

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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**IN THE MATTER OF THE ARBITRATION BETWEEN**

**ALASDAIR ROSS ANDERSON *ET AL***  
CLAIMANTS

v.

**REPUBLIC OF COSTA RICA**  
RESPONDENT

**ICSID CASE No. ARB(AF)/07/3**

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**DECISION ON PROVISIONAL MEASURES**  
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**MEMBERS OF THE TRIBUNAL**

Dr. Sandra Morelli Rico, President  
Prof. Jeswald W. Salacuse, Arbitrator  
Prof. Raúl E. Vinuesa, Arbitrator

**SECRETARY OF THE TRIBUNAL**  
Natalí Sequeira

**NOVEMBER 5, 2008**

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## **I. PROCEDURAL BACKGROUND**

1. On March 27, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) registered a request for arbitration from 135 individual nationals of Canada (“the Claimants”) against the Republic of Costa Rica (“the Respondent” or “Costa Rica”), alleging various breaches of domestic and international law, in particular the Agreement between the Government of the Republic of Costa Rica and the Government of Canada for the Protection and Promotion of Investment, signed on March 18, 1998. Pursuant to the procedures of the Centre, in particular the ICSID Arbitration (Additional Facility) Rules (the “Arbitration AF Rules”), this Tribunal was formally constituted on May 2, 2008 to decide the case. A first session was subsequently scheduled to discuss preliminary procedural matters.
2. During the course of the first session held at the seat of the Centre in Washington D.C., on June 27, 2008, the counsel for the Respondent, Dr. Stanimir A. Alexandrov, mentioned his intention to submit a request for certain provisional measures. On this point, the Tribunal invited the counsel for the Respondent to present a written request within the terms and conditions of the rules applicable to this case.
3. The Secretariat of the Centre received the Respondent’s Request for Provisional Measures (“the Request”) on July 8, 2008. Specifically, it requested:
  - (i) that the Tribunal order the Claimants to post a bank guarantee (or an escrow account deposit administered by ICSID) equivalent to the ICSID administrative fees that the Respondent may incur during the course of the proceedings on jurisdiction; and
  - (ii) that the Tribunal order Claimants to represent that they agree to be held jointly and severally liable for any amounts that the Tribunal may award to cover Respondent’s legal fees and expenses.<sup>1</sup>

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<sup>1</sup> Para. 24 of the Request.

The Secretariat forwarded the Request to the Claimants for their observations, in accordance with instructions given by the Tribunal. On August 6, 2008, the Claimants filed their Response to the Respondent's Request for Provisional Measures ("the Response"). In such Response the Claimants contest each and all of Claimants' requests and accordingly asked the Tribunal not to impose any provisional measures.

## **II. THE RESPONDENT'S ARGUMENTS**

4. The Respondent grounds the Request for Provisional Measures on Article 46(1) of the Arbitration AF Rules which provides that:

“[u]nless the arbitration agreement otherwise provides, either party may at anytime during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal.”

Asserting that Article 46(1) of the Arbitration AF Rules is equivalent to Article 47 of the ICSID Convention and Article 39 of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), the Respondent argues that this Tribunal clearly has authority to order provisional measures and that such measures may take a variety of forms, referring to various cases in the past in which arbitral tribunals have considered ordering such measures.

5. The Respondent contends that the provisional measures requested are justified because of alleged "unusual circumstances" presented by the present case. The unusual circumstances, according to the Respondent, arise from three factors: (i) the unusual nature of the Claimants in this case; (ii) the difficulties in enforcing any eventual award of costs against the Claimants because of their unusual nature; and (iii) the unusual nature of the claims asserted by the Claimants. The effect of these unusual circumstances, according to the Respondent, is to increase the risk of non-payment by the Claimants of any costs that this Tribunal might award to the Respondent at the conclusion of this proceeding.
6. With respect the first of the above-indicated factors, Respondent submits that unlike the ordinary ICSID cases in which claimants are one or a few corporations, about which

adequate information is usually available or accessible, the Claimants in the present case consist of 135 separate individuals (some of whom are heirs or beneficiaries of persons now deceased), about which the Respondent has very little information. Moreover, the Respondent alleges that the Claimants do not seem to have sufficient economic solvency to make such payments, as evidenced by their proposal for witnesses to testify remotely, rather than to travel in person to ICSID hearings; by the existence of contingency fee arrangements with their counsel, and by the Claimants' many difficulties in registering their claims with ICSID.

