

**United Utilities (Tallinn) B.V.**

and

**Aktsiaselts Tallinna Vesi**

Claimants

v.

**Republic of Estonia**

Respondent

ICSID Case No. ARB/14/24

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**PROCEDURAL ORDER No. 2**

**Decision on Respondent's Request for Bifurcation  
and on the Timetable for the Arbitration**

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**The Tribunal**

Mr. Stephen L. Drymer, President  
Prof. Brigitte Stern, Arbitrator  
Mr. David A.R. Williams, Arbitrator

**Secretary of the Tribunal**

Mr. Paul-Jean Le Cannu

**Date:** 17 June 2015

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## INTRODUCTION

1. This Procedural Order addresses certain issues left unresolved at the first session of the Tribunal held on 5 May 2015 (“**First Session**”) and by Procedural Order No. 1, dated 5 June 2015.
2. First, it determines whether the proceedings are to be bifurcated, as requested by Respondent.
3. Second, it decides certain scheduling matters that the parties have been unable to resolve between themselves.
4. As noted at §14.1 of Procedural Order No. 1, the parties’ positions in respect of these issues were set out in their correspondence and written submissions dated 1 May 2015 and were pleaded orally at the First Session.
5. On the basis of the Tribunal’s determination of these matters, the timetable for the arbitration (“**Timetable**”) is annexed hereto as Annex A.

### I. BIFURCATION

#### A. Estonia’s Request

6. In its Request for Bifurcation (“**Request**”), Estonia asks that the proceedings be bifurcated in accordance with Article 41(2) of the ICSID Convention (“**Convention**”) so as to allow the issue of jurisdiction to be considered and decided by the Tribunal as a preliminary question, separately from the merits of the dispute. It argues that the objections to jurisdiction that it intends to raise warrant bifurcation for compelling reasons of procedural economy and the orderly conduct of the arbitration.
7. Estonia states that it currently intends to raise two objections – and possibly a third – under Article 41(2) of the Convention and Rule 41(1) of the ICSID Arbitration Rules (“**Rules**”):
  - Aktsiaselts Tallinna Vesi (“**ASTV**” or “**Tallinna Vesi**”) is not an investor within the meaning of Article 1(b)(iii) of the Dutch-Estonian BIT at issue in this case (“**Treaty**”), as it is not controlled directly or indirectly by United Utilities (Tallinn) B.V. (“**UUTBV**” or “**United Utilities**”) or by any other Dutch entity; and
  - The Tribunal’s jurisdiction over the Claimants’ claims related to the 12 January 2001 Service Agreement between ASTV and the City of Tallinn (“**Service Agreement**”) is barred – more specifically, the parties’ consent to ICSID arbitration under Article 26 of the Convention is vitiated – by virtue of the fact that ASTV has initiated and continues to pursue no fewer than five domestic court cases against the Estonian authorities in connection with the Service

Agreement, in which “the same facts [are alleged] and the same remedy is being sought” as in this arbitration.<sup>1</sup>

- Estonia is also considering whether to raise a third jurisdictional challenge – “the so-called ‘intra-EU BIT’ objection to jurisdiction” – in which case, “[i]f the objection is raised, it may be accompanied by an *amicus curiae* submitted by the European Commission.”<sup>2</sup>
8. Estonia submits that bifurcation is called for, to allow the Tribunal to consider and decide these objections separately from the merits of the dispute, for five reasons:
- i. Bifurcation would result in significant cost savings if some or all of the Claimants’ claims are ultimately dismissed on jurisdictional grounds;
  - ii. Even if only ASTV’s claims were to be dismissed, the number of UUTBV’s claims to be considered in the merits phase would be significantly limited and the nature of those claims would be circumscribed;
  - iii. Removal of ASTV on jurisdictional grounds would significantly reduce the quantum claimed and would as well alter the methodology used to calculate any damages that might be found to be owed to UUTBV;
  - iv. Respondent’s jurisdictional objections require a determination of discrete factual and legal issues that are unrelated to, and can be neatly separated from, the issues associated with the merits of Claimants’ claims;
  - v. Removal of ASTV from the arbitration would enable Estonia to gain access to important documents regarding the Service Agreement from the City of Tallinn, which has thus far refused to provide such information to Respondent on the ground that as a shareholder in ASTV it has a duty of loyalty to the company that prevents it from undermining the company’s claim for compensation in the arbitration.

#### **B. Claimants’ Response**

9. Claimants consider that the proceedings should not be bifurcated into separate jurisdiction and merits phases. In their submissions in response to Estonia’s Request (“**Response**”), they contend that bifurcation will not contribute to procedural economy and will in fact add to the time and costs of the proceedings and cause them significant prejudice.

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<sup>1</sup> First Session Transcript (“**Tr.**”) page 51: lines 3-9.

