



# Memorandum

**To:** Meg Kinnear-Secretary General  
International Centre for Settlement of Investment Disputes

**From:** Iván Zarak A.  
Acting Minister of Economy and Finance

**Date:** September 12, 2016

**Re:** Effective Protection for Respondent States Against Judgment-Proof Claimants

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## I. Introduction

The Republic of Panama has provided notice to the Secretary-General, pursuant to Regulation 3(2) of the Administrative and Financial Regulations of the International Centre for Settlement of Investment Disputes (ICSID),<sup>1</sup> of its request to place on the agenda for the 50th Annual Meeting of the ICSID Administrative Council, scheduled to take place in Washington, DC in October 2016, the subject of improved protection for respondent states against judgment-proof claimants.

As background, this memorandum introduces the publicly-available record of ICSID costs awards in favor of respondent states and their enforcement; a description of the characteristics of judgment-proof claimants; the experience of the Republic of Panama with ICSID costs awards against judgment-proof claimants; tools currently available to ICSID tribunals to protect respondent states against judgment-proof claimants; and actions that the ICSID Administrative Council and ICSID Secretariat may take to improve understanding of issues related to the effective enforcement of such costs awards and opportunities for enhanced protection for respondent states.

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<sup>1</sup> “Additional subjects may be placed on the agenda for any meeting of the Administrative Council by any member provided that he shall give notice thereof to the Secretary-General not less than seven days prior to the date set for such meeting. . . .” ICSID Administrative and Financial Regulations, Regulation 3(2).

The Republic of Panama proposes that, at its October 2016 meeting, the ICSID Administrative Council request<sup>2</sup> the ICSID Secretariat to conduct and publish a survey<sup>3</sup> taking stock of the current situation and trends with respect to costs awards in favor of respondent states, as well as the views and suggestions of the ICSID Contracting States with respect to enhanced protections for respondent states against judgment-proof claimants. A survey could include the incidence of costs awards in favor of respondent states; the experience with collection of costs awards, whether through voluntary payment, settlement or pursuit of enforcement proceedings in domestic courts and the cost thereof; any impediments to enforcement that respondent states have experienced; and comments and recommendations concerning the effective enforcement of costs awards and opportunities for improvement. Further consideration then may be given to the possibility of developing guidelines for tribunals and amending the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”) with an aim toward improving the enforceability of costs awards and protecting respondent states against judgment-proof claimants.

The Republic of Panama appreciates the attention of the ICSID Administrative Council to this important subject. As an increasing number of Contracting States understand first-hand, the taxpayers of a Contracting State should not be left to bear significant financial burdens that have resulted from opportunistic and, at times, abusive initiation of ICSID arbitration proceedings by impecunious claimants.

## **II. Publicly-available record of enforcement of ICSID costs awards in favor of respondent states**

Although the enforcement of ICSID costs awards in favor of respondent states is not subject to formal monitoring and publication, results of an informal survey were published in *Global Arbitration Review* in September 2015.<sup>4</sup> According to the report, the authors identified eighty investment treaty arbitration proceedings that had resulted in a costs award up to December 31, 2013 and contacted counsel to the successful party in each case.

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<sup>2</sup> The ICSID Administrative Council may make such a request pursuant to Article 6(3) of the ICSID Convention: “The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), art. 6(3), Mar. 18, 1965, 575 U.N.T.S. 159.

<sup>3</sup> The ICSID Secretariat may conduct and publish a survey pursuant to Regulation 22(1) of the ICSID Administrative and Financial Regulations: “The Secretary-General shall appropriately publish information about the operation of the Centre . . . .” ICSID Administrative and Financial Regulations, Regulation 22(1).

<sup>4</sup> Judith Gill QC & Matthew Hodgson, *Costs Awards – Who Pays?*, 10(4) *Global Arbitration Review* (September 15, 2015), available at <http://globalarbitrationreview.com/article/1034757/costs-awards-%E2%80%93-who-pays>.

