

Access to Justice in International Investment Law through Integrative Legal Thinking

Fifi Junita, University of Airlangga, Indonesia

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Abstract

The principle of access to justice is very dominant in the enforcement of the protection of the public interests in International Investment Agreements (IIAs). Protection against fundamental rights of the local community is often ignored in the establishment of IIAs. It would be argued that the enforcement of access to justice principle needs an integrative legal thinking both in the substantive and procedural levels. Integrative legal thinking which is also known as non-compartmentalized legal thinking, as promoted by Prof. Pieter H.F. Bekker,¹ insists a balance protection of private and public interests in investment dispute settlement which involve multiple stakeholders. The fragmented approach may lead to pro investor bias and impede the enforcement of access to justice, especially for the civil communities which are also harmed as a result of the implementation of the investment. This article examines the concept of the integrative legal thinking and its relevant recent practices. It also argues that integrative or non-compartmentalized legal thinking is considered as a prominent factor to uphold the principle of access to justice in investment dispute settlement in order to protect not only the contracting parties, but also the local community or third party affected by the investment.

Keywords: integrative legal thinking, access to justice, investment dispute settlement.

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¹Pieter H.F. Bekker, 'Recalibrating the Investment Treaty Arbitration System Through Non-Compartmentalized Legal Thinking', *Harvard International Law Journal*, Vol. 55, December 2013, http://www.harvardilj.org/wp-content/uploads/2013/12/Bekker_to_Publish.pdf, p. 2.

Introduction

The principle of access to justice lies at the basic concept of International Investment Law (IIL) regime as a system of governance rather than purely economic notion. As a governance system, International Investment Law has no longer been considered as a pure private nature. It deals with both public and private concerns, impact upon both private and public actors.²In light of this overlap, this regime involves diverse stakeholders who adversely impacted on by foreign investment in a host state. This notion is inextricably linked to the state responsibility to ensure the protection of individual's legal right before a court as the exemplification of constitutional democracy and rule of law as basic attributes of the public law. The complexity of IIL is also caused by its international character which lies at prominent concept of transnational legal process.³ These basic notions call for integrative legal thinking in order to ensure the minimum standard of justice in IIL. The principle of access to justice is an integral part of the minimum standard of treatment of aliens under the customary international law.⁴ It promotes the protection of individual's rights who has suffered an injury caused by abusive power of public authorities or private entities to access to court.⁵ The negation of this principle will lead to the 'denial of justice' since there is no guarantee of just, fair and adequate access to court and judicial outcome.

The implementation of the principle of access to justice is not without constraints. International investment cases are not always purely commercial in nature, but they might also have strong correlation with social issues.⁶ The principle of access to justice as part of 'minimum standard of treatment of aliens' basically gives rights for third party to access to courts and administer justice in accordance with minimum standards of fairness and due process.⁷ The binding arbitration clause under the International Investment Agreements (IIAs) leads to major issues of whether the access to justice principle can also be enforced since it basically refers to the access to domestic court of the host state. Other issue relates to how to resolve conflicts between private rights and public interests through Investor State Arbitration as a 'private' or 'commercial' dispute resolution mechanism.⁸ Inconsistent decisions of the tribunal as regard to the societal dimension of investment disputes shows a little safeguard of access to justice for local communities who suffered by the investment.⁹

²Julie A Maupin, Public and Private in International Investment Law: An Integrated System Approach, Virginia Journal of International Law, Vol. 54: 2, p. 1.

³ Pieter H.F. Bekker, *op.cit.*, p. 2.

⁴This minimum standard was essentially similar to standards of justice and treatment accepted by 'civilized states'. See Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law', available at <http://www.ejil.org/pdfs/20/3/1862.pdf>, accessed on 11 November 2016, p. 12

⁵ *Ibid.*

⁶ The OECD report asserted that amongst 296 of IIAs which are signed by 30 member states and of 9 non member states do have incorporate societal dimension, in particular environment and labour issues. The similar trend is also adopted by 131 IIAs that are signed by 15 developing states including China and India.

