

INTERNATIONAL CENTRE
FOR THE SETTLEMENT OF INVESTMENT DISPUTES
ICSID Case No. ARB/10/6

RACHEL S. GRYNBERG, STEPHEN M. GRYNBERG, MIRIAM Z. GRYNBERG, AND
RSM PRODUCTION CORPORATION

Claimants

v.

GOVERNMENT OF GRENADA

Respondent

**TRIBUNAL'S DECISION ON RESPONDENT'S APPLICATION FOR
SECURITY FOR COSTS**

14 October 2010

Tribunal

Edward W. Nottingham
Prof. Pierre Tercier
J. William Rowley QC (President)

ICSID Secretary: Ms Milanka Kostadinova

Representing Claimants

Roger A. Jatko
Janice C. Orr

RSM Production Corporation

Representing Respondent

Jan Paulsson
D. Brian King
J. J. Gass
Elliot Friedman

Freshfields Bruckhaus Deringer US LLP

1. INTRODUCTION

- 1.1 On 15 January 2010, Claimants filed a Request for Arbitration (“Request”) against Respondent (sometimes also referred to as “Grenada”) alleging breach of the 1986 Treaty Between the United States and Grenada Concerning the Reciprocal Encouragement and Protection of Investment (“Treaty”). The Request was registered by the Secretary-General on 16 March 2010.
- 1.2 On 5 August 2010, the Tribunal was constituted, comprising Prof. Pierre Tercier (Switzerland), Edward W. Nottingham (USA) and J. William Rowley QC (Canada), with the latter as its President.
- 1.3 On the same date, Respondent filed: (a) a Request for Security for Costs (“Security Application”) to protect its rights during the first phase of the proceeding; and (b) an Objection Under Arbitration Rules 41(5) (“Objection”). The Security Application seeks an order from the Tribunal that Claimants post US\$ 500,000 within 14 calendar days of the Tribunal’s decision, failing which this proceeding should be suspended until such payment is made. This Decision deals only with Respondent’s Security Application. In reaching our Decision, the Tribunal expresses no view as to the merits of either Respondent’s Objection or the merits of underlying dispute.
- 1.4 By letter dated 13 August 2010, the Tribunal directed Claimants to provide their written response to the Security Application (“Response”), if advised, by 31 August 2010. The parties were also advised that the Tribunal envisaged being able to reach a decision on the Security Application on the basis of one round of written submissions and without the need for oral argument.
- 1.5 On 30 August 2010, Claimants filed their Response to Grenada’s Security Application.

2. BACKGROUND TO PRESENT ARBITRATION

- 2.1 Claimants' Request asserts claims under Treaty. The essence of those claims is that Grenada breached a number of its Treaty obligations to Claimants by reason of its dealings with Claimants in relation to a petroleum exploration agreement between one of the Claimants, RSM Production Corporation ("RSM"), and Grenada, dated 4 July 1996 ("Agreement").
- 2.2 The Agreement, in summary, provided for RSM to apply for, and Grenada to grant, a petroleum exploration licence within 90 days of the Agreement's effective date. In 2004, RSM applied for an exploration licence. Grenada denied the application as untimely and thereafter terminated the Agreement. This gave rise to a contractual dispute between the parties to the Agreement.
- 2.3 The Agreement's dispute resolution clause calls for disputes arising thereunder to be referred to Arbitration under the ICSID Convention, and on 31 August 2004, RSM submitted a request for arbitration. RSM's request was thereafter registered by ICSID and captioned as *RSM Production Corporation v Grenada*, ICSID Case NO ARB/05/14 ("Prior Arbitration"). Following the exchange of pleadings and a five-day hearing (in London in June 2007) on the merits, a three-member ICSID tribunal ("Prior Tribunal") rendered an award ("Prior Award") on 13 March 2009.
- 2.4 Amongst other things, the Prior Award dealt with RSM's contractual rights in relation to the Agreement, and declared:

"The Tribunal declares that the Respondent [Grenada] did not breach any of its obligations towards the Claimant [RSM] under their Agreement of 4 July 1996 in failing to issue an Exploration Licence to the Claimant, such obligation having lapsed on 28 March 2004 and the Agreement having been lawfully terminated

on 5 July 2005 so that the Respondent had thereafter no further substantive contractual obligations to RSM.”¹

- 2.5 RSM applied for annulment of the Prior Award pursuant to Article 52 of the ICSID Convention. The annulment application remains outstanding. Although it has been fully briefed, RSM has declined to pay the advance on costs requested by the Centre on 13 January 2010, and those proceedings are currently suspended. If RSM does not cure its default by 29 September 2010, the *ad hoc* Annulment Committee may discontinue the proceedings.

