INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

EUGENE KAZMIN

Claimant

and

REPUBLIC OF LATVIA

Respondent

ICSID Case No. ARB/17/5

DECISION ON THE PROPOSAL TO DISQUALIFY ALL MEMBERS OF THE TRIBUNAL

Chair of the Administrative Council
Mr. David Malpass

Secretary of the Tribunal
Dr. Jonathan Chevry

October 14, 2020

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I. PROCEDURAL HISTORY

(1) Background

1. On December 30, 2016, Mr. Eugene Kazmin (the "**Claimant**") submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") against the Republic of Latvia ("**Latvia**" or the "**Respondent**").

2. On February 3, 2017, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**").

3. The Tribunal is composed of Dr. Vera Van Houtte, a national of Belgium, President, appointed by the Chair of the ICSID Administrative Council (the "**Chair**"); Mr. Mark A. Kantor, a national of the United States of America, appointed by the Claimant; and Prof. Rolf Knieper, a national of Germany, appointed by the Respondent.

4. On July 28, 2017, the Acting Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").

5. Pursuant to the final version of the Procedural Timetable, the hearing on jurisdiction and the merits (the "**Hearing**") was scheduled to take place between June 1 and June 12, 2020.

(2) The Respondent's Application for Security for Costs and Resulting Procedural Orders No. 6 and No. 7

6. On January 17, 2020, the Respondent filed an Application for Security for Costs.

7. Following instructions from the Tribunal, the Parties filed the following submissions regarding the Respondent's Application for Security for Costs:

- February 14, 2020: Claimant's Reply to the Respondent's Application for Security for Costs;
- March 5, 2020: Respondent's Comments on the Claimant's Reply to the Respondent's Application for Security for Costs; and
- March 20, 2020: Claimant's Additional Comments on the Respondent's Application for Security for Costs.

8. On April 13, 2020, the Tribunal issued Procedural Order No. 6 ordering the Claimant to post security for costs in the amount of EUR 3 million within 15 days of the date of the order.

9. On April 13, 2020, the Tribunal also sent the Parties a letter advising that the Hearing might not be held in person due to the COVID-19 situation, and invited the Parties "to indicate … if they can identify whether the entirety of the dispute or discrete issues, such as *e.g.* jurisdiction, may be resolved on the basis of documents only, with no evidentiary hearing and/or would prefer (i) to maintain the Hearing as initially scheduled but hold it *via* video-conference, or (ii) to postpone the Hearing to a later date so that it can be held in person."[1]

10. By letter of April 17, 2020, the Claimant asked that the deadline to post security for costs be suspended pending his submission of comments on Procedural Order No. 6.

11. By letter of April 20, 2020, the Tribunal noted the Claimant's right to submit observations on Procedural Order No. 6 but affirmed that its order to post security for costs by the given date remained in effect.

12. On May 1, 2020, the Respondent, noting that the Claimant had not complied with the Tribunal's order to post security for costs, requested, *inter alia*, the suspension of the proceedings. By email of the same date, the Tribunal invited the Claimant's comments on the Respondent's request.

13. By letter of May 4, 2020, and in response to the Tribunal's letter of April 13, 2020, the Claimant informed the Tribunal that he would soon be submitting a request for the disqualification of one or more arbitrators and therefore he did not consider it appropriate for the Tribunal as presently constituted to decide any procedural or substantive issues.

14. By letter of May 5, 2020, the Claimant provided his comments on the Respondent's May 1, 2020 request and reiterated that any decision should be delayed until after the disqualification proposal had been decided.

15. On May 6, 2020, the Tribunal issued Procedural Order No. 7 suspending the proceedings.

(3) The Claimant's Proposal for Disqualification

16. On July 30, 2020, the Claimant proposed the disqualification of the entire Tribunal, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Claimant's Proposal**").

[1] Letter from the Tribunal to the Parties, dated April 13, 2020.

17. By letter of July 31, 2020, ICSID acknowledged receipt of the Proposal and forwarded it to the Tribunal and the Parties.

18. By letter of August 5, 2020, ICSID established a procedural calendar for the Parties' submissions on the Proposal.

19. The Respondent submitted its Reply to the Claimant's Proposal for Disqualification (the "**Respondent's Reply**") on August 28, 2020.

20. The Members of the Tribunal furnished explanations on September 3, 2020, as envisaged by ICSID Arbitration Rule 9(3) (the "**Tribunal Member's explanations**").

21. The Respondent filed its further comments on September 9, 2020 (the "**Respondent's Further Comments**") and the Claimant filed his further observations on September 11, 2020 (the "**Claimant's Further Observations**").

II. THE PARTIES' POSITIONS

22. The following description of the Parties' positions summarizes the arguments relevant to the Chair's analysis and findings. All of the submissions made by the Parties have been carefully considered in reaching this decision.

