INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

RSM PRODUCTION CORPORATION
(CLAIMANT)

and

SAINT LUCIA
(RESPONDENT)

ICSID Case No. ARB/12/10

DECISION ON SAINT LUCIA'S REQUEST FOR SECURITY FOR COSTS

Members of the Tribunal
Professor Siegfried H. Elsing, President
Dr. Gavan Griffith QC, Arbitrator
Judge Edward W. Nottingham, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

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Date: August 13, 2014

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A. Parties

I. Claimant

1. **RSM Production Corporation** (hereinafter referred to as **"Claimant"**) is a company constituted under the laws of Texas, U.S.A. It is represented by Messrs. Jack J. Grynberg and Roger Jatko and Ms. Janice Orr. Counsel for Claimant in this arbitration is Mr. Daniel L. Abrams and Mr. Karel Daele of Mishcon de Reya.

II. Respondent

2. **Saint Lucia** (hereinafter referred to as **"Respondent"**) is represented in this arbitration by its counsel Messrs. Brian King and Elliot Friedman and Ms. Lexi Menish of Freshfields Bruckhaus Deringer US LLP as well as Mr. Jonathan J. Gass of the London office of Freshfields Bruckhaus Deringer LLP and Ms. Kate Parlett of the Paris office of Freshfields Bruckhaus Deringer LLP.

3. Claimant and Respondent are hereinafter referred to individually as a **"Party"** and collectively as the **"Parties"**.

B. Procedural History

4. On April 2, 2012, Claimant filed a request for arbitration dated March 29, 2012 with ICSID against Respondent (the **"Request"** or **"RFA"**).

5. On April 23, 2012, the Secretary-General of ICSID registered the Request, as supplemented by letters of April 8 and 20, 2011, in accordance with Article 36(3) of the ICSID Convention and notified the Parties thereof. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.

6. The Parties agreed to constitute the Tribunal in accordance with Article 26.3(b) of the "*Agreement between the Government of Saint Lucia and RSM Production Corporation*", entered into on March 29, 2000 (**"Agreement"**), which provides:

> *Each party shall appoint one arbitrator, and these two shall designate a third arbitrator, who shall chair the Arbitration Board. If the arbitrators named by the parties fail to agree upon a third arbitrator within thirty (30) days after the latter of the two arbitrators has been appointed, or if any party does not appoint an arbitrator within thirty (30) days following appointment of an arbitrator by the other party, such arbitrator shall, at the request of either party, be designated by the Chairman of the Administrative Council of ICSID.*

7. The Tribunal is composed of Prof. Siegfried H. Elsing, a national of the Federal Republic of Germany, President, appointed by agreement of the Parties; Judge Edward Nottingham, a national of the United States of America, appointed by Claimant; and Dr. Gavan Griffith QC, a national of Australia, appointed by Respondent.

8. On August 6, 2013, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (**"ICSID Arbitration Rules"**) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aurélia Antonietti, ICSID Team Leader/Legal Counsel, was designated to serve as Secretary of the Tribunal.

9. On September 6, 2013, Respondent filed a request for provisional measures.

10. Claimant filed its opposition to Respondent's request for provisional measures on September 20, 2013.

11. On September 26, 2013, Respondent filed its reply on provisional measures.

12. On October 2, 2013, Claimant filed its rejoinder on provisional measures.

13. The Tribunal held its first session and a hearing on provisional measures with the Parties on October 4, 2013, in New York City (**"First Session"**).

14. On December 12, 2013, the Arbitral Tribunal issued its **"Decision on Saint Lucia's Request for Provisional Measures"**, obliging Claimant to bear all further advances and to refund to Respondent the portion it had already paid. The decision on Respondent's request for security for costs was suspended.

15. On January 24, 2014, Claimant filed its Memorial on the Merits.

16. On June 6, 2014, Respondent filed its Counter-Memorial.

C. Background of the Dispute

17. In order to briefly summarize the subject matter of the arbitration, so far as it can be derived from the Parties' submissions to date, Claimant bases its claim on the Agreement. Pursuant to the Agreement, Respondent granted Claimant an exclusive oil exploration license in an area off the coast of Saint Lucia, initially for a period of four years.

18. Subsequently, according to Claimant's position, boundary disputes developed, affecting the exploration area, in particular in relation to Martinique, Barbados and St. Vincent, which allegedly prevented Claimant from initiating exploration. The details concerning the existence of such boundary disputes and their legal consequences are disputed among the Parties.

19. On September 8, 2000, the Parties amended their agreement to the effect that it was acknowledged that a *force majeure* situation existed due to the boundary issues and that this situation excused performance of Claimant's obligations under the Agreement. Additionally, the Parties extended the duration of the Agreement and the period allowed for performance by the period necessary to solve the boundary issues.

20. In March 2004, the Parties acknowledged the continuance of the boundary issues and agreed on an extension of the Agreement by another three years.

21. After a change of the government of Saint Lucia in 2006 and after a further replacement of Saint Lucia's prime minister in 2007, an envelope was given to Mr. Earl Huntley on

November 7, 2007 in the prime minister's office. Whether he was acting as a representative of Claimant, is disputed among the Parties. According to Claimant, the envelope contained an agreement signed by the prime minister to the effect that the Agreement was extended by another three years.

22. Mr. Huntley was, after collecting the envelope, called and asked to come back and gave back the envelope which was not returned, neither to Mr. Huntley nor to Claimant.

23. Claimant refers to its right under the Agreement to begin exploration in the area agreed upon after resolution of the boundary issues. Claimant requests an award declaring that the Agreement is still in force, prohibiting Respondent to negotiate with or grant to third parties any exploration rights in the same area or, in the alternative, an award declaring that Respondent terminated the Agreement in breach of the same and obliging Respondent to reimburse Claimant for all damages incurred in reliance upon the Agreement.[1] Respondent, in turn, requests an award dismissing Claimant's claims and declaring that the Agreement

[1] Claimant's Memorial of January 24, 2014, paras. 83 *et seq.* (*"[…] RSM respectfully requests the following relief:*

- *to declare that the Agreement remains in full force and effect up to and until nine years, five months and twenty days have elapsed from the date that St Lucia establishes beyond doubt its ownership and control over all the petroleum in the entire Agreement Area;*
- *to order that St Lucia is prohibited from initiating a competitive bid to grant third parties any exploration or development rights in the Agreement Area during the pendency of the Agreement;*
- *to order that St Lucia is prohibited from granting third parties any exploration or development rights in the Agreement Area during the pendency of the Agreement; and*
- *to order St Lucia to pay all the cost and expenses of the arbitration, including the fees and expenses of the Tribunal, the ICSID administrative expenses and the legal fees and other expenses incurred by RSM in the arbitration.*

In subsidiary order, RSM respectfully requests the following relief:

- *to declare that St Lucia has terminated the Agreement in breach of Article 27 of the Agreement;*
- *to order St Lucia to pay damages in the amount of at least $200 million;*
- *to order St Lucia to pay interest on the damages awarded, from the date of the termination of the Agreement up to and until the full payment of the Final Award;*
- *to order St Lucia to pay all the cost and expenses of the arbitration, including the fees and expenses of the Tribunal, the ICSID administrative expenses and the legal fees and other expenses incurred by RSM in the arbitration."*).

has expired or is at least not enforceable and that Respondent has no obligations *vis-à-vis* Claimant.[2]

24. In its request for provisional measures, which was again reiterated in Respondent's letter of June 6, 2014, Respondent seeks an order obliging Claimant to post security for costs in addition to its request to order that Claimant bear all outstanding advances which has already been dealt with in the Tribunal's decision of December 12, 2013.

