COMPETENCE OF AN ICSID TRIBUNAL TO ORDER SECURITY FOR COSTS

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I. INTRODUCTION

"Only in the jurisprudence of an imaginary Wonderland would this make sense." This comment was made by the dissenting arbitrator in the *RSM Production Corporation v. Saint Lucia*[1] case before the International Centre for the Settlement of Investment Disputes [**"ICSID"**]. In this proceeding, the arbitral tribunal – for the first time in the history of ICSID arbitration – granted the respondent state's request to order the claimant investor to provide security for costs.[2] The dissenting arbitrator not only questioned the tribunal's authority to order security for costs, but also criticised the majority's consideration of the existence of a third-party funding agreement on the claimant's side when determining the redressability of the claim.[3]

Highly contentious is the issue of whether and under what conditions ICSID tribunals may compel security for expenses. With the recent emergence of third-party funding, a new element has been introduced to the argument over whether ICSID tribunals should consider this consideration when evaluating petitions for security for expenses.

This topic will be addressed in the present article. After briefly describing the objective and function of security for expenses, the authors will demonstrate that ICSID courts have the jurisdiction to impose these provisional measures. The article will next address the prerequisites that must be satisfied for an ICSID tribunal to impose security for expenses. After providing an explanation of the concept of third-party funding, the authors will analyse the role that third-party funding may play in an ICSID tribunal's judgment regarding security for expenses by using these standards.

II. WHAT IS A SECURITY FOR COSTS ORDER?

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[1]RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10¶ 8 (Aug. 12, 2014) (Edward Nottingham, J., dissenting) ("Decision on Saint Lucia's Request for Security for Costs of 13 August 2014.").

[2]*Id.* ("The tribunal ordered the claimant to post security for costs in the amount of USD 750,000.").

[3]RSM v Saint Lucia, *supra* note 1, ¶ 17.

A security for costs order is a special form of provisional measures requiring the party bringing a claim (or counter-claim) to provide sufficient security to cover the respondent's legal costs that may be awarded against the claimant should the claim be dismissed.[4] This provisional measure is typically requested by a respondent who fears that the claimant may be unable or unwilling to honour an adverse costs award and who wants to preserve the ability to recover its costs.[5] The security might take a variety of forms, but is commonly a bank guarantee or an escrow deposit.[6]

III. DOES THE ICSID TRIBUNAL HAVE THE AUTHORITY TO ORDER COSTS SECURITY?

A. THE ABSENCE OF PRECISE LANGUAGE

No express provision in the ICSID regime[7] addresses the competence of an ICSID tribunal to require security for expenses. Some arbitrators have taken this absence of express language as a reason to generally question an ICSID tribunal's authority to grant such measures.[8] However, a large number of arbitration tribunals have ruled that security for costs orders do not fall outside an ICSID tribunal's authority, classifying them as a subset of general provisional measures mentioned in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.[9]

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[4]Jeff Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION p.642 (2012); Noah Rubins, *In God we Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 AM REV INT'L ARB 307, 310 (2000); Blackaby et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION5.35 (6th ed. 2015).

[5]Jean E Kalicki, *Security for Costs in International Arbitration*, 3(5) TDM, (2006); Joe Tirado & Max Stein, *Security for Costs in International Arbitration – A Briefing Note*, 9(4) TDM, (2012).

[6]Jonas von Goeler, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE 333 (2016); Wendy Miles and Duncan Speller, *Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference*, THE EUROPEAN ARBITRATION REVIEW 32, 32 (2007); Waincymer, *supra* note 4, at p. 652.

[7]*Id.*

[8]RSM v Saint Lucia, *supra* note 1, ¶ 8.

[9]Atlantic Triton v Guinea, cited in Paul D Friedland, *Provisional Measures and ICSID Arbitration*, 2 ARB INT'L 335, 347 (1986); Emilio Agustin Maffezini v Kingdom of Spain, ICSID Case No ARB/97/7 ¶ 6 – 8 (Oct. 28, 1999) ("Procedural Order No 2 of Oct. 28, 1999."); Rachel S Grynberg, Stephen M Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada, ICSID Case No ARB/10/6 ¶ 5.16 (Oct. 14, 2010) ("Decision on Respondent's Application for Security for Costs."); RSM v Saint Lucia, *supra* note 1, ¶ 52; *See* Von Goeler, *supra* note 6, at 335 (This view has been supported by Scholars & Commentators as well); Tirado and Stein, *supra* note 5; Rubins, *supra* note 4, at 346; Christoph Schreuer, THE ICSID CONVENTION – A COMMENTARY p.784 (2nd ed. 2009).

In *RSM Production Corporation v. Saint Lucia*, the ICSID tribunal attempted to explain why security for costs was not expressly mentioned and listed as a separate provisional measure in these provisions.[10] It held that the provisions on provisional measures were worded broadly on purpose in order to leave to the tribunal's discretion which concrete measure it deems necessary and appropriate under the specific circumstances of each case.[11]

B. WHAT DOES 'RECOMMEND' MEAN?

In addition to the absence of clear language, the competence of an ICSID tribunal to impose security for costs has been contested on the basis of the definition of 'recommend' in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.