⁷ Francesco Francioni, *op.cit.*, p. 4.

⁸ Jose E Alvarez, Is Investor State Arbitration Public?, available at http://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016_6-GAL.pdf, accessed on 11 November 2016, pp.1-5.

⁹ Leyla Davarnejad, 'Strengthening Social Dimensions of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises', available at <http://www.oecd.org/investment/globalforum/40352144.pdf>, accessed on 11 November 2016, pp. 7-8.

Therefore, the procedural rights to access to justice through integrative legal thinking need to be secured.

The challenge of accommodating the conflicting claims/interests of various stakeholders within international investment law regime is best met through an integrative legal thinking, given the advantages offered by the inherent non compartmentalized nature of this method.¹⁰ The integrative legal thinking cuts off the complexities of investor state arbitration from the perspective of conflicting interests between investor rights and broader government regulatory concerns. This approach can resolve the debate whether international investment law has shifted to public governance system or it is just a private regime.¹¹ This is mainly because the integrative legal thinking in IIL detaches from the strict traditional division of public private interests, national, private and public transnational law.

This article proceeds as follows. Part I analyses what is the concept of access to justice in IIL. This part will focus on the promotion of substantive and procedural justice and fairness. Secondly, the major constraints of the enforcement of access to justice principle in ISA will be examined. These challenges involve the issue of jurisdiction, the lack of public participation and transparency. Thirdly, it introduces the integrative legal thinking as an alternative measure to uphold the right of access to justice and address those challenges. In this context, the integrative legal thinking will focus on whether investment arbitration tribunals can consider non disputing party and non economic objective, in particular, the protection of public interests - e.g. human rights, sustainable development – taking into account in the limited scope of the jurisdiction of arbitral tribunals.

Basic Concept of The Principle of Access to Justice in International Investment Regime

Access to justice has become an important issue in ISA due to the public nature of both the respondent and the measures at issue. The public nature of investment disputes are also based on the fact that the disputes both arises out of treaties and alleged violations of international legal obligations undertaken between two or more states to other state.¹² This should be differentiated from a claim based upon a contractual promise between the private parties.¹³ Investment disputes based on treaty commonly relates to public values, often involving scrutiny of actions of public authorities in the execution of public duties or to advance policies stated in the law.¹⁴

The principle of access to justice is considered as a fundamental principle of the rule of law embodying transparency, accountability and good governance as an effective means for the achievement of eco social justice. It comprises not only the individual's access to court/arbitration, or guaranteeing legal representation, but it also insures just

¹⁰Pieter H.F. Bekker, *op.cit.*, p. 4.

¹¹Stephan W Schill, 'Reforming Investor State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward', available at <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>, accessed on 1 November 2016, pp. 8-9.

¹²Mark A Clodfelte, 'Why Aren't More Investor-State Treaty Disputes Settled Amicably?', available at http://unctad.org/en/Docs/webdiaeia20108_en.pdf, accessed on 1 November, p. 40.

¹³ *Ibid.*

¹⁴ *Ibid.*

and equitable judicial outcomes.¹⁵ The concept of access to justice must target on two fundamental goals of a legal system: (1) that it accessible to people from all levels of society; and (2) that it is able to provide fair decisions and rules for people from all levels of society, either individual or collectively.¹⁶ Sussinctly, the principle of access to justice covers both the procedural justice and substantive justice.¹⁷ The UNDP prescribes access to justice as the ability of people to seek and obtain remedy through formal or informal institutions of justice, and in conformity with human rights standards.¹⁸ In the absence of access to justice, people are unable to exercise their rights. The right of equal access to justice for all including members of vulnerable groups has been reaffirmed in the United Nations Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Level.¹⁹ The equality of justice is the basic value of the principle of access to justice.²⁰ This comprises the equality before the court and tribunal as the main characteristic of constitutional democracy in order to protect the constitutional/fundamental rights of the people. The notion of access to justice has also surfaced in international legal framework as incorporated in the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union. These conventions encompass expansive concept of access to justice, comprising of the following elements: due process of law, right to a fair trial and right to an effective remedy.²¹ As one of the attributes of rule of law, it pertains to both procedural and substantive justice and fairness.