D. Positions of the Parties

25. The Parties' positions with respect to Respondent's request for security for costs can be summarized as follows:

I. Respondent's Position

26. Respondent asserts that the Tribunal has jurisdiction and the power to order security for costs and makes reference to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.[3]

27. Respondent acknowledges that so far, no ICSID tribunal has eventually ordered security for costs. However, in Respondent's opinion, in the present case an order for security for costs is justified.[4]

28. Respondent takes the view that such an order is necessary in order to protect its procedural right to request that Claimant be ordered to reimburse some or all of Respondent's costs.[5]

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2 Respondent's Counter-Memorial of June 6, 2014, para. 205 (*"[…] St. Lucia requests that the Tribunal render an Award:*

(a) declaring that the Agreement has expired or, alternatively, that it is not enforceable;

(b) declaring that St. Lucia has no legal duties or obligations to RSM, under the Agreement or otherwise;

(c) dismissing RSM's claims; and

(d) ordering RSM to pay in their entirety the costs of this arbitration, including the fees and expenses of the Tribunal and the Centre and the reasonable fees and expenses incurred by St. Lucia in defending against RSM's claims.").

3 Request for provisional measures of September 6, 2013, para. 24.

4 *Ibid.*

29. Respondent alleges that there is a material risk that Claimant will be unable or unwilling to comply with a costs award issued against it.[6]

30. In this regard, Respondent makes reference to prior arbitrations under the auspices of ICSID, in which Claimant failed to honor its obligations under costs awards or requests for payment of advances. In particular, Respondent refers to an ICSID proceeding where Claimant did not honor the costs award issued against it[7] and to an ICSID annulment proceeding which was discontinued due to Claimant's failure to pay the advances on costs.[8]

31. Additionally, Respondent points to the conduct of Claimant's CEO in prior court proceedings, not limited to ICSID arbitrations, as an expression of Claimant's alleged unreliability concerning the compliance with orders of courts and tribunals.[9]

32. In its reply, Respondent further points out that Claimant has initiated a number of arbitrations and litigation proceedings subsequent to the aforementioned costs awards which it did not comply with. Therefore, Respondent concludes that despite Claimant's financial situation it goes on to engage in litigation and arbitration and is thus likely not to honor a future costs award.[10]

33. Respondent alleges that the proceedings initiated by Claimant are funded by third parties (which Claimant admits[11]), and concludes that these third parties fund the initiation of proceedings, but they will not comply with Claimant's obligations under a resulting costs

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5 Request for provisional measures of September 6, 2013, para. 26.

6 Request for provisional measures of September 6, 2013, paras. 28 *et seq.*

7 Request for provisional measures of September 6, 2013, para. 28; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Award of December 10, 2010.

8 Request for provisional measures of September 6, 2013, para. 28; *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14). The tribunal issued its decision to discontinue the annulment proceeding on April 28, 2011.

9 Request for provisional measures of September 6, 2013, paras. 19 *et seq.*

10 Reply on provisional measures of September 26, 2013, paras. 13 *et seq.*

11 See the transcript of the First Session of October 4, 2013, page 116 line 10.

award.[12] This, in Respondent's view, constitutes an exceptional situation justifying an order of security for costs, which Respondent describes as "*arbitral hit-and-run*".[13]

34. Respondent contends that there is an urgent need for an order of security for costs at this time, since security for costs has to be ordered as early as possible in the proceedings in order to be effective.[14]

35. Respondent further contends that it is not yet necessary to make any showing regarding the merits of the dispute in order to obtain security for costs. As an explanation, Respondent points out that such requirement would lead to the result that security for costs could never be ordered at the outset of the proceeding until the requesting party has elaborated on the merits. In Respondent's view, this contravenes the purpose of security for costs.[15]

36. Concerning the amount claimed as security for costs, Respondent asserts that it contains a modest calculation of the legal expenses likely to incur in the course of the arbitration.[16]

37. Respondent requests[17] the Tribunal to

> *(a) Direct RSM to post an irrevocable bank guarantee in the amount of $750,000 as security for costs; or*
>
> *(b) In the alternative, direct RSM to procure from a third party with demonstrably adequate assets a legally binding undertaking to pay any costs order entered against RSM, failing which St. Lucia would be granted the primary relief requested in paragraph 31(a), above; and*
>
> *(c) Award St. Lucia the costs of this application.*

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12 Reply on provisional measures of September 26, 2013, paras. 17 *et seq.*

13 Reply on provisional measures of September 26, 2013, para. 17.

14 Reply on provisional measures of September 26, 2013, para. 21.

15 See the transcript of the First Session of October 4, 2013, page 139 lines 15 *et seq.*

16 Request for provisional measures of September 6, 2013, paras. 31 *et seq.*

17 Reply on provisional measures of September 26, 2013, para. 31. Since Respondent's request concerning the payment of advances has already been granted, the present decision will merely focus on the request for security for costs.

II. Claimant's Position

38. Claimant denies the Tribunal's jurisdiction (in terms of power or authority) to order security for costs. According to Claimant, an order of security for costs would protect a right to an award of costs which is purely hypothetical; consequently, it cannot constitute a "*right to be preserved*" under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.[18]

39. In Claimant's view, even if one assumes that the Tribunal is in principle authorized to order security for costs, the requirements for such measure are not fulfilled in the case at hand, since such an order should be issued only under exceptional circumstances not present here.[19]

40. Claimant admits that its financial resources are limited and that it hopes to be in a position to honor a possible costs award issued against it.[20] However, in Claimant's opinion, limited financial resources alone cannot constitute a ground for ordering security for costs. Claimant asserts that a precarious financial situation of the claiming party is common in ICSID arbitrations and may in many cases be the reason for a claimant to initiate the proceeding.[21]

41. Additionally, Claimant sees its right to pursue its claim unduly limited in case security for costs is ordered prior to a decision upon the claim.[22] In Claimant's opinion, this would also contravene the purpose and overriding policy of the ICSID Convention, namely to facilitate dispute resolution between investors and states.[23]

42. Claimant considers Respondent's reference to prior proceedings as irrelevant, since Respondent did not put forth any circumstances regarding Claimant's current conduct which

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18 Opposition to request for provisional measures of September 20, 2013, para. 18.

