

GEA GROUP AG v UKRAINE (ICSID CASE NO. ARB/08/16)**TRIBUNAL'S DECISIONS REGARDING CLAIMANT'S REQUESTS FOR PRODUCTION OF DOCUMENTS**

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
1 GEA	Financial statements for Oriana reflecting its assets, liabilities and results of operations for the period 1996-2004. GEA requests annual statements for the period 1996-2004, and monthly statements for the period October 1997-June 1998.	Memorial of Claimant, paras. 33-36, 49-80, 150-185. Respondent's Counter-Memorial, paras. 29-31, 179-216, 226, 250.	The documents will show how Oriana accounted for the misappropriation of GEA's property, the use of the proceeds and the materiality of those proceeds. The documents will also shed light on Oriana's governmental and quasi-governmental functions and relationship with the State. The documents requested are not in the possession, custody or control of GEA. The documents	The Respondent will provide any financial statements for the period which the Claimant submits is relevant which are in its possession. These documents have been requested from the State Statistics Committee and are presently being gathered. They will be provided to the Claimant as soon as possible. The Respondent reserves the right to request an extension in accordance with § 14.13 of the Minutes of Meeting of the First Session.	GEA takes note of Ukraine's statement that the requested documents are presently being gathered and will be provided as soon as possible. GEA also notes that on October 26, 2009 it provided Ukraine with an iteration of its Request for the Production of Documents (quite similar to the one communicated on January 22, 2010), with a view to allow ample time for Ukraine to search for responsive documents and to comply with its disclosure obligations in a timely manner. Given that Ukraine has had the opportunity to begin compiling documents in response to this request since October 2009, GEA also notes that it will vigorously oppose any request made by	N/A (documents will be produced).

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			<p>requested are in the possession, custody or control of Ukraine for two reasons: first, according to Article 9.1 of its Charter, Oriana was required to file operational and accounting records with the state statistics authority, which is currently known as the State Statistics Committee of Ukraine (<i>see</i> Exhibit R-0027). Second, Article 4.2 of Oriana's Charter gives Ukraine the right to obtain information on the activity of the Company including copies of annual balance sheets, reports of meetings</p>		<p>Ukraine for an extension of time to respond to this document request.</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			and other documents (<i>see</i> Exhibit R-0027).			

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
2 GEA	Documents from October 1997 through June 1998, recording the transportation from Oriana's plant of raw materials and finished products contemplated by the Conversion Contract (diesel, naphtha, ethylene, vinyl chloride, polyethylene, propylene, C4 fraction, benzol, C5-C9 fraction, pyrolysis resin).	Memorial of Claimant, paras. 49-80, 150-185. Respondent's Counter-Memorial, paras. 29-31, 179-216, 226, 250.	This is the period when GEA's products were misappropriated. During that period, GEA supplied 100% of the raw materials for the plant. The raw materials and the finished products were at all times the property of GEA. The documents requested will show what happened to the misappropriated products and to whom they were shipped. GEA anticipates that these documents may take the form of bills of lading, certificates for exportation, certificates of origin of goods, and may	This request must be rejected for the following reasons: (1) the Claimant has only provided a vague and unspecific description of the documents requested and, as a consequence, has failed to comply with Article 3(3)(a)(ii) of the IBA Rules. It has simply referred to "documents" which might include "bills of lading, certificates for exportation, certificates of origin of goods".	(1) GEA's request is not vague and unspecific merely because, in recognition of the fact that in Ukraine documents with the same function may bear other labels, it is framed in terms of documents with a narrow and specific function rather than in terms of the labels the documents bear. The statements made by GEA in the "Comments" column at the time of its request leave no doubt as to what the request references. Indeed, Ukraine's objection is curious given that Ukraine itself has requested under its Request 13 "[c]opies of (...) shipping documents." It is difficult to understand how requests for shipping documents are clear when they come from Ukraine but "vague and unspecific" when made by GEA.	Rejected (too vague).

