

# Observations on the Proposed new ICSID Regime for Security for Costs

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## §1. Introduction

In its Working Paper of 2 August 2018 (hereinafter 'Working Paper'), the International Centre for Settlement of Investment Disputes (ICSID) has proposed certain amendments to its rules and regulations, including the Rules of Procedure for Arbitration Proceedings (ICSID Rules). The proposals in the Working Paper reflect comments that ICSID received from Member States and the public in a consultation process launched in January 2017.<sup>1</sup> The proposed amendments cover a range of topics, from changes to the administrative and financial regulations of ICSID to significant modifications of its arbitration and conciliation rules. The purpose of this paper is to address only one of the proposed changes: security for costs.

Security for costs orders require a party to provide a security to cover the estimated costs that the other party will incur in the proceeding, including arbitration costs and legal fees. The ICSID Secretariat has proposed to introduce a new provision – Draft Rule 51 – to establish a separate regime for security for costs. In ICSID arbitration, security for costs orders are almost always sought by States against claimant investors. While the new security for costs regime proposed by ICSID will in theory be able to be invoked by claimant investors against States – the rather unconvincing example the Working Paper gives is 'when a respondent raises counterclaims'<sup>2</sup> – the reality is that it will almost exclusively be invoked by States against claimant investors. This is because the main criterion that the new rule posits for whether security should be granted is 'the party's ability to comply with an adverse decision on costs'<sup>3</sup> and it is hard to see how a State – even a State with limited resources – could fall afoul of this measure. Thus, there is an asymmetry inherent in Draft Rule 51 and the provision should be understood as a mechanism for States to use against investors.

In this light, this paper identifies three main concerns with Draft Rule 51 as currently drafted:

- First, for reasons explained below, Draft Rule 51 will likely have the effect of materially lowering the threshold for the grant of security for costs orders, such

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<sup>1</sup> International Centre for Settlement of Investment Disputes, *Proposals for Amendment of the ICSID Rules – Working Paper* (Volume 3, ICSID Secretariat, 2 August 2018, available at [https://icsid.worldbank.org/en/Documents/Amendments\\_Vol\\_Three.pdf#page=230](https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf#page=230)).

<sup>2</sup> *Ibid.*, at ¶ 517.

<sup>3</sup> Draft Rule 51(3).

that they are significantly easier to get in ICSID proceedings. The introduction of a more '*applicant friendly*' regime should be a cause for concern amongst capital-exporting countries. Draft Rule 51 poses a clear threat to the interests of small businesses, especially single-asset companies, who are already most exposed to security for costs orders in the ICSID system (larger businesses are less exposed because they have the balance sheet to satisfy adverse costs orders if they are made against them). Many capital-exporting countries are now including specific provisions designed to promote and protect the interests of Small and Medium-Sized Enterprises (SMEs) in their new trade and investment treaties, and these countries must take special care to ensure that the introduction of a new security for costs regime in the ICSID Rules does not undermine this commendable economic objective. Nor should it be forgotten that the ICSID system was not meant to only promote investment by big businesses, but rather promote and protect investors of all sizes.

- Second, Draft Rule 51 will apply in annulment proceedings. This is a major change and it is not explained in the Working Paper's explanation of Draft Rule 51. It will radically alter the economics of an annulment proceeding, which are already challenging for SMEs. Under the current annulment regime, and under the amendments proposed, the applicant for annulment is solely responsible to pay the costs of ICSID and the annulment committee (this is different to first-instance proceedings before an ICSID tribunal, where the costs are normally paid in equal advances by both parties). If an investor needs to invoke the annulment procedure and is required to pay these costs *and* potentially post security for the respondent State's legal and other costs, annulment may well be unaffordable for many SMEs. This would result in an important group of foreign investors – arguably the group that needs protection most – being denied access to justice that the ICSID system was intended to guarantee.
- Third, the matters that Draft Rule 51(3) requires ICSID tribunals (and annulment committees) to consider when they rule on security for costs requests make no mention of access to justice or whether the costs claimed by the party requesting security are reasonable. Under Draft Rule 51(3), the only specific consideration that must be taken into account is 'the party's ability to comply with an adverse decision on costs' – a factor that would naturally go against many SMEs, especially those who have had their only cash-generating asset expropriated. While Draft Rule 51(3) does require the tribunal or committee to consider 'any other relevant circumstances', to balance the provision for SME investors, the wording of Draft Rule 51(3) should be amended so that the critical issues of '*access to justice*' and the reasonableness of the costs claimed are elevated to the level of specific and mandatory considerations (of equal relevance to the ability to pay). Failing such amendments, Draft Rule 51 will disproportionately effect SME claimants and should be opposed by capital-exporting countries.
- Fourth, under Draft Rule 51, if a party fails to comply with a security for costs order against it, the tribunal may suspend and ultimately discontinue the proceedings. The Working Paper rightly notes that this change raises 'important

