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Summary of Young-OGEMID Symposium No. 3: "Prove It! Evidence in International Arbitration (6-15 June 2016)" by D. Wong

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TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of Young-OGEMID Symposium No. 3: “Prove It! Evidence in International Arbitration (6-15 June 2016)”

by *Dominic Wong**

Executive Summary

Young-OGEMID’s third virtual symposium covered a variety of topics relating to evidence in international arbitration. In introducing the event, YO moderator Professor S.I. Strong cautioned that “While many aspects of international arbitration are relatively predictable and transparent, the art of taking and presenting evidence can be somewhat confusing.” This set the stage for panellists from both practice and academia to provide practical and theoretical insights into the issue. Over the next ten days of dynamic online discussion, the panellists aired their views on the presentation of evidence at hearings, whether a set of principles of evidence in international arbitration existed, Redfern Schedules, and the handling of evidence issues by the International Court of Justice.

The event featured:

- *Kate Brown de Vejar – Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, Mexico;*¹
- *Frédéric G. (Freddy) Sourgens – Associate Professor, Washburn University School of Law, USA;*²
- *Louise Barrington – Chartered Independent Arbitrator, Aculex Transnational Inc, Hong Kong/Canada;*³
- *John R. Crook – Arbitrator and Professorial Lecturer in Law, George Washington University, USA.*⁴

* **Dominic Wong** is an LLB and LLM graduate of King’s College London, whose expertise centres on dispute resolution, with a particular interest in antitrust, IP, WTO dispute settlement and commercial arbitration.

¹ **Kate Brown de Vejar** is a Partner in the International Arbitration group of Curtis, Mallet-Prevost, Colt & Mosle LLP, and is based in Mexico City. Ms. Vejar’s practice focuses on investor-State and international commercial arbitration, with an emphasis on complex construction and engineering disputes. Since 2008, she has been a member of the Australian Delegation to UNCITRAL Working Group II on Arbitration and Conciliation, charged with revising the UNCITRAL Arbitration Rules and developing the UNCITRAL Rules on Transparency in treaty-based investor-State arbitration, as well as the corresponding Convention on Transparency. She was co-Chair of Young ICCA from 2014-2016 and is on the executive committee of Young Arbitral Women Practitioners.

² **Freddy Sourgens** is an Associate Professor of Law and Associate Director of the Oil and Gas Law Center at Washburn University School of Law. Prof. Sourgens is the co-chair of the ASIL’s Private International Law Interest Group and Managing Editor of Investment Claims. He currently co-authors a book on Evidence in Investor-State Arbitration with Ian Laird and Kabir Duggal, to be published later in 2016 by Oxford University Press.

³ **Louise Barrington** is a chartered arbitrator and accredited mediator, legally qualified in Ontario, New York and England. She has acted as sole arbitrator, co-arbitrator named by parties and institutions, and as tribunal president, in both ad hoc and institutional cases in Asia, Europe and America. Having taught international law and dispute resolution at two of Hong Kong’s law schools and at King’s College London, Prof. Barrington returned to full-time arbitration and mediation practice as principal of Aculex Transnational Inc in 2009. Now dividing her time between Toronto and Hong Kong, in addition to sitting as arbitrator, she continues to teach arbitration law and practice, award writing and international sales law.

⁴ **John Crook** teaches international arbitration at George Washington University Law School and currently acts as presiding or party-appointed arbitrator in several investment treaty cases in ICSID, the PCA, and other settings. During three decades in the US State Department’s Office of the Legal Adviser, he was US Agent at the Iran-United States Claims Tribunal and was deeply involved in creating the UN Compensation Commission. He later was General Counsel of the Multinational Force and Observers (which operates peacekeepers in the Sinai Desert) and a member of the Eritrea-Ethiopia Claims Commission. Prof. Crook is past vice-president of

Speaker 1: Presenting Evidence at Hearings

Speaking first, **Kate Brown de Vejar** introduced her topic, explaining that whilst oral opening statements at the outset of a hearing had become accepted practice in international arbitration, they were rarely done well. She began by highlighting what she considered the three most important things to consider when preparing an opening statement: its content, preparation (particularly oral presentation) and the use of props.

1. Content

Ms. Vejar explained that the content of one's opening statement should be guided by what would be persuasive and helpful to the arbitral tribunal ('what is important and why'), being sure to keep it simple. In doing this, the opening statement should be the roadmap (or 'story') that counsel would like the tribunal to follow as it progresses through all the written pleadings and exhibits.

Next, she suggested providing the tribunal with a short outline of one's opening statement – which could simply be headings with a list of the evidence referred to under each heading – so that the tribunal would pay attention to counsel, and not be distracted by the need to take note of exhibit numbers or references during the opening statement. In doing this, Ms. Vejar cautioned against covering the entire case in one's opening, proposing instead to prioritise the most important claims, issues and/or damages. In doing so, one would have the advantage of setting the tone for the whole hearing, as well as highlighting damages, an issue frequently left last.

Ms. Vejar also said that it could be very effective if counsel explained at the outset that their opening would focus on, say, just three points, deal with those points, and then let the tribunal's questions guide counsel as to the other issue(s) they are interested in. If counsel were to choose this tactic, Ms. Vejar recommended they prepare answers on issues they know will draw questions from the tribunal.

