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

El Hosseny, F.F.

CONCLUSION

The first ever BIT was concluded between West Germany and Pakistan in 1959.[1464] Makhdoom Ali Khan, Pakistan's former Attorney General, recalled the rationale behind his country's negotiation of BITs as 'everyone simply considered the treaties a piece of paper, something for the press, a good photo opportunity and that was the end of it'.[1465] States such as Pakistan have now realized that they have created, perhaps inadvertently, a formidable international law regime that bestows upon foreign investors both unprecedented substantive and procedural rights.

With this realization, the investor-state arbitration mechanism thus created has come under severe criticism when public-national interests were perceived as being trumped by private-foreign ones. To say the least, investor-state arbitration has increasingly become a divisive issue that is being systematically debated not only by specialist international law practitioners, but also citizens, civil society, parliaments and politicians, and of course multinationals and investors.[1466]

Stakeholders in this debate are often taking dogmatic and defensive positions on the basis of stereotypical perspectives, as opposed to empirical ones. The stereotype of the inherently inferior foreign investor who resorts to arbitration to seek remedies of the discretionary abuse committed by the inherently superior host state is simply flawed. Equally inaccurate is the assumption that host states are attempting to fend off claims by powerful foreign investors aimed at contesting measures taken in the public interest. This research comes to the rather obvious conclusion that facts and circumstances are fundamentally different in each particular investor-state arbitration. Yet, the current

---

[1464] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387 UNCTAD reports that Pakistan has concluded 50 IIAs, see UNCTAD's website, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/160 (last accessed 01 July 2015).

[1465] Quoted in J. Kurtz, 'Buidling Legitimacy Through Interpretation in Investor-State Arbitration', in in Z. Douglas et al. (eds.), *The Foundations of International Investment Law* (2014), at 261–262.

[1466] In the wake of the ongoing TTIP negotiations, the EU Parliament called for 'a new justice system, run by publicly-appointed judges and subject to scrutiny and transparency rules, [that] should replace private arbitration' . See EU Parliament, 'TTIP: ease access to US market, protect EU standards, reform dispute settlement', 8 July 2015, available at: http://www.europarl.europa.eu/news/en/news-room/content/20150702IPR73645/html/TTIP-ease-access-to-US-market-protect-EU-standards-reform-dispute-settlement (last accessed 01 August 2015).

debate over the legitimacy of investor-state arbitration has taken such a polarizing turn that this obvious assertion now appears rather blurred.

There is no doubt that investor-state arbitration is important in order to guarantee access to justice to foreign investors, replace diplomatic protection, and uphold international principles and standards of investment protection as well as the international rule of law. The investor-state arbitration regime must equally ensure that host states could freely enact legitimate public interest measures. One of the key ways to ensure this is that investor-state tribunals need to get a full understanding of the issues at stake in order to 'arrive at a correct decision'.[1467]

As an example, upon deciding whether a host state violated its international law obligations towards a foreign investor who invested in a water distribution concession, should a tribunal consider whether the ability to access water of a segment or group of a host state's population was undermined as a result of a water price increase by that same foreign investor?[1468] In essence, should an investor-state tribunal consider relevant environmental protection, public health, human rights or other public policy issues when adjudicating host state responsibility under international law vis-à-vis foreign investors?

This was not the precise question of this research. In fact, it may be argued that the answer to this question has been settled long ago. Since the *Methanex v. United States* decision in 2001, the answer to that question is essentially *yes*.[1469] Some, primarily international commercial arbitration specialists, are nonetheless committed to a negative answer. It is based – from this research's perspective – on anachronistic conceptions that are merely out of touch with an established reality, *a fait accompli*. The contemporary investor-state dispute settlement regime suffers from negative perceptions of systemic deficiencies partly as a result of such conceptions.[1470] These detractors fail to recognize

[1467] Aguas Provinciales de Santa Fe S.A et. al. v. The Argentine Republic, *supra* note 555, at para. 23.
[1468] See Introduction – Section 1.
[1469] It is worthy to recall here that, while deciding to accept *amicus* submissions by civil society, the *Methanex* tribunal noted that 'there is an undoubtedly public interest in this arbitration….The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the [*amicus*] Petitions. In this regard, the *Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular*, whereas a blanket refusal could do positive harm'. See Methanex Corporation v United States, *supra* note 428, at para 49 (our emphasis).
[1470] Various sources were cited throughout this research to that effect. See here, *inter alia*, C. Olivet and P. Eberhardt, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom' (November 2012), *Transnational Institute* and *Corporate Europe Observatory*, available at: http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf (last accessed 06 October 2014);

that (i) there are public interest-related investor-state arbitrations that could potentially affect the public's broader interest; and (ii) although limited in number, certain public interest-related investor-state arbitrations closely relate to environmental protection, public health, human rights or other public policy issues that could potentially affect the direct interests of certain communities or groups who are third parties to arbitration proceedings.

