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

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5. An appraisal of civil society's *amicus curiae* role

Having looked at a significant number of rules and cases, it is worthy at this stage to provide an assessment – from this research's perspective – on the possible impact civil society might have had on investor-state tribunals' decisions. This impact shall be considered from both procedural (**Section 5.1**) and substantive (**Section 5.2**) standpoints. The aim of this section is thus to explore whether civil society has had any effects on the decisions discussed hitherto.

5.1 Procedural developments: *Amicus curiae* intervention crystallized

Part I has shown that international commercial arbitration typically covered disputes arising from international relationships of a commercial nature, which include investment activities.[814] As previously mentioned, concerns regarding the *amicus curiae* procedure often stem from those preoccupied with the consensual nature of arbitration and other fundamental principles of international commercial arbitration, which in essence could be credited to the receding practice of the diplomatic protection of foreign investors, and thus, the de-politicization of investor-state disputes.

However, the rules and cases examined hitherto show that there exists a relative departure from the international commercial arbitration model appearing as a *fait accompli* with (i) the increasing recognition by arbitral tribunals for a shift in procedure where the public interest is at stake; (ii) both ICSID and UNCITRAL amending existing, or adopting new, arbitration rules; (iii) NAFTA parties setting out new guidelines to increase third-party participation and transparency under Chapter XI disputes; and (iv) newly negotiated BITs adhering to similar principles. In fact, numerous arbitration practitioners have not welcome greater transparency and third party involvement.[815]

The *Methanex* case was the starting point for civil society actors to solicit arbitral tribunals in that regard. The IISD, the Communities for a Better Environment and the Earth Island Institute had successfully submitted petitions for leave to file *amicus curiae* briefs 'on the basis of the immense public importance of the case'. The tribunal explicitly

[814] See *supra* note 110.
[815] For an overview, see A. Kawharu, *supra* note 393, at 281.

referred to arguments raised by the *amici* on the public importance of the case. The *Methanex* tribunal upheld these arguments as it ultimately acknowledged its authority to accept *amicus curiae* submissions. This triggered NAFTA parties to issue the FTC Statement notwithstanding their apparent reluctance to amend Chapter XI. The Statement is considered as compelling guidance as shown by the *Glamis* tribunal as well as others.[816] The acceptance by *Methanex* of the *amicus curiae* practice is clearly portrayed as a procedural novelty.[817] Resorting to similar arguments in the case of *Sociedad General de Aguas de Barcelona, S.A. v Argentina*,[818] civil society actors succeeded in convincing ICSID tribunals to accept *amicus curiae* submissions prior to the amendment of the ICSID Arbitration Rules. Civil society actors should be credited to a large extent for the acceptance of the *amicus curiae* procedure. It has allowed third parties such as the Quechan Indian Nation to make its voice heard.[819] Without the *amicus* procedure, the Nation would not have had any access to the *Glamis* tribunal.[820]

That said, the acceptance of *amici curiae* does not amount to the recognition of any third party right. Rather, it is a matter of procedural discretion. This was once more confirmed recently in the highly sensitive *Philip Morris v. Uruguay* arbitration. While accepting the submission of an *amicus* brief by the Pan American Health Organization, the tribunal emphasized that 'the need to safeguard the integrity of the arbitral process requires in fact *that no procedural rights or privileges of any kind be granted to the non-disputing parties*'.[821]

Moreover, investor-state tribunals do not shy away from rejecting *amicus curiae* petitions based on their procedural discretion – even if there is a close nexus between the subject matter of a dispute and public interest and/or human rights issues. The previously

[816] Following the *Glamis* arbitration, the *Merrill & Ring* tribunal accepted *amicus* submissions by Communications, Energy and Paperworkers Union of Canada, the United Steelworkers, and the British Columbia Federation of Labour without much controversy. Merrill & Ring Forestry L.P. v. Government of Canada, *supra* note 135, at paras 22, 50.
[817] A. Van Duzer, *supra* note 171, at 685.
[818] Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544.
[819] Glamis Gold Ltd v. United States, *supra* note 496.
[820] E. De Brabandere, *infra* note 852, at 105.
[821] The tribunal stated that 'under the terms of Rule 37(2), the Tribunal has discretion whether to accept a written submission by a non-disputing party. Acceptance of a submission shall confer to the petitioner neither the status of a party to the arbitration proceeding nor the right to access the file of the case or to attend hearings. The need to safeguard the integrity of the arbitral process requires in fact that no procedural rights or privileges of any kind be granted to the non-disputing parties'. See Philip Morris v. Uruguay, *Procedural Order No. 4 of 24 March 2015*, at para 24 (our emphasis).

