

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

Gavrilović and Gavrilović d.o.o.

v.

Republic of Croatia

(ICSID Case No. ARB/12/39)

**DECISION ON THE CLAIMANTS' URGENT APPLICATION FOR
PROVISIONAL MEASURES**

Members of the Tribunal

Michael C. Pryles, President of the Tribunal
Stanimir A. Alexandrov, Arbitrator
Matthias Scherer, Arbitrator

Secretary of the Tribunal
Lindsay Gastrell

Assistant to the President of the Tribunal
Albert Dinelli

19 March 2015

This Order concerns the Claimants' urgent application, made by letter dated 13 March 2015 (**the Urgent Application**). By the Urgent Application, the Claimants seek an order that the Respondent temporarily suspend its interrogation of the First Claimant until the Tribunal rules on the pending application made by the Claimants on 15 December 2014 to stay, *inter alia*, the entirety of the criminal prosecution of the First Claimant.

Relevant Background

On 15 December 2014, the Claimant made an application to the Tribunal, by a 44-page document entitled "Claimants' Request for Provisional Measures" (**the Claimants' Request**), for provisional measures.

In Part IV of the Claimants' Request, they requested relief, which included:

- (i) Respondent shall take all appropriate measures to suspend any investigation relating to the Investigation Order dated November 25, 2014, and any other criminal investigatory actions or criminal proceedings initiated against [the First Claimant], and to suspend any other criminal proceedings or investigation related in any way to the present arbitration, until the arbitration is completed or upon a further decision of the Tribunal.
- (ii) Respondent shall refrain from engaging in any other course of action which may directly or indirectly jeopardize the procedural integrity of this arbitration, aggravate or extend the dispute, alter the *status quo*, destroy the equality of arms between the parties or threaten the exclusivity of this ICSID arbitration ...

It is unnecessary for present purposes to set out the basis for the Claimants' Request, other than to note that, on the basis of the Claimants' Request and its supporting material, it is plain that it is a substantial and significant application requiring careful consideration by the Tribunal. Put another way, and not intending to indicate how the Tribunal may ultimately deal with the Claimants' Request, the application is not one which can be summarily dismissed.

On 23 December 2014, the Tribunal ordered that the Respondent provide its reply to the Claimants' Request by 28 January 2015.

On 28 January 2015, the Respondent provided its 67-page response, by way of a document entitled "Respondent's Reply to Claimants' Request for Provisional Measures" (**the Respondent's Reply**). It also provided supporting material.

On 9 February 2015, the Claimants were invited by the Tribunal, if they wished to do so, to file a short Rejoinder to the Respondent's Reply by 24 February 2015. A short extension of this deadline was sought by the Claimants, and granted by the Tribunal, to 27 February 2015.

On 27 February 2015, the Claimants filed a 26-page Rejoinder. It, too, was supported by evidential material.

On 4 March 2015, the Respondent was invited by the Tribunal, if it wished to do so, to file a short Surrejoinder by 31 March 2015.

So, by way of summary, before receipt of the Urgent Application:

- (a) the Claimants' Request had been pending before the Tribunal for nearly three months, while the Tribunal received submissions from the Parties;
- (b) each of the Parties had availed itself of the opportunity to file significant submissions and supporting evidence; and
- (c) pending receipt of the final submissions from the Respondent, the Tribunal was to rule on the Claimants' Request shortly after 31 March 2015.

Recent Developments

In its Urgent Application, the Claimants explained (citations omitted):

Yesterday, March 12, 2015, [the First Claimant] received an official summons compelling his appearance next Friday, March 20, 2015, for an interrogation by Respondent pursuant to the investigation order filed against him on November 26, 2014 (the "Investigation Order") by the Respondent's State Attorney's "Office for Suppressing Corruption and Organized Crime" ("USKOK"). ... Pursuant to Croatian law, [the First Claimant] must attend the interrogation, and faces arrest if he refuses to do so. [The First Claimant's] responses to the questions of the State Attorney will be admissible during any eventual prosecution under the Investigation Order.

