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 SUSPENSION OR DISCONTINUATION OF PROCEEDINGS

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

Secretary of the Tribunal
Ms. Aurélia Antonietti

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Date of dispatch to the Parties: April 8, 2015

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A. Brief Procedural History of the Discontinuation Proceedings

1. This determination is supplemental to and should be read in conjunction with the Tribunal's "Decision on Saint Lucia's Request for Security for Costs" dated August 13, 2014 and its modification of August 20, 2014[1] ("**Security for Costs Decision**"), which is incorporated herein by reference.

2. By its Security for Costs Decision[2] as modified on August 20, 2014[3], the Tribunal directed 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. Such a bank guarantee is to be provided by a reputable bank, approved by the President after appropriate consultation with the other member of the Tribunal, and conditioned upon the rendering of a cost award in Respondent's favor and Claimant's non-compliance with its obligations under the cost award within 30 days from the date of the award. In the alternative, Claimant may post cash security if the Parties can negotiate a stipulated arrangement therefor. ICSID is not in a position to act as escrow agent or to otherwise hold cash security.*
>
> *(ii) Failing provision of such guarantee within 30 days, Respondent is granted 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.*

3. By e-mail dated December 15, 2014, Claimant's counsel informed the Tribunal that Claimant's funding arrangement had been terminated and that Claimant would be unable to provide a USD 750,000 bank guarantee or place that amount in escrow.

4. On December 24, 2014, Respondent filed a request for the discontinuation of proceedings ("**Discontinuation Request**").

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1 ICSID's e-mail to the Parties of August 20, 2014 with regard to Mr Jatko's e-mail dated August 18, 2014, relating to the implementation of the Security for Costs Decision, informing about the Tribunal's modification of para. 90.

2 Security for Costs Decision, para. 90.

3 Fn. 1.

5. On January 5, 2015, Claimant filed its opposition to the Discontinuation Request ("**Opposition to Discontinuation**").

6. On January 15, 2015, Claimant filed its Reply Memorial on the merits.

7. On January 23, 2015, Respondent filed its reply to Claimant's Opposition to Discontinuation ("**Discontinuation Reply**").

8. On February 4, 2015, Claimant filed its rejoinder on the Discontinuation Request ("**Discontinuation Rejoinder**").

B. The Parties' Positions

I. Respondent's position

9. Respondent asserts that the Tribunal has the power to order discontinuation and in that regard makes reference to the Tribunal's inherent power to protect the integrity of the proceedings. Respondent relies on ICSID Arbitration Rule[4] 45 in support of its proposition.[5]

10. Respondent contends that an order that these proceedings be discontinued is the logical implication of the Security for Costs Decision.[6] Should the Tribunal decide against discontinuing these proceedings, Respondent would be exposed to precisely the threat that the Security for Costs Decision was intended to avoid.[7] The Tribunal has already carefully balanced Respondent's interest with Claimant's right to access to justice and on the unusual facts of this case the Tribunal found that it is justified to condition Claimant's pursuit of the proceedings on its posting a modest amount of security.[8]

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4 For ease of reference, throughout this Decision, the ICSID Arbitration Rules are referred to as "the Rules".

5 Discontinuation Reply, p. 9, para. 1.

6 Discontinuation Request, p. 1, para. 2.

7 *Ibid.*

8 *Ibid.*, p. 2, para. 2.

11. Respondent foresees that Claimant would not comply with the Tribunal's Award if it deems that the compliance would be unjust.[9] Respondent argues that the unusual circumstances of this case justify the exercise of the Tribunal's inherent power to discontinue the proceedings,[10] also in the light of Claimant's manifest refusal to comply with the forthcoming Award.

