

## Transparency versus Confidentiality in International Investment Arbitration – The *Biwater Gauff* Compromise

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### Abstract

Recent years have seen a trend towards increasing transparency in international investment arbitration. This trend has been reflected in arbitral practice and in the amendments to the ICSID Arbitration Rules in 2006, which now expressly allow for participation of non-disputing parties as *amicus curiae*. Still more problematic, however, is the publication of arbitral documents, which has recently been controversial in *Biwater Gauff v. Tanzania*. This paper will discuss the core provisions on the publication of documents of the UNCITRAL Arbitration Rules, the ICSID Arbitration Rules and NAFTA Chapter 11. It will analyze the reasoning and the findings of the *Biwater* Tribunal in this regard as well as the pertinent practice of previous investment tribunals. Important policy issues underlying the decision of the *Biwater* Tribunal will also be analyzed.

### Keywords

Investment Arbitration; Transparency; Confidentiality; Publication of Awards; ICSID Arbitration Rules; UNCITRAL Arbitration Rules; NAFTA Chapter 11; Commercial Arbitration

## I. Introduction

The issue of transparency in arbitral proceedings has gained importance in recent investment arbitrations. Transparency is achieved primarily through disclosure of decisions and pleadings to the public. Also granting certain participatory rights to non-disputing parties may contribute to make arbitration more transparent. Following the orders of the ICSID tribunals in *Aguas Argentinas*<sup>1</sup> and

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<sup>1</sup> *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus curiae*, 19 May 2005, available at [http://ita.law.uvic.ca/documents/AguasArgentinas\\_Vivendi-OrderAmicusCuriae.pdf](http://ita.law.uvic.ca/documents/AguasArgentinas_Vivendi-OrderAmicusCuriae.pdf).

*Aguas Provinciales*<sup>2</sup> on *amicus curiae* participation and the amendments to the ICSID Arbitration Rules of April 2006<sup>3</sup> the issue of participation of non-disputing parties as *amicus curiae* is no longer very problematic.<sup>4</sup>

The publication of documents has recently turned out to be controversial in *Biwater Gauff v. Tanzania*,<sup>5</sup> a highly politicized dispute between a UK company, Biwater Gauff, and the Republic of Tanzania concerning water privatization. In this case, one party unilaterally disclosed certain documents to the potential detriment of the other. The ICSID tribunal in *Biwater Gauff v. Tanzania* was the first to address the issue of disclosure of documents to the public during the arbitral process in detail. The thoroughness with which the tribunal addressed this issue is noteworthy and its findings are likely to have an impact on future investment arbitrations.

The question of how to balance the demands for transparency against the need for confidentiality touches on a core issue of arbitral proceedings. It is not easy to determine to what extent the arbitral process should be transparent and where confidentiality, which is generally considered to be one of the basic characteristics of arbitration, should prevail. Before turning to the decision of the *Biwater* Tribunal and its underlying policy issues, this paper will briefly discuss the core rules on the publication of documents produced during investment arbitrations and the pertinent practice of tribunals on this question.

## II. Investment Arbitration Rules on the Publication of Documents

There is a different level of transparency and availability of documents in the three most widely used arbitration procedures for the settlement of investment disputes. There are the very restrictive rules of UNCITRAL arbitration where it is often impossible to gain access to documents and where awards and other arbitration related documents are rarely made public at all. ICSID arbitration also handles confidentiality issues rather restrictively. Access to documents is easier in the context of NAFTA Chapter 11 proceedings.

<sup>2</sup> *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus curiae*, 17 March 2006, available at <http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf>.

<sup>3</sup> Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006, available at [http://www.worldbank.org/icsid/basic doc/CRR\\_English-final.pdf](http://www.worldbank.org/icsid/basic doc/CRR_English-final.pdf).

<sup>4</sup> See Knahr, C., Transparency, Third Party Participation and Access to Documents in International Investment Arbitration, 23 *Arbitration International* (2007) (forthcoming); Mourre, A., Are *Amici Curiae* the proper response to the public's concern on transparency in investment arbitration?, 5 *The Law and Practice of International Courts and Tribunals* 257 (2006).

<sup>5</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, available at <http://ita.law.uvic.ca/documents/Biwater-PONo.3.pdf>.

### A. UNCITRAL

The UNCITRAL Arbitration Rules<sup>6</sup> are the most restrictive in their provisions on confidentiality. According to Article 25(4), “[h]earings shall be held *in camera* unless the parties agree otherwise”. Article 32(5) provides that “[t]he award may be made public only with the consent of both parties”. These rules make clear that hearings are open to the public only if there is an agreement of the parties to this effect. There are no provisions expressly addressing the publication of minutes of meetings, pleadings of the parties and orders of the tribunal. It therefore remains for the parties to decide and in the discretion of the tribunals to make determinations on this issue on a case-by-case basis. Also the UNCITRAL Model Law on Arbitration deliberately refrained from regulating the issue of confidentiality.<sup>7</sup>

### B. ICSID

Article 48(5) of the ICSID Convention provides that:

The Centre shall not publish the award without the consent of the parties.<sup>8</sup>

This prohibition, which is addressed to the Centre itself only, is reiterated in Rule 48(4) of the ICSID Arbitration Rules<sup>9</sup> and extends to ICSID arbitrators through declarations of confidentiality as provided for in Rule 6(2) of the ICSID Arbitration Rules. On this basis, Regulation 22(2) of the Administrative and Financial Regulations provides that ICSID’s Secretary-General shall arrange for the publication of awards and minutes and other records of proceedings if both parties consent. The confidentiality obligations of the Centre and its arbitrators do not prevent, however, the publication of general “information about the operation of the Centre, including registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding”<sup>10</sup> which is currently accomplished on ICSID’s website.<sup>11</sup> The

<sup>6</sup> United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, approved by the General Assembly on 15 December 1976, UN GAOR, 31st Session, Suppl. No. 17, Chap. V, Sec. C, UN Doc. A/31/17, 1976; 15 ILM 701 (1976).

<sup>7</sup> According to the UNCITRAL Model Law Working Group “it may be doubted whether the Model Law should deal with the question whether an award may be published. Although it is controversial since there are good reasons for and against such publication, the decision may be left to the parties or the arbitration rules chosen by them.” Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN.9/207), para. 101.

<sup>8</sup> Article 48(5) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; 4 ILM 532 (1965).

<sup>9</sup> “The Centre shall not publish the award without the consent of the parties. [...]” ICSID Arbitration Rules, available at [http://www.worldbank.org/icsid/basic doc/CRR\\_English-final.pdf](http://www.worldbank.org/icsid/basic%20doc/CRR_English-final.pdf).

