

**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**

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**DECISION ON CLAIMANT'S PROPOSAL FOR THE DISQUALIFICATION OF  
DR. GAVAN GRIFFITH QC**

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Rendered by:

Prof. Dr. Siegfried H. Elsing, President of the Tribunal  
Judge Edward W. Nottingham, Arbitrator

*Secretary of the Tribunal*  
Ms. Aurélia Antonietti

Date: October 23, 2014

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## A. PARTIES

1. **RSM Production Corporation** (hereinafter referred to as “**Claimant**”) is a company constituted under the laws of Texas, U.S.A. It is legally represented by Messrs. Jack J. Grynberg and Roger Jatko and Ms. Janice Orr. Claimant is represented in this arbitration by its counsel Mr. Daniel L. Abrams of Law Office of Daniel L. Abrams, PLLC, and Mr. Karel Daele and Ms. Heidrun Walsh of Mishcon de Reya.
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 the New York office of Freshfields Bruckhaus Deringer US LLP, Messrs. Jonathan J. Gass and Patrick McGahan of the London office of Freshfields Bruckhaus Deringer LLP, as well as 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 with ICSID a request for arbitration dated March 29, 2012 against Respondent (the “**Request**”).
5. On April 23, 2012, the Secretary-General of ICSID (the “**Secretary-General**”) registered the Request, as supplemented by letters of April 8 and 20, 2011, in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes (the “**ICSID Convention**”) and notified the Parties thereof.
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, 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 Professor Dr. 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. Aurélie 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.
14. On December 12, 2013, the Tribunal issued its “**Decision on Saint Lucia’s Request for Provisional Measures**” in which it ordered 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 on the merits.

17. By letter of the same date, Respondent reiterated its request for security for costs.
18. On August 13, 2014, the Tribunal issued its “**Decision on St. Lucia’s Request for Security for Costs,**” together with Dr. Griffith’s assenting reasons (“**Assenting Reasons**”) and Judge Nottingham’s dissenting opinion. In its Decision, the Tribunal ruled 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.*”
19. On August 14, 2014, the Tribunal issued its decisions on the Parties’ respective requests for production of documents which were filed on July 18, 2014.
20. On August 20, 2014, the Tribunal supplemented its Decision on St. Lucia’s Request for Security for Costs.
21. By letter dated August 20, 2014, Claimant requested the Tribunal to extend the deadline for filing of its reply by six weeks, *i.e.* from September 12, 2014 to October 24, 2014.
22. By email of the same date, the Secretariat informed the Parties that Respondent was invited to comment on Claimant’s request of August 20, 2014 by August 27, 2014.
23. By email dated August 27, 2014, Claimant indicated that the Parties had conferred and jointly agreed to extend the deadline for filing of Claimant’s reply by two weeks, *i.e.* by September 26, 2014, with the deadline for filing of Respondent’s rejoinder remaining unchanged, *i.e.* December 19, 2014, and the reserved hearing dates being maintained.
24. By email of the same date, Respondent confirmed its agreement to Claimant’s proposed dates.
25. By email dated August 28, 2014, the Secretariat informed the Parties that the Tribunal agreed to the extension of the deadline for filing of Claimant’s reply.

