

**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.

II. Claimant’s Document Requests Objected to in Whole or in Part by Respondent

Request	Reason for Request (including reference to the relevant paragraph(s) in Amended Request for Arbitration, where appropriate) Rebuttal to Objection	Objection	Tribunal's decision Grant / Deny
<p>Request 1</p> <p>All documents relating to the steps taken to establish and to appoint members to EWURA and the reasons for the delay in establishing EWURA and making such appointments, <u>between the passage of the Act on 21 June 2001 and 1 June 2005.</u></p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 11 of the Amended Request for Arbitration:</p> <p><i>“As a prelude to the Bid Process which led to the award of the Lease Contract, the Energy and Water Utilities Regulatory Authority Act 2001 (the “Act”) was made law in Tanzania (see Exhibit BGT2). The Act established the Energy and Water Utilities Regulatory Authority ... whose functions included the regulation of energy and water utilities, and in particular the issue and renewal of licences, the regulation of rates and charges, and the resolution of complaints and disputes.”</i></p> <p><u>Reason for request</u></p> <p>Given the Claimant’s allegation that the appointment of the Minister as Interim Regulator</p>	<p><u>Accept in part; object in part (overbreadth, relevance, privacy, privilege)</u></p> <ol style="list-style-type: none"> 1. The Respondent does not accept that there has been a “delay in establishing EWURA,” and any production in response to Request No. 1 should not be taken as such an acceptance. 2. The Respondent objects to Request No. 1 as overbroad and unduly burdensome insofar as it requests “all” documents “relating” to the subject matter of Request No. 1. 3. The Respondent further objects to Request No. 1 as irrelevant insofar as it requests documents 	<p>The Arbitral Tribunal considers that the requested documents are relevant to the issues in dispute. However, the Arbitral Tribunal is also of the view that their production is unduly burdensome insofar as the request concerns “all” documents “relating” to the subject matter of the request and covers a period of nearly four years.</p> <p>The Arbitral Tribunal has noted that the Respondent has undertaken to produce documents reflecting the appointment of EWURA members. The Respondent is also hereby invited to explain in its first memorial why on June 1, 2005, the members of EWURA had not yet been appointed, while the Act had been enacted on June 21, 2001, and</p>

	<p>compromised the political neutrality and independence of EWURA, it is relevant to understand what steps the Government took to meet the Claimant's legitimate expectations and create favourable conditions for investment in the form of a politically neutral and independent regulator and the reasons for the delay in establishing such a body. This category of documentation is therefore relevant to the Claimant's claim for breach of the Respondent's obligations to encourage and create favourable conditions for investment and to accord the Claimant fair and equitable treatment.</p> <p><u>Rebuttal to Respondent's objection</u></p> <ol style="list-style-type: none"> 1. The Act was passed in 2001. By 1 June 2005, EWURA had still failed to materialise. In the Claimant's view, a lapse of time of four years duration qualifies as a "delay". 2. The Request relates to "all documents" within a specific category, identified by: (i) a particular time period; and (ii) a particular subject matter. It is legitimate for the Claimant to seek complete production of all documents within a specific and clearly identified category, provided that such category meets the requirements of relevance and materiality. In this regard, the Tribunal will note that the Claimant has sought to take into account the Respondent's objection by inserting a specified time period into the Request. 	<p>dated before the signing of the Lease Contract (which City Water signed in the knowledge that EWURA was not then regulating the water sector).</p> <ol style="list-style-type: none"> 4. The Respondent further objects to Request No. 1 as invading the privacy of individuals who may have been considered for appointment (including individuals who were not appointed). 5. The Respondent further objects to Request No. 1 insofar as it calls for the production of documents reflecting internal deliberations that are subject to public interest immunity. 6. Notwithstanding the foregoing reservations and objections, the Respondent will produce documents reflecting the appointment of EWURA members. 	<p>to file documents which explain the position. If the Claimant considers that the documents produced are not sufficient, it will have the opportunity to file a request for additional specific documents in the second round of requests for document production.</p>
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	<p>3. The Request is relevant and material for the reasons given above. While it is correct that the Request extends to documents which predate the signing of the Lease Contract, that does not render the documents irrelevant to determining what steps the Government took to establish a politically neutral and independent regulator. The fact that the Lease Contract was entered into in the knowledge that EWURA was not then regulating the water sector is irrelevant, given the legitimate expectation of the Claimant that EWURA would be established forthwith.</p> <p>4. To the extent that the Tribunal determines that the withholding of relevant and material documents is a proportionate and necessary response to protect privacy, the Respondent must establish the application of this exemption in respect of particular documents.</p> <p>5. The Claimant disputes the Respondent's objection to the production of documents on the grounds of public interest immunity for the reasons given above.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
Request 2	<u>Relevant paragraph</u>	<u>Object (overbreadth and documents in</u>	The Arbitral Tribunal considers

<p>Documents relating to the appointment of the Minister as Interim Regulator</p> <p>All documents relating to:</p> <p>(i) the selection of; and</p> <p>(ii) the decision to appoint,</p> <p>the Minister as “<i>Interim Regulator</i>” in place of EWURA in respect of the Lease Contract, including discussion of alternative candidates <u>from the passage of the Act on 20 June 2001 to the date of the Minister's appointment on 23 May 2003.</u></p>	<p>Paragraph 11 of the Amended Request for Arbitration:</p> <p><i>“Following significant delay in the appointment of members of the [Energy and Water Utilities Regulatory] Authority, by an amendment to the Dar es Salaam Water and Sewerage Authority Act (the “DAWASA Act”) in May 2003, the Minister of Water and Livestock Development took on the role and functions of EWURA in respect of DAWASA and City Water as the ‘Interim Regulator’.”</i></p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to establishing the reasons for, and the transparency and procedural propriety or otherwise of, the selection and decision-making process, and is relevant to the Claimant’s claim for breach of the Respondent’s obligations to encourage and create favourable conditions for investment and to accord the Claimant fair and equitable treatment.</p> <p><u>Rebuttal to Respondent's objections</u></p> <p>1. As stated above, the Request relates to "all documents" within a specific category, identified by: (i) a particular time period; and (ii) a particular subject matter. It is legitimate for the Claimant to seek complete production of all documents within a specific and clearly identified category, provided that such</p>	<p><u>public domain</u>)</p> <ol style="list-style-type: none"> 1. The Respondent objects to Request No. 2 as overbroad and unduly burdensome insofar as it requests “all” documents “relating” to the subject matter of Request No. 2. 2. The Minister was appointed as Interim Regulator by an Act of Parliament, the Written Laws (Miscellaneous Amendments) Act, 2003 (Act No. 11 of 2003). This Act amended Section 25 of the DAWASA Act. The statement of reasons and objects for the amendment leading to the appointment of the Interim Regulator are contained in the Bill for the Act. The Bill is in the public domain and may be obtained from the Government Bookshop or the Clerk to Parliament. The legislative history for the Act of Parliament is contained in the Hansards of the National Assembly. Hansards are in the public domain and may be obtained from the Clerk to the National Assembly. 3. The Respondent therefore objects to Request No. 2 on the grounds that the Claimant is capable of 	<p>that the requested documents are overly broad and unduly burdensome insofar as the request covers “<i>all</i>” documents “<i>relating</i>” to its subject matter. The Arbitral Tribunal considers that it is sufficient at this stage for the Claimant to have at its disposal Act n° 11 of 2003 and the legislative history for the Act contained in the Hansard reports of the National Assembly. The Respondent is hereby required to produce such documents. It is also entitled to add the costs of this production to the costs of arbitration.</p> <p>If the Claimant subsequently considers that it needs additional specific documents, it will have the opportunity to request them in the second round of requests for production of documents.</p>
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	<p>category meets the requirements of relevance and materiality.</p> <p>2. The Claimant appended a copy of the Written Laws (Miscellaneous Amendments) Act, 2003 (Act No. 11 of 2003) as Exhibit 3 to its Request for Arbitration. The Claimant will seek to obtain a copy of the Bill for the Act. However, the Claimant disputes the Respondent's contention that the Bill and Hansard entries alone constitute the entirety of "the responsive documents" to this Request, given that the Claimant's Request covers all documents relating to the selection of and decision to appoint the Minister himself, including discussion of alternative candidates, within the specified time period.</p> <p>3. The Claimant disputes that all the documents responsive to its Request are available in the public domain, and therefore disputes that it is able to obtain such documents through a local agent.</p> <p>The Claimant requests that the Tribunal order the production of all documents within this Request.</p>	<p>obtaining the responsive documents through its local agents, including FK Law Chambers. Should the Respondent be required to produce such documents, the Respondent requests that the Claimant pay the costs of such production.</p>	
<p>Request 3</p> <p>Documents relating to attempts to find a replacement Interim</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 11 of the Amended Request for Arbitration:</p>	<p><u>Accept in part; object in part (overbreadth)</u></p> <p>1. The Respondent objects to Request No. 3 as overbroad and unduly</p>	<p>The Arbitral Tribunal considers that the request is overly broad and unduly burdensome insofar as it may be understood as directed at "all" documents over a twenty-six-</p>

