

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ayat Nizar Raja Sumrain and others

v.

State of Kuwait

(ICSID Case No. ARB/19/20)

**DECISION ON RESPONDENT'S REQUEST FOR SUSPENSION OF PROCEEDINGS
AND ON THE PROCEDURE WITH REGARD TO CLAIMANTS' REQUEST FOR
PROVISIONAL MEASURES**

Members of the Tribunal

Prof. Zachary Douglas QC, President
Mr. Fernando Piérola Castro, Arbitrator
Mr. Samuel Wordsworth QC, Arbitrator

Secretary of the Tribunal

Ms. Leah Waithira Njoroge

23 April 2020

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I. INTRODUCTION

1. The Tribunal recalls its previous summary of the parties' positions on the suspension of these proceedings in its letter of 9 April 2020. In summary, the parties were agreed that these proceedings should be suspended due to the difficulties arising from the COVID-19 pandemic, but disagreed as to the terms of that suspension.
2. In order to resolve this disagreement, the Tribunal, *inter alia*, invited the Claimants to confirm, by 13 April 2020, whether or not they intended to pursue their request for provisional measures before any suspension would take effect and, if so, to explain the urgency of the measures requested. Separately, the Tribunal invited the parties to confirm, by 10 April 2020, whether or not they agreed to extend the deadline for holding the first session for 60 days.
3. In their correspondence dated 10 April 2020, the Claimants retracted their position that a suspension of these proceedings was necessary as a result of the COVID-19 pandemic. They also refused to extend the deadline for the first session. The Respondent, in its correspondence of 10 April 2020, confirmed its agreement to extend the deadline for the first session.
4. As there was no agreement between the parties on the extension of the deadline in ICSID Rule 13(1) for holding the first session, the Tribunal duly held the first session without the parties on the final day of the period specified in Rule 13(1); viz., on 13 April 2020. (The Tribunal records that the Respondent sent a further letter on 13 April 2020 calling for the Tribunal to extend the deadline for the first session in view of the lack of agreement of the parties to do the same. Without deciding whether or not the Tribunal has such discretion, the Tribunal notes that the Tribunal received the Respondent's letter after it had already held the first session by telephone conference without the parties as it had foreseen in its letter of 9 April 2020. In any case, the Tribunal will convene a further session with the parties to discuss, *inter alia*, drafts of the first procedural order and the schedule for this arbitration at an appropriate juncture in due course.)

5. On 13 April 2020, the Claimants filed a document entitled “Request for Provisional Measures”. The Tribunal does not understand this to be the Claimants’ definitive request as it is not supported by evidence (the Tribunal indicated that this was a requirement in its letter of 9 April 2020). The Tribunal, moreover, specifically stated in its letter of 9 April 2020 that: “*For the avoidance of doubt, the Claimants would not be expected to file their detailed request for provisional measures on 13 April but simply explain the urgency of the request so that the Tribunal can make an informed decision about whether or not to suspend the proceedings with immediate effect.*” The Claimants did, in any case, comply with the Tribunal’s instruction to provide an explanation of the urgency of the request for provisional measures, which is set out at paragraphs 22 to 32 of their document.

6. On 16 April 2020, the Respondent, as requested by the Tribunal in its letter of 9 April 2020, filed its observations on the Claimants’ submission on the urgency of its request for provisional measures as well as its submission in support of the immediate suspension of the proceedings.

II. DISCUSSION

7. The Tribunal now has to rule on a narrow issue, which is whether these proceedings should be suspended immediately, as requested by the Respondent, due to the current difficulties it faces in participating in this arbitration as a result of the COVID-19 pandemic, and thus before a procedure is fixed by the Tribunal to deal with any request for provisional measures made by the Claimants. The Tribunal reiterates that the Claimants had previously requested the suspension of these proceedings but on the condition that the Tribunal ruled upon their request for provisional measures first. That position was withdrawn in the Claimants’ letter of 13 April 2020.

8. The Tribunal has the discretion, under Article 44 of the ICSID Convention, to decide on “any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties.” In the Tribunal’s view, this general power includes the

discretion to suspend these arbitral proceedings upon the showing of good cause. In deciding whether or not to exercise this discretion in the present circumstances, the Tribunal will weigh the prejudice that may be suffered by the Claimants in not having its request for provisional measures adjudicated upon immediately against the prejudice that may be suffered by the Respondent in having to defend itself under the constraints imposed by the COVID-19 pandemic. This balancing exercise essentially focuses on two issues that the Tribunal anticipated in its letter of 9 April 2020: the urgency of the Claimants' request for provisional measures against the severity of the constraints upon the Respondent resulting from governmental policies to deal with the COVID-19 pandemic.