A. THE CLAIMANT'S POSITION

23. This section reviews the arguments in the Claimant's Proposal and Further Observations.

(1) The Claimant's Proposal was Filed in a Timely Fashion

24. The Claimant argues that his Proposal for Disqualification was filed "promptly," in accordance with Rule 9(1),[2] which provides as follows:

> "*A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*"[3]

25. In support, the Claimant refers to the "relevant circumstances" that must be considered when looking at the timing of his Proposal.[4] The Claimant argues that while he was "alerted to the biased attitude of the Arbitral Tribunal" on April 13, 2020, when the Tribunal issued Procedural Order

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2 Claimant's Proposal, ¶ 142.

3 ICSID Arbitration Rule 9(1).

4 Claimant's Further Observations, ¶ 8.

No. 6, he "could hardly be expected to start actively working on his proposal for disqualification prior to May 2020,"[5] because: (i) he thought he had first to "exhaust all remedies" relating to the security for costs decision, notably by submitting a request to extend the time to comply with Procedural Order No. 6 "with a view to submitting an application for its revision,"[6] and (ii) the proceedings were continuing and the Claimant was working on his last submission on the merits.[7]

26. The Claimant further argues that the time to prepare his proposal was "reasonable" as it involved two forensic experts, one of whom encountered "serious health issues" while he was working on his report.[8] The Claimant's Proposal was filed as soon as the second expert report was finalized (*i.e.* on July 27, 2020) and therefore was made in a "timely fashion."[9]

27. Lastly, the Claimant argues that "no delay or procedural disruption was caused" by filing the Claimant's Proposal in July 2020 because the proceedings were already suspended by Procedural Order No. 7.[10] According to the Claimant, finding his Proposal untimely would be a "formalistic application of the criteria for promptness."[11]

(2) The Applicable Legal Standard

28. The Claimant's Proposal is based on Articles 57 and 14(1) of the ICSID Convention.[12] Article 57 provides (in relevant part only):

> "*A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.*"

29. Article 14(1) reads:

> "*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence*

5 Claimant's Proposal, ¶¶ 142-143.

6 Claimant's Proposal, ¶ 144.

7 Claimant's Proposal, ¶ 143.

8 Claimant's Proposal, ¶ 147; Claimant's Further Observations, ¶¶ 9-12.

9 Claimant's Proposal, ¶¶ 148-149.

10 Claimant's Further Observations, ¶ 15.

11 Claimant's Further Observations, ¶ 15.

12 Claimant's Proposal, ¶ 27.

in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."[13]

30. According to the Claimant, Article 14(1) creates a standard of independence and impartiality for ICSID arbitrators.[14] The Claimant relies on ICSID jurisprudence to argue that "impartiality 'refers to the absence of bias or predisposition towards a party', while independence 'is characterized by the absence of external control'."[15] According to the Claimant, ICSID caselaw has established that "Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias."[16]

31. Relying on the disqualification decision issued in *RSM v. Saint Lucia* and on other ICSID precedents, the Claimant argues that it is sufficient to demonstrate an "appearance" of bias or dependence,[17] or even the "existence of 'reasonable doubts'" as to such bias or dependence, to meet the threshold of Article 14 of the ICSID Convention.[18]

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13 ICSID Convention Art. 14(1).

14 Claimant's Proposal, ¶ 29.

15 Claimant's Proposal, ¶ 30 (relying upon, *inter alia*, *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, November 12, 2013 (**CL-215**), ¶¶ 58-59 ("***Blue Bank***") and *Caratube Int'l Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, March 20, 2014 (**C-217**), ¶¶ 52-53 ("***Caratube***").

16 Claimant's Proposal, ¶ 32, referring to, *inter alia*, *Blue Bank*, ¶ 59; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, December 13, 2013 (**CL-219**), ¶ 66 ("***Burlington***").

17 Claimant's Proposal, ¶ 33, quoting from *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, October 23, 2014 (**CL-222**), ¶ 66 ("***RSM Production***")(where the two arbitrators reviewing the disqualification proposal noted that "proof of bias or dependence must almost always rest on 'appearances,' that is, on circumstantial evidence. Proving a person's actual bias, dependence, or prejudice is practically impossible, absent an admission or declaration from the person himself. There is simply no way for ordinary people to scrutinize or fathom the operations of a human mind.").

18 Claimant's Proposal, ¶ 34, referring to, *inter alia*, *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, October 3, 2001 (**CL-223**), ¶ 25 (explaining that "[i]f the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld."); and *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, December 19, 2002 (**CL-224**), ¶ 21 (finding that "[t]he inference resulting from the facts must be that, manifestly, that is, clearly, the person challenged is not to be relied upon for independent judgment, or that a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen from the facts established or not disputed").

