Class 2: Ever More Transparent? A History of International Arbitration

Professor Anne Peters, for Monday 5th February 2024

ICSID, Biwater Gauff (2006, final award 2008)

Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, Procedural Order No. 3, 29 September 2006, ICSID Case No ARB/05/22.

Biwater Gauff (Tanzania) = ‚BWG'.

para. '135. It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute. Both may be seen as a particular type of provisional measure (as, for example, in Article 17 of the newly revised UNCITRAL Model Law on International Commercial Arbitration, which refers to the prevention of "current or imminent harm or prejudice to the arbitral process itself"), or simply as a facet of the tribunal's overall procedural powers and its responsibility for its own process.
Both concerns have a number of aspects, which can be articulated in various ways, such as the need to:
-- preserve the Tribunal's mission and mandate to determine finally the issues between the parties;
-- preserve the proper functioning of the dispute settlement procedure;
-- preserve and promote a relationship of trust and confidence between the parties;
-- ensure the orderly unfolding of the arbitration process;
-- ensure a level playing field;
-- minimise the scope for any external pressure on any party, witness, expert or other participant in the process;
-- avoid "trial by media".

136. It is self-evident that the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure. This is all the more so in very public cases, such as this one, where issues of wider interest are raised, and where there is already substantial media coverage, some of which already being the subject of complaint by the parties.

137. Whilst it is in the wider public interest to ensure that accurate information about the parties' dispute and its resolution is broadcast, this is not always easy to achieve. That is particularly true while an arbitration is ongoing, and an arbitral record has yet to be completed.

138. These concerns have been recognised in a number of previous decisions. In particular the Tribunal agrees with the observations (in the context of NAFTA) made in The Loewen Group, Inc. and Raymond L. Loewen v. USA (ICSID Case N° ARB (AF) 98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, January 5, 2001) and Metalclad Corp. v. United Mexican Sates(ICSID Case N° ARB (AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regard the Case, 27 October 1997), that "it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings they were both to limit public discussion of the

case to what is considered necessary" (Loewen, § 26), "... subject only to any externally imposed obligation of disclosure by which either of them may be legally bound" (Metalclad, § 10).

139. Further, according to C. SCHREUER, supra, at p. 744 and following, at 746:
"[t]he purpose of provisional measures is to induce behavior by the parties that is conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties' rights, preventing self-help, safeguarding the awards' eventual implementation and generally keeping the peace…"
140. Importantly, these are not concerns that are inconsistent for all time with transparency – since they are limited in duration, and do not impact beyond the end of the proceedings themselves. Once the arbitration has finally concluded, most restrictions would not normally continue to apply. While the proceedings remain pending, however, there is an obvious tension between the interests in transparency and in procedural integrity.
[…]
148. Having carefully considered each category of documents and information involved in Claimant's request for provisional measures, the Tribunal concludes that an appropriate balance between the competing interests, at least for the time being, is as follows:

i. General Discussion about the Case
149. Subject to the restrictions on disclosure of specific documents set out below, neither party should be prevented from engaging in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to the Republic's duty to provide the public with information concerning governmental and public affairs), and is not used as an instrument to further antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult.

150. Part of the UROT's opposition to the measures sought by BGT is based upon a concern that there ought not to be any: "curtailment of a sovereign State's right (and obligation) to inform the public about a matter of great public importance and comment" (UROT's submission of 18 August 2006, para 15). The Tribunal agrees with this, and considers that the direction in paragraph 149 above adequately caters for UROT's concern. Indeed, as clarified in its submission of 11 August 2006, BGT has: "not sought an order restraining the UROT from commenting on the arbitral proceedings in a general way".

ii. Awards
151. In light of the parties' agreement (as recorded in paragraph 117 above) that the Centre may publish awards at such time and in such manner as it deems fit, there is no need for any direction in this regard.

iii. Decisions, Orders and Directions of the Tribunal (other than Awards)

152. Given the treatment of awards, and the treatment of such materials in investment arbitration generally, the presumption should be in favour of allowing the publication of the Tribunal's Decisions, Orders and Directions. Publication of the Tribunal's decisions also, as a general matter, will be less likely to aggravate or exacerbate a dispute, or to exert undue pressure on one party, than publication of parties' pleading or release of other documentary materials.

153. However, the nature and subject matter of Decisions, Orders and Directions varies enormously, and for some it may still be inappropriate to allow wider distribution. It follows that this category ought to be considered by the Tribunal on a case-by-case basis as such determinations are made.

