

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

RSM PRODUCTION CORPORATION

Applicant

and

SAINT LUCIA

Respondent

ICSID Case No. ARB/12/10 (Annulment Proceeding)

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Prof. Donald M. McRae, President
Prof. Andreas Bucher
Mr. Alexis Mourre

Secretary of the *ad hoc* Committee
Ms. Aurélia Antonietti

Date of dispatch to the Parties: April 29, 2019

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I. INTRODUCTION AND PARTIES

1. This case concerns the outcome of a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the “Agreement between the Government of Saint Lucia and RSM Production Corporation” (the “Agreement”), entered into on March 29, 2000, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated October 14, 1966 (the “ICSID Convention”).
2. The Claimant in the arbitration proceeding and the Applicant in the annulment proceeding is RSM Production Corporation (“RSM” or the “Applicant”), a company organized and licensed in Texas, United States of America.
3. The Respondent is Saint Lucia (“St. Lucia” or the “Respondent”).
4. The Applicant and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).
5. The underlying dispute relates to the implementation of the Agreement, whereby the Respondent granted RSM an exclusive oil exploration license in an area off the coast of St. Lucia. A boundary dispute developed, affecting the exploration area, in particular in relation to Martinique, Barbados and St. Vincent, which allegedly prevented RSM from initiating exploration. RSM argued that the Agreement was still in force, while St. Lucia argued that the Agreement has expired or at least was not enforceable due to *force majeure*. The present annulment proceeding relates however to the Award issued by the Tribunal that dismissed the case with prejudice and the disqualification decision issued by the majority of the Tribunal with respect of Dr. Gavan Griffith, arbitrator.

II. FACTUAL AND PROCEDURAL HISTORY

6. On March 30, 2012, ICSID received a request for arbitration from RSM against St. Lucia (the “RfA”).

7. On April 23, 2012, the Secretary-General of ICSID registered the RfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. On August 6, 2013, a Tribunal composed of Prof. Siegfried H. Elsing, a national of Germany, President, appointed by agreement of the Parties; Judge Edward Nottingham, a national of the United States of America, appointed by RSM; and Dr. Gavan Griffith Q.C., a national of Australia, appointed by St. Lucia, was constituted.
9. On September 6, 2013, St. Lucia filed a request for provisional measures seeking (1) a provisional measure requiring RSM to post security for costs in the form of an irrevocable bank guarantee for USD 750,000, pursuant to Article 47 of the ICSID Convention and Arbitration Rule 39; and (2) an order requiring RSM to pay all costs advances during the pendency of the arbitration, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and Arbitration Rule 28(1)(a). Both Parties briefed the request, and the Tribunal held its first session and a hearing on provisional measures with the Parties on October 4, 2013.
10. On December 12, 2013, the Tribunal issued a Decision on St. Lucia's Request for Provisional Measures whereby it ordered RSM to pay all costs advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and Arbitration Rule 28(1)(a), and adjourned St. Lucia's request for an order requiring RSM to post security for costs for USD 750,000.
11. On January 24, 2014, RSM filed its Memorial on the Merits.
12. On June 6, 2014, St. Lucia filed its Counter-Memorial on the Merits, and reiterated its request for an order obliging RSM to post security for costs in addition to its request to order that RSM bear all outstanding advances, that was dealt with in the Tribunal's decision of December 12, 2013.

13. On August 13, 2014, the Tribunal issued its Security for Costs Decision, together with Dr. Griffith's assenting reasons (the "First Assenting Opinion") and Judge Nottingham's dissenting opinion. It directed RSM to post security for costs in the form of an irrevocable bank guarantee for USD 750,000 within 30 days of the Decision.
14. On September 10, 2014, RSM submitted a proposal for the disqualification of Dr. Gavan Griffith. On October 23, 2014, Prof. Elsing and Judge Nottingham issued their Decision on RSM's Proposal for the Disqualification of Dr. Gavan Griffith, in which they declined RSM's proposal (the "Challenge Decision").
15. On December 15, 2014, RSM informed the Tribunal that it would be unable to provide a USD 750,000 bank guarantee or place that amount in escrow.
16. On December 24, 2014, St. Lucia filed a request for the discontinuation of proceedings, to which RSM objected on January 5, 2015. Another round of pleadings was then exchanged on the issue respectively on January 23 and February 4, 2015.
17. On January 15, 2015, RSM filed its Reply memorial on the merits.
18. On April 8, 2015, the Tribunal issued a Decision on St. Lucia's request for Suspension or Discontinuation of Proceedings (the "Vacatur Decision") with assenting reasons from Judge Nottingham. The Tribunal directed as follows:¹
 - (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 [RSM] within six months as of the date of this decision [ie., by October 8, 2015] 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.

¹ Award, para. 68.

- (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.
19. By letter of October 13, 2015, on behalf of the Tribunal, the Secretariat informed the Parties that the vacatur period as ordered in the Vacatur Decision expired on October 8, 2015, and that the Tribunal had noted that RSM did not provide for the security for costs as referred to under (ii) of the Vacatur Decision.
20. On November 24, 2015, St. Lucia filed a request for a final Award.
21. On February 9, 2016, RSM filed its reply to St. Lucia's request for a final Award.
22. On February 17, 2016, St. Lucia filed its response to RSM's reply on a final Award.
23. On March 11, 2016, RSM filed its rejoinder to St. Lucia's response on a final Award.
24. The Parties thereafter presented their submissions on costs and the Tribunal closed the proceedings on June 13, 2016.
25. On July 15, 2016, the Tribunal rendered its Award (the "Award"), along with an assenting opinion of Dr. Griffith (the "Second Assenting Opinion"). The Tribunal directed and ordered as follows:²
- (i) All Claimant [RSM]'s prayers for relief are dismissed.
 - (ii) Costs of the Proceedings are fixed at USD 615,670.25. Claimant [RSM] is ordered to bear all Costs of the Proceedings.

² Award, para. 184.

(iii) Claimant [RSM] is ordered to reimburse Respondent's legal and other costs in the amount of USD 291,153.76 plus interest at the rate of 3 months LIBOR plus 4% per annum from the notification of the Award until full and final payment.

(iv) All further prayers for relief submitted by the Parties are dismissed.

26. On November 12, 2016, ICSID received an Application for Annulment (the "Application") from RSM. The Application for Annulment was made within the time-period provided in Article 52(2) of the ICSID Convention. RSM sought annulment of the Award based on the following three grounds:

- The Tribunal was not properly constituted because Dr. Griffith allegedly did not possess the required impartiality;
- The Tribunal manifestly exceeded its powers because it (i) improperly ordered RSM to post a security for costs before any hearing on the merits while the ICSID Convention does not provide for such; (ii) vacated the proceedings when there are no provisions to this effect in the ICSID Convention; and (iii) dismissed the case due to RSM's failure to post the security while it had no such authority under the ICSID Convention; and
- The Tribunal departed from the fundamental rules of procedure because Dr. Griffith did not possess the required impartiality and participated in all the stages of the decision-making.

27. On November 21, 2016, the Acting Secretary-General registered the Application.

28. By letter of December 19, 2016, the Parties were informed that, in accordance with Article 52(3) of the ICSID Convention, the Centre planned to recommend to the Chairman of the Administrative Council the appointment of Prof. Andreas Bucher, a national of Switzerland, Prof. Donald McRae, a national of Canada, and Mr. Alexis Mourre, a national of the France to the *ad hoc* Committee (the "Committee") and were invited to submit any comments by December 23, 2016.

29. By email of December 23, 2016, RSM confirmed that it had no objections to the Committee as proposed in ICSID's December 19, 2016 letter. By email of December 27, 2016, St. Lucia confirmed that it was likewise amenable to the proposed Committee.
30. By letter of December 27, 2016, ICSID informed the Parties that the Centre would proceed to seek the candidates' acceptance of their appointments.
31. On January 4, 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three Committee Members had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. Ms. Aurélie Antonietti, Senior Legal Adviser, was designated to serve as Secretary of the Committee.
32. Following exchanges regarding the date of the first session, by email of January 26, 2017, RSM requested that the first session be delayed for a period of three months.
33. By letter of February 3, 2017, St. Lucia stated it was willing to accept the postponement subject to (i) the delay being for a period of only one month and (ii) the request being granted only if RSM paid the first advance payment, requested on January 4, 2017.
34. By email of February 6, 2017, the Committee invited RSM to provide its comments on St. Lucia's letter of February 3, 2017, and to confirm the status of the first advance payment.
35. By email of February 24, 2017, RSM informed the Centre that Mr. John L. Morgan had been appointed as the receiver over the business of RSM by the District Court of the Arapahoe County, State of Colorado and would need time to acquaint himself with the annulment proceeding and related financials. RSM therefore requested a one-month extension to revert to the Committee on the status of the first advance payment.
36. By email of February 24, 2017, the Committee invited St. Lucia to provide its views on RSM's updated request.
37. By letter of March 1, 2017, St. Lucia agreed to a delay of one month from RSM's letter, i.e. until March 24, 2017, but no longer.