The anonymous responses to the survey indicated that, among thirty-five respondent states that had been granted costs awards during the period under review,<sup>5</sup> seventeen awards (49%) had been paid in full, five awards (14%) had been paid in part, and thirteen awards (37%) had not been paid at all.<sup>6</sup>

Responses to the survey also indicated that, among the twenty-two costs awards in favor of respondent states that had been paid either in full or in part, fourteen awards were paid voluntarily (64%), two awards were paid pursuant to a settlement (9%), and six awards were paid through enforcement (27%).<sup>7</sup>

The amounts outstanding under the costs awards in favor of respondent states that remained unpaid were not disclosed in the report, nor were the amounts foregone pursuant to settlement agreements. The authors noted, however, that in a prior study of awards issued up to December 31, 2012, average party costs were found to be approximately U.S.\$4.5 million and average ICSID tribunal costs to be approximately U.S.\$770,000.<sup>8</sup>

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<sup>5</sup> The Republic of Panama is aware of at least twelve reported costs awards in favor of respondent states that have been issued by ICSID arbitration tribunals since December 31, 2013, the cutoff date used by the authors of the survey. *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/11/8, (Award, 1 Aug. 2016) (as reported by Sebastian Perry, *Pakistan Wins Costs After Kuwaiti Claimant's U-turn*, Global Arbitration Review (Aug. 15, 2016)); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Award, 8 July 2016), ¶ 590; *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28 (Award, 2 June 2016), ¶ 130; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8 (Award, 4 May 2016), ¶ 375; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 (Award, 8 Mar. 2016), ¶ 411(e); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33 (Award, 3 Nov. 2015), ¶ 480; *Pluspetrol Perú Corporation and others v. Perupetro S.A.*, ICSID Case No. ARB/12/28 (Award, 21 May 2015), ¶ 220; *Renée Rose Levy and Grencitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17 (Award, 9 Jan. 2015), ¶ 203(c); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 (Award, 25 Aug. 2014), ¶ 12.1(4)–(5); *Société Industrielle des Boissons de Guinée v. Republic of Guinea*, ICSID Case No. ARB/12/8 (Award, 21 May 2014), ¶ 130; *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1 (Award, 16 May 2014), ¶ 217(4)–(5); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 (Award, 10 Dec. 2014), ¶ 530(2).

<sup>6</sup> Among the twenty-one claimants that had been granted costs awards, eleven awards (52%) had been paid in full; six awards (29%) had been paid in part; and four awards (19%) had not been paid at all.

<sup>7</sup> Among the seventeen costs awards in favor of claimants that had been paid either in full or in part, eight awards (47%) were paid voluntarily, seven awards (41%) were paid pursuant to a settlement, and two awards (12%) were paid through enforcement.

<sup>8</sup> Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9(2) Global Arbitration Review (March 24, 2014), available at

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### III. Judgment-proof claimants and their characteristics

The Republic of Panama has encountered judgment-proof claimants in three circumstances: (i) bankruptcy, (ii) transfer of shares of claimant to a judgment-proof party, and (iii) establishment as a special purpose vehicle. This list may not be exhaustive.

First, if a claimant enters bankruptcy before, during, or after an ICSID arbitration proceeding, the claimant typically will be shielded by a bankruptcy stay against creditor claims, including any claims deriving from an ICSID costs award in favor of a respondent state. In such cases, a respondent state will need to submit to the appropriate tribunal its claims against the bankruptcy estate of the claimant, where the ICSID costs award may be considered among other unsecured claims against the bankruptcy estate. When the bankruptcy proceeding eventually reaches a conclusion, the respondent state may be able to collect only a fraction, if anything, of its entitlement under the ICSID costs award and, in the course of asserting its claims during the bankruptcy proceeding, the respondent state likely will have incurred significant further expenses.

