

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Eugene Kazmin

v.

Republic of Latvia

(ICSID Case No. ARB/17/5)

PROCEDURAL ORDER NO. 7
Decision on the Respondent's Request for Suspension of the Proceedings

Members of the Tribunal

Mrs. Vera van Houtte, President of the Tribunal

Mr. Mark A. Kantor, Arbitrator

Professor Dr. Rolf Knieper, Arbitrator

Secretary of the Tribunal

Dr. Jonathan Chevry

6 May 2020

TABLE OF CONTENTS

I. Procedural Background.....	1
II. The Parties' Positions.....	2
1. The Respondent's Position.....	2
2. The Claimant's Position.....	2
III. The Tribunal's Analysis.....	3
IV. Decision.....	5

I. PROCEDURAL BACKGROUND

1. On 13 April 2020, the Tribunal issued Procedural Order No. 6, in which it ordered the Claimant to provide security for costs in the amount of EUR 3 million within 15 days of the issuance of the Order. The Tribunal also determined that, in case of non-compliance, it would decide on the issue of the suspension of the proceedings after hearing the Parties.

2. The Tribunal's order in Procedural Order No. 6 is reproduced below:

“68. *In light of the above, the Tribunal decides as follows:*

- 1) *The Claimant shall provide, within 15 days from the date of this Procedural Order No. 6, security for the Respondent's costs in the amount of EUR 3 million in the form and terms indicated in Annex 1 to the Application;*
- 2) *In case of non-compliance by the Claimant with the foregoing Paragraph 68.1, the Tribunal, upon receipt of the notification thereof from the Respondent and after hearing the Parties, will determine the terms of the suspension of the proceedings;*
- 3) *The Claimant shall bear the costs of the application and this Procedural Order (by separate Order, the Tribunal will set out a timetable for submissions by the Parties on such costs); and*
- 4) *All other requests are rejected.”¹*

3. By letter of 17 April 2020, the Claimant asked the Tribunal to grant him permission to make comments on certain findings in Procedural Order No. 6, “with a view to possible revision of the Tribunal's order for security for costs.”² The Claimant asked that the deadline for compliance with the order be suspended until a decision on the revision is taken.

4. By letter of 20 April 2020, the Tribunal, while accepting the Claimant's right to apply for the revision of Procedural Order No. 6, rejected his request to suspend the performance of the Order. The Tribunal stated that “Procedural Order No. 6 retains its full effect” and that “the security ordered in Procedural Order No. 6 has to be provided as ordered therein.”³

5. By letter of 1 May 2020, the Respondent noted that the deadline for the Claimant to post security for costs had expired on 29 April 2020 and requested, *inter alia*, that the Tribunal order an immediate suspension of the proceedings.

6. By email of 1 May 2020, the Tribunal invited the Claimant's comments on the Respondent's request by 5 May 2020.

¹ Procedural Order No. 6, ¶ 68.

² Letter from the Claimant to the Tribunal, dated 17 April 2020.

³ Letter from ICSID to the Parties, dated 20 April 2020.

7. By letter of 4 May 2020, the Claimant informed the Tribunal that he would shortly apply for the disqualification of one or more of the arbitrators and stated that he therefore did “not consider it appropriate for the Tribunal as presently constituted to decide any procedural or substantive issues.”⁴
8. Notwithstanding his 4 May 2020 letter, by letter of 5 May 2020, the Claimant provided comments on the Respondent’s 1 May 2020 letter, while reiterating his position that all substantive and procedural matters be deferred until after the filing of his disqualification request.

II. THE PARTIES’ POSITIONS

1. The Respondent’s Position

9. In its letter of 1 May 2020, the Respondent summarized the content of the Tribunal’s decision in Procedural Order No. 6 and noted that “the Claimant has not provided any evidence showing that he has posted the security pursuant to PO6 and accordingly it must be presumed that he has failed to do so.”⁵
10. The Respondent further requested that the Tribunal order “an immediate suspension of the proceedings on jurisdiction and merits and establish a timetable for the Parties’ submissions on the consequences of the Claimant’s failure to comply with PO6.”⁶

2. The Claimant’s Position

11. As indicated above, on 1 May 2020, the Tribunal invited the Claimant to reply on the Respondent’s request for an immediate suspension of the proceedings by 5 May 2020.
12. Between 1 May and 2020 and 5 May 2020, the Claimant sent two letters to the Tribunal, on 4 May 2020 and on 5 May 2020.
13. In his letter of 4 May 2020, the Claimant indicated that based on “facts that evidence the lack of impartiality and independence on the part of arbitrator(s)” he was “preparing a proposal for disqualification of arbitrator(s) on the basis of Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.”⁷ The Claimant added that “[p]rior to the submission and consideration of the said proposal, the Claimant does not consider it appropriate for the Tribunal as presently constituted to decide any procedural or substantive issues in the case.”⁸
14. In his letter of 5 May 2020, the Claimant addressed the issue of his non-compliance with Procedural Order No. 6, explaining that –as indicated in his letter of 4 May 2020– he was preparing a request for disqualification under Article 57 of the ICSID Convention, and that “[i]n the circumstances where the Claimant does not have confidence in the independence and

⁴ Letter from the Claimant to the Tribunal, dated 5 May 2020.