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			<p>have been issued by the Ukrainian customs authorities, especially the State Customs Service of Ukraine (SCSU) and the Ivano-Frankivsk Customs Service. The documents requested are not in the possession, custody or control of GEA. GEA believes the documents requested to be in the possession, custody or control of Ukraine for the reasons stated above in respect of Request No. 1. In addition, some of the documents requested were issued by the Ukrainian customs</p>	<p>(2) the Claimant is unable to provide sufficient reason why it assumes the documents requested to be in the Respondent's possession, custody or control (Article 3(3)(c) of the IBA Rules).</p> <p>These are commercial documents and, if retained, would presumably have been retained by the parties to the relevant shipments and not the Respondent. To the extent that any of the documents described by the Claimant still exist, they are therefore likely to be in the possession, custody or control of Oriana and not in the possession, custody or control of the Respondent. Oriana is an independent company, separate from the Respondent and not a party to this arbitration. The Respondent cannot determine in lieu of Oriana whether Oriana has</p>	<p>(2) Oriana was a party to the relevant shipments and, as acknowledged by Ukraine, Oriana should thus have retained the requested documents.</p> <p>Arbitral tribunals have repeatedly and consistently found that documents maintained by a wholly-owned subsidiary are within the "possession, custody or control" of the parent company or controlling shareholder. For example, an ICC tribunal held as follows: "For the purposes hereof, 'possession, custody or control' shall include documents to the extent Claimant or Respondent has actual knowledge, without an obligation to do any research or inquiry, that a document responsive to a request for production is in the possession, custody or control of a person or an entity (i) within the same group as Claimant or Respondent, as the case may be (...)</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			or other state authorities.	additional grounds to invoke any of the categories of Article 9(2) of the IBA Rules, for example, commercial or technical confidentiality (Article 9(2)(e) of the IBA Rules). The Claimant cannot, in part of a request for the disclosure of documents, require the Respondent to procure documents from such third parties. In addition, the documents described by the Claimant do not correspond to the documents covered by Articles 4.2 and 9.1 of Oriana's Charter, and the Respondent has no record that Oriana ever provided any such documents to the Respondent by operation of either Article 4.2 or Article 9.1 of Oriana's Charter.	<p>An entity shall be deemed to belong to the same group as Claimant or Respondent if such entity directly or indirectly owns or controls Claimant or Respondent, or is directly or indirectly owned or controlled by Claimant or Respondent, or is directly or indirectly owned or controlled by the same entity as Claimant or Respondent.” (ICC Bull. Spec. Supp. 2006 - <i>Document Production in International Arbitration: Document Production in ICC Arbitration</i>, Virginia Hamilton, page 74, paragraph e)).</p> <p>Ukraine has offered neither evidence nor argument to suggest that it lacks control over Oriana, its wholly-owned subsidiary. Its contention that Oriana is a separate legal entity is beside the point: Ukraine controls Oriana, and documents in Oriana's possession are within its control.</p> <p>Ukraine has also failed to prove that</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>(3) The Respondent has been advised by the State Customs Service that during the relevant time period (1997-1998) the Ivano-Frankivsk Customs Service was operating in the Ivano-Frankivsk region.</p> <p>The State Customs Services has confirmed that it is not in possession of any of the documents requested by the Claimant since customs clearance documents are only retained for three years in accordance with Ukrainian law. Accordingly, if any such documents had been in its possession, they would have been destroyed.</p> <p>The Ivano-Frankivsk Customs Service has similarly confirmed</p>	<p>the requested documents are not covered by Articles 4.2 and 9.1 of Oriana's Charter, which are broadly framed.</p> <p>(3) GEA takes note of Ukraine's statement that the State Customs Services and the Ivano-Frankivsk Customs Service do not have the requested documents. However, this statement does not answer the question whether the requested documents are in the possession, custody or control of Ukraine through its control of its wholly-owned subsidiary Oriana.</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>that it has no documents corresponding to the description provided in the Claimant's Request since any such documents would have been destroyed in accordance with established document storage / document destructions procedures provided for by Ukrainian law.</p> <p>(4) The documents requested in any event lack sufficient relevance or materiality, and this request must be rejected in accordance with Article 9(2)(a) of the IBA Rules. The Claimant has failed to describe how these documents are relevant and material to the outcome of the case as required by Article 3(3)(b) of the IBA Rules. The rights to the product shipped to Ukraine pursuant to the Conversion Contract vested in Klöckner and not KCH, and were consequently not assigned to the Claimant (Counter-Memorial, paras. 114-121). As a result,</p>	<p>(4) It is hypocritical for Ukraine to claim that the shipping documents requested by GEA are irrelevant and immaterial while requesting similar documents from GEA (<i>see</i> Ukraine's Request 13).</p> <p>GEA has agreed to produce documents responsive to Ukraine's Request 13.