

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

RSM PRODUCTION CORPORATION

Applicant

- AND -

GRENADA

Respondent

ICSID CASE No ARB/05/14
(ANNULMENT PROCEEDING)

DECISION ON RSM PRODUCTION CORPORATION'S APPLICATION FOR A
PRELIMINARY RULING OF 29 OCTOBER 2009

Members of the ad hoc Committee:

Dr Gavan Griffith QC, President

Dato' Cecil W M Abraham, Member

Professor Campbell McLachlan QC, Member

Secretary to the ad hoc Committee:

Ms Milanka Kostadinova

Assistant to the ad hoc Committee:

Dr Chester Brown

The Parties' Legal Representatives:

Representing the Applicant:

Representing the Respondent:

Dewey & Leboeuf LLP

Freshfields Bruckhaus Deringer LLP

A. Introduction

1. On 26 June 2009, RSM Production Corporation ('the Applicant'), submitted a Request for Annulment to the ICSID Secretariat ('ICSID') pursuant to Article 52(1) of the ICSID Convention and Rule 50(1)(iii) of the ICSID Arbitration Rules, requesting the annulment of the Award of 13 March 2009 rendered by the Tribunal in the arbitration proceeding between the Applicant and Grenada ('the Respondent'). The Request for Annulment was registered by the ICSID Secretariat on 10 July 2009, and the *ad hoc* Annulment Committee ('the Committee') was constituted on 17 August 2009.
2. In its Request for Annulment, the Applicant submits that in rendering the Award, the Tribunal 'manifestly exceeded its powers' (contrary to Article 52(1)(b) of the ICSID Convention); that there was a 'serious departure from a fundamental rule of procedure' (contrary to Article 52(1)(d)); and that the Award 'failed to state the reasons on which it is based' (contrary to Article 52(1)(e)). These submissions are further particularised in the Applicant's Request for Annulment dated 26 June 2009, and in the Applicant's Memorial in Support of its Request for Annulment dated 16 November 2009.
3. The Committee convened a procedural hearing in London on 16 October 2009 ('the Procedural Hearing'). At the Procedural Hearing, the Applicant made an application in which it requested the Committee to investigate suspicions of corruption in the contract underlying the present dispute. The Committee invited the Applicant to put its application in writing. The Applicant duly submitted its application by letter dated 29 October 2009 ('the Application'), with which it enclosed various exhibits. The Respondent submitted its observations on the Application, together with various exhibits, by letter dated 16 November 2009 ('the Reply').

B. The Application

4. In its Application, the Applicant offers a summary of the dispute between it and the Respondent. In that summary, the Applicant essentially sets out the case that it put before the Tribunal constituted to determine the merits of this dispute, as detailed in various written submissions and as elaborated at the substantive hearing which was held at the International Dispute Resolution Centre, 70 Fleet Street, London EC4Y 1EU, from 18 – 22 June 2007 ('the Merits Hearing'). It would serve no practical purpose to restate the Applicant's case in extensive detail here. For present purposes, it suffices to say that the Applicant infers that the Respondent's denial of the Applicant's application for an exploration licence on 27 April 2004, and the Respondent's subsequent termination of the Agreement of 4 July 1996 ('the Agreement'), as notified by letter dated 5 July 2005, was motivated by an alleged bribe that was paid, or was to be paid, to Mr Bowen, the then Attorney-General of Grenada, by a corporate entity called Global Petroleum Group ('Global').
5. At the Merits Hearing, counsel for the Applicant put it to Mr Bowen that he had accepted a bribe from Global in relation to an oil exploration contract which Global has apparently since concluded with the Respondent. The Applicant repeats this allegation in its Application. At the Merits Hearing, Mr Bowen denied this allegation,¹ but confirmed that Global had provided the Respondent with US\$2.5 million in order to fund the arbitration proceedings.²
6. At the Merits Hearing, counsel for the Applicant did not request that the Tribunal make a finding of fact relating to the alleged corruption. Rather, counsel for the Applicant merely submitted that the Tribunal should take this evidence into account in deciding on the credibility of Mr Bowen and his testimony. As counsel for the Applicant put it:

I have explained the significance, as we see it, of what has been going on with a negotiation of this secret agreement, and the – I would venture to suggest the

¹ Merits Hearing Transcript, Day 4, 44-45.

