

DOCUMENT PRODUCTION AND DISCLOSURE IN INVESTOR-STATE ARBITRATION*

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Abstract

It is not uncommon for states to engage in arbitration proceedings with their investors (“Investor-State Arbitration” or “International Investment Arbitration”) administered under the International Centre for the Settlement of Investment Disputes. When these parties engage in document production during evidentiary proceedings, there arises an issue with regards to documents requested by the investor, which is considered as a “state secret” by the state. Based on the IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”), states may have particular interest to refuse the production of a document. This is based on the argument that a document may be exempted from production if the document qualifies as a state secret by virtue of Article 9 of the IBA Rules. This paper will discuss appropriate measures to be taken by tribunals in order to allow for material and relevant evidence to be produced during proceedings, which may be crucial in being able to prove the case of the investor in the case of a conflict pertaining to the production of documents containing state secrets.

Intisari

Tidaklah jarang bagi negara untuk terlibat dalam proses arbitrase dengan investornya (“Arbitrase Investasi Negara” atau “Arbitrase Investasi Internasional”) di bawah Pusat Penyelesaian Sengketa Investasi Internasional. Ketika para peserta melakukan pengadaan dokumen pada tahap pembuktian, muncul masalah di mana dokumen yang diminta investor dianggap “rahasia negara” bagi negara terkait. Berdasarkan Aturan Pengambilan Bukti dalam Arbitrase Internasional IBA (“**IBA Rules**”), negara dimungkinkan untuk memiliki kepentingan tertentu dalam menolak pengadaan suatu dokumen. Hal ini berdasarkan pendapat bahwa sebuah dokumen mungkin dikecualikan dari pengadaan apabila dokumen tersebut termasuk dalam rahasia negara di bawah Pasal 9 IBA Rules. Tulisan ini akan membahas tindakan tepat yang dapat diambil tribunal agar memperbolehkan dikeluarkannya bahan dan bukti relevan yang menjadi penting selama sidang untuk mendukung ihwal dari investor dalam konflik terkait pengadaan dokumen yang mengandung rahasia negara.

Keywords: *International, Investment, Arbitration, Evidence, States, Secrets, Sensitive, Disclose, Measures, Material, Relevant, Prove, IBA, ICSID, Document, Production*

Kata Kunci: *Internasional, Investasi, Arbitrase, Bukti, Negara, Rahasia, Sensitif, Menyingkap, Tindakan, Bahan, Relevan, Membuktikan, IBA, ICSID, Dokumen, Pengadaan*

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A. Introduction

It is not uncommon for states to engage in International Investment Arbitration. As of June 2016, there were already 570 international investment arbitrations registered under the International Centre for the Settlement of Investment Disputes (“ICSID”) (ICSID Statistics, p. 7). ICSID is a convention-based forum and methods of dispute settlement, where the parties involved are contracting states of ICSID Convention (“State”) and investors in such countries (“Investor”) (ICSID Convention, Art. 25 (1)). These Investor-State disputes arise under international investment treaties, which, in their provisions contain arbitration clauses in case of dispute. ICSID has been a popular institution to administer arbitration.

However, there persists a controversial issue when it comes to evidence which must be produced by a state during arbitration proceedings. One of the discussed issues is document production, which occurs when a party requested the opposing party to produce certain documents to support their case. This production of documents might raise issues with regards to evidence considered as “state secrets” which, in the arguments of the states usually are considered as sensitive information not being able to be disclosed to the arbitration tribunal.

This paper will discuss appropriate measures to be taken by tribunals in order to allow for documents to be produced during proceedings, which may be crucial in being able to prove the case of the non-state party in the case of a dispute arising out of a state secret being produced. Furthermore, this paper will also discuss the weight of material evidence against the sensitivity of state secrets that, in compelling circumstances, must be produced in order to ensure the rights of the party seeking the information in order to be able to present its case. The rules that apply to these ICSID proceedings are the ICSID Convention, which also serves as the arbitration rules, the IBA Guidelines for the rules of evidence, as well as the law of the seat of the arbitration proceedings. It is worth emphasizing that the enforcement of

the proceedings brought before ICSID Tribunals are different from that of commercial arbitration, as arbitration awards issued by ICSID Tribunals are not subject to the New York Convention on the Recognition and Enforcement of Arbitral Awards. Instead, the authorization is given by contracting states when they ratify the ICSID Convention (see ICSID Convention, Section 6).

