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

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

Introductory remarks

Part II provides a comparative analysis of the role of civil society in international adjudication. It looks at the procedural rules and practice of a number of international forums and jurisdictions allowing for the access of civil society. Attention is particularly given to the ICJ, the WTO dispute settlement system, and the following international human rights jurisdictions: the ECtHR, IACtHR (and the Commission), and ACHPR.

Unlike the ICJ and the WTO dispute settlement system, which are limited by a solely inter-state procedure, the ECtHR, IACtHR, and ACHPR grant access to *any person* in general, and open their doors *de facto* to civil society organizations. Article 44 of the IACHR⁸⁴³ and Article 34 of the ECHR⁸⁴⁴ specifically entitle ‘any person’ to file a complaint to the Inter-American Commission or an application to the ECtHR against a state-party to the treaty in question. As for the Banjul Charter, Article 55 separates communications into two categories, those emanating from states parties to the Charter and those who are made by ‘other than those of States parties to the present Charter’.⁸⁴⁵

A closer understanding of the rules governing civil society’s access is necessary. The main question to be addressed here is what are the modalities for civil society’s access to justice in front of each of those jurisdictions. The aim of Part II is to look at those rules governing civil society access in general, and the regulation of third party

⁸⁴³ Article 44 states that: ‘Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party’. See American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S.123, entered into force 18 July 1978 (the ‘IACHR’).

⁸⁴⁴ Article 34 states that: ‘The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right’. See European Convention for the Protection of Human Rights and Fundamental Freedoms (the ‘ECHR’), entry into force 04 November 1950, 213 U.N.T.S. 221.

⁸⁴⁵ Article 55 states that: ‘1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission’. See Organization of African Unity, African Charter on Human and Peoples’ Rights (the ‘Banjul Charter’), entry into force 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

intervention in particular, in order to better understand civil society's petitions for third party intervention in investor-state proceedings and place them into perspective – as will be further elaborated in Part III.

At the heart of this discussion is the principle of access to justice.⁸⁴⁶ In essence, access to justice⁸⁴⁷ entails a *right* to initiate, or *take part in*, proceedings.⁸⁴⁸ Civil society's access to international justice falls under four different roles: that of indirect participation, which solely concerns the ICJ (**Section 1**), standing as a victim/claimant (**Section 2**), a representative of victims of human rights violations (**Section 3**), or *amicus curiae* in on-going proceedings (**Section 4**). The last, and most relevant, category of procedural modalities is third party intervention, which is incidentally unavailable to civil society in international jurisdictions but is available to civil society before domestic jurisdictions such as US and Canadian courts (**Section 5**).

1. Absent, but not entirely: Indirect participation at the ICJ

The ICJ plays a central role in the application and interpretation of international law.⁸⁴⁹ It was established for the purposes of resolving disputes amongst states pursuant to Articles 93 and 94 of the UN Charter. It has a contentious function and an advisory one. The ICJ's Statute and the Rules of Court do not envisage a role for *persons* in general, including individuals, civil society, or corporations, as is the case in international human rights jurisdictions for instance.⁸⁵⁰ The main reason for such absence lies in the quintessentially inter-state nature of proceedings at the ICJ. This applies to both contentious and advisory proceedings. The aim of this section is to consider whether civil

⁸⁴⁶ This principle will be extensively discussed at a later stage of this research in Part III – Section 2.1.

⁸⁴⁷ Francioni defines access to justice as: 'the individual's right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection'. See F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law', (2009) 20 *European Journal of International Law* 729, at 729.

⁸⁴⁸ T. Meron, *The Humanization of International Law* (2006), at 318.

⁸⁴⁹ While referring to the ICJ's formulation of the 'effective control' test for the attribution of state conduct, particularly in light of its judgement in the *Bosnian Genocide* case, Crawford opines that 'despite the lack of formal hierarchy between international courts and tribunals, the pronouncements of the [ICJ], the only permanent tribunal of general jurisdiction, carry particular weight'. See J. Crawford, *supra* note 74, at 291; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007; ICJ Rep. 1997, at para 399 (the 'Bosnian Genocide' case).

⁸⁵⁰ E. Valencia-Ospina, 'Non-Governmental Organizations and the ICJ', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 227. See also P. Sands and R. Mackenzie, *supra* note 55, at para 6.

society has had any participation at ICJ contentious (**Section 2.1**) or advisory proceedings (**Section 2.2**), and whether it may have a potential for broader participation therein.