The dissenting arbitrator in *RSM Production Corporation v. Saint Lucia* noted that the drafters of the ICSID Convention purposefully excluded the phrase 'order' because they did not intend provisional measures – such as security for costs – to be enforceable on the parties.[12]

Despite this issue, ICSID tribunals have repeatedly found that the word 'recommend' must be interpreted as 'order.' In *Maffezini v. Spain*, the tribunal concluded that "the difference is more apparent than real" and that the parties to the ICSID Convention did not intend to "create a substantial difference in the effect of these two words."[13]As a result, the tribunal saw its jurisdiction to decide on provisional measures as "no less binding than that of a final award."[14] This logic has been confirmed and accepted by subsequent ICSID tribunals dealing with provisional measures.[15] Commentators have also endorsed this approach, noting that a concept under which provisional measures have binding consequences on the parties would

[10]RSM v Saint Lucia, *supra* note 1, ¶ 54.
[11]*Id.*
[12]*Id*, ¶ 13.
[13]Maffezini v. Spain, *supra* note 9, ¶ 9.
[14]*Id.*
[15]Pey Casado v Chile, ICSID Case No ARB/98/2 ¶ 17-20 (Sept. 25, 2001)("Decision on Request for Provisional Measures."); TokiosTokelés v Ukraine, ICSID Case No ARB/02/18 ¶ 4(July 1, 2003) ("Procedural Order No 1."); Occidental Petro- leum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No ARB/06/11 ¶ 58 (Aug. 17, 2007) ("Decision on Provisional Measures.").

promote the successful implementation of verdicts and protect the integrity of the arbitral process.[16]

C. NO ENFORCEABILITY

In this context, however, it should be clarified that provisional measures issued by an ICSID tribunal do not have a 'binding' effect in terms of being enforceable through the ICSID Convention because recommendations under ICSID Arbitration Rule 39 do not qualify as final awards within the meaning of Article 54 of the ICSID Convention.[17] Nonetheless, parties should not underestimate the authority of these recommendations, as an ICSID tribunal may consider the behaviour of the parties and draw unfavourable conclusions from their failure to comply with provisional measures in its final award.[18]

IV. BEFORE AN ICSID TRIBUNAL MAY PROVIDE SECURITY FOR COSTS, WHAT PREREQUISITES MUST BE MET?

After establishing that ICSID tribunals normally have the tribunal to impose security for expenses, we turn to the issue of what prerequisites must be satisfied for such measures to be granted.

A. GENERAL STANDARDS FOR PROVISIONAL MEASURES

Given that security for costs orders is often classified as a subset of provisional measures according to Article 47 of the ICSID Convention, it appears reasonable to first examine the criteria arbitral courts apply to evaluate requests for general provisional measures.

In this context, it is important to note that neither the ICSID Convention nor the ICSID Arbitration Rules specify the conditions under which tribunals may order provisional

[16]Zannis Mavrogordato and Gabriel Sidere, *The Nature and Enforceability of ICSID Provisional Measures*, 75(1) Arbitration p. 38, 42 (2009).
[17]Gabrielle Kaufmann-Kohler and Aurélia Antonietti, *Interim Relief in International Investment Agreements*, *in* Katia Yannaca-Small (eds), ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS – A GUIDE TO THE KEY ISSUES p. 546 (Katia Yannaca-Small ed., 2010); RSM v Saint Lucia, *supra* note 1, ¶ 50.
[18]Kaufmann-Kohler and Antonietti, *supra* note 17, at p. 546; Loretta Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER p.180 – 181 (Christina Binder et al. eds., 2009); Schreuer, *supra* note 9, at p. 758.

measures.[19] As a result, the decision to grant provisional measures is left to the discretion of each ICSID tribunal, without the ICSID regime providing guidance on how this discretion should be exercised.[20] Nonetheless, an examination of ICSID case laws discloses that they may only be granted if the respondent can demonstrate that they are essential, urgent, and required to prevent irreparable damage.[21]

B. HIGHER THRESHOLD FOR SECURITY FOR COSTS ORDERS

Unfortunately, the criteria laid down by ICSID courts for ordinary provisional remedies are of little use in identifying the requirements for evaluating petitions for security for expenses. This is due to the fact that, although security for costs fall under the category of general provisional measures pursuant to Article 47 of the ICSID Convention, they represent a special form of provisional measures that raises specific issues that necessitate a higher threshold for the evaluation of respective applications.[22]

This higher threshold is primarily due to the effect that orders for security for costs have on the claimant's access to justice. It is a common concern among practitioners and scholars in international arbitration that an order for security for costs could prevent a claimant who cannot afford to provide the ordered security from pursuing a meritorious claim.[23] This concern is even more justified if the claimant's impecuniosity has been caused by the respondent's actions that are the subject of the dispute between the parties.[24] In the context of disputes between private investors and governments, where the respondent state is often accused of unjustly expropriating the claimant, leaving the claimant with insufficient finances to pursue expensive investment arbitration, allegations to this effect are prevalent.[25] In many instances, it would appear improper and unreasonable to impose a further financial burden on