This paper will also focus on the problems facing the enforcement of an investment arbitration award with regards to if the evidence is not produced and deemed as hindering the principle of parties’ equality. Lastly, this paper will propose a few solutions with regards to balancing interests between the rights of an investor party to present its case and the right of a state party not to disclose state secrets.

B. Brief Explanation about Investment Arbitration

Arbitration in itself is a form of an alternative dispute resolution. With regards to Investment Arbitration, such issues may arise from investment treaties which contain arbitration clauses in them. The most common form of investment treaties which prevail in the world come in Bilateral Investment Treaties (“BIT”). A BIT is an agreement between two states establishing the terms, conditions and protections for investments by one party in the territory of the other. Investors from the contracting states may rely on the protective terms of the BIT without entering into a further contractual relationship with the host state. Investors from the contracting states have access to the remedies specified in the BIT and investors may directly claim for breach by the host state through a dispute settlement mechanism.

Investment Arbitration can be conducted through different forum, which are stipulated under the dispute resolution clause in a treaty. An arbitration clause could point to two kinds of arbitrations. The first is an arbitration administered by an institution, where the parties simply agree for their future dispute to be administered

under a set of rules. The second one could be an ad-hoc arbitration, where the parties can tailor the arbitration agreement and rules that govern their agreement.

The ICSID was established based on a convention which is signed by 153 states around the world (ICSID List). This automatically makes ICSID the most popular institution to submit an investment arbitration to, as arbitration awards issued by ICSID do not require further registration upon their enforcement. This convention included a set of rules for arbitration and conciliation which would become the mandatory arbitration rules used if a state wishes to submit its dispute to ICSID. A sample arbitration clause appointing ICSID would be as follows as cited from Article 10 of the 2008 German Model Treaty:

“Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties to the dispute. To help them reach an amicable settlement, the parties to the dispute also have the option of agreeing to institute conciliation proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).”

Hence, it needs to be stated that typically, an investment dispute can arise out of disputes of an investor of a state, whose state has entered into an agreement (in the form of a treaty) with the host state. With this perspective in mind, it must be also recognized that any evidence produced in this kind of investment arbitration could be of a different nature than that of commercial arbitration. In international commercial arbitration, where the concerning parties are corporation or individuals, evidence produced would only

implicate corporate matters as well the business in itself. Whereas investment arbitration would produce documents which may be regarded as a secret of the state which considers national matters. Thus, it would become a problem if states are compelled to produce documents, especially when it pursued to prove the case of an investor.

C. Grounds to Produce Evidence under the ICSID Arbitration Rules

The right to present one’s case is a general principle in arbitration, which is also recognized in investment arbitration. ICSID explicitly states the embodiment of such principle under Rule 39(1) of the Arbitration Rules:

“[a]t 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.”

Further, Rule 39(4) of the Arbitration Rules emphasized that:

“[t]he Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.”

With regards to this principle, the right to be heard requires the tribunal to weigh every submission on facts or requests on the taking of evidence, which is realized in a party’s right to present its case (Haugeneder/Netal, p. 168). This principle is enforced by the evidence provisions in Rule 33 of the ICSID Arbitration Rules which states that:

“Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.”

It is not uncommon in international arbitration to request documents under the right to present a party's case, as the objective of any arbitral procedure should be to allow the parties their opportunity to present the relevant facts in the most reliable, efficient, and fair manner, one of which is the right to receive document production (O'Malley, p. 34). A party is afforded a reasonable opportunity to fully state its case when each party is given reasonable opportunity to present evidence and argument in support of its own case. Tribunals can even order parties to produce evidence in order to fulfill the right of a party to present its case (*Fraport v. Philippines*).

Under Rule 28 of the ICSID Arbitration Rules, there persist two types of evidence which may be present during arbitral proceedings. The first one is evidence, that a party intends to produce. The second type is evidence which a party requests the tribunal to call for from the other party.