</p> <p>In these circumstances, the principle of fairness and equality of the Parties recognized by Article 9(2)(g) of the IBA Rules would be contravened if GEA, producing documents in good faith to Ukraine's request as it has stated</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>what happened to the allegedly misappropriated products and to whom they were shipped is irrelevant to the outcome of the case.</p>	<p>that it will, provided “shipping documents” from its files while Ukraine were relieved of any obligation to do the same with respect to the same category of documents in files within its control.</p> <p>In addition, there is no merit to Ukraine’s objection on grounds of relevance and materiality. As demonstrated in the Memorial and as will be further demonstrated in the Reply, Ukraine’s assertion that no rights under the Conversion Contract vested with KCH cannot be reconciled with the contractual documentation (including multiple amendments and addenda to that Contract reflected in Exhibit 6a, among other exhibits), the conduct of the parties over several years, the ICC Award and multiple protocols and letters signed by the Ukrainian Government, Oriana and other relevant parties.</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
3 GEA	Documents concerning authority granted to ██████████ to act for Oriana during the period August to November 1998.	Memorial of Claimant, paras. 70-73, 92-101, 184, 193. Respondent's Counter-Memorial, paras. 71-72, 343-347.	This category of documents is relevant as evidence that ██████████ had the authority to sign the Repayment Agreement (1 App. Exh. C-18). The documents may take the form of an order issued by the State Property Fund, a resolution issued by the board, the supervisory council or the supreme body of Oriana, a power of attorney or order issued by ██████████ or ██████████ or other officer, director or shareholder of Oriana, or some	This request must be rejected for the following reasons: (1) The Claimant is unable to provide any convincing reasons why it assumes that any such documents exist and are in the possession, custody or control of the Respondent as required by Article 3(3)(c) of the IBA Rules. This is simply a "fishing" request made by the Claimant on the hope that documents might exist to support its claim. As stated by Reed, Paulsson and Blackaby: "Parties to ICSID proceedings cannot expect extensive, US-style document discovery ... To put it bluntly, a claimant investor cannot obtain the evidence to prove its case from the State respondent." (Reed, Paulsson, Blackaby, <i>Guide to ICSID Arbitration</i> (Kluwer Law International, 2004), pp. 84-85). It would place an unreasonable burden on the Respondent to	(1) Contrary to Ukraine's suggestion, the record contains evidence supporting a strong inference that the requested documents exist and are in the possession of Ukraine or its wholly-owned subsidiary Oriana. Ample evidence shows that ██████████ had the authority to sign the Repayment Agreement. Therefore, this allegation is not "mere speculation," contrary to Ukraine's assertion. For example, in multiple documents signed by himself and by top officers of Oriana, ██████████ (see, e.g., Protocol of meeting between Oriana and KCH dated September 24, 1998, 3 App. Exh. C-79; Custody Agreement between Oriana and Klöckner, dated September 30, 1998, 3 App. Exh. C-85). It cannot lightly be assumed that he and the top officers	Granted.

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			<p>other form. The documents requested are not in the possession, custody or control of GEA. GEA believes the documents requested to be in the possession, custody or control of Ukraine for the reasons stated above in respect of Request No. 1.</p>	<p>require it to identify and locate documents responsive to mere speculation, and this request must accordingly be rejected in accordance with Article 9(2)(c) of the IBA Rules.</p> <p>For the avoidance of doubt, it is denied that the State Property Fund issued any orders somehow mandating ██████████ to sign the Repayment Agreement.</p>	<p>of Oriana would repeatedly have signed documents containing such representations without any basis for them, particularly given the undisputed fact that Ukraine never commenced any investigation or even any disciplinary action concerning what Ukraine now asserts to be serious falsehoods by officers of a state enterprise.</p> <p>Ukraine's "fishing expedition" assertion is without merit. On the one hand, it distorts a single generalization in a brief summary of ICSID practice (Reed, Paulsson and Blackaby) into a rule that an ICSID Tribunal cannot order a party to produce evidence that would tend to prove the other party's case. On the other hand, it contends that the requested documents are not material to the outcome of the case. Ukraine's contention is absurd: the rule cannot be both that a request for documents relevant to the outcome of the case is impermissible "fishing" and that the</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>(2) If, contrary to the Respondent's belief, any of the other documents described by the Claimant (e.g., corporate resolutions or powers of attorney) do exist, they would be in the possession, custody or control of Oriana and not in the possession,</p>	<p>request must seek documents relevant to the outcome of the case to be granted.</p> <p>Ukraine's hypertechnical "heads I win, tails you lose" approach cannot be reconciled with that of the applicable rules. ICSID Arbitration Rule 34(3) provides that "[t]he parties shall <i>cooperate</i> with the Tribunal in the production of evidence (...)." The ICSID rules thus contemplate that the parties and the Tribunal will engage in a cooperative effort with a view toward establishing the truth. Ukraine's objection can be reconciled with neither the letter nor the spirit of the applicable rules.