19 Opposition to request for provisional measures of September 20, 2013, para. 21.

20 Opposition to request for provisional measures of September 20, 2013, para. 16.

21 Opposition to request for provisional measures of September 20, 2013, para. 19.

22 *Ibid.*

23 Rejoinder on provisional measures of October 2, 2013, para. 10.

could affect the arbitration at hand. Claimant, hence, concludes that there can be no urgent need to issue an order for security for costs.[24]

43. Claimant contends that Respondent's application for security for costs is unjustified since Respondent does not elaborate on the merits of the case and its position towards Claimant's RFA.[25] In the absence of any, not even *prima facie* submission on the substance of Respondent's defence, the Tribunal is not in a position to balance the legitimate interests of the Parties and the relative equities of granting the requested relief.[26]

44. Finally, Claimant alleges that also Respondent is being funded by a third party and hence, Respondent would not suffer any immediate disadvantage. Rather, an order for security for costs would merely serve the benefit of such third party.[27] Accordingly, Claimant opines that the amount requested is disproportionate because Claimant would have to post security in that amount whereas on the other hand, Respondent does not face any corresponding, let alone considerably higher risk, due to its third party funding.[28]

45. Claimant requests the Tribunal to

> *reject Respondent's request in its entirety.*

24 Opposition to request for provisional measures of September 20, 2013, para. 31.

25 Opposition to request for provisional measures of September 20, 2013, paras. 32 *et seq.*

26 Opposition to request for provisional measures of September 20, 2013, para. 34.

27 *Ibid.*

28 Rejoinder on provisional measures of October 2, 2013, paras. 22 *et seq.*, in particular para. 23.

E. Tribunal's Analysis

I. Tribunal's Authority to Recommend Security for Costs as a Provisional Measure

46. Article 47 of the ICSID Convention provides as follows:

> *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.*

47. ICSID Arbitration Rule 39 provides, in pertinent part:

> *(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.*

48. Thus, there is no question that, in general, the Tribunal has the authority to order provisional measures to preserve a Party's right. However, as regularly noted by ICSID tribunals, provisional measures should only be granted in exceptional circumstances.[29]

Meaning of "*recommend*"

49. Despite the wording of the cited provision that indicates that the Tribunal may (only) "*recommend*" provisional measures, it is well settled among ICSID tribunals that such

[29] *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Decision on Provisional Measures of April 6, 2007, para. 32; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005, para. 38; *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, para. 175; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007, para. 59; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs of October 14, 2010, para. 5.17; *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 of September 20, 2012, para. 44; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2 of May 3, 2012, para. 34.

decisions are binding.[30] Accordingly, the term "*recommend*" is to be understood as meaning "*order*".

50. However, the distinction between a "*recommendation*" and an "*order*" in connection with provisional measures remains a theoretical rather than a practical issue. Irrespective of this distinction, provisional measures issued by an ICSID tribunal do not have a binding effect in terms of being enforceable (*e contrario* Article 54(1) ICSID Convention).[31] Hence, the question whether the Tribunal "*recommends*" or "*orders*" provisional measures is in any case irrelevant for the nature and effect of the respective measure. However, a tribunal can draw negative inferences from the non-compliance with provisional measures.[32]

Security for Costs not Expressly Mentioned

51. Neither Article 47 ICSID Convention nor ICSID Arbitration Rule 39 deals with the tribunal's power to order security for costs explicitly. The type of provisional measures a tribunal may recommend is not specified in those provisions.

52. The Tribunal notes that a large number of ICSID tribunals have ruled that a measure requesting the lodging of security for costs does, generally, not fall outside an ICSID tribunal's power[33] provided exceptional circumstances exist.

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30 *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999, para. 9; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007, para. 58; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures of December 13, 2012, para. 120; *Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18), Procedural Order No. 1 of July 1, 2003, para. 4.

31 Kaufmann-Kohler/Antonietti, in: Yannaca-Small (Ed.), Arbitration Under International Investment Agreements: A Guide to the Key Issues, Part V, p. 546.

32 Kaufmann-Kohler/Antonietti, *ibid.*; Schreuer *et al.*, The ICSID Convention: A Commentary, 2nd ed. 2009, Article 47 para. 16.

33 See *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008, para. 57; *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, Decision on El Salvador's Application for Security for Costs of September 20, 2012, para. 45; *Víctor Pey Casado, Fundación Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001, para. 88; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID

53. No ICSID ruling, however, has been submitted to the Tribunal in which such exceptional circumstances were found to be established.

54. The Tribunal, by majority, agrees with the general proposition that security for costs can be ordered based on Article 47 ICSID Convention and ICSID Arbitration Rule 39.[34] The fact that ordering security for costs is not expressly provided for in those provisions does not exclude the Tribunal's jurisdiction to issue such measure. Rather, such provisions are phrased broadly and encompass "*any provisional measures*" the Tribunal, after carefully balancing the Parties' interests deems appropriate "*to preserve the respective right of either party*" under the given circumstances. The fact that other sets of arbitration rules (such as Art. 25.2 of the London Court of International Arbitration Rules) expressly provide for the possibility to order security for costs does not lead to a different conclusion: The broad wording does not address any particular measure but rather leaves it entirely to the Tribunal's discretion which measure it finds necessary and appropriate under the circumstances of the individual case.

55. The fact that Article 47 ICSID Convention and ICSID Arbitration Rule 39 do not expressly make reference to security for costs in particular – nor to any other particular measure – can easily be explained by the time at which the ICSID Convention was drafted. In 1965, issues such as third party funding and thus the shifting of the financial risk away from the claiming party were not as frequent, if at all, as they are today. Hence, the omission does not allow any negative inference.

56. Moreover, the reference to other arbitration rules such as Art. 25.2 of the LCIA Rules and the explicit mention of security for costs as a provisional measure does not provide a valid argument against ordering such measure under the ICSID regime. Institutional arbitration rules are constantly subject to review and modernization as deemed necessary by the drafters. By contrast, there is no comparable mechanism with regard to the ICSID Convention. Amending the ICSID Convention in general and in particular to the effect that

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Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs of October 14, 2010, para. 5.16.

[34] Arbitrator Nottingham disagrees. His dissenting opinion is attached to this decision.

security for costs as a provisional measure is expressly dealt with would require considerably more effort. Hence, stating that such amendment has not been made cannot serve as a ground for assuming that the drafters of the ICSID Convention intended to exclude security for costs.

57. The Tribunal also fails to see how such power to order security for costs in appropriate circumstances would contravene the purpose and overriding policy to facilitate dispute resolution between investors and states.

II. Requirements of an Order for Provisional Measures[35]

58. Before ordering any provisional measure, particularly including the granting of security for costs, under the ICSID Convention and the ICSID Arbitration Rules, an arbitral tribunal must be satisfied

(1) that a right in need of protection exists and
(2) that the circumstances require that the provisional measures be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party's right to be protected.
(3) Moreover, the tribunal in recommending provisional measures must not prejudge the dispute on the merits.[36]

1. *Prima Facie* Subject Matter Jurisdiction

59. It has regularly been held in previous ICSID arbitrations that a tribunal needs to have, on a *prima facie* basis, subject matter jurisdiction.[37] An argument favorable to that position is that

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35 Arbitrator Griffith, while agreeing with the result of the present ruling, formulated assenting reasons which are attached to this decision.

36 *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999, para. 21; Schreuer *et al.*, The ICSID Convention: A Commentary, 2nd ed. 2009, Article 47 para. 157.