7. With respect to the special difficulties of enforcing any award in its favor because of a possible refusal by individual Claimants to pay costs awarded against them, the Respondent points out three difficulties occasioned by the existence in this case of 135 physical persons as Claimants. The Respondent first notes that it is not clear that all the Claimants have assets located within a single Canadian jurisdiction. As a result, Respondent would have the onerous task of locating Claimants' assets throughout Canada and pursuing multiple enforcement actions in many jurisdictions. Second, even if Claimants' assets were located in a single Canadian jurisdiction, the Respondent would still have the costly and onerous task of pursuing a number of legal actions. Third, the respective shares of liability of each of the 135 Claimants would have to be determined in order to bring any legal action against them in any jurisdiction, thus further complicating enforcement.
8. Finally, the Respondent contends that the highly unusual nature of the Claimants and the nature of their claims raise serious doubts as to the soundness and propriety of their case and that therefore the Respondent has a reasonable basis for obtaining a favourable award on costs.

### **III. THE CLAIMANTS' ARGUMENTS AGAINST PROVISIONAL MEASURES**

9. At the outset of their Response, the Claimants acknowledge that the Tribunal has the authority to recommend the adoption of provisional measures to grant the relief sought.

However, the Claimants also argue that such measures have an exceptional character and may be granted only in extreme cases.

10. The Claimants assert that the Respondent has not provided any basis to demonstrate that the present case is extreme, and moreover has not identified a single precedent granting the required relief in other similar cases.
11. The Claimants further state that the arguments of the Respondent are based on suppositions and conjectures, and they then proceed to reject each of the points advanced by the Respondent in support of its Request. With respect to the alleged unusual nature of the Claimants and the nonexistence of information regarding them, the Claimants consider that such factors in and of themselves do not imply a risk of non-payment. As far as testifying remotely, the Claimants referred to numerous ICSID cases that have used the technology of teleconferencing and video conferencing to demonstrate that the use of such technologies is a common practice and is not evidence of a party's insolvency or lack of financial capacity. With respect to contingency fee arrangements for the payment of legal counsel, the Claimants argue that such arrangements do not evidence a risk of non-payment of costs that might be awarded. In addition, the supposed difficulties in the enforcement of such obligations, according to the Claimants, are based on hypothesis and suppositions and are without foundation. Moreover, the practice of ICSID tribunals with respect to the awarding costs does not justify the assumption that even if the Respondent succeeded on the merits of the present case that the Tribunal would automatically award costs against the Claimants.
12. The Claimants also reject the Respondent's request that the Tribunal declare that the Claimants be held jointly and severally liable for any costs that may be awarded against them at the end of this case. Claimants point out that they are separate individual investors, were not participants in a common investment, and did not act jointly in anyway.
13. In further support of their case, the Claimants presented the expert opinion of Dr. Enrique Rojas Franco, an expert in Costa Rican public law, to the effect that the imposition of

provisional measures, such as those requested by the Respondent, would not be ordered under Costa Rican domestic law because such measures would constitute a denial of due process and access to justice.

#### **IV. THE TRIBUNAL'S ANALYSIS**

##### **A. INTRODUCTION**

14. The Tribunal considers that the parties through their pleadings have provided it with sufficient elements and arguments to make a decision on the Respondent's Request; consequently the Tribunal considers it is unnecessary to hold an additional hearing specifically to receive further arguments by the parties in this respect.

##### **B. LEGAL FRAMEWORK**

15. Provisional measures in ICSID cases under the Additional Facility are governed by Article 46 of the Arbitration AF Rules. Paragraph (1) of Article 46, the relevant provision with respect to the Respondent's Request, provides as follows:

(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.

Thus, paragraph (1) of Article 46 of the Arbitration AF Rules, contemplates the possibility of requests by either party for provisional measures to protect that party's rights and provides that such requests should be decided on a priority basis. This provision is similar to Article 47 of the ICSID Convention and to Article 39 of the ICSID Arbitration Rules (although they do not apply to Additional Facility cases). The requirement of priority means that in order to avoid harm to rights that are at risk, the Tribunal, once having heard the arguments of the parties, should proceed to decide on the request for provisional measures before making any other decision, even those decisions

relating to jurisdiction, a position taken by many ICSID tribunals.<sup>2</sup>

16. A second important part of the legal framework governing the Respondent's Request is Article 58 of the Arbitration AF Rules concerning the awarding of costs in arbitral proceedings, which provides that:

“(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.”