38. By email of March 7, 2017, the Committee granted RSM until March 27, 2017 to provide an update on the status of the case.
39. By email of March 28, 2017, RSM confirmed that the receiver had granted it the right to continue with the annulment proceeding and intended to make the first advance payment by April 3, 2017. ICSID confirmed receipt of the payment on April 10, 2017.
40. By email of April 10, 2017, the Committee invited the Parties to provide their comments on the dates for the first session and whether it was to be held in person or by teleconference. Both Parties agreed to a teleconference.
41. In accordance with ICSID Arbitration Rule 13(1), the *ad hoc* Committee held a first session with the Parties on May 16, 2017 by teleconference.
42. Following the first session, on June 2, 2017, the *ad hoc* Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also set out the agreed schedule for the proceedings, which was later modified by agreement of the Parties.
43. In accordance with the amended schedule, on September 8, 2017, RSM filed its Memorial on Annulment (the “Memorial”) with accompanying documentation.
44. By letter of December 13, 2017, St. Lucia requested leave to submit new factual exhibits into the record.
45. By letter of December 18, 2017, RSM requested that the Committee reject St. Lucia’s request of December 13, 2017, and strike Annex A of the request, the list of proposed exhibits, from the record.
46. By letter of December 19, 2017, St. Lucia reiterated its request that the documents listed in Annex A of its December 13, 2017 letter be submitted into to the record.

47. By letter of December 20, 2017, RSM reaffirmed its position that St. Lucia’s request be denied, and that Annex A be excluded from the record.
48. By letter of December 20, 2017, the Committee (i) admitted the documents requested by St. Lucia into the record and (ii) moved the deadline for the filing of St. Lucia’s Counter-Memorial on Annulment, which had previously been scheduled for that day, to December 22, 2017.
49. On December 21, 2017, St. Lucia filed its Counter-Memorial with accompanying documentation (the “Counter-Memorial”).
50. On April 16, 2018, RSM filed its Reply with accompanying documentation (the “Reply”).
51. On August 8, 2018, St. Lucia filed its Rejoinder with accompanying documentation (the “Rejoinder”).
52. On October 24, 2018, the Committee held a pre-hearing conference with the Parties, in which it was decided, *inter alia*, that the hearing would be limited to one day, November 15, 2018.
53. On November 15, 2018, a hearing on Annulment was held in Washington, D.C. (the “Hearing”). The following persons were present at the Hearing:

Ad hoc Committee:

Prof. Donald McRae	President
Prof. Andreas Bucher	Member
Mr. Alexis Murre	Member

ICSID Secretariat:

Ms. Aurélie Antonietti	Secretary of the <i>ad hoc</i> Committee
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For RSM:

Counsel	
Mr. Karel Daele	Mishcon de Reya
Ms. Deepa Somasunderam	Mishcon de Reya
Parties	
Mr. A.M. Kip Hunter	Hall Estill

For St. Lucia:

Counsel

Mr. D. Brian King

Mr. Elliot Friedman

Mr. Sam Prevatt

Mr. Dean Rosenberg

Mr. Pieter-Bas Munnik (Support)

Parties

Ms. Brender Portland-Reynolds

Freshfields Bruckhaus Deringer US LLP

Solicitor General, Saint Lucia

Court Reporter:

Mr. David Kasdan

World Wide Reporting LLP

54. The Committee having indicated on March 20, 2019, that it did not need detailed costs submissions, the Parties filed their submissions on costs on March 22, 2019, and St. Lucia submitted a reply on April 5, 2019. RSM did not file a reply submission.

III. THE PARTIES' POSITIONS

A. RSM'S POSITION

55. RSM seeks annulment of the Award under Article 52(1) of ICSID Convention and asserts that it is entitled to request the Committee to annul the Award in consideration of the role of the *ad hoc* Committee, the nature of annulment, and the applicable threshold (1). It further denies that it had not raised the underlying arguments submitted in this proceeding in the arbitration proceeding (2).
56. As to the annulment grounds, RSM contends that the Tribunal was improperly constituted as Dr. Griffith was not removed from the Tribunal and that the Tribunal departed from a fundamental rule of procedure because Dr. Griffith lacked impartiality (3). RSM further argues that the Tribunal has manifestly exceeded its powers by ordering a provisional measure, requiring security for costs, and suspending the arbitration and then dismissing RSM's claims with prejudice (4).

(1) Role of the *ad hoc* Committee, nature of annulment and applicable threshold

57. RSM seeks the annulment of the Award on the basis of the Award and “the Tribunal’s determinations in its earlier decisions, in particular the Security for Costs Decision and the Vacatur Decision,”³ that were incorporated in the Award.⁴
58. RSM agrees with St. Lucia that annulment proceedings are about reviewing the integrity of an arbitration. However, it submits that the Committee can annul the Award on the ground of manifest excess of powers⁵ “where a Tribunal has failed to apply the agreed law, or has attempted to apply the law but ultimately did not do so,”⁶ or if a tribunal has “applied the law so grossly or egregiously that it amounts to a non-application of the law.”⁷
59. RSM argues that “there is no presumption either in favour or against annulment. The grounds for annulment are to be examined in a neutral, reasonable and appropriate way, neither narrowly nor extensively.”⁸ It rejects Respondent’s view which deems the threshold for annulling an award “exceptionally high.”⁹
60. *Ad hoc* committees have the discretion to annul an award or not, considering “all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether these circumstances had – or could have had – a material effect upon the outcome of the case.”¹⁰
61. Relying on *EDF v. Argentina*,¹¹ RSM submits that it is sufficient to establish that Dr. Griffith’s lack of impartiality “could have had a material effect”¹² on the award to justify its annulment under Articles 52(1)(a) and 52(1)(d). Dr. Griffith’s participation in the deliberations of the Security for Costs Decision, the Vacatur Decision and the Award means

³ Memorial, para. 30.

⁴ Memorial para. 30.

⁵ Reply, paras. 20-24.

⁶ Reply, para. 21.

⁷ Reply, para. 22.

⁸ Memorial, para. 32. Reply, paras. 25-28.

⁹ Counter-Memorial, para. 71, quoted in Reply, para. 28.

¹⁰ Memorial, para. 33.

¹¹ Memorial, para. 34.

¹² Memorial, para. 34.

that Dr. Griffith’s lack of impartiality could have had a material effect on all three decisions. RSM adds that “Dr. Griffith’s involvement did have a material effect on at least the Security for Costs Decision”¹³ as “without Dr Griffith, there would not have been a majority to order a security for costs and RSM’s claims would subsequently not have been dismissed for noncompliance with the Security for Costs Decision.”¹⁴

62. Regarding the annulment ground under Article 52(1)(b), RSM contends that the “majority Tribunal manifestly exceeded its powers first by ordering RSM to post security and then, following RSM’s failure to do so, by vacating the hearing and dismissing the claims with prejudice.”¹⁵ The Tribunal thereby had a material impact on the outcome of the case, depriving RSM of its “contractual right under the Agreement and its right under the ICSID Convention to have its case determined on the merits by an independent and impartial tribunal.”¹⁶

(2) RSM did not fail to make arguments in the arbitration proceeding

63. RSM challenges St. Lucia’s allegations that “a party cannot apply for the annulment of an award on the basis of arguments or evidence that it failed to raise in the arbitration.”¹⁷

64. Regarding the annulment ground of Dr. Griffith’s bias under Article 52(1)(a) and (d), RSM asserts that “Dr Griffith’s bias was raised in the arbitration in the context of the challenge proceedings under Article 57 of the ICSID Convention in the arbitration.”¹⁸

65. Regarding the annulment ground that the Tribunal did not have the power or authority to order security for costs under Article 52(1)(b),¹⁹ RSM declares having “repeatedly raised this issue in the arbitration,”²⁰ in its “first submission in response to Saint Lucia’s request

¹³ Memorial, para. 34.

¹⁴ Memorial, para. 34.

¹⁵ Memorial, para. 35.

¹⁶ Memorial, para. 35.

¹⁷ Reply, para. 29.

¹⁸ Reply, para. 31.

¹⁹ Reply, para. 32.

²⁰ Reply, para. 32.

for provisional measures,”²¹ in “its second submission,”²² and in a letter to the Tribunal after the issuance of the Security for Costs Decision.²³

66. Regarding the annulment ground that security for costs does not preserve an existing right under Article 52(1)(b),²⁴ RSM indicates that it raised this issue since it has been noted in the Security for Costs Decision.²⁵
67. Regarding the annulment ground of the direct sanctions that the Tribunal imposed for non-compliance with the Security for Costs Decision under Article 52(1)(b),²⁶ RSM contends that “RSM argued in its Opposition to Discontinuation dated January 5, 2015 and its Discontinuation Rejoinder dated 4 February 2015 that the Tribunal did not have the power to either discontinue and/or suspend the arbitration for non-compliance. In its Final Award, the Tribunal acknowledged that RSM had made arguments in relation to this power.”²⁷
68. RSM denies making new arguments in the annulment proceeding and claims that it is “at most [...] only further developing arguments that were already made in the arbitration and fleshing out the grounds for annulment.”²⁸

(3) Arbitrator’s lack of impartiality

a. The annulment grounds

69. RSM alleges that Dr. Griffith was biased or at least appeared to be biased and therefore did not possess the requisite qualification of impartiality demanded by Article 14(1) of the ICSID Convention,²⁹ requiring the annulment of the Award on the grounds of “the improper

²¹ Reply, para. 32(1), quoting RSM’s Opposition to Request for Provisional Measures of September 20, 2013, para. 2, A/R-14.

²² Reply, para. 32(2), quoting RSM’s Rejoinder on Provisional Measures of October 2, 2013, para. 1, A/R-16.

²³ Reply, para. 32(4), quoting Letter to the Tribunal of February 4, 2015, page 3, A/C-19.

²⁴ Reply, para. 33.

²⁵ Reply, para. 33, quoting Security for Costs Decision, para. 38.

²⁶ Reply, para. 34.

²⁷ Reply, para. 34, referring to the Opposition to Discontinuation of January 5, 2015, A/C-20, and the Discontinuation Rejoinder of February 4, 2015, A/C-19.

²⁸ Reply, para. 37.

