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Amicus Curiae Interventions: The Tail That Wags the Transparency Dog

Luke Eric Peterson (Investment Arbitration Reporter) · Tuesday, April 27th, 2010

I spent yesterday at a Georgetown Law School conference on transparency and international arbitration. Ostensibly focused on arbitration writ large, the event tended to zero in on investor-state arbitration (and investment treaty arbitration more specifically).

While various arguments were aired for and against transparency, I was struck (anew) by the extent to which the transparency debate focuses on the rights of third-parties to intervene as so-called *amicus curiae* in investment treaty arbitrations.

These third-party interventions are front and centre in the minds of transparency proponents and opponents alike.

Advocates for such interventions like to stress how third-party interventions may lead to better tribunal decision-making, and provide for greater legitimacy to the arbitral process.

Critics complain that the interventions can increase the costs and duration of a case, as parties are obliged to reckon with one or more *amicus* briefs.

Whatever one's views on the value and propriety of *amicus curiae* interventions, it's remarkable how this particular issue has become a proxy or shorthand for transparency.

And I'm not sure that's a good thing.

I think it's important to draw a distinction between public disclosure of arbitration claims (and documents and pleadings related to those claims), and the question of third-party participation.

The former (disclosure of info) is clearly at the core of transparency; however, *amicus curiae* interventions should not be viewed as a substitute or proxy for transparency.

First of all, these interventions occur in only a tiny handful of investment treaty arbitrations. My back-of-the-envelope guess is that 400 to 500 treaty-based arbitrations have been initiated over the last 25 years; and *amicus curiae* interventions may have taken place in perhaps a dozen of those cases.

Moreover, such interventions may or may not lead to any additional opening of the arbitral proceedings to public scrutiny.

Oftentimes, NGOs in this field have tended to push for greater transparency as part of a given *amicus curiae* intervention.

However, there are also cases where a third-party intervention does not lead to more disclosure – or indeed may not be accompanied by any transparency demands.

Take, for instance, the recent interventions by the European Commission in a series of investment treaty arbitrations. The EC has been made privy to some arbitral documents in at least one of these cases, but none of these materials have been put into the public domain as a result of this intervention. Indeed, the EC has not asked for the process to be opened up to public scrutiny; nor has the EC obliged requests to disclose the briefs which it has filed in these arbitrations.

Clearly, it's possible for *amicus curiae* interventions to have nothing to do with transparency whatsoever.

Why do I stress this point?

It's not an excuse to give a hard time to would-be *amicus curiae*. (Indeed, as a journalist, I can appreciate that outsiders may seek privileged access to non-public materials in order to accomplish their own strategic objectives – whether that is the drafting of a legal brief or the preparation of a magazine article).

Rather, I'm dismayed by the tendency on the part of “opponents” of transparency to raise a series of objections which are actually motivated by their disagreement with or distaste for *amicus curiae* interventions.

Time and again, I'm told that “transparency” leads to a lot of costs and delays for the parties who have to grapple with outside legal arguments. Equally, I often hear about how the “right” of third-parties to intervene in proceedings is not recognized in many parts of the world.

I'm under no illusion that we lack for principled objections to real transparency (i.e. disclosure of information about cases), and I think it's time we re-calibrated our focus in the debate over transparency.

I hope to look at some of the objections to transparency in a subsequent post, but in the interests of time and space, I wanted to start with this opening plea for us not to conflate transparency with third-party participation.

The two concepts may overlap or intersect. But they ain't the same.

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