Thus, decisions on the award of costs are to be made at the conclusion of the proceeding, and the Tribunal has wide discretion in making such determinations. Article 58 contains no elements that would give parties at the beginning of an Additional Facility arbitration any *expectation* as to how costs will be awarded, let alone a *vested right* to payment of costs yet to be awarded.

17. In the present case, neither of the parties contests the authority of the Tribunal to make provisional orders and to make them at this time. The basic question faced by this Tribunal is whether the facts of this case justify the granting of such measures according to appropriate legal criteria.
18. It is to be noted that none of the parties was able to refer the Tribunal to a case interpreting Article 46(1) of the Arbitration AF Rules. Presumably because of the lack of such cases, they referred instead to cases interpreting Article 47 of the ICSID Convention and to Rule 39 of the ICSID Arbitration Rules, which though not legally applicable to the

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<sup>2</sup> See for example *SAIPEM S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB 05/07).

present case, contain language similar to Article 46(1) of the Arbitration AF Rules. It is also to be noted that neither the Arbitration AF Rules nor the ICSID Convention and Rules specify the criteria to be followed by tribunals in deciding on provisional measures, other than to state that they are for the “preservation of [the] rights” of a party. In this respect the Tribunal notes that Article 47 of the ICSID Convention and Rule 46(1) of the Arbitration AF Rules were drafted following Article 41 of the Statute of the International Court of Justice. Article 41 of the Statute reflected general rules of international law on provisional measures as applied by international tribunals.

In view of the above, for guidance on the criteria to be applied in deciding on requests for provisional measures, the Tribunal shall refer to the relevant jurisprudence.

19. There appears to be a consensus in jurisprudence concerning the need for the existence of certain circumstances to justify the granting of provisional orders. For example, in the ICSID case of *Occidental Petroleum Corporation – Occidental Exploration and Production Company v. the Republic of Ecuador*, the tribunal stated:

“It is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost. It is not contested that provisional measures are extraordinary measures which should not be recommended lightly. In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party’s rights and where the need is urgent in order to avoid irreparable harm.”<sup>3</sup>

20. Thus, two factors must be present to justify the granting of provisional measures: i) the measures must be necessary to preserve a party’s rights and; ii) the need for such measures must be urgent to avoid irreparable harm. Relevant jurisprudence makes clear

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<sup>3</sup> Para. 59, Decision on Provisional Measures, August 17, 2007, *Occidental Petroleum Corporation – Occidental Exploration and Production Company v. the Republic of Ecuador* (ICSID Case No.ARB /06/11).

that provisional measures proceed from situations of necessity and urgency to protect rights, not mere expectations, and to avoid an irreparable harm, not merely to give convenience to one of the parties. The stringency of these basic requirements explains the extreme caution that should guide the Tribunal on this matter. In effect, only a situation of real and imminent risk to the rights of the parties justifies acceding to such request or ordering provisional measures on its own initiative.

21. Provisional measures are intended to preserve parties' rights, not to protect their mere expectations. The reason for the need for restraint and caution in this area is that the imposition of a provisional measure in many circumstances may have the effect of inhibiting a party's access to justice and may result in prejudging matters of rights and obligations that are at the core of the case to be heard by a tribunal and should be decided in a final award.
22. Of closest relevance to the present case is the ICSID case of *Emilio Agustín Maffezini v. the Kingdom of Spain*<sup>4</sup> in which the Respondent requested provisional measures from the tribunal that would have required the Claimant to establish a guarantee for the amount of costs that Spain could incur in defending itself. The tribunal denied the request for provisional measures presented by Spain, stating that granting provisional measures with the intention of protecting mere expectations of success on the part of the Respondent would imply a prejudgement on the cause of the Claimant.

### **C. ANALYSIS OF THE PRESENT CASE**

23. After careful analysis of the facts of the present case, the Tribunal considers that no circumstances exist to justify a decision to order the provisional measures requested by the Respondent. In essence, the Tribunal does not find that the facts presented by the Respondent constitute an urgent situation that risks irreparable harm to the Respondent's rights. Indeed, at this point in the proceeding, the Respondent has not proven the existence of any rights whose preservation requires the requested provisional measures.

