**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Eugene Kazmin**

**v.**

**Republic of Latvia**

**(ICSID Case No. ARB/17/5)**

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# PROCEDURAL ORDER NO. 6
## Decision on the Respondent's Application for Security for Costs

***Members of the Tribunal***
Mrs. Vera van Houtte, President of the Tribunal
Mr. Mark A. Kantor, Arbitrator
Professor Dr. Rolf Knieper, Arbitrator

***Secretary of the Tribunal***
Dr. Jonathan Chevry

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13 April 2020

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## I. PROCEDURAL BACKGROUND

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

2. By email of 21 January 2020, the Tribunal invited the Claimant to file a response to the Application by 3 February 2020.

3. By email of 24 January 2020, the Claimant requested an extension until 28 February 2020 to file his response. By email of the same date, the Tribunal invited the Respondent to react to the Claimant's request for an extension by 28 January 2020.

4. 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.

5. By email of 30 January 2020, the Claimant requested an update on the Tribunal's decision on his request for an extension.

6. By email of 30 January 2020, the Tribunal granted the Claimant until 14 February 2020 to file his response to the Application, including any necessary translations.

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

8. By email of 17 February 2020, the Respondent sought leave to respond to the Reply. By email of 18 February 2020, the Tribunal granted the Respondent until 5 March 2020 to file its response.

9. On 5 March 2020, the Respondent filed its Comments on the Claimant's Reply to the Respondent's Application for Security for Costs (the "**Respondent's Comments**").

10. By email of 6 March 2020, the Claimant sought permission from the Tribunal to respond to the Respondent's Comments. By email of 9 March 2020, the Tribunal invited the Claimant to provide his response by no later than 20 March 2020.

11. On 20 March 2020, the Claimant filed his Additional Comments on the Respondent's Application for Security for Costs (the "**Claimant's Comments**") with accompanying documentation.

## II. THE RESPONDENT'S APPLICATION

12. In the Application, the Respondent requested the Tribunal:

> a) *to order the Claimant to provide, within 15 days, security for the Respondent's costs of these proceedings in the amount of EUR 4 million, or any amount deemed reasonable by the Tribunal:*
>
> > (i) *in the form and terms indicated in Annex 1 of this Application;*
> >
> > (ii) *alternatively, in the form and terms indicated in Annex 2 of the Application; or*
> >
> > (iii) *alternatively, in any other form and terms the Tribunal deems appropriate;*
>
> b) *to declare that the present proceedings will be immediately terminated with prejudice, in case of non-compliance by the Claimant; and*
>
> c) *to order the Claimant to pay the Respondent's costs of this Application.*

13. Annexes 1 and 2 are a Model Bank Guarantee and a Model Escrow Agreement, respectively.

14. In the Respondent's Comments, the Respondent amended the second and third legs of its Request for Relief as follows:

> b) *in case of non-compliance by the Claimant, to order the suspension of the proceedings for a period of time to be determined by the Tribunal;*
>
> c) *should the Claimant fail to comply, to order the discontinuance of the proceedings prejudice; and*
>
> d) *to order the Claimant to bear the costs of this Application.*

15. The Claimant requested in the Reply and in the Claimant's Comments the dismissal of the Application and an order that the related costs be borne by the Respondent.

## III. THE PARTIES' ARGUMENTS

16. The Parties disagree as to whether the requirements for an order for security for costs are fulfilled.

17. The Respondent argues that three requirements must be fulfilled: (i) necessity; (ii) urgency; and (iii) the existence of "*exceptional circumstances*". The Claimant is of the view that there is a fourth requirement, (iv) proportionality, requiring the Tribunal to weigh the respective interests of both Parties including the Claimant's access to justice.

### 1. Necessity

18. The Respondent considers that the requested security is necessary to protect its right to the reimbursement of costs in this proceeding. In assessing this necessity, the Tribunal, in the Respondent's view, does not have to determine whether a cost award is "*likely*", but only

whether the Respondent has a "*plausible case*" and that a "*future claim for cost reimbursement is not evidently excluded*".[1] The Respondent denies that other tribunals have referred to third-party funding as a prerequisite for a successful security for costs application. It argues that the common underlying principle of these decisions was the inability to recover costs and considers that necessity exists as it is proven that the Claimant is unable and in any event unwilling to comply with a cost award.[2]

19. The Claimant considers the Respondent's allegations are false or speculative and denies having financial difficulties.[3] The "*exceptional circumstances*" relied on by the Respondent are insufficient to warrant security for costs.[4]

### 2. Urgency

20. The Respondent insists that the security must be ordered before the final award is issued and before it incurs further defense costs, which will be important in the next six months.[5] It emphasizes that the admission of the Claimant in his Reply on the Merits and Counter-Memorial on Jurisdiction of 19 September 2019 – and the related evidence – that he had stripped KVV LM of its cash and cash receivables during the first half of 2016, are new developments.[6]

21. The Claimant denies that there is any urgency and points out that the majority of the information on which the Respondent relies was known by or available to the Respondent for a considerable amount of time[7] and that, even if it relies on information contained in the Reply on the Merits, it waited four months to submit the Application.[8] The Respondent's argument that the order must be made before the award and the Tribunal becoming *functus officio,* on the other hand, renders the urgency requirement meaningless.[9]

### 3. Exceptional Circumstances

22. According to the Respondent, exceptional circumstances exist when the other party is "*demonstrably unable or unwilling to comply with a future adverse costs award*"[10] which it considers to be established in this case by:

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[1] Application, ¶¶ 30-31.
[2] Respondent's Comments, ¶¶ 31-32.
[3] Reply, ¶ 45.
[4] Claimant's Comments, ¶ 52.
[5] Application, ¶ 32.
[6] Respondent's Comments, ¶¶ 34 and 17-23.
[7] Reply, ¶¶ 46-47 and 61.
[8] Claimant's Comments, ¶ 55.
[9] Claimant's Comments, ¶ 54.
[10] Application, ¶ 25.

