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

El Hossey, F.F.

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Author: El Hosseney F.F.

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5. Concluding remarks

To date, numerous courts and tribunals have had an extensive *amicus curiae* practice. Notwithstanding such liberalism, the position of courts and tribunals on *amicus curiae* may be poignantly summarized by the following words of the WTO Appellate Body's decision in the *Hot-Rolled Lead* case:

*Individuals and organizations, which are not members of the WTO, have no legal 'right' to make submissions or to be heard by the Appellate Body. The Appellate Body has no legal 'duty' to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not members of the WTO...*¹¹⁹⁵

Third party intervention is, on the other hand, generally practiced in a limited manner and continues to be rather a rare exception.¹¹⁹⁶ The background is that dispute settlement largely remains of a bilateral nature.¹¹⁹⁷ When parties arbitrate or litigate, they generally have a legitimate expectation to do so amongst each other as per their agreement – and not with anyone else. In a commercial arbitration or litigation setting, the intervention of third parties is strictly confined to the realm of contractual

¹¹⁹⁵ See WTO, Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), para. 41 ('*Hot-Rolled Lead* case').

¹¹⁹⁶ See generally, A. Zimmermann, *supra* note 55.

¹¹⁹⁷ *Ibid.*, at para 17.

relationships, i.e. the third party must be, along with the disputing parties, bound by the same arbitration agreement or contractual agreement in which the former is contained.

In domestic law settings, intervention could arise in public interest related litigation – as clearly reflected by US case law. A broad right to intervene is considered to ultimately allow third party intervenors to be heard, the taking into account of third party interests and, it is argued, the enhancement of the legitimacy of proceedings.¹¹⁹⁸ Yet, the burden caused by third party intervention on the proceedings and to disputing parties is a paramount factor that requires further reflection.¹¹⁹⁹ The protection of third parties' interests ought to be balanced with the disputing parties' interests on one hand, as well as the accuracy and efficiency of proceedings on the other. In this respect, tribunals have not hesitated in exercising their discretion in modulating the intervention of third parties to fit the particular needs, and circumstances, of the litigation either by rejecting it, or restricting its scope.

These questions are further addressed in Part III through the prism of investor-state arbitration.¹²⁰⁰ Indeed, IIAs and BITs contain an 'offer to arbitrate' by host states that is exclusively aimed at foreign investors. The intervention of third parties in the form of a joinder – as understood in an international commercial arbitration context – could lead to unwelcomed structural changes, and hurdles, to the investor-state dispute settlement regime. That said, intervention as a 'non-party' may turn out to be an interesting model that merits further scrutiny.

¹¹⁹⁸ On the impact of third party intervention in general on the legitimacy of proceedings, see P. Sands and R. Mackenzie, *supra* note 55, at para 29; W. Benedek, *infra* note 661, at 204.

¹¹⁹⁹ E. Triantafilou, *supra* note 18.

¹²⁰⁰ See Part III – Section 3.2.2.