

# Ciarb's Young Members Group Writing competition 2023



## Case Material

You are the Secretary General of the Arbitral Institution that administers an investor-state arbitration proceedings seated in London, United Kingdom under the 2013 UNCITRAL Rules and are acting as the appointing authority. The Claimant is International Waste Treatment Corporation Ltd. (**IWTC**), a company incorporated in the Republic of Munditia<sup>1</sup>, the Respondent is the Republic of Indigo (**Indigo**).<sup>2</sup>

The Respondent has submitted an application challenging the arbitrator appointed by the Claimant, and you must decide on the Respondent's challenge.

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<sup>1</sup> The name of the State is made up for the purposes of this material.

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Below you will find the summary of relevant information (I) along with a brief rundown of the next steps (II).

## I. Summary of Relevant Information

### A. Background

1. IWTC won a tender held by the government of Indigo for conducting a waste treatment project. IWTC was granted a permit for 3 years and conducted the project within that period. The tender documentation contained a strategy note stating that the waste treatment project was to continue for at least 10 years, although the tender only covered the initial 3-year term.
2. IWTC had legitimate expectations that the permit would be prolonged for another 5 years. It invested in significant infrastructure for the project and engaged a large number of personnel. However, the government of Indigo refused to renew the permit due to alleged breaches of regulations of Indigo.
3. IWTC submitted a Notice of Arbitration, claiming that the act of the government of Indigo constituted an expropriation in violation of the Munditia-Indigo BIT. Alternatively, IWTC argues that Indigo violated the obligation of fair and equitable treatment by breaching IWTC's legitimate expectations, in violation of the Munditia-Indigo BIT.
4. The Claimant notified the Respondent of the appointment of Mr. One FCI Arb as its party-appointed arbitrator. Pursuant to Article 11 of the 2013 UNCITRAL Rules, Mr. One confirmed that he has no conflicts of interest and no matters to disclose in relation to the parties or counsel in these proceedings and that he was independent and impartial vis-à-vis the parties in dispute.
5. The Respondent applied to challenge Mr. One in accordance with Article 13 of the 2013 UNCITRAL Rules on the ground that he failed to disclose facts seriously affecting his impartiality and independence for the purposes of this arbitration (see below).
6. The Claimant resisted the challenge, relying *inter alia* on the explanations of Mr. One, who insisted that the facts referred to by the Respondent were immaterial and did not affect his impartiality and independence.
7. The challenge was submitted to the Arbitral Institution for the review of the Secretary General.

### B. The Challenge Application

8. Mr. One is a partner at the firm One, Two and Partners (the "**Firm**"). The Firm represents Bias Corp. in another investment treaty arbitration, in which neither IWTC nor Indigo is a party, but involves legal issues that, according to the Respondent, overlap with the issues to be resolved in this arbitration.
9. In particular:

- 9.1. Bias Corp., a company incorporated in Sweaterland,<sup>3</sup> won a tender to explore a coal mining deposit in the Republic of Induria.<sup>4</sup>
- 9.2. Bias Corp. was granted a 5-year license for initial exploration of the deposit. After expiry of these 5 years, Induria's government refused to renew the license to Bias Corp. as the whole coal mining project went against Induria's newly established 'green' policy. Induria's authorities therefore decided to shut down the project completely.
- 9.3. Bias Corp. considered the closure of the project to be an act of expropriation as well as a violation of fair and equal treatment under the Sweaterland-Induria BIT and initiated an arbitration against Induria.
10. The Bias Corp/Induria case has been pending for two years, but no materials generated therein are available for the general public.
11. The Respondent supplied the following public statements made in press:
  - 11.1. "Mr. Two of the Firm leads the legal team representing Bias Corp. in this legal battle. He commented: 'We are honored to represent Bias Corp. and we are confident that the Government of Induria allowed a gross act of expropriation against a fair winner of the tender who invested significant funds in the country. Case laws must further evolve so as to ensure that investors' legitimate expectations are rigorously protected under all circumstances. **My partners and I** believe our client will prevail'" Sweaterland Times.
  - 11.2. "We believe **Mr. Two and Mr. One** are prominent arbitration practitioners, particularly skilled in investor-state arbitration, so we are in good hands" Press Release of Bias Corp.
12. The Respondent further explained that the Bias Corp/Induria case seems to involve the following issues:
  - 12.1. Rights of the supplier and obligations of the client under government tender procedures.
  - 12.2. Refusal to prolong a governmental permit to the supplier.
  - 12.3. Qualification of the government's acts as expropriation.
13. Based on the foregoing, the Respondent argues that the issues in the Bias Corp/Induria case clearly overlap with the issues to be resolved in these proceedings. Since Mr. One is one of the partners leading the Bias Corp/Induria case, he cannot be deemed to be impartial and independent.