37 See, *e.g.*, *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05), Procedural Order No. 1 on Burlington Oriente's

a tribunal which evidently does not have jurisdiction lacks the power to render any decision at all. On the other hand, a respondent may well have a legitimate interest in obtaining security for costs even in cases where the tribunal does not have subject matter jurisdiction.

60. In the case at issue, however, the Tribunal need not finally decide upon the exact requirements, if any, of establishing its jurisdiction.

61. The jurisdiction of the Tribunal to rule on the merits of the dispute (as opposed to the power to grant the provisional measures requested) is undisputed among the Parties and was explicitly confirmed at the First Session on October 4, 2013.[38]

62. The subject matter jurisdiction follows from Article 26.3(a) of the Agreement which provides:

> *Any unresolved dispute or difference aforesaid shall be submitted for settlement by arbitration to the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention for the Settlement of Investment Disputes between States and Nationals of other States of 16 March 1965 and for this purpose it is agreed that although the Company (as an investor) is a company registered as a foreign company in Saint Lucia, it is controlled by nationals of the United States and shall be treated as a national of that State for the purpose of the Convention.*

2. Right to be Preserved

63. Saint Lucia requests provisional measures for the protection of its asserted right to claim reimbursement of the costs it incurs in the course of this arbitration in the event

(1) it prevails on the merits (by dismissal of the claim) *and*
(2) the Tribunal grants a claim for reimbursement of costs.[39]

Request for Provisional Measures of June 29, 2009, para. 50; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007, para. 55.

38 See the transcript of the First Session of October 4, 2013, page 123 lines 6 *et seq.*

39 Request for provisional measures of September 6, 2013, para. 5. See as well *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999, para. 16; *Víctor Pey Casado, Fundación Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001, para. 81.

64. Consequently, the right invoked by Respondent can be qualified as a *procedural* right not directly related to the subject matter of the dispute (Claimant's claim for specific performance and damages under the Agreement) and moreover as a *contingent* right which only arises if and when the two conditions spelled out above are met.

Substantive vs. Procedural Right

65. The Tribunal notes that in *Maffezini*[40] the panel has taken the view that only "*rights in dispute*", *i.e.* directly relating to the subject matter of the dispute, can be protected by provisional measures.[41] However, this position was contradicted by a number of subsequent rulings which found that also procedural rights, such as the potential right to obtain reimbursement of costs, can likewise be protected.[42] The Tribunal accepts this view because it is well settled that provisional measures can be ordered to protect the integrity of the proceeding as a whole.[43]

66. Costs decisions, while contingent upon the tribunal's ultimate and final decision on the merits and the exercise of its discretion to grant cost reimbursement, are nonetheless part of the arbitral process the integrity of which deserves protection by Article 47 ICSID Convention and ICSID Arbitration Rule 39.

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40 *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7).

41 *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999, para. 23.

42 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005, para. 40; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of March 31, 2006, para. 71; *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05), Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures of June 29, 2009, para. 60.

43 *Cf. Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18), Procedural Order No. 3 of January 18, 2005, para. 7; *Quiborax S.A. and Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Provisional Measures of February 26, 2010, para. 141; Mouawad/Silbert, A Guide to Interim Measures in Investor-State Arbitration, Arb. Intl. 29 (2013), p. 381, 394.

67. As was correctly stated in *Plama*[44], where a tribunal consisting of Carl F. Salans, Albert Jan van den Berg and V.V. Veeder found:

> *The rights to be preserved [under Article 47 and Rule 39] must relate to the requesting party's ability to have its claims considered and decided by the Arbitral Tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out.*[45]

68. Respondent's request for reimbursement of its costs is part of its defence. Whereas Claimant requests relief to the effect that Respondent be ordered to honor the agreement between the Parties, Respondent requests to dismiss the claim and, in turn, order Claimant to reimburse Respondent for the expenses necessary for its defence. Hence, Respondent's procedural right to claim reimbursement of its expenses (provided that the respective requirements are met) is directly linked to the relief it requests.

69. The predominant objective of provisional measures is to protect the integrity of the proceedings. This integrity comprises both substantive and procedural rights, such as, *e.g.*, the preservation of evidence.[46] The right to seek reimbursement of one's costs in the case of a favorable 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.

70. Similarly, in *Burlington*[47], the tribunal (Prof. Gabrielle Kaufmann-Kohler presiding, Stephen L. Drymer and Prof. Brigitte Stern):

> *In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as*

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44 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24).

45 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005, para. 40.

46 See, *e.g.*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of March 31, 2006, para. 84; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award of September 28, 2007, para. 37 (citing the tribunal's Decision on Provisional Measures of January 16, 2006).

47 *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05).

> *referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute.*[48]

71. As discussed above, Respondent's procedural right is part of its defence and thus is related to the relief it requests. There is no limitation in the applicable provisions as to the nature of the rights to be preserved by provisional measures. In many cases, the rights invoked by the applying party will be of procedural nature[49], *e.g.* relating to the preservation of evidence. The exclusion of such rights from the scope of provisional measures would unduly narrow Article 47 of the ICSID Convention and ICSID Arbitration Rule 39. In order to reasonably limit the scope, it is sufficient to require that the rights asserted by the requesting party be related to the requested relief. The Tribunal finds that this requirement is met here.

Existing vs. Conditional Right

72. Furthermore, the Tribunal finds that the right to be preserved by a provisional measure need not already exist at the time the request is made. Also future or conditional rights such as the potential claim for cost reimbursement qualify as "*rights to be preserved*". The hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures. At the same time, however, the prohibition of prejudging the merits of the case already at this stage[50] ensures that the conditional character of the respective right is duly taken into account. As long as interim measures do not cross the line to a definite judgment, the right allegedly to be protected need, in the Tribunal's opinion, not definitely exist at the time the respective measure is issued.

73. Therefore, the (conditional) right to reimbursement of legal costs qualifies as a right to be protected within the meaning of Article 47 ICSID Convention and ICSID Arbitration Rule 39 (1).

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48 *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05), Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures of June 29, 2009, para. 60.

49 See as well Schreuer *et al.*, The ICSID Convention: A Commentary, 2nd ed. 2009, Article 47 paras. 79 *et seq.*

50 See para. 58 above.

***Prima Facie* Existence of Right**

74. As far as the discussion is concerned whether or not the party requesting provisional measures needs to make any showing as to its position on the merits,[51] this question need not be finally decided by the Tribunal. In its Counter-Memorial of June 6, 2014, Respondent has elaborated on its defence against the claims brought forward by Claimant. Hence, without making any prejudgment of the merits, Respondent's position is at least plausible, *i.e.* a future claim for cost reimbursement is not evidently excluded. The Tribunal notes in this context that its power and authority to award reimbursement of Respondent's costs is in principle undisputed.[52]

3. Exceptional Circumstances

75. In accordance with Article 47 ICSID Convention and ICSID Arbitration Rule 39 (1), an order of security for costs has to be required by the circumstances. As held by previous tribunals, such order can be made only in exceptional cases.[53] Pursuant to jurisprudence of ICSID tribunals, ICSID Arbitration Rule 39 (1) is construed to the effect that it requires (1)

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51 Such showing was, *e.g.*, required in *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Revocation of Provisional Measures and Other Procedural Matters of May 13, 2008, para. 45 and *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures of December 13, 2012, para. 117.

