Universiteit
Leiden
The Netherlands

The role of civil society in investment treaty arbitration : status and prospects

El Hosseny, F.F.

Citation
El Hosseny, F. F. (2016, May 26). *The role of civil society in investment treaty arbitration : status and prospects*. Retrieved from https://hdl.handle.net/1887/42075

Version:	Not Applicable (or Unknown)
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/42075

Note: To cite this publication please use the final published version (if applicable).

Cover Page

Universiteit Leiden

The handle http://hdl.handle.net/1887/42075 holds various files of this Leiden University dissertation.

Author: El Hosseny F.F.
Title: The role of civil society in investment treaty arbitration : status and prospects
Issue Date: 2016-05-26

THE ROLE OF CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION: STATUS AND PROSPECTS

Farouk Fahmi El-Hosseny

THE ROLE OF CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION:
STATUS AND PROSPECTS

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 26 mei 2016
klokke 11.15 uur

door

FAROUK FAHMI EL-HOSSENY

geboren te Cairo (Egypte)

in 1985

Promotor: Prof. dr. L.J. van den Herik

Co-promotor: Dr. E.C.P.C.D. De Brabandere

Promotiecommissie: Prof. dr. N.J. Schrijver

Dr. J.P. Loof

Prof. dr. M. Piers (Universiteit Gent, België)

Prof. dr. A.M.E. Tanzi (University of Bologna, Italy)

إلى أبي العزيز

(TO MY DEAR FATHER)

TABLE OF CONTENTS

ABBREVIATIONS **12**

INTRODUCTION **13**

1. RESEARCH AIM AND PROBLEM STATEMENT **17**

2. CONCEPTUAL FRAMEWORK **20**

3. APPROACH AND METHODOLOGY **31**

4. STRUCTURE **37**

PART I: THE FUNCTION AND MODALITIES OF CIVIL SOCIETY PARTICIPATION BEFORE INVESTOR-STATE TRIBUNALS **42**

INTRODUCTORY REMARKS **42**

1. IDENTIFYING THE 'PUBLIC INTEREST' IN AN INVESTOR-STATE ARBITRATION CONTEXT **44**

1.1 A STRUCTURAL STRESS TEST: 'PUBLIC INTEREST' PRESSURE ON FOREIGN INVESTORS' RIGHTS AND HOST STATES' OBLIGATIONS **46**

1.2 LOTS OF 'HARD LAW' RIGHTS, FEW 'SOFT LAW' OBLIGATIONS: A LOOK AT THE INTERNATIONAL FRAMEWORK ON FOREIGN INVESTMENT PROTECTION **53**

1.2.1 Foreign investors' rights 54

1.2.2 Foreign investors' obligations 59

1.3 EARLIER EXAMPLES OF PUBLIC INTEREST ISSUES RAISED IN INVESTOR-STATE DISPUTES **66**

1.3.1 Sea turtle protection, an exception to property rights? – *Santa Elena v. Costa Rica* 66

1.3.2 Cactus reserves and hazardous chemical waste – *Metalclad v. Mexico* 68

1.3.3 Persistent organic pollutants as a test for protectionism – *SD Myers v. Canada* 71

1.4 ADJUDICATION *À SENS UNIQUE*: SOME OF THE EARLIER CRITICISM OF INVESTOR-STATE TRIBUNALS' AWARDS **74**

1.4.1 Environmental protection as a 'substantial deprivation of investment': Formal and informal contestation of awards 74

1.4.2 A legitimacy deficit: the absence of third party stakeholder representation 81

1.5 IMPACT OF THE INTERNATIONAL COMMERCIAL ARBITRATION MODEL ON INVESTOR-STATE ARBITRATION AND CIVIL SOCIETY'S ROLE **84**

1.5.1 The decline of diplomatic protection and other virtues of the international commercial arbitration model 84

1.5.2 Does civil society's role really matter?: the irrelevance of public interest issues under international commercial arbitrations 91

1.5.3 Confidentiality and transparency issues as testaments of inadequate interchangeability 93

1.5.4 The gradual shift towards the acceptance of civil society's participation in investor-state disputes: a *fait accompli*? 98

2. PROCEDURAL RULES GOVERNING CIVIL SOCIETY'S PARTICIPATION AS *AMICUS CURIAE* 99

2.1 ACCEPTANCE OF CIVIL SOCIETY'S PARTICIPATION AS *AMICUS CURIAE* 100

2.1.1 The Iran-US Claims Tribunal precedent 101

2.1.2 The *Methanex* precedent – a point of no return 102

2.2 FORMALIZATION OF *AMICUS CURIAE* PARTICIPATION – THE OPENING UP TO 'THIRD PERSONS' 109

2.2.1 Amendments to the ICSID Arbitration Rules 110

2.2.2 Adoption of the UNCITRAL Rules on Transparency 111

2.2.3 Acknowledgment through state practice – NAFTA parties and newly negotiated BITs 115

3. FROM THEORY TO PRACTICE: INVESTOR-STATE TRIBUNALS' REGULATION OF *AMICUS CURIAE* PARTICIPATION 121

3.1 TRIBUNALS THAT APPLIED THE *METHANEX* PRECEDENT 122

3.1.1 *Amicus* acceptance as a mere matter of procedural discretion: *UPS v. Canada* 122

