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CERTIFICATE

EUGENE KAZMIN

v.

REPUBLIC OF LATVIA

(ICSID CASE NO. ARB/17/5)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated March 24, 2021.

Meg Kinnear
Secretary-General

Washington, D.C., March 24, 2021

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

AWARD

Members of the Tribunal

Mrs. Vera van Houtte, *President*
Mr. Mark A. Kantor
Prof. Dr. Rolf Knieper

Secretary of the Tribunal

Dr. Jonathan Chevry

Date of dispatch to the Parties: 24 March 2021

REPRESENTATION OF THE PARTIES

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Ms. Olena Yatsenko
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I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of the Republic of Latvia and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, signed on 24 July 1997 and entered into force on 30 December 1997 (the "**Latvia-Ukraine BIT**," or the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Mr. Eugene Kazmin ("**Mr. Kazmin**" or the "**Claimant**"), a natural person having the nationality of Ukraine. The Respondent is the Republic of Latvia ("**Latvia**" or the "**Respondent**"). The Claimant and the Respondent are collectively referred to as the "**Parties**."

3. This dispute relates to the Claimant's acquisition of a steel mill factory in Latvia in 2014. Mr. Kazmin alleges, amongst other things, that the government misrepresented the state of the plant during the tender process for the acquisition of the plant and failed to provide alleged promised support for the plant's operation once the transaction was complete. The plant ceased operating in 2016 and the Claimant's investment vehicle created for the acquisition went bankrupt.

4. In this Award, the Tribunal sets out the procedural history leading up to its decision (Section II). The background of the case is contained in Section III. The Tribunal then reviews the Parties' positions on the issues of discontinuance and allocation of costs and lays down its analyses on both issues (Section IV and V). Section VI contains the Tribunal's decisions.

II. PROCEDURAL HISTORY

5. On 3 January 2017, ICSID received a request for arbitration dated 30 December 2016 from Mr. Kazmin against Latvia (the "**Request**").

6. On 3 February 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute

an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

7. By letter of 10 April 2017, the Centre detailed its understanding of the Parties' method of constitution and asked for confirmation of their agreement by 11 April 2017. By emails of 11 April 2017, both Parties confirmed their agreement.

8. By letter of 12 April 2017, the Centre confirmed that Mr. Kantor, appointed by the Claimant, and Prof. Dr. Knieper, appointed by the Respondent, had accepted their appointments and noted that, in accordance with the Parties' agreement, they should proceed to agree on a President of the Tribunal by 12 May 2017.

9. By email of 19 June 2017, the Claimant informed the Centre that the Parties had not agreed on a President and asked the Chairman of the Administrative Council to proceed with the appointment in accordance with Article 38 of the ICSID Convention.

10. By letter of 7 July 2017, the Centre informed the Parties that it intended to propose that the Chairman of the Administrative Council appoint Mrs. Vera van Houtte as President and invited the Parties' comments, if any, by 14 July 2017. By emails of 17 July 2017 and 18 July 2017, the Claimant and the Respondent respectively confirmed their agreement to Mrs. van Houtte's appointment.

11. On 28 July 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), 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. Dr. Laura Bergamini, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. By letter of 16 July 2019, Dr. Bergamini was subsequently replaced as Secretary of the Tribunal by Dr. Jonathan Chevry, ICSID Legal Counsel.

12. The Tribunal is composed of Mrs. Vera van Houtte, a national of the Kingdom of Belgium, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Mr. Mark A. Kantor, a national of the United States of America, appointed by the Claimant; and Prof. Dr. Rolf Knieper, a national of the Federal Republic of Germany, appointed by the Respondent.

13. In accordance with Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 31 October 2017 in Paris at which the draft procedural timetable and draft procedural rules were discussed.

14. Following the first session, on 1 November 2017, the Tribunal issued Procedural Order No. 1 recording the Parties' agreement on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect as of 10 April 2006, that the procedural language would be English, and that the place of proceedings would be Paris, France.

15. Pursuant to the procedural schedule established by the Tribunal in Procedural Order No. 1 and further modified upon the Parties' agreements, the Parties filed their first round of submissions on jurisdiction and the merits:

- the Claimant's Memorial, on 4 May 2018 (the "**Claimant's Memorial**");
- the Respondent's Counter-Memorial, on 9 November 2018 (the "**Respondent's Memorial**").

16. Pursuant to the procedural schedule established by the Tribunal in Procedural Order No. 1 and as further modified upon the Parties' agreements, the Parties exchanged document production requests and observations on these requests between February 2019 and April 2019. On 12 March 2019, the Tribunal issued Procedural Order No. 2 with its decisions on the Parties' requests for document production. On 18 April 2019, the Tribunal issued Procedural Order No. 3 on certain aspects of the document production.

17. By letter of 3 June 2019, Jones Day informed the Centre that it was no longer representing the Claimant. By letter of the same date, ARBITRADE Attorneys-at-Law, Kyiv, Ukraine, provided a power of attorney designating them as the Claimant's representative.

18. By emails of 7 June 2019, the Parties informed the Tribunal that they had agreed to an adjustment of the procedural calendar for the remaining pleadings. By email of the same date, the Tribunal confirmed its agreement to the Parties' adjustment and asked that they provide, by 13 June 2019, a confirmation of the exact dates of the hearing during the reserved period of 1 to 19 June 2020.

19. By emails of 13 June 2019, the Parties informed the Tribunal that the Parties had agreed to hold the hearing from 1 through 14 June 2020.

20. By letter of 13 June 2019, the Tribunal confirmed the hearing dates (1-14 June 2020) and provided an updated procedural calendar.

21. On 15 July 2019 and on 19 July 2019, the Tribunal issued Procedural Orders No. 4 and No. 5 on the transmission by the Claimant's former counsel to its successor of high-level confidential documents ordered for production in Procedural Order No. 3.

22. On 19 September 2019, the Claimant filed his Reply on the Merits and Counter-Memorial on Jurisdiction (the "**Claimant's Reply**") along with accompanying documentation.

23. On 17 January 2020, the Respondent filed its Application for Security for Costs (the "**Respondent's Application for Security for Costs**").

24. By email of 21 January 2020, the Tribunal invited the Claimant to respond to the Application for Security for Costs by 3 February 2020.

25. By letter of 24 January 2020, the Claimant requested an extension until 28 February 2020 to reply to the Application for Security for Costs. By email of the same date, the Tribunal asked the Respondent to provide its comments on the Claimant's extension request by 28 January 2020.

26. By letter of 27 January 2020, the Respondent objected to the Claimant's request for an extension to file his response and asked that, should the Tribunal be minded to grant an extension, it be only for the filing of translations, with the body of the submission still due on 3 February 2020.

27. By email of 27 January 2020, the Claimant informed the Tribunal that Mr. Andriy V. Shulga and Ms. Anastasiya O. Grenyuk were leaving ARBITRADE and would continue to represent the Claimant under the aegis of their new firm, Lamwell Law Firm, Kyiv, Ukraine.

28. On 30 January 2020, the Tribunal granted the Claimant until 14 February 2020 to file his response to the Application for Security for Costs, including any necessary translations.

29. On 14 February 2020, the Claimant filed his Reply to the Respondent's Application for Security for Costs (the "**Claimant's Reply on SfC**") with accompanying documentation.

30. On 27 February 2020, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (the "**Respondent's Rejoinder**") with accompanying documentation.

31. After having each requested and obtained the Tribunal's leave, the Respondent filed on 5 March 2020 Comments on the Claimant's Reply to the Respondent's Application for Security for Costs (the "**Respondent's Comments on SfC**") and, on 20 March 2020, the Claimant filed his Additional Comments on the Respondent's Application for Security for Costs (the "**Claimant's Additional Comments on SfC**").

32. On 13 April 2020, the Tribunal issued Procedural Order No. 6, containing its decision on the Respondent's Application for Security for Costs ("**PO6**"). The Tribunal granted the Respondent's application and ordered the Claimant to post security for costs in the amount of EUR 3 million in the form of a bank guarantee within 15 days of the issuance of PO6.

33. On 13 April 2020, the Tribunal, referring to the COVID-19 situation, invited the Parties to inform it by 23 April 2020 whether they considered that the dispute or discrete issues could be resolved on a documents-only basis and/or whether they wished to maintain the hearing dates of 1-14 June 2020 for a virtual hearing or to postpone them to a later date so that the hearing could be held in person.

34. On 17 April 2020, the Claimant wrote to the Tribunal requesting an opportunity to submit additional comments on the Tribunal's findings with a view to a possible revision of the Tribunal's order for security for costs, and further requesting a suspension of the performance of PO6.

35. On 20 April 2020, the Tribunal informed the Parties that while the Claimant was free to apply for a revision of PO6, the Claimant's request to provisionally suspend the performance of PO6 was rejected.

36. Also on 20 April 2020, the Respondent informed the Tribunal about the Parties' agreement on the postponement of the hearing and proposed possible alternative dates in October 2020 or from 22 February 2021. The Respondent reserved its answer on the possibility to decide discrete issues on the basis of documents only until after review of the Claimant's Rejoinder on Jurisdiction. On 21 April 2020, the Claimant confirmed his agreement to postpone the hearing to prospective new dates.

37. On 27 April 2020, the Claimant filed his Rejoinder on Jurisdiction (the "**Claimant's Rejoinder**") with accompanying documentation.

38. On 1 May 2020, the Respondent indicated to the Tribunal that the deadline for the Claimant to post the security for costs had expired on 29 April 2020 and requested that the Tribunal order an immediate suspension of the proceedings.

39. On the same date, the Tribunal invited the Claimant to provide his comments to the Respondent's request by 5 May 2020. The Parties were also informed that neither the World Bank premises in Paris nor the ICC Hearing Center were available for a hearing on the October 2020 dates which Parties had proposed and that a different venue should be considered.

40. By letter of 4 May 2020, the Respondent provided its comments on the possibility of resolving certain discrete issues in the proceedings on a documents-only basis, suggesting that a video conference be held to allow the Parties to make brief oral pleadings and to address any questions the Tribunal might have.

41. By letter of 4 May 2020, the Claimant objected to the consideration of discrete issues on a documents-only basis or conducting pleadings on discrete issues *via* video conference and requested a full evidentiary hearing by an impartial and independent tribunal. The Claimant informed the Tribunal that he would shortly be filing a disqualification proposal for one or more arbitrators and, given those circumstances, objected to any further decisions being taken by the Tribunal.

42. By letter of 5 May 2020, the Claimant objected to the forthcoming suspension of the proceedings.

43. On 6 May 2020, the Tribunal issued Procedural Order No. 7 suspending the proceedings ("**PO7**"). PO7 provided, *inter alia*, that the proceedings could resume if the Claimant posted security for costs, as envisioned by PO6; failing that, as of 6 November 2020, the Respondent would be granted leave to request the discontinuance of the proceedings.

44. On 30 July 2020, pursuant to Article 57 of the ICSID Convention and Arbitration Rule 9, the Claimant filed a proposal for the disqualification of all three members of the Tribunal with accompanying documentation (the "**Claimant's Disqualification Proposal**").

