School of International Arbitration, Queen Mary,
University of London

International Arbitration Case Law

Academic Directors: Ignacio Torterola &
Loukas Mistelis[*]

GIOVANNA A BECCARA AND OTHERS
V.
THE ARGENTINE REPUBLIC
(ICSID CASE NO. ARB/07/5 – PROCEDURAL ORDER NO. 3)
CONFIDENTIALITY ORDER

Case Report by Amal Bouchenaki & Mildred Ojea[**]
Edited by Andrea Saldarriaga[***]

A Procedural Order dated 27 January 2010 analyzing confidentiality issues under ICSID for three disputed types of material: disclosure to the public of information regarding the ongoing case; access to a database which includes information regarding claimants' nationalities; and admissibility of potentially confidential materials (specifically, expert opinions and transcripts) produced or issued in other arbitral proceedings to which Respondent was a party.

Tribunal: Prof. Pierre Tercier (President; replacing Dr. Robert Briner), Albert Jan van den Berg, Georges Abi-Saab.

Claimants' Counsel: White & Case LLP.

Defendant's Counsel: Procuración del Tesoro de la Nación.

[*] Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

[**] Amal Bouchenaki is Of Counsel in the Arbitration Practice at Gibson, Dunn & Crutcher LLP. Mildred Ojea is a Senior Associate in the Arbitration and Latin American Practice at Gibson, Dunn & Crutcher LLP.

[***] Andrea Saldarriaga is a consultant on Investment Law and International Arbitration.

INDEX OF MATTERS DISCUSSED

Digest

1. Facts of the Case

The confidentiality issues arise in the context of a dispute against Respondent Argentine Republic ("Argentina" or "Respondent") in relation to bonds allegedly issued to Italian citizens, on which Respondent defaulted. After defaulting on its external debt, Argentina restructured its debt and launched an exchange offer, under which bondholders could swap their bonds for new debt. Claimants did not participate in the exchange offer and Argentina disputed the right to be compensated in relation to the bonds that were not submitted to the exchange offer. As a result of Argentina's refusal to compensate Claimants for those bonds, Claimants initiated ICSID arbitration on September 14, 2006, pursuant to the Argentina-Italy bilateral investment treaty (BIT). During the document production phase of the arbitration, issues arose regarding the confidential nature of some of the documents requested. At the request of the parties and pursuant to ICSID Rule 19, the Tribunal addressed the issues in a Procedural Order 3 dated January 27, 2010.

The confidentiality issues arise in three forms:

a) Claimants alleged that Respondent's position and actions showed that Respondent considered it could disclose and use the confidential information from the ongoing arbitration. The Claimants pointed to, among others, an article in the Italian press that contained statements that "mimic those in Respondent's written pleadings and correspondence" (¶ 35). Therefore, Claimants believed that Respondent's position demanded a confidentiality order from the Tribunal to protect the personal information of the Claimants.

b) Respondent demanded complete data from Claimants in a format easily accessible for Respondent, describing the Claimants' status as natural or juridical persons, and their national identity. The data existed as a database created by "Task Force Argentina"—an organization assisting in the management of Italy's bondholders claim—which collected personal information of all those wishing to consent to the ICSID arbitration. This information was later compiled by a leading provider of informational technology services in Italy into an online Database. While Claimants had produced to Respondent much of the data already, Claimants argued that the remaining part—additional information and documents relating to the nationalities of the persons in the database—would violate Italian and European data privacy laws. Claimants considered that the Tribunal should apply Italian and European law to determine this question because the ICSID Convention and Rules did not ensure sufficient protection of personal information. Before it would give complete access to Respondent to the online Database, Claimants demanded that it sign a confidentiality

agreement, which Respondent rejected as being overly broad or unnecessary—even for Italian law. Respondent further argued that ICSID confidentiality rules were sufficient, and, failing that, it would consent to sign only a narrower agreement.

c) Respondent submitted for admission "supplemental exhibits" which included 21 expert opinions and transcripts from other treaty arbitrations against Argentina. Claimants argued that presenting such opinions and transcripts "ignore[ed] … any confidentiality protections in the proceedings" (¶ 29). Claimants further argued that the use of these documents would violate the principle of fairness and equality of the parties, because Claimants did not have access to these other proceedings—the documents could be taken out of context and the Claimants could not recreate the environment in which the experts gave their testimony. Claimants also note that Respondent's cavalier use of this confidential information foreshadowed how it might use Claimants' own confidential data.