<sup>2</sup> Request, pp. 2-3. At the First Session, Estonia stated that “it is very likely that if the decision is made to proceed this way, then the European Commission will file an *amicus curiae*.” (Tr. 53:17-19)

10. Claimants submit that the specific jurisdictional objections identified by Respondent are without merit:
- Evidence of UUTBV's control of ASTV will be provided at the appropriate time;
  - Article 26 of the Convention is not a jurisdictional provision of the Convention and does not operate to affect the Tribunal's jurisdiction, and in any case the domestic court proceedings initiated by ASTV are domestic administrative law claims, not treaty claims, and do not affect Claimants' substantive or procedural rights under the Treaty, which does not contain a fork-in-the-road provision;
  - The "intra-EU BIT" objection to jurisdiction has to date been rejected in every published decision in which it has been considered by an investment treaty arbitration tribunal.
11. Bifurcation is fundamentally unwarranted, say Claimants, because the jurisdictional objections raised by Estonia do not involve what Claimants call a "knockout blow ... [T]here is no knockout blow, because whatever happens on those proposed jurisdictional challenges ... UUTBV will remain in the case, and therefore the case ... will continue on a similar scale whatever is the result of the jurisdictional challenge."<sup>3</sup>
12. Claimants further decry what they call Estonia's effort to characterise this case as "a claim that's only about the services agreement, in an attempt to show that the Estonian proceedings brought by ASTV will prevent any other claim being brought; and also in an attempt to show, because [UUTBV] is not a party to the services agreement, that UUTBV is just an add-on to this case that cannot [sic] be ignored."<sup>4</sup> On the contrary, say Claimants, this case is fundamentally about "a privatisation where the bidder in that privatisation was [UUTBV]."
13. As regards the five reasons invoked by Respondent in support of bifurcation, Claimants argue:
- i. Estonia's proposed jurisdictional challenges concern ASTV, not UUTBV. Even if ASTV were removed from the case this would not significantly reduce the costs involved in the arbitration;
  - ii. Even if ASTV were "knocked out" as a claimant, UUTBV's claims – including its umbrella clause claim – would remain unaffected, and UUTBV would still be entitled to seek, as it does, compensation for the diminution of the value of its shares in ASTV;
  - iii. Whatever impact the removal of ASTV from the case may have on the overall quantum of damages to be paid by Respondent, it would not

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<sup>3</sup> Tr. 61:2-11.

<sup>4</sup> Tr. 62:2-13.

affect the time or cost involved in determining damages, “[b]ecause to work out the quantum of UUTBV’s claim, the Tribunal will first need to work out what the tariffs [owed to ASTV] would have been had Estonia not altered ... the tariff methodology”;<sup>5</sup>

- iv. Many of the factual and legal issues associated with Respondent’s jurisdictional objections arise as well in connection with the merits. This includes the history of UUTBV’s control of ASTV, for which the same witnesses will be required to give evidence – one of whom is no longer employed by UUTBV and may not be able to be prevailed upon to testify on two separate occasions;
- v. The attitude of the City of Tallinn with respect to documents, and speculation as to how that attitude may or may not change depending on whether ASTV remains a party to the arbitration, is not an argument that bears on bifurcation. In any event “the Tribunal has many tools in its armoury to get specific relevant documents, and if we were asked for them, I’m sure we would produce them, if they were specific and relevant.”<sup>6</sup>

### **C. Discussion**

- 14. One of the difficulties associated with deciding whether or not to order bifurcation arises from the fact that the nature and substance of the jurisdictional objections that Respondent proposes be decided in a preliminary phase of the arbitration have yet to be fully articulated. Estonia has described briefly – it has “foreshadowed”, as it says in its Request – the jurisdictional objections that it intends to raise, and it has suggested that additional objections may also be forthcoming. Its argument for bifurcation is based largely on the proposition that its objections are well-founded and are likely to be granted by the Tribunal.
- 15. However, Respondent’s objections, and of course Claimants’ responses thereto, will only be fleshed out and considered at a later stage of the proceedings. A decision on bifurcation can only be based, therefore, on a *prima facie* appreciation of whether bifurcation will or will not prove to be appropriate in the circumstances of this case as they eventually unfold.
- 16. The parties agree that the decision to bifurcate – or not – ought to be based on considerations of procedural economy (as Respondent refers to it) or procedural efficiency (in Claimants’ words). The parties also agree that economy and efficiency entail a consideration of the impact of bifurcation on the overall time and costs of the proceedings, which includes considering whether and how the success of a jurisdictional

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<sup>5</sup> Tr. 70 :17-24.

<sup>6</sup> Tr. 89 :10-15

challenge would obviate or otherwise impact the conduct of a subsequent merits phase. The Tribunal agrees.

