

**Taking of Evidence - Disclosure in**  
**International Investment Treaty Arbitration\***

**1 Introduction**

“Give your evidence,” said the king.

(Lewis Carroll’s Alice in Wonderland).

- (a) An international arbitrator has never had it this easy even in commercial arbitration. Complex questions have been raised for the international arbitrators’ determination on all kinds of issues relating to the taking of evidence. Solutions, at times quite creative, have been found to such questions. Investment treaty arbitration gives rise to even more complexities because of the interaction between its commercial and public international law aspects.
- (b) There arise issues relating to witnesses, experts, privilege, disclosure of documents, access to documents to non-parties, confidentiality and use of documents in other proceedings and so on. This paper cannot outline all types of issues that arise in investment treaty arbitration in the taking of evidence.
- (c) What I intend to do is to outline the nature of some typical problems in relation to documentary evidence.
  - (i) Documents lost/destroyed

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- (ii) Documents about to disappear
- (iii) Documents in possession of non-parties and
- (iv) Public interest immunity.

## **2 Documents lost or destroyed**

- (a) In exceptional circumstances the relevant evidence may simply have become unavailable. For instance, the Iran-US tribunal had to deal with a number of claims where the evidence was lost or destroyed. The tribunal can accept secondary evidence and draw an adverse inference in such circumstances.

## **3 Documents about to disappear**

- (a) Where documents are about to disappear tribunals have recommended the preservation of documents in *Agip v Congo* (Award of 30 November 1979) and *Vacuum Salt v Ghana* (Award of 16 February 1994). The property to be preserved belonged, in both the cases, to the investors. I do not believe that the ownership of the evidence should make any difference to the tribunal's ruling – if something is relevant to an issue before the tribunal, the tribunal has power to order its preservation regardless of whether the State or the investor owns the property.
- (b) In *Agip v Congo* the claimant's locally incorporated subsidiary was nationalised and its assets were transferred to a state owned oil corporation. At the claimant's request the tribunal recommended that the respondent State should collect, create a complete list of and keep available for presentation to the tribunal, the documents which had been in the subsidiary's local office at the date of the occupation. The

respondent did not avail itself of its right to make observations on this request, i.e. it implicitly consented to it.

- (c) In *Vacuum Salt* the investor alleged a breach of its lease agreement and the progressive expropriation of its business and property by the respondent State. Vacuum Salt was concerned about the preservation of its corporate records. The government made a voluntary undertaking that it would not deny Vacuum Salt access to its records.
- (d) The ICSID Convention provides very wide powers to the tribunal to make recommendations to preserve, not only evidence, but also *rights* of the parties. Article 47 provides:

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

Rule 39(3) of the ICSID Arbitration Rules<sup>1</sup> empowers the tribunal to recommend provisional measures on its own initiative or to recommend measures other than those specified in a request made by a party under Rule 39(1).

Rule 34(1) of the ICSID Arbitration Rules<sup>2</sup> makes the tribunal the judge of the admissibility of any evidence adduced and its probative value. Rule 34(2)<sup>3</sup> empowers the tribunal, at any stage of the proceedings, to call upon the parties to produce documents, witnesses and experts. Rule 34(3) empowers the tribunal to take formal note of the failure of a party to comply with its obligations in this respect and of any reasons given for such failure.

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<sup>1</sup> Corresponding provision in the Additional Facility Rules is in Article 46(2).

<sup>2</sup> Article 41(1) of the ICSID Additional Facility Arbitration Rules.

<sup>3</sup> Article 41(2) of the ICSID Additional Facility Arbitration Rules.

(e) The ICSID tribunal can only make a *recommendation* to preserve evidence and it is not empowered to “order” this. Contrast this with other Rules.

(f) UNCITRAL Arbitration Rules are used in many investment treaty arbitrations and Article 26 of the UNCITRAL Arbitration Rules provides:

“At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Such interim measures may be established in the form of an interim award....”.

(g) Article 1134, NAFTA: Interim Measures of Protection

“A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.”