² Ibid 43-44.

devastating admissions that Bowen made in cross-examination yesterday about how this agreement had come about, and why he kept it quiet, and gauge this; he told me in answer to questions yesterday afternoon that the US\$2.5 million was received around the time, within a month or so around the time that the agreement was entered into at the end of September 1995 [sic], but he couldn't explain why the following May of 2006 the government received US\$1.9 million less US\$25 for bank charges from the Fish Eye Company on account of Global, on account of the agreement of September, and he said, well, he thought that actually might be part of the US\$2.5 million, an explanation, obviously inconsistent with the one he had given me only a minute or so before. I am not asking you, I made it plain in the private sessions we had when Bowen was out of the room, I am not asking you, and it is no part of your function, and it is not necessary for you, to find that Mr Bowen is corrupt, or even to find that he's incompetent, or that he's both. What this has to do with is the credibility, in the sense that I have explained it.³

7. On this issue, the Tribunal concluded as follows:

On all the evidence adduced in these arbitration proceedings, the Tribunal does not accept any of these personal criticisms of Senator Bowen for the purposes of its decision in this Award. Moreover, after a firm but fair cross-examination of Senator Bowen during the Main Hearing, RSM's counsel submitted in his closing oral submissions that RSM was not requesting this Tribunal, in these proceedings, to find Senator Bowen 'corrupt' or 'incompetent' ... Nor does it.⁴

8. Having set out this background, the Applicant then explains in its Application what it is asking of the Committee. First it states that it is not asking the Committee to review these findings of the Tribunal for error. Rather, the Applicant explains, it is asking the Committee *'to exercise its independent jurisdiction to enquire whether Senator Bowen did in fact behave corruptly. In other words, we are now explicitly asking the Committee to do what we specifically said that the Tribunal need not do'*.⁵ The Applicant claims that it does so now because, two years on from the Merits Hearing, it is 'better able to

³ Ibid, Day 5, 49-50.

⁴ Award of 13 March 2009, para 212.

⁵ Application, 4.

marshal and evaluate the evidence, some of which only emerged at the hearing itself'.⁶

9. The Applicant explains that it is not asking the Committee 'to conduct a full-bore investigation into corrupt activities at high levels of the Grenadian government', as it acknowledges that the Committee 'plainly lacks the power to embark upon that kind of venture'.⁷ The Applicant submits, however, that the Committee has the authority and the obligation to make its own enquiries on the basis of *prima facie* evidence which it has submitted. In the view of the Applicant, the Committee possesses an inherent jurisdiction to investigate allegations of bribery, which it describes as being contrary to 'accepted norms of international public policy' and a 'universal norm of international law'.⁸

10. In support of the proposition that the Committee has an inherent jurisdiction to investigate such allegations, the Applicant cites a number of decisions of international arbitral tribunals, namely the *Lehigh Valley Railroad Company Case*,⁹ *Dallal v Iran*,¹⁰ and *Morris v Iran*.¹¹ On the basis of these decisions, the Applicant submits that 'international tribunals have jurisdiction to make enquiries and decisions beyond the scope of their technical mandate where circumstances so require'.¹²

11. In the closing paragraph of the Application, the Applicant puts into concrete terms the relief that it seeks. There, the Applicant 'petitions this Committee to instruct Grenada to reveal the details of its relationship with Global Petroleum', beginning with 'disclosure of who is paying Freshfields' fees in the current annulment proceeding',¹³ and the Applicant submits further that '[t]he Committee should thereafter make whatever further enquiries it deems fit to assure itself that it has

⁶ Ibid.

⁷ Ibid 5.