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<sup>4</sup> *Emilio Agustín Maffezini v. the Kingdom of Spain* (ICSID Case No. ARB/97/07).

As of today, the Respondent has only a mere expectation, not a right with respect to an eventual award of costs.

24. In the present case, the fact that the Claimants consist of a number of persons; the fact that there is no information about them, except for the essential data they provided to register their case at ICSID; the fact that they are individual Canadian nationals living in different parts of a federation and therefore may be subject to different judicial systems; the fact that some of the Claimants are heirs or beneficiaries of those who originally engaged in certain financial operations in Costa Rica (their status as “investors” under the BIT has yet to be determined); the fact that the Claimants took up a collection to pay the administrative expenses of their case; and the fact that the fees of their legal counsel were agreed on a contingency basis, may indeed be considered unusual when compared to many, if not most ICSID cases, as the Respondent, argued. However, the alleged unusual nature of these facts does not *per se* create a risk situation that would make it imperative to order provisional measures to protect the Respondent’s rights. Not only does the Respondent fail to identify an imminent risk that would justify the exceptional measures requested, but it has also failed to demonstrate the existence of any of its rights that are in jeopardy of irreparable harm.
25. In effect, for the Tribunal to accept the existence of the hypothetical case of non-payment by the Claimants of the costs that might be awarded to the Respondent in this ICSID proceeding and thus to order the requested provisional measures would constitute a prejudgment by the Tribunal of underlying rights and obligations in a case which it has not yet heard. Proceeding in such manner would constitute a denial of justice to the Claimants. Moreover, even if the Tribunal were ultimately to decide this case in favor of the Respondent, such a decision would by no means necessarily result in an award to the Respondent of any ICSID costs.
26. At this point in the proceeding, the Respondent cannot be considered to be the holder of a legal right, but only the bearer of a mere expectation, which could hardly be the object of a guarantee or of protection by means of provisional measures. In short, the Tribunal has

no basis for presuming future willful non-payment by the Claimants or for assuming their eventual economic incapacity.

27. As indicated above, the jurisprudence on this question invites tribunals to exercise extreme caution when deciding on whether or not to order provisional measures, and to strike an appropriate balance between the imperatives of preserving the rights of the parties that could be at risk and the risk of ordering preventive measures without adequate justification, that might nullify or restrict a party's right of access to justice. In this case, the Tribunal finds that Respondent's rights are not at risk and that the imposition of the proposed provisional measures could become an unjustifiable obstacle to the right of the parties to have access to justice.
28. Taking into consideration the foregoing, the Tribunal hereby rejects the Respondent's Request for the Provisional Measures of a bank guarantee or escrow account to secure the payment of costs that this Tribunal might award to the Respondent at the conclusion of this case.
29. Furthermore, the Tribunal also denies the Respondent's request that the Tribunal order the Claimants to agree to be held joint and severally liable for the payment of any costs awarded to the Respondent in the present case. In this case, such request is not in the nature of a provisional measure to preserve existing rights. Rather, any decision of the Tribunal in this respect might constitute a prejudgement on the responsibility of the individual parties, especially taking into consideration that the Tribunal has not even heard substantive arguments on this vital question. At this early stage of the present case, it is impossible for this or any other Tribunal to determine if any or all of the parties are subject to specific legal obligations and, if such obligations do exist, how they each are to share responsibility. Moreover, at this stage the Tribunal can say nothing at all about the relationship among the 135 different persons who chose to present a single ICSID request. The Tribunal does not know for example, if it is dealing with an active, mandatory or optional *litis consortium*; if the 135 Claimants have some contractual relationship among them; or if they assumed some reciprocal commitments with respect this proceeding.

**V. DECISION OF THE TRIBUNAL**

30. For the reasons set forth above, the Tribunal hereby denies each and every request advanced in the Respondent's Request for Provisional Measures.

Done in English and Spanish.

.....Signed.....

.....Signed.....

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Professor Jeswald W. Salacuse

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Professor Raúl E. Vinuesa 

.....Signed.....

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Dr. Sandra Morelli Rico  
President