Major Constraints of Access to Justice in Investor State Arbitration (ISA)

The global backlash and legitimacy crisis against ISA due to its inherent systemic challenges have become the major sources of challenges to the access to justice in international investment regime. This includes inconsistent and contradictory decisions issued by the tribunals, increasing number of dissenting opinions and potential conflict of interests of arbitrators.²² The complexities of ISA involve diverse participants and stakeholders such as private and public actors i.e. the host state as well as non disputing party (local communities) who suffers from adverse impacts of investment. This character may constitute the greatest threat potential to the enforcement of access to justice in ISA. The public nature of ISA provides legal

¹⁵ Desmond Mudala Kaunda, 'Expanding Access to Justice for the Poor Malawi's Search For Solutions, A Comparative Analysis with other Select Informal Justice System', available at http://menneskeret.dk/files/media/dokumenter/udgivelser/desmond_report_ok.pdf, accessed on 4 September 2016, p. 19.

¹⁶ *Ibid.*

¹⁷ Matthias Kötter, 'Better Access To Justice By Public Recognition of Non-State Justice Systems?', available at <http://ssrn.com/abstract=2613408>, accessed on 4 September 2016, pp. 3-4.

¹⁸ *Ibid.*

¹⁹ "We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid." See United Nations General Assembly, Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Available at <http://www.ipu.org/splz-e/unbrief12/dr-declaration.pdf>, accessed on 4 November 2016, p. 3.

²⁰ See Article 14 of the International Covenant on Civil and Political Rights.

²¹ See Article 2 (3) of the International Covenant on Civil and Political Rights.

²² Pieter Bekker, *op.cit.*, p. 6.

competence for investment tribunal to award damages to foreign investors, thus the confidentiality in the arbitral procedure is basically inadequate.²³

The jurisdictional issue of investor state arbitration has become another major constraint to access to justice. The limited jurisdiction of international investment tribunals can restraint the investment tribunal to resolve non investment or non-economic issues. Based on the principle of party autonomy and arbitrability, the legal authority of the arbitration confines to investment disputes or claims arising out or related to the investment treaty and it cannot apply any laws that had not been defined as the applicable law. Therefore, the legal competence of ISA is basically only concerned with claims directly arise out or related to the investment and the governing law/applicable law that had been chosen by the contracting parties. Thus, it cannot be always extended to any types of conflicts between the investor and the host state and any applicable laws cannot be applied extensively.²⁴ These issues may hamper the implementation of access to justice principle in ISA.

The lack of public participation and transparency in investment arbitration also create major constraints for non disputing party access to ISA. The adoption of public participation provides a legal basis for non disputing party who suffered from adverse impact of investment to access to justice in investment arbitration. The notion of public participation encompasses the public's right to participate in decision making processs that impinge their lives. The investment dispute that have societal dimension also possibly induce public's living reality.²⁵ The absence of public participation raises a query of legitimacy and accountability of the arbitral tribunal. The principle of access to justice closely interlinked with the public participation.

Addressing Constraints of Access to Justice through Integrative Legal Thinking

Integrative legal thinking in this context is meant to integrate, not to isolate, substantive and procedural elements of the concept of access to justice principle in international investment law. Given that the previous methods only address concerns about the interpretive stage, the integrative legal thinking highlights the value of a holistic/integrative approach to access to justice that includes multiple integrated procedural and substantive strategies to address the diverse legal needs of the diverse stakeholders in ISA. It underscores the importance of a holistic/integrative approach that integrates procedural and substantive issues for upholding the right of access to justice in ISA. An integrative legal thinking to promote access to justice requires overcoming the fragmentation across procedural and substantive issues and across conflicting principles of public and private law regimes. The integrative legal thinking comprises of recognition, systemic integration at the interpretation stage and institutionalization of ISA mechanism at the adjudicative level.