First, the principles of a right to be heard and equal treatment have to be observed in respect to various evidentiary issues. As an example, fairness must be observed in organizing an evidentiary hearing, appointing a tribunal expert or ruling on the admissibility of evidence. Second, when considering equality and fairness, a tribunal must also balance the consideration of other legal principles, such as, the observance of attorney-client privilege. A third challenge to the

application of fairness and equality to evidentiary procedure is to find modes of application accepted beyond the boundaries of one legal system as it is very possible that parties may come from two different jurisdictions (O' Malley, p. 5). Clearly, as international arbitration calls upon the service of arbitrators and counsel from a wide variety of legal systems, and involves parties of similarly wide backgrounds, what is considered a “fair opportunity” to present evidence must appeal to those in many arbitrations.

D. The IBA Rules on the Taking of Evidence and the Issue of State Secrets

1. The Adoption of the IBA Rules as International Standard Guidelines

The UNCITRAL Model Law, which most pro-arbitration states have adopted, stipulates that where the parties have adopted a set of rules that do not touch on a particular issue, the arbitral tribunal may conduct the arbitration as it considers appropriate, or the common international practice (Lew/Mistelis/Kröll, p. 28). Over the last decade, the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”), have been widely used by international arbitral tribunals as a guide, as it reflects the experience of recognized professionals in the field. The IBA Rules were originally drafted to fill the gap in most arbitration rules on the taking of evidence (IBA Rules' Commentary, p. 2).

Parties and arbitral tribunals may adopt the IBA Rules, in whole or in part, to govern arbitration proceedings, or merely use them as guidelines in developing their own procedures (Preamble of IBA Rules). It is this flexibility that has led the IBA Rules to achieve prominence within international arbitration, as they embody a set of standards for arbitral practice and therefore can be applied even without an expressed provision (Lew/Mistelis/Kröll, p. 154). Generally, ICSID Tribunals adopt the IBA Rules as it provides a balance between evidence hearings in the common law and civil law systems (IBA Rules, Foreword).

It is known that in civil law systems there is limited document production which parties may engage with, whereas in common law countries such as in the United States rely on a wider form of document production which is also referred to as full discovery (Hanotiau, p. 113, O' Malley, p. 39). In the U.S., this discovery practice often includes a "fishing expedition", which are requests for evidence that outweighs the probative value of the information and the disclosure of unspecified evidence. This kind of discovery is not common in international arbitration.

The IBA rules strikes a balance between the systems of different nations in respect to evidence, making it advantageous for both parties at dispute to use.

2. Requirements to Produce Documents under the IBA Rules

The IBA Rules have several rules regarding requirements for being able to request a document, that is spread out throughout article 3 of the IBA Rules. These are, pursuant to article 3(a)(ii) that the document should be "a narrow and specific requested category of Documents that are reasonably believed to exist", pursuant to article 3(b), "relevant to the case and material to its outcome" and lastly, pursuant to article 3(c)(i), not "unreasonably burdensome for the requesting Party to produce such Documents".

First, the IBA Rules required that in order for a document to be "narrow and specific" under article 3(a)(ii), the request should be sufficient to identify the documents requested, by providing quantifiable guidelines such as limited in time frame and subject matter (Ashford, p. 70).

In an arbitration sitting in Switzerland under the UNCITRAL Rules (Caron/Caplan/Pellonpää, pp. 649-650), the tribunal denied the requests of the Respondent who sought the disclosure of "all documents relating to..." a number of broadly defined claims, referring in some instances to nine-month periods of time, or in others, no time limitations were included in the request at all. Moreover, the term

"reasonably believed to exist" is meant to prevent a broad "fishing expedition" found in U.S. style discovery which also, in conjunction with the narrow and specificity requirement, becomes a safeguard for the production of documents which may not be relevant to the proceedings (IBA Rules' Commentary, p. 8). Conclusively, this would mean that a party may not "blindly" request for unspecified documents it thinks might exist and examine them in anticipation to suddenly find a document which would aid their case.