policy question for Member States'.<sup>4</sup> This mechanism creates a direct link between security for costs and access to justice, as a security for costs order can bring about the end of a case. It therefore reinforces the need for '*access to justice*' to be introduced as one of the matters that a tribunal or committee must consider in deciding whether to order security for costs.

The writer acknowledges that States have a legitimate interest in being able to collect costs orders in their favour. The writer also acknowledges that there will be cases where orders should be made to secure this right. However, in the writer's view, the changes that ICSID is proposing fail to strike the right balance between the interests of States and the interests of investors. In the writer's view, capital-exporting countries should either oppose the introduction of Draft Rule 51 as currently written or, alternatively, propose certain amendments to the part of the provision that sets out the matters a tribunal or annulment committee is required to consider in its ruling on the request (Draft Rule 51(3)). The proposed amendments are explained further below and displayed in the extract of Draft Rule 51 that is included as **Annexure A** to this paper.

## **§2. Existing Regime for Security for costs at ICSID**

To appreciate the significance of the changes that ICSID is proposing to introduce through Draft Rule 51, it is necessary to first consider the way security for costs is regulated under the existing ICSID regime.

Under the existing regime, security for costs are treated as a form of provisional measure. The regime for provisional measures is derived from three sources: Article 47 of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Rule 39 of the ICSID Rules and jurisprudence, as reflected in the published decisions of ICSID and other investment arbitration tribunals.

Parties to ICSID proceedings regularly request provisional measures and, as a result, the law and practice of ICSID provisional measures is well developed. It is generally accepted that, to obtain provisional measures under Article 47 and Rule 39, the requesting party must demonstrate that: (a) the arbitral tribunal has *prima facie* jurisdiction, (b) there is a *prima facie* basis to the claim, (c) the requested measures are necessary to protect the requesting party's rights (or to preserve the status quo and avoid aggravating the dispute), (d) the requested measures are urgent, and (e) the requested measures are proportional.<sup>5</sup> Tribunals tend to apply these criteria 'in the round', meaning the strengths and weaknesses of the request are assessed holistically, with the attention and weight given to each condition depending on the facts of the case, the backgrounds, and experiences of the arbitrators themselves and, increasingly, the nature of the orders being sought.<sup>6</sup> The object of the inquiry is to determine whether the requesting party deserves protection in the form of provisional measures.

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<sup>4</sup> *Proposals for Amendment of the ICSID Rules – Working Paper*, *supra* n. 1, at ¶ 531.

<sup>5</sup> For a wider discussion of the ICSID provisional measures system, see Sam Luttrell, *ICSID provisional measures "in the round"*, 31 *Arb Intl* 393, 397 (2015).

<sup>6</sup> *Ibid.*

However, provisional measures are not easily obtained in ICSID arbitration. ICSID arbitrators generally regard 'the imposition of provisional measures [as] an extraordinary measure which should not be granted lightly by the Arbitral Tribunal'.<sup>7</sup> An applicant for provisional measures under Article 47 and Rule 39 will, therefore, usually bear a heavy burden of proof (and persuasion) to show why provisional measures should be granted in the circumstances at hand.