The next logical question of interest to this research was '*how*?', i.e. how would an investor-state tribunal consider environmental protection, public health, human rights or other public policy issues when adjudicating host state responsibility under international law vis-à-vis foreign investors? The *amicus curiae* procedure was accepted by investor-state tribunals, ICSID, UNCITRAL and an increasing number of states as an answer to that question. This research attempted to contribute to the debate by understanding the answer as to '*how*?'

The *amicus curiae* answer is a novel development given its inadequacy and irrelevance in international commercial arbitration. International commercial arbitration rules had been adapted to investor-state arbitration. However, the subject matter of the latter widely transcends strictly commercial aspects of arbitrations between two private parties. This procedural interchangeability faded to some extent with (i) the increasing recognition by investor-state tribunals for the necessity of 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) an increasing number of recently negotiated IIAs and BITs confirming this trend. These developments indeed marked a clear paradigm shift, i.e. investor-state arbitration is increasingly perceived as distinct – both substantively and procedurally – from international commercial arbitration. The various examples cited in this research show that investor-state tribunals could render decisions with vast socio-economic implications

---

The Economist, 'The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors' (11 October 2014), available at: http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (last accessed 05 January 2015). Also, see generally, UNCTAD 2013 Report, *supra* note 210; J. Maupin, *supra* note 48, at 62; A. Martinez, *supra* note 181. For a dismissal of much of this criticism, see generally C. Brower and S. Blanchard, *supra* note 8.

making them the target of mounting pressure 'for the public voice to be heard'.[1471] In this light, states have increasingly recognized the need for enhanced transparency and third party participation within investor-state arbitration. All of these factors lead to the formal recognition of the *amicus curiae* procedure.

Against this backdrop, civil society now participates in investor-state arbitrations as *amicus curiae* and raises arguments that comprise, but also often transcend, the mere furtherance of 'broader' public interest issues. In some cases, civil society equally and distinctly aims to raise, assert, or defend the 'direct' interests of communities or groups that claim to be affected by investor-state arbitrations or the arbitral claims of foreign investors. Indeed, the acceptance of civil society's *amicus curiae* participation in investor-state disputes is typically premised on an underlying 'broader' public interest to a given dispute. Yet, in certain cases, and in light of their particular facts and circumstances, tribunals explicitly noted that civil society petitioners sought to participate on the basis of their 'direct' interests'. [1472] Such 'direct' interests also relate to environmental protection, human rights or other public policy issues that are not necessarily brought forward by host states.

Civil society also viewed the *amicus curiae* procedure as insufficient. The mere submittal of a 15 to 20 page *amicus* brief, along with an invariable access to hearings and case materials, was considered as an incomplete access to justice. The recently-recognized *amicus* role before investor-state tribunals contrasts starkly with access to international human rights jurisdictions where civil society may benefit from three procedural roles, i.e. standing as a party, representation of victims, or participation as *amicus curiae*. Civil society has indeed adequate and effective access to these jurisdictions; whereas it arguably does *not* benefit from such access before investor-state tribunals. In the landmark *Bechtel* case, civil society organizations precisely sought standing as third parties in order to act *on behalf* of adversely affected groups from the city of Cochabamba and formulated their request on the basis of these stakeholders' *rights*:

[1471] R. Garcia, *supra* note 972, at 357.
[1472] See United Parcel Service v. Canada, *infra* note 517, at para 13.