²³ Eric De Brabandere, *Investment Treaty Arbitration as Public International Law*, Cambridge, UK, 2014, p. 151.

²⁴ *Ibid.*, p. 131.

²⁵ Markus W Gehring&Avidan Kent, 'International Investment Agreements and the Emerging Green Economy: Rising to the Challenge', in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspective*, Cambridge, UK, 2013, p. 199.

a. Recognition Stage

The recognition stage involves the establishment of explicit provisions as regard to access to justice for non-disputing party, amicus curiae briefs and the substantive protection of public interests both in the body text and the preamble of the treaty. The three former provisions must be expressly incorporated in the arbitration rule of procedures. All of these provisions may specify the manner in which arbitrators should take into investor's obligations toward non-disputing party who suffered from investment when interpreting the treaty. Express provisions as regard to the possibility of non-disputing party to access to ISA in the arbitration rule of procedures will guarantee their rights.

The integrative legal thinking should approach the procedural and substantive threats to access to justice holistically. At the procedural level, this approach takes into account all of those inherent challenges within the ISDS mechanism.²⁶ The incorporation of specific rules regarding public participation in the form of non-disputing party and non-governmental organization (NGO) participation as *amici curiae* in the ICSID Arbitration Rules demonstrates the adoption of the integrative legal thinking. At the substantive level, the integrative legal thinking more likely confines to the interpretation of treaty provisions based on the principle of systemic integration as stipulated in VCLT. It is argued that the arbitral tribunal tends to interpret vague provisions of IIAs too generously, and thus deteriorate proportional protection between investment and the right to regulate of the sovereign state (host state).²⁷

The issue of non-disputing party access to ISA is closely interconnected with the procedural justice e.g. public participation and transparency. The absence of modification reform of the existing ISDS can obstruct the implementation of access to justice principle. This can be noted from the case of *Agua del Tunari SA v. The Republic of Bolivia*²⁸ (also known as Bechtel case), in which case the arbitrator refused to allow third party participation on the ground that it was inconsistent with arbitration proceedings and unwillingness of the parties to consent their participation. This case demonstrates the interconnectedness of ICSID arbitration procedures, the BIT and the private nature of arbitration which left the decision as regard amicus participation in the hands of the parties to the arbitration.²⁹ The arbitral tribunal refused to allow the third parties' participation since the parties did not consent, thus the arbitral tribunal has no legal authority to allow any form of third party intervention.³⁰ The negation of third party participation in this case more likely

²⁶ The ICSID Arbitration Rules and several investment agreements has designed specific rules for non-disputing party access to Investment Treaty Arbitration. This rule constitutes one of the most important means to ensure public access to the proceedings which can also generate a fair outcome.

²⁷ Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?', in Wenhua Shan, Penelope Simons & Dalvinder Singh, *Redefining Sovereignty in International Economic Law*, Hart Publishing, USA, p. 234.

²⁸ ICSID case No. ARB/02/3

²⁹ Based on the party autonomy principle, the disputing parties in a commercial arbitration play a pivotal role.

³⁰ See the ammendmend if ICSID Arbtration Rules 37 and Article 41` of the Additional Facility Arbitration Rules regarding evidence, that arbitral tribunals would have the authority, after consulting both parties as far as possible, to accept and consider submission from third parties. `See OECD,

confines to the procedural issues which relates to the absence of parties' consents. The decision demonstrated the interplay of access to justice and the ICSID mechanism.