45. By letter of 5 August 2020, the Secretary-General of ICSID established a calendar for submissions on the Disqualification Proposal. Pursuant to this calendar, on 28 August 2020, the Respondent filed its Reply to the Claimant's Proposal for Disqualification of the Arbitral Tribunal with accompanying documentation (the "**Respondent's Reply on**

Disqualification"), asking the Chairman of the ICSID Administrative Council to reject the Disqualification Proposal. By letter of 3 September 2020, Mrs. van Houtte, on behalf of the Tribunal, stated that the Tribunal had "not prejudged the dispute and that [it had] at all times acted and continue[d] to act independently and impartially."

46. By letter of 9 September 2020, the Respondent reiterated its request that the Disqualification Proposal be denied.

47. On 11 September 2020, the Claimant submitted his Further Observations on the Disqualification of the Arbitral Tribunal.

48. On 14 October 2020, the Chairman of the ICSID Administrative Council issued the Decision on the Proposal to Disqualify All Members of the Tribunal, rejecting the Disqualification Proposal.

49. By letter of 10 November 2020, the Respondent informed the Tribunal that the six-month period for the posting of the security for costs had lapsed on 6 November 2020 and that it intended to shortly file an application for the discontinuance of the proceedings, in line with Procedural Order No. 7.

50. On 10 December 2020, the Respondent formally requested the discontinuance of the proceedings as well as an award on costs (the "**Respondent's Application for Discontinuance**").

51. By email of 11 December 2020, the Tribunal invited the Claimant's reply to the Application for Discontinuance by 23 December 2020.

52. By email of 23 December 2020, the Claimant responded to the Application for Discontinuance, reserving his rights, insisting that the apportionment of costs in the form of an award was not justified, and requesting that the Tribunal order each Party to bear its own costs (the "**Reply to the Application for Discontinuance**").

53. On 15 March 2021, the proceedings were closed pursuant to Arbitration Rule 38.

III. BACKGROUND ON THE CASE

54. As further indicated below, the present Award results from the Respondent's Application for Discontinuance. The Tribunal summarises in the present section the relevant facts leading up to the dispute between the Parties, as well as the Parties' submissions on

jurisdiction and the merits, bearing in mind the circumstances leading up this Award. The statement of facts and the presentations of the Parties' positions below are not meant to serve as exhaustive reviews of the Parties' submissions in this case.

A. FACTUAL BACKGROUND OF THE DISPUTE

55. The dispute relates to the purchase and operation of the Liepajas Metalurgs metallurgical plant in Latvia (hereinafter "**LM**"). The Parties tend to agree on the history and principal business of LM.[1] The Parties however largely differ on the conditions for, and organization of, the sale of LM and on the operation of the plant further to its acquisition by the Claimant. The summary below focuses on the main factual developments leading up to the acquisition of LM by the Claimant and to the dispute between the Parties.

56. LM was established as a joint stock company in the early 1990s and became a listed company upon its privatization in 1997.[2] LM's principal business was the production of hot rolled steel rebars, which are used in construction to reinforce concrete structures. LM played a significant role in the Latvian economy.[3] In order to survive the 2008 global financial crisis and to improve its competitiveness, LM underwent a modernization process that culminated in 2011 with the installation of a technologically advanced electric arc-furnace.[4] The modernization process was financed by a € 73.7 million loan from UniCredit SpA, guaranteed by the Latvian State.[5] The plant functioned profitably for some years after the modernization process,[6] but encountered new economic difficulties in 2013.[7]

57. In early 2013, LM's management announced that the company was experiencing financial problems.[8] Around the same time, LM stopped repaying the loans to UniCredit SpA and UniCredit sought to enforce the guarantee that was agreed upon by the State.[9] In July 2013, the State Treasury of Latvia agreed to pay the outstanding amount of the loan

1 Claimant's Memorial, ¶ 13; Respondent's Counter-Memorial, ¶ 66.
2 Respondent's Counter-Memorial, ¶ 66.
3 Claimant's Memorial, ¶ 14; Respondent's Counter-Memorial, ¶ 68.
4 Claimant's Memorial, ¶ 14; Respondent's Counter-Memorial, ¶ 68.
5 Claimant's Memorial, ¶ 15; Respondent's Counter-Memorial, ¶ 68.
6 Respondent's Counter-Memorial, ¶ 68.
7 Claimant's Memorial, ¶ 16; Respondent's Counter-Memorial, ¶ 71.
8 Respondent's Counter-Memorial, ¶ 72.
9 Claimant's Memorial, ¶ 16; Respondent's Counter-Memorial, ¶ 78.

(approximately € 67.5 million).[10] Further to this payment, the Latvian Ministry of Finance became LM's largest secured creditor.[11]

58. LM's difficulties persisted past July 2013 and LM was eventually declared insolvent in November 2013. Mr. [redacted], who oversaw LM's legal protection proceedings prior to the insolvency, was appointed as LM's insolvency administrator.[12] In January 2014, Mr. [redacted] prepared a detailed plan for the sale of LM's core assets through an international tender. The plan for the sale of LM assets was submitted to and approved by LM's creditors,[13] including Latvia's Ministry of Finance.[14] The tendering process was handled by Prudentia, a Latvian investment banking and financial consulting firm engaged by Mr. [redacted].[15]

59. In June 2014, KVV Group LLC ("**KVV Group**"), a company allegedly owned by Mr. Kazmin, contacted Prudentia to express its interest in the tendering process.[16] KVV Group further conducted due diligence and submitted proposals for the acquisition of LM assets in July and August 2014. Negotiations between Mr. [redacted], Prudentia and the bidders (including KVV Group) occurred throughout July, August and early September.[17] Some of LM's assets, which were non-core assets according to the Respondent, but crucial for the plant's operation according to the Claimant,[18] were sold separately in the course of the summer. KVV Group's offer for the acquisition of LM assets was accepted on 9 September 2014. A purchase agreement "regarding the core business assets" was concluded on 2 October 2014 between LM (represented by its insolvency administrator) and KVV LM, a Latvian company created on 24 September 2014 by KVV Group for the purpose of the acquisition.

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10 Claimant's Memorial, ¶ 16; Respondent's Counter-Memorial, ¶ 78.

11 Claimant's Memorial, ¶ 16; Respondent's Counter-Memorial, ¶ 78.

12 Claimant's Memorial, ¶ 20; Respondent's Counter-Memorial, ¶ 100.

13 Claimant's Memorial, ¶ 27; Respondent's Counter-Memorial, ¶ 126.

14 Claimant's Memorial, ¶ 28; Respondent's Counter-Memorial, ¶ 130.

15 Claimant's Memorial, ¶ 28; Respondent's Counter-Memorial, ¶ 130. Prudentia had previously been involved in the LM's legal protection proceedings, as the main consultant to LM's creditors.

16 Claimant's Memorial, ¶ 43; Respondent Counter-Memorial, ¶ 152.

17 Claimant's Memorial, ¶¶ 47-62; Respondent's Counter-Memorial, ¶¶ 152-173.

18 *See e.g.* LM's majority shareholding in LM Osta, a stevedoring company at the Port of Liepāja, and its minority shareholding in Elme Messer, the company running the oxygen plant which was also a supplier to LM. The conditions and consequences of the acquisition by KVV LM of these assets form part of the dispute. *See* Claimant's Memorial, ¶¶ 63-106; Respondent's Counter-Memorial, ¶¶ 234-271.

60. Following the conclusion of the asset purchase agreement and before the closing of the transaction, several negotiations and further financial transactions took place between Mr. [redacted], Prudentia, the Claimant, LM's creditors (including the Latvian government) and other entities with interests in the sale of LM. The purpose of these negotiations and transactions was to organize the financial repercussions of the sale. The Parties disagree on the content of these negotiations. The closing took place on 30 December 2014.[19]

61. After KVV LM acquired the plant, discussions continued between KVV LM and Latvian authorities on the operation of the plant, the level of support KVV LM would require from Latvia, and possible electricity price reductions that KVV LM could benefit from and which were allegedly discussed during the tendering process.[20] The Parties largely disagree on the content and outcome of these discussions.

62. In May 2015, KVV LM suspended the operation of the steelmaking works in the plant.[21] In January 2016, KVV LM discontinued other operations of the plant, effectively cutting the plant's main sources of revenue. Negotiations between KVV LM, its creditors and the Latvian government on the conditions to restore the operation of the plant were unsuccessful. On 20 April 2016, the Claimant filed a notice of dispute under the BIT with the Minister of Justice of Latvia.[22] On 21 June 2016, KVV LM applied for legal protection proceedings, but its Plan of Measures of Legal Protection Proceedings dated 23 August 2016 was not accepted by the majority of creditors. On 16 September 2016, KVV LM was declared insolvent and an administrator was appointed.[23]

B. THE PARTIES' POSITION ON JURISDICTION AND THE MERITS

1. Jurisdiction

63. The Respondent has four general jurisdictional objections. Specifically, the Respondent argues that:

- The Claimant has failed to establish that he is the owner of KVV LM and therefore that he qualifies as an investor under the BIT;[24]

19 Respondent's Counter-Memorial, ¶¶ 219-233.

20 Claimant's Memorial, ¶¶ 115-128; Respondent's Counter-Memorial, ¶¶ 272-294.

21 Respondent's Counter-Memorial, ¶ 296.

22 Claimant's Memorial, ¶ 5; Respondent's Counter-Memorial, ¶ 317.

23 Respondent's Counter-Memorial, ¶ 322.

24 Respondent's Counter-Memorial, ¶¶ 325-331.

- The Claimant's alleged investment is not protected under the BIT because it was not made in accordance with Latvian law and in good faith, and because the investment was not fully owned by the Claimant at the time of the alleged breaches;[25]

- The measures which, according to the Claimant, constitute the breaches of the BIT have been taken by persons or entities (*i.e.* Mr. [redacted] and Prudentia) whose conduct cannot be attributed to Latvia;[26] and

- The normative basis of the Claimant's claims is the Asset Purchase Agreement concluded between KVV LM and LM, and not the BIT.[27]

64. The Claimant challenges these four objections. According to the Claimant, (i) the Claimant is an investor within the meaning of the BIT,[28] (ii) the Claimant's investment is protected under the BIT,[29] (iii) the actions of insolvency administrators and Prudentia are attributable to Latvia,[30] and (iv) the Claimant's claims are based on the BIT.[31]

2. Liability

65. According to the Claimant, the Respondent's actions towards the Claimant throughout the process for the acquisition of LM and after the acquisition constitute a creeping expropriation. According to the Claimant, this expropriation deprived him of the economic benefit of the property of his investment and therefore constituted a breach of Article 5 of the BIT.[32] In particular, the Claimant contends that the Respondent first induced the Claimant to make an investment by making representations that turned out to be untrue, and which the Respondent later claimed to be unrealistic. The Claimant further submits that the Respondent then reneged on its promises and failed to provide any support to the Claimant despite prior assurances, and eventually took measures that pushed the Claimant's investment to insolvency. According to the Claimant, the Respondent took advantage of the insolvency proceedings to take back the ownership of KVV LM and left the Claimant with no compensation for any of the purchase price and/or funds invested in KVV LM.[33]

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25 Respondent's Counter-Memorial, ¶¶ 332-360.
26 Respondent's Counter-Memorial, ¶¶ 361-426.
27 Respondent's Counter-Memorial, ¶¶ 427-437.
28 Claimant's Reply, ¶¶ 188-226.
29 Claimant's Rejoinder, ¶¶ 17-60.
30 Claimant's Reply, ¶¶ 227-286.
31 Claimant's Reply, ¶¶ 287-297.
32 Claimant's Reply, ¶¶ 298-320.
33 Claimant's Reply, ¶¶ 298-320.