[19]ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration, Subcommittee on Security for Costs and Costs, Draft Report of 1 November 2015, at p. 13.
[20]Kaufmann-Kohler and Antonietti, *supra* note 17, at 514; BLACKABY ET AL., *supra* note 4, at p. 310; VON GOELER, *supra* note 6.
[21]SCHREUER, *supra* note 9, at p. 776; Malintoppi, *supra* note 18, at 161; Kaufmann-Kohler and Antonietti, *supra* note 17, at p. 529.
[22]Blackaby et al., *supra* note 4, at ¶5.35; Waincymer, *supra* note 4, at p. 647; Von Goeler, *supra* note 6, at p. 336; Pey Casado v Chile, *supra* note 15, ¶86.
[23]Waincymer, *supra* note 4, at p. 643; Miles and Speller, *supra* note 6, at 32; Blackaby et al., *supra* note 4, at ¶5.35.
[24]Waincymer, *supra* note 4, at p. 643; Blackaby et al., *supra* note 4, at 5.35;Weixa Gu, *Security for Costs in International Commercial Arbitration*, 22(3) JOURNAL OF INTERNATIONAL ARBITRATION 167, 185 (2005).
[25]Von Goeler, *supra* note 6, at p. 337.

the claimant by obtaining security for expenses due to circumstances for which the claimant may not even be liable.[26]

C. OBSTACLES TO ESTABLISHING A UNIFORM TEST

In view of what has been said so far, it is not unexpected that ICSID tribunals have traditionally been quite hesitant to provide security for expenses. In *Libananco v. Turkey*, the tribunal opined that the possibility of granting security for costs should be entertained only in the most extreme cases, i.e., when an essential interest of either party was in jeopardy of irreparable harm.[27] However, apart from handling requests for security for costs with extreme caution, ICSID tribunals have not yet developed a uniform test or specific conditions under which such measures may be granted. One ICSID tribunal acknowledged that "it is difficult, in the abstract, to formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable."[28] Creating a common standard is made more difficult by the fact that many factors used to evaluate requests for security for expenses in commercial arbitration do not apply in investment treaty arbitration.

Commentators stress that in international commercial arbitration, the parties have freely entered into a business partnership that includes an arbitration agreement. Therefore, by the time the agreement was closed, each party must be presumed to have accepted any risks inherent in the other party's nationality, creditworthiness, and trustworthiness.[29] As a result, it is insufficient for a respondent requesting security for costs in commercial arbitration proceedings to merely point to an alleged insolvency of the claimant that could prevent him from paying a potential adverse costs award, given that the possibility of a business partner's credit rating changing over time is generally regarded as a normal commercial risk.[30] To justify a security for costs order, the respondent must demonstrate that the claimant's financial circumstances have substantially and unpredictably altered since the completion of

[26]Rubins, *supra* note 4, at p. 362; Von Goeler, *supra* note 6, at p. 337.
[27]Libananco Holdings Co Limited v Republic of Turkey, ICSID Case No ARB/06/8 ¶57 (June 23, 2008) ("Decision on Preliminary Issues.").
[28]RSM v Grenada, *supra*note 9, ¶ 5.20.
[29]Alastair Henderson, *Security for Costs in Arbitration in Singapore*, 7(1) ASIAN INTERNATIONAL ARBITRATION JOURNAL 54, p. 69 (2011).
[30]ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 13; Waincymer, *supra* note 4, at p. 650.

the arbitration agreement.[31] This criteria, however, cannot be applied to the system of treaty-based and legislation-based arbitration, since the responding state has not engaged into an arbitration agreement with a specific claimant investor in these instances.[32] Therefore, it cannot be stated that the respondent state has accepted the danger of interacting with a financially shaky claimant business, since it does not even know it's possible opponent in a future arbitration action.

D. PRINCIPAL CONDITIONS DEMANDED BY ICSID TRIBUNALS

Despite the difficulties in developing a uniform test with regard to specific criteria for security for costs orders, it is possible by examining ICSID case jurisprudence, to extract certain key requirements that ICSID tribunals generally consider necessary prior to considering ordering security for costs.

i. The Claimant's Lack of Funds

As a first stage in assessing petitions for security for costs, ICSID tribunals often investigate the financial status of the claimant investor and determine whether the respondent state has provided sufficient information demonstrating the claimant's inability to pay a possible adverse costs award.[33]

However, ICSID tribunals have emphasised that in order to justify an order for security for costs,"more should be required than a simple showing of the likely inability of a claimant to pay a possible costs award."[34] In their opinion, "it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award".[35]