> *…this Tribunal's award will determine Petitioners' rights*. As such, it is essential that Petitioners have an opportunity to be heard by the Tribunal.[1473]

These arguments were premised on the principle of access to justice, most notably on the basis of Article 14 of the ICCPR.[1474] Investor-state tribunals have correctly dismissed such arguments given that, under IIAs and BITs, foreign investors acting as claimants on the one hand, and host states acting as respondents on the other, are the sole parties whose rights and obligations are being adjudicated upon. Investor-state tribunals cannot therefore grant standing to additional disputing parties. There is simply no legal basis for a civil society *ius standi* before investor-state tribunals. As shown, this is consistent with the practice of international human rights jurisdictions where civil society benefits from standing in the same manner as 'any person' who seeks redress of violations to *rights* guaranteed under the ECHR, IACHR, or the Banjul Charter.

This research has shown, however, that there may be procedural and substantive avenues to accommodate investor-state tribunals' dismissal. From a procedural standpoint, courts and tribunals may, on the basis of their legitimate exercise of discretion, allow third party intervention based on 'non-party' intervention as is practiced at the ICJ for instance or the access given to some non-disputing IIA or BIT contracting parties.[1475] From a substantive standpoint, the fact that IIAs and BITs solely set forth the rights and obligations of foreign investors and host states respectively does not mean that investor-state disputes might not affect the rights of communities or groups that are formally recognized under either international or municipal law. These rights could translate as 'direct' interests before investor-state tribunals. The debate then shifts away from the jurisdictional barrier that was rightly set by investor-state tribunals, i.e. third party interests would not interfere (jurisdictionally) with the adjudication of foreign investors' and host states' treaty rights and obligations.

In concreto, under the proposed third party intervention procedure, civil society would be considered as a third party to the dispute and not as an additional disputing party on the one hand, nor a mere assistant of an investor-state tribunal as *amicus curiae* on the other. This research thus adheres to the position that third party intervention

[1473] See the petitioners' requests at Aguas del Tunari, S.A. v. The Republic of Bolivia, *supra* 716, para 48.
[1474] See Article 14(1), ICCPR, *supra* note 1250.
[1475] Article 85, ICJ Rules of Court, *supra* note 852; Article 21.11, United States-Peru BIT, *supra* note 505.

should not lead to the 'addition of a party to the dispute' – to use the *UPS* tribunal's terms.[1476] In other words, foreign investors should not be faced with an 'additional party'. Visually speaking, third party intervention stands somewhere between standing and *amicus* participation. Third party intervention does not (i) necessarily equate to standing as an additional party; and (ii) transcends the mere *assistance of the court as a friend*. Third party intervenors would be able to effectively scrutinize foreign investors' claims and arguments, and in fact, have access to hearings, case materials, submit relevant factual and legal arguments accordingly, including by oral observations.[1477]

Third party intervention is *grosso modo* an enhanced, more expansive, *amicus curiae* role. It is subject to a direct, significant, and legally protectable interest; or a 'real and concrete' interest underlying to a legal norm. This research thus proposed a standard for third party intervention on the basis of a '*direct and significant interest in the outcome of the arbitration*'. Otherwise, the remaining criteria regulating *amicus curiae* interventions simply apply *mutatis mutandis*.[1478]

That said, two crucial points are worthy to reiterate here. First, despite being categorically recognized as non-underlying to any third party right, but rather as a matter of procedural discretion, and subject to the assistance of investor-state tribunals (amongst other conditions), the *amicus* procedure is now fully recognized in investor-state arbitration as a procedural means to channel 'broader' public interest concerns. Second, there is a need to ponder over a more expansive procedural role, i.e. through third party intervention, to those stakeholders whose 'direct' interests – and not merely whose 'broader' interests – are affected by a given investor-state dispute. The *amicus* procedure would be the proper means to channel 'broader' public interests; and third party intervention would be resorted to raise, assert, or defend the 'direct' interests of affected communities or groups that relate to environmental protection, human rights or other

[1476] United Parcel Service v. Canada, *supra* note 517, at para 13.
[1477] These modalities are well reflected in the US-Peru BIT: 'A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties…'. See Article 21.11, United States-Peru BIT, *supra* note 505 (our emphasis).
[1478] The criteria are as follows: 'in exercising its discretion, the Tribunal should consider whether (a) There is a public interest in the arbitration; (b) The Petitioners have sufficient interest in the outcome of the arbitration; (c) The Petitioners' submissions will assist in the determination of a factual or legal issue related to the arbitration by bringing a perspective or particular knowledge that is different from that of the disputing parties; and (d) The Petitioners' submissions can be received without causing prejudice to the disputing parties'. See UPS v Canada, *supra* note 517, at para 7(iii). See also Part III – Section 1.2.

public policy issues – if and when relevant to investor-state disputes. Both procedures need not be conflated. A clear distinction of the type of interest at stake in the arbitration is a paramount factor to take into account when assessing the adequacy of either procedure.

