

Use of the Media by Counsel in Investor-State Arbitration

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I. INTRODUCTION

Many observers would suggest that the single most significant development in international investment arbitration is the increasing transparency of the process. Traditionally it was assumed that international investment arbitration, like commercial arbitration, was private. Bilateral investment treaties (BITs) rarely addressed the nature of arbitration other than to make it available in principle, to designate broadly applicable procedural rules, and to assign arbitrators wide discretion where there was a lacuna in those rules.¹ In turn, the applicable rules usually assumed closed proceedings and arbitral practice followed suit. Hearings were attended only by the parties, their counsel, witnesses, arbitrators and necessary service providers. Pleadings were inaccessible to non-participants and tribunal awards were rarely available in the public domain. Requests to participate by *amici* were unheard of.

The traditional assumption that investor-State arbitration would be conducted in private seems to have been just that: an assumption, taken for granted by all involved in the process. In recent years the appropriateness of closed proceedings in investor-State arbitration has been debated, and in many instances, reversed by practice, treaty

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The views expressed in this paper are personal views of the authors and are not offered as official views of ICSID.

1. See, e.g., Art. 10 of the Belgium-Luxembourg/Malaysia BIT; Art. 8 of the UK/Senegal BIT; Art. 10 of the Singapore/Sri Lanka BIT; Art. 10 of the Hungary/Switzerland BIT; Art. IX of the Italy/Philippines BIT; Art. 9 of the Hungary/Finland BIT. See also, Art. 44 of the Convention on the Settlement of Disputes between States and National of Other States (the ICSID Convention) which gives tribunals the power to decide questions of procedure that are not covered by the Arbitration Rules or otherwise agreed on between the parties. Similarly, tribunals have the power to conduct arbitrations in such manner as they consider appropriate under Art. 15 of the UNCITRAL Arbitration Rules.

interpretation or formal rule amendment.² The media has played a key role in this debate by challenging the assumptions supporting closed arbitral proceedings and by advocating for full transparency. In turn, increased transparency in the system has complemented and encouraged continued media coverage of this field.

II. THE BROADER CONTEXT

A number of shifts in the global environment set the stage for the increased role of the media in investment arbitration. However, two phenomena deserve special mention.

First, the cultural phenomenon of the information age has altered virtually every aspect of communication, including communication about investment arbitration. The development of the internet, followed by the advent of the World Wide Web, has enabled unprecedented access to information and its transfer on a global scale. We live in a time when there are vast sources of information (some reliable and some not), information is usually available for free or at low cost, it is distributed with lightening speed and is received by virtual and actual audiences around the world.

Second, there has been a proliferation in the number of concluded BITs. The United Nations Conference on Trade and Development (UNCTAD) reports that the number of BITs rose to 2,676 by the end of 2008,³ from 1,857 in 1999,⁴ and that “[t]he most dramatic increase took place during the 1990s, when their number quintupled”.⁵ Investor-State arbitration clauses have become standard in most BITs, including Model BITs.⁶ Many new BITs expressly address transparency in the arbitral process, and allow

2. See, for example, NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 21 July 2001, available at <www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en>; ICSID Secretariat, “Possible Improvements of the Framework for ICSID Arbitration”, Discussion Paper, 22 October 2004. See also, *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures of 9 December 1983, 1 ICSID Rep. (1993) 410, 412; *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, para. 13. Amokura KAWHARU, “Public Participation and Transparency in International Investment Arbitration: *Suez v. Argentina*”, 4 N.Z. Y.B. Int’l L. (2007) p. 159; Christina KNAHR, “The Role of Non-state Actors in International Investment Arbitration”, 32 S. Afr. Y.B. Int’l L. (2007) p. 455.

3. See UNCTAD, “Recent Developments in International Investment Agreements (2008-June 2009)”, IIA Monitor No. 3 (2009) International Investment Agreements, UNCTAD/WEB/DIAE/IA/2009/8, p. 2, available at <www.unctad.org/en/docs/webdiaeia20098_en.pdf>.

4. UNCTAD, “Bilateral Investment Treaties 1959-1999”, UNCTAD/ITE/IIA/2 (2000) p. 1, available at <www.unctad.org/en/docs/poitiiad2.en.pdf>.