²⁹ Memorial, para. 37.

constitution of the tribunal (Article 52(1)(a)) and a serious departure from a fundamental rule of procedure (Article 52(1)(d)).”³⁰

70. Article 14(1) of the ICSID Convention requires arbitrators to exercise independent and impartial judgment. A tribunal is not properly constituted if one (or more) of its members do not possess the qualities required under Article 14(1) of the ICSID Convention. Therefore, a lack of the qualities in Article 14(1), such as a lack of impartiality, may serve as ground for annulment under Article 52(1)(a).³¹
71. RSM contends that “[s]everal *ad hoc* Committees have ruled that the presence on a tribunal of an arbitrator who does not possess the qualities required under Article 14(1) of the ICSID Convention, such as the requirement of impartiality, constitutes a serious departure from a fundamental rule of procedure,” justifying the annulment of the Award under Article 52(1)(d) of the ICSID Convention.³²
72. RSM considers that the applicable standard under both Articles 52(1)(a) and 52(1)(d) is the reasonable doubt test adopted by the jurisprudence “according to which an arbitrator does not meet the requirements if there is an ‘appearance of dependence or bias’ or ‘a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality.’”³³

b. Scope of *ad hoc* Committee’s review and applicable test

73. Relying on Article 51(2)(a) and the drafting history of the ICSID Convention, RSM contends that “an *ad hoc* committee is not bound or in any other way limited by the factual and/or legal findings made in challenge proceedings” and should review *de novo* the facts and legal issues regarding the questioned arbitrator’s impartiality.³⁴ This entails that “any *ad hoc* committee has a self-standing duty to review whether the members of the tribunal

³⁰ Memorial, para. 37.

³¹ Memorial, para. 39.

³² Memorial, para. 40.

³³ Memorial, para. 43.

³⁴ Memorial, paras. 45-47.

did (or did not) meet the requirements of impartiality” under Article 14(1) of the ICSID Convention.³⁵

74. Relying on the drafting history, RSM contends that the drafters have not limited the duty of the committees³⁶ and that there was no rule against the fact that “the proper constitution of the Tribunal would possibly be reviewed twice” at the stage of the arbitration and at the stage of the annulment.³⁷
75. RSM objects to the finding of the Azurix Committee as well as the findings of the EDF and Suez Committees.³⁸
76. RSM stands against the Azurix position³⁹ according to which, in particular, the matter of an arbitrator lacking the requisite qualities “could not be a basis for annulment but could only be raised by way of proceedings for the revision of the award under Article 51,” if the facts are unveiled after the arbitration has been closed.⁴⁰
77. RSM further considers that the reasonableness test upheld in recent committees does not apply. It challenges the findings of the *EDF v. Argentina* and *Suez v. Argentina* Committees⁴¹ that ruled that “the scope of an *ad hoc* committee’s review would be limited to reviewing the reasonableness of the challenge decision” and that found an exception “[o]nly in cases where the challenge decision was so plainly unreasonable that no reasonable

³⁵ Memorial, para. 48.

³⁶ Memorial, para. 49.

³⁷ Memorial, para. 50.

³⁸ Reply, paras. 42-43 and seq.

³⁹ Reply, paras. 40-42, citing *Azurix Corp. v. The Argentine Republic* (“*Azurix v. Argentina*”) (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, paras. 280 and 282, A/RLA53.

⁴⁰ Reply, para. 41.

⁴¹ Memorial, para. 50, citing *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Argentine Republic* (“*EDF v. Argentina*”) (ICSID Case No. ARB/03/23), Annulment Decision, February 5, 2016, para. 145, A/CLA-1; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* (“*Suez v. Argentina*”) (ICSID Case No. ARB/03/19), Decision on Argentina’s Application for Annulment, May 5, 2017, paras. 93-94, A/CLA-24.

decision-maker could have come to such a decision.”⁴² RSM contends that those decisions are not binding and can be “severely criticized and/or distinguished from this case.”⁴³

78. RSM stresses the different role of the *ad hoc* committee reconsidering a challenge decision; it is not sitting in an appeal of a challenge decision because it considers “different issues and the consequences of its decision are different from the consequences of a challenge decision.”⁴⁴ RSM also stresses that a challenge decision is not taken by the tribunal, it is not an award, but a decision taken by another entity, i.e. the two non-challenged members of a tribunal or the ICSID Chairman.⁴⁵ “At most, an *ad hoc* Committee would sit in review of a third party. There is no authority whatsoever to argue that an *ad hoc* committee’s review of a third-party decision should be anything less than a full, *de novo* review.”⁴⁶
79. RSM further highlights that Article 52(1)(a) contains no qualifying language.⁴⁷ and that such an absence shows the drafters’ intention not to limit the role of *ad hoc* committees.⁴⁸
80. Should the *ad hoc* Committee agree with the reasoning adopted in *EDF v. Argentina* and *Suez v. Argentina*, those cases are to be distinguished from the present case⁴⁹ since the “*ad hoc* Committee is requested to consider facts that were before the deciding arbitrators in the challenge procedure because those facts only occurred after the challenge decision was issued and after the arbitration proceeding was closed.”⁵⁰ Thus, the new facts, not analysed in the challenge decision, justify not limiting the scope of review to the reasonableness of the challenge decision.⁵¹ However, due to the “inseverable connection to the ‘old’ facts”,

⁴² Memorial, para. 52.

⁴³ Memorial, para. 53.

⁴⁴ Memorial, para. 54(i).

⁴⁵ Memorial, para. 54(ii). Reply, para. 50.

⁴⁶ Reply, para. 52.

⁴⁷ Memorial, para. 55, citing and quoting *Suez v. Argentina*, para. 83.

⁴⁸ Memorial, para. 55(ii).

⁴⁹ Memorial, paras. 60-61.

⁵⁰ Memorial, para. 62.

⁵¹ Memorial, para. 63. Reply, para. 44.

the new facts must be considered along the old facts by the Committee to decide on the annulment of the Award.⁵²

c. Facts relevant to determine lack of impartiality

81. RSM contends that both annulment grounds “that the Tribunal was not properly constituted (Article 52(1)(a)) and the arbitration was tainted by a serious departure from a fundamental rule of procedure (Article 52(1)(d)) [...] turn on Dr Griffith’s presence on the Tribunal.”⁵³ “[A] reasonable third party would consider that there are reasonable grounds for doubting that Dr Griffith met the impartiality requirement under Article 14(1) of the ICSID Convention.”⁵⁴
82. The relevant factors to determine the alleged lack of impartiality are (i) Dr. Griffith’s First Assenting Opinion revealing his bias in favour of Respondent States and St. Lucia and his bias against funded claimants such as RSM, and thus his determination of the case on the basis of influences other than the facts and the merits;⁵⁵ (ii) his failure to provide comments after RSM’s challenge⁵⁶ that was eventually rejected by non-challenged members of the Tribunal;⁵⁷ (iii) his Second Assenting Opinion attached to the Award providing “additional comments on the First [Assenting] Opinion”,⁵⁸ (iv) in which he “backtracked” from the First Assenting Opinion.⁵⁹
83. According to RSM, the Second Assenting Opinion and the alleged backtracking are new matters that Messrs. Elsing and Nottingham did not review.⁶⁰

⁵² Memorial, para. 63. Reply, para. 57.

⁵³ Memorial, para. 64.

⁵⁴ Memorial, para. 64.

⁵⁵ Memorial, para. 65 quoting Dr. Griffith’s First Assenting Opinion; Memorial, paras. 100-105.

⁵⁶ Memorial, paras. 66-70, quoting RSM’s Proposal for the Disqualification of Dr. Gavan Griffith of September 10, 2014, paras. 21-23, A/C-15.

⁵⁷ Memorial, para. 70.

⁵⁸ Memorial, para. 72, quoting Dr. Griffith’s Second Assenting Opinion.

⁵⁹ Memorial, paras. 73-78, quoting Dr. Griffith’s Second Assenting Opinion.

⁶⁰ Reply, para. 54.

84. RSM further submits that “Dr Griffith held biased views against third-party funders and funded claimants such as RSM,”⁶¹ as he used “mercantile adventurers” to describe third-party funders in a pejorative way⁶².
85. Should EDF and Suez be followed, RSM further submits that the Challenge Decision was unreasonable since Dr. Griffith’s views were not related to the merits of the case, it only took the terminology into account and not its context or other relevant matters, notwithstanding the radical and extreme language used, and refused to take objective evidence into account through the eyes of a neutral third party.⁶³

(4) Manifest excess of powers

86. The Tribunal’s alleged excess of powers relates to the following:
- The Tribunal did not recommend provisional measures but ordered RSM to post security for costs, hence ignoring Article 47 of the ICSID Convention and rewriting the law.
 - The Tribunal required security for costs, even though such security does not preserve a “right” of a party.
 - The Tribunal suspended the proceeding and dismissed the case with prejudice.

a. Standard for annulment under Article 52(1)(b)

87. According to RSM, the Committee must determine “whether RSM and Saint Lucia agreed to grant the Tribunal the power to order binding provisional measures.”⁶⁴

⁶¹ Memorial, para. 79.

⁶² Memorial, para. 81.

⁶³ Memorial, paras. 110-125.

⁶⁴ Reply, para. 68.

88. Relying on *Malaysian Historical Salvors v. Malaysia*,⁶⁵ RSM points out the importance of the drafting of the history of the ICSID Convention. It also argues that an excess of power can be manifest even when case law shows that an interpretation can go either way.⁶⁶

b. Manifest excess of power by ordering a provisional measure

89. RSM contends that the Tribunal rewrote the law by ordering a provisional measure⁶⁷ and failed to apply the law, thereby amounting to a non-application,⁶⁸ hence manifestly exceeding its powers.

