

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Pawlowski AG and Projekt Sever s.r.o.

v.

Czech Republic

(ICSID Case No. ARB/17/11)

PROCEDURAL ORDER NO. 5

Introduction of New Evidence

Members of the Tribunal

Prof. Juan Fernández-Armesto, President of the Tribunal

Mr. John Beechey, CBE, Arbitrator

Prof. Vaughan Lowe, QC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

Assistant to the Tribunal

Ms. Krystle Baptista

16 June 2020

I. PROCEDURAL HISTORY AND SUMMARY OF PARTIES' POSITIONS

A. Claimants' Request

1. On 27 May 2020, Claimants sought leave of the Tribunal to submit new evidence pursuant to Procedural Order No. 1 (“**PO1**”), para. 17.4 (“**Claimants' Request**”). In particular, Claimants seek to produce a Facebook post with a comment by Respondent’s witness, Ms. Silvie Štěpánková, dated April 2, 2015 (the “**New Evidence**”), in which she described how she came to be involved in the court case that resulted in the annulment of the zoning plan change.
2. In the course of her cross-examination at the Hearing, Ms. Štěpánková was questioned about Doc. C-183, a press article that reported on an interview in which she had answered several questions related to Claimants’ project and how she became involved in the opposition to it. In her answers, Ms. Štěpánková denied the substance of several statements reported in Doc. C-183. Claimants argue that Ms. Štěpánková’s demeanour and defensiveness at the Hearing regarding Doc. C-183 bring her denials of the substantive accuracy of her statements in Doc. C-183 into question. Claimants request leave to adduce the New Evidence in order to challenge what they contend to be Ms. Štěpánková’s untruthful testimony under oath.
3. Claimants acknowledge that the New Evidence dates back to 2015, but they argue that the following “exceptional circumstances” justify the admission of the New Evidence outside the procedural timetable:
4. First, Claimants explain that they could not have submitted the New Evidence any earlier, since they submitted Doc. C-183 with their Reply on the Merits. Ms. Štěpánková was given an opportunity to answer questions about Doc. C-183 at the Hearing. Claimants say that they cannot be faulted for having failed to predict that Ms. Štěpánková would deny under oath that she had made the statements in Doc C-183.
5. Second, the submission of the New Evidence into the record would not unduly prejudice Respondent, because the New Evidence does not expand allegations, facts or evidence

which are not already in the record, but rather confirms the accuracy of Doc. C-183. Additionally, Respondent will have the opportunity to comment on the New Evidence in its Post-Hearing Brief due on 8 July 2020.

B. Respondent's Reply

6. Respondent replied to Claimants' Request on 3 June 2020, requesting its dismissal by the Tribunal for the following reasons:
7. First, Respondent says that Claimants' Request is simply too late. Claimants could have submitted the New Evidence ahead of the Hearing, by way of the procedure set out in para. 17.4 of PO1.
8. Second, Ms. Štěpánková can no longer be called upon to answer questions about the New Evidence, now that the Hearing is over. The Czech Republic maintains that Claimants' application gives rise to a fundamental due process issue; it should be able to defend itself against allegations as to Ms. Štěpánková's credibility through Ms. Štěpánková herself.
9. Third, the supposed "exceptional circumstances" described by Claimants are precisely the issues and questions that could have been put to Ms. Štěpánková at the Hearing. Respondent considers that Claimants' Request does not provide a reasoned justification for the late introduction of further evidence, but rather an after the event attempt to rely upon the New Evidence to support their line of cross-examination at the Hearing.

II. TRIBUNAL'S DECISION

10. Paragraph 17.4 of PO1 established the following rule:

"17.4 Neither party shall be permitted to submit additional or responsive documents outside of the Procedural Timetable, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party.

17.4.1 Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.

17.4.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.”

11. The rule in para. 17.4 of PO1 requires “exceptional circumstances” to allow the submission of new evidence into the record. Such circumstances may encompass *inter alia* the following situations:
 - That the need to present evidence – relevant and material to the dispute – derives directly from allegations or proof presented after the parties had their last opportunity to submit evidence according to the procedural calendar;
 - That the evidence pertains to facts – relevant and material to the dispute – that occurred after the parties had their last opportunity to submit evidence according to the procedural calendar;
 - That the evidence (again relevant and material) has become available or accessible to the requesting party after the parties had their last opportunity to submit evidence according to the procedural calendar.
12. Applying these principles, the Arbitral Tribunal will accept Claimants’ Request and allow the submission of the New Evidence into the record, for the following reasons:
13. First, the New Evidence pertains to facts which are *prima facie* relevant and material to the case, because Ms. Štěpánková’s testimony could clarify the dispute between the Parties regarding the real motives behind Mayor Topičová’s decision to file the lawsuit that eventually resulted in the annulment of the zoning plan change.
14. Second, Claimants’ request to adduce the New Evidence derives directly from Ms. Štěpánková’s testimony at the Hearing, testimony which Claimants now suggest they can demonstrate to have been untruthful. The Request to submit the New Evidence only arose *after* the Hearing, because before the Hearing, Claimants could not have anticipated that the truthfulness of Ms. Štěpánková’s testimony would be susceptible to challenge in such a way.

15. Finally, Respondent counter-argues that the Czech Republic should be able to defend itself against allegations raised in respect of Ms. Štěpánková's credibility through Ms. Štěpánková herself. To ease such concerns, the Republic will be granted the opportunity to provide an affidavit by Ms. Štěpánková, referring exclusively to the issues raised by the New Evidence, within 10 days from the introduction of the New Evidence into the record. In order to afford the Parties an opportunity to comment upon this material in their post-hearing briefs, the submission of such briefs, scheduled for 8 July 2020, shall be postponed until 15 July 2020.

16. Accordingly, the Tribunal allows the introduction of the New Evidence into the record by **18 June 2020**. If so advised, Respondent may file an affidavit by Ms. Štěpánková in answer exclusively and specifically to the issues raised by the New Evidence by **29 June 2020**. The date for submission of the Parties' respective post-hearing briefs shall be postponed until **15 July 2020** and the date for submission of the Parties' respective Statements of Costs remains unchanged. A new procedural calendar is attached.

On behalf of the Tribunal,

[signed]

Prof. Juan Fernández-Armesto
President of the Tribunal
Date: 16 June 2020

POST-HEARING PROCEDURAL TIMETABLE (16 JUNE 2020)

Procedural action	Party required to act	Deadline
Introduction of the New Evidence into the record	Claimants	18 June 2020
Affidavit by Ms. Štěpánková in answer exclusively and specifically to the issues raised by the New Evidence	Respondent	29 June 2020
Simultaneous Post-Hearing Briefs (limited to 30,000 words)	Both Parties	15 July 2020
Simultaneous Statements of Costs	Both Parties	6 August 2020