

**International Centre for Settlement
of Investment Disputes**

ICSID Case No. ARB/05/22

**BIWATER GAUFF (TANZANIA) LTD.,
CLAIMANT**

v.

**UNITED REPUBLIC OF TANZANIA,
RESPONDENT**

PROCEDURAL ORDER N° 2

Rendered by an Arbitral Tribunal composed of

**Gary BORN, Arbitrator
Toby LANDAU, Arbitrator,
Bernard HANOTIAU, President**

Considering the Minutes of the First Session of the Arbitral Tribunal held in Paris, France, on March 23, 2006;

Considering that with respect to production of documents, section 17 of the Minutes provides as follows:

“Arbitration Rule 34

It was agreed that the following procedure would apply to requests for production of documents:

The parties may request documents from each other at any time during the proceedings. Correspondence or documents exchanged in the course of this process should not be sent to the Arbitral Tribunal.

To the extent that the totality of these requests is not satisfied, the parties are allowed to submit for decision by the Arbitral Tribunal one request for production of documents before the first round of memorials and one request after the first round.

After the parties have exchanged their respective demands as outlined above, these requests shall take the form of a joint submission in tabular form (what is usually called in England a “Redfern schedule”), divided into two sections:

- A) the Claimant’s request for the production of documents; and*
- B) the Respondent’s request for the production of documents.*

Each section shall identify:

- (i) the documents or categories of documents that have been requested;*
- (ii) the reasons for each request; and*
- (iii) a summary of the objections by the other party to the production of the documents requested.*

For its decision, the Tribunal will be guided by Article 3 of the IBA Rules of Evidence. On this basis, the Tribunal considers that the following standards should guide its reasoning:

- (i) The request for production must identify each document or specific category of documents sought with precision;*

(ii) *The request must establish the relevance of each document or of each specific category of documents sought in such a way that the other party and the Arbitral Tribunal are able to refer to factual allegations in the submissions filed by the parties to date. (This shall not prevent a party from referring to prospective factual allegations intended to be made in subsequent memorials provided such factual allegations are made or at least summarized in the request for production of documents). In other words, the requesting party must make it clear with reasonable particularity what facts / allegations each document (or category of documents) sought is intended to establish.*

(iii) *The Arbitral Tribunal will only order the production of documents or category of documents if they exist and are within the possession, power, custody or control of the other party. If this is contested, the requesting party will have to satisfy the Arbitral Tribunal that the document is indeed within the possession, power, custody or control of the other party.*

(iv) *If necessary, the Tribunal shall also balance the request for production against the legitimate interests of the other party, including any applicable privileges, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances.*

If, beyond the two possible rounds of requests for production of documents, additional documents are needed by a party, leave to submit a further disclosure request to the Arbitral Tribunal must first be sought”;

Considering that section 14 of the Minutes further provided that:

“1. *A first round joint submission requesting production of documents (see item 17) is to be submitted by April 28, 2006;*

...

4. *A second round joint submission requesting production of documents (see item 17) is to be submitted by November 17, 2006”;*

Considering the parties’ respective requests for production of documents submitted in the form of a Redfern schedule on 5 May 2006, as well as other related correspondence;

The Arbitral Tribunal hereby decides and directs as follows:

I. The Issue of Public Interest Immunity

The Respondent has 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.