</p> <p>(2) Arbitral tribunals have repeatedly and consistently found that documents maintained by a wholly-owned subsidiary are within the "possession, custody or control" of the parent company or controlling shareholder. For example, an ICC tribunal held as</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>custody or control of the Respondent. As noted above, Oriana is independent of the Respondent. Even if such documents did exist, they do not fall within the categories of documentation described at Articles 4.2 and 9.1 of Oriana's Charter, and the Respondent has no record that Oriana ever provided any such documents to the Respondent by operation of either Article 4.2 or Article 9.1 of Oriana's Charter.</p>	<p>follows: "For the purposes hereof, 'possession, custody or control' shall include documents to the extent Claimant or Respondent has actual knowledge, without an obligation to do any research or inquiry, that a document responsive to a request for production is in the possession, custody or control of a person or an entity (i) within the same group as Claimant or Respondent, as the case may be (...) An entity shall be deemed to belong to the same group as Claimant or Respondent if such entity directly or indirectly owns or controls Claimant or Respondent, or is directly or indirectly owned or controlled by Claimant or Respondent, or is directly or indirectly owned or controlled by the same entity as Claimant or Respondent." (ICC Bull. Spec. Supp. 2006 - <i>Document Production in International Arbitration: Document Production in ICC Arbitration</i>, Virginia Hamilton,</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>(3) The documents requested in any event lack sufficient relevance or materiality, and this request must be rejected in accordance with Article 9(2)(a) of the IBA Rules. The Claimant has failed to describe how these documents are relevant and material to the outcome of the</p>	<p>page 74, paragraph e)).</p> <p>Ukraine has offered neither evidence nor argument to suggest that it lacks control over Oriana, its wholly-owned subsidiary. Its contention that Oriana is a separate legal entity is beside the point: Ukraine controls Oriana, and documents in Oriana's possession are within its control.</p> <p>Ukraine has also failed to prove that the requested documents are not covered by Articles 4.2 and 9.1 of Oriana's Charter, which are broadly framed.</p> <p>(3) There is no merit to Ukraine's objection that the requested evidence is not material because KCH, but not GEA, was the contractual party to the Repayment Agreement. The Memorial demonstrates that GEA is the successor in interest to KCH's rights. The evidence of record</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>case as required by Article 3(3)(b) of the IBA Rules. The Claimant is not a party to the Repayment Agreement and no longer has any share in KCH. Whether the Repayment Agreement was signed with proper authority and whether this has been properly recognised by the Ukrainian courts is irrelevant to the outcome of the case.</p>	<p>amply supports GEA's position. At the time GEA's subsidiary sold KCH's shares to Chemdis, KCH transferred to GEA "all rights, title and interest held by [KCH] in and to all claims of [KCH] against Oriana deriving from [KCH] business relations to Oriana (...) as well as all rights, title and interest in and to the belonging underlying transactions, including all rights thereunder." (Sale and Purchase Agreement between Solvadis chemag ag and mg technologies ag dated June 28, 2004, 1 App. Exh. C-2, Section 2.2). In addition, GEA indirectly controlled KCH's investment in Ukraine at the time of the relevant events and, therefore, GEA has rights under the Treaty by virtue of its control of KCH. Ukraine's assertion cannot be reconciled with the definitive evidence of record on the subject.</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
4 GEA	Contracts signed by Oriana with Ukrainian and foreign companies during the period August to November 1998.	Memorial of Claimant, paras. 177-195. Respondent's Counter-Memorial, paras. 367-368, 373.	The documents requested are relevant to GEA's claim of breach of the standard of protection against arbitrariness or discrimination and of the national and most-favored-nation treatment standards. [REDACTED] According to the Ukrainian courts, the new president was not appointed until November 1998 and no one but the president was authorized to sign a contract on behalf of Oriana. GEA has asserted that it was denied national and	This request must be rejected for the following reasons: (1) the Claimant has failed to provide any reasons why contracts entered into by Oriana would be in the possession, custody or control of the Respondent, as required by Article 3(3)(c) of the IBA Rules. To the extent that any of the documents described by the Claimant still exist, they are likely to be in the possession, custody or control of Oriana and not in the possession, custody or control of the Respondent. As noted above, Oriana is an independent company, separate from the Respondent and not a party to this arbitration. The documents requested by the Claimant presumably will include a number of matters giving rise to grounds of commercial or technical confidentiality (Article 9(2)(e) of the IBA Rules). As indicated above, the Respondent	(1) Arbitral tribunals have repeatedly and consistently found that documents maintained by a wholly-owned subsidiary are within the "possession, custody or control" of the parent company or controlling shareholder. For example, an ICC tribunal held as follows: "For the purposes hereof, 'possession, custody or control' shall include documents to the extent Claimant or Respondent has actual knowledge, without an obligation to do any research or inquiry, that a document responsive to a request for production is in the possession, custody or control of a person or an entity (i) within the same group as Claimant or Respondent, as the case may be (...) An entity shall be deemed to belong to the same group as Claimant or Respondent if such entity directly or indirectly owns or controls	Rejected (too vague).