(3) The Claimant's Proposal

32. The Claimant argues that the language of Procedural Order No. 6 on Security for Costs and the subsequent procedural communications demonstrate that the Tribunal is biased against the Claimant and, therefore, lacks impartiality.[19]

33. In his Further Observations, the Claimant summarizes his position as follows: [20]

- The Tribunal has frequently used sarcastic and derogatory language concerning the Claimant;
- The Tribunal's language often indicates fundamental mistrust of the Claimant's arguments and evidence;
- The Tribunal disregards basic principles of due process, including the presumption of innocence, when discussing the Respondent's allegations as to the Claimant's criminal conduct;
- The Tribunal has raised issues of its own initiative on which neither Party has made any submissions, to make findings against the Claimant;
- The negative tenor of Procedural Order No. 6 is confirmed by two expert reports submitted by the Claimant;
- The Tribunal's reasoning in Procedural Order No. 6 amounts to prejudgment; and
- Some of the procedural aspects leading up to Procedural Order No. 6 further demonstrate the Tribunal's bias against the Claimant.

34. Accordingly, the Claimant's Proposal relies on (**a.**) the language of Procedural Order No. 6 and (**b.**) alleged procedural irregularities by the Tribunal while issuing this Order and shortly thereafter.

a. The Language of Procedural Order No. 6

35. The Proposal focuses on specific parts of Procedural Order No. 6, allegedly showing the Tribunal's negative bias against the Claimant and its prejudgment of several issues pertaining to the jurisdiction and merits of the case. In particular, the Claimant reviews those parts of Procedural Order No. 6 discussing criminal proceedings related to the Claimant, and the Tribunal's comments about the activities of the Claimant and other affiliated persons in Ukraine and Latvia.

36. Based on this review, the Claimant contends that the language of Procedural Order No. 6 "reveals lack of impartiality on the Tribunal's part" and "clearly demonstrates a negative attitude to the

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19 Claimant's Proposal, ¶ 16.

20 Claimant's Further Observations, ¶ 41 (footnotes omitted).

Claimant that goes beyond the Claimant's arguments in respect of security for costs and extends to the Claimant's personality and business conduct."[21]

37. In support of his analysis of the language used in Procedural Order No. 6, the Claimant filed expert reports from: (i) Dr. William Eggington, a *corpus linguistics* expert,[22] and (ii) Prof. Julie Boland, a linguistics expert.[23] According to the Claimant, these reports confirm the Claimant's view that Procedural Order No. 6 contains language biased against the Claimant and that the Tribunal has negative views against the Claimant and his business, going as far as considering Mr. Kazmin as untrustworthy and dishonest.[24]

38. The Claimant argues that the expert reports "provide systemic and objective analysis of the Procedural Order No. 6 using proven scientific methods."[25] He contends that "[t]he reports are the only way for the Claimant to demonstrate the view of an objective third party – rather than merely the Claimant's own view on the matter."[26] According to the Claimant, the experts' reports confirm that not only the Claimant, but any reasonable third party would consider Procedural Order No. 6 as lacking impartiality.[27]

b. The Alleged Procedural Irregularities prior and further to the Issuance of Procedural Order No. 6

39. The Claimant also submits that the Tribunal conducted itself in an irregular manner before and after issuing Procedural Order No. 6, demonstrating additional "indicators" of the Tribunal's prejudgment of the Claimant's case.[28] On this issue, the Claimant notes that he "does not argue that these procedural issues are independent grounds for a challenge" but that they "contribute to the unfavourable picture of the Tribunal's approach to the Procedural Order No. 6."[29]

40. In particular, the Claimant refers to: (i) the timeline that the Tribunal established for the Parties to submit their pleadings on the Respondent's Request for Security for Costs, arguing that this

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21 Claimant's Proposal, ¶ 89.

22 Expert Report of Dr. William G. Eggington, July 27, 2020.

23 Expert Report of Prof. Julie E. Boland, June 14, 2020.

24 Claimant's Proposal, ¶ 89.

25 Claimant's Further Observations, ¶ 43.

26 Claimant's Further Observations, ¶ 43.

27 Claimant's Proposal, ¶ 91.

28 Claimant's Proposal, ¶ 111.

29 Claimant's Further Observations, ¶ 60.

timeline favored the Respondent,[30] and (ii) the Tribunal's letter of April 13, 2020 regarding possible adjustments to the hearing arrangements due to the COVID-19 pandemic. In this letter, the Tribunal asked the Parties whether they would be inclined to have "the entirety of the dispute or discrete issues, such as *e.g.* jurisdiction […] resolved on the basis of documents only, without an evidentiary hearing."[31] According to the Claimant, this suggestion could "only be taken to mean that the Tribunal was inclined to reject the Claimant's case on jurisdiction."[32]

B. THE RESPONDENT'S POSITION

41. The Respondent submits that: (**1.**) the Claimant's Application is untimely; (**2.**) the legal standard for disqualification under Articles 57 and 14(1) of the ICSID Convention is more stringent than asserted by the Claimant; and (**3.**) the Claimant's Proposal does not meet this standard (nor even the standard that the Claimant says is applicable).