Within this legal framework, security for costs developed as a specific branch of ICSID provisional measures jurisprudence. As tribunals confronted and resolved specific questions arising within this framework – including whether the right to claim costs is a right amenable to protection under Article 47 (provisional measures are generally only available to protect an existing right) – a *sui generis* test for security for costs gradually emerged. The Working Paper accurately summarises this *sui generis* test, where it explains that tribunals working under Article 47/Rule 39 have generally required that a party requesting security for costs:

prove that it will suffer serious or irreparable harm if an order of security for costs is not granted, and that the security is 'urgent' and 'necessary'. In undertaking this analysis, Tribunals have considered factors such as: whether the other party has insufficient assets to cover a costs award, has failed to comply with past costs awards or other obligations, or may act in bad faith to shield assets. Evidence of 'exceptional circumstances' is routinely required.<sup>8</sup>

The 'exceptional circumstances' element of this *sui generis* test reflects the fact that security for costs orders raise specific access to justice issues that do not arise with other forms of provisional relief. This requirement, combined with the requirements ordinarily applicable to provisional measures requests, placed a heavy burden on applicants. Under this regime, most security for costs applications were unsuccessful.

Indeed, the first time a security for costs application succeeded in an ICSID arbitration was in 2014, in the case of *RSM Production Corporation v. Saint Lucia*.<sup>9</sup> In *RSM* the majority of the three-member tribunal decided to grant security for costs, on the basis that the claimant investor had a proven history of non-compliance with ICSID costs awards, had admitted that it did not have sufficient financial resources to fund its case and was funded by an unknown third party (which the majority of the tribunal considered might not comply with a possible costs award rendered in favour of St. Lucia). One member of the *RSM* tribunal dissented, his dissenting reasons including that he did not consider security for costs to be within the scope of Article 47 of the ICSID Convention and that reading Article 47 as allowing a tribunal to order security

<sup>7</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Request for Provisional Measures (28 October 1999), at ¶ 10; see also *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Order of 6 September 2005, at ¶ 38; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No ARB/06/5, Decision on Provisional Measures (6 April 2007), at ¶ 33; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/15, Decision on the Claimants' Request for Provisional Measures (3 March 2010), at ¶ 41.

<sup>8</sup> *Proposals for Amendment of the ICSID Rules – Working Paper*, supra n. 1, at ¶ 501.

<sup>9</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security of Costs (13 August 2014).

for costs would be against the object and purpose of the ICSID Convention (which is to encourage economic development through private investment).

Following the *RSM* decision, numerous security for costs requests were made by States but it was not until June 2018 that security for costs were ordered by another ICSID tribunal, in the case of *Manuel García Armas et al v. Venezuela*.<sup>10</sup> *Armas* was a combined case, with one proceeding brought under the Arbitration Rules of the United Nations Commission on International Trade Law and another proceeding brought under the ICSID Additional Facility Rules. It is notable that the *Armas* tribunal's reasons for ordering security for costs included that the claimant has entered into a Third-Party Funding (TPF) arrangement, the terms of which were the subject of extensive analysis by the tribunal. The *Armas* decision is not referred to in the Working Paper but merits attention in the context of Draft Rule 51. While some practitioners are viewing *Armas* as an outlier, the decision is already being cited by States in security for costs applications.

Finally, it is important to note that, while it has become accepted that security costs may be sought from an arbitral tribunal through the provisional measures framework in Article 47 of the ICSID Convention, the position is less clear when it comes to whether security for costs may be sought from an ad hoc committee in an annulment proceeding. This is because Article 47 is not one of the articles Article 52(4) of the ICSID Convention deems applicable (*mutatis mutandis*) in annulment proceedings. Although there is some authority for the proposition that security for costs may be granted in the exercise of an annulment committee's inherent powers in an 'extreme case',<sup>11</sup> to date no ICSID annulment committee has ever granted security for costs. The heightened threshold recognised in the annulment contest reflects both the fact view that inherent powers are an 'extraordinary control'<sup>12</sup> and the concern that security for costs could have the effect of denying the party against whom they are ordered access to justice at the apex of the ICSID system.

### §3. Observations on Proposed new Regime: Draft Rule 51

The new regime that ICSID is proposing to introduce is contained in Draft Rule 51, which ICSID has explained will be a 'new stand-alone provision'<sup>13</sup> for security for costs. The shift from a provisional measures-based regime to a 'stand-alone' regime for security for costs represents a major change and raises important questions of law and policy for users of the ICSID system, especially SMEs and capital-exporting countries.