3.1.2 Exclusion of *amicus* at the jurisdictional phase: *Aguas del Tunari v. Republic of Bolivia* 126

3.1.3 *Sociedad General de Aguas de Barcelona v. Argentina* – the first *amicus* ICSID case 127

3.1.4 No assistance, no participation: *Chevron and Texaco v. Ecuador* 130

3.2 TRIBUNALS THAT APPLIED THE RECENTLY-ENACTED CRITERIA 131

3.2.1 Clear guidelines and no objections: *Glamis Gold v. the United States* 132

3.2.2 Bringing issues unaddressed by disputing parties to the fore – *Biwater Gauff v. the Republic of Tanzania* 132

3.2.3 Unprecedented access to case materials in *Piero Foresti et al. v. the Republic of South Africa* 134

3.3 COMMON PROCEDURAL GROUNDS 135

4. CIVIL SOCIETY PARTICIPATION: WHERE PROCEDURE INTERTWINES WITH SUBSTANCE 136

4.1 ARE ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS ISSUES RELEVANT TO THE ADJUDICATION OF INVESTOR-STATE DISPUTES? 138

4.2 THE *LEITMOTIV* OF ENVIRONMENTAL PROTECTION 142

4.2.1 The environment: An exclusive affair for states? 143

4.2.2 NAFTA's sustainable development goal – The example of *Methanex* 146

4.3 CIVIL SOCIETY AS A HUMAN RIGHTS ADVOCATE 151

4.3.1 The need for foreign investment in water distribution 152

4.3.2 Is there a 'human right to water'? 154

4.3.3 Privatizations, protests, and problems – A look at some of the key decisions 159

4.4 REPRESENTING THE UNDER-REPRESENTED: CIVIL SOCIETY AND INDIGENOUS GROUPS 169

4.4.1 Legal principles on the protection of indigenous peoples 170

4.4.2 'Extracting the sacred' – Examples of the dilemma of protecting indigenous peoples in the wake of investments in extractive industries 173

5. AN APPRAISAL OF CIVIL SOCIETY'S *AMICUS CURIAE* ROLE 181

5.1 PROCEDURAL DEVELOPMENTS: *AMICUS CURIAE* INTERVENTION CRYSTALLIZED 181

5.2 'MIXED RESULTS' – DO INVESTOR-STATE TRIBUNALS CONSIDER *AMICI*'S SUBSTANTIVE ARGUMENTS? 183

6. CONCLUDING REMARKS 187

PART II: THE FUNCTION AND MODALITIES OF CIVIL SOCIETY PARTICIPATION BEFORE OTHER JURISDICTIONS: FOUR MODELS 189

INTRODUCTORY REMARKS 189

1. ABSENT, BUT NOT ENTIRELY: INDIRECT PARTICIPATION AT THE ICJ 190

1.1 CONTENTIOUS PROCEEDINGS 191

1.2 ADVISORY PROCEEDINGS 192

2. STANDING FOR CIVIL SOCIETY – A LOOK AT INTERNATIONAL HUMAN RIGHTS JURISDICTIONS 195

2.1 CIVIL SOCIETY AS A VICTIM OF HUMAN RIGHTS VIOLATIONS BEFORE THE ECTHR 196

2.1.1 Standing as a redress for violations of ECHR *rights* 197

2.1.2 Representation on the basis of *rights* and not *interests* – Examples from the case law 198

2.2 REPRESENTATION OF VICTIMS OF HUMAN RIGHTS VIOLATIONS BEFORE THE IACTHR AND ACHPR 201

2.2.1 Flexible *ratione personae* and exacting *ratione materiae* criteria 202

2.2.2 Access to justice on the basis of *actio popularis* – A look at the case law 204
2.2.3 Rationale for admissibility of *actio popularis* 211

3. WHAT IS A '*FRIEND OF THE COURT*'? – A CROSS-JURISDICTIONAL PERSPECTIVE OUTSIDE THE REALM OF INVESTOR-STATE ARBITRATION 212

3.1 THE *AMICUS CURIAE* PROCEDURE – A *COMMON LAW* INSPIRATION 213

3.2 WTO PANELS AND THE APPELLATE BODY'S RESTRICTIVE APPROACH 218

3.2.1 Brief background to WTO dispute settlement 218
3.2.2 Non-trade concerns as the substantive context 219
3.2.3 *Amicus* authorities: *Shrimps* and *Asbestos* 222

3.3 INTERNATIONAL HUMAN RIGHTS JURISDICTIONS' LIBERALISM 230

4. THE PECULIAR CASE OF THIRD PARTY INTERVENTION 233

4.1 THIRD PARTY INTERVENTION BEFORE *COMMON LAW* COURTS 234

4.1.1 Applicable procedural rules – A look at the US model 235
4.1.2 A *sine qua non* condition: The existence of a *'direct, significant, and legally protectable interest in an action to intervene'* 239