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			<p>most-favored-nation treatment because the Ukrainian courts decided that GEA's contract (the Repayment Agreement, 1 App. Exh. C-18) should be annulled but did not annul comparable contracts with Ukrainian or third country nationals. GEA reasonably believes the documents to exist. Oriana was a very large enterprise and it is not credible that Oriana entered into no other contract during this time period. The documents requested are not in the possession, custody or control</p>	<p>cannot determine this in lieu of Oriana. In addition, the documents described in this category of the Request are not covered by Articles 4.2 and 9.1 of Oriana's Charter, and the Respondent has no record that Oriana ever provided any such documents to the Respondent by operation of either Article 4.2 or Article 9.1 of Oriana's Charter;</p>	<p>Claimant or Respondent, or is directly or indirectly owned or controlled by Claimant or Respondent, or is directly or indirectly owned or controlled by the same entity as Claimant or Respondent." (ICC Bull. Spec. Supp. 2006 - <i>Document Production in International Arbitration: Document Production in ICC Arbitration</i>, Virginia Hamilton, page 74, paragraph e)).</p> <p>Ukraine has offered neither evidence nor argument to suggest that it lacks control over Oriana, its wholly-owned subsidiary. Its contention that Oriana is a separate legal entity is beside the point: Ukraine controls Oriana, and documents in Oriana's possession are within its control.</p> <p>Ukraine has also failed to prove that the requested documents are not covered by Articles 4.2 and 9.1 of Oriana's Charter, which are broadly framed.</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			of GEA. GEA believes the documents requested to be in the possession, custody or control of Ukraine for the reasons stated above in respect of Request No. 1.	(2) the Claimant is requesting these documents to support a claim of discrimination that it is unable to sustain. As noted above, in ICSID arbitrations “a claimant investor cannot obtain the evidence to prove its case from the State Respondent”. It would place an unreasonable burden on the Respondent to require it to produce evidence responsive to mere speculation, and this request must accordingly be rejected in accordance with Article 9(2)(c) of the IBA Rules.	<p>(2) Ukraine’s “mere speculation” assertion is without merit. On the one hand, it distorts a single generalization in a brief summary of ICSID practice (Reed, Paulsson and Blackaby) into a rule that an ICSID Tribunal cannot order a party to produce evidence that would tend to prove the other party’s case. On the other hand, it contends that the requested documents are not material to the outcome of the case. Ukraine’s contention is absurd: the rule cannot be both that a request for documents relevant to the outcome of the case is impermissible “fishing” and that the request must seek documents relevant to the outcome of the case to be granted.</p> <p>Ukraine’s hypertechnical “heads I win, tails you lose” approach cannot be reconciled with that of the applicable rules. ICSID Arbitration Rule 34(3) provides that “[t]he parties shall <i>cooperate</i> with the</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>(3) it would furthermore place an unreasonable burden on the Respondent to locate and procure all and any contracts (assuming any such contracts exist) entered into by Oriana over 10 years ago (Article 9(2)(c) of the IBA Rules). This is particularly so given that the Claimant is evidently speculating and unable to indicate with whom these contracts may have been entered into, or to confirm that any such contracts in fact exist;</p>	<p>Tribunal in the production of evidence (...).” The ICSID rules thus contemplate that the parties and the Tribunal will engage in a cooperative effort with a view toward establishing the truth. Ukraine’s objection can be reconciled with neither the letter nor the spirit of the applicable rules.</p> <p>(3) Ukraine’s objection of unreasonable burden is without support. The request covers a narrow period of time, i.e., the four months from August to November 1998. The fact that the events at issue in this case are of a certain age does not make requests concerning those events unreasonably burdensome.</p> <p>In addition, Ukraine’s “age equals burden” objection is difficult to take seriously given that Ukraine itself has also requested from GEA documents dating back to 1998 (or even before) (<i>see, e.g.</i> Ukraine’s Requests 1, 2, 3, 6, 8, 9, 10, 11, 12,</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