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<sup>10</sup> *Manuel García Armas et al v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08/ICSID Case No. ARB(AF)/16/1, Decision on Request for Security for Costs (20 June 2018).

<sup>11</sup> *See Commerce Group Corp & 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 (20 September 2012), at ¶¶ 44-47.

<sup>12</sup> *Commerce Group Corp & 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 (20 September 2012) at ¶ 44.

<sup>13</sup> *Proposals for Amendment of the ICSID Rules – Working Paper*, *supra* n. 1, at ¶ 514.

In the sections that follow, the focus is on three issues: first, the lower threshold for security for costs that Draft Rule 51 will introduce; second, the applicability of Draft Rule 51 in annulment proceedings; and third, the matters that a tribunal or ad hoc committee is required to consider when deciding a security for costs application under Draft Rule 51.

### [A] Lower Threshold for Security for Costs

As summarised above, to date, the law and practice of security for costs has developed as a branch of provisional measures jurisprudence under Article 47 and Rule 39. It bears emphasising that it has been case law, rather than the posited law of the ICSID Convention or the ICSID Rules, that has shaped the development of law and practice in this area. While there is no doctrine of precedent (*stare decisis*) in ICSID arbitration, or international law generally, previous decisions are commonly referred to by ICSID tribunals and annulment committees.

Against this backdrop, a major question that arises out the proposed changes is what effect the introduction of a stand-alone rule will have on the persuasive value of the body of case law that developed through tribunals deciding requests for security for costs under the Article 47/Rule 39 regime. This has important practical implications because, if the prior case law is no longer considered to be persuasive under Draft Rule 51, several important principles may fall away. One of these principles is that parties requesting security for costs need to show 'exceptional circumstances'.<sup>14</sup> If this principle no longer applies, then the threshold for security for costs will be materially lower than it is under the existing regime.

Draft Rule 51 does not contain any express wording to indicate that a particularly high threshold must be met for security to be granted, and indeed the Working Paper suggests that Draft Rule 51 is intended to lower the threshold that an applicant for security must meet.<sup>15</sup> While it may be argued that decisions made under the prior regime remain persuasive – at least to the extent they stand for principles that are not expressly displaced by the text of Draft Rule 51 – it may also be argued that Draft Rule 51 is an effective codification and, as such, decisions under the previous regime are no longer relevant. Tribunals and committees will have considerable discretion in how they approach this important issue. However, Draft Rule 51 is certain to be regularly used and, as a result, a specific body of jurisprudence will quickly be developed under the new provision. Given that certain parts of the Working Paper suggest an intention to lower the threshold to make security for costs 'more readily available',<sup>16</sup> and considering the way the rule is presently drafted (discussed below), it is likely that this jurisprudence

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<sup>14</sup> See for example *EuroGas Inc & Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 (23 June 2015), at ¶ 121. In the context of annulment proceedings, see also *Commerce Group Corp & 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 (20 September 2012).

<sup>15</sup> *Proposals for Amendment of the ICSID Rules – Working Paper*, supra n. 1, at ¶¶ 501-502 ('Evidence of "exceptional circumstances" is routinely required [...] In practice, it has been difficult for parties requesting security for costs to meet this burden').

<sup>16</sup> *Ibid.*, at ¶ 496.

will be significantly more favourable to parties requesting security for costs (typically, States) than the jurisprudence of the existing regime.

What this means is that, in crafting this new '*stand-alone*' security for costs rule, great care needs to be taken to ensure that its text is balanced and does not conflict with the object and purpose of the ICSID Convention. In the writer's view, the rule as currently drafted is manifestly lacking such balance and should not be accepted by capital-exporting States. It should either be opposed or accepted only on the condition that the text of Draft Rule 51(3) is amended to require the tribunal (or committee) to consider the extent to which an order to provide security for costs could limit a party's access to justice. Access to justice concerns are expressly noted in the Working Paper,<sup>17</sup> and so this proposal should not come as a surprise to ICSID. This amended wording will ensure that, in a regime in which the threshold for obtaining security for costs is materially lower, the protections that the ICSID Convention was intended to afford to foreign investors are not overlooked.

