DOCUMENT DISCLOSURE IN INVESTMENT ARBITRATION

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Document disclosure is, in many respects, the poor cousin in investment arbitration. It lacks the glamour of the public policy issues that are often presented in other areas of the field. Its challenges are more of a practical nature than a legal one. In investment awards studied with great interest by scholars, practitioners and the parties, document disclosure often is addressed, if at all, in a paragraph or two in the procedural history, a part of the award that only the most diligent reader reviews before hurrying on to the jurisdictional and substantive discussion.

Yet, document disclosure is an important part of investment arbitration. It presents significant legal, logistical and practical challenges for counsel and arbitrators. It is often a significant

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component of the total cost of an investment arbitration. In many cases, the documents disclosed can make or break a claim or defense.

Document disclosure, of course, is far from unique to investor-State arbitration. To the contrary, the rules, procedure and practice of document production in investment arbitration largely mirror those found in commercial arbitration.

There are, however, certain issues that are presented more often, or to a greater extent, in investment arbitration than in commercial cases. This article begins its consideration of these issues by recalling the general framework for document disclosure created by the applicable rules and practice (section I). It then examines recurrent legal issues raised by document disclosure in investment arbitration (section II). The article concludes with a discussion of practical issues presented by document disclosure in investment arbitration (section III).

I. THE GENERAL FRAMEWORK FOR DOCUMENT DISCLOSURE

The rules most often used in investment arbitration, those of ICSID and UNCITRAL, affirm the power of the tribunal to order the production of documents.[2] However, the rules leave

[2] Rule 34(2)(a) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (2006) provides as follows: "The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts … ." Article 27(3) of the UNCITRAL Arbitration Rules (2010) provides as follows: "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine." The SCC and ICC rules are to similar effect.

significant discretion to arbitral tribunals concerning the scope and organization of the production of documents.

A review of investment awards addressing the issue of document production reveals a strong tendency to refer to the IBA Rules on the Taking of Evidence in International Arbitration (hereafter the "IBA Rules"), both at the initiative of the parties and the arbitral tribunal.[3] Article 3.3(a) of the IBA Rules authorizes requests for specific documents and those that describe "in sufficient detail (including subject matter) … a narrow and specific category of Documents that are reasonably believed to exist … ."[4]

There appears to be a general practice in investment treaty arbitration of permitting limited document requests, following the IBA Rule quoted above.[5]

In *International Thunderbird v. Mexico* for instance, the tribunal interpreted the standard of narrowness and specificity set forth by the IBA Rules "to mean narrowly tailored, i.e.,

[3] See, for example, *Methanex Corp. v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 10 (Aug. 3, 2005)*; In re Application of Caratube Int'l Oil Co.*, No. 10-0285 (JDB), slip op. at 10 (D.D.C. Aug. 11, 2010), for decisions where the IBA Rules on the taking of evidence were referred to at the initiative of the parties; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 46 (Sept. 13, 2001), for decisions where the IBA Rules on the taking of evidence were referred to at the initiative of the tribunal.

[4] IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010), Article 3(3)(a).

[5] *See S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Procedural Order No. 1, ¶ 5 (May 28, 1999); *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Procedural Order No. 2, ¶ 8(a) (May 3, 2000)*; Biwater Gauff Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Procedural Order No. 1, ¶ 104 (Mar. 31, 2006).

reasonably limited in time and subject-matter in view of the nature of the claims and defences advanced in the case."[6]

II. LEGAL ISSUES RAISED BY DOCUMENT DISCLOSURE IN INVESTMENT ARBITRATION

Three broad categories of legal issues recur in investment arbitration, but are less prevalent in commercial arbitration. These are evidentiary privileges (A), treatment of documents in the public domain (B), and disclosure of documents or information through unconventional means (C).

A. EVIDENTIARY PRIVILEGES

Evidentiary privileges exempt a party from having to produce a document or information in response to a disclosure request.

Perhaps the most commonly encountered privilege in any arbitration is that for communications between an attorney and a client. This also is often a subject in investment arbitration. But in

[6] *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Procedural Order No. 2, ¶ 2(ii) (July 31, 2003).

treaty arbitrations, one often encounters additional privileges rarely seen in commercial cases, such as cabinet privilege, secret diplomatic negotiations, state secrets, deliberative process privilege, confidential taxpayer records, and the secrecy of law enforcement investigations.

