

**International Centre for Settlement
of Investment Disputes**

ICSID Case No. ARB/05/22

**BIWATER GAUFF (TANZANIA) LTD.,
CLAIMANT**

v.

**UNITED REPUBLIC OF TANZANIA,
RESPONDENT**

PROCEDURAL ORDER N° 3

Rendered by an Arbitral Tribunal composed of

**Gary BORN, Arbitrator
Toby LANDAU, Arbitrator,
Bernard HANOTIAU, President**

I PROCEDURAL BACKGROUND:

1. On 2 August 2005, the Claimant, Biwater Gauff (Tanzania) Ltd. (“BGT”) filed a request for arbitration with respect to a dispute with the Respondent, the United Republic of Tanzania (“the UROT”) arising out of a series of alleged breaches by the UROT of its obligations under both international and domestic law concerning foreign investment which, according to BGT, are said to have caused loss to BGT in the region of US\$ 20 to 25 million.
2. On 23 March 2006, a First Session of the Arbitral Tribunal was held in Paris, which dealt with procedural issues and with BGT’s first request for provisional measures. The ICSID Secretariat transmitted the Minutes of this First Session of the Arbitral Tribunal to the parties on 1 June 2006.
3. On 31 March 2006, the Arbitral Tribunal issued Procedural Order N°1 containing its decision on the request for provisional measures.
4. On 23 May 2006, the Arbitral Tribunal issued Procedural Order N°2 dealing with the Parties’ respective requests for production of documents.
5. On 7 July 2006, in accordance with the Tribunal’s directions set out in the minutes of the First Session, BGT filed its Memorial together with exhibits. In a letter accompanying BGT’s Memorial, it drew the Tribunal’s attention to the fact that the UROT would have unilaterally disclosed certain orders made by the Tribunal to an unrelated third party, and that details of them would have appeared on an internet site. BGT alleged that the UROT’s counsels had openly acknowledged that the disclosure was from ‘their side’. In its letter, BGT further informed the Arbitral Tribunal that it sought an express undertaking in order that the Memorial and its attached documents would be treated as confidential. The UROT refused to give its approval to this undertaking. It however agreed that the documents would be treated as confidential on an interim basis pending the Tribunal’s ruling. BGT informed the Arbitral Tribunal that it would file an urgent application to resolve the issue of confidentiality.

6. By letter dated 17 July 2006, BGT filed a request for provisional measures on confidentiality (“the Request”).
7. On 19 July 2006, the ICSID Secretariat acknowledged receipt of Claimant’s request for provisional measures on behalf of the Arbitral Tribunal. It also informed the parties in the same letter that the UROT was invited to submit its comments by August 4, 2006 and that BGT was invited to reply by August 11, 2006. Finally, Respondent would have an opportunity to file its last comments no later than August 18, 2006.
8. The parties filed written submissions pursuant to these directions.
9. On 23 August 2006, BGT submitted some additional remarks on the UROT’s Rejoinder (BGT’s Sur-Reply). Although this submission was not provided for in the calendar, the Arbitral Tribunal accepted the submissions in a letter of 24 August 2006 and granted the UROT three days to respond.
10. On 25 August 2006, the UROT submitted a letter to the Arbitral Tribunal which crossed the Arbitral Tribunal’s letter of 24 August 2006. In its letter, the UROT requested the Arbitral Tribunal to disregard BGT’s pleading on the ground that it was not authorized by the Tribunal’s directions as contained in its letter to the parties dated 19 July 2006. Alternatively, the UROT requested the Arbitral Tribunal to give it the opportunity to respond.
11. On 29 August 2006, the UROT filed its comments on BGT’s Sur-Reply.

II SUMMARY OF THE PARTIES’ POSITIONS:

A - BGT’s Request for Provisional Measures

12. In its Request, BGT asks the Tribunal to order the following measures:

that, for the duration of the arbitration proceedings, the parties 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, and in particular that:

- a. the parties undertake to discuss on a case by case basis the publication of all Decisions other than the Award made in the course of the proceedings, with the object of achieving mutual agreement, and if agreement cannot be reached, the parties refer the matter to the Tribunal for decision;
- b. the parties refrain from disclosing to third parties any of the Pleadings;
- c. the parties refrain from disclosing to third parties any of the documents produced in respect of the First Round Disclosure and the Second Round Disclosure; and
- d. the parties refrain from disclosing to third parties any correspondence between the parties and / or the Tribunal exchanged in respect of the arbitral proceedings.

1- Facts leading to BGT's request:

13. BGT alleges that the UROT has made a unilateral disclosure of certain documents produced in these proceedings by publishing them on Internet, on the "Investment Treaty Arbitration" website (<http://ita.law.uvic.ca/>). These documents are the Minutes of the First Session of the Arbitral Tribunal, as well as the Procedural Order N°2 dated 24 May 2006. The UROT has acknowledged being at the origin of such disclosure. In front of the UROT's refusal to undertake not to disclose BGT's Memorial or accompanying exhibits submitted on 7 July 2006, or the 9 files of material disclosed by the Claimant under Procedural Order N°2 (to the exception of certain financial files of BGT), BGT submits a request for provisional measures in order to ensure the confidentiality of the above documents. Counsel for the UROT has agreed however to treat all the above documents as confidential on an interim basis pending the Tribunal's ruling on BGT's application.
14. BGT's considers that the UROT's refusal to provide an undertaking not to disclose certain future categories of documents constitutes a breach of the UROT's

obligations to observe the procedural integrity of the Arbitration Process and the non-aggravation of the dispute.

15. BGT notes that this dispute has already attracted significant public interest, and that it has lead to action being taken by third parties. To support its allegation, BGT gives two examples.
16. The first example concerns an association called World Development Movement (WDM) which has initiated a campaign entitled "*Dirty aid, dirty water. Hands off Tanzania: Stop UK company Biwater's attempt to sue*". According to BGT, this campaign has the expressed purpose of bringing about the discontinuation of the present ICSID Proceedings. BGT states that WDM has set up a link on its website to the email address of the Chairman of BGT, Mr. Larry Magor, inviting members of the public to email him directly in an attempt to exert personal pressure on him to discontinue the ICSID proceedings.
17. As second example, BGT addresses some exhibits demonstrating that this Arbitration has been the subject of extensive commentaries in Investment Treaty Newsletters such as the Investment Treaty News bulletin of 4 July 2006.
18. BGT therefore requests the Tribunal to order the requested provisional measures.

2- Legal arguments supporting BGT's claim:

19. To support its claim, BGT relies on Article 47 of the ICSID Convention and on Article 39(1) of the ICSID Arbitration Rules.
20. Article 47 of the Convention provides:
"Except 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."
21. Rule 39(1) of the Arbitration Rules provides:

“At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

22. BGT states that tribunals arbitrating disputes under the ICSID Convention and Arbitration Rules have recognized the importance to assure the procedural integrity of the Arbitration Process and the non-aggravation of the dispute, in the context of unilateral disclosure of information / documentation.
23. To support its claim, BGT relies on the following ICSID decisions:
 - Amco Asia Corp & others v. The Republic of Indonesia*, decision on Request for Provisional Measures, 9 December 1983¹;
 - Metalclad v. United Mexican States*²,
 - Loewen Group Inc & Raymond L Loewen v. United States*³.
24. By reference to the above jurisprudence, BGT submits that rights to the maintenance of the procedural integrity of the Arbitration Process and the non-aggravation of the dispute are capable of protection by means of a recommendation of provisional measures under Article 47 of the ICSID Convention. BGT holds that these rights have been breached by the publication of certain documentation and fears that they may be breached in the future by the publication of further categories of documentation.
25. In its argumentation, BGT makes indeed a distinction between various categories of documentation.
26. First, it acknowledges that each party has a right to unilaterally disclose the Award made by the Tribunal. On the other hand, ICSID is entitled to publish the Award only if it has the consent of both parties (ICSID Convention Article 48(5)).