Respondent, on the other hand, sustained that the expert opinions and transcripts it submitted were relevant, wholly appropriate for impeachment purposes, timely filed and went directly to the credibility and consistency of the witnesses and experts that Claimants presented. Responded also argued that the material it sought to introduce had not been submitted in sealed proceedings, was presented in full and not produced 'selectively' or 'out of context.' Respondent finally argued that there is "no provision in the ICSID Convention or in the ICSID Arbitration Rules establishing a general principle of confidentiality or a confidentiality rule applicable to the kind of documents submitted by Argentina." (¶ 51)

2. *Legal Issues Discussed in the Decision*

(a) Confidentiality in ICSID arbitrations generally (¶¶ 52-73)

The Tribunal considered its power to rule on the confidentiality issue describing the provisions to be considered: (i) Provisions on Provisional Measures (Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules) and (ii) Provisions on Procedural Orders (Rule 19 of the ICSID Arbitration Rules). The Tribunal also noted that presently there is no uniform practice relating to the use of "orders" or "provisional measures" in connection with confidentiality issues in international investment arbitration. Although the members of the Tribunal also held different views on this issue, they all agreed that in this case the questions arising relate to the rules applicable to the conduct of the proceedings and can therefore appropriately be addressed by an order under the terms of Rule 19 of the ICSID Arbitration Rules.

After analyzing ICSID case law (the panel noted that while it is not bound by previous decisions of other tribunals, it finds value in contributing to the harmonious development of investment law), the tribunal determined that while ICSID does not have a general confidentiality requirement, it is not a stranger to confidentiality in certain situations.

The tribunal acknowledged a "general ... trend towards transparency in investment arbitration…" (¶ 67). It concurred with the opinion on confidentiality in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 of September 29, 2006 § 21, which stated that while there is no general duty of confidentiality in ICSID, there is also "no requirement for transparency or non-confidentiality." The tribunal also listed several limitations on specific aspects of confidentiality and privacy in the ICSID Convention and the Administrative and Financial Regulations and the Arbitration Rules.

However, despite the lack of certain rules and despite desiring to generally promote transparency, the Tribunal identified important limiting principles on disclosure, so that:

i. Public disclosure and discussion of a case should be limited to "'what is considered necessary,'" (¶ 70, citations omitted);

ii. "[T]ransparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings" (¶ 72); and

iii. "[T]ransparency considerations may not prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party's domestic law" (*id.*).

To pursue these principles, the Tribunal decided that instead of "imposing a general rule in favour or against confidentiality", it must examine confidentiality issues on a case by case basis, trying to "achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents" (¶ 73).

(b) Confidentiality of the arbitration proceedings (¶¶ 77-120)

As for public discussion and disclosure of the arbitral proceedings, the Tribunal rejected both party's extreme approaches (restricted disclosure of general updates on the status of the case versus full disclosure). Instead, the tribunal voiced the need to distinguish between different types of documents and information when establishing any disclosure restrictions. Thus, the Tribunal ordered that the parties could discuss in public the proceedings generally, but only to the extent necessary, and not so as to antagonize each other, exacerbate the dispute, or disrupt the resolution process.

With respect to the award, the Tribunal noted the parties' agreement to publish the award. The Tribunal indicated that the publication of certain annexes submitted by Claimants, relating in particular to their identity, as Annexes to the award, would be determined at a later stage of the proceedings.

In the case of decisions, orders and directions of the Tribunal (other than awards), the Tribunal followed the principle stated in the Biwater case that presumption should be in favour of allowing disclosure of these documents. The Tribunal shared the considerations of the Biwater case that publication of decisions, orders and directions "will be less likely to aggravate or exacerbate a dispute, or to exert undue pressure on one party than publication of parties' pleading or release of other documentary materials." (¶ 90). In addition, the Tribunal noted that various factors of the case supported such disclosure, in particular, the position of the parties with respect to publication of the award and the possibility to publicly discuss the proceedings generally. The Tribunal further considered that Claimants' desire for confidentiality is diluted by the 180,000 claimants that in principle have access to all the records in the proceedings. Thus, the Tribunal decided not to restrict the disclosure of any of its decisions, orders or directions.