12. Respondent acknowledges that the conditions for a discontinuation decision as provided for in the ICSID Convention or the Rules (at least Rules 43 and 44) are not met.[11] However, Respondent contends that the Tribunal has an inherent power to render the discontinuation decision because doing so is necessary for the proper administration of justice.[12] Respondent refers to a number of judgments published by the International Court of Justice in which the inherent power to discontinue the proceedings was exercised because doing so was necessary for the proper administration of justice.[13]

13. Respondent contends that compliance with the Tribunal's decisions is a basic requirement for procedural good faith that Claimant owes not only to Respondent but also to the Tribunal.[14] Respondent alleges that Claimant acts against good faith and destroys the integrity of the proceedings by treating the Tribunal's decisions as mere advisory opinions.[15]

14. Respondent argues that the Tribunal may base its decision to discontinue the proceeding on Rule 45, which provides that the proceedings may be discontinued if the parties fail to take any steps in the proceedings during six consecutive months.[16] Respondent submits that

9 Discontinuation Reply, p. 3, para. 3, p. 4 at the top, p. 7, para. 1.
10 *Ibid.*, p. 7, para. 1.
11 *Ibid.*, p. 5, para. 4.
12 *Ibid.*, p. 6, para. 1.
13 *Ibid.*, p. 6, para. 1.
14 *Ibid.*, p. 7, para. 2.
15 *Ibid.*, p. 8, para. 1.
16 *Ibid.*, p. 9 at the top, para. 1.

there is no need to delay the discontinuation decision because Claimant has already stated that it will not or cannot comply with the Security for Costs Decision.[17]

15. Respondent relies on *SGS Société Générale de Surveillance S.A. v. Philippines*[18] to support its proposition that the Tribunal has the power to suspend the proceedings.[19] In that case, the tribunal based its decision on Rule 19 in connection with Article 44 sentence 2 of the ICSID Convention.[20] Respondent suggests, in the alternative, that the Tribunal suspends the proceeding for six months and if Claimant fails to comply with the Security for Costs Decision during that additional period, the proceedings shall be discontinued pursuant to Rule 45.[21]

16. Respondent argues that the suspension alone would not cure the harm that Claimant's conduct has inflicted, nor would it re-establish the proper administration of justice.[22]

17. Finally, Respondent does not object to a short delay if the Tribunal considers it prudent to exercise its discretion to direct Claimant to provide information about how this case has been financed.[23]

18. Respondent seeks the following relief:[24]

> *1. An order suspending the proceeding, with the proviso that if RSM does not comply with the Decision within two weeks, the proceeding will be discontinued; or, alternatively*
>
> *2. An order directing RSM to produce and provide within two weeks such information as to its funding arrangements as the Tribunal deems necessary, with the proviso that if RSM fails to comply with that*

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17 *Ibid.*, p. 9, para. 1.

18 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004 ("*SGS v. Philippines* Decision").

19 Discontinuation Reply, p. 9, para. 1 and fn. 28.

20 *SGS v. Philippines* Decision, para. 173.

21 Discontinuation Reply, p. 9, para. 1

22 *Ibid*.

23 *Ibid.*, p. 10, para. 2.

24 *Ibid.*, p. 12.

direction, the proceeding will be suspended on the terms set out in paragraph 1 above, and that if RSM does comply with that direction, the Tribunal will review the information and then confirm that the proceeding is to be suspended on the terms set out in paragraph 1 above; or, alternatively

3. *An order suspending the proceeding, with the proviso that if RSM does not comply with the Decision, the proceeding will be discontinued after six months, pursuant to Arbitration Rule 45; and, in any case*

4. *Before the proceeding is discontinued, an invitation to St. Lucia to submit a statement of its costs and, upon discontinuance, an order of full costs to St. Lucia.*

II. Claimant's position

19. Claimant argues that the Tribunal has no jurisdiction to order the discontinuation or suspension of these proceedings. Claimant also objects to any award on costs.[25]

20. Claimant asserts that the proceedings must continue because none of the situations apply in which the proceedings may be discontinued pursuant to the Rules and the ICSID Administrative and Financial Regulations.[26] Claimant argues that the Parties took steps in the proceedings in the last six months (Rule 45) and that Claimant paid all advances on costs (Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations).[27]

21. Claimant contends that Respondent's references to the case law of the International Court of Justice are irrelevant because the present proceedings are conducted under the auspices of ICSID.[28]

22. Claimant invokes Rule 34(3) which provides that the sanction for non-compliance with an order of a tribunal in relation to the production of evidence is not the discontinuance of the proceedings, but the formal taking of note of the party's failure and of any reasons given

[25] Opposition to Discontinuation, p. 1, para. 3.