90. RSM submits that the Tribunal went beyond the Parties' agreement. Article 26 of the Concession Agreement between RSM and St. Lucia did not grant the Tribunal the power to order binding provisional measures, and only provided for the award to be final and binding.⁶⁹

91. In any event, Article 47 does not empower the Tribunal to order a binding provisional measure, except as otherwise agreed by the parties.

92. From a textual standpoint and based on the history of the ICSID Convention retraced in detail, RSM recalls that the word prescribe was rejected and submits that the term recommend finally adopted had no legal binding effect, as accepted by leading authors and the case law.⁷⁰

93. The reliance on the case law from the International Court of Justice is inapposite, as Article 41 of the Statute of the Court which uses the term indicate is not subject to any deviation by the parties unlike Article 47.⁷¹

⁶⁵ Reply, para. 75, citing *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10), Annulment Decision, April 16, 2009, paras. 63-73, A/CLA-72.

⁶⁶ Reply, para. 78.

⁶⁷ Reply, para. 124.

⁶⁸ Reply, paras. 130-131.

⁶⁹ Reply, paras. 139-141.

⁷⁰ Memorial, paras. 136-153. Reply, paras. 84-102, and 150-173.

⁷¹ Reply, para. 147.

94. From a contextual standpoint, the ICSID Convention, the Rules and the AF Rules “confirm that the interpretation that a recommendation is not binding and that a ‘recommendation’ cannot be understood as an ‘order’.”⁷² The fact that the Spanish version of Rule 39(1) employs the verb “*dictar*” while it uses recommend in other places is a contradiction in the text and is not indicative.⁷³ In addition, Arbitration Rule 39 uses the term recommend, while the AF Arbitration Rule 46 uses order.⁷⁴
95. RSM contends that the object and purpose of the treaty further militates against a tribunal ordering binding provisional measures.⁷⁵
96. Looking at the ICSID jurisprudence, RSM acknowledges that some decisions have adopted the majority’s view but recalls that there is no rule of precedent and that those decisions got it wrong. RSM rejects the notion of *jurisprudence constante* used by St. Lucia in that regard.⁷⁶
97. RSM distinguishes the binding character of a decision and its enforceability. The former deals with a party’s obligation to comply and abide by the terms of a decision. Related to it is the power to sanction non-compliance. The latter relates to the obligation of the contracting state to recognize an ICSID award.⁷⁷
98. RSM further rejects St. Lucia’s argument that tribunals could have inherent powers to order a provisional measure, as there cannot be inherent powers when a statutory or contractual provision applies.⁷⁸

c. Manifest excess of power by requiring security for costs

99. RSM contends that the majority of the Tribunal sought to preserve St. Lucia’s right to seek reimbursement of its costs in case of a favourable award. However, such a right does not

⁷² Memorial, para. 154. Reply, paras. 174-179.

⁷³ Reply, para. 177.

⁷⁴ Memorial, paras. 162-165.

⁷⁵ Memorial, para. 173.

⁷⁶ Reply, paras. 104-138.

⁷⁷ Memorial, paras. 179-180.

⁷⁸ Reply, paras. 184-123.

exist,⁷⁹ as acknowledged by various decisions.⁸⁰ This is an excess of power as a tribunal's power is limited to measures that preserve existing rights only.⁸¹

100. From a textual standpoint, the right to costs only arises at the end of the proceeding in the award, hence "one can obviously not preserve, maintain or protect something that does not exist yet."⁸² Contrary to St. Lucia's assertion, security for costs does not protect "the right to seek an award on costs."⁸³
101. Ordering security for costs actually disrupted the *status quo* improving St. Lucia's collection position instead of preserving the *status quo*.⁸⁴
102. From a contextual standpoint, the power to post security for costs was discussed in the negotiating process of the ICSID Convention, but it was concluded that it would not be furnished without the prior consent of the parties.⁸⁵
103. The Administrative and Financial Regulations provides mechanisms for the direct costs of the proceedings. The parties' fees and expenses are not covered by such mechanisms, indicating that they have not been granted a right to collect their potential fees and expenses.⁸⁶
104. Finally, RSM points out that the object and purpose of the ICSID Convention militates for access to justice, equality of treatment, and no prejudgement.⁸⁷

⁷⁹ Memorial, paras. 185-186.

⁸⁰ Reply, para. 134.

⁸¹ Reply, para. 133.

⁸² Memorial, para. 187.

⁸³ Reply, para. 135.

⁸⁴ Memorial, para. 194.

⁸⁵ Memorial, para. 198.

⁸⁶ Memorial, paras. 200-202.

⁸⁷ Memorial, paras. 203-220.

d. Manifest excess of power by suspending the arbitration and dismissing RSM's claims

105. By imposing a sanction for RSM's non-compliance namely, the "dismissal of RSM's claims with prejudice by way of a Final Award,"⁸⁸ the Tribunal exceeded its power under Article 44 second sentence of the ICSID Convention. The Tribunal had no such powers.⁸⁹
106. For RSM, the Tribunal in the Award found that it had inherent power to fill a gap, when there was no such gap.
107. RSM points out that neither the Convention nor the Arbitration Rules contain an express provision dealing with sanctions for non-compliance with provisional measures. The question is whether this was "a qualified silence or an unintended gap."⁹⁰
108. Given that the issues of sanctions for non-compliance were discussed at length and voted upon during the negotiation and drafting, the silence is "anything but unintended."⁹¹ According to RSM, "the proposed power to prescribe binding provisional measures and to impose sanctions for non-compliance with provisional measures was knowingly and willingly omitted from the ICSID Convention. The drafters of the Convention and subsequently the Contracting States only empowered tribunals to 'recommend' provisional measures. As parties retained the freedom to comply or not with such measures, it was not appropriate to provide for direct sanctions for non-compliance."⁹²
109. The Tribunal thus exceeded its power by interpreting the qualified silence as an unintended gap and by using its power to fill that gap.⁹³
110. Lastly, RSM contends that Article 44 of the ICSID Convention only empowers tribunals to decide questions of procedure, while the issues of sanctions, relief and remedies are issues

⁸⁸ Memorial, para. 223.

⁸⁹ Reply, para. 148.

⁹⁰ Memorial, para. 230.

⁹¹ Memorial, para. 232.

⁹² Memorial, para. 232.

⁹³ Memorial, para. 223. Reply, para. 154.

of substance.⁹⁴ “As a consequence of the Tribunal’s alleged procedural decisions RSM’s USD 600 million claims were dismissed with prejudice.”⁹⁵

111. RSM also submits that “Article 44 second sentence does not empower tribunals to take decisions on important issues such as the suspension of the arbitration, or, even more importantly, the dismissal of the claims with prejudice,”⁹⁶ but only empowers tribunals to decide procedural issues of minor importance.

(5) RSM’s request for relief

112. RSM requests that the Committee determine that:
- (i) the Tribunal was not properly constituted;
 - (ii) there has been a serious departure from a fundamental rule of procedure;
 - (iii) the Tribunal has manifestly exceeded its powers by ordering provisional measures;
 - (iv) the Tribunal has manifestly exceeded its powers by requiring a security for costs; and
 - (v) the Tribunal has manifestly exceeded its powers by suspending the arbitration and dismissing RSM’s claims with prejudice.

In consequence, RSM requests the *ad hoc* Committee to annul the Award in accordance with Article 52 of the ICSID Convention and order Saint Lucia to pay the cost of all fees and expenses incurred in the proceedings for annulment by RSM.⁹⁷

⁹⁴ Memorial, para. 238.

⁹⁵ Memorial, para. 238.

⁹⁶ Memorial, para. 243.

⁹⁷ Reply, paras. 198-199.

B. ST. LUCIA’S POSITION

113. St. Lucia submits that RSM “believes that it is entitled to choose when it wants to pay, and when it does not,”⁹⁸ and “to abandon proceedings that it considers are not going its way, and then mount collateral attacks impugning the integrity of those who have ruled against it.”⁹⁹
114. St. Lucia recalls that RSM’s funding in the arbitration was terminated because Dr. Griffith remained on the Tribunal, and that is the reason why RSM did not provide security for costs.¹⁰⁰ St. Lucia submits that once more RSM is abusing the ICSID system.¹⁰¹
115. St. Lucia examined the nature of annulment proceedings (1), before moving on to RSM’s grounds based on the Challenge Decision (2), and to the manifest excess of power grounds (3).

(1) The nature of annulment proceedings

116. St. Lucia recalls that an annulment proceeding is not an appeal. It is “an exceptional remedy available only in extraordinary cases of gross departures from basic principles.”¹⁰² St. Lucia points out that RSM has not come close to satisfying its burden of proof. The threshold is extremely high.¹⁰³
117. St. Lucia further recalls that “an annulment committee must confine its review to the arguments and evidence put before the tribunal in the arbitration; newly conceived arguments that a party could have raised during the arbitration, but did not, cannot be considered.”¹⁰⁴ For this reason, new arguments of fact or law are inadmissible on annulment.¹⁰⁵

⁹⁸ Counter-Memorial, para. 10.

⁹⁹ Counter-Memorial, para. 12.

¹⁰⁰ Rejoinder, para. 6.

¹⁰¹ Rejoinder, para. 10.

¹⁰² Counter-Memorial, para. 74.

¹⁰³ Rejoinder, para. 19.

¹⁰⁴ Counter-Memorial, para. 75.

¹⁰⁵ Rejoinder, paras. 21-29.