<p>Regulator</p> <p>All documents recording the steps taken by the Government between <u>23</u> May 2003 and <u>1</u> June 2005 to select and appoint a replacement to the Minister as Interim Regulator.</p>	<p><i>“EWURA had been envisaged as a politically neutral, independent body. The transfer of EWURA’s functions to the Minister in respect of DAWASA and City Water compromised this political neutrality and independence.”</i></p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to establishing the observance or otherwise by the Respondent of:</p> <p>(a) basic standards of due process (providing a neutral and impartial regulator); and</p> <p>(ii) respect for the Claimant’s legitimate expectations</p> <p>and is therefore relevant to the Claimant’s claim for breach of the Respondent’s obligations to encourage and create favourable conditions for investment and to accord the Claimant fair and equitable treatment.</p> <p><u>Rebuttal to Respondent's objections</u></p> <p>1. As stated above, the Request relates to "all documents" within a specific category, identified by: (i) a particular time period; and (ii) a particular subject matter. It is legitimate for the Claimant to seek complete production of all documents within a specific and clearly identified category, provided that such</p>	<p>burdensome insofar as it requests “all” documents over a 26-month period.</p> <p>2. Notwithstanding the foregoing objection, the Respondent notes that under Section 25 of the DAWASA Act, the Minister will automatically be replaced as Interim Regulator upon the appointment of the EWURA Board and Chairman. Accordingly, documents responsive to Request No. 3 are also responsive to Request No. 1 and will be produced as set forth in the response to that Request and subject to the objections set forth therein.</p>	<p>month period. It is therefore dismissed.</p> <p>However, by way of reframing the same request, the Respondent is invited to explain in its first memorial whether it took steps between 23 May 2003 and 1 June 2005 to select and appoint a replacement to the Minister as Interim Regulator, and if so the nature of such steps, and to provide all supportive documents. If the Claimant subsequently considers that it needs additional information or documents, it will have the opportunity to request them in the second round of requests for production of documents.</p>
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	<p>category meets the requirements of relevance and materiality.</p> <p>2. The Claimant disputes that "<i>documents responsive to Request No. 3 are also responsive to Request No. 1</i>" and will therefore be entirely covered by the Respondent's response to that Request: Request 1 covers documents relating to the steps taken to establish EWURA and the reasons for the delay in establishing EWURA; Request 3 covers documents relating to the steps taken to select and appoint a replacement to the Minister as Interim Regulator. Request 3 is thus concerned with any steps taken to switch to a different Interim Regulator, rather than steps taken to end the Interim Regulator scheme and usher in EWURA. The Claimant also disputes the Respondent's application to Request 3 of the objections made to Request 1, for the same reasons as set out above. Given the Respondents have accepted Request 1 in part it is hard to see how a refusal to produce documents under the closely allied Request 3 can be justified.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
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<p>Request 5</p> <p>Documents relating to the purported termination of the Lease Contract on 13 May 2005</p> <p>(i) All documents sent by the Minister / the Ministry / DAWASA to journalists or press agents or others inviting their attendance at the press conference held on 13 May 2005;</p> <p>(ii) Documents recording the statement made by the Minister or other representatives of the Government at the press conference on 13 May 2005; and</p> <p>(iii) Documents recording all other statements made by members of the Ministry or representatives of the Government <u>from</u> 13 May 2005 <u>to 24 June 2005</u> in respect of purported termination of the Lease Contract.</p> <p>All documents between the PSRC on the one hand and the</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 18 of Amended Request for Arbitration:</p> <p><i>“On 13 May 2005, and without any prior warning to City Water, the Minister of Water and Livestock Development, Edward Lowassa, announced at a televised press conference that the UROT, on advice from DAWASA, had ‘terminated the Lease Contract’”.</i></p> <p>Paragraph 20 and Exhibit BGT5 to the Amended Request for Arbitration.</p> <p>The article dated 14 May 2005 taken from the “Guardian” newspaper states at paragraph 3: <i>“The government has terminated the contract with City Water Services effective from today” Lowassa told a packed new conference at the ministry headquarters</i>” (emphasis added).</p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to establishing:</p> <p>(i) the observance or otherwise by the Respondent of respect for stability and the Claimant’s legitimate expectations (i.e. an expectation not to be informed of a contractual termination via a televised press conference);</p>	<p><u>Accept in part subject to clarifying construction</u></p> <ol style="list-style-type: none"> 1. The Respondent will produce documents responsive to parts (i)-(iii) of Request No. 5. 2. The Respondent considers that part (iii) of Request No. 5 would be overbroad and unduly burdensome if construed to apply to all statements made by any person who might be considered a “member of the Ministry” or “representative of the Government” to any other person (including other Government personnel) from 13 May to the present concerning the subject matter of the Request. Further, if the Request were construed to apply to internal governmental communications, it might contravene public interest immunity. For both reasons, the Respondent therefore construes parts (iii) of the Request as applying to press releases and similar formal statements. 3. For the reasons stated in the foregoing paragraph, the Respondent objects to the final 	<p>The Arbitral Tribunal considers that as currently formulated, the request is overly broad and unduly burdensome (in part because its precise ambit is not entirely clear).</p> <p>The Arbitral Tribunal has also noted the Respondent’s offer to satisfy items (i) to (iii) of the request to the extent it applies to press releases and similar formal statements.</p> <p>The request is granted to the following extent only</p> <p>The Respondent is hereby ordered to provide to the Claimant the following documents :</p> <ol style="list-style-type: none"> (i) invitations and other correspondence sent by the Minister, the Permanent Secretary of the Ministry, DAWASA, to journalists or press agents or others inviting their attendance at the press conference held on 13 May 2005; (ii) documents recording the statements made by the Minister or other representatives of the
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<p>Cabinet / the Minister / the Ministry / DAWASA on the other hand in relation to the matters set out at (i) to (iii) above.</p>	<p>(ii) the exercise of due diligence by the Respondent in the protection of the Claimant's investment; and</p> <p>(iii) the observance of due process by the Respondent</p> <p>and is therefore relevant to the Claimant's claim for breach of the fair and equitable treatment standard as well as to the claim for expropriation of the Claimant's investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's "clarifying construction"</u></p> <ol style="list-style-type: none"> 1. Noted. 2. The Respondent's "clarifying construction" is an objection to a subset of documents covered by the Request. We dispute the Respondent's restriction of paragraph (iii) to, in effect, public statements made by members of the Ministry or representatives of the Government from 13 May to 24 June 2005 in respect of the purported termination of the Lease Contract. Internal governmental communications are equally (if not more) likely to be pertinent to the issue of whether the Respondent exercised due diligence in the protection of the Claimant's investment and observed due process in its dealings with the Claimant's investment. Given the short time frame in 	<p>(unnumbered) paragraph of Request No. 5 as overbroad, unduly burdensome, and in contravention of public interest immunity.</p>	<p>Government – which were present – at the press conference on 13 May 2005; and</p> <p>(iii) documents recording public statements made by the Permanent Secretary of the Ministry or members of the Government, as well as internal communications submitted to the Minister or emanating from the Minister from 13 May 2005 to 24 June 2005 in respect of the purported termination of the Lease Contract.</p> <p>If the Claimant considers that additional specific documents are needed, it will have the opportunity to request them in the second round of requests for production of documents.</p>
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	<p>which this request operates (a specified 6 week period) the Claimant disputes the Respondent's contention that the request is overbroad and unduly burdensome. The Claimant disputes the Respondent's objection based on public interest immunity for the reasons given above.</p> <p>3. With regard to paragraph (iii), the Claimant disputes the Respondent's objection to the production of documents between the PSRC and the Cabinet / the Minister / the Ministry / DAWASA in relation to the matters set out at paragraphs (i) to (iii). The request is not overbroad, in that it relates to a short 6 week timeframe; nor does the Claimant accept that public interest immunity provides a valid ground for withholding such documentation for the reasons given at Rebuttal to General Response no.8.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
<p>Request 6</p> <p>Cabinet Minutes and briefing papers</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 20 and Exhibit BGT5 to the Amended Request for Arbitration.</p>	<p><u>Object (privilege)</u></p> <p>As noted in General Response No. 8, disclosure of the documents requested in Request No. 6 is prohibited by the</p>	<p>The Arbitral Tribunal considers that the Claimant has sufficiently established the relevance and materiality of the documents requested.</p>

<p>Minutes of and briefing papers prepared for:</p> <p>(i) Cabinet Meeting held on 13 May 2005: and</p> <p>(ii) All other Cabinet Meetings (or meetings of committees of the Cabinet) held between 1 May 2005 and 24 June 2005 which refer to:</p> <p>(A) the purported termination of the Lease Contract; and / or</p> <p>(B) City Water as Operator of the Dar es Salaam Water and Sewerage system.</p>	<p>The article dated 14 May 2005 taken from the “Guardian” newspaper states at paragraphs 1 and 2:</p> <p><i>“[the Minister] made the announcement to the Press in Dar es Salaam yesterday shortly after attending a Cabinet Meeting at State House. The Cabinet, which sat yesterday, endorsed cessation of the contract...”</i></p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to establishing:</p> <p>(i) the exercise of due diligence by the Respondent in the protection of the Claimant’s investment; and</p> <p>(ii) the observance of due process by the Respondent</p> <p>and is therefore relevant to the Claimant’s claim for breach of the fair and equitable treatment standard as well as to the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's Objection</u></p> <p>The Respondent seeks to impose a blanket exclusion on the production of all Cabinet Minutes. The function of Cabinet Minutes are to</p>	<p>Tanzanian Constitution and Evidence Code, and such documents are privileged by general principles of law reflected, for example, in the English doctrine of Crown privilege and the U.S. doctrines of deliberative process privilege and Executive privilege. See, e.g., the judgment of Lord Salmon in the House of Lords case of <i>Rogers v Secretary of State for the Home Department</i>, [1973] A.C. 388 at 412 D-E, [1972] 2 All E.R. 1057 at 1070-71 (“There are also classes of documents and information which for years have been recognised by the law as entitled by the public interest to be immune from disclosure....I refer to such documents as <i>Cabinet minutes</i>, minutes of discussions between heads of government departments and despatches from ambassadors abroad.”) (emphasis added).</p>	<p>The request is hereby granted.</p> <p>If the Respondent considers that some of the documents are sensitive in nature, it is invited to explain this in detail to the Arbitral Tribunal, together with any proposals for restricted production in order to safeguard confidentiality.</p>
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	<p>provide a formal record of the deliberations and decisions of the Executive. Cabinet Minutes relating to the purported termination of the Lease Contract, and the Respondent's subsequent dealings with the Claimant's investment, are clearly of direct relevance to the claims in dispute in these proceedings. The Respondent seeks to exclude an entire category of relevant and material documentation on the basis of a domestic concept ("<i>public interest immunity</i>") imported wholesale into public international law. This concept cannot be legitimately applied to the Claimant's Requests in these proceedings, for the reasons set out in detail above . Even if the relevance of article 54(5) of the Tanzanian Constitution is accepted, which it is not, the protection afforded by that article is limited. It states: "<i>The question whether any advice, and if so, what advice was given by the Cabinet to the President, shall not be inquired into by any court</i>" (emphasis added). It would be absurd to suggest that the entirety of Request 6 cannot be produced because it constitutes advice to the President. Furthermore, "<i>court</i>" is defined in the Tanzanian Constitution as: "<i>any court having jurisdiction in the United Republic [of Tanzania]...</i>" Therefore, the prohibition on inquiries into the advice given to the President applies only to a domestic Tanzanian Court, and not to an ICSID arbitral Tribunal.</p> <p>The Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
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<p>Request 8</p> <p>Documents relating to Minister’s address to City Water’s staff on 17 May 2005</p> <p>(i) All documents recording, providing a transcript of, or summarising the Minister’s address to City Water’s staff at 4pm on 17 May 2005;</p> <p>(ii) All documents between the Minister / the Ministry / DAWASA on the one hand and City Water’s “employee representative” on the other hand in respect of the address to staff <u>from 13 May 2005 to 17 May 2005</u>; and</p> <p>(iii) All documents between the Minister / the Ministry / DAWASA on the one hand and the Chairman of TUICO, City Water branch on the other hand in respect of the address to staff <u>from 13 May 2005 to 17 May 2005</u>.</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 24 of Amended Request for Arbitration:</p> <p>“...Minister Lowassa, acting with the assistance of DAWASA, called a meeting of all City Water’s staff...”</p> <p>Paragraph 24 and Exhibit BGT11 to the Amended Request for Arbitration: the note of the Minister’s address to City Water’s employees at 4pm on 17 May 2005.</p> <p>The note records a number of statements by an unnamed “employee representative” that are critical of City Water and “opening remarks” by the Chairman of TUICO, City Water branch.</p> <p><u>Reason for request</u></p> <p>This category of documentation (recording the giving of instructions / other form of communication / interference with City Water’s staff and Trade Union representative) is relevant to establishing the transparency and procedural propriety or otherwise of the Respondent’s conduct, and is therefore relevant to the Claimant’s claim for breach of the fair and equitable treatment standard as well as to the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1</p>	<p><u>No responsive documents</u></p> <p>The Respondent’s inquiries to date have not revealed the existence of any documents responsive to Request No. 8. The fact that no such documents have been found underscores the speculative nature of Request No. 8.</p>	<p>The Arbitral Tribunal notes that the Respondent has not been able to locate any documents falling under this request. The Arbitral Tribunal orders the Respondent to make a thorough research for the existence of any documentation falling within the limits of the request and (a) to confirm that such search has been undertaken and (b) to produce such documentation to the extent that it is found.</p>

	<p>June 2005.</p> <p><u>Rebuttal to Respondent's Objection</u></p> <p>This category of documentation is relevant and material for the reasons given above. It is certainly not "speculative" because it relates to one very specific gathering, the Minister's address to the staff of City Water. In terms of the existence of documentation, DAWASA's letter dated 14 May 2005 (BGT Exhibit 11) makes it clear that the address to City Water's staff was planned at least 3 days in advance. It is therefore likely that the Minister had considered and prepared the key points he wished to make at the meeting. It also appears likely, given the organisation that was obviously in place during the meeting (the opening address by the "<i>employee representative</i>" and the closing remarks by the "<i>Chairman of TUICO, City water branch</i>"), that there was at least some degree of co-ordination between the speakers in advance of the meeting.</p> <p>The Claimant requests that the Tribunal order the Respondent to make a thorough search for the existence of any documentation falling within the remit of this Request, and to produce such documentation to the extent that it is found.</p>		
Request 9	<u>Relevant Paragraph</u>	<u>Object (relevance and documents in</u>	The Arbitral Tribunal considers

