

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 PROVISIONAL MEASURES

Members of the Tribunal

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

Secretary of the Tribunal

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Date of the Decision: December 12, 2013

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A. THE PARTIES

I. Claimant

1. **RSM Production Corporation** (hereafter 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 of Balestriere, Fariello & Abrams LLP and Mr. Karel Daele of Mishcon de Reya.

II. Respondent

2. **Saint Lucia** (hereafter 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.
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, RSM Production Corporation filed a request for arbitration dated March 29, 2012 with the International Centre for Settlement of Investment Disputes ("**ICSID**") against Saint Lucia (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 Arbitral 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 (the "**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. On September 20, 2013, Claimant filed its opposition to Respondent's request for provisional measures.
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/Hearing**").

C. BACKGROUND OF THE DISPUTE

14. In order to briefly summarize the subject matter of the arbitration, so far as it can be derived from Claimant's RFA, 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.

15. Subsequently, boundary disputes developed, affecting the exploration area, in particular in relation to Martinique, Barbados and St. Vincent, which prevented Claimant from initiating exploration.
16. On September 8, 2000, the Parties amended their agreement to the effect that it was stipulated that the agreement was in a *force majeure* situation 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.
17. In March 2004, the Parties acknowledged the continuance of the boundary issues and agreed on an extension of the Agreement by another three years.
18. After a change of the government of Saint Lucia in 2006 and after a further replacement of Saint Lucia's prime minister in 2007, a representative of Claimant was asked to collect an agreement signed by the then prime minister of Saint Lucia, which extended the Agreement by an additional three years.
19. As asserted by Claimant, after its representative had collected the envelope with the agreement signed by the prime minister, he was called and asked to come back in order to allow the prime minister to further check the extension. Claimant asserts that the signed copy was not returned.
20. 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 for specific performance under the Agreement or, in the alternative, an award obliging Respondent to reimburse Claimant for all damages incurred in reliance upon the Agreement.
21. In its request for provisional measures, Respondent seeks, in its words:

two orders: (1) a provisional measure requiring RSM to post security for costs in the form of an irrevocable bank guarantee for USD 750,000, pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (the Rules); and, in addition, (2) an order requiring RSM to pay all costs advances during the pendency of this proceeding, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and Rule 28(1)(a).¹

¹ Request for provisional measures of September 6, 2013, para. 2.

D. POSITIONS OF THE PARTIES

22. The Parties' positions with respect to Respondent's request for provisional measures can be summarized as follows:

I. Respondent's Position

23. 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 39.²

24. 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.³

25. Respondent takes the view that such an order is necessary in order to protect its procedural right to request that Claimant be required to reimburse some or all of Respondent's costs.⁴

26. Respondent alleges that there is a material risk that Claimant will be unable or unwilling to comply with a costs award issued against it.⁵

27. 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 it⁶ and to an ICSID annulment proceeding, which was discontinued due to Claimant's failure to pay the advances on costs.⁷

² Request for provisional measures of September 6, 2013, para. 24.

³ *Ibid.*

⁴ Request for provisional measures of September 6, 2013, para. 26.

⁵ Request for provisional measures of September 6, 2013, paras. 28 *et seq.*

⁶ Request for provisional measures of September 6, 2013, para. 28; *RSM Production Corporation and others v. Grenada* (ICSID Case No. ARB/10/6), Award of December 10, 2010.

⁷ 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.

28. 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.⁸
29. 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.⁹
30. Respondent alleges that the proceedings initiated by Claimant are funded by third parties (which Claimant admits)¹⁰, and concludes that these third parties fund the initiation of proceedings, but they will not comply with Claimant's obligations under a resulting costs award.¹¹ This, in Respondent's view, constitutes an exceptional situation justifying an order of security for costs, which Respondent characterizes as an "arbitral hit-and-run".¹²
31. 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 at the outset of the proceedings in order to be effective.¹³
32. 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.¹⁴
33. 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.¹⁵

⁸ Request for provisional measures of September 6, 2013, paras. 19 *et seq.*

⁹ Reply on provisional measures of September 26, 2013, paras. 13 *et seq.*

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

¹¹ Reply on provisional measures of September 26, 2013, paras. 17 *et seq.*

¹² Reply on provisional measures of September 26, 2013, para. 17.

