Biwater Gauff (Tanzania) v. United Republic of Tanzania: Using Confidentiality to Undermine Meaningful *Amicus-Curiae* Participation

James Chalker

On 29 September 2006, the tribunal in *Biwater Gauff (Tanzania) v. United Republic of Tanzania* (*Biwater*) issued Procedural Order No. 3, imposing certain confidentiality requirements on the parties. The claimant, Biwater Gauff (Tanzania) Ltd. (Biwater Gauff), requested provisional measures requiring the parties to "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[.]"[1] Specifically, Biwater Gauff asked the tribunal to order the parties to "refrain from disclosing to third parties" arbitral "[p]leadings[,]" documents produced as part of the arbitration's disclosure process, and correspondence between the parties and the tribunal "exchanged in respect of the arbitral proceedings."[2] The claimant also requested the tribunal to order that, failing to agree between themselves, the parties refer to the tribunal the publication "of all Decisions other than the Award made in the course of the proceedings[.]"[3]

In cloaking the arbitration in confidentiality,[4] the *Biwater* tribunal utilized quasi-common law to exercise power it did not have under the tribunal's constitutive document, the ICSID Convention or its arbitration rules and in the process demonstrated a severe misunderstanding of the growing trend of transparency despite recognizing that trend's existence. The tribunal's conclusion that its "overall procedural powers and its responsibility for its own process[]"[5] empowered it to order the parties to keep all arbitration-related materials confidential rests upon a flimsy assortment of dicta-like material from other arbitral cases, statutory material unrelated to investor-state arbitration or the *Biwater* matter, secondary material, itself not supported with legal authority, and amazingly, a reference to unpublicised arbitral decisions. Remarkably, while the tribunal dresses its decision in the trappings of common-law-like analysis, it ignores a long-standing arbitral decision directly on point, preferring its hodgepodge analysis of vaguely-related materials, peppered with suggestive and misleading notions. This abandonment of basic transparency is all the more troubling because the tribunal used it to undermine meaningful *amicus-curiae* participation.

Biwater and Quasi-Common Law

Under the ICSID Convention's Article 47, "[e]xcept 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**."[6] This article makes clear that a tribunal should recommend provisional measures only if it is

---

[1] *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, Procedural Order No. 3, 29 September 2006 (*Biwater*, P.O. 3), paragraph 12, available at http://www.worldbank.org/icsid/cases/arb0522_procedural_order3.pdf.

[2] *Biwater*, P.O. 3, para. 12 b-d.

[3] *Biwater*, P.O. 3, para. 12 a.

[4] *Biwater*, P.O. 3, para. 163 (a) i-iv (ordering the parties to refrain from "disclosing to third parties:[] the minutes or record of any hearings;[] any of the documents produced in the arbitral proceedings by the opposing party[…];[] any of the Pleadings or Written Memorials (and any attached witness statements or expert reports); and any correspondence between the parties and / or the Arbitral Tribunal exchanged in respect of the proceedings."

[5] *Biwater*, P.O. 3, para.135.

[6] ICSID Convention, Article 47 (emphasis added).

necessary to preserve a party's rights. This article provides no other grounds for this provisional-measure power. Rule 39 of the Arbitration Rules addresses provisional measures. Rule 39 (1) authorizes a party to request provisional measures "at any time" and like the convention makes clear that the requested provisional measures are "for the preservation of its rights[.]"[7] The *Biwater* tribunal acknowledged that the claimant based its confidentiality request on Article 47 and Rule 39 (1),[8] but then promptly ignored both that article and its corresponding rule, relying on an alleged power "to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute."[9] *Biwater* offered no authority for this power and did not argue that this power was in any way related to the preservation of a party's rights.

Instead of inquiring into what rights, if any, were implicated by the claimant's request, the *Biwater* panel called for "a careful balancing between two competing interests: (i) the need for transparency in treaty procedures such as these, and (ii) the need to protect the procedural integrity of the arbitration."[10] From the start of its analysis, the tribunal labelled transparency and procedural integrity as "competing interests[.]" It neither adequately demonstrated that transparency is in competition with procedural integrity, nor looked at the role which transparency plays in furthering procedural integrity. Instead it assumed the concepts competed with each other and then utilizing evocative language, unsupported by legal authority, concluded that procedural integrity required limitations on transparency.

