

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

**Bank for International Settlements: Procedural Order No. 6 (Order with Respect
to the Discovery of Certain Documents for Which Attorney-Client Privilege Has
Been Claimed)**

11 June 2002

VOLUME XXIII pp. 169-182



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

PROCEDURAL ORDER NO. 6 (ORDER WITH RESPECT TO THE DISCOVERY OF CERTAIN DOCUMENTS FOR WHICH ATTORNEY-CLIENT PRIVILEGE HAS BEEN CLAIMED), 11 JUNE 2002

ORDONNANCE DE PROCÉDURE N^o 6 (ORDONNANCE CONCERNANT LA COMMUNICATION DE CERTAINES PIÈCES POUR LESQUELLES LE SECRET DES COMMUNICATIONS ENTRE L'AVOCAT ET SON CLIENT A ÉTÉ INVOQUÉ), 11 JUIN 2002

Attorney-client privilege: requirement *ratione materiae* (legal communications), requirement *ratione personae* (authorized decision makers), voluntary waiver by publicity, "sword and shield rule".

Secret des communications entre l'avocat et son client : condition *ratione materiae* (communications juridiques), condition *ratione personae* (décideurs autorisés), renonciation volontaire par publicité, règle dite « de l'épée et du bouclier ».

**Arbitration Tribunal Established Pursuant
to Article XV of the Agreement Signed at
The Hague on 20 January 1930**

Dr. Horst Reineccius, Claimant v. Bank for International Settlements,
Respondent (Claim No. 1)

First Eagle SoGen Funds, Inc., Claimant v. Bank for International Settlements,
Respondent (Claim No. 2)

Pierre Mathieu and la Société Hippique de la Châtre, Claimants v. Bank for
International Settlements, Respondent (Claim No. 3)

Procedural Order No. 6
(Order with Respect to the Discovery of Certain Documents for Which
Attorney-Client Privilege Has Been Claimed)
11 June 2002

A. Procedural History

Pursuant to Procedural Order No. 5, First Eagle SoGen Funds, Inc. (hereafter First Eagle) and the Bank for International Settlements (hereafter the Bank) resolved certain questions concerning the production of documents under the terms of Procedural Order No. 3. They then contacted the Secretary of the Tribunal to set up a conference call to address First Eagle's remaining concerns. At the telephone conference on 13 May 2002, attended by counsel for First Eagle and the Bank and the Secretary of the Tribunal, First Eagle

indicated that still at issue with respect to their relevance were nine (9) documents, portions of which had been withheld by the Bank for alleged lack of relevance under Procedural Order No. 3 or because of assertions of attorney-client privilege.

Counsel for First Eagle and the Bank requested that the Secretary review the nine documents (as numbered in the document log dated 8 May 2002, prepared by the Bank to which First Eagle appended its Objections on 10 May 2002) that were kept in the Bank's offices in Basel, Switzerland, and then discuss by telephone conference with counsel for First Eagle and the Bank her recommendations regarding the relevance of the redacted portions. Counsel also agreed that they would submit legal memoranda to the Tribunal concerning the Bank's assertions of attorney-client privilege.

The Secretary reviewed the nine documents in question at the Bank's offices on 15 and 16 May and discussed with counsel the possible relevance of some parts of Documents Nos. 25, 26, 31, 33 and 35 to Section E.1.f of Procedural Order No. 5; counsel for the Bank agreed to produce portions of those five documents which had been previously redacted for lack of relevance. In a telephone conference with First Eagle's counsel and the Secretary on 16 May 2002, the Bank indicated to First Eagle that it would immediately produce those portions of the five documents. The parties agreed that Documents Nos. 7, 22, 36 and 40 had been appropriately redacted.

On 22 May 2002, the Bank submitted a Memorandum to the Tribunal on attorney-client privilege issues raised in First Eagle's 10 May 2002 Objections. First Eagle responded with a Memorandum in support of its Objections on 29 May 2002.