3. GRENADA’S SECURITY APPLICATION

- 3.1 Grenada contends that the present arbitration, which it says seeks to relitigate the factual and legal questions that have been resolved by the Prior Award, epitomises vexatious litigation.
- 3.2 It argues that RSM’s refusal to pay the requested advance on costs in the annulment proceedings may have deprived it of any remedy for the costs imposed on it by those proceedings. Grenada also asserts that there is reason to believe that Claimants would not voluntarily comply with a costs award in its favour in this arbitration.
- 3.3 Grenada says that the question for this Tribunal is not whether Claimants *can* satisfy a possible costs award; it is whether they *will* do so.
- 3.4 Claimants are also said to have ample means to post the “modest security” Grenada requests. Requiring them to do so will prevent Claimants from using ICSID improperly as a tool to put pressure on Grenada. Respondent further argues that: (a) Claimants will have no incentive to comply with any award (as to costs) that the Tribunal may make, and every incentive to frustrate it; or, (b) they may tactically default before an award is rendered as, it is alleged, they did in the annulment proceedings.

¹ Exhibit R-1, Prior Award, at §503.

- 3.5 The Tribunal's power to recommend security for costs pursuant to Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules is asserted to be unquestioned.

4. CLAIMANTS' RESPONSE

- 4.1 Claimants contend that there is: (a) no legal authority that supports the Security Application and, (b) no factual basis for the requested amount.
- 4.2 With respect to their first point, Claimants say that the Secretary-General, in consultation with the President of the Tribunal, has determined that the costs for the first three to six months of the proceedings would be US\$ 250,000, which amount has been apportioned equally between the parties. They say that this precludes Respondent's Security Application because, although Article 61(2) of the Convention authorises the Tribunal, in an award, to apportion costs after the proceeding has been concluded, neither the Convention nor the Rules provide the Tribunal with the power to change the apportionment of costs prior to a final award or to provide for a party to post security for a potential costs award.
- 4.3 As to their second point, Claimants assert that the Security Application has only been made so as to allow Respondent to express its view in relation to earlier and unrelated litigation (litigation having no bearing on the present proceeding) in order to "poison" the views of the Tribunal regarding this arbitration.
- 4.4 Claimants note that, at the time of their Response, they had promptly paid their share of the requested advance against costs, but Respondent had not.
- 4.5 Finally, Claimants note the fact that, during the Prior Arbitration, Grenada's then Minister of Energy and Deputy Prime Minister confirmed that Global Petroleum Group Ltd ("Global") was paying Respondent's legal fees and expense. They state that if it turns out that Grenada is not paying its own expenses in this arbitration, then the request in its Security Application is dishonest, and security for costs is not required.

5. TRIBUNAL'S ANALYSIS AND CONCLUSIONS

- 5.1 Grenada's Security Application gives rise to three principal questions (set out below), some or all of which the Tribunal may be required to answer.
- (a) Does the Tribunal have jurisdiction to recommend security for costs as a provisional measure?
 - (b) If so, do the circumstances justify the making of such a recommendation?
 - (c) In the event it is appropriate to recommend the lodging of security for costs, is the amount sought appropriate

Jurisdiction

- 5.2 Article 47 of the ICSID Convention provides, in pertinent part:

"Except as the parties agree, the Tribunal may, if it considers that the circumstances so require, request any provisional measures which should be taken to preserve the respective rights of either party."

- 5.3 Rule 39 of the Arbitration Rules provides, in pertinent part:

"(1) At any time after the institution of the proceedings 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."

- 5.4 Grenada identifies its right to request that Claimants be required to reimburse it for some or all of the costs it will incur in the proceedings as its right which is in need of immediate protection.
- 5.5 Neither Article 47, nor Rule 39 specify the type of provisional measure a Tribunal may recommend. This being the case, and subject to one caveat, a measure

requiring the lodging of security for costs (by no means an uncommon provisional measure) would not, as a matter of jurisdiction, appear to fall outside a tribunal's power. That is, unless such a measure cannot be said to relate to the preservation of the applying party's rights – the preservation of which is the only limiting factor on the nature of a permissible provisional measure.