26. By email dated September 8, 2014, Claimant informed the Secretariat that the Parties had conferred and jointly agreed to extend the deadline for posting of the security for costs by one week from the date set forth by the Tribunal in its Decision on St. Lucia's Request for Security for Costs, *i.e.* by September 19, 2014.
27. By email dated September 9, 2014, the Secretariat informed the Parties that the Tribunal was agreeable to the Parties' jointly agreed extension of the deadline for posting of the security for costs.
28. On September 10, 2014, Claimant submitted its Proposal for the Disqualification of Dr. Gavan Griffith QC ("**Disqualification Proposal**").
29. By letter of the same date, the Secretariat notified the Parties that the proceedings were suspended pursuant to ICSID Arbitration Rule 9(6) and that it would revert shortly regarding the next steps in the proceedings.
30. By letter dated September 11, 2014, the Secretariat conveyed to the Parties the schedule of written submissions on the Disqualification Proposal as follows:
  - “1. Respondent is invited to submit its observations on the disqualification proposal by Friday, September 19, 2014;
  2. Dr. Griffith is invited to furnish any explanations that he may wish to provide, pursuant to ICSID Arbitration Rule 9(3), within one (1) week from receipt of the Respondent's submission;
  3. Both Parties are invited to simultaneously file, within one (1) week from the date of any explanations furnished by Dr. Griffith, any further observations they wish to make in connection with the disqualification proposal. The Parties are requested to submit their observations only to the Secretary of the Tribunal on the due date. The Secretary of the Tribunal will circulate the submissions upon receipt of both Parties' filings.”
31. By email dated September 18, 2014, Claimant informed the Secretariat that the Parties had conferred and would work towards having the arrangements for the posting of the security for costs in place by September 26, 2014.

32. On September 19, 2014, Respondent filed its observations on the Disqualification Proposal (**“Respondent’s Observations”**).
33. By letter dated September 23, 2014, the Secretariat informed the Parties that Dr. Griffith did not intend to submit observations on the Disqualification Proposal, and that Professor Elsing and Judge Nottingham decided that:

*“[...] should the Parties wish to submit further observations on the disqualification proposal, Claimant shall file its submission within one (1) week of today’s date, and Respondent shall file its reply if it so wishes, within one (1) week from the date of receipt of Claimant’s submission.”*
34. On September 30, 2014, Claimant filed its further observations on the Disqualification Proposal (**“Claimant’s Further Observations”**).
35. By letter of the same date, Respondent submitted comments concerning the schedule of submission on the merits and the hearing dates.
36. By letter dated October 1, 2014, Respondent indicated that it had no further observations on the Disqualification Proposal and commented on Claimant’s Further Observations.
37. By letter dated October 2, 2014, Claimant commented on Respondent’s letter of October 1, 2014.

## C. POSITIONS OF THE PARTIES

38. The Parties' positions with respect to the Disqualification Proposal are summarized below.

### I. Claimant's Position

39. Claimant's proposal for the disqualification of Dr. Griffith is based solely upon Dr. Griffith's Assenting Reasons to the Decision on St. Lucia's Request for Security for Costs of August 13, 2014.

40. Claimant asserts that the determinations made by Dr. Griffith in his Assenting Reasons raise the concern that he lacks the qualities required of an arbitrator.<sup>1</sup> According to Claimant the finding of a lack of impartiality or independence within the meaning of Articles 57 and 14(1) of the ICSID Convention merely requires the establishment of the appearance of dependence or bias.<sup>2</sup>

41. In Claimant's opinion, Dr. Griffith's comments reveal bias against both third-party funders and funded claimants, such as Claimant in this arbitration.<sup>3</sup> In this respect, Claimant's concerns are based on the following excerpt from the Assenting Reasons:

*"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.*

*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.*

*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*

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<sup>1</sup> Disqualification Proposal, para. 1.

<sup>2</sup> Disqualification Proposal, para. 15; Claimant's Further Observations, paras. 73 *et seq.*

<sup>3</sup> Disqualification Proposal, p. 4.

*mandate that its real exposure to costs orders which may go one way to it on success should flow the other direction on failure.*

*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.*

[...]