17. Without entering into a discussion of the merits of the jurisdictional objections which Respondent has indicated that it intends to raise, it suffices to note that the Tribunal is satisfied that those objections are genuine and, if they are in fact raised, will require serious consideration by the Tribunal. The main problem with Estonia's request, as Claimants point out, is that none of its potential objections (with the possible exception of the "intra-EU BIT challenge", which Respondent is as yet uncertain it will even raise), if granted, would put an end to the arbitration. The arbitration would thus proceed to the merits in any event, though after a delay more or less coterminous with the time necessary for the issue of jurisdiction to be briefed, pleaded, considered and determined.
18. The proposed timetables submitted jointly by the parties with their submissions of 1 May 2015 are helpful in quantifying this delay. The parties submitted two timetables: an agreed timetable covering the preliminary phase of the arbitration in the event that the proceedings are bifurcated; and a timetable, largely agreed, that would apply in the event that the proceedings are not bifurcated.
19. The parties' *bifurcated* timetable envisages that Claimants will file their Memorial on 18 September 2015, to be followed by Respondent's Memorial on Preliminary Objections and further Counter- and Reply submissions from the parties focused exclusively on those objections, all leading to a two- or possibly three-day hearing on Respondent's preliminary objections to be held during the period 23 to 25 May 2016.<sup>7</sup>
20. The parties' *non-bifurcated* timetable envisages, similarly, that Claimants will file their Memorial on 18 September 2015, and that, as discussed at the First Session, a hearing – on both jurisdiction and the merits – of up to seven days will be held during the period 7 to 15 November 2016.<sup>8</sup>
21. What the parties' proposed timetables do not explicitly address is the scenario in which the proceedings are bifurcated, a decision on Estonia's preliminary objections is rendered, and then (as is very possible, if the Claimants are not completely "knocked out") the parties and Tribunal return to the fray in order to address and resolve Claimants' remaining claims.
22. In this regard, it seems reasonable to base an estimate of the procedural steps and the time required to brief and hear whatever claims might remain after Respondent's

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<sup>7</sup> The parties' proposed timetable indicates hearing dates in "May 2016". The dates 23-25 May 2016 – specifically, 23-24 May, with 25 May held in reserve – were identified and tentatively agreed by the parties and the Tribunal during the First Session.

<sup>8</sup> The parties' proposed timetable did not indicate hearing dates, though at the First Session it became apparent that, if the proceedings were not bifurcated, the case would be ready for hearing during Autumn 2016. The dates 7-11 and 14-15 November 2016 were identified and tentatively agreed by the parties and the Tribunal as potential dates for a hearing on the merits in the event that the proceedings are not bifurcated.

preliminary objections are resolved, on the parties' own estimates. The parties' *non-bifurcated* timetable envisages approximately one year from the filing of Claimants' Memorial to a hearing on the merits.<sup>9</sup> This, more or less, is the time that would be required to bring the case to a hearing after the conclusion of a preliminary (jurisdictional) phase that does not result in what Claimants call a knockout blow. Of course, that timetable does not account for any efficiencies that might be achieved by virtue of the fact that, as Respondent argues, certain aspects of Claimants' case may fall away entirely or be simplified and thus require less briefing or hearing time. Still, in the Tribunal's view, it is illustrative of the timetable that might well remain to be implemented once all preliminary objections are decided.

23. Another angle from which to approach the question is to consider that the parties' *bifurcated* timetable envisages an approximately eight-month schedule for any preliminary objections to be briefed and heard, to which must be added a reasonable period for the Tribunal to deliberate and issue a decision. In other words, according to the parties' estimate, bifurcation would most likely entail a preliminary phase of *at least* approximately 10 months, and possibly longer, before proceedings on the merits would resume.
24. The question, then, is whether bifurcation might result in economies that outweigh the inefficiencies associated with an overall delay in resolving the dispute of approximately 10 to 12 months.
25. It is of course impossible to answer this question with certainty.
26. It seems undeniable that, if even one of the two Claimants were removed from the proceedings, and if certain of the remaining issues of liability and quantum were narrowed as a result, the merits phase of the arbitration would be rendered somewhat more efficient. However, from the admittedly skeletal submissions made by the parties to date it is also apparent that the factual issues to be considered for purposes of addressing Respondent's jurisdictional objections are not as cut and dried as Estonia suggests, and are indeed intertwined with the merits of the case as Claimants intend to plead it.
27. Nor is the Tribunal persuaded, on the basis of what it has read and heard from the parties to date, that the removal of ASTV as a Claimant (if that were to occur) would, as Estonia asserts, simplify to a significant degree the parties' and the Tribunal's tasks in relation to UUTBV's claims regarding either liability or quantum.
28. The Tribunal is not insensitive to Estonia's plea that by, in effect, clearing away certain underbrush associated with ASTV's claims, UUTBV would be forced to state its claims with greater clarity and precision. However, the question remains: at what price?