5.6 As to what rights of a party may be preserved, it seems obvious that, in the context of a dispute, the parties' contested substantive rights have yet to be determined. For example, a party seeking damages for contractual or a treaty breach has no "established" or "determined" right to damages. Similarly, a party who seeks an ultimate award for costs has only a potential right to costs.

5.7 We are thus drawn to, and believe to be correct, the *Plama* Tribunal's conclusion that:

"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." (Emphasis added)

5.8 To construe the rights that are to be protected or preserved under Article 47 and Rule 39 as being limited to "established" rights makes no sense whatever in the context of a *provisional* measure for their protection. Any such measure must, by definition, precede a determination of their substantive validity.

5.9 The learning to be drawn from previous published ICSID tribunal decisions also supports the conclusion that ICSID tribunals have the power (*i.e.* jurisdiction) in appropriate circumstances to recommend the lodging of security for costs.

5.10 In *Maffezini v Kingdom of Spain*², Spain filed an application for a provisional measure, requesting the Tribunal to require the claimant to post a guarantee, bond

² ICSID Case No. ARB/97/7.

or similar instrument in the amount of the costs expected to be incurred by Spain in the arbitration.

- 5.11 Although the application was ultimately denied, the Tribunal did not appear to feel that the security for costs posed any particular jurisdictional problem compared with other provisional measures. However, it concluded that:

“Any preliminary measure to be ordered by an ICSID arbitral tribunal must relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.

In this case, the subject matter in dispute relates to an investment in Spain by an Argentinean investor while the request for provisional measures relates to a guarantee or bond to ensure payment of additional costs and expenses should the Claimant not prevail in the case.

It is clear that these are two separate issues. The issue of provisional measure is unrelated to the facts of the dispute before the Tribunal.”³

- 5.12 Obviously, a requested provisional measure must concern rights (in the sense as described in 5.6 - 5.8 above) which are at issues in the dispute. However, we do not believe that there is any requirement for a provisional measure to relate to the subject matter of the dispute in the same way that the *Maffezini* Tribunal seemed to see such a relationship, or lack thereof⁴.

³ *Maffezini*, Procedural Order No. 2, 28 October 1999, paras 23-25.

⁴ The *Maffezini*, Tribunal’s emphasis on a measure’s necessary relationship to the subject matter of the case is somewhat surprising, given that such a requirement is not specified in either the wording of Article 47 of the Convention or Rule 39. Indeed, it is possible that the Tribunal may have mistakenly been thinking of the provision for interim measures found in the UNCITRAL Arbitration Rules. Article 26(1) of those rules provides that: “At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the

- 5.13 In the *Casado*⁵ case, although the Tribunal denied the security application before it, it saw no jurisdictional limitation on its powers to make such a recommendation in the right circumstances. It reasoned that:

*“Taking account of the preceding general observations on provisional measures and of the absence of a clear answer in the text, there is no justification from excluding the tribunal from being able to recommend in certain circumstances, the deposition of a guarantee aimed at protecting the respondent against the eventual non-payment of costs...”*⁶

- 5.14 The Tribunal in *Atlantic Triton v. Guinea* reached the same conclusion with respect to a request for pre-judgment security by Guinea for its counterclaim in a contract-based ICSID arbitration. The Tribunal ultimately declined to recommend the furnishing of the requested financial guarantees, but it held that:

*“Recommendation of such measures would clearly be within its mandate under Article 47 of the ICSID Convention.”*⁷

- 5.15 Finally, in the most recent reported ICSID decision on security for costs, the *Libananco* Tribunal concluded that it had jurisdiction to order such interim measures, but that it would:

*“Only be in the most extreme cases ... that the possibility of granting security for costs should be entertained at all.”*⁸

subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.” (Emphasis added)

⁵ *Casado and President Allende Foundation v. Republic of Chile* ICSID Case No. ARB/98/2

⁶ *Casado*, 16 ICSID Review – FILJ 567 (2001). p.3.