The allegations set forth in the Investigation Order are identical to certain of the jurisdictional objections set forth by Respondent in this arbitration. As such, an interrogation of [the First Claimant] by Respondent relating to these allegations would manifestly upset the equality of arms between the Parties, and would jeopardize the procedural integrity of this arbitration.

This is especially true given the timing of Respondent's summons to [the First Claimant]. As you know, on March 4, 2015, the Tribunal granted Respondent's request to submit a counter-rejoinder on March 31, 2015. The summons was issued two days later, on March 6, 2015, and fixes a date in advance of the submission of the counter-rejoinder.

Thus, Respondent intensifies its abuse of its sovereign powers to circumvent the procedural rules of this arbitration before the Tribunal will be in a position to finally rule on Claimants' request to enjoin such abuse.

In order to maintain the status quo, and to preserve the procedural integrity of this arbitration, Claimants respectfully request that the Tribunal order Respondent to temporarily suspend its interrogation of [the First Claimant] until the Tribunal rules on Claimants' Request to stay in its entirety the criminal prosecution of [the First Claimant].

The next day, on 14 March 2015, the Tribunal invited the Respondent's response to the Urgent Application by 17 March 2015.

On 17 March 2015, the Respondent provided a reply together with an English translation of Articles 229 and 239 of the Criminal Procedure Act of Croatia.

In its reply, the Respondent stated, *inter alia*:

- The interview will in no way affect, let alone cause serious or irreparable injury to, any of the existing rights of the Claimants in the arbitration.
- The interview of a suspect is an integral part of the Croatian Public Prosecution Services' duty to investigate alleged criminal conduct.
- The interview of the First Claimant will not in any way prevent him or the Second Claimant from fully participating in the arbitration.
- The interview of the First Claimant is not being used to gather evidence for this arbitration.

The Respondent further says that the criminal investigation must be completed within six months pursuant to Article 229 of the Croatian Criminal Procedure Act and that deadline expires on 25 May 2015. The Respondent further says that respect of human rights and the rule of law are part of the highest values Croatian Constitutional Order and that, since being issued with the investigation decision in November 2014, the First Claimant has been aware that he would be summoned for an interview, and he has been given nearly 2 weeks notice of his proposed interview date.

Disposition

Having regard to the chronology set out above, the Tribunal considers it is appropriate that any further steps to interrogate the First Claimant on 20 March 2015, or otherwise, should await the determination of the Tribunal on the Claimants' Request.

Interrogating the First Claimant now, in advance of the Tribunal's determination of the Claimants' Request, would render at least part of that request nugatory. That is to say, the relief sought by the Claimants' Request would be denied not by proper consideration of the Parties' respective contentions but by a decision, over which the Respondent has control, to facilitate an interrogation which, in the circumstances, would be premature.

The Tribunal is not persuaded that there is real, or any, prejudice to the Respondent or its agents by awaiting the outcome of the Tribunal's determination of the Claimants' Request. The Tribunal notes the Respondent's submission that the deadline for completing the investigation of the First Claimant expires on 25 May 2015. The decision on the Claimants' Request will be made soon after 31 March 2015 and the delay of the First Claimant's interrogation in respect of conduct over twenty years ago by a further period of no more than one month cannot, in the Tribunal's view, support a proper allegation of prejudice.

Order

Therefore, pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, and so as to protect the integrity of this arbitration, the Tribunal hereby orders:

The Respondent and/or its agents be restrained from interrogating, examining, or otherwise compelling the attendance of, the First Claimant on 20 March 2015, or on any other date, until the Tribunal rules on the Claimants' Request for Provisional Measures dated 15 December 2014 filed in this arbitration.

Postscript

For the avoidance of doubt, the Tribunal's determination of the Urgent Application should not be seen as in any way to suggest, or be taken to suggest, the ultimate outcome of the Claimants' Request. Self-evidently, the determination of the questions the subject of the Claimants' Request are broader in nature and not attended by the urgency the subject of the Urgent Application. They will, like the Urgent Application, be considered on their merits.

For and on behalf of the Tribunal,

[signed]

Michael Pryles
President of the Tribunal

Date: 19 March 2015.

Melbourne, Australia.