(1) The Proposal is Untimely

42. The Respondent argues that the Claimant's Proposal is untimely because: (i) it was not filed "promptly" in accordance with ICSID Arbitration Rule 9(1),[33] and (ii) in any event, the Claimant waived his right to propose disqualification.[34]

43. *First*, on the issue of promptness, the Respondent notes that Rule 9(1) does not specify the number of days within which a proposal must be filed, but argues that "[a] proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification."[35] According to the Respondent, all of the alleged facts triggering the Claimant's Proposal took place prior to or in April 2020, over three months before the submission of the Claimant's Proposal. The Respondent notes that the Claimant acknowledged his late submission but tried to justify it with "excuses" that "are not valid," and should therefore be dismissed.[36]

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30 Claimant's Proposal, ¶¶ 117-127.

31 Letter from the Tribunal to the Parties, dated April 13, 2020.

32 Claimant's Proposal, ¶ 111.

33 Respondent's Reply, ¶¶ 15-23.

34 Respondent's Reply, ¶¶ 24-32.

35 Respondent's Reply, ¶ 15, quoting from Christoph Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge, 2009) (excerpt) (**RLA-121**), ¶ 11.

36 Respondent's Reply, ¶¶ 20-23.

44. *Second*, on the alleged waiver, the Respondent argues that because the Claimant engaged with the Tribunal on several occasions after he became aware of the Members' lack of impartiality on April 13, 2020,[37] he should be deemed to have waived his right to propose disqualification.[38]

(2) The Legal Standard for Disqualification

45. The Respondent agrees with the Claimant that the applicable legal standard for the disqualification of arbitrators is prescribed by Articles 14(1) and 57 of the ICSID Convention,[39] and that ICSID Article 14 contains a requirement of "impartiality" in addition to the express reference to "independent judgement."[40] According to the Respondent, however, Article 57 "requires proof of facts 'indicating a **manifest** lack of the qualities required by paragraph (1) of Article 14',"[41] and that "[t]he requirements that the lack of qualities must be 'manifest' imposes a relatively heavy burden of proof on the party making the proposal."[42] Based on recent ICSID cases, the Respondent argues that "Article 57 requires proof of facts that would give rise to an evident or obvious appearance of a lack of impartiality and independence in the mind of a detached and reasonable observer,"[43] and that "[t]he mere 'appearance of bias' (rather than an evident or obvious appearance) or of a lack of impartiality and independence to such an observer does not suffice."[44]

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37 Respondent's Reply, ¶ 26, quoting from the Claimant's Application at ¶ 143.

38 Respondent's Reply, ¶¶ 31-32.

39 Respondent's Reply, ¶ 33.

40 Respondent's Reply, ¶ 34 (referring to, as the Claimant does, the Spanish text of the ICSID Convention).

41 Respondent's Reply, ¶ 35, quoting from Article 57 of the ICSID Convention (emphasis in the Respondent's submission).

42 Respondent's Reply, ¶ 35, quoting from Christoph Schreuer et al, The ICSID Convention: A Commentary (Cambridge, 2009) (excerpt) (**RLA-121**), ¶ 19.

43 Respondent's Reply, ¶¶ 37-38, referring to *Caratube*, ¶ 57.

44 Respondent's Reply, ¶ 38, referring to, *inter alia*¸ *Blue Bank*, ¶ 61 and *Burlington* ¶ 68.

46. According to the Respondent, "[t]he mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence,"[45] and Article 57 should not be used as a mechanism to address perceived unfairness of tribunal decision,[46] or alleged failures in a tribunal's reasoning.[47]

47. The Respondent therefore submits that the Claimant's "appearance of bias" test is inconsistent with the wording of Article 57 and ICSID practice.[48] The Respondent concludes by affirming that, in any event, the Claimant has failed to meet his own "appearance of bias" test.[49]

(3) The Respondent's Reply to the Merits of the Proposal

48. The Respondent develops five arguments on the merits of the Claimant's Proposal:

49. *First*, the Respondent argues that the Claimant's expert reports do not support a finding of the Tribunal's manifest lack of impartiality.[50] According to the Respondent, the very need for the Claimant to rely on expert reports shows "that any allegations of the lack of impartiality are not 'manifest'."[51] The Respondent further states that these expert reports do not help in assessing whether Procedural Order No 6 contains an "evident or obvious appearance of the Tribunal's lack of impartiality,"[52] given that the Claimant's instructions to the experts assumed that negative language was equivalent to evidence of lack of impartiality.[53] The Respondent submits that the Claimant's instructions are misguided as Procedural Order No. 6 is "a decision in which the Tribunal was required to express an opinion that necessarily would be favourable to one or the

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45 Respondent's Reply, ¶ 40, quoting from *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014 (**CL-218**), ¶ 80 ("***Abaclat***").