<sup>10</sup> Regulation 22(1) ICSID Administrative and Financial Regulations.

<sup>11</sup> See <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>.

new 2006 Arbitration Rules provide that the Centre has to publish excerpts of the legal reasoning of tribunals.<sup>12</sup>

There are no ICSID rules or regulations governing the actions of the parties. Thus, it is not clear whether they are allowed to disclose any documents to the public during or after the proceedings. Basically, one has to decide whether a similar prohibition applies to the parties, most likely stemming from a general underlying notion of confidentiality as part of any arbitral proceedings, or whether one would simply follow a literal *e contrario* approach, deducing therefrom that the confidentiality of the Centre aims at precisely avoiding such obligations to incur upon the parties.

The most important pre-*Biwater Gauff* authority on this issue, the *Amco v. Indonesia* Decision on Request for Provisions Measures,<sup>13</sup> specifically supports the latter approach by stating that “as to the ‘spirit of confidentiality’ of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case.”<sup>14</sup> As opposed to the Centre, the parties are thus in principle free to publish documents or awards unless they have explicitly agreed upon confidentiality. In fact, a number of ICSID awards have been released unilaterally by one of the disputing parties.<sup>15</sup> Nevertheless, even the *Amco* Tribunal recognized that “parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.”<sup>16</sup> While in the particular case this threat was not sufficiently serious to warrant the imposition of provisional measures requiring a party to refrain from publicizing information of its investment dispute with the host State, the *Amco* Tribunal’s obiter made it clear that there may be situations where the freedom of parties to make information about ICSID proceedings publicly available will be limited.

<sup>12</sup> Rule 48 (4) provides: “[...] The Centre *shall*, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.” (emphasis added) ICSID Arbitration Rules, available at [http://www.worldbank.org/icsid/basicdoc/CRR\\_English-final.pdf](http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf). Under the old Arbitration Rules (see International Centre for Settlement of Investment Disputes (ed.), ICSID Convention, Regulation and Rules (ICSID/15/Rev.1 2003)), the Centre had the possibility, but was under no obligation to do so. Prior to the amendment Rule 48 (4) read: “[...] The Centre *may*, however, include in its publications excerpts of the legal rules applied by the Tribunal.” (emphasis added).

<sup>13</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Provisional Measures, 9 December 1983, 1 ICSID Reports 410. In this case the Respondent had requested provisional measures to prevent the Claimant from publishing a newspaper article containing statements that would be detrimental to the Respondent. The Tribunal refused to make recommendations to that effect arguing that the article in question could not have harmed Indonesia nor could it have exacerbated the dispute.

<sup>14</sup> *Amco*, supra note 13, 412, para. 4.

<sup>15</sup> See the examples listed by Schreuer, C., *The ICSID Convention: A Commentary* (2001), at 822.

<sup>16</sup> *Amco*, supra note 13, 412, para. 5.

### C. NAFTA

NAFTA Chapter 11 does not provide for its own arbitration rules. Instead, it offers a choice, frequently also found in BITs, between ICSID, ICSID Additional Facility and UNCITRAL Arbitration.<sup>17</sup> While NAFTA's Chapter 11 does not contain any express rules on confidentiality, it does contain a number of provisions aimed at more transparency such as rules concerning the information of NAFTA States about pending cases, their possibility to intervene, etc.<sup>18</sup>

The lack of any specific rules on confidentiality has been noted by various NAFTA tribunals which have generally concluded that parties therefore remained free to publicly discuss cases to which they were parties. For instance, the *Metalclad* Tribunal, ruling on the basis of the ICSID Additional Facility Rules, held that:

[n]either the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration.<sup>19</sup>

Similarly, the *S.D. Myers* Tribunal, constituted according to the UNCITRAL Rules, found that:

[...] whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that *any general principle* of confidentiality exists in an arbitration such as that currently before this tribunal.<sup>20</sup>

<sup>17</sup> Art. 1120 NAFTA provides: "1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

- (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
- (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules."

<sup>18</sup> Art. 1127 NAFTA provides: "A disputing Party shall deliver to the other Parties:

- (a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and
- (b) copies of all pleadings filed in the arbitration."

Art. 1128 NAFTA provides: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

Art. 1129 NAFTA provides: "1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:

- (a) the evidence that has been tendered to the Tribunal; and
- (b) the written argument of the disputing parties.

2. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party."

<sup>19</sup> *Metalclad Corporation v. Mexico*, Case No. ARB(AF)/97/1, Award, 30 August 2000, 16 ICSID Review 168 (2001); 40 ILM 36 (2001), para. 13.

<sup>20</sup> *S.D. Myers Inc v. Canada*, Procedural Order No. 16 of 13 May 2000, para. 8.

In July 2001 the NAFTA Free Trade Commission (FTC) adopted an interpretation of Chapter 11 regarding provisions on access to documents and the minimum standard of treatment.<sup>21</sup> Its purpose was the clarification of the meaning of certain Chapter 11 provisions. As for the issue of transparency, Section A of this Interpretation which focuses on access to documents is of particular interest. The FTC Interpretation establishes that:

[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal.<sup>22</sup>

It is therefore permissible for the parties to a dispute to make available documents without breaching the confidentiality of the arbitration. Section A para. 2 of the FTC Interpretation stresses the agreement of the NAFTA Parties to provide for public availability of documents. However, confidential business information, information which is privileged or otherwise protected from disclosure under the Party's domestic law and information which the Party must withhold pursuant to the relevant arbitral rules is not encompassed by the agreement to disclose and must therefore be kept unpublished.<sup>23</sup> This Interpretation also confirms that disputing parties are allowed to disclose to other persons in connection with the arbitral proceeding documents necessary for the preparation of their cases but have to ensure that these persons protect confidential information that might be included in the documents.<sup>24</sup> It also contains an affirmation that the governments of the NAFTA Parties are allowed to share relevant documents, including confidential information, with officials of their federal, state or local governments.<sup>25</sup>

<sup>21</sup> Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, available at [http://www.naftalaw.org/files/NAFTA\\_Comm\\_1105\\_Transparency.pdf](http://www.naftalaw.org/files/NAFTA_Comm_1105_Transparency.pdf).

<sup>22</sup> Notes of Interpretation of Certain Chapter 11 Provisions, *supra* note 21, para. 1.

<sup>23</sup> *Ibid.*, para. 2(b): "Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

- i. confidential business information;
- ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
- iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied."

<sup>24</sup> *Ibid.*, para. 2(c): "The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents."