Finally, Ms. Vejar emphasised how preparation, as well as knowing the record thoroughly and being prepared to point the tribunal to relevant exhibits, witness testimonies and legal authorities, was key. Equally important was the ability to answer tribunal questions directly, honestly and succinctly. In this way, if counsel could show the tribunal that they were credible and in command of the relevant facts and law – the tribunal would be more likely to turn to them to clarify their doubts, and counsel would have done a good job.

2. Preparation

Ms. Vejar cautioned that in the preparation phase, many counsel do not pay enough attention to their oral delivery. She explained how important it was to practice the opening statement out loud multiple times, paying particular attention to:

- Committing it to memory and practicing not looking at the outline,
- Working out which phrases should be emphasised by tone changes,
- Working out where to put pauses to draw the tribunal's attention to key points,

the American Society of International Law. He has written widely on dispute settlement and is a member of the Board of Editors of the American Journal of International Law.

- Recognising which phrases work well when spoken as opposed to on paper, including the elimination of long sentences,
- Practicing difficult-to-pronounce words or names,
- Eliminating as many filler words as possible via practice (eg. 'um' or indeed'), and
- Practicing eye contact with the tribunal.

Ms. Vejar also mentioned the importance of having one's team listen to counsel's opening, in particular:

- Identifying what works most effectively by doing several dry-runs,
- Being receptive to the team's comments,
- Practicing with one's documents and/or props (eg. PowerPoint presentations), and
- Recognising the need to develop one's oral skills more if counsel is from a jurisdiction which lacks courtroom oral argument.

3. Props

Ms. Vejar offered her views on the use of PowerPoint presentations, explaining that she valued time spent practicing one's opening statement out loud more than time spent preparing a PowerPoint. Whilst she agreed that a highlighted extract of an exhibit on a screen may have an impact, she believed it to be not as effective in the tribunal's memory compared with taking them to the actual exhibit in the record and pointing them to the same extract.

Ms. Vejar then instead suggested that a binder of key documents distributed at the outset of the opening statement, with important paragraphs pre-highlighted and flagged (to which the opening statement's outline should refer) would be more effective and time-saving, since the tribunal would then not need to locate the documents in their own set of exhibits.

Q&A Session

During the Q&A session that followed, **Prof. Strong** opined that the Anglosphere idea of a 'skeleton argument' shared similarities with the opening statement's outline that Ms. Vejar suggested. Ms. Vejar fully endorsed developing skeleton arguments, even in cases where the agreed arbitral procedure did not ask for parties to file skeleton arguments – in order for counsel to structure their case as succinctly as possible and have a greater chance of being understood by the tribunal. She emphasised, however, that they should be 'short', and not of a length that the tribunal would be tempted to read, instead of listen to counsel.

Konstantin Christie, a Senior Associate at Peter & Partners, Geneva, agreed with Ms. Vejar, adding the following questions:

1. Where counsel briefly comments on the other party's opening statements, the tribunal's attention will immediately be drawn to the most salient points of each party's position. Are such 'rebuttals' a regular occurrence?
2. Would a 'binder' containing exhibits and highlighted sections, as suggested by Ms. Vejar, be something that would be previously discussed or approved with the other party's counsel? How should one minimise confusion during the exchange of demonstrative exhibits and/or props prior to the hearing?
3. Lawyers from different legal backgrounds often have diverse views on the definition of 'demonstrative exhibits' – even if PowerPoints are not considered one of these,

might a compilation of data on damages in those slides be? On the same issue, might not some lawyers consider a pre-marked or highlighted 'binder' as an additional 'demonstrative exhibit' and be opposed to its introduction just before the opening statement?

Ms. Vejar gave the following points in response:

On question 1 – from her own practice, she had not seen time allocated in advance for rebuttal to opening statements. However, she had seen tribunals pose questions at the end of counsel's opening statement, causing the other party's counsel to ask permission to also make oral submissions on the points raised by the tribunal – a scenario for which she had "never seen a tribunal refuse".

On question 2 – Ms. Vejar agreed that this could be an area of confusion, adding an informal taxonomy to the sorts of 'binders' she was imagining. She would distinguish between:

- a) A binder of exhibits accompanying one's opening statement without novel material and which is merely a collection of evidence or authorities which are already on the record, presented in their original form; as opposed to
- b) Demonstratives which contain information the source of which is not obvious, or data the calculation of which is not self-evident, or a new representation of evidence (eg. a graph) where the methodology used to create the demonstrative is unclear.

For (a), Ms. Vejar would normally see no reason to discuss this previously with opposing counsel and explained that she would be strongly opposed to the notion of exchanging such materials in advance, given that this would give opposing counsel the opportunity to prepare a response to one's opening statement and constrain one's freedom to change one's opening up until the last minute.

For (b), Ms. Vejar believed that counsel should exercise caution and common sense, given that the use of a complex demonstrative without prior discussion with the other side and agreement as to how such demonstratives would be treated – might well draw an objection, which might lead to hearing time being lost dealing with such a procedural issue. This could mean that use of the demonstrative might not be allowed until the other side would have had an opportunity to examine it, which might wreak havoc with one's opening if overly reliant on the demonstrative. Prof. Strong strongly agreed that it was important to avoid fights over controversial evidence or exhibits during the opening argument. She also noted that counsel should avoid raising a purported evidentiary or procedural question on a document that they know is prejudicial to their counterpart before opening arguments even begin – doing so would risk counsel looking as if they had tried an underhanded “attempt to manipulate the tribunal through psychology”.