66. The Claimant further argues that the Respondent has failed to accord fair and equitable treatment to Mr. Kazmin and his investment and therefore has breached Article 2(2) of the BIT.[34] On this issue, the Claimant submits that the Respondent breached the Claimant's legitimate expectations that electricity prices would be adjusted after the acquisition of LM and that LM would receive support from the government after the acquisition. The Claimant also asserts that he has been asked to pay bribes for the government to comply with its alleged undertakings.[35] The Claimant further argues that the Respondent acted arbitrarily and in bad faith towards the Claimant by selling him an asset with no or little prospect of success (due to the Respondent's own policies) while hiding the precise nature of the assets sold to KVV Group and by structuring the sale of LM's assets in a way that prevented the Claimant from acquiring an "integrated, self-sustaining and holistic" plant of which he could exploit the full potential.[36]

67. Finally, the Claimant argues that the Respondent violated the umbrella clause contained in the Bulgaria-Latvia BIT, which the Claimant submits can be imported through Article 3(2) of the BIT (the "**MFN clause of the BIT**").[37]

68. According to the Respondent, the Claimant fails entirely to demonstrate that Latvia's conduct breached the BIT. In particular, the Respondent argues that the Claimant's claim of expropriation has no basis in law or fact because (i) the Claimant had no legitimate expectations and, if he had, the frustration of these expectations would not have constituted an expropriation, and (ii) the Claimant in any event fails to prove any of the three elements of creeping expropriation (acts attributable to a State, an inference with property rights, and the destruction of the value of these rights).[38]

69. The Respondent further contends that Latvia did not breach the Fair and Equitable Treatment provision of Article 2(2) of the BIT, as it did not have a formal "relationship" with the Claimant, and when it did happen to interact with the Claimant, it acted fairly and equitably at all times.[39] Further, the Respondent argues that the Claimant fails to demonstrate that the three representations on which he attempts to rely (*i.e.* that LM would receive support from the government, that Mr. Kazmin would receive control over LM

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34 Claimant's Memorial, ¶¶ 191-208.

35 Claimant's Memorial, ¶¶ 136-144.

36 Claimant's Memorial, ¶¶ 191-208.

37 Claimant's Memorial, ¶¶ 209-220.

38 Respondent's Rejoinder, ¶¶ 417-451.

39 Respondent's Rejoinder, ¶¶ 452-460.

Osta and Elme Messer, and that the electricity prices would be adjusted) were actually made, that they created legitimate expectations, or that it was reasonable for the Claimant to rely on them.[40] The Respondent also argues that the Claimant's allegations that Latvia acted in bad faith towards the Claimant through the sale of LM are misguided because Latvia did not sell any assets to KVV LM.[41]

70. Finally, the Respondent argues that an MFN clause cannot be used to import the umbrella clause contained in the Bulgaria-Latvia BIT, and that in any event Latvia did not breach any contractual rights, as there are no contractual relations between the Respondent and the Claimant.[42]

3. Causation and Damages

71. The Claimant submits that it was the Respondent's conduct which drove KVV LM into insolvency, and specifically the Respondent's refusal to grant the electricity price reductions that the Respondent had promised during the tendering process for the sale of LM.[43] In particular, the Claimant contends that the evidence submitted in the present arbitration shows that KVV LM was not viable without a reduction of electricity prices and that it is inconceivable that the Claimant would have proceeded with the acquisition of LM in the absence of such a promise on behalf of Latvia.[44] The Claimant further argues that the existence of other factors which may have contributed to KVV LM's failure does not imply any lack of causation between the Respondent's actions and the Claimant's damages.[45]

72. The Claimant submits that he is entitled to full reparation for the losses that he incurred and claims for damages in an amount of EUR 72,031,855.64 and USD 4,121,450.00 (corresponding to the sums that the Claimant paid for the acquisition of LM assets and the amounts allegedly spent to keep KVV LM afloat after the acquisition),[46] plus pre- and post-award interest.[47]

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40 Respondent's Counter-Memorial, ¶¶ 468-471; Respondent's Rejoinder, ¶¶ 468-490.

41 Respondent's Counter-Memorial, ¶ 23; Respondent's Rejoinder, ¶¶ 491-503.

42 Respondent's Rejoinder, ¶¶ 452-460

43 Claimant's Reply, ¶¶ 351-358.

44 Claimant's Reply, ¶¶ 351-358.

45 Claimant's Reply, ¶¶ 358-367.

46 Claimant's Reply, ¶¶ 372-379.

47 Claimant's Reply, ¶¶ 380-392.

73. According to the Respondent, the Claimant has failed to prove that the alleged breaches were the underlying cause of KVV LM's insolvency and ultimately of the Claimant's loss of his investment.[48] The Respondent further argues that, in fact, it is impossible for the Claimant to demonstrate this causation, as Latvia had no part in KVV LM's failure, but it was rather the Claimant's mismanagement of his company that led to KVV LM's bankruptcy.[49]

74. On damages, the Respondent argues that the Claimant's submissions are flawed, especially because the Claimant's main claim relates to sunk costs, which the Respondent says he is not entitled to,[50] and that in any event the Claimant's calculations of these sunk costs and of the related interest are largely inflated.[51]

4. The Parties' Original Requests for Relief

75. In the Claimant's Reply and in his Rejoinder on Jurisdiction, the Claimant requests that the Tribunal:

> "*(1) dismiss the Respondent's jurisdictional objections in their entirety;*
>
> *(2) order that the Respondent shall pay, regardless of the outcome in relation to the merits of the present dispute, all of the Claimant's costs in relation to the Respondent's jurisdictional objections.*"[52]

And that:

> "*(a) Declare that the Respondent violated the BIT in respect of Claimant's investment in Latvia;*
>
> *(b) Award Claimant damages in the amount of EUR 72,031,855.64 and USD 4,121,450.00, including pre-award interest at the rate of LIBOR + 4 per cent compounded annually;*
>
> *(c) Award Claimant post-award interest on the same terms, running from the date of the Award until payment;*
>
> *(d) Award Claimant all of his legal fees and all of his costs and expenses incurred in the jurisdictional and merits phase of these proceedings; and*
>
> *(e) Award Claimant any other relief that the Tribunal deems appropriate.*"[53]

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48 Respondent's Counter-Memorial, ¶¶ 522-534; Respondent's Rejoinder, ¶¶ 525-586.

49 Respondent's Counter-Memorial, ¶¶ 522-534; Respondent's Rejoinder, ¶¶ 525-586.

50 Respondent's Counter-Memorial, ¶¶ 557-561; Respondent's Rejoinder, ¶¶ 590-594.

51 Respondent's Counter-Memorial, ¶¶ 562-569; Respondent's Rejoinder, ¶¶ 595-616.

52 Claimant's Rejoinder, ¶ 156.

53 Claimant's Reply, ¶ 393.

76. In the Respondent's Rejoinder, the Respondent requests that the Tribunal:

> "*a) dismiss the Claimant's claims for lack of jurisdiction.*
>
> *Alternatively, that the Tribunal:*
>
> *b) dismiss the Claimant's claims as inadmissible.*
>
> *Alternatively, that the Tribunal:*
>
> *c) dismiss the Claimant's expropriation claim as inadmissible.*
>
> *Alternatively, and in the event that the Tribunal finds that it has either jurisdiction over any of the claims or that any of the claims are admissible:*
>
> *d) dismiss the Claimant's claims as unfounded.*
>
> *And in any event:*
>
> *e) order the Claimant to compensate the Respondent for the costs incurred by the Respondent in connection with the review, investigation and defence against the Claimant's claims, both prior to and in the course of the present arbitration, including in-house and third-party costs, legal fees, the administrative charges of ICSID and the fees and expenses of the Tribunal.*"[54]

C. THE RESPONDENT'S REQUEST ON DISCONTINUANCE AND ALLOCATION OF COSTS

1. Background

77. As indicated above,[55] on 10 December 2020, the Respondent sent a request to the Tribunal asking for the discontinuance of the proceedings as well as an award on costs.[56] The Respondent's request was based on the Claimant's failure to pay security for costs as ordered in PO6 and on the Tribunal's ruling in PO7 which provided that, if by the expiration of a six-month period starting as of the date of PO7 (*i.e.* until 6 November 2020) the proceedings had not resumed further to the payment of the security for costs by the Claimant, the Respondent would be granted leave to file an application for the discontinuance of the proceedings.[57]

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54 Respondent's Rejoinder, ¶ 617.

55 *See* above, ¶ 50.

56 Respondent's Application for Discontinuance. The Respondent's position on discontinuance and allocation of costs is further discussed below. *See* below, Sections IV and V.

57 PO7, ¶ 27(c).

78. On 11 December 2020, the Tribunal invited the Claimant to comment upon the Respondent's Application for Discontinuance. The Claimant sent his reply on 23 December 2020, reserving his rights and referring to previous submissions.[58]

2. The Respondent's Request for Relief on Discontinuance and Allocation of Costs and the Claimant's Response

79. The Respondent requests that:

> "*the Tribunal order, in the form of an award, that:*
>
> *a) the proceedings be discontinued;*
>
> *b) the Claimant bear the costs of the arbitration, i.e., the fees and expenses of the members of the Tribunal and the administrative fees and costs of ICSID, and direct the ICSID Secretariat to reimburse to the Respondent any outstanding balance of the deposits paid by the Parties;*
>
> *c) the Claimant bear the costs incurred by the Respondent in connection with this arbitration and pay to the Respondent the amount of EUR 3,223,212.40 and USD 250,000.00 in compensation for such costs, less any amounts reimbursed by the ICSID Secretariat in accordance with paragraph 35(b) above; and*
>
> *d) the Claimant pay to the Respondent post-award interest on the amounts to be paid by the Claimant in accordance with paragraphs 35(b) and (c) above as from the date of the award until the date of payment at a rate of 6% per year, compounded annually.*"[59]

80. In response to the Respondent's Application for discontinuance, the Claimant sent an email, dated 23 December 2020, the content of which is reproduced below:

> "*The Claimant reserves all his rights arising out of his previous submissions, both on the issue of discontinuance of proceedings and regarding the Claimant's lack of confidence in the present composition of the Arbitral Tribunal. In addition to any previous statements regarding the issue of discontinuance, the Claimant believes that in the absence of a decision on the merits of the case the apportionment of costs in the form of an award is not justified. We would like to stress that the Claimant has acted in good faith at all times throughout these proceedings. The Claimant has never caused any unreasonable delays to the proceedings, having liaised with the Respondent in order to amicably resolve procedural issues and not requested any extensions of time limits that were unreasonable or disproportionate to the time limits granted to the Respondent. The Claimant has provided all written submissions on*

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58 Claimant's Reply to the Application for Discontinuance, dated 23 December 2020. The Claimant's position on discontinuance and allocation of costs is also further discussed below. *See* below, Sections IV and V.

