

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

HUMAN RIGHTS DEFENDERS INC.,

AS ASSIGNEE OF

NATALE PALAZZO, RODOLFO SCODELLER AND ANTONIO BASILE

Claimant

and

SWISS CONFEDERATION

Respondent

ICSID Case No. ARB/20/29

**ORDER OF THE TRIBUNAL
DISCONTINUING THE PROCEEDING**

Members of the Tribunal

Sir Daniel Bethlehem QC, President

Mr Gabriel Bottini, Arbitrator

Mr Toby Landau QC, Arbitrator

Secretary of the Tribunal

Mr Alex B. Kaplan

Date of dispatch to the Parties: 18 January 2022

REPRESENTATION OF THE PARTIES

Representing Human Rights Defenders Inc., as assignee of Mr. Natale Palazzo, Mr. Rodolfo Scodeller and Mr. Antonio Basile:

Mr. Giuliano Stefano Wildhaber
Human Rights Defenders Inc.
Postfach 118
CH-9606 Bütschwil / SG
Swiss Confederation

Representing the Swiss Confederation:

Mr. Lukas Siegenthaler
State Secretariat for Economic Affairs
Holzikofenweg 36
3003 Bern
Swiss Confederation

and

Mr. Matthias Scherer
Dr. Veijo Heiskanen
Mr. Baptiste Rigauddau
Mr. Alec Ray
Lalive
Rue de la Mairie 35
1207 Geneva
Swiss Confederation

I. PROCEDURAL HISTORY

1. On 29 May 2020, the International Centre for Settlement of Investment Disputes (“ICSID”) received a request for arbitration from Human Rights Defenders Inc. (“HRDI” or “the Claimant”), as assignee of Mr. Natale Palazzo, Mr. Rodolfo Scodeller and Mr. Antonio Basile for the institution of arbitration proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“the ICSID Convention”), in respect of a dispute with the Swiss Confederation (“the Request”).
2. Together, the Claimant and the Swiss Confederation (or “the Respondent”) are referred to as the Parties.
3. On 17 August 2020, the ICSID Secretary-General registered the Request pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “ICSID Institution Rules”) 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 the ICSID Institution Rules.
4. In the absence of an agreement between the Parties, on 24 November 2020, the Respondent invoked Article 37(2)(b) of the ICSID Convention regarding the number of arbitrators and the method of their appointment. In accordance with that provision, the Tribunal shall consist of three arbitrators—one arbitrator appointed by each Party and the third, the presiding arbitrator, appointed by the agreement of the Parties.
5. On 17 November 2020, the Respondent appointed Mr. Toby Landau QC, a national of the United Kingdom, as an arbitrator. The Respondent also invoked Article 38 of the ICSID Convention on that same date and requested that the Chairman of the ICSID Administrative Council appoint the arbitrators not yet appointed.
6. On 13 January 2021, consequent upon the appointments’ procedure prescribed in Article 38 of the ICSID Convention, the ICSID Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration

Rules”) notified the Parties that the Tribunal was deemed to have been constituted as of that date. In addition to Mr. Landau QC, appointed by the Respondent, the Tribunal is composed of Mr. Gabriel Bottini, a national of the Argentine Republic, and Sir Daniel Bethlehem QC, a national of the United Kingdom, as presiding arbitrator, both having been appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention. Mr. Alex B. Kaplan, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