On question 3 – Ms. Vejar explained how it would be prudent to have some sort of prior agreement with opposing counsel covering all the materials distributed by the parties at the hearing, including any 'binder' accompanying one's opening statement. This might specify:

- The number of copies to be distributed at the hearing (ensuring there are enough for opposing counsel as well as the tribunal, witness, court reporters, interpreters, etc).
- Treatment of translations prepared for the purposes of the hearing, if there are different languages in the proceeding (where the original document is already on the

record, but the translation is not). On this point, Prof. Strong added (from her experience) that parties should always double-check translated documents, even they appear to be official or certified and even if the arbitration agreement indicates the cost of translations is to be borne by the party submitting the document.

- Possibly other points.

If indeed demonstratives are used, Ms. Vejar elucidated that veteran counsel would prefer not to exchange them in advance since they would want to be free to change or eliminate them up until the last minute. The agreement usually reached in such circumstances might be that all demonstratives used must be based exclusively on evidence from the record, and must clearly indicate the location, in the record, of each element, fact, or data point, as well as any methodology used. This would also have the advantage of allowing the tribunal to easily deconstruct and understand the demonstrative later, when it is considering the evidence presented.

To summarise – in deciding which of the above approaches to take, Ms. Vejar stated that if one knows opposing counsel well and their team is of a similar profile to one's own, then one is perhaps in a position to judge what they will view as normal, unobjectionable practice, and also what may draw an objection from them. If, however, one does not know opposing counsel – then caution would be advised.

* * *

Ms. Vejar then concluded with a few points on witness examination and language. When preparing to cross-examine a witness, she advised counsel to consider:

- The original language of the witness's statement(s),
- Any other languages in which the witness may have some proficiency, and
- The language of any documents on which counsel wishes to rely on.

She explained that frequently, where a dispute involves documents in different languages, the document on the record on which counsel wishes to rely on in cross-examination does not have a translation on the record corresponding to the native language of the witness. So, if counsel plans to ask the witness anything about the exhibits on the record in cross-examination or to use them to impeach the witness, then counsel must:

1. Be sure that they are sufficiently proficient in the language of the documents, or
2. Have a translation corresponding to the native language of the witness of the relevant extracts from the documents.

If counsel decides that they need to prepare such translations, then a choice arises:

- Whether counsel should provide these to the other side for their review in advance (which will signal to them what documents one plans to use with the witness), or
- Simply offer them at the hearing, and prepare to answer any objections.

Speaker 2: The Existence of Principles of Evidence in International Arbitration

Prof. Sourgens narrowed the discussion by proposing to take on the question "Is it time to develop more precise principles of evidence in international arbitration?" He set the context by explaining how counsel in international arbitrations spend a significant amount of time and effort on fact development – the proof, or evidence, of what occurred in a particular dispute – via the initial client interview, through document disclosures to the hearing and post-hearing briefs. Indeed, he explained that whilst the prevailing sentiment within the arbitration community was that findings of fact dispose of disputes – few precise principles of evidence existed in international arbitration.

Prof. Sourgens then introduced one of the few such principles – *l'intime conviction de l'arbitre* (the inner conscience, or conviction, of the arbitrator). But he immediately highlighted its shortcomings, particularly:

- Its unhelpfulness in developing one's own factual case,
- Its lack of assistance in impeaching the probative value of items submitted by opposing counsel,
- Its silence on explaining how one might go about supporting or defeating an inference.

From a practical perspective, Prof. Sourgens believed the current state of affairs to raise two related questions:

1. First, whether it was actually true that *l'intime conviction de l'arbitre* was the only rule of evidence in international arbitration, and
2. Second, how one would go about finding more useful principles of evidence in addition to *l'intime conviction de l'arbitre*.

On question 1, Prof. Sourgens stated his belief that there were indeed other principles of evidence in international arbitration.

On question 2, Prof. Sourgens posited that, despite the significant diversity of arbitrators, their 'conscience' or 'conviction' appeared to function uniformly, highlighting the fact that dissenting opinions on questions of proof were rare. He also stated his belief that in most cases, experienced counsel could understand and predict how arbitrators made factual determinations due to an "...intuitively shared but determinable, uniform, and predictable code pursuant to which [the arbitral community] approach[ed] evidence" – which Prof. Sourgens stated that the arbitral community had "simply so far... failed to codify with... any precision what principles might be distilled...".

The reason for this, Prof. Sourgens said, was that international arbitration practitioners associated 'rules of evidence' with a Common Law mode of litigation, which were "viewed as the foe" of Civilian Law fact finding. However, in trying to establish descriptively the means by which arbitrators decided factual questions and counsel understood, predicted and sought to influence their reasoning – an empirical analysis of arbitral jurisprudence would be required to determine which principles were responsible for the uniformities in questions of proof that made an adversarial arbitral process possible. Much like the *lex mercatoria*, Prof. Sourgens believed these understandings were capable of codification, and it formed the basis

of the research that he and his co-authors Ian Laird and Kabir Duggal were working on, in identifying such principles in the investor-state arbitration context.

Q&A Session

Prof. Strong first stated her concern as to whether increased codification of the evidential process might unduly hinder what should be a flexible and cross-cultural arbitral process, highlighting how codification might impose a single, less-flexible system onto:

- Situations in which parties, counsel and the tribunal were all from Common Law traditions – where one approach to evidence would suffice.
- Situations in which these parties were all from Civilian Law traditions – where a different approach to evidence would suffice.
- Situations in which these parties were from two different legal traditions – which would require a third approach.