<p>Correspondence between STM and the Minister / the Ministry / DAWASA</p> <p>All documents from, to, or between STM on the one hand and the Minister / the Ministry / DAWASA on the other hand <u>between 1 January 2005 and 24 June 2005</u> relating to the operations of City Water and the involvement of STM in those operations.</p>	<p>Paragraph 24 and Exhibit BGT11 to the Amended Request for Arbitration.</p> <p>The note of the Minister’s address to City Water’s employees at 4pm on 17 May 2005 records the following statement by the Minister at paragraph 3.4: “<i>Biwater, Gauff took all the contracts STM got nothing</i>” (emphasis added).</p> <p>This note suggests that the Minister was in contact with STM, the minority shareholder in City Water, and that the Minister and STM discussed the operations of City Water (including STM’s participation in/profits from the Projects carried out by City Water) prior to the Minister’s address on 17 May 2005.</p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to establishing the Respondent’s observance or otherwise of basic standards of transparency and is therefore relevant to the Claimant’s claim for breach of the fair and equitable treatment standard as well as to the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's Objection</u></p> <p>1. The Respondent's statement that STM is the "co-venturer" in and 49% owner of City Water and that the Claimant should therefore attempt</p>	<p><u>possession of Claimant’s co-venturer)</u></p> <ol style="list-style-type: none"> 1. The Respondent notes that STM is the Claimant’s co-venturer and 49% owner of City Water and objects to Request No. 9 insofar as the Claimant has not attempted to obtain the requested information from STM itself. 2. The Respondent further objects on the grounds of relevance. The Claimant has not made any allegations concerning the behavior of STM, nor has the Claimant explained “with reasonable particularity” how the requested documents (if any exist) would be relevant to its claims. 3. The Respondent further disagrees with the Claimant’s assertion that the quotation from the notes of the Minister’s statement “suggests that the Minister was in contact with STM” and notes that it is (so far as we are aware) undisputed that the Claimant and its affiliates obtained subcontracts from City Water and that STM did not. 	<p>that the Claimant has sufficiently established the relevance and materiality of the requested documents, in particular given the allegation that the Claimant intends to make in its first memorial. The Arbitral Tribunal also agrees that the fact that STM is the co-venturer and 49% owner of City Water is not in itself a valid ground for objecting to the Claimant’s request.</p> <p>The request is therefore hereby granted.</p>
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	<p>to "<i>obtain the information from STM</i>" itself, does not provide a valid ground for objecting to the Claimant's request that the Respondent produce this category of documentation. STM is not a party to these proceedings, and is under no obligation to furnish the Claimant with any documentation as part of this disclosure exercise.</p> <p>2. The Respondent states that "<i>the Claimant has not made any allegations concerning the behavior of STM</i>". As stated in the Tribunal's Annex on Production of Documents, a party may refer to "<i>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</i>". The Claimant intends to allege in its Memorial that:</p> <ul style="list-style-type: none">• the Respondent has colluded with STM and / or has offered incentives (financial or otherwise) to the directors and shareholders of STM in return for STM's acquiescence in the Respondent's dealings with City Water. <p>3. The Claimant's contention is that the express singling out of STM by the Minister during his address to the workers supports the prospective factual allegation outlined above.</p> <p>The Claimant requests that the Tribunal order the production of all documents within</p>		
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	<p>this Request.</p>		
<p>Request 10</p> <p>All documents between the Minister / the Ministry/ DAWASA on the one hand and Ministry for Home Affairs, Immigration Division/ the Attorney General on the other hand between 1 May 2005 and 17 May 2005.</p> <p>(i) All documents between the Minister/ the Ministry / DAWASA on the one hand and the Ministry for Home Affairs, Immigration Division / the Attorney-General on the other hand, relating to the immigration status or entitlement of City Water’s senior management to remain in Tanzania or any intention to deport the senior management of City Water <u>between 1 May 2005 and 17 May 2005.</u></p> <p>(ii) All documents between the PSRC on the one hand and the Cabinet / the Minister / the</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 24 of Amended Request for Arbitration:</p> <p><i>“At this meeting he stated... City Water’s expatriate management had either left the country or were about to do so.”</i></p> <p>Paragraph 29 of the Amended Request for Arbitration:</p> <p><i>“On 1 June 2005, representatives of the UROT effectuated the deportation of City Water’s senior management: Mr Cliff Stone (Chief Executive Officer), Mr Michael Livermore (Chief Financial Officer) and Mr Roger Harrington (Senior Adviser).”</i></p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to establishing the Respondent’s observance of due process and procedural propriety in its dealings with the Claimant’s investment, and is therefore relevant to the Claimant’s claim for breach of the fair and equitable treatment standard as well as to the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1 June 2005.</p>	<p><u>Object (overbreadth, relevance, and privilege)</u></p> <p>1. The Respondent objects to the first paragraph of Request No. 10, which calls for "all documents" without limitation as to subject matter, as overbroad.</p> <p>2. The Respondent further objects to the entirety of Request No. 10 on the grounds of relevance. There is no dispute that the three individuals were deported. The details of the deportations are not relevant. Indeed, even the fact of the deportations is not relevant, inasmuch as the Claimant’s alleged damages, which resulted (allegedly) from the cessation of City Water’s business, would have been unchanged had the individuals remained in Tanzania. Finally, the Claimant has yet to explain how the deportations, even if they had been in violation of the Republic’s international obligations to the State(s) of the individuals’ nationality (which is</p>	<p>The Arbitral Tribunal considers that the Claimant has sufficiently established the relevance and materiality of the requested documents.</p> <p>The request is therefore hereby granted.</p> <p>If the Respondent considers that some of the documents are privileged or sensitive, it should submit the matter to the Arbitral Tribunal for final determination. The relevant document(s) should be clearly identified, together with the basis for the privilege or sensitivity and (if appropriate) any proposals for restricted production in order to safeguard confidentiality.</p>

<p>Ministry / DAWASA / the Attorney-General on the other hand in relation to the matters described above.</p>	<p><u>Rebuttal to Respondent's objection</u></p> <ol style="list-style-type: none"> 1. The Claimant has accepted the Respondent's objection to the first paragraph of Request 10. The Respondent has therefore withdrawn its objection. 2. Relevance: The Respondent states that neither <i>"the details"</i> nor indeed <i>"the fact"</i> of the deportations are relevant, on the grounds that the Claimant's alleged damages <i>"would have been unchanged had the individuals remained in Tanzania"</i>. Whether or not the deportations are irrelevant to the Claimant's case on quantum, they are of clear relevance to the Claimant's case on liability. The deportations formed part of a sequence of events which, taken in conjunction, constitute the expropriation of the Claimant's investment, and the breach of the fair and equitable treatment standard. The Claimant refers the Tribunal in this regard to the judgment of the Tribunal in an arbitration conducted under the UNCITRAL rules, <i>Biloune –v- Ghana (1990)</i>. The Tribunal stated that the deportation of an employee whose work was <i>"central"</i> to the company's project was an event which (taken together with other key events) constituted the expropriation of the company's contractual rights in the project: <i>"the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the</i> 	<p>denied), gives rise to a claim under the BIT or the Investment Act or how such deportation has any causal link to the Claimant's alleged damages.</p> <ol style="list-style-type: none"> 3. The Respondent further objects to Request No. 10 insofar as it calls for the production of documents containing legal advice from the Attorney General or requests therefor. Such documents are subject to the lawyer-client privilege. 4. The Respondent further objects to Request No. 10 in its entirety on the basis of public interest immunity. The requested documents would reflect deliberations concerning the exercise of one of the most basic attributes of sovereignty, namely the power to determine which aliens may be permitted to enter and remain in the territory of a State. 	
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	<p><i>deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing and managing [the company], his expulsion from the country effectively prevented [the company] from further pursuing the project. In the view of the Tribunal, such prevention of [the company] from pursuing its approved project would constitute constructive expropriation of [the company's] contractual rights in the project..."</i> In the present case, City Water was engaged on an "approved project", and the expatriate senior management team were central to the implementation of that project. Their deportation is thus of direct relevance to the Claimant's claim for expropriation, and in addition is relevant to its claim for breach of the fair and equitable treatment standard.</p> <p>3. Legal advice privilege: we would expect this exception to apply to only a limited subset of documents, and would request that the Respondent identify any such documents held back on this basis.</p> <p>4. Public interest immunity: the Claimant has set out its objections to this concept at the Rebuttal to General Response 8 above. The Claimant sets out further specific observations below.</p> <p>The Respondent states that:</p>		
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"The requested documents would reflect deliberations concerning the exercise of one of the most basic attributes of sovereignty, namely the power to determine which aliens may be permitted to enter and remain in the territory of a State."

Public international law would have no function if it did not operate to restrict States in their exercise of particular "*attributes of sovereignty*". In order to co-exist in the international community, States accept that certain prescribed restraints will be imposed on the exercise of their sovereign powers. The Respondent appears to be asserting that it has an unfettered power to expel or deport aliens at will. This is an inaccurate (or at best an incomplete) description of the Respondent's position: the Respondent may only deport or expel an alien from its territory without engaging its international responsibility if such deportation or expulsion does not contribute to or itself constitute a breach of that State's obligations under public international law. Where a deportation or expulsion forms part of the events which constitute an expropriation or a breach of the fair and equitable treatment standard, such deportation or expulsion will constitute a breach of public international law.

The Claimant requests that the Tribunal order the production of all documents within this Request.

<p>Request 11</p> <p>All documents relating to the decision to form / incorporate DAWASCO including the documents of formation / incorporation and explanatory / supporting documents explaining the need to establish DAWASCO, including any advice received from Uganda Water or other third party advisors, <u>from 13 May 2005 to 24 June 2005</u>.</p> <p>All documents between the PSRC on the one hand and the Cabinet / the Minister / the Ministry / DAWASA on the other hand in relation to the decision to form / incorporate DAWASCO, <u>from 13 May 2005 to 24 June 2005</u>.</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 24 of the Amended Request for Arbitration (regarding the Minister’s address to City Water’s staff):</p> <p><i>“At this meeting [the Minister] stated that ...the staff would be transferred to the new UROT entity which was to take over City Water’s operations.”</i></p> <p>Paragraph 18 and Exhibit BGT5 to the Amended Request for Arbitration: the article dated 14 May 2005 taken from the “Guardian” newspaper.</p> <p>The article states at paragraph 4:</p> <p><i>“[The Minister] said a new institution, to be known as Dar es Salaam Water and Sewerage Corporation (DAWASCO) would be formed immediately to replace City Water.”</i></p> <p><u>Reason for request</u></p> <p>This category of documents is relevant to BGT’s claim for breach of the fair and equitable treatment standard (lack of transparency).</p> <p><u>Rebuttal to Respondent's objection</u></p> <p>1. DAWASCO was formed while City Water</p>	<p><u>Accept in part; object in part (relevance and overbreadth)</u></p> <p>1. The Respondent objects to Request No. 11 as irrelevant and overbroad. The Claimant has not explained how any supposed lack of transparency concerning the creation of DAWASCO could have affected the Claimant’s ability to manage its alleged investment or to comply with applicable regulations or is in any other way relevant to the Claimant’s fair and equitable treatment claim. Nor has the Claimant attempted to specify the relevance of the requested documents with “reasonable particularity.” The two allegations referred to from the Amended Request for Arbitration state no more than that DAWASCO was formed shortly after 14 May 2005 and that it replaced City Water in operating the water and sewerage system, neither of which is disputed.</p> <p>2. The Respondent further objects on</p>	<p>The Arbitral Tribunal considers that the documents requested may be relevant to the issues in dispute but on the other hand, that the request is overly broad, in particular to the extent that it covers “all” documents “relating” to the decision to create DAWASCO, including the reasons for the decision.</p> <p>The Arbitral Tribunal has noted that the Respondent will produce a consultancy report prepared by the National Water and Sewerage Authority of Uganda.</p> <p>The Respondent is also ordered to produce:</p> <p>(i) a copy of the order dated 17 May 2005 establishing DAWASCO and published in the Official Gazette of the Republic on 20 May 2005;</p> <p>(ii) correspondence exchanged between the PSRC on the one hand and the Cabinet / the Minister / the Permanent Secretary of the Ministry / DAWASA on the other</p>