46 Respondent's Reply, ¶ 41, referring to *Abaclat*, ¶ 156, and *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007 (**RLA-123**), ¶ 35 ("***Suez***") (finding that "a difference of opinion over an interpretation of a set of facts is not in and of itself evidence of lack of independence or impartiality. It is certainly common throughout the world for judges and arbitrators in carrying out their functions honestly to make determinations of fact or law with which one of the parties may disagree. The existence of such disagreement itself is by no means manifest evidence that such judge or arbitrator lacked independence or impartiality.")

47 Respondent's Reply, ¶ 42, referring to *AS PNB Banka and others v. Republic of Latvia,* ICSID Case No. ARB/17/47, Decision on the Proposals to Disqualify Messrs. James Spigelman, Peter Tomka and John M. Townsend, June 16, 2020 (**RLA-126**), ¶¶ 164-166 ("***AS PNB Banka***").

48 Respondent's Reply, ¶ 44.

49 Respondent's Reply, ¶ 45.

50 Respondent's Reply, ¶¶ 47-52.

51 Respondent's Reply, ¶ 46.

52 Respondent's Reply, ¶ 52.

53 Respondent's Reply, ¶ 52.

other party."[54] The Respondent therefore concludes that "[i]t is not possible to formulate an opinion that is unfavourable to one party without relying on 'negative' or 'not neutral' language" and that if negative language in an arbitral decision was evidence of a lack of impartiality, "all tribunals would be immediately subject to challenge upon issuance of any decision or award."[55]

50. *Second,* the Respondent argues that the Tribunal's reasoning in Procedural Order No. 6 is not a ground for disqualification and, in any event, does not demonstrate the Tribunal's manifest lack of impartiality.[56] In support, the Respondent asserts that "Article 57 of the ICSID Convention is not a mechanism to address alleged failures in the Tribunal's reasoning."[57] The Respondent argues that the Claimant's reading and analysis of Procedural Order No. 6 is flawed as it misses Procedural Order No. 6's purpose and legal basis. In the words of the Respondent, "a tribunal's decision on security for costs requires, by definition, an assessment of the risk of non-compliance with an unfavourable costs award."[58] According to the Respondent, this is exactly what the Tribunal did in Procedural Order No. 6: the Tribunal reviewed the Parties' arguments and evidence on the likelihood that the Claimant would pay costs in case of an adverse award, and decided *in fine* that the Claimant was more likely not to do so. The Respondent therefore concludes that the Tribunal followed its mandate,[59] and that its reasoning does not evidence a manifest lack of impartiality.[60]

51. *Third*, the Respondent contends that the language in Procedural Order No. 6 does not support a finding of the Tribunal's manifest lack of impartiality.[61] According to the Respondent, the language used in Procedural Order No. 6 does not show any preference towards the Respondent, and is not "sarcastic or deprecating,"[62]but merely shows that the Tribunal was "reflecting on the facts and evidence presented to it by the Parties."[63] The Tribunal was free to choose appropriate wording to express its assessment of those facts and evidence, and none of the extracts of Procedural Order No. 6 referred to by the Claimant amount to evidence of a lack of impartiality.[64]

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54 Respondent's Reply, ¶ 49.
55 Respondent's Reply, ¶ 49.
56 Respondent's Reply, ¶¶ 53-64.
57 Respondent's Reply, ¶ 54.
58 Respondent's Reply, ¶ 58.
59 Respondent's Reply, ¶ 60.
60 Respondent's Reply, ¶ 64.
61 Respondent's Reply, ¶¶ 65-75.
62 Respondent's Reply, ¶ 72.
63 Respondent's Reply, ¶ 74.
64 Respondent's Reply, ¶¶ 74-75.

52. *Fourth*, contrary to the Claimant's allegation, the Tribunal did not prejudge the merits of the case in Procedural Order No. 6.[65] The Respondent first notes that the Claimant alleged that the Tribunal prejudged the case in his letter of April 17, 2020.[66] The Respondent then refers to the Tribunal's response of April 20, 2020, which explained that the Tribunal had not established any facts or made any findings on issues pertaining either to its jurisdiction or the merits of the case. Further, the Respondent argues that the Claimant had several opportunities to comment on the Tribunal's findings in Procedural Order No. 6, including in his correspondence after the issuance of the Order, and in his Rejoinder on Jurisdiction, filed on April 27, 2020 (*i.e.* 13 days after the issuance of Procedural Order No. 6). In any event, the Respondent argues that while the Tribunal had to assess the Claimant's financial situation and business practice in both Latvia and Ukraine to decide on security for costs, the Tribunal did not prejudge the Claimant's criminality. The Respondent also argues that the Tribunal did not find that Mr. Kazmin would be untrustworthy or unreliable as a witness.[67] According to the Respondent, in Procedural Order No. 6 the Tribunal "refer[red] to the Claimant's business practices and conduct, not to his honesty as a man nor to his trustworthiness as a witness."[68]

