**Written skills in Arbitration**

**Preparation**

1. **Memorials**

* ***Canfor* *Corporation v. The Government of the United States (UNCITRAL)*: (i) Notice of Arbitration, July 9, 2002; (ii) Objections to Jurisdiction, October 16, 2003; and, (iii) Reply Memorial in response to Objections to Jurisdiction, May 14, 2004**

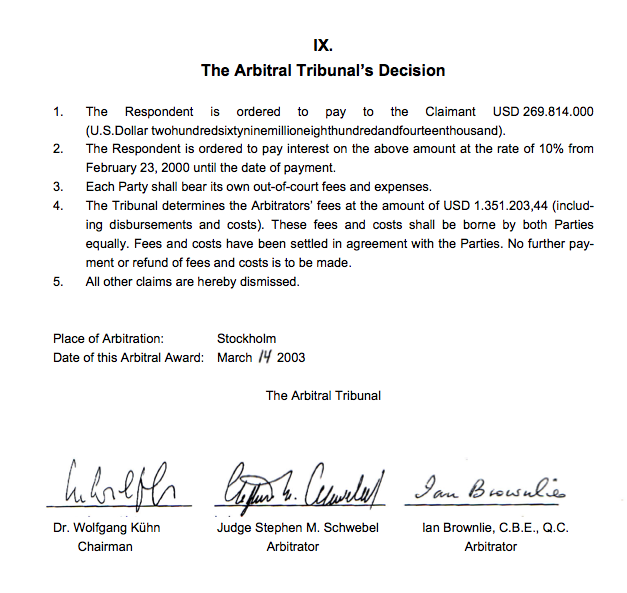
**The Claimant, CME** **Czech Republic B.V., is a corporation** organized under the laws of the Netherlands. The **Respondent, the Czech Republic,** is a sovereign State, represented in these proceedings by its Ministry of Finance.

CME Czech Republic B.V. (CME) initiated these arbitration proceedings on February 22, 2000 by notice of arbitration against the Czech Republic pursuant to Art. 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

CME claims that 􏰁NTS, the most successful Czech private broadcasting station opera- tor with annual net income of roughly USD 30 million, has been commercially destroyed by the actions and omissions attributed to the Media Council, an organ of the Czech Republic

CME claims, inter alia, that a signed merger and acquisition agreement between CME’s interim parent company and the Scandinavian broadcaster and investor Scandinavian Broadcasting System (“SBS”) was vitiated by these actions and omissions of the Media Council. CME accordingly suffered damage of more than USD 500 million, which was the value allocated by that agreement and by the joint venture partners to 􏰁NTS in 1999 before the disruption of the legal and commercial status of 􏰁NTS as a consequence of the Media Council’s actions and omissions.  CME claims that the Media Council, in breach of the Treaty, in 1996 coerced CME into amending the MoA thereby forcing CNTS to give up the exclusive right of the “use“ of the broadcasting license and that the Media Council in 1999 in collusion with Dr. Zelezny lent its support to the destruction of CNTS’ business.

The Czech Republic strongly disputes this contention and the purported underlying facts, maintaining that, inter alia, the loss of investment (if any) is the consequence of commercial failures and misjudgments of CME and, in any event, that CME’s claim is part of a commercial dispute between CNTS and Dr. Zelezny, for which the protection of the Treaty is not available.



* **Example of a procedural order setting out the applicable procedural rules: (i) Procedural Order No. 1, September 10, 2012 in *St Marys VCNA, LLC v. Government of Canada (UNCITRAL)***

“***Counsel for the Czech Republic have requested us to prepare an opinion*** *in connexion with the proceedings before the Tribunal* ***for the quantum phase of the arbitration****.*

*Our opinion is directed at three major areas which are relevant in the quantum stage of the arbitration proceedings.*

* *The first of these concerns the principle of res judicata in relation to the parallel UNCITRAL arbitration proceedings that ended with the Final Award of 3 September 2001.*
* *The second concerns the Tribunal’s duty to apply the proper law, in particular its duty to apply the law of the Czech Republic.*
* *The third concerns the Tribunal’s use of a theory of joint tortfeasors that has no foundation in international law.*

*In preparing the opinion, August Reinisch has drafted the section dealing with res judicata. Professor Philippe Sands has supplied valuable information on that section. Christoph Schreuer has drafted the section dealing with the duty to apply the proper law. With regard to the section on joint tortfeasors, we were greatly assisted by Dr. Stephan Wittich, an experienced specialist in the field of State responsibility. Despite this division of labour in the opinion's drafting, we have closely cooperated in its overall preparation. Therefore, we are jointly responsible for the opinion as a whole.*

*We have appended statements of our qualifications at the end of this opinion*”.