The consensual nature of arbitration has inhibited the access to justice of third parties in the arbitral proceedings of ISA. Despite the fact that basically the national court of the host state has a jurisdiction to adjudicate the investment disputes in its territory, the concept of 'arbitration without privity' as incorporated in many IIAs has assigned the host state to ISDS mechanism as regard to any investment disputes within its territory. This condition can undercut the rights of the public or non-disputing parties to ask for remedial proceedings through domestic court. As a matter of fact, the private nature of Investor State Arbitration is basically in conflict with the rule of law principle as promoted in the public law regime. In order to safeguard access to justice for third parties in ISA, it requires modification to the existing ICSID mechanism. For this reason, the recognition and promotion stage plays a pivotal role in order to give a legal basis of arbitrator's discretionary power to give leeway for the public participation of non-disputing parties in ISA. This is mainly due to the dominancy of private law regime rather than public law nature in ISA. This involves the adoption of public participation in Arbitration Rules and International Investment Agreements leading to the tailoring of the existing ICSID mechanism.³¹ The adoption of transparency and public participation in UNCTRAL Arbitration Rules and ICSID Arbitration Rules can be a starting point to set a system and manner of arbitrators to justify the promotion of access to justice in ISA.

b. Interpretive Stage: The adoption of Systemic Integration

At this stage, the systemic integration as provided in Article 31 (3)(c) of VCLT must be adopted in order to uphold access to justice. The Article obliges a treaty interpreter when interpreting primary treaty text to take into account 'any relevant rules of international law applicable in the relations between the parties'. Its purpose has been described as to enable 'systemic integration within the international law legal system'. It has to be noted that the major problem of access to justice of non-disputing party is the conflict of interests between public and private regime. The systemic integration may resolve the

At the substantive level, the integrative legal thinking promotes non-compartmentalized and transnational law approach to the interpretation of the vague terms of IIAs by cutting across domestic and international dichotomies, private and public, that taking account all diverse stakeholders in International Investment Law. This approach is also prominently advocated in VCLT which is known as the principle of 'systemic integration'.³² At this interpretive stage, the the right of access to justice is intended to achieve an integrative mutual gain by reconciling parties' underlying interests. The absence of integrative approach to both procedural and

'Transparency and Third Party Participation in Investor State Dispute Settlement Procedures', available at <http://www.oecd.org/daf>, accessed on 19 September 2016, p. 10.

³¹ Rule 32 (2) of ICSID Arbitration Rule provides : Unless either party object, the Tribunal, after consultation with the Secretary General, may allow other persons, besides the parties, their agents, counsel and advocates, witness, and experts during their testimony, and officers of tribunals, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.

³² See Article 31 (3) (c) of VCLT.

substantive issues, the enhancement of access to justice will consistently pose challenges and serious threat in ISA.

Through the integrative legal thinking, the interpretation of the protection of substantive rights of the foreign investors must also accommodate the interests of diverse stakeholder involved in ISA.³³ This will safeguard the right of access to justice for non disputing parties in ISA. This can be noted from the case of *Methanex Corporation v. United States of America*,³⁴ in which case the arbitral tribunal granted public participation of non disputing parties. In this case, the arbitrator attempts to recalibrate the conflicting interests of the disputing parties through integrative legal thinking by considering both public and private issues. This integrative legal thinking cut across the differentiation between public and private law regimes. Instead of establishing public and private law as a conflicting regimes, the integrative thinking can reconcile those two concepts through considering the interests of the diverse stakeholders. This integrative approach prominently advocates the interest based approach by bringing together and operates at the intersection of public and private law regimes.

c. Adjudicative stage: Institutional Reform of ISA Mechanism

Institutional reform plays a pivotal role in order to uphold the principle of access to justice in ISA. As noted, although ISA is a specialized forum for the resolution of investment disputes, it remains a system of arbitration with closely link to private adjudication instead of public adjudication. The major legal basis of⁵⁴ arbitration is the principle of party autonomy, confidentiality, and finality of the award. Access to justice as an exemplification of public participation principle in public law regime cannot seem to be recognized in ISA. Therefore, it is also unrealistic to expect arbitrators to discover and invoke the complex techniques of systemic integration under the Article 31 (3) of the VCLT without promoting institutional reform in ISA.³⁵