#### **4 Documents taken over by the State**

- (a) In *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*<sup>4</sup> the investor's office was seized by the State and the investor lost access to relevant documents including bank statements. This dispute arose out of a project for the purpose of a comprehensive program of repairs and upgrades to, and the expansion of, the Dar es Salaam water and sewerage system. The investors incorporated City Water, a local Tanzanian operating company to enter into three contracts with DAWASA, the Water and Sewerage Authority. City Water's offices were seized by the State and the minister of water announced at a televised press conference that the State had, on advice from DAWASA, terminated the lease contract. On the same day, City Water's senior management representatives were deported.
- (b) The investors relied upon Articles 43 and 47 of the ICSID Convention and asked the tribunal to consider making an order for the following provisional measures pursuant to ICSID Arbitration Rule 39(1) *inter alia*:
- (i) Preservation of evidence<sup>5</sup>, i.e. preservation of the investors' rights in respect of City Water's records, ledgers, papers, documents and mail, seized by the respondent,
  - (ii) Compilation of an inventory of documents,
  - (iii) Production of the documents ahead of normal discovery,
  - (iv) Production of bank statements sent to City Water's offices and
  - (v) Compilation of a statement of account in respect of all dealings with City Water's assets (e.g. monies collected from City Water's debtors by the respondent and monies paid to its creditors). This,

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<sup>4</sup> ICSID Case No. ARB/05/22, Procedural Order No. 1.

<sup>5</sup> There was also a request for the preservation of the investors' rights to the monies standing in City Water's Contracting Works Account, cheques issued to City Water and the payment of monies due to City Water etc.

together with the bank statements, the investors needed in order to be able to assess, or better assess, the extent of their loss since the date of seizure.

- (c) The investors alleged that there was an urgent need for this relief and that there was a risk of loss or destruction of these documents.
- (d) The respondent denied that the investors had provided any evidence of the risk of loss or destruction. There was no urgency, according to the respondent. City Water had commenced a contractual arbitration ten months prior to the investment treaty arbitration against DAWASA but had not asked for similar provisional measures from the tribunal or from a judicial authority. Further, the assets used by City Water under the lease contract were mostly the property of entities other than City Water. The respondent had no control over City Water's bank which continued to send the bank statements to the same post box address as used prior to the termination of the lease. Further, it argued that document disclosure requests were not appropriate subject for a provisional measures application.
- (e) The tribunal's observations as to urgency are interesting to note. The degree of "urgency" which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most cases, this will equate to "urgency" in the traditional sense (i.e. a need for a measure in a short space of time). The tribunal also recognised that in some cases the only time constraint could be that the measure be granted before an award. The tribunal held that the requirements of necessity and urgency were met. The former because of the potential need for the

evidence in question, and the latter because there is a need for such evidence to be preserved before the proceedings progresses further (e.g. to enable the parties to plead their respective cases properly). The tribunal also noted the fact that the respondent had volunteered an undertaking to preserve evidence.

- (f) The tribunal granted the request for the preservation of evidence under Article 47 of the ICSID Convention. The parties were asked to cooperate in preparing a workable and non-burdensome inventory in respect of the documents seized or taken over at the offices of the investor. However, the tribunal did specify that this was not to be an English litigation-style list of documents identifying individual items. DAWASA had offered a compilation of such an inventory in correspondence, subject to certain terms which had not been acceptable to the investors. The inventory should include categories of documents that exist so as to enable further specific requests to be made in the course of the planned disclosure exercise. The documents to be included in the inventory had to be those located in the offices of City Water when they were taken over by the respondent, regardless of who they belonged to. Such an inventory, would also facilitate and shorten the disclosure exercise.
- (g) The request for the production of documents was more controversial. The tribunal agreed that some of the investors' requests for provisional measures were, in truth, applications for disclosure of documents. Although the tribunal has the power to ask parties to produce documents or other evidence at any stage of the proceedings, the precise dividing line between what is a provisional measure under Article 47 and what is an order under Article 43 for production of evidence may not be immediately obvious. The danger of allowing Article 47 as a method of obtaining disclosure of documents is that it might be deployed to

circumvent the other procedures. In *Biwater* this meant the detailed mechanism for two exchanges of document requests. The *Biwater* tribunal therefore held that only in exceptional circumstances it could order production of the documents pursuant to Article 47. Given that the tribunal had already made an order for the preservation of the documents, the case was not exceptional enough to order production of the documents as well.