Second, claimants may be lower-tier subsidiaries in large corporations and they or the assets held by them may be transferred outside of the corporate structure, including to judgment-proof co-claimants. In some cases, the transfer may even constitute a fraudulent conveyance designed to defeat enforcement of a future cost award. The report of survey results published in *Global Arbitration Review* in September 2015 noted that counsel to a respondent state that participated in the survey commented that “a subsidiary of one of the claimant companies was transferred (in potentially fraudulent circumstances) during the course of the proceeding and without disclosure to the tribunal,” which “ultimately prevented enforcement of the costs award since the claimants were left without substantial assets.”<sup>9</sup>

Third, if a claimant entity is established as a special purpose vehicle, it may, by design, lack any revenues or assets other than those associated with the project that is the subject of an arbitration proceeding. In many instances, the alleged dispute that is subject to arbitration claims will be based upon a failure of the project that the special purpose vehicle was intended to hold (and to isolate from other revenues and assets of a parent entity) and, in some instances, the project may never have commenced at all. In circumstances in which a project has failed or never commenced, the project-specific special purpose vehicle is unlikely to be generating any significant revenue or to hold any significant assets, and the capitalization of the special purpose vehicle typically will not

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<http://globalarbitrationreview.com/article/1033259/counting-the-costs-of-investment-treaty-arbitration>.

<sup>9</sup> Judith Gill QC & Matthew Hodgson, *Costs Awards – Who Pays?*, 10(4) *Global Arbitration Review* (September 15, 2015), available at <http://globalarbitrationreview.com/article/1034757/costs-awards-%E2%80%93-who-pays>.

exceed a *de minimis* level. As a result, attempts to enforce a costs award against a claimant that is a special purpose vehicle are at high risk of being ineffective. According to the September 2015 report published by *Global Arbitration Review*, “it is a common complaint on the part of states and their counsel that claimants are frequently special purpose vehicles (SPVs) with no significant assets, placing the parties in an asymmetric position.”<sup>10</sup>

#### **IV. Experience of the Republic of Panama with ICSID costs awards against judgment-proof claimants**

The Republic of Panama twice has been granted costs awards by ICSID arbitration tribunals: first, in an award dated November 24, 2010 in *Nations Energy, Inc. and others v. Republic of Panama*<sup>11</sup> and, second, in an award dated June 2, 2016 in *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*.<sup>12</sup> To date, the Republic of Panama has been able to collect only five percent of the amount awarded in the *Nations Energy* case and has been unable to collect the full amount awarded in their *Transglobal Green Energy* case. Despite persistent efforts by the Republic of Panama to enforce the costs award it was granted in *Nations Energy*, the award now has been outstanding for nearly six years. Claimants sought to postpone enforcement by seeking annulment. Promptly after an ICSID *ad hoc* Committee discontinued the annulment proceeding due to a failure by the claimant-applicants to make a deposit for costs,<sup>13</sup> the Republic of Panama commenced proceedings in July 2012 in the federal courts of the United States.<sup>14</sup> The claimants, an individual and a former subsidiary of a major U.S. public utility, immediately filed for bankruptcy and invoked the stay on all judicial proceedings.<sup>15</sup> In June 2013, the bankruptcy proceedings were dismissed.<sup>16</sup> Then, the U.S. federal district court issued a judgment for the full amount that the Republic of Panama had requested, which included the costs of the U.S. litigation proceeding for recognition and enforcement of the ICSID costs award, as well as

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<sup>10</sup> Judith Gill QC & Matthew Hodgson, *Costs Awards – Who Pays?*, 10(4) *Global Arbitration Review* (September 15, 2015), available at <http://globalarbitrationreview.com/article/1034757/costs-awards-%E2%80%93-who-pays>.

<sup>11</sup> *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19 (Award, 24 Nov. 2010), ¶ 717(c).

<sup>12</sup> *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28 (Award, 2 June 2016), ¶ 130.

<sup>13</sup> *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19 (Order for Discontinuance, 15 June 2012).

<sup>14</sup> *Republic of Panama v. Jurado et al.*, M.D. Fla., No. 12-cv-1647 (Complaint, 24 July 2012), ECF No. 1.

<sup>15</sup> *Republic of Panama v. Jurado et al.*, M.D. Fla., No. 12-cv-1647 (Suggestion of Bankruptcy, 20 Sept. 2012), ECF Nos. 15 & 16.