This research has accordingly attempted to emphasize that the adequacy and relevance of civil society participation is a factual issue rather than a conceptual one. This research does not purport to call for a systematic approval of civil society participation in investor-state disputes. Investor-state tribunals would need to judge whether civil society's factual and legal arguments would be relevant to the adjudication of the dispute between a foreign investor and a host state, i.e. in assessing whether a host state violated the rights bestowed upon a foreign investor by virtue of an IIA or BIT, and whether that foreign investor is entitled to damages.

As the primary subjects of international law, states should maintain efforts to enhance transparency in general, and third party participation in investor-state disputes through the recognition of the *amicus curiae* procedure in particular. These efforts have benefited from continuous consolidation since the ground-breaking *Methanex* decision in 2001.[1479] Host states should also consider supporting a more expansive role for third party stakeholders that would compare, but not necessarily equate, to the adequate and effective access those stakeholders benefit from before several not only domestic jurisdictions, but also international ones. IIAs and BITs should be amended by states to explicitly recognize the right of non-disputing parties to act as third party intervenors if and when their direct interests are affected by investor-state disputes. Endorsing third party intervention requests, and calling on investor-state tribunals to exercise their discretionary procedural powers to accept them, would be a positive step towards that direction. In fact, the application of such discretion would be reminiscent of how the *amicus curiae* procedure was first introduced in investor-state arbitration over more than a decade ago.

From a more holistic perspective, detractors of the intervention of third parties in a macro sense, i.e. *amicus* or other forms of intervention, often raise an 'equality of arms' argument against the proliferation of third party interests before investor-state tribunals

[1479] Methanex Corporation v United States, *supra* note 428, at para 49.

that would ultimately prejudice foreign investors. There is a quasi-general recognition, as shown, that investor-state arbitration has been devised to ensure access justice to foreign investors. That said, it is unwarranted to assume that civil society acts exclusively 'in favour of' host states. Civil society could also submit arguments as a third party 'in favour of' a foreign investor-claimant in investor-state arbitrations.[1480] The direction of civil society's intervention will essentially depend on the facts and circumstances of each particular case. The question then is not whether civil society's third party intervention would favour a host state over a foreign investor, or *vice-versa*. This issue should not be a source of concern. Rather, to use the example of the previously discussed *Metalclad* case, the main issue is to determine whether a foreign investor-claimant dumped 20,000 tons of untreated toxic waste near a community that could have had its representatives legitimately act as third party intervenors in the ensuing arbitration.[1481] In more concrete terms, third party intervention would allow investor-state tribunals to get a more complete picture of the factual and legal issues at stake, which could turn out to be crucial for the purposes of rendering more just and balanced decisions.[1482] 'Justice' and 'balance' would mean that investor-state tribunals would not award 'polluters' millions of dollars in damages – as *Metalclad* was described.[1483] The absence of stakeholder participation in this precise case, including most notably community members inhabiting the Metalclad project area who had complained from widespread sickness and contamination, was particularly detrimental to the perception of the legitimacy of the *Metalclad* tribunal's decision. Again, the fact that *justice* tilts in favour of either claimants (foreign investors) or respondents (host states) is inexorably dependent on the facts and circumstances, the merits, of each particular case. Rendering *justice* is ultimately the most relevant and compelling concern to take into account when discussing civil society's, or any third party's, access to investor-state tribunals, either via the *amicus curiae* or third party intervention procedures.

[1480] In *Grand River v. the United States*, an *amicus curiae* submission was filed by a Canadian indigenous organization in support of the foreign investor (the claimant). See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, *supra* note 148.
[1481] Metalclad Corporation v. United Mexican States, *supra* note 257.
[1482] As previously mentioned, this was also an argument suggested in E. Triantafilou, *supra* note 18.
[1483] The United Mexican States v. Metalclad Corporation, *supra* note 314, at 5, 107. See also D. Schneiderman, *supra* note 304, at 82.