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14. The Respondent also stressed that the fact that Mr. One has failed to disclose his involvement with the Bias Corp/Induria case clearly indicates that he was concealing his understanding that this information would raise legitimate concerns as to his impartiality and independence.

### **C. Explanations of Mr. One**

15. Mr. One states that he is not the leading counsel handling the Bias Corp/Induria case (Mr. Two is), and that he is not a member of the team on the case.
16. Mr. One notes, though, that he was consulted a “couple of times” on certain matters of the Bias Corp/Induria case a year ago, which he had forgotten.
17. Mr. One declines to disclose the specific matters he was consulted about but states that he believes his involvement in the Bias Corp/Induria case does not in any way affect his impartiality or independence as an arbitrator in these proceedings.
18. Mr. One also explains that he is not tracking progress of the Bias Corp/Induria case and cannot confirm whether there are indeed any overlapping issues with the present arbitration. He notes that the Firm is in any event bound by a duty of confidentiality, and he cannot thus disclose any details about the case.

### **D. The Claimant's response**

19. The Claimant vigorously objects to the Respondent's challenge noting that it is no more than a blatant delatory tactic.
20. The Claimant states that:
  - 20.1. The legal issues in the Bias Corp/Induria case are not known and cannot be reliably verified, so the Respondent's concerns are speculative.
  - 20.2. Mr. One was/is not meaningfully involved in the Bias Corp/Induria case and therefore, his impartiality and independence could not be affected.
  - 20.3. It was highly inappropriate to accuse Mr. One, a reputable arbitrator and practitioner respected globally, of concealing anything. The simple explanation is that Mr. One's relation to the Bias Corp/Induria case is so light that he forgot about it. The very fact that Mr. One forgot about any involvement and that he does not know any details about the Bias Corp/Induria case spoke in favour of his impartiality and independence.
21. The Claimant further explains that the matters in the Bias Corp/Induria case on the face of it were very distant from the issues at hand, and that any resemblance was superficial. In particular:
  - 21.1. The cases concern different industries and different countries with different legal systems.

21.2. The motivations of the governments' refusals in each case are absolutely different.

21.3. The Bias Corp/Induria case does not involve fair and equitable treatment issues.

## **E. The Respondent's Reply**

22. In its reply, the Respondent reiterated its challenge and notes that:

22.1. Mr. One has included the Bias Corp/Induria case into his profile on Jus Mundi, and he was listed as a team member in a GAR publication about the case. There is no doubt that he acts for Bias Corp.

22.2. Based on the facts available on the Bias Corp/Induria case, it is reasonable to assume that the matters in that case overlap with this arbitration. Mr. One refuses to disclose any further details in order to resolve the Respondent's concerns.

22.3. It is reasonable to assume that fair and equitable treatment standard is also considered in the Bias Corp/Induria case, because (i) the facts in both cases are very similar; and (ii) this standard is reviewed in almost every investor-state arbitration.

Both parties have relied on the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members.

## **II. Next Steps**

The Secretary General closed the matter for submissions and moved to issue a decision. You are assisted by your staff with the procedural section of the decision, but you are to prepare the substantive part. The standard for this part is no more than 5 pages.

### **Rules**

#### **1. Participants**

- a. All participants must be under the age of 40 on 3 November 2023.
- b. All Submissions must be the original work of their authors.
- c. Each participant is only allowed to submit one submission.
- d. No submissions may be co-authored.

#### **2. Editorial Guidelines**

- a. Submissions must be in the English language and use British English spelling.
- b. Submissions must use Arial font size 12 for the text and Arial font size 10 for footnotes and be double-spaced with a one-inch margin on all sides.
- c. The submission must not exceed five pages.

#### **3. Deadline**

- a. All Submissions must be sent in word format to [essay@ciarb.org](mailto:essay@ciarb.org) by 11 PM London time on **3 November 2023**.
- b. Each participant should include his/her/their name, affiliation, location, and title on a separate cover page. The Submission itself should begin on the next page without the participant's name, affiliation or any other identifying details.

#### **4. Selection of the Winner**

- a. Submissions will be judged *inter alia* on their ability to spot and resolve relevant issues, their succinctness, and reasoning.
- b. An Editorial Jury will select five finalists.
- c. An Honorary Jury will choose the three best submissions, including the winning submission, among the five finalists selected by the Editorial Jury.

#### **5. Prize**

- a. The winning submission will be published on Ciarb's website with a news article and mention in the eSolver magazine.
- b. The winner will also be awarded a £100 voucher to attend one of Ciarb's closed events in 2024.
- c. Authors of the top 3 submissions will be given the opportunity to moderate a Let's Discuss virtual networking session to be held in 2024.

#### **6. Ciarb YMG Policy**

- a. The Ciarb YMG Global Steering Committee reserves the right to amend, modify, supplement, or interpret these rules at its sole discretion.
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