Second, with relevance and materiality pursuant to article 3(b) of the IBA Rules, it must be noted that there is a stark difference between the two. In demonstrating relevance, a party seeking to obtain document disclosure has the burden of demonstrating the relevance of the requested evidence (O'Malley, p. 55). This means that a tribunal should analyze whether a party has put forward a credible argument as to the likely or prima facie relevance of the requested evidence in support of an important contention in the presenting a party's case (Ashford, p. 71). Meanwhile, a set of documents is material if the documents are required for the record and might bear upon the final award. A tribunal may find that a request seeks records that are necessary to establish one's case but ultimately denies disclosure if it does not believe the allegation will impact its final award (O'Malley, p. 58). Furthermore, the documents are needed to allow complete consideration of the factual issues from which legal conclusions are drawn by a tribunal (Marghitola, p. 52).

Furthermore, document production should not burden the party producing the documents. In granting the document production, the tribunal must weigh the probative value of the documents against the reasonableness of ordering the non-requesting party to produce the documents (Waincymer, p. 865). In general, a party must use its own documents to prove its

contention instead of ordering the other party to finish the job for it. The presumption that parties who have access to documents should produce them instead of obtaining the records through document production, is strong, however, and would likely be overcome only in exceptional circumstances pursuant to the tribunal's discretion after weighing the probative value. (O'Malley, p. 45).

Hence, after being able to conform with requirements set out under article 3 of the IBA rules, tribunals would usually look through if there are any objections to the request which may be brought pursuant to Article 9 of the IBA Rules, discussed in the next section.

3. "Politically Sensitive" Information as a Shield for States who wish to not produce Documents during Investor-State Arbitration

After an investor has fulfilled all the requirements set out by Article 3(3) of the IBA Rules, the Tribunal would ask the State to comment on the evidence sought by the investor. With that notion, a state may, under the IBA Rules object to produce certain types of evidence. This is vested under Article 9(2) of the IBA Rules which include, among others, documents which are legally privileged or are technically or commercially confidential. Pursuant to Article 9(2)(f), it is stated that the tribunal shall exclude from evidence documents on the "grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling."

However now the question begs whether a document can really be deemed as exempted from evidence pursuant to Article 9(2)(f) or whether it would become a justifiable excuse to deem all documents relating to the government of the state a secret. The latter is clearly possible as in most investor-state related disputes, an investor who might alleges that there persist unfair practices during expropriation may request tribunals to order document production in order to

obtain information pertaining to communication in between government institutions, government decrees, or even expropriation schemes which involve communication and planning with domestic competitors in order to present its case (O'Malley, p. 307; See Pope and Talbot Inc. Case). This kind of evidence could very easily be deemed as secret by the state without the investor being able to object the process of classifying documents into the category stipulated pursuant to Article 9(2)(f).

Of the above considerations, it is the application of the principle of equal treatment and fairness which has on notable occasions conflicted with domestic laws providing for governmental secrecy. To illustrate the point, one may imagine that a domestic law providing the governmental entity with the self-judging, discretionary right to determine which documents will be protected from disclosure, would afford it a distinct procedural advantage vis-à-vis its non-state opponent.

In *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), the tribunal held that to accept a domestic law permitting a state-party wide, undefined discretion to declare itself immune from the duty to produce documents, would violate the principle of equal treatment, and did not qualify as "grounds" for resisting disclosure under article 9.2(f). The tribunal decided that the public interest immunity exception invoked by the Respondent, the Republic of Tanzania is not a valid objection to the production of documents requested by Claimant, *Biwater Gauff (Tanzania) Ltd.* The tribunal held that:

"... 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...If a state were permitted to deploy its own national law in this way it would, in effect, be avoiding its obligation to produce documents in so far as called upon to do so by this Tribunal... The Arbitral Tribunal considers that the only ground which might justify a refusal by the Republic to produce documents to this Tribunal is the protection of privileged or politically sensitive information, including State secrets restated in article 9.2(f) of the IBA Rules of Evidence... In conclusion, the Arbitral Tribunal decides that the public interest immunity exception invoked by the Respondent is not a valid objection to the production of documents requested by Claimant.”

Hence, pursuant to this precedent, it can be noted that the usage of domestic law to declare, with wide discretion, a document secret could be overruled by a tribunal.