[26] *Ibid.*, p. 1, para. 4; Discontinuation Rejoinder, pp. 1-3.

[27] Discontinuation Rejoinder, p. 2, para. 1.

[28] *Ibid.*, p. 2, para. 4.

for such failure.[29] In that regard, Claimant argues that the sanction for non-compliance with a provisional measure recommending the posting of a security for costs should be the formal taking of note of such failure and not the discontinuation of the proceedings.[30]

23. Claimant relies on the wording and the drafting history of Article 47 of the ICSID Convention to argue that this provision does not provide for and was not intended to provide for any sanction for a party's non-compliance with a provisional measure.[31]

24. Claimant contends that there exists no precedent in which a party would be sanctioned by discontinuance on the ground of its non-compliance with a provisional measure. Such a heavy-handed sanction would alter the nature of the Security for Costs Decision and it would turn it into a measure to determine the merits of the disputes.[32]

25. Claimant insists that the Tribunal does not have the power to suspend the proceedings.[33] There are only four situations under the Rules and the ICSID Administrative and Financial Regulations that provide for the suspension of the proceedings, and none of them apply in this arbitration.[34]

26. Claimant contends that suspending the proceedings in the circumstances, which are not provided for in the ICSID Convention, the Rules or the ICSID Administrative and Financial Regulations, would be a violation of Article 44 of the ICSID Convention.[35]

27. Claimant asserts that the Tribunal is not in a position to suspend the proceedings for six months and then discontinue the proceedings on the grounds of Rule 45, because a party can only be in default if the proceedings are running, not if they are suspended.[36]

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29 *Ibid.*, p. 3, para. 5.

30 *Ibid.*

31 *Ibid.*, p. 4, paras. 1 *et seq.*

32 Opposition to Discontinuation, p. 2, para. 1.

33 Discontinuation Rejoinder, p. 4, para. 5, p. 5, paras. 1 *et seq.*

34 *Ibid.*

35 *Ibid.*, p. 2, para. 3.

28. Claimant disagrees with Respondent that it pursues its claim abusively.[37] Claimant alleges that its non-compliance with the Tribunal's provisional measure is not a question of bad faith or unwillingness but simply of Claimant's inability to provide the USD 750,000 security.[38]

29. Claimant urges any Tribunal Member who is unable to decide this dispute "*fairly*" due to Claimant's inability to comply with the Security for Costs Decision must resign and "*make way for neutrals*".[39]

30. Finally, Claimant points out that Respondent is also being funded by a third party. In that regard, Claimant requests that Respondent informs the Tribunal as to who is funding its defense.[40] Claimant considers that providing information about its own funding is irrelevant as to the Tribunal's power to discontinue these proceedings.[41]

31. Claimant requests that the Tribunal "*continue the proceeding in accordance with the present procedural timetable in place.*"[42]

36 *Ibid.*, p. 5, paras. 4 *et seq*., p. 6, para. 1
37 *Ibid.*, p. 6, paras. 2, 3.
38 *Ibid.*
39 Opposition to Discontinuation, p. 2, para. 2.
40 *Ibid.*, p. 2, para. 3.
41 Discontinuation Rejoinder, p. 6, para. 4.
42 *Ibid.*, p. 7, para. 2.