154. In the exercise of this mandate, the Tribunal considers it important that no confidentiality restriction be imposed upon this Procedural Order No 3, given the need to explain to parties with interests in transparency the precise basis upon which the Tribunal is proceeding.

iv. Minutes or Records of Hearings

155. The Tribunal considers itself responsible to ensure that the hearing is conducted in an efficient manner, to resolve the parties' dispute fairly and impartially. The publication of minutes or records of hearings has at least the potential to affect the procedural integrity and efficiency of the hearing itself. Indeed:

(a) Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of the minutes and other records of proceedings if both parties to a proceeding so consent, and

(b) Rule 32(2) of the new ICSID Arbitration Rules provides that the hearing may not be opened by the Tribunal to third parties if a party objects.

Accordingly, it is appropriate that minutes or records of hearings should not be disclosed unless the parties so agree, or the Tribunal so directs.

v. Documents Disclosed in the Proceedings

156. No restriction is appropriate upon the publication by one party of its own documents, even if those documents have been produced in the arbitral proceedings pursuant to a disclosure exercise, or otherwise. (Of course, if there are separate contractual or other confidentiality restrictions on such publication, then the nature, applicability and enforceability of those restrictions would need to be raised and considered. No such restrictions have been suggested in this case).

157. However, in the interests of procedural integrity, the Tribunal does consider it appropriate to restrict publication or distribution of documents that have been produced in the arbitration by the opposing party. The interests of transparency are here outweighed, since the threat of wider publication may well undermine the document production process itself, as well as the overall arbitration procedure. The production of documents by a party, whether in response to a disclosure request or otherwise, is made for the purpose of resolving the parties' dispute and the presumption is that materials disclosed in this manner should be used only for such purpose.

vi. Pleadings / Written Memorials

158. Given that (a) the pleadings and written memorials are likely to detail documents that have been produced pursuant to a disclosure exercise, and (b) any uneven publication or distribution of pleadings or memorials is likely to give a misleading impression about these proceedings, this category of documents should be restricted, pending conclusion of the proceedings (or agreement between the parties, or further order by the Tribunal).

159. The same restriction ought to apply to witness statements and expert reports attached to pleadings and written memorials.

160. As to documents attached to pleadings and written memorials, this is already addressed in paragraphs 156 and 157 above.

vii. Correspondence Between the Parties and/or the Arbitral Tribunal Exchanged in respect of the Arbitral Proceedings

161. This is a category in which the needs of transparency (if any) are outweighed by the requirements of procedural integrity. Correspondence between the parties and/or the Arbitral Tribunal will usually concern the very conduct of the process itself, rather than issues of substance, and as such do not warrant wider distribution. It follows that this is an appropriate category for restriction.

162. Continued Review: In order to ensure that the balance between the competing interests is maintained, the Tribunal considers it appropriate to keep each category under continued review. To this end, pending the conclusion of these proceedings, the Tribunal will act as a "gate-keeper" on disclosures. Thus, if new circumstances arise, and the parties are unable to reach agreement, the parties remain at liberty to apply to vary these directions on a case-by-case basis. In the interests of efficiency, the Tribunal expects that such applications would be made only in well-justified circumstances, supported by concrete explanations.

163. Restrictions on Both Parties: As will be clear, the analysis above leads to a form of order different to that requested by BGT. In particular, it is an order that must as a matter of fairness, equality of treatment and non-aggravation of the parties' dispute apply equally to both parties. As noted by BGT in paragraph 20 of its submission of 11 August 2006:

"One way in which to ensure that a dispute is not aggravated is to preserve an even playing field for the parties (which will in turn maintain the working relationship between them conducive to an effective procedure) and maintain a focus on the merits of the dispute. These considerations will be undermined by allowing one party to disclose unilaterally to third parties the documents filed in the arbitral proceedings. …"

Given that, to date, both parties have made frequent use of publicity and disclosures, there is no reason why the mechanism set out below ought not to apply equally to all parties.

Consequently, the Arbitral Tribunal Recommends That:

for the duration of these arbitration proceedings, and in the absence of any agreement between the parties:

(a) all parties refrain from disclosing to third parties:

i. the minutes or record of any hearings;

ii. any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise;

iii. any of the Pleadings or Written Memorials (and any attached witness statements or expert reports); and

iv. any correspondence between the parties and / or the Arbitral Tribunal exchanged in respect of the arbitral proceedings.

(b) All parties are at liberty to apply to the Arbitral Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis.

(c) Any disclosure to third parties of decisions, orders or directions of the Arbitral Tribunal (other than awards) shall be subject to prior permission by the Arbitral Tribunal.

(d) For the avoidance of doubt, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not

used as an instrument to antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order.

Further it is Recommended that:

(e) all parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process and / or which might aggravate or exacerbate the dispute.'