

The Expanding Audience for Open Arbitration Hearings

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It's been nearly two months since public hearings concluded in an ICSID arbitration brought by a U.S. investor, Railroad Development Corporation, against the Republic of Guatemala.

And it's been about 8 months since public hearings wrapped up in another ICSID arbitration between Pacific Rim and the Republic of El Salvador.

Both proceedings were webcast online, and perhaps you tuned into one or both proceedings at some point during the hearings?

Or, more likely, you didn't.

But, either way, you'll enjoy the luxury of going back and watching an archived video of these proceedings on the ICSID website at some later date.

I think that's worth reflecting upon.

Some of the first "public" hearings in ICSID arbitration required that curious parties show up at the Centre and watch the proceedings unfold in real-time.

When the parties to the Southern Blue Fin Tuna arbitration agreed to open the doors, only to have nobody show up, some skeptics muttered that the whole experiment showed that the need for transparency was overblown.

A few years later, the *Methanex v. United States* arbitration was opened to the public via a live-video feed that you had to watch in a special viewing room at the ICSID. I attended parts of these hearings, and while there were students, academics and practitioners in the audience, I'd also be the first to concede that elbow-room was never at a premium.

Prof. William W. Park, in a recent academic article, reminds us that when investor-state arbitration proceedings have been opened to the public, they "usually prove so utterly boring that the audience dwindles quickly." Hence, he wonders if concerns about the conflict between public and private interests are "more theoretical, than real."

I don't think so.

Given the great inconvenience of having to travel to Washington, D.C. and devote one or more workweeks to a viewing experience, it's remarkable that *anyone* showed up at the *Methanex* hearings in 2004. Even courthouse journalists, who get paid to cover legal proceedings, rarely have 8 hours a day to devote to the art of spectating. The same goes for academics, practitioners, and just about anyone else with a day job.

But, thanks to advances in internet technology - which allow for the webcasting of hearings and for them to be archived online in perpetuity - the true audience for a public hearing is now a much more elastic concept. As with a television program, the real audience consists not merely of those who troubled themselves to watch it in real-time, but also those who may watch it online - days, weeks, or even years later.

Let's be clear: I believe that the case for transparency in investor-state arbitration ought to be rooted in concepts of good governance, economic efficiency and human rights law - not in any sort of crude head-count. (For a thoughtful exposition of the rationale for openness in investor-state arbitration, take a look at Marcos Orellana's article in the Autumn 2011 *ICSID Review*.)

But, if we insist upon counting heads, let's agree that the definition of the audience has changed dramatically over the last decade. Thanks to these dramatic technological changes, the opening-night box office numbers are not the only ones that matter.

For this expanded audience, one of transparency's greatest gifts may be that it is spawning a growing online archive of arbitration proceedings that can be utilized by generations of future scholars, practitioners, and even critics of the present system.

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