*a.* *The Claimant's failure to pay its former legal counsel in this arbitration*

There is no evidence that the Claimant paid its total debt of ████████ ████[11] Even if there is a dispute about part of this debt, the remainder, ███ ████ is undisputed and as yet unpaid.[12]

*b.* *The Ukrainian criminal investigations against the Claimant*

As a result of criminal investigations of KVV Group in Ukraine, Ukrainian authorities have seized most of the Claimant's assets in Ukraine on the suspicion that he has used his companies as vehicles in a large-scale tax evasion and money laundering system.[13] Moreover, the Claimant has stated that KVV Group has been largely inactive since 2017 and that he is preparing to liquidate it.[14] The Claimant's companies outside Ukraine and Crimea (████████████████ ████████████████████████████) are either not sufficiently capitalized or loss-making or even on the brink of insolvency.[15] There are indications that the Claimant deliberately structured his assets in such a way that they are not traceable back to him.[16]

The Respondent asserts that even if the criminal proceeding No. 42017000000004228 of 17 November 2017 was closed on 5 July 2019, not all the seizures have been lifted and that, on the contrary, in two instances judges have rejected the applications to lift them. It also argues that, even if the Claimant was not a party in this proceeding, he was at least involved.[17]

The Respondent furthermore considers that the Claimant may be involved in yet another criminal proceeding, No. 12018100100008004, which commenced on 24 July 2018, involving KVV-Group LLC.[18]

*c.* *The Claimant's engagement in serious misconduct in Latvia*

The Respondent suspects that a number of transactions of KVV LM with related companies in 2016 had no economic rationale and all resulted in funneling funds out of KVV LM and stripping the company of its assets precisely at a time where it desperately needed to preserve its own cash and assets. Constituent documents of *i.a.* ████████, with which KVV LM engaged in these suspect transactions, were found at the KVV Group's premises in Kiev by the Ukrainian police and show that all these companies were related, and that the Claimant used them to move assets out of the reach of legitimate creditors.[19]

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[11] Application, ¶¶ 36-37.
[12] Respondent's Comments, ¶ 16; Letter from the Claimant to the Tribunal dated 20 July 2019, p. 8 & ff (point 5).
[13] Application, ¶¶ 39-41, 46.
[14] Application, ¶ 42.
[15] Application, ¶ 44.
[16] Application, ¶ 45.
[17] Respondent's Comments, ¶¶ 6-9.
[18] Respondent's Comments, ¶¶ 10-13.
[19] Application, ¶¶ 59-73.

The Respondent asserts that by ordering security for costs on the basis of this conduct, the Tribunal will not prejudge the merits of the case and that it will be free to reconsider any issues during the merits assessment as provisional measures have no *res judicata* effect.[20] Similarly, ordering provisional measures does not oblige the Tribunal to take a view on the causal link between these transactions and the insolvency of KVV LM, but only to decide whether this extraction of cash from KVV LM constitutes a factual element which, together with others, establishes "*extraordinary circumstances*" and justifies the Application.[21]

*d.* *Latvia's legal and factual impossibility to enforce a cost award against the Claimant*

The Claimant has stated in this arbitration that he holds assets in the Crimea, but following Russia's annexation of the Crimea and Latvia's refusal to recognize the annexation, any attempt to enforce an arbitral award, and in particular an adverse costs award, before the courts controlled by the Russian Federation in the Crimea would be ineffective.[22] It argues (referring to *Adamakopoulos v. Cyprus*) that the determination of the appropriateness of security for costs may be based on the subjective circumstances of the party from whom security is requested, as well as on facts outside the control of that party.[23]

Enforcement of a costs award against the Claimant's assets in the rest of Ukraine would be equally impossible as these assets have been attached by the local authorities[24] and the Claimant has not adduced any evidence in support of his assertion that he also owns assets outside of Ukraine.[25]

23. The Claimant objects that the facts invoked by the Respondent are false or irrelevant:

*a.* *The Claimant's non-payment of its former counsel in this arbitration*

The Claimant denies that the non-payment of his former counsel is evidence of his impecuniosity or his unwillingness to honor his payment obligations because (i) the unpaid amount is related to the quality of the services rendered,[26] (ii) he is entitled to object to the amount claimed, (iii) no court decision obliging him to pay has been issued yet[27], and (iv) the parties are in the process of negotiations.[28] The Claimant considers that his engagement of new counsel – with whom there are no payment issues – proves his solvency.[29]

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[20] Respondent's Comments, ¶¶ 19-22.
[21] Respondent's Comments, ¶ 25.
[22] Application, ¶¶ 74-77.
[23] Respondent's Comments, ¶ 29.
[24] Application, ¶ 78.
[25] Respondent's Comments, ¶ 27.
[26] Reply, ¶¶ 31 and 32.
[27] Claimant's Comments, ¶ 31.
[28] Claimant's Comments, ¶ 32.
[29] Reply, ¶ 33 and Claimant's Comments, ¶ 30.

*b.* *The Ukrainian criminal investigations*

According to the Claimant, the rulings of the Pechersk District court of Kiev adopted between February and May 2019 on which the Respondent relies are part of criminal proceeding No. 42017000000042281 of 17 November 2017, which was closed on 5 July 2019 due to the absence of elements of a crime.[30] Consequently, the majority of the seizures of assets and funds were cancelled[31] or are "*in any event subject to cancellation as a matter of law*".[32] Moreover, as confirmed by a letter from the Territorial Department of the State Bureau of Investigation in Kiev of 20 January 2020, Mr. Kazmin himself was not a participant in these criminal investigations.[33] The Respondent has not even proven that all companies subject to this criminal proceeding belong to the Claimant, nor that the seizures relate to the Claimant or will prevent the Respondent from potentially recovering its costs.[34] The only specific company referred to by the Respondent in this connection, KVV Group, is owned by the Claimant's wife, has been largely inactive since 2017 and is planned to be liquidated.[35] The Claimant points out that the two rulings of the Pechersk District Court of Kiev that refused to lift the seizures do not refer to the closing of the criminal proceeding No. 42017000000042281, indicating that these judges did not take this element into account. According to the Claimant, this may be explained by the failure of counsel for the applicants to appear at the hearing and inform the judges of the closing.[36]

The Claimant denies the relevance of another criminal proceeding, No. 12018100100008004, which commenced on 24 July 2018, because it involves KVV-Group LLC which is another company with a different name (including a hyphen), another registration code, different activities and registered address, another incorporation date and a different founder and owner, none of whom is the Claimant.[37] This proceeding is therefore irrelevant to the Claimant and in any event has no impact on the Respondent's potential recovery of costs.[38]

The Claimant asserts that the Respondent's reliance on outdated and false information tries to mislead the Tribunal[39] and amounts to deliberate misrepresentation[40] while the Respondent must have been aware of the difference between KVV Group and KVV-Group on which information is readily available in

[30] Reply, ¶¶ 10-11.
[31] Reply, ¶ 14.
[32] Reply, ¶¶ 15-17.
[33] Reply, ¶ 13.
[34] Claimant's Comments, ¶ 12.
[35] Claimant's Comments, ¶ 13.
[36] Claimant's Comments, ¶¶ 17-19.
[37] Claimant's Comments, ¶¶ 25-27.
[38] Claimant's Comments, ¶ 28.
[39] Reply, ¶ 9.
[40] Reply, ¶ 19.