The report states : goes obviously in the direction of the Czech Republic : Under the general international law of State responsibility, neither the conduct of CET 21 nor that of Dr. Železný may be attributed to the Czech Republic

Followed by : Bibliography and authors’ resumes

* **Bryan A. Garner, LEGAL WRITING IN PLAIN ENGLISH 144 (2001)**

**Likes**

* Brevity
* Clarity
* Logical flow
* Clear issues
* Interesting writing
* Fluidity
* Informative headings
* Clean overall appearance
* Structured paragraphs
* Directness
* Issue & answer in first paragraph
* Practical writing
* Trustworthiness
* Succinctness
* Flowing prose; good transitions
* Clear divisions of thought
* Explanations Accuracy
* Honest, sincere writing
* Supporting rationale
* No footnotes
* Decisiveness
* Originality in presenting ideas
* Concise sentences
* Clear, concise statement of facts
* Outline style
* Short words
* Clear conclusions
* Conveying a sense of justice
* Instant clarity
* Storytelling
* Short, to-the-point style
* Simple sentences
* Clever phrases
* Well-put phrases
* Inspiring confidence about precise questions presented
* Understandable language
* Common sense Immediate identification of issues
* Logical organization
* Entertainment
* Footnotes for string citations
* Comprehensiveness
* Complex ideas stated simply & directly
* Footnotes properly and sparingly used
* Civil tone

1. **Witness Statements and Legal Opinions**

* ***Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12): (i) Decision on the Respondent’s Jurisdictional Objections, June 1, 2012; (ii) Witness Statement of Catherine McLeod-Seltzer, December 31, 2010; and, (iii) Witness Statement of Thomas C. Shrake, December 31, 2010**

Cf. Witness statement: surligné

* ***CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL): (i) Award, March 14, 2003; and, (ii) Legal Opinion of Professor Christoph Schreuer and Professor August Reinisch, June 20, 2002**

1. **Background of the dispute**

* **Facts**

The Claimant, CME Czech Republic, is a corporation organized under the laws of the Netherlands.

CEM initiated arbitration proceedings against Czech Republic as a result of alleged actions and inactions by the Czech Republic claimed to be in **breach of the Agreement on Encouragement and Reciprocal Protection of Investment between the Netherlands and the Czech and Slovak Federal Republic** (‘the Treaty’)

* CME holds 99% equity interest in CNTS, a Czech television services company. CME considers it as an investment which is therefore entitled to protection under the Treaty.
* CME’s investments (its ownership interest in CNTS) are related to a license for television broadcasting by the Czech Media Council.
* A **Memorandum of association** between CET 21 as the license holder and CNTS as the operator of the broadcasting station. Dr Zelezny, a Czech national who participated in the negotiations with the Czech media council served as a general director and chief executive of CNTS and as a general director of CET 21.
* In 1996 the Media Law changed
* The Media Council and CET 21, including CNTS agreed to change CNTS Memorandum of Association
* In 1999 after exchanges between Media Council and Dr Zelezny, CET 21 terminated the Service Agreement
* CET 21 thereafter replaced CNTS as service provider and CNTS business was totally eliminated
* CME claims CNTS, the most successful Czech private broadcasting station operator, has been commercially destroyed by the actions of the Media Council , an organ of the Czech Republic
* CME claims that the Media Council, in breach of the Treaty, coerced CME into amending the Memorandum of Association forcing CNTS to give up the exclusive right to use of the broadcasting license and that the Media Council in 1999 in collusion with Mr Zelezny lent its support to the destruction of CNTS’s business
* **Relief Sought**
* **Claimant**
* the Czech Republic has violated the following provision of the respective investment treaty:
  + The obligation of **fair and equitable treatment** of investments
  + The obligation of **full security and protection**
  + The obligation to treat investments at least in conformity with the rules/principles of international law
* The obligation **not to impair**
  + - investments by arbitrary and discriminatory measures
    - the operation, management, maintenance, use, enjoyment or disposal of investments by unreasonable or discriminatory measures
  + The obligation not to
    - expropriate investments directly or indirectly though measures tantamount to expropriation
    - **deprive Claimant of its investments** by direct or indirect measures
* Declaring that the Czech Republic is obliged to pay damages as a consequence of the treaty violations in an amount to be determined in a second phase of the arbitration
* Declaring that the Czech Republic will pay the Claimant's cost
* **Respondent** 
  + Dismissal as an **abuse of process**
  + Dismissal on grounds of **non-violation of the Treaty**
  + Dismissal on grounds that the **alleged injury was not the direct** and **foreseeable result of violation of the Treaty**
  + Declaring that CME is to pay Respondent's costs