7. By letter dated 20 January 2021, the Tribunal Secretary, writing on behalf of the Tribunal, requested each Party to make an initial advance payment in the amount of USD 125,000.00, pursuant to ICSID Administrative and Financial Regulation 14(3)(d). Payment was due within thirty days after the date of that request, *i.e.*, by 22 February 2021. By the same letter, the Tribunal enquired about the Parties’ availability for the Tribunal’s First Session to be held on 11 or 12 March 2021, “pending the receipt of funds”. For completeness and the avoidance of doubt, the Tribunal also noted that, given the absence of financial contributions to that date, it would take no further steps in the proceedings “until it is in receipt of funds”.
8. By an application dated 29 January 2021 and submitted under Rule 41(5) of the ICSID Arbitration Rules (the “Rule 41(5) Application”), the Respondent submitted that the Claimant’s claims are “manifestly without legal merit” and “fall manifestly outside the jurisdiction of ICSID and the competence of the Tribunal under Article 25 of the ICSID Convention. The Respondent accordingly requested that the Tribunal, *inter alia*, “dismiss HRDI’s claims for manifest lack of legal merit under Rule 41(5) of the ICSID Arbitration Rules”.
9. By letter dated 1 February 2021, the Tribunal indicated a briefing schedule for submissions on the Respondent’s Rule 41(5) Application. In doing so, it also reiterated that it would take no further steps in the proceedings until it was in receipt of funds, as per the Tribunal Secretary’s letter of 20 January 2021.

10. On 5 February 2021, ICSID's financial department confirmed its receipt of a wire transfer from the Respondent corresponding to the Respondent's portion of the requested advance payment.
11. By the due date of 22 February 2021, ICSID had not received payment from the Claimant of its share of the advance on costs of the arbitration.
12. On 23 February 2021, in accordance with Administrative and Financial Regulation 14(3)(d), ICSID informed the Parties of the Claimant's default and gave either Party the opportunity to make the required payment within 15 days, *i.e.*, by 10 March 2021.
13. Insofar as is relevant for present purposes, Article 14(3) of the ICSID Administrative and Financial Regulations provides as follows:

(3) In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):

(a) the parties shall make advance payments to the Centre as follows:

(i) initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;

[...]

(b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;

(c) if the initial advance payments are insufficient to cover estimated future expenses, prior to requesting

the parties to make additional advance payments, the Secretary-General shall ascertain the actual expenses incurred and commitments entered into by the Centre with regard to each proceeding and shall appropriately charge or credit the parties;

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding.

14. By letter to the Parties dated 24 February 2021, the Tribunal fixed 11 March 2021 as the date of the Tribunal's First Session and addressed in detail the modalities relevant to that session. By this letter, having regard to the Parties' submissions on the Respondent's Rule 41(5) Application, the Tribunal also indicated that it considered that "the Parties should have a further opportunity to make succinct oral submissions on the Rule 41(5) issue in the course of the First Session", and issued directions in this regard.
15. By letter dated 26 February 2021, the Respondent wrote to the ICSID Secretariat expressing the view that it had no obligation to pay the Claimant's share of the advance on

costs and confirmed that it did not intend to do so. By the same letter, the Respondent, “[i]n light of HRDI’s default”, requested “that the Secretary-General move the Tribunal to stay the proceedings in accordance with Administrative and Financial Regulation 14(3)(d)” and further requested “that the First Session be immediately cancelled, as in the circumstances [the Respondent] should not be required to incur the cost of preparing for the First Session.”

16. By correspondence dated 26 February 2021, the Tribunal invited the Claimant to comment on the Respondent’s letter of 26 February 2021.
17. By letter dated 27 February 2021, the Claimant addressed the Respondent’s letter of 26 February 2021, *inter alia*, requesting that the Tribunal order the Respondent to pay the Claimant’s advance on costs of USD 125,000.00 by way of a provisional measure.
18. By letter to the Parties dated 1 March 2021, the Tribunal addressed the Parties’ correspondence dated 26 and 27 February 2021, noting, *inter alia*, as follows:

Having considered the matter carefully, the Tribunal has come to an assessment that the funds available to it would not be sufficient to cover the costs of the scheduled First Session of the proceedings on 11 March 2021 and the parallel proceedings on the Respondent’s application under Rule 41(5) of the ICSID Arbitration Rules, a procedure which requires decision by the Tribunal “at its first session or promptly thereafter”. The Tribunal accordingly concludes that the First Session scheduled for 11 March 2021 should be immediately vacated and the proceedings suspended pending payment of the outstanding advance costs contribution by the Claimant.