					<p>13, 14, 15, 16, 19, 20, 21, 22, 23, 25, 26, 28, 30, 31, 32). Again, the principles of fairness and equality of the parties recognized by Article 9(2)(g) of the IBA Rules is difficult to reconcile with a scenario where GEA in good faith responds to Ukraine's requests for documents from 1998 while Ukraine declines to do the same.</p> <p>Moreover, Ukraine does not suggest that there is a factual basis for its assertion of burden – in other words, nothing indicates that Ukraine has even attempted to look for responsive documents. There is no factual support for Ukraine's assertion of burden.</p> <p>Finally, contrary to Ukraine's assertion, GEA is not speculating as to the existence of the requested contracts.</p> <p>The IBA Working Party that issued Article 3(3)(a)(ii) of the IBA Rules stated the following:</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
					<p>“[T]he Working Party understood that some documents would be relevant and material and properly produced to the other side, but they may not be capable of specific identification. Indeed, all members of the Working Party, from common law and civil law countries alike, recognised that arbitrators would generally accept such requests if they were carefully tailored to produce relevant documents. For example, if an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been prepared for the Board’s consideration of that decision and that minutes must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
					<p>documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared. Such a request may qualify as a “narrow and specific category of documents,” as permitted under Article 3.3(a)(ii).” (IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration, 2000 Business Law International 16, 22 (Issue No. 2, 2000)).</p> <p>Thus, it is not necessary for GEA to know that the requested documents exist. Rather, it is sufficient for GEA to state a reasonable basis for believing that the requested documents do exist.</p> <p>Oriana was the largest State-run petrochemical complex in the country, responsible for 2% of Ukraine’s gross domestic product at the relevant time. It is simply not</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>(4) the documents requested in any event lack sufficient relevance or materiality and this request must be rejected in accordance with Article 9(2)(a) of the IBA Rules.</p> <p>The Claimant has failed to describe how these documents are relevant and material to the outcome of the case as required by Article 3(3)(b) of the IBA Rules. Since the Claimant has divested any investment it purports to have had in Ukraine, its discrimination argument fails at the threshold. It is thus irrelevant who concluded other contracts on behalf of Oriana.</p> <p>Even if any such contracts could</p>	<p>credible that Oriana did not enter any other contracts with other entities during the period August-November 1998 and it is not burdensome to locate contracts signed by Oriana during this 4-month period.</p> <p>(4) There is no merit to Ukraine's objection that the requested evidence is not material because KCH, but not GEA, was the signatory to the requested contracts. The Memorial demonstrates that GEA is the successor in interest to KCH's rights. The evidence of record amply supports GEA's position. At the time GEA's subsidiary sold KCH's shares to Chemdis, KCH transferred to GEA "all rights, title and interest held by [KCH] in and to all claims of [KCH] against Oriana deriving from [KCH] business relations to Oriana (...) as well as all rights, title and interest in and to the belonging underlying transactions, including all rights thereunder."</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>be located, the Claimant would have to establish (a) that the contracts were signed by [REDACTED] or an officer or officers of Oriana and that the signatories to the contracts did so without authority as provided for by Oriana's Charter and Ukrainian law and (b) that the Respondent's courts discriminated against the Claimant by treating the Claimant (or KCH) differently than the signatories to the other (alleged) contracts in identical circumstances. Given that the Claimant does not allege that the Ukrainian courts issued judgments in respect of other alleged Oriana contracts to substantiate a claim of discriminatory treatment, the existence or not of the contracts requested is irrelevant;</p> <p>(5) this request is based on the premise that [REDACTED]. The Claimant asserts that</p>	<p>(Sale and Purchase Agreement between Solvadis chemag ag and mg technologies ag dated June 28, 2004, 1 App. Exh. C-2, Section 2.2). In addition, GEA indirectly controlled KCH's investment in Ukraine at the time of the relevant events and, therefore, GEA has rights under the Treaty by virtue of its control of KCH. Ukraine's assertion cannot be reconciled with the definitive evidence of record on the subject.</p> <p>It is thus wrong to state, as Ukraine does, that GEA's "discrimination argument fails at the threshold." GEA's case is well founded and well supported. In any event, it is for the Tribunal to determine at the hearing the strengths and weaknesses of the parties' respective case.</p> <p>(5) Contrary to Ukraine's suggestion, the evidence of record shows that [REDACTED]</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>[REDACTED]</p> <p>However, the Claimant has provided no evidence in support of this assertion, which is inconsistent with evidence filed by the Claimant [REDACTED]</p> <p>[REDACTED]</p>	<p>[REDACTED]</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