The privilege for communications between members of a cabinet of government was presented in *Pope & Talbot v. Canada*[7] and *UPS v. Canada*.[8] In *Pope & Talbot v. Canada,* the Tribunal recognized that "state secrets" may justify the refusal to produce documents, but refused the application of the Canada Evidence Act and invited Canada to furnish it with the dates, the identification of the documents and an indication of the aspect of the dispute to which each of the documents related.[9] Canada refused to identify and produce the documents.

In *UPS v. Canada*, the Tribunal elaborated on the privilege for communications between members of a cabinet of government by holding as follows:

> [S]tate practice does support the protection of information falling within the deliberative and policy making processes at high levels of government. Those processes cannot function completely in the open. That recognition of the need for protection exists notwithstanding the movement to be seen in many countries towards greater openness in the public sector. But the protection to be afforded is in general carefully circumscribed

[7] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Crown Privilege and Solicitor-Client Privilege, ¶ 1-1.8 (Sept. 6, 2000).

[8] *United Parcel Service, Inc. v. Government of Canada*, UNCITRAL, Decision relating to Canada's Claim of Cabinet Privilege (Oct. 8, 2004).

[9] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Crown Privilege and Solicitor-Client Privilege, ¶ 1.3-1.4, 1.7 (Sept. 6, 2000).

> to protect no more than the interests that call for protection … [and] those interests in general are subject to being outweighed by the competing interest in disclosure.[10]

The secrecy of inter-governmental communications during the negotiation of a treaty, which were classified as confidential under a national security law, was asserted in *Canfor Corporation v. United States*. In this case, the Tribunal invited the United States to produce the drafts and negotiating texts of the NAFTA exchanged between the NAFTA Parties,[11] but also any materials such as communications, explication notes, position papers or memoranda that were shared among the NAFTA Parties with respect to the relevant portions of the NAFTA identified by the claimant.[12]

A state secrets privilege was also discussed in the case of *Biwater Gauff v. Tanzania*. Tanzania invoked a public interest immunity exception based on the domestic law of Tanzania. While the Tribunal recognized that the state secrets privilege could justify a refusal to produce documents, it rejected the objection made by the State on the basis of its own law as contrary to the international law rule that no State may invoke its own internal law as a means of avoiding its international responsibilities. The tribunal further found that accepting the objection would create an imbalance between the parties. [13]

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[10] *United Parcel Service, Inc. v. Government of Canada*, UNCITRAL, Decision relating to Canada's Claim of Cabinet Privilege, ¶ 11 (Oct. 8, 2004).

[11] *Canfor Corp. v. United States*, UNCITRAL, Procedural Order No. 4, ¶ 9 (Mar. 26, 2004).

[12] *Canfor Corp. v. United States*, UNCITRAL, Procedural Order No. 5, ¶ 23 (May 28, 2004).

[13] *Biwater Gauff Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, at 8-9 (May 23, 2006).

In *Glamis Gold v. United States*, the US Government claimed a so-called deliberative process privilege, one according to which the internal deliberations of government officials prior to taking an action are protected from disclosure. The claimant in that case agreed with the respondent as to the applicability and general content of the privilege. The tribunal adopted the parties' agreed approach and resolved differences between them by finding the privilege to encompass "documents generated before the adoption of an agency policy or decision that contain opinions, recommendations or analyses of specific policies or decisions", and do not include factual information except where that information is "so inextricably intertwined with policy information that [they] cannot be appropriately segregated or or the factual information itself would reveal too much of the deliberative process to be disclosed."[14]

In *Feldman v. Mexico*, the tribunal was confronted with a claim of confidentiality of taxpayer records. In finding that Mexico had denied the Claimant national treatment, the majority of the tribunal referred to Mexico's failure to provide evidence as to its treatment of other tax payers.[15]

An interesting question often presented in these cases is which law, national or international, governs the question of whether the privilege exists or should be recognized. There are a small number of treaties that specifically address some of these privileges – notably the NAFTA,

[14] *Glamis Gold, Ltd., v. United States*, UNCITRAL, Decision on Parties' Requests for Production of Documents withheld on Grounds of Privilege, ¶ 36 (Nov. 17, 2005).

[15] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 178 (Dec. 16, 2002).

which in articles 2102 and 2105 except a State from any obligation to disclose information contrary to its essential security, or which would impede law enforcement or infringe upon laws protecting personal privacy or financial information.[16] Where the treaty addresses the issue, of course, the existence of the privilege is established by the treaty's terms and no choice of law question is presented.