*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.”<sup>4</sup>*

42. The description of third-party funders as “*mercantile adventurers*” and the association with “*gambling*” and the “*gambler’s Nirvana: Heads I win and Tails I do not lose*” are, in Claimant’s view, radical in tone and negative and prejudice the question whether a funded claimant will comply with a costs award.<sup>5</sup> Additionally, Claimant derives from Dr. Griffith’s determinations that his alleged bias against the funders extends to Claimant as the funded party as well.<sup>6</sup> Claimant contends that the language used by Dr. Griffith cannot be qualified as a neutral discussion of the issues or a mere rhetorical emphasis.<sup>7</sup>
43. Claimant goes on to assert that Dr. Griffith’s determinations are not based on any particular circumstances regarding the contractual arrangements between Claimant and its funder nor on its history in connection with the compliance with costs awards; his opinion derives from his preconceived, radical and general apprehension against third-party funding and funded claimants in BIT arbitrations.<sup>8</sup> Dr. Griffith did not distinguish between the various

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<sup>4</sup> Assenting Reasons, paras. 12 *et seq.*

<sup>5</sup> Disqualification Proposal, paras. 23, 24.

<sup>6</sup> Disqualification Proposal, para. 25.

<sup>7</sup> Claimant’s Further Observations, para. 100.

<sup>8</sup> Disqualification Proposal, para. 33.

existing and possible types of third-party funding but reached his decision by a consideration of funding in general.<sup>9</sup>

44. Claimant also bases its Disqualification Proposal on the fact that Dr. Griffith issued an assenting opinion with different reasons at all, whereas he agreed with the result of the Majority Decision. This, according to Claimant, shows that Dr. Griffith felt the need to express his radical views on third-party funding to the “*arbitration community*” instead of concurring with the President’s view, thereby stepping outside his role of an impartial and open-minded arbitrator.<sup>10</sup> In Claimant’s view, it is important to note that Dr. Griffith articulated his opinion in his capacity as arbitrator and not in an academic context.<sup>11</sup>
45. Claimant further contends that Dr. Griffith’s disqualification is justified by the fact that his argumentation is, in parts, based on references to the situation in arbitrations under bilateral investment treaties (BIT arbitration). Since the current arbitration concerns contract between the Parties (and cannot be qualified as a BIT arbitration), Claimant concludes that Dr. Griffith is being led by factors other than the facts of the case at hand.<sup>12</sup>
46. Claimant also refers to the questions whether a party requesting an order of security for costs has to establish *prima facie* jurisdiction of the tribunal and whether any showing on the merits of the case is required, on which Dr. Griffith likewise disagreed with the President’s approach. Dr. Griffith expressed his view on the establishment of *prima facie* jurisdiction as follows:

*“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.*

*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,*

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<sup>9</sup> Claimant’s Further Observations, para. 95.

<sup>10</sup> Disqualification Proposal, paras. 34 *et seq.*; Claimant’s Further Observations, paras. 66 *et seq.*

<sup>11</sup> Claimant’s Further Observations, para. 115.

<sup>12</sup> Disqualification Proposal, para. 30.

*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.*

*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.”<sup>13</sup>*

With respect to the requirement of setting out the position on the merits, Dr. Griffith reasoned:

*“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 [sic] 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.*

*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.”<sup>14</sup>*

47. From these remarks, Claimant derives that Dr. Griffith favors respondent state parties irrespective of the facts of the particular case.<sup>15</sup> In particular, Claimant points out that Dr. Griffith’s opinion does not contain any aspect in favor of the investor but merely in favor of the respondent state.<sup>16</sup>
48. In Claimant’s opinion, also the fact that both commentators and funders have criticized and disagreed with Dr. Griffith’s approach shows that this approach is perceived as inappropriate and thus further supports his disqualification.<sup>17</sup>

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<sup>13</sup> Assenting Reasons, paras. 4-6.

<sup>14</sup> Assenting Reasons, paras. 7-8.

<sup>15</sup> Disqualification Proposal, paras. 42. *et seq.*

<sup>16</sup> Disqualification Proposal, para. 44.

<sup>17</sup> Disqualification Proposal, paras. 54 and 62.