discussed *Aguas Provinciales de Santa Fe* decision.[822] The more recent *Bernhard von Pezold v. Republic of Zimbabwe* decision clearly manifest this.[823] Although the tribunal in this last case did recognize that proceedings may well have an impact on the interests of indigenous communities, it dismissed an *amicus* petition made by the European Center for Constitutional and Human Rights as well as four Zimbabwean indigenous communities citing doubts over the petitioners' independence and neutrality vis-à-vis Zimbabwe.[824] As previously mentioned, petitioners' independence and neutrality is a *sine qua non* condition under Article 37(2) of the ICSID Arbitration Rules.[825] The fulfilment of such condition is subject to tribunals' assessment and appraisal of civil society petitioners. The tribunal's rejection in *Bernhard von Pezold v. Republic of Zimbabwe* sheds light on a recurring and fundamental point for the purposes of this research, i.e. the adequacy of civil society participation as *amicus curiae* heavily depends on the facts and circumstances of each case. In this light, and as previously mentioned, investor-state tribunals do not, and should not, shy away from determining the adequacy of *amicus* petitions and dismissing them if need be.[826]

5.2 'Mixed results' – Do investor-state tribunals consider *amici*'s substantive arguments?

Notwithstanding the procedural developments mentioned above, numerous commentators doubt the substantive impact of *amicus curiae* submissions on arbitral

[822] Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555.
[823] Bernhard von Pezold and Others v. Republic of Zimbabwe, (ICSID Case No. ARB/10/15), *Procedural Order No. 2 of 26 June 2012.*
[824] Those were the: Chikukwa, Ngorima, Chinyai and Nyaruwa peoples who inhabit the region of Chimanimani, in South-Eastern Zimbabwe, on which the claimant's properties are located. Ibid., at para 18, 62.
[825] See also Article 37(2), ICSID Arbitration Rules, *supra* note 411.
[826] More recently, although not related to an *amicus* submissions by civil society, the tribunal in *Apotex v. the United States* dismissed two *amicus* petitions submitted by (i) an individual – Mr. Barry Appleton, which was denied in part because Mr. Appleton was vested in a 'particular and professional interest and not a "public interest" affecting him personally'; as well as (ii) the Study Center for Sustainable Finance, which was essentially denied because 'the Tribunal considers that while BNM seems to have a general interest in the Tribunal adopting interpretations of NAFTA that support its apparent interest in narrowing the scope of drug manufacturers' intellectual property protection, BNM has not demonstrated its significant interest'; see Apotex v. the United States, *supra* note 56, at 43-44 and note 59, at 33, 37 respectively. Another tribunal adjudicating the same dispute in parallel proceedings under the UNCITRAL Arbitration Rules had come to the same conclusion, see *Apotex Inc. v. the United States, Procedural Order No.2 On the Participation of a Non-Disputing Party of 11 October 2011*. In both cases the tribunal found that the *amicus* submissions would unduly burden the proceedings and prejudice the disputing parties.

tribunals' final awards. It is indeed argued that the extent to which *amicus* submission has influenced, or even may influence, arbitral tribunals' final awards is not clear.[827] In a similar vein, others argue that arbitral tribunals rarely quote or refer to *amici*'s legal arguments, and thereby their overall relevance might be put into question.[828] This is perhaps reflected in *UPS v. Canada*, where aside from one descriptive paragraph, the substantive issues raised by the *amicus curiae* briefs were not addressed in the tribunal's final award.[829] A look back below at some of the other key decisions mentioned in this Part I is thus merited to put these arguments to the test.