¹ ICSID Case ARB/81/1

² ICSID Case Arb (AF)/97/1

³ ICSID Case Arb (AF)/98/3

However it may publish excerpts of the legal rules applied by the Tribunal without the consent of the parties (ICSID Arbitration Rule 48).

27. BGT alleges that even if recommendations for provisional measures, preliminary decisions on jurisdiction and procedural orders are decisions of the tribunal, they do not constitute awards. Quoting Schreuer (“The ICSID Convention: A Commentary”), BGT notes that such decisions can contain “*extensive discussion of the factual and legal issues in dispute*”. As this is the case, BGT recalls that, at the First Session of the Tribunal on 23 March 2006, it stated that it would consider the disclosure of each such decision on a case by case basis. It was its understanding that both parties had agreed to this. In support of this allegation, BGT further relies on paragraph 19 of the Minutes of the First Session of the Tribunal (Publication of Decisions Relating to the Proceedings and of the Award).
28. Article 19 of the Minutes reads as follows:
“The parties will consider, on a case by case basis, the publication of other items listed in the Administrative and Financial Regulations 22(2) (b) and (c) and of any other order or decision of the Tribunal.”
29. The UROT’s disclosure of Procedural Order N°2, setting out the Tribunal’s decision on the detailed disclosure of both parties, was made unilaterally and without any prior or subsequent notification, and in breach of paragraph 19 of the Minutes.
30. BGT further contends that disclosure to third parties of the Minutes of Hearings, of the Parties’ Pleadings, or of the Parties’ Disclosure would breach the right to the procedural integrity of the Arbitration Process.
31. With regard to the Minutes of Hearings, BGT compares Article 32(2) of the old ICSID Arbitration Rules with the same article of the new ICSID Arbitration Rules:
32. Article 32(2) of the old ICSID Arbitration Rules provided as follows:

“The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.”

33. Article 32(2) of the new ICSID Arbitration Rules reads as follows:
“Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”
34. BGT relies on Schreuer’s comments on the old Article 32(2), where the author says that this article *“secures the privacy of the oral procedure before the Tribunal”*. The amendment of Article 32(2) does not affect Schreuer’s description of the purpose of this article. BGT emphasizes the fact that the new Article 32 (2) makes clear that the Tribunal may allow third parties to attend a hearing *“unless either party objects”*, which makes third party attendance still subject to the parties’ consent. It further holds that to permit a unilateral disclosure of the Minutes of the Hearings would render Article 32 (2) redundant in effect, as the entire workings of the Hearing would be exposed to public view while formal privacy would be preserved.
35. BGT further points out that the Arbitration Rules of 1968 contained a provision prohibiting disclosure of the Minutes without consent. This provision was deleted in the revision of the Rules. Quoting Schreuer again, BGT notes that *“[this] deletion...should not be interpreted as indicating that it is now permissible to publish [the minutes] if there is no contrary agreement. The closed nature of the proceedings, as evidenced in particular by Arbitration Rule 32, makes it amply clear that any minutes must be treated with confidentiality.”*
36. With regard to the disclosure of the pleadings and documents produced under Procedural Order N°2, BGT alleges that the parties have not been able to reach an agreement. It considers that the publication of pleadings, and / or the documents

produced as part of the First Round Disclosure exercise, will lead to the aggravation of the dispute between the parties.

37. Because of the nature of some of the intemperate coverage of these proceedings to date, BGT is extremely concerned about potential disclosure to third parties of sections of the Memorial and selected pages from its extensive First Round Disclosure. It draws the Tribunal's attention to the fact that the Memorials contain detailed reference to the facts in dispute, and to the legal submissions made in respect of them. Furthermore, BGT has provided to the UROT numerous confidential documents in the Exhibits, in particular those contained in the nine files of disclosure. BGT fears that the UROT's refusal to guarantee confidentiality to any material demonstrates its wish to disclose selected highlights to third parties as the case progresses. Such disclosure risks aggravating the present proceedings.

3- Necessity and Urgency:

38. BGT considers the requested measures necessary as they go to BGT's ability to rely on the private nature of the oral hearings, and its ability to present its case and accompanying evidence without the threat of increased harassment and interference from third parties, whose object is to mount pressure on BGT to discontinue the ICSID proceedings.
39. BGT alleges that the requested measures are urgent as the UROT has already published the Minutes of the First Session, and Procedural Order No. 2, and is only awaiting the Tribunal's decision on this application before publishing BGT's Memorial, and possibly, the documents produced by BGT in the First Round of Disclosure.

B - The UROT's Answer

40. The UROT replied to BGT's Request on 4 August 2006.
41. As a preliminary comment, after presenting some examples showing that BGT has issued some advertisements and press releases in which it mentioned the present

dispute, the UROT submits that BGT has no compunction about making aggravating “disclosures” relating to the case.

42. The UROT points out that the present proceedings involve claims arising under public international law. Therefore BGT should accept the regime that governs arbitrations under the ICSID Convention and Arbitration Rules, neither of which authorizes the restrictions on transparency sought by the Request.
43. Whereas ICSID provides a limited number of tools with which either party may unilaterally restrict transparency, the UROT considers that BGT does not have the right to demand further restrictions.
44. It also submits that it has no present intention to release BGT’s 7 July 2006 submission but declines to accept additional constraints upon the transparency of the proceeding as a matter of principle. According to the UROT, the Request lacks any legal basis and should be rejected in its entirety.

1- Legal arguments:

45. The UROT states that none of the ICSID cases cited in BGT’s claim restricted the parties’ ability to disclose information about the case. It emphasizes that ICSID cases are marked by a level of transparency which varies completely from the one found in private commercial arbitrations. Orders, decisions, awards, and pleadings from dozens of cases are available on line.
46. In support of its assertion, the UROT gives the example of the *Loewen case*⁴, which was cited by BGT in its Request. It contends that the Tribunal’s decision in that case does not support the Request at all. The Tribunal denied the State Respondent’s request that “*all filings in this matter, not excluding the minutes of proceedings, be treated as open and available to the public...*” on the ground 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.*”

⁴ *Loewen Group, Inc. v. United States*, ICSID Case No. ARB (AF)/98/3, Decision on hearing of Respondent’s objection to competence and jurisdiction (5 Jan. 2001), 7 ICSID Rep. 421 (2005)

47. The UROT further notes that not only in *Loewen* but in the two other cases cited in BGT's Request (*Metalclad*⁵ and *Amco*), the Arbitral Tribunals declined to restrict the parties' dissemination of information about the proceedings. The *Loewen* and *Metalclad* Tribunals recognized that minutes "*shall not be published without the consent of the parties*", under the Facility Rules as they then stood. Nonetheless, the three cases rejected contentions that a gag order should be issued on the basis of a "general principle of confidentiality" or "spirit of confidentiality" in ICSID proceedings. The UROT notes that in *Loewen*, the Tribunal explained that imposing such a duty would "*depriv[e] the public of knowledge and information concerning government and public affairs.*"⁶
48. The UROT adds that in 2001, the three NAFTA States issued their first formal Chapter 11 Note of Interpretation, affirming the conclusion of the *Metalclad* and *Loewen* Tribunals that there was no general or residual duty of confidentiality in investment arbitrations under NAFTA Chapter 11. The United States and Canada have now included transparency provisions in their BITs.
49. According to the UROT, there is now in international investment arbitration practice, a considerable greater transparency than when *Metalclad* and *Loewen* were decided. Documents from NAFTA are routinely opened to the public. The UROT cites as example the *Glamis Gold Case*⁷ in which the Decision on Objections to Document Production, the Decision on Parties' Requests for Production of Documents Withheld on Grounds for Privilege and the Claimant's Memorial were published by the U.S. Government. The UROT contends that the measures requested by BGT would be unprecedented as the clear trend in arbitral practice, scholarly commentary, and amendments to the ICSID Arbitration and Additional Facility Rules have been towards more transparency and not greater secrecy.