In its analysis of transparency, the tribunal noted "a marked tendency towards transparency in treaty arbitration."[11] It found no provisions in either the BIT or the ICSID Convention or Rules imposing a duty of confidentiality on the parties, including nothing requiring the parties to keep confidential "pleadings, documents or other information submitted by the parties during the arbitration."[12] The tribunal pointed to certain provisions which it argued "required (subject to contrary agreement) the privacy of the arbitral hearing" but stressed that these "provisions focus on the actions of ICSID and arbitral tribunals, and do not expressly address the actions of the parties themselves."[13] Looking to other investor-state international arbitration regimes, the ICSID Additional Facility, NAFTA and UNCITRAL, the *Biwater* panel showed that each rejected any confidentiality obligation by the parties to an arbitration. The tribunal concluded its transparency discussion with, "[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."[14]

While it found an impetus toward transparency in general, the *Biwater* panel ignored the transparency issues implicated by the parties' dispute. The Dar es Salaam Water Supply and Sanitation Project (project) is a World Bank project backed with over $143 million in

---

[7] ICSID, Rules of Procedure for Arbitration Proceedings, Rule 39 (1).
[8] *Biwater*, P.O. 3, paras. 109-111.
[9] *Biwater*, P.O. 3, para. 135.
[10] *Biwater*, P.O. 3, para. 112.
[11] *Biwater*, P.O. 3, para. 114.
[12] *Biwater*, P.O. 3, paras. 116, 121 and 125.
[13] *Biwater*, P.O. 3, para. 124 citing ICSID Convention, Article 48 (5) (providing "[t]he Centre Shall not publish the award without the consent of the parties."), Regulation 22 (2) of the Administrative and Financial Regulations (permitting ICSID's secretary-general to publish, *inter alia*, awards and minutes with the parties' consent), Rules 32 (2) of the Arbitration Rules (authorizing the tribunal to open the hearing to persons other than those associated with the parties unless one of the parties objects.
[14] *Biwater*, P.O. 3, para.133.

development bank funding.[15] The claimant's project entity, City Water, was awarded about $20 million in goods supply and consultation contracts for the project.[16] The World Bank has identified this project as supporting the Millennium Development Goal (MDG) of ensuring environmental sustainability (MDG 7).[17] Specifically Target 10 of MDG 7 calls for the "[h]alving by 2015 the proportion of people without sustainable access to safe drinking water and basic sanitation." This is of particular importance in Dar es Salaam, as the World Bank acknowledges that it is "a city prone to cholera outbreaks or other water-borne diseases[.]"[18] Hence, the World Bank also recognizes that this project contributes to human development and health.[19] This project's link to MDG 7 and Target 10 is most direct, but given the centrality of water and sanitation to human existence and the interlinked nature of the MDGs, it has implications for all eight of these "time-bound targets for overcoming extreme poverty and extending human freedom."[20] The importance of this project to achieving the MDGs places even more weight in favour of transparency, than the tribunal acknowledged.

Having set up a balancing test between transparency and procedural integrity, without demonstrating that the two concepts opposed each other and then finding heavy weight in favour of transparency, the tribunal launched into its claim of power, declaring that "[i]t is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute."[21] The tribunal believed that this power could stem from a specific grant, making reference to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, "or simply as a facet of the tribunal's overall procedural powers and its responsibility for its own process."[22] Since there is no such grant of power in the *Biwater* matter, one can only conclude that the tribunal's confidentiality order is based on its "overall procedural powers and its responsibility for its own process." Despite the *Biwater* panel's contention that such power is "now settled", a term evocative of a common-law system, it offers no authority, not one case or treaty provision, that demonstrates how the existence of this power is "settled."

Again, without providing any authority, the *Biwater* tribunal offered a number of "aspects" of procedural integrity and non-aggravation of the dispute, ranging from those concerned with the proper functioning of the panel, like "ensur[ing] the orderly unfolding of the arbitration process[,]" to those which appear to be well outside of the tribunal's abilities, like

---

[15] Dar es Salaam Water Supply and Sanitation Project, Financial, available at http://web.worldbank.org/external/projects/main?Projectid=P059073&Type=Financial&theSitePK=258799&pagePK=64330670&menuPK=64282135&piPK=64302772 (indicating International Development Association, a World Bank entity, financing of $61.5 million, African Development Bank financing of $48 million and European Investment Bank financing of $34 million).