(2) The grounds based on the Challenge Decision

118. Regarding the grounds based on Dr. Griffith's alleged bias and on a violation of a fundamental rule of procedure, St. Lucia considers that they amount to an impermissible appeal attempt based on the argument that the deciding members of the Tribunal reached the wrong conclusion in rejecting RSM's challenge to Dr. Griffith.¹⁰⁶

a. Standards for annulment under Article 52(1)(a) and (d)

119. Regarding the improper constitution of the Tribunal, St. Lucia submits that the ground of Article 52(1)(a) can only relate to the constitution of the tribunal, not to a challenge decision. The same applies for the ground of Article 52(1)(d).¹⁰⁷

120. St. Lucia contends that two lines of case law have emerged on how to treat an arbitrator challenge, the first approach being *Azurix v. Argentina*, the second one being *EDF v. Argentina* as well as *Suez v. Argentina*, and that they all rejected the *de novo* review advocated by RSM.¹⁰⁸

121. RSM's attempts to distinguish the present case from these decisions are meritless.¹⁰⁹

122. A resort to supplementary means of interpretation is also not needed, but in any event a review of the ICSID drafting history does not help RSM.¹¹⁰

123. Contrary to what RSM asserts, a committee does not assess different issues in a disqualification decision from those examined by the tribunal. Whether Dr. Griffith lacked the qualities required by Article 14(1) was analysed and resolved by the unchallenged arbitrators.¹¹¹

¹⁰⁶ Counter-Memorial, para. 139.

¹⁰⁷ Counter-Memorial, paras. 80-81.

¹⁰⁸ Counter-Memorial, paras. 85-95.

¹⁰⁹ Counter-Memorial, paras. 97-100.

¹¹⁰ Rejoinder, paras. 48-51.

¹¹¹ Counter-Memorial, para. 102.

124. The nature of the decisionmakers in a challenge decision does not make it more reviewable.¹¹²
125. St. Lucia rejects the idea that Dr. Griffith's Second Assenting Opinion constitute new facts.¹¹³

b. In any event, RSM has not shown that the Tribunal reached a plainly unreasonable result

126. St. Lucia considers that the Tribunal reasonably rejected RSM's attack on the substance of Dr. Griffith's view. A dissenting opinion cannot form the basis of a ground for disqualification.¹¹⁴ Dr. Griffith had taken no view as to whether RSM's claims were meritorious or not,¹¹⁵ nor was his position "radical."¹¹⁶
127. St. Lucia further considers that the Tribunal reasonably concluded that the manner in which Dr. Griffith expressed his views did not justify disqualification.¹¹⁷ His choice of wording should not have led to a disqualification,¹¹⁸ and he did consider the facts of the case.¹¹⁹
128. Finally, the fact that Dr. Griffith did not provide an additional explanation when challenged does not prove a lack of impartiality.

¹¹² Rejoinder, paras. 56-57.

¹¹³ Counter-Memorial, para. 104.

¹¹⁴ Counter-Memorial, para. 113.

¹¹⁵ Counter-Memorial, para. 115.

¹¹⁶ Counter-Memorial, para. 118.

¹¹⁷ Counter-Memoria, para. 123.

¹¹⁸ Counter-Memorial, paras. 124-130.

¹¹⁹ Counter-Memorial, paras. 131-135.

(3) No manifest excess of powers

a. Standard for annulment under Article 52(1)(b)

129. St. Lucia argues that “[t]he sole consideration for the Committee is whether the Tribunal ‘identified the applicable law and endeavored to apply it’,”¹²⁰ not the alleged errors in its application. The failure to apply the law must be *in toto*.¹²¹
130. “[A]n excess of powers must be manifest on the face of the award, *de novo* review of an award is beyond the scope of the annulment committee’s mandate and legal (or factual) error is insufficient to annul an award”¹²²
131. Where more than one interpretation of a provision is possible, there can be by definition no excess of powers.¹²³

b. No manifest excess of powers by ordering provisional measures

132. According to St. Lucia, RSM disagrees with the interpretation given by the Tribunal of Article 47 which cannot provide a basis for annulment under Article 52(1)(b),¹²⁴ as an erroneous interpretation or application of the law is not a basis for annulment.
133. The Tribunal did not fail to apply the law,¹²⁵ and it did not do it so wrongly that it would amount to a non-application of the law.¹²⁶ Even if the “error” would amount to non-application of the applicable law, the manifest requirement would not be met.¹²⁷
134. In any event, a *jurisprudence constante* has consistently endorsed the Tribunal’s interpretation, which precludes a finding of excess of powers, much less a manifest one.¹²⁸

¹²⁰ Counter-Memorial, para. 148, referring to *Daimler Financial Services A.G. v. The Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment, January 7, 2015, para. 191, A/RLA-82.

¹²¹ Rejoinder, para. 15.

¹²² Counter-Memorial, para. 152.

¹²³ Rejoinder, paras. 80-82.

¹²⁴ Counter-Memorial, para. 154.

¹²⁵ Rejoinder, paras. 99-103.

¹²⁶ Rejoinder, paras. 104-107.

¹²⁷ Counter-Memorial, para. 155.

¹²⁸ Counter-Memorial, paras. 158-159. Rejoinder, para. 121.

RSM cites decisions that do not support its position.¹²⁹ The same applies to a commentary relied on by RSM.¹³⁰

135. RSM failed to raise the arguments concerning the binding character of provisional measures before the Tribunal, it only raised it after the decision on security for costs.¹³¹
136. St. Lucia submits that in any event RSM's entirely novel interpretation of Article 47 is meritless. Relying on *Perenco v. Ecuador*,¹³² St. Lucia recalls the case law that has equated recommend to order and that such an order can be binding without being enforceable in domestic courts.
137. St. Lucia further rejects RSM's reliance on the object and purpose of the ICSID Convention and his drafting history.¹³³
138. It also objects to an argument raised in RSM's Counter-Memorial based on the "[e]xcept as the parties otherwise agree" contained in Article 47 as it was not raised before the Tribunal and is a circular argument. The Tribunal did not go beyond the Parties' agreement in any event.¹³⁴

c. No manifest excess by ordering security for costs

139. St. Lucia considers that RSM once again is challenging the interpretation the Tribunal made of Article 47.
140. In addition, St. Lucia recalls that a number of tribunals have found that Article 47 gives them the authority to order security for costs.¹³⁵¹³⁶

¹²⁹ Rejoinder, paras. 113-120.

¹³⁰ Rejoinder, paras. 128-131.

¹³¹ Rejoinder, para. 31.

¹³² Rejoinder, para. 134, citing *Perenco Ecuador Ltd. v. The Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, May 8, 2009, A/RLA-50, paras. 70-73.

¹³³ Counter-Memorial, paras. 174-180. Rejoinder, paras. 146-157.

¹³⁴ Rejoinder, paras. 96-98.

¹³⁵ Rejoinder, para. 87.

¹³⁶ Counter-Memorial, paras. 187-193.

141. For St. Lucia, the Tribunal acted within its powers in ordering security for costs: it protected St. Lucia’s right to seek an award of costs.¹³⁷
142. St. Lucia points out that the negotiating history does not evidence a decision to prohibit security for costs.¹³⁸ Granting security for costs does not defeat the object and purpose of the Convention.¹³⁹
143. St. Lucia further rejects RSM’s understanding of Administrative and Financial Regulation 14, as it has no bearing on the allocation of the parties’ own costs.¹⁴⁰
144. Even if Article 47 did not empower the Tribunal to order security for costs, it could have done it under its inherent powers under Article 44 of the Convention.¹⁴¹

d. No manifest excess of powers by dismissing RSM’s claim with prejudice

145. St. Lucia submits that RSM does not satisfy the requirements of Article 52(1)(b) on this ground and does not “state a cognizable annulment claim.”¹⁴² This ground is derivative from the other excess of powers arguments, and falls if the other two fall.¹⁴³ RSM is further precluded from raising these arguments in annulment when it did not raise them in front of the Tribunal.¹⁴⁴
146. RSM failed to establish that the Tribunal manifestly exceeded its powers. The Tribunal correctly identified a gap¹⁴⁵ and a question of procedure was at issue.¹⁴⁶ Not to do so “would have rendered the security for costs nugatory.”¹⁴⁷ “Moreover, the dismissal necessarily had to be with prejudice. Otherwise RSM could simply refile its claim, and thereby impose on

¹³⁷ Counter-Memorial, paras. 196-199.

¹³⁸ Counter-Memorial, paras. 200-202.

¹³⁹ Counter-Memorial, paras. 206-211.

¹⁴⁰ Counter-Memorial, paras. 203-205.

¹⁴¹ Counter-Memorial, para. 213.

¹⁴² Counter-Memoria, para. 219.

¹⁴³ Rejoinder, para. 183.

¹⁴⁴ Counter-Memorial, para. 222.

¹⁴⁵ Counter-Memorial, paras. 224-228.

¹⁴⁶ Counter-Memorial, paras. 229-238.

¹⁴⁷ Counter-Memorial, para. 238.

St. Lucia, once again, the very same detriment that the Tribunal's order was issued to remove."¹⁴⁸

147. There being no ambiguity or absurd result, there is no need to consider the *travaux préparatoires*.¹⁴⁹
148. St. Lucia further contends that the Tribunal was entitled to dismiss RSM's claims on other grounds as well, such as protecting the integrity of the proceeding under Article 44, but also for abuse of right or process as inadmissible under Article 41.¹⁵⁰

(4) St. Lucia's request for relief

149. St. Lucia requests that the Committee:
- (i) reject RSM's application for annulment in its entirety; and
 - (ii) order RSM to bear all costs and expenses of this proceeding, including the Respondent's legal fees and expenses.¹⁵¹

IV. AD HOC COMMITTEE'S ANALYSIS

A. THE NATURE OF ANNULMENT PROCEEDINGS

150. While the Parties are broadly in agreement that the objective of annulment proceedings is the protection of the integrity of the ICSID arbitral process, they differ in the implications this carries for the approach of *ad hoc* committees. The Respondent sees annulment as an "exceptional remedy" applicable only to gross departures from fundamental procedures. By contrast, RSM considers that there is no presumption either for or against annulment and that the grounds for annulment are to be construed neither narrowly nor extensively. The

¹⁴⁸ Counter-Memorial, para. 238.