⁷ P.D. Friedland, “Provisional measures and ICSID arbitration”, *Arbitration International*, Vol. 2 No. 4 (1986), pp. 355-357

⁸ *Libananco Holdings Co Limited v Turkey*, ICSID Case No. ARB/06/8 Decision on Preliminary Issues, 23 June 2008.

- 5.16 In these circumstances, the Tribunal, by majority, considers that the wording of Article 47 and Rule 39(1), properly construed, is of sufficient reach to enable an ICSID tribunal, in an appropriate case, to grant provisional measures in the nature of security for costs.⁹

Do the Circumstances Justify such a Recommendation?

- 5.17 It is beyond doubt that a recommendation of provisional measures is an extraordinary remedy which ought not to be granted lightly. Each of the *Maffezini*, *Casado* and *Libananco* Tribunals reached this conclusion. This is in line with widespread municipal precedent and jurisprudence. It is also beyond doubt that the burden to demonstrate why a tribunal should grant such an application is on the applicant.
- 5.18 In cases of security for costs, Arbitrators (and courts in jurisdictions which are prepared to make such an order) will rarely think it right to grant such an application if the party from whom security is sought appears to have sufficient assets to meet such an order, and if those assets would seem to be available for its satisfaction.
- 5.19 In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order. First, as was pointed out in *Libananco*, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investment. Second, as was noted by the *Casado* Tribunal, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award.

⁹ Arbitrator Nottingham feels that the Tribunal lacks the jurisdiction to order the posting of security for costs, for two reasons. First, there is no express provision allowing a Tribunal to order such a posting in the ICSID Convention or Arbitration Rules, in contrast to other bodies of law such as Section 38(3) of the English Arbitration Act of 1996 or Article 25.2 of the London Court of International Arbitration Rules. Second, the use of the words "preserve" and "preserved" in Article 47 and Rule 39 presupposes that the right to be preserved exists. Because Respondent has no existing right to an ultimate award of costs, the Tribunal is thus without jurisdiction.

- 5.20 It is difficult, in the abstract, to formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable, but it seems clear to us that more should be required than a simple showing of the likely inability of a claimant to pay a possible costs award. However, on the record before us, it is unnecessary to offer a view as to the nature of what evidence might suffice.
- 5.21 In this case, Grenada has made no showing of Claimants' impecuniosity, nor of any unwillingness on their part to pay a costs award. There is also no evidence to suggest that the United States' courts would not fully enforce any costs award that might be made against Claimants by this Tribunal. The fact that there are four Claimants who would be jointly and severally liable to pay any such award also minimizes the risk of non-payment.
- 5.22 All that Grenada has said about Claimants' financial standing is that "Claimants have ample means to post the modest security Grenada requests". This is the opposite to evidence of impecuniosity that is required.
- 5.23 As to Claimants' unwillingness to satisfy a possible award of costs, reliance is principally placed on: (a) RSM's decision not to post the advance on costs called for in its annulment application; and (b) Mr Jack Grynberg's attempt to place personal assets beyond the reach of his creditors some 10 years ago.¹⁰
- 5.24 The Tribunal does not agree that the evidence relied on by Respondent is sufficient to support such a conclusion. First, RSM had every right not to continue with its annulment application. And while Mr Grynberg may be CEO of RSM, there is no evidence to suggest that either it or any of the three individual Claimants have sought to avoid previous cost awards or similar obligations. The behaviour of Mr Grynberg, more than a decade ago, in unrelated proceedings, simply cannot support the conclusion that Claimants will use every available

¹⁰ Grenada asserts that the conduct of RSM, its principals and Mr Grynberg strongly suggests "that they [Claimants] will use any and every available means to frustrate Grenada's attempts to enforce a costs award."

means to avoid the enforcement of any potential costs award the Tribunal might in the future be minded to make against them in this proceeding.

5.25 Because Grenada has failed to meet its burden to show insufficient or unavailable assets, that is the end of the matter and it is not necessary to address the appropriateness of the amount sought for security by Respondent.

6. DISPOSITION OF SECURITY APPLICATION

6.1 For the reasons recorded above, the Tribunal denies Respondent's Security Application, the costs of which are reserved to a later stage of this proceeding.

Washington DC, USA

[14] October 2010

[Signed]

Edward W. Nottingham

[Signed]

Prof. Pierre Tercier

[Signed]

J. William Rowley QC (President)