Prof. Strong secondly asked whether Prof. Sourgens' approach took into account differences in substantive law, citing a hypothetical scenario where a claim involving fraud governed by US law would likely require more extensive document production from an opponent than a fraud claim governed under Civilian Law because the latter allowed a shifting of the burden of proof or a negative inference to surmount the lack of discovery or disclosure. Since there existed key connections between arbitral substance and procedure, Prof. Strong noted how practitioners working on a cross-border basis should be careful not to affect substantive rights when making procedural adjustments. Indeed, she strongly believed that different evidential procedures might be appropriate depending on the nature of the substantive law governing the dispute.

In responding to the first point, Prof. Sourgens explained that that the manner in which evidence and proof in international arbitration is handled was truly transnational, because the procedural context giving rise to them was. As he saw it, his approach in formulating a system of principles of evidence, correctly discerned and applied, would remain flexible as they would permit modification to take into account the specific legal and factual needs of each dispute. Prof. Sourgens explained that transnational principles of evidence would accommodate each of the parties' differences in legal traditions and business reality by providing an open-textured floor for how proof could be handled in each dispute. He urged that this approach to principles of evidence should not impose principles not already in use. Indeed, Prof. Sourgens' hypothesis was that the current practice of international arbitration in fact followed basic, consistent, predictable, and ascertainable principles of proof. His research – as an empirical exercise rather than a normative one, in codifying these rules of evidence – would be a way to discover how arbitration as a mechanism has provided parties with a reliable dispute resolution brand, and to provide evidential rules which are sufficiently robust. In this way, Prof. Sourgens hoped to give comfort to lawyers and business persons deciding upon an arbitration clause that their dispute would in fact be resolved in an orderly and predictable fashion, rather than by ad-hoc and ex-post improvisation by arbitrators under the principle of *l'intime conviction de l'arbitre*.

On the second point, Prof. Sourgens stated that applicable law played a significant part when dealing with evidentiary questions, and it could decide who has to produce what evidence to prove or disprove a point. He did, however, believe that international arbitration had more robust means of document disclosures than some Civilian Law countries extended to its civil

litigants. However, in transposing the disposition of a US Law or Civilian Law claim from its 'home' process of dispute resolution to international arbitration, Prof. Sourgens believed we would need to 'adapt' the relevant rules of applicable law to their new surroundings to ensure they would meet their function. In this way, Prof. Sourgens thought that international arbitration would come to a middle ground. In coming to a middle ground, he indicated that this would mean applying evidentiary principles that were no longer the principles of any one home jurisdiction – rather, principles which would be functionally and substantively transnational.

Prof. Strong then said that her concerns as to whether Prof. Sourgens' approach took into account differences in substantive law were less likely to arise in investment proceedings, since the substantive law in those cases would be the law of the treaty – and would therefore be much less of an issue than in commercial proceedings. She did, however, note that principles and practices often made their way across the commercial-investment arbitration divide. Prof. Strong agreed that bringing a more unified approach to evidence, at least in investment arbitration, might be appropriate.

Professor John Crook next stepped in to clarify Prof. Sourgens' methodology, asking whether the work done by Professor Sourgens and his colleagues was intended to be descriptive (discerning recurring patterns in past cases) or whether the goal was seen as more prescriptive (aimed at identifying rules that tribunals applied from a sense of obligation).

If the work was intended to be descriptive, he asked whether it was appropriate to describe the result as 'rules' or 'principles', as doing so suggested that they had normative weight.

Prof. Sourgens responded by confirming that the work was descriptive in the sense that it did not intend to provide suggestions for improvement of current practice but rather sought to facilitate its better understanding. Tribunals act out of obligation rather than convenience - though this obligation may not always be immediately apparent. Instead, the normative force of evidentiary practice becomes apparent when this practice is placed in a functional context. He concluded that the project sought to identify both principles and rules in the way of a restatement of law in the US context.

Mark Kantor also stepped in with a few other comments. He indicated that Prof. Sourgens' suggestion of certain evidentiary tools being associated with a Common Law tradition risked being overly simplistic.

He also noted that 'best practices' guides for tribunals such as the IBA Rules, CIArb protocols or CCA Best Practices guides arose from a cross-cultural process, going on to suggest that the fact that evidentiary principles were more limited in arbitration than in court practice should be viewed as welcome, not troubling – since harmonisation across legal cultures often necessitated reducing a set of rules to achieve greater consensus – rather than accepting one culture's set of rules to the exclusion of another's.

Prof. Sourgens responded that it was not his intent to advance his thesis via an overly simplistic arbitral discourse based on a caricatured Civilian Law/Common Law dichotomy. Prof. Sourgens affirmed his belief in the value of pluralism in transnational legal processes by

citing two of his own articles.⁵ Indeed, his goal was consistent with Mr Kantor's – to explain how arbitration served as a cross boundary multi-cultural dispute resolution process via showing a robust functional response to the specific procedural needs of international arbitrations.

In formulating more rules for international arbitration, Prof. Sourgens explained that he was engaging in principally doctrinal work. The principles he was drawing from the jurisprudence were not external to the current practice of arbitration – he was simply trying to catalogue what tribunals have done, thus lending more transparency to jurisprudence.