5. *Ibid.* See also, UNCTAD, “Recent Development in International Investment Agreements (2008-June 2009)”, IIA Monitor No. 3 (2009), UNCTAD/WEB/DIAE/IA/2009/8, available at <www.unctad.org/en/docs/webdiaeia20098_en.pdf>.

6. See Arts. 22 (Claim by an Investor of a Party on Its Own Behalf) and 23 (Claim by an Investor of a Party on Behalf of an Enterprise) of the Canada 2004 Model BIT; Art. 7 (Settlement of disputes between an investor and a Contracting Party) of the France 2006 Model BIT; Art. 10 (Settlement of disputes between a Contracting State and an investor of the other Contracting State) of the Germany 2008 Model BIT; Art. 9 (Settlement of Disputes Between an Investor and a Contracting

open hearings, public access to case documents, and non-disputing participation. More BITs, combined with increased international investment flows, have led to an increase in the number of investor-State disputes.⁷ For instance, the caseload of the International Centre for Settlement of Investment Disputes (ICSID) rose to 280 cases by the end of 2008, more than four times what it was in 1999 (69 cases).⁸ By May 2010, ICSID had registered its 315th case.⁹

The combination of the information age and the increase in BITs and BIT litigation has engaged media interest in this field and resulted in significant media coverage of investment arbitration. This coverage has come from a variety of sources and expressed a number of perspectives.

III. THE NATURE OF MEDIA COVERAGE IN INVESTMENT ARBITRATION

Broadly speaking, one can isolate three types of media that are active in investor-State arbitration: mass media, advocacy media and specialized media.¹⁰ Mass media relays news regarding any subject matter to the general public. The most familiar means of mass media communication are electronic (television, radio and internet) and print (newspapers, journals, and magazines) media. The topics addressed by mass media are usually of interest to the public at large or at least to a significant portion of their audience. The treatment of a topic in mass media tends to be on a more general or descriptive, rather than technical or detailed, level.

Mass media coverage of investment arbitration was stimulated by the initial NAFTA Chapter Eleven cases, filed in the mid and late 1990s.¹¹ These cases claimed large amounts of damages from the respondent States, and many challenged high-profile government measures, such as the cross-border transport and disposal of PCBs (*Myers v. Canada*),¹² construction and operation of a hazardous waste landfill in rural Mexico (*Metalclad Corp. v. Mexico*),¹³ or a ban on the gasoline additive, MTBE (*Methanex Corp. v.*

Party) of the India 2003 Model BIT; Art. 24 (Submission of a Claim to Arbitration) of the 2004 US Model BIT, all available at <<http://ita.law.uvic.ca/investmenttreaties.htm>>.

7. See Barton LEGUM, "Trends and Challenges in Investor-State Arbitration", 19 *Arbitration International* (2003, no. 2) p. 143.
8. See The ICSID Caseload – Statistics available at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>>.
9. See <<http://icsid.worldbank.org/ICSID/FrontServlet>>.
10. The authors acknowledge that these categories are generalizations, but offer them as a helpful shorthand to describe the different media in this area and as a way to think about the topic.
11. These cases are *Ethyl Corp. v. Canada* (1997), *Pope & Talbot v. Canada* (1998), *S.D. Myers v. Canada* (1998), *Metalclad Corp. v. Mexico* (1996), *Azinian v. Mexico* (1997), *Feldman v. Mexico* (1998), *Waste Management v. Mexico* (1998), *Loewen v. United States* (1998), *Methanex v. United States* (1999) and *Mondev v. United States* (1999).
12. See *S.D. Myers, Inc. v. Canada*, Partial Award of 13 November 2000, paras. 88-128.
13. *Metalclad Corporation v. Mexico* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, paras. 28-69.

