

RACHEL S. GRYNBERG, STEPHEN M. GRYNBERG, MIRIAM Z. GRYNBERG, AND
RSM PRODUCTION CORPORATION

Claimants

v.

GRENADA

Respondent

AWARD

Members of the Tribunal

Edward W. Nottingham
Prof. Pierre Tercier
J. William Rowley QC (President)

Secretary of the Tribunal

Milanka Kostadinova

Representing Claimants

Roger A. Jatko
Janice C. Orr
RSM Production Corporation

Daniel L. Abrams
Law Office of Daniel L. Abrams, PLLC

Representing Respondent

D. Brian King
Elliot Friedman
Freshfields Bruckhaus Deringer US LLP

Jan Paulsson
Jonathan J. Gass
Freshfields Bruckhaus Deringer LLP

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1. INTRODUCTION

1.1 The Present Arbitration

1.1.1 On 15 January 2010, Claimants filed a Request for Arbitration (“**Request**”) against Respondent (sometimes also referred to as “**Grenada**”) alleging breach of the 1986 Treaty Between the United States and Grenada Concerning the Reciprocal Encouragement and Protection of Investment (“**Treaty**” or “**BIT**”). The Request was registered by the Secretary-General on 16 March 2010.

1.2 Parties and Tribunal

1.2.1 Claimants in this arbitration are RSM Production Corporation (“**RSM**”) and its three shareholders, Rachel S. Grynberg, Stephen M. Grynberg and Miriam Z. Grynberg who collectively, and in equal shares, own 100% of the outstanding share capital of RSM. RSM is a US corporation organised under the laws of the State of Texas, USA. Rachel S. Grynberg, Stephen M. Grynberg and Miriam Z. Grynberg are citizens of the United States of America with Rachel and Miriam residing in the State of Colorado and Stephen residing in the State of California.

1.2.2 Claimants’ legal representatives are Roger A. Jatko and Janice C. Orr, RSM, 3600 Yosemite Street, Suite 900, Denver, Colorado 80237-11830, USA, and Daniel L. Abrams, Law Office of Daniel L. Abrams, PLLC, 2 Penn Plaza, Suite 1500, New York, NY 10121, USA.

1.2.3 Respondent is Grenada (“**Grenada**”).

1.2.4 Respondent’s legal representatives are Jan Paulsson, D. Brian King, Jonathan J. Gass and Elliot Friedman, Freshfields Bruckhaus Deringer US LLP, 520 Madison Avenue, 34th Floor, New York, NY 10022, USA, and Freshfields Bruckhaus Derringer, LLP, 2 rue Paul Cézanne, 75008 Paris, France.

1.2.5 On 5 August 2010, the Tribunal was constituted, comprising Prof. Pierre Tercier (Switzerland), Edward W. Nottingham (USA) and J. William Rowley QC (Canada), with the latter as its President.

1.3 Initial Proceedings

- 1.3.1 On the same date, Respondent filed: (a) a Request for Security for Costs (“**Security Application**”); and (b) an Objection under Arbitration Rules 41(5) (“**Objection**”).
- 1.3.2 By letter dated 13 August 2010, the Tribunal directed Claimants to provide their written response to the Security Application and to the Objection (“**Response**”), if advised, by 31 August 2010. The parties were also advised that the Tribunal envisaged being able to reach a decision on the Security Application on the basis of one round of written submissions and without the need for oral argument.
- 1.3.3 On 30 August 2010, Claimants filed separate responses to Grenada’s Security Application and its Objection.
- 1.3.4 On 22 September 2010, the Tribunal advised the parties that it did not require a second round of written submissions on the Objection, but that it would hear oral argument on the issues raised thereby on the occasion of the parties’ first meeting with the Tribunal scheduled for 25 October 2010 in Washington, DC.
- 1.3.5 On 14 October 2010, the Tribunal issued its Decision denying Respondent’s Security Application.
- 1.3.6 On 25 October 2010, the parties presented their respective oral submissions on the Objection at the first session held at the International Monetary Fund in Washington, DC, USA.¹
- 1.3.7 At the first session, Claimants were represented in person by Ms Janice Orr. By agreement of the parties and with permission from the Tribunal, Messrs Roger Jatko and Daniel Abrams, who also represent Claimants, and Mr Jack Grynberg, CEO of RSM, attended by teleconference hook-up.

¹ These oral submissions were recorded verbatim in the certified transcript prepared by David A. Kasdan, B&B Reporters, to which reference is made hereafter.

- 1.3.8 At the first session, Respondent was represented in person by Messrs Brian King and Elliot Friedman. The Hon. Mr Rohan Phillip, Attorney General of Grenada, was also in attendance.
- 1.3.9 It was agreed at the first session by the parties, *inter alia*, that the Tribunal had been properly constituted on 5 August 2010; that none of the parties had any objection to the Tribunal's members; that the language of the proceeding was English; and that these proceedings, applying Article 44 of the ICSID Convention, were to be conducted in accordance with the ICSID Arbitration Rules (English Text) of 2006.

1.4 **Background to the Present Arbitration**

- 1.4.1 Claimants' Request asserts claims under Treaty. The essence of these claims is that Grenada breached a number of its Treaty obligations to Claimants by reason of its dealings with Claimants in relation to a written petroleum exploration agreement between one of the Claimants, RSM, and Grenada, dated 4 July 1996 ("**Agreement**").
- 1.4.2 The Agreement, in summary, provides for RSM to apply for, and for Grenada to grant, a petroleum exploration licence within 90 days of the Agreement's effective date. On 14 April 2004, RSM applied for an exploration licence. On 27 April 2004, Grenada denied the application as untimely and thereafter, on 5 July 2005, purported to terminate the Agreement. This gave rise to a contractual dispute between the parties to the Agreement.
- 1.4.3 The Agreement's dispute resolution clause calls for disputes arising thereunder to be referred to arbitration under the ICSID Convention, and on 31 August 2004, RSM submitted a request for arbitration ("**Initial Request**"). RSM's Initial Request was thereafter registered by ICSID and captioned as *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14 ("**Prior Arbitration**"). Following the exchange of pleadings and a five-day hearing on the merits (in London in June 2007), a three-member ICSID tribunal ("**Prior Tribunal**") rendered a final award ("**Prior Award**") on 13 March 2009, dismissing all of RSM's substantive claims and all of Respondent's counterclaims.

- 1.4.4 Amongst other things, the Prior Award dealt with RSM’s contractual rights in relation to the Agreement, in the following declaration:

“The Tribunal declares that the Respondent [Grenada] did not breach any of its obligations towards the Claimant [RSM] under their Agreement of 4 July 1996 in failing to issue an Exploration Licence to the Claimant, such obligation having lapsed on 28 March 2004 and the Agreement having been lawfully terminated on 5 July 2005 so that the Respondent had thereafter no further substantive contractual obligations to RSM.”²

- 1.4.5 RSM applied for annulment of the Prior Award pursuant to Article 52 of the ICSID Convention. The annulment application remains outstanding. Although it has been fully briefed, RSM has declined to pay the advance on costs requested by the Centre on 13 January 2010, and those proceedings are currently suspended. RSM having not cured its default by 29 September 2010, the *ad hoc* Annulment Committee (“**Committee**”) may discontinue the proceedings at any time.

2. RELEVANT LEGAL TEXTS

2.1 The ICSID Arbitration Rules

- 2.1.1 ICSID adopted Arbitration Rule 41(5) in 2006, in response to criticism from certain states that no procedure existed for the expeditious dismissal of patently unmeritorious claims.³ Rule 41(5) provides, in pertinent part, that:

“Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, [...] file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible

² Prior Award, at ¶ 503, Exhibit R-1.

³ Antonio R. Parra, *The Development of the Regulations and the Rules of the International Centre for Settlement of Investment Disputes*, 41 INTERNATIONAL LAWYER, 47, 56 (2007), Exhibit RLA-53.

the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection [...].”

2.1.2 If a Tribunal upholds such an objection, it renders an award and terminates the case pursuant to Rule 41(6), which provides:

“If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.”

2.2 **The ICSID Convention**

2.2.1 Article 51 of the Convention provides, in relevant part, that:

“(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovering some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.”

2.2.2 Article 53 of the Convention provides that:

“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention. Each party shall abide by and comply with the terms of the award except to the extent that

enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

2.3 **The Grenada-United States Bilateral Investment Treaty (BIT)**

2.3.1 Those provisions of the Treaty considered to be pertinent by Claimants provide that:⁴

*“Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law [...]. Each Party shall observe any obligation it may have entered into with regard to investments.”*⁵

*“Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization except for a public purpose; in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2).”*⁶

2.4 **The Agreement**

2.4.1 It is common ground that the Agreement provided for the arbitration of all disputes, differences or questions between the parties with respect to any matter out of or relating to the Agreement by a three person ICSID arbitration panel, pursuant to the ICSID Convention and its Arbitration Rules.

2.4.2 Article 26.4 (b) of the Agreement provides:

⁴ Request, at ¶ 10.

⁵ Art II(2), Treaty, Exhibit C-7.

⁶ Art III(1), Treaty, Exhibit C-7.

“The award resulting from arbitration shall be final and binding on the parties.”

3. CLAIMANTS’ REQUEST FOR ARBITRATION

3.1 Nature of the Present Dispute

3.1.1 Claimants say that the present dispute arises under the terms and conditions of the Agreement; that the Agreement clearly describes an “investment” within the jurisdiction of ICSID, and that Claimants, through RSM, have to date made an extensive investment in Grenada.