*The Tribunal adds that, having deliberated on the matter, it can see no basis for a provisional measure along the lines sought by the Claimant. As both Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules make clear, the purpose of provisional measures is the preservation of rights. It is not an available avenue of recourse for a Claimant who is unable to meet its costs contribution obligations under ICSID Administrative and Financial Regulation 14(3)(d), which provides, *inter alia*, that “unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one*

half of each advance [payment of costs] or supplemental charge”. The Tribunal sees no basis for varying the standard rule.

In the light of the preceding, the Parties should take this correspondence as a direction from the Tribunal vacating the scheduled 11 March 2021 First Session date and suspending the proceedings pending payment of the outstanding advance costs contribution by the Claimant. For good order, these directions will be crystallised in a Procedural Order to be made by the Tribunal and transmitted to the Parties in due course.

For completeness, and to avoid any misapprehension, the Tribunal notes that it stands ready to resume the proceedings immediately upon receipt of the requested payment towards the advance costs of the proceedings by the Claimant. The Tribunal draws equally to the attention of the Parties, for special attention of the Claimant, the concluding sentences of ICSID Administrative and Financial Regulation 14(3)(d), which provide as follows: “At any time 15 days after such information is sent by the Secretary- General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding”.

19. By letter to the Tribunal dated 12 March 2021, the Tribunal Secretary noted that,

As of today, ICSID has not received the outstanding payment from either party. Accordingly, pursuant to Regulation 14(3)(d), the Secretary-General moves the Tribunal to stay the proceeding for non-payment. In this regard, the Secretary-General understands that the Tribunal indicated to the parties on March 1, 2021 that the case is ‘suspended’. By way of this letter, the Secretary-General moves the Tribunal for a suspension specifically within the ambit of Regulation 14(3)(d).

20. On 22 March 2021, the Tribunal issued Procedural Order No. 1 staying the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

21. On 20 August 2021, ICSID informed the Parties that the proceeding has been stayed for non-payment of the required advances since 22 March 2021 and that the six-month period referenced in ICSID Administrative and Financial Regulation 14(3)(d) would expire on

- 22 September 2021. In this correspondence, ICSID noted further that, if the outstanding payment was not received from either Party before 22 September 2021, the ICSID Secretary-General would consider moving the Tribunal to discontinue the proceeding.
22. On 3 September 2021, the ICSID Secretariat received a communication from Mr. Jonathan Xavier Santos Delgado, representing himself to be a liquidator of Human Rights Defenders Inc. who was appointed by a Seychellois bankruptcy court. The correspondence conveyed a power of attorney in favor of Mr. Danilo Ruggero Di Bella to represent “Human Rights Defenders Inc. (in liquidation)” in the present proceeding.
 23. By letter of 16 September 2021, the Claimant asked for a 12-month extension to pay the outstanding call for funds, stating that Human Rights Defenders Inc. has a pending appeal in the bankruptcy proceeding in Seychelles.
 24. On 20 September 2021, ICSID notified Mr. Santos Delgado and Mr. Di Bella that the Centre was in receipt of their respective correspondence and that they were not currently listed as representatives or counsel of record for the Claimant in the ICSID proceeding, and observed that if they wished to be added to the record, they should file with ICSID a reasoned request addressed to the Tribunal.
 25. By letter of 23 September 2021, the Respondent noted that the proceeding has been stayed in excess of six months and requested that the ICSID Secretary-General move the Tribunal to discontinue the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d). Additionally, the Respondent stated its intention to request that the Tribunal issue an award on costs in favor of the Swiss Confederation.
 26. On 24 September 2021, Mr. Di Bella filed a request on behalf of Mr. Santos Delgado, seeking to be added to the record in the present proceeding.
 27. By correspondence of 24 September 2021, the Tribunal invited the Claimant to comment on the aforementioned request filed on behalf of Mr. Santos Delgado. On the same date, ICSID notified the Respondent that the Tribunal would seek the Claimant’s view of the Swiss Confederation’s 23 September 2021 request.