United States).¹⁴ Media coverage of these cases was not restricted to the facts and legal issues in each case; it also focused on perceived deficiencies in the process of investor-State arbitration, and the extent to which information about a case was unavailable in the public domain. It critiqued what was characterized as a closed adjudication system allowing unknown and non-appointed judges to make decisions potentially affecting people to whom the process gave no input or appeal. At a minimum, the media saw this as an anomaly when contrasted with the presumption of open courts in most democratic States.¹⁵

For example, The New York Times published several articles reporting on *Metalclad Corp. v. United Mexican States*,¹⁶ criticizing the secrecy of its proceedings. One article reported:

“...[a] three-person panel, composed of arbitrators picked by the opposing sides, operates with broad latitude and almost complete institutional secrecy. Its sessions are private, its actions cannot be appealed except in limited circumstances, and its decisions may not be publicized unless the principals involved choose to make them known.”¹⁷

Another article, under the headline “Nafta’s Powerful Little Secret”, began as follows:

“... [t]heir meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.”¹⁸

A documentary on PBS entitled “Trading Democracy” took the same perspective. The narrator introduced the story by explaining that,

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14. *Methanex Corporation v. United State*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II, Chapter D, paras. 1-25.
 15. See, Andrea J. MENAKER, “Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration” in Katia YANNACAS- SMALL, ed., *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010) p. 131; See also, Meg KINNEAR, “Transparency and Third Party Participation in Investor-State Dispute Settlement”, presentation to Symposium Co-organized by ICSID, OECD and UNCTAD (12 December 2005, Paris) p. 2.
 16. *Metalclad Corporation v. Mexico* (ICSID Case No. ARB(AF)/97/1).
 17. Anthony DEPALMA, “International Business; Mexico Is Ordered To Pay a U.S. Company \$16.7 Million”, The New York Times (31 August 2000). See also, Evelyn IRITANI, “Canadians Sue Over NAFTA Bias Clause; Trade Activists, Labor Leaders Claim Pact’s Chapter 11 Favors Private Firms at the Expense of Citizens”, Los Angeles Times (29 March 2001).
 18. Anthony DEPALMA, “Nafta’s Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say”, The New York Times (11 March 2001).

“... almost no one heard about one obscure section of NAFTA – Chapter 11 – except for multinational corporations who are using it to challenge democracy... Today, foreign companies are exploiting Chapter 11 to attack public laws that protect our health – and our environment – even to attack the American judicial system.... Secret NAFTA Tribunals can force taxpayers to pay billions of dollars in lawsuits filed by corporations against the United States.... NAFTA’s Chapter 11 threatens radical changes in public policy. But it’s all happening out of sight. Citizens have no seat at the table.”¹⁹

Similar observations have been made by the mass media in relation to non-NAFTA cases. These reiterate concerns about the secrecy of the process, unknown qualifications of arbitrators, large awards of damages and the potential to protect foreign investment at the expense of domestic policy prerogatives.²⁰

The early emphasis by mass media on critiques of the investor-State process at large has been supplemented by coverage of individual investment arbitrations in the mass media. This type of coverage focuses on the facts of a particular case, specific holdings by a tribunal, or reports on a series of cases against a single State, rather than on the general discipline of investor-State arbitration. For example, the series of cases against Argentina arising out of its fiscal crisis in the late 1990s was carefully and frequently reported on in the Argentine press.

A second category of media coverage of investment arbitration can be termed advocacy media. Advocacy media not only describes the phenomenon of investor-State arbitration or a particular case, but also aims to persuade the reader to see the topic in a certain way or to draw conclusions urged by the author. Advocacy media coverage often extends its commentary to alleged linkages of investment arbitration with other areas of public policy such as health, the environment, public safety or public services. Some advocacy reporting takes the view that BITs and investor-State arbitration interfere with State sovereignty, fail to account for legitimate policy goals, benefit the (foreign) few over the (domestic) many and adversely affect the public good. A substantial portion of advocacy media critiques the closed nature of investor-State procedure, similar to critiques in the mass media.²¹

A third type of media coverage has grown up around arbitration generally, and often focuses on investment arbitration. This specialized media is subject-matter specific and usually reports on technical legal issues such as procedural mechanisms, the latest case holdings or the views of counsel and arbitrators involved in leading cases. It is usually

19. “Bill Moyers reports: *Trading Democracy*”, <www.pbs.org/now/printable/transcript_tdfull_print.html>.