	<p>was still in operation, and no accurate or complete information was provided to City Water or the Claimant in respect of DAWASCO prior to the events of 1 June 2005. Documents relating to the circumstances surrounding the incorporation of DAWASCO are relevant and material to the Claimant's claim for breach of the fair and equitable treatment standard, and for expropriation.</p> <p>2. As stated above, the Request extends to "all documents" within a specific category, identified by: (i) a particular time period; and (ii) a particular subject matter. It is legitimate for the Claimant to seek complete production of all documents within a specific and clearly identified category, provided that such category meets the requirements of relevance and materiality.</p> <p>3. The Respondent cannot choose to cherry pick particular documents from any given category. If a category is relevant and material, all of the documents within that category should be produced, unless a particular exemption applies.</p> <p>4. Noted.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>	<p>the grounds that even if transparency in the creation of DAWASCO were pertinent, a request for "all documents relating to" the decision to create DAWASCO, including the reasons for the decision, would be substantially overbroad and would cover documents subject to public interest immunity.</p> <p>3. Notwithstanding the foregoing objections, the Respondent will produce a consultancy report worked on by the National Water & Sewerage Authority of Uganda.</p> <p>4. The Respondent further notes that DAWASCO was established by an order dated 17 May 2005 and published in the Official Gazette of the Republic on 20 May 2005 as the Public Corporation (DAWASCO) Establishment Order, 2005 (Government Notice no. 139 of 2005). This Order is in the public domain and can be obtained by the Claimant's local agents, including FK Law Chambers.</p>	<p>hand in relation to the decision to form / incorporate DAWASCO from 13 May 2005 to 24 June 2005.</p>
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<p>Request 14</p> <p>Documents relating to VAT “Rejection Notice”</p> <p>All documents relating to the decision of the TRA to withdraw City Water’s entitlement to VAT relief and to issue the VAT “Rejection Notice” on 24 May 2005 (including documents between the Minister/ the Ministry / DAWASA on the one hand and the TRA on the other hand in this regard).</p> <p>All documents between the PSRC on the one hand and the Cabinet / the Minister / the Ministry / DAWASA on the other hand relating to the decision of the TRA to withdraw City Water’s entitlement to VAT relief and to issue the VAT “Rejection Notice” on 24 May 2005.</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 27 of the Amended Request for Arbitration:</p> <p><i>“On 24 May 2005, City Water was notified by the Tanzania Revenue Authority (“TRA”) that, as of 13 May 2005, it had lost its entitlement to VAT relief... As explained above, City Water had enjoyed this entitlement since the Handover, as part of the benefits due under the Certificate of Incentives issued under the TIA. City Water wrote to the TRA disputing the withdrawal of the VAT relief. To BGT’s knowledge, no reply has been received to this letter.”</i></p> <p><u>Reason for request</u></p> <p>This category of documents is relevant to the Claimant’s claim: (i) for breach of the fair and equitable treatment standard (failure of due process, failure to respect legitimate expectations); and (ii) the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's objection</u></p> <p>1. The Respondent states that <i>“the “Rejection Notice” did not purport to “withdraw City Water’s entitlement to VAT relief” in general.</i></p>	<p><u>Accept</u></p> <ol style="list-style-type: none"> 1. The Respondent notes that the “Rejection Notice” did not purport to “withdraw City Water’s entitlement to VAT relief” in general. The Rejection Notice rejected a specific application for VAT relief regarding specific transactions. 2. To the extent that documents relating to the decision to issue such notice exist and are not privileged or subject to immunity, they will be produced. 	<p>The Arbitral Tribunal has noted the parties’ remarks concerning the scope of the “Rejection Notice”.</p> <p>The request is hereby granted.</p> <p>If the Respondent considers that some of the documents are privileged or sensitive, it should submit the matter to the Arbitral Tribunal for final determination. The relevant document(s) should be clearly identified, together with the basis for the privilege or sensitivity and (if appropriate) any proposals for restricted production in order to safeguard confidentiality.</p>

	<p><i>The Rejection Notice rejected a specific application for VAT relief regarding specific transactions.</i> However, the "Rejection Notice" states that the application for VAT relief has been rejected on the grounds that: "<i>The consumer...is not [a] beneficiary of VAT relief.</i>" This seems to indicate that there has been a change in the status of the consumer (City Water), rather than a change relating to "<i>specific transactions</i>". In any event, whether the withdrawal of the VAT relief was general or specific (which is a subject for submissions), this category of documentation is clearly relevant and material, given that it relates to the withdrawal of a previously enjoyed exemption: <i>Occidental Exploration and Production Co.-v- Republic of Ecuador</i>.</p> <p>2. The Respondent must plead privilege in respect of specific documents. We dispute the Respondent's blanket public interest immunity objection for the reasons outlined above.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
Request 15	<u>Relevant paragraph</u>	<u>Object (overbreadth, relevance, and privilege)</u>	The Arbitral Tribunal considers that the Claimant has sufficiently

<p>Documents relating to the Deportation on 1 June 2005</p> <p>All documents relating to the decision of the Ministry of Home Affairs, Immigration Division, to issue the “Notice to Prohibited Immigrants” dated 1 June 2005 to Mr Cliff Stone, Mr Michael Livermore and Mr Roger Harrington, including documents concerning:</p> <p>(A) how, and by whom instructions were issued to the Tanzanian police to detain Mr Cliff Stone, Mr Michael Livermore and Mr Roger Harrington;</p> <p>(B) how, and by whom, the request or application to the Ministry of Home Affairs, Immigration Division was made to review the immigration status of, and/or issue the Notice to Prohibited Immigrants to, Mr Cliff Stone, Mr Michael Livermore and Mr Roger Harrington;</p>	<p>Paragraph 29 of the Amended Request for Arbitration:</p> <p><i>“On 1 June 2005, representatives of the UROT effectuated the deportation of City Water’s senior management: Mr Cliff Stone (Chief Executive Officer), Mr Michael Livermore (Chief Financial Officer) and Mr Roger Harrington (Senior Adviser). Mr Stone and the other senior management were detained by police officers at about 11.30am local time on the morning of 1 June 2005, and were held in custody and without arrest for the entire day. They were eventually deported from Tanzania that evening. A copy of the deportation notice handed to Mr Stone and his colleagues shortly before deportation is exhibited to this Request...Mr Stone and his colleagues were deported on the grounds that they were “prohibited immigrants” within the meaning of section 10 of the Immigration Act 1995 (pursuant to one of subsections (a), (b), (c), (e), (g), (h), (i) and (j)) and that their “presence in the United Republic of Tanzania is unlawful” (see Exhibit BGT15). The local law rendering the presence of Mr Stone and his colleagues “unlawful” has at no time been identified. Both the substantive and procedural basis for the deportation was lacking, thus rendering the deportation illegal under Tanzanian law.”</i></p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to BGT’s claim: (i) for breach of the fair and</p>	<p>For the reasons set forth in response to Request No. 10, the Respondent objects to Request No. 15.</p>	<p>established the relevance and materiality of the requested documents.</p> <p>The request is therefore hereby granted.</p> <p>If the Respondent considers that some of the documents are privileged or sensitive, it should submit the matter to the Arbitral Tribunal. The relevant document(s) should be clearly identified, together with the basis for the privilege or sensitivity and (if appropriate) any proposals for restricted production in order to safeguard confidentiality.</p>
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<p>(C) identification of the substantive legal grounds for the decision (including identifying the basis on which each relevant subsection of section 10 of the Immigration Act was being applied);</p> <p>(D) compliance with procedural protections (such as right to legal representation, right to a hearing).</p> <p>All documents to, from or copied to the Attorney-General in relation to (A)-(D) above.</p> <p>All documents between the PSRC on the one hand and the Cabinet / the Minister / the Ministry / DAWASA on the other hand relating to the matters described above.</p>	<p>equitable treatment standard (failure of due process and procedural impropriety, lack of transparency); and (ii) the claim for expropriation of the Claimant's investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's objection</u></p> <p>1. The Claimant relies on the points made above, at the Rebuttal to the Respondent's objection to Request 10.</p> <p>The Claimant requests that the Tribunal order the production of all documents within the Request.</p>		
<p>Request 16</p> <p>Documents relating to statements of the Ministry</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 30 and Exhibit BGT 17.</p> <p>The article taken from the Tanzanian newspaper</p>	<p><u>Accept subject to clarifying construction</u></p> <p>1. The Respondent will produce</p>	<p>The Arbitral Tribunal considers that as formulated, the request is overly broad and unduly burdensome. It has also noted the Respondent's offer to produce</p>

<p>and Government in respect of the events of 1 June 2005</p> <p>All documents recording, or summarising:</p> <p>(i) the statement made by the Permanent Secretary of the Ministry, Vincent Mrisho on 1 June 2005; and</p> <p>(ii) all other statements made by members of the Ministry or representatives of the Government in respect of the events of 1 June 2005, <u>between 1 June 2005 and 24 June 2005</u>.</p>	<p>“The Guardian” dated 2 June 2005 states at paragraphs 1 and 2:</p> <p><i>“The government has ordered City Water Services (CWS) management officials to vacate their offices effective from yesterday...In a statement issued yesterday, Permanent Secretary in the Ministry of Water and Livestock Development Vincent Mrisho said the order aimed at assuring smooth supply of water to users without fear of possible sabotage”</i> (emphasis added).</p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to BGT’s claim: (i) for breach of the fair and equitable treatment standard (failure of due process, failure to exercise due diligence in protection of investment); and (ii) the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's "clarifying construction"</u></p> <p>1. Noted.</p> <p>2. The Respondent's "clarifying construction" is an objection to a subset of documents covered by the Request. The Claimant is prepared to narrow its request to a specific 24 day period, 1 to 24 June 2005. We dispute the Respondent's restriction of paragraph (ii) to, in</p>	<p>documents, if any, responsive to Request No. 16</p> <p>2. The Respondent considers that Request No. 16 would be overbroad and unduly burdensome if construed to apply to all statements made by any person who might be considered a “member of the Ministry” or “representative of the Government” to any other person (including other Government personnel) from 1 June 2005 to the present concerning the subject matter of Request No. 16. Further, if the Request were construed to apply to internal communications, it might contravene public interest immunity. For both reasons, the Respondent construes parts (iii) and (iv) of Request No. 16 as applying to press releases and similar formal statements.</p>	<p>certain documents.</p> <p>The Arbitral Tribunal hereby orders the Respondent to produce:</p> <p>(i) all documents recording or summarizing the statement made by the Permanent Secretary of the Ministry, Vincent Mrisho on 1 June 2005;</p> <p>(ii) all press releases or similar formal statements made by members of the Government in respect of the events of 1 June 2005, between 1 June 2005 and 24 June 2005;</p> <p>(iii) correspondence exchanged between the Permanent Secretary of the Ministry and the members of the Government (Ministers) or between the members of the Government (Ministers) in respect of the events of 1 June 2005, between 1 June 2005 and 24 June 2005.</p>
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	<p>effect, public statements made by members of the Ministry or representatives of the Government in respect of the events of 1 June 2005. Internal governmental communications are equally (if not more) likely to be pertinent to the issue of expropriation of the Claimant's investment, and whether the Respondent exercised due diligence in the protection of, and observed due process in its dealings with, the Claimant's investment. Given the short time frame in which this request now operates (a specified 24 day period) the Claimant disputes the Respondent's contention that the request is overbroad and unduly burdensome. The Claimant disputes the Respondent's objection based on public interest immunity for the reasons given above.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
<p>Request 17</p> <p>Documents relating to Ministry or Government "orders"</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 30 and Exhibit BGT 17.</p> <p>As stated in (19) above, the article taken from the Tanzanian newspaper "The Guardian" dated 2</p>	<p><u>Accept in part; object in part (vagueness, overbreadth, privilege, and responsive documents in Claimant's possession)</u></p> <p>The Respondent notes that it does not</p>	<p>The Arbitral Tribunal has noted that the only order that the Respondent has been thus far been able to produce is the Notice to Prohibited Persons which is exhibit BGT17 to the Amended Request</p>