- (h) The bank statements were held to be in a separate category – they were specifically identified and would be obviously relevant and material to the proceedings. They would be sought by the investors in due course in any event. This part of the request for production was granted by the tribunal also because of the case management advantages.
- (i) The statement of account was held to be too broad a request and one that did not have any case management advantages to justify its acceleration.

## **5 Documents in the possession of Non-Parties**

- (a) As arbitrators have no jurisdiction over third parties to arbitrations, they cannot order third parties to disclose documents or give evidence. This principle is also recognised in the IBA Rules of Evidence.
- (b) It is an accepted principle in litigation and arbitration that adverse inferences may be drawn from the failure of a party to submit evidence likely to be at its disposal. However, sometimes what may be expected by the investor to be at a host State's disposal may not necessarily be within its power to produce and in such cases, it would be unfair to draw an adverse inference from such a failure.

## **6 Recognising the third parties as such**

- (a) The usual investment agreement is between a foreign investor who makes an investment in an infrastructure project. If we take the example of a power project to be constructed and operated, the power is usually to be sold to a State-owned electricity board as a sole customer over a period of say 25 years. The investors would bring in some equity, borrow a large part of the required funding from banks and financial institutions against the guaranteed earnings over the 25 year period. The contracts at this stage involve the loan agreements and the related documents as well as the Power Purchase Agreement (“PPA”) between the State owned electricity board and the investors’ investment vehicle – usually a locally incorporated company. There may be a State Support Agreement and a guarantee by the State Government of the electricity board’s performance. There may be another guarantee by the Central Government of the host State, in case the State Government fails to pay. I have deliberately chosen an example of a State with different constituent elements all of which operate with a varying degree of autonomy in a federal structure.
- (b) Under the PPA, the investor will have negotiated for itself a dispute resolution mechanism – either local courts or domestic or international arbitration. Let us assume that there is an umbrella clause in the applicable BIT. Thus, arguably the investor (not the State) has an added option of commencing an investment treaty arbitration against the Central government of the host State. The investor can commence both a contractual arbitration as well as an investment treaty arbitration. There is also every likelihood of some dispute simultaneously arising between the banks and the investors and/or the electricity board. There may also be contractual disputes between the investment vehicle and the State and

Central Governments, with their own contractual dispute resolution procedures.

- (c) In one investment treaty arbitration the investor will be in a position to bring in all its disputes including those against the Central Government, the State Government, the electricity board, and any banks owned by the host State that may have lent money to the project. The investor will rely upon the principles of State attribution and the umbrella clause in the BIT. For the purpose of this paper, I am going to assume that the typical umbrella clauses in BITs allow an investor to do so. To the extent the disputes involve the Central Government's or State Government's actions taken when acting in the governmental power (*puissance publique*), the Central Government should have the power to produce relevant documents. Even so, there may be friction between the Central and State governments and the latter may not necessarily be keen to assist in the defence of the investment treaty arbitration. This is even more likely, if the two governments are controlled by different political parties. The electricity board and the bank will have separate juridical entities and their own corporate governance procedures. The State Government, the State electricity board and the banks will not be parties to the investment treaty arbitration and will not be under any obligation to assist the Central Government by producing documents.
- (d) The arbitration tribunals sometimes make orders for the production of documents from such other entities as if these juridical entities are the same as the Central Government. Despite the fact that the respondent State may be ultimately responsible in international law for the actions of various agencies and instrumentalities, these juridical entities should be treated as non-parties to the investment treaty arbitration. Just because the Government may have the power to appoint board members or own

majority equity in an entity, these entities are not necessarily controlled by the Central Government in their day to day operations. They will have their own principles of independent corporate governance. The promotion and protection of foreign investments will be better achieved in the culture where corporate governance principles are always respected.