However, for many privileges the treaty is silent and government officials rely on their own national law to establish the content of the privilege. Tribunals in investment arbitration cases have tended to reject these arguments and instead address the question based on either international law or international arbitration practice as was mentioned above.[17] On this second category, it is notable that the widely accepted IBA Rules frame the standard in demanding terms. It is not enough that the State show that the information has been classified as a state secret or similar government information. According to Rule 9(2)(f), the respondent must also

[16] North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). NAFTA Art 2102(1)(a) provides that "1. Subject to Articles 607 (Energy - National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests ... ." NAFTA Art. 2105 provides that "Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions."

[17] *See, e.g., Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Crown Privilege and Solicitor-Client Privilege, ¶ 1.3-1.4 (Sept. 6, 2000) (rejecting the application of Canadian law, which provided for a broader scope of privilege, by deeming it inapplicable to an international arbitral tribunal); *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, at 8 (May 23, 2006) ("It is hardly conceivable that, in this setting, a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents which are relevant to determine whether the State has violated its international obligations and whether, therefore, its international responsibility is engaged.").

show "grounds of special political or institutional sensitivity ... that the Arbitral Tribunal *determines to be compelling* ... ."[18] This second element, which grants a power of appreciation to the tribunal, is not one often found in national law.

This issue can be relevant not only during the arbitration, but also when annulment of the award is sought before a national court. In *Feldman v. Mexico*, the tribunal essentially drew an adverse inference from Mexico's failure to produce key information concerning a taxpayer audit.[19] In an annulment action in Canadian court,[20] Mexico argued that it had been prevented from putting on its case because Mexican law prevented it from producing that information, and the tribunal had refused to give effect to Mexican law.[21] The Canadian court rejected that argument. But one can wonder what the result would have been had the place of arbitration, and therefore the annulment action, been in Mexico.

As the *Pope & Talbot* tribunal observed, application of a privilege applicable to only one side of the dispute can give rise to questions about the equal treatment of the parties by the tribunal. The tribunal held that the refusal to produce the documents requested by the claimant did not appear to be prejudicial to the investor but that "[a]s Canada's refusal to disclose or identify documents

[18] IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 9(2)(f) (emphasis added).

[19] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 178 (Dec. 16, 2002).

[20] *United Mexican States v. Marvin Roy Feldman Karpa*, [2005] CanLII 249, ¶ 49-61 (Can. Ont. C.A.).

[21] Applicant's Factum at ¶ 138(a)-(b), *United Mexican States v. Marvin Roy Feldman Karpa*, [2003] CanLII 34011 (Can. Ont. S.C.) (No. 03-CV-23500).

in these circumstances is at variance with the practice of other NAFTA Parties, at least of the United States, that refusal could well result in a denial of equality of treatment of investors and investments of the Parties bringing claims under Chapter 11."[22] One can indeed wonder whether it is fair for a government to shield key documents concerning why it adopted the relevant measure in the case based on a deliberative process privilege when the investor's internal deliberations are laid bare. The *Pope & Talbot* decision suggests that this question addresses an inequality contrary to this fundamental principle of international arbitration proceedings.[23]

B. INFORMATION IN THE PUBLIC DOMAIN

Unlike most parties in commercial arbitration, governments often make available to the public huge volumes of information about their activities, whether through national archives, court dockets or through more modern means such as websites and on-line databases. Sometimes this public information relates to issues in an investment arbitration. The question then becomes: does a party's obligation to respond in good faith to a document disclosure request extend to information in the public domain? Can a claimant shift the burden of looking through this mass of information to the respondent by transmitting a document request?

The tribunal in *ADF Group v. United States* considered this question. It concluded where the documents requested are in the public domain and equally and effectively available to both

[22] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, ¶ 193 (Apr. 10, 2001).

[23] *Id.*

parties, there is no necessity for requiring the other party physically to produce and deliver the documents to the former for inspection and copying. However, the tribunal held that "[w]here ... the requesting party shows it would sustain undue burden or expense in accessing the publicly available material, the other party should be required to produce the documents for inspection."[24] In this case, it was enough for the State to identify the particular government office at which the documents were in fact available to the claimant or its representatives, as members of the general public.

C. DISCLOSURE THROUGH UNCONVENTIONAL MEANS

Another feature of the investment arbitration landscape is the ability of the parties to obtain disclosure of documents or information through means not ordinarily encountered in commercial arbitration.