<sup>25</sup> *Ibid.*, para. 2(d): "The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information."

Submissions of the parties and other documents have in fact been made available to the public on a regular basis.<sup>26</sup>

### III. *Biwater Gauff v. Tanzania*

*Biwater Gauff v. Tanzania*<sup>27</sup> is an ICSID case brought before a panel consisting of Gary Born, Toby Landau, and Bernard Hanotiau as presiding arbitrator. The arbitration was instituted on 2 August 2005 and led to a first session of the Tribunal in March 2006 dealing with procedural issues and a request for provisional measures. The Minutes of this First Meeting of the Tribunal<sup>28</sup> were communicated to the parties in June 2006 and, together with Procedural Order No. 2,<sup>29</sup> subsequently published on the internet by the Respondent, Tanzania.

The Claimant, *Biwater Gauff Tanzania* (BGT), filed a request for provisional measures on confidentiality, complaining about unilateral disclosure of the above-mentioned documents without an agreement of both parties to this effect.<sup>30</sup> BGT requested that the Tribunal order measures that the parties should discuss on a case-by-case basis the publication of all decisions other than the award produced in the course of the proceedings and if no agreement of the parties can be reached that the matter should be referred to the Tribunal. In addition, BGT requested that the Tribunal should also order that the parties refrain from disclosing to third parties any of the pleadings and any correspondence between the parties and/or the Tribunal exchanged during the proceedings.<sup>31</sup>

#### A. *Positions of the Parties*

BGT based its claim on Article 47 of the ICSID Convention and on Rule 39(1) of the ICSID Arbitration Rules which contain the authority of a tribunal to recommend provisional measures.<sup>32</sup> The claimant furthermore cited Rule 32(2)

<sup>26</sup> See, for example, the following websites: information about NAFTA disputes is available at <http://www.naftalaw.org/> or [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?ArticleID=5](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=5); information on investment disputes is available at <http://www.investmentclaims.com/>.

<sup>27</sup> *Biwater Gauff*, supra note 5.

<sup>28</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Minutes of the First Session of the Arbitral Tribunal, 23 March 2006, available at <http://ita.law.uvic.ca/documents/Biwater-MinutesofFirstSessionParis23March2006.PDF>.

<sup>29</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006, available at <http://ita.law.uvic.ca/documents/BiwaterProceduralOrder-No224May2006.pdf>.

<sup>30</sup> *Biwater Gauff*, supra note 5, para. 13.

<sup>31</sup> *Ibid.*, para. 12.

<sup>32</sup> Article 47 of the ICSID Convention, supra note 8, provides: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party." Rule 39 (1) of the new ICSID

of the new Arbitration Rules regarding attendance or observance of the hearings of persons other than the disputing parties. BGT argued that despite the replacement of the phrase “with the consent of the parties” by the phrase “unless either party objects”<sup>33</sup> third party attendance would still be subject to the parties’ consent.<sup>34</sup> According to BGT a unilateral disclosure of the Minutes of the Hearings would render this provision redundant in effect, since the public would gain access to the workings of the hearings through the publication and privacy would only formally be kept.<sup>35</sup>

The Respondent, on the other hand, argued that ICSID arbitration is not comparable to private commercial arbitration when it comes to transparency. Investment arbitration under ICSID was characterized by a higher level of transparency, manifested by the online availability of a considerable number of awards, decisions and other documents.<sup>36</sup> Tanzania furthermore contended that the measures requested by BGT would not authorize restrictions on transparency and run counter to the clear trend towards more transparency as reflected in arbitral practice as well as scholarly commentary and the amendments to the ICSID Arbitration Rules.<sup>37</sup>

#### B. *The Tribunal’s General Observations on Transparency and Procedural Integrity*

In its reasoning the Tribunal weighed two competing interests: the need for transparency, on the one hand, and the need to protect the procedural integrity of the arbitration, on the other hand. These competing interests exist not only in this particular dispute, but arise in other investment arbitration proceedings as well. The considerations of the Tribunal therefore deserve broader attention.

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Arbitration Rules provides: “At any time after the institution of the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.” ICSID Arbitration Rules, available at [http://www.worldbank.org/icsid/basicdoc/CRR\\_English-final.pdf](http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf).

<sup>33</sup> Rule 32(2) of the new ICSID Arbitration Rules provides: “Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.” ICSID Arbitration Rules, available at [http://www.worldbank.org/icsid/basicdoc/CRR\\_English-final.pdf](http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf). Prior to the Amendment this provision read: “The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.” ICSID Arbitration Rules, in: International Centre for Settlement of Investment Disputes (ed.), ICSID Convention, Regulation and Rules (ICSID/15/Rev.1 2003).

<sup>34</sup> *Biwater Gauff*, supra note 5, para. 34.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, para. 45.

<sup>37</sup> *Ibid.*, paras. 42 and 49.

The Tribunal started from the premise that parties are “free to conclude any agreements they choose concerning confidentiality.”<sup>38</sup> However, such an agreement had not been reached. Similarly, the BIT between the United Kingdom and Tanzania,<sup>39</sup> pursuant to which the case had been brought, did not contain any provision on confidentiality.<sup>40</sup> The Tribunal stated that “there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.”<sup>41</sup> Due to this lack of a general rule on this issue it was within the discretion of each individual tribunal to find the right balance when conducting proceedings. Demands for transparency had to respect procedural integrity and the interest of the disputing parties that certain information remained confidential. It was also difficult to determine how much guidance or interference by a tribunal was needed during the process and how much should be left to party autonomy and their discretion to disclose certain information to the public or to retain confidentiality.

The Tribunal also acknowledged that the 2006 amendments to the ICSID Arbitration Rules<sup>42</sup> reflect the trend in international investment arbitration towards transparency.<sup>43</sup> As of yet, however, there are only limitations on specific aspects of confidentiality in Article 48(5) of the ICSID Convention and in Regulation 22(2) of the Administrative and Financial Regulations, which, however, only address the publication of documents by the Centre and arbitral tribunals but do not cover disclosure of documents by the disputing parties.<sup>44</sup> In the absence of an agreement of the parties on which documents to publish and which ones to keep confidential it seems problematic if one party nonetheless divulges information to the potential detriment of the other party, since this can lead to an aggravation of the dispute. Such a situation is certainly not desirable and tribunals should try to avoid it in conducting the arbitral process.

The *Bewater* Tribunal continued its examination by discussing other rules governing investment arbitration like the ICSID Additional Facility Rules, the UNCITRAL Rules and the rules governing investment arbitration under NAFTA Chapter 11.<sup>45</sup> None of these rules contained a general duty of confidentiality. On

<sup>38</sup> Ibid., para. 115.