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[31]ICC Case No 10032 ¶ 45 (Nov. 9, 1999) ("Procedural Order."), cited in Pierre A Karrer and Marcus Desax, *Security for Costs in International Arbitration – Why, When, and What If …,in* LIBER AMICORUM KARL-HEINZ BÖCK- STIEGEL339, 348 (Robert Briner et al. eds., 2001); Henderson, *supra* note 29, at p. 69; Gu, *supra* note 24.
[32]ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 14.
[33]Commerce Group Corp & San Sebastian Gold Mines, Inc v Republic of El Salvador, ICSID Case No ARB/09/17 ¶51 (Sept. 20, 2012) ("Decision on El Salvador's Application for Security for Costs; RSM v Grenada, *supra* note 9,¶ 5.18; RSM v Saint Lucia, *supra* note 1, ¶ 82.
[34]RSM v Grenada, *supra* note 9, ¶ 5.20; EuroGas Inc and Belmont Resources Inc v Slovak Republic, ICSID Case No ARB/14/14 ¶ 120 (June 23, 2015) (Procedural Order No 3) ("Decision on the Parties' Request for Provisional Measures.").
[35]RSM v Grenada, *supra* note 9, ¶ 5.19; EuroGas v Slovak Republic, *supra* note 34, ¶ 120; Pey Casado v Chile, *supra* note 15, ¶ 86.

ii. 'Exceptional Circumstances'

In addition to the claimant's indigence, ICSID tribunals have considered evidence of 'exceptional circumstances' a prerequisite for granting security for costs.[36] While the term 'exceptional circumstances' has not been defined in the abstract, one tribunal, in an attempt to at least narrow the threshold of exceptional circumstances, identified 'abuse or serious misconduct' as elements that had to be demonstrated on the claimant side before security for costs could be granted.[37] These cases have been cited in later ICSID decisions,[38] and experts have concurred that the claimant's conduct in this circumstance may likewise entail elements of bad faith.[39] The bar for 'exceptional circumstances' consequently seems to be reached when the claimant conducts an arbitration procedure abusively or in poor faith.

V. WHAT ROLE DOES THIRD-PARTY FUNDING PLAY IN THE EVALUATION OF REQUESTS FOR SECURITY FOR COSTS?

The authors will now assess the impact that third-party funding may have in an ICSID tribunal's ruling on security for expenses.

A. BRIEF INTRODUCTION TO THIRD-PARTY FUNDING

First, a brief introduction of the idea of third-party funding, its application, and funding conditions pertinent to security for expenses will be presented.

i. Understanding Third-Party Funding

Third-party funding[40] can take many forms, but one model is predominant in international arbitration.[41] This model defines third-party funding as an arrangement whereby an outside

[36]EuroGas v Slovak Republic, *supra* note 34, ¶ 121; RSM v Saint Lucia, *supra* note 1, ¶ 75; Liba-nanco Holdings Co Limited v Republic of Turkey, ICSID Case No ARB/06/8¶ 57 (June 23, 2008) ("Decision on Preliminary Issues of 23 June 2008."); Commerce Group v El Salvador, *supra* note 33, ¶ 45; RSM v Grenada, *supra* note 9, ¶ 5.17.
[37]Commerce Group v El Salvador, *supra* note 33, ¶ 45.
[38]EuroGas v Slovak Republic, *supra* note 34, ¶ 121.
[39]VON GOELER, *supra* note 6, at 356; ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 17.
[40]*Id.*

entity unrelated to a legal action agrees to pay the claimant's costs associated with pursuing its case.[42] In exchange for funding the claimant's legal representation in the dispute, the third-party funder obtains a percentage or fraction of the case's revenues if the claimant prevails.[43] However, if the lawsuit is unsuccessful, the claimant is not required to return the funder, and the funder loses its investment in the claimant's case.[44]

ii. Third-Party Funding Utilization

Third-party financing is often lauded as a means of facilitating access to justice by allowing claimants with limited financial resources to continue arbitration procedures.[45] This benefit is especially significant in the context of investor-state arbitration, where the claimant investor's inability to sue the host state for reimbursement in an expensive investment arbitration procedure may come from measures made by the host state. However, third-party funding is also used by financially secure claimants who are able to pay for the expenses of arbitration themselves but would rather outsource the costs in order to retain liquidity.[46]

iii. Relevant Funding Terms in the Context of Cost Security

The conditions of third-party funding products available to finance international arbitration procedures vary per funder.[47] It is beyond the scope of this article to discuss all conceivable contract structures underpinning third-party funding arrangements. Nonetheless, it is worthwhile to highlight a few frequent funding provisions that might shed light on a funder's contractual duty for unfavourable costs and, therefore, play a part in an ICSID tribunal's decision to approve a security for costs application.

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[41]Victoria Shannon Sahani and Lisa Bench Nieuwveld, THIRD-PARTY FUNDING IN INTER- NATIONAL ARBITRATION5 (2012); CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 185 (2014).
[42]Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA LAW REVIEW 388, 392 (2016); VON GOELER, *supra* note 6, at p. 73; Cento Veljanovski, *Third-Party Litigation Funding in Europe* 8(3) JOURNAL OF LAW, ECONOMICS & POLICY 405 (2012).
[43]Shannon Sahani and Bench Nieuwveld, *supra* note 41, at 392; Von Goeler, *supra* note 6, at 73; Rogers, *supra* note 41, at p.185.
[44]Veljanovski, *supra* note 42, at 405; Von Goeler, *supra* note 6, at p.73; Shannon Sahani, *supra* note 42.
[45]Susanna Khouri, Kate Hurford and Clive Bowman, *Third Party Funding in International Commercial and Treaty Arbitration – A Panacea or a Plague? A Discussion of the Risks and Benefits of Third Party Funding*, 8(4) TDM, 2011.
[46]Von Goeler, *supra* note 6, at 83-84; Chiann Bao, RSM v Saint Lucia:With Prejudice—The Unlikely Death Knell, 35 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 44, 44 – 49 (2021).
[47]Aren Goldsmith and Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)*, 53 INTERNATIONAL BUSINESS LAW JOURNAL 53, p. 56 (2012); Shannon Sahani and Bench Nieuwveld, *supra* note 41, at p. 28.