the Unified Register of Legal Entities.[41] He also objects to the Respondent's baseless assumption that further seizures of Mr. Kazmin's assets may follow.[42]

In law, the Claimant argues that the Respondent disregards the Ukrainian and ECHR presumption of innocence, that the circumstances set out in the Ukrainian rulings and those courts' assessment of these facts are not *res judicata* for this Tribunal[43] and that even the facts mentioned in a ruling of a court in a criminal case cannot be relied on as established facts.[44]

*c.* <u>*The Claimant's alleged misconduct in Latvia*</u>

The allegations of improper activity of KVV LM are mere speculation of the Respondent, who does not provide evidence of any criminal proceedings against KVV LM in Latvia.[45] The Claimant denies that there was any impropriety in these transactions which were related to the repayment of a loan extended by ██████ to KVV LM[46] and relies on the decision in *BSG Resources Limited v. Republic of Guinea*,[47] which held that "*mere non-transparency*" of transactions does not suffice to establish exceptional circumstances.[48] The Claimant refers to documents – filed with his Counter-Memorial – showing that the Latvian police, following an investigation into suspect transactions of KVV LM requested by the Ministry of Finance, decided not to initiate criminal proceedings.[49]

Moreover, the alleged facts date from 2016 and cannot serve as a basis to hold that the Claimant is impecunious in 2020 or unable or unwilling to pay a cost award.[50]

Finally, the Claimant asserts, with reference to *Unionmatex v. Turkmenistan,* that the Tribunal cannot base an order for costs security on these transactions without prejudging the merits.[51]

*d.* <u>*Impossibility to enforce a costs award*</u>

The Respondent's statements about its inability to enforce an award against the Claimant's assets in Crimea is speculative and irrelevant and it is not established that the Claimant's assets outside of Crimea would be insufficient to cover a costs

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[41] Claimant's Comments, ¶ 26.
[42] Reply, ¶ 20.
[43] Reply, ¶¶ 21-23.
[44] Reply, ¶ 22 and Claimant's Comments, ¶ 21.
[45] Reply, ¶ 26.
[46] Claimant's Comments, ¶ 37.
[47] ICSID Case No. ARB/14/22, Procedural Order No.3, 25 November 2015 (**Exhibit RLA-85**), ¶ 78.
[48] Claimant's Comments, ¶ 38.
[49] Letter from the Ministry of Finance to the Kurzeme Police Department No 30.2-5.5/124 (English translation with Latvian original), 5 February 2016 (**Exhibit R-153**); Letter from the Kurzeme Police Department to the Ministry of Finance No 20/19/4ip (English translation with Latvian original), 24 February 2016 (**Exhibit R-154**); and Letter from the Kurzeme Police Department to the Ministry of Finance No 20/19/18-ip (with enclosure) (English translation with Latvian original), 13 May 2016 (**Exhibit R-155**).
[50] Reply, ¶ 27.
[51] Reply, ¶ 28 and Claimant's Comments, ¶¶ 34-35.

order.[52] Moreover, the illegal occupation of Crimea is outside of the Claimant's control and the Respondent cannot cover its own political risk by security for costs in the absence of evidence of the Claimant's inability or unwillingness to pay.[53]

The Claimant considers the information from the financial statements of [redacted] [redacted]. on which the Respondent relies, irrelevant, as *i.a.* the statements of [redacted] were not analyzed by a professional accountant or auditor and because [redacted]. has no legal obligation to file accounts.[54] He denies that his companies are financially struggling.[55]

The Claimant replies to the Respondent's arguments that recovery of assets from a physical person is more difficult than from a company because he will as an individual remain liable with all his present and future assets.[56]

### 4. <u>Proportionality</u>

24. The Claimant asserts that this fourth requirement is "*firmly established in ICSID jurisprudence on interim measures*" [57] and considers it is not fulfilled because the potential harm for the Respondent is vague and based on broad assumptions and false allegations,[58] while a cost order would be highly onerous for himself, having already expended considerable amounts on legal fees and representation in this arbitration.[59] He sees the request as an attempt to make him pay upfront for a potential costs award and to replace the mechanism for enforcement of an ICSID award by a bank guarantee or escrow agreement.[60]

25. The Respondent denies that proportionality is a requirement for granting an application for security for costs and argues that if the requirements of "*necessity*", "*urgency*" and "*exceptional circumstances*" are met, the order will necessarily be proportional.[61] It also denies that posting security would impair the Claimant's access to justice.[62]

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[52] Reply, ¶¶ 35 and 37.
[53] Reply, ¶ 36 and Claimant's Comments, ¶ 44.
[54] Claimant's Comments, ¶¶ 43-44.
[55] Claimant's Comments, ¶ 43.
[56] Claimant's Comments, ¶ 47.
[57] Reply, ¶¶ 55-56, with reference to *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3, Decision on Respondent's Request for Provisional Measure, 12 April 2017 (**Exhibit CL-212**).
[58] Reply, ¶ 59.
[59] Reply, ¶ 60.
[60] Reply, ¶ 62.
[61] Respondent's Comments, ¶ 38, with reference to *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2 (Decision on Respondent's Application for Provisional Measures), 13 February 2016 (**Exhibit RLA-80**), ¶ 63, and noting that "*the arbitral tribunal equated 'exceptional circumstances' with the 'requirement of a risk of irreparable or substantial harm'*."
[62] Respondent's Comments, ¶ 41.

26. The Claimant objects to what he refers to as an attempt from the Respondent to conflate the notions of proportionality and of "*irreparable and substantial harm*," and argues that a security for costs order in this case would be disproportionate because the Respondent failed to prove his impecuniosity or unwillingness to pay costs.[63]

## IV. THE TRIBUNAL'S ANALYSIS

27. The Tribunal's authority to order security for costs is not contested by the Claimant and the Tribunal is satisfied that it has this authority under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules on provisional measures. Arbitral tribunals have consistently interpreted this Article and Rule as granting tribunals such power.[64] The Tribunal adheres to this *jurisprudence constante*, even if it would appear at a later stage not to have jurisdiction.

### 1. Necessity

28. As regards necessity of the requested measure, the Tribunal considers, without prejudging any jurisdiction or merits issue in this arbitration, that the Respondent's Counter-Memorial of 9 November 2018 and its Rejoinder on the Merits and Reply on Jurisdiction of 27 February 2020 contain a plausible defense against the Claimant's claims and that a future claim of the Respondent for cost reimbursement is not "*evidently excluded*". The Tribunal finds, as did the *RSM v. Saint Lucia* tribunal, that "*[a]lso future or conditional rights such as the potential claim for cost reimbursement qualify as* 'rights to be preserved'"[65] by provisional measures. Whether the Respondent's potential entitlement to reimbursement of costs is at risk and makes the requested measure necessary will be assessed hereafter in the context of the discussion of the "*exceptional circumstances*" relied on by the Respondent.

