**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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**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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# DECISION

**Respondent's Application for Provisional Measures**

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**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**: 12 May 2016

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## INTRODUCTION

1. This Decision addresses Estonia's Application for Provisional Measures dated 26 February 2016 ("**Application**").

2. Approximately one month earlier, on 27 January 2016, Estonia filed an Application for an Immediate Procedural Order Prohibiting Publication of any Arbitration Material ("**January Application**"). In the January Application, Respondent requested that the Tribunal:

> (a) issue an urgent procedural order prohibiting publication of [certain excerpts of Claimants' Memorial (referred to by the parties respectively as the "**Excerpts**" and the "**Extract**")] or any other arbitration material by the Parties, directly or indirectly through any third parties, until the Tribunal's decision on Estonia's request for preliminary measures;
>
> (b) grant leave for Estonia to file a request for provisional measures prohibiting publication of the Excerpts or any other arbitration material (unless such material is already in the public domain) by Friday 26 February 2016; and
>
> (c) invite the Parties to agree on further briefing schedule regarding Estonia's request for provisional measures by Friday 19 February 2016.[1]

3. Respondent argued that Claimants' "unilateral decision" to publish the Extract on Aktsiaselts Tallinna Vesi (ASTV)'s website shortly prior to Respondent's filing of its Counter-Memorial had "no legitimate basis,"[2] was designed to offer a "one-sided picture of the dispute"[3] and "distract"[4] Estonia from its filing preparations, and had the effect of exacerbating the dispute by turning this arbitration into a trial by media.[5] Respondent also proposed to file its proposed Request for Provisional Measures on 26 February 2016.

4. By letter of 28 January 2016, the Tribunal informed the parties that it intended to decide the January Application by no later than 29 January 2016 and invited Claimants to respond to the January Application by no later than noon (ET) on 29 January 2016. The parties were informed that the Tribunal expected Claimants to refrain from all further publication or dissemination of materials related to the arbitration until such time as the Tribunal determined the questions raised in the January Application.

5. By letter of 29 January 2016, Claimants filed their response to the January Application, including a proposal for a solution pending the filing of a request for provisional measures by Respondent.

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[1] Application for an Immediate Procedural Order Prohibiting Publication of any Arbitration Material ("January Application"), ¶ 46.

[2] January Application, ¶ 3.

[3] January Application, ¶ 3.

[4] January Application, ¶ 4.

[5] January Application, ¶ 4.

6. By letter of the same date, the Tribunal invited the parties to communicate directly with each other regarding Claimants' proposal, with a view hopefully to reaching agreement on a solution to be proposed to the Tribunal. The Tribunal also requested Respondent to inform the Tribunal of the outcome of such discussions, including any agreement reached or, if necessary, its reply to Claimants' proposal, by 30 January 2016.

7. By email of 30 January 2016, Respondent informed the Tribunal that the parties had come to the following agreement, which would apply pending the Tribunal's consideration of Respondent's full request for provisional measures to be filed on 26 February 2016:

> 1. Neither Party shall publish the Memorial, the Counter-Memorial, any witness statement, or any expert report that have been or will be filed in this arbitration, or any summary, excerpt or extract thereof.
>
> 2. Each Party may publish a stock exchange announcement or press release, or make public statements regarding the filing of the Memorial or the Counter-Memorial and the general position that Claimants claim violations of the Treaty and Estonia denies Claimants' claims in full. Such communications shall not discuss the specific content of the Memorial or the Counter-Memorial or the witness statements and expert reports attached thereto, or identify the witnesses and experts. The Parties reserve the right to revisit this agreement with each other and with the Tribunal in the event of material media coverage which goes beyond the fact of the filing of the Memorial and Counter-Memorial and that Claimants claim violations of the Treaty and Estonia denies Claimants' claims in full, and which either Party considers it should respond to.

8. By email of the same date, Claimants confirmed the parties' agreement.

9. On 26 February 2016, as noted, Respondent filed its Application that is the subject of the present Decision.

10. By letter of 16 March 2016, Claimants informed the Tribunal of the following agreement between the parties as to the briefing schedule to address the Application:

> 1. The Claimants shall file their Response to the Application by Friday 18 March 2016 (the "Response");
>
> 2. By 22 March 2016, Estonia shall notify the Claimants and the Tribunal whether it wishes to file a reply to the Response (the "Reply");
>
> 3. If Estonia opts to file a Reply, that Reply is to be filed by 1 April 2016, with the Claimants' rejoinder to that Reply, if any, to be filed by 15 April 2016;
>
> 4. Thereafter, the Tribunal is respectfully requested to resolve the Application without an oral hearing.

11. By email of 17 March 2016, Respondent confirmed the parties' agreement regarding the proposed briefing schedule.

12. By email of the same date, the Tribunal confirmed that the parties' proposed briefing schedule was accepted.

13. On 18 March 2016, in accordance with the agreed briefing schedule, Claimants filed their Response to Estonia's Application ("**Response**").

14. By letter of 22 March 2016, Respondent informed the Tribunal that it would file a reply to the Response ("**Reply**"). Pursuant to the parties' agreement, the Reply would be filed by 1 April 2016 and Claimants' rejoinder to that Reply by 15 April 2016 ("**Rejoinder**").

15. On 1 April 2016, Respondent filed its Reply.

16. On 15 April 2016, Claimants filed their Rejoinder.

## I. PARTIES' POSITIONS REGARDING THE APPLICATION

### A. Respondent's Position

#### *(i) Claimants have been waging an aggressive, one-sided media campaign against the Estonian Government since the initiation of this arbitration*

17. Similar to the January Application, the Application concerns what Respondent characterizes as "Claimants' intended publication of selected excerpts of Claimants' Memorial (the 'Excerpts') as set forth in Claimants' letter dated 19 January 2016."[6] Respondent seeks to prevent such publication because, in its submission

> […] Claimants' unilateral publication of the Excerpts or any other document filed in this arbitration, such as the Parties' written submissions, witness statements, expert reports and documents produced within the framework of document production (the "**Arbitration Documents**"), would aggravate an already aggressive media campaign that Claimants have been conducting in Estonia for several years. Such a trial by the media would inevitably exacerbate the dispute and severely compromise Estonia's right of due process.[7]

18. According to Respondent, Claimants have been waging a one-sided media campaign since the beginning of this arbitration, "designed to convince the Estonian public that Estonia is wrong and will lose the case"[8] by means of "unilateral disclosures to the media […]."[9] Estonia refers to the following examples of this campaign:

> – on 19 June 2014, a leading online daily newspaper and news channel, *Delfi*, reported on Claimants' notice of dispute to Estonia and, according to

[6] Application, ¶ 2.

[7] Application, ¶ 4 (emphasis in the original).

[8] Application, ¶ 7.

[9] Application, ¶ 15.

Respondent, "gave a remarkably pro-Claimants—and *inaccurate*—picture of the dispute […]";[10]

– on 24 July 2014, another online newspaper, *Postimees*, incorrectly suggested that the opinions provided by independent experts in the context of a domestic lawsuit brought by ASTV supported the latter's position;[11]

– on 14 October 2014, *Postimees* reported that Claimants had initiated international arbitration proceedings against Estonia, and offered only Claimants' point of view as to the dispute;[12] and

– on 13 November 2014, Mr. Kaur Kender published on *Nihilist.fm* what Respondent calls "an open piece of propaganda"[13] in favour of Claimants, which Respondent also criticizes for its "inflammatory call for personal liability of those who have caused Estonia's alleged loss of reputation as well as for the predicted future loss in this arbitration."[14] According to Estonia, such "pro-Claimant rhetoric"[15] is anything but "*balanced and constructive*,"[16] contrary to Claimants' pretensions in this regard.

19. Respondent describes these articles as "the tip of the iceberg."[17] It says that many more such articles were published even before the commencement of this arbitration. Respondent cites as examples an article from the Estonian daily newspaper Eesti Päevaleht of 6 May 2011[18] and ASTV's press releases of 26 September 2011 and 13

[10] Application, ¶ 8 (emphasis in the original). See Article by Tanel Saarmann "Tens of millions in a game: Tallinna Vesi submitted a formal request against the State" published in the online version of "Delfi" on 19 June 2014, Exhibit R-2.

[11] Application, ¶ 9. See Article by Meribel Sinikalda "Experts support the service agreement of AS Tallinna Vesi" published in the online version of Postimees on 24 July 2014, Exhibit R-3; Expert Opinion in the administrative matter no 3-11-1355, Expert Andres Root, 30 June 2014, s 4.3, p 3864, Exhibit C-241. Expert's report ordered by the court in AS Tallinna Vesi's administrative matter 3-11-1355, Expert Andres Juhkam, 30 June 2014, s 4 (p-s 3807-3809) and s 5 (p-s 3810-3812), Exhibit C-240.

[12] Application, ¶ 11. See Article by Uwe Gnadenteich "Tallinna Vesi is demanding 90 million euros from the state" published in the online version of Postimees on 14 October 2014, Exhibit R-4. Respondent also refers to the following articles: article by Juhan Lang "Tallinna Vesi demands 90 million euros from the state" published in Äripäev on 14 October 2014, Exhibit R-5; article "Tallinna Vesi turned to the court with 90 million euros claim against the state" published in "Pealinn" on 14 October 2014, Exhibit R-6.

[13] Application, ¶ 13.