52 Request for provisional measures of September 6, 2013, paras. 31; Opposition to request for provisional measures of September 20, 2013, para. 5.

53 *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Decision on Provisional Measures of April 6, 2007, para. 32; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005, para. 38; *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, para. 175; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007, para. 59; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs of October 14, 2010, para. 5.17; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, Decision on El Salvador's Application for Security for Costs of September 20, 2012, para. 44; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2 of May 3, 2012, para. 34.

necessity of the measure to protect a certain right and (2) urgency which leaves no room for waiting for the final award.[54]

Tribunal's Prior Decision Based on Administrative and Financial Regulation 14(3)(d)

76. The Tribunal notes that the requirements of ordering security for costs under the provisions in Article 47 ICSID Convention and ICSID Arbitration Rule 39 are not necessarily the same as those of a decision pursuant to which one party is to pay all advances as an exception to the rule as provided for in Administrative and Financial Regulation 14(3)(d). Regarding the latter, the Tribunal, in its Decision of December 12, 2013, required that there be a "*good cause*" for deviating from the default rule that each Party bears half of the advances to be paid. In this Decision, the Tribunal summarized its findings as follows:

> *The Tribunal concludes from RSM's conduct in the Annulment Proceeding and the Treaty Proceeding that RSM was unwilling or unable to advance the expenses and fees of ICSID as required by ICSID Regulation 14 (in the Annulment Proceeding) or to pay its opponent's part of those same ICSID expenses as awarded by the Tribunal (in the Treaty Proceeding). This gives rise to a reasonable inference that this state of affairs, whether caused by unwillingness or inability to pay, persists to the present day, unless things have changed or unless there is in the current record some basis for the inference that the state of affairs does not persist.*
>
> *The record before the Tribunal, far from allaying apprehensions about RSM's ability or willingness to satisfy the awards for ICSID's expenses and requests for advances in this proceeding, exacerbates the apprehensions. Claimant's submissions to the Tribunal are equivocal, confusing, and contradictory. Claimant plainly acknowledges that it may not be able to satisfy a monetary award:*

[54] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures of December 13, 2012, para. 118; *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8), Decision on the Respondent's Request for Provisional Measures of December 20, 1999, para. 18; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005, para. 38; *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, para. 174; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures of August 17, 2007, para. 59; *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures of May 8, 2009, para. 43; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2 of May 3, 2012, para. 34.

> *The reality is that RSM has financial limitations. This is not surprising given that RSM lost what the tribunal in the Main Grenada Arbitration observed was a "relatively close call," and won [an unrelated arbitration] in a manner which did not afford it any monetary or other relief. And the investment in St. Lucia has not borne any fruit to date. RSM will honor any costs award it has the ability to honor, and would hope to be in a position to honor a costs award in the unlikely circumstance that one is granted in favor of St. Lucia….*
>
> *There is no evidence that RSM presently has the funds to satisfy a costs award, much less that RSM will move funds around in order to avoid such an award.(Claimant's opposition to request for provisional measures (September 20, 2013), paras. 16 and 30.)*

Counsel reiterated that position during the Hearing on Respondent's request for provisional measures.(See the transcript of the First Session of October 4, 2013, at 115, ll. 14–16. ("Certainly RSM doesn't have existing funds that can satisfy a costs award.").)

Further, as Claimant's counsel admitted during the Hearing, it is a fair inference that RSM has third party funding in this matter.(Ibid. at 116, ll. 10–11.)

The third party funding exacerbates the concern engendered by RSM's conduct in the Annulment Proceeding and the Treaty Proceeding. It places an unfunded RSM and the third party funder(s) in the inequitable position of benefitting from any award in their favor yet avoiding responsibility for a contrary award.

Thus, unless this Tribunal requires advance payment of ICSID administrative fees and expenses, it is a reasonable inference, based on RSM's conduct in the Annulment Proceeding and the Treaty Proceeding, and its impecuniousness here, that those fees and expenses will never be paid. It is the view of the Tribunal that these circumstances constitute a showing of "good cause" to alter the presumptive allocation of advance payments. Claimant should be required to make all such interim advances, including Respondent's one-half share of advances heretofore ordered, subject to its right to seek reimbursement if required by the Tribunal's final award.[55]

Material and Serious Risk that a Cost Award Will Not be Complied With

77. Against this background and regarding the analysis of exceptional circumstances pursuant to Article 47 ICSID Convention and ICSID Arbitration Rule 39, the Tribunal wishes to recall ICSID Case No. ARB/05/14, in particular the annulment proceeding which led to the

[55] Decision on Saint Lucia's Request for Provisional Measures of December 12, 2013, paras. 71-74.

decision to discontinue the proceeding of April 28, 2011[56] (the **"Annulment Proceeding"**) as well as the proceeding against Grenada based on an alleged violation of the Grenada-United States Bilateral Investment Treaty (ICSID Case No. ARB/10/6) (the **"Treaty Proceeding"**) and the decision of December 10, 2010.[57]

78. In the Annulment Proceeding, Claimant was dilatory in meeting the initial request for advance payment which it was obliged to make under Regulation 14. Of the USD 150,000 requested, USD 31,895 was not paid until more than four months after the request had been made.[58] Additionally, Claimant never complied with the additional call that it pays USD 300,000. It did not even pay the USD 100,000 that it had indicated it was prepared to pay (whereas it rejected the call for USD 300,000 as "*unreasonable*").[59] An explanation for this has not been provided, neither in the Annulment Proceeding decisions nor in the record before this Tribunal. Because of this failure by Claimant to pay, the Committee decided to stay the proceeding as of March 29, 2011.[60] The Annulment Proceeding was eventually discontinued. Moreover, because of Claimant's refusal to meet its regulatory obligations by paying requested advances, ICSID found that it could not even meet actual costs incurred in the Annulment Proceeding.[61] It asked Claimant to advance USD 35,000 to allow recovery of costs actually incurred before the discontinuance. Claimant did not follow that request. Instead, Grenada stepped in to pay ICSID USD 31,424.74 to cover these outstanding fees and expenses.[62] This payment has not been recovered.

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56 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Order Of The Committee Discontinuing The Proceeding And Decision On Costs of April 28, 2011.

57 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Award of December 10, 2010.

58 *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Order Of The Committee Discontinuing The Proceeding And Decision On Costs of April 28, 2011, para. 16.

59 *Ibid.*, paras. 11, 16.

60 *Ibid.*, para. 24.

61 *Ibid.*, para. 31.

62 *Ibid.*, paras. 33 *et seq.*

79. In the Treaty Proceeding, the claimants were ordered to reimburse Grenada for the cost advances which Grenada had made to ICSID, in the amount of USD 93,605.62.[63] However, they did not comply with this obligation.

80. Claimant itself did not satisfy the award. Instead, the award was, in the absence of sufficient assets on the part of Claimant, executed on the assets of one of Claimant's shareholders in the United States District Court for the District of Colorado[64], whereas the shareholder was also a claimant in the Treaty Proceeding.

