

Kluwer Arbitration Blog

Confidentiality in Investment Treaty Arbitration

Andrew Newcombe (University of Victoria Faculty of Law) · Wednesday, March 3rd, 2010

Procedural Order No. 3 (Confidentiality Order) dated 27 January 2010 in *Giovanna a Beccara and others v. The Argentine Republic* (the “Order”) addresses the competing considerations of confidentiality, transparency, public information, equality of the Parties’ rights, and orderly conduct of the proceedings in investment treaty arbitration. Although the Tribunal’s Order provides a nuanced approach to confidentiality issues in investment treaty arbitration, the Tribunal appears to accept that the risk of incorrect public impressions arising from the disclosure of party submissions is sufficient to impose restrictions on publication. In contrast, I would argue that in situations where there are no express confidentiality obligations in an investment treaty arbitration, the party making a request for confidentiality should have to substantiate on a balance of probabilities that, if confidentiality is not maintained, there is a real risk of aggravation of the dispute or that the disclosure will compromise the integrity of the arbitration proceedings.

Summary

Beccara involves a claim by Italian bondholders against Argentina under the Argentina-Italy BIT. Early in the proceedings the parties took opposing positions on confidentiality. Although they agreed that the final award would be made public (para. 75), prior to the hearing on jurisdiction differences arose with respect to three issues related to confidentiality. First, the parties could not agree on the terms governing Argentina’s access to the Claimants’ database containing information on the over 180,000 claimant bondholders. The Claimants argued that Argentina could only have access to the database if Argentina agreed to maintain individual claimant information confidential and signed a confidentiality agreement. Second, the Claimants objected to Argentina’s submission of 21 expert opinions and transcripts from other treaty arbitrations. The Claimants argued that the submission of these materials ignored confidentiality duties in the other treaty arbitrations and would be contrary to the principle of equality of the Parties since the Claimants did not have access to the entire record of the other proceedings and Argentina might use the materials from other arbitrations selectively and out of context. Third, in light of the Parties’ inability to agree on confidentiality issues, the Claimants requested an order for confidentiality aimed at protecting the entire record of the proceedings.

Although neither party contested the Tribunal’s power to issue a confidentiality order, the tribunal noted that a confidentiality order could be based on either the power to recommend Provisional Measures (Art. 47, ICSID Convention and Rule 39(1), ICSID Arbitration Rules) or the power to make orders required for the conduct of the proceedings (Rule 19, ICSID Arbitration Rules). The Order notes that although Tribunal members (Pierre Tercier, Georges Abi-Saab and Albert Jan Van

den Berg) held somewhat different views on the use of orders and provisional measures with regard to confidentiality issues in international investment arbitration, this difference was of “mainly technical nature and does not carry any substantial practical relevance for the present case” (para. 64). The Tribunal expressly based the Order on its power to determine the conduct of proceedings under Rule 19, ICSID Arbitration Rules.

The Tribunal began its consideration of the issue by agreeing with the statement by the Tribunal in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* that:

In the absence of any agreement between the parties on this issue, 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. (para. 121 of Procedural Order No. 3 of 29 September 2006)

After discussing various authorities, the *Beccara* Tribunal outlined the following general approach:

72. In the light of the above considerations, whilst the Tribunal shares the view that transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration, it also believes that transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings. Further, transparency considerations may not prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party’s domestic law.

73. In conclusion, the Tribunal deems that the ICSID Convention and Arbitration Rules do not comprehensively cover the question of the confidentiality/transparency of the proceedings. Thus, in accordance with Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules, unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

With respect to the record of the proceedings, the Claimants had requested that the entire proceedings be covered by a general duty of confidentiality allowing only the disclosure by the Parties of “general updates on the status of the case” (para. 77). For its part, Argentina submitted that there is no general rule of confidentiality governing ICSID arbitration proceedings. The Tribunal viewed Argentina’s conduct in submitting expert opinions and transcripts from other proceedings as suggesting that the “Respondent does not consider any such documents to be subject to any restriction, unless they relate to sealed proceedings” (para. 78).

The Tribunal disagreed with the positions of both Parties, stating that although there is no general duty of confidentiality, parties do not have a “carte blanche” to disclose information or documents issued or produced in the proceedings (para. 79). Rather, a more contextual approach is required:

80. Depending on the information and documents at stake, different considerations of confidentiality, transparency, public information, equality of the Parties’ rights, orderly conduct of the proceedings and other procedural rights and principles may apply, requiring a differentiated treatment.

Applying this approach, the Tribunal ordered that:

(i) Subject to further specific restrictions on disclosure of specific documents and information as set out herein, 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 antagonize 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 No. 3.

(ii) No confidentiality restriction shall apply to the publication of the award and its content.

(iii) In the absence of any specific contrary ground, no confidentiality restriction shall be imposed on orders or directions of the Tribunal, including this Procedural Order No. 3.

(iv) Minutes and records of hearings of the present proceedings shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs.

(v) Pleadings, written memorials and other written submissions of the Parties (including correspondence between the Parties and the Tribunal on substantive issues), as well as witness and experts statements attached thereto shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs.

