Kluwer Arbitration Blog

Transparency, Legitimacy, and Investor-State Dispute Settlement: What Can We Learn from the Streaming of Hearings?

Colin Trehearne (Herbert Smith Freehills) · Saturday, June 9th, 2018 · Herbert Smith Freehills

> [I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1)]

> If you sought to distil [the connection between ISDS's transparency and legitimacy] to a single point, it would be that transparency is a necessary condition of the legitimacy of ISDS.[2)]

Scholars, NGOs, and practitioners have been discussing the legitimacy of investor-state dispute settlement ("ISDS") for years. Much of this debate has focused on the critique that ISDS, usually taking the form of confidential and binding arbitral proceedings, sees private and unelected tribunals determining matters thought to be of public importance. Some activist and media publications (such as in this local newspaper or in this news website) also allege a host of profound ills arising from ISDS: negative impacts on systems of criminal justice, the protection of kleptocracy, and the placing of pressure on host states to assist in the murder of environmental activists.[3)] All of this harm is compounded still further, it is argued, by the fact that ISDS is largely conducted behind closed doors.

The Open Court Principle

The argument that justice should be seen to be done, also known as the open court principle, is nothing new to interlocutors from (at least) the common law world. Generally speaking this principle holds that both proceedings and the record, including the evidence submitted in the matter, should be available for public scrutiny. In many jurisdictions this principle has become enshrined in law and, in some locations, in the constitutions of States. Openness is argued to foster fairness and to allow individuals to determine for themselves whether or not legal matters are being conducted in accordance with the rule of law.[4)] Transparency is thought to foster legitimacy, and on some views, is a condition of legitimacy.

For these and other reasons, court systems throughout the world have sought to increase transparency and in many cases have begun either time-delayed or live streaming, on the internet, of proceedings. The Supreme Court of England and Wales, for example, both live streams cases and provides on-demand access to some of its past proceedings. According to the Court, about 15,000 people used the live streaming service per month in the seven months following its launch. Similar services are available in other jurisdictions, such as Canada – where the norm is to broadcast Supreme Court proceedings online and to provide video archives of almost the last 10 years of hearings. In Australia the High Court and other levels of court offer similar services. Similar efforts in China, too, demonstrate that this trend is not limited to the common law world. Courts are not alone, however, in looking to technology to improve transparency and thereby to increase perceived legitimacy.

Transparency in the Proposed Investment Court System and ISDS

In 2015 the European Commission proposed the introduction of its Investment Court System ("ICS") for *inter alia* the Transatlantic Trade and Investment Partnership. In a speech introducing the idea, Commissioner Cecilia Malmström referred to a "fundamental lack of trust by the public" in the traditional ISDS system and stated that the answer to this problem was clear: *"We need to introduce the same elements that lead citizens to trust their domestic courts. This is the only way to establish trust in this system."* With regard to how this will be achieved, Commissioner Malmström set out various elements of the new ICS and affirmed that: *"All this will be done in a system that is even more transparent than in domestic courts. All documents will be online and hearings will be open to the public."*

Against this background, participants in and defenders of traditional ISDS have also taken significant steps to increase legitimacy through increased transparency. The adoption by the United Nations Commission on International Trade Law ("UNCITRAL") of Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules") were thought to hold the potential to blaze a trail towards ISDS transparency and the UN Convention on Transparency in Treaty-based Investor-State Arbitration was thought yet another step. Certain key institutions, including the International Centre for Settlement of Investment Disputes ("ICSID"), have used technology – including the live streaming of hearings – to increase transparency. It is now approaching 10 years of practice since the first case in which an ICSID hearing was publicly webcast (*Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12)). This practice has continued, most recently with *BSGR et al v. Republic of Guinea* ("BSGR") — the first ISDS case to apply the Transparency Rules under the ICSID Convention, with the resulting recording available on ICSID's YouTube channel.