5 GEA	Documents sufficient to show the disposition in Oriana's bankruptcy of creditors' claims that accrued during the period August to November 1998.	Memorial of Claimant, paras. 102-119, 169-195. Respondent's Counter-Memorial, paras. 93-95, 250, 284-305, 350-358, 367-368.	The documents requested are relevant to GEA's claim of breach of the standard of protection against arbitrariness or discrimination, of the fair and equitable treatment standard, and the national and most-favored-nation treatment standards. The courts administering Oriana's bankruptcy appear to have applied only to GEA the theory that a debt from 1998 was time-barred but did not similarly treat local or third-country creditors holding debts from the same time period. The	This request must be rejected for the following reasons: (1) the Claimant is requesting these documents to support a claim of discrimination that is based on mere speculation. This is clear from the language of the Claimant's request: "The courts ... <u>appear to</u> have applied only to GEA the theory that a debt from 1998 was time-barred ..." (Emphasis added). As noted above, in ICSID arbitrations "a claimant investor cannot obtain the evidence to prove its case from the State Respondent". It would place an unreasonable burden on the Respondent to require it to produce evidence to support a claim based on mere speculation, and this request must be rejected in accordance with Article 9(2)(c) of the IBA Rules. The Claimant is unable to in any way particularise or support its contention that other creditors holding debts dating	(1) GEA's request is not based on "mere speculation." The IBA Working Party that issued Article 3(3)(a)(ii) of the IBA Rules stated the following: "[T]he Working Party understood that some documents would be relevant and material and properly produced to the other side, but they may not be capable of specific identification. Indeed, all members of the Working Party, from common law and civil law countries alike, recognised that arbitrators would generally accept such requests if they were carefully tailored to produce relevant documents. For example, if an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain	Rejected (too broad).

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			documents requested will show that other creditors received treatment more favorable than that accorded to GEA. The documents requested may take the form of documents submitted to, in possession of, or drafted by the Commercial Court Bankruptcy Manager appointed during the relevant bankruptcy proceedings; bankruptcy claims submitted to the Ukrainian commercial courts by creditors other than GEA and whose debts against Oriana arose in	from 1998 were treated differently than KCH and has made this request on pure speculation;	date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been prepared for the Board's consideration of that decision and that minutes must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared. Such a request may qualify as a "narrow and specific category of documents," as permitted under Article 3.3(a)(ii)." (IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration, 2000 Business Law International 16, 22 (Issue No. 2, 2000)). Thus, it is not necessary for GEA to know that the requested documents	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			<p>August-November 1998; documents attached to the claims submitted by these creditors; documents confirming the recognition of these creditors' claims by Oriana; decisions of the commercial courts which examined these creditors' claims. The documents requested are not in the possession, custody, or control of GEA. The documents should be in the possession, custody or control of Ukraine for two reasons. First, the documents would ordinarily be in the custody of the</p>	<p>(2) the Claimant has failed to provide "a description in sufficient detail ... of a narrow and specific" category as required by Article 3(3)(a) of the IBA Rules. The Claimant states that the documents "may take the form of" several vaguely described documents. For</p>	<p>exist. Rather, it is sufficient for GEA to state a reasonable basis for believing that the requested documents do exist. As noted by Ukraine itself, Oriana had over 110 creditors and faced over 500 claims. It is thus not credible that GEA's bankruptcy claim against Oriana was the <i>only</i> claim which arose in 1998 and was pursued in the bankruptcy proceedings against Oriana initiated in 2002. So far as GEA is aware, no other claim concerning Oriana was denied on limitations grounds. This is a reasonable basis to believe that the requested documents exist.</p> <p>(2) This request does not impose an unreasonable burden on Ukraine. GEA is not requesting all documents in the possession, custody or control of Ukraine, but only those documents <i>sufficient to show</i> the situation that in fact existed at the time. A single document could be sufficient to</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