(vi) Documents and exhibits submitted with pleadings, written memorials and/or other written submissions of the Parties shall be subject to the restrictions contemplated in §§ 109-110 above unless the Parties otherwise agree, or the Tribunal otherwise directs.

(vii) Correspondence between the Parties and the Tribunal which does relate to the mere conduct of the case shall be restricted.

In addition, the Tribunal ordered that Argentina be given access to the information in the Claimants’ database subject to certain terms and conditions aimed at protecting personal data. Further, the tribunal ordered that the expert reports and transcripts from other treaty arbitration not be admitted as evidence.

Comment

Although the Order raises a series of important issues (such as the application of home state privacy laws to protect confidential Claimant information (paras. 121-133); the use of materials from other international arbitrations (paras. 136-152); and, as highlighted by Tribunal, the power and authority of the Tribunal to order the continuation of confidentiality restrictions beyond the conclusion of the proceedings (para. 120), my comment focuses on the restriction on disclosure of pleadings, written memorials and other written submissions of the Parties.

The Tribunal's reasons for restricting disclosure of pleadings is as follows:

101. Pleadings and written memorials are likely to contain references to and details of documents produced pursuant to a disclosure exercise, and their uneven publication or distribution carry the risk of giving a misleading impression about these proceedings.

102. Indeed, based on their function and aim, pleadings and memorials of a Party often present a one-sided story of the dispute. Their publication therefore carries the inherent risk to give an incorrect impression about the proceedings. This would not only thwart public information purposes, but would further antagonise the Parties and aggravate their differences. In the present proceedings, this risk is further accentuated by the fierce tone of some of the Parties' submissions.

103. Under these circumstances, the Tribunal concludes that – at this stage of the proceedings – the need to preserve a constructive atmosphere allowing the proper unfolding of the arbitration requires restricting publication of the Parties' pleadings, written memorials and other written submissions, including correspondence between the Parties and the Tribunal on substantive issues (see further below § 114-116).

104. The same restriction applies to witness and expert statements attached to pleadings and written memorials, the publication of which would carry the same risk of giving a misleading impression about the proceedings.

In general, I agree with the Tribunal's differentiated treatment approach set out in para. 80 above. There are legitimate reasons why disclosure of certain materials maybe inappropriate—for instance, restrictions to protect confidential information or for the protection of the interests of third parties, such as witnesses, who may be exposed to harassment or intimidation. But, with the greatest respect to the Tribunal, the view that publication of the pleadings carries a *risk* of incorrect impressions and thus of antagonizing and aggravating the Parties' differences is not a particularly good reason to justify restricting a party from disclosing its own pleadings (subject to redaction for any confidential information). Restricting sovereign states from disclosing their legal pleadings in an arbitration governed by public international law on the basis of unsubstantiated risks is not likely to enhance public confidence in the investment treaty arbitration.

The Tribunal rightly states: “that transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings.” (para. 72). Yet, the only evidence cited in the Order of risks to the integrity of the arbitration proceedings

is the “fierce tone” of some of the Parties’ submissions (para. 102) and allegedly erroneous information regarding the status of the arbitration proceeding in an Italian newspaper (para. 35). This is a very scant record on which to justify the differentiated treatment approach espoused by the Tribunal in para. 80. It is not a very balanced “solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents” (para. 73).

References to the risk of aggravation from disclosure are not to my mind particularly compelling in light of the experience of the NAFTA Parties, where disclosure of pleadings is the norm. There appears to be little or no evidence that disclosure has had any negative impact on Chapter Eleven arbitrations.

In situations where there are no express confidentiality obligations, I would argue that the party making a request for disclosure restrictions should have to substantiate on a balance of probabilities that there is a real risk of aggravation of the dispute, that the disclosure will compromise the integrity of the arbitration proceedings or there is a likelihood of harm to a third party. To my mind, the risk of misinformation is not a sufficient basis to impose restrictions to which the parties have not agreed.

Although I disagree with the Tribunal’s application of its contextual differentiated treatment approach, I would emphasize that the Tribunal’s Order addresses confidentiality comprehensively and systematically, distinguishing between different types of materials. The Order addresses confidentiality issues in a nuanced manner and recognizes that the Parties retain the right to engage in general discussion about the case in public. No confidentiality restrictions are imposed on Tribunal orders, directions or the award. Further, restrictions are subject to party agreement, or as the Tribunal otherwise directs. Therefore, either party is at liberty to request that particular documents be exempted from the general restrictions.

Finally, in *Beccara*, even though Argentina submitted that there is no general rule of confidentiality governing ICSID arbitration proceedings, it should be noted that Argentina has not made its pleadings or expert opinions in its legion of investment treaty arbitrations publicly available. Argentina, thus, is not the aggrieved poster child for transparency in investment treaty arbitration. If it wants the advantage of submitting materials from other investment treaty arbitrations in its ongoing arbitrations, perhaps it should make them all public.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



Wolters Kluwer

This entry was posted on Wednesday, March 3rd, 2010 at 7:08 am and is filed under [Arbitration Institutions and Rules](#), [Arbitration Proceedings](#), [Investment Arbitration](#), [Other Issues](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.