### 2. Urgency

29. As regards urgency, the Tribunal does not share the Claimant's view that the Respondent has waited an unduly long time to bring this Application. The Tribunal acknowledges that information on the "*extraordinary circumstances*" became known gradually over time and acquired its overall significance only when it could be considered in its totality. Given the circumstances of this case, the Respondent could not be blamed for taking the time to form a reasonable opinion on the opportunity to file a request for security for costs.. The Claimant's refusal to pay his former legal counsel, [redacted], came to the Respondent's attention on [redacted], but this fact alone was no reason for concern. Certain facts about the Claimant, in particular about his activities in Latvia, including the "*suspect transactions*" of KVV LM in 2016, and about his companies in Ukraine were revealed in the Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction. This submission was dated 19 September 2019, but the information it contained was reviewed only in the larger context of the Respondent's preparation

[63] Claimant's Comments, ¶¶ 60-62.
[64] *See*, *e.g.*, *Rachel S Grynberg, et al v. Grenada*, ICSID Case No ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, (**Exhibit RLA-72**), ¶ 5.16; *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014 (**Exhibit RLA-78**), ¶ 5.5; *Lighthouse v. Timor-Leste*, Procedural Order No. 2, (**Exhibit RLA-80**), ¶ 53.
[65] *RSM Production Corporation v. St. Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014 (**Exhibit RLA-78**), ¶ 5.5.

of its Rejoinder on the Merits and Reply on Jurisdiction which was due on 27 February 2020. Thus, the fact that the relevant information was on the Respondent's desk on 19 September 2019 does not mean that it was promptly digested. It necessarily took some time before an overall understanding of the relevance of each piece of information would be acquired and arouse the Respondent's specific suspicion (footnote 38 of the Respondent's Application) about the Claimant's business practices and what they could mean for his ability and willingness to pay a possible costs award. The Respondent thereafter had to gather further information in Ukraine to verify its suspicion. The discovery of the existence of criminal investigations involving KVV Group was the last puzzle piece which pushed the Respondent to file the Application, more than a month before the due date of its Rejoinder on which the work was proceeding in parallel.

30. Consequently, the Tribunal disagrees with the Claimant that the filing of the Application was late or disproves urgency.

**3. <u>Exceptional Circumstances</u>**

31. The existence of each of the exceptional circumstances can be assessed separately but it follows from the above that their actual weight for the Application has to be considered jointly.

*a) Failure to pay former counsel*

32. The Tribunal finds that the Claimant's failure to pay its former counsel a non-disputed amount of ██████████, out of a total amount of fees of ███████████, of which ████████████ is in dispute, whether or not proper, is not an extraordinary circumstance which in itself justifies granting security for costs. But it may be taken into account with other circumstances.

*b) Ukrainian criminal investigations*

33. The information on Ukrainian criminal investigations against KVV Group gives more cause for concern than the non-payment of part of ███████'s legal fees. Even if the criminal proceeding No. 42017000000042281, in the context of which investigations and seizures have taken place, was closed on 5 July 2019 and many of the seizures were lifted thereafter, it is understandably a matter of concern for the Respondent that KVV Group, which was the company which bid for and negotiated the Asset Purchase Agreement with JSC Liepājas Metalurgs's trustee in bankruptcy, was suspected of having set up a tax evasion and money laundering scheme.

34. The Claimant denies any evidentiary value to the facts stated in the decisions of the Pechersk District Court of Kiev because there was no condemnation of KVV Group. The Tribunal disagrees, however. These decisions list facts, such as:

- "*The pre-trial investigation found that the officials of Financial and Industrial Holding "KVV GROUP" in the period of 2017-2018 organized a scheme to provide services for the conversion of funds and the formation of costs for the purchase of scrap metal to enterprises of the real sector of economy through a number of created and acquired*

*enterprises with sings[sic] of fraud for the purpose of tax evasion in particularly large amounts*."[66]

- "*Subsequently, the above mentioned enterprises with signs of fraud conducted fictitious transactions and displayed deliberately false data in the tax report on the purchase of scrap metal and other goods and services from enterprises that also have signs of fraud and are controlled by the officials of the Financial and Industrial Holding "KVV GROUP" in order to cash out funds through bank accounts opened at a banking institution JSC "CIB".*

  *In fact, the purchase of goods by enterprises of the real sector of economy is carried out at specialized scrap yards, that also belong to the Financial and Industrial Holding "KVV GROUP", for cash without being reflected in the tax reports.*

  *The above-mentioned non-cash transactions were conducted by enterprises in the real sector of economy to artificially increase costs in order to evade income tax and to convert funds into cash through enterprises with signs of fraud and a bank institution controlled by the latter.*"[67]

- "*[T]he prosecutor notes that all the above mentioned enterprises*,[[68]] *for which the documents at the above addresses were temporarily removed, are interconnected and belong to one Financial and Industrial Holding "KVV GROUP". These circumstances are confirmed by the fact that the constituent documents of these enterprises were found in the office premises of the Financial and Industrial Group "KVV GROUP", owned by PERSON_9, at one address: 28 Predslavynska Street, Kyiv city. At the same time, the bank documents of the respective enterprises were found in one banking institution,*

[66] Pecherskyi District Court of Kyiv City, Decision in case No. 757/6784/19-к (English translation with Ukrainian Original), 12 February 2019 (**Exhibit R-199**), p. 1.

[67] Pecherskyi District Court of Kyiv City, Decision in case No. 757/6784/19-к (English translation with Ukrainian original), 12 February 2019 (**Exhibit R-199**), p. 3. *See* also Pecherskyi District Court of Kyiv City, Decision in Case No. 757/25033/19-к (English translation with Ukrainian original), 21 May 2019 (**Exhibit R-202**); Pecherskyi District Court of Kyiv City, Decision in Case No. 757/25301/19-к (English translation with Ukrainian original), 22 May 2019 (**Exhibit R-204**); Pecherskyi District Court of Kyiv City, Decision in Case No. 757/25312/19-к (English translation with Ukrainian original), 22 May 2019 (**Exhibit R-206**); Pecherskyi District Court of Kyiv City, Decision in Case No
757/25316/19-к (English translation with Ukrainian original), 22 May 2019 (**Exhibit R-207**); Pecherskyi District Court of Kyiv City, Decision in Case No. 757/27250/19-к (English translation with Ukrainian original), 29 May 2019 (**Exhibit R-208**); Pecherskyi District Court of Kyiv City, Decision in Case No. 757/27234/19-к (English translation with Ukrainian original), 29 May 2019 (**Exhibit R-209**); Pecherskyi District Court of Kyiv City, Decision in Case No. 757/27225/19-к (English translation with Ukrainian original), 29 May 2019 (**Exhibit R-210**); Pecherskyi District Court of Kyiv City, Decision in Case No. 757/27232/19-к (English translation with Ukrainian original), 29 May 2019 (**Exhibit R-211**).