### **[B] Applicability of Draft Rule 51 to Annulment Proceedings**

As noted above, historically there has been some uncertainty as to the legal basis upon which an ICSID annulment committee may order security for costs. However, through the introduction of Draft Rule 51, there will be a clear basis for security for costs to be granted in annulment proceedings. This result will be achieved through two steps:

- First, by detaching the regime for security for costs from the provisional measures regime in Article 47 of the ICSID Convention, the fact Article 47 is not one of the articles of the Convention referred to in Article 52(4) (which articles are applicable *mutatis mutandis* in annulment proceedings) will no longer present a barrier to the grant of security for costs by ad hoc annulment committees. Committees will no longer need to resort to inherent powers as an alternate basis for granting security.
- Second, by changing the regime for security for costs so that it is governed purely by a *rule* (rather than an article of the Convention), the regime for security for costs is made eligible for application to annulment proceedings, without creating any conflict with Article 52(4) of the Convention. Note that the work of incorporating the security for costs rule into annulment proceedings is done not by Draft Rule 51, but rather by Draft Rule 66(1), which provides that 'the provisions of these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee'.

The Working Paper does not explain this in its otherwise comprehensive explanation of Draft Rule 51. This is surprising because the inclusion of Draft Rule 51 in the overall procedure applicable to annulment proceedings will present a real issue for many investors – particularly SMEs – *a fortiori* given that (for reasons explained above) Draft

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<sup>17</sup> *Ibid.*, at ¶ 498.

Rule 51 will likely impose a materially lower threshold for the grant of security for costs.

The fundamental issue here is how the new rule will affect the already unique economics of an annulment proceeding. In an annulment proceeding, Rule 14(3)(e) provides that 'the applicant shall be solely responsible for making the payments requested by the Secretary-General' to cover the costs of the ad hoc committee and ICSID. This is to be contrasted with proceedings before a first-instance tribunal, where the costs are generally called in equal advance instalments from both parties.

So, not only does the applicant for annulment have to pay the full the costs of the annulment proceedings under Rule 14, but under Draft Rule 51 they stand to be further burdened with providing security for the respondent's legal and other costs (which often run into the millions). For smaller investors – such as single-asset companies who lack the balance sheet to meet these financial obligations – it may not be possible to use the annulment mechanism in the ICSID Convention. Such a result must be avoided. The annulment mechanism is available *as of right* to all parties under the Convention. To introduce any rule that has the effect of limiting or de facto preventing a certain class of investors from exercising this right would be contrary to both the text and the purpose of the ICSID Convention (which is to encourage economic development through private investment).

The writer's proposed amendments to Draft Rule 51(3) are intended to address this issue. They will require annulment committees (just as they will require tribunals) to consider the extent to which an order to provide security for costs could have the effect of limiting the target party's access to justice. Importantly, they will also require the committee to consider whether the costs claimed by the party requesting security are *reasonable* (which often they are not). These amendments will ensure that orders for security for costs do not place an economic burden on investors that they cannot meet, and which the drafters of the ICSID Convention did not intend they would bear.

### **[C] Relevant Considerations for the grant of Security for Costs**

Draft Rule 51 requires the tribunal to consider two broad criteria when making its decision on the request for security for costs. These criteria are set out in Draft Rule 51(3), which reads as follows:

In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.

While the Working Paper confirms that these broad criteria are mandatory ('*required*'<sup>18</sup>) considerations for the Tribunal, it emphasises that the intent of Draft Rule 51(3) is 'to provide general guidelines for Tribunals without inhibiting the flexibility they will need to address a vast range of factual circumstances'.<sup>19</sup> According to the Working Paper, Draft Rule 51:

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<sup>18</sup> *Ibid.*, at ¶ 526.

<sup>19</sup> *Ibid.*



avoids more specific mandatory criteria because: (i) the relevance of certain criteria varies on a case-by-case basis; (ii) currently, there is insufficient case experience with security for costs in investment arbitration to devise a comprehensive list of mandatory criteria; and (iii) specific criteria could become outdated and compromise the longevity of the provision.<sup>20</sup>

This explanation is interesting in so far as it suggests ICSID is anticipating significant evolution in the jurisprudence of security for costs under the new provision.