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<sup>9</sup> In fact, the period between the filing of Claimants' Memorial (on 18 September 2015) and hearing (commencing on 7 November 2016) would be approximately 14 months, as indicated above.



29. On balance, on the basis of what it knows of the case thus far, and without in any way prejudging its eventual determination of whatever jurisdictional objections may be raised, the Tribunal considers that the price of a further year's delay in resolving the dispute is not warranted in the uncertain circumstances here. The case might be rendered simpler – for Respondent; perhaps for both parties – if the proceedings were bifurcated and Estonia were to prevail on its jurisdictional objections; but it would almost certainly be rendered significantly more lengthy for all concerned, which the Tribunal does not consider fair or reasonable.
30. As to Respondent's concern regarding the accessibility of documents in the possession of the City of Tallinn, the Tribunal notes Claimants' statement, quoted above, to the effect that if they were asked in the context of this arbitration to produce specific and relevant documents that may be in the possession of ASTV's shareholder, they would produce them.
31. For all of these reasons, Respondent's Request for Bifurcation is denied.

## II. TIMETABLE

32. As mentioned above, there remains one aspect of the parties' proposed *non-bifurcated* timetable that the parties have been unable to resolve between themselves. This concerns the date on which Respondent's Rejoinder Memorial is to be filed (which determines the dates of the three subsequent pre-hearing steps – "Witness Notification"; "Pre-Hearing Organizational Meeting"; and "Pre-Hearing Skeleton" – identified in the parties' proposed timetable and discussed at the First Session). Claimants suggest that that date should be 22 July 2016. Respondent proposes 11 September 2016. In fact, 11 September 2016 is a Sunday, and the Tribunal understands Respondent's proposed date, which Estonia claims is precisely seven weeks later than Claimants', to be Friday, 9 September 2016).
33. Having considered the parties' submissions on point, and noting in particular that the period during which the Rejoinder will be prepared straddles the traditional summer vacation period, that Claimants do not claim that Estonia's proposal would give rise to any unfairness or prejudice, and – importantly – that the filing date for the Rejoinder proposed by Respondent does not affect the hearing dates otherwise identified, the Tribunal accepts Estonia's proposal. Respondent's Rejoinder shall be filed on 9 September 2016.
34. Subject to the forgoing, the Tribunal accepts the parties' proposed "*non-bifurcated*" timetable, as discussed at the First Session, as the Timetable for the arbitration. The Timetable, which may be varied or modified by the Tribunal, in whole or in part, after consultation with the parties, is annexed to this Procedural Order as Annex A.

**III. DECISION and ORDER**

35. FOR ALL OF THESE REASONS, the Tribunal decides and orders:

- (1) Respondent's Request for Bifurcation is denied;
- (2) The Timetable for the arbitration is as annexed hereto as Annex A.

For and on behalf of the Tribunal:

[Signed]

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Stephen L. Drymer  
President of the Tribunal

**Annex A: TIMETABLE**

<u>Date / Period of Time</u>	<u>Party / Tribunal</u>	<u>Description</u>	<u>§ of P.O. 1*</u>
18 September 2015	CLAIMANTS	Memorial	§§ 13, 14
5 February 2016	RESPONDENT	Counter-Memorial	§§ 13, 14
4 March 2016	CLAIMANTS AND RESPONDENT	Request for Production of Documents	§ 15
1 April 2016	CLAIMANTS AND RESPONDENT	Production of Documents non-contested; and	§ 15
		Responses and/or Objections to the Request for Production	§ 15
15 April 2016	CLAIMANTS AND RESPONDENT	Reply to Objections – Sent to Tribunal	§ 15
29 April 2016	TRIBUNAL	Decision on Objections	§ 15
13 May 2016	CLAIMANTS AND RESPONDENT	Production of Documents Ordered	§ 15
10 June 2016	CLAIMANTS	Reply Memorial	§§ 13, 14
9 September 2016	RESPONDENT	Rejoinder Memorial	§§ 13, 14
16 September 2016**	CLAIMANTS AND RESPONDENT	Witness notification	§ 18
23 September 2016**	CLAIMANTS AND RESPONDENT	Proposed Hearing Schedule; and Witnesses Requiring Translation	§§ 19, 20.8
	ALL	Pre-Hearing Organizational Meeting	
24 October 2016**	CLAIMANTS AND RESPONDENT	Pre-Hearing Skeleton; Chronology; <i>Dramatis Personae</i> ; and List of Issues	§ 20.9
<b>7-11 and 14-15 November 2016</b>	<b>ALL</b>	<b>Hearing</b>	§ 20

\* For illustrative purposes only. The terms of Procedural Order No. 1 apply in their entirety.

\*\* Date based on the *period of time* from the previous procedural step agreed by the parties and discussed at the First Session.