[68] The "*above mentioned enterprises*" include, among many others, not only names of companies known in this arbitration as subsidiaries of KVV Group, such as ████████████, and its shareholder ███, but also companies which appear in this arbitration as trade partners of KVV LM before it went bankrupt.

> *namely JSC "Commercial Industrial Bank", located at the address: 6 Bulvarno-Kudriavska Street, Kyiv city, also owned by PERSON_9.*"[69]

35. The Tribunal is aware that there is no evidence that the Claimant or the companies have been condemned for these facts and that, in that sense, the facts mentioned are not *res judicata.* However, this Tribunal is authorized to assess the above facts which have not been contradicted by the Claimant for the purpose of deciding the Application. Moreover, there are other facts in the documents on record which have drawn the Tribunal's attention in relation to this closed criminal proceeding No. 42017000000042281.

36. The Tribunal is not reassured by the Claimant's evidence that criminal proceeding No. 42017000000042281 has been closed "*due to the absence of the elements of a crime.*"[70] Contrary to what the Claimant suggests, the closing of a criminal proceeding is no evidence of innocence. This is especially so when proceedings are closed merely because the investigations did not proceed, as was confirmed by the decision of the investigating judge in another criminal proceeding No. 12018100100008004.

37. In this case, the investigating judge decided on 2 May 2019 to cancel the closing decree of 24 August 2018 because "*the decree on closing the criminal investigation issued by the investigating officer was premature as the pretrial investigation failed to duly check all the arguments in the application […] on the criminal offense and did not provide the assessment thereof. In addition, the decree on closing the criminal investigation is unmotivated*", the latter being a violation of Article 110 of the Criminal Procedure Code of Ukraine.[71] The judge considered that "*[p]articularly, if an investigating officer closed the criminal proceeding due to absence of the components of a crime in the actions of a person, an investigating judge shall determine whether the decree offers a detailed description of events that let the applicant believe that the person(s) have committed a criminal offense, and the investigating officer's arguments to prove the contrary.*"[72]

38. The closing decree in criminal proceeding No. 42017000000004228 has not been produced, and it is thus unknown whether the reasoning of that decree provides "*motives for passing the decree and their substantiation*", as the judge who reopened criminal proceeding No. 12018100100008004 considered required under Article 110 of the Ukrainian Criminal Procedure Code.[73] The Tribunal concludes that the closing of case No. 42017000000004228 is insufficient to dissipate the concerns raised by this criminal proceeding and the seizures which were performed on that basis.

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[69] Pecherskyi District Court of Kyiv City, Decision in case No. 757/6784/19-к (English translation with Ukrainian original), 12 February 2019 (**Exhibit R-199**), p. 20.
[70] Reply, ¶ 11. According to exhibits C-374 and C-375, the 5 July 2019 decision on the closure of the said criminal proceedings was adopted on the grounds of clause 2 of part 1 of Article 284 of the Criminal Procedure Code. That article has not been produced, however.
[71] Pecherskyi District Court of Kyiv City, Decision in Case No. 761/12224/19 (English translation with Ukrainian original), 2 May 2019 (**Exhibit R-268**), p. 3.
[72] Pecherskyi District Court of Kyiv City, Decision in Case No. 761/12224/19 (English translation with Ukrainian original), 2 May 2019 (**Exhibit R-268**), p. 3.
[73] Pecherskyi District Court of Kyiv City, Decision in Case No. 761/12224/19 (English translation with Ukrainian original), 2 May 2019 (**Exhibit R-268**), p. 3.

39. The Tribunal is not reassured either by the Claimant's showing that criminal proceeding No. 12018100100008004 does not relate to KVV Group but to another legal entity called "*KVV-Group*". It is surprising that Ukrainian law would allow an unrelated company in the same city to bear a name which resembles so much that of another existing company, unless there was some link between the two companies or their (beneficial) shareholders which could explain the similarity of the names. That the sole shareholder of KVV-Group is not Mr. Kazmin is probably also not conclusive. Indeed, the information which the record contains on various roles of Mr. – going from beneficial co-owner of various companies to a mere assistant of the Claimant (see further paragraph 55 hereafter) and the ease with which the Claimant has apparently transferred his ownership of KVV Group to his wife – is not prone to convincing the Tribunal that there is no link between the Claimant and Mr. [74] or Ms. .[75] If there is any link between the two companies, the criminal investigation against KVV-Group is as worrisome as that against KVV Group, even if the latter is closed. This is especially so since criminal proceeding No. 12018100100008004 KVV-Group was opened on suspicion of criminal offenses set forth in Article 358 (1) of the Criminal Code of Ukraine: "*pretrial investigation determined that unidentified persons forged official documents, particularly, minutes of the General Meeting of KVV-Group LLC, <u>Share Sales Agreement, Articles of Association of KVV-Group LLC</u>,[76] and application for state registration of amendments to corporate information signed by PERSON_1.*"[77] The investigating judge found that "*[i]n particular, during the pretrial investigation, there was no interrogation of PERSON_3, representative of the founder of KVV-Group LLC PERSON_4, who was said (by PERSON_1) to use the forged documents. No decision on conducting handwriting analysis was taken and no appeals to the investigating judge with the relevant motion to this effect were filed. The investigator did not conduct other investigating (searching) actions for the purpose of comprehensive, full and objective consideration of all the circumstances of the criminal proceeding.*"[78]

40. Even if the Claimant is possibly right that "*Person 3*" is not Mr. Kazmin (contrary to the Respondent's assertion[79]) because he is not registered as owner of KVV-Group,[80] the mere nature of the crimes suspected in case No. 12018100100008004 involving a company with a very similar name as KVV Group and likely to create confusion between the two, leads to the conclusion that the suspicions about the Claimant's activities and operations through various Ukrainian companies, including his possible involvement (whether direct or indirect) in this

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[74] Mentioned as owner of KVV-Group in Excerpt from Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations on the company LLC "KVV-Group," 12 March 2020 (**Exhibit C-425**), and by the Claimant in Claimant's Comments, ¶ 25.