¹³ Reply on provisional measures of September 26, 2013, para. 21.

¹⁴ See the transcript of the First Session of October 4, 2013, page 139 lines 13-16.

¹⁵ Request for provisional measures of September 6, 2013, paras. 31 *et seq.*

34. Regarding its request to order Claimant to pay all costs advances, Respondent also relies on Administrative and Financial Regulation 14 (3)(d) in conjunction with ICSID Arbitration Rule 28. Respondent holds that such a decision under those regulations and rules is entirely subject to the Tribunal's discretion. In Respondent's view, this would not result in any prejudgment as to the merits of the case and the final award including a decision on costs.¹⁶

35. Respondent requests the Tribunal to:¹⁷

(a) *Direct RSM to*

(i) post an irrevocable bank guarantee in the amount of \$750,000 as security for costs; and

(ii) pay all costs advances, without prejudice to the Tribunal's final allocation of costs in the Award; and

(iii) reimburse to St. Lucia, within seven days of the Tribunal's order, the sums that St. Lucia has paid to ICSID as part of the initial advance on costs; or

(b) *In the alternative to any or all of the foregoing orders, directing 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.*

II. Claimant's Position

36. 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

¹⁶ Request for provisional measures of September 6, 2013, paras. 34 *et seq.*

¹⁷ Reply on provisional measures of September 26, 2013, para. 31.

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

37. 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
38. 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 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
39. 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
40. Claimant considers Respondent's reference to prior proceedings as irrelevant, since Respondent did not put forth any circumstances regarding Claimant's current conduct which 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
41. 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

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.

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

42. 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

43. In response to Respondent's request to order Claimant to pay all costs advances, Claimant asserts that this request is not justified by any facts concerning the present case. Moreover, Claimant considers the request to order Claimant to pay all costs advances as another way of trying to obtain security for costs, which must fail for the same reasons which Claimant submitted in opposition to the security for costs request.²⁹

44. Claimant requests the Tribunal to:

reject Respondent's request in its entirety.

E. TRIBUNAL'S ANALYSIS

I. Respondent's Request That Claimant Be Compelled to Advance All Sums Required to Secure Payment of the Direct Costs of This Proceeding

1. Introduction and Applicable Legal Principles

45. In order to secure and pay the direct expenses of individual proceedings, including the fees and expenses of tribunal members as well as expenses and fees of ICSID itself, the Administrative and Financial Regulations of ICSID require advance payments based on an estimation of those anticipated fees and expenses. Article 14 of the Administrative and Financial Regulations of ICSID establishes procedures for setting the amount of the advance payments and allocating that

²⁷ *Ibid.*

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

²⁹ Opposition to request for provisional measures of September 20, 2013, para. 35.

amount between the Parties. These direct expenses of the proceeding are distinct from the "expenses incurred by the parties in connection with the proceedings."³⁰

46. Concerning allocation of direct expenses of the proceeding, Article 14 provides:

[I]n connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. (Emphasis supplied.)

Article 14 thus plainly and specifically empowers the Tribunal to decide upon and order a division of advance payments which is different from the one-half ratio set forth in Article 14 itself.

47. The Tribunal's power to order a division of advance payments which varies from the one-half ratio specified in Article 14 is confirmed by Rule 28 of the ICSID Arbitration Rules:

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

48. Two conclusions emerge from the provisions of Article 14 and Rule 28. First, the Tribunal has the explicit and undoubted authority to order that advance payments be allocated in a ratio which varies from the one-half ratio stated in Article 14. Second, because the Convention, Regulations, and Arbitration Rules are silent concerning what matters the Tribunal must consider in exercising that authority, the Tribunal must necessarily use its discretion and judgment in determining the allocation.

³⁰ See ICSID Convention Art. 61(2) (listing both types of expenses and authorizing tribunals to decide in final awards "how and by whom" each category is to be paid).