59 Respondent's Application for Discontinuance, ¶ 35.

jurisdiction and merits of the case in accordance with the procedural timetable. The Claimant was also fully prepared to take part in the oral hearing as originally scheduled. The Claimant's single use of his right to challenge the Arbitral Tribunal cannot be regarded as a cause of delay, as it occurred during a time when the proceedings were suspended and when the hearing had to be rescheduled in any event due to COVID-19. In light of this, we do not consider that it would be just and reasonable to place the entire burden of the costs of the arbitration as well as the costs incurred by the Parties onto the Claimant. The Claimant, being an individual, has expended considerable amounts in this arbitration, namely – USD 250,000 on ICSID fees, as well as USD 926,933.05, EUR 297,453.80 and GBP 300,991.95 on legal and experts' fees and expenses. Given the circumstances of the present case and in the absence of a decision on the merits, we believe that it would be just and fair for each party to bear its own costs.

All rights of the Claimant are reserved."[60]

D. CONSIDERATIONS OF THE TRIBUNAL ON PENDING CLAIMS

81. The Tribunal has reviewed the Parties' positions and taken them into consideration as needed in the preparation of this Award.

82. The Tribunal finds that, although the circumstances make it impossible for the Tribunal to make any determinations on merits – or even jurisdiction –, its decisions on discontinuance and on cost allocation should be an award. The Tribunal acknowledges that decisions to discontinue proceedings often are issued as procedural orders, discontinuance being considered by many to be a procedural matter.[61] However, discontinuance in this case is unusual because it follows a suspension of the proceedings which would, but for the discontinuance, become permanent as a result of the stalemate caused by the Claimant's sustained refusal to post security as ordered.[62] The Tribunal's decision to discontinue the proceedings thus causes this case to come to an end, not only for the Respondent who applied for discontinuance, but also for the Claimant whose claims cannot be adjudicated in any event in this arbitration. Therefore, the Tribunal's decision to discontinue the proceedings is a final decision in these proceedings as it disposes of all issues before the Tribunal.

83. However, the Tribunal must also deal with the Parties' requests that it decide on the allocation of costs. Article 48 of the ICSID Convention requires an award to "deal with every question submitted to the tribunal"; and Article 61(2) of the ICSID Convention and

60 Claimant's Reply to the Application for Discontinuance, dated 23 December 2020.

61 On this issue, *see* below Section IV.C.3.

62 On this issue, *see* below Section IV.C.2.

Arbitration Rule 47(j) requires an award to contain "any decision of the Tribunal regarding the cost of the proceeding." For reasons of procedural fairness and efficiency, the Tribunal decides on the discontinuance and the cost allocation requests in a single award closing this arbitration so that Articles 51-53 Convention may be applicable.

84. The Tribunal deals with the issues of discontinuance and costs separately, however, notwithstanding the links between the two and between the reasoning related to each, because they do involve distinct issues: first, whether the proceedings should be discontinued (**Section IV.**); and second, whether the Respondent is entitled to an award of costs (**Section V.**).

IV. DISCONTINUANCE OF THE PROCEEDINGS

A. THE RESPONDENT'S POSITION

85. According to the Respondent, the Tribunal has the authority to order the discontinuance of the proceedings by virtue of Article 44 of the ICSID Convention.[63] In support, the Respondent refers to ICSID precedents in which tribunals and annulment committees relied on Article 44 of the Convention when exercising their power to order the discontinuance of the proceedings.[64]

86. In particular, the Respondent refers to the tribunal's findings in *RSM v. Saint Lucia*, as later confirmed by the *ad hoc* committee constituted to review the *RSM v. Saint Lucia* award. According to the Respondent, the tribunal's order to discontinue the proceedings and the committee's subsequent decision demonstrate that, in the context of an application for discontinuance as a result of a party's failure to post a security for costs, the proper course of action for the Tribunal is to discontinue the proceedings pursuant to Article 44 of the Convention.[65]

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63 Respondent's Application for Discontinuance, ¶ 5.

64 Respondent's Application for Discontinuance, ¶ 5, referring to *Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Procedural Order No. 1, 14 April 2006 (**Exh. RLA-132**), p. 2 *et seq.; Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (**Exh. RLA-133**), p. 17 *et seq.* (¶¶ 76-79); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (**Exh. RLA-134**), p. 20 (¶¶ 77-81); *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (**Exh. RLA-135**), p. 10 *et seq.* (¶¶ 27-33).

65 Respondent's Application for Discontinuance, ¶¶ 6-7, referring to *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Request for Suspension or Discontinuation of Proceedings, 8 April 2015 (**Exh. RLA-117**), and *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**).

87. The Respondent therefore requests the Tribunal to exercise its powers under Article 44 of the ICSID Convention and to order that the proceedings be discontinued in view of the Claimant's failure to comply with PO6.[66]

B. THE CLAIMANT'S POSITION

88. The Claimant's Reply to the Application for Discontinuance of 23 December 2020 reserved "all his rights arising out of his previous submissions, both on the issue of discontinuance of proceedings and regarding the Claimant's lack of confidence in the present composition of the Arbitral Tribunal," and referred to "any previous statements regarding the issue of discontinuance."[67]

89. Although the Claimant did not refer in his email to any specific previous submission or statement therein, the Tribunal assumes that the Claimant's general reference was *inter alia* to his Reply on SfC of 14 February 2020[68] and to his Additional Comments on SfC of 20 March 2020.

90. This assumption is also in accordance with PO7, in which the Tribunal did not take a decision on the Respondent's request for the discontinuance of the proceedings with prejudice but decided that, in case the Respondent were to renew its application to the Tribunal to order the discontinuance of the proceedings, the Claimant would "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."[69]

91. In his Reply on SfC, the Claimant denied that the ICSID Convention or Arbitration Rules provide for a possibility of terminating proceedings due to non-compliance with a tribunal's order for interim measures.[70] He argued that the ICSID Arbitration Rules provide only for a limited number of grounds for discontinuance of proceedings: settlement (Rule 43); request of a party and agreement of the other (Rule 44); and failure of the parties to act (Rule 45), and that none of these causes of discontinuance are applicable in this case.[71] The Claimant acknowledged that there is an ICSID precedent where proceedings were

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66 Respondent's Application for Discontinuance, ¶ 9.

67 Claimant's Reply to the Application for Discontinuance, first and second sentences.

68 Claimant's Reply on SfC.

69 PO7, ¶ 27(c).

70 Claimant's Reply on SfC, ¶¶ 65-66.

71 Claimant's Reply on SfC, ¶¶ 65-66.

discontinued on the basis of the claimant's failure to provide security for costs, *RSM v. Saint Lucia,* but emphasized the Annulment Committee's conclusion that the *RSM* tribunal had exceeded its powers by dismissing the claims with prejudice, which led to the partial annulment of the *RSM* award.[72]

92. In his Additional Comments on SfC, the Claimant replied to Respondent's reliance on Article 44 of the ICSID Convention that: "[d]ismissing a claim with prejudice is not a merely procedural question, but effectively amounts to a decision on the merits of the case" and that "dismissal of the case on the merits is a substantial matter," implying that Article 44 of the ICSID Convention cannot be relied on here.[73] In the Claimant's view, the fact that "Rule 45 of the Arbitration Rules clearly sets out specific circumstances under which the parties' failure to act may cause discontinuance of the proceedings [which means] that any other set of circumstances does not give rise to the same result."[74]

93. The Claimant further argued that none of the decisions by other ICSID tribunals which had been relied on by the Respondent, nor the proposed amendments to the ICSID Arbitration Rules, actually support the discontinuance of proceedings with prejudice.[75] The Claimant concluded that:

> "*there is no authority for discontinuance of the proceedings in case of non-compliance with an order for security for costs under the ICSID Convention and Rules. In any event, discontinuance of the case with prejudice on procedural grounds would be contrary to the basic notions of justice, is not supported by any case law, and is even contrary to the suggested amendments to the ICSID Rules.*"[76]

94. As far as the Tribunal can see, other than these comments, the Claimant has not argued against or objected to the Respondent's Application for Discontinuance.

C. ANALYSIS OF THE TRIBUNAL

95. In order to decide on the Respondent's request for discontinuance, the following issues have to be addressed: the nature and consequence of the Respondent's request for discontinuance (**1.**), the Claimant's submissions against discontinuance and his procedural

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72 Claimant's Reply on SfC, ¶ 67; Claimant's Additional Comments on SfC, ¶ 64.

73 Claimant's Additional Comments on SfC, ¶ 63.

74 Claimant's Additional Comments on SfC, ¶ 63.

75 Claimant's Additional Comments on SfC, ¶¶ 64-67.

76 Claimant's Additional Comments on SfC, ¶ 70.

conduct when faced with the possibility of a discontinuance (**2.**), and the authority of the Tribunal to order discontinuance of the proceedings in an award (**3.**).

1. The Respondent's Application for Discontinuance *Without* Prejudice

96. The Tribunal notes that there have been some changes during the proceedings as to whether the requested discontinuance was with or without prejudice.[77]

97. The Tribunal agrees with the Claimant's argument[78] whereby a decision discontinuing the proceedings with prejudice can hardly be considered as a mere procedural matter. Indeed, a decision discontinuing the proceedings with prejudice would prevent the Claimant from reintroducing his claims at a later stage, even if no decision on jurisdiction nor on the substance of the claims had been made. Such decision implies a decision on jurisdiction or on the merits of the case and would thus not be just a matter of procedure.

98. The Respondent did not reaffirm once the suspension expired without security being posted its request that the "proceedings will be immediately terminated with prejudice, in case of non-compliance."[79] In its Application for Discontinuance of the Proceedings and for an Award of Costs, the Respondent merely asks that "the proceedings be discontinued,"[80] without asking (as before) that they be discontinued with prejudice. There is no reason to doubt the Respondent's intention to obtain discontinuance without prejudice as it confirms, albeit only in a footnote of its Application, that "[t]he Respondent no longer requests the termination of the proceedings with prejudice as set out in its Application for Security for Cost of 17 January 2020."[81] The Respondent accepts that, as a consequence, "it may have to defend itself against the very same claims before another ICSID tribunal."[82]

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77 *See* Respondent's Application for Security for Costs, ¶ 82, requesting that "the Tribunal to order that the present proceedings be immediately terminated with prejudice if the Claimant fails to comply with the Tribunal's order for security for costs," and Respondent's Application for Discontinuance, ¶ 1, fn. 1, noting that "The Respondent no longer requests the termination of the proceedings with prejudice as set out in its Application for Security for Cost of 17 January 2020."

78 Claimant's Additional Comments on SFC, ¶ 63.

79 The Respondent had formulated this request in its SfC Application of 17 January 2020 and repeated it in its Comments on SfC of 5 March 2020.

80 Respondent's Application for Discontinuance, ¶ 35(a).

81 Respondent's Application for Discontinuance, ¶ 1, fn. 1.

82 Respondent's Application for Discontinuance, ¶ 28(a).

99. Given this amendment of the relief sought by the Respondent, the Claimant's objections in his Reply on SfC of 14 February 2020 and Additional Comments on SfC of 20 March 2020, to the extent they addressed the "with prejudice" termination, are no longer apposite.

100. As regards a "without prejudice" discontinuance, the Tribunal notes that the Claimant has not addressed this change of the Respondent's request for discontinuance in his Reply to the Application for Discontinuance. The Claimant's Reply on SfC and his Additional Comments did not address discontinuance without prejudice either and those submissions contain no arguments on the authority of the Tribunal to discontinue the proceedings without prejudice.