53. *Fifth*, the alleged procedural irregularities are not grounds for disqualification under the ICSID Convention.[69] The Claimant's complaints regarding the alleged unfairness of the proceedings leading up to the issuance of Procedural Order No. 6 demonstrate the Claimant's dissatisfaction with the outcome of Procedural Order No. 6. The Respondent further argues that these complaints do not evidence a lack of independence or impartiality and are therefore irrelevant for the purposes of deciding on the Claimant's Proposal.[70]

III. THE TRIBUNAL MEMBERS' EXPLANATIONS

54. By letter dated September 3, 2020, Dr. Van Houtte provided the following explanations on behalf of the Tribunal:

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65 Respondent's Reply, ¶¶ 76-87.

66 Respondent's Reply, ¶ 76, referring to the Letter from the Claimant to the ICSID Secretariat, dated April 17, 2020. In that letter, the Claimant asked the Tribunal to suspend the deadline to post security for costs pending his submission of comments on Procedural Order No. 6

67 Respondent's Reply, ¶ 85.

68 Respondent's Reply, ¶ 85.

69 Respondent's Reply, ¶¶ 88-92.

70 Respondent's Reply, ¶ 90.

> "*Dear Mr. Chairman,*
>
> *I am writing this letter as Presiding Arbitrator in the matter* of Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, also on behalf of my two co-arbitrators, Mr. Mark A. Kantor and Professor Dr. Rolf Knieper and with their consent.*
>
> *We wish to thank ICSID for giving us the opportunity to furnish explanations following the Proposal for the Disqualification of the Arbitral Tribunal which has been filed on 30 July 2020 by Mr. Eugene Kazmin.*
>
> *We hereby confirm that we have acted only on the basis of the record before us as reflected in our Procedural Orders, that we have not prejudged the dispute and that we have at all times acted and continue to act independently and impartially. We draw to your attention that, in our letter to the Parties of 20 April 2020, we advised the Parties* inter alia *that 'The Claimant is free to Apply for a revision of Procedural Order No. 6 if and when he chooses, subject to the Respondent's defense rights.' To date, we have not received any such application.*"[71]

55. The Parties were given the opportunity to comment on these explanations. The Claimant noted that he "was surprised to receive a single letter from all three arbitrators that was extremely brief and did not engage with any of the arguments in the Claimant's Proposal,"[72] and that "[t]he Tribunal did not deny any of the findings of the linguistic experts, nor the Claimant's arguments in relation to the Tribunal's reasoning and language."[73] The Claimant also noted that the Tribunal reiterated that he could apply for a revision of Procedural Order No. 6, but explained that "the Claimant has already made the choice not to appeal against the Procedural Order No. 6 before this Tribunal, and the mere revision of the Procedural Order No. 6 would not be an adequate remedy for the Claimant."[74]

56. The Respondent observed that the Tribunal Members' explanations supported its view that the Claimant's Proposal was untimely and manifestly unfounded. According to the Respondent, the Tribunal Members' explanations show that the Claimant decided not to make use of a remedy that the Tribunal had expressly confirmed was available to him.[75]

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71 Letter from the Tribunal to the Chairman of the Administrative Council, dated September 3, 2020.

72 Claimant's Further Observations, ¶ 61.

73 Claimant's Further Observations, ¶ 62.

74 Claimant's Further Observations, ¶ 63.

75 Respondent's Further Comments, p. 2.

IV. REASONS

(1) Timeliness

57. Arbitration Rule 9(1) requires a proposal for disqualification to be filed "promptly."

58. The ICSID Convention and Rules do not specify the number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.[76]

59. In *Urbaser v. Argentina*, the Tribunal decided that filing a challenge within 10 days of learning the underlying facts fulfilled the promptness requirement.[77] In *Suez v. Argentina*, the Tribunal held that filing a challenge 53 days after learning the relevant facts was too long.[78] In *Burlington v. Ecuador*, two grounds for a challenge were dismissed because they related to facts which had been public for more than 4 months prior to the filing of the challenge.[79] In *CDC v. Seychelles*, a filing after 147 days was deemed untimely,[80] and in *Cemex v. Venezuela*, 6 months was considered too long.[81]

60. In this case, the Proposal was filed on July 30, 2020. According to the Claimant, his proposal arose from the following facts:[82] (i) the procedural correspondence related to the Parties' submissions on the Respondent's application for security for costs (January-March 2020); (ii) the Tribunal's treatment of the Parties' arguments, the Respondent's application and the wording of Procedural Order No. 6 (April 13, 2020); and (iii) the Tribunal and the Parties' correspondence further to Procedural Order No. 6 (end of April or at latest, by or before May 4, 2020).[83]

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76 *See e.g.*, *Burlington*, ¶ 73; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014 (**CL-220**), ¶ 39 ("***Conoco***"); *Abaclat*, ¶ 68.