⁵ *Metalclad Corp. v. United Mexican States*, 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 Oct. 1997)

⁶ *Loewen*, at §26

⁷ *Glamis Gold Ltd. v. United States* (UNCITRAL Rules, administered by ICSID), Decision on Objections to Document Production (20 July 2005), Decision on Parties' Requests for Production of Documents Withheld on Grounds for Privilege (17 Nov. 2005), and Claimant's Memorial (5 May 2006)

50. Furthermore, the UROT states that while BGT refers to the concepts of procedural integrity and non-aggravation of the dispute, it does not explain how either is threatened in this case. While BGT complains about the publication of Procedural Order No. 2 and the First Session Minutes, there is no evidence that these disclosures have led to “*increased harassment and interference*”, or to any harm at all to either party. In relation to the example cited by BGT about the World Development Movement which was encouraging its supporters to send e-mails to Mr. Magor, the UROT points out the fact that this campaign started before the Tribunal was even formed, and certainly before the dissemination of Procedural Order No.2 and the First Session Minutes.
51. The UROT contends that BGT fails to explain how the “harassment and interference” it has experienced suggest a threat to procedural integrity or non-aggravation of the dispute. While BGT notes that WDM has asked people to send e-mails to Mr. Magor, it does not say how many e-mails he has received. The UROT further alleges that Mr. Magor has withstood the assault without showing any sign of being inclined to withdraw the case. Furthermore, it emphasizes that whatever pressure has been mounted on BGT to discontinue the proceedings, it is not proved that BGT’s access to justice is under threat. In support of its argument, the UROT quotes Paul D. Friedland, in “Provisional Measures and ICSID Arbitration”⁸ who considers that “[t]he AMCO decision stands for the quite reasonable proposition that, in order to justify provisional measures on the ground of aggravation of the underlying dispute, the conduct at issue must be much more than merely annoying.” The UROT emphasizes that in the present case, the conduct complained of is that of an unrelated third party, not of the UROT. Therefore, the Request is premised on speculation about that third party’s possible future conduct, which is a subject on which the Tribunal has little or no basis for judgment.
52. By way of conclusion, the UROT states that while BGT identified two asserted rights – procedural integrity and non-aggravation of the dispute – it does not provide evidence that either of them has been harmed or threatened with harm. Nor can BGT show that the recommended measures would prevent any theoretical

⁸ 2 Arb. Int’l 335, 336 (1986)

future harm since the third party conduct of which it complains predates the release of Procedural Order No.2 and the First Session Minutes. The ICSID Convention and Rules do not regard the provision of truthful information to the public as harmful to a party's legally protected rights. The UROT contends that if there had to be an exception to this general rule, it could only be in an extraordinary case: this is not established by BGT in the present case.

53. The UROT states further that it has consistently emphasized the importance of transparency. However, it contests that during the First Session of the Tribunal where the subject of transparency was discussed at some length, it has undertaken to keep secret any order or decision unless BGT otherwise consented. The UROT further refutes BGT's allegation that it has violated item 19 of the First Session Minutes. It notes that BGT omits the heading and first paragraph of item 19 which reads as follows:

Publication of the Decisions Relating to the Proceedings and of the Award

Article 48(5) of the Convention; Administrative and Financial Regulation 22

It was agreed that the Centre may publish the item listed in Administrative and Financial Regulation 22(2)(b) (the award), at such time and in such manner as it deems fit.

The parties will consider, on a case by case basis, the publication of other items listed in Administrative and Financial Regulation 22(2)(b) and (c), and of any other order or decision of the Tribunal.

The parties subsequently agreed on the publication of the Tribunal's Procedural Order No.1 of March 31, 2006.

54. The UROT contends that by omitting some parts of item 19 of the Minutes of the First Session, BGT attempts to make plausible an interpretation of the Minutes that is completely at odds with what transpired.
55. It submits that when producing documents in June 2006, both parties requested confidential treatment for certain documents. Both parties have respected those

requests, and the UROT confirms its acceptance that some information remains confidential due to its legal or financial nature. However, it adds that after BGT requested its agreement not to release such materials without its permission in future, the UROT declined, emphasising its consistent position regarding transparency. It only confirmed that it would treat as confidential particular documents when justified.

56. Before 7 July 2006, BGT asked the UROT to agree not to release any of the documents BGT was scheduled to submit on that date. The UROT declined again for the reason previously given and acknowledged that it had no intention at that time of disseminating BGT's memorial or associated documents. The UROT draws the Tribunal's attention to the fact that it has honoured its undertaking not to disclose any of the documents pending the ruling of the Tribunal on BGT's application.

2- Factual arguments:

(a) BGT's Public Relations Activities Outside the Arbitral Process

57. The UROT alleges that BGT has orchestrated an ongoing public relations campaign about the present proceedings. Because of the provocative nature of its public statements, the UROT considers that BGT is not in position to contend that the dissemination of true information about the ICSID Arbitration will harm procedural integrity or aggravate the dispute. In support of its allegation, it refers to BGT's Memorial which suggests that after the collapse of negotiations, at a time that it believed that an agreement might be reached that would leave City Water in place, BGT's public relations firm was already at working on a press campaign against the UROT. At the time of the G8 summit, BGT published an advertisement (reproduced p.7 of the UROT's Answer), entitled "A message to the G8 and Africa, A CLEAN, reliable water supply for all". This advertisement implied that international aid allocated to the Tanzanian project had been "*misappropriate[ed]*" and not "*used for its intended purpose*" in a manner that was not "*clean*". The UROT argues that this did not contribute to the improvement of the relationship between the parties as this

advertisement threatened Tanzania's reputation among international donors and international private investors.

58. The UROT cites as another example some excerpts taken from a press release issued by BGT on 1 December 2005 (reproduced in Annex 2 to the UROT's Answer). In these, Mr. Magor made comments on the case and the underlying dispute which the UROT considers to be misleading, thereby increasing fears of further harm to Tanzania's reputation.

(b) Press Coverage of the Dispute

59. The UROT asserts that BGT is not the only one to have made some comments about the case. The dispute is of interest to a number of audiences such as the Tanzanian public, the UK public, citizens of other developing countries that are considering similar privatizations projects, international development institutions and their many observers and critics, the international water industry; and investment arbitration specialists. According to the UROT, this widespread interest is reflected in press coverage among a variety of media. The UROT provides in Annex 1 to its Answer a sample of such coverage.
60. The UROT agrees with BGT when the latter says that "this dispute has already attracted significant public interest". It notes that the case involves not only the provision of a critical public service in a particular developing country but also larger (and often controversial) questions of international development policy. The UROT emphasizes that the level of public interest underscores two points: the Tanzanian Government's obligation to its citizens to make information about the case available to the greatest extent practicable; and the fact that there was considerable public discussion – and NGO activism – about this case before the Tribunal was even selected, let alone before any of the documents in question was disseminated.

C - BGT's Reply to the UROT's Answer

61. In its Reply dated 11 August 2006, BGT makes two preliminary comments. First, it emphasizes that the gist of the UROT's opposition to BGT's application is that BGT has negative reasons for wanting to restrict the flow of information to external parties. It submits that the Tribunal should not take into account this UROT's allegation. It is not based on evidence but merely on speculation and is indeed wrong.
62. Secondly, BGT recalls that its Request concerns issues of transparency insofar as they affect the fundamental integrity of the present international arbitration proceedings and the non-aggravation of the dispute. The UROT's repeated claim that BGT's Request seeks an unprecedented restriction on transparency in a new age of openness is, according to BGT, "*attacking a straw man*".

1- The Legal Issues:

63. BGT disagrees with the UROT that the ICSID Convention and Arbitration Rules do not authorise the restrictions sought in the Request on the flow of information to external parties. The UROT's argument that investment treaty arbitration is in an age of transparency where information filed in the arbitral proceedings should be readily available to the public oversimplifies and misstates the current position.