49. That Dr. Griffith elected not to furnish any explanations in reaction to Claimant's Disqualification Proposal, in Claimant's opinion, adds further weight to the doubts concerning his impartial and independent judgment.<sup>18</sup>
50. Claimant contends that by expressing his views on third-party funding, Dr. Griffith showed a clear preference in favor of Respondent and thus a preference with regard to the outcome of the dispute.<sup>19</sup>
51. Claimant opines that, in any case, the cumulation of two grounds for a challenge, *i.e.* the bias in favor of respondent states and the bias against funded claimants, justifies the disqualification of Dr. Griffith.<sup>20</sup>
52. Claimant contests that the Disqualification Proposal is in any way related to the prior modification of the timetable. Rather, Claimant asserts that it had negotiated the possible extension of time limits with Respondent in good faith and with the intention to maintain the planned hearing date in order to not disrupt the proceeding.<sup>21</sup>
53. Claimant requests that
- "a. Dr. Griffith be disqualified as a member of the Tribunal"*<sup>22</sup>
  - b. It is not required to advance the costs St. Lucia has incurred in responding to RSM's Disqualification Proposal"*<sup>23</sup>
  - c. St. Lucia be ordered to reimburse the costs RSM has incurred in making its Disqualification Proposal"*<sup>24</sup>

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<sup>18</sup> Claimant's Further Observations, para. 9.

<sup>19</sup> Claimant's Further Observations, para. 115.

<sup>20</sup> Claimant's Further Observations, paras. 118 *et seq.*

<sup>21</sup> Claimant's Further Observations, paras. 27 *et seq.*

<sup>22</sup> Disqualification Proposal, para. 2.

<sup>23</sup> Claimant's Further Observations, para. 127.

<sup>24</sup> *Ibid.*

## **II. Respondent's Position**

54. Respondent asserts that Claimant's Disqualification Proposal is a mere attempt to disrupt the proceeding, especially given that Claimant had, immediately prior to the Disqualification Proposal, already delayed the proceeding by requesting that time limits be extended leading to the modification of the procedural calendar.<sup>25</sup>
55. Respondent believes that it was not necessary for Dr. Griffith to furnish further observations on the Disqualification Proposal since the remarks in his Assenting Reasons sufficiently speak for themselves.<sup>26</sup>
56. Moreover, Respondent asserts that, against the background of the delay of the proceeding caused by the Disqualification Proposal, the latter is to be, contrary to the requirements of ICSID Arbitration Rule 9(1), regarded as untimely and therefore to be rejected.<sup>27</sup>
57. Additionally, in Respondent's view, the Disqualification Proposal fundamentally lacks merit.<sup>28</sup> Respondent contends that the only reason for Claimant's Disqualification Proposal is its disagreement with the Decision on Security for Costs rendered in Respondent's favor. Such disagreement cannot constitute a ground for challenging an arbitrator.<sup>29</sup> Consequently, the disqualification cannot be based upon the merits of the decision, but only on the manner.<sup>30</sup>
58. According to Respondent, the Disqualification Proposal does not meet the standard required for a disqualification, which requires Claimant to furnish evidence that Dr. Griffith manifestly lacks the ability to exercise independent judgment. Respondent regards establishing a mere "*appearance*" as insufficient.<sup>31</sup>
59. Respondent further argues that the arguments put forth by Dr. Griffith do not raise any doubts as to his impartiality. There is no basis to infer that Dr. Griffith would not act fairly

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<sup>25</sup> Respondent's Letter of September 30, 2014, p. 1.

<sup>26</sup> Respondent's Observations, para.6.

<sup>27</sup> Respondent's letter of September 30, 2014, p. 2.

<sup>28</sup> Respondent's Observations, para. 4.

<sup>29</sup> Respondent's Observations, para. 15.