3.2 Alleged Breaches of the Treaty

3.2.1 Claimants rely on five alleged breaches of the Treaty; summarised under descriptive sub-headings below.⁷

Expropriation

3.2.2 Claimants argue that, by violating the Agreement and precluding RSM’s filing of its application for an exploration licence, Grenada expropriated their investment. Should it be determined that there was not an actual taking, Claimants say that Grenada’s denial of RSM’s application and the resultant termination of the agreement is a *de facto* expropriation. Further, Claimants also contend that Grenada’s wrongful termination of the Agreement effectively, if not actually, expropriated RSM’s investment without compensation, which clearly frustrates the letter and spirit of the Treaty.

Arbitrary, Discriminatory and Illegal Conduct

3.2.3 Claimants submit that Grenada’s termination of the Agreement can only be justified by its contrived counting procedure (in ascertaining the time limit for a licence application) which defies fact, logic and the law. Its failure to

⁷ There is a slight uncertainty as to whether Claimants’ allege breach of Article II (1) (most favoured nation provisions) of the Treaty. In paragraph 11 of their Request, Claimants list the protections provided under the Treaty, and include *inter alia*, the MFN protections of Article II (1). Claimants state that they discuss in later paragraphs “Respondent’s violations of these provisions”, in reverse order to the list. However, there is no apparent subsequent discussion of Respondent’s breach of the most favoured nation provision. Nor, when they quote from what they consider to be the most pertinent provisions in the Treaty, do they quote from or set out the provisions of Article II(1). Nevertheless, in the final analysis, we find that nothing turns on this uncertainty.

respond to RSM's letter of 27 February 2004 for two months, until the potential deadline had passed, is said to have been unreasonable, and demonstrates Grenada's intent to pursue other avenues for the exploration of its offshore hydrocarbon reserves, to the detriment of Claimants' investments. Such actions are claimed to have been arbitrary, discriminatory and illegal.

Breach of Agreement Contravenes International Law

- 3.2.4 Claimants says that Grenada's position, that RSM's application for an exploration license was untimely, is contrary to the terms of the Agreement, international law and Grenadian law, and constitutes a breach of the provisions and spirit of the Treaty.
- 3.2.5 Claimants also contend that RSM's letter of 12 January 2004, which it describes as a "courtesy and non-binding notification of the cessation of the *force majeure*," was not an effective notification of the conclusion of the *force majeure* (and did not restart counting for the 90-day period for the licence application) and that Grenada's assertion that RSM's license application was untimely is ineffective, because under relevant international and Grenadian law, time is of the essence only if it is explicitly so stated in the contract, which is clearly not the case as regards to the Agreement.

Full Protection and Security

- 3.2.6 Claimants assert that Respondent failed to provide their investment with full protection and security under the Treaty by failing to respond to RSM's letter of 27 February 2004 (a second notification of the conclusion of the *force majeure* period). Grenada is said to have arbitrarily rejected RSM's application, in breach of the Agreement, and that it further breached its obligation to provide full protection and security by failing to provide RSM any leeway with its calculation of the filing deadline "which would have been in conformity with the *force majeure* provisions of the Agreement."
- 3.2.7 Claimants argue that, contrary to the express language of the Treaty, Grenada nullified Claimants' investment at the earliest possible time afforded to it. In doing so, it frustrated the purpose of the Treaty.

Unfair and Inequitable Treatment

3.2.8 Finally, Claimants say that Grenada's denial of RSM's application for an exploration license constituted a breach of the fair and equitable standard provided for in the Treaty. Claimants say that Grenada and its agents were placing personal gain over their obligations under the Treaty and by these actions violated the terms of the Treaty.

4. RESPONDENT'S OBJECTION

4.1 Introduction

4.1.1 Grenada requests an award dismissing all of Claimants' claims in this case under ICSID Arbitration Rule 41(5), asserting that the legal and factual contentions on which the present claims depend have already been fully litigated in the Prior Arbitration.

4.1.2 Grenada argues that all of Claimants' Treaty claims flow from allegations of breach of contract (Claimants specifically state that "This investment dispute arises under the terms and conditions of the "Petroleum Agreement."")⁸ However, those contractual claims were fully litigated, resulting in a Prior Award that not only dismissed such claims, but also found that RSM - not Grenada - had breached the Agreement. Put differently, the essential predicate to the present Treaty claims has already been determined, conclusively and adversely to Claimants.

4.1.3 Grenada notes that Article 53 of the ICSID Convention provides that ICSID awards are final, binding and not subject to appeal or review apart from the internal remedies provided by the Convention itself. However, the claims advanced here attempt to circumvent that basic principle and constitute an abuse of process.

⁸ Request, at ¶ 5, Exhibit R-2.

4.2 The Applicable Standard

4.2.1 Since Rule 41(5) was adopted, two publicly available decisions have interpreted its “manifestly without legal merit” standard.⁹ According to those decisions, a Rule 41(5) objection must raise a “legal impediment to a claim and not a factual one.” Such legal impediment may go to either jurisdiction or the merits. In either case, a respondent must “establish its objection clearly and obviously with relative ease and dispatch.” Put another way, “the exercise may [...] be complicated; but it never should be difficult.” Assuming these are the applicable standards, Respondent says that they are satisfied.

4.2.2 Respondent accepts that it is not the function of a Rule 41(5) objection to dispute a claimant’s factual allegations and says it does not do so here. Grenada can and does, however, dispute the legal effect that Claimants attribute to certain events. For example, the Request alleges that on 12 January 2004, RSM sent Grenada a notice that *force majeure* no longer applied. Grenada accepts that the letter was sent, but it need not accept Claimants’ contention that the letter was “non-binding” and “was not [...] effective.”¹⁰ Those are legal assertions - indeed, legal assertions that the Prior Tribunal rejected.

4.2.3 Furthermore, Grenada says that, to the extent that the “legal impediments” to the current claims stem from factual findings by the Prior Tribunal, it is entitled to rely on such facts. The Prior Award is binding and it is accepted that a subsequent tribunal may consider the content of a prior judgment or award when ruling on a claim of *res judicata* or similar doctrines.

4.3 The Prior Arbitration

4.3.1 Respondent submits that the essential question in the Prior Arbitration was whether RSM’s application for a petroleum license made on 13 April 2004 was timely and made in accordance with the Agreement.

⁹ *Trans-Global Petroleum, Inc., v Jordan* ICSID (Case No. ARB/07/25), Decision of 12 May 2008 (“*Trans-Global*”), Exhibit RLA-30; and *Brandes Investment Partners LLP v Venezuela* (ICSID Case No. ARB/08/3), Decision of 2 February 2009 (“*Brandes*”), Exhibit RLA-7.

¹⁰ Request, at ¶¶ 6 and 18.

- 4.3.2 Respondent notes that the Agreement provided for RSM to apply for, and Grenada to grant an exploration license within 90 days of the Agreement's effective date. It says RSM invoked *force majeure* 14-days after the Agreement was signed and it did not apply for an exploration license until some eight years later.
- 4.3.3 As determined in the Prior Arbitration, RSM sent a notification to Grenada's Prime Minister, on 12 January 2004, nearly eight years after the effective date of the Agreement, "to remove the *force majeure*" ("**First Letter**").¹¹ RSM sent a second letter on 27 February 2004, this time to the Permanent Secretary of the Ministry of Finance ("**Second Letter**"). Unlike the First Letter, the Second Letter included a purported computation of the 90-day period within which the exploration license was to be applied for and granted. RSM's calculation assumed, amongst other things, that the *force majeure* period ended with the sending of the 27 February letter - not the 12 January letter - and thus, that the 90-day period recommenced on 27 February 2004 and would end on 10 May 2004.
- 4.3.4 Grenada, which had responded to the 12 January letter to the Prime Minister, did not respond to the 27 February letter to the Permanent Secretary.
- 4.3.5 Grenada says that its silence (until late April) is explained by the fact, not mentioned in the Request, but found as a fact by the Prior Tribunal after considering all the evidence, that the Second Letter was not actually delivered to the Ministry of Finance until 14 April 2004.¹²
- 4.3.6 RSM prepared an application for an exploration license, dated 6 April 2004. On 27 April 2004, Grenada denied RSM's license application on the grounds that it was untimely. After further correspondence, Grenada terminated the Agreement on 5 July 2005.

¹¹ Grynberg-Mitchell letter (12 January 2004), Exhibit R-6.

¹² Prior Award, at ¶¶ 181-86, Exhibit R-1.

4.4 The Prior Award

- 4.4.1 Although the Prior Award dealt with many issues, including a jurisdictional objection and counterclaims by Grenada, Grenada says that one paragraph from the *dispositif*, entirely precludes all the claims made by Claimants in the current arbitration:

*“The Tribunal declares that the Respondent [Grenada] did not breach any of its obligations toward the Claimant [RSM] under their Agreement of 4 July 1996 in failing to issue an Expiration License to the Claimant, such obligation having lapsed on 28 March 2004 and the Agreement having been lawfully terminated on 5 July 2005 so that the Respondent had thereafter no further substantive contractual obligations to RSM.”*¹³

- 4.4.2 Respondent notes that in reaching this conclusion, the Prior Tribunal made the following findings on issues that the parties had contested with evidence, legal authority and argument:

- (a) RSM’s 12 January 2004 letter to the Prime Minister had terminated the period of *force majeure* and re-commenced the running of the 90-day period within which RSM had to apply for the exploration license.¹⁴
- (b) The 14-days that had elapsed between the signing of the Agreement and RSM’s invocation of *force majeure* counted towards the 90-day limit.¹⁵
- (c) Therefore, the 90-day period had ended on 28 March 2004.¹⁶

¹³ Prior Award, at ¶ 503.

¹⁴ Prior Award, at ¶¶ 173, 343-45.

¹⁵ Prior Award, at ¶¶ 343-45.

¹⁶ Prior Award, at ¶ 345.