¹⁴⁹ Rejoinder, para. 190.

¹⁵⁰ Counter-Memorial, paras. 240-249.

¹⁵¹ Rejoinder, para. 211.

consequence for St. Lucia is that there is a high threshold to establish an annulment claim; for RSM the burden is no different than in any other claim.

151. In the view of the Committee, there is no presumption one way or another about an annulment process. The criteria for annulment set out in Article 52 of the ICSID Convention are to be interpreted, as provided in Article 31 of the Vienna Convention on the Law of Treaties, in good faith and in accordance with their ordinary meaning, in their context and in light of the object and purpose of the treaty as a whole. The provisions in Article 52 may be described as exceptional in the sense that Article 52 provides limited grounds for annulment but that has no impact on the way the provisions are to be interpreted and applied by the Committee.
152. A corollary for St. Lucia is that arguments raised in annulment proceedings must be confined to those already raised in the arbitration and an *ad hoc* annulment committee cannot base its decision on new facts or new arguments presented at the annulment stage. RSM argues that in any event it is not relying on new facts or new arguments. All of the issues raised by it were raised in the original arbitration.
153. The Committee does not consider that there is anything for it to decide on this matter. Obviously, the annulment stage is not one where facts not before the Tribunal can be introduced. At the same time, the arguments raised on annulment are those that relate to the grounds for annulment, which themselves need not have been raised in the original arbitration. An applicant cannot be inhibited from raising arguments in annulment relating to the interpretation or application of Article 52 that best support its position. However, the Committee does not see this as an issue in the present case.

B. THE DISQUALIFICATION OF AN ARBITRATOR

154. RSM argues that the requirements of Article 52(1)(a) that the Tribunal be properly constituted were not met because one of the arbitrators did not meet the requirement of impartiality required by Article 14(1) of the ICSID Convention. RSM also argues that the inclusion of the arbitrator amounted to a serious departure from a fundamental rule of procedure, and hence contrary to Article 52(1)(d) of the Convention.

155. RSM argues that the First Assenting Opinion of the arbitrator, on the question of ordering security for costs, showed bias against third party funding and therefore bias against a party like RSM which was being funded by a third party. This was reinforced by the failure of the arbitrator to provide any comments on the challenge to him by RSM when given the opportunity to do so and by his Second Assenting Opinion where he appeared to backtrack from the views in his First Assenting Opinion.
156. St. Lucia characterizes the RSM's position as an impermissible attempt to invite the Committee to engage in an appeal since the issue of arbitrator impartiality was decided by the unchallenged arbitrators in accordance with Article 58 of the Convention. According to St. Lucia, RSM is, in essence, trying to appeal that decision. RSM contends, however, that the Committee is not bound by the conclusions made under the challenge procedure and that it is for the Committee to review *de novo* the question whether the arbitrator met the standards of impartiality.
157. St. Lucia rejects the view that there can be a *de novo* review of the challenge to an arbitrator arguing that this has been consistently rejected in the arbitral jurisprudence, citing the decisions of annulment Committees in *Azurix v. Argentina* and *EDF v. Argentina*. However, RSM argues that this does not give sufficient weight to the fact that the *travaux préparatoires* provide no basis for an exclusion of *de novo* review from the powers of an *ad hoc* committee and in this case part of the evidence for the allegation of impartiality is based on evidence arising after the decision by the unchallenged members of the Tribunal.
158. In considering this matter, the Committee makes two preliminary observations.
159. First, in accordance with Article 58 of the Convention it is the unchallenged members of a tribunal who decide on a challenge to an arbitrator. Thus, decisions on challenge are not decisions of the tribunal. Since it is the award of a tribunal that can be annulled, an *ad hoc* committee has no power of annulment with respect to a challenge decision, even if it has been declared incorporated in the award. However, that does not preclude a committee from taking into account a challenge decision when deciding whether the terms of Article 52(1)(a) have been met and a tribunal has been properly constituted.

160. Second, *ad hoc* committees are divided on the standard of review to apply when considering a challenge decision. The most prominent division is between the position taken by the tribunal in *Azurix v. Argentina* and the decision of the tribunal in *EDF v. Argentina*. The *ad hoc* Committee in *Azurix* limited review to determining whether the unchallenged arbitrators had failed to comply properly with the procedure for challenging members of the tribunal.¹⁵² The *ad hoc* Committee in *EDF* considered that there should be no annulment unless the decision of the unchallenged arbitrators not to disqualify an arbitrator “was so plainly unreasonable that no reasonable decision-maker could have come to such a decision.”¹⁵³ However, RSM rejects the approach of both tribunals and uses neither in its arguments for annulment. Thus, the Committee sees no need to form its own opinion about the approaches in those cases.
161. The primary argument of RSM is that *ad hoc* committees are entitled to engage in a *de novo* review of the challenge to the arbitrator for it is the committee itself that has to be satisfied that the tribunal was properly constituted. RSM argues that there is nothing in the Convention that prohibits a tribunal from conducting such a review and that the assertion of a standard of review in cases such as *EDF* have simply no basis in the provisions of the Convention. Furthermore, RSM argues, in the present case *de novo* review is required because certain factors relevant to the impartiality of the arbitrator in question were not available to the unchallenged arbitrators since they arose after the decision of the unchallenged members.
162. In order to assess these arguments, the Committee will consider the basis for the challenge to the arbitrator in this case and the circumstances alleged by RSM to establish that the tribunal was not properly constituted.
163. The challenge to the impartiality of Dr. Griffith was made on the basis that he had expressed views in his Assenting Decision on the request for security of costs. In that Opinion he had referred to third party funders as “mercantile adventurers” and had linked third party

¹⁵² *Azurix v. Argentina*, para. 280.

¹⁵³ *EDF v. Argentina*, para. 145.

funding with “gambling.” RSM saw these views as “negative and radical in tone.”¹⁵⁴ Its conclusion was that Dr. Griffith saw third party funders and funded claimants as undermining the integrity of foreign investor-state arbitration.¹⁵⁵ RSM also points out that Dr. Griffith failed to provide any comments to the challenge committee although requested to do so, yet in his Second Assenting Opinion (with the Award) Dr. Griffith reverted to what had been said in his First Assenting Opinion and backtracked from what had been said. This, RSM says, is an admission that the views he had expressed in the First Assenting Opinion were “negative and extreme and suggested bias.”¹⁵⁶

164. The Committee has difficulty in seeing that what was said by Dr. Griffith demonstrated a lack of impartiality contrary to Article 58 of the Convention or that his inclusion on the Tribunal demonstrated that the tribunal was not properly constituted. And this is so whether the Committee was entitled to engage in *de novo* review or whether the approaches taken in either Azurix or EDF were to be followed.
165. In his First Assenting Opinion, Dr. Griffith was raising the important question of whether third-party funding is a relevant consideration in determining whether there should be an order for security of costs and the consequences if it were not. Dr. Griffith’s concern was that the funder is not subject to the arbitral tribunal’s jurisdiction and therefore not legally bound to comply with an adverse cost order. This has not been contested by RSM. Dr. Griffith’s observation was thus directly applicable to the circumstances of the instant case. To be sure, Dr. Griffith used some evocative language, but evocative language emphasizes a point rather than evidencing bias. The point was an important one and Dr. Griffith used language that would highlight it. Of course, as the unchallenged arbitrators pointed out in their challenge decision, language can go too far and express another intent, but they, too, considered that the language used by Dr. Griffith did not do that.¹⁵⁷
166. Nor do the subsequent considerations relied on by RSM alter the situation. The fact that Dr. Griffith did not submit any comments to the unchallenged members but referred to the issue

¹⁵⁴ Memorial, para. 66.

¹⁵⁵ *Ibid.*

¹⁵⁶ Memorial, para. 91.

¹⁵⁷ Challenge Decision, para. 86.

again in his Second Assenting Opinion does not carry the weight that RSM seeks to ascribe to it. At most this provides clarification of what was said in the First Assenting Opinion but it neither adds to nor subtracts from the conclusion that he did not lack impartiality.

167. In short, even if a *de novo* review were conducted, taking account of the considerations not before the unchallenged members when they made their decision to reject the claim for disqualification, there is no basis for concluding that Dr. Griffith lacked the necessary impartiality required by Article 14(1) of the ICSID Convention.
168. If the question before the Committee was whether the unchallenged members had properly complied with the procedures for considering a challenge to an arbitrator, there is no allegation that they did not. If the question before the Committee was whether the decision on challenge by the unchallenged arbitrators was reasonable or was so plainly unreasonable that no reasonable decision-maker could have reached it, the answer of the Committee would be that the Challenge Decision meets either a reasonableness or a not plainly unreasonable test.
169. In short, the Committee finds no basis on which it can be concluded that Dr. Griffith's alleged lack of impartiality was a ground for deciding that the Tribunal was not properly constituted within the meaning of Article 52(1)(a). Equally, for the same reasons, the Committee does not find any basis on which it can be concluded that Dr. Griffith alleged lack of impartiality would be a ground for deciding that there had been a substantial departure from a fundamental rule of procedure within the meaning of Article 52(1)(d).