B. The Documents at Issue

Seventeen documents which fall within the purview of Section E. of Procedural Order No. 3 (Terms of Submission) were listed by the Bank; five documents were partially redacted and twelve documents were withheld entirely on the ground of attorney-client privilege. The documents are described in the log assembled by the Bank in compliance with Procedural Order No. 3 along with summaries of First Eagle's objections, as follows on pp. 3-8:

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
28	BIS00696-BIS00701	Explanatory Note to the Board of Directors Regarding Convening an Extraordinary General Meeting with a view to an Amendment of the Bank's Statutes, 10 September 2000	General Counsel	Board Members	00699-00701	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Summary of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion. No legal impediment or privilege is available where the Bank has already disclosed privileged advice.
31	BIS00765-BIS00767	Explanatory Note for the Board of Directors regarding an Extraordinary General Meeting with a	General Counsel	Board Members	00765-00767	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
		view to Amending the Bank's Statutes, Draft Resolutions, 12 December 2000				Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Summary of legal advice from outside counsel in relation to various issues	transaction.
32	BIS00772- BIS00777	Draft Explanatory Note for the Information of Central Banks represented at the Extraordinary General Meeting to be held on 8 January 2001	General Counsel	Member Central Banks	00775, 00777	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Summary of legal advice in relation to the proposed transaction	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion transaction. No legal impediment or privilege is available where the Bank has already disclosed privileged legal advice.

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
34	BIS00783- BIS00797	Opening Oral Statement of the Chairman of the Board of Directors at the Press Conference on 8 January 2001 and Public Record of the Proceedings of the Extraordinary General Meeting on 8 January 2001	General Counsel and Notary Public	Member Central Banks	00788, 00790	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Redacted portion consists of legal advice in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion transaction.
45	N/A	Legal Opinion dated 29 August 2000	Gide, Loyrette Nouel	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the

BANK FOR INTERNATIONAL SETTLEMENTS

174

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
							exclusion
46	N/A	Correspondence relating to Legal Opinion dated 10 July 2000	Gide, Loyrette Nouel	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
47	N/A	Correspondence relating to Legal Opinion dated 21 July 2000	Gide, Loyrette Nouel	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
48	N/A	Correspondence relating to Legal Opinion dated 4 December 2000	Gide, Loyrette Nouel	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
						transaction.	and carrying out the exclusion
49	N/A	Legal Opinion dated 4 September 2000	Professor Frank Vischer	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
50	N/A	Legal Opinion dated 1 December 2000	Professor Frank Vischer	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
51	N/A	Summary of Legal Opinion dated 1 December 2000	Professor Frank Vischer	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice

BANK FOR INTERNATIONAL SETTLEMENTS

176

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
						transaction.	related to planning and carrying out the exclusion
52	N/A	Legal Opinion dated 14 August 2000	Alain Hirsch	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
53	N/A	Correspondence relating to Legal Opinion dated 31 July 2000	Alain Hirsch	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
54	N/A	Legal Opinion dated 6 December 2000	Winthrop, Stimson, Putnam &	Board Members	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in	No legal impediment or privilege is applicable to shareholders of the

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
			Roberts			relation to the proposed transaction.	Bank for legal advice related to planning and carrying out the exclusion
55	N/A	Correspondence relating to Legal Opinion dated 20 November 2000	Winthrop, Stimson, Putnam & Roberts	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
56	N/A	Correspondence relating to Legal Opinion dated 21 November 2000	Winthrop, Stimson, Putnam & Roberts	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
57	N/A	Summary of Legal Opinion dated 6	Winthrop, Stimson, Putnam	Board Members	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal	No legal impediment or privilege is applicable to

BANK FOR INTERNATIONAL SETTLEMENTS

178

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
		December 2000	& Roberts			advice from outside counsel in relation to the proposed transaction.	shareholders of the Bank for legal advice related to planning and carrying out the exclusion

C. *The Parties' Contentions*

In its Objections submitted on 10 May 2002, First Eagle, while acknowledging that “the attorney-client privilege may provide a basis to withhold documents from discovery in an international arbitration,”¹ contended that the Bank was not entitled to invoke the attorney-client privilege as a justification for refusing to share legal advice paid for and owned by the Bank and, derivatively, its shareholders relating to the compulsory repurchase of the shares from the private shareholders. First Eagle also contended that the Bank could not invoke the attorney-client privilege selectively and that once it disclosed certain parts of the legal advice in question, all of the legal advice that had been given was no longer to be deemed privileged.