(a) The application of Metalclad, Amco and Loewen

64. In its Answer, the UROT emphasized that in the cases cited by BGT in support of its Request, the Arbitral Tribunals refused to grant the particular orders sought. According to BGT, the UROT misses the point as the refusal to grant the orders sought in those cases does not undermine the principle that such relief is available, nor does it mean, as the UROT suggests, that the principle would only be applied in exceptional circumstances. BGT considers that the UROT places too much emphasis on the outcome of those cases without analysing why the tribunals declined to grant the orders sought. There were important differences with the present case.

65. *In Amco*: BGT explains that in this case, Indonesia sought an order to restrain Amco from “*promoting, stimulating, or investigating the publication of propaganda presenting their case selectively outside this tribunal or otherwise calculated to discourage foreign investment in Indonesia*”. Indonesia’s concern was that certain press articles that had been published might damage its economy but the Tribunal was not satisfied on that point. Nonetheless, the Tribunal considered it fitting to reiterate “*the good and fair practical rule*” that the parties should “*refrain, in their own interest, to do anything that could aggravate or exacerbate*” the dispute.
66. *In Metalclad*: in this case, the Government of Mexico sought an order prohibiting the disclosure of any information about the case and an order that any breach would entitle it to request the Tribunal to enforce sanctions. BGT notes that among other reasons, the Tribunal refused to grant the relief sought because the Claimant was a public company trading on a public stock exchange with a duty to provide certain information to shareholders, implying that it could not be precluded from making such public utterances. However, while refusing to grant the request, the Tribunal held that “*it still appears to the Tribunal that 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 proceedings 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*”.
67. *In Loewen*: BGT notes that in this case, the Tribunal impliedly allowed the United States to make most (but not all) of the filings in the arbitration publicly available, but, according to BGT, the circumstances were unique. First, it arose under NAFTA, which is characterized by a strong policy in favour of transparency, which is not the case in the present proceedings. It also arose out of the conduct of a public trial in the state of Mississippi, following which the Loewen companies requested the Tribunal to assert interlocutory jurisdiction over the United States’ internal mechanism of due process. As *Loewen* involved both a challenge to the mechanism of the judiciary within a State party and arose out of a public affair, it gave rise to an exceptionally compelling public interest. BGT invokes a distinction between *Loewen* and the present case. Even if the dispute between BGT and the UROT arises out of the public expropriation of BGT’s investment, BGT recalls that the

application of the investment treaty in the present case does not involve any challenge to the UROT's mechanisms of popular governance. It adds that in any event, as the *Loewen's* decision on disclosure delivered on 28 September 1999 is not publicly available, it is not possible to know the full reasons for the tribunal's decision.

68. BGT points out that the request raised in those cases or the circumstances surrounding them are different from the present one, and their outcomes do not suggest, as the UROT implies, that BGT must show extraordinary, or unique, circumstances in order to be entitled to the relief sought. Those cases demonstrate that if tribunals do not make orders that are unduly burdensome, they are however concerned to preserve the arbitral process and to maintain a working relationship between the parties conducive to that process.

(b) The trend towards greater transparency

69. To the UROT's assertion that there is a trend towards greater transparency in investment arbitration and that the current practice "*makes documents about and from ICSID proceedings widely and routinely available*", BGT opposes the fact that the UROT does not distinguish between agreed and unilateral disclosure, or between post-award publication (which is routine) and dissemination of information during the pendency of the proceedings.
70. BGT adds that to support its argument in favour of a trend towards greater transparency in investment arbitration, the UROT cites in particular NAFTA cases, but avoids mentioning the differences between the NAFTA and other investment treaties. The UROT fails to point out that the trend in transparency has focused on "*the 'big ticket' items...such as open hearings, the accessibility of awards and amicus participation*"⁹, rather than on the issue whether pleadings, expert reports and supporting documentation prepared for the purposes of the arbitration should be made widely available.

⁹ Meg Kinnear, "*Transparency and Third Party Participation in Investor-State Dispute Settlement*" (presented on 12 December 2005 at a symposium organized by ICSID, the OECD and UNCTAD), available at <http://www.oecd.org/dataoecd/6/25/36979626.pdf>, at page 10.

71. BGT also notes that the UROT referred at footnote 11 of its submission to an article written by Meg Kinnear. BGT alleges that Meg Kinnear’s analysis is more balanced and she notes differences between NAFTA and other tribunals. Ms. Kinnear argues in favour of transparency obligations being incorporated into treaties so “*that all parties know what to expect in advance of the process*”. According to BGT, this allegation does not imply that there are such transparency obligations in the applicable investment treaty.

(c) Entitlement of amicus curiae to documents

72. In support of its argumentation, BGT cites the *Aguas Argentinas v. Argentina* case¹⁰ in which five organisations applied to intervene as amicus curiae under the ICSID Arbitration Rules. One of the orders they sought was for “*unrestricted access to the documents of the arbitration, namely the parties’ submissions, transcripts of the hearings, statement of witnesses and experts, and any other documents produced in this arbitration*”. BGT deduces that if the practice in favour of transparency that the UROT contends for had indeed been established as it suggests, one would have expected the Arbitral Tribunal to have no hesitation in making that order, which it did not. The Tribunal deferred its decision.

(d) Unilateral disclosure encourages robust debate

73. To the argument raised by the UROT that certain subjects arising out of this dispute are legitimate subjects for debate (such as the merits of privatisation, foreign aid, public policy and related political subjects), BGT answers that this may be the case, but that these debates have already been conducted. It adds that it is not necessary for third parties to have access to BGT’s Memorial and/or other documents prepared for these proceedings in order for them to engage in this debate.

2- Factual Arguments:

¹⁰ *Aguas Argentinas et al. v. Argentina* in response to a petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005).

74. To the argument raised by the UROT that an order allowing indiscriminate access to the procedural documents would have an equal impact on the parties, BGT responds that it is not the reality of the media landscape as most of the commentaries on this matter have been generated by third parties who are against privatisation in general or this privatisation in particular, and for those reasons alone support the UROT's conduct in expropriating City Water. BGT contends that the reality is that third parties may selectively use the information to further their private agenda and BGT would have to monitor and correct published information outside the Tribunal's own fact-finding process. This would create additional expenses for BGT and divert its resources away from dealing with the merits of the dispute. BGT cites as an example the reference at paragraph 4 in the UROT's Response where it challenges the relevance of individual invoices included in the expert report. BGT says that this is the kind of spin that will appeal to the media and could generate confusion rather than clarity about this claim, thus aggravating the dispute. According to BGT, restricted access to the documents in the arbitral proceedings will provide sensible parameters that will help to preserve an even playing field and avoid a situation that will in reality favour one party over the other.
75. BGT also contests as being nonsense the arguments raised by the UROT that BGT's own conduct in hiring a public relations firm and publishing two advertisements should prevent the Tribunal from granting the relief sought.
76. It draws the Arbitral Tribunal's attention to the fact that the two BGT's advertisements produced by the UROT commented generally on facts that were already in the public domain. BGT considers that this omission blurs the fact that UROT is objecting to the same conduct it has engaged in.
77. BGT adds that the conclusion reached by the UROT when it made a textual analysis of the advertisements is forced and is an extreme way for the UROT to characterize BGT's position just because it opposes its own. BGT submits that the potential for squabbling about the tone and content of public commentary will only increase if third parties have the opportunity to access and use selectively material produced in the arbitration.

78. BGT also draws the Tribunal's attention to the fact that it used very moderate language in referring to its dispute with DAWASA and the UROT in the press extract referred to in attachment 1 of the UROT's Response. It invites the Tribunal to read page 33 of this extract. It does not evidence a provocative PR campaign against the UROT as suggested.
79. Finally BGT notes that a recently published article (attached to its Reply) refers to BGT seeking damages of about US\$20 million from the UROT. It submits that as this figure appears to be drawn from its expert report, it wonders how the journalist obtained the information that the UROT is keeping confidential pending the Tribunal's decision.

