

# The Gold Standard of Transparency

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✘ By now almost everyone in the international arbitration world is aware of the gavel-to-gavel coverage of the oral pleadings in the so-called Abyei Arbitration before the Permanent Court of Arbitration. The case included many of the leading lights of international arbitration, including Pierre-Marie Dupuy, Stephen Schwebel, and Michael Reisman among the arbitrators, and James Crawford, Alain Pellet, Paul Williams, and Gary Born among the counsel.

By any measure, the arbitration is a watershed in that it represents one of the most transparent examples of international arbitration in history. All of the pleadings, the entire transcript, and the complete oral hearings are all available on the PCA website. And of course the final award likewise will be published.

The key language authorizing such transparency is found in Article 8.6 of the Arbitration Agreement:

“The oral pleading(s) of the Tribunal shall be open to the media. A portion of a hearing may only be closed at the discretion of the Tribunal for security reasons. The Parties authorize the PCA to issue periodic press releases regarding the progress of the arbitration proceedings and to make publicly available on its website the final award, as well as Party submissions.”

Having watched a fair bit of the oral hearing, I think there is little doubt that international arbitrations involving matters of public interest benefit greatly from this approach. The veil of secrecy is removed and the world is invited to observe and even marvel at the peaceful settlement of disputes in action. The reputation and credibility of international arbitration (and individual arbitrators and counsel) is greatly enhanced by such transparency. Even Sudan, a country of profound disrepute, benefits from this sort of exposure.

This approach of remarkable transparency is, of course, in sharp contrast to other types of international adjudication, most notably the WTO, which excels in its irrational limitations on the public's access to information. Unlike the Abyei Arbitration, virtually nothing is available to the general public under the WTO regime. Neither the pleadings, nor the supporting documents, nor the written transcript of the oral hearings are made available by the WTO. Even the scheduled date of an oral hearing is considered confidential. Only the interminable final reports are public, and they are so tedious that their import is often lost.

Of course, this is not to suggest that transparency is desirable in every instance, particularly in the context of private commercial arbitration. A recent story in the *Economist* summarized the matter

nicely: “Commercial law operates in a climate of secrecy, especially when two or more private bodies are involved. International law (on human rights, say, or border disputes) tends to work more openly. So what happens when the two worlds meet? In practice privacy generally prevails.”

It shouldn't. The presumption should be exactly the opposite. At a minimum the following presumption should prevail: if the arbitration involves a state party, then the proceedings should be open to the public. As is common with public records, there should be exceptions to this general rule. The FOIA exemptions in the United States include, among other things, some useful limitations on public disclosure: (1) classified national security information; (2) trade secrets and other confidential business information; (3) privileged government documents; and (4) information involving matters affecting personal privacy. In most cases such concerns can be addressed by submitting every brief in two versions: a private version and a public redacted version. That is the common practice in domestic international trade litigation. And of course public oral hearings can be regulated with specific portions of the hearing closed to the public to protect such interests.

The proliferation of investment arbitration and public international arbitration will continue to put severe pressure on the parties and arbitrators to promote transparency. Kudos to those involved in the Abyei Arbitration for setting the standard.

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