- (d) RSM had applied for a license on either 13 or 14 April 2004 (being the date of its receipt by Grenada), some two weeks after the 90-day period had expired.¹⁷
- (e) The relevant clause of the Agreement, properly construed under Grenadian law, made RSM's compliance with the 90-day limit a "condition" of the contract, which is the term of art in English law for an obligation whose breach permits the other party to terminate the contract.¹⁸
- (f) RSM's compliance with the 90-day limit was also a condition precedent to all of Grenada's subsequent obligations under the Agreement. This was an alternative basis for concluding that Grenada had no further obligation to RSM once RSM failed to make a timely application.¹⁹

4.5 Allegations of Treaty Breach

4.5.1 Grenada says that Claimants assert that Grenada violated the Treaty in five respects:

- (a) expropriating Claimants investments without compensation;
- (b) acting in an "arbitrary, discriminatory and illegal fashion";
- (c) breaching the Agreement in ways contrary to international law;
- (d) failing to provide full protection and security; and
- (e) failing to treat Claimants fairly and equitably.

4.5.2 Respondent says that each of these claims depends on RSM's assertion that, by failing to grant RSM's application for an exploration license, Grenada breached the Agreement - contrary to the *dispositif* of the Prior Award. It

¹⁷ Prior Award, ¶¶ 203, 345.

¹⁸ Prior Award, ¶ 377.

¹⁹ Prior Award, ¶ 377.

argues that these claims also depend on the proposition that the Prior Tribunal was incorrect about each of the factual and legal findings set out in paragraph 4.4.2 above.

- 4.5.3 Grenada points out that Claimants' unlawful expropriation claim is headed "Grenada's Violation of the Agreement Constitutes an Expropriation in Explicit Violation of the Terms of the Treaty."²⁰
- 4.5.4 Claimants' claim concerning arbitrary, discriminatory and illegal action attacks Grenada's "contrived counting procedure" with respect to the 90-day period and criticises Grenada for not responding until April to the letter dated 27 February 2004 (which the Prior Tribunal found had not been delivered until 14 April 2004).
- 4.5.5 As regards Claimants' assertions of violation of international law, Respondent points out that the heading of this claim reveals its dependence on contractual breach - "Grenada's Breach of the Agreement is Contrary to International Law."²¹ The text also sets out a series of contentions that the Prior Award expressly rejected.
- 4.5.6 Claimants' case based on full protection and security is likewise said to depend on alleged breaches of the Agreement, and the contractual essence of Claimants' case for breach of the fair and equitable treatment standard is said to be captured in the opening sentence of that claim which asserts that "Respondent failed to treat Claimants fairly and equitably when it denied the application."
- 4.6 **Claims Are Manifestly Without Legal Merit**
 - 4.6.1 Grenada advances four arguments in support of its contention that Claimants' claims are manifestly without legal merit.
 - 4.6.2 First, it says that the essential predicate of every claim in the Request is that the Agreement required Grenada to grant RSM's April 2004 license

²⁰ Request, at ¶ 25.

²¹ Request, at ¶¶ 19-20.

application. It follows that, if Claimants cannot prove that Grenada breached the Agreement by denying the application, then all of their claims must fail. As to this, it asserts that the municipal-law issues have already been referred to and decided by the agreed forum. The Prior Tribunal had jurisdiction to construe the Agreement definitively, and it did so, finding against RSM on all relevant factual and legal contentions.

- 4.6.3 Respondent thus says that the Tribunal may not take on the task of deciding whether Grenada breached the Agreement. Indeed, reopening the findings of the Prior Tribunal would violate Article 53 of the ICSID Convention: “the award shall be binding on the parties and not shall be subject to any appeal to any other remedy except those provided for in this convention.”
- 4.6.4 Secondly, Respondent asserts that Claimants’ claims must additionally be dismissed under the doctrine of collateral estoppel. Under that doctrine a question may not be re-litigated if, in a prior proceeding: (a) it was put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.
- 4.6.5 Collateral estoppel, it is said, is well established as a general principle of law applicable in international courts and tribunals being a species of *res judicata*.
- 4.6.6 As framed by the *Amco II* Tribunal, chaired by Professor Higgins (as she then was), the general principle is that:

“[A] right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.”²²

- 4.6.7 Grenada says that the Prior Tribunal’s findings are entitled to such preclusive effect and its conclusions bind both RSM, as a party to the Prior Arbitration, and RSM’s three shareholders, who are privies of RSM, and whose claims in this proceeding are entirely derivative of and dependent on RSM’s alleged

²² *Amco Asia Corporation v Republic of Indonesia* (ICSID Case No. ARB/81/1), Resubmitted Case, Decision on Jurisdiction, 10 May 1988, at ¶ 30.

rights under the Agreement. Grenada notes that the latter point is clearly made in the Request, where it is stated that, “Claimants, through RSM, have to date made an extensive investment in Grenada.”²³

4.6.8 Grenada accepts that RSM is a juridical entity with legal personality separate from its three shareholders. However, it says that this does not alter the analysis for two reasons. First, the shareholders’ putative investment is a contract to which RSM is a party and the shareholders are not; the shareholders seek compensation for damages that they allegedly have suffered indirectly through RSM for violations of RMS’s legal rights. Second, the three individual Claimants collectively own 100% of RSM’s stock, and there is nothing unfair in holding them to the result of RSM’s litigation. Indeed, if the individual Claimants wish to claim standing on the basis of their indirect interests in corporate assets, they must be subject to defences that are available against the corporation - including collateral estoppel.

4.6.9 Grenada thirdly, argues that the Treaty’s fork-in-the-road clause precludes the current proceeding.

4.6.10 Article VI(3) of the Treaty gives the investor the option of submitting the dispute to ICSID, rather than in accordance with a previously agreed and applicable procedure. The investor has thus been given a choice, but it must make that choice once and live with it:

*“Either party to the dispute may institute proceedings before the Centre provided: (i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures ...”*²⁴

4.6.11 Here, says Grenada, Claimants concede that the claims raised in the two proceedings - for breach of contract (the Agreement) in the Prior Arbitration and the breach of Treaty in the present proceeding - are part of the same

²³ Request, at ¶ 5, Exhibit R-2.

²⁴ Treaty, Art. VI(3)(a) - (i), Exhibit R-2.

dispute: “This Request involves a legal dispute, as the issue is whether Grenada’s action constitute a breach of the Treaty and Agreement.”²⁵

4.6.12 Similarly, after recounting the events of April 2004, the Request notes that: “Subsequent attempts by RSM itself to amicably resolve the matter were unsuccessful.”²⁶

4.6.13 However, RSM never tried to resolve the distinct BIT dispute amicably. The first time RSM even mentioned the instant claims to Grenada was in the Request.

4.6.14 Article VI(3)(i) of the Treaty is intended to prevent the re-litigation of disputes. As cases such as *Vivendi* (first annulment committee) and *ATA Construction* confirm, that objective is thwarted if claimants can bring successive cases that, despite raising formally distinct legal causes of action, are *co-extensive*, share the same *fundamental basis*, or derive *from the same origin or source*. That is said to be precisely the situation here - Claimants’ Treaty claims being based entirely on the same events that underlay the breach of contract claims submitted to the Prior Tribunal.

4.6.15 Finally, Grenada says that the claims here advanced by Claimants are an attempt to circumvent the basic principles enshrined in Article 53 of the ICSID Convention – *i.e.*, that ICSID awards are final, binding and not subject to appeal or review apart from the internal remedies provided by the Convention itself. As such Claimants’ claims constitute a clear abuse of process.

4.6.16 And, although there is no express provision in the ICSID Convention giving the Tribunal the power to dismiss this proceeding for abuse of process, Grenada says that the Tribunal has the inherent power to do so to protect the integrity of its own process. Here, Respondent relies on the fact that RSM previously argued, successfully, in favour of such inherent powers:

“The Committee agrees with the Applicant that international courts and tribunals have certain inherent

²⁵ Request, at ¶ 27.

²⁶ Request, at ¶ 9.

*powers which permit them to exercise powers which may go beyond the express terms of their constitutive instruments.*²⁷

4.6.17 Respondent points out that notable commentators from common-law jurisdictions have accepted that successive proceedings should be dismissed under the doctrines of abuse of process or abuse of rights, even where the requirements of *res judicata* may not have been met; this is particularly true if the successive proceedings are vexatious.

4.6.18 Grenada thus contends that the purpose and spirit of Article 53 of the ICSID Convention, which precludes any appeal or remedy, other than those explicitly set forth in the Convention, is thwarted when claimants empanel successive ICSID tribunals to hear their case, hoping that one panel will eventually side with them. The ICSID system likewise does not permit subsequent tribunals to sit in judgment of other ICSID tribunals. To allow Claimants to proceed with this arbitration would force this Tribunal to act in such ways, forcing it also to be complicit in Claimants' abuse.

5. CLAIMANTS' OPPOSITION TO THE OBJECTION

5.1 Overview of Opposition

5.1.1 Claimants say that Grenada's Objection cannot succeed because it fails to show that any of the claims are manifestly without legal merit.

5.1.2 They note that Grenada relies exclusively, as the basis for its Objection, on findings in the Prior Award that Grenada was not in breach of the Agreement. However, Claimants contend that there is nothing inconsistent with finding that Grenada complied with the terms of its Agreement with RSM, yet violated the Treaty, it being well settled that BITs provide an independent source of rights to investors which can, depending on the BIT provisions or the precise facts, expand an investor's rights over and above what is contained in any contract. Thus, a finding that there has been no breach of the

²⁷ *RSM Production Corporation v Grenada* (ICSID Case No. ARB/05/14), Annulment Proceeding, Decision on RSM Production Corporation's Application for a Preliminary Ruling of 29 October 2009 (7 December 2009), at ¶ 20, Exhibit R-10.