Concluding, Prof. Sourgens also stressed the importance of demonstrating that the arbitral process is not arbitrary, especially given the current negative public perception of investor-state dispute settlement (ISDS). In showing that the fact-finding and decision-making processes employed by arbitrators were predictable, transparent, and fair, Prof. Sourgens' research hoped to defuse one of the strongest critiques of arbitration – the belief that it relied upon an elite cadre of decision makers which made biased decisions consistent with the wishes of its target audience.

Speaker 3: The Use of the Redfern Schedule

Professor Louise Barrington introduced the topic, explaining how one of the most challenging elements in an international arbitration could be the gathering and presentation of evidence by each party's counsel to persuade the tribunal that the facts favour their client's case. She explained that when key evidence for one party's case may be in the other's possession, there might be vastly differing expectations of what should be produced depending on the legal traditions of the parties. What one party might consider relevant and material, the other party might consider a 'fishing expedition' to try and shore up a weak case. One side might expect that ALL the evidence should go to the tribunal, while the other would present only what it wishes to rely on. Furthermore, different national bar associations would have different and often contradictory ethics standards. However, as a result of continued discussions amongst arbitrators and counsel on standards for production, the IBA Rules on the Taking of Evidence in International Commercial Arbitration became a particularly well-recognised standard for achieving an “economical and fair process” for disclosure. Prof. Barrington highlighted the Redfern Schedule as one of the most useful tools to establish that procedure.

The Schedule, attributed to Alan Redfern (of Redfern and Hunter), had been a stock tool of arbitration for thirty years. She explained that it is a chart for dealing with requests for the production of evidence, to which the parties' counsel and the tribunal would all contribute.

Across the page would be four columns, usually labelled:

1. Request to disclose,
2. Reason for request,
3. Objecting party's reasons, and

⁵ Frederic G Sourgens, 'Functions of Freedom - Privacy, Autonomy, Dignity, and the Transnational Legal Process' (2015) 48 Vanderbilt Journal of Transnational Law (forthcoming) <<http://ssrn.com/abstract=2508977>> accessed 04 August 2016 and Frederic G Sourgens, 'The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness' (2015) 39(2) Fordham International Law Journal <<http://ssrn.com/abstract=2656333>> accessed 04 August 2016

4. The tribunal's rulings, with brief reasons for each.

Under the first column would be a separate entry for each requested document or class of documents and the reason each is requested. The tribunal might ask each party to prepare its own Schedule, and then decide whether to combine the Claimant's requests as Part A and the Respondent's requests as Part B. In other cases, there might be a single Schedule from the beginning.

In her own practice, Prof. Barrington would add an extra left-hand column to identify each requested document or class of document as Claimant's/Respondent's Request 1 and then number them sequentially: CR-1, CR-2, CR-3 and RR-1, RR-2, RR-3 etc. She would also split the Request column into two: description of document, and the reason for its disclosure in a separate column. She attached a sample Schedule to illustrate her points.

XCompany (Claimant) v YCompany (Respondent)
File No 98765/15

DOCUMENT PRODUCTION REQUESTS

Part A – Documents Requested by Claimant X

No.	Description of document	Materiality and Reason for Request	Objections to production from Y	Tribunal's observations	Tribunal's ruling
CR-1	Building Plan of 14/08/2009 and descriptive notes	Shows location and extent of damaged structure. Document produced by Y's personnel and is in sole control of Y.	Information is privileged, having been created by Y's engineer and its general counsel in preparation for this arbitration	The applicable law does not recognise such documents as privileged	Y to produce
CR-2	Letters between YCo and B for period 25/07/09- 31/09	Describe options available for construction of the with costs and risks to the structure associated with each	No such letters have ever existed.	No evidence available that such letters ever existed	No production ordered
CR-3	Etc.				

Part B – Documents Requested by Respondent Y

No.	Description of document	Materiality and Reason for Request	Objections to production from X	Tribunal’s observations	Tribunal’s ruling
RR-1	Medical records for Mr. Z relevant to injuries suffered in site accident of 17/09/10	Relevant to Z’s claim for compensation from X	Not material to this arbitration; Z is not a party and the records are not in the possession or control of X	Not material to the dispute. Tribunal does not have authority to order Z to produce.	No production ordered
RR-2	Minutes of ExCom meeting of 18/06/09	X alleges no misrepresentation regarding the physical risks of the project. The minutes may show what knowledge the board members possessed at that time	Not relevant to the issues of this arbitration. Confidential and commercially sensitive information. Disclosure would harm X	The contract was formed on the basis of X’s representations. The basis for these representations appears relevant.	Disclose the minutes with sensitive financial information redacted.
RR-3	Etc				

Prof. Barrington would typically let parties request from each other the documents they wanted produced, have them agree on whatever points they could (saving time and expense), and then ensure that the parties submitted to the tribunal only the problem cases, which only then would necessitate the creation of a Redfern Schedule.

* * *

Practitioners’ opinions on Redfern Schedules, Prof. Barrington explained, were polarising. Some saw them as more problematic than helpful. According to an experienced arbitrator she recently spoke casually with, creating the chart form of the Schedule would force parties to reduce their requests and their reasoning such that they resulted in requests that were vague, ambiguous and unfocused. Objections would multiply, arguments would ensue, and the exercise would create more problems than it solved. This arbitrator believed that a better way would be for the parties to set out the documents they required, along with their full reasons for requiring production, and let the other side respond, also in full, so that the tribunal would have the entire story before making a ruling on each request.