1. **Procedure**

* **The appointment of the Tribunal**

The first phase of the proceedings

* Various procedural orders issued by the Tribunal on the issues related to the exchange of **written submissions, the language of the proceedings** and the production of documents, hearing dates and payment of costs
* Place of arbitration: Stockholm
* Sep 2000: Claimant submitted **statement of Claim**
* Nov 2000: Respondent submitted **statement of defense** raising, inter alia, the defense on jurisdiction stating the Tribunal lacked jurisdiction
* Nov 2000: Claimant submitted a **request for Production of Documents** which was contested by the Respondent as not conforming to the IBA rules
* For the hearing, the parties jointly submitted an agenda
* The parties submitted **witness statement** and attached to their submissions copies of 300 documents
* The hearing took place in Stockholm, the parties presented their case and submitted post-hearing briefs
* **The Partial Award**

The Tribunal decided that the Respondent has violated the following provisions of the Treaty:

* Obligation of fair and equitable treatment
* Obligation not to impair investments by unreasonable or discriminatory measures
* Obligations of full security and protection
* Obligations not to deprive Claimant of its investment
* **The Quantum phase of the proceedings**
* The Respondent requested to adjourn the quantum phase of the proceedings. Claimant opposed Respondent’s request for adjournment.
* The Claimant requested the Tribunal to limit the production of documents by ordering that the Claimant is not obliged to produce documents concerning CME and the subsidiaries for years after 1999 and documents concerning CNTS and other CME affiliates internal thinking about how to hadle matters with Dr. Zelezny. Respondent opposed the Claimant’s request
* The Tribunal gave instructions for the time table agreed
* The Tribunal clarified the scope of disclosure concerning the Respondent’s Document requests : Claimant was not obliged to disclose its internal strategizing
* Respondent made request for additional disclosure of documents. The Tribunal instructed the Claimant to disclose certain documents including unredacted versions of nine exhibuits specified by the Respondent and documents in accordance with the Respondent’s request
* The Tribunal considered the Claimant’s submissions dealing with the timing of the forthcoming hearing. The Tribunal took note of the Respondent’s proposal to restrict the forthcoming hearing to the cross examination of factual witnesses.
* **The parties’ submissions (Quantum)**
* Statement of claim respecting quantum
* Respondent’s statement of defense respecting quantum
* Claimant’s reply respecting quantum
* Respondent’s reply
* Claimant’s skeleton argument
* Respondent’s skeleton argument

1. **The position of the Claimant (Quantum)**

* Approaches to value CNTS
* CNTS’s historical performance
* Measuring CNTS’s value

1. **The position of the Respondent**

* **The Tribunal’s obligation to reconsider the Partial award**
* The Parallel arbitrations in Stockholm and London create the risk of conflicting awards arise out of bilateral investment treaties
* **Analysis of the applicable law**
* **Principles of causation under Czech law**: mitigation of losses, contributory fault, joint tortfeasors
* **CME’s contributory fault**: CME contributed to the destruction of CNTS participation in TV Nova
* Claimant was obliged to **mitigate its losses**
* Loss from 1996 Breach: CET’s contribution to CNTS in 1993, the exclusive right to use the license, as evidence by the Memorandum of Association of 1993 was only a promise to contribute the right to use the license. No change to CET’s contribution took place in 1996, it was irrevocable.
* CME Media has already been compensated by the use of know-how of the license
* Loss from 1999 Breach of Treaty; if CME’s investment has been harmed as a foreseeable result of the Media Council’s conduct in breach of the Treaty, the loss attributable is only that to which CME had definite legal rights