⁵ Letter from the Respondent to the Tribunal, dated 1 May 2020.

⁶ Letter from the Respondent to the Tribunal, dated 1 May 2020.

⁷ Letter from the Claimant to the Tribunal, dated 4 May 2020.

⁸ Letter from the Claimant to the Tribunal, dated 4 May 2020.

impartiality of the Tribunal, the Claimant rationally did not provide security for costs pursuant to Procedural Order No. 6 of 13 April 2020.”⁹

15. The Claimant further noted that he “is cognizant of the potential consequences of non-provision of security set out in the Procedural Order No.6,” but affirmed that “even the strict application of Procedural Order No. 6 without any regard to the Claimant’s position on the manifest lack of independence and impartiality on the part of the present Tribunal would not result in an immediate suspension of proceedings.”¹⁰ Accordingly, the Claimant argued that the Respondent’s application for an immediate suspension of the proceedings was in contradiction with Procedural Order No. 6.¹¹
16. The Claimant finally indicated that even if the Tribunal was inclined to consider the Respondent’s application for a suspension of the case, “suspension could only be ordered after an exchange of the Parties on the terms of the suspension.”¹²

III. THE TRIBUNAL’S ANALYSIS

17. The second sentence of Article 44 of the ICSID Convention provides as follows:

If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

18. It is generally admitted that pursuant to this provision, ICSID tribunals have the authority to suspend the proceedings in appropriate circumstances.¹³ In *RSM v. Saint Lucia*, the tribunal found specifically that Article 44 sentence 2 of the ICSID convention granted ICSID tribunals the authority to suspend the proceedings in case of a non-compliance by a party with an order for security for costs.¹⁴ The present Tribunal agrees with this position.
19. The Tribunal has noted the Respondent’s hesitation, in its letter of 1 May 2020 about whether or not the security had been posted. The Respondent informed the Tribunal that given the Claimant’s failure, since 29 April 2020, to provide any evidence showing that he had posted the security, “it must be presumed that he ha[d] failed to do so.”¹⁵ The Tribunal found that this presumption was reasonable, hence, on 1 May 2020, it invited the Claimant’s comments on the Respondent’s application. In his letter of 5 May 2020, the Claimant, stating that he “rationally did not provide security pursuant to Procedural Order No. 6 of 13 April 2020,”¹⁶ confirmed that the presumption was correct.

⁹ Letter from the Claimant to the Tribunal, dated 5 May 2020.

¹⁰ Letter from the Claimant to the Tribunal, dated 5 May 2020.

¹¹ Letter from the Claimant to the Tribunal, dated 5 May 2020.

¹² Letter from the Claimant to the Tribunal, dated 5 May 2020.

¹³ See e.g., *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1995, ¶ 87.

¹⁴ *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Suspension or Discontinuation of Proceedings, ¶¶ 32-36, 60.

¹⁵ Letter from the Respondent to the Tribunal, dated 1 May 2020.

¹⁶ Letter from the Claimant to the Tribunal, dated 5 May 2020.

20. The acknowledged non-compliance by the Claimant with paragraph 68.1 of Procedural Order No. 6, triggered the application of paragraph 68.2 of the same Order in which the Tribunal had announced that it would determine the terms of the suspension of the proceedings “upon receipt of the notification [of non-compliance] from the Respondent and after hearing the Parties.”¹⁷
21. The Respondent in its application of 1 May 2020 had asked for the “immediate suspension of the proceedings on jurisdiction and merits” and “to establish a timetable for the Parties’ submissions on the consequences of the Claimant’s failure to comply with PO6.”¹⁸ The Tribunal did not grant the request for an immediate suspension because it wished to hear the Claimant first, not only because that was already envisaged in paragraph 68.2 of Procedural Order No.6, but also in view of the announcement of the Claimant, on 17 April 2020, of a possible application for revision of Procedural Order No. 6.
22. In his comments of 5 May 2020, the Claimant acknowledged being “cognizant of the potential consequences of non-provision of security.”¹⁹ Yet, he failed to comment on the terms of the requested suspension. Instead, the Claimant argued that, because he had “become aware of circumstances that evidence the lack of impartiality and independence on the part of the arbitrator(s),” it is “inappropriate for the Tribunal in its present composition to render any procedural or substantive decisions in this case, and that “the issue of security for costs may only be reverted to after consideration of the Claimant’s application for disqualification of arbitrator(s) and the constitution of an independent and impartial Tribunal.”²⁰
23. The Tribunal cannot follow the Claimant’s argument. Whatever claims the Claimant made on the impartiality and independence of Members of the Tribunal does not yet suspend the proceedings. Pursuant to Rule 9.6 of the ICSID Arbitration Rules, a disqualification proposal has to be filed with the Secretary-General, and the proceedings are suspended thereafter. In the absence of any filing of a disqualification proposal as of the issuance of this Procedural Order No.7, this Tribunal is not only authorized, but also obliged to fully exercise its powers and authority as needed.
24. The Claimant has in his letter of 5 May 2020 advanced a second, assertedly independent, reason why this Tribunal cannot issue the present Order. In his view, ordering an immediate suspension in “strict application of Procedural Order No. 6” would be contrary to Procedural Order No. 6 itself, because it could “only be ordered after an exchange of the Parties on the terms of the suspension.”²¹ In this argument, the Claimant overlooks the fact that he failed to act on the opportunity which he was given on 1 May 2020 to comment on the terms proposed by the Respondent and that therefore nothing prevents the Tribunal from deciding now on the requested suspension. The last sentence of the Claimant’s 5 May 2020 letter erroneously suggests that the Tribunal has to establish “at the current stage of the proceedings” “the timetable for the Parties’ submissions on the terms of the suspension.”²² The Tribunal did so