- (e) From the host State's point of view, the "investor" who owns shares in the investment vehicle will invariably be a shell company, set up for the express purpose of channelling the investment of a much larger group of companies into the project, and will, itself, probably take very little part in any material decisions which might be made regarding its investment, which will be made by the ultimate investors – the real investors who may not be incorporated in a State which has a BIT with the host State. In most of the investment treaty arbitrations, the host State raises jurisdiction and admissibility challenges. The State will want to challenge that the investor is a protected investor under the BIT but the documents relating to the incorporation or control of the investor would not necessarily be in the control of the shell company. In the *Tokios v Ukraine* case the president of the tribunal was clear in his dissenting opinion that the ICSID arbitration was not available for an investor to bring a claim against its own State merely by making the investment through a shell foreign company. The majority of the tribunal only looked at the separate corporate entity of the shell company rather than the reality behind that shell. However, the dispute over the principle is not conclusively resolved and in another case similar arguments can be made by a State – thus rendering all the documents in relation to the source of capital and the board meetings etc. relevant to an ICSID arbitration, Further, the real decisions as to the merits of the underlying

contractual disputes will be taken by the investor at a level higher than the shell companies which qualify as parties to the investment treaty arbitration. As regards the companies going upward in the chain towards the ultimate investor, the tribunal again will not have any power to influence the production of the relevant documents by the party to the investment treaty dispute, i.e. the vehicle used by the investors, unless the tribunal applies to them the same assumption as tends to be applied to the State's side, namely that these separate entities are, in effect, the same.

- (f) Thus, in an investment treaty arbitration it is more likely than in an average international commercial arbitration that the relevant documents are in the hands of third parties. Obtaining disclosure of all the relevant documents depends on the legal representatives of various parties and non-parties taking a reasonable attitude and giving voluntary cooperation. It may not always be fair to apply the principle of drawing an adverse inference when the non-party is an independent juridical entity. Should the non-parties on both sides be treated in a similar fashion regardless of who takes the decisions? It may be that the investor can control the production of documents from all the other entities in the group of its companies given that many of them are brass-plates in tax-friendly jurisdictions. The State may not always be in a position to compel the non-parties on its side, and may not always succeed in obtaining the voluntary cooperation of such entities. These entities' will have their own sets of lawyers who would worry over the impact the production of any documents would have in giving the investors an unfair advantage in any parallel contractual arbitration or judicial proceedings. Is the answer then to treat the non-parties on both sides as such and use other measures to obtain documents from them? Is it justifiable in investment treaty arbitration to treat the non-parties on one side differently from the non-

parties on the other side? The non-parties may wish to claim privilege on some of their documents but these documents may well be relevant to the treaty claim. For instance, if there is an allegation of arbitrariness against a State, the fact that the State agency in question had acted upon independent legal advice might well be relevant to the treaty questions but the agency may not wish to waive the privilege in the legal advice because it is a matter of relevance to the contractual proceedings to which that agency is a party.

### **Modes of obtaining documents from non-parties**

#### **7 The IBA Rules of Evidence**

- (a) In 1999 the IBA developed its Rules of Evidence which have been widely adopted by tribunals since then and are used in conjunction with existing institutional arbitration rules.
- (b) The IBA Rules of Evidence<sup>6</sup> provide that an arbitral tribunal can take whatever steps are legally available to obtain documents from a third party as long as such documents are relevant and material to the outcome of the case.<sup>7</sup>
- (c) Article 27 of the UNCITRAL Model Law provides that the tribunal, or a party with the approval of the tribunal, may request from a competent court assistance in taking evidence.
- (d) Both English and US national law provide methods which can be used to obtain documents from third parties, and the relevant aspects of each of these are discussed below as possible solutions. Not all other countries will recognise a similar procedure under their local legislation. The 1970

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<sup>6</sup> Article 3(8) of the IBA Rules of Evidence.

<sup>7</sup> Article 3(8) IBA Rules of Evidence

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters does not apply to arbitration and therefore the procedure therein is not available to parties to an arbitration.