81. The Tribunal concludes from Claimant's conduct in the Annulment Proceeding and the Treaty Proceeding that it was unwilling or unable to pay the requested advances and, in the Treaty Proceeding, the opposing party's share of advances as awarded by the tribunal. Hence, absent a material change of circumstances, the Tribunal is satisfied that also in this proceeding, there is a material risk that Claimant would not reimburse Respondent for its incurred costs, be it due to Claimant's unwillingness or its inability to comply with its payment obligations. Concerning Claimant's potential inability, its statements in the present arbitration as cited in the Tribunal's Decision of December 12, 2013[65], raise serious doubts.

82. Thus, contrary to the situation in previous ICSID cases where tribunals have denied the application for security for costs (*inter alia*) because there was no evidence concerning the financial situation of the opposing party[66], it has been established to the satisfaction of the Tribunal that Claimant does not have sufficient financial resources. Whereas it has previously been held that such financial limitations as such do not provide a sufficient basis

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63 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Award of December 10, 2010, para. 9.1.

64 See Request for provisional measures of September 6, 2013, para. 14 and Exhibit R–4.

65 Decision on Saint Lucia's Request for Provisional Measures of December 12, 2013, para. 72; Claimant's opposition to request for provisional measures (September 20, 2013), paras. 16 and 30. See as well above para. 76.

66 See, *e.g.*, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008, para. 59; *Víctor Pey Casado, Fundación Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001, para. 89.

for ordering security for costs[67], the circumstances of the present case are different. In particular Claimant's consistent procedural history in other ICSID and non-ICSID proceedings provide compelling grounds for granting Respondent's request.

Third Party Funding

83. Moreover, the admitted third party funding further supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor.

84. Claimant's argument that also Respondent used third party funding, is merely based on suspicion and not substantiated.[68]

Urgency

85. It is for these reasons that the Tribunal considers it necessary to order Claimant to provide security for costs before proceeding further with this arbitration. In light of the fact that in the above referenced prior proceedings costs accrued on the part of the opposing party (and the Centre) have not been reimbursed, the Tribunal further finds it inappropriate to wait for the final award before dealing with Respondent's legal costs.

86. The difference between the present proceeding and previous ICSID arbitrations in which the request for security for costs was in every case denied, is that in this case the circumstances which were brought forward in other proceedings occur cumulatively. Those circumstances are, in summary, the proven history where Claimant did not comply with cost orders and

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67 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs of October 14, 2010, para. 5.19.

68 Rejoinder on provisional measures of October 2, 2013, para. 23 ("*If, as RSM suspects, [...]*").

awards due to its inability or unwillingness, the fact that it admittedly does not have sufficient financial resources itself and the (also admitted) fact that it is funded by an unknown third party which, as the Tribunal sees reasons to believe, might not warrant compliance with a possible costs award rendered in favor of Respondent.

87. Against the background of the aforesaid, the Tribunal, after carefully balancing Respondent's interest with Claimant's right to access to justice, is confident that the described circumstances constitute sufficient grounds and exceptional circumstances as required by ICSID jurisprudence for ordering Claimant to provide security for costs.

4. No Prejudgment of the Dispute on the Merits

88. Ordering Claimant to provide security for costs does not entail any prejudgment of the merits of the case[69]: the definite allocation of the costs of the arbitration remains subject to the final award. Moreover, the present decision does not concern the merits of the case, but merely Claimant's financial situation in conjunction with the history of its conduct in prior proceedings as elaborated above. This decision does not imply any ruling to the effect that the Tribunal considers Respondent's defence on the merits to be successful.

5. Quantum

89. The amount to be provided as security is to be calculated according to an estimate of the legal expenses that will incur on the part of Respondent during this proceeding. By contrast, the administrative expenses and the costs of the Tribunal are not to be included in the security since those costs are meant to be covered by the advances which, according to the Tribunal's decision of December 12, 2013, are also to be borne by Claimant. Hence, the Tribunal considers the amount of USD 750,000 as requested by Respondent to be reasonable.

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[69] With respect to the prohibition of prejudging the merits, see, *e.g.*, *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999, para. 21; *Víctor Pey Casado, Fundación Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures of September 25, 2001, para. 46.

F. Decision

90. Based on the above analysis, by majority, the Tribunal rules as follows:

(i) Claimant is ordered to post security for costs in the form of an irrevocable bank guarantee for USD 750,000 within 30 days of this decision.

(ii) Failing provision of such guarantee within 30 days, Respondent is granted leave to request that the Tribunal cancel the hearing date as set forth in the Procedural Timetable.

(iii) The decision regarding the costs of Respondent's application remains reserved until a later stage in these proceedings.

Dr. Gavan Griffith, QC
Arbitrator
(subject to the attached assenting reasons)

Judge Edward W. Nottingham
Arbitrator
(subject to the attached dissenting opinion)

Prof. Siegfried H. Elsing
President of the Tribunal

Assenting reasons of GAVAN GRIFFITH

1. Whilst concurring with the President on jurisdiction and in the result, I have three issues of departure from the reasons propounded on discretionary issues.

2. In a real sense, the risk to a State of a self-identifying investor claimant under a BIT having no funds to meet costs orders is inherent in BIT regimes. As a general proposition it may be said that a State party to a BIT has prospectively agreed to take claimant foreign investors as it finds them. That the claimant does not have funds to meet costs orders if unsuccessful is no reason to make orders for security. Commonly, this situation is contended to arise from the matters of complaint, and it would be inconsistent with the BIT entitlements for such financial issues arising from its lacks of funds to derogate from the investor's treaty entitlements.

3. It follows, that save in truly exceptional circumstances there is little scope for security for costs orders being made against a claimant *simpliciter* under a BIT claim

4. *Paras 59 and 60.* Whilst under a BIT treaty claim an investor claimant may be required to establish *prima facie* jurisdiction to obtain an order for provisional measures, conceptually it is inadmissible to apply any such requirement upon a respondent State party's application for security for costs orders.

5. First, it is no function of the respondent State to establish jurisdiction: indeed the application may be based upon the contention that there is none. Second, a respondent party has no obligation to advance any case in defence on jurisdiction or on merits before the claimant has made its case. Third, to require a respondent State to establish the negative against its own interests, namely, as a pre-condition for the making of such orders in defence, would be a plain breach of Article 52 of the Convention as a serious departure from a fundamental rule of procedure.

6. For these reasons, I would recast the possibility hinted at *paras. 59 and 60* to the level of an absolute proposition that there is no requirement for a respondent party applying for provisional measures to establish any, let alone *prima facie*, position on jurisdiction.

7. *Para. 74.* Applications for security are inherently to be made at inception before any filings or proofs either way in response to the bare claim itself. The Respondent's application for security is grounded merely upon on the alleged incapacity in the claiming party to meet adverse costs orders made at a time when the claimant may not have put even a summary of its case to establish jurisdiction and merits.

8. Hence, for essentially the same reasons stated in paras. 4 to 6 above, it is conceptually impermissible to cast any burden on a respondent applicant for costs security to have any obligation to proffer any case in refutation in advance of the claimant pleading its case.

Hence, there is no possibility that the respondent applicant could ever be required to establish 'any showing as to its position on the merits', by which I understand the President to mean as to its defence.