2. The Claimant's Procedural Conduct in Response to the Possibility of Discontinuance

101. The Claimant's Reply on SfC of 14 February 2020 and his Additional Comments of 20 March 2020 are the only submissions containing arguments of the Claimant concerning the discontinuance of the proceedings. The Tribunal notes, however, that the Claimant's procedural conduct when facing the possibility of discontinuance is also instructive.

102. As the procedural history above has shown, notwithstanding the Respondent's early request that the Tribunal declare that "the present proceedings will be immediately terminated with prejudice, in case of non-compliance by the Claimant"[83] with a security for costs order, the Tribunal has proceeded gradually, leaving many opportunities for the Claimant to avoid the present situation:

- In PO6, the Tribunal ordered the Claimant to post security within 15 days and indicated that if he failed to do so, a suspension might be ordered after the Parties were heard on the terms of a suspension.[84]

- The Claimant's 17 April 2020 request for an extension of the 15 days period until a decision on the revision of PO6 which he intended to request on 27 May 2020 (*i.e.* only four days before the scheduled Hearing on Jurisdiction and Merits) was rejected by the Tribunal in a letter of 20 April 2020. This letter also confirmed that PO6 retained its full effect, that for the time being all procedural dates remained fully applicable and that the Claimant was free to apply for a revision of PO6 if and when he chose.

- Following the expiration of the deadline for the posting of the security, the Respondent applied on 1 May 2020 for the immediate suspension of the proceedings. The Tribunal invited comments from the Claimant who, on 5 May 2020, acknowledged being

83 Respondent's SfC Application ¶ 83(b).

84 PO6, ¶ 68(1).

"cognizant of the potential consequences of non-provision of security."[85] However, referring to his lack of confidence in the independence and impartiality of the Tribunal, the Claimant considered it "inappropriate for the Tribunal in its present composition to render any procedural or substantive decisions in the case."[86] The Claimant also appeared to consider that the Tribunal was bound by paragraph 68(2) of PO6 (which provided that the Tribunal would, upon receipt of the notification of non-compliance with the security order and after hearing the Parties, determine the terms of the suspension of the proceedings).

- In PO7, the Tribunal noted that the Claimant had chosen not to comment on the terms of the requested suspension and that he, moreover, had not yet filed an application for the revision of PO6, nor an application for the disqualification of the Tribunal, although he had announced both repeatedly. The Tribunal also observed that the initially provided hearing date was less than a month away and that the Parties and the Tribunal were also to decide on the possibility of partially bifurcating certain jurisdictional issues for a limited virtual hearing in June and/or on the hearing facilities for a live hearing in Paris on 12-23 October 2020. The Tribunal concluded that the proceedings were to be immediately suspended until security was posted and that, in order to avoid the proceedings remaining indefinitely suspended, the Respondent would be authorized to re-apply for a discontinuance of the proceedings if no security was posted within six months.

103. Despite the rejection, on 14 October 2020, of the Claimant's 30 July 2020 Proposal for Disqualification of the Tribunal by the Chair of the ICSID Administrative Council,[87] the Claimant did not post the security ordered within the six-month suspension period, nor thereafter and until today (*i.e.* during more than 11 months). Nor has the Claimant filed an Application for the Revision of Procedural Order No. 6 or asked in his email of 23 December 2020 for leave to file such application.

104. The Claimant had several opportunities either to pay the security or to apply for the revision of PO6 by convincing the Tribunal that security was not or no longer required as ordered in PO6. The Claimant did not use these opportunities, however. He did ask leave, on 17 April 2020, to submit an Application for Revision of Security for Costs, but when it was granted by the Tribunal on 20 April 2020, he did not use it. Together with the leave, the Claimant had requested to be given until 27 May 2020 to file the Application and that

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

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

87 Decision on the Proposal to Disqualify All Members of the Tribunal, dated 14 October 2020. The Tribunal further takes notes of the Claimant's comment of 5 May 2020 that "[t]he issue of security for costs may only be reverted to after the consideration of the Claimant's application for disqualification of arbitrator(s) and the constitution of an independent and impartial Tribunal." *See* Letter from the Claimant to the Tribunal, dated 5 May 2020.

performance of PO6 be suspended until after the Tribunal's decision on the Application. While the leave to apply for a revision of PO6 specifically provided that the Application could be filed at the time of Claimant's choice, the Tribunal confirmed that all applicable procedural dates remained valid.[88] These were in particular the filing date for the Claimant's Rejoinder on Jurisdiction on 27 April 2020, the date on which security had to be posted (29 April 2020) and the hearing dates of 1-14 June 2020. Since the Claimant's request for suspension of the effectiveness of PO6 would mean that security would not be posted until after the hearing (which entailed further costs), the request for suspension of the date for posting security was rejected. The Claimant did not post the security on 29 April 2020 and he did not file an Application for Revision of PO6 either, not even by 27 May 2020. He continued to fail to either post security or apply for the revision of PO6 (i) during the six-month suspension of the proceedings which was ordered in PO7 on 6 May 2020, (ii) following the 14 October 2020 rejection of his Disqualification Proposal, (iii) after the Respondent announced on 10 November 2020 that it would apply for discontinuance of the proceedings and (iv) during the four months which have lapsed since the Respondent filed that application. The Tribunal never received the "additional comments on the Tribunal's findings [in PO6] with a view to possible revision of the Tribunal's order for security for costs" which the Claimant had been granted leave to submit and which the Tribunal needed to be able to reassess its position on security.[89] The Claimant's argument that "the provision of the security for costs before the submission of the Application for Revision of Security for Costs would defeat the purpose of the Request"[90] disregarded the purpose of the security order in view of the upcoming hearing, which was about to further increase the Respondent's costs. The Claimant has never argued that it was impossible for him to post the security ordered nor proven[91] that posting it would

88 Letter from the Tribunal to the Parties, dated 20 April 2020.

89 Claimant's letter of 17 April 2020, p. 1, and letter from the Tribunal to the Parties, dated 20 April 2020.

90 Claimant's letter of 17 April 2020, p. 4.

91 Claimant's Reply on SfC ¶ 60 states, without any supporting evidence, that "making the continuation of consideration of the case conditional on the provision of security for costs at the current stage of the proceedings would be highly onerous for the Claimant, who has already expended considerable amounts on arbitration fees and legal representation in these proceedings. Requiring the Claimant to pay EUR 4 million in order to proceed to the hearing on the merits after his participation in the case over the last three years would effectively impede the Claimant's access to justice." In his Additional Comments on SfC, the Claimant argued that the Respondent did not show that the facts on which it relied for its request for security "impact on the Respondent's prospects of recovery of its costs" (¶ 2), and that they do not prove "the impecuniosity of the Claimant" (¶ 4), are irrelevant (¶¶ 5, 14, 22, 28, 40, 41, and 50), or "too remote from the issue of the Claimant's ability and willingness to pay the costs of the present arbitration" (¶ 55). In PO6, the

affect his ability to pursue his claims further. Therefore, the Tribunal has seen nothing that persuasively prevented him from posting the security and applying on or after 27 May 2020 (having stated on 17 April 2020 that he needed a month to prepare the Application) for a revision of PO6. If the Claimant considered that there were relevant facts or comments which would allow or oblige the Tribunal to revise the security order, he could have used the leave he had been granted on 20 April 2020 to file an Application for Revision, and the Tribunal could thereafter, if persuaded, have cancelled or modified the security order depending on the "additional comments," preferably with supporting documents, which the Claimant would have presented.

105. The Tribunal concludes that the Claimant's conduct can only be interpreted as a firm and final refusal – up to this date – to post security, notwithstanding his knowledge and acknowledgement that the consequence of this refusal might well be the discontinuance of the proceedings.

106. In PO7, the Tribunal also gave the opportunity to the Claimant, in case the Respondent were to renew its application to the Tribunal to order the discontinuance of the proceedings, "to comment on such application and/or to confirm or elaborate on the objections he formulated in his Reply [on SfC] of 14 February 2020 and in his Additional Comments [on SfC] of 20 March 2020."[92] On 11 December 2020, after the Respondent applied for discontinuance, the Claimant was invited to provide his comments by 23 December 2020. However, the Claimant's Reply to the Application for Discontinuance merely reserved his rights and referred to his "previous submissions and statements."[93] At none of these times did the Claimant argue that it was impossible for him to post security or that he still intended to apply for a revision of the security order. His response, limited to discontinuance and costs, confirms the Tribunal's finding that the Claimant clearly had decided not to post the security, notwithstanding his awareness of the consequences.

107. The Tribunal is thus confident that the Claimant's due process rights have been and are duly respected throughout the proceedings leading up to the present decision. The discontinuance is an outcome which the Claimant clearly has envisaged as a possibility.

Tribunal duly weighed all the evidence in its possession at the time and determined that there was a risk that the Claimant would not honor a possible adverse cost award.

92 PO7, ¶ 27(c).

93 Claimant's Reply to the Application for Discontinuance.

3. The Tribunal's Authority to Discontinue the Proceedings

108. Even if the Claimant does not deny that the Tribunal has the authority to discontinue the proceedings without prejudice, the Tribunal must ascertain that it has such authority in the event of a failure to post security and on what basis.

109. The Respondent's Request is based on Article 44 of the ICSID Convention, which provides (second sentence):[94]

> "*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*."

110. Under this provision, the Tribunal must first determine whether a question of procedure arises (**a.**), and then identify whether this question is not covered by the Convention or the Arbitration Rules or any rules agreed by the parties (**b.**).

a) Question of Procedure

111. PO6 and PO7, like all other orders in this arbitration, were unanimously adopted procedural decisions. PO6 ordered the posting of security for costs to preserve Respondent's contingent right to enforce a possible costs award in its favour if it prevailed on the merits. The Tribunal issued this order because it was convinced that the Respondent's possible right to recover costs was seriously at risk and the Claimant had failed to prove or even confirm that he was not only able but also willing to pay a possible cost award. The order also foreshadowed that, in case of non-compliance by the Claimant, the suspension of the case might be decided if requested by the Respondent. When neither a revision request was received nor security posted, PO7 suspended the proceedings (at the Respondent's request and following the Claimant's comments of 5 May 2020) and allowed the Respondent to apply for discontinuance if the non-compliance continued throughout the suspension period, "in order to avoid that the proceedings remain indefinitely suspended."[95]

112. Thus, this Award lies in the line of these two earlier decisions and serves the same purpose, *i.e.* to sanction the Claimant's failure to fulfil his obligation to comply with the Tribunal's order to post security. The line could have been interrupted at any time if the Claimant had either posted the security ordered or applied successfully for a revision of PO6 (as he had

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94 *See* above, ¶ 85.

95 PO7, ¶ 26.

announced he would do and was explicitly authorized by the Tribunal to do), but he did not.