⁸ Ibid 5-6.

⁹ 8 UNRIAA 160 (US – Germany Mixed Claims Commission, 1933).

¹⁰ 5 Ir-USCTR 84 (Iran – US Claims Tribunal, 1984).

¹¹ 3 Ir-USCTR 364 (Iran – US Claims Tribunal, 1983).

¹² Application, 7.

¹³ Ibid 8.

properly discharged its obligations in accordance with existing and evolving international public policy'.¹⁴

C. The Reply

12. In its Reply, the Respondent makes a number of submissions in response to the Application. First, the Respondent submits that the Applicant had, in the course of the Merits Hearing, waived the right to argue that Mr Bowen was involved in corrupt activities.¹⁵ The Respondent refers to the ongoing court proceedings in New York, in which the Applicant has pursued the allegations of corruption which are levelled at Mr Bowen. The Respondent explains that at an earlier stage of these arbitration proceedings, it had requested an order that the Applicant be required to withdraw the case on the basis that the Applicant was attempting to litigate the same dispute in another forum (namely the New York courts). The Respondent submits that the Applicant, at the time, assured the Tribunal that its allegations of corruption formed no part of its case before the Tribunal. In the Respondent's submission, this is consistent with various statements made at the Merits Hearing by counsel for the Applicant.¹⁶ The Respondent further submits that the Applicant, '[h]aving expressly and repeatedly disclaimed the corruption allegations in the proceedings before the Tribunal ... may not seek to resuscitate them now'.¹⁷ In this regard, the Respondent refers to the Decision of the Annulment Committee in *Maritime International Nominees Establishment v Republic of Guinea*, in which the Annulment Committee stated that 'the annulment proceeding is not an occasion to present arguments and submissions which a party failed to make in the underlying proceedings'.¹⁸ The Respondent also refers to the decisions of other international courts and tribunals as authority for this proposition.¹⁹

¹⁴ Ibid.

¹⁵ Reply, 3-5.

¹⁶ Merits Hearing Transcript, Day 4, 55-56; Merits Hearing Transcript, Day 5, 49-50.

¹⁷ Reply, 4.

¹⁸ *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No ARB/84/4), Decision on Annulment of 22 December 1989, para 6.42.

¹⁹ Reply, 4-5.

13. Second, the Respondent submits that, in any event, the Applicant's allegations have no relevance to the issues before the Committee.²⁰ The Respondent notes that the Applicant does not allege that there was corruption on the part of a member of the Tribunal, and the Respondent observes that the Applicant does not allege that the procurement, formation or performance of the Agreement of 4 July 1996 was in any way tainted by corruption. In the Respondent's submission, the only respect in which the Applicant contends that corruption has any relevance to the present case is that Mr Bowen's testimony on a particular issue should have been disregarded due to his credibility being undermined by his alleged willingness to solicit and accept a bribe. However, in its Award, the Tribunal did not find it necessary to rely on Mr Bowen's testimony on that issue, due to the existence of relevant corroborating documentary evidence. Furthermore, the Respondent submits that even on the Applicant's own case, the allegations of corruption are not relevant to the 'dispositive issue in the Award', being the proper construction of the relevant provision in the Agreement of 4 July 1996.²¹ And finally on this point, the Respondent observes that the Application contains only one concrete request for information, namely whether Global is funding the Respondent's costs in the present annulment proceeding. The Respondent submits that it cannot see how the Government's 'payment of fees "in the current annulment proceeding" could be part of an investigation into Mr Bowen's alleged corruption'.²²

14. Third, the Respondent submits that, in any event, the Committee lacks the jurisdiction to consider the Application.²³ The Respondent observes that the Committee 'is a creature of the ICSID Convention', as established under Article 52 of the ICSID Convention, and that the grounds for annulment in Article 52 are exhaustive.²⁴ The Respondent also refers to Article 53(1), which provides that an award 'shall not be subject to any appeal or to any other remedy except those provided for in this Convention'.²⁵ The Respondent notes that the 'public policy' invoked by the Applicant cannot serve as a basis for any remedy that the

²⁰ Ibid 5-7.