<sup>16</sup> *Republic of Panama v. Jurado et al.*, M.D. Fla., No. 12-cv-1647 (Notice of Dismissal of Bankruptcy Cases and Request for Judgment, 12 June 2013), ECF No. 17.

reasonable attorneys' fees and disbursements.<sup>17</sup> The judgment remains unpaid today because the individual claimant put the few assets he had into joint name with his spouse and the former subsidiary is an empty shell.

The third Claimant was already in a Chapter 11 reorganization proceeding at the time of the award. After the Republic of Panama filed a claim in the bankruptcy court, the judge ordered mediation, and the Republic of Panama received only five percent of the costs awarded.

In the *Transglobal Green Energy* case, the Republic of Panama brought to the attention of the tribunal the judgment-proof nature of the claimants (the putative foreign investor being a limited liability corporation formed in the State of Texas in the United States with essentially no assets and the other claimant being a Panamanian shell company) and its concerns about the enforceability of any eventual costs award. The Republic of Panama accordingly requested security for costs and supported its request by presenting evidence (i) that the claimants lacked meaningful assets, and that their financial situation was not attributable to the Republic of Panama; (ii) that the claimants had engaged in abusive procedural behavior in contravention of Procedural Order No. 1; (iii) that the claimants were special purpose vehicles with no assets that posed a significant risk of non-compliance with any eventual cost award; and (iv) that the Republic of Panama already had experienced problems with respect to ICSID arbitration proceedings initiated by judgment-proof claimants. The tribunal nevertheless decided that security for costs was not warranted.<sup>18</sup>

In its award dated June 2, 2016, the same ICSID tribunal determined that the claimants had committed an "abuse of process" and awarded the Republic of Panama the costs of the ICSID arbitration proceeding, plus over \$2.2 million of legal fees and expenses.<sup>19</sup> The Republic of Panama now faces the prospect of engaging again in a likely futile (and costly) exercise pursuing vindication of its rights under a costs award granted by an ICSID arbitration tribunal.

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<sup>17</sup> *Republic of Panama v. Jurado et al.*, M.D. Fla., No. 12-cv-1647 (Judgment, 14 June 2013), ECF No. 21. Pursuant to an agreement reached in a separate bankruptcy proceeding, the Republic of Panama agreed to reduce its claim under the ICSID costs award by approximately 15%. *Id.* (Notice of Dismissal of Bankruptcy Cases and Request for Entry of Judgment, 12 June 2013), ECF No. 17.

<sup>18</sup> *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28 (Decision on the Respondent's Request for Provisional Measures Relating to Security for Costs, 21 Jan. 2016).

<sup>19</sup> *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28 (Award, 2 June 2016), ¶ 130(i)–(iii).

## V. Existing tools available to ICSID tribunals to protect respondent States against judgment-proof claimants

The Republic of Panama is aware of at least three existing tools available to ICSID arbitration tribunals to provide some protection to respondent States against judgment-proof claimants: (i) cost-shifting (which protects States only partially), (ii) provisional measures in the form of security for costs, and (iii) security for costs through application of the inherent authority of ICSID tribunals to maintain the integrity of a proceeding. Although already recognized as available to ICSID tribunals pursuant to their existing sources of authority, ICSID tribunals have proven reluctant to apply these tools in the context of specific arbitration proceedings. Here, the ICSID Administrative Council may want to clarify the authority of the ICSID tribunals to use these tools and encourage their use in appropriate cases.

### A. Existing tools available to ICSID tribunals: Cost-shifting

Cost-shifting is a tool by which an ICSID tribunal may require one of the parties to pay the fees and expenses of the tribunal, the charges for use of the ICSID facilities, and the costs related to any part of the proceeding. At any stage of the proceedings, an ICSID tribunal may issue a cost-shifting order pursuant to Rule 28(1) of the ICSID Arbitration Rules<sup>20</sup>:

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) *at any stage of the proceeding*, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) *with respect to any part of the proceeding*, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

Rule 28(1)(a) of the ICSID Arbitration Rules refers to Administrative and Financial Regulation 14, which specifies the following<sup>21</sup>:

(d) . . . [I]n connection with every arbitration proceeding *unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge*, without prejudice to the final decision on the

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<sup>20</sup> ICSID Arbitration Rules, Rule 28(1) (emphasis added).