2. Discussion

49. The Parties have not cited any authorities articulating the standards which should inform a Tribunal's exercise of its discretion to order that advance payments be allocated in a ratio which varies from the one-half ratio stated in Article 14. The Tribunal is satisfied that Article 14 embodies a presumption that such payments should be allocated equally. The corollary is that any variance from this presumption must be supported by a record showing good cause for the variance. The Tribunal is of the view that this "*good cause*" standard should be less stringent than the "*exceptional circumstances*" more generally required for a Tribunal to order provisional measures under Arbitration Rule 39 and Article 47 of the ICSID Convention. Allocation of advances is largely an interim administrative mechanism designed to secure and pay ongoing expenses of the proceedings themselves. Both Regulation 14 and Arbitration Rule 28 are clear that, whatever interim allocation might be ordered, that allocation remains subject to final adjustment under Article 61(2) of the Convention, as part of the Tribunal's final award.

50 The Tribunal has no occasion here to conceive of and address what sort of circumstances might generally amount to "good cause" for varying the presumption that each Party advances one-half of ongoing administrative expenses. It is sufficient to state here (1) that Claimant's record concerning payment of these administrative expenses in two prior ICSID proceedings gives rise to substantial doubt about either its willingness or ability (or both) to pay any award of such expenses and (2) that, far from allaying these doubts, the circumstances of this proceeding thus far compound them. It is this combination which, in the Tribunal's view, constitutes "good cause" for the variance.

51. Although Respondent spends much time discussing prior litigation involving Claimant and/or its chief executive officer, the proceedings which cause concern to the Tribunal all arose from Claimant's investment disputes with Respondent's neighbor, Grenada. Those proceedings may be divided into three related but distinct proceedings, which, for convenient reference, the Tribunal will call (a) the Original Proceeding, (b) the Annulment Proceeding, and (c) the Treaty Proceeding.

- (a) **The Original Proceeding:** (RSM Production Corporation v. Grenada, "Award" (March 13, 2009) (ICSID Case No. ARB/05/14), "**Original Decision**")

52. The Original Proceeding is relevant only for background concerning the other two proceedings. RSM commenced an ICSID arbitration against Grenada for breach of an agreement to issue a petroleum exploration license covering certain designated waters near Grenada. Grenada challenged ICSID's jurisdiction and asserted counterclaims. On the merits, the Tribunal found that it had jurisdiction, dismissed RSM's contract claims, and dismissed all of Grenada's "substantive counterclaims." The Tribunal further decided that each Party should bear its own costs and that each should bear one-half of ICSID's administrative expenses.³¹

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

53. Dissatisfied with the Original Decision, RSM commenced the Annulment Proceeding pursuant to Article 52 of the ICSID Convention. RSM, as the applicant for annulment, was required by Regulation 14(e) to make "*the advance payments requested by the Secretary-General to cover expenses following the constitution of the [Annulment] Committee.*" The requirement that RSM advance such payments was "*without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.*"³²

54. Recitation of precise dates is important to understanding the present Tribunal's concerns about RSM's conduct in the Annulment Proceeding. On September 17, 2009, pursuant to Regulation 14, ICSID invited RSM to make an advance payment of USD 150,000 to enable it to meet the direct costs of the proceeding in the next three to six months. RSM made an initial payment of USD 118,105.³³ The remaining USD 31,895, however, was not paid until January 29, 2010, over four months after ICSID made the request.³⁴

³¹ Original Decision, paras. 501–506.

³² *Ibid.*

³³ Discontinuance Decision, para. 3.

³⁴ *Ibid.* para. 16.

55. ICSID having incurred significant administrative expenses and Committee member fees in 2009 and RSM having failed to pay USD 31,895 of the USD 150,000 which had been requested in September of 2009, ICSID wrote another letter to RSM on January 13, 2010, requesting a second advance payment of USD 300,000. The amount was an estimate of the further costs incurred and to be incurred in relation to the annulment proceeding to finality, including the hearing in Washington, D.C.³⁵
56. RSM did not pay. Rather, it objected to the request for a second advance payment of USD 300,000 as “unreasonable”, and indicated that it was prepared to pay USD 100,000.³⁶
57. ICSID thereafter confirmed on behalf of the Committee that the advance payment of USD 300,000 was intended to meet the further expenses in the proceedings, and that the call for USD 300,000 was a reasonable pre-estimate in light of the expedited time schedule agreed at the First Session of the Committee.³⁷
58. By letter dated January 28, 2010, ICSID observed that the advance of USD 300,000 remained outstanding, including the amount of USD 31,895 which was due after the first call for funds, but which had not been received. The Committee noted that if any part of the amount remained outstanding by February 12, 2010, the proceeding would be suspended. RSM was invited to confirm by February 3, 2010 whether the requested deposits would be paid and the hearing confirmed.³⁸
59. On January 29, 2010, the outstanding amount of USD 31,895 was finally wired to ICSID. No part of the additional USD 300,000 was paid by RSM, as requested.³⁹
60. Since the requested payment was not received from RSM, the Committee vacated the hearing dates and informed the Parties that, in the event of non-payment by RSM of the request for advance payment of costs by February 12, 2010, the proceeding would be subject to the

³⁵ *Ibid.* para. 9.