9. The Tribunal will examine the urgency of the Claimants' request for provisional measures first. The Claimants' request of 13 April 2020 (hereinafter referred to as the "Request") is fashioned as seeking "*to stay of executing the eviction order No 4 of year 2019 issued by the Kuwaiti Authorities till the final settlement of this dispute before the arbitral tribunal*" (at p. 2). The Tribunal is inhibited to some extent in the review of the Claimants' Request because the various documents and regulations that are referred to therein are not referenced as exhibits on the record and are not otherwise appended to the Request. Nonetheless, it is clear that the said eviction order is "Administrative eviction decision No. (4) of 2019" which was previously appended to the Claimants' Request for Arbitration as Exhibit C-19 ("Eviction Order"). Although the English version of that document does not appear to be dated, both the Claimants in the Request for Arbitration (at p. 8) and the Respondent in its letter of 16 April 2020 have confirmed that the Eviction Order was made on 1 April 2019.

10. In their Request for Arbitration (at p. 22), the Claimants included a request for an "interim measure" to prevent the Respondent from calling on a performance bond that the Claimants say they provided to the Respondent. The Eviction Order was referred to in this context but only as a reason that the Respondent may be likely to call upon the performance bond.

11. The first time that the Claimants raised the issue of seeking a provisional measure to prevent the execution of the Eviction Order was by their email of 26 March 2020. It follows that, when the Claimants' request was first made, almost a year had elapsed since the issuance of the Eviction Order. In their Request, the Claimants do not indicate any basis for concluding that the execution of the Eviction Order is now imminent or refer to any change of circumstance that would provide a basis for such conclusion. For its part, the Respondent states in its letter of 16 April 2020 that, “[n]o action can be undertaken on the Heritage Village site [in respect of which the Eviction Order was made] during the COVID-19 pandemic” due to the lockdown imposed on all non-critical government departments and work. The Respondent references various websites with details of the Government of Kuwait’s measures in relation to COVID-19.

12. On the basis of this record, the Tribunal must assess the likelihood that the Eviction Order will be executed by the Government of Kuwait imminently or during the period in which the Respondent requests these proceedings to be suspended. The Tribunal considers that it is unlikely that the Eviction Order, which was made more than a year ago on 1 April 2019, will be executed by the Government of Kuwait in the foreseeable future and especially while non-critical government work has been suspended as a result of COVID-19. For the avoidance of doubt, the Tribunal’s assessment of the urgency of the Claimants’ request at this stage is limited to its determination of the question as to whether the proceedings should be suspended before or after consideration of the Claimants’ request and is without prejudice to the Tribunal’s ultimate consideration of the Claimants’ definitive request for provisional measures if and when it is filed.

13. Turning to the prejudice that the Respondent may suffer given the constraints presented by the lockdown measures in Kuwait, the Respondent states in its letter of 16 April 2020 that: “[O]n 11 March 2020, the Council of Ministers issued a decision to suspend all ministries, government entities, public authorities and institutions as a precautionary measure due to the COVID-19 pandemic. Certain key sectors are exempted. None are relevant to the present

dispute.”. The Respondent then addresses the impact of these measures on the Department of Legal Advice and Legislation, which is responsible for the administration of this case for the Respondent: “[E]mployees of the Department of Legal Advice and Legislation are not allowed to enter into office premises, unless they are one of only eight individuals listed on the emergency team for the sole purpose of reviewing urgent procurement contracts for other ministries which require urgent supplies and services to address the pandemic. During this time, it is also impossible for state employees to liaise with other departments to obtain any information, much of which is still held in physical form. For auditing and accountability purposes, no entity representative is able to respond to a query unless these are addressed in an official form. Responding by email is extremely difficult.”

14. The Council of Ministers’ decision of 11 March 2020 and the Civil Service Commission’s Circular No. 7 (2020) implementing that decision are not appended to the Respondent’s letter, but the Respondent had undertaken to provide these documents together with certified translations upon the Tribunal’s request (see footnote 3).
15. The Claimants, for their part, contest the Respondent’s previous representations about the extent of the government lockdown in Kuwait (see paragraph 11 of their Request).
16. Given that this matter is contested, the Tribunal considered that it was appropriate to require the Respondent to provide the official documents detailing the nature and scope of the government lockdown before the Tribunal issued its decision. The Respondent duly complied with that request on 20 April 2020 and the Tribunal was able to confirm that its description of the nature and scope of the lockdown was accurate. In particular, Circular No. 7 (2020) reads:

The Civil Service Commission would like to inform all government agencies that the Council of Ministers has decided, in its meeting held on Wednesday 11/03/2020, to suspend the work of all government ministries and agencies, and public bodies and institutions as a precautionary measure due to the outbreak of the recent coronavirus for a period of fifteen days – as official public holidays - as from Thursday 12/03/2020 until Thursday 26/03/2020,

*provided that official working hours shall resume on Sunday
29/03/2020.*

17. The government lockdown was extended by the Decision of the Council of Ministers dated 21 March 2020 until 12 April 2020, and then again by the Decision of the Council of Ministers dated 6 April 2020 until 26 April 2020. The Claimants, for their part, sent further documents relating to the lockdown on 20 April 2020. The Tribunal does not consider that these documents contradict the essential position recorded in the official documents referred to above which is that all government work is currently suspended unless it is directed towards maintaining a vital service or coordinating efforts to combat the COVID-19 virus.
18. The Tribunal concludes that the governmental measures referred to above are likely to impose serious constraints on the ability of the Respondent to defend its position in relation to the Claimants' request for provisional measures while the current lockdown measures remain in place for the Government of Kuwait. Given that the lockdown has already been extended twice, it seems likely that it will be extended again before it is due to elapse on 26 April 2020.
19. It follows from the Tribunal's consideration of the lack of urgency of the Claimants' request for provisional measures and the constraints that the Respondent is facing due to the lockdown measures in place for the Government of Kuwait that the Respondent's position should be accommodated in the procedure going forward. The Tribunal is not persuaded, however, that a full suspension of the proceedings is the appropriate way to deal with this situation.
20. First, if the Respondent were to give an undertaking that the Eviction Order will not be enforced without reasonable prior notice being given to the Claimants and the Tribunal, then the Tribunal may be prepared to stay any consideration of the Claimants' request for provisional measures.
21. Second, if the Respondent is not prepared or able to give such an undertaking, then the Claimants, who maintain they are not inhibited in participating in this arbitration on account

of the COVID-19 pandemic, can prepare and file their definitive request for provisional measures with supporting evidence and legal authorities. The Respondent, by that time, may be in a position to respond in full (if the lockdown has been eased to a relevant extent) or in part (in relation to matters for instance that do not require factual investigations). The Tribunal can assess the position with the parties once it is in receipt of the Claimants' definitive request.

22. Third, the Respondent indicated in letter of 13 April 2020 that it was prepared to hold the first meeting on 20 May 2020. The Respondent thus appears to share the view that at least some aspects of this arbitration can be progressed notwithstanding the governmental lockdown.

III. DECISION

23. The Tribunal thus makes the following directions pursuant to its discretion in Article 44 of the ICSID Convention:

- a. The Respondent shall indicate on or before 1 May 2020 whether it can give an undertaking of the nature referred to in paragraph 20 and on what terms;
- b. If an undertaking is given by the Respondent: then the Claimants shall indicate within 24 hours after receipt of the Respondent's communication as to whether or not they are prepared to consent to a stay of any request for provisional measures in light of that undertaking (if they do not consent then the Tribunal will decide whether or not the procedure for dealing with the Claimants' request for provisional measures will be stayed);
- c. If an undertaking is not given by the Respondent or the Claimants have rejected it and the Tribunal has resolved that there will be no stay on the basis of the undertaking as provided: then the Claimants shall file their definitive request for

provisional measures with supporting evidence and legal authorities on or before 8 May 2020 should they wish to do so;

- d. Following receipt of the Claimants' definitive request for provisional measures, the Respondent shall, within 2 days of receipt, indicate whether it is still constrained in responding to any aspect of that request and the reasons for the same (the Tribunal will then set a timetable for dealing with the Claimants' request taking any such constraints into account);
- e. The Respondent is at liberty to file its submission on whether the Tribunal has discretion to extend the deadline for an application under Rule 41(5) notwithstanding that the Claimants do not consent to any extension of the same (as confirmed by their letter of 20 April 2020) and, if, so, whether that discretion should be exercised in the circumstances. Following receipt of that submission, the Tribunal will establish a timetable for the Claimants to respond;
- f. The parties shall indicate their first availability for a telephone conference to discuss the draft Procedural Order No. 1 (which will be circulated once the date of the conference has been confirmed) on or before 1 May 2020 (for the avoidance of doubt, the Tribunal considers that such telephone conference should take place as soon as possible and need not await the resolution of any of the foregoing matters).

On behalf of the Tribunal,

[signed]

Prof. Zachary Douglas QC
President of the Tribunal
Date: 23 April 2020