[14] Application, ¶ 14. See Kaur Kender: "What kind of a ticking bomb? The one worth 100 million euros," published in Nihlist.fm on 13 November 2014, http://nihilist.fm/milline-miin-saja-milline, Exhibit R-8.

[15] Reply, ¶ 33.

[16] Reply, ¶ 32 (emphasis in the original), quoting Response, ¶ 31.

[17] Reply, ¶ 16.

[18] See Reply, ¶ 17, quoting Article by Margit Adorf "Talinna Vesi is not happy with the decision of the Competition Authority" published in Eesti Päevaleht on 6 May 2011, Exhibit R-218.

February 2013.[19] Estonia argues that Claimants have "*actively incited and nourished*"[20] this anti-government media campaign, as revealed by the simultaneous publication of ASTV's 14 October 2014 press release and three articles in the Estonian press, for the preparation of which Claimants provided the relevant information.[21] Further, far from being "*necessary and legitimate*" [22] updates to its shareholders, ASTV's stock exchange announcements merely offer Claimants' one-sided view of the dispute. Respondent takes the example of ASTV's press release of 24 July 2014 regarding the above-referred statements of experts in the Estonian court proceedings, as well as press releases of 5 May 2014 and 7 January 2015.[23] While Estonian law requires that listed companies "disclose information on the key factual milestones relating to the proceedings,"[24] it does not require, in Respondent's view, publication of one-sided documents such as the Excerpts.

20. Respondent argues that the Tribunal has already rejected Claimants' effort to have the case effectively made public. Respondent recalls that, after having heard the parties,[25] the Tribunal decided in its Procedural Order No. 1 that "[t]he parties consent to ICSID publication of any Procedural Orders, Decisions, and Award issued in the present proceeding, subject to the redaction of confidential information."[26] In Respondent's submission, Claimants are now seeking to achieve what they failed to obtain from the Tribunal by way of unilateral disclosures to the media.[27]

21. Respondent further submits that after Procedural Order No. 1 was issued, Claimants expressed the view that paragraph 23.1 of Procedural Order No. 1 applied only to ICSID and placed no restriction on publication of submissions by the parties, "subject to the redaction of confidential information and provided that publication is undertaken in a manner compatible with efficient conduct of the arbitration."[28] In Respondent's

[19] See Reply, ¶¶ 18-19, quoting ASTV's Stock Exchange announcement, 26 September 2011, Exhibit R-219 and ASTV's Stock Exchange announcement, 13 February 2013, Exhibit R-220.

[20] Reply, ¶ 20 (emphasis in the original).

[21] See Reply, ¶¶ 21-22; Article by Uwe Gnadenteich "Tallinna Vesi is demanding 90 million euros from the state" published in the online version of Postimees on 14 October 2014, Exhibit R-4; Article by Juhan Lang "Tallinna Vesi demands 90 million euros from the state" published in Äripäev on 14 October 2014, Exhibit R-5; Article "Tallinna Vesi turned to the court with 90 million euros claim against the state" published in "Pealinn" on 14 October 2014, Exhibit R-6.

[22] Reply, ¶ 23 (emphasis in the original) quoting Response, ¶ 32.

[23] See Reply, ¶¶ 24-27; ASTV's stock Exchange announcement, 24 July 2014, Exhibit C-268; ASTV's stock Exchange announcement, 5 May 2014, Exhibit R-221; ASTV's stock Exchange announcement, 7 January 2015, Exhibit R-222.

[24] Reply, ¶ 29.

[25] See Application, ¶¶ 18-19; Letter from Claimants to ICSID, 29 May 2015, Exhibit R-9; Letter from Respondent to ICSID, 4 June 2015, Exhibit R-10.

[26] Application, ¶ 20 quoting Procedural Order No. 1, ¶ 23.1.

[27] See Application, ¶ 21.

[28] Application, ¶ 22. Respondent refers to Claimants' letter to ICSID dated 5 June 2015, Exhibit R-11.

view, Claimants' distinction between publication by ICSID and publication by the parties is "purely formalistic"[29] and would deprive of any meaning the requirement of party consent to publication under the ICSID Convention. [30] In subsequent correspondence, Respondent argues that it opposed (and opposes) unilateral publication for the following reasons:

> a. Claimants' unilateral publication of any of Estonia's documents without Estonia's express consent would nullify the principle of confidentiality under ICSID rules, which expressly require the consent of both Parties to publication;
>
> b. The publication would jeopardize integrity of proceedings and Estonia's due process rights. This is because the dispute involved a number of highly sensitive political issues and was already subject to intense media scrutiny, including comments on both Parties' chances in the dispute. Publication of Estonia's submissions would spark further media attention and could be used as a means to craft and harvest new evidence; and
>
> c. The publication would expose Estonia's potential and actual witnesses and experts to considerable media pressures—which would severely compromise Estonia's very right to defense.[31]

22. When, after two months of silence and shortly before Respondent was due to file its Counter-Memorial, Claimants suddenly informed Estonia that they intended to publish the Excerpts, the "true motives" behind the announced disclosures were revealed, says Respondent, namely, "to distract Estonia in the last days of its most intense work on the Counter-Memorial […]."[32]

23. According to Estonia, Claimants falsely allege that their intended disclosure is confined to "a summary of [their] claim and an explanation of how Estonia's actions constitute a breach of the BIT."[33] In fact, "the Excerpts is an entirely one-sided and conclusory piece of advocacy and […] Claimants intend to publish much more." [34] Indeed, according to Respondent, while Claimants are currently seeking to publish the Excerpts, they insist on a broader right to publish many of the Arbitration Documents.[35]

24. Contrary to Claimants' allegation, their media campaign cannot be considered a response to any similar media campaign by Estonia – the evidence of such a campaign being comprised of nothing more than "public criticism by private individuals and entities who opposed ASTV's excessive tariffs."[36] The conduct of the Estonian

[29] Reply, ¶ 70.

[30] See Reply, ¶¶ 69-70.

[31] Application, ¶ 24. Respondent refers to its letter to Claimants dated 26 November 2015, Exhibit R-12.

[32] Application, ¶ 29.

[33] Reply, ¶ 12 quoting Response, ¶ 101.

[34] Reply, ¶ 12.

[35] Reply, ¶ 13.

[36] Application, ¶ 32.

Home Owners Association ("**EOKL**"), an "independent organization", cannot be attributed to Respondent.[37] In any event, the conduct complained of by Claimants, which allegedly occurred in 2009 and 2010, predates this arbitration and bears no relevance to the matter addressed in Estonia's Application.[38] Similarly, the publication of a press release on 14 January 2016 which reiterated the contents of confidential internal government document improperly leaked to *Postimees* and published on 6 January 2016, cannot be considered a media campaign.[39] In any event, the release merely confirmed the allocation of additional funds to cover Estonia's costs in the arbitration, which Respondent rightly anticipated would increase as a consequence of Claimants' unrelenting media campaign.[40]

### *(ii) The Application satisfies the requirements of Article 47 of the ICSID Convention*

25. Respondent submits that its Application satisfies the following four requirements specified in Article 47 of the ICSID Convention in order for a tribunal to order provisional measures:

a. *prima facie* jurisdiction of the Tribunal;

b. *prima facie* existence of a right susceptible of protection;

c. necessity of the measure requested; and

d. urgency of the measure requested.[41]

26. According to Respondent, these requirements are all satisfied in this case. So is the requirement of proportionality upon which Claimants insist in their submissions.[42]

#### *(a) Prima facie jurisdiction of the Tribunal*

27. Respondent contends that the Tribunal has *prima facie* jurisdiction to decide on the Application. As confirmed in *Pey Casado v. Chile*,[43] the fact that Respondent has raised jurisdictional objections does not deprive the Tribunal of its power to issue provisional measures, *prima facie* jurisdiction being based here on "the consent

[37] See Reply, ¶¶ 35-39.

[38] See Reply, ¶ 40.

[39] See Application, ¶¶ 34, 36-37.

[40] See Application, ¶ 35.

[41] Application, ¶ 39. Respondent refers to *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* ("*Menzies v. Senegal*"), ICSID Case No. ARB/15/21, Procedural Order No. 2, 2 December 2015, ¶ 108, Exhibit RL-168.

[42] See Reply, ¶¶ 101-108.

[43] See Application, ¶ 44. Respondent quotes *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* ("*Pey Casado v. Chile*"), ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, ¶ 13, Exhibit RL-170.

between Claimants and Estonia under the Treaty perfected when Claimants filed their Request for Arbitration […]."[44] Respondent notes that Claimants do not dispute that this requirement is met.[45]

*(b) Prima facie existence of a right susceptible of protection*

28. Respondent submits that it seeks protection of its "vital procedural rights,"[46] including the right to due process and the right to the non-aggravation of the dispute,[47] which are "self–standing rights"[48] subject to protection under Article 47 of the ICSID Convention. It is Estonia's view that its due process rights include a right to a trial exclusively before this Tribunal, rather than a "trial in the media" (or "trial by media"). Respondent insists that tribunals have recognized that reporting and publishing Arbitration Documents can threaten a party's due process rights and the integrity of the proceedings by creating a "misleading picture"[49] of the dispute in the media and thus a "parallel forum for the resolution of [the] dispute."[50] It may also create "external pressure on the parties, witnesses, experts and other participants in the process."[51] In addition, it may exacerbate the dispute, especially in this case since "the dispute is in part based on an allegation that Estonia has already engaged in a 'negative publicity campaign.'"[52] Contrary to Claimants' position, cases show that tribunals grant provisional measures to protect "purely procedural rights" and not only "rights which have an impact on the underlying [substantive] dispute."[53]

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[44] Application, ¶ 45. Respondent refers to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* ("*Occidental v. Ecuador*"), ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 55, Exhibit RL-171.