Prof. Barrington agreed that the Schedule could be misused in the hands of inexperienced or abusive counsel, but suggested that that in complex cases, the Schedule could be utilised in conjunction with parties’ full document request submissions. They could make full, formal and specific submissions to clearly identify the specific document or class of documents as well as the justifications for the request and objections. These would then be summarised on the Schedule. According to Prof. Barrington, this would have the benefit of enabling the tribunal to insist on “sound reasons, rather than sound-bites”, before deciding on the requests. Having the submissions then summarised in the Schedule would oblige counsel to focus on each request and to be clear about each one. The completed Schedule would then be a convenient record of the decisions of the tribunal ordering specific actions on the part of each

side – allowing it to be relatively easy to check whether or not a party had complied with the tribunal’s order.

Prof. Barrington then posed, to arbitrators, tribunal secretaries and counsel, the following questions for discussion:

- What are your experiences with Redfern Schedules?
- Do you use them regularly?
- Have you encountered problems because of the summary nature of the requests?
- Or, for any other reason?
- Can the Schedule accommodate and adequately express the gaps between legal cultures often present in international arbitration?
- If you have never used one, do you think you would use it in the future?
- Or, is the Schedule just one more document to add to the already massive heap – duplicative and adding to the expense of the process?

Prof. Barrington later added another question, prompted by Prof. Strong:

- Whether you saw any difference in the content of the Redfern schedule according to geography?

Q&A Session

As an arbitrator, Prof. Strong explained how she was happy to use Redfern Schedules as a first step, and from there, would typically later ask more detailed briefings on any points she would need clarification on.

David H. Weiss, a Senior Associate at King & Spalding LLP, believed that the Redfern Schedule's top-to-bottom format was "very hard to read", preferring instead to use rows instead of columns for each aspect of a request. He attached an example.

Part A – Documents Requested by Claimant X

CR-1	
Description of document	Building Plan of 14/08/2009 and descriptive notes
Materiality and Reason for Request	Shows location and extent of damaged structure. Document produced by Y’s personnel and is in sole control of Y.
Objections to production from Y	Information is privileged, having been created by Y’s engineer and its general counsel in preparation for this arbitration
Tribunal’s observations	The applicable law does not recognise such documents as privileged
Tribunal’s ruling	Y to produce
CR-2	
Description of document	Letters between YCo and B for period 25/07/09-31/09
Materiality and Reason for Request	Describe options available for construction of the with costs and risks to the structure associated with

	each
Objections to production from Y	No such letters have ever existed.
Tribunal's observations	No evidence available that such letters ever existed
Tribunal's ruling	No production ordered
CR-3	Etc.

Following this, Prof. Sourgens believed there were both pros and cons to the formatting style of Redfern Schedules, highlighting the fact that their format forced one to make points as transparently and briefly as possible. Brevity, he explained, was favourable in most instances, in order to ensure document requests (or objections) would not be frivolous. On this note, he suggested that a favourable format for a Redfern Schedule would follow Mr. Weiss' example, but with predetermined word limits for each row, subject to the tribunal setting additional argument for requests that would require additional briefing.

Prof. Barrington responded that the most important point to take from this discussion was that although it had its drawbacks, on balance the Schedule provided a succinct and visible record produced for reference throughout the procedure. She continued that Mr. Weiss' example, whilst possibly prolix, could be tempered if combined with Prof. Sourgens' word limit – resulting in an enviable Redfern Schedule, especially if there would be the possibility to see each requested document's story on a single line.

Mr. Weiss agreed that the format of the Schedule was one of preference, but disagreed that the traditional Redfern format imposed brevity, given that all the top-down Schedules he had seen from his experience were long-winded. He also agreed that although document requests should be succinct, arbitrators and advocates would have different motivations for succinctness. Arbitrators might be interested in word limits to try and impose good order. On the other hand, Advocates should know that being succinct is persuasive, and so not having a word limit that forces their counterparty to be more effective – would be advantageous.

Speaker 4: Differences in Evidentiary Principles and Practices between International Arbitration and ICJ Litigation

Finally, Prof. Crook began his observations on the International Court of Justice's handling of evidence issues, positing that while the Court had not historically handled it well, they recently seemed to be working to improve.

1. Context

He explained that fact-finding was not traditionally a major part of the work of the fifteen-member ICJ, which heard international legal disputes between States, as well as occasional requests for advisory opinions from major UN organs. Roughly half of its caseload involved land and maritime boundary disputes (which included their own evidentiary practices and challenges, often necessitating digging into colonial and other historical archives). A portion of the remaining cases involved straightforward questions of treaty interpretation or general international law (without significant factual dimensions). Many ICJ judges came from backgrounds in diplomacy or academia, and were therefore comfortable with such cases. Prof. Crook cited, as examples, *Questions relating to the Obligation to Prosecute or Extradite*

(*Belgium v Senegal*),⁶ and *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*.⁷ Nevertheless, the Court's cases increasingly raise important factual issues.

2. *Lack of Procedures for Fact Development*

Since there was no requirement that ICJ judges should have prior litigation experience, some judges' discomfort with fact-finding could arise where a case posed factual challenges. Indeed, Prof. Crook cited a significant environmental case involving a dispute between Argentina and Uruguay, where two distinguished jurists of the Court in effect complained in their dissenting opinion that they could not be expected to properly assess the Parties' technical evidence.⁸

Prof. Crook observed that ICJ practice emphasised documentary evidence. However, in cases presenting factual disputes, the Court's procedural orders rarely established procedures for developing the facts. Parties would be left to guess what they needed, often leading to bulky and expensive written filings. There often are few – if any – live witnesses at ICJ hearings. The Court's experience with cross-examination also appeared to be mixed. Prof. Crook cited the public remarks of a highly regarded Common Law jurist recounting how a polite but effective cross-examination revealing inconsistencies in a distinguished expert's testimony was later judged to have been detrimental to the cross-examining party, with some judges believing that it was inappropriate to embarrass the witness.