1. **The Tribunal’s Analysis**

* International law should apply as parties based their arguments on the interpretation of the Treaty in the light of the principles of international law
* The Respondent’s narrative does not refute the Tribunal’s finding, according to which the Media Council coerced CME into giving up the legal protection of the exclusiveness of the use of the broadcasting license in 1996 and breached the Treaty by the 1999 events.
* The Partial award is binding
* The London Tribunal’s Award does not control the arbitration: if the London Award would have had any *res judiciata* effect on this arbitration, the Respondent waived that defense by refusing to accept any of the Claimant’s proposals to coordinate the two proceedings. Res judicata doesn not apply as: 1) the parties in London arbitration differ from the parties in this arbitration; 2) the two arbitrators are based on differing bilateral investment treaties; 3) even if both arbitrations deal with the Media Council’s interference with the same investment in the Czech Republic, the Tribunal cannot judge whether that facts are identical
* The Respondent’s view that the Tribunal exceeded its mandate by deciding that the appropriate form of relief is the fair market value of the investment in CNTS is unsustainable in the light of the parties’ instructions to the Tribunal to decide on the Claimant’s request for compensation of the fair market value of its investment, leaving open for the Quantum phase only the amount of monetary damages. The Tribunal cannot identify any other aspect of liability open for re-litigation under the heading of “exceeding the Tribunal’s mandate”
* The Respondent’s narrative in support of its request to re-litigate causation in the Quantum Phase did not provide any new facts or circumstances that could lead the Tribunal to revisit its reasons set out in the Partial Award
* The Tribunal could not identify any deficiencies of CME or CNTS in mitigating losses
* The Claimant having gained relief from the Czech court proceedings against Dr Zelezny and his company CET 21, there appears to be no danger of double attribution of damages by the Tribunal

1. **The fair market value of CNT’s as of August 5, 1999**

* The Tribunal did not adjudicate the compensation of the ‘’fair market value’’ on theoretical grounds but on the basis of the fair market value reflecting the facts. Fair market value equates with just compensation that represents genuine value of the property affected, this is supported by the parties’ conduct in the First Phase of the arbitration and by the law.
* The assessment of compensation on the basis of the fair market value is sustained by the terms of the Treaty
* The determination of the compensation on the basis of the fair market value to eliminate the consequences of the wrongful act for which the State is responsible is acknowledged in international arbitration
* Czech law stipulates the primacy of the Treaty
* The Respondent must compensate the Claimant for its loss incurred bu the destruction of the Claimant’s investment in the Czech republic in accordance with the Partial award which provides for payment the fair market value of Claimant’s investment as it was before consummation of the Respondents breach of treaty in 1999.
* The Stockholm tribunal decided that the Czech Republic breached all the Articles as sought by the CME

**Legal Opinion of Professor Christoph Schreuer and Professor August Reinisch, June 20, 2002**

PART ONE: RES JUDICATA

1. **The Principle of Res judicata**

* Protects defendants from having to defend themselves twice in the same time
* Aims at preventing costly relitigation of already decided cases
* Provides legal security

1. **Res judicata as a Rule of international law**

* Customary international law/general principles of law
* In number of cases defined as legally binding principle
* This doctrine, according to which once a matter is judicially determined that matter may not be litigated again by the same parties in the same interest, applies equally to international arbitral tribunals

1. **Requirements of International res judicata**

3 main conditions for the applicability of the doctrine of res judicata:

* Before **international courts or arbitral tribunals**
* Between the **same parties**
* Increasingly “economic approach’’ adopted by international arbitral tribunal with regard of parent companies before such tribunals in cases where only the subsidiaries owned or controlled by them have formally signed arbitration agreements
* Related parent and subsidiary companies can be regarded as the same party for purposes of res judicata where a parent company has been allowed to bring a claim for its subsidiary or vice versa
* Concerning the **same issues**
* Identical object and ground, where object means that the same type of relief is sought in different proceeding and ground- that the same legal arguments are relied upon in different proceedings.
* Identical ground- where a party bases its claim, in one case, on a multilateral agreement, in another, on a bilateral one or on two different BITs such as in the present case