<sup>30</sup> *Ibid.*

<sup>31</sup> Respondent's Observations, paras. 10 *et seq.*

*vis-à-vis* Claimant in this proceeding.<sup>32</sup> Rather, his assenting reasons merely state his opinion with regard to a widely discussed topic. The expressions used by Dr. Griffith are, in Respondent’s view, merely a means to emphasize his opinion and not a sign of his bias against Claimant or in favor of Respondent.<sup>33</sup>

60. Respondent requests that

*“a. the Disqualification Proposal be denied.”*<sup>34</sup>

*b. RSM be ordered to reimburse the costs St. Lucia has incurred in responding to RSM’s Disqualification Proposal.”*<sup>35</sup>

## D. ANALYSIS

### I. Applicable Legal Standard

61. The legal framework governing a proposed disqualification of a member of an ICSID tribunal is set out in Articles 57 and 14(1) of the ICSID Convention. Article 57 of the ICSID Convention provides:

*“A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”*

62. Since Claimant raises no question concerning eligibility for appointment to the Tribunal, our focus must be on whether Claimant has sufficiently demonstrated “*a manifest lack of the qualities required by paragraph (1) of Article 14,*” to which we now turn.

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<sup>32</sup> Respondent’s Observations, para. 17.

<sup>33</sup> Respondent’s Observations, paras. 18 *et seq.*

<sup>34</sup> Respondent’s Observations, para. 24.

<sup>35</sup> Respondent’s Observations, para. 25.

63. Article 14(1) of the ICSID Convention reads:

*“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”*

64. Focusing again on the language which Claimant has placed in issue, the only question before us is whether Claimant has sufficiently demonstrated a “*manifest lack*” of the ability “*to exercise independent judgment.*”

65. As previously noted (paragraphs 40 and 58, *supra*), the Parties disagree about what the pertinent language in Articles 57 and 14(1) requires. According to Claimant, all that is required is “*the appearance of dependence or bias,*” (quoting *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/ 12/20), Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal of November 12, 2013, para. 58). Respondent insists that mere “*appearance*” of bias is insufficient and that partiality must “*be clearly and objectively established*” (quoting *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, of May 5, 2011, para. 45). In our view, the Parties are conflating distinct concepts. The authorities on which they rely are consistent with one another and can be reconciled, a task which we now undertake.

66. The first conflated concept is simply this: proof of bias or dependence must almost always rest on “*appearances,*” that is, on circumstantial evidence. Proving a person’s actual bias, dependence, or prejudice is practically impossible, absent an admission or declaration from the person himself. There is simply no way for ordinary people to scrutinize or fathom the operations of a human mind. Hence, we find ourselves in full agreement with those authorities which declare

*“Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.”*<sup>36</sup>

67. The second conflated concept is this: what is the standard by which the circumstantial evidence of dependence or bias is to be evaluated? The standard has two aspects. First, it is an *“objective standard based on a reasonable evaluation of the evidence by a third party.”*<sup>37</sup> Second, giving meaning to the word *“manifest,”* the circumstantial evidence of dependence or bias must be *“obvious.”*<sup>38</sup>
68. According to *Schreuer*, the term *“manifest”* does not refer to the gravity, but rather to the *“ease with which it is perceived.”*<sup>39</sup>
69. To summarize our view of the authorities: we believe the circumstantial evidence demonstrating the appearance of dependence or bias must be plain or obvious to an independent third party based on an objective and reasonable evaluation of the evidence. We thus find ourselves in agreement with the Unchallenged Arbitrators in *Caratube*:

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<sup>36</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal of November 12, 2013, para. 59. See also *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of December 13, 2013, para. 65; *Repsol SA. and Repsol Butano SA. v. Republic of Argentina* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser of December 13, 2013, para. 70; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision to Disqualify a Majority of the Tribunal of February 4, 2014, para. 74.

<sup>37</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal of November 12, 2013, para. 60; *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of December 13, 2013, para. 67; *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify a Majority of the Tribunal of May 5, 2014, paras. 53; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision to Disqualify a Majority of the Tribunal of February 4, 2014, para. 77.

