Rethinking Interested Parties in ISDS: The case of 3rd States

Kluwer Arbitration Blog
December 3, 2015

Velimir Živković (London School of Economics and Political Science, Department of Law)

Please refer to this post as: Velimir Živković, 'Rethinking Interested Parties in ISDS: The case of 3rd States', Kluwer Arbitration Blog, December 3 2015, http://arbitrationblog.kluwerarbitration.com/2015/12/03/rethinking-interested-parties-in-isds-the-case-of-3rd-states/

---

by Velimir Živković, London School of Economics and Political Science, Department of Law

Imagine that in the heyday of post-Cold War period State A concluded a number of bilateral investment treaties ("BITs") with a number of countries. Due to a variety of factors, these lay dormant for decades as State A is not exposed to investor claims. Governments and policies change, as do officials in various departments. However, State A does eventually get sued by an investor from State B under the A-B BIT for an alleged breach of the fair and equitable standard. As State A's legal team prepares and presents the defense based on their view what 'fair and equitable' was under the circumstances, one thing becomes clear – the Tribunal already has guidance (if not more) on this issue. This guidance is provided by numerous investment awards that, however, had nothing to do with A-B BIT or State A in any way. How was State A meant to influence these developments, bearing in mind that it never had the chance or (presumably) a need to have a say in those cases? Was State A to be on permanent lookout for arbitrations happening elsewhere? And, crucially, was it to constantly attempt to have a recognized *amici curiae* present State A's view on what 'fair and equitable' means in order to try and at least somehow shape the law that will apply when its 'day in court' comes?

The scenario presented above hopefully conveys a concern relevant to those

thinking about the legitimacy issues in international investment law. In brief, there seems to be a tension at play that deserves careful consideration. There has been an increasingly strong agreement in jurisprudence and doctrine that IIL is an overarching treaty system, effectively multilateralized through ISDS under the ideas of achieving consistency of interpretation of international investment agreements and putting in place *jurisprudence constante* to be followed on particular issues. The bilateral nature of most IIL instruments as well as the lack of *stare decisis* would seem to present a considerable problem here – yet one that does not seem to be too hard to overcome in practice. The nod towards formal bilateralism but embrace of actual multilateralism has probably reached its clearest expression in the often (to say the least) quoted paragraph 90 of the *Saipem v. Bangladesh* award [ICSID Case No. ARB/05/07] in which a (very eminent) tribunal posited that 'subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.'

There might be further steps afoot toward institutionalizing such practice. Arguing at this very blog, Gary Born and Mitchell Moranis proposed further 'legalization' through instituting unique interpretation rules for BITs. These would aim to overcome the perceived inadequacy of the Vienna Convention on the Law of Treaties and align the formal rules with what is actually happening in practice. Essentially, it should be formally possible for a tribunal to use BITs (and jurisprudence surrounding them) concluded with third parties, or even between third parties as interpretative tools. To summarize,

> *'The principles are the rules of the Vienna Convention and the notion of consent on which they are premised. The reality is the simplicity and rationality of looking past a single treaty to many others that purport to do the exact same work. The reality is the benefit of consistency and predictability across the system, for both substantive rules and the interpretive framework that defines those rules. A unique approach to interpreting investment treaties would help resolve these tensions.'*

Accepting for the purposes of the discussion that this multilateralization is indeed taking place, a question to be asked is then what possibilities are there for states to have their voice heard in the construction of the rules of this new order and avoid the scenario from the beginning of this post? If every investment arbitration is a laboratory for rules which may be expected to influence the outcome of

proceedings under a completely unrelated BIT, it is relevant to ask how can a State party to that unrelated BIT influence the workings of the said laboratories, as it arguably has a very legitimate interest in doing so.

A useful, albeit brief, comparison can be made in this regard to the International Court of Justice ["ICJ"] and the NAFTA framework. The ICJ Statute, despite also recognizing the lack of *stare decisis* in its Article 59, provides the interested third States the possibility of intervention in Articles 62 and 63. As evidenced, for example, in the advisory opinion on the Kosovo declaration of independence, the facility can turn an individual case into a veritable forum for exchange of legal opinions from interested (and the world's most powerful) states. More to the IIL point, NAFTA Article 1128 provides a right to the non-disputing State party to the dispute to provide the tribunal with its view on how a particular provision of the NAFTA agreement should be interpreted. While there is again no *stare decisis* principle, the provision recognizes the inherent interest that a State participant to a multilateral convention has in furnishing its view on the interpretation of relevant provisions.