20. Michael PEEL and Jane CROFT, “Arbitration: case closed”, *Financial Times* (15 April 2010).

21. See, for example, the June 2008 press release by the Center for International Environmental Law and the International Institute for Sustainable Development calling for the revision of the UNCITRAL commercial arbitration rules to support transparency requirements for investment arbitration: “CIEL and IISD call for an end to an era of secrecy in investor-State arbitration: UN body must support transparency in new arbitration rules”. CIEL web at <www.ciel.org/Tae/Investor_Secrecy_27Jun08.html>.

directed to an audience with some interest in, and knowledge of, the topic and its coverage is often more in-depth than that of mass or advocacy media.

The traditional expression of the specialized media is through academic legal texts and periodicals. There has been a vast increase in publication of specialized investment texts in the last twenty years, including publication of awards, surveys of investment law and procedure, annotations of relevant treaties and rules, and edited compilations of articles on investment arbitration. Much of this publication is found exclusively on internet sites such as <http://naftalaw.org> or <http://ita.law.uvic.ca>.

A more recent variation of specialized media in international investment arbitration has been the development of publications that look not just at the law, but also at the influences on the law and those who are professionally involved in arbitral practice. A good example of this type of publication is Global Arbitration Review (GAR). GAR relays investment (and other) arbitration news, and tracks developments in the legal and arbitral profession such as appointments to tribunals or career movements of professionals in law firms. Some media outlets, such as the Oil, Gas, Energy, Mining, Infrastructure and Investment Disputes forum (OGEMID) or the Kluwer investment blog, go even further to serve as an almost “real-time” forum for the exchange of information and ideas. The Transnational Dispute Management (TDM) site states its mandate “[t]o provide intelligence on [investment arbitration] developments.... [It] is ... a combination of newsletter, review-journal, internet service and primary materials database....”²² Likewise, Investment Treaty Arbitration (ITA) “serves as a resource for lawyers, academics, government officials, researchers and members of the public who are interested in international investment law”.²³ The Investment Arbitration Reporter (IARReporter) describes itself as a “news and analysis service focusing on cross-border lawsuits between foreign investors and their host governments. [It] specializes in tracking and chronicling so-called investor-state arbitrations, [which, although] confidential in nature ... may have major financial, legal and policy impacts.”²⁴

Specialized media have become an indispensable source of investment arbitration information and jurisprudence. The variety of these outlets, the quantity of information they offer and the speed with which they disseminate information make them important resources, while their informal character makes them user-friendly.

IV. IMPLICATIONS FOR COUNSEL AND CLIENTS

Media interest in investment arbitration presents both a challenge and an opportunity for counsel and their clients. While media coverage can complement a party’s overall litigation approach, counsel should have a clear idea of the extent to which it is proper for them, or their clients, to comment publicly on a case.

From a legal perspective, the constraints on communication with the media are potentially found in a few sources. One might first check in the relevant treaty or

22. <http://transnational-dispute-management.com/about/welcome.html>.

23. <http://ita.law.uvic.ca/about.htm>.

24. www.iareporter.com/categories/about-us.

contract, although these documents are unlikely to address such issues. Another potential source is the applicable arbitration rules, although again, these are unlikely to address the question directly. For example, the ICSID Arbitration Rules have few provisions governing confidentiality of proceedings, and the ones that exist primarily bind the tribunal or the ICSID Secretariat, and not the parties to the arbitration.²⁵ A more likely source of guidance is in the procedural rules adopted for the particular case, usually by the first procedural order.

Perhaps the most important constraint is the one developed by jurisprudence: A long line of investment awards clearly states that there is no presumption of confidentiality in investment arbitration. However, this case law also holds that counsel and their clients must ensure that their communications concerning the case do not jeopardize the procedural integrity of the arbitration and do not aggravate the dispute between the parties. In *Amco v. Indonesia*, the respondent blamed the claimants for the publication of a newspaper article which the respondent contended was prejudicial to Indonesia, and requested provisional measures, inter alia, on confidentiality. The respondent wrote, “Claimants’ actions are incompatible with the spirit of confidentiality which imbues these international arbitral proceedings.”²⁶ The tribunal replied, finding that “as to the ‘spirit of confidentiality’ of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case.”²⁷ The absence of a presumption of confidentiality was reiterated in *Metalclad v. United Mexican States*, in which Mexico filed a Request for a Confidentiality Order. In rejecting Mexico’s request, the tribunal found,