On 22 May 2002, the Bank stated in its Memorandum that attorney-client communications between the Bank and its counsel are protected by privilege in disputes between the Bank and its private shareholders because, under international law, “a corporation has a distinct legal personality from its shareholders,” and “attorneys for a corporation do not represent the shareholders, but the corporation itself.” When corporations find themselves in disputes with one or more shareholders, the corporation and the shareholder “invariably have separate legal advisers, representing their separate and adverse interests.”² The Bank contended that seven legal opinions were provided only to Board members and not to the central bank shareholders.³ Finally, the Bank contended that it had not engaged in “selective disclosure” as understood in United States jurisprudence “where a party uses privileged attorney-client communications as a “sword,” to prove its case and is therefore in fairness not permitted to use the privilege as a “shield” to withhold related communications.”⁴

In its Memorandum of 29 May 2002, First Eagle contended that under the governing law, which it stated was international law, there is a general principle of corporate law establishing “the duty of the Board of Directors of a company to exercise its powers in good faith and in disinterested fashion, and to treat all of its shareholders equally and fairly;”⁵ the differential treatment accorded by the Bank to its private shareholders with respect to the communications which First Eagle sought to discover was inconsistent with this principle. First Eagle also contended that the Explanatory Note of 8 January 2001 which was distributed at the Extraordinary General Meeting and the “Public Record” of the proceedings were disclosed to all of the central bank shareholders. From this, First Eagle infers that there could no credible assertion of an expectation of confidentiality for the documents so distributed. First Eagle also contended that while a litigant is entitled to withhold documents generated to assist an anticipated or actual litigation, it may not

¹ *Id.*, at page 4.

² *Ibid.*

³ *Id.*, at page 5.

⁴ *Id.*, at page 6, relying upon *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir. 1991).

⁵ *Id.*, at page 2.

withhold advice “that was provided primarily to assess the legality, feasibility, or form of a transaction.”⁶ Under this analysis, six of the documents the Bank withheld, First Eagle stated, would not benefit from privilege as they were created prior to the Board’s announcement of the compulsory repurchasing program. First Eagle also contended that the Bank could not unilaterally withdraw documents that it had “inadvertently” produced.

D. Decision

The attorney-client privilege, which is widely applied in domestic legal systems, has been recognized in public international and international commercial arbitration rules and arbitral awards. The privilege applies to corporate entities as well as to individuals; when claimed for corporate entities, it obtains with respect to those who are authorized to participate in the decisions. The attorney-client privilege has, in addition, been recognized and applied with respect to international organizations.

At the core of the attorney-client privilege in both domestic and international law is the appreciation that those who must make decisions on their own or others’ behalf are entitled to seek and receive legal advice and that the provision of a full canvass of legal options and the exploration and evaluation of their legal implications would be chilled, were counsel and their clients not assured in advance that the advice proffered, along with communications related to it, would remain confidential and immune to discovery.

Ratione materiae, the legal communications which are entitled to an attorney-client privilege must be related to making a decision that is in or is in contemplation of legal contention; *ratione personae*, the legal communications must be between an attorney (whether in-house or outside) and those who are afforded his or her professional advice for purposes of making or in contemplation of that decision. Legal communications which would qualify for privilege on the basis of these criteria may lose their privileged status if the party entitled to it waives the privilege by word or deed or voluntarily publicizes the substance of the legal communications beyond the circle of those who are authorized to make or participate in the making of the decision. In addition, in circumstances in which the privilege is abused by using it in ways that would unfairly benefit the party entitled to it and unfairly prejudice the other party – the so-called “sword and shield rule” as it is called in United States’ federal jurisprudence – the privilege will not be given effect. As the Court said in *U.S. v. Bilzerian*,

the attorney-client privilege cannot be used as a shield and a sword. . . . A defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.

⁶ *Id.*, at page 8.

⁷ *U.S. v. Bilzerian*, 926 F.2d 1285 (2nd Cir. 1991) at 1292.

Of the 17 documents which are summarized above, all would fulfil, *prima facie*, the attorney-client privilege requirement *ratione materiae*. Documents No. 45, 46, 47, 48, 49, 50, 51, 52 and 53, 55 and 56 are legal opinions of outside counsel to the General Counsel of the Bank and, in some of the documents, senior management of the Bank and, thus, would, *prima facie*, fulfil the attorney-client privilege requirement *ratione personae*.