C. MANIFEST EXCESS OF POWER – ORDERING A PROVISIONAL MEASURE

170. RSM argues that the Tribunal manifestly exceeded its powers by ordering a provisional measure instead of just recommending such a measure, and hence the Award can be annulled by virtue of Article 52(1)(b).
171. The crux of this question is the meaning to be attached to Article 47 of the Convention, which provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

172. The Tribunal had “ordered” the provisional measure in this case. RSM challenges this on the ground that Article 47 gives a tribunal the power only to “recommend” a provisional measure not to “order” such a measure. Article 47 contemplates the parties agreeing to vary the terms of its provisions, including making orders instead of recommendations, but the Parties have not done so here. St. Lucia argues that tribunals have consistently interpreted Article 47 to equate a “recommendation” for a provisional measure with an “order” for a provisional measure and hence give it binding effect.
173. The Committee begins with some preliminary observations. There is no doubt that Article 47 uses the word “recommend” and does not use the word “order.” Moreover, the negotiating history makes clear that the word “recommend” was chosen deliberately instead of the proposed alternative word “prescribe.”¹⁵⁸ However, the negotiating history also made clear that notwithstanding the use of the word “recommend” it was understood that consequences could attach to non-compliance with a recommendation for provisional measures. As Mr. Broches, the Chairman of the Legal Committee, pointed out after the vote that retained the word “recommend” in Article 47, if recommendations were not carried out “the Tribunal would undoubtedly take that fact into account when rendering its award.”¹⁵⁹
174. In the view of the Committee, the issue is not whether the word “recommendation” can be equated with the word “order” or whether one can characterize a recommendation as binding. The issue is whether there can be any consequences for non-compliance with a recommendation for provisional measures under Article 47, whether it is expressed in terms of a recommendation or an order. Quite clearly, a recommendation for provisional measures could not be enforced in the way that an award can be enforced in accordance with Article

¹⁵⁸ Christoph H. Schreuer, *The ICSID Convention - A Commentary*, second edition, para. 47-3, A/CLA-46.

¹⁵⁹ Memorial, para. 146.

54 of the Convention. But that does not mean that it is not binding in the sense that consequences can flow from non-compliance with a provisional measure.

175. The Committee also considers that what is being raised is the correct interpretation and application of Article 47, which is a question of law and legal application, not something within the mandate of an annulment committee. The Tribunal may be right or wrong as a matter of law but that does not of itself constitute an excess of power. As is well recognized the function of an *ad hoc* committee is not an appellate one. Furthermore, in the current situation, where tribunals have differed on the implications of a recommendation for provisional measures, and there is a significant number of decisions where such a recommendation has been treated as an order, even if there were an excess of power, it could hardly be “manifest.”
176. In the result, the Committee concludes that there was no manifest excess of power by the Tribunal in making an “order” for provisional measures. Using the word “order” rather than “recommend” cannot of itself constitute an excess of power, not to mention a manifest excess of power, even though the Tribunal characterized its order as “binding.” The question, which will be considered below, is what a tribunal can do when faced with non-compliance with a recommendation or order for provisional measures.

D. MANIFEST EXCESS OF POWER – SECURITY FOR COSTS

177. RSM claims that the Tribunal manifestly exceeded its powers by making an order for security of costs. It argues that under Article 47 provisional measures may be recommended only to preserve existing rights. No right to costs arises until they have been ordered. Thus, there was no existing right to preserve within the meaning of Article 47. Provisional measures are designed to preserve the *status quo* but the Tribunal disrupted the *status quo* by improving St. Lucia’s position.
178. St. Lucia argues that RSM simply disagrees with the Tribunal’s application of the law; this is not a matter of the Tribunal exceeding its powers. Moreover, the Tribunal makes clear that the preservation of rights can include conditional or future rights a view that has been asserted by other tribunals as well.

179. The Committee is not convinced that ordering a provisional measure that required RSM to post security for costs constituted a manifest excess of power. Article 47 imposes no limitation on the nature of the rights to be preserved and thus does not exclude rights that may be contingent. Thus, the fact that costs have yet to be ordered does not preclude an order for security of those costs. Other tribunals have ordered security for costs as a provisional measure¹⁶⁰ and thus, even if there were doubt about whether the ordering of costs was an excess of power, it could not in any event be manifest.
180. Furthermore, the Tribunal recognized the limited nature of the power it was exercising. It justified doing so because there were “exceptional circumstances.”¹⁶¹ Those circumstances related to the apprehension that RSM would not pay any costs ordered based on the experience with RSM in other cases.¹⁶² There was also the circumstance of an undisclosed third-party funder whose willingness to pay any costs award could not be ascertained.¹⁶³
181. In short, the Tribunal exercised a narrow and circumscribed jurisdiction, based on its powers under Article 47, and the particular circumstances of this case, to require that security be given for any costs that may be awarded against RSM. The Committee sees here no excess of power let alone an excess of power that was manifest.
182. Accordingly, this claim for annulment under Article 52(1)(b) of the Convention is rejected.

¹⁶⁰ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3, June 23, 2015, para. 121, A/RLA-87; *BSG Resources Ltd. v. Republic of Guinea* (ICSID Case No. ARB/14/22), Procedural Order No. 3, November 25, 2015, para. 71, A/RLA-88; *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia* (PCA Case No. 2013-15), Procedural Order No. 10, January 11, 2016, para. 52 A/RLA-92; *Transglobal Green Energy, LLC v. Republic of Panama* (ICSID Case No. ARB/13/28), Decision on the Respondent’s Request for Provisional Measures Relating to Security for Costs, January 21, 2016, para. 30, A/RLA-94; *Eskosol S.P.A in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), Procedural Order No. 3, April 12, 2017, para. 31, A/CLA-54; *Burimi S.R.L. and Eagle Games S.H.A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2 (Provisional Measures Concerning Security for Costs), May 3, 2012, para. 42, A/CLA-15; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) (Annulment Proceeding), Decision on El Salvador’s Application for Security for Costs, September 20, 2012, para. 45, A/CLA-14.

¹⁶¹ Decision on Security for Costs, para. 75.

¹⁶² Decision on Security for Costs, para. 81.

¹⁶³ Decision on Security for Costs, para. 83.

E. MANIFEST EXCESS OF POWER – SUSPENDING THE ARBITRATION AND DISMISSING RSM’S CLAIMS WITH PREJUDICE

183. RSM argues that the lack of any provision in the Convention for sanctioning a failure to comply with a provisional measure was a deliberate omission and thus there was no gap for the Tribunal to fill by invoking Article 44, second sentence, of the Convention. Moreover, the power in the Tribunal under that provision deals with only procedural matters of minor importance. As a result, implying a power under Article 44, second sentence, to suspend the proceedings and then dismissing RSM’s claim with prejudice constitutes a manifest excess of power by the Tribunal within the meaning of Article 52(1)(b) of the Convention.
184. St. Lucia argues that this again is an attempt to show that the Tribunal was wrong in law, which is nothing more than an appeal of the Tribunal’s decision. It further argues that since the Convention and Rules make no provision for the consequences of non-compliance with an order for provisional measures, the Tribunal was perfectly entitled to exercise its power under Article 44, second sentence, and make its own decision on the consequences of non-compliance. Article 44, second sentence, St. Lucia argues, is not limited to procedural matters of minor importance.
185. The Committee recalls that there were three stages involved in the process that led to the Tribunal’s ultimate decision to discontinue the proceedings. First, there was an order by the Tribunal for security for costs with RSM given 30 days to comply. Second, in face of the failure of RSM to provide such security, there was a decision by the Tribunal suspending the proceedings for a period of sixth months. Third, following the six-month period when it was clear that RSM was refusing to provide security for costs the Award was issued by the Tribunal discontinuing the proceedings with prejudice. RSM argues that both the suspension of the proceedings and their discontinuance were a manifest excess of power by the Tribunal.
186. The Committee observes that in its Vacatur Decision the Tribunal had noted that the question of sanctions for non-compliance with an order for provisional measures was not dealt with expressly in the ICSID Convention or its Rules.¹⁶⁴ The Tribunal also noted that

¹⁶⁴ Vacatur Decision, para. 40.

in its Decision on Security for Costs it had stated that the Decision was binding although not in the sense that it was enforceable.¹⁶⁵ The Security for Costs Decision, it said, was predicated on the claims not proceeding until security for costs was provided.¹⁶⁶ On that basis, acting pursuant to Article 44, second sentence, of the ICSID Convention, the Tribunal suspended the proceedings for six months. The rationale of the Tribunal for doing this was the unfairness for the Respondent of having to participate in proceedings where there was a real likelihood that it would be unable to recover any costs awarded to it.

187. The Committee does not consider that reliance on Article 44, second sentence, as the basis for the suspension of the proceedings constitutes a manifest excess of power. That sentence provides:

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.

188. The Parties have debated whether the words “any question of procedure” include the issue of sanctioning for non-compliance with an order for provisional measures. The Committee has already pointed out that an order for provisional measures has consequences, even though such consequences have not been set out in the Convention or the Rules. Control over the arbitral proceedings is in the hands of a tribunal, which in accordance with Article 41, can determine its own competence and in accordance with Article 44 can decide any question of procedure that may arise that is not already regulated by the Convention, the Rules, or the agreement of the parties. Control over the arbitral proceedings, in the view of the Committee, includes control, in accordance with the Convention and the Rules, over whether the proceedings should be suspended. Such a question is a procedural matter concerning the proper conduct of the proceedings that falls, in accordance with Article 44, second sentence, within the power of a tribunal.

189. In the Vacatur Decision, the Tribunal had decided that the proceedings should not be continued until security for costs had been provided. That decision was clearly within the

¹⁶⁵ Security for Costs Decision, paras. 49-50.

¹⁶⁶ Vacatur Decision, para. 55.

competence of the Tribunal. The question is whether the decision to go beyond staying the proceedings and discontinue the proceedings was also a matter of procedure within the meaning of Article 44, second sentence.