[45] See Reply, ¶ 51.

[46] Application, section III.B.1., p. 12.

[47] Application, ¶¶ 46-48. Respondent refers to *Burlington Resources Inc. v. Republic of Ecuador* ("*Burlington v. Ecuador*"), ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60, Exhibit RL-172; *Plama Consortium Limited v. Republic of Bulgaria* ("*Plama v. Bulgaria*"), ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40, Exhibit RL-173; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* ("*Quiborax v. Bolivia*"), ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 117-118, Exhibit RL-174.

[48] Reply, ¶ 85.

[49] Application, ¶¶ 51, 54.

[50] Application, ¶ 54.

[51] Application, ¶ 49.

[52] Application, ¶ 54.

[53] Reply, ¶ 81. See also Reply, ¶¶ 83-89. Respondent refers to *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* ("*Biwater Gauff v. Tanzania*"), ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶¶ 135-136, Exhibit RL-1; *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60, Exhibit RL-172; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40, Exhibit RL-173*; Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 118-119, 124, Exhibit

29. Referring to *Biwater Gauff v. Tanzania*, *Lao Holdings v. Laos* and *Abaclat v. Argentina*, Respondent contends that ICSID tribunals have made it clear that unilateral publication of pleadings, memorials, witness statements and expert reports must be restricted in order to protect these procedural rights,[54] in particular so as to avoid publicising a "misleading picture" or "impression" of the dispute.[55] In Estonia's view, Claimants' argument that *Biwater* and *Abaclat* are distinguishable because the facts were different is incorrect. That the facts may be different is "irrelevant" since the tribunal's analysis of the law applicable to confidentiality and disclosure in those cases "did not depend on the[ir] specific facts […]."[56]

30. According to Estonia, the other authorities on which Claimants rely are not germane to the issue here[57] and, in any event, support the Application.[58] *AMCO v. Indonesia*, *World Duty Free v. Kenya*, and *Churchill v. Indonesia* concern public discussion of a case. Consistent with Respondent's position, they confirm that "any right to engage in public discussions is not unlimited but is qualified most notably by the duty to act in good faith and not to exacerbate the dispute."[59] In Respondent's view, "[…] it was only because of the facts specific to each of these cases that the tribunals denied the requests for provisional measures."[60]

31. Contrary to Claimants' assertion, they "do not have an unfettered general right to unilaterally publish the Arbitration Documents, whether their own or Estonia's."[61] None of the authorities put forward by Claimants support their view.[62]

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RL-174; *Menzies v. Senegal*, ICSID Case No. ARB/15/21, Procedural Order No. 2, 2 December 2015, ¶ 128, Exhibit RL-168.

[54] See Application, ¶¶ 50-53. Respondent quotes *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶¶ 136, 158-159, Exhibit RL-1. *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014, ¶ 13, Exhibit RL-2; *Abaclat and Others v. Argentine Republic* ("*Abaclat v. Argentina*"), ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, ¶¶ 102-104, Exhibit RL-3.

[55] Reply, ¶¶ 54, 59.

[56] Reply, ¶ 53.

[57] See Reply, ¶ 60.

[58] See Reply, ¶¶ 61, 66.

[59] Reply, ¶ 61. Respondent quotes *Amco Asia Corporation and others v. Republic of Indonesia* ("*Amco v. Indonesia*"), ICSID Case No. ARB/81/1, Decision on the Request for Provisional Measures, 9 December 1983, reported in 1 ICSID Rep. 410 (1993), pp. 410, 412, Exhibit CL-21; *World Duty Free Company Limited v. Republic of Kenya* ("*World Duty Free v. Kenya*"), ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶ 16, Exhibit CL-19; *Churchill Mining PLC v. Republic of Indonesia* ("*Churchill v. Indonesia*"), ICSID Case No. ARB/12/14, Procedural Order No. 3 on Provisional Measures, 4 March 2013, ¶¶ 9, 20, and 57, Exhibit CL-22.

[60] Reply, ¶ 61. See above the references to *Amco v. Indonesia*, *World Duty Free v. Kenya*, and *Churchill v. Indonesia*.

[61] Reply, ¶ 68.

32. Estonia further argues that its Application is compatible with the requirements of transparency. While unrestricted transparency cannot prevail over the integrity of the proceedings and the parties' due process rights, as recognized in *Abaclat v. Argentina*,[63] transparency is guaranteed in this case by the publication of the Tribunal's Procedural Orders, Decision and Award, which offer a "balanced and objective picture of the dispute."[64] Claimants' reliance on the City of Tallinn's support for publication of the Excerpts is misplaced, the City of Tallinn being one of ASTV's shareholders and thus naturally espousing Claimants' views regardless of their merits.[65] In addition, the Application safeguards "the Parties' right to engage in general public discussion of the case,"[66] bearing in mind that such public discussion is subject to limitations so as to avoid exacerbating the dispute, as held by the tribunal in *Biwater Gauff v. Tanzania*.[67] These limitations include refraining from discussing the specific contents of submissions, witness statements and expert reports, as well as avoiding the identification of witnesses and experts.[68] Respondent thus makes the following proposal:

> […] both Parties may issue stock exchange announcements or press releases, or make general public statements regarding the filing of any submissions, the hearing and/or the issuance of the award, provided that such communications do not discuss the substance of the case beyond stating the general position that Claimants claim violations of the Treaty and Estonia denies Claimants' claims in full. Specifically, the Parties' communications shall not discuss the specific content of any submissions or the witness statements and expert reports attached thereto, or identify the witnesses and experts, including by disclosing any general or anonymized information that would allow their identification.[69]

*(c) Necessity of the measure requested*

33. The necessity requirement is also met in this case, says Estonia. According to Respondent, "the mere likelihood of future exacerbation of the dispute or procedural unfairness is sufficient for the Tribunal's intervention in the interest of safeguarding the

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[62] See Reply, ¶¶ 72-76. Respondent refers to *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 121, Exhibit RL-1; *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on the Request for Provisional Measures, 9 December 1983, reported in 1 ICSID Rep. 410 (1993), p. 412, Exhibit CL-21; Christoph H. Schreuer, "The ICSID Convention: A Commentary", (2nd Edition), p. 1 (paragraph 100 on page 698 in Schreuer), Exhibit CL-20.

[63] See Application, ¶ 58. Respondent quotes *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, ¶¶ 72, 79, Exhibit RL-3.

[64] Application, ¶ 56. See also Reply, ¶ 68.

[65] See Reply, ¶ 79.

[66] Application, ¶ 59.

[67] See Application, ¶ 61. Respondent quotes *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 149, Exhibit RL-1.

[68] See Application, ¶ 62.

[69] Application, ¶ 60.

orderly conduct of arbitration."[70] In this case, publication of the Excerpts and other Arbitration Documents will (i) put "enormous media pressure"[71] on the Estonian government to comment on the arbitration, (ii) lead to a discussion in the media of the specific issues to be decided in the arbitration and (iii) result in the misuse of such arguments to fuel a political debate in Estonia.[72] Respondent denies that the information contained in the Excerpts is already in the public domain; and even if it were, the Application is not limited to publication of the Excerpts.[73] In any case, Claimants do not explain how the information that they seek to disclose would already be public.[74] According to Respondent, it cannot have been made public through the Estonian courts, which in any event are hearing claims under Estonian law, not BIT claims.[75]

34. Referring to the *Biwater* and *Abaclat* cases,[76] Respondent concludes that restrictions on publication of the Excerpts and other Arbitration Documents are therefore necessary to

> [p]rotect Estonia's vital rights of due process […], the right not to have the dispute exacerbated[,] […] the right to protect the integrity of these proceedings[,] [and] to prevent external pressure on Estonia, its representatives, witnesses, and experts and to avoid the kind of "trial by the media" that Claimants have been seeking to impose […].[77]

35. As to the proportionality requirement raised by Claimants in their submissions, Respondent argues that the so-called "balance of inconvenience" invariably tips toward Respondent because Claimants have no right to publish the Arbitration Documents, are under no legal obligation to publish the Arbitration Documents[78] and thus "will suffer no harm if the Application is granted."[79]

*(d) Urgency of the measure requested*

36. The measures sought in the Application are urgent. Estonia emphasizes that, as noted above in the Introduction to the present Decision, the parties' interim agreement regarding publication remains in place only until the Tribunal rules on the Application.[80]

[70] Reply, ¶ 92.

[71] Application, ¶ 64.

[72] See Application, ¶ 64.

[73] See Reply, ¶ 96-97.

[74] See Reply, ¶ 98.

[75] See Reply, ¶ 99.

[76] See Reply, ¶ 91.

[77] Application, ¶ 66.

[78] See Reply, ¶ 104.

[79] Reply, ¶ 103.

[80] See Application, ¶ 68.