## **8 Section 43 Arbitration Act 1996 (the “Act”)**

- (a) Section 43 of the Act states that a party to arbitral proceedings may use “*the same Court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence*”.<sup>8</sup> This may only be done with the permission of the tribunal or the consent of the other parties to the arbitration,<sup>9</sup> and these procedures may only be used if the witness is in the United Kingdom.<sup>10</sup>
- (b) This procedure under Section 43(3)(b) of the Act can normally be used if the arbitral proceedings are being conducted in England and Wales or Northern Ireland. However, section 2(3)(a) of the 1996 Act gives the courts a discretionary power to apply section 43 even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined. This apparent conflict has been interpreted to mean that section 43 can be used by arbitrations with their seat elsewhere provided that they decide to hold evidentiary hearings in England, Wales or Northern Ireland.<sup>11</sup>
- (c) The issue of whether tribunals are entitled to hold hearings in England when the seat is elsewhere will generally depend on the law of the seat of

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<sup>8</sup> s43(1) of the Act

<sup>9</sup> s43(2) of the Act

<sup>10</sup> s43(3)(b) of the Act

<sup>11</sup> “Obtaining Evidence from Third Parties in International Arbitration” Thomas H. Webster, *Arbitration International* Vol 17 No. 2 (2001) pp. 43-162

the arbitration and the applicable arbitration rules. The ICSID<sup>12</sup>, LCIA<sup>13</sup> and the UNCITRAL<sup>14</sup> Rules allow this.

- (d) Section 43 of the Act therefore provides a way to obtain documents from a third party to arbitration proceedings located in the UK. Section 43 of the 1996 Act does not entitle a party to arbitration to make an application for *disclosure* of documents from a third party.<sup>15</sup> The subpoena must specify the particular documents required. If it is too general in wording, the subpoena will be set aside.<sup>16</sup>
- (e) Therefore, whilst section 43 of the Act does provide a way to obtain documents from third parties to an arbitration, it is by no means a green light allowing the parties to the arbitration to ask for any unspecified document or category of documents they think might be of help to them. They must be precise and exact in their requests. This is similar to the trend in international commercial arbitration – most tribunals will allow only specific requests for disclosure rather than a fishing expedition.

## 9 The US solution – Section 7 of the Federal Arbitration Act (“FAA”)

- (a) Section 7 of the Federal Arbitration Act states that the arbitrators, or a majority of them “*may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material evidence in the case*”. [Emphasis added]

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<sup>12</sup> Rule 37, ICSID Arbitration Rules

<sup>13</sup> Article 7.2 of the LCIA Rules.

<sup>14</sup> Article 16.2 of the UNCITRAL Arbitration Rules.

<sup>15</sup> *Sunderland Steamship P&I Association v Gatoil International Inc. (the “Lorenzo Halcoussi”)* [1988] 1 Lloyd’s Rep. 180; *Tajik Aluminium Plant v (1) Hydro Aluminium AS, (2) Abdukadir Ganievich Ermatov, (3) Alexander Shushko, (4) Avaz Nazarov, (5) Ashton Investments Limited* [2005] EWCA Civ 128.

<sup>16</sup> *Ibid.*

- (b) In applying the FAA, the US courts appear to assess the efficiency and cost-effectiveness of a particular arbitral procedure. Thus, the US Courts do not allow tribunal to compel non-parties to give depositions. But they do allow tribunals more power than they themselves have to compel production of documents from non-parties.<sup>17</sup>

## **10 Another possible way of obtaining documents from third parties**

- (a) In one case that I was involved in, the documents and witness were located in Poland and the seat of the arbitration was in Vienna. We requested the tribunal to send a Letter of Request for help from the Austrian courts – there was no specific legislation allowing or forbidding this. The tribunal considered our efforts to obtain the evidence otherwise had failed and allowed this. They sent a Letter of Request to the court in Vienna which in turn sent a Letter of Request to the Warsaw court. The witness and several documents were produced in the Warsaw court. The transcript of the evidence was then sent back to the tribunal via the court in Vienna.
- (b) The entire procedure took over six months and there were numerous logistical difficulties. Also, the questions had to be put in writing in the letter of request – it was not an open-ended cross-examination. Even so, we obtained some valuable evidence which otherwise would not have been available. This procedure is rarely used – it is more likely to succeed if the seat of the arbitration is in an arbitration-friendly country and also if the court at the place of evidence has a supportive attitude towards international arbitration.