“...[t]here remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration.”²⁸

25. ICSID Arbitration Rule 6 requires tribunal members to undertake to keep information coming to their attention in the course of their tribunal participation confidential; ICSID Arbitration Rule 15 prescribes that tribunal deliberations “shall take place in private and remain secret”. ICSID Arbitration Rule 32(2) gives tribunals authority to open hearings to non-parties. Art. 48(5) of the ICSID Convention states that “[t]he Centre shall not publish the award without the consent of the parties”. ICSID Administrative and Financial Regulation 22(2) contains complementary language permitting the Secretary-General to publish awards with the consent of both parties.

26. *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures of 9 December 1983, 1 ICSID Rep. 410 (1993).

27. *Ibid.*

28. *Metalclad Corporation v. Mexico* (ICSID Case No. ARB(AF)/97/1), Award, para. 13; see also, *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7); *Loewen v. United States*, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, para. 26; *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Procedural Order No. 5

The tribunal in *Loewen v. United States* went even further, expressly recognizing the inherent value of making information about arbitrations public. As the *Loewen* tribunal noted, failure to make such information public would “preclude the Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs”.²⁹ Today, tribunals almost unanimously acknowledge that there is no general duty of confidentiality or privacy in investment arbitration, other than that imposed expressly by the relevant treaty, procedural rules or by procedural agreement of the parties, and that there is value in giving the public access to relevant information.³⁰ That said, tribunals usually pair this acknowledgment with an admonition to the parties that public disclosure, including interaction with the media, should not jeopardize the orderly unfolding of the individual case. As explained by the *Metalclad* tribunal,

“...it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceeding they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound”.³¹

From a practical perspective, the counsel team in an investment arbitration should address whether communication with the media concerning its case is either inevitable or would be beneficial. If so, it should develop a media strategy at an early stage. A first consideration will be to ensure that the procedural rules governing the arbitration allow sufficient openness to implement the media strategy. This should be reflected in the first procedural order. For example, counsel should consider which categories of documents will be public. From a media perspective, it is easier to answer media questions and to

concerning questions raised in connection with Procedural Order No. 4, 6 December 2000, paras. 9-11; *S. D. Myers Inc. v. Government of Canada*, Procedural Order No. 16 of 13 May 2000, paras. 2-18.

29. *The Loewen Group, Inc. and Raymond L. Loewen v. United States* (ICSID Case No. ARB/(AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction of 5 January 2001, para. 26.

30. See, for example, *Giovanna Beccara et al v. Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No. 3 of 27 January 2010, paras. 67-73. In 2001, the North American Free Trade Commission issued a Note of Interpretation of certain provisions of Chapter 11 of the NAFTA, confirming that “nothing in the NAFTA imposes a general duty of confidentiality on the parties”: NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 21 July 2001, available at <www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en>.

31. *Metalclad Corporation v. Mexico* (ICSID Case No. ARB/(AF)/97/1), Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case ARB/(AF)/97/1, 27 October 1997, para. 10; See also, *Giovanna Beccara et al v. Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No. 3 of 27 January 2010, paras. 70, 85; *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 3 of 29 September 2006, paras. 147, 163; *Loewen v. United States*, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, para. 26.

ensure accurate reporting if pleadings and other documents relevant to the arbitration are in the public domain. The first procedural order should also address the extent to which awards and procedural orders can be made public. That order should also consider the extent to which hearings will be open to the public. An open hearing makes it easier for media to attend and report on a case and can reduce the burden on counsel to brief the media.

The media strategy should address a number of pragmatic considerations. For example, who will be designated as the media spokesperson? While counsel might wish to play this role, they are often too busy during the hearing to do so effectively. As a result, consideration should be given to having a designated media spokesperson, ideally one with media training and experience.