<sup>21</sup> ICSID Administrative and Financial Regulations, Regulation 14(3)(d) (emphasis added).

payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. . . .

At least one ICSID tribunal has issued a cost-shifting order requiring a claimant to pay advances that otherwise might have been divided with the respondent state. In a decision dated December 12, 2013, the tribunal in *RSM Production Corporation v. Saint Lucia* determined that the “Claimant should be required to make all such interim advances, including Respondent’s one-half share of advances heretofore ordered, subject to its right to seek reimbursement if required by the Tribunal’s final award.”<sup>22</sup>

Notwithstanding the absence of any specified standard in Rule 28(1) of the ICSID Arbitration Rules or in Administrative and Financial Regulation 14(3)(d) by which a respondent state would need to demonstrate the propriety of cost-shifting, the tribunal in *RSM Production Corporation v. Saint Lucia* based its conclusion on a finding of “good cause” for a cost-shifting measure.<sup>23</sup> Subsequently, the tribunal in *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama* “ha[d] difficulty in appreciating the difference in the analysis of the *RSM* tribunal between ‘good cause’ in a request for shifting costs and ‘exceptional circumstances’ in a request for security for costs,”<sup>24</sup> suggesting that a clarification may be beneficial to future tribunals. Of course, even with clarification, a cost shifting order will offer only partial protection to respondent States, but such an order may deter claimants from pursuing meritless cases initiated as a low-cost option to pressure a respondent state.

#### **B. Existing tools available to ICSID tribunals: Security for costs**

Security for costs is a second tool available to ICSID tribunals to protect respondent States against judgment-proof claimants. Security for costs involves the provision of funds or a readily cashable instrument, such as a bond, bank guarantee or letter of credit, that may be held during the pendency of a proceeding and eventually applied toward the fulfillment of an award.

Several ICSID tribunals have interpreted their general authority to issue provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules to include authority to require, in “exceptional” circumstances,

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<sup>22</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia’s Request for Security for Costs, 13 Aug. 2014), para. 76 (quoting *id.*, Decision on Saint Lucia’s request for Provisional Measures of December 12, 2013, paras. 71–74).

<sup>23</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia’s Request for Security for Costs, 13 Aug. 2014), para. 76 (quoting *id.*, Decision on Saint Lucia’s request for Provisional Measures of December 12, 2013, paras. 71–74).

<sup>24</sup> *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28 (Decision on Respondent’s Request for Shifting the Costs of the Arbitration, 4 Mar. 2015), ¶ 40.

security for costs.<sup>25</sup> Article 47 of the ICSID Convention provides authority to issue provisional measures if a tribunal “considers the circumstances so require”:

Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.<sup>26</sup>

Rule 39 of the ICSID Arbitration Rules sets forth details concerning the issuance of provisional measures, specifying that a party may request provisional measures at any time after the institution of a proceeding, that a tribunal may also recommend provisional measures on its own authority, and that each party shall have an opportunity to present its observations concerning a proposed provisional measure.<sup>27</sup>

To date, however, only one ICSID tribunal is known to have required security for costs.<sup>28</sup> The tribunal in *RSM Production Corporation v. Saint Lucia*, subsequent to having issued a cost-shifting order, determined by majority that the issuance of a provisional measure requiring security for costs would depend on three requirements: that a right in need of protection existed; that the circumstances required that the provisional measures be ordered to preserve such right; and that the tribunal must not prejudge the merits of the dispute.<sup>29</sup> The tribunal found each requirement to be satisfied, including, with respect to the requirement that “the circumstances required that the provisional measures be ordered to preserve such right,” that the situation was urgent and that the requested measures were necessary to prevent irreparable harm.<sup>30</sup> In particular, the tribunal determined that “there [was] a material risk that Claimant would not reimburse

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<sup>25</sup> See *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia’s Request for Security for Costs, 13 Aug. 2014), paras. 51–52 & note 33 (listing five ICSID decisions as examples). Among the ICSID decisions cited by the tribunal in *RSM Production Corporation v. Saint Lucia* is a decision by the *ad hoc* Committee that presided over the annulment stage of *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*; for its authority to require security for costs, the *ad hoc* Committee invoked its inherent powers to safeguard the integrity of the proceeding. See *Commerce Group Corporation and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, (Decision on El Salvador’s Application for Security for Costs, 20 Sept. 2012), paras. 40–45.

