

Biwater Gauff (Tanzania) Limited
v. United Republic of Tanzania
(ICSID Case No. ARB/05/22)

Introductory Note to Three Procedural Orders

The proceeding in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* is an illustration of the complex procedural background that is often present in investment arbitration. The case involved three requests for provisional measures, two joint submissions regarding requests for production of documents and a petition seeking *amicus curiae* status. In addition to other pleadings, these applications generated 16 briefs and five ensuing procedural orders over a period of a little more than a year. This note introduces three of the orders: (a) No. 1 of March 31, 2006 concerning the Claimant's first request for provisional measures; (b) No. 3 of September 29, 2006 concerning the Claimant's second request for provisional measures; and (c) No. 5 of February 2, 2007 concerning a petition to file a non-disputing party submission (*amicus curiae*). The orders dealt with important procedural questions, such as the dividing line between an order for provisional measures under Article 47 of the ICSID Convention recommending provision of evidence and an order for production of documents under Article 43 of the Convention (Procedural Order No. 1); the balance between the need for transparency and the need to protect procedural integrity concerning confidentiality issues in treaty arbitrations (Procedural Order No. 3); and the scope of new ICSID Arbitration Rule 37(2) regarding submissions of non-disputing parties (Procedural Order No. 5).

The case concerns a water and sewerage infrastructure project in Dar es Salaam, Tanzania. A successful bid for the operation and management of the water and sewerage system submitted by a British-German joint venture led to the establishment of the Claimant as an investment vehicle incorporated in England and Wales. In turn, the Claimant established a local Tanzanian company, City Water Services Limited (City Water), which in 2003 concluded certain agreements with a Tanzanian public corporation, the Dar es Salaam Water and Sewerage Authority (DAWASA), to implement the project. In May 2005, following discussions to resolve a dispute between City Water and DAWASA,

City Water initiated contractual arbitration proceedings. Subsequently, a series of events led to the alleged deportation of City Water's senior management, as well as the seizure of City Water's assets and takeover of its business by DAWASA and the Respondent. On August 5, 2005, the Claimant submitted a request for arbitration to ICSID, invoking breaches of the Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of 1994 and the Tanzanian Investment Act of 1997.

A. Procedural Order No. 1 of March 31, 2006 Concerning the Claimant's First Request for Provisional Measures

The Claimant's first request for provisional measures was contained in its request for arbitration, which was registered by ICSID on November 2, 2005. The Arbitral Tribunal, composed of Bernard Hanotiau (President), Gary Born and Toby Landau, thus dealt with the request for provisional measures as soon as it was constituted and heard oral arguments in this respect at the first session of the Tribunal on March 23, 2006.

The purpose of the request was to preserve, and to give the Claimant access to, documentation relating to the bank accounts and assets of City Water which had allegedly been seized by DAWASA and the Respondent during the takeover of City Water's business. The measures sought included the provision of an inventory of documents. The Claimant argued that the measures requested were necessary and urgent because there was a risk of loss or destruction of the documents. It stated that the documents were also necessary in order for the Claimant to be able to assess its claim for damages, and that the right to be preserved thus concerned a procedural right to the preservation and production of evidence.

The Respondent objected that the Claimant had not shown that there was a need for the measures because it had not lost or destroyed any relevant documentation and did not intend to do so. It argued that the request would prejudice the merits of the case as, in the Respondent's view, most of the assets were not the property of City Water under a contractual clause between City Water and DAWASA which the Tribunal would need to consider. It also argued that it was out of place to request production of evidence as a provisional measure, because it would circumvent the procedural mechanism that the parties had agreed to in regard to production of documents.

The Tribunal first observed that the ambit of its power to recommend provisional measures under Article 47 of the ICSID Convention is very broad and involves protection of both procedural and substantive rights. It considered

uncontroversial the fact that its powers include preservation of evidence and concluded that it was appropriate in the circumstances to recommend that the Respondent preserve documents and provide an inventory of categories of documents. The Tribunal added that, from the point of view of case management, the compilation of an inventory of documents was likely to facilitate an anticipated document production exercise.

However, the Tribunal saw more controversial its powers to recommend production of documents as a provisional measure, as actual production is catered for under Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules. The Tribunal was in any event not satisfied that there was any right threatened in regard to the production of documents because it had already ordered their preservation. It did however consider the request under Article 43 of the Convention as it held that there might be case management reasons which justify the granting of the request ahead of the planned document disclosure procedure. It allowed the production of one of the categories of documents (concerning City Water's Bank accounts) which it found specifically identified, narrow and of relevance and materiality to the issues in dispute. In allowing the request, the Tribunal mentioned as case management advantage that there would be more time to resolve the issue whether or not the documents existed and were in the Respondent's possession, custody or control. The Tribunal rejected the other requests for production concluding that they should properly be addressed during the document disclosure procedure.