Clauses explicitly excluding the funder's liability for adverse costs are the first funding terms that come to mind in this context.[48] Such clauses would naturally attract the attention of an arbitral tribunal deciding upon security for costs, as they indicate that the funder will not be responsible for the respondent's costs if the claim fails.

Provisions granting the donor the right to cancel the funding arrangement may also be relevant in this situation. While virtually all third-party funders insist on including such provisions in their funding agreements, the design of such terms varies across the industry.[49] Some termination clauses allow the funder to cease funding at its sole discretion; other terms require material changes in circumstances or a material breach by the funded party.[50] Depending on the ease with which a funder might cancel a funding arrangement, it is possible that a claimant will be stuck in a case without money and unable to pay unfavourable costs.[51]

The budget limit reflects the maximum amount of capital that the third-party funder is willing to invest in the case and is typically determined at the outset of the funding agreement.[52]Once the budget limit is reached, the funder is contractually not required to increase its financial commitment and pay for costs in excess of this limit.[53] Expenses arising from adverse costs awards granted at the very end of a proceeding, i.e., when the budget is likely to be almost depleted, may thus exceed the case budget, resulting in the likelihood that the third-party funder will not reimburse these expenses.[54]

B. THE DEBATE

There is a heated dispute in the arbitration community over the role that third-party funding should play in an arbitral tribunal's evaluation of a security for costs request.

[48]ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 18.
[49]Maxi Scherer, Aren Goldsmith and Camille Flechet, *RDAI/IBLLJ Roundtable 2012: Third Party Funding in International Arbitration in Europe (Part 1: Funders' Perspective)*, 2 INTERNATIONAL BUSINESS LAW JOURNAL, (2012); Von Goeler, *supra* note 6, at p. 35.
[50]Scherer, Goldsmith, and Flechet, *supra* note 49; Von Goeler, *supra* note 6, at p. 35.
[51]Von Goeler, *supra* note 6, at p. 340.
[52]Shannon Sahani and Bench Nieuwveld, *supra* note 41, at p. 27; Von Goeler, *supra* note 6, at p. 29.
[53]Von Goeler, *supra* note 6, at p. 29.
[54]Shannon Sahani and Bench Nieuwveld, *supra* note 41, at p. 27.

Some scholars object to the notion that funders provide impoverished investors with the means to sue states and share in the proceeds if the claimant wins, but – as third parties to the action – cannot be held liable to meet any award of costs that might be made against the claimant if it loses.[55] This scenario has been dubbed 'arbitral hit and run' and described as 'particularly compelling grounds for security for costs.'[56]

Given that arbitral tribunals lack the authority to make costs orders against third-party funders, commentators have suggested that a security for costs order should be used as pressure to compel the third-party funder to participate.[57] In accordance with this logic, the concurring arbitrator in *RSM v. Saint Lucia* opined that the mere presence of a third-party funder on the claimant side should be sufficient for a tribunal to order security for costs, unless the claimant demonstrates its ability and willingness to pay adverse costs in the event that the tribunal rules in favour of the respondent.[58] This plan, however, has been criticised as 'too drastic or misconceived' by several critics, most notably financing industry professionals.[59] They have claimed that it would be 'unfair and discriminatory' to treat specialised funding firms differently than insurance companies or contingent-fee lawyers.[60]

C. INVESTMENT ARBITRATION JURISPRUDENCE

In some investment arbitration proceedings,[61] arbitral tribunals have addressed the effect of third-party funding on rulings for security for costs.

i. Guaracachi and Rurelec v. Bolivia

Guaracachi and Rurelec v. Bolivia was one of the first decisions in which an investment arbitration tribunal had to examine the presence of a third-party funding arrangement while

[55]Kalicki, *supra* note 5.
[56]*Id.*
[57]David Howell, cited in Alison Ross, *The Dynamics of Third Party Funding*, 7 GLOBAL ARBITRATION REVIEW, 12 (2012); William Kirtley and Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?*,30(1) JOURNAL OF INTERNATIONAL ARBITRATION 17, 20 (2013).
[58]RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10 ¶ 16 (Aug. 12, 2014) (Gavan Griffith, J., assenting) ("Decision on Saint Lucia's Request for Security for Costs of 13 August 2014.").
[59]Alison Ross, *A Storm Over St Lucia*, 9(5) GLOBAL ARBITRATION REVIEW 12, p. 14 (2014).
[60]Christopher Bogart, *Why the Majority Got it Wrong on Security for Costs*, 9(5) GLOBAL ARBITRATION REVIEW, 16 (2014); Todd Weiler, cited in Ross, *supra* note 59, at p. 14.
[61]*Id.*