C. Tribunal's Analysis[43]

I. Tribunal's authority to sanction non-compliance with a provisional measure

32. Article 44 sentence 2 of the ICSID Convention reads as follows:

> *If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*

33. Following from the wording of Article 44 sentence 2 the Tribunal's power to close gaps in the rules of procedure is only limited by the framework of the ICSID Convention, the Rules and the parties' agreement.[44] The Tribunal closes gaps in the procedure rules in accordance with the principles and rules of treaty interpretation generally recognised in international law.[45]

34. The Tribunal, when assessing the question whether it is empowered to render a decision with regard to the non-compliance with its Security for Costs Decision on the grounds of Article 44 sentence 2 of the ICSID Convention, took into account the individual circumstances of the present case. Thus, it did not feel restricted by the mere fact that no respective precedents exist. As numerous ICSID cases show, Article 44 sentence 2 of the ICSID Convention even opens the door for a substantial enhancement of the ICSID Convention and the Rules by Arbitral Tribunals as long as the above principles are observed.[46]

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

44 *See also* Schreuer *et al.*, The ICSID Convention: A Commentary, 2nd ed. 2009, Article 44, para. 54.

45 *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, May 16, 1986, para. 18.

46 For example the arbitral tribunal's path breaking decision on the admissibility of mass claims under the ICSID Convention in *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, August 4, 2011, paras. 504 *et seq*.

35. Thus, there is no doubt that, in general, the Tribunal has the authority to make procedural orders which are not expressly described as such and which are authorized in the ICSID Convention or the Rules.

36. For these reasons the Tribunal finds that it has the power to sanction non-compliance with the Security for Costs Decision pursuant to Article 44 sentence 2 of the ICSID Convention.

II. Requirements under Article 44 sentence 2 of the ICSID Convention

37. Before rendering a decision under Article 44 sentence 2 of the ICSID Convention, the Arbitral Tribunal must be satisfied

(1) that a question of procedure has arisen

(2) which is not covered by the Convention or the Arbitration Rules or any rules agreed by the parties.

1. Question of procedure

38. On August 13, 2014, the Arbitral Tribunal ordered Claimant to post security in the amount of USD 750,000 within 30 days of the decision which Claimant did not provide for, yet. The security for costs was lodged in order to protect Respondent's asserted right to claim reimbursement of the costs it incurs during this arbitration in the event that it prevails on the merits and the Tribunal grants a claim for reimbursement of costs.[47] In order to effectively protect Respondent's right, the Tribunal, by majority, considered

> *it necessary to order Claimant to provide security for costs before proceeding further with the arbitration*.[48]

39. Undoubtedly, here a "*question of procedure arises*", namely what procedures should apply in the case of continuing non-compliance with the security for costs orders.

[47] Security for Costs Decision, para. 63.

[48] Security for Costs Decision, para. 85.

2. Question not covered by the ICSID Convention, the Rules or rules agreed by the Parties

a) Sanction for non-compliance with the Security for Costs Decision not regulated

40. The Tribunal, by majority, agreed that the power to order the security for costs is to be based on Article 47 of the ICSID Convention and Rule 39, even though none of these provisions explicitly deals with the Tribunal's power to order security for costs.[49] It therefore neither comes as a surprise nor does it allow the drawing of any negative inference that the ICSID Convention and the Rules do not expressly provide for the Tribunal's power to order any sanctions for the non-compliance with a security for costs order.

41. In particular, non-compliance with the Security for Costs Decision is not a matter for discontinuance regulated by Rule 44 (Discontinuance at Request of a Party), Rule 45 (Discontinuance for Failure of Parties to Act), or for mere noting for non-compliance under Rule 34(3) (Evidence: General Principles).

42. The Tribunal is further convinced that none of the Rules invoked by Respondent, nor others referred to by the Parties for or against the application for stay and discontinuance inform or control the consequence of non-compliance with an affirmative order that money is to be lodged as security for costs.

b) Sanction as inevitable consequence for non-compliance

43. Nevertheless, the Arbitral Tribunal is of the opinion that a sanction for non-compliance with the Security for Costs Decision is inevitable under the circumstances of the present case.