1.1 Contentious proceedings

Contentious proceedings are solely accessible to states. Article 34 of the ICJ Statute provides that:

1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of *public international organizations* information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative...⁸⁵¹

Is it plausible to consider that article 34(2) paves the way for civil society organizations to file *amicus curiae* briefs if they are considered as ‘public international organizations’? The prevalent understanding is that this category only includes ‘international organizations of states’ as defined by article 69(4) of the Rules of Court.⁸⁵² In the *Aerial Incident of 3 July 1988 Case* for instance, the ICJ invited the International Civil Aviation Organization (ICAO) to provide certain information regarding ICAO council proceedings.⁸⁵³ It seems clear that article 34 of the ICJ’s Statute does not open the door to civil society in contentious proceedings.⁸⁵⁴ The Court has previously confirmed this position in the *Asylum Case* by rejecting a petition of the International League for the Rights of Man – an NGO with consultative status at the ECOSOC – for it to be considered as a ‘public international organization’ in the sense of article 34(2) of the Statute.⁸⁵⁵

⁸⁵¹ Article 34, ICJ Statute, *supra* note 94.

⁸⁵² Article 69(4) states that: ‘In the foregoing paragraph, the term “public international organization” denotes an international organization of States.’ See ICJ Rules of Court, entered into force 01 July 1978. See also E. De Brabandere, ‘NGOs and the “Public Interest”: the Legality and Rationale for Amicus Curiae Interventions in International Economic and Investment Disputes’, (2011) 12 Chicago Journal of International Law 85, at 92.

⁸⁵³ *Aerial Incident of 3 July 1988, Iran v United States*, [1996] ICJ Rep 9, ICGJ 93. Similar invitations were made in: *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment (Provisional measures) of 26 May 1959, ICJ Rep. 1959; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Judgment (Preliminary Objections), ICJ Rep. 1988; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Judgment (Preliminary Objections) of 27 February 1998, ICJ Rep. 1998. See also P. Sands and R. Mackenzie, *supra* note 55, at para 6.

⁸⁵⁴ P. Sands and R. Mackenzie, *supra* note 55, at para 6.

⁸⁵⁵ See *Asylum Case (Colombia v. Peru)*, Judgements of 20 and 27 November 1950, [1950] ICJ Reports, Vol II, Part IV Correspondence, at 228. And see also, E. Valencia-Ospina, ‘Non-Governmental Organizations and the ICJ’, in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 228.

It is precisely in this light that investor-state tribunals could not refer to the ICJ's practice for potential guidance or precedents with regards to allowing access to third parties in general, and civil society organizations in particular. Indeed, in the *UPS v. Canada* case, the tribunal noted that:

it is true that in contentious cases in the International Court of Justice only states and in certain circumstances public international organisations may have access to the Court (the latter only to provide information relevant to cases before it). However, that limit appears to result directly from the wording of Articles 34, 35 and 61-64 of the Statute of the Court which carefully regulate those matters as well as from the practice under them extending over several decades.⁸⁵⁶

The *UPS* tribunal highlighted the stark contrast between the ICJ's strictly inter-state dispute settlement process with the one contemplated under NAFTA Chapter XI, which involves private persons (NAFTA investors) acting as claimants against states (NAFTA parties). This fundamental difference allowed the tribunal to part with ICJ practice, and ultimately accept *amicus* intervention by two civil society organizations – the Canadian Union of Postal Workers and the Council of Canadians.

Finally, some question whether article 50 of the ICJ Statute could be 'mooted as a possible vehicle for *amicus curiae* participation in contentious cases upon the initiative of the Court'.⁸⁵⁷ The article provides that 'the Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.⁸⁵⁸ That said, article 50 has not yet been utilized for such purpose.

1.2 Advisory proceedings

The same principles apply to advisory proceedings. No express provision on *amicus curiae* participation exists.⁸⁵⁹ Yet, article 66(2) of the ICJ Statute states that:

The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or *international organization* considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question.⁸⁶⁰

⁸⁵⁶ *UPS v. Canada*, *infra* note 517, para 64.

⁸⁵⁷ See P. Sands and R. Mackenzie, *supra* note 55, at para 6.

⁸⁵⁸ Article 50, ICJ Statute, *supra* note 94.

⁸⁵⁹ See P. Sands and R. Mackenzie, *supra* note 55, at para 7.

⁸⁶⁰ Article 66, ICJ Statute, *supra* note 94. (our emphasis).

The term used is ‘international organization’ as opposed to ‘public international organization’ as in Article 34(2) of the Statute. The difference in wording has indeed caused ambiguity.⁸⁶¹

In practice, the ICJ has for instance solicited information from ICAO, which is clearly an inter-state international organization.⁸⁶² The ICJ has only once accepted to receive a written submission by a civil society organization, the International League of the Rights of Man, in the *International Status of South-West Africa* advisory opinion.⁸⁶³ As mentioned above, the ICJ did not consider the League to be a ‘public international organization’ in the *Asylum Case*, and this meant that the ICJ had shown flexibility by opening a window for non-state actors in its advisory proceedings.⁸⁶⁴ The ICJ has in fact accepted submissions by other non-state actors.⁸⁶⁵ Could the ICJ’s acceptance of submissions by non-state actors be considered as a sign of flexibility in advisory proceedings? There are no clear indications that could reinforce such a contention at the moment. The ICJ has been, in any event, adopting a limited approach to *amici curiae* in general, even when filed by states.⁸⁶⁶ It does not indeed object to *amicus* briefs so long as they are appended to the disputing parties’ submissions.⁸⁶⁷

Conscious of the challenge posed by unsolicited *amicus* submissions, the ICJ has nevertheless clarified its position on unsolicited submissions in advisory proceedings through the adoption of Practice Direction XII in 2004. The Direction reads as follows:

⁸⁶¹ E. Valencia-Ospina, *supra* note 850, at 230.