Agreement does not stop an ICSID tribunal from determining whether or not there has been a violation of an applicable BIT.

- 5.1.3 In the present case, the Prior Arbitration did not involve any allegations of Treaty violations. Moreover, the three individual Claimants in this case were not part of the Prior Arbitration. More importantly, the Prior Tribunal was not asked to, nor did it, examine issues pertaining to corruption. However, it is now clear that Grenada's reasons for denying RSM a licence were based on the corrupt motives of individual officials entrusted with Grenada's natural resources, specifically Senator Gregory Bowen, the former Minister of Energy and Deputy Prime Minister.²⁸
- 5.1.4 Claimants assert that the evidence of corruption they will lead will show that RSM was forced out because Global Petroleum Group Ltd ("**Global Petroleum**"), bribed Senator Bowen. They say that Grenada's corrupt motives for replacing RSM (a non-bribe-giver) with Global Petroleum (a bribe-giver) constitutes a clear violation of the Treaty provisions.
- 5.1.5 Finally, unlike the contract case before the Prior Tribunal, which was decided under Grenadian law, these proceedings involve, and this Tribunal will be required to resolve, different issues and interpret different law.

5.2 **Alleged Evidence of Corruption**

- 5.2.1 Claimants allege that Global Petroleum was founded in December 2003 (by Lev Model, a convicted villain of Russian origin, Lev Korshagin, a Russian attorney, and Eduardo Vasilev) and that, within months of its formation, Grenada was taking active steps to get out of its Agreement with RSM.
- 5.2.2 They say that RSM learned of Global Petroleum's existence for the first time in August 2005 when Lev Korshagin contacted RSM's Chief Executive, Jack Grynberg, in an effort to settle the Prior Arbitration. Mr Korshagin, who advised that he was a director of Global Petroleum, a Grenadian oil and gas

²⁸ Claimants say that "RSM did not raise issues of corruption in the Prior ICSID Proceeding because almost all of the evidence of Grenada's corruption was uncovered by RSM after commencement of the Prior ICSID Proceeding, with most of the discoveries coming at or after the June 2007 hearing in the Prior ICSID Proceeding." Opposition, ¶ 8.

company, suggested that he and Mr Grynberg meet in London to resolve any problems RSM had in Grenada. He further explained that “if his group could participate as a partner in RSM’s offshore Grenada licence, his group would work everything out.” He assured Mr Grynberg of a positive outcome because he claimed that “his group ‘owns’ the Government of Grenada.”

- 5.2.3 Thereafter, Mr Grynberg received a call from Michael Melnicke, an ambassador-at-large in the United States, hired by Grenada. Mr Melnicke offered to be a peace maker with Grenada, and sought compensation for his efforts by way of a proposed substantial overriding royalty based on the amount of oil and natural gas that would ultimately be produced pursuant to the exclusive RSM/Grenada Agreement.
- 5.2.4 In the course of their many conversations, Mr Melnicke revealed to Mr Grynberg in early 2006 that two business tycoons with roots in Russia, Len Blavatnik and Mikhail Fridman, had bribed Senator Bowen so that their group could develop the petroleum reserves believed to exist in the offshore Grenadian territory. Messers Blavatnik and Fridman promised to pay additional bribes to Grenadian Government officials in the future as well as to pay all Grenada’s legal fees in connection with the Prior Arbitration.
- 5.2.5 Mr Grynberg calculated that the overriding royalty that Mr Melnicke was seeking was worth at least US\$ 10,000,000 and that most, if not all of that money, would end up in the pockets of individual Grenadian Government officials.
- 5.2.6 In December 2007, William J. Leyton, a California resident who was incarcerated at the time, provided a declaration to RSM that confirmed Mr Melnicke’s admission that he was hoping to pay-off Grenadian government officials, including the then Prime Minister Mitchell, with the overriding royalty he had hoped to receive from RSM.
- 5.2.7 During the hearing in the Prior Arbitration, Senator Bowen testified that Global Petroleum had financed the Arbitration and that it had entered into an agreement with Grenada pertaining to this funding arrangement. He further

testified that he had negotiated the funding agreement with Messers Vasilev and Korshagin in September 2005.

- 5.2.8 The minutes of certain official Grenadian Government proceedings which have been made public show that Global petroleum had, by July 2007, invested over US\$ 4,000,000 into the legal defence of the Government of Grenada in the Prior Arbitration. Claimants have also discovered evidence that Mr Lev Model paid a cheque for US\$ 2,500,000 to the Government of Grenada dated 12 October 2005.
- 5.2.9 In October 2007, RSM learned that Mr Model, as an illegal bribe payment to Senator Bowen, paid the college tuition of Senator Bowen's daughter. In June 2008, the Mitchell Government issued Grenada's offshore exploration licence to Global Petroleum just before the July 2008 elections. The licence has since been suspended by the present Government.

5.3 **Claimants' Treaty Claims**

Correct Approach for the Tribunal

- 5.3.1 Relying on the *Brandes* Tribunal's analysis of the constitutive elements of an Article 41(5) objection, Claimants argue that the Tribunal must assume that the facts they allege are true. Accordingly, the Tribunal must determine whether, if the alleged facts are proven, they would constitute a violation of the Treaty. If so, then this case must proceed to the merits.

Inequitable and Discriminatory Treatment

- 5.3.2 Claimants contend that the corrupt relationship between Global Petroleum and Grenada's former high level officials, if proven, supports their position that the corruption lead to the breaches of the Treaty. This is because Grenada cannot, in a manner consistent with the Treaty, use a hyper-technical procedure (Grenada's so-called contrived counting exercise) as a pretext for terminating its relationship with RSM (even if *arguendo* the terms of the Agreement permitted it to do so) when the real reason for terminating was the desire of high-level former Grenadian officials to do bribe-induced business

with a company founded by a convicted felon. This is precisely the type of inequitable, discriminatory conduct that is forbidden by the Treaty.

- 5.3.3 Claimants say that Grenada's entire argument rests on the false premise that the Prior Arbitration conclusively resolved all issues in this Arbitration. Claimants contend that this must be wrong where the causes of action are different in the two proceedings. Moreover, breach of contract issues do not dispose of BIT issues because a party may be in compliance with an international contract but still run afoul of a BIT.
- 5.3.4 Here, the current arbitration is necessary because Grenada chose to conceal the corrupt relationship between Global Petroleum and its former Government officials.

Collateral Estoppel

- 5.3.5 Claimants accept that Grenada's description of the requirements for collateral estoppel are correct but says that it has misapplied them. They assert that collateral estoppel cannot apply in this instance because the question 'put in issue' in the Prior Arbitration arose out of the Agreement, but no Treaty question was dealt with. Moreover, the question of corruption which is at the heart of this arbitration was not considered in the Prior Arbitration.
- 5.3.6 Claimants also say that Grenada's collateral estoppel argument obscures the independent interests that the three individual Claimants possess under the Treaty. The fact that their investment was made through RSM does not alter the individual Claimants' standing under the Treaty.

Fork-in-the-Road

- 5.3.7 As a threshold matter, Claimants say that even if Grenada's fork-in-the-road analysis was correct, it would not bar the individual Claimants' claims, who were not parties to the Prior Arbitration. Grenada's argument that the same investor "cannot change its mind" does not apply to individual investors who did not make any choice in the first instance.

5.3.8 Claimants rely on the views expressed by the first *ad hoc* Annulment Committee in *Compania de Aguas del Aconquija SA et al. v. Argentina* for the proposition that a tribunal may not ignore alleged treaty violations because another tribunal has determined contractual issues.

5.4 Claimants' Supplementary Oral Submissions

5.4.1 During the course of Claimants' oral submission on 25 October 2010 in Washington, Ms Orr said that Claimants were not claiming that they could re-litigate the decision that was before the Prior Tribunal: "We are not trying to litigate - - re-litigate a breach of contract action."²⁹

5.4.2 Nevertheless, she also took the position that "this panel is [not] bound by the prior panel," and that "the facts, as developed in this case, could lead to a different conclusion." Specifically, it was her position that the facts as developed in this case could and would lead to a different conclusion as to whether the allegations of fact as set forth by Grenada were reasonable or correct. By way of example, it would open to the Tribunal to assess and determine whether the Second Letter "was not received by them for two weeks, if that makes any sense."³⁰

5.4.3 The rationale for this approach is that, armed with the facts of corruption now alleged, the Tribunal would be entitled to reach different conclusions from those reached by the Prior Tribunal on the facts - such as whether Grenada received the Second Letter only after the 90-day period had expired.

5.4.4 Ms Orr as well confirmed that Claimants were indeed asserting five Treaty violations.³¹

5.4.5 When also asked by the Tribunal to identify what acts or measures of Grenada (in addition to those set out in their Request) that Claimants considered to constitute breaches of the Treaty standards, Ms Orr responded as follows:

²⁹ Transcript, 157/7-15, 158/13-15.

³⁰ Transcript, 148/15-159/8.

³¹ Transcript 174/18-175/5.

MS ORR: "Well, those will be developed more fully in our subsequent submissions. The - - what occurred is that Global Petroleum came in and paid money to some of the prior Government officials and obtained their agreement get the licenses that we held at that time, or we would have held.

PRESIDENT ROWLEY: You would have held if you took certain steps under the contract to apply for them?

MS ORR: Correct.

And it was in the contract the Agreement was pretty much that the license applications were fairly much of a pro forma thing, that Grenada was to grant the licenses and that - - but that you had to apply for that, and that's when they claimed we were untimely in filing them.

