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Judge Nikken on the potential friction between a state's obligation to disclose information and foreign investor protections

Luke Eric Peterson (Investment Arbitration Reporter) · Monday, November 2nd, 2009

The relationship between human rights and investment law is all the rage these days in academia. It seems like every week I come across a PhD student or a young academic who is tackling some aspect of the topic.

But, while there are many scholars and writers looking to bridge the two fields, it's rarer to come across adjudicators with experience in the two realms.

However, Judge Pedro Nikken is one of the rare individuals who straddles the two fields. He's a former Judge on the Inter-American Court of Human Rights (IACHR) and he's also sitting as arbitrator in a trio of ICSID cases against Argentina which may touch upon the relationship of human rights law and investment law.

So, it was with particular interest that I read Judge Nikken's brief contribution to a recent edited collection on human rights and investment law.

Judge Nikken's article surveys the jurisprudence and practice of the Inter-American human rights system and concludes that investment protection has been handled rather delicately and timidly by that region's human rights institutions.

He goes on to examine whether protections owed to foreign investors might be considered to be legitimate limitations on human rights in some circumstances. While this is not a question that the Inter-American Court of Human Rights has grappled with squarely, or at length, he does highlight several cases where tensions arise between human rights obligations and foreign investor protections.

Rather than canvas each of them here, I thought I'd focus on a case which I discussed on this blog some months ago: the so-called Trillium case (Claude Reyes v. Chile).

In a 2006 judgment, the Inter-American Court of Human Rights held Chile liable for breaching the rights of Chilean activists who had been stonewalled by Chile's Foreign Investment Commission following a request for information about a major forestry development in the Patagonia region.

As noted in an earlier blog posting, the Court's judgment has been hailed for its ringing

endorsement of the public's right to receive information and to exercise informed democratic control over political and bureaucratic institutions.

However, in his recent article, Judge Nikken also wonders if the Court's disclosure-friendly approach might, in fact, conflict with the "fair and equitable treatment" owed to foreign investors.

Judge Nikken acknowledges that the Chilean Government had not framed its defence in the Claude Reyes case in these terms; however, a Chilean bureaucrat did testify during the hearings before the Inter-American Court of Human Rights that one reason for refusing to disclose certain categories of information sought by public petitioners had been because it was "not reasonable that foreign companies applying to the Foreign Investment Committee should have to disclose … financial information … that could be very important to them in relation to their competitors".

Judge Nikken suggests that the Inter-American Court failed to consider whether "access to confidential information was in conflict with the right of a foreign investor to a certain standard of treatment, which could involve respect for the confidentiality of some financial information that it had given to the government" – either as a matter of the "fair and equitable treatment" obligation found in many investment protection treaties or in the "right to privacy" contained in the American Convention on Human Rights.

Regrettably, Judge Nikken follows the Court in declining to analyze the potential friction between these norms. However, he does point to a suggestive line of inquiry – one which I hope some of the legions of budding investment & human rights scholars will examine in more detail.

Doubtless much can be said about what expectations of confidentiality are legitimate in a given domestic context; local laws on access to information (which Chile did not have when the Claude Reyes claim was initiated) will also prescribe certain categories of information which need not be disclosed.

In the Claude Reyes case, Chile's behaviour was sanctioned by the Court, in part, because the absence of a law on access to information meant that too much discretion was given to bureaucrats.

However, where so-called sunshine or access to information laws are in place – but prescribe certain categories of information which need not be disclosed to the public – it would be interesting to see how much leeway the Inter-American Court is prepared to give to government bureaucrats who use such exceptions to thwart disclosure of information about FDI projects.

Certainly, the Court used very bold rhetoric in its 2006 judgment: speaking of the need for "maximum disclosure", and stipulating that restrictions on disclosure must serve a "compelling public interest".

For this (admittedly lay) observer, it's hard to imagine that a human rights Court would deem a very ambiguous "fair and equitable treatment" obligation contained in a BIT to be the type of compelling public interest that could override the principle of maximum disclosure. (Were an arbitral tribunal to go so far as to read the fair and equitable treatment in such a manner, that might give the Court something more tangible than the treaty text to grapple with).

If we assume, for the sake of argument, that the Court sticks to its guns on information disclosure – even in the face of arguments that BIT obligations should shelter foreign investors from the full brunt of such a principle – one wonders if the disclosure of particularly-sensitive information about

a foreign investment project would give rise to a BIT arbitration claim?

A preliminary question might be whether there is a protected investment under most investment protection treaties? Recall that many such treaties only apply once an investment has been established. So, if we are talking about information submitted by a foreign investor to a government agency as part of the screening and review phase of an investment (i.e. prior to the establishment of an actual investment), has the investor made an investment that will be protected under the treaty?

Assuming, however, that there is a protected investment at stake, I wonder if arbitrators would go so far as to declare that it is unfair or inequitable for government officials to disclose information about proposed projects, particularly where governments do so in a good faith effort to maximize disclosure of information under a relevant domestic law (and under the watchful eye of the Inter-American Human Rights Court).

I'm not sure. However, the fact that at least one arbitrator thinks there is a possible conflict here should give pause – and perhaps even an idea for a PhD dissertation.

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