<p>(i) The government “order” referred to by the Permanent Secretary in the Guardian article dated 2 June 2005; and</p> <p>(ii) All other “orders”, measures, decrees, or other form of executive decision, relating to:</p> <p>(A) the deportation of City Water’s senior management;</p> <p>(B) the occupation of City Water’s offices;</p> <p>(C) the installation of DAWASCO; and</p> <p>(D) any other aspect of City Water’s operations</p> <p>made between 1 May 2005 and 24 June 2005.</p>	<p>June 2005 refers at paragraphs 1 and 2 to “orders” of the government: “<i>the government has ordered...the Permanent Secretary...said the order was aimed at...</i>”</p> <p>The article states in paragraph 4: “<i>The PS stressed that the removal would be accompanied by other measures as deemed appropriate to end the protracted tug of war between the two parties...</i>”</p> <p>The article states at paragraph 6: “<i>Since the termination [of the Lease Contract] CWS management has been defying the government order...</i>”</p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to BGT’s claim: (i) for breach of the fair and equitable treatment standard (failure of due process, failure to exercise due diligence in protection of investment); and (ii) the claim for expropriation of the Claimant’s investment which culminated in the seizure on 1 June 2005.</p> <p><u>Rebuttal to Respondent's objection</u></p> <p>With regard to accuracy of the newspaper article, the Claimant would request that the Respondent produce the Permanent Secretary's notes of the interview, in order that discrepancies can be identified.</p>	<p>accept the accuracy of the newspaper article. The Respondent responds to the various subparts of Request No. 17 as follows.</p> <p>(i) So far as the Respondent has thus far been able to determine, the only “order” to which the quoted passage might refer is the Notice to Prohibited Persons that is Exhibit BGT 17 to the Amended Request for Arbitration.</p> <p>(ii) The Respondent objects to the breadth of the introductory paragraph (“<i>All other...measures [or] executive decision[s] relating to.....</i>”), which renders the subparts overbroad and subject to public interest immunity. Notwithstanding this objection, the Respondent will respond to the extent possible to each subpart.</p> <p>(A) The only responsive and non-privileged document identified to date is the Notice to Prohibited Persons.</p> <p>(B-C) The Respondent objects to the phrasing of these subparts. Notwithstanding this objection, the Respondent has not located any non-privileged Government orders or similar documents requiring or authorizing DAWASCO to use facilities that had been leased by City</p>	<p>for Arbitration.</p> <p>The Arbitral Tribunal also considers that as formulated, the request is overly broad.</p> <p>It therefore grants the request to the following extent only. The Respondent is ordered to produce all government “orders”, formal measures, decrees or other forms of executive decision relating to:</p> <p>(i) the deportation of City Water’s senior management;</p> <p>(ii) the occupation of City Water’s offices;</p> <p>(iii) installation of DAWASCO, made between 1 May 2005 and 24 June 2005.</p>
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	<p>(i). We would request that the Respondent be ordered to carry out a thorough search in respect of this Request.</p> <p>(ii). As stated above, the Request relates to "all documents" within a specific category, identified by: (i) a particular time period; and (ii) a particular subject matter. It is legitimate for the Claimant to seek complete production of all documents within a specific and clearly identified category, provided that such category meets the requirements of relevance and materiality. The Claimant's rebuttal to the Respondent's arguments on public interest immunity are set out above.</p> <p>(A) Noted. Thorough search requested as above.</p> <p>(B –C) Noted. Thorough search requested as above.</p> <p>(D) Governmental orders within this specified time frame which relate to an aspect of City Water's operations are relevant to the Claimant's claims of expropriation and breach of the fair and equitable treatment standard.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the Respondent to make a thorough search for the existence of any</p>	<p>Water, other than publicly available documents identified in response to Request No. 11.</p> <p>(D) The Respondent objects to this subpart as vague, overbroad, and failing to “identify [a] specific category of documents with particularity.”</p>	
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	documentation falling within the remit of this Request, and to produce such documentation to the extent that it is found.		
<p>Request 18</p> <p>Documents between Ministry / DAWASA and the World Bank</p> <p>All documents between the Minister / the Ministry / DAWASA on the one hand and the World Bank on the other hand recording the financial or other assistance to be provided to DAWASCO, <u>from 13 May 2005 to present date.</u></p> <p>All documents between the PSRC on the one hand and the Cabinet / the Minister / the Ministry / DAWASA on the other hand relating to the World Bank recording the financial or other assistance to be provided to DAWASCO, <u>from 13 May 2005 to present date.</u></p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 77 and Exhibit BGT31.</p> <p>The World Bank stated in the penultimate paragraph of its letter to Biwater, dated 13 July 2005: <i>“we are continuing to work with the United Republic of Tanzania and the project financiers in a coordinated effort to ensure that there is as little disruption as possible in the supply of water and sanitation services to the residents of Dar es Salaam and the designated parts of the Coast Region.”</i></p> <p><u>Reason for request</u></p> <p>This category of documentation is relevant to BGT’s assessment of quantum.</p> <p><u>Rebuttal to Respondent's objection.</u></p> <ol style="list-style-type: none"> 1. The financial assistance afforded by the World Bank to DAWASCO may also have been available to City Water, and for this reason may be relevant to an assessment of quantum. 2. The Respondent cannot choose to cherry pick 	<p><u>Accept in part notwithstanding objection (relevance)</u></p> <ol style="list-style-type: none"> 1. The Respondent objects to Request No. 18 on the grounds that there is no explanation of how the requested documents could relate to quantum and it is not apparent to the Respondent that they have any relevance to the assessment of quantum. 2. Notwithstanding the foregoing objection, the Respondent will produce an Aide Memoire, dated 17 June 2005, of a Joint Mission from the World Bank, the European Investment Bank, and the African Development Bank concerning the Dar es Salaam Water Supply and Sanitation Project and, in particular, the financing of that project. 	<p>The Arbitral Tribunal considers that the Claimant has sufficiently established the relevance and materiality of the requested documents. It has also noted the offer made by the Respondent.</p> <p>The request is hereby granted.</p>

	<p>particular documents from any given category. If a category is relevant and material, all of the documents within that category should be produced, unless a particular exemption applies.</p> <p>Given the limited nature of the Respondent's acceptance, the Claimant requests that the Tribunal order the production of all documents within this Request.</p>		
<p>Request 19</p> <p>Documents between the Minister / the Ministry / DAWASA / DAWASCO and STM / Gauff / FK Law</p> <p>All documents between the Ministry / DAWASA/ DAWASCO on the one hand and:</p> <p>(i) STM;</p> <p>(ii) Gauff; and</p> <p>(iii) FK Law</p> <p>between 1 May 2005 and the present date relating to the operations of City Water, the</p>	<p><u>Relevant paragraph</u></p> <p>Paragraph 21 of Freshfields' letter dated 20 March 2006:</p> <p>Freshfields state (in respect of the Claimant's Provisional Measures request for the preservation and production of documents):</p> <p><i>“Over the past 10 months, the Claimant has apparently failed to enlist the assistance of City Water's 49% Tanzanian shareholder (Super Doll Trailer Manufacture Co. (T) Limited). Nor has it called on the expatriate and Tanzanian City Water directors who remained in the country after 1 June 2005 to make inquiries. Nor has it caused City Water to instruct its Tanzanian lawyers to take any action regarding evidence supposedly in the hands of DAWASA or DAWASCO...”</i></p>	<p><u>Object: incorrect premise, relevance, and documents in Claimant's possession, custody, or control</u></p> <ol style="list-style-type: none"> 1. The Respondent notes that the quoted letter referred to the “apparent[]” fact that the Claimant had failed to enlist the assistance of the named entities. This statement was made on the basis that none of the named entities, to Freshfields' knowledge, had taken any action in relation to the matters at issue, leading to the inference that they had not been asked to do so. 2. The Respondent further objects to Request No. 19 on the grounds that responsive documents, if any, 	<p>The Arbitral Tribunal considers that, at least as matters currently stand, the Claimant has not sufficiently established the relevance or materiality of the requested documents and in particular how “ongoing contact”, if any, with any of the named entities would be relevant to its claims.</p> <p>The request is therefore dismissed at this stage.</p>

<p>events of 1 June 2005 and its consequences for City Water or the direct / indirect shareholders of City Water.</p>	<p><u>Reason for request</u></p> <p>This statement suggests that the Minister/ the Ministry / DAWASA / DAWASCO have ongoing contact with: (i) STM; (ii) Gauff; and (iii) FK Law.</p> <p>This category of documentation is relevant to BGT's claim for breach of the fair and equitable treatment standard (procedural impropriety, lack of transparency).</p> <p><u>Rebuttal to Respondent's objection</u></p> <ol style="list-style-type: none"> 1. It is clear that the Respondent has had at least indirect contact with Gauff in respect of the matters at issue in this arbitration: we refer the Tribunal to Freshfield's letter of 6 April 2006, which enclosed a letter addressed from Gauff to the Claimant (copied to DAWASA) concerned with intra-shareholder issues. This letter was (presumably) passed from DAWASA to the Respondent and from the Respondent to Freshfields, and was relied on by Freshfields as undermining the Claimant's corporate authority for initiating the ICSID arbitration. 2. As stated above, the Respondent's argument that the Claimant should obtain the relevant documentation from the three listed entities, rather than from the Respondent itself, does not provide a valid ground for objecting to the 	<p>would be in the possession of: (i) the Claimant's "investment vehicle" (<i>see</i> Allen & Overy letter dated 17 February 2006 (provisional measures request), at p. 2); (ii) a shareholder in the Claimant itself; and (iii) the lawyers for the Claimant's investment vehicle (who are also the firm to which the Claimant requested City Water's bank statements to be forwarded (<i>see</i> Allen & Overy e-mail dated 4 April 2006).</p> <ol style="list-style-type: none"> 3. The Respondent further objects to Request No. 19 on the grounds of relevance. The Claimant has not explained how "ongoing contact" with any of the named entities (assuming there has been such contact) would be relevant to its claims, considering that the Claimant alleges that its investment was expropriated no later than 1 June 2005. The "relevant paragraph of the Amended Request for Arbitration" quoted in column 2 is not from that document but from a letter from the Respondent's counsel, and the statement in column 2 simply asserts that the requested documents are relevant to the 	
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	<p>Claimant's request. None of the three entities in question are parties to these proceedings, and none of them has an obligation to furnish the Claimant with any documentation as part of this disclosure exercise.</p> <p>3. "<i>Ongoing contact</i>" is relevant to the extent that any of the three entities referred to are receiving inducements or incentives from the Respondent in exchange for adopting a particular approach in respect of their dealings with City Water.</p> <p>The Claimant requests that the Tribunal order the production of all documents within this Request.</p>	Claimant's claim.	
<p>Request 20</p> <p>Documents between the Minister / the Ministry / DAWASA / DAWASCO and CRDB</p> <p>All documents between the Minister / the Ministry / DAWASA/ DAWASCO on the one hand and CRDB on the other hand between 1 May 2005 and the present date relating to the operation of City</p>	<p><u>Relevant paragraph</u></p> <p>See section II, 1.1 of the Claimant's letter dated 17 February 2006 (the Request for Provisional Measures):</p> <p><i>"Following the seizure of its premises and business operations on 1 June 2005, and prior to the submission of the Request for Arbitration, City Water wrote to CRDB on four occasions requesting copies of its bank statements...In addition to these letters, numerous emails and telephone calls were made to CRDB during the course of July 2005... Further attempts to obtain</i></p>	<p><u>Object (relevance and mootness)</u></p> <p>1. The Respondent objects to Request No. 20 on the grounds of relevance and mootness. The "relevant paragraph of the Amended Request for Arbitration" quoted in column 2 is not from that document but from the provisional measures request, which has already been resolved.</p> <p>2. The Respondent further notes that all mail retrieved from City</p>	<p>The Arbitral Tribunal considers that the Claimant has sufficiently established the relevance and materiality of the requested documents.</p> <p>The request is partially granted as follows. The Respondent is ordered to produce all correspondence exchanged between the Ministers / the Permanent Secretary of the Ministry / DAWASA / DAWASCO on the one hand and CRDB on the other hand between 1 May 2005 and the present date</p>