But during the time Global Petroleum came in, and they made the determination that they you were going to have Global Petroleum do the drilling, which has apparently turned out not to be the case, but at that time it is our understanding that Global Petroleum said they would take care of the finances, financial arrangements for Grenada to fight RSM and to pay Freshfields and to pay the Tribunal and that sort of thing, and that they would then get the licenses. And there were a number - - there was a number of things that were involved in all of that, which I won't go into at length at this time, but that's basically what the overview of what occurred, so that they - - instead of honoring the Treaty and our involvement, RSM's involvement at that time, they decided to take a different route.

ARBITRATOR NOTTINGHAM: So, in some sense, you're saying the prior proceeding was a charade on

the part of the previous Grenada government? That is to say, your allegation is that they made the arrangement with Global Petroleum; and, after having made that arrangement, they litigated in the Prior ICSID Tribunal and got a favorable decision?

MS ORR: Yes, sir.”

6. TRIBUNAL’S APPROACH

6.1 Requirements of Article 41(5)

6.1.1 Based on the conclusions of the *Trans-Global* and *Brandes* Tribunals, the parties appear to find common ground as to the requirements of Article 41(5)’s “manifestly without legal merit” standard. That is, that an objection under Article 41(5):

- (a) may go either to jurisdiction or the merits;
- (b) must raise a legal impediment to a claim, not a factual one; and
- (c) must be established clearly and obviously, with relative ease and dispatch.

6.1.2 The Tribunal agrees with these requirements, and also with the *Trans-Global* Tribunal’s conclusions that:

“the standard is thus set high”³²

“... as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous or vexatious or inaccurate or in bad faith: nor need a tribunal accept a legal submission dressed up as a factual allegation. The Tribunal does not

³² Exhibits RLA-30, ¶ 88.

*accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.”*³³

- 6.1.3 The Tribunal’s agreement with the conclusions of the *Trans-Global* and *Brandes* Tribunals’ as to the requirements of Article 41(5), means it is not necessary to rehash or to seek to supplement their analyses. However, given the potentially decisive nature of an Article 41(5) objection, we would add that, for a tribunal faced with such an objection, it is appropriate that a claimants’ Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant. The Tribunal has proceeded on this basis.
- 6.1.4 Unlike the Convention’s provisions relating to the registration of a Request for Arbitration (Convention Article 36(3)), Article 41(5) of the ICSID Rules does not limit a tribunal’s analysis of the manifest absence of legal merit to a claimant’s Request for Arbitration. For this reason, the Tribunal considers it right also to have regard to Claimants’ submissions contained in their Opposition (explaining their claims) as well as those made by Ms Orr at the first meeting on 25 October 2010 in analysing the Article 41(5) standard.
- 6.1.5 It should be noted that the Tribunal’s summaries, contained in this Award, of Claimants’ claims, submissions and explanations do not pretend to be exhaustive. Nonetheless, the Tribunal has considered Claimants’ complete case in coming to the decision reflected in this Award.
- 6.1.6 As regards the scope of Claimants’ case, even though the Request appears to assert five claims, limited to breach of Treaty Articles III (1) (Expropriation) and II (2) (arbitrary and discriminatory measures; treatment in accordance with international law; full protection and security; and, fair and equitable

³³ Exhibit RLA-30, ¶ 105. It will be observed that the first component of the quoted conclusion points to a slight difference between the Tribunal’s and Claimants’ view as to how the Tribunal may approach the facts, (Claimants asserting that “the Tribunal must assume the alleged facts to be true”). In this case, however, nothing turns on this slight difference as there is no present dispute for present purposes as to the facts alleged either by Claimants or Respondent. It is true that Grenada does dispute the legal effect that Claimants attribute to certain events. But such assertions are legal assertions, and they are a proper subject for assessment on an Article 41(5) application.

treatment), the Tribunal will also consider a possible claim for breach of Article II (1) (concerning most favoured nation protection).

6.2 Questions Arising

6.2.1 Based on these requirements, the Tribunal, in Section 7 below, addresses three fundamental questions:

- (a) Are the findings of the Prior Tribunal in relation to breach of the Agreement and its termination binding on the Tribunal (the collateral estoppel and ICSID Convention Article 53 questions)?
- (b) If so, can any of Claimants' five (possibly six) claims of Treaty breach survive in the face of these findings?
- (c) If so, is this arbitration precluded by the Treaty's fork-in-the-road clause or by reason of Claimants' alleged abuse of process?

7. TRIBUNAL'S ANALYSIS AND CONCLUSIONS

7.1 Binding Effect of the Prior Award

Collateral Estoppel

7.1.1 The disputing parties do not differ as to the requirements for the application of the doctrine of collateral estoppel. They agree that a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.

7.1.2 It is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one.³⁴

³⁴ *Amoco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Re-submitted Case) (10 May 1988) at ¶ 30, Exhibit RLA-1. The analysis in the well known passage of Professor Higgins (as she then was) which is relied upon by Grenada (quoted at 4.6.6 above) is similar to those used by the mixed claims commission in the *Company General of the Orinoco Case*, Exhibit RLA-13, which itself quoted the US Supreme Court's Decision in *Southern Pacific Railroad Co. v U.S.*, Exhibit RLA-38. The latter case is of special significance

7.1.3 But, Claimants’ argument, that the questions “put in issue” in the Prior Arbitration concerned the Agreement, and that the Prior Tribunal considered no Treaty questions, is not an answer to Grenada’s argument. Claimants’ argument confuses issue preclusion and claim preclusion. As the United States Supreme Court says in *Southern Pacific Railroad Co v United States*, 168U.S.1, 48-49 (1897), “The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified.” Here, Respondent does not seek to argue that the Prior Tribunal determined the Treaty questions that Claimants now raise, but rather that its findings on a series of rights, questions and fact, bind this Tribunal and that *these findings* must apply in the assessment of whether Claimants present Treaty claims are “manifestly without legal merit.”

Individual Claimants Are Bound

7.1.4 Claimants only other argument against the application of the principle is that the three individual Claimants’ claims cannot be affected (as regards the rights, questions and facts that were determined by the Prior Tribunal) since only RSM and Grenada were parties to the Prior Arbitration.

7.1.5 In the circumstances of this case, however, the fact the three individual Claimants were not parties to the prior arbitration does not assist. This is because they are, and were at the time of the Prior Arbitration, RSM’s three sole shareholders. They were thus privies of RSM at the time. As such, they, like RSM, are bound by those factual and other determinations regarding questions and rights arising out of or relating to the Agreement.

here because of its holdings that the collateral estoppel rule applies in a subsequent suit “[...] between the same parties or their privies.”

7.1.6 Of course, RSM is a juridical entity with a legal personality separate from its three shareholders. But this does not alter the analysis. First, the Claimant shareholders' only investment is a contract to which RSM is a party and the shareholders are not: the shareholders seek compensation for damage they allege they have suffered indirectly, "through RSM," for violations of RSM's legal rights.³⁵ Second, the three individual Claimants collectively own 100% of RSM's stock and therefore entirely control the corporation. In these circumstances, we agree with Respondent, that there is nothing unfair in holding them to the results of RSM's Prior Arbitration.

7.1.7 It is true that shareholders, under many systems of law, may undertake litigation to pursue or defend rights belonging to the corporation. However, shareholders cannot use such opportunities as both sword and shield. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation - including collateral estoppel.

Questions Considered in the Prior Arbitration

7.1.8 In the Prior Arbitration, the following findings pertaining to RSM and Grenada's rights and obligations under the Agreement arose out of questions that were put in issue and which had to be addressed to resolve the claims that were before the Prior Tribunal. They are thus binding on RSM, the individual Claimants and this Tribunal and may not be re-litigated in these proceedings.

- (a) Grenada did not breach any of its obligations towards RSM under the Agreement in failing to issue an exploration license to RSM, such obligation having lapsed on 28 March 2004 (Prior Award, ¶ 503);
- (b) The Agreement was lawfully terminated by Grenada on 5 July 2005 so that Grenada thereafter had no further substantive contractual obligations to RSM (Prior Award, ¶ 503);

³⁵ The Request describes the investment as "this Agreement [...] clearly describes an 'investment' within the jurisdiction of ICSID. Claimants, *through RSM, have to date made an extensive investment in Grenada.* Request, at ¶ 5 (emphasis added).

- (c) RSM's 12 January 2004 letter to the Prime Minister terminated the period of *force majeure* and re-commenced the running of the 90-day period within which RSM had to apply for the exploration license (Prior Award, ¶¶ 173, 343-45);
- (d) The 14 days that had elapsed between the signing of the Agreement and RSM's invocation of *force majeure* counted towards the 90-day limit (Prior Award, ¶¶ 343-345);
- (e) Therefore, the 90-day period ended on 28 March 2004 (Prior Award, ¶ 345);
- (f) RSM applied for an exploration license on either 13 or 14 April 2004, some two weeks after the 90-day period had expired (Prior Award, ¶¶ 203, 345);
- (g) RSM's Second Letter, of 22 February 2004, revoking *force majeure*, addressed to the "Permanent Secretary, Ministry of Finance," was not delivered to Grenada until 14 April 2004. It was only seen by Senator Bowen after this date. (Prior Award, ¶ 176 and ¶ 186);
- (h) Because RSM's second letter was received by Grenada only on 14 April 2004, Grenada could not have deliberately kept silent before 28 March 2004, as a means of luring RSM into a trap. Thus, there could be no bad faith or other unconscionable conduct by Grenada in not responding to such letter before 28 March 2004. (Prior Award, ¶¶ 187-189);
- (i) It is manifestly clear from the terms of the Agreement that the timeliness of RSM's application was intended to be an important factor for the further performance of both parties' obligations under the Agreement. As a matter of contractual interpretation under the laws of Grenada, the obligation of RSM to make a timely application for an exploration license under Article 3.1 is a "condition" and a "condition precedent" of the Agreement, in the legal sense that RSM's failure to act timeously within the 90-day period relieves Grenada from any

correlative obligation to proceed with further performance of its substantive obligations under the Agreement and also entitled Grenada to terminate the Agreement under Grenadian law (Prior Award, ¶¶ 376-377);

- (j) Under Article 3.1 of the Agreement, RSM was to be the sole master of its own application's timing within the 90-day period. This application depended on its will alone. It could choose when to make its application within the time period without any dependence on Grenada under the Agreement or the 1989 Act. It could make its application on the first day of the 90-day period. It did not need to wait until the end of this period, and there was thus no reason to delay the application to the end of this period (Prior Award, ¶¶ 372 to 374).

