Dissenting Opinion in respect to Procedural Resolution No. 1 on Confidentiality

Ricardo Ramírez Hernández

1. I agree with the majority's decision that the legal provisions applicable in this case do not impose a general rule of confidentiality or transparency for these proceedings. For the same reason, I share the majority's view that this Tribunal must seek a solution that protects both the interests of transparency emphasized by the Respondent, as well as the specific confidentiality interests advocated by the Claimant.

2. Although I agree with the criterion stated by the majority, I do not share the manner in which this criterion has been applied in the present case.

3. The majority's decision indeed establishes a presumption of confidentiality by prohibiting the Parties from disclosing: (i) the transcripts or minutes of the hearings; (ii) the documents submitted by the Parties in this proceedings; (iii) the pleadings or written memorials of the Parties and their annexes; and (iv) the correspondence relating to these proceedings (exchanged between the Parties or between the Parties and the Tribunal). The Parties preserve the right to request this confidentiality restriction to be lifted or modified, but any such request must be justified. This presumption clearly responds to a general interest of confidentiality. Nevertheless, I consider that this presumption is being applied in a broad and unrestricted manner, without the Tribunal having exercised any form of prior control. This can hardly be characterized as a "solution" that protects the interest of both Parties, and much less as a balance struck between the interests of transparency and the interests of confidentiality.

4. It is true that the majority's decision authorizes the Parties to participate in public discussions about the general aspects of this arbitration. This narrow space for the disclosure of information was even requested by the Claimant as an exception to the confidentiality clause it had proposed.[19] The Claimant referred to the potential need to disclose general information to its subsidiaries and affiliates, shareholders, managers, advisors or auditors, stock markets, financial or market analysts or to the media. I believe that the majority's decision responds solely to the Claimant's interests and ignores the interests indicated by the Respondent.

5. When adopting a presumption of confidentiality, the majority fails to explain why a transparency request should be justified, whereas a request for confidentiality does not require justification. If, as asserted by the majority, neither the APPRI nor the Arbitration Rules (Additional Facility) provide for an obligation of confidentiality or an obligation of transparency, the need for justification would apply equally to both requests for transparency as well as

[19] Claimant's submission of 15 April 2013, p. 2.

requests for confidentiality. The absence of an obligation of confidentiality would give rise to an equally legal valid presumption of transparency.

6. I suppose, if one follows the criterion set out in the majority's decision, that the majority assessed the different interests involved and concluded that, in this case, the interests of confidentiality prevail over the interests of transparency. However, this type of analysis is only reflected in the majority's assessment of the possibility for the Parties to participate in general discussions about the case. In that part of its decision, the majority characterises its solution as one that reconciles the interests of the Parties and also addresses the legitimate concern of the Respondent that it must be allowed to provide information to the public about this arbitration. This characterisation is not precise at all. As noted earlier, the Claimant also requested authorization to discuss the case publicly in a general manner. Looking at this aspect of the majority's decision together with the broader restriction on the disclosure of information in other circumstances, the majority's decision reflects, in essence, the Claimant's position, and could hardly be characterised as a solution that tends to the interests of both Parties.

7. Notwithstanding the foregoing, the majority's decision contains no indication whatsoever as to how it took into account the different interests to which the Parties referred. Nor is there any indication of the reasons that led the majority to put the interests of confidentiality above the interests of transparency in this case. The majority's decision simply opts for confidentiality with respect to all other aspects of the proceedings without explaining why confidentiality should prevail over transparency in this case.

8. Moreover, [the majority] did not explain why the Respondent's proposal, which gives the Tribunal the same power to decide when the parties have failed to reach an agreement with respect to the confidentiality of a particular document, would not be valid. Had the majority opted for transparency, unless a party justified the need for confidentiality, the Tribunal would also have retained control and it would have provided the same level of flexibility.

9. Unlike prior cases in which the same issue was analysed, the Respondent proposed a mechanism to safeguard all confidential information submitted in this dispute. This mechanism was based "on a practice that had its origin in the North American Free Trade Agreement".[20] The majority correctly observed in its Decision that neither the NAFTA nor Mexican law are applicable to the present dispute. I also agree with the majority that it is not possible to directly "import" a procedure that is derived from another international instrument that was not executed by both Parties to the dispute.

10. However, I assume that the Respondent's proposal was intended to address the legitimate interest of protecting confidential information, as requested by the Claimant, while at the same time addressing the valid interest of transparency with respect to all other information submitted during these proceedings. Said proposal was simply not analysed. It seems contradictory that the Tribunal would have the authority to issue this Decision, but not to consider the Respondent's proposal as a basis for designing a mechanism that would provide a

[20] Respondent's submission of 18 April 2013, p. 1.

real balance between both interests. Particularly since the Claimant, neither in its submissions nor during the hearing argued that the mechanism proposed by the Respondent would be ineffective to safeguard its interests in maintaining the confidentiality of certain information.