³⁶ *Ibid.* para. 11.

³⁷ *Ibid.* para. 12.

³⁸ *Ibid.* para. 15.

³⁹ *Ibid.* para. 16.

procedure in Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations, and that the advance payment would have to be made by one Party or the other.⁴⁰

61. On February 17, 2010, ICSID notified the Parties that the advance on costs had not been paid by February 12, 2010. The Parties were given the opportunity to make the outstanding payment within 15 days (i.e., by March 5, 2010). No part of the USD 300,000 was paid. Instead, the Parties quarreled about whether the Committee should proceed to as though RSM were in default of its obligations to make advance payments.⁴¹
62. By letter dated March 11, 2010, ICSID informed the parties of the proposal of the Committee to convene for a one-day procedural hearing in Washington D.C. to consider the applications and submissions of either party as to the course of the proceeding. The parties were also advised that the procedural hearing would take place subject to the payment by March 24, 2010, by either party, of an advance of USD 150,000 to finance that hearing.⁴²
63. Not having received any payment, the Committee decided to stay the proceeding, effective March 29, 2010.⁴³
64. After more than six months had elapsed since the stay of the proceeding, by letter dated November 8, 2010, the Secretary to the Committee moved that the Committee discontinue the annulment proceeding in this case for non-payment of advances for the direct expenses of the proceeding.⁴⁴
65. By letter dated December 7, 2010, ICSID informed the parties that part of the actual costs incurred in the proceeding remained outstanding and could not be covered since the balance of the case was negative. It requested RSM to pay USD 35,000 by January 7, 2011 to allow ICSID to cover costs already incurred before the discontinuance.⁴⁵

⁴⁰ *Ibid.* para. 19.

⁴¹ *Ibid.* paras. 20–22.

⁴² *Ibid.* para. 23.

⁴³ *Ibid.* para. 24.

⁴⁴ *Ibid.* para. 30.

⁴⁵ *Ibid.* para. 31.

66. By letter dated January 14, 2011, ICSID observed that RSM had failed to pay the USD 35,000 as requested. ICSID invited either party to advance the relevant amount within 15 days, i.e., by January 31, 2011.⁴⁶

67. On March 23, 2011, the Respondent Grenada transferred to ICSID USD 31,424.74 to cover outstanding fees and expenses relating to the conclusion of the Annulment Proceeding and thereafter included this amount in its expenses which it asked the Committee to award as costs.⁴⁷ The Committee did so.⁴⁸

68. The Tribunal draws several inferences from this chronological recitation of RSM's conduct in the Annulment Proceeding. First, RSM 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. Second, RSM never complied with the additional call that it pays USD 300,000. It did not even pay the USD 100,000 that it said it was prepared to pay. There is no explanation for this in the Annulment Proceeding decisions or in the record before this Tribunal. Third, because of RSM's failure to pay advances as requested, the Committee discontinued the Annulment Proceeding. Fourth, because of RSM'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. It asked RSM to advance USD 35,000 to allow recovery of costs actually incurred before the discontinuance. RSM did not do so. Instead, Grenada stepped in to pay ICSID USD 31,424.74 to cover these outstanding fees and expenses. No part of this has been recovered.

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

69. In the Treaty Proceeding, RSM was joined by all three of its shareholders in asserting claims against Grenada under the Grenada-United States Bilateral Investment Treaty ("BIT"). The Request for Arbitration was filed January 15, 2010, the month ICSID was calling for additional advances in the Annulment Proceeding. Although Claimants alleged violations of the BIT, the

⁴⁶ *Ibid.* para. 32.

⁴⁷ *Ibid.* paras. 33–34.

⁴⁸ *Ibid.* para. 69.