Documents 28, 31, 54 and 57, involving summaries of legal advice, were communicated by the General Counsel or outside counsel to the members of the Board. Documents No. 32 and 34 were communicated to member central banks. Whether these documents fulfil the *ratione personae* requirement of the attorney-client privilege turns on whether the recipients of these documents were authorized by the relevant legal regime to participate in making the decision with respect to which the legal advice had been prepared. If the recipients were authorized decision makers, the documents would continue to benefit from the attorney-client privilege, for, notwithstanding the numerically larger circle of recipients, the purpose of the attorney-client privilege rule would be frustrated if the legal advice, whether in full or in summary, could not be made available to those who were legally charged with making the decision without surrendering the privilege. Indeed, the attorney-client privilege would then be an absurdity. If the recipients were neither authorized decision makers nor senior management, the communication to them of material that was otherwise privileged *ratione materiae* would constitute a waiver of the attorney-client privilege. Hence the resolution of this part of the dispute over the claims regarding the attorney-client privilege of the Bank will turn upon the decision making rules of the Bank.

Article 26 of the Statutes vests the administration of the Bank in the Board, whose membership is prescribed in Article 27. The rules for General Meetings and Extraordinary General Meetings of the Bank are set out in Chapter V of the Statutes. General Meetings are to be attended, according to Article 44, by nominees of the central banks or other financial institutions referred to in Article 14. An Extraordinary General Meeting is, according to Article 47, to be summoned to decide upon proposals of the Board, *inter alia*, to amend the Statutes. Hence all the central banks, and not merely the Board, would have to decide a proposed amendment of the Statutes. As the private shareholders did not have a right to vote or representation at the Extraordinary General meeting pursuant to Article 14 of the Statutes, they would not participate in a General Meeting or Extraordinary General Meeting. Since the communications for which attorney-client privilege is claimed related to the proposed amendment of the Statutes, the fact that a larger number of entities than those on the Board received the communications would not *per se* deprive them of the attorney-client privilege.

First Eagle contended that private shareholders owned the legal advice their corporation secured, but international law, like domestic systems, recognizes the separate legal personality of a corporate entity and the International Court of Justice has upheld this principle, even in circumstances

in which the legal effect of separate personality was unhelpful to the interests of the shareholders.⁸

First Eagle also contended that principles of equal treatment of all shareholders would require that any legal communications made available to central bank shareholders should also be made available to the private shareholders. But the attorney-client privilege obtains with regard to advice about taking a legal decision and under the terms of the Statutes, as explained above, only the central banks and not the private shareholders were accorded the competence to make the decisions in question (without prejudice to their legality, which question is to be decided by the Tribunal pursuant to Procedural Order No. 3 in a separate phase) and would, hence, have been entitled to the legal advice.

Nor is there evidence that, other than Document No. 34, insofar as it was disclosed at a press conference, the material that would otherwise benefit from the attorney-client privilege was publicized by the Bank, with the necessary consequence that it ceased to be privileged. The words “Notarized Public Record” of the Swiss notary appear to be a formula for certifying the minutes under Swiss law but do not indicate that the documents were made available publicly.

If the Extraordinary General Meeting had been open to the public, communications made there would cease to benefit from the attorney-client privilege. There is no indication that any General Meetings are open to the public. Article 44 of the Statutes permits attendance only by nominees of the central banks or other financial institutions referred to in Article 14.

Finally, there is no indication that giving effect to the claimed attorney-client privilege with respect to the documents in contention would constitute an abuse of rights or allow the beneficiary of the attorney-client privilege to use the contents of the documents as a sword, while using the privilege as a shield. In the pleadings to date, no parts of the legal opinions or their summaries are being selectively used as evidence.

E. Order

For the above reasons, the Tribunal orders the Bank to produce, insofar as it was disclosed at a press conference, Document No. 34. The Bank will produce said document to each of the claimants in accordance with Procedural Order No. 5. The Tribunal determines that Documents Nos. 28, 31, 32, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 and 57 are subject to the attorney-client privilege and need not be produced.

Professor Michael Reisman, President, on behalf of the Tribunal

⁸ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) Second Phase*, 1970 ICJ Reports 3.