<p>Water, the events of 1 June 2005 or the subsequent assumption of the operations of City Water by DAWASCO.</p>	<p><i>bank statements from CRDB in November 2005 also failed.”</i></p> <p><u>Reason for request</u></p> <p>This request is relevant to BGT’s claim for breach of the fair and equitable treatment standard.</p> <p><u>Rebuttal to Respondent's objection</u></p> <ol style="list-style-type: none"> 1. This category of documentation is relevant to BGT’s claim for breach of the fair and equitable treatment standard, to the extent that it establishes any improper conduct on the part of the Respondent vis-à-vis CRDB. 2. The mail from CRDB in City Water’s post office box which has been handed over unopened to FK Law Chambers is simply mail from CRDB to City Water. It does not include mail between CRDB and the Respondent, which is the category of documentation which this Request is addressed to. <p>The Claimant requests that the Tribunal order the production of all documents within this Request.</p>	<p>Water’s post office box, including mail sent from CRDB, has been handed over unopened to FK Law Chambers at the Claimant’s request and in accordance with Procedural Order No. 1.</p>	<p>relating to the operation of City Water, the events of 1 June 2005 or the subsequent assumption of the operations of City Water by DAWASCO.</p>
<p>Request 21</p> <p>Any documents relating to</p>	<p><u>Reason for Request</u></p> <p>This category of documentation is relevant to the</p>	<p><u>Object (relevance and documents in possession of Claimant’s co-venturer)</u></p>	<p>The Arbitral Tribunal considers that the Claimant has sufficiently established the relevance and</p>

<p>whether and if so, the extent to which, STM has received any direct or indirect compensation arising out of the loss of its investment in City Water, <u>from 13 May 2005 to the present date.</u></p>	<p>Claimant's claim for breach of the Respondent's obligations to accord the Claimant fair and equitable treatment.</p> <p><u>Rebuttal to Respondent's objection</u></p> <ol style="list-style-type: none"> 1. This category of documentation is relevant to BGT's claim for breach of the fair and equitable treatment standard, to the extent that it establishes any improper conduct on the part of the Respondent vis-à-vis STM. 2. As stated above, the Respondent's argument that the Claimant should obtain the relevant documentation from STM, rather than from the Respondent itself, does not provide a valid ground for objecting to the Claimant's request. STM is not a party to these proceedings, and does not have an obligation to furnish the Claimant with any documentation as part of this disclosure exercise. <p>The Claimant requests that the Tribunal order the production of all documents within this Request.</p>	<ol style="list-style-type: none"> 1. The Respondent objects to Request No. 21 on the grounds of relevance and notes that the Claimant has simply stated that "this category of documentation is relevant" to a claim without explaining how. 2. The Respondent further objects to Request No. 21 on the grounds that STM is the Claimant's co-venturer and that documents should be sought from STM rather than the Respondent. 	<p>materiality of the requested documents. It also considers that the fact that the relevant documentation might be in the possession of STM is not itself sufficient to provide a valid ground for objecting to the Claimant's request.</p> <p>The request is hereby granted.</p>
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III. Respondent's Document Requests Objected to in Whole or in Part by Claimant

	Document / Category of Documents requested by Respondent	Reason for Request	Objection to production	Tribunal's decision
1	<p><u>Due diligence reports</u></p> <p>Due diligence reports produced by or for the Claimant and/or its principals or affiliates before the signing of the Water and Sewerage Lease Contract dated 19 February 2003 (the <i>Lease Contract</i>), including any written communications with Severn Trent.</p>	<p>1. The Amended Request for Arbitration (the <i>ARfA</i>) alleges at considerable length that misrepresentations were made to the Claimant during the bid process that led to the signing of the Lease Contract. <i>See, e.g.,</i> ArfA ¶¶ 141-53. It is expected to be the Respondent's case that no such material misrepresentations were made and that breaches of the Lease Contract by City Water Services Ltd (<i>City Water</i>) cannot be attributed to any alleged misinformation provided during the bidding and negotiation process.</p> <p>2. Documents reflecting the Claimant's due diligence exercise are relevant and material to this core factual and legal dispute. Resolution of that dispute, in turn, is relevant and material to elements of the claims asserted by the Claimant, such as the extent of City Water's contractual rights (if any) and to the Claimant's contention that City Water's revenues were materially lower than expected.</p>	<p><u>Request refused: irrelevant.</u></p> <p>1. The Respondent requests the production of due diligence reports produced by or for the Claimant and/or its principals or affiliates before the signing of the Lease Contract, on the grounds that such documents are relevant and material to a "core factual and legal dispute". This "dispute" is said to relate to whether or not the Respondent made material misrepresentations during the bid process and whether "breaches of the Lease Contract by City Water" can be attributed to such misrepresentations (the "Misrepresentation dispute"). The Respondent states that the Misrepresentation dispute is relevant to "elements of claims" asserted by the Claimant, including:</p> <ul style="list-style-type: none"> • "the extent of City Water's contractual rights"; and • the "contention that City Water's revenues were materially lower than expected." 	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents. The fact that the Claimant relies on treaty rights rather than on contractual rights is not a valid objection to the request, given that the documents remain relevant to issues under the treaty.</p> <p>The request is hereby granted.</p>

Response to Objections

1. *This Tribunal’s jurisdiction under Article 25 of the Convention can extend only to disputes arising directly out of an investment. By definition, this case is about the Claimant’s alleged investment.*

2. *The Claimant’s alleged investment was “the Project.” ARfA ¶ 40. Paragraph 4 of the ARfA defines “the Project”:* “As a condition of the Overall Project Funding, the UROT was obliged to appoint a private operator to manage and operate the water and sewerage system, and to carry out some of the works associated with the Overall Project (the ‘**Project**’).” (*emphasis added*).

3. *As damages, the Claimant requests, inter alia, “the market value” of its investment and “the value of the income that BGT would have earned from the investment.” ARfA ¶ 132(b,c).*

4. *Whatever theory of valuation the Claimant eventually decides to adopt, clearly the market value of and income expected from its alleged investment—i.e., the Project—depend entirely on City Water’s right to “manage and operate the water and sewerage system” and to “carry out some of the works associated with the Overall Project.” Both rights were purely contractual: the right to manage and operate the system was granted by the Lease Contract, and the right to carry out other works was granted by the Lease Contract and the related SIPE and POG contracts. See ARfA ¶ 6.*

5. *Furthermore, those three contracts defined the revenue that would accrue to City Water, e.g., the payment for the works to be carried out or the Operator’s Tariff under the Lease Contract.*

6. *The Republic will allege that City Water failed to perform its obligations under all three contracts. It will further allege that DAWASA was entitled to terminate City Water’s rights under those contracts (and, indeed, had to do so as a matter of urgency in light of the vital public service that City Water was mismanaging).*

2. This is a mischaracterisation of the Claimant's case. The Claimant does not rely upon the contractual rights of its joint venture subsidiary, City Water; rather, it relies on the treaty rights accruing to it under the UK/Tanzania Bilateral Investment Treaty (the "**BIT**"). The Claimant does not assert a breach by DAWASA of its obligations under the Lease Contract; rather, it asserts a breach by the Respondent of its obligations under the BIT and under customary international law in respect of expropriation and the fair and equitable treatment standard.

3. The Lease Contract, and the relations of City Water and DAWASA, are necessarily part of the factual background to the Claimant's claim, given that the Claimant's investment in the Respondent's territory was made through the medium of City Water and involved the Lease Contract. They were dealt with in the ARfA solely on that basis. There is no Misrepresentation dispute in the context of this arbitration and pre-Lease Contract documents are of no relevance to the issues in the case.

7. If the Republic's allegations are upheld, the value of the alleged investment was zero at the time of the alleged expropriation. Indeed, if the Republic's allegations are upheld, there could have been no expropriation, and possibly no investment.

8. The Claimant's assertion that "there is no Misrepresentation dispute" is thoroughly contradicted by its pleadings, though the ARfA—a document not called for by the ICSID Rules and that has no function (given that the original RfA would have been effectively supplanted by the Claimant's Memorial)—attempts to disguise this fact.

9. For example, consider the Appendix to the RfA—originally entitled "Further particulars regarding performance of the Lease Contract" but now simply labeled "Further Particulars." The first section was called "Breach of UROT's obligations under international and domestic law: material misrepresentation/non-disclosure during Bid Process." The amended version is called "Background to breach of UROT's obligations under international and domestic law" full stop. But other than the title, not a single word in the 11 paragraphs of allegations has changed. Unless the original title was completely wrong, this section is all about alleged misrepresentations and nondisclosure. With the next section, the Claimant did not even bother to change the title: "Dispute with UROT in respect of the misrepresentations/non-disclosures." The only remaining material in the Appendix is "Attempts to settle the dispute"—i.e., the dispute in respect of misrepresentations and non-disclosures. In the entire Appendix, no allegations have been added, removed, or changed. For other examples, see ARfA ¶¶ 17, 69, 116, 118.

10. Further, the Claimant's jurisdictional argument also depends on the "Misrepresentation dispute." Article 8.3 of the BIT permits ICSID arbitration "If any dispute should arise and agreement cannot reached within six months between the parties to this dispute" In claiming to have satisfied this jurisdictional prerequisite, the Claimant refers to the very same "Attempts to settle the dispute," as well as an earlier visit to Tanzania by its director Brian

Wingfield to discuss with the Minister alleged misrepresentations and nondisclosures. See ARfA ¶¶ 67-71. Unless the Claimant now concedes the absence of jurisdiction over its BIT claims, it cannot deny that the “Misrepresentation dispute” is the dispute it has brought to the Tribunal.

11. In any case, inasmuch as the alleged misrepresentations are the only excuse the Claimant has ever offered for City Water’s repeated breaches of contract, such allegations are plainly relevant and material to determining whether the Claimant’s alleged investment had any value or was expropriated, for the reasons set forth above.