113. The Tribunal concludes that, as was the case for PO6 and PO7, the decision to discontinue the proceedings without prejudice is a procedural decision. The fact that discontinuance is asked "without prejudice" distinguishes the present case from *RSM v. Saint Lucia.*[96]

b) Question Not Covered by the ICSID Convention, the Rules or Rules Agreed by the Parties

114. The Tribunal sees no other provision in the ICSID Convention or Arbitration Rules which applies to the procedural issue raised by the Respondent's Application for Discontinuance. This is not a discontinuance following a settlement between the Parties (Arbitration Rule 43), nor a discontinuance for failure of the Parties to act (Arbitration Rule 45). The Tribunal also finds that Arbitration Rule 44 (discontinuance at the request of a party) does not apply, because the Claimant, through his 23 December 2021 reference to his Reply on SfC and his Additional Comments on SfC, has objected to the discontinuance request.[97]

115. The Tribunal recalls that the ICSID Convention and Arbitration Rules make no provision for the consequences of non-compliance with an order to post security for costs and considers that Article 44 of the Convention is thus applicable. The Tribunal finds comfort in the findings of the *RSM* Annulment Committee which stated that:

> "*When the condition for lifting suspension will never be met, there is no alternative but to terminate the proceedings. If the right to suspend for failing to provide security for costs is a valid exercise of the power of a tribunal, as the Committee has found, so too discontinuance in the event of failure to provide security for costs must be a valid exercise of that tribunal's power*."[98]

and that:

> "*In the view of the Committee, while the decision to discontinue the proceedings for failure to provide security for costs is a procedural matter, and within the power of a tribunal under Article 44, second sentence, a*

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96 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**).

97 Claimant's Reply to the Application for Discontinuance.

98 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**), ¶ 190.

decision to dismiss the claims with prejudice takes on a different character."[99]

116. The Tribunal concludes that it has the authority to order discontinuance of these proceedings without prejudice.

4. The Tribunal's Decision on Discontinuance

117. As explained above, the decision to be taken is a logical consequence of the successive procedural steps of the Parties and the Tribunal since 17 January 2020. One other ICSID tribunal has previously come to the conclusion that a failure to comply with an unenforceable procedural order to post security cannot be sanctioned but by a suspension of the proceedings and, eventually, a discontinuance of the proceedings.[100]

118. This Tribunal agrees with the idea that, unless such sanction is recognized as admissible and, depending on the circumstances of the case, also justified, a party's request for security for costs and a tribunal's order that it be posted, would be pointless exercises.[101]

119. Having found that the Respondent's arguments supporting its request for security are well-founded and that the Claimant has failed (and even not tried) to present additional facts and arguments for the revision of the security order, the Tribunal, after having carefully reviewed the Parties' positions on the successive suspension and discontinuance requests, has to decide on the next step. The Tribunal is aware that the discontinuance, eventually requested by the Respondent "without prejudice," is the final step and, together with the decision on costs allocation, terminates the proceedings, without a decision on the merits of the claims which may thus be brought again. Should the Claimant again bring his claims to arbitration, there will be a risk of duplication of the major procedural steps, except the hearing. In order to avoid this risk, a solution could be not to sanction the Claimant's failure to post security and to consider whether and how these proceedings could be continued without such sanction. The general context and specific circumstances of this case, in particular the Parties' arguments summarized above and the Claimant's procedural conduct, lead the Tribunal to the conclusion that the need to sanction Claimant's non-

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99 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**), ¶ 196.

100 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**), ¶¶ 190-192.

101 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**), ¶¶ 190-192.

compliance with the Tribunal's security order in this case takes priority over the risk of the procedural inefficiency of a hypothetical second arbitration for the same claims.

120. The Tribunal further finds that it is not necessary, prior to ordering discontinuance, to ask the Claimant whether he maintains his refusal to post security or whether he wishes to apply for the revision of PO6. This would clearly be a futile exercise since the Claimant has reconfirmed in his email of 23 December 2020 his "lack of confidence in the present composition of the Arbitral Tribunal."[102] The discontinuance of the proceedings will achieve for the Claimant a result he had previously sought by his Application for Disqualification of the Tribunal.

121. For the above reasons, the Tribunal concludes that the circumstances justify discontinuance of these proceedings without prejudice and orders that they be so discontinued.

V. ALLOCATION OF COSTS

A. THE RESPONDENT'S POSITION

122. According to the Respondent, ICSID tribunals have consistently held that they have the power to award a party its costs in case of discontinuance of the proceedings.[103] In particular, the Respondent argues that it is "well established in ICSID practice that the Tribunal has the power under Article 61(2) of the ICSID Convention to order the Claimant to bear the costs of arbitration and the Respondent's legal and other costs when ordering the discontinuance of the present proceedings."[104]

123. The Respondent refers to previous ICSID cases in which tribunals accepted to allocate costs when discontinuing arbitral proceedings.[105] The Respondent argues that the *RSM v. Saint Lucia* tribunal approved this approach and found that it had the power to order that the claimant bear the costs of the arbitration together with the respondent's legal and other costs. The Respondent further contends that the *RSM v. Saint Lucia* Annulment Committee

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102 Claimant's Reply to the Application for Discontinuance.

103 Respondent's Application for Discontinuance, ¶ 12.

104 Respondent's Application for Discontinuance, ¶ 16.

105 Respondent's Application for Discontinuance, ¶¶ 13-14, referring to, *inter alia*, *Piero Foresti et al. v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010 (**Exh. RLA-136**); *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011 (**Exh. RLA-139**); and *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010 (**Exh. RLA-140**).

agreed that, in a case where the proceedings are dismissed as a result of a claimant's failure to post a security for costs, it was appropriate to order the claimant to bear the costs of the proceedings.[106]

124. The Respondent further submits that it is well established that, in circumstances where the claimant is responsible for the discontinuance of the proceedings, the claimant should bear the costs of the proceedings.[107] The Respondent further argues that the Tribunal should find the Claimant responsible for the discontinuance of the proceedings because he failed to comply with PO6 and further engaged in conduct that increased the cost of the proceedings.[108]

125. In addition, the Respondent explains that if no cost award were issued in its favour, the Claimant could bring the same claim before another Tribunal without any adverse consequence from his failure to comply with PO6.[109] Such a hypothetical new case would have financial consequences for the Respondent, including the irreversible loss of the costs incurred in the present proceedings, and the additional costs in defending itself in the new case.[110]

126. As a result, the Respondent argues that the Tribunal should order the Claimant to bear the costs of the arbitration, as well as the Respondent's arbitration costs, which the Respondent contends are reasonable.[111]

B. THE CLAIMANT'S POSITION

127. The Claimant asserts that, if the merits are not decided, the costs cannot be apportioned in the form of an award.[112]

128. He also argues that it would not be just and reasonable to place the entire burden of the costs of the arbitration as well as the costs incurred by the Parties onto the Claimant. He emphasizes that:

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106 Respondent's Application for Discontinuance, ¶ 15, referring to *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**), ¶¶ 25 and 199.

107 Respondent's Application for Discontinuance, ¶ 23.

108 Respondent's Application for Discontinuance, ¶¶ 24-25.

109 Respondent's Application for Discontinuance, ¶ 27.

110 Respondent's Application for Discontinuance, ¶ 28.

111 Respondent's Application for Discontinuance, ¶¶ 30-34.

112 Claimant's Reply to the Application for Discontinuance.

- he has acted in good faith at all times throughout the proceedings;
- he has never caused any unreasonable delays to the proceedings; and
- the single use of his right to challenge the Arbitral Tribunal cannot be regarded as a cause of delay, as it occurred during a time when the proceedings were suspended and when the hearing had to be rescheduled in any event due to COVID-19.[113]

129. The Claimant states that he has expended considerable amounts in this arbitration, including:

- USD 250,000 on ICSID fees; and
- USD 926,933.05, EUR 297,453.80 and GBP 300,991.95 on legal and experts' fees and expenses.[114]

130. The Claimant believes that in the present circumstances and in the absence of a decision on the merits, it would be fair for each party to bear its own costs.[115]

C. ANALYSIS OF THE TRIBUNAL

1. Authority to Award Costs

131. The Respondent has argued that the Tribunal is authorized to award costs in a case of discontinuance. It considers that this power follows from Article 61(2) of the ICSID Convention and has been confirmed in decisions of other ICSID tribunals which awarded costs after discontinuance.[116] The Claimant has not disputed the Tribunal's power but objects to such decision being made in an award because the merits of the case have not been decided.

132. The Tribunal acknowledges that the ICSID Convention and Arbitration Rules do not explicitly grant it authority to rule on costs following a discontinuance and that some tribunals have in the past hesitated to include a decision on costs in their discontinuance

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113 Claimant's Reply to the Application for Discontinuance.

114 Claimant's Reply to the Application for Discontinuance.

115 Claimant's Reply to the Application for Discontinuance.

116 Respondent's Application for Discontinuance, ¶¶ 12-14, with references to *Piero Foresti et al. v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010 (**Exh. RLA-136**) ¶¶116, 130-132; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Proceeding, 11 July 2011 (**Exh. RLA-137**), ¶¶23- 24; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 August 2013 (**Exh. RLA-138**), ¶¶ 58-62.

orders, since a decision on costs is normally included in an award and their orders discontinuing proceedings did not amount to an arbitral award.[117]

133. The Tribunal notes that the cost orders to which the Respondent referred were granted in discontinuance decisions based on ICSID AFR Rule 14(3)(d),[118] AFR Rule 14(3)(e)[119] or Arbitration Rule 44.[120] However, these cases give little guidance in this case where the discontinuance is based on Article 44 of the ICSID Convention and is contained in an award. Thus, the Tribunal shall ascertain its authority to order costs in the present matter.

134. As the Respondent has pointed out, there is "only [one] publicly available decision in which proceedings were terminated as a result of the claimant's failure to post security for costs, *RSM v. Saint Lucia* [, where] the tribunal decided that it had the power to order the claimant to bear [all] costs."[121]

135. Having reviewed these cases, the Tribunal notes that there is a recent trend among tribunals to make use of their general power to allocate costs when a case is discontinued, regardless of the legal basis in the ICSID Convention or Arbitration Rules used for the discontinuance. The Tribunal agrees with this upcoming trend, in particular in circumstances, as here, when both Parties have put the question of cost allocation before the Tribunal in a contradictory way, because when a case is discontinued (even without prejudice), the proceedings are closed and it may be unfair to leave the costs where they fall. It is a tribunal's duty to "deal with every question submitted to the tribunal."[122] This principle is embedded in Article 48 of the ICSID Convention and concerns awards. Article 61(2) of the ICSID Convention and Arbitration Rule 47(1)(j) provide that the award shall contain "any decision of the Tribunal regarding the cost of the proceeding." Although not immediately applicable, Article 61(2)

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117 *See e.g.*, *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010 (**Exh. RLA-140**), ¶ 64.

118 *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010 (**Exh RLA-140**).

119 *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011 (**Exh. RLA-139**); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 August 2013 (**Exh. RLA-138**).

120 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Proceeding, 11 July 2011 (**Exh. RLA-137**).

121 Respondent's Application for Discontinuance, ¶ 15.

122 ICSID Convention Article 48(3).

and Rule 47(1)(j) give guidance for interpretation of the term "question of procedure" in Article 44 of the ICSID Convention. No provision specifies in what form the question on the final allocation of costs as submitted to the Tribunal has to be decided. Given that the present decision is final and disposes of all questions before the Tribunal, it is appropriate to render an award in accordance with Article 48 of the ICSID Convention.

136. Bringing a claim (or defending against one) and not pursuing the action – for whatever reason, even because of an alleged lack of impartiality of the Tribunal (which is later rejected by the competent authority) – should not be gratuitous. If the parties agree on discontinuance (*e.g.* under Arbitration Rule 43 or 44), they are likely to agree on the costs consequences as well and there is indeed no need for a tribunal to issue a costs order. However, if there is no agreement on the discontinuance or on the costs, only the tribunal can decide whether and how costs must be allocated. When a party asks it to do so, it cannot avoid this task which is necessary for the proper and full termination of the case.

