

**Investment, arbitration and secrecy****Behind closed doors**

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**A hard struggle to shed some light on a legal grey area**

FOR those who know where to look, it is not difficult to establish that Ashok Sancheti, an Indian lawyer, is pursuing a claim under international arbitration against the British government. Many details of the case are to be found in the public domain, too. His complaint, the steps he has taken to resolve the matter, and even the make-up of the three-person tribunal considering the claim were all mentioned in a related judgment by Britain's Court of Appeal in November.

Yet last month, when asked to confirm the existence of the arbitration case, Britain's Foreign Office declined, citing "an implied general duty of confidentiality" over cross-border arbitration cases. The whole story highlights an anomaly that troubles some Western governments more than others. Commercial law operates in a climate of secrecy, especially when two or more private bodies are involved. International law (on human rights, say, or border disputes) tends to work more openly.

So what happens when the two worlds meet? In practice, privacy generally prevails, and things which may well be in the public interest to know are hidden from view. That happens ever more frequently because of a surge in the number of international investment treaties: from around 1,000 in 1990 to more than 5,700 now. Such treaties prescribe a bewildering array of methods for settling disputes, which typically pit a private claimant (whether individual or corporate) from one country against the government of another.

Canada, followed by the United States, has been the most vocal supporter of greater openness in arbitration cases. A sidebar to the North American Free Trade Agreement (grouping those two countries plus Mexico) calls for almost total transparency in the way rows are settled. But many countries are loth to follow suit.

Opponents of change have been reluctant to identify themselves, preferring to block the work of little-known committees. But one institution that is leery of changing the rules is the Milan Club of Arbitrators, an influential European body.

The sheer complexity of the field makes the reformers' work harder. Indeed, nobody is sure how many investment arbitration cases are being considered. UNCTAD, an agency dealing with trade and development, knew of 290 in 2007.

However, sticklers for secrecy may not be able to blind the public with legal science for much longer. Luke Eric Peterson, editor of the *Investment Arbitration Reporter*, a trade publication, expects a "pitched battle" to break out soon between backers and opponents of transparency. In part this will reflect pressure on governments from citizens and NGOs who want to know more. For example, some Germans, at least, want details of the €1 billion (\$1.3 billion) arbitration claim that Vattenfall, a Swedish power firm, has brought against their government under the Energy Charter Treaty.

The bare facts of that case are public because it was filed at the International Centre for Settlement of Investment Disputes, which works with a modicum of transparency. But other dispute-settling bodies, even in

countries known for open governance, are more guarded: for example, the Arbitration Institute of the Stockholm Chamber of Commerce, to which many energy disputes are referred.

Among the arguments for secrecy, one has obvious force. In cases involving defence contracts, national security could be at risk. Another concern is that if NGOs (green ones, say) become heavily involved in arbitration cases, the costs of securing a judgment, which are borne by the parties, will soar—and thus deter investors. At a minimum, this means that for change to work, all the main arbitration bodies will have to move in lockstep.

Supporters of secrecy are true to their own principles; they generally lay out their arguments in obscure places. One of their contentions is that disputes involving the state in its role as regulator should be dealt with on the narrow, technical facts, free from political pressure. But some question whether disputes of this kind can ever be purely technical; by their nature, arguments about important areas of public policy are bound to be political, says Marcos Orellana Cruz, an environmental lawyer and lobbyist in Washington, DC.

Also, in any argument where the stakes are high, journalists have usually covered the story before an arbitration claim has been filed, and they don't stop doing so once proceedings start. Nor, says Loukas Mistelis, a University of London professor who sits on arbitration panels, is it possible to stop "formalised gossip" or leaks to newsletters and the media by the parties.

In theory, reform is in sight. A working group is now updating the 30-year-old rules of the UN Commission on International Trade Law, which are widely used in all types of arbitration. But it is scarcely hurrying; it has decided to complete a review of the rules for purely commercial cases before even considering the matter of greater transparency in cases involving states. And the parameters of that discussion, whose start has been deferred from this year to next, have yet to be set.

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