BSGR

The Kluwer blog has previously considered *BSGR* and examined the sources and implications of its transparency provisions. Interestingly, however, we are now better placed to answer a question posed in previous posts: whether open hearings will attract a huge crowd of spectators or whether the purported public interest in ISDS proceedings is much ado about nothing. If an ISDS hearing was likely to attract public attention, BSGR seems a reasonable candidate for the role: in an era of Wikileaks and the Panama papers, the matter involved the mining industry, allegations of a political conspiracy,[5] allegations relating to corruption[6] and allegations of the wrongful involvement of billionaire George Soros,[7] and a failed application for disqualification of all of the

tribunal members.[8] One might expect, therefore, various civil society actors, institutions, scholars, and the public to be keenly interested in the hearing. An initial analysis suggests that this is not the case; public interest in ISDS hearings, based on *BSGR* at least, appears to be minimal.

BSGR and View Counts

While few members of the public have the resources, time, and ability to attend public ISDS hearings, billions of people are online and have ready access to free platforms like YouTube, Vimeo, and Dailymotion. So while the UN General Assembly[9] recognized "*the need for provisions on transparency in [ISDS] disputes to take account of the public interest involved*", the view counts visible on uploaded ISDS videos suggest more concretely the actual amount of public interest. The BSGR hearing is, it bears noting, a relatively recent upload to YouTube (published on 29 March 2018) but the view counts are extremely low: the English version of the hearing videos has (as at 7 May 2018) fewer than 150 views for day 1 and no more than 30 views for any of the other days made available. These figures, it bears noting, may also overstate or understate the amount of public interest: YouTube's view count only indicates that the video was loaded and does not indicate whether the video was actually watched in part or in full, nor does a single view count capture all views where hearings are available on multiple websites (such as the *Vattenfall v Germany* hearing, available on YouTube and Livestream). What these numbers do suggest, nevertheless, is that there has so far been minimal public interest in observing ISDS cases. A recent video on how to pick up cats safely recorded more than 2 million views in 5 days, and a video showing a silent black screen with a blinking red dot recorded more views than the *BSGR* hearing in less than 24 hours. What can be gleaned from this?

The goal of increased transparency and open courts is generally a worthy one, provided that appropriate protections are in place as needs be and as national courts regularly put into effect in addressing risks that can arise from cameras in court rooms. As institutions and policymakers take steps towards greater ISDS transparency,[10] an (admittedly) cursory examination of the ISDS hearings available online suggests that too much is being made of the ability of transparency to improve public perceptions of legitimacy. While there may be small gains to legitimacy for those especially interested in a given matter, few people appear to have the time or inclination to meaningfully engage with the technology-assisted offerings nor is there evidence that ICSID's streaming of hearings for almost a decade has improved opinions of ISDS legitimacy. While streaming and uploading hearings may be one part of improving the perceived legitimacy of ISDS, the view counts suggest that much more will need to be done if the link between transparency and legitimacy is as strong as some suggest.

References

?1 R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, 259 (Lord Hewart C.J.)

?2 Michael Douglas, "The Importance of Transparency for Legitimising Investor-State Dispute Settlement: An Australian Perspective" in the New Zealand Association of Comparative Law, Hors Serie Volume XIX (2015) Part I: Investor-State Dispute Settlement and UNCITRAL Texts on Transparency, at page 112. ("Douglas")

?3 The author notes that addressing such critiques is beyond the scope of this blog post.

?4 See, for example, Douglas at pages 117 and 119.

?5 *BSG Resources Limited v The Republic of Guinea*, Request for Arbitration at paragraph 75

?6 Request for Arbitration at paragraph 60

?7 Request for Arbitration at paragraphs 57ff

?8 Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal (28 December 2016), available here

?9 General Assembly Resolution 69/116 of 10 December 2014

?10 It bears noting, of course, that these are limited steps as evidenced by the slow adoption of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration of 2014. As of May 2018 this convention has only three parties.

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