<sup>26</sup> ICSID Convention, art. 47. The authority to “recommend” provisional measures has been interpreted to as authority to “order” such measures. See Christoph H. Schreuer et al., *The ICSID Convention: A Commentary*, art. 47, paras. 15–22 (2d ed. 2009).

<sup>27</sup> ICSID Arbitration Rules, Rule 39.

<sup>28</sup> See *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia’s Request for Security for Costs, 13 Aug. 2014), paras. 53 & 90.

<sup>29</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia’s Request for Security for Costs, 13 Aug. 2014), para. 58. *But see id.* (Dissenting Opinion of Edward Nottingham, 12 Aug. 2014).

<sup>30</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia’s Request for Security for Costs, 13 Aug. 2014), paras. 58–90.

Respondent for its incurred costs, be it due to Claimant's unwillingness or its inability to comply with its payment obligations."<sup>31</sup>

The facts in the *RSM Production Corporation* case were exceptional. To make provisional measures in the form of security for costs a more meaningful protection, the criterion of "urgency" may merit reexamination with a view to its elimination. As noted by Judge Stephen M. Schwebel in his keynote address to the International Council on Commercial Arbitration in April 2014<sup>32</sup>:

Another reform that may merit consideration is institutionalizing security for costs. As it is, special purpose vehicles may bring a thin claim against a State which has the financial burden of defending itself; the State wins the arbitration and is awarded costs, but finds that the special purpose vehicle used by the claimant lacks the funds to pay costs.

It is to shortcomings such as these that reform efforts should be directed.

**C. Existing tools available to ICSID tribunals: Inherent authority to maintain the integrity of a proceeding**

Application of the inherent authority of ICSID tribunals to maintain the integrity of a proceeding is a third tool available to ICSID tribunals to improve protection for respondent States against judgment-proof claimants. Article 44 of the ICSID Convention makes clear that, "if any question of procedure arises which is not covered by this Section [of the ICSID Convention] or the [ICSID] Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."<sup>33</sup>

In the context of annulment proceedings under the ICSID Convention, the inherent powers of a tribunal have been found to provide authority to an *ad hoc* Committee to require security for costs, notwithstanding the inapplicability of Article 47 of the ICSID Convention to the annulment context.<sup>34</sup> Other appropriate opportunities for the exercise by ICSID tribunals of their inherent powers to maintain the integrity of a proceeding in the context of costs awards against judgment-proof claimants appear to be an underexplored subject area at this time.

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<sup>31</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Saint Lucia's Request for Security for Costs, 13 Aug. 2014), para. 81.

<sup>32</sup> Judge Stephen M. Schwebel, Keynote Address to the International Council on Commercial Arbitration: In Defence of Bilateral Investment Treaties (Apr. 6, 2014), available at [http://www.arbitration-icca.org/media/2/14169776244680/schwebel\\_in\\_defence\\_of\\_bits.pdf](http://www.arbitration-icca.org/media/2/14169776244680/schwebel_in_defence_of_bits.pdf).

<sup>33</sup> ICSID Convention, art. 44 (appearing in Section 3 of the ICSID Convention, "Powers and Functions of the Tribunal").

<sup>34</sup> *Commerce Group Corporation and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, (Decision on El Salvador's Application for Security for Costs, 20 Sept. 2012), paras. 40–45.

**VI. Actions that the ICSID Administrative Council and ICSID Secretariat may consider to improve understanding of issues concerning the enforcement of costs awards and improved protection for respondent States against judgment-proof claimants**

The Republic of Panama believes that the subject of improved protection for respondent States against judgment-proof claimants warrants the attention of the ICSID Administrative Council. Accordingly, the Republic of Panama proposes two initiatives directed at improving understanding of the phenomenon of judgment-proof claimants and issues concerning the effective enforcement of costs awards.