<sup>39</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, 7 January 1994, available at [http://www.unctad.org/sections/dite/ia/docs/bits/UK\\_tanzania.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/UK_tanzania.pdf).

<sup>40</sup> *Bewater Gauff*, supra note 5, para. 115.

<sup>41</sup> Ibid., para. 121.

<sup>42</sup> See new Rule 32 (2), supra note 33.

<sup>43</sup> *Bewater Gauff*, supra note 5, para. 122.

<sup>44</sup> Ibid., para. 123.

<sup>45</sup> See supra text starting at note 38.

the contrary, in the context of NAFTA Chapter 11 the Interpretation of the Free Trade Commission of July 2001 established the permissibility of disclosure of documents also by the disputing parties separately.<sup>46</sup> According to the *Biwater* Tribunal, also the more restrictive UNCITRAL Rules did not expressly impose a general duty of confidentiality.<sup>47</sup>

The Tribunal did not define the term ‘procedural integrity’ which appears to comprise the entire set of circumstances necessary for the efficient conduct of proceedings of which confidentiality seems to be just one, albeit a crucial aspect.

The Tribunal argued that the “prosecution of a dispute in the media”, in particular in highly publicized cases like *Biwater v. Tanzania*, could impact the integrity of the arbitral procedure.<sup>48</sup> The Tribunal agreed<sup>49</sup> with the considerations of the tribunal in *Loewen* that “it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings the parties were to limit public discussion to what is considered necessary”<sup>50</sup> and with the tribunal in *Metalclad*, which similarly held that “it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligations of disclosure by which either of them may be legally bound.”<sup>51</sup> Further, the *Biwater* Tribunal reasoned that the concerns regarding procedural integrity should be evaluated differently depending on whether proceedings were still pending or an award had already been rendered. It held that “[w]hile the proceedings remain pending [...] there is an obvious tension between the interests in transparency and in procedural integrity”,<sup>52</sup> but after a final award had been rendered, “in the normal course, concerns as to procedural integrity no longer apply.”<sup>53</sup>

### C. *Categories of Documents*

In the most important part of the procedural order, the Tribunal distinguished between various kinds of documents of the proceedings, i.e., minutes of hearings, pleadings or written memorials of the parties, and decisions or orders of the tri-

<sup>46</sup> FTC Interpretation, *supra* note 21.

<sup>47</sup> *Biwater Gauff*, *supra* note 5, para. 132.

<sup>48</sup> *Ibid.*, para. 136.

<sup>49</sup> *Ibid.*, para. 138.

<sup>50</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction, 5 January 2001; 7 ICSID Reports 421, para. 26.

<sup>51</sup> *Metalclad Corp. v. Mexico*, Decision on a Request by the Respondent for an Order prohibiting the Claimant from revealing Information Regarding ICSID Case ARB(AF)/91/1, 27 October 1997, available at <http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladProceduralOrder1.pdf>, para. 10.

<sup>52</sup> *Biwater Gauff*, *supra* note 5, para. 140.

<sup>53</sup> *Ibid.*, para. 142.

bunal. It reached different conclusions as to the permissibility of publication and distribution of these documents.

The Tribunal took a “police patrol” rather than a “fire alarm” approach, arguing that its task was not to react after harm had already been done to one of the parties as a consequence of disclosure of documents to the public. Rather, it thought that “its mandate and responsibility include[d] ensuring that the proceedings will be conducted in the future in a fair and orderly manner.”<sup>54</sup> Since there had been a media campaign fought on both sides of this case, the Tribunal reached the conclusion that there existed a sufficient risk of aggravation of the dispute that would warrant some form of control by the tribunal.<sup>55</sup> Nonetheless, the Tribunal also emphasized the significance of the public interest in the case, therefore determining that “any restrictions must be carefully and narrowly delimited.”<sup>56</sup>

In its reasoning, the *Biwater* Tribunal made reference to previous investment cases like *Amco*,<sup>57</sup> *Metalclad*,<sup>58</sup> *S. D. Myers*,<sup>59</sup> and *Loewen*,<sup>60</sup> but it found that these cases were not decisive. Rather, it emphasized the importance of determining the risks of aggravating the dispute between the parties in each instance.<sup>61</sup>

In the end, the *Biwater* Tribunal reached a rather nuanced conclusion differentiating between different aspects of transparency and confidentiality and different types of activities and documents involved.

Since the parties had already agreed upon the publication of a final award pursuant to Article 48(5) of the ICSID Convention the Tribunal did not see any necessity to separately address this issue in its procedural order.<sup>62</sup> With regard to the general discussion about the case in public, the Tribunal declared such discussion permissible under the condition that it is “restricted to what is necessary [...] and is not used as an instrument to antagonize the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult.”<sup>63</sup> Based on a presumption of transparency and the fact that an impartial tribunal’s decisions are less likely to aggravate a dispute, the *Biwater* Tribunal held that the disclosure of decisions, orders and directions of the tribunal should be considered on a case-by-case basis<sup>64</sup> and could thus be achieved subject to prior permission of the Tribunal.<sup>65</sup> It also found that restrictions on the

<sup>54</sup> *Ibid.*, para. 145.

<sup>55</sup> *Ibid.*, para. 146.

<sup>56</sup> *Ibid.*, para. 147.

<sup>57</sup> *Amco*, supra note 13.

<sup>58</sup> *Metalclad Corporation v. Mexico*, Case No. ARB(AF)/97/1, Award, 30 August 2000, 16 ICSID Review 168 (2001); 40 ILM 36 (2001).

<sup>59</sup> *S.D. Myers Inc. v. Canada*, Procedural Order No. 16 of 13 May 2000.

<sup>60</sup> *Loewen*, supra note 50.

<sup>61</sup> *Biwater Gauff*, supra note 5, para. 141.

<sup>62</sup> *Ibid.*, para. 151.

<sup>63</sup> *Ibid.*, para. 163 (d).

<sup>64</sup> *Ibid.*, paras. 152–154.

