# The Strange Case of Expert Legal Opinions in Investment Treaty Arbitrations

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I have always found the submission of expert legal opinions on matters of international law to investment treaty tribunals rather odd. Why are expert opinions needed and what is their status? To begin, the opinion is submitted to an international arbitration tribunal often comprising leading public international lawyers (and sometimes current or former judges of the International Court of Justice). This tribunal's role is to interpret and apply the international investment agreement in question in accordance with public international law. Further, an international tribunal operating under public international law is deemed to know the law (*jura novit curia*). Next, we have the counsel for the claimant or respondent who submits the expert opinion, eminent international arbitration practitioners often with substantial academic and practical experience in public international law. Then we have the the opinion, written by the expert in public international law, typically a professor or long-standing practitioner.

The practice is rather strange given the usual allocation of roles in dispute settlement: witnesses provided evidence; experts opine on technical issues or facts; and counsel make legal submissions based on the applicable law. Yet, many of the expert legal opinions on international law that parties have submitted to tribunals in investment treaty arbitrations (see here) are used by counsel as legal submission in everything but name.

The Interim Awards on Jurisdiction and Admissibility in the Yukos cases (PCA Case Nos. AA 226, 227 and 228) present rather striking examples of this phenomenon. The awards present a veritable battle of international law experts on issues that, based on the summaries of the expert opinions in the awards, involve legal analysis of matters of pure public international law (i.e. matter for legal submission). Yet, at points in the awards, expert opinions are referred to as "evidence", an expert statement as "testimony" and experts are included under the heading of "witnesses".

This terminological blurring is probably harmless and, given the difficulty of the issues addressed in the awards, it would be petty to criticize the tribunal or counsel. Indeed, in the Yukos cases, the parties submitted a veritable cornucopia of 23 different witness statements and expert legal opinions, which addressed a range of issues—factual statements with respects to the *travaux préparatoires* of the Energy Charter Treaty, statements of national law, opinions on the implementation of treaties within national legal systems and opinions more generally on the application of the Energy Charter Treaty. Given this overlapping mélange, it is understandable there was some blurring of distinctions.

More generally, what objection can there be if a party, wishing to ensure that its legal submissions have more gravitas, chooses to support them by relying on an expert legal opinion, rather than

bringing on the expert as co-counsel in the case?  Further, not all counsel and not all arbitrators are experts in public international law.  Expert legal opinions can serve an important function in ensuring that relevant legal principles are fully briefed.

Although there may be no principled objection to the use of expert legal opinions, as investment treaty jurisprudence develops and matures, I think we can expect less reliance on the expert legal opinion on international law. With the exception of the Yukos case, it may be that trend has already begun (and, in any event, the expert legal opinion on international law only appears in a minority of cases). In the future, counsel in investment treaty arbitrations will presumably do what counsel in most legal systems do—brief the law and make legal submissions without submitting opinions from legal experts.