## **11 Public interest immunity**

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<sup>17</sup> B Ted Howes, *Pre-hearing discovery II: further divergence in court treatment of pre-hearing depositions and pre-hearing document discovery*, IBA Newsletter Vol.10, No. 2.

- (a) Public interest immunity (“PII”) is not a principle of law frequently referred to in international commercial arbitration. It is a principle of law used by court to reconcile any conflict between the two public interests, namely:
- (i) the fair administration of justice, which demands that the courts should have the fullest possible access to all relevant material, and
  - (ii) the need to maintain the confidentiality of information the disclosure of which could be damaging to the public interest.
- (b) Examples of documents covered by PII, which may vary from country to country, include, cabinet papers, foreign office despatches, documents related to the security of the State, high-level inter-departmental minutes, correspondence and documents pertaining to the general administration of the naval, military and air force service, and so on. The principle is not as wide as it used to be as many countries have legislated for freedom of information and transparency in governmental work. In some countries PII also extends to the internal note-sheets used by the civil servants in discussing and arriving at a briefing paper to be given to the cabinet minister. These privileges generally protect the records of these discussions from disclosure in domestic legal settings.
- (c) The PII principle is not absolute. However, the court will carry out a balancing exercise to decide which interest should prevail over the other. In an investment treaty arbitration, the host State may at times wish to raise the PII principle to justify the non-production of otherwise relevant material. This would not happen in every investment treaty case but where an investor’s investment was adversely affected by the State’s actions taken in a national emergency of some kind, there may be all sorts

of material in the State's documents, which it may wish to keep confidential in the wider public interest.

- (d) These privileges, which may be taken for granted by states in domestic situations, are less effective in the context of international arbitration. I was involved in a case where the State wished to object strongly to the production of the documents on the basis of PII because it did not want to set a precedent. These documents were entirely helpful to support the State's defence in the investment treaty arbitration but the State still did not wish to disclose them. The State's resistance to the disclosure of course could have given rise to a suspicion in the tribunal's and the investors' minds that there was damaging material in the documents. Had an adverse inference been drawn against the State, that would have been unfair given the content of the documents. This showed though how entrenched the ideas of these privileges are
- (e) In the *United Parcel Service* case<sup>18</sup> Canada claimed PII (Cabinet privilege) for 377 documents or parts thereof. The tribunal accepted that the privilege may apply domestically but not in the context of the law governing the tribunal. A claim for Cabinet privilege "*would have to be assessed not under the law of Canada but under the law governing the Tribunal.*" Canada may not have the advantage of its own law if it is more generous than the law governing the tribunal.<sup>19</sup> That law does not in this context refer the Tribunal to national law. Further, the Canadian statutory provision in its own terms does not apply to this proceeding since the Tribunal does not have "*jurisdiction to compel the production of information.*"

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<sup>18</sup> Decision of Oct. 8, 2004 (NAFTA Ch. 11), available at [www.dfait-maeci.gc.ca/tnanac/documents/TribunalDecisionrelatingtoCanclaimofCabinetpriv.pdf](http://www.dfait-maeci.gc.ca/tnanac/documents/TribunalDecisionrelatingtoCanclaimofCabinetpriv.pdf), paragraphs 15 and 17.

<sup>19</sup> Paragraph 7 of the decision dated 8 October 2004.