D - The UROT's Rejoinder

80. On 18 August 2006, the UROT submitted its Response to BGT's Reply.
81. The UROT reaches the conclusion that BGT has not shown any threat to any legitimate right, nor that the measures requested are required at all, nor that they are necessary as a matter of urgency and necessity, nor that it will suffer any prejudice if relief is not granted. Therefore, BGT's request should be denied.
82. The UROT focuses on the two alleged rights claimed to be threatened by BGT: preserving the procedural integrity of the proceedings and preventing the aggravation of the dispute.
83. *Preserving the procedural integrity:* The UROT contends that none of the alleged interests claimed by BGT is threatened in the actual circumstances. There is no evidence that the procedural integrity of the proceeding is in any danger. Neither the Tribunal's functioning, nor due process, nor the equal treatment of the parties is threatened. The UROT adds that there is no evidence that BGT has been or will be inhibited from participating fully in this proceeding.
84. *Non-aggravation of the dispute:* Among the set of alleged interests presented by BGT ("*preservation of the relationship of trust and confidence*" between the

parties; avoiding “*trial by media*”; preserving the parties’ “*working relationship*”; and preventing “*confusion rather than clarity about this claim*” among the public), the UROT declares that some of them are not of a kind that could justify the recommendation of provisional measures – even if they were under threat. Furthermore, according to the UROT, BGT does not show that any of the cited interests is threatened:

-BGT has not suggested that the Tribunal’s ultimate decision will be influenced by media coverage, making “the trial by media” concern moot.

-As for promoting “clarity” rather than “confusion” about BGT’s claim among the public, the availability of information such as in the Procedural Order No. 2 would contribute to the accuracy of the information.

-The parties’ working relationship of trust and confidence is preserved.

85. Finally, the UROT alleges that the release of accurate information has not hindered the conduct of these proceedings, nor is there any indication that it might in the future.

1- Legal Arguments:

86. Referring to the cases cited by BGT, the UROT notes that in the *Amco*, *Metalclad*, and *Loewen* decisions, the Arbitral Tribunals only suggested that there could be circumstances in which it would be appropriate for a tribunal to restrict the parties’ public comment about an ICSID proceeding. However, none of them actually placed any restrictions on the parties before them. Furthermore, the UROT submits that the comments made by the Arbitral Tribunals as to “non-aggravation” in *Amco* and *Metalclad* were expressed in extremely general terms, and none of these comments are binding, or constitute authority for the recommendation of binding provisional measures.

87. The UROT adds that BGT has failed to demonstrate the existence of circumstances that the *Amco*, *Metalclad* or *Loewen* Tribunals would conceivably have found sufficient to justify an order of the kind BGT seeks. BGT notes that in *Amco*, “*Indonesia puts its case on the basis that the press articles were damaging its economy, a fact which could not be made out*”. The UROT alleges that by

comparison to the present case, BGT has not shown here that it has suffered any damage to its business at all , or that the procedural integrity of the proceedings has been impaired, or again that the dispute has been aggravated.

88. To the argument raised by BGT that *Loewen* is not entirely apposite because “*it arose under the NAFTA, which has attracted a strong public policy in favour of transparency, embodied, not least, in the Free Trade Commission’s statement to which the Republic refers*”, the UROT opposes the fact that *Loewen* predates the Free Trade Commission’s statement and the other steps towards transparency taken by the three NAFTA States. *Loewen* (like *Metalclad*) was decided under an old and more restrictive version of the ICSID Additional Facility Rules.
89. Finally, to the suggestion made by BGT that dissemination of information during the proceedings “*is [...] designed to bring pressure to bear on the opposing party*” by opposition to post-award publication, the UROT answers that there is no reason to assume that releasing truthful information during the proceedings is intended or will have the effect of unfairly “pressuring” the other party. It further states that there is no indication that BGT has been subjected to unfair pressure or other prejudice here.

2- Factual Arguments:

90. The UROT alleges that BGT has failed to demonstrate that it has suffered any prejudice from the release of truthful information about the arbitral proceedings. It further adds that BGT is unable to present any evidence that there is a threat to the procedural integrity of the proceedings or to any right to non-aggravation of the dispute. According to the UROT, the kind of prejudice BGT fears cannot support a measure which curtails a sovereign State’s right (and obligation) to inform the public about matters of significant public importance.
91. As to the argument raised by BGT that third parties may use information selectively, and that this will require BGT “to monitor and correct” published information, the UROT expresses doubts that BGT and its public relations consultants are not already monitoring press coverage and NGO activity concerning

the dispute. Furthermore, there is already considerable media comment about this case. According to the UROT, BGT has failed to show that the particular categories of information that it asks the Tribunal to protect have contributed or will contribute disproportionately to inaccurate publications that BGT would have to correct. According to the UROT, none of this has anything to do with procedural integrity of the proceedings or the non-aggravation of the dispute. The prejudice that BGT claims would merely amount to bad publicity.

92. The UROT further contends that BGT and its public relations consultants have been telling the press and the world for a year and a half that there was an expropriation. This is why the UROT believes that transparency will benefit it rather than BGT. It expects these proceedings to demonstrate that BGT's public accusations are baseless and that the UROT did not "*expropriat[e] City Water*".
93. Finally, concerning the allegation made by BGT according to which it might suffer a prejudice from a third-party abuse of information, the UROT replies that this is entirely speculative and that even if this would happen, that is no reason to deprive the UROT of its rights.

E - BGT's Sur-Reply:

94. On 23 August 2006, BGT addressed to the Arbitral Tribunal a further response to the UROT's Rejoinder. In this submission, BGT substantiates its claim on three particular points.
95. First, BGT contests the argument raised by the UROT that the fact that BGT has not yet been harmed proves that there is little risk of harm. It contends that this approach is flawed as BGT seeks preventive relief. It adds that the UROT misinterprets the word "harm" as it gives it an extreme meaning implying BGT withdrawing from the arbitration or the Arbitral Tribunal's ability to decide the case being impaired. Maintaining the procedural integrity of the arbitration is not limited to preventing the proceedings from collapse but extends to structuring it in a way that serves the primary purpose of the arbitration.

96. The second point raised by BGT concerns the reality of the alleged threat of the UROT using documents produced or disclosed in the arbitration. BGT contends that the UROT is not only interested in the release of accurate information in order to “contribute to clarity” as it claims in its Rejoinder. To further substantiate its allegation, BGT cites an article of the Guardian newspaper in Tanzania dated 19 July 2006, entitled “*Dawasa triumphs against City Water*”. This article quoted Nimrod Mkono who is the managing partner of Mkono & Co, and co-counsel in both ICSID and UNCITRAL proceedings. According to BGT, the article was riddled with errors and grossly misrepresented the position, forcing the Guardian to issue a retraction on 24 July 2006 in which Mr. Mkono had to clarify almost every point of the previous publication.
97. BGT asserts that the UROT wants to play the media game and to use its access to BGT’s / City Water’s documents to position itself in the Tanzanian media. It further contends that the procedural integrity of the arbitral process is preserved when the proceedings are structured in a way that serves that purpose and not the collateral purpose of either party’s public relations strategy. According to BGT, its position has always been that full and frank disclosure between the parties is likely to be inhibited if the parties apprehend that their confidential documents are going to end up published on the internet or used selectively.
98. BGT repeats that it is both necessary and urgent that the proceedings be structured to prevent unilateral disclosure. It is urgent because the decision cannot await the outcome of the award on the merits and because until the position is resolved there is a disincentive to producing further documentation in the present proceedings. It is necessary because damages cannot compensate for the relief sought.
99. Finally, BGT draws the Tribunal’s attention to the fact that in earlier exchanges over the release of the Tribunal’s decisions (BGT quotes in particular an e-mail from Mr. Gass of Freshfields Bruckaus Deringer to Mrs. Polasek dated 13 April 2006), the UROT took the view that if BGT did not consent to disclosure of the Tribunal’s decisions, they would not otherwise come into the public domain. At no stage during the proceedings, did the UROT suggest that they felt having the right to release every document produced in the arbitration, as and when they saw fit.