44. Regardless of the consent with respect to the consequences for Claimant's non-compliance with the Security for Costs Decision, the Members of the Arbitral Tribunal maintain their

[49] Security for Costs Decision, para. 54.

respective position with regard to such decision which was reached by majority. However, by virtue of Article 48(1) of the ICSID Convention in connection with Rule 16(1) the majority's ruling has become the ruling of the Tribunal. As such, the Tribunal's majority ruling is regarded and accepted by each Member of the Tribunal as the law of the case.

45. With respect to the present decision, the Arbitral Tribunal understands and, for the reasons stated, accepts the Tribunal's majority ruling as having coercive effect. This understanding follows from the Security for Costs Decision which states that:

> *Despite the wording of the cited provision [i.e. Rule 39] that indicates that the Tribunal may (only) "recommend" provisional measures, it is well settled among ICSID tribunals that such decisions [on provisional measures] are binding.*[50]

46. Accepting this premise, the Arbitral Tibunal unanimously concludes that the Security for Costs Decision as being binding obliges Claimant to comply with it.[51] Thus, the only conceivable and logical consequence for the non-compliance with the Security for Costs Decision must be a sanction that is suitable to achieve the objective pursued by the Security for Costs Decision.

47. As Claimant has stated that the security will not be provided, and makes no proposals for its later provision, it must follow that the Arbitral Tribunal is empowered to provide for relief. This continuing default to provide for the Security for Costs justifies and demands a sanction for the non-compliance with the Security for Costs Decision. Otherwise the Security for Costs Decision would have no effect and Claimant would be permitted to proceed to a hearing on the merits, as though the Tribunal's Security for Costs Decision did not exist.

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50 Security for Costs Decision, para. 49.

51 *See* with respect to provisional measures in general: *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on Provisional Measures, November 19, 2007, para. 52; *Occidental Petroleum Coporation Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, August 17, 2007, para. 58; *Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18), Procedural Order No. 1, July 1, 2003, para. 4; *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, October 28, 1999, para. 9.

48. Against this background the silence on sanctions for provisional measures may furthermore not be interpreted as an intended or qualified silence, as a result of which any sanctions would be excluded.

49. The fact that the drafting history of Article 47 of the ICSID Convention and Rule 39 reveals that provisional measures may not be enforced does not lead to a different conclusion: It has to be strictly differentiated between the question of enforcement of provisional measures ordered under Article 47 of the ICSID Convention and Rule 39 and a sanction for the non-compliance with a provisional measure. In this regard, the Arbitral Tribunal refers to its Security for Costs Decision in which it has already acknowledged that

> *provisional measures issued by an ICSID tribunal do not have a binding effect in the terms of being enforceable.*[52]

50. This acknowledgment does not contradict the above conclusion that the Security for Costs Decision is legally binding and as such may empower the Arbitral Tribunal to order a sanction for non-compliance with the decision since it only refers to the enforceability of the Decision.

51. Finally, it also follows from the drafting history of Article 47 of the ICSID Convention that sanctions for non-compliance with a provisional measure may be directed. Awarding damages, for example, is regarded as an alternative sanction for the non-compliance with provisional measures.[53]

III. Suitable sanction in case of non-compliance

52. Article 44 sentence 2 of the ICSID Convention enables the Arbitral Tribunal to apply measures taking into account the goals of the ICSID Convention as well as the special circumstances of the individual case.

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[52] Security for Costs Decision, para. 50 (emphasis added).

[53] Schreuer *et al.*, The ICSID Convention: A Commentary, 2nd ed. 2009, Article 47, para. 31.

1. Vacatur of present-scheduled remaining matters for a period of time of six months

53. The circumstances of the case at hand require the Arbitral Tribunal to order the vacatur of the presently-scheduled remaining matters, since neither damages nor a negative inference of the non-compliance at the end of the arbitral proceedings are practically suited to preserve Respondent's asserted right to claim reimbursement of costs.

54. With regard to the present case, the Tribunal weighted up Respondent's interest with Claimant's right to access to justice[54] and came to the conclusion that it would be

> *unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in the Respondent's favor*[55.]