evaluating a request for security for expenses.[62] In this proceeding, where the UNCITRAL Arbitration Rules were applicable, the arbitral tribunal denied the respondent state's request to compel security for costs, citing the 'very rare and exceptional' character of the proposed provision. The tribunal determined that the respondent had failed to establish that the claimants would be unable to pay an adverse costs award and emphasised that the mere existence of third-party funding on the claimants' side does not automatically support the conclusion that the claimants lack the means to pay a costs award rendered against them.[63]

ii. RSM Production Corporation v. Saint Lucia

Another pertinent case was the previously noted case, *RSM Production Corporation v. Saint Lucia*.[64] In this proceeding, for the first time in the history of investment arbitration, the tribunal required the claimant investor to give security for expenses. Noting that the provisional measure of security for costs required proof of 'exceptional circumstances,' the majority of the tribunal determined that this criterion was met for two reasons: First, the claimant had a documented history of non-compliance with prior decisions and failure to make advance payments. Second, the existence of a third-party funder on the claimant's side added to the tribunal's worry that the claimant would not comply with an adverse cost award.[65] The tribunal reasoned that it was unreasonable to burden the respondent state with such uncertainty and risk.[66]

iii. Eurogas Inc.& Belmont Resources v. Slovac Republic

In 2015, a third reported ruling was issued in the case of *EuroGas and Belmont v. Slovak Republic*.[67] In an ICSID proceeding, the tribunal refused the respondent state's request to compel the claimant to give security for costs, finding that no extraordinary circumstances had been shown to warrant such a step. The panel ruled that 'financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute *per se*

[62]Guaracachi America, Inc (USA) and Rurelec plc (United Kingdom) v Plurinational State of Bolivia, PCA Case No 2011–17, (Mar. 11, 2013) (Procedural Order No 14).
[63]Guaracachi v Boliva, *supra* note 62, ¶ 7.
[64]RSM v Saint Lucia, *supra* note 1.
[65]*Id.*¶ 86.
[66]*Id.* ¶ 83.
[67]EuroGas v Slovak Republic, *supra* note 34.

exceptional circumstances justifying that the Respondent be granted an order of security for costs.'

iv. South American Silver Limited v. Bolivia

Based on similar considerations, the arbitral tribunal in *South American Silver Limited v. Bolivia* denied the respondent's request for security for costs.[68] Like previous arbitral tribunals, the tribunal in *South American Silver Limited v. Bolivia* emphasised the exceptional nature of this provisional measure and its high threshold. In light of this, the tribunal determined that the respondent state had not presented sufficient evidence demonstrating that the claimant investor was impoverished and therefore, financially unable to satisfy an adverse cost award.[69] The mere support by a third-party funder was not considered proof for the claimant investor's impoverishment, as funding solutions were not only utilised by financially unstable claimants. An investor's dependence on third-party funding might be considered by an arbitral tribunal as one of many factors in its decision-making process; but, the funder's mere existence was not deemed sufficient to approve a request for security for costs.[70]

v. Interpretation

Analyzing the preceding cases, it is clear that all tribunals evaluated requests for security for expenses using the same criteria. Aware of the extraordinary character of this interim remedy, all courts have emphasised the high threshold for ordering security for costs – 'exceptional circumstances' – and have maintained that financial constraints on the claimant side alone cannot support an award for security for costs. Therefore, it should not come as a surprise that none of the arbitral courts saw the mere existence of a third-party funder on the side of a claimant investor as sufficient justification for granting a request for security for costs.

In the instance of *RSM v. Saint Lucia*, where the majority predicated its decision to impose security for costs in part on the fact that the claimant investor depended on third-party finance, this finding is even more accurate. However, it does not appear that the admitted involvement of a funder played a significant role in the tribunal's evaluation, as the main

[68]South American Silver Limited v The Plurinational State of Bolivia, PCA Case No 2013–15 (Jan. 11, 2016)(Procedural Order No 10).
[69]South American Silver Limited v The Plurinational State of Bolivia, *supra* note 68, ¶ 66–67.
[70]*Id*, ¶ 65-77.

reason for the tribunal's decision was the claimant's documented history of non-compliance with costs orders, which the tribunal deemed sufficient evidence of bad faith. The panel seemed to view the claimant's dependence on third-party finance as a favourable point.[71]

D. ANALYSIS

Keeping in mind the position of ICSID tribunals affirming the high threshold for security for costs, which requires proof not only of the claimant's indigence but also of exceptional circumstances, the authors will analyse the impact of third-party funding on an ICSID tribunal's evaluation of an application for security for costs.

i. The claimant's Lack of Funds

Given that the claimant's impecuniosity seems to be a prerequisite for requiring security for costs, it is essential to emphasise that a claimant's dependence on third-party funding alone should not lead an ICSID tribunal to conclude that a supported claimant is impoverished. This is because third-party funding is not only used by financially distressed claimant investors, but also by solvent parties that are in a position to pay for the costs of arbitration themselves but seek recourse to third-party funding in order to share costs risks or remain financially liquid.[72] Therefore, an ICSID tribunal may view a claimant's reliance on third-party funding as an initial indication of the funded party's overall financial situation. This should not, however, halt the tribunal's investigation into perjury. Instead, it should confirm that the claimant is really experiencing financial hardship. This may be performed by evaluating additional financial documents to determine whether a supported claimant is impoverished.[73]

ii. Exceptional Circumstances

In addition to the claimant's indigence, unusual circumstances must be shown in order for security for costs to be ordered. Thus, the issue is whether the existence of a third-party

[71]RSM v Saint Lucia, *supra* note 1, ¶ 83; *See* Von Goeler, *supra* note 6, at 353.
[72]*Id.*
[73]See ICCA-Queen Mary Task Force Draft Report, *supra* note 19 at 17.

funder represents an extraordinary situation that might justify an order of these provisional measures.