Publication and the ensuing trial by media would cause irreparable harm to Respondent's due process rights.[81] Because the Excerpts "reproduce the most aggressive part of the Memorial"[82] and ASTV's earlier press releases have already "unleashed waves of media reaction,"[83] publication of the Excerpts will obviously generate further media coverage, leading to two potential and equally harmful outcomes: either Respondent will remain silent and thereby run the risk of "severe reputational damage, accusations of incompetence and non-transparency, and further waves of media speculations and criticisms";[84] or Respondent will be forced to respond to the Extracts and thereby invite the media and public to "comment, judge and criticize the Government's substantive and procedural positions and strategies."[85]

37. While the urgency arising out of the intended publication of the Excerpts is not disputed, Respondent notes that Claimants do contest the urgency of any decision concerning potential publication of other Arbitration Documents given that they do not currently intend to publish anything other than the Excerpts.[86] In reply, Estonia submits that urgency arises when the matter to be decided cannot wait until a decision on the merits of the dispute, which is clearly the case here.[87]

## B. Claimants' Position

### *(i) There is no media campaign*

38. Claimants submit that Respondent mischaracterizes both what Claimants have done and what they are proposing to do in this instance. Claimants have not waged, are not waging and have no intention of waging an "aggressive media campaign."[88] In any event, it is important to underline that Estonia minimises or ignores altogether "its own engagement with the media."[89]

39. Claimants propose nothing more than to post online an extract from their Memorial comprised of Section II (Summary of Claim) and VII (Estonia's Breaches of the BIT) of the Memorial.[90] The purpose is to "inform their current and potential shareholders, their customers and other parties with an interest in the issues at stake in the arbitration of

[81] See Application, ¶ 69.

[82] Reply, ¶ 44.

[83] Reply, ¶ 45.

[84] Reply, ¶ 47.

[85] Reply, ¶ 48.

[86] See Reply, ¶ 109.

[87] Reply, ¶ 110.

[88] Response, ¶ 5 quoting the Application, ¶¶ 4, 31.

[89] Response, ¶ 7.

[90] See Response, ¶ 16 and Exhibit R-1.

the status of the arbitration and the Claimants' position therein."[91] They have not proposed and do not propose to publish any other document from the arbitration, and they recall that as long ago as 19 January 2016[92] they undertook to "seek advance agreement [from Estonia] regarding any publication, and if such agreement cannot be reached the Claimants will provide Estonia with appropriate notice before any publication such that Estonia can raise the matter with the Tribunal should it wish to do so."[93] In their Rejoinder, Claimants declare that they are willing "to go further and agree that they will not publish any of Estonia's submissions, witness statements or expert reports in connection with this arbitration."[94]

40. Claimants insist that the Extract does not disclose any information confidential to Respondent or to any third party, or that it concerns state secrets or sensitive information, or even that it contains information obtained from Respondent in the arbitration.[95] Indeed, according to Claimants, the Extract "relies on what are mostly public facts to describe the narrative of this dispute at a high level" and explains "how this narrative gives rise to the breach of Estonia's obligations under international law."[96] Far from seeking to publish Arbitration Documents as defined by Respondent[97] or to unleash a "media battle"[98], Claimants have taken a reasonable approach.[99] Although they are fully entitled to publish their Memorial, Claimants have refrained from doing so and instead have voluntarily engaged with Respondent on this matter.[100]

41. Claimants argue that Respondent misrepresents what is in fact Claimants' "minimal media engagement.[101] They further argue that the evidence of their so-called "media campaign"[102] is confined to a total of "seven news articles over the course of 20 months."[103] According to Claimants, the majority of these articles merely report on stock exchange announcements made by ASTV regarding the existence and status of the arbitration and the court proceedings in Estonia.[104] In this regard, ASTV's stock

[91] Response, ¶ 17.

[92] See Rejoinder, ¶ 15; letter from Claimants dated 19 January 2016.

[93] Response, ¶ 18.

[94] Rejoinder, ¶ 19.

[95] See Response, ¶¶ 19-21. See also Rejoinder, ¶ 20.

[96] Rejoinder, ¶ 22.

[97] See Response, ¶ 23.

[98] Response, ¶ 5.

[99] See Response, ¶ 25.

[100] See Response, ¶ 25.

[101] Response, Section V, p. 6. See also Rejoinder, ¶¶ 13-14.

[102] Response, ¶ 27.

[103] Response, ¶ 27.

[104] See Response, ¶¶ 29-31; see table showing alleged correlation between the seven news articles and ASTV's stock exchange announcements at ¶ 31.

exchange announcement of 24 July 2014 is accurate and supported by evidence; it does not misrepresent the opinions of the experts in the Estonian court proceedings, as alleged by Respondent.[105] Similarly, Respondent's argument that Claimants leaked ASTV's 14 October 2014 stock exchange announcement to the press in advance of its official release is baseless. Claimants aver that all stock exchange announcements are kept confidential until they are released in accordance with the Tallinn Stock Exchange rules;[106] the apparent simultaneity of publication to which Respondent refers has to do with the software used by journalists, which indicates "the time at which the file is opened for the author to begin work, not the time of publication of the article online."[107] The contents of the other articles were either not disclosed by Claimants[108] or provide no basis for the proposition that Claimants are waging a media campaign.[109]

42. Although Respondent claims that these seven articles are merely "the tip of the iceberg,"[110] Respondent's evidence of other media engagement is confined to five exhibits submitted with its Reply. Four of these predate this arbitration and comprise, again, simple stock exchange announcements[111] that disclose "key factual milestones relating to the proceedings."[112] The only actual press article submitted by Respondent, dated 6 May 2011, clearly indicates that it is conveying ASTV's perspective, and moreover "presents a reasonable criticism of a regulatory decision by reference to the relevant legal framework."[113]

43. In sum, Respondent's claim that ASTV's stock exchange announcements have "unleashed waves of media reaction" is clearly hyperbolic[114] and unsupported by the evidence.[115]

#### *(ii) The Application fails to meet the requirements of Article 47 of the ICSID Convention*

44. According to Claimants, five – not four – requirements have to be met in order for tribunals to grant provisional measures:

a. *prima facie* jurisdiction;

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[105] See Rejoinder, ¶¶ 66-67.

[106] See Rejoinder, ¶ 48.

[107] Rejoinder, ¶ 49.

[108] See Response, ¶ 28.

[109] See Response, ¶¶ 31-32.

[110] Rejoinder, ¶ 45 quoting Reply, ¶ 16. See also Rejoinder, ¶ 55.

[111] See Rejoinder, ¶¶ 55-57.

[112] Rejoinder, ¶ 64, quoting Reply, ¶ 29. See Exhibits R-219 to R-222.

[113] Rejoinder, ¶ 60. See Exhibit R-218.

[114] Rejoinder, ¶ 68 quoting Reply, ¶ 45.

[115] See Rejoinder, ¶ 72.

b. *prima facie* case on the merits / the existence of a right susceptible of protection;

c. necessity;

d. urgency; and

e. proportionality.[116]

45. Claimants contend that applicants have to meet a high threshold in order for provisional measures to be granted.[117] Respondent has failed to meet this threshold.[118]

46. Claimants emphasize that Respondent omits to mention the requirement of proportionality, which is applied by investment tribunals either as a stand-alone requirement or as part of the requirement of necessity, as in *Quiborax et al. v. Bolivia*.[119] In addition to failing to satisfy the proportionality requirement, say Claimants, Respondent has failed to establish both the existence of a right to be protected and the necessity of the provisional measures requested.[120]

47. As a general matter, Claimants emphasize that there exists no duty of confidentiality in ICSID arbitration, as recognized in *World Duty Free* and *Biwater*.[121] While parties are free to agree on restrictions to the publication of their pleadings, there is no such agreement in this case and a tribunal may only impose such restrictions if the requirements for the grant of provisional measures are met.[122] Claimants also rely on a 2004 Discussion Paper from the ICSID Secretariat to argue that there is no requirement of "mutual consent […] from the parties for the publication of the award (much less a party's own submissions), nor [is there] anything improper or impermissible about a party publishing it unilaterally."[123]

48. Contrary to Respondent's suggestion, in issuing Procedural Order No. 1, the Tribunal did not rule on whether this case should be made public, it merely "complied with the

[116] Response, ¶ 10.

[117] See Response, ¶ 9.

[118] See Response, ¶ 8.

[119] See Response, ¶¶ 11-12. Claimants quote *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 158, Exhibit RL-174, and *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 82, Exhibit RL-172.

[120] See Response, ¶ 14.

[121] See Response, ¶¶ 33-35. Claimants quote *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶ 16, quoting Decision on a Request by the Respondent for a Recommendation of Provisional Measures dated 25 April 2001, Exhibit CL-19; *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 125, Exhibit RL-1.

[122] See Response, ¶¶ 36-38. Claimants quote Christoph H. Schreuer, "The ICSID Convention: A Commentary" (2nd Edition), ¶ 100, p. 698, Exhibit CL-20.

[123] Rejoinder, ¶ 26. Claimants refer to the ICSID Secretariat Discussion Paper, Possible Improvements of the Framework For ICSID Arbitration, 22 October 2004, p. 8, Exhibit CL-26.

requirement for party consent to ICSID publication."[124] In Claimants' view, "Estonia cannot rely on its refusal to consent to ICSID publication […] to alter the general default position that its consent is not required for publication by the Claimants."[125] Claimants submit that Respondent has failed to put forward a sufficiently strong case for the Tribunal to depart from this default position.[126]

49. By contrast, the Tribunal should take into account the "overarching interest in the transparency of the arbitration proceedings."[127] Interested parties are entitled to scrutinize the conduct of Estonia, which Claimants argue is in breach of international law, as well as Claimants' position in relation thereto.[128] According to Claimants, the City of Tallinn supports such transparency,[129] and Respondent ought to do the same.[130]

50. Claimants further contend that the cases Respondent relies upon in support of its Application, namely *Biwater*, *Lao Holdings*, and *Abaclat*, must be distinguished from the present case.[131]

51. As to *Biwater*, Claimants point out that in that case the respondent state was proposing to publish "selected extracts of the other party's submissions […], including information confidential to that other party and a large number of documents obtained from the other party through the document production process,"[132] with a risk of misrepresenting the claimant's submissions.[133]

52. In Claimants' view, their proposed disclosure here is different because it is:

> a. by the Claimants (who are the party complaining of a breach of their rights under international law);
>
> b. of only an extract of their own submissions, without the same risk of such submissions being selectively published and thereby misrepresented; and
>
> c. in circumstances where the underlying complaint in the arbitration concerns negative commentary in the media by the state, i.e. the party resisting the disclosure rather than by the party proposing the disclosure.[134]

[124] Response, ¶ 41.