77 *Urbaser SA & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, August 12, 2010 (**CL-216**), ¶ 19.

78 *Suez*, ¶¶ 22-26.

79 *Burlington*, ¶¶ 71-76.

80 *CDC Group PLC v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005, ¶ 53.

81 *Cemex Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, November 6, 2009, ¶ 41.

82 Claimant's Proposal, ¶ 128.

83 Claimant's Proposal, ¶ 128.

61. The facts relied upon by the Claimant to support the Proposal occurred before May 4, 2020. This is confirmed by the Claimant's communication of May 4, 2020, in which he indicated that he had "recently become aware of facts that evidence the lack of impartiality and independence on the part of arbitrator(s)"[84] and that he was preparing a proposal for disqualification.[85]

62. Based on the above, approximately 87 to 90 days elapsed between the last facts triggering the Proposal and its filing. This time period exceeds the delay found to be acceptable in prior decisions on disqualification proposals.

63. The Chair notes that the Claimant argues that the circumstances in this case justify the delay in filing the Proposal. The Chair has reviewed these circumstances and is not persuaded by the Claimant's justifications.

64. As stated in *Suez v. Argentina*, "[a]n orderly and fair arbitration proceeding while permitting challenges to arbitrators on specified grounds also normally requires that such challenges be made in a timely fashion."[86] It follows that a party proposing a disqualification under Article 57 of the ICSID Convention must ensure that the evidence gathering and coordination with their lawyers and possible experts for the preparation of their proposal is completed within the time constraints of ICSID Arbitration Rule 9(1).

65. The fact that one of the Claimant's experts encountered difficulties in finalizing his report, delaying the filing of the Proposal, is unfortunate, but not relevant to determine whether the Claimant's Proposal was filed promptly.

66. Further, the fact that the proceeding was suspended does not give the Claimant the right to expand *sine die* the time frame to file a disqualification proposal, on grounds that such filing would not disrupt the suspended proceeding. The requirement of *promptness* in Rule 9(1) is not contingent on a showing of prejudice caused by the late filing of the disqualification proposal.

67. The Chair considers that the disqualification proposal was not filed promptly as required by Arbitration Rule 9(1). As a result, the Proposal is dismissed in its entirety. As further explained below, the Chair considers that the Proposal is in any event unfounded on the merits.

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84 Letter from the Claimant to the ICSID Secretariat, dated May 4, 2020, p. 1.

85 Letter from the Claimant to the ICSID Secretariat, dated May 4, 2020, p. 1.

86 *Suezabac*, ¶ 18.

(2) Applicable Rules and Legal Standards for Disqualification under the ICSID Convention

68. The Parties agree that Article 14 of the ICSID Convention requires arbitrators to be both independent and impartial.[87]

69. The Parties also agree on the meaning of impartiality.[88] While independence is characterized by the absence of external control, impartiality refers to the absence of bias or predisposition towards a party. Independence and impartiality both "protect parties against arbitrators being influenced by factors other than those related to the merits of the case." [89]

70. The Parties also seem to agree on the legal standard to apply when determining whether an arbitrator lacks impartiality.[90] They agree that a lack of impartiality must be "manifest" in order to give rise to a challenge and that "manifest" means "evident" or "obvious."[91] This is consistent with commentaries of Article 57 which indicate that the standard relates to the ease with which the alleged lack of the required qualities can be perceived.[92]

71. Finally, it is common ground between the Parties that the legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party," and that, as a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[93]

72. It is well established that Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias.[94] Nonetheless, as the Claimant admits, such appearance of dependence or bias "have to be evident or obvious according to ICSID jurisprudence."[95] In other words, a finding of apprehension of bias

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87 Claimant's Proposal, ¶¶ 78-29; Respondent's Reply, ¶ 34. While the English version of Article 14 refers to "*independent judgment*," and the French version to "*toute garantie d'indépendance dans l'exercice de leurs fonctions*" (guaranteed independence in exercising their functions), the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all three versions are equally authentic, it is established that ICSID arbitrators must be both impartial and independent. *See e.g.*, *Burlington*, ¶ 65.

88 Claimant's Application, ¶ 30; Respondent's Reply, ¶ 34.

89 *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Blue Bank*, ¶ 59.

90 Claimant's Further Observations, ¶ 34, noting that "the Parties are substantively in agreement as to the applicable legal standard." *See* also, Claimant's Application, ¶¶ 31-32; Respondent's Reply, ¶¶ 35-37.

91 Claimant's Application, ¶¶ 31-32; Respondent's Reply, ¶¶ 35-37.

92 *See e.g.*, Christoph Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202, ¶¶134-154.

93 *Burlington*, ¶ 67; *Abaclat*, ¶ 77; *Blue Bank*, ¶ 60; *Conoco*, ¶ 53.