1. **Res judicata applied to the London and the Stockholm proceedings**

* London and Stockholm proceedings took place before international tribunal on the basis of BITs between Czech Republic and the US and the Netherlands. UNCITRAL
* Identity of the parties: Mr Launder as the ultimate controlling shareholder of all the companies
* Identity of issues: London proceedings- claim for damages as a result of breaches of the provisions of the US-Czech BIT; Stockholm- demand for damages for a violation under the Netherlands-Czech BIT. Both refer to the obligations of **fair and equitable treatment** of investments ; the obligation of **full security and protection** and the obligation to treat investments at least in conformity with the rules/principles of international law
* Identical grounds: both BITs contain same standards of protection relevant to investors; in both arbitrations identical written pleadings were filed, the same witness statements, the same arguments were made
* Both arbitrations concern the same facts: concerning the events surrounding the regulatory and other involvement of the Czech Media Council in the television broadcasting join venture undertaken by a Czech company (CET 21) and a series of foreign companies controlled by Mr. Lauder (the Claimant in the London proceedings)
* The Stockholm tribunal should therefore defer to the res judicata doctrine in order to avoid parallel proceedings leading to different results

**PART TWO: DUTY TO APPLY THE PROPER LAW**

* Choice of law clauses in BITs refer to the law of the host State as well as to international law, including the BIT itself
* The application of a law other that agreed by the parties constitutes an excess of powers and is a ground for annulment.
* Combined choice of law clauses embrace the law of the host State as well as international law
* The Tribunal applies international law in addition to national law
* In some cases tribunals have used language that might be interpreted in the sense of a priority or precedence of the host State’s domestic law over international law.
* As to the present case, art. 33 of the UNCITRAL Rules requires that the Tribunal shall apply the law designated by the parties. In the present case, the choice of law is based on BIT between Netherlands and the Czech Republic, which refers to the host State’s law as well as to international law
* In that case, tribunals are under the obligation to apply both systems of law
* A failure to apply the proper law constitutes an excess of powers. Tribunals that failed to apply the host state’s domestic law, although the latter was part of applicable law, were found to have committed an excess of power. In the relationship between the host Stat’s law and international law, the latter has a supplemental as well as corrective function. Therefore, the Stockholm tribunal must apply the law of the Czech Republic, as well as international law

**PART THREE: JOINT TORTFEASORS**

* Causation: even where a specific conduct is attributable to a State, it will still be necessary to establish that this attributable conduct is contrary to an international legal obligation of the acting State. The fact that the conduct of a state is considered causal in relation to an injury suffered says nothing about the question as to whether this conduct was contrary to international law. The Partial award seems to merge wrongful conduct, attribution and causality. The real cause for the damage in the present case was the conduct of a private individual which was an intervening causte that broke the chain of causation.
* The idea of States and individuals being jointly and severally liable towards an injured party runs to the basic principle of State responsibility that a State shall only be liable for its own unlawful conduct. Therefore, joint and several liabilities of States and individuals have no basis in international law. Neither the conduct of CET 21 nor that of Dr. Zelezny may be attributed to the Czech Republic.

1. **Document Production**

* ***Railroad Development Corporation v. The Republic of Guatemala* (ICSID Case No. ARB/07/23): The Republic of *Guatemala’s* Requests for the Production of Documents**

**Summary:**

Railroad Development Corporation (RDC) v. Republic of Guatemala: Production documents (June 29, 2012)

**Quick facts:**

*Railroad Development Corp. (RDC) v. Guatemala*, a Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA”) arbitration before the International Centre for Settlement of Investment Disputes (“ICSID”), is the first CAFTA claim to reach the merits stage. The ICSID tribunal ordered Guatemala to pay the investor almost twelve million dollars in damages in a dispute between RDC and the Guatemalan government over RDC’s operation of Guatemala’s railway system.

In 2007, RDC, a privately-owned U.S. railway investment and management company, filed a request for arbitration against Guatemala under CAFTA on its own behalf and on behalf of Companía Desarrolladora Ferroviaria, S.A., a Guatemalan company that does business as Ferrovías Guatemala (“FVG”) and is majority-owned and controlled by RDC. RDC requested the ICSID tribunal to find 1) that the *lesivo* declaration (“a measure adopted by the executive branch where the government agrees to declare [a] . . . contract *lesivo* because it causes harm to the State, and instructs and authorizes the Attorney General to take measures to cease its obligatory character”) and Guatemala’s subsequent conduct constituted an indirect expropriation in violation of CAFTA Article 10.7.1; 2) that Guatemala violated the minimum standard of treatment of CAFTA Article 10.5 by failing to provide, in accordance with customary international law, fair and equitable treatment and full protection and security to RDC’s investments; and 3) that Guatemala violated the national treatment standard of CAFTA Article 10.3. RDC also requested the tribunal to order Guatemala to pay RDC $64,035,859 in damages, plus costs and attorneys’ fees incurred in prosecuting its CAFTA claims.

