Equality of the parties in investment arbitration – private international law aspects

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Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. In investor-state arbitration, one has to distinguish between arbitral proceedings which are initiated on the basis of a contract concluded between the investor and the host state, on the one hand, and arbitral proceedings which are initiated on the basis of a bilateral investment treaty, on the other hand. In the latter case, there is no arbitration agreement in the traditional sense. This entails a unilateral right of the investor to initiate arbitral proceedings. Granting the host state the right to bring a counterclaim might compensate this asymmetry up to a certain degree.

2. Whether the host state has the right to bring a counterclaim, depends on the dispute settlement mechanism provided for in the bilateral investment treaty. For future investment treaties, it is recommended to grant the host state such a right. When the investor introduces arbitral proceedings on the basis of such a treaty, the investor usually declares his consent with the entire dispute settlement clause. If, at this moment, the investor expressly excludes the right of the host state to bring a counterclaim

which is provided for in the bilateral investment treaty, there is no correspondence between the declaration of the host state and the declaration of the investor to submit the dispute to arbitration. Consequently, if the host state refuses to participate in the arbitral proceedings on such a basis, the arbitral tribunal does not have jurisdiction to decide the case.

3. The subject matter of treaty-based investor-state arbitration generally concerns regulatory measures of the host state. This makes a considerable difference in comparison to commercial arbitration, which focuses on the interests of private actors. This difference entails different procedural principles, primarily as far as questions of confidentiality and transparency are concerned.

4. There are, however, procedural principles of particular importance, which reflect the cornerstones in a system based on the rule of law in its substantive sense and require, as such, observance in all types of proceedings independently of the subject matter. The principle of equality of arms is one of these principles. Tribunals shall ensure that both parties are in an equal position to present their case. If there is a systemic superiority of one group of parties, tribunals have to be particularly vigilant and, if necessary, to intervene proactively in order to compensate factual inequality.

5. The principle of equal treatment of the parties is not only to be respected within one and the same proceeding. Treating two types of party – states on the one hand and investors on the other – differently in general, i.e. not just in a specific proceeding, would likewise amount to a violation of this principle. If certain questions concerning the burden and standard of proof arise in one procedural situation typically in the interest of the host state and in another procedural situation typically in the interest of the investor, the tribunals should deal with those questions in the same manner.

6. Investments which are in conformity with the law as far as their object is concerned, but which are corruption-tainted due to corruption that took place when the investment was made lead to discussions about the content of international public policy. Against this background, there would appear to be a practice for tribunals to deny jurisdiction or admissibility of the arbitral proceedings in cases concerning corruption-tainted investments. Actually, this leads to a denial of justice. International public policy, however, does not require such an approach. A comparison with the treatment of corruption cases in commercial arbitration shows this very clearly. The circumstances of the individual cases are too manifold; a one-fits-all solution construed at the level of jurisdiction or admissibility is not convincing. The arbitral tribunals should rather undertake a comprehensive analysis on the basis of the applicable substantive rules of law in order to take into account the particular circumstances of each individual case. State interests can be properly respected via mandatory rules and international public policy.

Full (German) version: *Stefan Huber*, Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit (unter besonderer Berücksichtigung von Korruptionsproblemen) – Unternehmen als gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 303 et seq.