Dissenting Opinion on Confidentiality relating to Procedural Resolution No. 1

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1. I agree with the position set out by the majority in its decision that legal provisions applicable in this case do not establish a general rule of confidentiality or of 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 underscored by the Claimant.

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

3. The majority's decision establishes, *de facto*, a presumption of confidentiality by prohibiting Parties from disclosing: (i) the records 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 maintain the right to request the lifting or modification of this confidentiality restriction, but all such requests must be duly justified. This presumption clearly responds to a general interest of confidentiality. Nevertheless, I consider that this presumption is being applied in an overly broad and unlimited manner, without prior control having been exercised by the Tribunal. 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 decision of the majority authorizes the parties to participate in public discussions about general points relates to this arbitration. This narrow space for the disclosure of information was also requested by the Claimant as an exception to the confidentiality clause it had proposed.[1] The Claimant referred to the potential need to disclose information of a general nature to its affiliates and subsidiaries, shareholders, management, advisors or auditors, the stock market, financial or stock analysts or to the media. I believe that the majority's decision responds solely to the interests of the Claimant and ignores the interests identified by the Respondent.

5. When adopting a presumption of confidentiality the majority does not explain why a request for confidentiality does not have to be duly justified and the request for disclosure would. If, as stated by the majority, the bilateral investment treaty and the Arbitration Rules (Additional Facility) do not 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 requests for confidentiality. The absence of an obligation of confidentiality would give rise, with the same equal legal force, to a presumption of transparency.

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

6. Presumably, following the standard set out in the majority's decision, the majority assessed the different interests involved and conclude that, in this case, the interests of confidentiality prevails over the interests of transparency. However, this type of analysis is only reflected in the assessment that the majority makes regarding the possibility that the Parties 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 position of the Claimant and could hardly be characterised as a solution which responds to the interests of both Parties.

7. Irrespective of the above, the majority's decision does not indicate how it weighs 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 decision of the majority simply opts for confidentiality with respect to all other aspects of the proceedings without explaining why confidentiality prevails over transparency in this case.

8. Moreover, the majority does not provide reasons why it did not consider the Respondent's proposal appropriate, despite the fact that it granted the Tribunal the same responsibility to decide when there is no agreement between the parties with respect to the confidentiality of a particular document. Had the Tribunal 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. In contrast to prior arbitrations in which the same issue was discussed, the Respondent proposed a mechanism to safeguard any confidential information submitted in this dispute. This mechanism was based "on a practice that had its origin in the North American Free Trade Agreement".[2] The majority correctly observes in its Resolution that neither 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 to which both Parties are not signatories.

10. However, I understand that the Respondent's proposal was intended to address the legitimate interest in 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. This proposal was simply not analysed. It seems contradictory that the Tribunal would have the authority to issue this Resolution but not the authority to consider the Respondent's proposal as a basis for designing a mechanism that would provide a real balance between both interests. This is particularly the case here given that the Claimant, in either its submissions or at

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

the hearing, did not challenge the fact that the mechanism proposed by the Responding party, if adopted, would effectively 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 "too burdensome", and that the information "could not be disaggregated". In other words, the reasons given for rejecting the procedure proposed by the Respondent do not relate to the standard established by the Tribunals in *Beccara and Others v. The Argentine Republic* (Beccara) and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, because 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 "practical" arguments, such as the allegations that the procedures would be too burdensome or that the information could not be disaggregated.

12. As regards the first argument, I believe that the Claimant should have provided reasons and duly justified why it would have been too burdensome to comply with the procedures proposed by the Respondent. The fact that something is burdensome could not be used as a general excuse to reject a request for transparency. This is particularly the case where, as in these proceedings, the party that proposes confidentiality does not present a single piece of evidence to sustain its position. Following this reasoning, all requests for transparency could be denied with the pretext that any procedural mechanism to protect confidential information is burdensome.

13. With respect to the alleged difficulties involved in classifying or segregating information, I fail to see on what basis this reason must prevail, in this case, over transparency. The redaction of documents is a common practice in domestic and international proceedings, particularly for international companies that have experienced counsel such as is the case in these proceedings.

14. Finally, although not related to the procedures 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. In my view, however, this reason should only apply where a reasonable risk has been demonstrated 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 challenge. Presumably, such information would be protected from public disclosure and, consequently, could not be a reason for the exacerbation of the dispute. As for the information that is not of a confidential nature, the Claimant refered to certain instances in which the Respondent allegedly disclosed certain information about these proceedings.[3] Irrespective of the fact that the Respondent contests these facts and, even if we assume that this was correct, I believe that the standard of proof in such circumstances would require a party to demonstrate that, given the context surrounding the dispute, there is a reasonable risk that the disclosure of information could exacerbate the dispute.

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

No evidence was presented in this case to suggest that there is a reasonable risk that public disclosure of information would exacerbate the dispute.

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 types of interests, that is, the interests of confidentiality and the interests of transparency. These Tribunals preferred the second option. In doing so, I understand them to have recognized the fundamental value that transparency has for these kinds of proceedings. As stated by the Tribunal in Becarra, "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…".[4]

16. This reasoning is, in my view, even more relevant today when disputes of this nature are under intense scrutiny by Society. Let me be clear, transparency does not mean that there is no right to protect certain information in particular circumstances. Parties must have the possibility to protect information that is confidential in nature, for example information where disclosure could give an advantage to a competitor or, information that qualifies as a trade secret. I am completely convinced that Tribunals can adopt mechanisms that protect such information while, at the same time, providing more transparency to the proceedings.

17. Society has a right to know – of course protecting at all times 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 can provide legitimacy both to the claims of the investor as well as to the defence of the State. 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 that Society renders a judgement, in the dark, about these proceedings. For all of these reasons, I cannot join a Resolution that goes in the opposite direction.

[4] *Giovanna A. Beccara and Others v. The Argentine Republic* (now *Abaclat and Others v. The Argentine Republic*) at para. 72.