In 1997, RDC won a government bid to operate Guatemala’s rails for fifty years. The dispute commenced when Guatemala’s executive branch declared RDC’s contract to be *lesivo i.e damaging/detrimental* because, *inter alia*, RDC failed to deliver the promised rehabilitation of Guatemala’s railway system. RDC claimed that the *lesivo* declaration harmed its investment in violations of Article 10.3 (national treatment), Article 10.5 (minimum standard of treatment), and Article 10.7 (expropriation) of CAFTA.

The ICSID tribunal found that Guatemala breached the minimum standard of treatment under Article 10.5 of CAFTA as its conduct was “arbitrary, grossly unfair, [and] unjust,” and it ordered that Guatemala pay RDC damages for losses incurred as a result of the breach. The tribunal also ruled that once the award is paid, RDC should forfeit and renounce all its rights under the contracts and transfer to Guatemala RDC’s shares in FVG.

**Relevance for the production of documents:**

The Claimant and the Respondent has provided with a list of documents in a following headings on

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  |  |  | | --- | --- | --- | --- | | **Request** |  |  |  | |  |  |  |  | | |  |  | | --- | --- | | **Reason for Request**  **(including reference to the relevant paragraph(s) in Amended Request for Arbitration, where appropriate)**  **Rebuttal to Objection** |  | | **Objection** | **Tribunal's decision Grant / Deny** |

**Following are the arguments seen in the submissions of both parties in respect of production of documents:**

**The Issue of Public Interest Immunity**

**Respondent’s submissions for objection to provide documents requested by the Claimant:**

The Respondent objected to the production of certain categories of documents requested by the Claimant on the basis of its assertion of **public interest immunity.** Given that this issue bears upon a number of document requests, it is considered first, as a matter of general principle.

**Claimant’s submissions disputing the Respondent’s objections:**

The Claimant disputes the Respondent’s objection to the production of documents on the grounds of public interest immunity for the reasons given below.

**“In any event, in the jurisdictions relied on by the Respondent, domestic law allows an extensive right of access to public documents, which is subject to an exemption the application of which is reviewed by the courts”**

International responsibility of the state requires the state to produce such documents as it is to decide whether or not the state violated its international obligations. And that to such situation the doctrine of public interest of immunity doesn’t apply.

Such doctrine is not a general principle of law as understood for the purposes of article 38 (1)(c) (source of public international law) of the Statute of the International Court of Justice. Neither is it provided for in the ICSID Convention or the ICSID Arbitration Rules (which endow ICSID Tribunals with broad powers to order the production of documents).

**Tribunal’s decision:**

1. The public interest immunity exception invoked by the Respondent is not a valid objection to the production of documents requested by the Claimant.
2. Politically sensitive documents, as for example containing State secrets, the Respondent should immediately refer the matter to the Arbitral Tribunal.
3. The Respondent should identify the relevant document(s) and indicate the reasons why in conformity with the above-mentioned principles the document concerned should be withheld, or disclosed subject to specific restrictions in order to preserve confidentiality. Any dispute will be finally decided by the Arbitral Tribunal.
4. The fact that a document could be adverse to the position of the Respondent in this arbitration is not sufficient to qualify the document as politically sensitive.

* ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22): Procedural Order No. 2, May 2006**

**Arbitration Rule 34: document production**

**The Arbitral tribunal decision:**

The Arbitral Tribunal notes that the Respondent’s identification of, and articulation of, “public interest immunity” as a doctrine rests upon the national law of Tanzania, and in particular (a) article 54(5) of the Tanzanian Constitution (which prohibits disclosure of any information relating to any advice that the President has received or may receive from the Cabinet) and (b) section 132 of the Tanzanian Evidence Act 1967 (which codifies what was formally known in England as “Crown privilege” and applies to unpublished official records and communications received by a public officer whose disclosure would be prejudicial to the public interest). The Respondent notes that similar doctrines are accepted in other national legal systems. However, and importantly, no equivalent doctrine has been identified as a matter of public international law, or as part of the ICSID regime.

As far as article 54(5) is concerned, the Arbitral Tribunal notes that strictly interpreted, this article does not cover all Cabinet papers but only those which specifically relate to advice for the President. Moreover, article 54(5) prohibits inquiries by “any court”, a term which is defined in the Tanzanian Constitution as any court having jurisdiction in the Republic of Tanzania. It may therefore be argued that this particular prohibition, by its own terms, does not apply to an ICSID Arbitral Tribunal.