55. The Security for Costs Decision, thus, is predicated on a finding that the claims may not proceed unless and until the requisite security is provided, and implicitly upon the assumption that if the directed security is not provided as had been directed the matter will not proceed. Otherwise Respondent would – contrary to the reasoning of the Security for Costs Decision – be left in a situation where it had to bear the risk as described.

56. Furthermore, Rule 34(3) on the production of evidence is inapt in the case at hand. Pursuant to Rule 34(3) the Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph. Rule 34(3) reflects the common principle that a fact-finder can draw inferences from a failure to produce evidence. In this case, the Tribunal, in its decision, may properly draw adverse inferences of varying degrees (such as finding against the party on an entire issue) when a party fails to cooperate in evidentiary matters. The noting of failure, thus, will constitute an effective measure and is suitable to reach the intended objective which Rule 34(3) pursues. In contrast, the Tribunal's Security for Costs Decision would remain without any effect upon mere "*noting of failure*". Hence, there is not sufficient basis for an analogy.

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54 Security for Costs Decision, para. 87.

55 Security for Costs Decision, para. 83.

57. Since the Tribunal's power to vacate the presently-scheduled remaining matters derives directly from Article 44 sentence 2 of the ICSID Convention, the Tribunal needs not consider the jurisprudence derived from International Court of Justice decisions as to the reach of its inherent powers.

58. The proceedings are vacated for a period of time of six months. The Arbitral Tribunal is of the opinion that such period of time is reasonable.

2. Leave to apply for dismissal

59. The Tribunal rejects as inapplicable the application to make orders of discontinuance arising under specific Rules as invited by the Parties in their submissions. The situation with which this Tribunal is confronted does not implicate any of the provisions invoked.[56]

60. It is the absence of other specific provisions which, pursuant to Article 44 sentence 2 of the ICSID Convention, enlivens the Tribunal's authority for an autonomous resolution of the impasse in this case of continuing default, which is Claimant's continuing non-compliance with the Security for Costs Decision.

61. The Members of the Arbitral Tribunal concur that such resolution must be final. A mere interruption or a break would mean that the matter might be resumed or continued in the future. An interlocutory state of affairs is not in the interest of either party.

62. In particular, an indefinite stay or an indefinite discontinuance would mean denying Claimant procedural fairness, which at the least, must include the capacity to vindicate its contentions that the Tribunal had no jurisdiction to make the Security for Costs Decision.

63. As a matter of procedural fairness to Claimant, the Tribunal's determination here must be framed so as to afford beyond doubt or contrary argument Claimant's right to challenge on an Annulment Application under Article 52 (1) (b) of the ICSID Convention the Tribunal's majority finding and exercise of jurisdiction in the Security for Costs Decision. Hence, in

[56] *See* para. 41.

the event of Respondent making a further application for finality upon continuing non-compliance after six months, the Tribunal is presently inclined to regard a formal award of termination or dismissal as the proper form of final order.

64. Furthermore, an indefinite stay or discontinuance is not in Respondent's interest, which would become subject to indefinite uncertainty as to the outcome of monetary and other claims concerning the disposition of its offshore resources. This conclusion is in line with Respondent's submissions and claims for relief whereby Respondent applies for (1) "*suspension*" and (2) upon Claimant's failure to post the security for costs for the "*discontinuance*" of the proceedings. Irrespective of the terminology applied, Respondent clearly seeks the final end of the proceedings at hand and thereby legal certainty. In this context, Respondent contends that

> *[…] suspension alone cannot cure the harm RSM's conduct has inflicted, nor can it re-establish the proper administration of justice. If the proceedings were suspended indefinitely, but not discontinued after a reasonable period, St. Lucia would be severly prejudiced, particularly by a second postponement of the hearing and the in terrorem effect the pendency of the proceedings might have should St. Lucia choose in the future to seek reliable concessionaires to explore its maritime zones.*[57]

65. Thus, the Tribunal is of the opinion that should Claimant fail to comply with the Security for Costs Decision upon the expiry of a time period of six months, Respondent must be permitted to apply for a final award dismissing the case.