<sup>38</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal of November 12, 2013, para. 61; *Suez, Sociedad General de Aguas de Barcelona S.A. and others v. Argentine Republic* (ICSID Case Nos. ARB/3/17 and ARB/03/19), Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of May 12, 2008, para. 29.

<sup>39</sup> *Schreuer et al.*, *The ICSID Convention: A Commentary*, 2nd ed. 2009, Article 52 para. 135. See also *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of June 25, 2008, para. 68; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Committee of October 3, 2001, para. 25.

*“Claimants must show that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.”*<sup>40</sup>

## **II. Timeliness**

70. Pursuant to ICSID Arbitration Rule 9(1), a disqualification proposal has to be made “promptly.” ICSID Arbitration Rule 9(1) reads as follows:

*“A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.”*

71. The term “promptly” is not further defined in the ICSID Arbitration Rules, so that, in accordance with prior decisions, the issue of timeliness is to be assessed in each individual case.<sup>41</sup>

72. In *Abaclat*, a disqualification proposal filed after 21 days was considered timely.<sup>42</sup> In contrast, in *Suez*, a period of 53 days was considered as untimely.<sup>43</sup> Whereas such prior determinations cannot have an immediately binding effect on us, since the assessment is subject to the specific circumstances of the case, the scale revealed by these two exemplary decisions appears, depending on the individual constellation, to be reasonable.

73. In the present case, Claimant filed its Proposal on September 10, 2014, *i.e.* 28 days after the issuance of the Decision on St. Lucia’s Request for Security for Costs of August 13, 2014. Every submission requires preparation and coordination between lawyers and clients. Absent circumstances indicating the contrary, we consider the Disqualification

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<sup>40</sup> *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Arbitrator Bruno Boesch of March 20, 2014, para. 57.

<sup>41</sup> *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision to Disqualify a Majority of the Tribunal of February 4, 2014, para. 68; *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/05), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of December 13, 2013, para. 60.

<sup>42</sup> *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision to Disqualify a Majority of the Tribunal of February 4, 2014, para. 69.

<sup>43</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of October 22, 2007, para. 26.

Proposal filed after 28 days to be timely and thus filed “*promptly*” within the meaning of ICSID Arbitration Rule 9(1).

74. Also, we do not see any hint to the effect that the Disqualification Proposal was made in bad faith or was in any way related to the prior modification of the procedural timetable. As the negotiations reveal, Claimant’s counsel had already contacted Respondent’s counsel on August 11, 2014, with a request to alter the timetable and extend the deadline for filing its reply memorial on the merits (until October 10, 2014). The negotiations continued until the Parties informed the Tribunal of their agreement on September 8, 2014. At the beginning of these ongoing negotiations, the Decision on St. Lucia’s Request for Security for Costs had yet not been issued. Hence, as Claimant could not have known when the decision would be issued and what its reasoning would be, we see no reason to conclude that Claimant followed a plan comprising both the alteration of the timetable and the Disqualification Proposal.
75. The challenge of arbitrators is a procedural right of the Parties, granted under the ICSID regime by Article 57 of the ICSID Convention in conjunction with ICSID Arbitration Rule 9. As there are no concrete circumstances indicating the contrary, the exercise of this procedural right cannot be characterized as abusive.

### **III. Merits of the Disqualification Proposal**

#### **1. General Remarks**

76. According to the standard established above, it is required that the statements by Dr. Griffith in his Assenting Reasons manifestly, *i.e.* obviously, reveal bias regarding the conduct of the proceeding from an objective point of view.
77. First and foremost, however, it is worth noting that the Assenting Reasons were issued in connection with the Tribunal’s Decision on St. Lucia’s Request for Security for Costs and thus on a *procedural issue*. This decision did not deal in any respect with the merits of this arbitration, *i.e.* the contractual relationship between the Parties. Nor were Dr. Griffith’s statements related to the substance of the dispute. Hence, it is difficult to see how the views

expressed in the Assenting Reasons could allow any inference as to Dr. Griffith's position with regard to the disposition of the merits of this arbitration.