"investment" which they claimed to have made arose from the contract which was the basis of the Original Proceeding.⁴⁹ This was the primary basis for the Tribunal's determination that the doctrine of collateral estoppel precluded Claimants from re-litigating matters actually litigated in the Original Proceeding.⁵⁰ The Tribunal thus concluded that the claims were manifestly without legal merit and included in its award an order that "Claimants" reimburse Grenada for the cost advances which Grenada had made to ICSID, in the amount of USD 93,605.62.

70. The significance of the Treaty Proceeding for this Tribunal is that RSM itself did not satisfy any part of the Treaty Award. Instead, Grenada had to sue to reduce the Treaty Award to a judgment of the United States for the Southern District of New York and eventually executed on the assets of one of RSM's shareholders in the United States District Court for the District of Colorado.⁵¹ This was possible there only because the shareholders were Claimants in the Treaty Proceedings. Only RSM is the Claimant in the proceeding before this Tribunal, and its inability or unwillingness to pay ICSID's expenses as ordered in the Treaty Proceedings gives rise to further insecurity concerning its willingness or ability to pay such expenses in this proceeding.

(d) Summary of Findings

71. 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.

72. 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:

⁴⁹ Treaty Award, paras. 1.1.1; 1.4.1–1.4.5.

⁵⁰ *Ibid.* paras. 7.1.1–7.1.8.

⁵¹ See request for provisional measures of September 6, 2013, para. 14 and Exhibit R–4.

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.⁵²

Counsel reiterated that position during the Hearing on Respondent's request for provisional measures.⁵³

73. Further, as Claimant's counsel admitted during the Hearing, it is a fair inference that RSM has third party funding in this matter.⁵⁴ 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.

74. 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.

II. Respondent's Request for Security for Costs

1. Applicable Legal Principles

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

⁵² Claimant's opposition to request for provisional measures of September 20, 2013, paras. 16 and 30.

⁵³ 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.*").

⁵⁴ *Ibid.* at 116, ll. 10–11.

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.

76. 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.

2. Discussion

77. Notwithstanding the omission in Article 47 and Rule 39 of any explicit mention of security for costs, 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 power⁵⁵ provided exceptional circumstances exist. The Tribunal further notes that none of these tribunals has actually found exceptional circumstances which would support an award of security for costs. Against this background, the Tribunal elects to hold over the request for an order requiring Claimant to post security for costs until the end of May 2014 or an earlier point in time with leave to parties to bring on with prior notice.

III. Decision

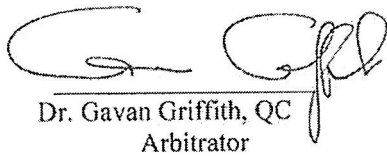
Based on the above analysis, the Tribunal rules as follows:

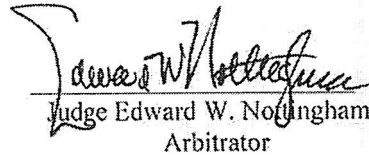
- (a) Respondent's request for an order requiring Claimant RSM to pay all costs advances during the pendency of this proceeding, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and Rule 28(1)(a), is GRANTED. Unless and until otherwise ordered by the Tribunal, Claimant RSM will pay all costs advances heretofore or hereafter requested by**

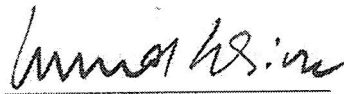
⁵⁵ See *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008, para. 57; *Emilio Agustín Maffezini v. Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 of October 28, 1999; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/07), 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; *Grynberg & RSM Production Corporation v. Government of Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs of October 14, 2010, para. 5.16.

ICSID. It shall also refund Saint Lucia the USD 100,000 heretofore advanced by Respondent.

- (b) Respondent's request for an order requiring RSM to post security for costs in the form of an irrevocable bank guarantee for USD 750,000, pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, is ADJOURNED sine die for further consideration by the Tribunal upon notice to the parties before end of May 2014, or upon earlier application by either party.
- (c) The decision regarding the costs of Respondent's application remains reserved until a later stage in these proceedings.


Dr. Gavan Griffith, QC
Arbitrator


Judge Edward W. Nottingham
Arbitrator


Prof. Siegfried H. Elsing
President of the Tribunal