E. Possible Solutions to conflict between the Right to Present One’s Case/Right to Be Heard and the Protection of State Secrets/Politically Sensitive Documents

1. Redaction as means of Blocking Out Sensitive Information

Redaction is a method in which phrases or sentences in a document are highlighted in a black color so that it covers these phrases or sentences which qualifies as information meeting standards of Article 9(2)(f) of the IBA Rules. Each Party should be entitled to redact truly irrelevant information of a sensitive or confidential nature as well as privileged information. If a document is redacted, it should to the extent possible, not redact the information which permits a reader to identify the author, recipient, document type and date of the document. In the event such

information is redacted, the Party making the redactions must provide the information in question to the other Party so that the basis for the redaction can be appropriately tested (Hamilton, p. 77).

However, considering the voluntary nature of redaction conducted unilaterally by a party, it would be prudent to consider the challenges of knowing whether the redacted information truly does fall within the requirements stipulated under Article 9(2) of the IBA Rules. Hence, even the involvement of the tribunal who may order that the information sought should remain unredacted would be ineffective to control what a party would redact. Direct involvement by a tribunal may also be not possible as the tribunal may examine documents which even they may not see due to the state sensitive nature of the documents.

2. The Use of a Redfern Schedule

When considering a request for document disclosure, and the objections that have been raised, it has become common practice in international arbitration for tribunals to use what is known as a “Redfern Schedule” (O’Malley, p. 52). This schedule usually takes the following format:

Description of the document requested for production	Justification for the request by the requesting party	Comments and/or objections by the other party	Decision of the arbitral tribunal

Fig. 1. Sample of a Redfern Schedule

The Schedule is used by a party who wish to request the production of documents from the opposing party. First, the requesting party will list out the documents with the details as set out in Fig. 1 above. This list will be submitted to the opposing party to be commented, and then the tribunal will decide and comment on whether to allow the production of such documents based on the argumentation of both parties. It is also very common that the

tribunal might request additional arguments before deciding on the document production (O'Malley, p. 23).

Using this schedule would strike a balance between what a party might find relevant to proving its case and what a state-party might find as a privileged document. In using this schedule, it would be in the discretion of the tribunal, to determine whether a document should be produced or not. It gives room to the parties to argue on the importance of the document and how material and relevant it would be to fulfill the party's right to be heard. The use of this schedule has its roots under article 3.6 of the IBA Rules, which states that:

“[u]pon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.” This obliges the tribunal to first consider the consultation of the parties before deciding on the specific document production.”

Using the Redfern schedule as a means to debate whether a document should be produced is would however be insufficient. If a document, or a range of specified documents are of such relevance and materiality to the outcome of the proceedings and yet objected by the opposing party, then a separate hearing for the production of documents should be held to determine the implications of producing such documents. The weighing of the rights to be heard against the objections found in Article 9(2) of the IBA Rules would require substantial arguments to be heard rather than submitting a few lines of justification for the request as the violation of fundamental rights on both sides are at stake. Ideally, these hearings should yield interim awards which may be enforced by a party in order to ensure that a party does not refuse the decision of a tribunal which contrasts the current use of redfern schedules in procedural orders.

F. Conclusion

In conclusion, it is stipulated that the right to be heard, which encompasses the right to present one's case, is one of the most fundamental rights of due process in international arbitration. It is that right which must be balanced against the right of privilege stipulated under the IBA Rules which allows a state not to produce evidence on the basis that the documents are politically sensitive and or a state secret. It is this balance, that would allow arbitrators to produce awards which do not infringe upon the rights of both parties, yet remain enforceable. Furthermore, it should be considered that the instruments that are currently used in arbitration do not create the perfect balance between these rights.

Voluntary measures such as redaction may call for the possibility of abuse by a party as the tribunal would not be involved in the redaction process nor would it be able to control the redaction process. Furthermore, the current usage of a redfern schedule may be insufficient to determine how important the document is in order to fulfill the right to be heard or how the detrimental it would be for a state to produce a state secret forcing it to object using Article 9(2) of the IBA Rules. Documents which may alter the course of the proceedings or the award should be thoroughly examined by the tribunal and their production scrutinized more carefully to respect the rights of the parties.

If a document is deemed to be “relevant and material to the outcome” to the proceedings, then the best measure is to conduct evidence hearings yielding interim awards on whether the document should be produced. In this way, parties would have a full opportunity to present its case with substantial arguments on why a document should be produced or deemed as a state secret. Additionally, a tribunal would have a more complete overview of the “balance” that it needs to achieve.

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