4.2 A FUNCTION UNAVAILABLE TO CIVIL SOCIETY: THIRD PARTY INTERVENTION AS PRACTICED BEFORE INTERNATIONAL JURISDICTIONS 242

4.2.1 States as third party intervenors before the ICJ on the basis of an *'interest of a legal nature'* 243
4.2.2 Not *'friends'*, nor litigants: Contracting parties to IIAs or BITs as third party intervenors 249
4.2.3 'Joinders' or 'intervenors'? – Third parties in international commercial arbitration 250

4.3 COMMON DENOMINATORS 255

5. CONCLUDING REMARKS 256

PART III: AN ENHANCED ROLE FOR CIVIL SOCIETY BEFORE INVESTOR-STATE TRIBUNALS? 258

INTRODUCTORY REMARKS 258

1. TRANSCENDING *AMICUS CURIAE* SUBMISSIONS 259

1.1 THE INHERENT LIMITATIONS OF THE *AMICUS CURIAE* ROLE – A COMPARATIVE PERSPECTIVE 260

1.2 TO BE AN *AMICUS*, OR NOT TO BE: FUNDAMENTAL DIFFERENCES WITH THIRD PARTY INTERVENTION 263

1.3 PETITIONS TO UPHOLD THE 'DIRECT' INTEREST IN INVESTOR-STATE ARBITRATION 265

1.3.1 The impossibility of 'adding strangers to the arbitration' – *UPS v. Canada* 266

1.3.2 Extreme circusmtances, standard limitations – *Aguas del Tunari v. Bolivia* 271

1.3.3 Jurisdictional barriers set by the *UPS* and *Bechtel* tribunals 277

2. COULD THERE BE A BASIS FOR CIVIL SOCIETY'S THIRD PARTY INTERVENTION? 278

2.1 ACCESS TO JUSTICE UNDER INTERNATIONAL LAW 278

2.2 IS THERE A CIVIL SOCIETY *IUS STANDI* BEFORE INVESTOR-STATE TRIBUNALS? 283

2.2.1 Foreign investors as the primary beneficiaries of access to justice 283

2.2.2 Does civil society have a 'right to be heard' before investor-state tribunals? 287

3. POTENTIAL REGULATION OF THIRD PARTY INTERVENTION IN INVESTOR-STATE DISPUTES 294

3.1 RATIONALIZING CIVIL SOCIETY'S THIRD PARTY INTERVENTION IN INVESTOR-STATE ARBITRATION 294

3.1.1 *Interests* are not *rights* 295

3.1.2 'Broader' interests that do not require enhanced access 296

3.1.3 Differences in civil society's stakes in investor-state arbitration 299

3.2 PROCEDURAL VOID AND SUBSTANTIVE BARRIERS: HOW TO RECONCILE THIRD PARTY INTERVENTION WITH THE INVESTOR-STATE ARBITRATION REGIME? 302

3.2.1 Filling the legal void: A look back at the regulation of third party intervention 302

3.2.2 A last resort: The exercise of investor-state tribunals' discretion 306

4. CONCLUDING REMARKS 312

CONCLUSION 314

BIBLIOGRAPHY 324

SUMMARY 358

SAMENVATTING 364

CURRICULUM VITAE 371

ABBREVIATIONS

ACHPR – African Commission for Human Rights

ASEAN – Association of South East Asian Nations

BITs – Bilateral Investment Agreements

CEDAW – Convention on the Elimination of all Forms of Discrimination against Women

CERDS – Charter of Economic Rights and Duties of States

CESCR – Committee on Economic, Social and Cultural Rights

DSU – Dispute Settlement Understanding

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECOSOC – United Nations Economic and Social Council

ECOWAS – Economic Community of West African States

EU – European Union

GATT – General Agreement on Tariffs and Trade

GATS – General Agreement on Trade in Services

FDI – Foreign direct investment

FTA – Free Trade Agreements

FTC – NAFTA Free Trade Commission

IACHR – Inter-American Convention on Human Rights

IACtHR – Inter-American Court for Human Rights

ICC – International Chamber of Commerce

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ICSID – International Center for Settlement of Investment Disputes

IIAs – International Investment Agreements

ILC – International Law Commission

ITO – International Trade Organization

MAI – OECD Multilateral Agreement on Investment

NAFTA – North American Free Trade Agreement

NAALC – North American Agreement on Labor Cooperation

UNCED – United Nations Conference on Environment and Development

UNCITRAL – United Nations Commission on International Trade Law

UNCTAD – United Nations Conference on Trade and Development

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNIDROIT – International Institute for the Unification of Private Law

SIAC – Singapore International Arbitration Center

OAS – Organisation of American States

TBT – Agreement on Technical Barriers to Trade

TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights

TTIP – Trans-Atlantic Trade and Investment Partnership

WTO – World Trade Organisation