137. In this case, absent an agreement on costs between the Parties, it falls upon the Tribunal to assess the expenses and costs of the proceedings and apportion them between the Parties. It is largely recognized that, under Article 61(2) of the ICSID Convention and ICSID Arbitration Rules 28 and 47(1)(j), ICSID tribunals benefit from broad discretion to allocate costs in the manner that they consider fair and appropriate. The present Tribunal will exercise this discretion rationally and fairly. In that perspective, the expenses and costs involved may not, by default, be left where they lie, certainly not when the discontinuance is clearly due to the conduct of one party only. The Respondent's claim for a costs order must be addressed, and the Claimant in his answer of 23 December 2020 has also indicated that he expects the Tribunal to take a costs decision. The Claimant's maintained unwillingness (he never claimed that there was an impossibility) to post security as ordered has as an inevitable consequence: the Claimant's claims cannot be assessed and decided in this arbitration. The Claimant appears to accept that consequence.

138. The power to decide on costs is also based on Rule 28 according to which a tribunal may, unless otherwise agreed by the parties, decide at any stage of the proceedings and with respect to any part thereof, about the portion which each party shall pay of the tribunal's fees and expenses. If no decisions on costs have been previously made (as is the case here, *e.g.* on the costs of PO6 and PO7), the time when discontinuance is ordered is in fact the last possible moment where such decision can be made.

139. There is a further issue, however, because the Respondent has specifically requested that the Tribunal make its decision on costs in the form of an award.[123] The Respondent relies on the *RSM v. Saint Lucia* Annulment Decision and quotes the Annulment Committee, which in its view "agreed that, in a case where the proceedings are dismissed as a result of a claimant's failure to post a security for costs, it was appropriate to order the claimant to bear the costs of the proceedings."[124] In fact, the *RSM v. Saint Lucia* tribunal had issued an award, covering both discontinuance and cost allocation.

140. The Claimant, in response, has simply stated that "in the absence of a decision on the merits, the apportionment of costs in the form of an award is not justified."[125]

141. The Tribunal cannot follow the Claimant, who has not given any arguments for his views.

142. The Tribunal considers that the Respondent's reliance on the *RSM v. Saint Lucia* Annulment Decision is justified, even if the Committee partially annulled the tribunal's award. As stated above, the Committee found that the tribunal had manifestly exceeded its powers by dismissing the claims "with prejudice." However, the Committee did not annul the award because it allocated costs.[126]

2. Nature of the Decision

143. The next question is whether this Tribunal can issue an award which does not contain a decision on the claims submitted to it, but only a decision regarding discontinuance and the costs of the proceedings.

144. In fact, the combination of the Respondent's withdrawal of its initial request for a "with prejudice" discontinuance and of the Claimant's blocking of the proceedings, makes it impossible for the Tribunal to decide on the merits of the case (and even on the jurisdictional objections). The only claims which are left to be decided are the Respondent's request for discontinuance (which is addressed above) and its claim for costs. The Tribunal can decide on these matters in an award which is its final decision in this case.

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123 Respondent's Application for Discontinuance, ¶ 11.

124 Respondent's Application for Discontinuance, ¶ 15.

125 Claimant's Reply to the Application for Discontinuance.

126 *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10, Decision on Annulment, 29 April 2019 (**Exh. CL-214**), ¶ 200.

145. As the discontinuance, which the Respondent requests and which this Tribunal orders, is without prejudice, it is understood that the Claimant will have the possibility to start a new arbitration and bring his claims once more.[127] However, the Claimant cannot be allowed to do so without first having paid whatever costs this Tribunal may order him to pay. It would not be admissible that the Claimant, who has failed during 11 months to comply with an order of this Tribunal, brings these claims a second time before another tribunal and obliges the Respondent once more to engage in defence costs while its costs from the present proceedings have not yet been reimbursed. The Respondent cannot be blamed for the discontinuance of the proceedings (and the Claimant has not tried to do so). It would therefore be unfair not to allow the Respondent to recover its costs, which have been unnecessarily incurred, as the Claimant continues to fail to post security for costs and thereby prevents this arbitration from proceeding.

146. According to Article 61(2) of the ICSID Convention:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award*."[128]

147. The Claimant has not argued why this Article should not be applicable in the present instance and the Tribunal does not see any reason either. There cannot be any doubt that, following the discontinuance of the proceedings, this case must come to an end and that the costs issue can no longer be postponed. Rule 28, concerning interim decisions on costs, refers to "the final decision on the payment of the costs of the proceeding," thus confirming that at the end of a case, for whatever reason, a costs decision is to be adopted, unless the parties have agreed on the cost allocation. The Parties clearly did not agree in this case. Allocating costs in a mere order, as the Claimant asks, would mean that the Respondent would not be able to enforce the decision on costs, which would be unacceptable. The Tribunal sees it as its duty to give the Parties an enforceable ruling. Simultaneously, the issuance of an award will also enable the Claimant, should he so wish, to have the award and the preceding orders of the Tribunal reviewed by an *ad hoc* committee.

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127 Claimant is already taking this option into account when he indicates that he considers "submitting the same claim in another proceeding." *See* the Claimant's Reply on SfC, ¶ 68.

128 ICSID Convention, Article 61(2).

148. The Tribunal concludes that, further to ordering discontinuance of the proceedings, it not only has the authority to take a decision on the costs issue which the Parties have submitted to it, but also that the procedural fairness to both Parties justifies that this decision be issued in the form of an award.

3. Liability for Costs

149. Having determined that it has the authority to allocate the costs of the proceedings, the Tribunal notes the Parties' disagreement on how this allocation should be made: the Respondent considers that the Claimant should bear all costs of the arbitration, as well as the Respondent's arbitration costs, whereas the Claimant argues that each Party should bear its own costs.

150. Since this arbitration is discontinued without prejudice, the Tribunal cannot consider the costs allocation in terms of the extent to which either Party prevailed, but only in terms of the Parties' cooperation in the efficient conduct of the proceedings and their procedural behaviour. The Parties appear to agree with this finding as the Claimant has stressed in his defence that at all times he acted in good faith, whereas the Respondent relied on the Claimant's conduct in support for its costs claim.

151. The Respondent lists three reasons why the Claimant should bear all costs of the arbitration:

- the Claimant's failure to comply with PO6 which renders him responsible for the discontinuance of these proceedings;[129]
- the Claimant engaging in conduct that further increased the costs of these proceedings (including each of the letters starting with the Claimant's letter of 17 April 2020) and his sustained failure to post security, thereby showing his effective abandonment of the proceedings;[130] and

[129] Respondent's Application for Discontinuance, ¶ 23, with reference to *Silverton Finance Service, Inc. v. Dominican Republic*, UNCITRAL, Final Award, 15 March 2017 (**Exh. RLA-142**), ¶ 58.

[130] Respondent's Application for Discontinuance, ¶¶ 24-26, referring to *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-21, Order for the Termination of the Proceedings and Award on Costs, 2 August 2010 (**Exhibit RLA-141**), ¶ 75.

- fairness and equity, because, in the absence of an award of costs, "the Claimant could bring the same claims before another ICSID tribunal, without any adverse consequence from his failure to comply with PO6."[131]

152. As regards the first reason, the Tribunal agrees with the Respondent that the cause of the discontinuance is the Claimant's continued refusal to post security as ordered in PO6. Especially after his proposal to disqualify the Tribunal had been rejected by the Chairman of the ICSID Administrative Council, the Claimant could no longer use the circumstances that in his view "evidence the lack of impartiality and independence on the part of arbitrator(s)" as a justification for not complying with PO6. The Claimant himself had stated on 5 May 2020 that "[t]he issue of security for costs may only be reverted to after the consideration of the Claimant's application for disqualification of arbitrator(s) and the constitution of an independent and impartial Tribunal."[132] Thus, once the Chairman's decision was issued, the Claimant could no longer reasonably pretend that PO6 was not fully applicable. His failures to post the security and/or to apply for a revision of PO6, even after the Respondent's letter of 10 November 2020 announcing its intention to apply for discontinuance of the arbitration, can only be understood as a final and intentional refusal to comply with the Tribunal's orders and as a firm determination not to do whatever necessary for the further pursuit of his claims before this Tribunal.

153. Consequently, the Tribunal finds the Claimant responsible for the discontinuance of the proceedings. This responsibility is not reduced by the fact that the Tribunal agrees that the Claimant has indeed, as he argues, "never caused any unreasonable delays to the proceedings, […] liaised with the Respondent in order to amicably resolve procedural issues and not requested any extensions of time limits that were unreasonable or disproportionate to the time limits granted to the Respondent," and that he "provided all written submissions on jurisdiction and merits of the case in accordance with the procedural timetable" and was possibly "also fully prepared to take part in the oral hearing as originally scheduled."[133] Even if "the Claimant's single use of his right to challenge the

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131 Respondent's Application for Discontinuance, ¶ 27, referring to *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Order Taking Note of the Discontinuance of the Proceeding, 11 July 2011 (**Exh. RLA-137**), ¶ 35; *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010 (**Exh. RLA-140**), ¶ 71.

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

133 Claimant's Reply to the Application for Discontinuance. The Tribunal noted nonetheless a lack of cooperation by the Claimant when it had become clear that, due to the COVID-19 crisis, it would

Arbitral Tribunal cannot be regarded as a cause of delay, as it occurred during a time when the proceedings were suspended and when the hearing had to be rescheduled in any event due to COVID-19,"[134] it remains a fact that all of the Respondent's costs have become useless as a result of the discontinuance which is the inevitable result of the Claimant's continued refusal to post security.

154. ICSID tribunals have repeatedly held that in circumstances where the claimant is responsible for the discontinuance of the arbitration, it should bear the costs of the proceedings.[135] The Tribunal agrees with them that in such case, the respondent cannot be left with the costs of its defence.[136]

155. In relation to the second reason, the Tribunal notes the Claimant's argument that it would not be "just and reasonable" to place the entire burden of the costs on him because he "has acted in good faith at all times throughout these proceedings."[137]

156. The Tribunal does not share the Respondent's implicit criticism of the Claimant's conduct (that it increased the costs of this arbitration). It does not consider the Claimant's letter of 17 April 2020 to be evidence of procedural misconduct.[138] The Claimant thereafter duly replied, on 20 April and 4 May 2020, to the Tribunal's inquiry of 13 April 2020 about the hearing arrangements, duly filed his Rejoinder on 27 April 2020 as required by the

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not be possible to hold the Hearing on Jurisdiction and Merits as scheduled on 1-14 June 2020. The Claimant insisted on an "oral hearing" and objected even to a virtual hearing dealing with jurisdiction only. He even reacted strongly to the Tribunal's question of whether, in the Parties' views, there were discrete issues which might be resolved on a documents-only basis while awaiting the possibility of an *in personam* hearing. The discussion about alternative dates and venues for a live hearing became moot as a result of the suspension of the proceedings when the security was not posted.

134 Claimant's Reply to the Application for Discontinuance.

135 *See e.g.*, *Piero Foresti et al. v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010 (**Exh. RLA-136**), ¶ 132; *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010 (**Exh. RLA-140**), ¶ 71; *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011 (**Exh. RLA-139**), ¶¶ 65-66.

136 *Piero Foresti et al. v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010 (**Exh. RLA-136**), ¶ 132; *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010 (**Exh. RLA-140**), ¶ 71; *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011 (**Exh. RLA-139**), ¶¶ 65-66.

