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

El Hosseny, F.F.

Propositions relating to the dissertation

THE ROLE OF CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION: STATUS AND PROSPECTS

by Farouk Fahmi El-Hosseny

1. Civil society should not be viewed as comprising exclusively of non-governmental organizations ("NGOs"), particularly the most renowned ones on the global level. Its heterogeneity, diversity, and complexity ought to be recognized. It comprises a plethora of organizations, associations, trade unions, and indigenous groups that are appearing increasingly before the various fora of globalization, including investor-state tribunals.

2. Civil society is primarily concerned with advancing the public interest – it does not advance market or economic interests. However, civil society does not necessarily systematically oppose foreign investors' claims in investment treaty arbitration. In any event, whether civil society ends up supporting host states or foreign investors is irrelevant.

3. Rather than advancing dogmatic positions, suspected all too often with anti-globalization connotations, civil society's role in investment treaty arbitration should be premised on – and viewed through the prism of – the assistance of arbitral tribunals in the adjudication of investment treaty disputes.

4. As a general rule, the procedural vehicle for civil society participation in investor-state disputes should be the *amicus curiae* procedure. This is subject to the existence of a broader public interest that is linked to the substance of the dispute as well as other criteria such as independence vis-à-vis the disputing parties and, more fundamentally, the assertion of issues that are inadequately or not fully addressed by the disputing parties.

5. The assistance of civil society – through such participation – is *in fine* aimed at ensuring that arbitral tribunals get a full understanding and appreciation of the complex public interest issues that are increasingly at stake in investment treaty arbitration. This in turn would allow tribunals to render balanced, less contested, awards. Ultimately, this is crucial in order to maintain the legitimacy – and indeed the existence – of the investment treaty arbitration regime.

6. Such participation might be disruptive and unhelpful in arbitrations of purely or largely commercial nature, where the same transparency requirements would be unmerited.

7. The facts and circumstances of each case are the most fundamental factors that need to be taken into account when assessing the adequacy and merit of civil society's participation as *amicus curiae* or otherwise.

8. In light of that, it appears that *certain* 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, i.e. such arbitrations do not merely touch upon the *broader public interest*.

9. In such cases, a more expansive access to investor-state tribunals might be merited. An access that does not (i) necessarily equate to standing as an additional party; and (ii) transcends the mere *assistance of the court as a friend*. It may be premised on the basis of a '*direct and significant interest in the outcome of the arbitration*'. Such third party intervention would entail the right to attend all hearings, to make written and oral submissions to the tribunal, and to receive written submissions of the disputing parties.

10. As the European Commission has shown, IIAs and BITs should be amended by host 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 investment treaty 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.