			Commercial Court Bankruptcy Manager, who under Ukrainian law is responsible to the commercial courts competent for bankruptcy matters. Second, Ukraine (likely through its organ the State Property Fund) is a party to the bankruptcy proceedings and should have all copies of the documents filed with the Ukrainian commercial courts.	example, the Claimant requests: “documents submitted to, in the possession of, or drafted by the Commercial Court Bankruptcy Manager appointed during the relevant bankruptcy proceedings” without stating what specific documents it is referring to or even which bankruptcy proceedings are relevant; “documents” confirming the recognition of such alleged claims by Oriana”, again, without indicating which specific documents these might be (or whether they would have been filed in the bankruptcy proceedings), whether documents are sufficient to show or confirm the recognition of claims is a matter of legal analysis not of describing the document; decisions of the commercial courts examining claims of creditors relating to debts arising in August – November 1998 without providing any indication that any such decisions actually	satisfy this request. Because GEA does not have access to the documents in question, it is not possible for GEA to identify a specific document. However, this request is formulated precisely to avoid imposing a burden of producing a large amount of documents on Ukraine. If the Tribunal considered that the mere search for such documents could be burdensome, GEA is willing itself to inspect the bankruptcy records and identify the responsive documents, under Ukraine’s supervision.	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				<p>exist. Consequently, this request would place an unreasonable burden on the Respondent (Article 9(2)(c) of the IBA Rules);</p> <p>(3) as noted at paragraph 289 of the Counter-Memorial, Oriana had over 110 creditors and faced over 500 claims. The Respondent understands that vast amounts of documentation have been filed in the Oriana bankruptcy proceedings and it would clearly place an unreasonable burden on the Respondent to divert resources to search through this documentation for vaguely described documents the existence of which the Claimant is unable to confirm in order to sustain a claim of alleged discrimination that is based solely on the Claimant's speculation.</p> <p>(4) The documents requested in any event lack sufficient relevance or materiality and this</p>	<p>(3) Nothing in Ukraine's objections suggests that the Respondent has even attempted to look for responsive documents. There is thus no basis for Ukraine's assertion that this request would be burdensome.</p> <p>(4) There is no merit to Ukraine's objection that the requested evidence is not material because</p>	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
				request must be rejected in accordance with Article 9(2)(a) of the IBA Rules. The Claimant has failed to describe how these documents are relevant and material to the outcome of the case as required by Article 3(3)(b) of the IBA Rules. Since the Claimant has divested any investment it purports to have had in Ukraine, its discrimination argument fails at the threshold. It is thus irrelevant whether other creditors' claims were properly disposed of in the bankruptcy proceedings.	GEA divested its investments in Ukraine. The Memorial demonstrates that GEA is the successor in interest to KCH's rights. The evidence of record amply supports GEA's position. At the time GEA's subsidiary sold KCH's shares to Chemdis, KCH transferred to GEA "all rights, title and interest held by [KCH] in and to all claims of [KCH] against Oriana deriving from [KCH] business relations to Oriana (...) as well as all rights, title and interest in and to the belonging underlying transactions, including all rights thereunder." (Sale and Purchase Agreement between Solvadis chemag ag and mg technologies ag dated June 28, 2004, 1 App. Exh. C-2, Section 2.2). In addition, GEA indirectly controlled KCH's investment in Ukraine at the time of the relevant events and, therefore, GEA has rights under the Treaty by virtue of its control of KCH. Ukraine's assertion cannot be reconciled with the definitive	

Annex A to Procedural Order No. 1 dated 19 February 2010

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments			
					<p>evidence of record on the subject.</p> <p>It is thus wrong to state, as Ukraine does, that GEA's "discrimination argument fails at the threshold." GEA's case is well founded and well supported. In any event, it is for the Tribunal to determine at the hearing the strengths and weaknesses of the parties' respective case.</p>	