Article 53 of the ICSID Convention

- 7.1.9 The Prior Tribunal had jurisdiction to construe the Agreement definitively, and it did so. That being so, the Tribunal concludes that to re-open the Prior Tribunal's findings would also violate Convention Article 53 which provides that "the Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." The provisions of Article 26.4(b) of the Agreement are to the same effect.
- 7.1.10 The Tribunal also agrees with Respondent that the Convention's self-contained system of review is exclusive. That system - which RSM triggered by instituting annulment proceedings - does not permit *de novo* review of factual or legal findings by an annulment committee,³⁶ let alone by a successor ICSID Tribunal.
- 7.1.11 Even when the contractual forum is not an ICSID Tribunal, BIT tribunals do not reopen the municipal law decisions of competent *fora*, absent a denial of justice.

³⁶ *Azurix Corporation v Argentina* (ICSID Case No. ARB/01/12), Decision on Application for Annulment (1 September 2009, at ¶¶ 41-42, Exhibit RLA-5).

7.1.12 The *Helnan* Tribunal had to consider this exact question against a similar factual backdrop.³⁷ There, the claimant contended that Egypt had breached the BIT by evicting it from the hotel it managed. However, a tribunal appointed pursuant to the arbitration clause in the underlying management contract, had already determined that the contract law had become “impossible to execute” and was therefore terminated pursuant to Egyptian law. As a result, the state party had no further contractual obligations to leave the claimant in possession of the premises.

7.1.13 In dismissing *Helnan*'s subsequently brought treaty claims, that ICSID Tribunal explained:

*“The Management Contract was terminated by the Cairo Award on 30 December 2004 pursuant to the arbitration clause included in the Management Contract. This award [...] is final and binding. It has been in force and has res judicata effects in the Egyptian legal order. As Egyptian law was applicable to the Management Contract, the present arbitral tribunal cannot ignore its effect, unless it would be established that rendering of the Award was made in breach of the Treaty, or general international law.”*³⁸

7.1.14 Having regard to the fact similarity between this and the *Helnan* case, the Tribunal considers the reasoning in the *Helnan* Award is persuasive and applicable here.

Article 51 of the ICSID Convention

7.1.15 Another basis for review of an ICSID award is provided by Convention Article 51. That Article states that a party may request revision of an award by an application in writing addressed to the Secretary-General on the ground of *discovery of some fact of such a nature as decisively to affect the award*,

³⁷ *Helnan International Hotels A/S v Egypt* (ICSID Case No. ARB/05/19), Award, 3 July 2008, Exhibit RLA-14.

³⁸ *Helnan*, at ¶ 6, Exhibit RLA-14.

provided that when the award was rendered, that fact was unknown to the tribunal and to the applicant, and that the applicant's ignorance of the fact was not due to negligence. Such an application is required to be made within 90 days after the discovery of such fact, and in any event, within three years after the date the award was rendered.

7.1.16 The Tribunal considers the fact that RSM had the possibility to obtain a revision of the Prior Award pursuant to this provision to be of importance in this case.

7.1.17 In their Opposition, Claimants allege that:

*“At the time RSM commenced the Prior ICSID Proceeding, RSM was not aware of the real reason why Grenada was refusing its license - in the following years RSM would slowly learn the details of Grenada's corrupt relationship with an entity called Global Petroleum Group, Ltd.”*³⁹ (emphasis added)

7.1.18 Accepting the literal truth of this statement for the purposes of the Objection, (*i.e.*, that Grenada's alleged corruption was not known to RSM when it commenced the Prior Arbitration), it is nevertheless clear that by the time the Prior Arbitration came to a hearing in mid-June 2007, Claimants were aware of virtually everything they now rely on concerning Grenada's allegedly corrupt relationship with Global Petroleum.⁴⁰

7.1.19 The relevance of this to the question (dealt within the next Section of this Award), of whether Claimants' claims can survive in the face of the relevant findings of the Prior Tribunal, is that it was open to RSM to seek revision of those findings from the Prior Tribunal, based on evidence of corruption that was discovered thereafter. RSM sought no such revision.

³⁹ Opposition, ¶ 23.

⁴⁰ In the Prior Award, the Prior Tribunal deals with a complaint filed by RSM on 1 November 2006 (seven months before the hearing) in the US District Court for the Southern District of New York against Senator Bowen, and others, raising issues of corruption against them and claiming damages in excess of US\$500 million. A review of the judgment of Judge Wallach in that case, filed on 19 February 2009, which summarises the facts alleged in Plaintiffs' Third Amended Complaint, indicates that, by at least November 2006, Claimants were aware of the substantial whole of the allegations of corruption relied on in this case.

7.1.20 To the extent that evidence of corruption was discovered following the close of proceedings at the end of the oral hearing, it was also open to RSM to seek to reopen those proceedings in order to introduce evidence of corruption that it wished the Prior Tribunal to consider in its analysis of whether Grenada had failed to fulfil its contractual obligations. Indeed, it sought to do so, but its application was denied because the new evidence would not have been decisive.⁴¹

7.1.21 Similarly, to the extent evidence of corruption was known prior to the oral hearing, it was of course open to RSM to seek to have it considered.

7.1.22 In their Opposition, Claimants say that:

“None of the facts [set out in ¶¶ 24-43 of the Opposition] were known by RSM when it instituted the Prior ICSID Proceeding, and none of these facts were adjudicated in the Prior ICSID Proceeding. Nor did the Prior ICSID Proceeding make any findings or conclusions with reference to the Treaty.”

7.1.23 Ms Orr went further in her oral submissions when she suggested that “the facts concerning the bribery and the fraud issues were specifically excluded from the prior - - by the prior panel.” And although she backed away from this assertion when its accuracy was tested by the Tribunal,⁴² the statement in the Opposition leaves an inaccurate impression that the factual underpinnings to Claimants’ present corruption allegations were neither before the Prior Tribunal, nor used by RSM in its contractual breach case.

7.1.24 As noted above, the Prior Tribunal had been provided with the formal court documents submitted by RSM in the New York State corruption proceedings it had instituted against Senator Bowen (and others) on 1 November 2006, just one year after it initiated the Prior Arbitration, and well before the submission

⁴¹ By letters of 4 and 10 February 2009, RSM applied for the Prior Tribunal’s permission to introduce into evidence certain new materials (corruption related) and to reopen the Prior Arbitration under Article 38 (2) of the ICSID Arbitration Rules. The Tribunal declined to do so, having concluded that the fresh evidence was not of such a nature as to constitute a decisive factor in the case. *See* Prior Award, ¶ 38.

⁴² Transcript, 160/22 – 162/11.

of RSM's written Reply submissions and testimony. These documents make clear that RSM had knowledge at that time of the facts alleged in ¶¶ 24-32 of the Opposition. And the rest of the facts relating to corruption (Opposition, ¶¶ 33-40) relied on by Claimants were known by RSM before the issue of the Prior Award: *i.e.*, either by the time of the prior oral hearing or when it sought to have the Prior Tribunal reopen proceedings in February 2009.

7.1.25 More importantly, RSM sought to rely on its allegations of corruption.⁴³ In the Prior Award, the Prior Tribunal states plainly that:

“211. Senator Bowen: RSM impugned the honesty and competence of Senator Bowen, both in these arbitration proceedings and, to a much greater extent in formal court documents submitted in the New York Proceedings and supplied to the Tribunal in these proceedings.

212. On all the evidence adduced in these arbitration proceedings, the Tribunal does not accept any of these personal criticisms of Senator Bowen for the purposes of its decision in this Award. Moreover, after a firm but fair cross-examination of Senator Bowen during the Main Hearings, RSM's Counsel submitted in his closing oral submissions that RSM was not requesting the Tribunal, in these proceedings, to find Senator Bowen “corrupt” or “incompetent”[...]. Nor does it.”⁴⁴
(emphasis added)

7.1.26 The fact that in his closing speech RSM's counsel took the position that he was not asking the Prior Tribunal formally to find Senator Bowen to be “corrupt” does not mean that RSM was not asking for its allegations of

⁴³ At the hearing, counsel for RSM put it to Senator Bowen that he had accepted a bribe from Global Petroleum in relation to an oil exploration contract by Grenada. Senator Bowen denied this allegation, but confirmed that Global Petroleum had provided Grenada with \$2.5 million in order to fund the arbitration proceedings. Prior Arbitration, Merits Hearing, Transcript, Day 4, pages 44-45.