More fundamentally, however, the nature of this dispute resolution process is entirely different from a national court process. This is an international tribunal, governed by an international convention, which is mandated to enquire into the conduct and responsibility of a State in light of its international treaty and customary international law obligations. It is hardly conceivable that, in this setting, a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents which are relevant to determine whether the State has violated its international obligations and whether, therefore, its international responsibility is engaged. This is certainly not the context in which the doctrine of “public interest immunity” was developed. The doctrine is not a general principle of law as understood for the purposes of article 38 (1)(c) of the Statute of the International Court of Justice. Neither is it provided for in the ICSID Convention or the ICSID Arbitration Rules (which endow ICSID Tribunals with broad powers to order the production of documents).

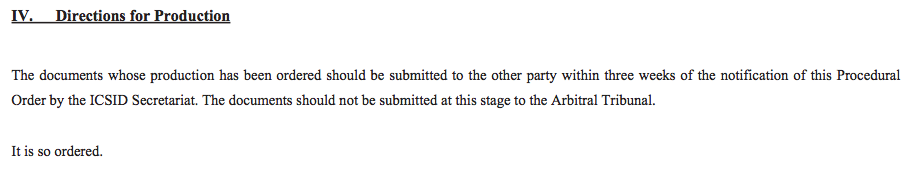
Further, if a State were permitted to deploy its own national law in this way, it would, in effect, be avoiding its obligation to produce documents in so far as called upon to do so by this Tribunal. This, in itself, is an international legal obligation arising from the State’s consent by way of the BIT to ICSID arbitration. It may also thereby stifle the evaluation of its own conduct and responsibility. As such, this would be to undermine the well established rule that no State may have recourse to its own internal law as a means of avoiding its international responsibilities. This principle finds expression in Article 27 of the Vienna Convention on the Law of Treaties 1969, as well as numerous other international decisions and commentaries (see e.g. Oppenheim’s International Law (9th Ed, Vol 1, Jennings & Watts ed.), at pp. 84-85).

Moreover, accepting Respondent’s theory would create an imbalance between the parties, which the Tribunal considers unacceptable. It is indeed one of the most fundamental principles of international arbitration that the parties should be treated with equality.

The Arbitral Tribunal considers that the only ground which might justify a refusal by the Republic to produce documents to this Tribunal is the protection of privileged or politically sensitive information, including State secrets, as pointed out by the Arbitral Tribunal in Pope and Talbot, Inc. v. Government of Canada, Ruling on Claim of Crown Privilege dated 6 September 2000 (2005) 7 ICSID Rep. 99, para. 1.4, and restated in article 9(2)(f) of the IBA Rules of Evidence (“The Arbitral Tribunal shall ... exclude from evidence or production any document ... for any of the following reasons : ... (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a Government or a public international institution) that the Arbitral Tribunal determines to be compelling ...”).

In conclusion, the Arbitral Tribunal decides that the public interest immunity exception invoked by the Respondent is not a valid objection to the production of documents requested by the Claimant. However, to the extent that some of the documents whose production will be ordered might be considered politically sensitive, as for example containing State secrets, the Respondent should immediately refer the matter to the Arbitral Tribunal. More precisely, the Respondent should identify the relevant document(s) and indicate the reasons why in conformity with the above mentioned principles the document concerned should be withheld, or disclosed subject to specific restrictions in order to preserve confidentiality. Any dispute will be finally decided by the Arbitral Tribunal. The Tribunal emphasizes in this respect that the fact that a document could be adverse to the position of the Respondent in this arbitration is not sufficient to qualify the document as politically sensitive.

All decisions made below are without prejudice to this direction.



Minutes = written record of courtroom proceedings.

1. **First part of the decision: the tribunal indicates the rules/standards it applies to the proceedings (“*considering…”)***

* Minutes of the First Session of the Arbitral tribunal provided that the parties agreed on a procedure applicable to the requests for production of documents between the parties.
* The parties’ requests will take tabular form with different sections (*see III and IV*.).