94 *Burlington*, ¶ 66; *Abaclat*, ¶ 76; *Blue Bank*, ¶ 59; *Conoco*, ¶ 52.

95 Claimant's Further Observations, ¶ 35.

must be based on facts, and cannot be based on speculation, presumption or the subjective belief of the requesting party. As stated in *Caratube v. Kazakhstan*, the party proposing the disqualification "must show that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts."[96]

73. It has also been established that "[t]he mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention."[97] The purpose of Art. 57 of the ICSID Convention is "to ensure that arbitrators possess the qualities required by Art. 14(1) of the ICSID Convention," and Art. 57 is "not the appropriate mechanism to address alleged failures in the Tribunal's reasoning."[98]

(3) The Merits of the Claimant's Proposal

74. This decision is made in accordance with Articles 57 and 58 of the ICSID Convention, and in accordance with the legal standards described above. The application of these legal standards to the facts of this case requires the review of two issues: the language of Procedural Order No. 6 (**a.**), and the alleged procedural irregularities surrounding the issuance of Procedural Order No. 6 (**b.**)

a. Language of Procedural Order No. 6

75. The Claimant alleges that the Tribunal's language and underlying analysis in Procedural Order No. 6 contain strong indications that the Tribunal has already formed its view of the Parties and of its prospective decision in the case. The Claimant therefore argues that this language constitutes compelling evidence of a manifest lack of impartiality from the arbitrators in this case. The Respondent argues that the Claimant is merely dissatisfied with Procedural Order No. 6 and is seeking to challenge that Order by pretending to read bias in the Tribunal's reasoning where there is none.

76. The question for the Chair is whether an objective third party would find that Procedural Order No. 6 contains language that would give rise to an evident or obvious appearance of a lack of impartiality.

77. The Tribunal had to ascertain whether there was a risk that the Claimant would not pay an adverse award on costs. The Tribunal determined that exceptional circumstances must exist for it to grant

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96 *Caratube*, ¶ 57.

97 *Abaclat*, ¶ 80.

98 *AS PNB Banka*, ¶¶ 164-166.

the request for security for costs.[99] The Tribunal then examined the evidence with regard to the alleged exceptional circumstances concerning: (i) the Claimant's failure to pay former counsel; (ii) Ukrainian criminal investigations against the Claimant; and (iii) whether the Claimant had a habit of moving assets to make them untraceable,[100] and made findings of fact that met the standard of exceptional circumstances. These findings of fact were adverse to the Claimant and resulted in a decision directing the Claimant to provide security for costs. Necessarily, the adverse findings of facts are reflected in the language used by the Tribunal to express its opinion.

78. Procedural Order No. 6 touches upon sensitive issues, such as criminal proceedings involving the Claimant.[101] However, the Chair does not find that the language used by the Tribunal goes beyond what the Tribunal was required to decide, *i.e.* whether the Claimant should provide security for costs because there is a risk that he will not comply with a potential award on costs.

79. The Tribunal was careful to explain that its decision on security for costs should not be considered as constituting "a preliminary determination on the jurisdictional objections raised by the Respondent or on the merits of the case,"[102] and the Chair does not consider that the language used by the Tribunal shows a prejudgment of the Claimant's case.

80. The Chair does not find that the language used in Procedural Order No. 6 evidences manifest lack of impartiality by the Members of the Tribunal. The language in Procedural Order No. 6 is the result of the Tribunal's discretion to make preliminary findings of fact with regard to the request for provisional measures.

b. Alleged Procedural Irregularities

81. The Claimant also alleges that there were irregularities in the conduct of the Tribunal prior and further to the issuance of Procedural Order No. 6 which provide further "indicators" of the Tribunal's prejudgment of the Claimant's case and therefore reinforce the Tribunal's lack of impartiality.

82. Having reviewed the Parties' pleadings and evidence on this issue, the Chair does not consider that the procedural steps taken by the Tribunal prior or subsequent to the issuance of Procedural Order No. 6 can be considered as irregular and/or evidence of lack of impartiality.

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99 Procedural Order No. 6, ¶ 61.

100 Procedural Order No. 6, ¶¶ 31-60.

101 Procedural Order No. 6, ¶¶ 31-60.

102 Procedural Order No. 6, ¶ 62.

83. The Chair takes note of the Claimant's dissatisfaction with the letter dated April 13, 2020. There is no indication in that communication that the Tribunal prejudged or was prejudging part of the case. Rather, the Tribunal reacted to an exceptional and unprecedented situation and sought the Parties' comments on possible solutions.

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84. In the Chair's view, a third party undertaking a reasonable evaluation of the issues addressed above would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the Claimant's Proposal is rejected.

V. DECISION

85. For the reasons stated above, the Chair rejects the Claimant's Proposal to disqualify all Members of the Tribunal.

David Malpass
Chair of the ICSID Administrative Council