BGT only found about this issue with the publication of the Minutes of the First Session of the Arbitral Tribunal and Procedural Order N°2 on the Investment Treaty Arbitration website.

100. BGT does not accept the UROT's allegation that it was only ever concerned about what documents the Centre, and not itself, could publish. Neither during the discussion at the First Session or in the comments made subsequently on the Draft Minutes, the UROT has taken the view that it was unilaterally entitled to disclose all documents in the proceedings.

F - The UROT's Answer to BGT's Sur-Reply:

101. Following the Arbitral Tribunal's directions issued on 24 August 2006, the UROT filed its comments on BGT's Sur-Reply on 29 August 2006.
102. The UROT contends that BGT's unsolicited Sur-Reply does not bring anything new from BGT's side. It draws the Tribunal's attention to the fact that the Guardian newspaper articles cited by BGT in the Sur-Reply are both dated weeks prior to BGT's Reply submission filed on 11 August 2006. The UROT considers that the Sur-Reply is thus, merely a re-hashing of points that BGT has made before, accompanied by two exhibits that could have been introduced earlier if they were truly significant. Therefore, according to the UROT, nothing justified BGT's unauthorized filing.
103. The UROT addresses the contents of the Sur-Reply in five points.
104. First, it notes that in its last submission, BGT admits (at paragraph 1) that it has suffered no harm from the UROT's disclosure of certain documents from this arbitration. The UROT considers that this concession gives rise to a strong inference that BGT faces no material threat to any legitimate interest and much less a threat necessitating the urgent imposition of interim measures. According to the UROT, BGT's request for interim measures must fail.

105. The second point raised by the UROT concerns the use made by BGT of the word “interest” in support of its claim for interim measures. The UROT contends that BGT has yet to settle on a formulation or give content to the broad concept of “procedural integrity” that it says necessitates the interim measures it seeks. It further emphasizes the fact that BGT’s formulation “*structuring [the proceedings] in a way that serves the primary purpose of the arbitration*” is remarkable for its vagueness and its lack of authority in support of it. According to the UROT, there is no evidence that the “interest” asserted by the BGT is threatened, and it still has failed to provide any evidence in support of its allegation that the Tribunal’s ability to conduct the arbitration has been or will be compromised.
106. Concerning the *Guardian* articles cited by BGT in support of its Sur-Reply, the UROT makes the following comments:
- (i) First, the two articles do not relate to this arbitration but to the separate UNCITRAL arbitration commenced by City Water against DAWASA. The UROT alleges that if BGT believes that any rule of confidentiality in that proceeding has been breached, its remedy lies before the arbitrators there.
 - (ii) As a second point, the UROT adds that journalists make mistakes, and it is for this reason, among others, that the availability of accurate information about high-profile proceedings like the present arbitration is so important. Also for this reason, Mr. Mkono’s initiative of writing to the newspaper to bring the various errors in the article to the attention of the Editor-in-Chief, was appropriate.
 - (iii) The UROT reaffirms that it has no objection to BGT commenting publicly about this case. However, it considers that in light of BGT’s provocative and inflammatory press campaign, it is in no position to insist upon a gag order against the UROT.
107. The fourth point raised by the UROT is that BGT’s suggestion that the UROT has been inconsistent in its approach to transparency is not new and has not improved. It contends that it has already demonstrated that BGT’s argument is incorrect (it refers to para. 27-30 of its Response dated 4 August 2006) and that it is clear that it has pressed for the greatest possible transparency.

108. The UROT concludes that BGT’s application for interim measures should be denied and that the UROT should be awarded the costs it has incurred in defending against that application. BGT has failed to show a threat to any legitimate interest, and has failed to demonstrate that the measures requested are necessary and urgent. There has been neither any harm to BGT, nor evidence of any future threat to the “procedural integrity” of this arbitration.

III DISCUSSION AND RECOMMENDATIONS

109. The Claimant’s request is based on Article 47 of the ICSID Convention and Rule 39(1) of the Arbitration Rules.

110. Article 47 of the Convention provides:

“Except 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”.

111. Article 39 (1) of the Arbitration Rules provides :

“At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures”.

(a) Two Competing Interests

112. The determination of this application for provisional measures entails a careful balancing between two competing interests: (i) the need for transparency in treaty proceedings such as these, and (ii) the need to protect the procedural integrity of the arbitration.

113. In order properly to strike this balance, it is important at the outset to clearly identify the nature of each interest.

i. Transparency

114. Considerations of confidentiality and privacy have not played the same role in the field of investment arbitration, as they have in international commercial arbitration. Without doubt, there is now a marked tendency towards transparency in treaty arbitration.

115. *Agreement of the Parties:* Parties are free, of course, to conclude any agreements they choose concerning confidentiality. Any such agreements would give rise to rights that are susceptible of protection by way of provisional measures or other appropriate relief.

116. There has been no general agreement in this regard in this case, and there is no provision on confidentiality in the UK-Tanzania bilateral investment treaty pursuant to which these proceedings have been brought.

117. To date, the only agreement that has been reached appears in the Minutes of the First Session, where, under a heading “*Article 48(5) of the Convention; Administrative and Financial Regulation 22*”, an agreement was recorded that the Centre may publish the item listed in Administrative and Financial Regulation 22(2)(b) (the award), at such time and in such manner as it deems fit.

118. Beyond this, it was simply noted that the parties:

“will consider, on a case by case basis, the publication of other items listed in Administrative and Financial Regulation 22(2)(b) and (c), and of any other order or decision of the Tribunal.”

119. As the heading in the Minutes suggests, this was a position reached by specific reference to Article 48(5) of the Convention and Financial Regulation 22, both of which only concern publication by the ICSID secretariat itself (C. SCHREUER, *The ICSID Convention, A Commentary* (CUP 2002) at 819-828). It follows from this,

and from the nature of the discussion at the time, that the parties did not address other forms of publication.

120. As also noted in the Minutes of the First Session, the parties subsequently agreed on the publication of the Tribunal's Procedural Order No. 1 of 31 March 2006, and this was accordingly published by ICSID.
121. *No General Per Se Rule:* In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.
122. The position of ICSID with respect to transparency has evolved from the old Rules to the new Rules, in force since 10 April 2006, and which govern these proceedings as of that date (Minutes of the First Session, Item 5). The changes mainly concern briefs *amicus curiae* and the attendance of third parties at the hearing (e.g. the new Rule 37(2)). However, as noted above, they clearly reflect an overall trend in this field towards transparency.
123. As matters now stand, the ICSID Convention and the Administrative and Financial Regulations and Rules only contain limitations on specific aspects of confidentiality and privacy, as follows:
 - (a) Article 48(5) of the ICSID Convention provides that: "The Centre shall not publish the award without the consent of the parties." As noted above, this provision deals by its terms only with publication by the Centre itself (C. SCHREUER, *supra*, at 819-828).
 - (b) Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of (i) arbitral awards or (ii) the minutes and other records of proceedings, if both parties to a proceeding so consent. Again, this provision by its terms is addressed only to the Secretary-General.