Given that ICSID tribunals require evidence of abuse or an element of bad faith on the claimant side in order to meet the threshold for exceptional circumstances,[74] it appears that recourse to third-party funding must be placed on the same level as conducting investment arbitration abusively or in bad faith in order to be considered 'exceptional.'

E. RELYING ON THIRD-PARTY FUNDING AS A SIGN OF BAD FAITH OR ABUSE?

In the context of bad faith or abuse connected to honouring cost decisions given in arbitration processes, commentators often allude to a situation in which, prior to initiating a claim, the claimant investor takes active steps to insulate itself from possible obligation for unfavourable costs.[75]

One technique to do this is to assign a claim to a legal company with no assets and maybe no financial resources to prosecute the claim in an arbitration proceeding. This legal entity is a so-called 'empty shell' whose costs and expenses incurred during the proceeding are covered by an unrelated but financially stable third party.[76] In this context, the nominal claimant functions as a mere procedural vehicle that will collect the proceeds if the case is won but will be unable to pay adverse costs if the case is lost and a costs award is issued in the respondent's favour.[77] Is this conduct, which may serve as an example of abuse or bad faith, analogous to a case in which an impoverished claimant investor depends on the financial help of a third-party funder to file a claim against a respondent state?

F. TWO CIRCUMSTANCES WITH DIFFERENT EVIDENCE-BASED FACTORS

To address this issue, it is useful to differentiate between two situations that ICSID tribunals may encounter in investment arbitration procedures and that vary with respect to the evidentiary foundation ICSID tribunals will have for assessing security for costs petitions.

[74]Von Goeler, *supra* note 6, at p. 356; ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 14.
[75]Kirtley and Wietrzykowski, *supra* note 55; Von Goeler, *supra* note 6, at 357; Kalicki, *supra* note 5.
[76]Rubins, *supra* note 4, at p. 361.
[77]Von Goeler, *supra* note 6, at p. 358.

i. The First Scenario

In the first scenario, an ICSID tribunal may become aware of an indigent claimant's access to third-party funding without being privy to the precise details of the agreement underlying the funding connection. In this case, an ICSID tribunal must decide whether or not to impose security for costs on the basis of shaky factual evidence. The only information the ICSID tribunal has regarding third-party funding and which it may include in its assessment is the fact that a funder is actually financing the case on behalf of an impecunious claimant.[78] There is no more information on the nature or terms of the financing arrangements, either because the tribunal does not think it essential to conduct any enquiries or because the supported claimant refuses to divulge the specifics of the funding arrangement.

Can the simple reliance of an impoverished claimant to third-party financing in this situation be contrasted to the previously mentioned scenario in which a claimant purposefully avoids culpability for unfavourable expenses by assigning its claims to an 'empty shell'? The fact that an impoverished claimant relies on third-party support does not preclude a responder from recovering its expenses if the claimant is unsuccessful. Although not all third-party funders give coverage for future adverse costs awards as part of their funding packages, depending on the contract and price structure, certain funders are willing to bear responsibility for adverse costs.[79] For example, a representative of the finance sector recently stated in an article that his company supplied After the Event Insurance (ATE Insurance), which reimburses the opponent's expenditures in the event that the claim is unsuccessful.[80] Such insurance inevitably comes with a premium, which is the responsibility of the claimant.[81]

Typically, financing conditions stipulate whether and to what degree a sponsor would pay unfavourable expenses. In the absence of the precise provisions of a financing arrangement, an ICSID tribunal cannot definitively determine whether or not a claimant has planned for unfavourable costs to be reimbursed if its case is lost. Due to this uncertainty, several commentators and arbitrators have suggested that the funded claimant should be required to 'disclose all relevant factors' and ‘make a case why security for costs orders should not be

[78]RSM v Saint Lucia, *supra* note 1.
[79]Scherer, Goldsmith and Flechet, *supra* note 49.
[80]Bao, *supra* note 46.
[81]*Id.*

made.'[82] However, this technique is deceptive. It is commonly acknowledged that the asking party has the burden of evidence when obtaining security for expenditures.[83] There is no reason a claimant's reliance on third-party financing should, as a general rule, place the burden of evidence on the claimant.[84] As an interim result, it can be stated that, in cases where an ICSID tribunal's evidentiary basis for its decision on security for costs is limited to the fact that a funder is financing the impoverished claimant's case, this fact alone should not prompt an ICSID tribunal to order security for costs.

