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# ICSID Tribunal issues gag order to stop parties turning arbitration into "trial by media"

On 12 May 2016, the ICSID Tribunal in *United Utilities (Tallinn) B.V. v Republic of Estonia* granted provisional measures restricting the parties from publishing documents filed in the arbitration. The Tribunal, however, allowed the parties to engage in public discussion of the case, provided it was not used to aggravate, disrupt or exacerbate the proceedings.

The application for provisional measures was made by Estonia in response to United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi (together, the **Claimants**) publishing an extract of the Claimants' memorial of claim on Aktsiaselts Tallinna Vesi's website shortly prior to Estonia filing its counter-memorial. In its application, Estonia argued that the Claimants' publication had "*no legitimate basis*" and was designed to offer a "*one-sided picture of the dispute*" and distract Estonia from its filing preparation. It also contended that the Claimants' publication had the effect of exacerbating the dispute by turning the arbitration into a trial by media and would severely compromise Estonia's right of due process. Estonia argued that the Claimants had been "*waging a one-sided media campaign since the beginning of the arbitration, 'designed to convince the Estonian public that Estonia is wrong and will lose the case*'".

The Claimants rejected Estonia's contentions, submitting that the disclosure of excerpts of arbitration documents were for the purpose of informing their shareholders of the status of the arbitration and their position.

Further, the Claimants argued that the disclosures mostly related to information that was already public and did not reveal any confidential information such as State secrets.

The starting point for the Tribunal – Mr Stephen Drymer (Canada), Professor Brigitte Stern (France) and Professor David Williams QC (New Zealand) – was to determine whether there is a general duty of confidentiality and/or general right to disclosure in ICSID proceedings. The Tribunal concluded that there is neither a general duty of confidentiality nor a general right to disclosure in ICSID proceedings. Instead, the Tribunal held that applications for provisional measures, like Estonia's, must be determined on a case by case basis having regard to the criteria for the granting of provisional measures. Namely, (a) whether the tribunal has *prima facie* jurisdiction; (b) whether there is a *prima facie* right susceptible of protection; (c) the necessity of the provisional measure sought; (d) the urgency of the provisional measure sought; and (e) the proportionality of the provisional measure sought.

## Key Points

- There is no general duty of confidentiality nor a general right to disclosure in ICSID arbitration
- Whether public discussion and publication of documents in an ICSID arbitration should or should not be allowed is to be determined on a case by case basis
- Parties to ICSID proceedings should ensure that any public disclosure or discussion in relation to the proceedings does not aggravate the dispute
- Careful consideration should be given to aspects of confidentiality when selecting the dispute resolution method to be adopted in an investor-State claim

In applying those criteria to Estonia's application, the Tribunal recognised the need to balance the parties' right to engage in general public discussion of the case and ensuring procedural integrity and non-aggravation of the dispute.

Accordingly, the Tribunal concluded that "[...] *no party should be prevented from engaging in general discussion about the case in public, which discussion* [...] *may include* [...] *a summary of the parties' positions, provided that such public discussion is not used as an instrument to antagonise any party, exacerbate the parties' differences, aggravate the dispute, disrupt the proceedings or unduly pressure any party*".

The Tribunal added that public discussion did not extend to publication of documents filed in the arbitration, including written submissions, witness statements and expert reports, and extracts and excerpts thereof.

This position, taken within the framework of an ICSID arbitration, in *United Utilities* may be contrasted with an investor-State arbitration conducted under the United Nations Commission on International Trade Law (**UNCITRAL**) Arbitration Rules. From our experience, treaty arbitrations conducted under the UNCITRAL Arbitration Rules currently attract more confidentiality than ICSID arbitrations. For example, even the existence of a treaty claim under the UNCITRAL Arbitration Rules may not be made public. By comparison, the ICSID website lists in detail every ICSID arbitration whether pending or concluded.

A very different situation will be present in cases where the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (**UNCITRAL Transparency Rules**) will apply. These Rules have default application in disputes arising under an investment treaty concluded on or after 1 April 2014, unless the parties to the treaty have agreed otherwise. Article 3 of the UNCITRAL Transparency Rules enables, (with exceptions) the pleadings, witness statements, expert reports, transcripts of hearings, decisions and awards in the case to be made available to the public. Exhibits are exempted from disclosure, as are certain documents deemed to be confidential or protected. No treaty tribunal has yet applied these rules.

The UNCITRAL Transparency Rules may apply to ICSID arbitrations pursuant to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (**Mauritius Convention**), which is designed to apply the UNCITRAL Transparency Rules to investor-State arbitrations under any set of arbitration rules (even for ICSID arbitrations).

The Mauritius Convention opened for signature on 17 March 2015, but is not yet in force. If, and when, the Mauritius Convention does enter into force, a tribunal required to apply the Convention would be expected to arrive at a very different decision from that made in *United Utilities*: most documents submitted in the arbitration (with the exception of exhibits and certain confidential or protected documents) would be made available to the public.

The *United Utilities* case and the recent developments in transparency in investment arbitration requires that careful consideration be given to aspects of confidentiality when selecting the dispute resolution method to be adopted in an investor's treaty claim. The choice may have a critical impact on whether information in the arbtiraton will enter into the public domain.

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