190. In the view of the Tribunal, a decision to discontinue the proceedings when there is not going to be compliance with an order for costs is a logical consequence of the decision to suspend. When the condition for lifting suspension will never be met, there is no alternative but to terminate the proceedings. If the right to suspend for failing to provide security for costs is a valid exercise of the power of a tribunal, as the Committee has found, so too discontinuance in the event of failure to provide security for costs must be a valid exercise of that tribunal's power.
191. If a tribunal were unable to discontinue proceedings that had been suspended for refusal to provide security for costs, the case would remain in suspension without any prospect of the suspension ever being lifted. Such a result that keeps the parties in limbo indefinitely hardly comports with the function of a tribunal to manage proceedings in a way that provides fairness to both parties. In such circumstances, discontinuance of the proceedings becomes inevitable. The logic of this is clearly recognized in the proposed revisions to ICSID's Arbitration Rules.¹⁶⁷
192. Accordingly, the Committee sees no manifest excess of power by the Tribunal in deciding to discontinue the proceedings as a result of RSM's refusal to provide security for costs.
193. However, the Tribunal did more than discontinuing the proceedings before it. It dismissed the claims with prejudice. This was not just a discontinuation of the proceedings before the Tribunal because of a failure to provide security for costs. It was effectively a dismissal of the case on the merits, thereby preventing RSM from recommencing proceedings on its claims in the future should it be in a position to provide security for costs.
194. The treatment of this issue in the Award of the Tribunal is not entirely clear. In the body of the Award, the Tribunal states that it intends to dismiss the proceedings with prejudice.

¹⁶⁷ ICSID Amendments, Working Paper # 1, Proposed Arbitration Rule 51(4) and Working Paper # 2, Proposed Arbitration Rule 51(5).

Chapter II of the Award is headed “Dismissal with prejudice” and in paragraph 108 of the Award it is said “the Tribunal unanimously dismisses the case with prejudice” and this is restated in paragraph 138. Notwithstanding these affirmations of the intention of the Tribunal, the formal decision of the Tribunal states, “[a]ll Claimant’s [RSM’s] prayers for relief are dismissed” and no mention is made of the dismissal being with prejudice.

195. Although the formal decision or award of a tribunal in its *dispositif* is normally taken as the only part that is binding, in fact both Parties have treated the Tribunal’s decision as a dismissal with prejudice. Thus, the Committee will treat it as such as well.
196. In the view of the Committee, while the decision to discontinue the proceedings for failure to provide security for costs is a procedural matter, and within the power of a tribunal under Article 44, second sentence, a decision to dismiss the claims with prejudice takes on a different character. Such a decision prevents the claim from being reintroduced at a later stage, even though no decision on the substance of the issues claimed has been made. Dismissing a claim with prejudice is the same as concluding that the claim has no merit. This cannot be just a matter of procedure.
197. The Committee recognizes what the Tribunal was trying to achieve. It was concerned that unless St. Lucia had some security for its costs then it ran the risk of never being able to recover its costs in the event that it was successful. And given RSM’s track record, this appeared to be a real likelihood. Unless the proceedings were dismissed that risk would continue to hang over St. Lucia.
198. While the Committee has some sympathy with the Tribunal’s concerns, although as will be pointed out below they may not be as great as perceived, the Committee does not see any basis for a power in the Tribunal to dismiss the case with prejudice. This is not just a procedural matter affecting this case; it is a substantive matter affecting the merits of the case and the rights of RSM to pursue its claims. It is not just about preventing a claimant from continuing proceedings in which it has failed to provide security for costs. It is about ending the case on its merits. Such a power cannot derive from Article 44, second sentence, nor is there any other basis in the ICSID Convention for a tribunal to dismiss a case on the merits without having heard arguments on the merits. In this regard, the Committee

observes that while the Secretariat's proposed amendments to the ICSID Arbitration Rules provide for discontinuance of proceedings for failing to comply with an order for security of costs, it makes no provision for discontinuance "with prejudice." Dismissal of a claim with *res judicata* prevents a party, irrespective of its future financial situation and willingness to satisfy any order for costs, from ever being able to submit that claim for determination by any tribunal, so creating a risk of denial of justice.

199. In the Committee's view, there is no reason why a claimant that has had proceedings dismissed for failing to provide security for costs should not, after paying the costs associated with those proceedings and properly providing security for costs in new proceedings, have its claims on the merits considered by another tribunal. This would provide fairness for a claimant by preserving the opportunity for the merits of its case to be heard, while ensuring that by ordering security for costs a respondent is protected. In other words, the concerns that led the Tribunal to dismiss the case with prejudice could have been dealt with in other ways rather than by a draconian dismissal of the merits of the case without those merits being heard.
200. In the result, the Committee concludes that while the Tribunal was not manifestly exceeding its powers by discontinuing the proceedings, it was manifestly exceeding its powers by dismissing the claims "with prejudice." Accordingly, the Award has to be partially annulled to preserve the discontinuation of proceedings dealing with RSM's prayers for relief but to abrogate the stipulation that such decision entails the dismissal of RSM's claims "with prejudice."
201. As the Committee has noted, the Tribunal did not use the term "with prejudice" in the *dispositif* of the award. However, it used the term "dismiss" which could imply, based on the reasons provided earlier in the Award (Chapter II Dismissal with prejudice; paragraph 108; the heading 2 Dismissal with prejudice; and, paragraphs 126 to 138), that the term dismissal in the *dispositif* meant dismissal with prejudice. To the extent that it does the

dispositif manifestly exceeds the Tribunal's power and paragraph 184(i) of the Award must be partially annulled.¹⁶⁸

V. COSTS

202. Pursuant to ICSID Administrative and Financial Regulation 14(3)(e), the party applying for annulment, in this case RSM, is solely responsible for making advance payments to the Centre without prejudice to the Committee's eventual decision as to how and by whom the expenses incurred in the annulment proceeding are to be borne.
203. By letter of January 4, 2017, ICSID requested a first advance payment of USD 175,000 from RSM. ICSID confirmed receipt of the first advance on April 10, 2017.
204. By letter of January 16, 2018, ICSID requested a second advance payment of USD 125,000. ICSID confirmed receipt of the second advance by letter of February 16, 2018.
205. By letter of September 18, 2018, ICSID requested a third advance payment of USD 300,000. By letter of September 26, 2018, ICSID confirmed receipt of the requested advance.

A. RSM'S COST SUBMISSIONS

206. In its Reply, RSM requested an award on costs. If its application is successful, it requested that St. Lucia be ordered to pay RSM's legal fees and expenses and ordered it to refund RSM for half of the ICSID and the Committee's costs.
207. If the application is unsuccessful, RSM accepts to pay all its legal fees and expenses, and asks each party be ordered to bear the costs of its own legal fees and expenses and that St. Lucia be ordered it to refund RSM for half of the ICSID and the Committee's costs in light of the novelty and complexity of the case.

¹⁶⁸ The annulment power of Article 52(2) of the ICSID Convention has been treated as including the power of an *ad hoc* Committee to partially annul an award. See para. 62 of the 2016 ICSID Background Paper on annulment. See also pp. 51-52.

208. In its submission on costs of March 22, 2019, RSM indicated that its fees and expenses amounted to GBP 881,903.11 and to GBP 1,357,799.92 with the payments made to the Centre.

B. ST. LUCIA’S COST SUBMISSIONS

209. St. Lucia requests that RSM bear St. Lucia’s costs and legal fees in full and applies the “costs follow the event” principle.¹⁶⁹

210. In its submission on costs of March 22, 2019, St. Lucia indicated that its fees and expenses amounted to a grand total of USD 1,028,226.41.

211. In its submissions on costs of April 5, 2019, St. Lucia indicated that its fees and expenses were reasonable and reiterated its request that the Committee order RSM to bear all the costs and expenses of the proceeding, including St. Lucia’s fees and expenses.

C. THE *AD HOC* COMMITTEE’S DECISION ON COSTS

212. RSM was successful in partially annulling the Award of the Tribunal but was unsuccessful in challenging the composition of the Tribunal on the basis of the alleged lack of impartiality of Dr. Griffith or the order of provisional measures for security for costs and discontinuance of the proceedings.

213. Although RSM was thus partially successful in its application for annulment, it was not successful on the major claim to annul the Award. In these circumstances the Tribunal considers that the costs of the annulment proceeding, including the fees and expenses of the *ad hoc* Committee, and ICSID’s administrative fees and direct expenses, should be borne in more substantial part by RSM. Accordingly, the Committee decides to divide those costs between the Parties on the basis of one third to be paid by St. Lucia and two-thirds by RSM.

214. For the same reasons, the Tribunal decides that that RSM shall bear its own legal costs and expenses and one third of the legal costs and expenses of St. Lucia.

¹⁶⁹ Rejoinder, para. 206.

VI. DECISION

215. For the reasons set forth above, the *ad hoc* Committee decides as follows:

- (1) The Tribunal's Award is partially annulled to the extent that it concludes in Paragraph 184(i) that RSM's prayers for relief are dismissed with prejudice.
- (2) The costs covering the *ad hoc* Committee Members' fees and expenses, the ICSID administrative fees and other direct expenses, as determined by the ICSID Secretariat, shall be borne on the basis of one third to be paid by St. Lucia and two-thirds by RSM.
- (3) RSM shall bear its own legal costs and expenses and one third of the legal costs and expenses of St. Lucia.

[Signed]

Andreas Bucher
Ad hoc Committee Member

Date: April 16, 2019

[Signed]

~~Alexis Mourre~~
Ad hoc Committee Member

Date: April 26, 2019

[Signed]

Donald M. McRae
President of the *ad hoc* Committee

Date: April 18, 2019