<sup>65</sup> *Ibid.*, para. 163 (c).

publication of a party's own documents would not be appropriate in general.<sup>66</sup> On the other hand, the publication of minutes of hearings,<sup>67</sup> pleadings or written memorials,<sup>68</sup> correspondence between the parties and/or the Tribunal,<sup>69</sup> as well as any documents produced by the opposing party<sup>70</sup> may threaten the procedural integrity of the arbitral process and should thus not be permitted in principle.<sup>71</sup> The Tribunal considered it appropriate, however, to provide an opportunity to the parties to ask the tribunal for exceptions to these restrictions on a case-by-case basis.<sup>72</sup>

In addition to distinguishing between different types of documents the Tribunal also differentiated between the release of documents while proceedings are pending and after the conclusion of the proceedings and the publication of final awards. The Tribunal argued that the tensions between increasing transparency and safeguarding procedural integrity were only pertinent as long as proceedings were pending. Concerns regarding procedural integrity would no longer apply after the conclusion of the proceedings.<sup>73</sup> The Tribunal therefore concluded that disclosure of documents during the proceedings was problematic and should therefore be handled restrictively. The publication of awards, other tribunal decisions, but also pleadings and written memorials after the conclusion of proceedings would cause less trouble.<sup>74</sup>

As a consequence the Tribunal recommended the following measures

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

<sup>66</sup> *Ibid.*, para. 156.

<sup>67</sup> *Ibid.*, para. 155.

<sup>68</sup> *Ibid.*, paras. 158–160.

<sup>69</sup> *Ibid.*, para. 161.

<sup>70</sup> *Ibid.*, para. 157.

<sup>71</sup> *Ibid.*, para. 163 (a).

<sup>72</sup> *Ibid.*, para. 163 (b).

<sup>73</sup> *Ibid.*, paras. 140, 142.

<sup>74</sup> *Ibid.*, para. 142.

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:

- (c) 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.<sup>75</sup>

#### **IV. Analysis of the Policy Issues Underlying the Tribunal's Procedural Decision**

Confidentiality and transparency are squarely conflicting principles serving competing interests. In order to assess the validity of claims in favor of one over the other it is useful to analyze these interests. Since many of the underlying policy considerations have been primarily discussed and relied upon in international commercial arbitration between private parties it is particularly appropriate to contemplate whether and in how far similar considerations are also applicable and justified in investor-State arbitration.

##### *A. Why Confidentiality?*

Confidentiality is generally regarded as one of the hallmarks of (commercial) arbitration and usually ranks high among the perceived main advantages of arbitration over other forms of dispute settlement.<sup>76</sup> It is usually assumed that many firms appreciate the privacy and confidentiality of arbitral proceedings because it protects business secrets and may help to protect the public image of companies when even the mere fact of litigation released to the public might cause harm to its reputation. The confidential nature of arbitration proceedings may also contribute to a reduction of tensions between the parties. In the absence of the requirement to publicly comment on various procedural steps during dispute

<sup>75</sup> Ibid., para. 163.

<sup>76</sup> Cf. Article 31 UNCITRAL Notes on Organizing Arbitral Proceedings: "It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality." UNCITRAL Notes on Organizing Arbitral Proceedings, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>. See also Kouris, S., Confidentiality: Is International Arbitration Losing One of Its Major Benefits?, 22 *Journal of International Arbitration* 127 (2005); Rogers, A. and Miller, D., Non-Confidential Arbitration Proceedings, 12 *Arbitration International* 319 (1996).

settlement procedures, it might be easier to agree on certain non-disputed aspects of a case and thus to accelerate the proceedings. Ideally, the confidential nature of proceedings may even facilitate settlement talks between the parties and ultimately a mutually-agreed-upon solution, be it in the form of an award on agreed terms or a direct settlement agreement between the parties.

Many of these considerations are equally applicable to investment arbitration, typically involving host States as respondents. The protection of business secrets as well as of governmental secrets has to be safeguarded by any effective system of dispute settlement. Similarly, the confidentiality, at least during proceedings, will contribute to the de-politicization of investment disputes, one of the avowed purposes of ICSID arbitration,<sup>77</sup> and it might equally increase the possibility of settlement talks. In view of the typical long-term relationship between an investor and a host State, it may be particularly important to facilitate any move towards a negotiated settlement between the parties.<sup>78</sup>

#### B. *Why Transparency?*

Transparency has become one of the central aspects of good governance<sup>79</sup> claims directed against States. Transparency is also increasingly demanded from private parties as an important aspect of corporate social responsibility.<sup>80</sup> According to traditional transparency demands, all branches of government should avoid secrecy in their dealings with citizens. In investment law transparency is usually understood as an obligation of host States to publish all legal rules affecting investors.<sup>81</sup>

While the traditional transparency demands may be primarily addressed towards the administrative and the legislative branch, they also have implications for the judiciary, requiring it to abolish secret courts, to conduct its proceedings publicly and to publish its decisions. Arbitration could be regarded simply as an alternative to judicial dispute settlement where such transparency considerations

<sup>77</sup> Cf. *Shihata, I. F. I.*, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID Review 1 (1986).

<sup>78</sup> The availability of conciliation under Articles 28–35 of the ICSID Convention stresses this aspect.

<sup>79</sup> Cf. European Commission, White Paper on European Governance, COM (2001) 428 final, [2001] OJ C 287/1; Harlow C., Global Administrative Law: The Quest for Principles and Values, 17 EJIL 187 (2006), at 195, 202.

<sup>80</sup> Cf. Muchlinski P., Human Rights, Social Responsibility and the Regulation of International Business: the Development of International Standards by Intergovernmental Organisations, 3 Non-State Actors and International Law 123 (2003); Tapscott D. and Ticoll D., The Naked Corporation: How the Age of Transparency will Revolutionize Business (2003).

<sup>81</sup> See, for example, Article 20 Energy Charter Treaty: “2. Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. [...]” 34 ILM 360 (1995); See also UNCTAD, Transparency, Series on Issues in International Investment Agreements (2004).

do not arise as a result of the presumed confidential nature of arbitration. The better approach is to look at the underlying functions fulfilled and values protected by transparency which apply to dispute settlement methods in general and to arbitration in particular.