12. Finally, another head of damage requested by the Claimant is “the losses suffered by BGT between Handover [i.e., when City Water started operating the system] to the date of the Unlawful Expropriation.” ARfA ¶ 132(a).

13. Such losses allegedly stemmed from: BGT’s agreeing to uneconomical terms under the Lease Contract on the basis of misrepresentations and omissions, see ARfA ¶¶ 141-52; the rejection by PriceWaterhouseCoopers of City Water’s application to increase the level of the Operator’s Tariff set by the Lease Contract on the basis that circumstances allegedly differed from what City Water had expected, see ARfA ¶¶ 153-58; and that DAWASA and City Water did not reach an agreement on revised financial terms in negotiations held in April and May 2005, see ARfA ¶ 159-62.

14. In short, judging from the ARfA, the only basis on which the Republic, or any entity related to it, could be said to have caused the losses referred to in paragraph 12 above is: The Republic made misrepresentations and omissions during the bidding process and then failed to correct the consequences of such misrepresentations and omissions by agreeing to change the contractual terms.

15. For all of the above reasons, the Claimant’s objection to Request No. 1 is frivolous.

2	<p><u>Financial Models</u></p> <p>1. Financial model(s) used by the Claimant and/or its principals or affiliates in 2002 and 2003 (prior to the date of the Lease Contract) and reflecting projected or assumed expenditures, revenues, and/or profits in connection with the Lease Contract and related contracts.</p> <p>2. The most recent update of such financial model(s) as of:</p> <p>(a) City Water’s request for an interim review of the Operator Tariff (<i>see</i> ArfA ¶ 154); and</p> <p>(b) 9 May 2005, when the Claimant alleges City Water “accept[ed] the majority of TRC’s recommendations.” <i>See</i> ARfA ¶ 161; and</p> <p>3. The “Annual Business Plans” referred to in Article 61.2 of the Lease Contract.</p>	<p>1. During the bidding process in 2002-03, the Claimant and/or its principals provided various financial projections to the Presidential Parastatal Sector Reform Commission (the PPSRC). Such documents are <i>not</i> sought in this request. Rather, the Respondent requests production of financial models used internally by the Claimant and/or its principals and affiliates.</p> <p>2. The requested documents are relevant and material to several issues in this case, most notably to the Claimant’s alleged damages and to the Claimant’s allegation that City Water’s financial results were materially different from the Claimant’s expectation because of acts or omissions attributable to the Respondent or the Dar es Salaam Water and Sewerage Authority (DAWASA).</p> <p><u>Response to Objections</u></p> <p><i>1. As previously noted, Claimant claims, inter alia, its share of income that City Water would have received under the Lease Contract, the SIPE, and the POG. ARfA ¶ 132(c). Determining what that income would have been requires projecting what would have happened had the alleged breaches of the BIT not occurred. Request No. 2 asks for projections of City Water’s expected income and other projected financial data—i.e., precisely what the Claimant now requests as damages.</i></p>	<p><u>Request refused: irrelevant</u></p> <p>Re. 1: Financial models used in 2002 /2003 (prior to the date of the Lease Contract) are of no relevance to the claims at issue in these proceedings.</p> <p>Re. 2 (a) and (b): The Claimant does not rely on these models in support of its claim for damages. In those circumstances such financial models are not relevant to the issues in the proceedings.</p> <p>Re. 3: Again, the "Annual Business Plans" referred to in Article 61.2 of the Lease Contract are not relied upon in support of the Claimant’s damages claim and are not therefore relevant to the issues in these proceedings.</p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents.</p> <p>The request is hereby granted.</p>
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3	<p><u>Plans for the Mobilisation</u></p> <p>1. Plans for the deployment of capital, equipment, and/or personnel to enable City Water to carry out its obligations during the “Mobilisation” as defined in Article 1.1 of the Lease Contract; and</p> <p>2. Documents reflecting the actual deployment of capital, equipment and/or personnel during the Mobilisation.</p>	<p>1. As previously noted, the Claimant alleges that City Water’s poor financial performance was caused by, <i>inter alia</i>, misrepresentations and non-disclosures during the bid process. In contrast, the Respondent’s case is expected to be that such performance was caused by defaults of City Water itself and the Claimant. Among such defaults were the failure to take the necessary steps during the Mobilisation to enable City Water to function effectively as of the “Commencement Date” (as defined in Article 1.1 of the Lease Agreement) that came at the end of the Mobilisation.</p> <p>2. The requested documents are relevant and material to resolving the foregoing factual dispute. The factual dispute itself is relevant and material to, <i>inter alia</i>, the Claimant’s alleged damages and the justification (or lack thereof) for City Water’s breaches of the Lease</p>	<p><u>Request refused: irrelevant</u></p> <p>1. The Respondent requests the production of Plans for the Mobilisation, and documents reflecting the implementation of those Plans, on the grounds that such documents are relevant and material to the Misrepresentation dispute. The Respondent states that the Misrepresentation dispute itself is relevant and material to, <i>inter alia</i>,:</p> <ul style="list-style-type: none"> • the Claimant’s alleged damages; • the justification (or lack thereof) for City Water’s breaches of the Lease Agreement. <p>2. The same points made in respect of the respondent's Request No. 1 are applicable here. There is no Misrepresentation dispute at issue in these proceedings. The Claimant does not rely on such misrepresentations to establish either its</p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents.</p> <p>The request is hereby granted.</p>

		<p>Agreement, which is in turn relevant and material to the Claimant's claims and its alleged losses.</p> <p><u>Response to Objections</u></p> <p>See <i>Response re Request No. 1</i>.</p>	<p>expropriation claim, or its claim for breach of the fair and equitable treatment standard.</p> <p>3. Nor does the Claimant seek to rely on such misrepresentations as "<i>justification ...for City water's breaches of the Lease Agreement</i>". Breaches of the Lease Agreement, whether by DAWASA or City Water, are not at issue in these proceedings.</p>	
4	<p><u>Expatriate Staff</u></p> <p>1. List(s) or roster(s) of expatriate staff of City Water or the Claimant in Tanzania as of:</p> <p>(a) The Commencement Date, as defined in Article 1.1 of the Lease Contract;</p> <p>(b) 19 February 2004 (the first anniversary of the Lease Contract);</p> <p>(c) 19 February 2005 (the second anniversary of the Lease Contract); and</p> <p>(d) 1 June 2005 (the date of the alleged expropriation of the Claimant's investment).</p>	<p>1. The requested documents are relevant and material to, <i>inter alia</i>, City Water's performance of the Lease Contract, the Claimant's alleged investment, and the Claimant's regular contention (including orally at the First Session) that City Water has been unable to function following 1 June 2005 because of actions allegedly attributable to the Respondent.</p> <p><u>Response to Objections</u></p> <p>1. <i>With respect to paragraph 2 of the Objection, see Response re Request No. 1.</i></p> <p>2. <i>With respect to paragraphs 3 and 4, the Republic first notes that these paragraphs concede that the requested documents are, or at least in principal are likely to be, relevant to the listed issues. Further, the Claimant makes no other objection to production. Thus, even if the argument in paragraph 2, regarding the relevance of</i></p>	<p><u>Request refused: irrelevant</u></p> <p>1. The Respondent requests the production of lists or rosters of expatriate staff of City Water or the Claimant in Tanzania, on the grounds that such documents are relevant and material to:</p> <ul style="list-style-type: none"> • City Water's performance of the Lease Contract; • The Claimant's alleged investment; • The Claimant's contention that City Water has been unable to function following 1 June 2005. <p>2. City Water's "<i>performance of the Lease Contract</i>" is irrelevant to the claims at issue in these proceedings: the Respondent's expropriation of the Claimant's investment, and breach of the fair and equitable treatment standard.</p> <p>3. To the extent that "<i>list(s) or roster(s) of</i></p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents.</p> <p>The request is hereby granted.</p>

	<p><i>other issues, were correct, the Claimant would still have asserted no objection that would preclude production of any documents responsive to Request No. 4.</i></p> <p><i>3. The Republic understands that, with its Memorial, the Claimant will select documents that it believes “are necessary to plead and prove” its allegations; but the Republic is entitled to relevant documents that could <u>disprove</u> such allegations, whether or not the Claimant chooses to include such documents with its Memorial.</i></p> <p><i>3. Because the Claimant has not described the documents that it intends to serve with its Memorial, there is no way to assess whether the Claimant will produce the documents that are responsive to Request No. 4 and that are not subject to a valid objection.</i></p> <p><i>4. By contrast, when the Claimant has, in its own document request, made requests that are greatly overbroad and whose scope covers mainly matters to which the Republic has made a relevance objection, the Republic has specified the documents or narrow categories of documents that it believes to be responsive and relevant. This will enable the Claimant to formulate a response to the objection and enable the Tribunal to determine whether the Republic’s objection to producing a wider</i></p>	<p><i>expatriate staff of City Water” are relevant to establishing the quantum of the Claimant’s claim, such documentation will be produced and appended to the Expert’s Report on Quantum to be served with the Memorial.</i></p> <p><i>4. To the extent that “list(s) or roster(s) of expatriate staff of City Water” are necessary for the Claimant to plead and prove the factual allegation that City Water has been unable to function following 1 June 2005, they will be produced and appended to the Memorial.</i></p>	
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		<p><i>category of documents is well-taken.</i></p> <p>5. For examples, see <i>Objection to Claimant’s Requests No. 1</i> (“the Republic will produce documents reflecting the appointment of EWURA members”) and <i>No. 18</i> (“the Respondent will produce an Aide Memoire, dated 17 June 2005, of a Joint Mission from the World Bank, the European Investment Bank, and the African Development Bank concerning the Dar es Salaam Water Supply and Sanitation Project and, in particular, the financing of that project”). <i>In the latter example, the Republic has agreed to produce a 91-page document setting forth the financial arrangements and substantive plans established with the World Bank and similar institutions for the operation of the water and sewerage system by DAWASCO in the medium term and the nature of the entity the World Bank would like to see operate the system in the long term. The Tribunal is therefore in a position to determine the adequacy of the Republic’s production and the validity of its objections.</i></p>		
7	<p><u>Statements of City Water’s indebtedness to DAWASA</u></p> <p>Statement(s) reflecting any indebtedness of City Water to DAWASA as of:</p> <p>(a) 19 February 2004 (the first</p>	<p>1. The Respondent will contend that City Water regularly and admittedly failed to make contractually required payments to DAWASA. City Water furthermore borrowed millions of U.S. dollars from DAWASA under the “Government Loan Agreement” as defined in Article 1.1 of</p>	<p><u>Request refused: irrelevant</u></p> <p>1. The Respondent requests the production of Statement(s) reflecting any indebtedness of City Water to DAWASA, on the grounds that such documents are relevant and material to:</p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents. The Arbitral Tribunal is not</p>