[75] Mentioned as founder of KVV-Group in 2015 in Excerpt from Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations on the company LLC "KVV-Group" as of 22 September 2015, 10 March 2020 (**Exhibit C-426**), and by the Claimant in Claimant's Comments, ¶ 27.

[76] Pecherskyi District Court of Kyiv City, Decision in Case No. 761/12224/19 (English translation with Ukrainian original), 2 May 2019 (**Exhibit R-268**), p. 3 (emphasis added).

[77] Pecherskyi District Court of Kyiv City, Decision in Case No. 761/12224/19 (English translation with Ukrainian original), 2 May 2019 (**Exhibit R-268**), p. 3.

[78] Pecherskyi District Court of Kyiv City, Decision in Case No. 761/12224/19 (English translation with Ukrainian original), 2 May 2019 (**Exhibit R-268**), p. 3.

[79] Respondent's Comments, ¶¶ 11-12.

[80] Claimant's Comments, ¶ 27.

second criminal proceeding, No. 12018100100008004, are sufficiently justified for the present purpose.

41. The Tribunal does indeed not need evidence of criminal misconduct when it is, as in this case, satisfied that the evidence is sufficient to raise justified and serious concerns about the Claimant's business practices and eventual willingness to comply with a costs order if one were to be made, and when it is thus persuaded that there has been some misconduct.

*c) Untraceable assets*

42. Not only the fact that criminal proceedings were opened because the Claimant or his companies were suspected of having evaded taxes and that further investigations in another case may bring to light other alleged wrongful acts attributable to the Claimant, but also the Claimant's documented practice of moving assets to reduce their exposure to creditors' claims justify the Respondent's concerns and a security order.

43. First, the Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction state that KVV Group which the Claimant had presented in 2014 as a company owned by him, is today no longer his property (through ███.) but has been transferred, under terms which are unknown in this arbitration, to his wife. The Claimant purports not to understand how this can affect the Respondent's potential right to recover its costs. This reaction is per se troubling since the KVV Group was (at least as presented in 2014) as the centerpiece of the Claimant's business imperium and could thus be considered as the Respondent's security, which has now disappeared from its potential assets.

44. Second, there are other companies which were presented as the Claimant's property which can no longer be considered as such or have otherwise lost their value as potential security for the Respondent.

45. In Annex A of his Request for Arbitration, containing his "*corporate chart*", the Claimant also listed ███, a Cypriot company, of which he claims to own 100% of the shares through a proxy, ███., also a Cypriot company. It is unknown whether ███ was incorporated for the sole purpose of holding 100% of the shares of KVV LM which bought the assets of JSC Liepājas Metalurgs in 2014, or whether it held/holds other assets. The 2014 financial statements for ███ indeed show net losses of close to USD 1.5 million before tax, and according to the Respondent, no subsequent accounts appear to have been filed for this company.[81] The Claimant asserts that to his knowledge, all accounts of ███ have been duly filed to date.[82] He does not prove so, however, explaining that *"We do not submit these accounts in the present arbitration, as they are in any event irrelevant to the issue security for costs, and we do not wish to burden the case file with superfluous documents."*[83] The Tribunal does not agree that these accounts are irrelevant, since only these accounts could take away the concerns that the Claimant is becoming impecunious or hiding his assets.

[81] Application, ¶ 44.a.
[82] Claimant's Comments, ¶ 41.
[83] *Ibid*.

46. In relation to another company presented in 2014 as owned by the Claimant, [redacted]., the Claimant has explained that this Belizean company is not required under Belizean law to file accounts with the Registry, as long as it keeps accounts "*within or outside Belize as may be determined by its directors or other competent persons*".[84] In support of this statement, the Claimant produced the Belize Accounting Records (Maintenance) Act No.18 of 2013,[85] but he did not find it necessary to produce – even unpublished – recent financial statements to mitigate the Respondent's concern about the Claimant's assets.

47. Strikingly, the Claimant claims he was "*not in a position to provide an auditing report on its companies in the time available to prepare these Comments*", adding that "*this is immaterial, as the Respondent has not discharged its burden of proof in showing that the Claimant's companies are struggling financially*."[86]

48. The Tribunal cannot but note that the Claimant keeps insisting on the Respondent's burden of proof without himself producing a single document which may dissipate the justified concerns and suspicions of the Respondent. The result is that the Tribunal is now convinced that these concerns are justified. In this respect, the Tribunal considers that the standard of proof which applies for an order on provisional measures, such as the posting of security for costs, is not so strict as for a final decision, and certainly not so strict as for a criminal conviction. The Tribunal considers that it is sufficient that the evidence before it makes it more plausible than not that the right of the Respondent to be able to enforce a costs award is at risk.

49. The Tribunal finds this to be the case, not only because any current evidence of the assets which the Claimant owned at the time he filed his Request for Arbitration is missing from the file, but also because there is *prima facie* evidence of unusual business practices of the Claimant.

50. First, it is striking that even for the companies which the Claimant owned in 2014, none of his interests were directly held.

51. The Claimant is (or at least was on 30 December 2016) the owner of 100% of the shares of [redacted].[87] However, the Claimant holds the [redacted] shares indirectly, through [redacted].[88] The same applies to the second vertical line of companies on Annex A to the Request for Arbitration: [redacted], which was the main shareholder of KVV Group (at least until 2 October 2014),[89] is also owned only indirectly by the Claimant, through

[84] Claimant's Comments, ¶ 42.
[85] Accounting Records (Maintenance) Act No.18, 2013 (**Exhibit C-427**).
[86] Claimant's Comments, ¶ 43.
[87] *See* Annex A to Request for Arbitration.
[88] Certificate of Shareholders of [redacted], 18 November 2013 (**Exhibit C-125**) and Declaration of Trust, [redacted] Holding Shares in [redacted] for UBO, 31 October 2013 (**Exhibit C-124**).
[89] *See* Excerpt from the Ukrainian register of companies in respect of Limited Liability Company "KVV LM" as of 24 July 2014, 13 September 2019 (**Exhibit C-346**); Excerpt from the Ukrainian register of companies in respect of Limited Liability Company "KVV LM" as of 10 September 2014, 13 September 2019 (**Exhibit C-347**); and Excerpt from the Ukrainian register of companies in respect of Limited Liability Company "KVV LM" as of 2 October 2014, 13 September 2019 (**Exhibit C-348**).

,[90] of which the shares were held (at least until 19 February or 2 March 2016;[91] and until 13 April 2016[92]) by the Claimant. Until today, four years later, the Claimant has not come forward with any update of this ownership evidence. On the contrary, having disclosed that KVV Group is now owned by his wife, he has failed to give any explanation, let alone counter-balancing evidence.