[125] Response, ¶ 42. See also Rejoinder, ¶ 29.

[126] See Response, ¶¶ 43-44.

[127] Response, ¶ 45.

[128] See Response, ¶ 47.

[129] See Response, ¶ 48.

[130] See Response, ¶ 49.

[131] See Response, ¶¶ 52-53.

[132] Response, ¶ 55. Emphasis in the original.

[133] See Response, ¶ 56.

[134] Response, ¶ 59.

53. In addition, while the *Biwater* tribunal did impose some restrictions on the parties, it also "permitted the parties to engage in general discussion about the case in public, provided that such discussion was restricted to what was necessary and was not used to antagonise or pressure another party, or make the resolution of the arbitration more difficult."[135]

54. According to Claimants, Respondent's reliance on *Lao Holdings* is equally misplaced because the tribunal "was not considering any issues related to the publication of submissions or other documents or the disclosure or discussion of any information related to the arbitration."[136]

55. As to *Abaclat*, Claimants argue that the tribunal's primary concern was not adverse publicity but rather "the management of confidential information and […] the potential disclosure of documents obtained from the other parties as part of the document production process."[137] In addition, Claimants submit that the *Abaclat* decision, like *Biwater*, supports their position because the *Abaclat* tribunal:

> a. emphasised that pleadings are "likely to contain references to and details of documents produced pursuant to a disclosure exercise". This is not the case with the Extract;
>
> b. held that in the absence of specific contractual or confidentiality obligations, the parties were free to decide if and how to publish their own documents, provided that the publication would not be used as an instrument to further antagonise the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult; and
>
> c. declined to prevent the parties from general discussion of the case, provided that it was not intended to antagonise or pressure another party, or make the resolution of the arbitration more difficult. […][138]

56. Furthermore, in Claimants' view, the *Biwater* and *Abaclat* cases lend no support to Respondent's argument that publication of party submissions automatically leads to an aggravation of the dispute such as to warrant the imposition of provisional measures.[139] Claimants point to the many cases in which party submissions have been published without there being any need for tribunal intervention, thus confirming that there is no causal link between publication and aggravation of the dispute.[140] The

[135] Response, ¶ 60.

[136] Response, ¶ 62.

[137] Response, ¶ 65.

[138] Response, ¶ 64. Footnotes omitted. Respondent refers to *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, ¶¶ 85, 101, 109-110, Exhibit RL-3.

[139] See Rejoinder, ¶¶ 34-35.

[140] See Rejoinder, ¶¶ 36, 43, and the cases referred to in footnote 20.

burden is on Respondent to prove that the aggravation of the dispute will be the likely consequence if the relief sought is not granted.[141]

57. Claimants further submit that in addition to misrepresenting the content and scope of the aforementioned decisions, Respondent ignores decisions in which tribunals have denied applications to prevent publication or disclosure.[142] Claimants refer in this regard to *Amco Asia v. Indonesia*[143] and emphasize that although the *Amco* tribunal recognized that "a large press campaign"[144] might have an influence on the State's economy, it would not be an influence on the rights actually in dispute in the arbitration, which Claimants characterize as the "relevant reference point in granting provisional measures."[145] Referring to *Churchill Mining v. Indonesia*, Claimants emphasize that the tribunal ruled that there is "no general rule imposing a duty of confidentiality on the parties and prohibiting them from disclosing their case in public, as was already stated 30 years ago in *Amco v. Indonesia*."[146] The *Churchill* tribunal recognized that "[a]t the same time, it is true that the parties are bound by a good faith duty not to exacerbate the dispute or affect the integrity of the arbitration proceedings,"[147] but found that "none of the public statements made by the Claimant reach a level that could jeopardize the Respondent's rights in dispute."[148] Claimants also point to *World Duty Free* in which the tribunal rejected the State's request for a ban on public discussion of the case by the parties.[149]

58. According to Claimants, these three cases show that "where tribunals have considered circumstances similar to those at hand, those tribunals have determined that those circumstances did not amount to aggravation of those disputes."[150] In addition, contrary to Respondent, Claimants see no basis to distinguish between cases where parties discuss publicly their positions in the arbitration and those where they publish

[141] See Rejoinder, ¶ 37.

[142] See Response, ¶¶ 52, 66-67.

[143] Claimants refer to *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on the Request for Provisional Measures dated 9 December 1983, reported in 1 ICSID Rep. 410 (1993), Exhibit CL-21.

[144] Response, ¶ 70.

[145] Response, ¶ 70.

[146] Response, ¶ 73. Claimants quote *Churchill v. Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 3 dated 4 March 2013, ¶ 46, Exhibit CL-22.

[147] Response, ¶ 74. Claimants quote *Churchill v. Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 3 dated 4 March 2013, ¶ 47, Exhibit CL-22.

[148] Response, ¶ 74. Claimants quote *Churchill v. Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 3 dated 4 March 2013, ¶ 50, Exhibit CL-22.

[149] Response, ¶ 76. Claimants refers to *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶ 16, quoting Decision on a Request by the Respondent for a Recommendation of Provisional Measures dated 25 April 2001, Exhibit CL-19.

[150] Rejoinder, ¶ 40.

their own submissions. Both situations generate the risk that a party may be called upon to comment in the media.[151]

59. Claimants go on to argue that three "key questions" have to be answered in the positive for Estonia's Application to be granted:

a. Does Estonia have a right susceptible of protection?

b. Has Estonia satisfied the necessity test?

c. Has Estonia satisfied the proportionality test?[152]

*(a) <u>No right susceptible of protection</u>*

60. Claimants argue that none of the cases relied upon by Respondent support the view that "provisional measures can be granted in connection with any procedural circumstance of the case, including peripheral issues like public discussion of the case by the parties, which can have no impact on the underlying dispute,"[153] as Respondent wrongly suggests. While Respondent invokes the protection of the "right of due process," the "right not to have the dispute aggravated," and the "right to protect the integrity of [the arbitration] proceedings," [154] references in these cases to non-aggravation of the dispute and preservation of the *status quo* concern rather "the underlying harm at the core of the dispute between the parties and the prevention of measures which make this underlying harm worse."[155] Such rights are considered "self-standing"[156] not because they are unconnected with the substantive dispute, but because a party need not identify a contractual clause or other legal source of a right, for example, not to have the dispute aggravated in order to be able to rely on such a right in the context of an arbitration.[157] In Claimant's words, "preserving the status quo and not aggravating the dispute would mean preventing an increase in the harm to the claimant […] not freez[ing] the entire conditions of the arbitration in place […]."[158] Contrary to Respondent's allegation, the Application fails because the proposed

[151] See Rejoinder, ¶ 42.

[152] Response, ¶ 79.

[153] Response, ¶ 82.a. Claimants refer to *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, Exhibit RL-172; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, Exhibit RL-173; *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, Exhibit RL-174.

[154] Response, ¶ 81.

[155] Response, ¶ 82.a.

[156] Response, ¶ 86. Claimants quote *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60, Exhibit RL-172.

[157] See Response, ¶ 86.

[158] Response, ¶ 87.

publication "does not affect the harm at the core of the claim and does not impact on Estonia's ability to defend that claim, or the Tribunal's ability to rule on it."[159]

61. In addition, as indicated earlier, the *Biwater* and *Abaclat* cases do not support Respondent's unqualified view that "reporting and publication exacerbates the dispute, creates external pressure on the parties, witnesses, experts, and other participants in the process, and often imposes a 'trial by the media'."[160]

62. Lastly, Respondent fails to demonstrate how the proposed publication of the Extract would in fact aggravate the parties' dispute.[161] In Claimants' view, Respondent does not explain how its alleged rights would be harmed, how the creation of a so-called parallel forum for the resolution of the dispute – i.e., the media – would affect the quality of the Tribunal's decision-making, or how publication of the Extract would affect Respondent's witnesses and experts since they are not named.[162]

63. Claimants conclude that Respondent has failed to establish the existence of a right susceptible of protection and any threat to this right that the proposed publication might pose.[163]

*(b) No necessity*

64. Claimants argue that "[n]ecessity is a high threshold,"[164] which tribunals have held requires the existence of "a risk of 'serious and irreparable harm' or similar wording."[165] Far from proving the harm that it might suffer if the Application were not granted, Respondent

[159] Response, ¶ 89.

[160] Response, ¶ 90 quoting the Application, ¶ 49.

[161] See Response, ¶ 92.

[162] See Response, ¶¶ 92-94.

[163] See Response, ¶ 95.

[164] Response, ¶ 96.