²¹ Ibid 6.

²² Ibid 7.

²³ Ibid 8-10.

²⁴ Ibid 8.

²⁵ ICSID Convention, Article 53(1).

Committee has the power to grant.²⁶ Further, the Respondent submits that the cases cited by the Applicant as a source of the Committee's 'inherent jurisdiction' to grant the Application provide no assistance to its argument. The Respondent concludes by submitting that the Application is 'wholly unsupported by logic or the ICSID Convention' and that it should be rejected.²⁷

D. The Committee's Views

15. The Application raises an important issue relating to the jurisdiction of the Committee under the ICSID Convention. The ICSID Convention establishes a self-contained system of arbitration. This is confirmed by Article 53 of the ICSID Convention, which provides that an ICSID award 'shall not be subject to any appeal or to any other remedy except those provided for in this Convention.'²⁸
16. The ICSID Convention and the ICSID Arbitration Rules expressly confer various procedural powers on Tribunals which are constituted in accordance with the ICSID Convention in order to determine disputes. With particular regard to the procedural powers of ICSID Tribunals in the post-award phase, those powers include the power of rectification,²⁹ the power to issue a supplementary award,³⁰ the power of interpretation,³¹ and the power of revision.³² These powers are to be exercised by the original Tribunal which determined the merits of the dispute, and can only be exercised within certain stipulated time periods.
17. In particular, Article 51 expressly enables either party to apply to the original Tribunal for the revision of the award 'on the ground of the discovery of some fact of such a nature as decisively to affect the award, provided that when the award

²⁶ Reply, 8-9.

²⁷ Ibid 10.

²⁸ ICSID Convention, Article 53(1). The Convention does not permit the review of an arbitral award on grounds of public policy. A proposal for an exception to the obligation to enforce an ICSID award under Article 54 on public policy grounds was rejected by a large majority of states (25 in favour of rejection; 9 against) negotiating the ICSID Convention: *History* vol II, 903.

²⁹ ICSID Convention, Article 49(2).

³⁰ Ibid Article 49(2).

³¹ Ibid Article 50(1).

³² Ibid Article 51(1).

was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence'.³³

18. In addition to these post-award powers of the original Tribunal, the ICSID Convention provides that either party can request the annulment of an award under Article 52.³⁴ Article 52(1) sets out five grounds on which a request for annulment may be based. These five grounds are exhaustive.³⁵ '[A]n annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal'.³⁶

19. The Committee observes that the allegations made by the Applicant in the present Application do not fall within any of the five grounds for annulment enumerated in Article 52. Indeed, the present Application cannot properly be characterised as a request for annulment. In this respect, it is noteworthy that the corruption issue is not raised in the Request for Annulment dated 26 June 2009. The corruption issue is only briefly mentioned in the Memorial in Support of the Application for Annulment dated 16 November 2009, although the Applicant fails to explain the ground for annulment in Article 52 of the ICSID Convention on which this argument is based.³⁷ Rather, as noted above, the Applicant asks the Committee to consider and investigate evidence that was available before the original Tribunal and additional evidence that has been led in proceedings commenced by the Applicant before the New York courts. The Applicant does not point to any specific provision of the ICSID Convention or the ICSID Arbitration Rules as a basis for the Committee's power to grant its Application, but rather seeks to invoke the Committee's inherent powers.

20. The Committee agrees with the Applicant that international courts and tribunals have certain inherent powers which permit them to exercise powers that may go beyond the express terms of their constitutive instruments. However, the

³³ Cf. ICJ Statute, Article 61.

³⁴ ICSID Convention, Article 52(1).

³⁵ See, e.g., *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4), Decision on Annulment of 5 February 2002, paras 17-18; Christoph Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed, 2009), 932.