In *Methanex v. the United States*, the tribunal did not revisit procedural aspects nor summarize the content of the *amici*'s submission but noted the IISD's arguments against Methanex's contention that 'trade law approaches can simply be transferred to investment law'. Methanex had also argued that there was no valid environmental, health, or safety justification for the MTBE ban and that it aimed at protecting and promoting 'local interests' in a protectionist manner to the disadvantage of 'foreign competitors'.[830] In addition, the tribunal emphasized the validity of the legitimate exercise of sovereignty as a host state defence against foreign investors' claims, i.e. it found that government measures (i) aimed at ensuring a public purpose; (ii) that are non-discriminatory; and (iii) enacted 'in accordance with due process', are in principle not deemed as expropriatory and compensable – which is a finding that was in line with the IISD's *amicus curiae* arguments.[831] Ultimately, Methanex's claim was rejected and the decision was hailed by civil society organizations such as the IISD.[832]

In *Sociedad General de Aguas de Barcelona, S.A. v Argentina*, the *amici*'s arguments did not seem to alter the tribunal's position in terms of determining Argentina's liability towards the claimants. It relied on the criteria set forth by Article 25

[827] F. Francioni, *infra* note 847, at 741.
[828] A. Moore, *infra* note 1040, at 269; See also T. Ishikawa, *supra* note 108, at 404; N. Blackaby and C. Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration', in M. Waibel et al. (eds), *The Backlash against Investment Arbitration*, at 270; J. Maupin, *supra* note 48, at 29.
[829] United Parcel Service v Canada , *supra* note 515. See also T. Ishikawa, *supra* note 108, at 406.
[830] Methanex Corporation v. United States (Final award on jurisdiction and merits of 03 August 2005), at 13.
[831] See also A. Martinez, *supra* note 181, at 331.
[832] H. Mann, 'The Final Decision in Methanex v United States: Some New Wine in Some New Bottles', International Institute for Sustainable Development, August 2005, available at: http://www.iisd.org/pdf/2005/commentary_methanex.pdf (last accessed 06 October 2014).

of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts[833], indicating that 'the severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations.'[834] Ultimately, it did not consider that Argentina expropriated the claimants' investments, nor did Argentina violate the claimants' right to full protection and security. It did however find that they were not afforded fair and equitable treatment. A decision on quantum is still not public; therefore, it remains to be seen whether *amicus* arguments might have been further considered.

In *Glamis Gold v. the United States*, the Quechan Indian Nation, Friends of the Earth, the National Mining Association, and Sierra Club and Earthworks made *amicus* submissions.[835] The tribunal acknowledged but did not address human rights arguments that were particularly raised by the Quechan Indian Nation. The tribunal focused on factual issues and California's treatment of Glamis Gold. It nonetheless concluded the case by denying Glamis Gold's claims under both NAFTA Articles 1110 on expropriation and 1105 on the fair and equitable treatment.

Perhaps the case where civil society actors seemed to have caused most impact is the *Biwater Gauff v. Tanzania* case.[836] This is paradoxical given that, as mentioned previously, the *amici* particularly lamented not having had access to the arbitral record; and therefore, claimed they could not adequately scrutinize the arguments or facts alleged by the parties. While citing the *Methanex* precedent, the tribunal acknowledged the wider public interest that is relevant to the dispute in the following terms: 'this arbitration raises a number of issues of concern to the wider community in Tanzania'.[837] As mentioned above, the tribunal extensively summarized the *amici*'s contentions with respect to the human right to water, and noted that Biwater Gauff explicitly acknowledged such right prior to the dispute. It also mentioned the target set by the Millennium Development

[833] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 01 September 2013) ('ILC Articles on the Responsibility of States for Internationally Wrongful Acts').
[834] See Sociedad General de Aguas de Barcelona v. The Argentine Republic, *supra* note 544, at para 249, 259.
[835] Glamis Gold Ltd v. United States, *supra* note 496.
[836] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, *supra* note 741.
[837] Ibid., at para 358.

Goals to reduce by half the number of people without access to potable water.[838] It ultimately found that Tanzania had indeed expropriated Biwater Gauff's investment, and therefore violated the United Kingdom-Tanzania BIT. However, it considered that the claimant failed in sustaining any of its claims for damages.[839]

In *Piero Foresti et. al v. South Africa*, the South African Legal Resources Centre and the Centre for Applied Legal Studies' – acting amongst others as *amicus* petitioners[840] – presented quite extensive and robust arguments on South Africa's human rights obligations in implementing, *inter alia*, affirmative action measures aimed at promoting the economic welfare of African-descendant citizens that were being contested by the claimants. The *Piero Foresti* tribunal was the first ICSID tribunal to have partially accepted the *amicus* petitioners' request to access certain case materials – which were then redacted by the disputing parties.[841] However, the case was discontinued. It is therefore not possible to draw any conclusions on civil society's impact in this particular case.