[165] Response, ¶ 97. Claimants refer to *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimant's Request for Provisional Measures, 3 March 2010, ¶ 56, Exhibit CL-23; *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures, 25 January 2016, ¶ 86, Exhibit CL-24;, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order 3, 18 January 2005, ¶ 8, Exhibit CL-14; *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 59, Exhibit RL-171; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 38, Exhibit RL-173; *Menzies v. Senegal*, ICSID Case No. ARB/15/21, Procedural Order No. 2, 2 December 2015, ¶ 121, Exhibit RL-168; Schreuer, "The ICSID Convention: A Commentary", p. 2 (¶ 64 on p. 776 of Schreuer), Exhibit CL-20.

i. provides no evidence as to the severe damage that Claimants' alleged "media activities" have supposedly caused to "the prospects of objective media coverage";[166]

ii. does not explain how "objective media coverage" can ever be achieved "where Estonia itself claims to have no control over parties expressing anti-ASTV viewpoints […]";[167]

i. does not explain why the few articles it refers to are not "objective";[168]

ii. fails to provide any evidence in support of its allegation that it "will be under an enormous media pressure to provide its comments" on the Extract and other Arbitration Documents in a "parallel forum";[169]

iii. offers no evidence that Claimants' arguments will be misused by the media or that this presents a risk of serious and irreparable harm;[170] and

iv. cannot rely on the *Biwater* and *Abaclat* cases as a basis for the requested restrictions on publication because of the "different and much more extreme circumstances" of these cases.[171]

65. The fact that the Extract may generate media interest and that the media may be critical of Estonia does not constitute serious and irreparable harm.[172] Claimants have already explained their intentions with respect to publication in their letter of 19 January 2016.[173] Claimants further indicate that they would "not object to Estonia publishing a similar extract from its own Counter-Memorial should it wish to do so, provided that it gives seven days' notice to the Claimants before doing so."[174]

[166] Response, ¶ 100.a.

[167] Response, ¶ 100.b.

[168] Response, ¶ 100.c.

[169] Response, ¶ 100.d.

[170] See Response, ¶ 100.e.

[171] Response, ¶ 100.f.

[172] See Response, ¶ 101.

[173] See Response, ¶ 102.

[174] Response, ¶ 102.

*(c) No proportionality*

66. In addition to failing the necessity test, Respondent also fails and in fact does not even address the issue of proportionality, which requires "balancing the inconvenience in the imposition of the measures upon the parties."[175]

67. In order to give proper consideration to this "balance of inconvenience", the Tribunal must take into account the "countervailing interest in favour of transparency" as well as the potentially substantial damage that Claimants would suffer should the Application be granted.[176] Claimants contend that Respondent itself has waged a "negative publicity campaign"[177] regarding ASTV's excessive profitability and tariffs, which is precisely one of the BIT violations that Claimants invoke in this arbitration. Claimants refer to comments made by the head of the Estonian Competition Authority ("**ECA**"), the Minister for Economic Affairs and Communications, members of the Estonian Parliament and the Legal Chancellor,[178] as well as the government-funded EOKL.[179] Respondent's attempt to deny any involvement in the conduct of EOKL on the basis of the ILC Articles on State Responsibility misses the point.[180] Claimants believe that EOKL was "influenced" by Respondent, including through members of the Estonian Parliament who were on the management board of EOKL at the time of its negative media comments about ASTV.[181]

68. If, as Respondent claims, criticism of ASTV in the Estonian media is generated by "private individuals and entities" and as such "is not an act attributable to Estonia," then, Claimants submit, the relief sought by Respondent would not be proportionate because it "would not prevent the continuation of this campaign against ASTV but

[175] Response, ¶ 104. See also Response, ¶ 105. Claimants also quote Gary Born, "International Commercial Arbitration" (2nd Edition), p. 21 (Chapter 17 at page 2470 in Born), Exhibit CL-25.

[176] Response, ¶ 106.

[177] Response, ¶ 107.

[178] See Response, ¶ 107. Claimants refer to Press article, "The State bridles Tallinna Vesi's tariffs policy", 3 April 2009, Exhibit C-149; Press article, "Reinsalu: Tallinna Vesi must be bridled fast", 27 April 2009, Exhibit C-150; Blog post by Ken-Marti Vaher, "Responses to Anti-Monopoly Bill", 8 October 2009, Exhibit C-154; Press article, "State is willing to take monopolies in hand", 13 October 2009, Exhibit C-155; and Äripäev press article, 2 December 2009, Exhibit C-158; Memorial, ¶ 219; and First Witness Statement of Ian John Alexander Plenderleith, ¶¶ 50-52, 58, 59, 60-61, 64, 74, 86 and 89.

[179] See Response, ¶ 108. Claimants refer to Press article, "Owners' Union is planning to take the dispute over water tariff to the court", 30 January 2009, Exhibit C-145; Press article, "Homeowners Association: Tallinna Vesi should reduce its tariffs by at least 20%", 28 September 2009, Exhibit C-152. Claimants also refer to further "negative media coverage" of ASTV's tariffs and profitability in articles exhibited at Exhibits R-111 to R-114. See Response, ¶ 109.

[180] See Rejoinder, ¶ 75.

[181] Rejoinder, ¶ 75.

would prevent the Claimants responding to it."[182] Claimants insist that the negative media coverage emanating from the Estonian state apparatus continues.[183]

69. In addition, although Claimants do not believe that Respondent actually had no involvement in the allegedly illegal leak of an internal government document or in the statements of the EOKL, they contend that "Estonia's admitted lack of control over information within the state apparatus provides the Claimants and the Tribunal with little confidence that such disclosures will not happen again."[184]

70. Respondent's argument that Claimants would suffer no harm if the Application were granted has no merit.[185] Claimants insist that the issue not only concerns their obligation to provide certain information to their stakeholders and the public, it also concerns how Claimants choose to "run their business and communicate with their current and potential shareholders and customers."[186] This dispute is highly relevant to Claimants' operations since it "goes to the heart […] of the value of their single most valuable investment."[187] Being prevented from communicating publicly on the present dispute has potential to cause substantial harm to Claimants.[188]

71. Claimants conclude that the relief sought in the Application goes well beyond restrictions on the publication of the Extract, and would "limit any discussion of the Claimants' claims whatsoever."[189] The measures sought by Respondent are disproportionate,[190] and the Application should therefore be dismissed.

## II. THE PARTIES' REQUESTS FOR RELIEF

72. Respondent requests that the Tribunal grant its Application and issue the following order:

> a. Neither Party shall publish, whether directly or indirectly through any third parties, any Arbitration Document, or any summary, excerpt or Excerpts thereof.

[182] Response, ¶ 110.

[183] See Response, ¶ 111. Claimants refer to Article "Estonia spends 3.4 million euros for the arbitration dispute with Tallinna Vesi" published in Postimees, 6 January 2016, Exhibit R-214; and Article "The government decided to allocate 2.38 million euros to represent Estonia in the arbitration dispute", 14 January 2016, Exhibit R-215.

[184] Response, ¶ 113.

[185] See Rejoinder, ¶ 83.

[186] Rejoinder, ¶ 85.

[187] Rejoinder, ¶ 85.

[188] See Rejoinder, ¶¶ 82, 86.

[189] Response, ¶ 115.

[190] Response, ¶ 11

> b. Each Party may publish a stock exchange announcement or press release, or make general public statements regarding the filing of any submissions, the hearing and/or the issuance of the award. Such communications may state the general position that Claimants claim violations of the Treaty and Estonia denies Claimants' claims in full but shall not discuss the specific content of any submissions or the witness statements and expert reports attached thereto, or identify the witnesses and experts (including by disclosing any general or anonymized information that would allow their identification).
>
> In accordance with Article 23.1 of the Procedural Order No. 1, Estonia confirms its agreement to the publication of the order on Estonia's Application issued by the Tribunal.[191]

73. Claimants request:

> On the basis of the foregoing, without limitation and fully reserving its right to supplement the relief sought in these proceedings, the Claimants request that the Tribunal dismiss Estonia's Application in its entirety.
>
> The Claimants reserve the right to ask the Tribunal to take into account the bringing and conduct of this Application when considering costs at the end of the arbitration.
>
> In the event that the Tribunal is minded to grant the relief sought in Estonia's Application, the Claimants request that:
>
> a. The Tribunal's recommendation be phrased so as not to place any burden on the Claimants with regard to the conduct of independent third parties, but rather to require the Claimants themselves to "*take no steps*" to publish any Arbitration Document;
>
> b. The Tribunal's recommendation be limited to, at most, the relief sought in paragraph 71 (a) of Estonia's Application; and
>
> c. In accordance with Article 23.1 of Procedural Order No. 1, the Tribunal's recommendation be published by ICSID and the Claimants be permitted to share this recommendation directly with their shareholders. The Claimants note that Estonia agreed to this in its Reply at paragraph 114.[192]

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[191] Reply, ¶¶ 113-114. See also Application, ¶¶ 71-72. In footnote 76 to paragraph 113 of the Reply, Respondent made the following observation:

> Claimants state that Estonia's Application should have requested the Tribunal to issue a recommendation rather than an order. (See Claimants' Response, ¶ 120) While Estonia considers this issue to be immaterial, this Tribunal is in fact empowered to issue orders under Article 47 of the ICSID Convention. This was confirmed for example in *Occidental v. Ecuador* […]. See *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 58, RL-171.