- (c) Rule 32(2) of the new ICSID Arbitration Rules provides that the hearing may be opened by the Tribunal to other persons besides the disputing parties, their agents, counsel and advocates, witnesses and experts and officers of the Tribunal - provided that no party objects (in which case, the hearing is to be held in private).
124. These provisions require (subject to contrary agreement) the privacy of the arbitral hearing – a central element of the arbitral process. At the same time, the foregoing provisions focus on the actions of ICSID and arbitral tribunals, and do not expressly address the actions of the parties themselves.
125. There is no provision in the ICSID Arbitration Rules which expressly provides for the confidentiality of pleadings, documents or other information submitted by the parties during the arbitration. On the contrary, the official annotations accompanying the original version of the ICSID Arbitration Rules (which are not binding, and do not form part of the Rules) state that the parties are not prohibited from publishing their pleadings, but that they may agree not to do so “*if they feel that publication may exacerbate the dispute*” (Rule 30, Note F, 1 ICSID Reports 93 – C. SCHREUER, *supra*, at 824, fn 141).
126. This position was confirmed (inter alia) by the ICSID Tribunal in *Amco Asia Corp & others v The Republic of Indonesia*, in the context of an application to recommend a provisional measure to prevent the parties from promoting newspaper publication of details of the case. The Tribunal rejected this request on the ground that neither the ICSID Convention nor the Rules nor any accepted principle of confidentiality in arbitration prevented a party from revealing information about an arbitration case to the newspapers ((1983) 1 ICSID Reports 410, 412). It observed 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; ...” (p.412).¹¹

¹¹ The Tribunal, however, went on to address the issue from the perspective of “non-aggravation and non-exacerbation of the dispute,” an analytically distinct and competing interest which is discussed further below.

127. As outlined below, this position is very similar in other types of treaty arbitration.
128. *ICSID Additional Facility*: The ICSID Additional Facility Rules similarly contain no general duty of confidentiality, but rather a small number of specific protections. For instance, Article 39 limits attendance at hearings. Article 44 limits publication by the Secretary-General of ICSID of minutes of hearings. The extent of confidentiality obligations under the Additional Facility Rules has been the subject of analysis in a number of cases, such as *Metalclad v United Mexican States* (ICSID Case ARB(AF)/97/1), in which it was held, inter alia, that:
- “There remains ... 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 free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission. ...”
129. A general duty of confidentiality was also rejected by the Tribunal in *Loewen Group Inc & Raymond L. Loewen v United States* (ICSID Case No. ARB(AF)98/3), in particular insofar as might preclude a Government or other party from discussing the case in public, and thereby deprive the public of knowledge and information concerning government and public affairs (paras 24-28).
130. *NAFTA Chapter 11*: There is no general provision in NAFTA providing for confidentiality with respect to arbitrations under its Chapter 11. On the contrary, there are a number of specific provisions aimed at ensuring transparency (e.g. Arts 1127-1129, entitling the States Parties to NAFTA to be informed about claims, to receive copies of all claims, evidence and submissions, and to make general submissions about them; Art 1137(4), on publication of awards). Since the Free

Trade Commission's Interpretation of 31 July 2001, it has now been made clear (in Section A.1 of the Interpretation) that:

“Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration, and, subject to the application of Article 1137(4), nothing in NAFTA precludes the parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal.”

131. The FTC Interpretation provides expressly for general disclosure of information, subject to only specified and narrow exceptions (such as the protection of confidential business or privileged information, security interests, and other rights of privacy). Thus, NAFTA arbitration has probably achieved the highest level of transparency in this field. Memorials, procedural orders and other decisions, as well as awards, are now made public on a routine basis, and can be consulted for example on the US Department of State website (www.state.gov). In broad terms, subject to narrow exceptions, and in the absence of any restrictive order by a tribunal, disputing parties remain free to disclose all information submitted to or issued by a NAFTA tribunal.
132. *UNCITRAL Arbitration Rules:* Under Article 25(4) of the UNCITRAL Rules, hearings are to be held *in camera* unless the parties agree otherwise. Under Article 32(5), awards are to be made public only with the consent of both parties. Aside from these two provisions, there are no other provisions expressly imposing a general duty of confidentiality, or prohibiting disclosure of documents prepared for or disclosed in the arbitration. In *S.D. Myers Inc v Canada*, (Procedural Order No 16 of 13 May 2000), the Tribunal operating under the UNCITRAL Rules distinguished treaty arbitrations from private commercial arbitrations, as follows (para 8):

“The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that *any general principle* of confidentiality exists in an arbitration such as that currently before this tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a

provision in an international treaty, not pursuant to an arbitration agreement between disputing parties.”

(At the same time, the Tribunal did impose restrictions on hearings and materials that formed part of the hearings. Insofar as NAFTA arbitration are concerned, the Tribunal’s holdings may have to be reconsidered in light of the subsequent FTC Interpretation of 2001).

133. These 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.
134. However, there exist other specific, and analytically distinct, interests that may militate in favour of restrictions. These are addressed below.

ii. Procedural Integrity and “Non-Aggravation / Non-Exacerbation” of the Dispute

135. It 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. Both may be seen as a particular type of provisional measure (as, for example, in Article 17 of the newly revised UNCITRAL Model Law on International Commercial Arbitration, which refers to the prevention of “*current or imminent harm or prejudice to the arbitral process itself*”), or simply as a facet of the tribunal’s overall procedural powers and its responsibility for its own process. Both concerns have a number of aspects, which can be articulated in various ways, such as the need to:

- preserve the Tribunal’s mission and mandate to determine finally the issues between the parties;
- preserve the proper functioning of the dispute settlement procedure;

- preserve and promote a relationship of trust and confidence between the parties;
 - ensure the orderly unfolding of the arbitration process;
 - ensure a level playing field;
 - minimise the scope for any external pressure on any party, witness, expert or other participant in the process;
 - avoid “trial by media”.
136. 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. This is all the more so in very public cases, such as this one, where issues of wider interest are raised, and where there is already substantial media coverage, some of which already being the subject of complaint by the parties.
137. Whilst it is in the wider public interest to ensure that accurate information about the parties’ dispute and its resolution is broadcast, this is not always easy to achieve. That is particularly true while an arbitration is ongoing, and an arbitral record has yet to be completed.
138. These concerns have been recognised in a number of previous decisions. In particular the Tribunal agrees with the observations (in the context of NAFTA) made in *The Loewen Group, Inc. and Raymond L. Loewen v. USA* (ICSID Case N° ARB (AF) 98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, January 5, 2001) and *Metalclad Corp. v. United Mexican States* (ICSID Case N° ARB (AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regard the Case, 27 October 1997), that “*it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings they 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).

139. Further, according to C. SCHREUER, *supra*, at p. 744 and following, at 746:

“[t]he purpose of provisional measures is to induce behavior by the parties that is conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties’ rights, preventing self-help, safeguarding the awards’ eventual implementation and generally keeping the peace...”

140. Importantly, these are not concerns that are inconsistent for all time with transparency – since they are limited in duration, and do not impact beyond the end of the proceedings themselves. Once the arbitration has finally concluded, most restrictions would not normally continue to apply. While the proceedings remain pending, however, there is an obvious tension between the interests in transparency and in procedural integrity.

141. The UROT states that if the orders sought here are granted, this would be without any precedent in ICSID proceedings, and an event “*unique in ICSID history*”. The Tribunal disagrees. There are a number of instances in which such recommendations have been made – albeit not all publicised – and the underlying rights and interests in question are now well-accepted. The fact that the actual orders that were sought in cases such as *Loewen*, *Metalclad*, and *Amco* were not granted in the terms on which they were sought is not decisive. Each case turned upon specific facts regarding the risk of exacerbation and the effects on the arbitration’s procedural integrity, while in each instance, the tribunal reaffirmed the general principles outlined above concerning the need to minimise aggravation of the parties’ dispute.

142. As to the observation that most treaty arbitrations are the subject of widespread reporting and publicity, the Tribunal would note that this is so, but that (at least outside of the expressly-regulated regime of NAFTA), much of this reporting and publicity occurs after arbitral proceedings have actually concluded, and a final award rendered. As noted above, it is at this stage that, in the normal course, concerns as to procedural integrity no longer apply.