First, the Republic of Panama proposes that, at its October 2016 meeting, the ICSID Administrative Council request<sup>35</sup> the ICSID Secretariat to conduct and publish a survey<sup>36</sup> taking stock of the current situation and trends with respect to costs awards in favor of respondent states, as well as the views and suggestions of the ICSID Contracting States with respect to enhanced protections for respondent states against judgment-proof claimants. The survey could include the incidence of costs awards in favor of respondent states; the experience with collection of costs awards, whether through voluntary payment, settlement or pursuit of enforcement proceedings in domestic courts and the costs thereof; any impediments to enforcement that respondent states have experienced; and comments and recommendations concerning the effective enforcement of such awards and opportunities for improvement.

Second, the Republic of Panama proposes that further consideration be given to the possibility of developing guidelines for tribunals and amending the ICSID Arbitration Rules with an aim toward improving the protection for respondent states against judgment-proof claimants.

For example, developing guidelines and amending the ICSID Arbitration Rules may facilitate the application of existing sources of general authority to the particular context of requests for security relating to future costs awards. As illustrated above, to date, ICSID tribunals have addressed party concerns related to effective enforcement of costs awards based on general authority to issue provisional measures or to maintain the integrity of a proceeding. With the exception of the tribunal in *RSM Production Corporation v. Saint Lucia*, ICSID tribunals have been reluctant to exercise these existing powers to protect respondent states from the risk of being unable to vindicate rights under costs awards. At times, tribunals have found a demonstration of such risk to be

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<sup>35</sup> The ICSID Administrative Council may make such a request pursuant to Article 6(3) of the ICSID Convention: “The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.” ICSID Convention, art. 6(3).

<sup>36</sup> The ICSID Secretariat may conduct and publish a survey pursuant to Regulation 22(1) of the ICSID Administrative and Financial Regulations: “The Secretary-General shall appropriately publish information about the operation of the Centre . . . .” ICSID Administrative and Financial Regulations, Regulation 22(1).

insufficient due to the application of requirements, such as “urgency,”<sup>37</sup> that are difficult and perhaps inapposite in the context of the future enforceability of a costs award against a judgment-proof claimant. Specifying certain guidelines and amending the ICSID Arbitration Rules may assist ICSID tribunals in exercising their existing powers by more clearly conveying the will of the Contracting Parties.

In addition, guidelines and amendments to the ICSID Arbitration Rules may serve to expand the current range of tools available to ICSID tribunals to protect respondent states from the risk of being unable to collect on costs awards against judgment-proof claimants. Guidelines and amendments to the ICSID Arbitration Rules might address subjects such as requiring disclosures concerning the financial condition of a claimant and the use of any third-party funding, as well as measures to protect the confidentiality of such disclosures. Another subject to examine might be the deadlines for preliminary objections pursuant to Rule 41(5), which might be linked to the claimant’s effectuation of its initial deposit rather than to formation of the tribunal in order to avoid a situation in which the respondent state must make a substantial deposit in order to obtain dismissal of a claim that is manifestly without legal merit.

### **Conclusion**

The Republic of Panama appreciates the attention of the ICSID Administrative Council to the important subject of improved protection for respondent states against judgment-proof claimants and trusts that this memorandum may serve as a point of departure for further examination and discussion of the subject. As noted above, several Contracting States already understand first-hand that the taxpayers of a Contracting State should not be left to bear significant financial burdens that have resulted from opportunistic and, at times, abusive initiation of ICSID arbitration proceedings by impecunious claimants.

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<sup>37</sup> *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28 (Decision on the Respondent’s Request for Provisional Measures Relating to Security for Costs, 21 Jan. 2016), para. 35. The tribunal applied an “urgency” requirement after explaining that it felt reservations stemming from its perception of the “extraordinary quality of the remedy requested [] combined with the exceptional nature of the petitioned measure.” *Id.*, para 31.