Respondent's submissions

The Respondent objects to the Requests insofar as they call for the production of documents whose disclosure is prohibited by Tanzanian law regarding public interest immunity, which is consistent with general principles of law observed by other jurisdictions. Article 54(5) of the Tanzanian Constitution prohibits disclosure of any information relating to any advice that the President has received or may receive from the Cabinet. Inasmuch as Cabinet papers are one of the ways by which the Cabinet advises the President, disclosure of Cabinet papers would contravene this Constitutional provision; in domestic proceedings, the Government has always raised Article 54(5) whenever Cabinet papers have been requested. This is consistent with, for example, English law, under which Cabinet minutes are the classic example of a class of documents subject to public interest immunity, whether or not the Government is a party to the proceedings, and the Government is not permitted to waive such immunity. See, e.g., the judgment of Lord Salmon in the House of Lords case of *Rogers v Secretary of State for the Home Department*, [1973] A.C. 388 at 412 D-E, [1972] 2 All E.R. 1057 at 1070-71. Similarly, Section 132 of the Tanzanian Evidence Act 1967 codifies what was formerly 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 Evidence Act is based on the analogous Act in India. Indian case law holds that the assessment whether disclosure of any particular document is likely to be prejudicial to public interest falls within the discretion of the head of the relevant government department and that that official’s determination must be accepted by the court. See, e.g., *S v. Sodhi Sukhdev* A1961 SC 493). Several of the Requests call for documents that reflect the internal deliberations and decision-making processes of Government organs and are thus subject to this immunity. Cases from other jurisdictions are instructive on this point. See, e.g., *Conway v Rimmer*, [1968] AC 910 (House of Lords) (“*The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. That must in my view also apply to all documents concerned with policy making within departments including it may be minutes and the like by quite junior officials and correspondence with outside bodies. Further, it may be that deliberations about a particular case require protection as much as deliberations about policy.*”); *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (U.S. Supreme Court 1975) (noting immunity from disclosure applies to both intra- and interagency memoranda and communications). Such immunity is of general application and covers matters both mundane and extraordinary, including decisions of great public interest and national (and even international) importance. See *Mapother v. Dep’t of Justice*, 3 F.3d 1533 (U.S. Ct. of Appeals for the

D.C. Circuit 1993) (withholding report used by immigration officials to determine that President of Austria should be classified as an excludable alien).

Claimant's submissions

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

(i). The matters at issue in domestic proceedings and the mandate of domestic courts are readily distinguishable from the matters at issue in international proceedings and the mandate of an ICSID Tribunal.

The very task before this Tribunal is to scrutinize the governmental acts of the Republic against its public international law obligations as set out in the Bilateral Investment Treaty (the "BIT") and as established under customary international law. Even if the domestic law authorities upon which the Republic relies were applicable as a matter of principle, they are distinguishable from the present ICSID proceedings. The Claimant has pleaded public international law causes of action arising out of multiple breaches of the BIT and customary international law, invoking the Republic's international responsibility. It is disingenuous in the extreme for the Republic to seek to hamper a full hearing of these alleged treaty and customary international law violations (and so seek to evade its international responsibility) by seeking to rely upon notions of Tanzanian law. Domestic notions of public interest and policy relating to the operation of government have no bearing on the foreign investor seeking a remedy under public international law. More particularly, Article 27 of the Vienna Convention on the Law of Treaties 1969 clearly provides that:

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

The Republic carefully describes the notion of "*public interest immunity*" upon which it relies as "*consistent with general principles of law observed by other jurisdictions*", but not as reflective of a general principle of law as understood for the purposes of Article 38(1)(c) of the Statute of the International Court of Justice 1945 (i.e. a source of public international law).

(ii). 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

The Respondent fails to mention that the jurisdictions to which it refers grant an extensive right of access to private persons in respect of public documents, subject to a qualified exemption the application of which is subject to the review of the courts (eg, Freedom of Information Act 1966 (USA); Freedom of Information Act 2000 (UK); and *Pope and Talbot, Inc. v. Government of Canada*, Ruling on Claim of Crown Privilege dated 6 September 2000 (2005) 7 ICSID rep. 99, paras. 1.1 to 1.4). Thus the Respondent may not simply rely on a conclusory blanket assertion. If there is a real issue as to privileged or sensitive information the Respondent must demonstrate this to the satisfaction of the Tribunal.

(iii). Whether or not the Respondent acted in the “public interest” is one of the key issues to be determined in respect of the Claimant’s claim for unlawful expropriation, and the burden of proof rests on the Respondent.

