

debate as to whether the present system of settling investment disputes (ISDS) should be reformed.

One of the most salient elements of this ISDS reform debate is the tension between transparency and confidentiality in ISDS. Many stakeholders argue that transparency is required because investor-State disputes necessarily implicate issues of public interest.¹ Arbitral awards can shape legislation and public policy² and arbitral proceedings should therefore not be conducted in secrecy.

Others argue that investment disputes should rather be conducted in private.³ Conducting ISDS proceedings in private may facilitate settlement by reducing tension among disputing parties, respondent States may favour confidentiality in order to protect State secrets and sensitive political information, and investors may seek to protect trade secrets and other private business information.⁴

Leaving aside the merits of each side of this debate, I would rather focus on an oft-ignored tool of gaining access to confidential arbitration documents: freedom of information laws. While not novel, this tool or tactic has received little attention in the debate on transparency. This is perhaps

¹ Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edition, 2012), 286.

² Columbia Center on Sustainable Investment, “Cost and Benefits of Investment Treaties: Practical Considerations for States” (2018), 11-14 (available at: <http://ccsi.columbia.edu/files/2018/04/07-Columbia-IA-investor-policy-briefing-ENG-mr.pdf>). See also Diana Rosert, “The Stakes Are High: A review of the financial costs of investment treaty arbitration”, International Institute for Sustainable Development (2014) (available at: <https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf>).

³ See for instance Settlement of commercial disputes: Transparency in treaty-based investor-State arbitration - Compilation of comments by Governments, United Nations Commission on International Trade Law Working Group II (Arbitration and Conciliation), A/CN.9/WG.II/WP.159/Add.2 (2010), 5-7, 11.

⁴ See Sherlin Hsieh-lin Tung & Brian Lin, “More Transparency in International Commercial Arbitration: To Have or Not to Have?”, 11(1) *Contemporary Asia Arbitration Journal* (2018), 21, 24-26 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188001).

because such laws exist in the domestic sphere, beyond and apart from ISDS instruments. Today, I intend to explore how laws favouring freedom of information affect and inform the larger debate on transparency in ISDS.

One can assess the implications of freedom of information laws from three angles: policy, law, and procedure. First, through the prism of policy, we focus on the actors. Who are making these requests? How do States respond to them? Why do they grant or reject them?

Next, various legal questions arise when States grant or deny freedom of information requests for ISDS-related material. How do domestic courts react to such State action (or inaction)? What about arbitral tribunals? And what happens when a domestic duty to disclose clashes with an international obligation of confidentiality?

Finally, freedom of information requests have procedural implications. How can such requests affect the conduct of an ISDS proceeding? And do these effects vary depending on the stage of the proceedings when the relevant request is granted? Before delving into these questions, however, let me examine briefly the characteristics of freedom of information laws and how they came to be.

Freedom of information laws emerged in Europe and North America during the latter half of the twentieth century.⁵ At their core, these laws allow, under certain conditions, disclosure of previously confidential government information.⁶ Such disclosure is meant to lead to enhanced accountability of public authorities by increasing public knowledge and understanding of government operations and activities.⁷ Today, freedom of

⁵ Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2nd edition, 2008), 3 (available at: <https://unesdoc.unesco.org/ark:/48223/pf0000158450>).

⁶ *Ibid.*, at 141.

⁷ *Ibid.*

information laws are found in 119 countries, spanning every world region.⁸

Being domestic legislation, freedom of information laws necessarily differ from State to State. In general, however, their basic contours are quite similar.⁹ By and large, freedom of information laws establish an administrative procedure by which a person may request the disclosure of confidential information.¹⁰ Disclosure is subject to a regime of exceptions meant to protect various public and private interests, such as national security, private information, patents, and trade secrets.¹¹

The proliferation of these laws coincided with the ISDS boom of the past two decades. It is therefore unsurprising that third parties have availed themselves of these laws to access confidential arbitration documents from the start. Indeed, the earliest reported instance of an ISDS-related request dates back to 1999.¹²

This then brings me to my first policy inquiry: who makes freedom of information requests related to ISDS proceedings, and why? One can readily envisage two different types of actors submitting such requests: first, actors who are not a party to an ISDS-proceeding, such as members of the civil society and second, claimant parties in a proceeding seeking an alternative avenue to obtain case-related documents. One would expect

⁸ A full list of States with freedom of information laws can be found at: <http://www.freedominfo.org/?p=18223>

⁹ See generally Mendel, *supra* note 6, at 141-154.

¹⁰ *Ibid.*, at 141.

¹¹ *Ibid.*, at 148-150.

¹² See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, paras. 24-26, 28 (available at: <https://www.italaw.com/sites/default/files/case-documents/ita0469.pdf>); Organisation for Economic Co-operation and Development, "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures", 2005/01 *OECD Working Papers on International Investment* (2005), para. 22 (available at: <http://dx.doi.org/10.1787/524613550768>).