52. The Tribunal does not agree with the Claimant that Ms. becoming the sole shareholder of KVV Group does not affect the Claimant's ownership of KVV Group "*as group of companies*." The only information on record about the companies which are allegedly part of that group is on p. 3 of KVV's Proposal for the Purchase of LM assets,[93] but that was the situation in 2014. The fact that the company bears as name "*KVV Group*" does not mean that there (still) exists a group of companies such as the one represented in the Claimant's proposal on 30 July 2014. Moreover, it is unlikely that these companies still belong to KVV Group, as it is being liquidated according to Mr. Kazmin.[94]

53. The record also contains information on KVV Group which is puzzling and may therefore be unreliable in one way or another. Paragraph 7 of the Request for Arbitration states that KVV Group "*was created in Ukraine over 15 years ago*". However, the oldest extract from the Unified State Register of Legal Entities on record (R-269) states that on 16 November 2010 the Claimant was the company's sole "*founder/participant*" (shareholder), with a contribution of only 1000 UAH to the capital. The date of 16 November 2010 also figures in R-84, as the "*record date - date of entry in the Unified State Register*". The Tribunal notes, however that:

(i) there is no evidence that the KVV Group, which was recorded in the register on 16 November 2010, was indeed a holding company as it cannot check the statutory purpose of KVV Group (exhibit C-80 containing an incomplete translation of the statutes[95]);

(ii) there is no evidence that KVV Group was incorporated before it was registered on 16 November 2010 and thus was indeed created over 15 years ago; and

(iii) there is no evidence that KVV Group which was registered on 16 November 2010 is actually the same legal entity with the same assets and activities as KVV MPU which was in 2010 no. 40 on the Forbes list with an annual revenue of 5.734 Million UAH – a fact on which KVV Group relied heavily in its proposal of 30 July 2014.[96]

54. Whether is still the Claimant's property is unknown and, as a result of the indirect character of the ownership, in any event hard to verify.

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[90] *See* Share Certificate of Issued to 13 September 2010 (**Exhibit C-67**).
[91] *See* Certified set of corporate documents of 2 March 2016 (**Exhibit C-344**), pp. 1 and 5.
[92] Certificate of Incumbency of , 13 April 2016 (**Exhibit C-64**).
[93] Commercial Proposal of KVV, 30 July 2014 (**Exhibit C-2**).
[94] Reply on the Merits and Counter-Memorial on Jurisdiction, ¶ 196.
[95] According to R-84, KVV Group has only industrial and trading activities. *See* Extract from the corporate register of the KVV Group (English translation with Ukrainian original), 6 August 2018 (**Exhibit R-84**).
[96] Commercial Proposal of KVV, 30 July 2014 (**Exhibit C-2**), p. 3 of 16 and "200 Biggest Ukrainian Companies, 2010," Forbes, 19 July 2012 (**Exhibit C-3**).

55. The Tribunal cannot but conclude that since the Claimant submitted his proposal to purchase LM to Prudentia in 2014, he has become considerably more discrete about details of his property. While the Claimant is correct that a physical person remains personally liable with all his property, the Tribunal does not agree with him that the Respondent is better off with him as a debtor than with a company which "*may be easily disposed of in some cases*".[97] The record shows how easily the Claimant has disposed of KVV Group by transferring it to his wife and how he has a tradition of holding shares only through intermediaries or strawmen.

56. Second, the Tribunal also has problems with the information it has been given about Mr. : according to footnote 5 of the Request for Arbitration, he is/was an assistant of the Claimant. Yet, on 29 May 2015, he signed a letter from KVV LM to the Prime Minister of Latvia as "*Member of the Board and co-owner*" of KVV LM.[98] According to the Forbes list of the 200 largest companies in Ukraine based on 2010 income, was in 2010 CEO of KVV MPU,[99] the previous name of KVV Group according to the Claimant.[100] According to C-2 (KVV Group's commercial proposal for the purchase of the assets of LM), is a "*final beneficiary*" of , as is the Claimant. *Prima facie*, either this statement was inaccurate, or one of the documents in the chain of C-67, C-64 and C-344 (p. 5) is wrong or false.

57. Furthermore, the same proposal of KVV Group for the purchase of the assets of JSC Liepajas Metalurgs also mentions Mr. as ultimate co-owner (together with the Claimant) of (Cyprus).[101] Again, if this information is correct, the document filed as Annex A to the Request for Arbitration – or at least the impression it gives about Mr. Kazmin's shareholding[102] – appears not accurate.

*d) Unusual transactions in 2016 in Latvia*

58. The Respondent has also based its Application on allegedly unusual transactions in 2016 between KVV LM on the one hand and apparently unrelated companies .[103] The Tribunal agrees that it should not prejudge the merits of the case when taking these into account and will duly review and assess these transactions during the merits phase. However, for the present purpose, the evidence supplied by the decisions of the investigating judges in criminal proceeding No. 42017000000042281 about corporate documents of these companies being found in the offices of KVV Group[104] suffices to arouse suspicion that these companies were related to KVV Group

[97] Claimant's Comments, ¶ 47.
[98] Letter from KVV LM to the Prime Minister of Latvia, 29 May 2015 (**Exhibit C-95**).
[99] "200 Biggest Ukrainian Companies, 2010," Forbes, 19 July 2012 (**Exhibit C-3**).
[100] Request for Arbitration, footnote 8.
[101] Commercial Proposal of KVV, 30 July 2014 (**Exhibit C-2**), p. 14.
[102] The Tribunal notes that C-124 confirms that holds 1000 shares of Eur 1.00 each in but it is not clear how many shares of exist, nor how many shares, if any, the Claimant owns in .
[103] Application, ¶¶ 21 – 56.
[104] Pecherskyi District Court of Kyiv City, Decision in case No. 757/6784/19-к (English translation with Ukrainian Original), 12 February 2019 (**Exhibit R-199**), pp. 1-2 (stating that "*the pre-trial investigation found that the officials of Financial and Industrial Holding 'KVV GROUP' in the period of 2017-2018 organized a scheme to provide services for the conversion of funds and the formation of costs for the purchase of scrap metal to*

and may have belonged to the Claimant's group of companies. Even if these transactions were entirely at arm's length, they remain suspect because there was, at least *prima facie,* no economic rationale for them. The suspicion that they may have been "*carrousel*" payments has not been contradicted by the Claimant who shields behind the fact that "*the Latvian police refused to investigate KVV LM's transactions in the run up to insolvency for lack of criminality*".[105] As for the Ukrainian criminal investigations, the Tribunal takes into account that the failure to investigate these transactions may have other reasons than "*lack of criminality*". While the Claimant is correct that these transactions from 2016 do not establish that he is today or tomorrow impecunious or unwilling to honor a potential costs award, they do shed a further negative light on the Claimant's business practices, which justifies the Respondent's concern about its possibilities of recovering costs in the future.