66. Hence, as a matter of compelling and necessary principle in the exercise of the open-textured jurisdiction under the second sentence of Article 44, the impasse arising here upon the open non-compliance firstly has to be resolved by an immediate vacatur, and upon non-compliance after a reasonable period followed by a final award for determination if applied for by Respondent.

[57] Discontinuation Reply, p. 9, para. 2 (emphasis added).

IV. Information on the Parties' sources of funding

67. The Tribunal does not accept the invitation that it should interrogate either Party as to its sources of funding. The issues of determination are confined to the sanctions that may arise from the continuing default in compliance with the Tribunal's Security for Costs Decision. This determination does not depend on the question of the Parties' sources of funding.

D. Decision

68. Based on the above analysis, the Tribunal directs and orders as follows:

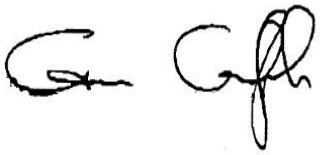
(i) The deadline for Respondent's Rejoinder and the hearing dates are vacated and, subject to (ii) below, the procedural directions of hearings are stayed until further order.

(ii) The vacatur will be lifted if Claimant within six months as of the date of this decision provides security for costs in the amount of USD 750,000, as directed by the Security for Costs Decision as modified on August 20, 2014.

(iii) In default of (ii) Respondent is granted leave to apply to the Tribunal for a Final Award for dismissal, with costs or such other orders as it may be advised.

(iv) All other procedural requests are dismissed.

(v) 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
(subject to the attached assenting reasons)

Prof. Siegfried H. Elsing
President of the Tribunal

Assenting Reasons of EDWARD NOTTINGHAM:

1. I arrive at the same destination as the majority in disposing of Respondent's request to suspend and/or discontinue these proceedings on account of Claimant's non-compliance with the Tribunal's majority ruling of August 13, 2014, which ordered Claimant to post security for costs in the form of an irrevocable bank guarantee of USD 750,000. I take a somewhat different path, however. I write separately to explain.

2. Unsurprisingly, the ICSID Convention provides — and the Arbitration Rules reiterate — that a "*Tribunal shall decide questions by a majority of the votes of all its members.*"[1] By virtue of these provisions, the majority's ruling has become the ruling of the Tribunal, although I continue to disagree with its reasoning and result, for the reasons explained in my dissenting opinion of August 12, 2014. Unless and until a majority of the Tribunal should rectify or revise the ruling, pursuant to ICSID Arbitration Rules 49 or 50, or unless and until an *ad hoc* Committee should annul all or part of it, pursuant to ICSID Arbitration Rules 52, the majority ruling should be regarded as the law of this case.[2]

3. The primary corollary of treating the Tribunal's majority ruling as the law of the case is that, as the majority thinks, the ruling must be understood as having some coercive effect; it is not a "recommendation" or an advisory opinion which either party is free to disregard. Accepting this premise for the present, I can also accept the majority's approach as measured and reasonable, for two reasons. *First*, all remaining aspects of scheduling, including the date for a hearing on the merits, are vacated until further order of the Tribunal. Meanwhile, Claimant is effectively given an additional six months within which to comply with the order to post security for costs. This is reasonable, because surely Claimant cannot be permitted to pick itself up, dust itself off, and proceed to a hearing on the merits, as though the Tribunal's security for costs decision did not exist. The six-month extension for compliance affords Claimant a reasonable period to find the means with which to comply with the ruling. *Second*, if Claimant is unable or unwilling to comply within six months, then Respondent is permitted to apply for a final award dismissing the case. This imparts the prospect of finality to the proceedings, and

[1] ICSID Convention, Art. 48(1); ICSID Arbitration Rule 16(1).

finality is something in which each side should be interested — Claimant, because it will be able to seek annulment of the ruling; Respondent, because it will be able to treat the proceeding as at an end for all further purposes.

April 8, 2015

Judge Edward W. Nottingham

[2] *See, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *Arizona v. California*, 460 U.S. 605, 612 (1983).