If a media spokesperson is designated, it is vital for that individual to understand the facts of the arbitration and the procedure sufficiently. The media spokesperson should be involved with counsel in designing the overall media strategy and key messages on behalf of the client. The spokesperson must also be kept current throughout the case so that he or she can ensure the media strategy evolves with case developments. It is often helpful for counsel and the media spokesperson to think through likely questions and how they should be answered. All representatives of the client should know who the designated spokesperson is and should refer media inquiries to that person. It is important for all clients to understand the importance of speaking with a single voice. It is equally important for clients to understand that media coverage that aggravates the dispute is also likely to aggravate the tribunal!

Another consideration is whether to compile a physical, or “take away”, package for the media. This practice is increasingly seen in high profile cases, often by *amici*, but also by parties to the dispute. The advantage of a media package is that it makes key information available in an accessible format. It allows a party to ensure that the information shared is properly in the public domain, is factual and supports the overall media strategy adopted by that party. For example, in *Piero Foresti v. South Africa*, the non-disputing parties published various documents relating to the case, including the *amici* petition for participation to the tribunal, the tribunal’s letter to the petitioners, and a press release stating, “[t]he group’s aim is to assist the tribunal in resolving the dispute fairly while at the same time avoiding any conclusion that would create conflict between South Africa’s legal obligations arising from bilateral investment treaties and its human rights obligations...”.³² In the same vein, one might consider whether a press briefing is appropriate to convey background information and the basic messages of the client. While such briefings are unusual, they are seen increasingly in high profile investment arbitration. For example, in the *Chevron* arbitration, environmental law organizations such as the Center for International Environmental Law (CIEL) held a public briefing, co-sponsored by Oxfam America, to explain the legal issues in the dispute.³³ In the same case, a group of Ecuadorian plaintiffs had a press spokesperson and press release that set

32. “South African and International Human Rights Groups Granted Permission to Intervene in Foreign Mining Companies’ Complaint Against South African Government”, available at <www.ciel.org/Publications/SouthAfrica_Media_19Oct09.pdf>.

33. <www.ciel.org/Hre/Ecuador_Chevron_17Nov09.html>.

out the case against Chevron's claim.³⁴ Press reports also quoted the views of Chevron's media relations advisor stating its position that private claimants had no legal grounds to claim for damages in Ecuadorian domestic proceedings. The General Counsel of Chevron was quoted in a company press release stating that "Because Ecuador's judicial system is incapable of functioning independently of political influence, Chevron has no choice but to seek relief under the treaty between the United States and Ecuador."³⁵

If there is communication with the media concerning an arbitration, counsel must continuously assess whether this interaction with the media would aggravate the dispute or affect its procedural integrity. This is a highly fact-specific assessment. However, most tribunals urge counsel to err on the side of caution when making this assessment. For example, in the *Metalclad* example quoted above, after the claimant held a conference call discussing the case and the potential for settlement, the tribunal suggested that the parties limit public discussion to a minimum, subject only to legally binding external obligations of disclosure.

Procedural Order No. 3 in the *Biwater v. Tanzania* case provides useful guidance in drawing the line between legitimate and inappropriate use of the media in investment arbitration. That arbitration concerned the cancellation of a contract for water in Dar Es Salaam, Tanzania. It garnered significant media and public attention, and ultimately both disputing parties complained to the tribunal that the opposing party had launched media campaigns which both aggravated the dispute and undermined its procedural integrity. The claimant requested a provisional measure on confidentiality, asking that the parties discuss all publication on a case-by-case basis, and that they refrain from publishing pleadings, documents and correspondence in respect of the arbitration except by mutual agreement. In support of this request the claimant alleged that counsel for the respondent had given misleading statements to The Guardian newspaper, had unilaterally published tribunal minutes without authorization, had facilitated numerous commentaries in investment treaty newsletters and that this publicity had led to a public e-mail campaign urging the Chair of the claimant company to discontinue the proceedings.