9. Upon the initial exclusion of this factor of *prima facie* jurisdiction as a possible relevant consideration, my position is that the Respondent's costs security application could, and should, have been determined at the outset on 16 December 2013, at the same time as its other security application for payment of deposits. The subsequent exchanges of memorials were (and remain) entirely irrelevant to the considerations determinative of the costs orders application and its final disposition.

10. *Paras 75 to 82*. As to discretionary grounds, I accept that if there were ever a case for such security costs orders to be made, by reason of RSM's financial circumstances and prior conduct and history as a claimant in BIT claims, and in other arbitral and curial litigations (including here cost free jurisdictions such as United States' courts), a clear finding of such truly exceptional circumstances should here be made for the reasons canvassed in the decision. On any view, the adverse factors personal to the Claimant here rise to the level of being truly exceptional.

11. However, in my view the preferred ground for making such orders here concern the third party funding issue.

12. It is increasingly common for BIT claims to be financed by an identified, or (as here) unidentified third party funder, either related to the nominal claimant or one that engages in the business venture of advancing money to fund the Claimant's claim, essentially as a joint-venture to share the rewards of success but, if security for costs orders are not made, to risk no more than its spent costs in the event of failure.

13. Such a business plan for a related or professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose.

14. The founders of the Convention could not have foreseen in any way the emergence of a new industry of mercantile adventurers as professional BIT claims funders. It is no reach to find that, as strangers to the BIT entitlement, such funders also should remain at the same real risk level for costs as the nominal claimant. In this regard, the integrity of the BIT regimes is apt to be recalibrated in the case of a third party funder, related or un-related, to mandate that its real exposure to costs orders which may go one way to it on success should flow the other direction on failure.

15. Costs orders may be significant, the more so proportionally to a small State such as the Respondent here. An extreme recent example of costs awards in a Treaty claim is the recent Award in *Hulley Enterprises Ltd (Cyprus) v The Russian Federation* (18 July 2014), where the claimant's costs were allowed at $79m.

16. For these brief reasons, my position is that, unless there are particular reasons militating to the contrary, exceptional circumstances may be found to justify security of costs orders arising under BIT claims as against a third party funder, related or unrelated, which does not proffer adequate security for adverse cost orders. An example of contrary circumstances might be to establish that the funded claimant has independent capacity to meet costs orders.

17. For that reason, I am inclined not so much to fix the orders here made to the peculiar, and truly one-off, defaulting costs history of the RSM Group, but to the discrete third party funding issue.

18. My determinative proposition is that once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.

19. These supplemental reasons do not qualify my adherence to the majority determination on jurisdiction and the Decision made in *para. 90* to which these assenting reasons are appended.

Dated 12 August 2014

Gavan Griffith, QC

Dissenting opinion of EDWARD NOTTINGHAM

1. Relying on Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, the Majority orders Claimant to post a $750,000 bank guarantee to secure payment of any monies that the Tribunal may award Respondent as costs and attorney fees in this proceeding. In my view, the language of Article 47 and Rule 39, properly interpreted, does not support this unprecedented result. I must therefore respectfully dissent, for two reasons. First, I do not think that an order requiring Claimant to secure costs which may be awarded to Respondent is encompassed within the class of "provisional measures" which may "be taken to preserve the rights" of Respondent. Second, entry of an "order" simply flies in the face of the explicit direction in both Article 47 and Rule 39 that a tribunal may "recommend" provisional measures. I will develop each reason below.

2. I begin, as does the Majority, with the language appearing first in Article 47 and reiterated in Rule 39. Where the language is susceptible of more than one interpretation (perhaps even multiple interpretations), as is the case here, it is useful and appropriate to examine the overall purpose and intent of the Convention and its implementing rules. According to the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter, "Report"), the ultimate aim of the Convention is to encourage economic development through private investment:

> *The creation of an institution [ICSID] designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.*

Report ¶ 9.

3. The Report then recognizes that private investment is fostered by a delicate balance in the Convention between the interests of investors and those of host states:

> *While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States*.

Report ¶ 13.

4. In my view, the precise language of Article 47 (which I shall discuss momentarily) reflects the "careful" balance intended by the drafters of the Convention and it should be given a reasonable construction designed to maintain that balance. To suppose that any single ICSID tribunal has the power to order security for costs whenever "it considers that the circumstances so require" (Convention, Art. 47) potentially imposes a sizable burden on ICSID investor-claimants at the outset, before their claims can ever be heard, by tribunal rulings that are not only *ad hoc* but also *post hoc*. Such unpredictability is unlikely to promote "*an atmosphere of mutual confidence and thus stimulat[e] a larger flow of private international capital.*" (Report ¶ 9). If the drafters of the Convention had intended to give tribunals the power to award security for costs, it would have been reasonable to expect that they would have (1) said so, and (2) articulated some standards or guidance for tribunals' use in exercising the power. They did not do so. To the contrary, the words they used and omitted reasonably suggest that individual tribunals do not have such power.

5. The precise words used are an instructive expression of intent. The object of provisional measures is "to *preserve* the respective rights of either party." (Emphasis supplied.) The Merriam-Webster On-line Dictionary defines the word "preserve" as follows:

> *: to keep (something) in its original state or in good condition*
> *: to keep (something) safe from harm or loss*
> . . . .
> *: to keep safe from injury, harm, or destruction : protect: maintain*

Merriam-Webster On-line Dictionary, found at http://www.merriam-webster.com/dictionary/preserve. *Accord*, The Free Dictionary, found at http://www.thefreedictionary.com/preserve

6. As the Majority recognizes, the "right" claimed by Respondent is "contingent" and hypothetical. It does not presently exist. It may never exist. It will arise if and only if (1) Respondent prevails on the merits and (2) the Tribunal grants a request for reimbursement of its costs. It is therefore not entirely sensible to speak of preserving, maintaining, or protecting such a non-existent thing. Indeed, one may question whether the contingent claim to a cost award is a "right" at all.

7. The Majority deals with this issue by holding that Aconditional rights such as the potential claim for cost reimbursement qualify as "*rights to be preserved*." (Maj. Op. ¶ 71.) (Italics in original.) That apparently is because, in the Majority's view, "[t]he hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures." (*Id.*) Not so, I think, unless one circularly accepts the inclusion of a contingent claim for a cost award within the definition of a "right." There are surely other existing rights which might be protected under the authority of Article 47. The Tribunal in *Maffezini v. Spain* gave an example:

> *An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the status quo of the property, thus preserving the rights of the party in the property.*

Maffezini v. Spain, (ICSID Case No. ARB97/7) Procedural Order No. 2, Oct. 29, 1999, ¶ 14. Because Article 47 (carefully, I suggest) uses the verb "preserve," it is only by stretching the language beyond sensible limits that individual tribunals can find that a contingent claim to an award of costs qualifies as a "right" which

the Convention authorizes them to preserve. I am therefore inclined to agree with the suggestion of the *Maffezini* tribunal that the provisional measures envisioned in Article 47 are mainly those formulated to preserve the *status quo pende lite*.