[192] Rejoinder, ¶¶ 97-99 (emphasis in the original). At paragraph 120 of its Response, Claimants note that "Estonia has sought an 'order' from the Tribunal in its Application. For good order, the Claimants note that the Tribunal is empowered by the ICSID Convention and the ICSID Arbitration Rules to make a '*recommendation*', rather than an order."

## III. ANALYSIS

### A. Legal Framework

#### *(i) The ICSID Convention and Rules*

74. The rules regarding provisional measures are set out at Article 47 of the ICSID Convention and Rule 39 of the ICSID Rules. These grant broad discretion to a tribunal to craft such provisional measures as it considers appropriate in the circumstances to preserve the rights of the parties.

75. Article 47 of the ICSID Convention reads:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

76. Rule 39 of the ICSID Arbitration Rules provides:

> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
>
> (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
>
> (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

77. Rule 19 of the ICSID Rules is also worth recalling, as regards the Tribunal's authority generally to make such orders as it considers required for the conduct of the arbitrations:

> The Tribunal shall make the orders required for the conduct of the proceeding.

### *(ii) Requirements for provisional measures*

78. From these rules a number of practical requirements, or criteria, have developed which assist in determining whether and in what particular circumstances provisional measures are called for, as well as the nature of such measures as may be warranted. There is no real dispute between the parties regarding the nature of these criteria, as is clear from their pleadings. Although formulated in different ways by different tribunals – and by the parties themselves here – five criteria apply:

i. *prima facie* jurisdiction of the tribunal;

ii. *prima facie* existence of a right susceptible of protection / prima facie case on the merits;

iii. necessity of the measure requested;

iv. urgency of the measure requested;

v. proportionality of the measure requested (balance of inconvenience).[193]

## B. Discussion

79. The parties' fulsome submissions cover comprehensively and very effectively the legal and factual questions that arise from Estonia's Application and that must be addressed in order to determine whether the Application is to be granted or denied.

### *(i) The "starting point"*

80. The starting point of the particular analysis called for in the circumstances here, where Respondent seeks measures designed to limit and control the publication or other disclosure of documents and information related to the arbitration, is the question *whether parties to ICSID arbitration are under a general duty of confidentiality and/or whether they have a general right of disclosure*.

81. The Tribunal does not consider that there is a general prohibition in ICSID arbitration against a party publishing extracts of its own submissions. Nor, on the other hand, is there a general rule permitting unfettered publication. In this respect, the Tribunal shares the opinion expressed by the tribunal in *Biwater*, one of the principal cases that address this question and on which all parties in this arbitration rely:

> In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however,

[193] Application, ¶ 39; Response, ¶ 10; Reply, ¶¶ 101 *et seq*.; Rejoinder, ¶¶ 82 *et seq*.

> there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.[194]
>
> [Emphasis added]

82. This statement of general principle – *no general duty of confidentiality/no general right to disclose* – is consistent with the analysis found in other decisions and commentary to which the parties refer. For example, as noted by the tribunal in *Abaclat*:

> […] if it is true that there is no general duty of confidentiality, this is not to be understood as a "carte blanche" entitling a Party to disclose as it deems fit any kind of information or documents issued or produced in this proceeding.[195]

83. Along similar lines, and with reference specifically to the existence of an express rule concerning the sort of publication/disclosure proposed by Claimants, Professor Schreuer observes:

> The Arbitration Rules do not say that the parties must keep their memorials secret. In fact, a note to the 1968 Arbitration Rules specifically points out that the parties are not prohibited from publishing their pleadings. It adds that they may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute.[196]
>
> [Emphasis added]

84. The tribunal in *Abaclat*, some years after *Biwater*, framed the general proposition regarding confidentiality/disclosure (or transparency) this way:

> In conclusion, the Tribunal deems that the ICSID Convention and Arbitration Rules do not comprehensively cover the question of the confidentiality/transparency of the proceedings. Thus, in accordance with Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules, unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.[197]

85. The Tribunal considers that in addition to the *no general duty/no general right* principle so aptly articulated in *Biwater*, the approach by the *Abaclat* tribunal to bridging the

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[194] *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 121, Exhibit RL-1.

[195] *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, ¶ 79, Exhibit RL-3.

[196] Christoph H. Schreuer, "*The ICSID Convention: A Commentary*" (2nd Edition), p. 1 (¶ 100 on p. 698 in Schreuer).

[197] *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, ¶ 73, Exhibit RL-3.

confidentiality/disclosure divide is both fully in line with applicable rules and eminently sensible.

86. As to the next steps in the analysis, the Tribunal will indeed consider all the circumstances of the case, in order to decide whether to grant the requested provisional measures.

87. Before proceeding with the analysis, however, the Tribunal pauses to address two matters tangential but nonetheless connected both to what has been said and to what follows. First, the Tribunal cannot but note that no understanding exists between the parties here as to their entitlement or not to publish their own submissions, and that Claimants have nonetheless agreed – helpfully, in our view – to refrain from publishing the Extract pending the Tribunal's consideration of the important and wide-ranging issues raised in Respondent's Application. Second, for the sake of clarity, the Tribunal states emphatically that in issuing Procedural Order No. 1 it did not address, let alone confirm, and it does not consider that PO 1 either addresses or confirms, the position of any party regarding the questions at issue here regarding the parties' duties and rights. Paragraph 23.1 of Procedural Order No. 1 does no more than record, as it says it does, the parties' consent for ICSID to publish the procedural orders, decisions and awards issued in this case subject to the redaction of confidential information.

88. We turn now to a consideration of whether the Application satisfies the criteria for the taking of provisional measures.

### *(ii) Prima facie jurisdiction*

89. There is no dispute as to the Tribunal's *prima facie* jurisdiction. As discussed above, Claimants' contestation of Estonia's Application is based on other grounds. The Tribunal indeed considers that its *prima facie* jurisdiction is based here on the consent between Claimants and Estonia, the consent of Estonia having been given in the BIT and the consent of the Claimants in their Request for Arbitration.

### *(iii) Prima facie existence of a right susceptible of protection*

90. The rights that Estonia claims its Application is intended to protect are enumerated in its pleadings summarised above. The Tribunal considers that these can be grouped under the rubric of *procedural integrity and non-aggravation of the dispute.* [198] Claimants' publication of the Extract, Respondent claims, would harm this right.

91. There is no dispute – and rightly so, in the Tribunal's view – that both substantive and procedural rights are "susceptible of protection" by means of provisional measures. The crux of Claimants' argument here is that procedural rights in this context do not encompass "purely procedural matters which do not have any bearing on the underlying dispute or the harm alleged to flow from that underlying dispute."[199] In the circumstances of this case, say Claimants, the right asserted by Respondent – the

[198] See: Application, ¶ 46; Reply, ¶ 80.

[199] Response, ¶ 86.

right to procedural integrity and non-aggravation of the dispute – and the protections sought are wholly unrelated to the parties' substantive claims in the arbitration and could have no bearing on the merits of the case or the parties' substantive rights.

92. The Tribunal does not share this view.

93. The Tribunal agrees with Claimants that, merely because certain other tribunals have found that publication of arbitration documents or information could exacerbate the dispute in those cases, it does not follow that "publication in every case […] must self-evidently amount to aggravation of the dispute."[200] As Claimants say, there is no basis in the case law (and the Tribunal would add, or in principle) for such an unqualified proposition. But that is not the foundation of the Tribunal's decision, which rests rather on the considered view, as explained below, that – in the circumstances of this arbitration – Claimants' proposed publication of the Extract is more likely than not to disrupt these proceedings and aggravate this dispute between these several parties.

94. Claimants deny that they are involved in any media campaign or that Respondent has in any event proven a link between such reporting as has appeared in the media and any harm that it has suffered or may suffer as a result of any publicity. On the other hand, Claimants themselves repeatedly insist that "Estonia has waged a negative publicity campaign against ASTV and that this is one of the breaches of the BIT on which Claimants found their claims in the arbitration."[201] Moreover, Claimants argue that "the damage to Claimants' interests in the event that Estonia's Application is granted, preventing the Claimants from not only publishing a summary of their position but also discussing the case publicly, has the potential to be substantial."[202]

95. It would seem that there is indeed, even in Claimants' view, a very real connection between publicity related to the arbitration and harm, not merely to what Claimants call the "dispute proceedings" but to the parties' interests and rights in the "underlying substantive dispute."[203]

96. Claimants go further and state that "the reason" they oppose the requested provisional measures and "wish to reserve their rights in relation to disclosure is to enable them to be responsive where necessary" to "misleading and damaging" reports emanating from Estonia.[204] Later, they claim that they "consider it necessary to be able to respond to further negative publicity" emanating from sources within the Estonian government or government-funded entities.[205]

[200] Response, ¶ 91.

[201] See for example: Response, ¶¶ 107 *et seq*.

[202] Response, ¶ 106.

[203] Response, ¶ 85.

[204] Rejoinder, ¶ 18.

[205] Rejoinder, ¶ 73.

97. In such circumstances, it hardly lies with Claimants to plead that publicity can have no bearing on the parties' underlying rights or is not "related to the specific issues in dispute in the arbitration."[206]

### *(iv) Necessity*

98. The question is whether the measures sought by Respondent – the restraints on publicity that it proposes – are necessary for procedural integrity and non-aggravation of the dispute in the circumstances of this case.