⁴⁴ Prior Award, ¶¶ 211-212. Exhibit R-1.

bribery not to be considered. Rather, RSM's counsel made it abundantly clear that RSM's allegations of corruption levied against Senator Bowen, and the answers he gave during cross-examination, *were relevant to and should be considered by the Prior Tribunal* as regards the credibility of Senator Bowen's testimony, not least as to the date of Grenada's receipt of RSM's Second letter.⁴⁵

7.1.27 In the light of these circumstances, Claimants' statements that ... "here the second proceeding is necessary precisely because Grenada chose to conceal the corrupt relationship between Global Petroleum and its former government officials," and "Claimants have chosen to interpose Treaty claims because it is now clear that Grenada had a corrupt motive for refusing of RSM's license," suggest a much more recent discovery of Grenada's alleged corruption than is, in fact, the case.⁴⁶

7.1.28 For the purposes of the Objection, it is also apparent that RSM had sufficient evidence of alleged corruption to institute New York State court proceedings in 2006, and thus could have, but declined formally to put corruption in issue, as such, before the Prior Tribunal. To the extent that further evidence of corruption became available after the issue of the Prior Award, RSM could also have sought revision of that award under the provisions of Article 51. It did not, but instead instituted annulment proceedings.

7.1.29 At the first procedural hearing convened by the *ad hoc* Committee on 16 October 2009, RSM applied to have the Committee investigate suspicions of corruption in connection with Grenada's refusal of RSM's exploration license. In its written application of 29 October 2009, RSM sought to show that its license application had been denied, and the Agreement terminated by Grenada, by reasons of bribes paid and to be paid to Senator Bowen by Global Petroleum.⁴⁷

⁴⁵ Prior Arbitration, Merits Hearing, Transcript, Day 5, pages 49-50, as quoted in the Decision on RSM Production Corporation's Application for a Preliminary Ruling of 29 October 2009 ("**Committee Decision**"), at ¶ 6, Exhibit R-10.

⁴⁶ Opposition, ¶ 40.

⁴⁷ Committee Decision, ¶¶ 1-4, Exhibit R-10.

7.1.30 The Committee denied RSM’ application for a number of reasons, including the fact that the allegations made by RSM did not fall within any of the grounds for annulment enumerated in Convention Article 52. In rendering its decision, the Committee noted that:

- (a) The Prior Tribunal had the exclusive power in the post-award phase to rectify, revise, supplement or interpret the Prior Award;
- (b) RSM was asking the Committee to consider and investigate evidence that was available before the Prior Tribunal, and additional evidence led in RSM’s New York State court’s proceeding; and
- (c) The evidence of corruption relied upon by RSM “was also obtained by it prior to the delivery of the Award, and, in one case, prior to the Merits Hearing. In the case of the evidence obtained after the Merits Hearing, if the Applicant had good grounds to submit that this was new evidence decisively relevant to the issues in the arbitration, then, even if the Tribunal had closed the proceedings, the Applicants could still have applied to the Tribunal to re-open the proceedings under ICSID Rule 38(1).”⁴⁸

7.2 Merit of Claimants’ Claims

Summary Conclusion

7.2.1 For the reasons set out below, the Tribunal concludes that an essential predicate to the success of each of Claimants’ claims is an ability for the Tribunal to re-litigate and decide in Claimants’ favour conclusions of fact or law concerning the parties’ contractual rights that have already distinctly been put in issue and distinctly determined by the Prior Tribunal. Because the Tribunal has concluded, in the answer to the first question it has considered, that it cannot properly revisit those conclusions, the Tribunal therefore finds that each of Claimants’ claims is manifestly without legal merit. Accordingly, the Tribunal is obliged to dismiss each of Claimants’ present claims.

⁴⁸ Committee Decision, ¶ 28.

Expropriation

7.2.2 Claimants' case for expropriation is set out in four short paragraphs of the Request. Claimants' Opposition and subsequent oral submissions add nothing of substance. Paragraph 12 of the Request, contains the only description (allegations) of how the expropriation came about. This claim relies *exclusively* on Grenada's breach of the Agreement:

- (a) *“By violating the Agreement and precluding RSM's filing of the application for exploration, Grenada's action constituted an actual and a de facto expropriation [...]”;*
- (b) *“the denial of the application and the resultant termination of the Agreement is a de facto expropriation”;*
- (c) *“Grenada's action [the breaches of the Agreement spelled out above] forecloses the possibility that Claimants could enjoy the benefits of their investment.”*

7.2.3 Based on the Prior Tribunal's findings, Claimants' expropriation claim must therefore fail. The Prior Tribunal's conclusions that: (a) Grenada was not in breach of the Agreement; (b) RSM, which was the sole master of its own application's timing, had failed to file in a timely fashion; (c) RSM's filing within the prescribed time limit was a condition precedent to Grenada's further obligations; and (d) Grenada was entitled under Grenadian law to terminate the Agreement, preclude any possible finding of expropriation under the Treaty.

7.2.4 In paragraph 12, of the Request, Claimants allege that Grenada determined to cancel the Agreement “to benefit itself and its apparent new investors, Global Petroleum Group of Russia [...]” This proposition, that Grenada's behaviour was motivated by its allegedly corrupt dealings with Global Petroleum was developed in Claimants' Opposition and during the first meeting, but

Claimants never alleged that Grenada did anything that affected Claimants' investment that it was not entitled to do under the Agreement.

7.2.5 Accepting all of Claimants' allegations of the corruption of Grenadian officials at face value, they cannot, as described, constitute a Treaty breach. At their highest, they allege the acceptance of bribes by Grenadian official to grant Global Petroleum rights that RSM *might have acquired*, had it filed its application in a timely fashion. But it is nowhere credibly alleged (bearing in mind the findings of the Prior Tribunal) that Grenada "acted" in any way improperly in connection with RSM's loss of its contractual rights. Indeed, the Prior Tribunal has definitively determined that RSM lost its ability to explore because of its own failings, none of which can be laid at Grenada's doorstep, the alleged corruption notwithstanding. Given the Prior Tribunal's binding factual determination that Grenada acted properly in terminating the Agreement, its allegedly-bad motive for standing firm and asserting its contractual rights simply cannot support Claimants' invitation to ignore that settled determination.

7.2.6 If proven, Claimants corruption allegations, would certainly show that certain Grenadian government officials had acted unlawfully under Grenadian and international law (the acceptance of a bribe being unlawful under both), but such unlawful behaviour, by itself, does not amount to a Treaty violation.

7.2.7 For Claimants to succeed on a claim for the violation of Treaty Articles II or III, they must allege that Grenada took active steps to do as it was improperly bidden (something more than simply relying on its contractual rights), which steps could amount to a breach of the Treaty. However, no such allegations are made.

Arbitrary, Discriminatory and Illegal Behaviour

7.2.8 Grenada's allegation of breach of Treaty Article II (2), based on arbitrary, discriminatory and illegal behaviour, is set out in paragraph 16 of the Request. There Claimants rely on: (a) Grenada's "contrived counting procedure which defies fact, logic and the law"; (b) its "failure to respond to Claimants' letter of 27 February for two (2) months, until the potential deadline had past [...]";

and (c) “Grenada’s action [...] enriched the Russian Global Petroleum for its own ends and thereby discriminated against the significant investments of American Claimants.”⁴⁹

7.2.9 The difficulty with this claim, as with the claim for expropriation, is that it too relies entirely on this Tribunal’s ability to retry RSM’s contractual case, which it may not do.

7.2.10 The Prior Tribunal’s findings that Grenada’s calculations were not contrived or illogical, but were correct, are binding, as are its findings that Grenada could not possibly have responded to RSM’s 27 February letter before the deadlines had passed.

7.2.11 As to the claim that Grenada discriminated against RSM and in favour of Global Petroleum, there is simply no credible allegation of fact to support it. Claimants, though Ms Orr, accepted that their investment is the Agreement.⁵⁰ And, as found by the Prior Tribunal, the Agreement was lawfully terminated on 5 July 2005 (leaving Grenada with no further substantive contractual obligation to RSM). Claimants admit that it was some three years before Global Petroleum was issued with an offshore exploration license by Grenada in June 2008 and by this time, Claimants’ investment had long been lawfully terminated as a result of RSM’s own non compliance with the condition precedent to its right to acquire an exploration license.⁵¹ Thus, when Grenada eventually, as alleged, awarded Global petroleum a license, Claimants no longer had an investment against which Grenada could be said to have discriminated.

Breach of International Law Standard of Treatment

7.2.12 Claimants’ case based on treatment allegedly not in accordance with the standard required by applicable international law (in breach of Article 11 (2)) is dealt with in paragraphs 17-20 of the Request. Like their other claims, here

⁴⁹ Arguably, this latter allegation may refer to a claim for a breach of Treaty Article II (1)’s most favoured nation standard and we will also consider it as such.

⁵⁰ Transcript, 157/12-15.

⁵¹ Opposition, ¶ 40.

Claimants also rely exclusively on breach of, or inappropriate behaviour by Grenada in connection with the Agreement.

- 7.2.13 Claimants say that Grenada’s position, that their application was untimely, “is contrary to the terms of the Agreement, international law and Grenadian law, and is in breach [...] of the Treaty.” But as discussed above, the Prior Tribunal has held otherwise as regards breach of the Agreement under Grenadian law.
- 7.2.14 Claimants next allegations, of Grenada’s “confabulated system of counting,” and that “time is of the essence only if it is explicitly so stated in the contract, which is clearly not the case here,” fall foul of the Prior Tribunal’s explicit finding that Grenada counted the 90-day period correctly and that time was indeed of the essence - compliance with the 90-day application period being a condition of the Agreement.
- 7.2.15 Based, as they are, only on Grenada’s breach of the Agreement, for them to succeed would again require a re-litigation of facts and issue that have already been definitively determined in favour of Grenada. Accordingly, they cannot possibly succeed in the present proceeding.