In the current state of play in BIT-based ISDS, however, when it comes to the issue who can (apart from the parties) have their voice heard in a particular case, the paradigm readily shifts to bilateralism and the 'isolation' of individual cases. An overview of *amici curiae* practice, while still in a relatively early stage of development, illustrates that should a 3rd State want to pursue the said route itself, doors would more than likely be shut. While there are indications that the circle of entities admitted as *amici* is broadening from NGOs as 'usual suspects' (as evidenced by the EU Commission participation in a number of cases), the situation still seems far less promising for 3rd States.

Namely, the maximum extent of non-disputing State participation so far seems to be the *Eureko v. Slovak Republic* [PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension] tribunal request to the Kingdom of Netherlands (as the other party to the BIT, it must be emphasized) to provide its view on certain matters of interpretation [para. 154]. As Lucas Bastin notes, in doing so the tribunal actually became not only the first investor-State tribunal to request amici curiae submission *propio motu*, but also the first to receive such a submission from a State [Lucas Bastin, 'Amici Curiae in Investor-State Arbitration: Eight Recent Trends' (2014) 30 International Arbitration 125, 130]. The previous case of note, here in the ICSID context, is *SGS v. Pakistan* [ICSID Case No. ARB/01/13, Decision

of the Tribunal on Objections to Jurisdiction], where the tribunal's failure to request Switzerland's view on the proper interpretation of the umbrella clause in the Pakistan-Switzerland BIT prompted a Swiss reaction and inquiry from the ICSID Secretary-General as into why they have not been consulted on the issue [Andrés R Sureda, *Investment Treaty Arbitration: Judging under Uncertainty*, CUP 2012, 37].

These examples show, even when a non-disputing State is consulted, that the paradigm of bilateralism remains deeply embedded. And this can be seen as worrying. Much has been written on the different types of lopsidedness existing in the IIL sphere, but this one does not seem to have come to the forefront yet. It is a case of the development of the law with multilateral or system-wide consequences, yet coupled with mechanisms that constrain possible involvement of those affected by insistence on bilateralism and the formal independence of each arbitral proceeding.

Should something be done and, if so, what? As far as it is known, it is not an acute problem whereby 3rd States have attempted to submit their views, yet faced rejections by tribunals. More precisely, what is at stake here is a reasonable assumption that such 3rd State participation would likely not be possible, and a question if it should be. With the answer being positive, it is possible to suggest some very preliminary thoughts on the ways of achieving this while recognizing that it would be overly ambitious to offer detailed solutions within the scope of this contribution. Staying within the domain of ICSID, a direct path would be an explicit amendment of ICSID Arbitration Rule 37. This is in the jurisdiction of the ICSID Administrative Council, with a 2/3 necessary majority and, while not simple, is definitely far more achievable than an ICSID Convention amendment which, for example, effectively ended the idea of ICSID Appellate mechanism. Secondly, even Rule 37(2), if flexibly interpreted, is not in itself an insurmountable obstacle to admitting third states as interested parties. To the extent that tribunals recognize the interest of a 3rd state, the fact that a view on interpretation is also within a scope of the dispute and that an intervening state might have a different and valuable perspective, the formal amendment of ICSID Rules might not be necessary.

A number of other relevant questions can be posed in this context, such as that of the interest of investors worldwide in a similar possibility. Or of the alternative possibility to control BIT interpretation through amendments and interpretive

notes, if necessary. This note had a much more modest objective than a comprehensive discussion. It is to indicate that to the extent that IIL moves towards substantive multilateralism, its procedural tail may be increasingly lagging behind. In the light of the current discussions about the new free trade agreements, ISDS and ambitious reforms, it is worth remembering that transparency, participation and, ultimately, legitimacy might be built in ways that do not necessarily capture the everyday headlines.