99. Claimants argue that Estonia fails to prove exactly how publication of the Extract will aggravate the dispute or threaten its rights. However, the discussion above illustrates the real and direct connection between the very sort of publicity that Claimants envisage and the parties' underlying dispute. Each side accuses the other of waging a media war. Each side claims that it is harmed by the other's publicity campaign. Claimants themselves insist that they need to be able to continue to counter Estonia's conduct in this regard, whether intentional or otherwise, by publishing documents or information from the arbitration; this is part of the justification for publishing the Extract. Presumably they would accord the same right to Estonia "to respond to further negative publicity" and "to be responsive where necessary [to] misleading and damaging leaks appearing from [Claimants];" and they have stated that they would have no objection to Respondent publishing excerpts from their pleadings similar to the Extract.

100. Claimants correctly argue that "the necessity investigation focuses upon the nature and extent of the harm which is likely to occur to the applicant in the event that the provisional measure sought is not granted."[207] They are wrong, though, when they claim that Respondent has failed to address the nature of the harm with which it says it is threatened, or that it has failed to show that such harm is likely to occur. Both the nature of the harm in question here and the likelihood of its occurrence (in the absence of any control on publication or other form of disclosure by the parties) are addressed above. The Tribunal is of the view that the sort of tit-for-tat publicity described here – beginning or continuing (it matters not how this is described) with the Extract and going forward from there – which the parties describe as being almost inevitable, and inevitably damaging, need not be branded a "war" or a "campaign" in order for the Tribunal to find, as it does, that such conduct would inevitably harm the parties' respective rights in the dispute.

101. In any case, neither the nature nor the likelihood of the harm in question need be demonstrated with certainty. It suffices, as Respondent notes – and this is expressly acknowledged by Claimants – that such harm be *likely*;[208] specifically, that it be more likely than not to occur if provisional measures are not taken. As stated in *Biwater*:

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[206] *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 118-119, Exhibit RL-174.

[207] Response, ¶ 98.

[208] Reply, ¶ 92.

> In truth, [the applicant's] complaint amounts to a concern about the risk of future prejudice, or the potential risk to the arbitral process as it unfolds hereafter.
>
> The Tribunal disagrees, however, with the suggestion that actual harm must be manifested before any measures may be taken. Its mandate and responsibility includes ensuring that the proceedings will be conducted in the future in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect). Among other things, its mandate extends to ensuring that potential inhibitions and unfairness do not arise; equally, its mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties.[209]

102. The Tribunal considers the subsequent paragraph of *Biwater* equally applicable in the circumstances here:

> Given the media campaign that has already been fought on both sides of this case (by many entities beyond the parties to this arbitration), and the general media interest that already exists, the Tribunal is satisfied that there exists a sufficient risk of harm or prejudice, as well as aggravation in this case to warrant some form of control.[210]

### *(v) Urgency*

103. The Tribunal agrees with the formulation of the urgency requirement advocated by Respondent: urgency is not restricted to "matters which will happen in the immediately foreseeable future."[211] Urgency is to be assessed according to the circumstances, which include the requested measures; and the requirement may be satisfied on a showing that the requested measures are necessary at a certain point in time before the award is issued.

104. In this case, urgency is not disputed with respect to the publication of the Extract. However, Claimants do argue that there is no urgency with respect to "broader publication", in which they do not at this time intend to engage:

> The Claimants have no current intention of publishing any other documents or submissions from the arbitration, and have already confirmed that they will in any event not publish any of Estonia's [materials] without seeking advance agreement from Estonia, and without providing Estonia with appropriate notice before any publication such that Estonia can raise the matter with the Tribunal should it wish to do so. Relief restraining the Claimants from doing something they have already indicated they do not intend to do, and will in any event provide notice before doing, cannot be necessary or urgent, and there is therefore no need for the

[209] Reply, ¶ 92, quoting *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶¶ 144-145, Exhibit RL-1.

[210] *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 146, Exhibit RL-1.

[211] Reply, ¶ 110.

> Tribunal to consider, much less address, any possible broader publication at this stage.[212]

105. The Tribunal sees things differently. The Tribunal has already stated that it considers that the parties' rights would be at risk from additional publicity in this case; and that additional publicity appears likely in the circumstances, as discussed above. Though it may not be decisive, the Tribunal is also mindful of the obvious limitation – the gap – in Claimants' repeated statement of "no current intention." As framed, and indeed for the reason explained by Claimants, their statement of intent provides for the possibility that Claimants might decide unilaterally to publish further of their own arbitration documents without further warning.

106. The Tribunal considers that the urgency requirement is satisfied in the circumstances.

#### *(vi) Proportionality*

107. Claimants submit that preventing them from discussing their claim publicly is wholly disproportionate to whatever harm may befall Estonia solely by publication of the Extract. Stated in this fashion, it perhaps could be said that the balance of inconvenience is such that the Tribunal should decline to grant the Application. However, "preventing the Claimants from discussing their claim publicly", including as may be required to satisfy legal or regulatory (including stock exchange/securities) disclosure duties, is not what is sought in the Application, and it is certainly not what the Tribunal has in mind.

108. On the contrary, the Tribunal considers the measures discussed below to be not only necessary, but in fact reasonable, fair and entirely proportionate in the light of the concerns and interests expressed by both sides.

#### *(vii) The binding character of a decision on provisional measures*

109. Finally, lest there be any doubt in respect of this question, the Tribunal considers that it has the authority to *order*, not merely to "recommend", provisional measures. This has been recognised by many ICSID tribunals, as stated in *Tokios Tokelés v. Ukraine*:

> [A]ccording to a well-established principle laid down by the jurisprudence of ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal and the parties are under a legal obligation to comply with them.[213]

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[212] Response, ¶ 102.

[213] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 on Claimant's Request for Provisional Measures, 1 July 2003, ¶ 4 (footnote omitted). See also: B. Stern, "Interim/Provisional Measures, *Occidental v. Ecuador*, ICSID Case No. ARB/06/11" in Meg Kinnear et al., eds., Building International Investment Law, The First 50 Years of ICSID, 2016, pp. 627-640 at pp. 630-631: "The importance of provisional measures is confirmed by the recognition of their binding nature by ICSID tribunals. The question of the legal scope of provisional measures has been the subject of much debate, but seems to be solved today. The International Court of Justice ("ICJ") was the first to affirm the principle of their binding nature, when it declared the following in the *LaGrand*

### *(viii) Conclusion: appropriate form of provisional measures*

110. The Tribunal has hesitated between, on the one hand, issuing a decision which would require the parties to submit certain types of intended disclosures to each other for approval and, if necessary, to the Tribunal for a ruling prior to publication – in effect, what Claimants have done here – and, on the other hand, issuing a decision which, in ruling on certain types of disclosure and setting out *expected standards of conduct* for others, essentially relies on both the good faith and the good sense of the parties. It opts for the latter.

111. It is noted that Respondent expressly acknowledges "both Parties' right to engage in general public discussion of the case," and it recognizes "that it may be necessary for both Parties to generally comment on the progress of the case […]."[214] To this extent the Tribunal agrees with Respondent. The Tribunal does not agree, however, with the limits on such discussion proposed by Respondent, which as Estonia states, seek in effect to ban the parties from any discussion of "the substance of the case" (other than general statements to the effect that "Claimants claim violations of the Treaty" and "Estonia denies Claimants' claims in full.")[215] The Tribunal considers that such a ban is not called for: it is neither necessary nor proportionate to the potential harm that has been described.

112. The Tribunal shares in this respect many of the views and adopts many aspects of the general approach taken by the *Abaclat* and *Biwater* tribunals.[216] Specifically, the Tribunal considers that no party should be prevented from engaging in general discussion about the case in public, which discussion is not limited to updates on the status of the case, and may include wider aspects of the case such as 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.

113. For the sake of clarity, in view of the particular circumstances here and the particular measures requested by Respondent, such public discussion does not include

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judgment: 'The power to indicate provisional measures entails that such measures should be binding.' Article 47 of the ICSID Convention was modeled on Article 41(1) of the Statute of the ICJ. The only difference is that the verb "recommend" is used in Article 47 of the ICSID Convention while "indicate" is used in the corresponding Article of the ICJ's Statute. With a few exceptions, ICSID tribunals widely embrace the view that provisional measures have a binding nature. As far as the materialization of this binding nature is concerned, ICSID tribunals concur on their authority to draw negative inferences should a party fail to comply with the ordered provisional measures." (footnotes omitted)

[214] Application, ¶ 59.

[215] Application, ¶¶ 60, 71.b.

[216] See for example: *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, ¶¶ 84-85, Exhibit RL-3.

publication of the "Arbitration Documents" as defined by Respondent,[217] or any excerpt or extract thereof.

## IV. DECISION and ORDER

114. FOR ALL OF THESE REASONS, the Tribunal decides as follows:

(1) Respondent's Application for Provisional Measures is granted in part.

(2) No party is prevented from engaging in general discussion about the case in public, which discussion is not limited to updates on the status of the case, and may include wider aspects of the case such as 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.

(3) Such public discussion does not include publication of the "Arbitration Documents," i.e., the documents filed in this arbitration, such as the parties' written submissions, witness statements, expert reports and documents produced within the framework of document production, or any excerpt or extract thereof.

(4) Any request not granted herein is denied.

[217] "Arbitration Documents" are defined as "documents filed in this arbitration, such as the Parties' written submissions, witness statements, expert reports and documents produced within the framework of document production." See: Application, ¶ 4.

[*Signed*]

Brigitte Stern
Arbitrator

[*Signed*]

David A.R. Williams
Arbitrator

[*Signed*]

Stephen L. Drymer
President of the Tribunal