Regarding the first limb of Draft Rule 51(3) – the party's ability to comply with an adverse costs order – this reflects existing practice under the Article 47/Rule 39 regime, in which it is generally accepted that a lack of assets alone will not justify a grant of security for costs. This practice is noted in the Working Paper:

Tribunals have not found that a lack of assets alone justifies granting security for costs. As discussed above, there must be other circumstances present, such as a history of noncompliance with legal orders or bad faith.<sup>21</sup>

Given the specificity of the first limb of Draft Rule 51(3), it is likely that most parties will not bother requesting security unless they have a strong case for saying that the other party does not have the ability to satisfy an adverse costs award. So, in many (if not most) cases, the decision of the tribunal or committee will turn on the second limb of Draft Rule 51(3): whether there are '*other relevant circumstances*' that warrant an order for security for costs. It will be the way these open-textured words are interpreted and applied by tribunals and committees – the circumstances that come to be accepted as favouring a grant of security for costs – that determines how Draft Rule 51 operates in practice.

The Working Paper explains that TPF may be relevant under either or both limbs of Draft Rule 51(3).<sup>22</sup> The Working Paper confirms, however, that 'the mere fact of TPF, without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed Draft Rule 51'.<sup>23</sup> This is consistent with the approach taken by ICSID tribunals, such as the

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<sup>20</sup> *Ibid.*, at ¶ 529.

<sup>21</sup> *Ibid.*, at ¶ 527.

<sup>22</sup> *Ibid.*, at ¶ 530 ('Draft Rule 51(3) does not refer expressly to TPF. Instead, it is drafted in general terms that would cover TPF or any other funding arrangement to the extent that such arrangement: (i) reflects on the party's ability to comply with an adverse decision on costs; or (ii) is a circumstance relevant to assessing the appropriateness of the security. Under proposed [Draft Rule 21], parties are under a continuing obligation to disclose the existence of TPF immediately upon registration of the request for arbitration. As a consequence, this fact will be available to a party seeking security for costs and to the Tribunal that must decide the application. The Tribunal can then make further inquiries as needed').

<sup>23</sup> *Ibid.*, at ¶ 267. (The Working Paper explains that Draft Rule 51(3) 'would cover TPF or any other funding arrangement to the extent that such arrangement: (i) reflects on the party's ability to comply with an adverse decision on costs; or (ii) is a circumstance relevant to assessing the appropriateness of the security' (*see* ¶ 53).

tribunal in *EuroGas v. Slovak Republic*.<sup>24</sup> However, given that Draft Rule 21 will require a party to ICSID proceedings to provide 'written notice disclosing that it has third-party funding and the name of the third-party funder' (a rule the writer supports), it seems reasonable to expect that TPF will be a recurring theme in future practice under Draft Rule 51.

Without delving into the wider debate on whether TPF is a good or bad thing, it is worth noting that the likely effect of Draft Rule 51 will be to increase the cost of funding – at least for those SMEs who do not have the balance sheet to satisfy a large adverse costs award (and who are therefore prima facie captured by the first limb of Draft Rule 51(3)). This is because, for such businesses, funders will need to apportion additional monies at the outset of the proceedings to be used as security (in the event security is ordered), with the result that the overall level of funding required for the case is increased and the funded party's share of the proceeds is decreased accordingly. For smaller cases (claims for USD 50 million or less), it may not be possible to secure funding and as a result, these smaller claims will be excluded from the ICSID system. This prospect needs to be considered in the context of the emerging policy of many capital-exporting countries to promote the participation of SMEs in the international trade and investment system.

#### **[D] Consequences of Non-compliance with Security for Costs**

Draft Rule 51(4) sets out the regime that applies in circumstances where an order for security for cost is not complied with by the party against whom it is made. It provides that the tribunal may suspend the proceeding until the ordered security is provided and, if the proceeding is suspended for more than 90 days, the tribunal may, after consulting with the parties, order the discontinuance of the proceeding. It is notable that Draft Rule 51(4) uses the permissive word '*may*' (rather than mandatory '*shall*'), thereby signalling that the tribunal retains discretion to determine what consequences should follow from non-compliance with its security for costs order.