³⁶ *MTD Equity Sdn Bhd v Chile* (ICSID Case No ARB/01/7), Decision on Annulment of 21 March 2007, para 31.

³⁷ Memorial in Support of the Application for Annulment, 2.

Committee considers that international courts and tribunals can only exercise such powers where those powers are necessary to ensure the performance of functions that have been expressly conferred. Further, there are limitations on the exercise of inherent powers, including that such powers cannot be inconsistent with the terms of the relevant constitutive instrument of the international court or tribunal.³⁸

21. The Committee's function is to determine the Applicant's Request for Annulment, which was submitted under Article 52(1) of the ICSID Convention. It is well established that *ad hoc* Annulment Committees have a narrowly defined jurisdictional mandate. The Committee agrees with the view that the exhaustive nature of the list enumerated in Article 52(1) means that 'a party may not present new arguments on fact and law that it failed to put forward in the original arbitration proceeding ... [n]or should a party present new contemporaneous evidence'³⁹

22. As for the jurisprudence relied on by the Applicant in support of its proposition that the Committee has the power to make investigations into the alleged bribery, the Committee considers that these authorities do not assist the Applicant:

- In the *Lehigh Valley Railroad Company Case*, the Commission held that it had the power to reopen cases in relation to which charges were made that the Commission had been 'defrauded and misled by perjury, collusion, and suppression'.⁴⁰ However, two features distinguish the *LeHigh Valley Railroad Company Case* from the present one. First, the application in that case was made to the original Commission, which was not *functus officio*. If such an application were to be made under the ICSID Convention, it would properly be made by way of an application to the original tribunal for revision under Article 51. Second, there has been no allegation that the Tribunal's Award in this case was procured by fraud or affected by corruption; rather, as noted above, the Applicant maintains that

³⁸ *United States – United Kingdom, Court of Arbitration established under the Air Services Agreement of 23 July 1977 (Heathrow Airport User Charges)* (Supplementary Decision, 1 November 1993), 102 ILR 564, 579.

³⁹ Schreuer, above n 35, 932.

⁴⁰ 8 UNRIAA 160, 190 (US – Germany Mixed Claims Commission, 1933).

the alleged corruption was ultimately immaterial to the construction of the relevant provision of the Agreement of 4 July 1996.⁴¹

- As for the decisions of the Iran – United States Claims Tribunal cited by the Applicant, neither of these provides any authority for the proposition on which the Applicant seeks to rely, for in both cases, the Iran – United States Claims Tribunal did not decide whether it had an inherent power to review and revise an Award under exceptional circumstances.⁴²

23. Although not cited by the Applicant or the Respondent, there are a number of other arbitral decisions which deal with the power of international courts and tribunals to reopen a case for newly discovered evidence. On the basis of the principle of *jura novit curia*, the Committee is able to consider the relevance of those decisions.⁴³

24. One such decision is *Ram International Industries, Inc v Air Force of Iran*,⁴⁴ where the Iran – United States Claims Tribunal expressed the view that ‘it might possibly be concluded that a tribunal ... which is to adjudicate a large group of cases for a protracted period of time would by implication, until the adjournment and dissolution of the tribunal, have the authority to revise decisions induced by fraud’.⁴⁵ However, this decision does not assist the Applicant, for again, the Iran – United States Claims Tribunal ultimately left the issue open; in any event, the present Committee is not the same body as that which determined the merits of the dispute.

25. Another relevant decision is that of the UNCITRAL Tribunal in *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*.⁴⁶ In that case, the UNCITRAL Tribunal held that: ‘[A] court or tribunal, including this international arbitral tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous

⁴¹ Application, 3.

⁴² *Morris v Iran*, 3 Ir-USCTR 364, 365 (1983); *Dallal v Iran*, 5 Ir-USCTR 74, 75 (1984).

⁴³ *Fisheries Jurisdiction* [1974] ICJ Rep 3, 9; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 24-5; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, 1987 ed), 299.

⁴⁴ 29 Ir-USCTR 383 (1993).

