

A human right to information about investment arbitration?

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I spent yesterday afternoon with a group of Latin American business journalists at Columbia University as part of an ongoing training program for developing country journalists.

After an hour of sharing my geek-like interest in tracking obscure international business arbitrations, we spent some time talking about reporting methods.

One topic of particular interest was the potential for access to information laws to open up information about foreign investment projects - including legal disputes arising out of such projects.

Access to information laws are in the process of being strengthened in some Latin American countries thanks to a very interesting 2006 ruling by the Inter-American Court of Human Rights.

In fact, I first heard about this ruling while watching a [webcast of a 2007 symposium](#) on investment law and human rights held at American University.

At the AU session, Margrete Stevens, a former acting Lead Counsel at the International Centre for Settlement of Investment Disputes (ICSID), highlighted the Inter-American Court judgment in the so-called [Trillium case](#).

The claim was brought to the Court by Chilean citizens and non-governmental organizations who complained that they had been stonewalled in their efforts during the late 1990s to obtain information from the Government of Chile about a series of contracts concluded with a foreign investor seeking to log virgin forests in the Patagonia region.

After scrutinizing the reticent posture of Chile's Foreign Investment Committee, the Inter-American Court ruled that Chile was liable for breaching Article 13 (freedom of expression) of the American Convention on Human Rights.

The Court was unsparing in its view that the right to freedom expression encompassed a right to receive information, and that public officials should adopt a posture of transparency and disclosure so that citizens may exercise democratic control over the actions of governments (including in relation to their interactions with foreign investors):

"Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the

individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.”

My counterparts at yesterday’s journalist training workshop informed me that the Government of Chile has since moved to introduce more robust access to information laws as a result of the Inter-American Court ruling. Apparently, the ruling has also been seized upon by media organizations in other parts of the hemisphere.

One wonders what implications it may have for investment arbitration.

At the 2007 AU Conference, Margrete Stevens speculated that the Court’s reasoning would seem to apply with equal force to efforts to pull back the curtain on international arbitrations pending between foreign investors and their host states.

As most readers of this blog will know, such arbitrations may or may not be a matter of public record – depending upon the arbitral rules governing a case. While ICSID cases are listed on [a public docket](#), cases under other procedural rules can go on under the radar.

Lately, some recent investment treaties have introduced public disclosure obligations for parties involved in investor-state arbitration, but most treaties are silent on the question – thus leaving it to the arbitral rules and the parties to determine.

Over the years, there have been sporadic attempts by civic groups or journalists to use existing domestic laws on access to information – in the United States, Canada, and, reportedly, South Africa – to obtain information on investor-state arbitrations.

And, as noted, these laws are being developed or strengthened in some countries as a result of the 2006 Inter-American Court ruling.

However, one wonders how long it will be before we see a human rights claim at the Inter-American Court of Human Rights – or perhaps its Strasbourg counterpart, the European Court of Human Rights – which deals squarely with the question of a state’s duty to disclose investor-state arbitrations to the wider public?