

Energy Charter Forum in Tokyo

Friday, 21 November 2014

Session 3 - Investment Arbitration: Particular procedural issues

The Use of IBA Rules on the Taking of Evidence in Energy Charter Treaty Arbitrations

Hiroyuki Tezuka
Nishimura & Asahi, Tokyo

NISHIMURA
& ASAHI



I. Brief Introduction to Arbitration under the ECT

- Three forums/rules are available for arbitrations under the ECT:
 - ✓ **ICSID** (The International Centre for Settlement of Investment Disputes)
 - ✓ **UNCITRAL** (The United Nations Commission on International Trade Law)
 - ✓ **SCC** (Stockholm Chamber of Commerce)
- No detailed rules on evidence in any of those rules!



II. Why are the IBA Rules of Evidence Widely Used in Investment Treaty Arbitrations?

- **The IBA Rules of Evidence** were issued in **1999**.
- Originally intended to be used for international **commercial** arbitrations.
- Often used for **treaty arbitrations** as well, in practice.

→ *Why?*



II. Why are the IBA Rules of Evidence Widely Used in Investment Treaty Arbitrations? (Cont'd)

- **Overlap** of arbitrators and other players.
- The IBA Rules of Evidence **harmonize different styles/cultures in the Common Law/Civil Law system** on the taking of evidence by suggesting the best practices.
- The IBA Rules of Evidence were amended in **2010**. The name was also changed (removing the term “**commercial**”).



II. Why are the IBA Rules of Evidence Widely Used in Investment Treaty Arbitrations? (Cont'd)

- The IBA Rules of Evidence have been globally recognized, and have become **prevailing in emerging jurisdictions**, whose governments are often parties to treaty arbitration.



Members of the Working Party in 1999

- David W. Rivkin (USA)
- Wolfgang Kühn (Germany)
- Giovanni M. Ughi (Italy)
- Hans Bagner (Sweden)
- John Beechey (France)
- Jacques Buhart (France)
- Peter S. Caldwell (UK)
- Bernardo M. Cremades (Spain)
- Emmanuel Gaillard (France)
- Paul A. Gélinas (France)
- Hans van Houtte (Belgium)
- Pierre A. Karrer (Switzerland)
- Jan Paulsson (France)
- Hilmar Raeschke-Kessler (Netherlands)

Members of Review Subcommittee in 2010

- Richard H. Kreindler (Germany)
- David Arias (Spain)
- C. Mark Baker (USA)
- Pierre Bienvenu (Canada)
- Amy Cohen Kläsener (Germany)
- Antonias Dimolitsa (Greece)
- Paul Friedland (USA)
- **Nicolás Gamboa (Columbia)**
- Judith Gill, QC (UK)
- Peter Heckel (Germany)
- Stephen Jagusch (UK)
- **Xiang Ji (China)**
- **Kevin Kim (South Korea)**
- Toby T. Landau, QC (UK)
- Alexis Mourre (France)
- Hilmar Raeschke-Kessler (Germany)
- David W. Rivkin (USA)
- Georg von Segesser (Switzerland)
- **Essam Al Tamimi (UAE)**
- **Guido S. Tawil (Argentina)**
- **Hiroyuki Tezuka (Japan)**
- **Ariel Ye (China)**

** Those in **red** are members from countries other than Europe or North America*



III. Actual Use of the IBA Rules of Evidence in Investment Treaty Arbitrations

Case 1 - Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, **ICSID Case No. ARB/05/22**

- It was agreed with regard to document production that “*For its decision, the Tribunal will be guided by Article 3 of the IBA Rules of Evidence.*”
- The Respondent objected to the production of documents by asserting “public interest immunity”.
- The Tribunal decided it is not a valid objection based on the IBA Rules of Evidence.



III. Actual Use of the IBA Rules of Evidence in Investment Treaty Arbitrations (Cont'd)

**Case 1 - Biwater Gauff (Tanzania) Ltd. v. United Republic of
Tanzania, ICSID Case No. ARB/05/22 (Cont'd)**

- The Tribunal ordered preservation of documents & preparation/delivery of inventory of documents taken by the government under Art. 47 of the ICSID Convention and Art. 39(1) of the ICSID Rules.
- The Tribunal accepted that document production (which is normally considered under Art. 47 of Convention) may be ordered as preservative measures under those provisions, where necessary.



III. Actual Use of the IBA Rules of Evidence in Investment Treaty Arbitrations (Cont'd)

Case 2 - ADF Group Inc. v. United States of America,
ICSID Case No. ARB (AF)/00/1

- The Claimant required the Respondent to produce certain documents, grouped under nine categories.
- Each party submitted various assertions with respect to whether the IBA Rules of Evidence were applicable.
- The Tribunal made category-by-category decisions without mentioning the IBA Rules of Evidence.



III. Actual Use of the IBA Rules of Evidence in Investment Treaty Arbitrations (Cont'd)

**Case 2 - ADF Group Inc. v. United States of America,
ICSID Case No. ARB (AF)/00/1 (Cont'd)**

- The Tribunal might be influenced by the arguments on IBA Rules of Evidence.
- The Tribunal ordered Respondent to provide Claimant with document reference numbers and other data/assistance to enable Claimant to effectively identify/locate relevant documents that are publicly available on the government database but difficult to find, without producing the documents.



IV. The IBA Rules of Evidence in Energy Charter Treaty Arbitrations

- Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey, **ICSID Case No. ARB/06/8**

“The Tribunal decided to disregard Ms. Ayşegül Uzan’s witness statement, taking into account Article 4.8 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.”

“Taking Article 4(7)10 of the IBA Rules of Taking Evidence in International Arbitration (2010 version) as a guideline, the Tribunal (in the absence of exceptional circumstances) accords no weight to Mr. Ulusoy’s statement, as he did not testify at the hearing.”



IV. The IBA Rules of Evidence in Energy Charter Treaty Arbitrations (Cont'd)

- Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey, **ICSID Case No. ARB(AF)/06/2**

“In addition to the relevant provisions of the Arbitration Rules on the production of evidence, they agreed that the IBA Rules on the Taking of Evidence in International Commercial Arbitration would apply.”



IV. The IBA Rules of Evidence in Energy Charter Treaty Arbitrations (Cont'd)

- Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, **ICSID Case No. ARB/07/14**

“The parties and the Tribunal may be guided by the IBA Rules on the Taking of Evidence in International Commercial Arbitration”



IV. The IBA Rules of Evidence in Energy Charter Treaty Arbitrations (Cont'd)

- Anatolie and Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd. v. Kazakhstan, **Arbitration Institute of the SCC (116/2010)**

“The Parties and the Tribunal may use, as an additional guideline, the 2010 version of the ‘IBA Rules on the Taking of Evidence in International Arbitration’, always subject to the SCC Rules and changes considered appropriate in this case by the Tribunal.”



V. Conclusion

- The IBA Rules of Evidence used in ECT arbitrations - but often **as a guideline only**.
- IBA Rules of Evidence used **regardless of underlying arbitration rules** (ICSID, SCC).
- Even if the IBA Rules of Evidence are **not explicitly used, arbitral tribunals might employ very similar principles**, given that IBA Rules of Evidence "codified" prevailing and international standards in taking of evidence in international arbitration



V. Conclusion (Cont'd)

- In Investment Treaty/ECT arbitrations, the Tribunal may order (i) measures to preserve evidence, (ii) assistance for Claimant's locating documents that are publicly available but difficult to find.
- Those are not provided for in the IBA Rules of Evidence, but may be justified because of the imbalance of access to evidence.



Thank You!