⁴⁵ *Ibid* 390.

⁴⁶ 95 ILR 184 (1990).

determinations were the product of false testimony, forged documents, or other egregious “fraud on the tribunal” Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action’.⁴⁷ This decision, although providing stronger support for the proposition advanced by the Applicant, is also of no assistance to the Applicant in the present case. First, the Application has not been made to the original Tribunal, but rather to the Committee. Second, and in any event, the Applicant has not argued that the Award was the product of false testimony. As stated by the Tribunal in its Award, and as acknowledged by the Applicant, the Tribunal did not need to rely on the alleged false testimony of Mr Bowen, but instead was able to rely on documentary evidence for its finding on the relevant issue.⁴⁸

26. The Applicant has specifically stated that it is not asking the Committee to review the Tribunal’s findings for error.⁴⁹ There would be no permissible ground for such an application under Article 52. On the basis of the foregoing reasons, the Committee also concludes that it does not have the power to exercise an independent jurisdiction to enquire into the matters of which the Applicant makes complaint.

27. Further, and in any event, the position adopted by the Applicant in the present Application is inconsistent with that which it expressly took before the Tribunal. Indeed, the Applicant accepts that it is ‘explicitly asking the Committee to do what we specifically said that the Tribunal need not do’.⁵⁰ But this the Committee considers the Applicant may not do, since international law, as much as any system of municipal law, will not permit a party to blow hot and cold in respect of the same matter.⁵¹

⁴⁷ Ibid 222.

⁴⁸ Award, para 183; Application, 3; Reply, 5-6.

⁴⁹ Application, 4.

⁵⁰ Ibid.

⁵¹ Cheng above n 43, 141-9.

28. The only ground advanced for this approach by the Applicant is that ‘unlike two years ago, RSM is better able to marshal and evaluate the evidence.’⁵² But the evidence to which the Applicant refers was all obtained by it prior to the delivery of the Award, and, in one case, prior to the Merits Hearing.⁵³ In the case of the evidence obtained after the Merits Hearing, if the Applicant had good grounds to submit that this was new evidence decisively relevant to the issues in the arbitration, then, even if the Tribunal had closed the proceedings,⁵⁴ the Applicant could still have applied to the Tribunal to reopen the proceedings under ICSID Arbitration Rule 38(2).

29. As noted above, the Committee’s function is to consider and determine the Applicant’s Request for Annulment. The Committee considers that the issues raised in the Application are not directly relevant to that Request. As the Applicant itself stated in its Application, it believes that ‘the language of the contract with Grenada militated in RSM’s favour; whether or not Senator Bowen acted corruptly was ultimately immaterial to the construction of that language’.⁵⁵ Further, the only specific request made by the Applicant in its Application is unrelated to the allegation of personal corruption on the part of Mr Bowen.

30. For these reasons, the Committee decides that the Application is outside its jurisdiction. The Committee accordingly rejects the Applicant’s Application in its entirety.

E. Costs

31. The Respondent has requested the Committee to order that the Applicant reimburse the Respondent for its costs in defending the Application.

⁵² Application, 4.

⁵³ Application Exhibit B: Deposition of T Bass is in the ICSID arbitration and is dated 23 May 2007 (prior to the Merits Hearing in the arbitration). Application Exhibit C: Declaration of M Rose in the New York Proceedings is dated 9 November 2007.

⁵⁴ According to the Award, the arbitration file was only ‘informally closed’ by the Tribunal at the end of the Merits Hearing: Award, para 26. The proceedings were not formally closed under Rule 38(1) until 15 January 2009: *ibid*, para 37. The Applicant claims in its Request for Annulment that the proceedings were closed at the end of the Merits Hearing on 22 June 2007: Request for Annulment, para 19.

⁵⁵ Application, 3.

32. The Committee considers it appropriate to reserve issues of costs until the end of the present annulment proceedings.

Done on 7 December 2009.

/Signed/

Gavan Griffith QC

President of the Committee