[16] Dar es Salaam Water Supply and Sanitation Project, Contractor: City Water Services Ltd/Biwater/Gauff, available at http://web.worldbank.org/external/projects/main?pagePK=233757&piPK=233763&theSitePK=40941&Supplierid=112727.

[17] Dar es Salaam Water Supply and Sanitation Project, Implementation & Results, available at http://web.worldbank.org/external/projects/main?pagePK=233757&piPK=233763&theSitePK=40941&Supplierid=112727 .

[18] Dar es Salaam Water Supply and Sanitation Project, Overview, available at http://web.worldbank.org/external/projects/main?Projectid=P059073&Type=Overview&theSitePK=258799&pagePK=64283627&menuPK=64282134&piPK=64290415.

[19] Dar es Salaam Water Supply and Sanitation Project, Implementation & Results, *supra* note 17.

[20] United Nations Development Program, Human Development Report 2006, 22-24.

[21] *Biwater*, P.O. 3, para.135.

[22] *Biwater*, P.O. 3, para.135.

"minimi[sing] the scope for any external pressure on any party, witness, expert or other participant in the process[.]" It is the last "aspect" which is most important to the tribunal's argument for its confidentiality order, namely "avoid[ing] 'trial by media'."[23]

The *Biwater* tribunal offered no authority for the position that investment-treaty arbitral tribunals have the power to "avoid 'trial by media[.]'" Nowhere does the tribunal explain even what it means by the notion of trial by media instead relying on vague warnings given in misleading and qualified language, such as:

> It is self-evident that the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure.[24]

Calling something "self-evident" is no replacement for finding legal support for it, and tribunal's use of "or" and "may" so qualify its statement as to make it meaningless. The use of the word "prosecution" is also telling, as it evokes a criminal law process, but ICSID disputes are not prosecuted; they are arbitrated. A survey of legal and general English language dictionaries alike confirms that the word "prosecution" is most often, almost overwhelmingly, associated with bringing criminal charges against a person. Whatever danger there may be of "trial by media" in criminal prosecutions, the *Biwater* tribunal did nothing to show how the dispute before it or any previous investor-state arbitration had, or even could have been, undermined by media coverage. Nor did the tribunal explain why its three members simply could refrain from viewing any materials relating to the dispute that were not submitted to the tribunal as part of the arbitral process. This would have been a far simpler solution than hiding the arbitration documents from the public.

Acknowledging the public interest "that accurate information about the parties' dispute and its resolution is broadcast," the tribunal expressed concern that this was difficult, "while an arbitration is ongoing, and an arbitral record has yet to be completed."[25] The panel expressed agreement with language it cobbled together from two separate NAFTA disputes, writing:

> that "*it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings* [the parties] *were both to limit public discussion of the case to what is considered necessary*" (Loewen, § 26), "… *subject only to any externally imposed obligation of disclosure by which either of them may be legally bound*" (Metalclad, § 10).[26]

The portion of this assertion attributed to *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (*Loewen*) comes from that dispute's procedural history in its jurisdictional decision. That overview indicated that the respondent initially filed a request "that all filings in this matter, not excluding the minutes of proceedings, be treated as open and available to the public."[27] The tribunal denied this

---

[23] *Biwater*, P.O. 3, para.135.
[24] *Biwater*, P.O. 3, para.136.
[25] *Biwater*, P.O. 3, para.137.
[26] *Biwater*, P.O. 3, para.138 (italics, parenthesis and ellipses in original).
[27] *Loewen* 24.

"request to the extent that it sought to bring about a situation in which the Tribunal or the Secretariat makes available to the public all filings in this case."[28] Then the *Loewen* tribunal recounted how it had rejected claimant's argument that the parties were obligated to keep the proceedings confidential and had closed its decision with the portion of the language quoted by the *Biwater* tribunal.[29] The language and sentiment from *Metalclad* regarding "externally imposed obligations" is absent from *Loewen*. Regardless, neither *Loewen* nor *Metalclad* support the *Biwater* tribunal's contention that it has the power to issue confidentiality orders.[30]