8. In my view, the language omitted confirms the conclusion reached by considering the language used. Had the Convention's drafters intended to include in Article 47 (or elsewhere) the authority for individual tribunals to order security for costs, a provision with the potential for significant limitation on investor-claimants' access to ICSID, it would have been reasonable to expect that they would use explicit language to tell us that security for costs was a part of the balance which the Convention reached between the interests of investors and those of member states. It did not do so, in contrast with other arbitration regimes. Article 25 of the London Court of International Arbitration Rules, for example, provides for a number of "Interim and Conservatory Measures." Specifically included is

> *the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate.*

LCIA Arbitration Rule 25.2. Similarly, section 38(3) of the English Arbitration Act of 1996 expressly provides:

> *(3) The tribunal may order a claimant to provide security for the costs of the arbitration.*

9. The Majority is unconcerned that the Convention does not contain an explicit, specific provision authorizing security for costs. (Maj. Op. ¶ 56.) In this view, the fact that other regimes expressly provide for costs and that the Convention's drafters could have included similar provisions is irrelevant. (*Id.*) Article 47 and Rule 39, rather, "leaves it entirely to the Tribunal's discretion which measure it finds necessary and appropriate under the circumstances of the individual case." (*Id.*) This breathtaking assertion of

undefined power in individual tribunals ignores both the limitation implicit in the language of Article 47 and the "careful balance" (Report ¶ 13) which the Convention's drafters aimed to achieve. For the reasons stated above, I disagree.

10. I turn now to the second reason for disagreeing with the Majority's interpretation of Article 47: entry of an "order" simply flies in the face of the explicit direction in both Article 47 and Rule 39 that a tribunal may "recommend" provisional measures. The ICSID governing documents, considered as a whole, demonstrate that there is a clear distinction between the power to "order" and the power to "recommend," and the drafting history of the Convention demonstrates that the power of individual tribunals to "order" provisional measures was considered and rejected by the drafters.

11. The distinction between the power to "order" and the power to "recommend" is explicitly recognized by ICSID's Additional Facility Rules:

> *(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.*
> *(2) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.*

ICSID Additional Facility Rule 46. In contrast, Article 47 of the Convention and Rule 39 of the Arbitration Rules omit use of the term, "order" or any similar term.

12. I acknowledge, of course, that the Additional Facility Rules do not apply to this dispute because the parties are a Contracting State and a national of another Contracting State. Thus, the Convention (Article 25) gives ICSID jurisdiction, and the Arbitration Rules

apply. The Additional Facility Rules are pertinent here only because the Secretariat in drafting the Rules and the Administrative Council in adopting them made an explicit, unmistakable distinction in Rule 46 between a Tribunal's power to "recommend" provisional measures in on situation and its power to "order" them in another. If, as the majority maintains, "recommend" really means "order," there would be no need for the consequent redundancy in Additional Facility Rule 46.

13. In my view, omission of the term "order" or any similar term in Article 47 and Rule 39 is intentional. As an authoritative commentator on the ICSID Convention has stated:

> *The legal authority of decisions on provisional measures was a central question in the drafting of Art. 47. [Footnote omitted.] The Working Paper, the Preliminary Draft and the First Draft foresaw the power of an ICSID tribunal to prescribe rather than merely recommend provisional measures (History, Vol. I, p. 206). . . . Eventually, the word "prescribe" was replaced by the word "recommend" by a large majority. [Citation omitted.] The Convention's legislative history suggests that a conscious decision was made not to grant the tribunal the power to order binding provisional measures.*

C. Schreuer, *et al.*, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009) ¶¶ 15-16 (hereinafter "Schreuer").

14. The Majority believes that Additional Facility Rule 46 supplies direct authority for issuing an "order" in this situation. (Maj. Op. ¶ 51.) Its reasoning, however, is based on the flawed premise that the Additional Facility Rules are directly applicable here. As I have already said (*supra*, ¶ 12), they are not applicable. They are relevant only because they are persuasive evidence that the drafters of the Additional Facilities Rules knew that the term "recommend" - the only term used in Convention Article 46 and Arbitration Rule 39 - does not encompass an "order" and that if one wants to give tribunals the authority to "order" something, one has to say so.

15. Citing rulings by other tribunals, the Majority observes, "it is well settled among ICSID tribunals that such decisions are binding." (Maj. Op. ¶ 49). Schreuer dryly puts the point slightly differently:

> *Despite the apparently clear restriction to recommendations, tribunals have developed a doctrine under which provisional measures have binding effect on the parties.*

Schreuer ¶ 18.

16. No matter how many times it is repeated, an order is not a recommendation. Only in the jurisprudence of an imaginary Wonderland would this make sense:

> *'When **I** use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'*
> *'The question is,' said Alice, 'whether you **can** make words mean so many different things.'*
> *'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'*
> *Alice was too much puzzled to say anything.*

Lewis Carroll (Charles Lutwidge Dodgson), "THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE (1871). Like Alice, I am puzzled, but I will venture to say something more.

17. In reaching its decision concerning security for costs, the Majority relies in part on its conclusion, based on the sketchiest of records, that Claimant has third party funding to finance its case. (Maj. Op. ¶ 82.) It also justifies its broad interpretation of tribunals' powers under Article 47 and Rule 39 by observing that, in 1965, when the ICSID Convention was drafted, "issues such as third party funding and thus the shifting of the financial risk away from the claiming party were not as frequent, if at all, as they are

today." (Maj. Op. ¶ 57.) In my view, this rationale illustrates the wisdom of tribunals' hewing closely to the words of the governing documents (the Convention and Arbitration Rules) and the mischief which can follow if individual tribunals adjudicating particular cases latch on to broad language in the governing documents as a warrant to address matters which, if they were matters of general concern, could and should be addressed by the ICSID Administrative Council after input and consultation with all interested parties.

18. The Majority's conclusion that there is third-party funding here and that the existence of such funding supports its decision is based on a one-sentence admission elicited from Claimant's counsel during the Tribunal's First Session. (Maj. Op. ¶ 75, citing Transcript of First Session of October 4, 2013 at 116 ll. 10-11.) There is no evidence concerning the identity of the funder or any other information about the funder. There is no evidence of the funder's financial means. There is nothing in the record about the arrangement between Claimant and the funder.

19. The financing of ICSID arbitrations by persons or entities other than the parties themselves may well raise issues of general or particular concern. Should third-party funding ever be permitted? If so, under what conditions? Is such funding a legitimate tool allowing the pursuit of meritorious claims which otherwise could not be brought? Or is it a form of reprehensible barrarty? What information about the nature of the funding or the identity of the funder should be relevant? What are the terms of the funding contract? Indeed, how is third-party funding defined? Would an insurance contract under which a State financed the defense of a case fit the definition?

20. There may be other issues raised by a regime concerning security for costs and the part which third-party funding may have in deciding whether and when security for costs may be appropriate. In my view, the general concerns about third-party funding and security for costs can and should be addressed by the Administrative Council in its rule-making capacity, if there is a problem that needs to be dealt with. Until the Administrative Council is more explicit about the matter, an individual tribunal should not be using

general language of unlimited elasticity to accomplish the result which the tribunal regards as appropriate.

August 12, 2014

Judge Edward W. Nottingham