Minutes and records of the hearings and the parties' pleadings, memorials, attached exhibits, and other written submissions would, on the other hand, be restricted. With respect to the minutes and the records of the hearings, the Tribunal indicated that the relevant ICSID rules "establish the principle that the content of hearings, as well as minutes and other records of such hearings should not be disclosed to third parties unless the Parties so agree." (¶ 96). In addition, the Tribunal noted that the minutes and pleadings are more detailed, and thus might contain more vulnerable information, also risking to further antagonise the parties. Moreover, the potential publication of minutes and records may influence the attitude of participants at the hearing, and eventually endanger the potential development of the arbitration. Correspondence among the parties and the Tribunal relating to the mere conduct of the case would likewise be restricted as it generally involved narrow procedural matters not in the public interest.

The Tribunal noted that 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." (¶ 101) Consequently, their publication would "thwart public information purposes" and further antagonize Parties and aggravate their differences (¶ 102). Finally, the Tribunal adopted specific principles for the disclosure of exhibits and other documents submitted in support of Parties' pleadings. The Tribunal further noted that in light of the variety of such documents, "the door for diverging case-by-case decisions must therefore remain open." (¶ 111)

The Tribunal decided that the restrictions imposed on disclosure would last until the conclusion of the proceedings unless otherwise agreed between the Parties or ordered by the Tribunal.

(c) Confidentiality of Claimants' database (¶¶ 121-135)

As for the database, "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" (¶ 121). Thus, the Tribunal looked to Italian and European Union data privacy laws. These laws allow transfer of data to other countries if they have comparable laws, as Argentina does. However, because the controller of the data must comply with Italian law and European Union directives' safeguard obligations, it has the right to require certain additional controls. Thus, the Tribunal ordered Claimants to give full access to the database to Respondent, but with a set of particular rules of use of the information in the database, as well as of the confidential information already provided to Respondent.

(d) Admissibility of documents from prior, otherwise unrelated arbitrations (¶¶ 136-151)

In opposition to the admissibility of various documents from previous arbitrations, the Claimants made two arguments: (1) the documents were confidential and (2) their alleged selective use out of context would disturb the principle of equality of the parties. Respondent argued that the documents did not originate in sealed proceedings, and would be necessary for impeachment purposes.

As for confidentiality, the Tribunal turned to the confidentiality directions in the arbitrations from which the documents came. One exhibit, produced in *BG Group PLC v. Republic of Argentina,* was covered by a confidentiality order. Respondent argued that the challenge mounted against the BG Group award before the District Court or the District of Columbia had lifted the confidentiality of the arbitration record. The tribunal disagreed and considered that confidentiality had been lifted only on those exhibits that were part of the court record. Accordingly, the exhibit was not admitted.

For the remaining exhibits, the Tribunal balanced the "Respondent's right of defense … with (i) Claimants' right to equality of arms and (ii) the general interest of ensuring the integrity of the procedure and in particular the finding of the truth" (¶ 143).

The tribunal found that the expert opinions and transcripts of oral examination "could not be transposed one to one" because, other than statements of general principles, these opinions were rendered in other arbitrations, under different BITs, subject to different laws, and involving different Claimants, as well and legal and factual issues. Additionally, Claimants cannot investigate the full context of the opinions, "since the full

records of these proceedings are not freely accessible to the Claimants and the Tribunal" (¶ 147).

Moreover, the Respondent's need of them was not great; the documents contained the expert opinions of well-known professors; their positions on relevant issues can be easily and fairly obtained elsewhere (such as from their writings, from their expert opinions submitted in this case, or from Respondent's cross-examination of these experts).

3. Decision

The Tribunal decided to restrict public disclosure of some materials from the proceedings—minutes, pleadings and their exhibits, and correspondence—but not others—general discussion of the case (if not done to antagonize the parties) and the publication of the award and its content. Respondent would receive access to the Claimants' database, subject to the Tribunal's restrictions. Finally, Respondent was not permitted to submit any of their proposed exhibits pulled from other arbitrations.