An early ICSID arbitration, *Amco Asia Corp. v. Indonesia*, handled a similar request for provisional measures much differently than the *Biwater* tribunal. In *Amco Asia*, the respondent, Indonesia, requested the tribunal to recommend "[t]hat claimants take no action of any kind which might aggravate or extend the dispute submitted to the Tribunal, and in particular that they abstain from promoting, stimulating or instigating the publication of propaganda presenting their case selectively outside this Tribunal [… .]"[31] The *Amco Asia* tribunal, looking to Article 47 and Rule 39 (1) found that the party seeking provisional measures needed to specify what "rights in dispute" it was seeking to preserve. In denying the request for provisional measures, it quickly concluded that not even "a large press campaign" could have any "influence on rights in dispute[.]"[32] Although it cited *Amco Asia* for the point that ICSID arbitration enjoyed no general principle of confidentiality,[33] *Biwater* utilized provisional measures without so much as acknowledging that it was departing from requirement that those measures relate to protecting a party's rights, as recognized by *Amco Asia* over two decades ago.

To Tanzania's justified argument that the requested confidentiality order would be unprecedented under ICSID arbitration, the tribunal responded, "there are a number of instances in which such recommendations have been made — albeit not all publicised — and the underlying rights and interests are now well accepted."[34] Certainly the tribunal did not identify any publicised ICSID or other investor-state arbitration where a confidentiality order was issued, and the reference to unpublicised recommendations leaves one wondering how the tribunal knows about them if they were unpublicised. It is strange that a tribunal expressing concern about the integrity of the process would suggest that unpublicised decisions could serve as precedent. Unpublicised recommendations should not be cited because their content, or even their existence, cannot be verified, which is especially important when one considers the misuse the tribunal makes of published decisions.

Biwater and Meaningful *Amicus-Curiae* Participation

In putting the arbitration's pleadings under lock and key, the Biwater tribunal took some comfort in the temporary nature of its provisional measures. "Once the arbitration has finally concluded," explained the tribunal, "most restrictions would not normally continue to apply.

---

[28] *Loewen* 25.
[29] *Loewen* 26.
[30] Likewise the *Biwater* tribunal's citation of C. Schreuer's argument that "[t]he purpose of provisional measures is to induce behavior by the parties that is conducive to a successful outcome of the proceedings […] and generally keeping the peace" is not persuasive as it is not supported with any authority. Biwater 139 citing C. Schreuer, *The ICSID Convention: A Commentary*, p. 746.
[31] *Amco Asia*, 1.
[32] *Amco Asia*, 3.
[33] *Biwater*, P.O. 3, para. 126.
[34] *Biwater*, P.O. 3, para. 141.

While the proceedings remain pending, however, there is an obvious tension between the interests in transparency and in procedural integrity."[35] It seems that in making this statement the tribunal was forgetting about *amicus-curiae* participation, which seems particularly strange because it had demonstrated awareness that such participation was likely. If a system is going to allow for *amicus-curiae* participation, would not procedural integrity demand that potential *amici* have access to the pleadings, the claims and responses, in order to determine if their participation is warranted?

One might have expected the tribunal to modify its confidentiality order in the face of an *amicus-curiae* petition, but the tribunal did not. In granting several nongovernmental organizations *amicus-curiae*, i.e. non-disputing party, status, the Biwater tribunal demanded that they make bricks without straw, refusing them access to the pleadings.[36] In granting the petitioners the right to file a fifty-page brief, the tribunal limited the scope of their participation by keeping the materials of the dispute off limits to them. In so doing the tribunal misidentified the role of *amicus-curiae* participation, envisioning:

> that the Petitioners will address broad policy issues concerning sustainable development, environment, human rights and governmental policy. *These, indeed, are the areas that fall within ambit of Rule 37(2)(a) of the ICSID Rules.* What is *not expected*, however, is *that Petitioners* (a) will consider themselves as simply in the same position as either party's lawyers, or (b) that they *will see their role as suggesting to the Arbitral Tribunal how issues of fact or law as presented by the parties ought to be determined* (which is the sole mandate of the Arbitral Tribunal itself).[37]

Contrary to the tribunal's contention, Rule 37 (2) (a) says nothing about limiting *amicus-curiae* participation to broad policy areas. Rule 37 (2) (a) describes the role of *amicus curiae* as to "assist the Tribunal in the determination of a factual or legal issue related to the proceeding[,]" precisely what the *Biwater* tribunal argued it is not.