While to an extent the suspension mechanism in Draft Rule 51(4) has a precedent in the *RSM v. St Lucia* case,<sup>25</sup> and an equivalent provision is present in the Arbitration Rules of the Stockholm Chamber of Commerce, many users of the ICSID system will still see it as a radical proposal. As the Working Paper notes, Draft Rule 51(4) 'would be unique within the [Rules], which otherwise give the Tribunal the power to discontinue the proceedings only with the (deemed) agreement or acquiescence of the parties'.<sup>26</sup> However, as the Working Paper also notes, 'many of the tools normally employed by Tribunals to address non-compliance with an order may be ineffective'<sup>27</sup> where security for costs orders are concerned. The Working Paper also notes that two Free Trade

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<sup>24</sup> *EuroGas v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures (23 June 2015).

<sup>25</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No ARB/12/10, Decision St Lucia's Request for Suspension or Discontinuance of Proceedings (8 April 2015).

<sup>26</sup> *Proposals for Amendment of the ICSID Rules – Working Paper*, supra n. 1, at ¶ 532.

<sup>27</sup> *Ibid.*, at ¶ 532.

Agreements have recently included provisions that allow a tribunal to suspend or dismiss the case if a claimant fails to comply with an order for security for costs.<sup>28</sup>

The Working Paper rightly identifies Draft Rule 51(4) as raising an 'important policy question for Member States'.<sup>29</sup> Given that non-compliance with a security for costs order can lead to the draconian result that the proceedings are discontinued without the consent of the parties, it is all the more important that '*access to justice*' be expressly included in Draft Rule 51(3) as one of the considerations that tribunals and annulment committees are required to take into account when they decide requests for security for costs under the new regime.

#### **§4. Concluding Remarks**

The ICSID Convention was intended to promote private international investment as a means of stimulating economic development amongst Member States. The dispute resolution mechanisms it offers investors are now regularly used and the system is flourishing as a result. It is not perfect (nor is any system of justice) and there are good reasons for reform in certain areas.

It is true that the current regime, in which security for costs are treated as a form of provisional measure, imposes a heavy burden on parties requesting security (almost always respondent States). Exceptional circumstances must be demonstrated by the requesting party, for the good reason that security for costs orders can have serious consequences for the other party's access to justice under the ICSID system. But cases like *RSM* and *Armas* show that the burden is not insurmountable in practice and that tribunals are sensitive to the competing interests at stake.

While the fact that a *sui generis* test for security for costs has developed in ICSID jurisprudence arguably does speak in favour of the introduction of a dedicated rule (as it may be seen as a signal that security for costs have evolved away from the provisional measures framework), the way that rule is drafted must reflect the asymmetry that is inherent in security for costs in ICSID arbitration and the critical issue of access to justice that often arises where security for costs are ordered. All capital-exporting countries must be on guard to ensure that their nationals – particularly their SMEs – are not unfairly exposed to the new security for costs regime that ICSID is proposing or denied the protection that the drafters of the ICSID Convention intended they would enjoy. Draft Rule 51 as currently proposed will have a disproportionate effect on SMEs and, in the writer's view, ICSID Member States should only accept Draft Rule 51 if the limited but crucial amendments proposed in this paper are accepted.

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, at ¶ 531.

## ANNEXURE A – SUGGESTED AMENDMENTS TO DRAFT RULE 51

*Note: the suggested amendments are underlined and in italics in the text below. No words have been deleted from the text proposed by ICSID.*

### DRAFT RULE 51

#### SECURITY FOR COSTS

1. A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.
2. The following procedure shall apply:
  - (a) the request shall specify the circumstances that require security for costs;
  - (b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;
  - (c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and
  - (d) the Tribunal shall issue its decision on the request within 30 days after the latest of:
    - (i) the constitution of the Tribunal;
    - (ii) the last written submission on the request; or
    - (iii) the last oral submission on the request.
3. In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs, *the extent to which an order to provide security for costs could limit the party's access to justice, whether the costs claimed are reasonable* and any other relevant circumstances.
4. If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.
5. A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
6. The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request.