78. Additionally, the mere fact that Dr. Griffith did not furnish any additional explanation cannot be considered to support his disqualification. Under ICSID Arbitration Rule 9(3), a challenged arbitrator has the option to give an explanation (or not), but for the decision on the challenge it is irrelevant whether or not the arbitrator made use of that option. To hold that an adverse inference may be drawn from the arbitrator's election not to furnish an explanation would fly in the face of Rule 9(3)'s plainly permissive language.
79. Nor can the fact that Dr. Griffith issued the Assenting Reasons as such add any weight to the Disqualification Proposal. Whereas, admittedly, the issuance of an assenting opinion is rare in international arbitration, it is not excluded by the procedural rules. On the contrary, it is an option granted by ICSID Arbitration Rule 47(3) which a co-arbitrator may decide to exercise or not. Hence, we see no basis for questioning Dr. Griffith's motives for issuing his Assenting Reasons.
80. Furthermore, the Disqualification Proposal cannot be successful to the extent that it deals with the merits of the Decision on St. Lucia's Request for Security for Costs, in particular the Assenting Reasons. An adverse ruling itself is no permissible ground for a disqualification.<sup>44</sup> Accordingly, Dr. Griffith's views as to the qualification of third-party funding as such, its impact on the assessment of a request for security for costs, as well as his views on the burden of pleading of the requesting party should not be reviewed in substance in the context of a decision on a disqualification proposal. Such review is not the purpose and function of the procedural right to challenge an arbitrator pursuant to Article 57 of the ICSID Convention. Accordingly, the Disqualification Proposal has to be considered merely concerning the manner in which Dr. Griffith expressed his views in the Assenting Reasons.

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<sup>44</sup> See *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision to Disqualify a Majority of the Tribunal of February 4, 2014, para. 81; *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify a Majority of the Tribunal of May 5, 2014, paras. 54 *et seq.*

81. Likewise, the perception of the Assenting Reasons by scholars and other commentators and the views expressed in their comments and articles are irrelevant for our decision. First, the articles published in response to the Assenting Reasons and in particular regarding the issue of third-party funding, also deal with the merits of the Decision on St. Lucia's Request for Security for Costs. These, as pointed out above, do not provide a permissible ground for a challenge. In any case, any criticism by commentators and funders against the Assenting Reasons or even Dr. Griffith in person should not be taken into account when assessing Dr. Griffith's qualification as an arbitrator within the meaning of Article 14(1) of the ICSID Convention. It is not part of an arbitrator's duties to ensure that his views are well-received or well-perceived among scholars and members of professions possibly affected by the substance of the decision. Such duty would impair the capacity of an arbitrator to render an independent decision exclusively guided by the facts of the case as submitted by the parties.
82. Regarding the group of affected professionals, *i.e.* professional funders in the present case, we also note that some of the authors cited by Claimant in support of his Disqualification Proposal appear to have a genuine interest in the matter themselves and can hardly be considered as neutral observers of the Assenting Opinion.<sup>45</sup>

## **2. The Assenting Opinion in Substance**

83. We now turn in detail to the objections and the specific issues raised by Claimant in the Disqualification Proposal.

### **a. The Wording of the Assenting Reasons**

84. The expressions used by Dr. Griffith in his Assenting Reasons, such as "*gambling*," "*adventurers*" and the reference to the "*gambler's Nirvana*" are strong and figurative metaphors. However, in our view, these expressions primarily serve the purpose of clarifying and emphasizing the point Dr. Griffith purports to make, namely the paramount importance, in his opinion, of third-party funding of a party in connection with a request for security for costs. We do not regard it to be established that these terms reveal any

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<sup>45</sup> In particular, this applies to Messrs. Mick Smith, Iain McKenny and Christopher Bogart, cited in Disqualification Proposal, para. 62 and Claimant's Further Observations, paras. 84 *et seq.*

underlying bias against third-party funders in general or Claimant in particular. The means of expressing a point of view or articulating an argument may vary from one arbitrator to another, and different arbitrators possess varied characteristics, including their habits of drafting decisions and the wording used. As long as such wording does not clearly reveal any preference for either party, it cannot serve as a ground for a challenge.