28. On 26 September 2021, the Claimant submitted to the Tribunal that Mr. Di Bella and Mr. Santos Delgado should not be added to the record nor should any correspondence from them be forwarded to the Claimant or the Tribunal due to an appeal of the bankruptcy proceeding currently pending before the Seychelles courts. The Claimant also reiterated its 16 September 2021 request for a 12-month extension to pay the first advance on the same basis.
29. On 27 September 2021, the Tribunal invited the Respondent to comment on the issues raised in its 24 September 2021 letter.
30. By letter of 7 October 2021, the Respondent stated that it had no objection to Mr. Di Bella and Mr. Santos Delgado being included in the record of the proceeding. The Respondent, however, objected to the Claimant's request for extension of time to pay its share of the advance. Finally, the Respondent reiterated its request that pursuant to ICSID Administrative and Financial Regulation 14(3)(b) the ICSID Secretary-General move the Tribunal to discontinue the proceeding and maintained its intention to request an award on costs.
31. By correspondence of 6 December 2021, the Tribunal decided to permit Mr. Santos Delgado and Mr. Di Bella to be included on the record of the case, stating that they should be copied on all case correspondence moving forward. The Tribunal also invited Mr. Santos Delgado and Mr. Di Bella to comment on the Respondent's letters of 23 September and 7 October 2021, with the Claimant permitted to make further observations thereafter.
32. On 7 December 2021, the ICSID Secretariat notified the Parties that since more than six consecutive months had elapsed from the date that the proceeding was stayed for non-payment and no payment had been received from either party, the ICSID Secretary-General was considering moving the Tribunal to discontinue the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d); the Parties and Mr. Santos Delgado were invited to provide any further observations on the matter.

33. On 9 December 2021, the Claimant again reiterated its request for an extension of 12 months to pay its share of the outstanding advance.
34. On 13 December 2021, Mr. Di Bella submitted that the “Claimant (in liquidation)” was in no position to pay the outstanding advance and, therefore, “we may agree with the discontinuance” as requested by the Respondent. Mr. Di Bella, however, objected to the Respondent’s request for an award on costs in favor of the Swiss Confederation, since both Parties were “jointly and severally liable for paying the advances” and both Parties were presently in default. Mr. Di Bella further proposed several possible scenarios on how the case should proceed, concluding that “the outstanding debt of Human Rights Defenders Inc. (in liquidation) are [sic] repaid in full.”
35. By letter of that same date, the Respondent maintained its request for discontinuance and for an award on costs in favor of the Swiss Confederation.
36. On 15 December 2021, the Claimant informed the Tribunal that the bankruptcy proceedings in the Seychelles were still pending in an appeal.
37. On 17 December 2021, the ICSID Acting Secretary-General wrote to the Tribunal addressing the non-payment of the required advances for more than six consecutive months and, stated accordingly,

In light of the present circumstances, after having provided notice to and consulted with the parties as far as possible, I move the Tribunal to discontinue this proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

38. Also on 17 December 2021, the Secretary of the Tribunal wrote to the Parties and other persons on the record of the proceeding recalling the procedural history relevant to the non-payment of the required advances for more than six consecutive months, and noted, having regard to these circumstances,

As of today, ICSID has not received the outstanding payment from either party. Therefore, after having provided notice to and consulted with the parties as far as possible, the Secretary-General has moved the Tribunal to discontinue the proceeding for

nonpayment pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

39. On 21 December 2021, the Respondent wrote to the Tribunal, referencing the ICSID Secretariat's 17 December 2021 letter, and requesting "that the Tribunal grant[] it leave to submit an application for an Award on costs in its favour ... [ordering] the reimbursement of the Swiss Confederation's costs and discontinuance of the proceedings in a single Award."
40. Also on 21 December 2021, Mr. Di Bella wrote to the Tribunal referencing the Respondent's correspondence of earlier that date, *inter alia*, objecting to the Respondent's application for an award on costs and contending that Rule 44 of the ICSID Arbitration Rules, which addresses "Discontinuance at Request of a Party", precludes the rendering of an award, let alone an award on costs.
41. On 23 December 2021, the Respondent wrote to the Secretary of the Tribunal referencing its 21 December 2021 letter and stating as follows:

In the interest of efficiency, the Swiss Confederation withdraws its request for leave. This is without prejudice to its view that HRDI's manifestly unmeritorious claim caused financial prejudice to the Swiss Confederation for which HRDI is liable.