As thoroughly discussed throughout this research, 'justice' and 'balance' have been widely perceived to be deficient in the contemporary foreign investment regime.[1484] Judge Bruno Simma raises the following questions:

> …how we can mediate the tension between investment protection and human rights concerns? What legal mechanisms and arguments may we employ to assure a harmonious interface of the two? What are possible, and acceptable, legal avenues for an international investment tribunal to consider international human rights law in investor-state disputes? [1485]

Indeed, what happens if a foreign investor undermines, or impedes the fulfilment of, human rights or causes harm to the environment as a result of its protected investment activities? Should it benefit from the protection of an IIA or BIT? More specifically, if there is a close nexus between that violation or harm on the one hand, and the expropriation of the foreign investor's investment on the other, should that constitute compelling factors for the reduction, or even dismissal, of its potential claim for damages against the expropriating host state in an investor-state arbitration, i.e. as 'mitigating or off-setting effects'? [1486] The answers to these questions exceed the scope of this research. Yet, they capture the importance of the on-going debate over investor-state arbitration. A foreign investment and investor-state arbitration framework that solely takes into account the objectives of foreign investment promotion and protection, without adequately and effectively considering host states' duty to address public interest issues and/or foreign investors' potential obligations or responsibilities towards, or the potentially adverse impacts of their activities on, host states' populations, communities or groups, clearly echoes with the anti-globalization slogan of '*mondialisation à sens unique*'.

It was argued in this research that in order to ensure this much-needed balance that Judge Bruno Simma alluded to, affected stakeholders should be adequately and effectively involved in the investor-state arbitration process to the extent they have a '*direct and significant interest in the outcome of the arbitration*'. This could be potentially achieved through the third party intervention procedure. Not only would just and balanced investor-state tribunals' decisions progressively affect the international law

[1484] It is evident that, as signalled by Judge Bruno Simma, 'we are now confronted with claims of a lack of balance leading to apprehension, disillusionment and disappointment on the part of participants–voiced not just by left-wing regimes in Latin America or the usual suspects among the NGOs but, for instance, also by US presidential candidates in their electoral campaigns'. See Simma, *supra* note 196, at 575.
[1485] Ibid, at 573-574.
[1486] M. Wells-Sheffer, *supra* note 206, at 507.

on foreign investment, but also contribute to a more just and balanced process of economic globalization. Some have proposed the idea of counter-claims in investor-state arbitration to rid it of its 'unilateral' dimension and re-balance its dynamics.[1487] In the same vein, others are re-thinking the entire investment treaty regime in order to allow adversely affected host state populations to directly participate in arbitration proceedings as disputing parties.[1488] Others suggested the need to re-negotiate balanced IIAs or BITs that would clearly articulate foreign investors' rights, but also their potential obligations and responsibilities not only towards host states, but also host states' populations.[1489] Others prefer a 'softer' approach through the enhancement of corporate responsibility and self-regulation through codes of conduct and guidelines, the implementation of human rights impact assessments including prior public consultations with local communities.[1490] In sum, these proposals, including this research, fit within an increasingly widespread recognition for the need to address the 'problem' of, and the 'backlash' towards, the investment treaty regime and investor-state dispute settlement…[1491]

[1487] Under such a model, the host state would submit a counter-claim in an investor-state dispute on behalf of individuals or groups from its population that may be adversely affected by foreign investors-claimants' activities. See F. Francioni, *supra* note 847, at 738. See also W. Ben Hamida, *supra* note 1391.

[1488] See J. Daniel Amado, 'From Investors' Arbitration to Investment Arbitration: A Mechanism for Allowing the Participation of Host State Populations in the Settlement of Investment Conflicts' (2014), University of Cambridge Faculty of Law Research Paper No. 8/2014.

[1489] See, *inter alia*, C. Olivet and P. Eberhardt, *supra* note 1470, at 73.

[1490] Berne Declaration, Canadian Council for International Co-operation (2010). Human Rights Impact Assessment for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland, available online: http://www.srfood.org/images/stories/pdf/otherdocuments/report_hria-seminar_2010_eng.pdf.

[1491] On the use of the term 'backlash', see A. Martinez, *supra* note 181.