B. Procedural Order No. 3 of September 29, 2006 Concerning the Claimant's Second Request for Provisional Measures

Following a procedural order regarding the production of documents which the Respondent posted on an internet website together with the minutes of the first session of the Tribunal, the Claimant submitted a request for provisional measures seeking to ensure the confidentiality of these and other documents in the proceeding. The Claimant was concerned, in particular, that the parties' pleadings, documents produced in disclosure procedures and correspondence in the case be disclosed to third parties. The Claimant stated that the rights to the maintenance of procedural integrity and non-aggravation of the dispute were threatened by the Respondent's unilateral disclosure of documents, and warranted protection by way of a provisional measures recommendation. It claimed that the measures were necessary and urgent because of increasing pressure by third parties seeking to bring about a discontinuance of the ICSID case or otherwise interfering with the process, and because the Respondent had indicated that it would publish documents from the proceedings.

The Respondent stated that the Claimant had failed to show that the rights to procedural integrity and non-aggravation of the dispute were threatened. It argued that truthful information to the public was not capable of causing harm to a party's protected rights under the ICSID Convention and Rules. The Respondent supported the view that a practice had formed from the trend in investment treaty arbitration toward greater transparency, as reflected in the amended Arbitration Rules applicable to this case, in that documents from ICSID proceedings are widely and routinely available. While the Respondent stated that it would treat certain documents as confidential when justified, it contested that it had an obligation to seek the Claimant's permission to publish any document from the case, as it had consistently pressed for the greatest possible transparency.

Having identified the competing interests of the need for transparency and the need to protect procedural integrity, the Tribunal first held that there was neither any general duty of confidentiality nor any general rule of transparency in ICSID arbitration proceedings. However, the Tribunal found that, given the significant media coverage of this case, there was a sufficient risk of aggravation or exacerbation of the dispute "to warrant some form of control." It therefore considered each category of documents balancing both interests of procedural integrity and transparency and issued an order directed to both parties recommending that they refrain from disclosing minutes or records of hearings, documents produced by either party in disclosure procedures, pleadings and correspondence, but that they were free to "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 antagonise 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"(para. 163(d) of the Order). Although the Tribunal indicated that it would be in favor of allowing publication of its decisions, orders and directions, it concluded that it would make a case-by-case determination upon a party's request for the disclosure of such category of documents. It held in this regard that Procedural Order No. 3 was subject to no confidentiality restrictions.

C. Procedural Order No. 5 of February 2, 2007 Concerning a Petition for Amicus Curiae Status

In November 2006, five non-governmental organizations filed a "Petition for *Amicus Curiae* Status" contending that the case involved issues related to

sustainable development, environment, human rights and governmental policy in which they hold expertise. The parties had agreed on the application of the ICSID Arbitration Rules adopted on April 10, 2006, which contain provisions on submissions of non-disputing parties (Arbitration Rule 37(2)). The non-disputing parties thus claimed that (i) their submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) that their submission would address a matter within the scope of the dispute; and (iii) that they have a significant interest in the proceeding. They also requested access to the key arbitral documents and to the oral hearings.

The Claimant objected to the petition as it considered the concerns factually and legally irrelevant to the issues to be decided by the Tribunal and that it was late. It also objected to the request for access to documents and hearings. The Respondent did not oppose the petition.

The Tribunal first stressed that a permission to participate as a non-disputing party did not entitle such party to any procedural rights and privileges but “a specific and defined opportunity to make a particular submission.” Having considered each of the conditions under Arbitration Rule 37(2), the Tribunal concluded that it may benefit from a submission by the petitioners and that allowing such submission would also secure wider confidence in the arbitral process. However, the Tribunal pointed out that the non-disputing party submission must not disrupt the proceeding or unduly burden any party, as provided under Arbitration Rule 37(2). Therefore, the Tribunal set up a process for the petitioners to file a limited submission without exhibits, for the parties to file replies and for further procedural directions by the Tribunal after the hearing on jurisdiction and the merits. The Tribunal rejected the non-disputing parties’ request to attend the hearing as the Claimant had objected to their presence under new ICSID Arbitration Rule 32(2). The Tribunal also held that, for the time being, the broad policy issues that the petitioners were expected to address should not require disclosure of documents from the proceeding, but that the decision might be revisited after the hearing. Following the filing of the non-disputing party submission and the hearing, the Tribunal decided that no further intervention of the *amici* in the proceeding was necessary.

This was the first petition of its sort filed under the new provisions of ICSID Arbitration Rule 37(2). In addition to considering these provisions, the Tribunal referred to the decisions in an UNCITRAL and an ICSID case:

Methanex Corporation v. United States of America and *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*.¹ In both cases, the tribunals allowed *amicus* submissions under certain conditions at a later stage of the proceedings.²

The text of the three procedural orders, issued in English, is also posted in PDF format on ICSID's website. The case is still pending before the Centre.

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¹ See *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* of January 15, 2001, available at <<http://www.state.gov>>; and *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* of May 19, 2005, [English original] 21 ICSID Rev.—FILJ 342 (2006).

² See, in particular, the Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *Amicus Curiae* Submission of February 12, 2007 in *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, available on ICSID's website at <www.worldbank.org/icsid>).