One such means, prominently addressed in the *Libananco v. Turkey* case, is use (or misuse) of a State's intelligence and law enforcement capabilities.[25] Intelligence services of a number of States routinely intercept communications of potential interest to the State, and sometimes monitor telephone and other conversations through hidden recording devices or wiretaps. Experienced investment counsel for claimants operating in such countries will often use

[24] *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Procedural Order No. 3 Concerning the Production of Documents, ¶ 4 (Oct. 4, 2001).

[25] *Libananco Holdings Co. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (June 23, 2008).

encryption or other means of protecting communications – not so much in the belief that these means will make it impossible for intelligence services to intercept or decrypt the communication, but in the hope that it will make doing so sufficiently inconvenient that the State will devote its limited resources to issues more pressing than the arbitration.

The balance to be struck by a tribunal in those instances where such practices come to light is one between the State's interest in conducting legitimate law enforcement or national security investigations and the need to ensure equality of arms between the parties. This was essentially the balance struck by the tribunal in the *Libananco* case.[26]

The other means of obtaining disclosure not generally available in commercial arbitrations is that provided by laws on freedom of public access to government information. The availability of requests under these laws to obtain discosure has figured in a number of investment arbitrations, most notably in the protection of confidential business or other information produced by an investor to a government.

III. PRACTICAL ISSUES AND ASYMMETRIES

[26] *Libananco Holdings Co. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 82 (June 23, 2008) ("The Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in Turkey. The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration. " (quoting from letter, dated May 1, 2008, containing Orders on Claimant's Application of February 29, 2008, ¶ 1.2)).

In addition to the legal issues which were analyzed above, and which often find expression in a tribunal's order or award, there are also a host of practical issues and asymmetries that are only rarely discussed, if ever, in the pleadings before the tribunal.

The main issue is the asymmetry in the quality of document dislosure by governments as opposed to investors. In the authors' experience, many governments cannot be relied upon to provide the same quality of diligent, complete, useful document production expected of most investors. From the investor's perspective, there is sometimes so little prospect of getting useful documents out of some governments that the cost-benefit analysis weighs against document disclosure.

This can be explained in part by a common law/civil law divide with respect to document disclosure. Document disclosure is a part of national civil procedure in most common law jurisdictions. As a result, there are rules of conduct and, most importantly, training of common law lawyers on what they should do after they receive a request for production: how to interview the client on document storage practices, identify the likely custodians of relevant documents and work with those custodians in good faith to search the files, copy the relevant documents and ultimately produce them to the adverse party.

Civil law lawyers, by contrast, generally receive no formal training in document disclosure since there is no equivalent to this procedure in court proceedings in civil law countries. While, in part as a result of the success and clarity of the IBA Rules, civil lawyers in international arbitration

are amply capable of reading and objecting to document requests, most civil law lawyers have no training and no established idea as to what they should do in order properly to produce documents in response to a request or tribunal order. Many view this principally as a role for the client.

When the client is a government and particularly one in a jurisdiction where transparency is not an everyday occurence, the problem is exacerbated considerably. A number of agencies in such countries have no experience with providing documents to anyone upon request. Persuading officials in such agencies seriously to embark on such a project is not easy – particularly if the industry in question is classified as one important to national security or otherwise sensitive.

There are other logistical problems as well. Filing documents in a centralized, organized manner is often not a priority for government agencies or officials. Often each official keeps files of those documents he or she deems to be useful. Depending on the level of interest of the official, the files may be large or small. If the official leaves, the files can become inaccessible or lost. Many States lack extensive or unified information technology systems. And persuading underpaid government clerks that they should put their other work on hold for days while they search for documents is not easy, particularly when the government does not pay overtime for services that must be provided on an urgent basis and after normal working hours.

In addition, in federal States, the relevant documents may be in the possession of a provincial or local government over which the federal government defending the case has no authority.

By contrast, many investors are multinational enterprises that deploy cutting edge technology to their investments abroad. Information technology, knowledge management systems, corporate document retention policies and well trained and paid personnel make it considerably easier to identify and produce relevant documents.

This gives the investor an advantage in when it comes to preparing its own case. But the end result is an asymmetry when it comes to document disclosure. The investor can generally be relied upon to provide a high quality response to document disclosure requests. But the State can generally be relied upon to provide the opposite. This is a special challenge for document disclosure in investment arbitration.

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In conclusion, there are legal and practical issues concerning document disclosure that are specific to investment arbitration. These issues merit carefully consideration by counsel to parties to investment treaty arbitration and, perhaps, deserve more scholarly attention than they have been accorded to date.

Document disclosure may be the poor cousin in the debates on investment arbitration, but it is a topic that deserves our attention.