Секция «Юриспруденция»

Participation of Amicus Curiae in International Investment Arbitration

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Where a State enters into a commercial agreement with a private party any disputes are likely to be reffered either to the courts of the State concerned or to international arbitration [Redferd, 2009: 63]. The private party would almost always prefer to submit to arbitration as a 'neutral' process, but there are many factors to be weighed in the balance while considering it. One of the them is a question of the system's accountability and legitimacy. Investor-state arbitration involves challenges to governmental measures, sometimes measures of general application intended to promote or achieve important public policy goals [Kinyua, 2009: 23]. Commentators and civil society groups have called for increased public involvement in investment arbitration proceedings, in order to incorporate broader policy considerations into the dispute resolution process and add a measure of transparency [Choudhury, 2008]. Amicus curiae intervention is heavily being relied upon as the most effective way to achieve the above-mentioned call. But does this intervention really bring benefits for parties involved in the dispute and how should this shift be incorporated in the international investment arbitration proceedings?

While all of the recent decisions on amicus curiae participation were based on the powers conferred to the tribunals by the procedural rules governing the arbitrations, so far none of the tribunals has used these powers to issue guidelines and indicate selective criteria to which amicus curiae submissions should accord in order to be considered [Matsushita, 2006: 124]. It is worth noting that, while accepting the amicus curiae written briefs on the basis of their discretion, no tribunal has yet relied on them to reach their final findings.

A model of how such briefs can be and should be used is a necessity for a sustainable development of international law. Such a model could be of practical use not only to lawyers, but also to tribunals and other dispute settlement bodies, helping to establish a clearer and more transparent way of amicus participation. While building this structure, I focus on: 1) primary and secondary sources in order to establish ways in which materials from amicus curiae have been used (existing practice and rules of procedure of WTO, ICSID and NAFTA); 2) arguments for such a usage in the future by international dispute settlement bodies, proving that amicus curiae are really friends of the courts and there is no need to make adjudication process closed for them; 3) a model that can be successfully used to make amicus curiae involvement in the process more satisfactory not only for the court, but for the parties as well. As an illustration of potential problems, I mention the following legal questions: Do Parties need to be given the opportunity or the duty to respond to amicus briefs? Who should bear costs arising from amicus interventions? What procedural safeguards are necessary for amicus curiae briefs to be satisfactory accommodated in dispute settlement proceedings?

My research is built on practical analysis of WTO and ICSID, NAFTA and ECT consideration of amicus curiae briefs, as also on academic literature examining theoretical background for their involvement and current developments in international law [Charnovitz, 2006: 354].

My contribution is in that I try to provide a complex legal assessment of the complicated legal problem, giving arguments for amicus curiae briefs to be accepted and considered by international dispute settlement bodies and presenting a new model of how it can be done in reality. This study indirectly benefits everyone, starting from international lawyers, judges and academics and ending with NGOs activists and civil service workers.

Литература

1. Charnovitz, Steve. Nongovernmental Organizations and International Law. - American Journal of International Law, Vol. 100, 2006. - P. 354.

2. Choudhury, Barnali. Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit, 41 VAND. J. TRANSNAT'L L. 775 (2008); See also, Andrew Newcombe and Axelle Lemaire, Should Amici Curiae Participate in Investment Treaty Arbitrations 5 VJ 22 (2001).

3. Kinyua, Kenneth Assessing the Benefits of Accepting Amicus Curiae Briefs in Investor-State Arbitrations: A Developing Country's Perspective, Stellenbosch University Faculty of Law Working Paper Series 4 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abst

4. Matsushita, Mitsuo The World Trade Organization, Second ed., Oxford University Press, 2006, p. 124.

5. Redferd and Hunter on International Arbitration, Fifth ed., Oxford University Press, 2009, p. 63.