11. The only two reasons given by the Claimant to reject the procedure proposed by the Respondent were that the procedure was "onerous", and that the information "could not be disaggregated". In other words, the reasons given by the Claimant for rejecting the procedure proposed by the Respondent do not relate to the criterion established by the Tribunals in *Beccara et al v. Argentine Republic* (Beccara) and *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, since this balance would have been safeguarded by the mechanism proposed by the Respondent. Furthermore, it seems to me that there should have been an assessment of the merits of the Claimant's arguments regarding "practicality", such as the argument that the process would be too onerous or that the information cannot be disaggregated.

12. In regard to the first argument, I believe that the Claimant should have explained and justified why it would have been onerous to comply with the procedure proposed by the Respondent. The burden that transparency puts on the parties cannot not be used as a general excuse to reject a transparency request. More so when, as in this case, the party that proposes confidentiality fails to provide any evidence to support its position. Following this reasoning, all requests for transparency could be denied through the subterfuge that any procedural mechanism to protect confidential information is onerous.

13. With respect to the alleged difficulties to classify or segregate information, I do not see why this reason must prevail over transparency in these proceedings. The redaction of documents is a common practice in domestic and international proceedings, particularly for international companies that have experienced counsel such as those who appear in these proceedings.

14. Finally, albeit not related to the procedure proposed by the Respondent, the Claimant referred to the fact that the disclosure of information about this arbitration could exacerbate the dispute. I agree that this reason has been used in previous arbitrations to justify the confidentiality of the proceedings. However, I believe that for this reason to apply, one has to prove the existence of a reasonable risk that the dispute will be exacerbated if information about the case is disclosed. As mentioned earlier, the Respondent proposed a mechanism to protect confidential information that the Claimant did not question. Presumably, such information would be protected from public disclosure and therefore, would not exacerbate the dispute. As for the information that is not confidential in nature, the Claimant complains about certain instances in which the Respondent allegedly disclosed certain information about these proceedings.[21] Regardless of the fact that the Respondent contests these facts and, even under the assumption that these allegations were true, I believe that the standard of proof in such circumstances would require a party to demonstrate that, in the context of the dispute, there is a reasonable risk that the disclosure of information could exacerbate the dispute. No evidence was presented in this case to suggest that there is a reasonable risk that public disclosure of information would exacerbate the dispute.

[21] Claimant's submission of 15 April 2013, pp. 7-10

15. The Tribunals that originally examined the issue of transparency in ICSID proceedings had two options. The first was to determine that, in the absence of explicit rules on transparency, every proceeding would be confidential, unless otherwise provided. The other option was to develop a standard requiring the weighing of the two interests, that is, the interest of confidentiality and the interest of transparency. These Tribunals preferred the second option. Their decision, in my opinion, is an acknowledgement of the fundamental value that transparency has for these kind of proceedings. As stated by the Tribunal in Beccara, "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…".[22]

16. This reasoning is, in my view, even more relevant today when disputes of this nature are under intense scrutiny by the public. I would like to clarify that transparency does not mean that the right to protect certain information in particular circumstances should not exist. Parties must have the opportunity to protect information of a confidential nature, for example information which disclosure could give an advantage to a competitor or information that qualifies as a trade secret. I am convinced that Tribunals can adopt mechanisms that protect such information while, at the same time, provide more transparency to the proceedings.

17. The public has the right to know –protecting at all times, of course, the information that is genuinely considered to be confidential– the actions of their governments and investors, as well as the manner in which they are defended. For this reason, transparency provides legitimacy to both to the investor's claims and the State's defence. Transparency generates certainty, ignorance panic. Transparency, therefore, can be a means to pave the way and facilitate a better development of these proceedings and to avoid a situation in which these proceedings are judged by the public in the dark. For all of these reasons, I cannot subscribe a Decision that goes in the opposite direction.

[Signed in the original by Lic. Ricardo Ramírez Hernández, Arbitrator]

[22] *Giovanna A. Beccara et al v. Argentine Republic* (now *Abaclat et al v. Argentine Republic*) at para. 72. [Quote omitted] Own translation.

ANNEX A

Procedural Schedule

Procedural act	Date (2013-2014)
Claimant's Memorial	20 September
Respondent's request for documents	4 October
Claimant's objections to Respondent's request for documents	11 October
Respondent's Reply	18 October
Tribunal's Decision (approximate date)	25 October
Counter-Memorial	7 February
Claimant's request for documents	21 February
Respondent's objections to Claimant's request for documents	28 February
Claimant's Reply	7 March
Tribunal's decision (approximate date)	14 March
Reply	18 April
Respondent's request for documents	2 May
Claimant's objections to Respondent's request for documents	9 May
Respondent's Reply	16 May
Tribunal's Decision (approximate date)	23 May
Rejoinder	27 June
Claimant's request for documents	11 July
Respondent's objections to Claimant's request for documents	18 July
Claimant's Reply	25 July
Tribunal's decision (approximate date)	1 August
Hearing (Provisional dates)	2nd or 3rd week of September