

Seventh Investment Forum
8th September 2006 - BIICL

Taking of Evidence

Disclosure in Investment Treaty Arbitration

Sarita Woolhouse
swoolhouse@mac.com

“Give your evidence”, said the king.

Lewis Carroll, *Alice in Wonderland*

Evidentiary issues relate to:

- Witnesses
- Documents
- Privilege
- Confidentiality and access to non-parties
- Use of documents in other proceedings, and so on ...

Outline:

1. Documents lost/destroyed
2. Documents about to disappear
3. Documents in possession of non-parties
4. Public interest immunity
5. Conclusions

1. Documents lost/destroyed

Where primary evidence is unavailable, tribunal will:

- Accept secondary evidence
- Draw adverse inference

Iran-US tribunal jurisprudence

2. Documents about to disappear

Tribunal can order preservation of documents:

- *Agip v. Congo*, Award 30 November 1979
- *Vacuum Salt v. Ghana*, Award 16 February 1994

Property belonged to the investors

2. Documents about to disappear

Power to order preservation of evidence

- Article 47 - ICSID Convention
- Article 26 - UNCITRAL Arbitration Rules
- Article 1134 - NAFTA
- Article 25 - LCIA Arbitration Rules
- Article 23 - ICC Arbitration Rules

2. Documents about to disappear

Documents Taken Over by State

- Investor's office seized
- Investor lost access to
 - Its bank statements
 - Other relevant documents (e.g. ledgers, correspondence, etc.)

Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania

2. Documents about to disappear

Article 47

The ICSID Convention

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.

2. Documents about to disappear

Article 43

The ICSID Convention

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, ...

2. Documents about to disappear

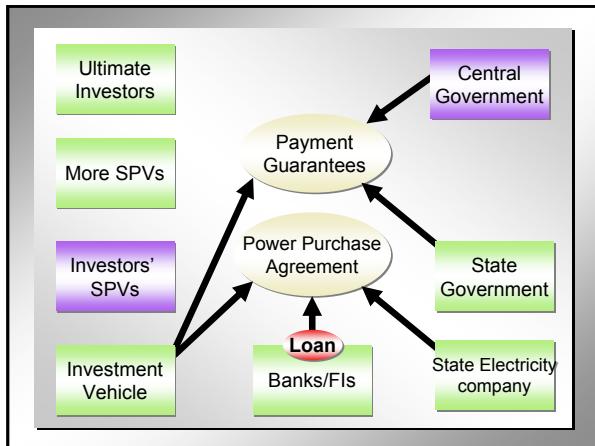
Tribunal's order

- | | |
|---------------------------------|------------------------------------------------|
| • Preservation of evidence | • Granted under Article 47, ICSID |
| • Inventory | • Yes - not English style |
| • Production of documents | • Case not exceptional enough to use Art.47 |
| • Production of bank statements | • Yes - under Article 43 - case management |
| • Statement of account | • Not allowed - akin to request for production |

3. Documents in possession of non-parties

Requesting party needs to show that the requested document is within the possession, power, custody or **control** of the other party

Article 3 (c) IBA Rules



3. Documents in possession of non-parties

Non-parties may not cooperate

- Contractual proceedings ongoing between various entities
- Friction between Central Government and other entities
- Parties should be treated with equality but inherent imbalance
- No counterclaim by non-parties on State's side

3. Documents in possession of non-parties

Other side of the coin

- Ultimate investor or other investors in the chain of companies non-parties
- State may challenge
 - The “investor” status
 - The “investment” status
- E.g. *Tokios Tokeles v Ukraine* (*Dissenting award on jurisdiction*)

3. Documents in possession of non-parties

Obtaining disclosure from Non-parties

- Order disclosure assuming that the Parties control such entities
- Use other methods such as
 - Section 43 of the 1996 Act
 - Section 7 of the FAA in the US
 - Court intervention without specific supporting legislation

4. Public interest immunity

- Not an absolute principle
- Balance between two competing public interests

Confidentiality of Certain information

Fair administration of justice - full access

4. Public interest immunity

Which law governs the claim?

- PII a domestic law principle
- BITs - applicable law
 - Domestic law of the State together with
 - the better of the law of
 - the investor's home State and
 - International law

4. Public interest immunity

State's own law - no justification for non-disclosure

- Investment treaty arbitration not the context in which PII developed
- State cannot stifle evaluation of its own conduct and responsibility
- Cannot create an imbalance between parties
- PII not a valid objection except in cases of
 - Privileged information
 - Politically sensitive information (State secrets)

Biwater Gauff v Tanzania Procedural Order No.2

4. Public interest immunity

Canada's cabinet documents

- 377 documents or parts claimed confidential
- Clerk of the Privy Council wrote to the tribunal
- No sufficient weighing exercise

United Parcel Service v Government of Canada

4. Public interest immunity

Tribunal's order

- Some information will need to be protected
 - E.g. frank uninhibited exchange between cabinet ministers
- Protection circumscribed and subject to being outweighed by competing interest in disclosure
- Claim not made out

4. Public interest immunity

Sanction for non-disclosure

A failure to disclose, found by the Tribunal to be unjustifiable, may lead to the Tribunal drawing adverse inferences on the issue in question.

Biwater and UPS tribunals

5. Conclusions

- Where State has taken over or destroyed or neglected to care for documents, fair to draw an adverse inference
- Tension between approach to non-parties on State's and investors' sides - States do not always control other entities' documents
- Public interest immunity claim unlikely to succeed except in exceptional circumstances

Seventh Investment Forum
8th September 2006 - BIICL

Thank you

Sarita Woolhouse
swoolhouse@mac.com