In sum, while looking back at the arguments raised by civil society, it undoubtedly appears that civil society benefited from a unique opportunity as *amicus curiae* to raise a plethora of environmental protection and human rights arguments in front of investor-state tribunals. However, although it appears as a seemingly a limited one, it is difficult to accurately assess the degree of influence these arguments might have had on investor-state tribunals' final awards. What is clear is that investor-state tribunals focus on the respective parties' arguments in great detail and that the same cannot be said about *amicus* arguments, which is in line with the limited role of *amici* as non parties. More fundamentally, for the purposes of this research, it is also clear that investor-state tribunals have systematically asserted that *amici curiae* are *not* additional parties to disputes. This is a fundamental limitation that merits further elaboration in Part III.

[838] 'BGT itself has acknowledged the existence and importance of this right, stating that "every man, woman and child has the right to reliable system of clean water and good sanitation" (the tribunal had cited material from the company's website). See Ibid., at para 379.
[839] Ibid., at para 812.
[840] The remaining two other petitioners are renowned organizations: the International Centre for the Protection of Human Rights and the Centre for International Environmental Law.
[841] Piero Foresti, Laura de Carli and others v. Republic of South Africa, *supra* note 575. See also J. Brickhill and M. Du Plessis, *supra* note 427, at 160.

6. Concluding remarks

Depending on the facts and circumstances of each case, civil society may have the capacity to act as *amicus curiae* in front of investor-state tribunals. This position is no longer in doubt and seems to be confirmed not only by arbitral precedents, but also through the amendment of the ICSID Arbitration Rules and the adoption of the UNCITRAL Rules on Transparency, as well as under several recently signed BITs. This is a benchmark position, a no-turning-back point. Indeed, this is well-reflected in Francioni's argument to the effect that:

> … *amicus curiae* participation has become and will remain in the foreseeable future an important feature of the administration of justice in the field of foreign investment.[842]

The background to this procedural development is arguably substantive. It comes as a recognition that the subject matter of investor-state arbitration could potentially (i) affect the public's broader interest; and, in some cases, (ii) closely relate to environmental protection, public health, human rights or other public policy issues that could affect the direct interests of certain communities or groups who are third parties to arbitration proceedings. Indeed, the adjudication of host state responsibility vis-à-vis foreign investors has, in numerous cases, required tribunals to apprehend facts and norms that relate to 'non-investment concerns' such as sustainable development or the human right to access water. These inherently transcend the narrow scope of the law on foreign investment protection, which enticed tribunals wary of getting a complete understanding of the subject matter to accept 'assistance' in this respect from third parties.

As opposed to international human rights jurisdictions where civil society is entitled to adopt three different procedural roles, i.e. that of a victim/claimant, a representative of victims of human rights violations, or an *amicus curiae* in on-going proceedings; its role in investor-state disputes has been until now solely confined to the status of an *amicus curiae*, i.e. that of an 'assistant'. This role entails procedural functions that are far less extensive from those of a party to the dispute. Indeed, a salient and recurring feature of this procedure is that its sole and unique purpose is the assistance of the tribunal by bringing arguments, perspectives, and expertise other than those of the

[842] F. Francioni, *infra* note 847, at 740.

disputing parties. More fundamentally, *amici curiae* – whether represented by civil society actors or not – do not benefit from the *right* to take part in proceedings, or in other words, the *right to be heard* by investor-state tribunals. They cannot act as litigants. In other words, they cannot challenge arguments or evidence put forward by disputing parties. This constitutes a limited access to justice that has nevertheless allowed civil society organizations to raise factual and legal arguments aimed at advancing environmental and human rights issues and ultimately influencing arbitral tribunals' interpretation of international investment law – even if the degree of such influence remains unclear.

Having said that, BITs are construed in a manner that solely provides foreign investors the right to file claims against host states. There is no opportunity really for civil society actors to access arbitral tribunals other than via the *amicus curiae* procedure under the current regime. Against this background, it is now merited to shift onto Part II, which considers the procedural modalities that may be available to civil society before other jurisdictions. Part III then questions whether civil society could benefit from other procedural avenues that would allow it to enhance its participation before investor-state tribunals.