Document Disclosure in Investment Arbitration
Barton Legum and Gauthier Vannieuwenhuyse

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 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).

1 Bart Legum is a partner and the head of the investment treaty arbitration practice of Salans LLP in Paris, France. Gauthier Vannieuwenhuyse is an associate in the international arbitration practice of Hogan Lovells LLP in Paris.
I. THE GENERAL FRAMEWORK FOR DOCUMENT DISCLOSURE

The rules most often used in investment arbitration, those of ICSID and UNCI-TRAL, affirm the power of the tribunal to order the production of documents. However, the rules leave 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. 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 . . . .”

There appears to be a general practice in investment treaty arbitration of permitting limited document requests, following the IBA Rule quoted above. 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., reasonably limited in time and subject-matter in view of the nature of the claims and defences advanced in the case.”

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.

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 Intl’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.