Tribunal refers to Art. 3 IBA Rules of Evidence. Guided by several standards in particular:

* Request for production must identify each document sought with **precision**
* Request must establish the **relevance** of each document for the proceedings. Each party must make it clear **which facts/allegations each document is supposed to establish.**
* Power of the Arbitral Tribunal:
* Can **order** the production of documents if they are within the possession, power, custody or control of the other party.
* Has to **balance** the request for production against the legitimate interests of the other party 🡪 ex: confidentiality.

1. **Issue in this case: public interest immunity**

* **Substantive issue** (why the case was brought before ICSID)**:** C alleges unlawful expropriation of his investments by R.
* **Problem**: Respondent (State) objects to the production of certain documents on the basis of public interest immunity.
* **R’s submissions:**
* Production of documents requested by C are prohibited by Tanzanian law (art. 54(2) of the Constitution)
* **Tribunal**: looks at the Constitution and notes that the article only covers documents which relate to advice for the President.
* **DECIDES**: **art. 54(2)C does not apply to an ICSID tribunal**.
* Government cannot waive the immunity (supports argument with House of Lords Case, English law, Crown immunity)
* Documents requested by C are related to internal deliberations and decision-making process of Government organs 🡪 so are subject to immunity (uses case law of UK and US jurisdictions)
* **C’s submissions**
* Distinction between domestic sphere and the international sphere: laws of the Republic of Tanzania are distinguishable from the ICSID proceedings.
* BIT: C alleges R has breached the treaty thus should be liable (international responsibility)
* **C’s argument:** R cannot invoke its own domestic laws to evade its international responsibility, states art. 27 Vienna Convention on the Law of Treaties which provides that “*a party may not invoke the provisions of its internal law justification for its failure to perform a treaty”.*
* **Tribunal:** reminds that it is an international tribunal governed by an international convention whose function is to determine whether the State is responsible in the light of its customary international law obligations and that of the BIT.
* **DECIDES:** State cannot invoke domestic notions of public interest to object to the production of documents which are relevant to the ICSID proceedings (determining whether R has breached international obligations).
* **Explanation:** art. 27 Vienna convention + accepting R’s theory would **create an imbalance between the parties** which is **contrary to the fundamental principle of equality governing international arbitration**
* **Arbitral tribunal**
* Need to determine **whether R acted in the public** **interest** to decide C’s expropriation of investments was lawful or unlawful under international law.
* Burden of proof on R 🡪 needs to establish that expropriation was done for a public purpose in accordance with requirements of customary international law and Art. 5 of the BIT.
* **If R does not provide documents, arbitral tribunal will use this failure against R** 🡪 will infer that R has refused to disclose because evidence is unfavourable to its case.

**CCL**: tribunal orders the production of requested documents. If R does not disclose, must prove it has very specific reasons (ex: State secrets, politically sensitive documents…etc.).

The fact that a document could be adverse to R’s position is not sufficient to qualify it as politically sensitive.

1. **Tabular form: summarizes the C’s document requests objected to by the R.**
2. **Tabular form: summarizes the R’s document requests objected to by the C.**

Form of the table: contains 4 columns:

1. Request
2. Reason for Request
3. Objection
4. Tribunal’s decision (Grant or Deny).

Reasons for Objection (in Whole or part)

* Privacy privilege
* **Public interest immunity** (not a ground according to Tribunals decision, cf. *supra),* state sovereignty.
* Because party can obtain the documents through its local agents. Should pay for the production, should try and obtain the documents itself.
* **Irrelevance**
* No responsive documents (i.e. no documents have been found)
* Documents subject to the lawyer-client privilege
* Vagueness of the request: does not identify a specific category of documents with particularity.
* Mootness of the request

Grounds for denying the request

* **Production is unduly burdensome** (ex: “***all*** *documents relating to the subject matter”).* **Tribunal specifies which documents should be produced** and allows the C to request other documents in another round if it considers that it needs additional specific documents
* If **party has not sufficiently established the relevance or materiality of the documents to its claims.**

Grounds for granting the request

* When party has **sufficiently established the relevance and materiality of the requested documents**
* Tribunal can **limit the** **grant to a certain extent**, gives a list of the documents the party has to provide to the other. Can give a party the **possibility to request additional specific documents if needed.**
* Tribunal can **order the Party to make a thorough research for the existence of the documents** where it hasn’t been able to find it so far.
* Tribunal reminds that if some of the documents are privileged or sensitive, R should submit the matter to the tribunal.
* Can **partially grant a request**
* **The IBA Rules on the Taking of Evidence in International Arbitration, May 2010**