(b) Threats to Procedural Integrity / Aggravation and Exacerbation of the Dispute at Issue in These Proceedings

143. The UROT asserts that none of the rights or interests identified by BGT are actually the subject of any existing threat, such as to warrant the imposition of provisional measures at this stage.
144. It is true that the risks to the integrity of these proceedings, and the danger of an aggravation or exacerbation of this dispute, have yet to manifest themselves in concrete terms. Neither party has demonstrated that it has yet been inhibited, in fact, from participating fully in these proceedings or that any of the existing arbitration procedures have been hindered or impaired by the publicity that has occurred to date. In truth, BGT's complaint amounts to a concern about the risk of future prejudice, or the potential risk to the arbitral process as it unfolds hereafter.
145. The Tribunal disagrees, however, with the suggestion that actual harm must be manifested before any measures may be taken. Its mandate and responsibility includes ensuring that the proceedings will be conducted in the future in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect). Among other things, its mandate extends to ensuring that potential inhibitions and unfairness do not arise; equally, its mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties.
146. Given the media campaign that has already been fought on both sides of this case (by many entities beyond the parties to this arbitration), and the general media interest that already exists, the Tribunal is satisfied that there exists a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some form of control.
147. Equally, however, given the public nature of this dispute and the range of interests that are potentially affected, including interests in transparency and public

information, the Tribunal is also of the view that, as far as possible, any restrictions must be carefully and narrowly delimited.

(c) Appropriate Form of Order

148. Having carefully considered each category of documents and information involved in Claimant's request for provisional measures, the Tribunal concludes that an appropriate balance between the competing interests, at least for the time being, is as follows:

i. General Discussion about the Case

149. Subject to the restrictions on disclosure of specific documents set out below, neither party should be prevented from engaging in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to the Republic's duty to provide the public with information concerning governmental and public affairs), and is not used as an instrument to further antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult.
150. Part of the UROT's opposition to the measures sought by BGT is based upon a concern that there ought not to be any: "*curtailment of a sovereign State's right (and obligation) to inform the public about a matter of great public importance and comment*" (UROT's submission of 18 August 2006, para 15). The Tribunal agrees with this, and considers that the direction in paragraph 149 above adequately caters for UROT's concern. Indeed, as clarified in its submission of 11 August 2006, BGT has: "*not sought an order restraining the UROT from commenting on the arbitral proceedings in a general way*".

ii. Awards

151. In light of the parties' agreement (as recorded in paragraph 117 above) that the Centre may publish awards at such time and in such manner as it deems fit, there is no need for any direction in this regard.

iii. Decisions, Orders and Directions of the Tribunal (other than Awards)

152. Given the treatment of awards, and the treatment of such materials in investment arbitration generally, the presumption should be in favour of allowing the publication of the Tribunal's Decisions, Orders and Directions. Publication of the Tribunal's decisions also, as a general matter, 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.
153. However, the nature and subject matter of Decisions, Orders and Directions varies enormously, and for some it may still be inappropriate to allow wider distribution. It follows that this category ought to be considered by the Tribunal on a case-by-case basis as such determinations are made.
154. In the exercise of this mandate, the Tribunal considers it important that no confidentiality restriction be imposed upon this Procedural Order No 3, given the need to explain to parties with interests in transparency the precise basis upon which the Tribunal is proceeding.

iv. Minutes or Records of Hearings

155. The Tribunal considers itself responsible to ensure that the hearing is conducted in an efficient manner, to resolve the parties' dispute fairly and impartially. The publication of minutes or records of hearings has at least the potential to affect the procedural integrity and efficiency of the hearing itself. Indeed:
- (a) Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of the minutes and other records of proceedings if both parties to a proceeding so consent, and
 - (b) Rule 32(2) of the new ICSID Arbitration Rules provides that the hearing may not be opened by the Tribunal to third parties if a party objects.

Accordingly, it is appropriate that minutes or records of hearings should not be disclosed unless the parties so agree, or the Tribunal so directs.

v. Documents Disclosed in the Proceedings

156. No restriction is appropriate upon the publication by one party of its own documents, even if those documents have been produced in the arbitral proceedings pursuant to a disclosure exercise, or otherwise. (Of course, if there are separate contractual or other confidentiality restrictions on such publication, then the nature, applicability and enforceability of those restrictions would need to be raised and considered. No such restrictions have been suggested in this case).
157. However, in the interests of procedural integrity, the Tribunal does consider it appropriate to restrict publication or distribution of documents that have been produced in the arbitration by the opposing party. The interests of transparency are here outweighed, since the threat of wider publication may well undermine the document production process itself, as well as the overall arbitration procedure. The production of documents by a party, whether in response to a disclosure request or otherwise, is made for the purpose of resolving the parties' dispute and the presumption is that materials disclosed in this manner should be used only for such purpose.

vi. Pleadings / Written Memorials

158. Given that (a) the pleadings and written memorials are likely to detail documents that have been produced pursuant to a disclosure exercise, and (b) any uneven publication or distribution of pleadings or memorials is likely to give a misleading impression about these proceedings, this category of documents should be restricted, pending conclusion of the proceedings (or agreement between the parties, or further order by the Tribunal).

159. The same restriction ought to apply to witness statements and expert reports attached to pleadings and written memorials.
160. As to documents attached to pleadings and written memorials, this is already addressed in paragraphs 156 and 157 above.

vii. Correspondence Between the Parties and/or the Arbitral Tribunal Exchanged in respect of the Arbitral Proceedings

161. This is a category in which the needs of transparency (if any) are outweighed by the requirements of procedural integrity. Correspondence between the parties and/or the Arbitral Tribunal will usually concern the very conduct of the process itself, rather than issues of substance, and as such do not warrant wider distribution. It follows that this is an appropriate category for restriction.
162. *Continued Review:* In order to ensure that the balance between the competing interests is maintained, the Tribunal considers it appropriate to keep each category under continued review. To this end, pending the conclusion of these proceedings, the Tribunal will act as a “gate-keeper” on disclosures. Thus, if new circumstances arise, and the parties are unable to reach agreement, the parties remain at liberty to apply to vary these directions on a case-by-case basis. In the interests of efficiency, the Tribunal expects that such applications would be made only in well-justified circumstances, supported by concrete explanations.
163. *Restrictions on Both Parties:* As will be clear, the analysis above leads to a form of order different to that requested by BGT. In particular, it is an order that must as a matter of fairness, equality of treatment and non-aggravation of the parties’ dispute apply equally to both parties. As noted by BGT in paragraph 20 of its submission of 11 August 2006:

“One way in which to ensure that a dispute is not aggravated is to preserve an even playing field for the parties (which will in turn maintain the working relationship between them conducive to an effective procedure) and maintain a focus on the merits of the dispute. These considerations will be undermined by allowing one party to disclose unilaterally to third parties the documents filed in the arbitral proceedings. ...”

Given that, to date, both parties have made frequent use of publicity and disclosures, there is no reason why the mechanism set out below ought not to apply equally to all parties.

Consequently, the Arbitral Tribunal Recommends That:

for the duration of these arbitration proceedings, and in the absence of any agreement between the parties:

- (a) all parties refrain from disclosing to third parties:
 - i. the minutes or record of any hearings;
 - ii. any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise;
 - iii. any of the Pleadings or Written Memorials (and any attached witness statements or expert reports); and
 - iv. any correspondence between the parties and / or the Arbitral Tribunal exchanged in respect of the arbitral proceedings.

- (b) All parties are at liberty to apply to the Arbitral Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis.

- (c) Any disclosure to third parties of decisions, orders or directions of the Arbitral Tribunal (other than awards) shall be subject to prior permission by the Arbitral Tribunal.
- (d) For the avoidance of doubt, the parties may 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.

Further it is Recommended that:

- (e) all parties 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.

Disclosure of this Procedural Order

- 164. This Procedural Order No 3 shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.

Reservation

- 165. The recommendations and orders above are made strictly without prejudice to all substantive issues in dispute and without prejudice to further requests (by either party) for production of documents or other disclosure. The Arbitral Tribunal is obviously not yet in a position to form any views whatsoever on the merits of the parties' cases, and it has been careful not to prejudge any issues of fact or law in the formulation of this procedural order.

The Arbitral Tribunal

Signed

Gary BORN

Signed

Toby LANDAU

Signed

Bernard HANOTIAU

Dated: 29 September 2006