⁸⁶² See *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. United States of America), Observations of the International Civil Aviation Organization of 4 December 1992, [1989].

⁸⁶³ The League did not however submit its statement to the Court within the prescribed time limit. See *South-West Africa Cases; Advisory Opinion Concerning the International Status*, Judgment of 11 July 1950, [1950] ICJ Reports, at 130.

⁸⁶⁴ E. Valencia-Ospina, *supra* note 850, at 230.

⁸⁶⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 19 December 2003, [2003] ICJ Reports, at 429; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Order of 17 October 2008, [2008] ICJ Reports, at 409-410. See also E. De Brabandere, *supra* note 852, at 91. Although both Palestine and Kosovo are now widely recognized as states. See also J. Crawford, *supra* note 74, at 196-200.

⁸⁶⁶ It is even argued that the ICJ should be more open to *amicus* submissions by states as an alternative to the more burdensome third state intervention. See in general P. Palchetti, *infra* note 1153 and the discussion on third state intervention at the ICJ under Part II – Section 4.2.1.

⁸⁶⁷ *Gabčíkovo-Nagymaros Project*, Hungary v. Slovakia, *infra* note 875. See also A. Von Bogdandy and I. Venzke, *supra* note 162, at 62.

1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace...⁸⁶⁸

Prior to its adoption, the ICJ Registrar had placed the numerous documents and statements it received from NGOs and other civil society organizations in the wake of the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion at the Court's library without considering them as *amicus curiae* submissions.⁸⁶⁹ Practice Direction XII confirms this practice and reasserts the Registrar's position for not considering unsolicited information or briefs as *amicus curiae* submissions.

Against this backdrop, the ICJ's acceptance of submissions by non-state actors in a limited number of advisory proceedings and the adoption of Practice Direction XII are indeed noteworthy. However, the practice of the Court still does not show any signs of a material change. Access to non-state actors in general, and to civil society in particular is significantly restrictive. It is generally understood, as a consequence, that civil society organizations including NGOs have had little impact on the Court's proceedings to date.⁸⁷⁰ The prevalent view is that the ICJ remains committed to its strictly inter-state character both under its contentious and advisory functions.⁸⁷¹ The ICJ's commitment to its inter-state dispute settlement process is well-reflected in Judge Guillaume's widely quoted words in *The Legality of the Threat or Use of Nuclear Weapons* advisory opinion:

... I dare to hope that Governments and inter-governmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media.⁸⁷²

That said, the ICJ also acknowledges the existence of wider common concerns and interests, which – although not explicitly mentioned by the ICJ – *de facto* transcend states

⁸⁶⁸ Practice Direction XII, International Court of Justice.

⁸⁶⁹ E. Valencia-Ospina, *supra* note 850, at 231.

⁸⁷⁰ D. Shelton, 'The International Court of Justice and Non-Governmental Organizations', (2007) 9 International Community Law Review 139, at 143.

⁸⁷¹ *Ibid.*, at 232.

⁸⁷² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (Separate Opinion of Judge Guillaume), [1996] ICJ Reports 66, at 287.

as they relate to each individual member of society as a whole.⁸⁷³ This is echoed in the ICJ's position on the environment in the *Legality of the Threat or Use of Nuclear Weapons* opinion when it stated that 'the environment is not an abstraction but represents a living space, the quality of life and the very health of human beings, including generations unborn'.⁸⁷⁴ In the same vein, in his separate opinion in the *Gabcikovo/Nagymaros* case, Judge Weeramantry stated that:

... we have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare ... International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.⁸⁷⁵

Whilst Judge Guillaume's remarks explicitly signal a concern to safeguard the ICJ's inter-state ethos, Judge Weeramantry comes as a refreshing reminder that contemporary international law transcends inter-state interests.⁸⁷⁶ A closer look subsequently below at WTO case law, where civil society actors sought to promote environmental protection, echoes Judge Weeramantry's remarks that international law cannot be 'unrelated to the global concerns of humanity as a whole'.⁸⁷⁷

⁸⁷³ D. Shelton, *supra* note 400, at 34.

⁸⁷⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 66, at para 29. See also *Ibid.*, at 34.

⁸⁷⁵ *Gabčíkovo-Nagymaros Project, Hungary v. Slovakia*, Judgement, Merits (Separate Opinion of Vice-President Weeramantry), [1997] ICJ Rep 88, at 115. See also *Ibid.*, at 33.

⁸⁷⁶ See also *Ibid.*, at 33.

⁸⁷⁷ See Part II – Section 3.2.

⁸⁷⁸ As will be shown, the representation of victims is still not permissible – in principle – before the ECtHR.