The publication of judicial and arbitral decisions is a precondition for the evolution of a consistent case-law<sup>82</sup> which creates legal certainty in the form of assuring that all cases are treated equally. It thus ensures predictability for its actual and potential users. This will in turn increase the confidence in the system of dispute settlement. For arbitration, it is important to be perceived as a true alternative to judicial dispute settlement. The special expertise of arbitrators which is often portrayed as one of the particular advantages of arbitration will only be sufficiently appreciated if their “products”, i.e., arbitral awards, decisions and orders, are also publicly available and thus open to public and scholarly scrutiny.<sup>83</sup> Finally, there may be a justified public interest in the outcome of certain disputes which affects not only the parties to the dispute but either the public at large or certain segments of the public.<sup>84</sup> This justified interest is frequently expressed in specific legal disclosure requirements imposed upon companies by national law. These requirements may trump confidentiality rules, in particular where arbitration rules qualify confidentiality through legal disclosure duties.<sup>85</sup>

All of these considerations are also valid in the context of investment arbitration. The evolution of a consistent case-law is only possible through the publication of decisions and awards on jurisdiction and on the merits as well as of orders addressing crucial procedural issues.<sup>86</sup> The public availability of judicial or quasi-judicial decision is particularly important where the substantive rules governing disputes between parties are of a highly general and vague character. This is a phenomenon not unknown in international law where sometimes very abstract rules are agreed upon in treaties, often in the form of vague compromise formulations, which are in need of interpretation by dispute settlement institutions. This *de facto* shifting of law-making functions from the legislator to the judiciary can be seen, for instance, in the context of WTO law but also in EC law. The actual

<sup>82</sup> Cf. Berger, K. P., *The International Arbitrators' Application of Precedents*, 9 *Journal of International Arbitration* 5 (1992), at 19 et seq; Lew, J.D.M., *The Case for the Publication of Arbitration Awards*, in: Schultz J.C./Van den Berg A.J. (eds.), *The Art of Arbitration, Essays on International Arbitration*, Liber Amicorum Peter Sanders, 223 (1982), at 229.

<sup>83</sup> See Lew, supra note 82, at 227.

<sup>84</sup> This policy aspect was highlighted in the famous Australian case of *Esso/BHP v. Plowman*, (1995) 128 ALR 391. See also Tweeddale, A., *Confidentiality in Arbitration and the Public Interest Exception*, 21 *Arbitration International* 59 (2005), at 61.

<sup>85</sup> Cf. Denoix de Saint Marc, V., *Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations*, 20 *Journal of International Arbitration* 211 (2003).

<sup>86</sup> It is thus not surprising to see that the *Biwater* Tribunal decided that its “Procedural Order No. 3 shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.” *Biwater Gauff*, supra note 5, para. 164.

meaning of such crucial provisions like Article III, XI or XXII of the GATT may be ascertained only by studying the reports of WTO panels as well as of the Appellate Body. In a similar fashion, it is primarily the case-law of the ECJ which determines the actual content of the EC Treaty's rules on the free movement of goods, persons and services.

These circumstances are equally applicable in the context of modern investment arbitration. The more or less similarly worded substantive treatment standards contained in most BITs as well as in the most important multilateral investment instruments, such as NAFTA Chapter 11 or the Energy Charter Treaty, are of a particularly undetermined and imprecise character.<sup>87</sup> It is only through their interpretation and application in the context of investment arbitration that fair and equitable treatment, full protection and security, expropriation and other notions become workable concepts.<sup>88</sup> Thus, the availability of investment decisions elaborating on these issues is crucial for the development of a settled case-law.<sup>89</sup> This will not only increase the predictability of outcomes and create more confidence in the system.<sup>90</sup> The establishment of generally accepted rules will also contribute to the avoidance of unnecessary disputes. Parties will be less likely to resort to investment arbitration, or at least to raise particular claims or defenses, where they have to argue against a well-settled body of law.

More transparency is also important in order to create or to re-establish confidence in the system of investment arbitration. Particularly in the context of NAFTA Chapter 11, the confidentiality of proceedings has provoked very strong criticism against investor-State arbitration as a form of unaccountable and secret justice.<sup>91</sup> In places where information about ongoing procedures or where awards and decisions are publicly available there should be no room left for speculation. The “unelected” and “unaccountable” arbitrators will have to be professional and highly-skilled experts whose rulings are open to public scrutiny.

<sup>87</sup> See, for example, Art. 2 (2) Pakistan-Italy BIT: “Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party.” Or Art 1105 NAFTA: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

<sup>88</sup> See Schreuer, C., *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, *Transnational Dispute Management* Vol. 3 No. 2 (2006).

<sup>89</sup> See also “Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures”, Statement by the OECD Investment Committee, June 2005, para. 42, available at <http://www.oecd.org/dataoecd/25/3/34786913.pdf>, according to which publication of arbitral awards would “contribute to the further development of a public body of jurisprudence which would allow investors and host states to understand how investment agreements are interpreted and applied and ultimately contribute to a more predictable and consistent system.”

<sup>90</sup> *Ibid.*, para. 41.

<sup>91</sup> See the famous NYT characterization of NAFTA Chapter 11 tribunals: “Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.” *The New York Times*, 11 March 2001, Section 3, p. 1.

Finally, the level of public interest in arbitration proceedings is normally much higher in investment arbitration than in ordinary commercial arbitration. This public interest does not only stem from the fact that usually one of the parties is a State and that frequently enterprises providing public services are also involved.<sup>92</sup> Since the public is potentially affected by the outcome of such arbitrations, it naturally shows more interest in these procedures. More importantly, the subject-matter of investment disputes regularly concerns governmental measures. This often transforms investment arbitration into a functional equivalent of judicial review of governmental measures which would otherwise be reserved to the national courts.<sup>93</sup> In cases where, for instance, the legality of environmental or health measures and/or their potential qualification as expropriatory acts is at issue, the public will show greater interest in the outcome of proceedings which may limit the future legislative and/or administrative freedom of manoeuvre.<sup>94</sup>

## V. A Differentiated Transparency for Investment Arbitration

Taking into account and balancing the above mentioned policy considerations supporting confidentiality or transparency lead to a nuanced outcome and necessarily to compromise. It is clear that both interests are legitimate and should be protected. The difficulty lies in finding the right balance. It is submitted that the *Biwater* Tribunal's approach of differentiating between different types of documents represents a useful and pragmatic, though not easily implemented case-by-case solution for solving the problem.

### A. Awards

Practice has shown that most ICSID tribunals do in fact take into consideration the reasoning and the findings of previous tribunals. Although they are not bound by the decisions of earlier tribunals,<sup>95</sup> the influence earlier tribunals frequently have on subsequent tribunals cannot be denied. In fact, ICSID tribunals are eager to contribute to a coherent body of law in interpreting and applying both customary international law principles as well as BITs and other investment

<sup>92</sup> See Hóber, K., *Arbitration Involving States*, in Newman, L. & Hill, R. (eds.), *Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, 2003), 139, 154.

<sup>93</sup> Cf. Van Harten, G., and Loughlin, M., *Investment Treaty Arbitration as a Species of Global Administrative Law*; 17 *EJIL* 121 (2006); Wälde, T., *Transparency, Amicus Curiae Briefs and Third Party Rights*, 5 *The Journal of World Investment and Trade* 37 (2004).

