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

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SUMMARY

Introduction

With over 3,000 bilateral (BIT) and international investment agreements (IIAs) worldwide, the contemporary global framework of foreign investment has for long addressed in limited ways environmental protection, public health, human rights, or other public policy concerns that may be affected by foreign investment activity. Arbitral tribunals have recognized, perhaps belatedly, that '*there is an undoubtedly public interest*' in certain investment treaty arbitrations and that '[t]*he substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties*'. In one of the post-Argentine financial crisis investment treaty arbitrations, the tribunal recognized that the water systems at the heart of the dispute 'provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations'. In fact, an Argentine civil society petitioner sought to intervene as *amicus curiae* in this arbitration on the basis of '*the right of every person to participate and make their voices heard in cases where decisions may affect their rights*'.

By promoting and protecting foreign investments under international law, states avidly seek to attract much-needed foreign capital into their economies, including in key sectors such as for instance natural resource extraction, energy, or water treatment and distribution – i.e. sectors that could potentially have adverse effects on host states' communities and groups, including indigenous communities. Investor-state tribunals have now acknowledged the need to grasp the complexity of public interest issues when adjudicating host state responsibility under international law vis-à-vis foreign investors. The context is that some arbitral tribunals had been criticized for failing to go beyond the sole objective of upholding the promotion and protection of foreign investments. It was argued that this was primarily the result of a unidimensional analysis of, on the one hand, the facts that lead to the alleged violations of foreign investors' international rights; and on the other, the letter of BITs and IIAs in isolation of other relevant international law norms.

The context of foreign investments in host states is often highly complex and investor-state tribunals are increasingly faced with utterly difficult mandates. The state is no longer the sole voice of the public interest. In fact, the interests of the state and civil society – including the groups and communities it purports to represent – are not systematically aligned. These include, for instance, international and local NGOs, faith-based associations, indigenous associations or organizations, gender-focused associations, epistemic communities or research institutions, trade unions, and other associational bodies aimed at representing local communities or groups, including small-scale farmers for example. Accordingly, there could be a need for civil society to raise facts and arguments related to public interest issues in order to ensure a balanced adjudication of investor-state disputes.

Problem statement and research aim

If there is a need for civil society to have a role in public-interest related investor-state arbitration, the question for this research then becomes: *Which procedural capacity could govern civil society's participation in investor-state arbitration and under what conditions?*

By first examining civil society's recently recognized *amicus curiae* role in addressing the 'broader' *public interest* at stake in investor-state arbitration, this research aims to provide a comprehensive understanding of civil society's role as practiced hitherto. It then considers whether such role may be equally adequate whenever 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.

Structure

This research has attempted to provide an appreciation of civil society's role in investment treaty arbitration and, subsequently, reflect upon its status therein through three main Parts. Part I deals with 'The Function and Modalities of Civil Society Participation Before Investor-State Tribunals'. Part II contains this research's comparative analysis by addressing 'The Function and Modalities of Civil Society Before other Jurisdictions'. Finally, Part III addresses the question of: 'An Enhanced Role for Civil Society Before Investor-State Tribunals?'.

The Function and Modalities of Civil Society Participation Before Investor-State Tribunals

Procedurally, an *amicus* role for civil society may be sufficient in ensuring a mechanism for *broader* public interests to be voiced before investor-state tribunals. This is *in* the result of a progressive and substantial development over the past fifteen years. With transparency and legitimacy concerns in mind, procedural rules governing *amicus curiae* submissions to investor-state tribunals have been gradually formalized. Tribunals went from accepting them on the basis of their inherent discretionary powers to applying clearly defined criteria under the relevant arbitration rules and treaties. For civil society to intervene as *amicus curiae*, investor-state tribunals generally take into account whether (a) there is a public interest in the arbitration; (b) the *amicus* petitioners have sufficient interest in the outcome of the arbitration; (c) their 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) their submissions can be received without causing prejudice to the disputing parties. More fundamentally, investor-state tribunals have been systematic in emphasizing 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*'; in other words, *amicus* intervention is not underlying to any third party right, including civil society's, and is entirely subject to the exercise of a tribunal's discretion. From a practical perspective, an *amicus* will generally be granted an opportunity to submit a short brief, following an inconsistent access to case documents as well as the disputing parties' pleadings, and a generic access to public hearings if they take place.