85. Whether the use of “*absolute propositions*” in the Assenting Reasons is preferable from an academic point of view, might be arguable. However, since the impartiality and independence of Dr. Griffith as an arbitrator are at issue here, this is, in our opinion, not a ground for a challenge. Rather, any objection regarding these propositions concerns the underlying reasons for the position taken by Dr. Griffith on the procedural issue of whether or not security for costs should be ordered and is not subject of the requirements under Article 14(1) of the ICSID Convention. Thus, Dr. Griffith’s deviating views as to the requirement of establishing a *prima facie* case on jurisdiction or on the merits are not contestable by means of a challenge.
86. In summary, we regard the language in the Assenting Reasons as radical and perhaps extreme in tone, but not to a degree as to justify a disqualification. Dr. Griffith may well, with the expressions used, have stepped close to the edge of what can be considered as an objective reasoning. However, we believe that he has not actually stepped over the demarcation line between radical and extreme language on the one hand and clearly inappropriate and hence unacceptable expressions in the context of an arbitration on the other hand.

**b. Bias in Favor of or Against one of the Parties**

87. Claimant asserts that Dr. Griffith’s Assenting Reasons reveal a “*general apprehension*” against funded claimants such as Claimant itself. For Claimant, one of the reasons is the repeated use of references to BIT arbitration proceedings. This however, in our opinion, is not to be understood to the effect that Dr. Griffith was guided by facts or principles other than the facts underlying the case at hand. Whereas perhaps his argumentation appears to be somewhat beside the point in certain respects since the present arbitration does not derive from a BIT but from a commercial contract between the Parties, we do not see that

Dr. Griffith disregarded the facts of the case to Claimant's detriment. The consistent reference to BIT arbitrations, which could also be understood as an analogy to a group of arbitrations in which state parties are typically respondents, might perhaps impair the persuasiveness of the argumentation in substance but cannot affect Dr. Griffith's ability to issue an independent judgment.

88. Additionally, Dr. Griffith starts his argumentation with the observation that

*“[i]n 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.*

*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.”<sup>46</sup>*

89. We believe that this passage shows that Dr. Griffith considered both sides of the coin, *i.e.* interests of the investor and of the respondent state alike. Hence, Claimant's argument that Dr. Griffith did not take into account any consideration in favor of the investor, is not persuasive.

90. We note, in accordance with the standard established above, that Claimant's Disqualification Proposal relies on Dr. Griffith's Assenting Reasons and hence on his expressed opinion which is subject to interpretation. As we require an objective standard to be met, Claimant needs to establish facts indicating Dr. Griffith's lack of impartiality. However, in this case, the facts presented are that Dr. Griffith issued his Assenting Reasons with the contents as described by Claimant. These facts, however, are as such not sufficient to constitute a lack of impartiality. The underlying arguments, as presented by

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<sup>46</sup> Assenting Reasons, paras. 2 and 3.

Dr. Griffith and the wording, in our view, do not cast reasonable doubt upon Dr. Griffith's capacity to issue an independent and impartial judgment in the present arbitration.

**E. DECISION**

91. Based on the above grounds, we decide as follows:

- (i) Claimant's Proposal for the Disqualification of Dr. Griffith dated September 10, 2014 is dismissed.
- (ii) The determination and allocation of the costs incurred in connection with the proposal remain reserved until a later stage in this proceeding.
- (iii) The suspension of this proceeding is terminated as of the date of this Decision.



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Prof. Dr. Siegfried H. Elsing  
President of the Tribunal



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Judge Edward W. Nottingham  
Arbitrator