ii. The Second Scenario

In the second scenario, an ICSID tribunal may not only be aware of the presence of a third-party funder on the side of the indigent claimant, but may also be aware of the terms of the funding agreement indicating that the funder will not assume responsibility for adverse costs. In this circumstance, an ICSID tribunal may base its judgement on security for expenses on stronger evidence. The tribunal may be aware of the details of the funding arrangement, for instance, because the supported claimant voluntarily disclosed the funding conditions.[85] By analysing the funding terms, the tribunal discovers that the funder is not contractually accountable for foreseeable unfavourable expenses. As described before, an ICSID tribunal may reach this determination due to funding agreements expressly removing the funder's liability for unfavourable expenses, provisions allowing the funder to cancel the funding arrangement, or clauses establishing a certain budget cap for the case.[86]

An ICSID tribunal confronted with an impoverished claimant relying on the financial support of a third-party funder who is manifestly unwilling to cover adverse costs may find this situation comparable to the previously described scenario where the claimant attempts to avoid liability by using an 'empty shell.' In both instances, the claimant decides to pursue a claim knowing from the proceeding that the respondent cannot recover its costs if the claim is unsuccessful.

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[82]RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10 ¶ 18 (Aug. 12, 2014) (Gavan Griffith, J., assenting) ("Decision on Saint Lucia's Request for Security for Costs of 13 August 2014.").
[83]SCHREUER, *supra* note 9, at p. 776; Romesh Weeramantry and Montse Ferrer, *RSM Production Corporation v Saint Lucia: Security for Costs – A New Frontier?*, 30(1) ICSID REVIEW 30, 32 (2015).
[84]Von Goeler, *supra* note 6, at p. 354.
[85]Muhammet Çap and SehilInsa at EndustriveTicaret Ltd Sti v Turkmenistan, ICSID Case No ARB/12/6 (June 12, 2015) (Procedural Order No 3).
[86]*Id.*

Despite the fact that these scenarios look equivalent in this sense, they are not comparable. In the scenario involving the 'empty shell' model, the original claimholder takes proactive steps to assign its claim to an entity without assets in order to thwart a potential costs award rendered against it; the claimant investor's sole intent behind the deliberate assignment of claims is to circumvent procedural obligations by avoiding future liability for adverse costs. Different rules apply when an impoverished claimant turns to a third-party funder who is not accountable for unfavourable expenses. In contrast to the case mentioned above, the claimant in this instance has not actively contributed to its own financial hardship. The claimant has neither outsourced its claim to another business organisation with insufficient assets to fulfil an adverse costs judgement, nor has it intentionally disposed of its assets to become impoverished and therefore, made itself incapable of paying adverse costs. Rather, the primary objective of the impoverished claimant is to empower itself to arbitrate. If this objective can only be accomplished with the assistance of a third-party funder who is ready to support the lawsuit but unwilling to pay unfavourable costs, a claimant's turn to such a funder may not be seen as abusive or in bad faith. Because in these circumstances, the respondent's inability to collect its expenses if the claim is denied is not intentional. It is only a side consequence – one might even argue a ‘necessary evil’ – of the claimant's resort to a valid financial remedy, which may be the only choice for an impoverished investor to access justice.[87]

For these reasons, even if an ICSID tribunal is aware of the provisions of a funding agreement indicating that the funder would not be responsible for an adverse costs judgement, the tribunal should not force the claimant to provide security for costs. As one observer noted, it may seem unjust that a respondent state would confront a lawsuit made by an insolvent claimant investor who is financially backed by a third-party funder and may arbitrate as if it were solvent. Such a claimant does not have to assume any economic risk and may leave the respondent unable to recover its costs if the claim fails.[88] However, as other scholars and practitioners have pointed out, the investment treaty dispute resolution mechanisms were primarily designed to protect investors and their investments – not the

[87]Von Goeler, *supra* note 6, at p. 359.
[88]*Id.*

contracting states.[89] Therefore, it seems appropriate to prioritise the ability of claimant investors to obtain justice.

VI. CONCLUSION

The determination of a request for security for costs by an ICSID tribunal is a delicate balancing act between the legitimate interests of the claimant investor and the responsible state. The respondent state, which is employing public money to fight the claim, wants to be in a position to recoup its costs if the claim is unsuccessful, while the claimant investor seeks effective access to international justice.

To date, no universal criterion has been developed to determine whether security for expenditures may be given. Rather, ICSID courts often evaluate petitions for security for expenses by considering the circumstances of each case. However, it seems that a claimant investor's prospective bankruptcy is insufficient to offer security for expenses. Due to the mentioned policy concerns, namely the risk of stifling a meritorious claim and denying a claimant investor access to justice, ICSID tribunals require, in addition to the claimant's demonstrated lack of financial resources, proof of exceptional circumstances, such as abusive behaviour or a similar element of bad faith on the claimant side.

According to the authors, an impecunious claimant's recourse to third-party funding does not constitute bad faith or abusive behaviour. Therefore, an ICSID tribunal should not be required to impose security for costs, regardless of whether the tribunal is aware of a funder on the claimant's side or the conditions of an underlying funding arrangement indicating that the funder would not be liable for unfavourable costs.

[89]Bao, *supra* note 46.