Notwithstanding this generally positive development, access as *amicus curiae* may not necessarily be sufficient whenever third parties' *direct* interests are at stake. Public interest-related investment treaty arbitrations may 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. Civil society has sought to represent such groups in a number of cases on that basis by requesting *standing* before investor-state tribunals, i.e. its addition as a disputing party. These included for instance adversely affected communities who opposed and contested a foreign investor's water price increase in a water distribution concession granted by the host state, alleging therefore that their right to access water had been undermined. Such instances raise compelling arguments for a more expansive access before investor-state tribunals, a more enhanced opportunity *to be heard*.

The Function and Modalities of Civil Society Before other Jurisdictions

Civil society is in fact active in a slightly similar respect before international human rights jurisdictions where it could gain standing as a party acting *on behalf of* victims of human rights violations. The comparison with international human rights jurisdictions is of relevance. International human rights law and the international law on foreign investment are not, in the words of Judge Bruno Simma, 'separate worlds'. Both in fact aim to protect the *individual* – as the 'ultimate' subject of international law – against wrongful state conduct. The jurisprudence of the European Court of Human Rights (ECtHR), or even the more liberal African Commission for Human Rights (ACHPR), with respect to civil society's standing sheds light on a fundamental point – civil society's standing is premised on the adjudication of the human *rights* of victims on the one hand, and the obligations of their states on the other, by virtue of an international treaty such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the African Charter on Human and Peoples' Rights.

The comparison with other jurisdictions such as the WTO Dispute Settlement mechanism, including domestic ones in common law systems, sheds light on the fundamental limitations of the *amicus curiae* procedure. It is clear that an *amicus* has no *right to be heard* upon accessing a court or tribunal. Although not available to civil society before international jurisdictions, the third party intervention procedure as practiced at the ICJ provides opportunities for inspiration. There, a state may intervene as a non-disputing party. This procedure is indeed familiar to the investment treaty arbitration realm. Numerous IIAs and BITs explicitly recognize the *right* of non-disputing contracting states to intervene without becoming additional parties to the arbitration. In essence, it is a more enhanced form of *amicus curiae*. This procedure fundamentally differs with third party intervention (or joinder) that would equate to standing – as practiced in international commercial arbitration.

An Enhanced Role for Civil Society Before Investor-State Tribunals?

Civil society petitioners requested standing asserting that '…*this Tribunal's award will determine Petitioners' rights*. As such, it is essential that Petitioners have an opportunity to *be heard* by the Tribunal'. Notwithstanding the compelling access to justice arguments raised by civil society, the current architecture of investment treaty arbitration would not accommodate civil society's standing. It is quintessentially construed as a *unilateral* form of dispute settlement where foreign investors act as claimants, and host states act as respondents. The international law on foreign investment encapsulates the rights of foreign investors, such as the right to fair and equitable treatment or prompt, adequate, and effective compensation in the event of expropriation, that host states are under an international obligation to uphold. Calling for civil society standing in investor-state arbitration would therefore be a misnomer. However, civil society – or any third person's – intervention as a non-disputing party appears as a procedurally feasible alternative, an enhanced, more expansive, *amicus curiae* role. It may be subject to a '*direct and significant interest in the outcome of the arbitration*'. It would entail the right to attend all hearings, to make written and oral submissions to the tribunal, and to receive the written submissions of the disputing parties.

Conclusion

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 disputes as a procedural means to channel 'broader' public interest concerns. This research has sought to examine whether civil society could participate in investment treaty arbitration in a more expansive manner, i.e. beyond the *amicus* procedure or the mere *assistance* of tribunals. Unless the entire investment treaty arbitration regime is re-thought, civil society's standing as an additional disputing party would not be feasible, nor perhaps desired. That said, third party intervention as a non-disputing party – as it is understood under the ICJ's Rules of Court as well as numerous IIAs and BITs – would present a realistic alternative. Such intervention could be subject to a '*direct and significant interest in the outcome of the arbitration*'.

In all cases, the adequacy of civil society's access will inexorably depend on the facts and circumstances of each case – it ought not to be regarded as a *droit acquis*. Investor-state tribunals would get a fuller understanding and appreciation of the complex public interest issues at stake, which in turn would allow them to render balanced, less contested, awards. As instruments of global governance, these tribunals would secure further legitimacy, and dismiss their association with anti-globalization slogans of '*mondialisation à sens unique*'. The right to intervene for third parties with 'a *direct and existing interest* in the outcome of a dispute' is recognized by the European Commission as part of its proposals for reforming investor-state arbitration that would be explicitly incorporated in the EU's future investment treaties. Indeed, third party intervention is one of the many reforms that could ensure the sustainability of the adjudication of host-state responsibility vis-à-vis foreign investors through arbitration, as a non-politicized, fair, efficient, and a largely successful tool for dispute settlement.