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

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4. Concluding remarks

This research posits that civil society should be recognized as a third-party intervenor when relevant and necessary as a ‘non-party’ intervenor. There are nonetheless challenges that may be arguably posed by broader stakeholder access to investor-state disputes. First, there is a question as to whether third party intervention should be premised on affected ‘direct’ interests or the ‘broader’ public interest. This debate is essential in understanding detractors’ arguments relating to the additional costs and burdens third party intervention might cause.¹⁴⁶²

¹⁴⁶⁰ See Part I – Section 1.5.3.

¹⁴⁶¹ Various empirical studies clearly suggest the dominance by international law firms of the investor-state dispute settlement ‘regime’. See for instance C. Olivet and P. Eberhardt, *infra* note 1470. See also P. Sergio, ‘Social Capital in the Arbitration Market’, (2014) 25:2 European Journal of International Law 388.

¹⁴⁶² R. Field et al., *supra* note 1084, at 986 citing J. Friedenthal, ‘Increased Participation by Non-Parties: The Need for Limitations and Conditions’, (1980) 13 University of California Davis Law Review 259, at 261-263.

The *UPS* tribunal found that Article 14 of the ICCPR,¹⁴⁶³ cited by the petitioners as one of the basis on which they should be granted standing, relates to persons whose *rights* and *obligations* – which according to the tribunal solely emanates from NAFTA. This shifts attention to the second challenge, i.e. civil society does not have any *rights* and *obligations* under IIAs or BITs – which provide that the sole two disputing parties in investor-state arbitration are the foreign investor, acting as claimant; and the host state, acting as respondent.

Civil society's third party intervention would be possible if both disputing parties give their consent. Otherwise, and notwithstanding the compelling access to justice arguments, investor-state tribunals would be venturing in a grey zone when deciding on the matter even if host states consent to civil society's third party intervention. Investor-state tribunals would most likely have to rely on their discretionary powers and authority – as they have done over a decade ago when the *amicus curiae* procedure was first accepted in the absence of any rules on the matter. The facts and circumstances of each case will be crucial and determinative factors in this regard, precisely because not all investor-state arbitrations are public interest-related disputes; and moreover, not all investor-state arbitrations that are in fact public interest-related involved the 'direct' interests of civil society and those it represents.

Against this backdrop, it may be argued that, when the '*direct*' interests, and not merely the '*broader*' public interest, of communities or groups are at stake, there would be a compelling need to secure broader third party intervention to civil society petitioners that are acting on their behalf or on behalf of those affected communities or groups.

¹⁴⁶³ Article 14(1) of the ICCPR states that: '1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. And Article 26 states that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. See ICCPR, *supra* note 93.