II. DISCUSSION

42. In its decision in Procedural Order No. 1 of 22 March 2021 staying the proceedings for non-payment of the required financial contribution from the Parties, the Tribunal stated, *inter alia*, as follows:

17. *The Tribunal notes that ICSID Administrative and Financial Regulation 14(3)(d) requires that "unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge". As the Tribunal observed in its letter of 1 March 2021, it can see no basis, in the circumstances of this case, for departing from the standard rule. Nor, as was also addressed in the Tribunal's*

letter of 1 March 2021, is there any basis for requiring the Respondent to pay the Claimant's advance on costs contribution by way of a provisional measure.

[...]

20. *Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations provides, inter alia:*

“If the amounts requested are not paid in full within 30 days, then the Secretary- General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding.”

21. *There is no dispute that this is the situation with which the Tribunal is faced.*

22. *The ICSID Secretary-General is responsible for ensuring that the Centre, including tribunals established under its auspices, operate within the budgetary constraints laid down in the Convention and in the ICSID Administrative and Financial Regulations. This follows from Articles 59 and 60(1) of the ICSID Convention and Regulation 14 of the ICSID Administrative and Financial Regulations. Tribunals cannot operate beyond their financial means, thereby incurring liabilities for the Centre. Parties to proceedings before the Centre, including tribunals established under its auspices, have an obligation to make advance on costs contributions as requested by a tribunal.*

23. *Having regard to these requirements, and to the circumstances of this case, the Tribunal considers that it must accede to the Secretary-General's request “for a suspension specifically within the ambit of Regulation 14(3)(d)”, a formulation that the Tribunal understands to mean a “stay” of the proceedings, within the meaning of this term in Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations. The Tribunal accordingly directs that the proceeding be stayed in consequence of the default of the Claimant in respect of the advance on costs contribution required of it under the ICSID Administrative and Financial Regulations.*

43. The Tribunal notes the Acting Secretary-General's 17 December 2021 correspondence that no payment of the outstanding financial contribution from the Parties had been received by that date, and that, notwithstanding the further passage of time to this point, no financial contribution has yet been received.
44. The Tribunal notes that the Acting Secretary-General of ICSID, by her correspondence dated 17 December 2021, "move[d] the Tribunal to discontinue this proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d)."
45. The Tribunal reiterates its analysis, recalled above, about the responsibility of the ICSID Secretary-General for ensuring that the Centre, including tribunals established under its auspices, operate within the budgetary constraints laid down in the Convention and in the ICSID Administrative and Financial Regulations, and that tribunals cannot operate beyond their financial means, thereby incurring liabilities for the Centre. As the Tribunal has already observed, parties to proceedings before the Centre, including tribunals established under its auspices, have an obligation to make advances on costs contributions as requested by a tribunal.
46. Having regard to these requirements, and to the circumstances of this case, the Tribunal considers that it must accede to the Acting Secretary-General's request to the Tribunal to discontinue this proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d). In so doing, the Tribunal observes that it has accorded the Parties, and in particular the Claimant, whose financial contribution it is that has not been forthcoming, every latitude to make the necessary payment, including an extended procedure, beyond the required six month period, in view of the unusual prevailing circumstances.
47. In light of the above, the Tribunal has decided to discontinue this proceeding due to non-payment of the first advance in accordance with ICSID Administrative and Financial Regulation 14(3)(d).

III. ORDER

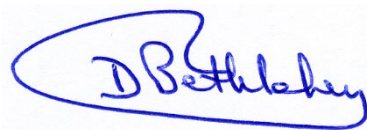
48. The Tribunal decides that the arbitration proceeding is hereby discontinued pursuant to ICSID Administrative and Financial Regulation 14(3)(d).



Gabriel Bottini
Arbitrator



Toby Landau QC
Arbitrator



Sir Daniel Bethlehem QC
President of the Tribunal

Dated as of 18 January 2022