The procedural order in *Biwater* began by recognizing the need to balance transparency of proceedings with procedural integrity of the arbitration. It noted that there is no general duty of confidentiality in ICSID arbitration absent an agreement between the parties on the issue, but noted equally that no provision imposed a general rule of transparency or non-confidentiality. The tribunal continued to hold that actual harm need not be established to justify a provisional order regulating public sharing of information in arbitration and that some form of control is warranted where a sufficient risk of harm or prejudice exists. In the result, the tribunal opted for narrowly delimited restrictions: it allowed the parties to publish their own documents and tribunal decisions so long as these did not contain information likely to exacerbate the dispute. At the same time, it refused to allow publication of minutes, of documents produced by the opposing

34. "Guy Walks Into A Court-house. Sky Does Not Fall", Luke Eric Petersen, Kluwer Arbitration Blog (28 March 2010).

35. Fernando CABRERA DIAZ, "Ecuadorians Battle Chevron in U.S. Court Over BIT Arbitration in Long-Running Environmental Damage Dispute", Investment Treaty News (March 2010) pp. 3-4.

party or of correspondence between the parties. It also permitted general discussion about the case in public so long as such discussion was not used to antagonize the parties, exacerbate their differences, unduly pressure either party or render resolution of the dispute more difficult.³⁶

Another factor relevant to assessing whether media contact aggravates the dispute is the stage of the case: by definition, it is impossible to affect the procedural integrity of a case after the arbitration is concluded, and so extra caution is required while the matter is on-going. The first procedural order in *Beccara v. Argentina* specifically made the point that where disclosure occurs while proceedings are ongoing, considerations such as the orderly unfolding of the arbitration, respect for the parties' equality of rights and avoiding exacerbation of the dispute carry more weight and therefore require more caution than once the procedure has been completed and an award has been rendered.³⁷

A final question concerns the remedy for communication with the media that goes beyond the proper limits and aggravates the dispute or adversely affects its procedural integrity. Of course, investment tribunals do not have contempt powers or other powers typically available to a domestic judge to ensure respect for the adjudicative process. Nonetheless, while a case is pending, a tribunal maintains some procedural tools to discipline unauthorized or inappropriate disclosure of information. The main remedy is an order for provisional or interim measures under the applicable procedure rules,³⁸ or a similar order made pursuant to the inherent power of the tribunal to regulate its proceedings. Ultimately, a tribunal might award costs against a party whose conduct with respect to media communications and confidentiality orders is inappropriate. In one case, *Pope & Talbot v. Canada*, a NAFTA tribunal awarded costs against claimants where claimants' counsel provided the media with a document that had been sent in error by an administrative officer of the respondent and where this error should have been obvious to counsel. In that case, the tribunal ordered the claimant to pay \$10,000 forthwith and expressed its wish that claimants' counsel voluntarily pay this sum personally.³⁹ Arguably, a tribunal might draw adverse inferences against the disclosing party based on the disclosures made, although this would require a very particular set of circumstances to fall within the correct ambit of the doctrine of adverse inferences.

While tribunals have several tools to enforce confidentiality orders and to police contact with the media that jeopardizes the proper functioning of the tribunal during the hearing of a matter, it becomes more difficult to control such behaviour after a case has concluded.⁴⁰ Some parties have obtained confidentiality undertakings that are expressed

36. *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 3 of 29 September 2006.

37. *Giovanna Beccara v. The Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No. 3 (Confidentiality Order) of 27 January 2010, para. 81.

38. ICSID Convention Art. 47 and ICSID Arbitration Rule 39 address provisional measures in ICSID Convention proceedings.

39. *Pope & Talbot, Inc. v. Canada* (UNCITRAL), Decision of Tribunal, 27 September 2000.

40. See *Giovanna Beccara et al. v. The Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No. 3 of 27 January 2010, para. 120 where the tribunal imposed specific confidentiality requirements and noted, without deciding, that

to survive the conclusion of the arbitration, but it is difficult to understand how these could be enforced in a cost-effective way.

V. CONCLUSION

At the end of the day, the professionalism and restraint of counsel will be vital to crafting a tailored and respectful media strategy in an investment arbitration. While communication with the media can be effective and appropriate, a media strategy must give priority to the orderly and fair unfolding of the arbitral proceedings.

“[T]he question will arise whether the tribunal has the power and authority to decide, either on its own initiative or upon request of a Party, on the continuation of some or all of these restrictions beyond the conclusion of the present proceedings. This question will be dealt with when concluding the present proceedings.”