To make sure the petitioners did not stray into any "legal issue related to the proceedings" the tribunal barred them from access to the proceeding's pleadings, ordering that they rely on "[t]he broad policy issues" as reported "in the public domain" for their fifty-page brief.[38] What in Procedural Order 3 was a "media campaign" and "media interest" that posed "a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some form of control[,]"[39] became, in Procedural Order 5, good enough to serve as the basis for the Petitioners' fifty-page brief.[40] Even if news reports are enough to alert a potential *amicus curiae* to the existence of a dispute, it would need to examine the claims and responses to determine if it could "assist the Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[41] The contracting parties to the ICSID Convention, in

---

[35] *Biwater*, P.O. 3, para.140
[36] *Biwater* Procedural Order 5 (*Biwater*, P.O. 5) 68.
[37] P.O. 5, 64 (emphasis added) in addition to its misinterpretation of Rule 37 (2) (a) found in part (b) of this statement, the tribunal's discussion of lawyers in part (a) is strange given that what is at issue is the rights of parties and the meaningful participation of non-parties, regardless of whether they are represented by lawyers.
[38] *Biwater*, P.O. 5, para. 65.
[39] *Biwater*, P.O. 3, para. 146.
[40] *Biwater*, P.O. 5, para. 65.
[41] ICSID Arb. Rules 37 (2) (a).

adopting Rule 37 (2)[42] have indicated that they want *amicus curiae* to address "factual or legal issues related to the proceeding[,]" but the *Biwater* tribunal made it impossible for the petitioners in this matter to do so.

One of the tribunal's duties under the ICSID Convention is to ensure that an *amicus-curiae* "submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party,"[43] but the tribunal's confidentiality order has undermined this duty. Under the tribunal's scheme, the petitioners submitted a fifty-page brief, of limited value, since they did not have access to the claims and responses of the parties.[44] An *amicus-curiae* submission composed in the dark really cannot achieve the objective set out in Rule 37 (2), and therefore having the parties take time to consider it is, at least arguably, a disruption of the proceedings.

At an "evidential hearing" a couple of weeks following the *amicus-curiae* submission, the tribunal asked the parties, "whether they considered that any further intervention of the Amici was necessary."[45] The parties having answered this question in the negative, i.e. "that no further intervention of the Amici in these proceedings is necessary", the tribunal apparently brought a close to *amicus-curiae* participation in the *Biwater* dispute. Should *Biwater* prove the model for implementing Rule 37 (2), then *amicus-curiae* participation in ICSID arbitration will prove hollow and do little to further the legitimacy of the process. ICSID tribunals are not public-relations firms, and they are not capable of handling document-management issues. As interest in *amicus-curiae* participation grows there will be challenges in ensuring a timely and orderly arbitral process. Potential *amici curiae* need to be able to review an investor's claim and the state's response, evaluate whether their participation is warranted and then, if they decide to participate, hone their arguments in on the "factual or legal issue" about which they want to provide their expertise to the tribunal. The *Biwater* process will not allow for this, will waste the parties' time and resources by having them consider *amicus-curiae* submissions of, at best, limited value, and has the potential to plunge the tribunal into the morass of document management.

---

[42] ICSID Convention, Articles 4 and 6 (1) (c).

[43] ICSID Arb. Rules 37 (2) (final paragraph).

[44] *Biwater*, P.O. 5, para. 60 (a); the Petitioners' brief can be found here: http://www.iisd.org/investment/, note that the petitioners acknowledge the limitations on the value of their submission resulting from P.O. 5, paras. 12-14.

[45] *Biwater*, Procedural Order 6 (P.O. 6), 25 April 2007, paras. 1, 3, it is strange that the tribunal used the term "intervention" to describe the role of the *amici curiae*. Nowhere in the ICSID Convention or Rules is the term "intervention" used and it is certainly not used to describe the role of *amici curiae.* In the U.S. legal system "intervention" is where a third party joins an already-existing lawsuit as a litigant. This has nothing to do with *amicus-curiae* participation, as amici curiae are by definition non-disputing parties. Given that at least one of the arbitrators is highly trained in U.S. law, it is hard to know whether this was just a poor word choice or whether the tribunal was making some sort of statement.