Claimants’ Non-receipt of Full Protection and Security

- 7.2.16 Claimants full protection and security claim relies on one assertion - that Respondent “failed to timely respond to Claimants’ letter [Second Letter] to refute its logical and factual calculation of the relevant time period, it failed to provide Claimant any leeway with respect to its calculation of the filing deadline [...], and it arbitrarily rejected the application which it was bound to accept under the terms of the Agreement.”
- 7.2.17 This claim, like those before it, cannot survive the Prior Tribunal’s findings that Grenada received the Second Letter only after the 90-day deadline had expired and thus could not have responded in sufficient time to enable a timely filing.
- 7.2.18 Moreover, Claimants’ loss of their contractual rights was entirely of RSM’s own doing. The Prior Tribunal specifically rejected any suggestion that

Grenada decided “not to respond as a means of luring RSM into a trap” when it found that “there could be no bad faith or other unconscionable conduct by Grenada in not responding to such letter before 28 March 2004 [the deadline].”⁵²

7.2.19 In these circumstances, it would be impossible for this Tribunal to conclude in the present proceedings that Grenada arbitrarily rejected Claimants’ late application, or that, by relying on its own contractual rights (without abusing those rights, *e.g.*, by luring Claimants into a trap), its “failure to provide Claimant any leeway” on RSM’s filing deadline could constitute a Treaty breach.

Claimants Were Not Treated Fairly and Equitably

7.2.20 This claim is given the shortest treatment of any in the Request. Grenada’s failure to meet the Treaty’s fair and equitable standard is again based on its denial of Claimants’ license application. Grenada and its agents are said to have placed personal gain over their obligations under the Treaty. The problem with this is that, in the absence of credible alleged abuse by Grenada of RSM’s rights under the Agreement, Grenada’s reliance on RSM’s failure to fulfill a required pre-condition for the award of a license cannot reasonably be said to breach the Treaty’s fair and equitable standard.

7.2.21 This is because Claimants lost their investment as a result of RSM’s own actions (or inactions). As the Prior Tribunal has found, RSM was the sole master of its own application’s timing and Grenada did absolutely nothing to influence RSM’s timing. Put another way, assuming it to be true that a senior official or senior officials were bribe takers from Global Petroleum, this/these corrupt acts were not causative of the loss of Claimants’ investment.

7.2.22 The taking of any such bribe was unlawful, but Grenada’s decision to rely on its contractual rights cannot be said to contravene the unfair and inequitable standard as it has so far been understood by multiple ICSID Tribunals.

⁵² Prior Award, ¶ 189, Exhibit R-1.

- 7.2.23 Grenada’s decision to rely on RSM’s failure to file timeously was in no way arbitrary, it involved no absence of due process, there was no absence of transparency and it did not discriminate by treating another party in a similar position to RSM more favourably (*i.e.*, by forgiving a failure of such a party to meet a condition precedent to the exercise of its rights) than RSM.
- 7.2.24 As was recognised by the *CMS* Tribunal, the fair and equitable treatment standard is an objective, not subjective one. Breach of the standard is “unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question.”⁵³
- 7.2.25 In these circumstances, even if Grenada was motivated, by bribes, to offer its off-shore exploration rights to Global Petroleum, its reliance on its contractual rights to terminate the Agreement cannot be said to infringe the fair and equitable standard when Grenada had done nothing to induce RSM’s failure to file its application within the time limits the parties had agreed.

7.3 Fork in the Road Clause / Abuse of Process

- 7.3.1 Having concluded that Claimants’ claims cannot succeed in the face of the findings by the Prior Tribunal concerning RSM’s and Grenada’s contractual rights and the facts underpinning those findings, it is not necessary for the Tribunal to decide whether the Treaty’s fork-in-the-road clause constitutes a legal impediment to the assertion of their claims, such that Respondent’s Objection should prevail, and we do not do so.
- 7.3.2 Nevertheless, even if it could be said that the parties to the present dispute “had not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures” (Treaty Article VI(3)), the Tribunal considers the initiation of the present proceedings, in which Claimants admittedly seek redetermination of the Prior Tribunal’s contractual findings, to be impermissible in the face of the ICSID Convention’s self-contained and exclusive system of review.

⁵³ *CMS Gas Transportation Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005, ¶208.

- 7.3.3 As noted in Section 6 above, RSM was aware of virtually all of the facts upon which they now allege corruption before the completion of pleadings in the Prior Arbitration, and it clearly sought to rely on allegations of bribery to impugn the testimony of Senator Bowen regarding the date on which Grenada received RSM's Second Letter.
- 7.3.4 Claimants also received Mr Leyton's declaration (confirming Mr Melnicke's statements to Mr Grynberg) within six months of the June 2007 oral hearings, and subsequently sought, unsuccessfully, to introduce new evidence into the prior proceedings.
- 7.3.5 Following receipt of the Prior Award, which dealt adversely with its case, and rather than attempting to seek its revision and rectification pursuant to Convention Article 51, RSM initiated annulment proceedings under Convention Article 52. It later abandoned those proceedings after the denial of its application for an investigation by the annulment committee of whether Grenada had denied RSM's license application based on bribes received from Global Petroleum.
- 7.3.6 It is true that Claimants style the present arbitration as Treaty claim based. But the difficulty with this is that, as pleaded and argued, the present case is no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revision application and over which the Prior Tribunal had jurisdiction.
- 7.3.7 Claimants' present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case. Having regard to all that has gone before, the Tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 and the procedures available for revision and rectification of awards provided for in Article 51.

8. COSTS

8.1 Parties' Requests for Costs

8.1.1 In its Objection, Grenada seeks, *inter alia*, an award ordering Claimants to pay all costs and fees of this arbitration, including the administrative fees and costs of ICSID, the fees and expenses of the Tribunal and Grenada's legal and other costs.

8.1.2 During the course of the first meeting, when dealing with agenda item 3 - "Apportionment of Costs and Advance Payments to the Centre (Convention Article 61; Administrative and Financial Regulation 14; Arbitration Rule 28)," the parties were each asked, if they were to prevail, whether the Tribunal should award legal and other costs to date of this arbitration in their favour. Each confirmed that such an award of, or order for costs was sought.⁵⁴

8.1.3 The parties having both sought an award of costs in relation to the Objection and, because of its potentially determinative effect on the arbitration, the Tribunal, on 27 October 2010, requested the parties to submit their respective statements of costs by 3 November 2010 (providing sufficient details as to time spent, work and personnel involved, and charge out rates, to enable assessment), and to submit their comments, if advised, on each other's costs' statements by 8 November 2010. This request was made without prejudice to the Tribunal's decision on the outcome of the Objection.

8.2 Parties' Claims for Costs

8.2.1 In response to the Tribunal's request, each of the parties submitted statements of costs, as requested, on 3 November 2010.

8.2.2 Claimants sought an award of cost in the amount of US\$ 31,092.50, of which US\$ 27,292.50 was attributed to the objection and US\$ 3,800.00 was attributable to the Security Application.

8.2.3 Respondent sought an award of costs in the amount of US\$ 330,126.83, less any portion of the advance refunded to it by ICSID, plus interest at a rate of

⁵⁴ Transcript, 14/11, 15/10.

3.25%, compounded semi-annually from the date of any Award in its favour until the date of full payment. Its claim for costs was limited to costs incurred for the Objection. The sum sought included US\$ 201,210.00 for legal fees, US\$ 3,916.83 for disbursements and US\$ 125,000.00 for its share of the advance payment to ICSID.

8.3 **Tribunal's Decision on Costs**

8.3.1 Convention Article 61(2) requires a tribunal, except as the parties otherwise agree, to assess the expenses incurred by the parties in conjunction with the proceedings, and to decide how and by whom those expenses, the fees and expenses of the members of the tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision is required to form part of any award.

8.3.2 Rule 28(2) of the ICSID Arbitration Rules, which governs the costs of proceedings, provides that:

“Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the Parties and the Secretary-General to provide additional information concerning the costs of the proceeding.”

8.3.3 The Secretary-General has advised the Tribunal that the costs of the arbitration, which include *inter alia*, the arbitrators' fees, the expenses of the Tribunal, and the Secretariat's administration fees and expenses, at the time of the Award, amount to US\$ 187,315.94.

8.3.4 In this case, each of the parties has asked the Tribunal to exercise its discretion under Article 61, based on the principle that such costs should follow the

event. Having regard to its' conclusions that Claimants present claims are manifestly without legal merit, and that, it was impermissible for Claimants to advance them in new ICSID proceedings, the Tribunal considers it appropriate that Respondent should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding.

8.3.5 The Tribunal has reviewed with care Respondent's statement of costs, and determines that its legal costs in the amount of US\$ 205,126.83 are reasonable and should be reimbursed by Claimants.

8.3.6 In addition, Claimants shall be liable for 100% of the fees and expenses of the members of the Tribunal, and 100% of the administrative fees and expenses of the Centre, in the amount of US\$ 187,315.94.

9. OPERATIVE PART

9.1 Accordingly, for the reasons set out above, the Tribunal **DECLARES, CONFIRMS, ORDERS and AWARDS** that:

- (a) each of Claimants' claims set out in its Request for Arbitration of 15 January 2010, and as further described in Claimants' Opposition of 30 August 2010, and in Claimants' oral submissions made on 25 October 2010, is manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules and is hereby dismissed;
- (b) Claimants shall pay to Respondent its legal and other costs of these proceedings in the amount of US\$ 205,126.83.
- (c) Claimants shall pay to Respondents US\$ 93,605.62, being its unrefunded share of the advance against costs paid to the Centre to cover the costs of the first phase of these proceedings.
- (d) Each of the sums awarded in (b) and (c) above shall bear interest at a rate of 3.25%, compounded semi-annually from the date of this Award until the date of full payment.

[Signed]

Professor Pierre Tercier

Date: [3 December 2010]

[Signed]

Edward W. Nottingham

Date: [December 7, 2010]

[Signed]

J. William Rowley QC
(President)

Date: [30 November 2010]