3. *Lack of Questioning or Spontaneity*

Prof. Crook explained that the Court had broad authority under its Statute and Rules to craft orderly procedures for developing evidence, but rarely used this authority. Little was spontaneous in hearings, and judges rarely asked questions (about facts or otherwise). Indeed, some judges seemed to view it as bad form for their colleagues to ask questions at all.

4. *Lack of Structured Procedures for Document or Evidence Requests*

There were also no structured processes for one State party to request documents or evidence from another. In a much-noted case, the Court denied a party's request that the other produce complete copies of a narrowly defined group of official documents previously produced in redacted form. In the circumstances, the un-redacted documents might have been highly prejudicial to the requested party. The Court declined to draw any adverse inferences from the refusal to produce un-redacted texts, instead declaring rather unconvincingly in its opinion that the requesting State had extensive documentation and evidence available to it.

5. *Mixed Signals on the required Quantum of Proof*

The Court had given mixed signals over the years regarding the quantum of proof required. Prof. Crook believed that the Court sometimes seemed to have felt that items of evidence be weighed individually, not as part of an aggregate picture, with each piece of evidence

⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) ICJ Rep [2012] 422

⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) ICJ Rep [2012] 99

⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Joint dissenting opinion of Judges Al-Khasawneh and Simma) ICJ Rep [2010] 108

seemingly tasked with proving the proponent's case by itself. There also seemed to be a disposition to make the evidentiary burden proportionate to the gravity of the claim, typically without much explanation. Prof. Crook cited *Oil Platforms (Iran v United States)*⁹ as an example.

6. Over-reliance on factual materials from other UN bodies

Perhaps recognising their institutional limitations in factually challenging cases, particularly those involving the complexities and ambiguities of armed conflicts, Prof. Crook noted that the Court had shown a tendency to outsource. It had relied on factual materials developed by other UN bodies, the international criminal tribunals, and NGOs, as the basis for its own factual findings. Prof. Crook cited *Congo v Uganda*¹⁰ and the Court's Advisory Opinion on Israel's security wall¹¹ as examples.

7. Criticism and Change

Prof. Crook stated that things appeared to be changing at the ICJ, perhaps influenced by lessons from experience, scholarly commentary, personnel changes, as well as by judges' separate and dissenting opinions addressing the Court's evidentiary practices. As examples, the Court recently:

- Articulated, in *Congo v Uganda*, a set of principles to be applied in assessing different types of evidence.¹²
- Heard, in *Whaling in the Antarctic*,¹³ detailed expert testimony at the hearing, in which judges asked important questions and the resulting judgment suggested a structured and thorough assessment of a substantial factual record.
- And, very recently, in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*,¹⁴ vigorously used its power of appointing experts to conduct a site visit near the border between Costa Rica and Nicaragua, and to report on specific questions – the first time it had tasked experts to conduct field reports since the very first ICJ case, *Corfu Channel*.¹⁵

Q&A Session

Mr Kantor then asked whether there were any supervisory institutions or credible advisory bodies which could call for the ICJ to improve its fact-finding processes and offer specific recommendations – to which Prof. Crook explained that while the handful of States that appeared regularly before the Court might care about evidence, most did not. However, he noted that there did exist the General Assembly's Sixth (Legal) Committee as the Court's

⁹ *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) ICJ Rep [2003] 161

¹⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) ICJ Rep [2005] 168

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep [2004] 136

¹² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) ICJ Rep [2005] 57-61

¹³ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) ICJ Rep [2014] 226

¹⁴ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Pending) ICJ Press Release 2016/17 <<http://www.icj-cij.org/docket/files/157/19024.pdf>> accessed 04 August 2016

¹⁵ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4

principal institutional overseer, which annually discussed the legal settlement of international disputes. While there seemed to be no critical mass of States interested in taking this on, Prof. Crook explained that some scholarly and professional organisations had addressed evidence in useful ways. He recommended the British Institute and International and Comparative Law's thorough review of the Court's practices, published in *Evidence before the International Court of Justice*.¹⁶ Prof. Crook also cited *Failings of the International Court of Justice*¹⁷ as containing a substantial discussion of evidence. He opined that the real driver for improvement would have to come from inside the Court, and noted the potential for change, given that the current Bench included several judges with substantial experience in national court litigation and investment arbitration – as well as the promising developments following the recent jurisprudence he alluded to before.

Prof. Strong proposed two solutions.

First, she wondered if there was more to be done besides interested observers writing academic discourse to influence those appointing the ICJ's judges. She said that if evidentiary determinations were outcome-determinative, and if evidentiary standards were primarily, if not exclusively, set by the judges, then the appointments process seemed the only way to improve the situation. But she lamented the chances of this happening, given her recollection that the ICJ was "not a system... prone to significant outside scrutiny or influence."