- (f) On October 8, 2004, the Tribunal recognised, in principle, Canada's assertions of cabinet confidences relating to document production, to a limited extent. It recognised the state practice of protecting information in the deliberative and policy making processes at high levels of government. The Tribunal directed Canada to establish "*by reference to particular stated public interests which justify protection and weigh that justification, if it is made out, against the public interest in disclosure, for the purpose of the arbitration, to UPS and the Tribunal*". On October 29, 2004, Canada submitted to the Tribunal and UPS the Clerk's submissions addressing the Tribunal's concerns.
- (g) Canadian domestic law merely requires the Clerk of the Privy Council to declare a document to be privileged in order for it to be so. In the *United Parcel Service*, the tribunal wanted a more explicit and open analysis before it might find that the privilege applied to specific documents. The letter and the schedules submitted to the tribunal merely repeated the wording from the Canadian legislation. Therefore, the tribunal directed Canada to (a) make an explicit initial judgment regarding the privileges to be protected with respect to each individual document, (b) then explicitly weigh each judgment against the public's interest in disclosure. These two steps would ordinarily be undertaken by the Clerk of the Privy Council. Once these steps were completed and the result submitted, the tribunal could decide whether the Cabinet privilege applied.
- (h) The tribunal ultimately held that the claim to a Cabinet privilege was not made out. As to the consequences of non-disclosure, the tribunal said that a failure to disclose documents where the tribunal had held the Cabinet privilege to be unjustifiable, might lead to the Tribunal drawing adverse inferences on the issue in question.

## 12 A recent example of a claim for PII denied by an ICSID tribunal

- (a) In *Biwater Gauff v Tanzania*,<sup>20</sup> a Redfern Schedule was directed to be used in respect of the parties' respective demands for documents. The respondent State objected to some categories of documents on the basis of PII. According to the State, the principle of PII is universally recognised and applied to matters both mundane and extraordinary, including decisions of great public interest and national and even international importance. The investor objected to such a blanket assertion of PII in a case where the very task before the tribunal is to scrutinise the governmental acts of the State against its public international law obligations. Further, Article 27 of the Vienna Convention on the Law of Treaties 1969 clearly provides: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*" Further, PII is not 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. as a source of public international law). Whether or not the State acted in the "public interest" or arbitrarily was one of the key issues before the tribunal and the burden of proving that it did not act arbitrarily was upon the State.
- (b) The tribunal noted that the State had not identified any equivalent doctrine to PII as a matter of public international law or as part of the ICSID regime. The PII doctrine did not develop in the context of a determination by an international tribunal of whether the State violated its international law obligations. The State cannot stifle the evaluation of its own conduct and responsibility by relying upon its domestic law. Further, the acceptance of PII would create an imbalance between the parties which would be against one of the most fundamental principles of

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<sup>20</sup> Procedural Order no. 2, 24 May 2006.

international law arbitration that the parties should be treated equally. The tribunal therefore considered that the only ground which might justify a refusal by the State was the protection of privileged or politically sensitive information, including State secrets.<sup>21</sup> Thus, the tribunal rejected PII as a valid objection to the production of documents (which included cabinet minutes and briefing papers for specific meetings) but asked the State to refer to the tribunal any precise objections on ground of political sensitivity or State secrets and set out the precise reasons for the objection of specific documents.

### **13 Conclusions**

- (a) Where a State has taken over or destroyed or neglected to care for documents, it is fair to allow a party to rely upon secondary evidence or to draw adverse inference against the State.
- (b) Where the documents or other evidence are about to disappear, investment treaty tribunals have power to order preservation of the evidence.
- (c) There is a slight tension in the approach tribunal should adopt when dealing with non-parties on the State's side and the non-parties on the investors' side. Each case needs to be looked at carefully on its own facts and the tribunals need to be aware of the potential difficulties that the State may genuinely experience in obtaining the cooperation of various agencies whose actions it is responsible for. This is particularly so in countries where there is a considerable autonomy given to constituent elements of a federation and the various entities have different economic interests in the dispute.

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<sup>21</sup> Also see *Pope and Talbot Inc v. Government of Canada*, Ruling on Claim of Crown Privilege of 6 September 2005 and Article 9(2)(f) of the IBA Rules of Evidence.

- (d) A claim for public interest immunity is unlikely to succeed in an investment treaty arbitration except in exceptional circumstances where a State has made out a clear case and carried out a balancing exercise showing, for each document or set of documents, why a limited PII claim needs to be upheld.