In this context, there must be a reform in ISDS mechanism e.g. ISA in order to ensure that it develops in ways that are democratic, respectful of human rights and in line with fundamental demands of the rule of law.³⁶ At the adjudicative stage, there must be a fundamental reform of the existing arbitral system in order to be more democratic which is based on the principle of rule of law.³⁷ The institutionalization of ISDS mechanism can be done through the establishment of appellate mechanism for the revision of error as mandated by the principle of rule of law and governance. The adoption of principle of transparency in Arbitration rule of procedures can also be promoted in order to maintain accountability of decision makers in ISDS mechanism. In addition, the possibility of amicus curiae brief and non-disputing party access to justice should also be expressly incorporated in the arbitration rule of procedures in order to promote public participation. This reform can be noted from the ICSID Rules

³³ See Pieter Bekker, *op.cit.*, p. 5.

³⁴ OECD, 'Transparency and Third Party Participation in Investor State Dispute Settlement Procedures', available at https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf, accessed on 11 November 2016, p. 6.

³⁵ Jurgen Kurtz, 'Access Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni', *The European Journal of International Law*, Vol. 20 no. 4, 2010, available at : <http://www.ejil.org/pdfs/20/4/1947.pdf>, accessed on 13 November 2016, p. 1085.

³⁶ Stephan W Schill, *op.cit.*, p. 3.

³⁷ *Ibid.*

in 2006, The UNCTIRAL Rule on Transparency in Treaty-based Investor State Arbitration in 2014.

The negation of investment arbitration tribunal to allow third-party participation or access to ISA was due to the inherent systemic different between arbitration proceedings and those before international or domestic court. In other words, there has been a strict distinction between private law and public law regimes. The consensual nature of arbitration has put the access to justice under the hands of the contracting parties. An integrated system and interplay of the institutionalization of ISDS mechanism, a systemic integration and recognition may support the enhancement of the principle of access to justice in ISA. Since the ISDS mechanism is mainly based on the principle of party autonomy, the absence of institutional reform, a systemic integration may deprive the public reasonable expectations which can be noted from the case of *Aguas del Tunari SA v. The Republic of Bolivia*.³⁸ In the case of *Methanex Corporations v. United States of America*,³⁹ however, the tribunal admitted the privilege of third parties to participate as *amicus curiae* in investment arbitration proceedings. This decision demonstrates the adoption of integrative approach to recognition, interpretation i.e. systemic integration and institutional reform.

Conclusion

The restraint of the enforcement of access to justice in ISA is mainly caused by the strict dichotomy between public and private law regimes. The basic concept of ISA mechanism as a private dispute resolution hampers the enforcement of access to justice which has a characteristic of public law regime. This challenge can be solved by considering both procedural and substantive justice and fairness through integrative legal thinking. At the substantive level, there must be recognition of the protection of public interests as well as the principle of transparency, public participation, accountability, democracy and rule of law. This needs a review of the existing treaties, in particular BIT (Bilateral Investment Treaties). At the procedural level, there must adopt the systemic integration as the method of interpretation and reform/institutionalism of ISA mechanism. Those elements are integrated system that can be used to uphold the principle of access to justice in International Investment Law.

³⁸ ICSID Case No. ARB/02/3, Jurisdiction, ICSID REV: Foreign Investment Law Journal 450 (2005).

³⁹Decision of the Tribunal on Petitions from Third Person to intervene as Amicus Curiae, in the matter of an arbitration under Chapter 11 of the North American Free Trade Agreement, UNCITRAL Arbitration Rules, available at: http://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf, accessed on 14 November 2016.

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Vienna Convention on Law of Treaty.

Contact email: fifijunita@yahoo.com