Secondly, she raised the possibility for interested individuals, institutions or NGOs to lobby various State governments to establish appropriate evidentiary standards, but indicated the potential difficulty, given the wide ranging views on evidentiary issues (highlighting, for example, the difficulties the European Law Institute were having in creating pan-European principles of civil procedure) and the desire to protect judicial independence. She also noted that similar types of issues (lack of transparency, excessive judicial discretion, concerns about hidden agendas via case management techniques, etc.) were currently being debated in the US by the civil procedure community, so these were not matters limited to the ICJ.

Prof. Crook responded with several points:

First, that the impact of thoughtful scholarly writing and commentary should not be underestimated. He felt that many ICJ Judges did care about what was written and said about their institution and its work.

Secondly, in terms of shaping the ICJ Judicial Appointments process – the system was complex (given that it was originally designed to insulate elections from politics as much as possible), and interested outsiders' ability to weigh in varied from country to country and depended on the quality of their 'National Groups', the mechanism by which States made judicial nominations, under Article 4 of the ICJ Statute, which is part of the UN Charter.¹⁸ He noted, however, that whilst nominations were made by National Groups, these bodies varied in how conscientiously and independently they performed their role. Further, deeply rooted UN practices such as the allocation of seats among regional groups shaped these elections, and contested elections could be driven by considerations of national prestige or regional rivalries.

¹⁶ Anna Riddell, Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009)

¹⁷ A. Mark Weisburd, *Failings of the International Court of Justice* (OUP USA 2016)

¹⁸ Art.4(2), Statute of the International Court of Justice

On whether Governments might one day somehow get together to establish evidentiary standards for the ICJ – Prof. Crook considered this unlikely, in part because changing the ICJ Statute would require a Charter amendment, which he believed was next-to-impossible, and because Article 30 of the ICJ Statute made the Court the sole master of its Rules¹⁹. However, particular pairs of disputants could perhaps negotiate what might amount to a *compromis* addressing evidence and ask the Court to constitute a Chamber to hear their dispute, akin to what the US and Canada did in their very detailed *compromis* in the *Gulf of Maine* case.²⁰ But whether or not the Court would agree to do so would be a different matter.

Prof. Crook concluded that he felt more likely outcomes to the problem of evidence at the ICJ would be for States to refer factually complicated cases to the Permanent Court of Arbitration or to agree to proceed via ad hoc arbitration, . This former solution could prove popular due to the perception that the PCA is institutionally more adept in dealing with such disputes, highlighting as an example the recent *Indus Waters Treaty* arbitration.²¹

* * *

Prof. Strong then posited that what Prof. Crook had said underscored the importance of international arbitration in both the commercial and investment context in providing more flexibility and responsiveness than the ICJ process. She also recommended an article on the transition from permanent international tribunals to second generation international arbitral tribunals.²²

Ms. Vejar then asked Prof. Crook to clarify how the Court would exercise its power to appoint experts, given that *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*²³ possibly signalled an inclination to exercise this power more often. On experts, she asked:

- What is the process of selection of such experts?
- What input can the parties have in appointing an expert, and the identity of the expert?
- From where are such experts sourced?
- How transparent is the expert’s process?
- Can the parties provide materials to the expert?
- Is the expert’s report typically provided to the parties?
- Are they typically permitted to comment on it?
- Can parties do anything effective to encourage the Court to exercise this power?
- Could it also suggest candidates, or perhaps a procedure to be followed in the appointment of the expert which would permit some party involvement?
- Could it propose a procedure to be followed by the expert which would permit some party involvement in the process of fact finding and the drafting of the report?

¹⁹ Art.30(1), Statute of the International Court of Justice

²⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) ICJ Rep [1984] 246.

²¹ *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Final Award) [2013]

<<https://pcacases.com/web/sendAttach/48>> accessed 04 August 2016

²² Gary Born, ‘A New Generation of International Adjudication’ 61(4) (2012) Duke LJ 775-879

²³ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Pending) ICJ Press Release 2016/17 <<http://www.icj-cij.org/docket/files/157/19024.pdf>> accessed 04 August 2016

Prof. Crook confirmed that the Court had not made significant use of its power to appoint experts since *Corfu Channel*.²⁴ To answer Ms. Vejar's other questions on experts, Prof. Crook explained that, given the lack of relevant practice over the last sixty years, it would be hard to predict in detail how the Court might handle these matters. Appointment of experts is governed by Article 67 of the Rules of Court²⁵, which offers little detail. He noted, however, that the Court's recent appointment of experts is described in a press release for *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*,²⁶ and a 31 May Order²⁷ suggests that the Court may make greater use of this power in the future.

Dr. Hege Elisabeth Kjos, J.D., Assistant Professor, University of Amsterdam, Department of Public International Law and European Law, also contributed an article²⁸ to the discussion of the ICJ's evidential processes.

Prof. Strong and **Christian Campbell** then closed the symposium, thanking each of the four speakers and the audience participants for their enjoyable yet informative practical and theoretical contributions.

²⁴ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4

²⁵ Art. 67, International Court of Justice, Rules of Court (adopted on 14 April 1978, entered into force 1 July 1978)

²⁶ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Pending) ICJ Press Release 2016/17 <<http://www.icj-cij.org/docket/files/157/19024.pdf>> accessed 04 August 2016

²⁷ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Pending) Order of 31 May 2016 <<http://www.icj-cij.org/docket/files/157/19030.pdf>> accessed 04 August 2016

²⁸ Ruth Teitelbaum, 'Recent-Fact-Finding Developments at the International Court of Justice' (2007) 6(1) *The Law & Practice of International Courts and Tribunals* 119-158

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