<sup>94</sup> See Mistelis, L., *Confidentiality and Third Party Participation*, 21 *Arbitration International* 211 (2005).

<sup>95</sup> See Schreuer, *supra* note 15, 828. "Neither the decision of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the *Klöckner ad hoc* Committee are binding on this *ad hoc* Committee. The absence, however, of a rule of *stare decisis* in the ICSID arbitration system does not prevent this *ad hoc* Committee from sharing the interpretation given to Article 52 (1) (e) by the *Klöckner ad hoc* Committee." *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 *ICSID Reports* 509, at 521.

instruments. As the tribunal in *SGS v. Philippines* put it, they are engaged in the development of a “common legal opinion or jurisprudence constante.”<sup>96</sup> For this purpose, the public availability of awards and decisions on jurisdiction is crucial.

Although the publication of awards is a requirement for the development of a case-law in international investment arbitration,<sup>97</sup> it does not guarantee a *consistent* case-law. This can be seen by the well-known disagreement over the effect of umbrella clauses, initially by the two *SGS* tribunals in *SGS v. Pakistan*<sup>98</sup> and *SGS v. Philippines*,<sup>99</sup> which was continued by a number of other ICSID tribunals.<sup>100</sup> Similarly, ICSID tribunals have differed in their assessment of the scope of MFN clauses. Not all tribunals have followed the *Maffezini* approach<sup>101</sup> which held that an MFN clause could encompass procedural questions and thus “import” dispute settlement rules into treaty arbitrations.<sup>102</sup> Most recently, the *CMS* and *LG&E* cases against Argentina confirmed that conflicting outcomes may not be wholly excluded. In *LG&E*<sup>103</sup> the tribunal came to a conclusion concerning the existence of a state of necessity in Argentina diametrically opposed to the decision rendered by another ICSID tribunal in *CMS v. Argentina*<sup>104</sup> about fifteen months earlier.<sup>105</sup>

<sup>96</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, 8 ICSID Reports 515, para. 97.

<sup>97</sup> Lew, *supra* note 82, at 229; Tahyar B.H., Confidentiality in ICSID Arbitration after *Amco Asia Corp. v. Indonesia: Watchword or White Elephant?* 10 Fordham International Law Journal 93 (1986), at 117.

<sup>98</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, 18 ICSID Review 301 (2003); 42 ILM 1290 (2003).

<sup>99</sup> *SGS v. Philippines*, *supra* note 96.

<sup>100</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, 44 ILM 73 (2005), para. 81; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 15 November 2004, 44 ILM 573 (2005), para. 126. See also Alexandrov, S.A., Breaches of Contract and Breaches of Treaty, 5 The Journal of World Investment & Trade 556 (2004); Schreuer, C., Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 The Journal of World Investment & Trade 231 (2004); Wälde, T., The Umbrella Clause in Investment Arbitration. A Comment on Original Intentions and Recent Issues, 6 The Journal of World Investment & Trade 183 (2005).

<sup>101</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, ICSID Decision on Jurisdiction of 25 January 2000, 40 ILM 1129 (2001), 16 ICSID Review 212 (2001), para 54: “[...] if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause [...]”

<sup>102</sup> See *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB/AF/00/2, Award of 29 May 2003, 43 ILM 133 (2004), para 69; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, 44 ILM 138 (2005), para 120; *Salini v. Jordan*, *supra* note 100, para. 119. See also Reinisch, A., Maffezini in EPIL (forthcoming).

<sup>103</sup> *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 46 ILM 40 (2007), see also Introductory Note by Reinisch A. 46 ILM 36 (2007).

<sup>104</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 ILM 1205 (2005).

<sup>105</sup> See Reinisch, A., Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS* and *LG&E*, 8 The Journal of World Investment & Trade (2007) (forthcoming).

Although the *CMS* award had been publicly available, the *LG&E* Tribunal did not even mention this award in its reasoning and its findings. As a matter of fact, the *LG&E* outcome resembles a situation which would be normal if ICSID awards remained confidential as a matter of routine. Usually it is the publication of awards which helps uncovering and thus avoiding inconsistencies between arbitral awards. As a rule, the public availability of awards thereby contributes to an increasing consistency and predictability, potentially also if arbitrators and the public are alerted to the problems arising from inconsistent case-law.

Not only tribunals, but also potentially disputing parties benefit from the availability of awards. They can refer to the arguments of the parties and the conclusions of the tribunals when making their case. They might find support for their own case in preceding cases brought under comparable circumstances and will be able to assess the chances of success for their case.<sup>106</sup> Publicly available awards could assist the disputing parties in their choice of arbitrators since they can review the past record of the arbitrators.<sup>107</sup>

Publication of awards also fosters scholarly debate on particular issues that turn out to be controversial in the findings of arbitral tribunals. The work of legal scholars is in turn considered by arbitral tribunals which make reference to scholarly analysis in their decisions. Critical evaluation of arbitral decisions by scholars, which is also to the benefit of arbitral tribunals, would not be possible if they did not have access to the decisions and awards of the tribunals. Thus, the availability of documents contributes to the development of the substantive standards of investment law through arbitral practice.

Against the background of this host of strong policy reasons in favor of transparency, i.e., publication of awards, it is difficult to see any reasons why the outcomes of investment arbitration should remain confidential. Clearly, the protection of business secrets and confidential governmental information may require certain exceptions to the rule which may be practically accomplished by deleting parts of an award.<sup>108</sup> Since decisions on jurisdiction contribute to the development of investment law in a similar way as final awards, the current practice of making them immediately available seems adequate. In special circumstances, however, a deferred publication after the release of the final award may be justified.

### B. *Distinction between Different Types of Documents*

An important aspect of the *Biwater* Tribunal's Procedural Order No. 3 was its differentiation between certain types of documents submitted and adopted during the proceedings, like minutes of meetings, pleadings by the parties or decisions of

<sup>106</sup> Schreuer, *supra* note 15, at 827.

<sup>107</sup> Lew, *supra* note 82, at 228; Tahyar, *supra* note 97, at 116.

<sup>108</sup> See "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures", *supra* note 89, para. 43.

the tribunals on the one hand, and the final award on the other hand in order to assess the permissibility of their publication. Although in the past the focus of the discussion had been on the publication of awards, the distinction between documents generated during the proceedings and final awards and their publication had already been addressed in scholarly writings.<sup>109</sup> The *Biwater* case demonstrates that a disclosure of documents at a stage prior to the rendering of the final award can be particularly problematic and therefore deserves special attention.

