

United Utilities (Tallinn) B.V.

and

Aktsiaselts Tallinna Vesi

Claimants

v.

Republic of Estonia

Respondent

ICSID Case No. ARB/14/24

PROCEDURAL ORDER No. 3

Decision on Parties' Requests for Document Production

The Tribunal

Mr. David A.R. Williams, Arbitrator

Prof. Brigitte Stern, Arbitrator

Mr. Stephen L. Drymer, President

Secretary of the Tribunal

Mr. Paul-Jean Le Cannu

Date: 3 May 2016

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INTRODUCTION

1. This Procedural Order ("**Order**") addresses issues connected with the parties' respective Requests for Document Production ("**Document Requests**" or "**Requests**"), including their respective responses ("**Responses**"), objections ("**Objections**") and replies ("**Replies**") thereto, concerning which the Tribunal is requested to rule at this time.¹
2. The Tribunal's rulings in respect of the parties' specific Requests, including the reasons therefor, are set out in the Redfern Schedules annexed to this Order as "**Annex A**" (Claimants' Document Requests) and "**Annex B**" (Respondent's Document Requests).

I. PROCEDURAL BACKGROUND

3. On 4 March 2016, the parties exchanged Document Requests in accordance with §15 of Procedural Order No. 1 (as amended) dated 19 June 2015 and the Timetable at Annex A of Procedural Order No. 2 dated 17 June 2015.
4. On 1 April 2016, the parties exchanged Responses and/or Objections to those Requests.
5. On 15 April 2016, the parties filed their Replies to each other's Objections, accompanied by Redfern Schedules setting out the parties' positions in respect of the Requests on which rulings are sought.
6. On Friday afternoon, 22 April 2016, Claimants wrote to the Tribunal as follows: "The Claimants recognise that there is no right of response to Estonia's Reply provided in the timetable at Annex A to Procedural Order No. 2. However, the Claimants seek the Tribunal's permission to bring certain matters to its attention" regarding various assertions made by Respondent in its Reply.
7. Shortly after 9:00 the following Monday, 25 April 2016, the ICSID Secretariat notified the parties that the Tribunal "invites Respondent to comment briefly ... should it wish to do so, on the submissions in Claimants' 22 April 2016 letter, by Wednesday, 27 April 2016, after which no further submissions shall be made in respect of the parties' document requests."
8. Respondent duly accepted the Tribunal's invitation and provided its comments on 27 April 2016.

¹ As set out at page 2 of their 15 April 2016 submission, discussed below, Claimants currently seek an order from the Tribunal only in connection with their Requests No. 11, 14(a)-(e), 15, 17(e), 18(a), 23 and 24, and "reserve their right to seek an order from the Tribunal in connection with further Requests ...".

II. APPLICABLE STANDARDS

9. Under the ICSID Convention ("**Convention**") and Arbitration Rules ("**Rules**"), parties to ICSID arbitration have ample freedom to determine the applicable procedure in a given case, including with respect to the taking of evidence. Should the parties fail to agree, the arbitral tribunal enjoys an equally ample authority to establish the applicable procedure.

10. As regards document production, Article 43 of the Convention provides:

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence [...].

11. Similarly, Rule 34(2) of the Rules states:

The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents, witnesses and experts [...].

12. In this case, §15 of Procedural Order No. 1 further provides:

15. Production of Documents

[...]

15.2 The conduct of document production shall be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) (the "**IBA Rules**").

[...]

15.4 The Tribunal will rule on the production of the documents or categories of documents in its discretion. It may be guided by Articles 3 and 9 of the IBA Rules.

13. The parties indeed rely on the IBA Rules in their Requests, and in considering and ruling on the parties' Objections to those Requests the Tribunal has itself sought guidance from Articles 3 and 9 of the IBA Rules, including in particular:

i. Article 3.3:

A Request to Produce shall contain:

(a) (i) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other

means of searching for such Documents in an efficient and economical manner;

- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

ii. Article 3.5:

If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

iii. Article 3.7:

[...] The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

iv. Article 9.2:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
 - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
- v. Article 9.7 (as regards the duty of good faith, both in *requesting* and in *producing* documents):

If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may [...].

14. With this in mind, the Tribunal applies the following general standards:

- Specificity: A Request must identify each requested document or category of documents with sufficient precision and specificity.
- Relevance: A Request must establish the relevance of each requested document or category of documents having regard to the factual allegations in the parties' submissions and the outcome of the case for which each party contends (for purposes of this Order, the term "relevance" encompasses both "relevance" and "materiality" as those expressions are used in the IBA Rules).²
- Possession, custody or control: A Request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting party, and that they are within the possession, custody or control of the requested party.
- Countervailing interests: Where appropriate and upon reasoned application, the Tribunal will balance the legitimate interests of the requesting party with those of the requested party, taking into account all relevant circumstances, including any legal privileges applicable to certain types of communications, the need to safeguard confidentiality, and the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested party by the Request.

² At this stage of the proceedings, the Tribunal is only in a position to assess the *prima facie* relevance of the documents requested, having regard to the parties' written submissions and the evidence filed to date. This assessment does not preclude the Tribunal from arriving at a different assessment at a later point in the arbitration when the entirety of the parties' submissions, evidence and argument will have been presented.

III. DECISION and ORDER

15. For the reasons set out in the Redfern Schedules at Annexes A and B to this Order, the Tribunal

- (1) Notes that the parties have voluntarily produced various documents responsive to a number of each other's Requests, and that, insofar as Claimants' Requests are concerned, the Tribunal is requested to rule at this time only in respect of certain of those Requests;
- (2) Grants Claimants' Requests no. 11, 14(a)-(e), 15, 17(e), 18(a), 23 and 24 as specified in Annex A;
- (3) Grants Respondent's Request no. 11 as specified in Annex B;
- (4) Makes certain other orders as specified in Annexes A and B;
- (5) Denies all other Requests in respect of which a ruling is sought at this time.

For and on behalf of the Tribunal:

[Signed]

Stephen L. Drymer
President of the Tribunal