None of the domestic authorities to which the Republic refers related to public international law causes of action stemming from a violation of a Treaty or customary international law; none are comparable to the present circumstances in which one of the key questions before the Tribunal is whether the expropriation of the Claimant’s investments was done in the public interest. As clearly set out in paragraph 124 of the Amended Request for Arbitration, the Tribunal is asked to determine whether the expropriation was lawful (and thus subject to the Republic’s yet unsatisfied obligation to pay compensation equal to the “genuine value of the investment”) or unlawful (thereby attracting the Republic’s obligation to make restitutio in integrum or pay its financial equivalent in damages). This Tribunal is fully competent to decide this point and in doing so may be required to follow the approach of other mixed arbitral tribunals which, having reviewed the evidence, have been able to conclude, for example, that an expropriation violated international law “*as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character*” (*BP Exploration Co (Libya) Ltd v. Government of the Libyan Arab Republic* Award dated 10 October 1973, (1979) 53 I.L.R. 297), or that an expropriation was “*exercised for a public purpose, namely, the preservation and protection of antiquities in the area*”, the question then being to set the level of compensation payable for a lawful expropriation (*Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt* (Case ARB/84/3) Award dated 20 May 1992 (1995) 3 ICSID Rep. 189). To assist it in making these findings, Article 43(a) of the ICSID Convention provides that the Tribunal may “*call upon the parties to produce documents or other evidence*” and makes no reference to a host State enjoying special privileges. Ultimately, if the Republic persists in refusing to disclose the material requested, it will be to its own detriment. This is because, once the Claimant has established that an expropriation took place, the burden of proof must rest upon the Republic to establish that the expropriation of the Claimant’s investment was not unlawful, but rather, was done for a public purpose in accordance with the requirements of customary international law and Article 5 of the Treaty (save the unsatisfied obligation that expropriation be “*against prompt, adequate and effective compensation*”). To the extent that the Republic does not provide disclosure on the specific matters covered in the Claimant’s request, the Tribunal will be asked to draw the appropriate adverse inference, namely that the Republic has refused to do so because the evidence is patently unfavourable to its case (C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) 656).

(iv). The protection afforded by Public International law, and in particular the Investment Treaty regime, will be compromised if a State is allowed to self-censor the evidence available in arbitration proceedings

The investment treaty regime involves not only questions as to the rights of foreign investors and their limits, and the correlative duties of host States, but also limitations upon the exercise of governmental powers. The question is not only whether the Claimant's rights have been infringed, but also whether in exceptional circumstances the Respondent may be able to establish that its conduct was not unlawful. If a host State may self-censor its responses to the claims of foreign investors arising under investment promotion and protection treaties and evade the reasonable inquiries of an international tribunal, this depoliticised, neutral mechanism to resolve legal disputes between States and foreign investors would lose much of its efficacy. It is an inherent function of the Tribunal to place the rights of the Claimant as a foreign investor in the context of the perceived public interest of the host State in order to assess whether or not the Republic has complied with the requirements of customary international law and the basic elements of Article 2 (Fair and Equitable Treatment) and Article 5 (Expropriation) of the BIT. In particular, as outlined above, with regard to the claim of expropriation, the Tribunal needs to be in a position to evaluate whether the Claimants investment was expropriated "*for a public purpose related to the internal needs of that Party on a non-discriminatory basis...*"

(v). The parties to arbitration proceedings should be treated with equality

If the Tribunal were to accept the Republic's stance, this would be an affront to the overriding principle that parties should be treated with equality in investment treaty arbitration proceedings (cf. *Pope and Talbot, Inc. v. Government of Canada*, Award on the Merits of Phase 2, 10 April 2001 (2005) 7 ICSID Rep. 102, para. 193). Understandably, this ICSID Tribunal would not wish to interfere with the Republic's legitimate efforts to regulate in the public interest and so would resist any attempt to undertake an open-ended examination of governmental actions, but that is not what the Claimant seeks. Conversely, the self-judging blanket exclusion behind which the Republic seeks to hide should be drawn aside so as to shed light on the very issues in dispute before the Tribunal.

In summary, the Tribunal is asked to order production of the documents requested. The Respondent should produce such documents unless it has very specific reasons why a particular document is privileged. A general assertion which attempts to protect all internal governmental documents from disclosure as privileged is untenable.

The Arbitral Tribunal's 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.