137 Claimant's Reply to the Application for Discontinuance.

138 *See* Letter from the Claimant to the Tribunal, dated 17 April 2020.

procedural calendar and commented on 5 May 2020 on the suspension in reply to the Tribunal's invitation of 1 May 2020. The Claimant also duly reacted, on 23 December 2020, to the Tribunal's invitation to reply to the Respondent's Application for Discontinuance. The fact that the Claimant paid little heed to the Tribunal's detailed reply of 20 April 2020 to the Claimant's letter of 17 April 2020 (explaining that the deadline for the posting of security could not be postponed, but confirming that a revision of PO6 was possible if and when the Claimant brought forward new evidence), his failure to post the security on 29 April 2020 without any explanation or justification and his application, albeit with an inexplicable delay,[139] for disqualification of the Tribunal, can all still be explained by the Claimant's conviction, no matter how unjustified, that the Tribunal was not impartial. Those actions therefore are not evidence of abuse of process. A possible suspicion that the Claimant, through his conduct after 17 April 2020, mainly aimed at the obstruction and eventual discontinuance of the proceedings was certainly not justified before the 14 October 2020 rejection of the Disqualification Proposal. Even if the Tribunal grants the Claimant the benefit of the doubt for his conduct between 4/5 May and 14 October 2020, the Claimant's behaviour after the latter date shows that, at least since that date, his main goal was to have the proceedings before this Tribunal discontinued, knowing that his further failure to post security would likely lead to such discontinuance.

157. However, this Tribunal need not determine whether the Claimant has acted in good faith from the beginning of May 2020 and again after 14 October 2020, because the Respondent itself has not reproached the Claimant for bad faith and has acknowledged that procedural misconduct or abuse of process is not necessarily required for an award of costs.[140] Moreover, whether the costs of the proceedings have been increased by the Claimant's conduct since 17 April 2020 appears irrelevant as the Respondent is claiming all its costs, without distinguishing between the normal costs of the proceedings and the "increased" costs.

158. The third reason invoked by the Respondent, fairness and justice, is a sound one in the Tribunal's view, although it seems to overlap with the first reason above. The Tribunal has already agreed that, as a result of the discontinuance in the circumstances of this case, the Respondent's costs have to be borne by the Claimant. This is a matter of procedural fairness

139 The Chair of the ICSID Administrative Council found the Disqualification Request belated as well as in any event unfounded on the merits.

140 Respondent's Application for Discontinuance, ¶ 22, referring to *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011 (**Exh. RLA-139**), ¶ 65.

and irrespective of whether the Claimant will bring his claims again in another arbitration. If the Claimant does not resubmit them, this means that he abandons his claims and it is only fair that he then bears the costs of this arbitration. If the Claimant were to bring his claims again, as he already indicated, the Respondent would have to defend itself once more and whether it would have to incur new material costs may depend in part on whether the Claimant pursued his claims with the same arguments as in this arbitration or whether he adapted his claims to the defence arguments already known. It would be up to the tribunal in the second case to determine to what extent the costs claimed in this second case would be justified in view of the costs already required to be recovered in this arbitration.

159. Given the uncertainty about the Claimant's further intentions, it is just and fair for the Tribunal to grant Respondent's costs.

a) <u>Assessment of the Costs</u>

160. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Mrs. Vera van Houtte	136,610.87
Mr. Mark A. Kantor	56,546.21
Prof. Rolf Knieper	63,039.43
ICSID's administrative fees	200,000.00
Direct expenses (estimated)	6,270.47
Total	**<u>462,466.98</u>**

161. The above costs have been paid out of the advances made by the Parties in equal parts.[141] As a result, each Party's share of the costs of arbitration amounts to USD 250,000.

162. Following its decision to award costs, the Tribunal must ascertain that the costs claimed by the Respondent are reasonable. The Respondent has provided details of its costs as Annex I to its Application for Discontinuance and declared that it is prepared to produce supporting evidence for its cost items if required by the Tribunal.

[141] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

163. The total costs which the Respondent claims – besides the USD 250,000 for the ICSID and Tribunal fees and expenses – amount to EUR 3,223,212.40. Of this amount, the large majority relates to Respondent's counsel fees and expenses: EUR 3,185,979.37. These were incurred as follows:

- Between 1 April 2017 and 30 April 2020, *i.e.* the "regular" phase, from the beginning of the arbitration until after the filing of the Respondent's Rejoinder on the Merits and Reply on Jurisdiction and including Respondent's SfC Application, the Claimant's SfC Reply and the Tribunal's PO6 (see Procedural History above):

  EUR 3,042,299.42

- Between 1 May and 30 November 2020, *i.e.* the "post-PO6" phase, in which the Respondent asserts that the Claimant increased the costs by his conduct:

  EUR 172,803.00

164. However, as the Tribunal has decided to grant all costs to the Respondent, without distinguishing between the costs incurred before or after 1 May 2020, all it needs to do is to assess whether the costs claimed for the Respondent's representation are reasonable. The Claimant has not commented on the detailed cost breakdown of the Respondent. He has not argued that they are unreasonable.

165. The Tribunal has only few elements to assess the reasonableness of the costs claimed by the Respondent.

166. First, it notes that, on 17 January 2020, the Respondent requested security for costs in an amount of EUR 4 million in light of, *inter alia*, "the amount of fees already incurred and to be incurred by the Respondent in these proceedings," without mentioning the amount of costs incurred until that date. The Tribunal lowered the amount of the security to EUR 3 million because the Respondent had also based its request on "the magnitude of costs claimed by respondents in recent investment treaty arbitration proceedings involving similar amounts at issue," which in the Tribunal's view was a criterion which had not correctly been applied by the Respondent.[142]

167. The Respondent's table, at pp. 2-9 of Annex I to its Application for Discontinuance, shows that, as of 31 January 2020, Respondent had incurred costs for its counsel in an amount of EUR 2,428,026.28, and EUR 36,272.55 for the Respondent's internal costs, together EUR

142 Respondent's SfC Application, ¶ 79(c); PO6, ¶ 65.

2,464,298.83. This appears a reasonable amount, given the status of the proceedings in January 2020, when compared to the amount of EUR 3 million, which the Tribunal determined at that time as a reasonable amount for the security for costs. Also, the presently claimed amount of EUR 3,185,979.37 is reasonable, even if it represents a further increase of costs by roughly EUR 800,000 (although no hearing took place), because, after 17 January 2020, the Respondent had still to file its Rejoinder on the Merits and Reply on Jurisdiction and, thereafter, to follow-up on the consequences of the Claimant's objections to the SfC Application, which were unforeseen interventions.

168. The Claimant, who has not objected to the quantum of the Respondent's costs, stated that he spent "considerable amounts in this arbitration," namely, besides the USD 250,000 of ICSID fees: USD 926,933.05, EUR 297,453.80 and GBP 300,991.95 for legal and experts' fees and expenses,[143] *i.e.* approximately EUR 1,410,600.00. While the Claimant does not request reimbursement of his costs, the Tribunal understands these figures are intended for a comparison of the Parties' costs in the assessment of the reasonableness of Respondent's costs, showing that the Respondent spent more than double what the Claimant spent. The Tribunal finds that in the absence of even a breakdown of the Claimant's costs, it cannot give material weight to this comparison. Moreover, the hourly rates of each Party's counsel may be quite different and there were several changes in the Claimant's representation, as well as a dispute about the fees of his first counsel.[144]

169. The Claimant also argues that each Party should bear its own costs because there is no decision on the merits. This argument is not appropriate, however, since the absence of a decision on the merits is entirely due to the failure of the Claimant to post security.

170. As stated above, the absence of a decision on merits makes it unusual for the Tribunal to issue a costs award, but is not sufficient to take away its power to do so, as this case is now to be closed and costs would otherwise be unfairly borne by a party which had to defend itself in a case which the Claimant has blocked by his refusal to post security.

171. In any event, having carefully reviewed the Respondent's summary and breakdowns in Annex I of its Application for Discontinuance, the Tribunal did not find these costs unusual, unjustified or exaggerated.

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143 Claimant's Reply to the Application for Discontinuance.

144 *See* Procedural Order No. 5 ordering the Claimant to do whatever necessary for the transmission of documents by his former counsel to his newly appointed counsel.

172. The Tribunal concludes that the Respondent is entitled to reimbursement of the costs paid to ICSID in an amount of USD 250,000 and of Respondent's own costs in an amount of EUR 3,223,212.40.

173. The Respondent has further requested that the amount awarded to it bear "interest at a rate of 6% per year, which is reasonable and in accordance with Latvian law, and be compounded annually."[145]

174. Although this request has not been contested by the Claimant, the Tribunal finds that the claim for interest must be denied. First, the sole authority on which the Respondent relies in this connection, is another, recent, investment arbitration award in which Latvia was awarded costs with an interest of 6 % per year. Interest was not compounded in that decision, however. Second, the Respondent itself has argued forcefully against the Claimant's claim for compounded interest in the present arbitration, referring *i.a*. to the Iran-US Claims Tribunal which allegedly has consistently denied claims for compound interest and to the application by many investment tribunals which have similarly applied simple interest.[146] For these reasons, the Tribunal considers that only simple interest can be awarded.

175. As regards the applicable rate, the Tribunal notes that the Respondent has argued in favour of the application of a euro risk-free rate (such as Euribor) to any sum to which Claimant might have been entitled "given that during the period for which the investor was deprived of its assets, it would not bear any business risk in relation to those assets."[147] As the Euribor 12 months has been negative from March 2016 (the arbitration request having been filed in December 2016) up till this date, the Tribunal concludes that the Respondent's costs are to be paid interest-free in the particular circumstances of this case and the Respondent's position. Indeed, the ICSID cases to which Respondent has referred for having granted 1% or 2% interest are all pre-dating May 2016 and the Respondent's own rejection of the 4% claimed by the Claimant[148] confirms the unreasonableness of the 6% it now claims from the Claimant. The Tribunal sees no justification for the award of any interest in this case.

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145 Respondent's Application for Discontinuance, ¶ 34.

146 Respondent's Counter-Memorial, ¶ 568; Respondent's Rejoinder, ¶¶ 615-616.

147 Respondent's Counter-Memorial, ¶ 567; Respondent's Rejoinder, ¶¶ 610-614.

148 Respondent's Rejoinder, ¶ 613.

VI. DECISION

176. For the reasons set forth above, the Tribunal:

(a) Orders that these proceedings are hereby discontinued without prejudice;

(b) Decides that the Claimant shall pay the sums of (i) USD 250,000 less any amounts reimbursed by the ICSID Secretariat, and (ii) EUR 3,223,212.40 to the Respondent in respect of expenses incurred in connection with this arbitration; and

(c) Declines to award interest on such sums.

Mark A. Kantor
Arbitrator

Date: March 17, 2021

Rolf Knieper
Arbitrator

Date:

Vera van Houtte
President of the Tribunal

Date:

Mark A. Kantor
Arbitrator

Date:

Rolf Knieper
Arbitrator

Date: 17 March 2021

Vera van Houtte
President of the Tribunal

Date:

Mark A. Kantor
Arbitrator

Date:

Rolf Knieper
Arbitrator

Date:

Vera van Houtte
President of the Tribunal

Date: 17.3.2021