¹⁷ Procedural Order No. 6, ¶ 68.2.

¹⁸ Letter from the Respondent to the Tribunal, dated 1 May 2020.

¹⁹ Letter from the Claimant to the Tribunal, dated 5 May 2020.

²⁰ Letter from the Claimant to the Tribunal, dated 5 May 2020.

²¹ Letter from the Claimant to the Tribunal, dated 5 May 2020.

²² Letter from the Claimant to the Tribunal, dated 5 May 2020.

on 1 May 2020 and the Claimant has to accept the consequences of his choice to disregard that letter, as well as paragraph 68.2 of Procedural Order No. 6.

25. The Tribunal is comforted in its present decision by the fact that, although the Claimant announced an intention to make an application for revision of Procedural Order No. 6, as well as a disqualification proposal, he has not yet done so and has not even given an approximate date by when he will do so, other than, as regards the disqualification, “within a reasonable time.”²³ The uncertainty which the Claimant so creates, would, if the Tribunal were to follow his arguments, lead to a *de facto* suspension of the proceedings. This would happen at a moment where the initially provided hearing is less than a month away and the Parties and the Tribunal are also to decide on the possibility of partially bifurcating certain jurisdictional issues for a limited hearing in June and/or on the hearing facilities for a live hearing in Paris on 12-23 October 2020. Until a disqualification proposal is actually filed, this Tribunal sees it as its obligation to proceed diligently and efficiently with this arbitration. Subject to a later revision of Procedural Order No. 6 (if any), that Order is fully applicable. The Tribunal is aware that a request for determination of the costs of the application for Procedural Order No. 6 is still pending and that paragraph 68.3 provides that the Tribunal will by separate order set out a timetable for the Parties’ submissions on such costs. In view of the fact that Procedural Order No. 6 has not been complied with yet and, moreover, a decision on its revision may have to be taken if and when revision is applied for, the Tribunal decides that this is not the proper time yet for issuing such separate order and reserves the costs issue for a later stage of this arbitration.
26. For the above reasons, the Tribunal considers that the proceedings are to be immediately suspended and will remain so until the Claimant will have posted the security pursuant to paragraph 68.1 of Procedural Order No. 6. In order to avoid that the proceedings remain indefinitely suspended, the Tribunal also considers it necessary to fix a term after which the Respondent will be authorized to re-apply for a discontinuance of the proceedings if security in accordance with Procedural Order No. 6 has not been posted. It determines that the Respondent will be entitled to file such application at the expiration of a period of six months from the date of the present Order and that the Claimant will be heard on such application and be authorized to re-present or elaborate on the arguments already contained in his Reply of 14 February 2020²⁴ and his Additional Comments of 5 March 2020.²⁵

IV. DECISION

27. In light of the above, the Tribunal decides as follows:
- a. The proceedings are immediately suspended;
 - b. The proceedings may resume if the Claimant posts the security as directed by the Tribunal’s decision in Procedural Order No. 6;

²³ Letter from the Claimant to the Tribunal, dated 5 May 2020.

²⁴ Claimant’s Reply to the Respondent’s Application for Security for Costs, dated 14 February 2020.

²⁵ Claimant’s Additional Comments on the Respondent’s Application for Security for Costs, dated 20 March 2020.

- c. If by the expiration of a six-month period starting as of the date of the present Procedural Order No. 7 (*i.e.* until 6 November 2020) the proceedings have not been resumed pursuant to paragraph 27.b above, the Respondent is hereby granted leave to renew at that time its reasoned application to the Tribunal to order the discontinuance of the proceedings. The Claimant will in such case be given the opportunity to comment on such application and/or to confirm or elaborate on the objections he formulated in his Reply of 14 February 2020 and in his Additional Comments of 20 March 2020;
- d. The decision on the costs of Respondent's Application for Security for Costs is reserved;
- e. All other procedural requests are dismissed.

For and on behalf of the Tribunal,



Mrs. Vera van Houtte
President of the Tribunal
Date: 6 May 2020