, non-compliance with a prior cost award by the same Claimant would be relevant to the overall balancing task.[75] However, in this case the non-compliance was by a separate legal entity, albeit the parent company of the Claimant, and was in a separate case. The Tribunal is unable to conclude that the non-compliance of Lotus Holding in its prior case means that Lotus would be unwilling to comply in this case.

74. Indeed, based on the record, the Tribunal cannot conclude that Lotus, or even SSL, would be unwilling to pay an adverse costs award, if they had the financial ability to do so.

75. Third, AR 53(3)(c) requires the Tribunal to consider the impact of SFC on pursuit of the claim. This requires balancing the relative harm to each party if there were insufficient funds available to pay an adverse costs award. Based on the current record, there are insufficient funds available to Lotus to satisfy a typical costs award, and so it is likely that the Respondent could recover little, if any, costs if it succeeds in the arbitration. On the other hand, Lotus has funding for its arbitration and will be able to pursue its claim. Should Lotus succeed on the claim, it may recoup its costs, including the cost of purchasing security. While the purchase cost of security is not insignificant, this appears to be the best

[74] **Application**, para. 17.

[75] **Ex. RL-0002**, *RSM v. Saint Lucia* addresses non-compliance by a claimant, RSM, which failed to comply with awards against different respondents. This case deals with the opposite situation: the same Respondent (Turkmenistan) and different claimants.

way to ensure that the relative ability of each party to address the claim on the merits can be maintained.

76. Finally, AR 53(3)(d) requires the Tribunal to consider the conduct of the Parties in this matter. In terms of procedural conduct to date, both Parties have been fully cooperative, and have met their obligations to pay the costs of the proceeding to date.

77. Lotus urges the Tribunal to factor in the Respondent's contribution to Lotus becoming bankrupt for purposes of AR 53(3)(d). The Respondent maintains that this is not permissible, as it would require a finding on the merits and would be tantamount to pre-judging the arbitration.[76] The Claimant disagrees, arguing that the Tribunal can consider whether a *prima facie* case has been established.

78. This question was addressed in *Contreras v. Costa Rica*, in which the tribunal held that consideration of the host State's role in causing the investor's financial situation is impermissible under AR 53. However, some cases under prior rules have been willing to consider such conduct in determining SFC.[77]

79. Even if the Tribunal was minded to do so, this arbitration is at such a preliminary stage that it would be impossible to make any credible determination about the role of either Party in Lotus' bankruptcy. The Tribunal does not yet have sufficient evidence or understanding of the case to reach a *prima facie* conclusion that Turkmenistan contributed to the bankruptcy of Lotus.

80. In the result, the Tribunal unanimously finds that the facts, considered cumulatively in accordance with the criteria in AR 53(3), support an order for SFC.

81. AR 53(5) requires the Tribunal to specify any relevant terms in an order for SFC and to fix a time limit for compliance with the order.

[76] **Application**, para. 23, referring to **Ex. RL-0007**, *Contreras v. Costa Rica*, paras. 47-48.
[77] See, for example, **Ex. RL-0012**, *Herzig v. Turkmenistan*, para. 83.

82. In this instance, the Claimant has not addressed the form of security it could obtain. The Tribunal is agreeable to the Claimant fulfilling its obligation to provide security by any of the following: posting a guarantee, depositing funds in escrow, or securing after-the-event ("**ATE**") insurance. It is for the Claimant to determine which of these options is most convenient and cost-effective, while providing the security required by this Order.

83. The Respondent has requested security of USD 3 million. The amount of security should be reasonable, calibrated to cover the likely costs of the arbitration. The median costs of investment arbitration generally, and the actual costs awarded to Turkmenistan in prior cases, are both helpful in considering this amount. At the same time, costs can vary depending on the complexity and duration of the case, both of which are unknown at this point. Given the various data, the Tribunal finds that security in the amount of USD 2 million in favour of the Respondent is appropriate.

84. The Tribunal will therefore allow the Claimant 30 days from the date of this order to determine the type of funding and the source of funding for the security. The Claimant should revert to the Tribunal in writing, copying the Respondent, with a detailed explanation of its proposal sufficient for the Tribunal to be assured that it will serve the intended purpose. Once the Tribunal has approved this security, the Claimant will have 30 days to put it into effect.

85. Once posted, the security should be maintained by the Claimant until the earlier of the conclusion of this arbitration and satisfaction of any adverse costs order, or modification or revocation of this SFC order pursuant to AR 53(6) to (8).

V. DECISION

86. For the foregoing reasons, the Tribunal orders as follows:

(a) The Respondent's Request for Security for Costs is granted;

(b) The Claimant shall post a USD 2 million security for costs in favour of the Respondent;

(c) The Claimant may elect to post such security in the form of a bank guarantee, cash into an escrow account, or ATE insurance coverage. The Claimant shall revert to the Tribunal in writing, with a copy to the Respondent, within 30 days of this order providing sufficient details concerning the security to be obtained and the provider of such security;

(d) Once approved by the Tribunal, the Claimant shall have 30 days to put such security in place;

(e) In the interim, the Parties shall follow the timetable in Schedule B of Procedural Order No. 1;

(f) Once posted, the security shall be maintained consistently until the conclusion of the arbitration and satisfaction of any adverse cost award, or modification of this order by the Tribunal pursuant to AR 53(6) to (8); and

(g) The Tribunal reserves its decision on the costs of this application.

On behalf of the Tribunal,

[signed]

Ms. Meg Kinnear
President of the Tribunal
Date: April 28, 2025