	<p>anniversary of the Lease Contract);</p> <p>(b) 19 February 2005 (the second anniversary of the Lease Contract); and</p> <p>(c) 1 June 2005 (the date of the alleged expropriation of the Claimant's investment).</p>	<p>the Lease Contract and incorporated as Appendix Q thereto.</p> <p>2. The amounts of City Water's indebtedness to DAWASA are relevant and material to City Water's breaches of the Lease Contract and to the Claimant's alleged losses and/or damages.</p> <p><u>Response to Objections</u></p> <p>1. <i>With respect to paragraph 2 of the Objection, see Response re Request No. 1.</i></p> <p>2. <i>With respect to paragraph 3, the Republic again notes that the Claimant's requested damages include the value of its alleged investment as at 1 June 2005. The value of the Claimant's alleged investment was, in essence, 51% of the value of City Water. The fact that City Water had debts amounting to millions of U.S. dollars is plainly relevant to City Water's valuation, and therefore to the value of the Claimant's alleged investment.</i></p> <p>3. <i>City Water's debts to DAWASA are also relevant to the Claimant's contention that the amount of the Performance Bond called by DAWASA on 16 May 2005 exceeded the amount City Water owed DAWASA. See ARfA ¶ 21.</i></p> <p>4. <i>Finally, the requested documents are direct evidence of City Water's breaches of contract.</i></p>	<ul style="list-style-type: none"> • City Water's alleged breaches of the Lease Contract; • The Claimant's alleged losses and/or damages. <p>2. The points made above are applicable here. City Water's alleged "<i>breaches of the Lease Contract</i>" are not relevant to the claims in dispute in these proceedings. A contractual dispute between City Water and DAWASA has no bearing on the public international law dispute between the Claimant and the Respondent.</p> <p>3. The alleged "<i>amounts of indebtedness</i>" owed by City Water to DAWASA are not relevant to an evaluation of the quantum of the Claimant's claim in these proceedings.</p>	<p>persuaded for purposes of this application that the contractual dispute between City Water and DAWASA has no bearing on the dispute between the Claimant and the Respondent, and therefore does not consider this a valid objection to the production of the requested documents.</p> <p>The request is hereby granted.</p>
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8	<p><u>City Water’s correspondence with CRDB regarding partially pulling the performance bonds</u></p> <p>Any request by City Water to CRDB Bank Limited (CRDB) to permit any of the Performance Bonds referred to in paragraph 14 of the ArfA to be drawn down in part rather than in full.</p>	<p>1. The Respondent will contend that City Water regularly and admittedly breached its financial obligations. The Respondent expects further to allege that City Water suggested to DAWASA that one or more of the performance bonds could be partially drawn down or “pulled” to compensate DAWASA for City Water’s non-payment of tariffs and other debts, but that CRDB took the position that the performance bonds could not be partially drawn down in this fashion. The Respondent expects further to allege that City Water told DAWASA that City Water would attempt to arrange with CRDB to amend the performance bonds to permit such partial draw-down.</p> <p>2. The requested documents, if any such exist, are relevant to City Water’s breaches of the Lease Contract, whether it conducted itself in good faith, and the reasonableness (or otherwise) of City Water’s behavior during what the Claimant describes as the “series of events culminating in seizure of 1 June 2005” (see ARfA section 3.2).</p> <p><u>Response to Objections</u></p> <p>See <i>Response re Request No. 1.</i></p>	<p><u>Request refused: irrelevant</u></p> <p>1. The Respondent requests the production of City Water’s correspondence with CRDB regarding the partial call of the performance bonds, on the grounds that such documents are relevant and material to:</p> <ul style="list-style-type: none"> • City Water’s breaches of the Lease Contract; • City Water's good faith; • the reasonableness (or otherwise) of City Water’s behaviour. <p>2. The points made above are applicable here. City Water's alleged breaches of the Lease Contract, its good faith, and the reasonableness of its behaviour, are not matters which are relevant (whether by providing a defence or otherwise) to the claims in dispute in these proceedings.</p> <p>3. The claims in dispute in these proceedings relate to the Respondent's breach of its obligations under public international law: the expropriation of the Claimant's investment and the breach of the fair and equitable treatment standard.</p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents. The Arbitral Tribunal is not persuaded for purposes of this application that City Water’s alleged breaches of the Lease Contract have no bearing on the dispute between the Claimant and the Respondent, and therefore does not consider this a valid objection to the production of the requested documents.</p> <p>The request is hereby granted.</p>
10	<p><u>Board Minutes</u></p> <p>Minutes of the Claimant’s and City Water’s board meetings</p>	<p>1. The Claimant alleges that it had an investment that was expropriated. See ARfA ¶ 119. The Claimant’s entire business appears to have been its</p>	<p><u>Request refused: irrelevant</u></p> <p>1. The Respondent requests the production of the Claimant’s and City Water’s board</p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance</p>

	<p>from the date of the respective entities' founding until the date of the original Request for Arbitration in this proceeding.</p>	<p>ownership of City Water shares and its interest in City Water subcontracts; thus, any “investment” that the Claimant could have had would have been inextricably intertwined with City Water’s activities. Therefore, minutes of both entities’ board meetings are relevant to a wide range of issues in this proceeding, including <i>inter alia</i> the performance of the Lease Contract (and related agreements), the Claimant’s alleged investment and the alleged expropriation thereof, and the Claimant’s alleged damages.</p> <p><u>Response to Objections</u></p> <p>1. <i>With respect to paragraph 2 of the Objection, see Response re Request No. 1.</i></p> <p>2. <i>With respect to paragraph 3, the number of documents requested, and the number of locations where they might be found, do not even begin to compare with the scope of the Claimant’s document requests.</i></p> <p>3. <i>The corporations in question were incorporated for the sole purpose of the Project, i.e., the Claimant’s alleged investment that is the basis of all of its claims. Given that fact, and the fact that the period from incorporation to the date of the Request for Arbitration is less than 3 years, the board minutes of these corporations could reasonably be expected fit in a single binder, or a small number of binders, and</i></p>	<p>minutes from the date of the respective entities' founding until the date of the original Request for Arbitration, on the grounds that such documents are relevant and material to:</p> <ul style="list-style-type: none"> • the performance of the Lease Contract (and related agreements); • the Claimant’s alleged investment and the alleged expropriation thereof; • and the Claimant’s alleged damages. <p>2. With regard to City Water's performance of the Lease Contract, the points made above are applicable here. City Water's alleged breaches of the Lease Contract are irrelevant to the claims in dispute in these proceedings.</p> <p>3. With regard to the relevance and materiality of the documentation requested to "<i>the Claimant’s alleged investment and the alleged expropriation thereof, and the Claimant’s alleged damages</i>", the Respondent has not shown how its request for this extremely broad category of documents (all of the Claimant's and City Water's board minutes from incorporation to the original Request for Arbitration) is either necessary or proportionate. The Respondent is invited to reformulate its request so as to identify the precise issues in relation to which relevant board minutes might be disclosed.</p>	<p>and materiality of the requested documents. The Arbitral Tribunal is not persuaded that City Water’s alleged breaches of the Lease Contract have no bearing on the dispute between the Claimant and the Respondent, and therefore does not consider this a valid objection to the production of the requested documents.</p> <p>The Arbitral Tribunal also considers that the request is not overly broad, particularly given that the corporations in question were incorporated for the sole purpose of the project and that the period from incorporation to the date of the Request of Arbitration is relatively short.</p> <p>The request is therefore granted.</p>
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		<p><i>to be easily locatable.</i></p> <p><i>4. Considering the sole purpose for which the corporations were incorporated, their minutes will be almost entirely devoted to matters relevant to this proceeding. It would be pointless to attempt to enumerate every issue to which the minutes would be relevant, as the Claimant invites. Such a list might begin, however, with minutes reflecting: the profits expected by the Claimant; the operational difficulties allegedly encountered by City Water; any intention to remedy the Claimant’s failure to make the agreed equity injections to City Water; the mandate of the Claimant’s director Brian Winfield when he met with the Minister to discuss “UROT’s [alleged] misrepresentations/ non-disclosures during the Bid Process which had induced BGT to procure City Water to enter into the Project Contracts” (see ARfA ¶¶ 68-69); and whether the Claimant was induced to make its alleged investment by a belief that the Certificate of Incentives constituted an offer to arbitrate Investment Act disputes under the ICSID Rules (see ARfA ¶ 64 and Ex. 4).</i></p> <p><i>5. Given recent revelations, such a list might conclude with minutes reflecting the proper authorization for the initiation of this ICSID proceeding.</i></p>		
11	<u>Correspondence between the</u>	1. The requested documents are relevant to	<u>Request refused: irrelevant</u>	The Arbitral Tribunal

<p><u>claimant and City Water</u></p> <p>Correspondence between the Claimant and City Water from 26 November 2004 (the date of the report referred to at ARfA ¶158) until the date of the original Request for Arbitration in these proceedings.</p>	<p>many issues in this proceeding, including <i>inter alia</i> the Claimant's alleged investment and alleged damages and the adequacy (or otherwise) of the directions given by the Claimant to City Water and the alleged deployment of the Claimant's assets. The requested documents are also relevant to the Respondent's expected allegation that City Water refused to cooperate in the transition of control of the water and sewerage system upon the expected termination of the Lease Contract.</p> <p><u>Response to Objections</u></p> <p><i>1. With respect to paragraph 2 of the Objection, the period in question is seven months and one week. The number of responsive documents is not likely to be large.</i></p> <p><i>2. One would reasonably expect the Claimant to have maintained a file of correspondence with its subsidiary. Therefore, the requested documents should be easy to locate.</i></p> <p><i>3. As noted in connection with Request No. 10 (board minutes), all of the activities of the Claimant and City Water were in pursuit of the Claimant's alleged investment. Therefore, the vast majority of the requested documents are likely to be relevant.</i></p>	<p>1. The Respondent requests the production of correspondence between the Claimant and City Water from 26 November 2004 until the date of the original Request for Arbitration, on the grounds that such documents are relevant and material to:</p> <ul style="list-style-type: none"> • the Claimant's alleged investment and alleged damages; • the adequacy (or otherwise) of the directions given by the Claimant to City Water; • the alleged deployment of the Claimant's assets; • the Respondent's expected allegation that City Water refused to cooperate in the transition of control of the water and sewerage system upon the expected termination of the Lease Contract. <p>2. This category of documentation (all correspondence between the Claimant and City Water from November 2004 until the date of the original Request for Arbitration, August 2005) is extremely broad, and the Respondent has not shown that such a Request is necessary or proportionate.</p> <p>3. In addition, the documentation requested is irrelevant to the claims in dispute in these proceedings: the Respondent's expropriation of the Claimant's</p>	<p>considers that the Respondent has sufficiently established the relevance and materiality of the requested documents.</p> <p>The Arbitral Tribunal also considers that the request is not overly broad, particularly given that the corporations in question were incorporated for the sole purpose of the project and that the period from incorporation to the date of the Request of Arbitration is relatively short.</p> <p>The request is therefore granted.</p>
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		4. <i>With respect to paragraph 3 of the Objection, see Response re Request No. 1.</i>	investment and the breach of the fair and equitable treatment standard.	
12	<p><u>Alleged investments made</u></p> <p>Statements (which may be in cumulative or summary form) reflecting any monetary expenditure by the Claimant that the Claimant contends constitutes an “investment” under the ICSID Convention, the Tanzania-U.K. Bilateral Investment Treaty, or the Tanzania Investment Act.</p>	<p>1. The requested documents are relevant and material to, <i>inter alia</i>, the Claimant’s alleged investment and its alleged damages.</p> <p><u>Response to Objections</u></p> <p><i>The Republic is entitled to more than a promise that unspecified documents the Claimant believes to be relevant will be produced in a few months. See Response re Request No. 4.</i></p>	<p><u>Request refused: relevant documents to be appended to Expert Report</u></p> <p>1. To the extent that Statements (in cumulative or summary form) reflecting any monetary expenditure by the Claimant are relevant to establishing the quantum of the Claimant's claim, such documents will be produced and appended to the Expert's Report on Quantum to be served with the Memorial.</p>	<p>The Arbitral Tribunal considers that the Respondent has sufficiently established the relevance and materiality of the requested documents.</p> <p>The request is hereby granted.</p>

IV. Directions for Production

The documents whose production has been ordered should be submitted to the other party within three weeks of the notification of this Procedural Order by the ICSID Secretariat. The documents should not be submitted at this stage to the Arbitral Tribunal.

It is so ordered.

..... May 2006

The Arbitral Tribunal

Gary BORN

Toby LANDAU

Bernard HANOTIAU