While procedural orders as well as pleadings and minutes of meetings may contain information of potential importance to the public, it seems that the risks of disrupting the procedural integrity of the process will frequently outweigh the interest of publication. Therefore it is appropriate to exempt not only documents revealing business secrets or other confidential information from a potential public disclosure but also to prohibit the publication of any other information which might aggravate disputes before investment tribunals.

There is probably no general level of transparency applicable to all cases. Therefore, it would be advisable to consider the particular circumstances of a dispute when determining how much transparency ought to be appropriate. The *Biwater* Tribunal has demonstrated that a nuanced, specifically tailored solution is a feasible option.

## VI. Legal Reasoning

It is interesting to see that the policy considerations discussed above seem to have played a crucial role in the ultimate decision of the *Biwater* Tribunal in its Procedural Order No. 3. In fact, the Tribunal's order evokes the impression of a lawmaker pondering over the policy choices available and then choosing what it believes to be the most appropriate solution. Indeed, because of the quasi-absence of any clear rules on confidentiality versus transparency as regards the parties to ICSID proceedings,<sup>110</sup> the Tribunal enjoyed a large degree of discretion which it used in an act of quasi-judicial law-making.<sup>111</sup>

In this context it is enlightening to analyze the interpretation technique used by the *Biwater* Tribunal. The Tribunal's starting point is its assertion that the rules governing ICSID arbitration contain neither a "general duty of confidentiality" nor

<sup>109</sup> Schreuer, *supra* note 15, at 819–828. See also Paulsson, J. and Rawding, N., *The Trouble with Confidentiality*, 11 *Arbitration International* 303 (1995), 304 *et seq.*

<sup>110</sup> See *supra* text at note 8.

<sup>111</sup> The difficulty of formulating a general rule on confidentiality of arbitration proceedings has also led the English legislator to leave the precise delimitation to the judicial practice. Cf. *City of Moscow v. Banker's Trust Co & International Industrial Bank* [2004] EWCA Civ 314, para 2: "it was the difficulty of reaching a statutory formulation, in the light of the 'myriad exceptions' and the qualifications that would have to follow, that led the [legislator] to conclude that the courts should be left to continue to work out the implications 'on a pragmatic case-by-case basis'."

a “provision imposing a general rule of transparency or non-confidentiality.”<sup>112</sup> The *Biwater* Tribunal did not follow the *Amco* precedent<sup>113</sup> and its conclusion that the absence of any confidentiality obligation on the parties implied that they were under no such obligation. Rather, the *Biwater* Tribunal treated the issue as an open one – only slightly bent in favor of non-confidentiality – as a result of what it termed as “an overall trend in [investment arbitration] towards transparency.”<sup>114</sup> In other words, instead of strictly relying on the *expressio unius est exclusio alterius* maxim,<sup>115</sup> the Tribunal ventured into the loftier heights of teleological interpretation by taking for granted a presumption in favor of transparency<sup>116</sup> against which it would then balance specific interests calling for confidentiality.<sup>117</sup>

Apart from briefly taking note of the fact that the parties had agreed upon the publication of the final award,<sup>118</sup> there is no real debate about the parties’ further express, or even implied or presumed intent concerning confidentiality or transparency. This is remarkable since many tribunals in the context of commercial arbitration have regularly resorted to the implied will of parties arbitrating their disputes to keep them confidential.<sup>119</sup> Though this assumption is no longer unquestioned,<sup>120</sup> it is still remarkable that the *Biwater* Tribunal, consisting of arbitrators highly experienced in the field of commercial arbitration, did not address this issue. Instead, they were satisfied by taking note that also the applicable BIT did not express any rule on confidentiality.<sup>121</sup>

From this starting point, the Tribunal was free to engage in a thorough policy analysis concerning transparency versus confidentiality and to integrate teleological

<sup>112</sup> *Biwater Gauff*, supra note 5, para. 121.

<sup>113</sup> *Amco*, supra note 13.

<sup>114</sup> *Biwater Gauff*, supra note 5, para. 122.

<sup>115</sup> See *Plama Consortium Limited v. Bulgaria*, Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 191, 20 ICSID Review 262 (2005); 44 ILM 721 (2005); *Tokios Tokelés v. Ukraine*, Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 30, 20 ICSID Review 205 (2005); *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 82.

<sup>116</sup> According to the tribunal, “[t]hese considerations, and the accepted need for greater transparency in this field, generally militate against the type of provisional measures for which the Claimant now contends.” *Biwater Gauff*, supra note 5, para. 133.

<sup>117</sup> According to the tribunal, “there exist other specific, and analytically distinct, interests that may militate in favour of restrictions.” *Biwater Gauff*, supra note 5, para. 134.

<sup>118</sup> *Biwater Gauff*, supra note 5, para. 117.

<sup>119</sup> See *Dolling-Baker v. Merrett* [1990] 1 WLR 1205, 1213 (CA): “As between parties to an arbitration. Although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must [...] be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, [...]”

<sup>120</sup> Cf. the Australian cause célèbre of *Esso/BHP v. Plowman*, (1995) 128 ALR 391, which rejected the notion of confidentiality as an essential attribute of private arbitration inherent in an agreement to arbitrate. See also Fortier, Y., *The Occasionally Unwarranted Assumption of Confidentiality*, 15 *Arbitration International* 131 (1999); Oberhammer, P., *Zur Vertraulichkeit von Schiedsverfahren*, *Festschrift Beys* 1139 (2003).

<sup>121</sup> *Biwater Gauff*, supra note 5, para. 116.

considerations about the nature of investment arbitration and the interests of the parties as well as of the non-parties affected by it.

While the resulting procedural order is a sensible, balanced and useful instrument addressing these issues in a striking combination of abstract guideline and detailed *ad hoc* regulation, it is not fully able to disperse concerns about the very broad discretion given, or rather taken, by some investment tribunals, in applying, or rather making, the law.

## VII. Conclusion

The *Biwater* decision constitutes a valuable contribution to the ongoing debate on increasing transparency in international investment arbitration. The novelty of Procedural Order No. 3 of the *Biwater* Tribunal lies in the differentiated treatment of various kinds of documents and its differentiated conclusions regarding the public availability or confidentiality of these documents. The Tribunal's weighing of the competing interests of increasing transparency, on the one hand, and protecting the procedural integrity of the arbitration, on the other hand, is an important contribution to clarifying under which circumstances what kinds of documents could be made public and which ones should not be disclosed to a broader audience. One can therefore assume that the Tribunal's recommendations will not remain without impact on arbitral proceedings in future investment disputes.