59. In summary, the Tribunal has serious doubts as to whether the Claimant would comply with an order to pay the Respondent's costs in the event he is ordered to do so. Its major concern is not the Claimant's possible impecuniosity but his business conduct, which has led to criminal investigations against companies that he controls or may have links with and to using intermediaries, companies, shares and contracts in a creative way which cannot otherwise be explained except by a desire to avoid paying debts and diverting assets from creditors.

60. Consequently, the Tribunal concludes that security for costs is to be posted by the Claimant.

### 4. <u>Proportionality</u>

61. The Tribunal agrees with the Claimant that imposing provisional measures, including costs security, requires to balance the parties' respective interests. Having found that the evidence of the combined exceptional circumstances relied on by the Respondent is convincing and that it is necessary to safeguard the Respondent's potential right to recover its costs, the Tribunal also finds that the posting of security in a reasonable amount as determined hereafter is a proportional measure and does not create an undue burden on the Claimant. Given the Claimant's repeated – but unproven - denials that he is not impecunious and confirmations that he owns assets in various countries and that his companies have no financial difficulties, it cannot be difficult for him to obtain a bank guarantee at a reasonable cost. Also, this additional cost should not restrict his access to justice any more than his payment of an advance on costs has done. Moreover, the

*enterprises of the real sector of economy through a number of created and acquired enterprises with sings[sic] of fraud for the purpose of tax evasion in particularly large amounts. […]*
*Subsequently, the above mentioned enterprises with signs of fraud conducted fictitious transactions and displayed deliberately false data in the tax report on the purchase of scrap metal and other goods and services from enterprises that also have signs of fraud and are controlled by the officials of the Financial and Industrial Holding 'KVV GROUP' in order to cash out funds through bank accounts opened at a banking institution JSC 'CIB'.*
*In fact, the purchase of goods by enterprises of the real sector of economy is carried out at specialized scrap yards, that also belong to the Financial and Industrial Holding 'KVV GROUP', for cash without being reflected in the tax reports.*
*The above-mentioned non-cash transactions were conducted by enterprises in the real sector of economy to artificially increase costs in order to evade income tax and to convert funds into cash through enterprises with signs of fraud and a bank institution controlled by the latter.*") *See* also Pecherskyi District Court of Kyiv City, Decision in Case No. 757/25033/19-к (English translation with Ukrainian original), 21 May 2019 (**Exhibit R-202**).

[105] Reply, ¶ 26.

Claimant could have avoided the present order by producing convincing and reliable evidence of its assets; given his failure to do so and even to offer a letter of comfort or other undertaking to pay a potential adverse cost award, the Tribunal had no choice but to order the security, while taking care that its amount is proportional (as explained hereafter) and its format is the least expensive for the Claimant.

### 5. No Prejudging of the Merits

62. The Tribunal's present order, and in particular its assessment of the above exceptional circumstances, does not constitute a preliminary determination on the jurisdictional objections raised by the Respondent or on the merits of the case. First, the Claimant's non-payment of its former counsel and his possible link to criminal investigations (closed or not) in Ukraine, are unrelated to the merits of the case and exclusively relevant to the cost security issue. Second, the Tribunal's questions about the Claimant's companies relate to some extent to evidence which may be relevant for the future assessment of the Tribunal's jurisdiction; no final decision is taken further to any of the questions raised, however. Moreover, the Claimant still has the opportunity to address these questions in his Rejoinder on Jurisdiction. Finally, the allegedly unusual transactions in Latvia are an issue which will be addressed in depth when the Tribunal reviews the merits of the case. The Tribunal's finding in paragraph 58 above is only *prima facie* and exclusively for the purpose of the present procedural order where each exceptional circumstance is considered together with the others.

## V. TERMS OF THE SECURITY

63. The Respondent requests security in an amount of EUR 5 million in light of (i) the amount claimed in this arbitration, EUR 72,031,855.64 plus USD 4,121,450.00, (ii) the amount of fees already incurred and to be incurred hereafter by the Respondent and (iii) the magnitude of costs claimed by respondents in similar investment arbitration cases for similar amounts.

64. The Claimant, while denying that extraordinary circumstances have been established in this case, has not commented on the amount of the security requested.

65. While the Respondent has not given an indication of the amount of fees already incurred, the Tribunal, having reviewed respondents' costs claimed in other investment arbitrations,[106] finds that the Respondent appears to base the amount of EUR 4 million on the mean figure published in table 1 (USD 4,855,000), which the authors admit to being distorted by the largest claims. The Tribunal finds it more correct to base itself on the median average, which is USD 2,793,000 and consequently fixes the amount of the security at EUR 3 million.

66. The Tribunal considers that the least burdensome form which the security may take is an irrevocable guarantee from a first-class international bank according to the model attached as Annex 1 to the Respondent's Application. Given the Claimant's assertion that he or his companies have no financial difficulties, the security is to be provided within 15 days of the date of this Procedural Order.

[106] M. Hodgson and A. Campbell, "Damages and costs in investment treaty arbitration", *Global Arbitration Review online news*, 14 December 2017, pp. 2 *et seq.* (Table 1) (**Exhibit RLA-87**).

67. The Respondent has requested that the Tribunal order the suspension of the proceedings in case of non-compliance with this order. The Tribunal considers that it is reasonable and logical to sanction the failure to provide this security by a suspension of the arbitration, because continuing the proceeding notwithstanding the Claimant's failure to provide the bank guarantee would deprive the Respondent of the protection of its potential future right to recover its costs. If the bank guarantee is not provided within the time period specified below in Paragraph 68, the Tribunal, upon receipt of the Respondent's confirmation of the non-compliance and after hearing the Parties, will determine the terms of the suspension of these proceedings.

## VI. DECISION

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

1) The Claimant shall provide, within 15 days from the date of this Procedural Order No. 6, security for the Respondent's costs in the amount of EUR 3 million in the form and terms indicated in Annex 1 to the Application;

2) In case of non-compliance by the Claimant with the foregoing Paragraph 68.1, the Tribunal, upon receipt of the notification thereof from the Respondent and after hearing the Parties, will determine the terms of the suspension of the proceedings;

3) The Claimant shall bear the costs of the application and this Procedural Order (by separate Order, the Tribunal will set out a timetable for submissions by the Parties on such costs); and

4) All other requests are rejected.

For and on behalf of the Tribunal,

______________________
Mrs. Vera van Houtte
President of the Tribunal
Date: