A GUARDIAN AND A FRIEND? THE EUROPEAN COMMISSION'S PARTICIPATION IN INVESTMENT ARBITRATION

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The figure of amicus curiae is a central feature of contemporary investor-state arbitration law and practice. Over the last several years the European Commission has taken part in a number of arbitral proceedings that touched upon matters of European Union Law. This phenomenon is part of the European Union's broader incursion into the realm of investment law. The participation of an entity with legislative and political functions in investment arbitrations raises complex questions regarding the nature of the interests that this entity pursues and the potential impact that its involvement might have in the dispute settlement mechanism. This paper examines the participation of the European Commission (EC) in investor-state arbitrations and assesses its impact in the overall mechanism of investor-state dispute resolution. It is argued that the EC is fundamentally a distinct type of amicus, as it pursues interests different from those of traditional amici, and should therefore be accorded extended participatory rights.

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INTRODUCTION

Over the past fifteen years amicus curiae briefs have become engrained in the law and practice of investor-state arbitration. The term 'amicus curiae' – which literally translates as "friend of the court" – refers to "someone who is not a party to a law suit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."[2] Normally *amici curiae* are individuals or organizations that do not have the right to participate in the dispute as parties, but want to intervene because the outcome of the proceedings may affect their interests.[3] Originally arbitral rules and international investment treaties contained no express

2. *Amicus Curiae*, BLACK'S LAW DICTIONARY (10th ed. 2014). Principle 13 (titled "Amicus Curiae Submission") of the American Law Institute & International Institute for the Unification of Private Law (UNIDROIT)'s Principles of Transnational Civil Procedure provides: "Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission. The parties must have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court." *ALI/UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT, http://www.unidroit.org/instruments/transnational-civil-procedure (last updated Sept. 27, 2016). *See also* Philippe J. Sands & Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 519 (Rüdiger Wolfrum ed., 2011); Luigi Crema, *Testing Amici Curiae in International Law: Rules and Practice*, *in* 2012 ITALIAN Y.B. INT'L L. 91, 94 (Benedetto Conforti, et al., eds.); Steven Kochevar, Comment, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L.J. 1653, 1654–55 (2013).

3. Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-ST. ACTORS & INT'L LAW 209, 273 (2005).

provisions concerning the participation of non-parties, neither prohibiting nor allowing it. The intervention of non-disputing parties in investment proceedings was accepted in a few groundbreaking cases and subsequently expressly enshrined in both arbitral rules and international investment agreements.[4]

The North American Free Trade Agreement (NAFTA), a free trade agreement between Canada, Mexico, and the United States of America, entered into force in 1994,[5] led the way in the movement toward the acceptance of third parties in investor-state arbitration.[6] While recognizing the right of NAFTA Member States to submit questions of interpretation of the agreement to a tribunal,[7] the NAFTA did not contain any specific provision on submissions by third parties. This question arose in two cases conducted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 1976[8] – *Methanex Corp. v. United States*[9] and *United Parcel Service of America*

4. Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001), http://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf [hereinafter Methanex Corp. v. USA]; United Parcel Service of America Inc. v. Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, (NAFTA Ch. 11 Arb. Trib. Oct. 17 2001), http://www.italaw.com/sites/default/files/case-documents/ita0883.pdf.

5. North American Free Trade Agreement, NAFTANOW.ORG, http://www.naftanow.org (last visited March 29, 2017).

6. Jack J. Coe, Jr., Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership, 54 KAN. L. REV. 1339, 1339-40 (2006); Joachim Delaney & Daniel B. Magraw, Procedural Transparency, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 721, 750 (Peter Muchlinski et al. eds., 2008; Sergio Puig & Meg Kinnear, NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration, 25 ICSID REV.- FOREIGN INV. L.J. 225, 259 (2010).

7. North American Free Trade Agreement art. 1128, Dec. 8, 1993, https://www.nafta-sec-alena.org [hereinafter NAFTA]. "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." *Id.*

8. G.A. Res. 31/98, UNCITRAL Arbitration Rules (Dec. 15, 1976), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

9. Methanex Corp. v. USA, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amicus Curiae," (NAFTA Ch. 11 Arb. Trib.).

Inc. v. Canada.[10] Even though the NAFTA and the UNCITRAL Rules were silent on the issue, both arbitral tribunals decided to accept amicus curiae submissions.[11] In reaction to these path-breaking decisions, the NAFTA Free Trade Commission issued an interpretative statement[12] clarifying that "[n]o provision of the North American Free Trade Agreement . . . limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party."[13] This was the first binding interpretation to expressly allow for amicus curiae participation in investor-state arbitration, clearly stating that tribunals have a discretionary power to accept submissions from non-disputing parties. Such a degree of openness of the proceedings to third parties would had been unthinkable a decade before.[14] For more than a decade, Canada and the United States have been making use of Model Bilateral Investment Treaties as a basis for negotiations of Bilateral Investment Treaties (BITs) with other nations.[15] These documents incorporate to a large extent the states' experience with NAFTA.[16] The Canada Model

10. United Parcel Service of America Inc. v. Canada, Decision of the Tribunal On Petitions for Intervention and Participation as Amici Curiae, (NAFTA Ch. 11 Arb. Trib.).

11. *Id.*; Methanex Corp. v. USA (NAFTA Ch. 11 Arb. Trib.).

12. NAFTA, art. 1131(2) provides that an interpretation by the Commission of a provision of the agreement shall be binding on a tribunal established under section 11 of the NAFTA.

13. NAFTA Free Trade Comm'n, Statement of the Free Trade Commission on Non-Disputing Party Participation (Oct. 7, 2003), http://www.state.gov/documents/organization/38791.pdf.

14. Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 787, 793 (Stephan Schill ed., 2010).

15. Canada Model Bilateral Investment Treaty 2004, http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [hereinafter Canada Model BIT 2004]; United States Model Bilateral Investment Treaty 2004, http://www.state.gov/documents/organization/117601.pdf [hereinafter US Model BIT 2004]; United States Model Bilateral Investment Treaty 2012, http://www.state.gov/documents/organization/188371.pdf [hereinafter US Model BIT 2012].

16. Andrea J. Menaker, *Benefiting from Experience: Developments in the United States' Most Recent Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 121, 126 (2005).

BIT 2004[17] and the US Model BIT, both in its 2004 and 2012 versions,[18] include express provisions on amicus curiae participation.

The trend towards the admission of non-disputing parties in investment arbitration was reflected in the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID),[19] the institution that administers most investment disputes. In its original version (1967) and subsequent amendments (1984 and 2002) there were no specific provisions referring to third-party participation in arbitral proceedings.[20] This was in line with the common practice in investment treaties, which generally contained no express provision concerning submissions by non-parties.

The first case under the ICSID Rules where third parties requested authorization to take part in the proceedings was the infamous case of *Aguas del Tunari S.A. v. Bolivia*.[21] Several non-governmental organizations (NGOs) and individuals submitted a petition to the tribunal requesting authorization to participate as parties – or, alternatively, to be granted amicus curiae status – invoking the public character of the dispute and the public interests that might be affected.[22] The tribunal rejected the request for amicus curiae participation, reflecting the traditional tenets of confidentiality and party autonomy.[23] Interpreting

17. Canada Model BIT 2004, *supra* note 15, at art. 39: Submissions by a Non-Disputing Party.

18. US Model BIT 2004, *supra* note 15, at art. 28, ¶ 3: Conduct of the Arbitration; US Model BIT 2012, *supra* note 15, at art. 28, ¶ 3: Conduct of the Arbitration.

19. *See* Int'l Ctr. for Settlem't of Inv. Disputes (ICSID), *ICSID Convention Arbitration Rules*, http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/main-eng.htm [hereinafter ICSID Convention Arbitration Rules].

20. Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV.-FOREIGN INV. L.J. 427, 433 (2006).

21. *See generally* Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, (Aug. 29 2002), http://www.italaw.com/sites/default/files/case-documents/ita0018.pdf.

22. Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Petition by NGOs and People to Participate as an Intervening Party or Amici Curiae, ¶ 30 (Aug. 29, 2002), http://www.italaw.com/sites/default/files/case-documents/ita0018.pdf.

23. Letter from David D. Caron, Pres. of the Tribunal, ICSID, to J. Martin Wagner, Dir., Int'l Program, Earthjustice (Jan. 29, 2003), http://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf (*In re* Aguas del Tunari S.A. v. Republic of Bol.).

these principles, the tribunal deferred to the parties, who unanimously opposed third party participation in the proceedings.[24]

The tribunal did not specifically rule on whether it could, on its own initiative, accept the amicus submission, having relied "on a rather restrictive interpretation of the consensual nature of investment arbitration."[25] The tribunal could have accepted third party submissions based on its broad procedural powers under article 34 of the ICSID Rules;[26] instead, the tribunal decided to engage in a balancing exercise between the parties' contractual right to resolve their dispute privately and the public interests associated with the dispute, ultimately deferring to the parties in case they wished to voluntarily waive their right to keep the proceedings confidential.[27] Still, the tribunal made an interesting reference:

> The Tribunal appreciates that you, and the organizations and individuals with whom you work, are concerned with the resolution of this dispute. The duties of the Tribunal, however, derive from the treaties which govern this particular dispute. It has been reported that the new bilateral investment treaty between Singapore and the United States contains provisions for the *amicus* participation of non-governmental organizations. The duty of a tribunal in any case that arises under that instrument will be to follow its dictates. It is no less our duty to follow the structure and requirements of the instruments that control this case.[28]

The decision raised substantial criticism about the secrecy of ICSID proceedings, reinforcing the idea that such arbitrations involved nothing

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24. *Id.*

25. Eric De Brabandere, *Non-State Actors in International Dispute Settlement: Pragmatism in International Law*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 342, 352 (Jean d'Aspremont ed., 2011).

26. Paul Friedland, *The Amicus Role in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 321, 326 (Julian D. Lew & Loukas A. Mistelis eds., 2006).

27. Epaminontas Triantafilou, *Amicus Submissions in Investor-State Arbitration After* Suez v. Argentina, 24 ARB. INT'L 571, 574 (2008).

28. Letter from David D. Caron to J. Martin Wagner, *supra* note 23.

beyond the parties[29] and did not take public interests into account.[30] Various groups denied amicus curiae status lambasted the decision as "profoundly undemocratic," "inexcusable," a "closed-door process," and an "extreme example[] of excessive power granted to corporations."[31]

The second time non-parties requested permission to take part in the proceedings as amicus curiae under the ICSID Rules was in the *Suez/Vivendi v. Argentina* case.[32] In contrast with the decision of the *Aguas del Tunari* tribunal, the tribunal held that it had the power under Article 44 of the ICSID Convention (which grants the arbitral tribunal the power to decide on procedural questions that are not regulated by the rules of the ICSID Convention[33]) to grant amicus curiae submissions to suitable parties.[34] The tribunal found that the case at hand was likely to trigger public concern because it regarded the "water distribution and sewage systems of a large metropolitan area."[35] "Any decision rendered in [the] case . . . ha[d] the potential to affect the operation of those systems and thereby the public they serve."[36]

> Given the public interest in the [dispute] . . . appropriate non-parties may be able to provide the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. . . . The

29. RENÉ URUEÑA, NO CITIZENS HERE: GLOBAL SUBJECTS AND PARTICIPATION IN INTERNATIONAL LAW 191 (2012).

30. Loukas A. Mistelis, *Confidentiality and Third-Party Participation:* UPS v. Canada *and* Methanex Corp. v. USA, 21 ARB. INT'L 211, 223 (2005).

31. *Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water*, EARTHJUSTICE (Feb. 12, 2003), http://earthjustice.org/news/press/2003/secretive-world-bank-tribunal-bans-public-and-media-participation-in-bechtel-lawsuit-over-access-to-water.

32. *See generally* Suez v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, (May 19, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0815.pdf [hereinafter Suez/Vivendi v. Argentina].

33. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), art. 44, Oct. 14, 1977, https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf.

34. Suez/Vivendi v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶¶ 15, 24 (May 19, 2005).

35. *Id.* ¶ 19.

36. *Id.*

> acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration.[37]

Based on a review of amicus practices in other jurisdictions and fora, the tribunal decided that the acceptance of amicus submissions should depend on three basic criteria: "a) the appropriateness of the subject matter of the case; b) the suitability of a given non-party to act as *amicus curiae* in that case, and c) the procedure by which the *amicus* submission was made and considered."[38]

The third case where non-parties submitted a request for amicus curiae participation was *Suez/InterAgua v. Argentina*.[39] The arbitral panel was exactly the same as in *Suez/Vivendi v. Argentina,* and the decision was closely similar.[40] Even though the tribunal laid down the same three conditions for the potential amici as in *Suez/Vivendi*, it decided that the petitioners had only met the first of the three conditions.[41] However, it was pointed out that petitioners could submit a new application for leave.[42]

As a result of the mounting pressure from scholars, practitioners, and commentators for greater public participation in investment arbitration proceedings,[43] ICSID decided to amend its Arbitration Rules. The new

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37. *Id.* ¶¶ 21, 22.

38. Suez/Vivendi v. Argentina, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 2 (Feb. 12, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0823.pdf.

39. *See generally* Suez v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010) [hereinafter Suez/InterAgua v. Argentina].

40. Suez/Vivendi v. Argentina, ICSID Case No. ARB/03/19, Award (Apr. 9, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4365.pdf.

41. Suez/InterAgua v. Argentina, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, ¶ 33 (Mar. 17, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0803.pdf.

42. *Id.* ¶ 34.

43. *See, e.g.*, Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute Settlement* (Dec. 12, 2005), http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf; Org. for Econ. Co-operation & Dev., *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, OECD WORKING PAPERS ON INT'L INV. NO. 2005/01 (2005), http://dx.doi.org/10.1787/524613550768; Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 ARB.

rules came into effect on the 10th of April 2006.[44] The new paragraph two of Rule 37 (Visits and Inquiries; Submissions of Non-disputing Parties) provides:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.[45]

The new rule makes an express reference to the participation of non-disputing parties in arbitral proceedings, namely by allowing them to file written submissions.[46] This basically corresponds to the figure of amicus curiae. It can be said that the new Rule 37(2) ratified past arbitral

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INT'L 327 (2007); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 814 (2008); Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMP. L. 337, 337-38 (2009); Nathalie Bernasconi-Osterwalder, *Transparency and Amicus Curiae in ICSID Arbitrations*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 191 (Marie-Claire Cordonier Segger et al. eds., 2011).

44. ICSID Convention Arbitration Rules, *supra* note 19.
45. *Id.* at Rule 37(2).
46. *See id.*

practice, as tribunals in the aforementioned cases had already recognized that they had the power to accept or refuse amicus submissions.[47] Pursuant to Rule 37(2), the decision to accept or reject a submission is within the full discretion of the tribunal, even though there is the obligation to consult both parties first and to consider, among other things, the three factors mentioned in paragraphs (a) to (c).[48] The decision on whether to accept amicus curiae briefs cannot be vetoed by the parties.[49] Naturally, if both parties object the tribunal may find it harder to justify the alleged advantages of third-party participation.[50] Still, the final decision rests with the tribunal.

Neither the 1976[51] nor the 2010[52] versions of the UNCITRAL Arbitration Rules contained express provisions on third-party participation. This made sense since these rules were originally designed for use in commercial arbitrations.[53] Differently, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Rules on Transparency), which came into force on April 1, 2014, were designed specifically for investor-state arbitrations.[54] These rules apply to investment arbitrations "initiated under the UNCITRAL Arbitration

47. Jarrod Wong & Jason Yackee, *The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns*, *in* 2009-2010 Y.B. INT'L INV. L. & POL'Y 233, 268 (Karl P. Sauvant ed.).

48. *See* Bernasconi-Osterwalder, *supra* note 43, at 198; *see* ICSID Convention Arbitration Rules, *supra* note 19, at Rule 37(2).

49. Bernasconi-Osterwalder, *supra* note 43, at 198.

50. KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 374 (2013).

51. *See* G.A. Res. 31/98, *supra* note 8.

52. *See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Arbitration Rules (As Revised in 2010), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

53. *See* G.A. Res. 31/98, *supra* note 8, which precedes the UNCITRAL Arbitration Rules, and refers to "commercial relations," "arbitral institutions and centres of international commercial arbitration," and "commercial contracts" in the preamble. The UNCITRAL itself recognizes that the UNCITRAL Arbitration Rules can be used "for the conduct of arbitral proceedings arising out of their commercial relationship." UNCITRAL, *UNCITRAL Arbitration Rules*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited Feb. 23, 2017).

54. UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited Feb. 23, 2017).

Rules pursuant to [] treat[ies] . . . concluded on or after 1 April 2014 unless the parties to the treaty have agreed otherwise."[55] In order to facilitate the application of the UNCITRAL Rules on Transparency to disputes arising under existing investment treaties, on December 10, 2014 the United Nations adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency").[56] The convention allows parties to investment treaties concluded before April 1, 2014 to express their consent to apply the UNCITRAL Rules on Transparency.[57] It will "enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession."[58] The Convention seeks to facilitate the "opt-in process."[59] The UNCITRAL Transparency Rules are also "available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings," if the parties so agree.[60]

The UNCITRAL Rules on Transparency cover all stages of the arbitration proceedings, including submissions to arbitral tribunals and arbitral awards.[61] They also contain specific provisions on the participation of non-disputing third parties.[62] Article 4 (submission by a third person) provides:

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55. UNCITRAL, *UNCITRAL Arbitration Rules (with New Article 1, Paragraph 4, as Adopted in 2013) UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, art. 1.1, (2014) http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf [hereinafter UNCITRAL Rules on Transparency]. The UNCITRAL Arbitration Rules were amended in 2013, inserting a new article 1(4) that expressly incorporates the UNCITRAL Rules on Transparency. *See id.*

56. *See* United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Dec. 10, 2014, http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.

57. *Id.* at art. 2.1.

58. *Id.* at art. 9.1.

59. Laurence Boisson de Chazournes & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2 BCDR INT'L ARB. REV. 59, 60 (2015).

60. UNCITRAL Rules on Transparency, *supra* note 55, at art. 1.9.

61. *Id.* at arts. 3–4.

62. *See* Mariel Dimsey, *Article 4. Submission by a Third Person*, *in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 128 (Dimitrij Euler et al. eds., 2015).

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral

> proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[63]

The UNCITRAL Rules on Transparency are a powerful example of how entrenched the figure of amicus curiae is in contemporary legal instruments on investment arbitration. Benefitting from the stamp of the United Nations, and with a scope of application potentially magnified by the Mauritius Convention on Transparency, the Rules constitute an unprecedented effort towards the consolidation of the principles of transparency and openness of investment arbitration at a worldwide scale.

While arbitral rules and investment treaties do not specifically refer to this possibility, arbitral tribunals can also take the initiative of inviting amicus curiae submissions.[64] This is in line with the opening of arbitral proceedings to the community at large. If arbitrators notice that the dispute before them may be of interest for NGOs, civil society groups, or other entities, they can release a public notice inviting them to apply for amicus curiae status, disclosing the requirements for such application.[65] This contributes to the transparency of proceedings and adds a dynamic nature to amicus curiae participation in investment arbitration.

As demonstrated, the last 15 years witnessed a growing movement in favor of greater public participation in investor-state arbitration. This momentous change has been hailed as "one of the most important evolutions weathered by international law in recent decades,"[66] a "groundbreaking"[67] and "fascinating development."[68] Amicus curiae

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63. UNCITRAL Rules on Transparency, *supra* note 55, at art. 4.

64. Press Release, ICSID, Procedural Order Regarding Amici Curiae (Feb. 2, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0608.pdf (regarding ICSID Case No. ARB/09/12). A similar invitation was made by the tribunal in Eli Lilly and Co. v. Canada. Press Release, ICSID, Eli Lilly and Company v. Government of Canada (ICSID Case No. UNCT/14/2) – Amici Curiae (Nov. 5, 2015), https://icsid.worldbank.org/apps/icsidweb/Pages/News.aspx?CID=169&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us. *See also* UNIDROIT, *supra* note 2, § 13 cmt. P-13B.

65. *See id.*

66. Eric De Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 CHI. J. INT'L L. 85, 112 (2011).

67. *Id.*

participation is considered "an entrenched"[69] or "routine and standardized feature of investor-state arbitration,"[70] a symbol of the "emergence in international law of the idea of civil society"[71] or even of "the arrival of the golden age of civil society participation into investor-state arbitration."[72]

The identity of amici curiae may be extremely varied. Therefore, definitions of this figure normally do not make any reference to a specific category of individuals or organizations that may play the role of "friends of the court." It is not adequate for arbitral rules or investment treaties to limit *ex ante* the typology of subjects who can request authorization to participate in the proceedings.[73] The perspectives advocated by the amici curiae may be so diverse that there should be ample personal legitimation in this field.[74] In most cases applicants include NGOs and civil society groups.[75] Normally candidates "pretend to represent the interests of all or part of the civil society."[76] Amici may therefore introduce themselves as advocates for the environment, public

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68. Catherine Kessedjian, *Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society*, 29 MELBOURNE U. L. REV. 765, 775 (2005).

69. J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 McGILL L.J. 681, 720 (2007).

70. Charles H. Brower, II, *Introductory Note to International Centre for Settlement of Investment Disputes (ICSID):* Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID case no. ARB/05/22, Procedural Order No. 5*, 46 INT'L LEGAL MATERIALS 572 (2007).

71. Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729, 742 (2009).

72. Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PA. ST. INT'L L. REV. 251, 264 (2007).

73. *See* Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L.J. 510, 556 (2012).

74. *Id.*

75. Amokura Kawharu, *Participation of Non-governmental Organizations in Investment Arbitration as Amici Curiae*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 275 (Michael Waibel et al. eds., 2010).

76. Alexis Mourre, *Are* Amici Curiae *the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?*, 5 L. & PRAC. INT'L CTS. & TRIBUNALS 257, 266 (2006).

health, workers rights, and other social concerns.[77] "[P]rofessional associations, trade unions, private companies, scholars, law school clinics, [and] law firms" have also been granted amicus curiae status.[78]

Over the last several years, a new category of amicus curiae has emerged: intergovernmental organizations. Notably, the European Union, through the European Commission (EC), has requested and been granted authorization to take part in several investment proceedings.[79] This is a facet of the European Union's increasing interest in foreign investment law and arbitration. Foreign direct investment is a fundamental engine for the competitiveness of the European economy,[80] as the European Union is the biggest investor and recipient of foreign direct investment worldwide.[81] With the entry into force, on December 1, 2009, of the Lisbon Treaty, the European Union acquired exclusive competence on foreign direct investment.[82] This means that negotiations

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77. *See* Christian Schlieman, *Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15*, 12 L. & PRAC. INT'L CTS. & TRIBUNALS 365, 374 (2013).

78. Gómez, *supra* note 73, at 556.

79. See *infra* Sec. II.

80. *See* Fabienne Ilzkovitz et al., *Steps Towards a Deeper Economic Integration: The Internal Market in the 21st Century*, in European Economy: European Commission Economic Papers at 8 (Jan. 2007), http://ec.europa.eu/economy_finance/publications/publication784_en.pdf.

81. *Economic and Financial Affairs: Foreign Direct Investment*, EUROPEAN COMM'N, http://ec.europa.eu/economy_finance/international/globalisation/fdi/index_en.htm (last updated Oct. 27, 2014).

82. Consolidated Version of Treaty on the Functioning of the European Union art. 207, 2012 O.J. (C 326) 1, 49; *see generally*, ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW (2011); *see also* Ulrich Wölker, *The EU as a Player in the BIT Arena: Current and Future Legal Challenges*, 24 ICSID REV. 434 (2009); Jan Kleinheisterkamp, *The Future of the BITs of European Member States After Lisbon*, 29 ASA BULL. 212 (2011); Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, 21 EUR. J. INT'L L. 1049, 1049 (2011); Angelos Dimopoulos, *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*, *in* EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 401, 401 (Paul James Cardwell ed., 2012); Chien-Huei Wu, *Foreign Direct Investment as Common Commercial Policy: EU External Economic Competence After Lisbon*, *in* EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 375, 375 (Paul James Cardwell ed., 2012); *see* Anna De Luca, *New Developments on the Scope of the EU Common Commercial Policy Under the Lisbon Treaty: Investment Liberalization vs.*

on investment with third states are to be pursued at the European level. The European Union has recently concluded negotiations for Free Trade Agreements, which include investment chapters with Canada (Comprehensive Economic and Trade Agreement – CETA) and Vietnam (EU-Vietnam Free Trade Agreement), and is currently negotiating similar arrangements with other countries, most notably the United States of America (Transatlantic Trade and Investment Partnership).[83]

Participation in investment proceedings as amicus curiae is part of the European Union's broader incursion into the realm of investment law and arbitration. The EC has been demonstrating growing interest in participating in arbitral proceedings.[84] This interest is explained by different reasons. First, as will be discussed below, in some cases the dispute between the foreign investor and the host state raises matters pertaining to the interpretation and application of European Law, particularly where the defendant is an European Union member state and the impugned state measure was adopted in compliance with or in order to execute European Union law.[85] Second, several disputes regarding investments in the field of energy have emerged over the past years, most of them under the rules of the Energy Charter Treaty,[86] a multilateral

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Investment Protection?, *in* 2010-2011 Y.B. INT'L INV. L. & POL'Y 165 (Karl P. Sauvant ed., 2012); Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT'L ECON. L. 51, 52 (2012); August Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements*, 12 SANTA CLARA J. INT'L L. 111, 115 (2014); Mark A. Clodfelter, *The Future Direction of Investment Agreements in the European Union*, 12 SANTA CLARA J. INT'L L. 159, 161 (2014); Julie A. Maupin, *Where Should Europe's Investment Path Lead? Reflections on August Reinisch, "Quo Vadis Europe?"*, 12 SANTA CLARA J. INT'L L. 183, 185 (2014); Thomas Kendra & Lara Kozyreff, *The Future of Investment Protection in Europe – The EU Takes Control*, *in* 3 Y.B. INT'L ARB. 239, 239 (Marianne Roth & Michael Geistlinger eds., 2013); Alfredo Rizzo, *Legal Foundations of the Competence of the European Union on Foreign Direct Investments*, *in* 23 IT. Y.B. INT'L L.131, 131 (Benedetto Conforti & Luigi Ferrari Bravo eds., 2014).

83. *See Overview of FTA and Other Trade Negotiations*, EUROPEAN COMM'N, http://trade.ec.europa.eu/doclib/docs/2006/
december/tradoc_118238.pdf (last updated Sept. 2016).

84. Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT'L L. 363, 382 (2015).

85. *See* infra Sec. III.

86. The International Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.

treaty that entered into force in 1998, establishing a legal framework to promote long-term cooperation in the energy field, and to which the European Union and its member states are parties.[87] Finally, the participation of the European Union in proceedings between member states and third countries is required by Regulation (EU) No. 1219/2012 of the European Parliament and of the Council, of December 12, 2012, which establishes "transitional arrangements for [BITS] between Member States and third countries."[88]

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87. *See, e.g.,* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY (Graham Coop & Clarisse Ribeiro eds., 2008); THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY (2011); Andrei Konoplyanik & Thomas Wälde, *Energy Charter Treaty and its Role in International Energy*, 24 J. ENERGY & NAT. RESOURCES 523, 523 (2006); Justin D'Agostino & Oliver Jones, *Energy Charter Treaty: A Step towards Consistency in International Investment Arbitration?*, 25 J. ENERGY & NAT. RESOURCES 225, 225 (2007).

88. 2012 O.J. (L 351) 1, 40–46. Pursuant to article 13(b), member states shall "immediately inform the Commission of any request for dispute settlement lodged under the auspices of the bilateral investment agreement as soon as the Member State becomes aware of such a request. The Member State and the Commission shall fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, the participation in the procedure by the Commission." Paragraph (c) adds that member states shall "seek the agreement of the Commission before activating any relevant mechanisms for dispute settlement against a third country included in the bilateral investment agreement and shall, where requested by the Commission, activate such mechanisms. Those mechanisms shall include consultations with the other party to a bilateral investment agreement and dispute settlement where provided for in the agreement. The Member State and the Commission shall fully cooperate in the conduct of procedures within the relevant mechanisms, which may include, where appropriate, the participation in the relevant procedures by the Commission." The regime of cooperation between the EC and member states is complemented by Regulation (EU) No. 912/2014 of the European Parliament and of the Council, of 23 July 2014, which establishes a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the Union is party, or the Union and its Member States are parties, and initiated by a claimant of a third country. 2014 O.J. (L 257) 121–34. Pursuant to the first paragraph of article 10, where a Member State acts as the respondent, in all phases of the dispute, including possible annulment, appeal or review, the member state shall: "(a) provide the Commission in a timely manner with relevant documents relating to the proceeding; (b) inform the Commission in a timely manner of all significant procedural steps, and upon request enter into consultations with the Commission with a view to taking into due consideration any point of law or any other element of Union interest raised by the dispute and identified by the Commission in a non-binding written analysis provided to the Member State

The EC has already requested permission from arbitral tribunals to intervene as amicus curiae in several cases.[89] This is a significant development as it means that amicus curiae status is not an exclusive of non-governmental or private organizations.[90] It also represents critical progress in the use of arbitral rules—namely the ICSID Arbitration Rules—as it was probably never imagined that such institutions would make use of this procedural mechanism.[91] The emergence of new categories of entities seeking access to investment arbitration "raises complex questions regarding the nature of the interests" that such entities pursue, the potential impact that their involvement might have in the proceedings, and "the different forms that their participation should take in the future."[92]

The purpose of this paper is to examine the participation of the EC in investor-state arbitrations and, despite the scarcity of information available about some cases, assess its impact in the overall mechanism of investor-state dispute resolution. The article proceeds as follows. Part I discusses the main theoretical and practical benefits that have led to the introduction of provisions allowing for amicus curiae participation in investment arbitration. Such arguments are crucial as they justify and legitimize this mechanism, validating the existence of a fundamental deviation from the traditional confidential and consensual nature of arbitration. Part II reviews the cases where the EC requested authorization from tribunals to take part in arbitral proceedings. Part III then moves to discuss the role played by the EC in those disputes. The participation of this special entity in investment arbitrations may raise

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concerned; and (c) permit representatives of the Commission, at its request and its own expense to form part of the delegation representing the Member State."

89. *See infra* Sec. II.

90. Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30 ARB. INT'L 125, 130 (2014).

91. Ciaran Cross & Christian Schliemann-Radbruch, *When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through* Amicus Curiae *Submissions by Regional Organisations*, 6 L. & DEV. REV. 67, 96 (2013).

92. Epaminontas Triantafilou, *A More Expansive Role For Amici Curiae In Investment Arbitration?*, KLUWER ARB. BLOG (May 11, 2009), http://kluwerarbitrationblog.com/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration; Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200, 201 (2011).

concerns regarding its impact on the overall efficiency of the dispute settlement mechanism. It is argued that the EC is fundamentally a distinct type of amicus, as it pursues interests different from those characteristic of NGOs and civil society groups. This part also examines the range of participatory rights that have been granted to the EC and discusses the impact of the EC's intervention on the proceedings and on the outcome of the dispute. Part IV concludes by offering some final remarks.

I. BENEFITS OF THE AMICUS CURIAE MECHANISM

The investor-state dispute resolution system has changed profoundly over the last several years, shifting from a confidentiality-based archetype, tributary of the commercial roots of investment arbitration, to a model that is open, subject to certain requirements, to the participation of non-disputing parties. This momentous change in the philosophy and structure of investment arbitration, ignited by some pioneer arbitral decisions, was duly acknowledged and incorporated by states in their international investment agreements and by arbitral institutions in their arbitral rules. This reform process was supported by the conviction among scholars, parties, and practitioners that investment arbitration had to change significantly so as to accommodate the aspirations and concerns of the overall community. Four main theoretical justifications have been articulated to explain the need for amicus curiae involvement in investor-state arbitration.

First, it is argued that amicus curiae participation increases the transparency of the dispute resolution system.[93] Over the last several years transparency became "[o]ne of the most topical issues in

93. Levine, *supra* note 92, at 200, 206; De Brabandere, *supra* note 66, at 102; *see* Eric De Brabandere, *Non-State Actors and the Proliferation and Individualization of International Dispute Settlement*, *in* THE ASHGATE RESEARCH COMPANION TO NON-STATE ACTORS 347-59 (Bob Reinalda ed., 2010); *see* Laurence Boisson de Chazournes, *Transparency and Amicus Curiae Briefs*, 5 J. WORLD INV. & TRADE 333 (2004); *see* Christina Knahr & August Reinisch, *Transparency Versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 L. & PRAC. INT'L CTS. & TRIBUNALS 97 (2007); Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMBRIDGE J. INT'L & COMP. L. 208, 223 (2012).

international economic law,"[94] as it is perceived as a fundamental tool to enhance the credibility and legitimacy of the system.[95] In the realm of investment law and arbitration, the concept can be used to refer to the obligation of host states to publish all legal rules affecting investors and to the existence of transparency in the conduction of arbitral proceedings.[96] In the latter sense, transparency entails not only that the general public is aware of the existence of an arbitration and its contents, but also that it can have access to the proceedings.[97] Investment disputes should not be decided in a process that was originally designed to address private controversies, focusing on commercial considerations, without due regard to the importance of transparency for democratic governance.[98] The involvement of amicus curiae draws the general public's attention to a controversy that may have a significant impact on public interests and public finances.[99] Naturally, transparency and public participation are deeply related. Public participation is a form of transparency and, in order for it to be effective, it is necessary that participating parties have access to the information that exists in the proceedings.[100]

Second, the participation of third-parties is said to promote greater accountability of investor-state arbitration.[101] The arbitral tribunal is called upon to scrutinize the conduct of the host state against the

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94. Marc Bungenberg, *Towards a More Balanced International Investment Law 2.0?*, 2015 EUR. Y.B. INT'L ECON. L. (SPECIAL ISSUE: TRADE POLICY BETWEEN LAW, DIPLOMACY AND SCHOLARSHIP) 15, 31 (Christoph Herrmann et al. eds.,).

95. N. Jansen Calamita, *Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach*, 15 J. WORLD INV. & TRADE 645, 651 (2014); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861, 887 (2016); Catharine Titi, *International Investment Law and Good Governance*, *in* INTERNATIONAL INVESTMENT LAW: A HANDBOOK 1768 (Marc Bungenberg et al. eds. 2015).

96. Calamita, *supra* note 95, at 649.

97. *Id.*; Loretta Malintoppi & Natalie Limbasan, *Living in Glass Houses? The Debate on Transparency in International Investment Arbitration*, 2 BCDR INT'L ARB. REV. 31, 32 (2015).

98. Choudhury, *supra* note 43, at 782.

99. Malintoppi & Limbasan, *supra* note 97, at 31.

100. *Id.* at 32, n. 5.

101. Choudhury, *supra* note 43, at 808; VanDuzer, *supra* note 69, at 685; Bastin, *supra* note 93, at 227; Kawharu, *supra* note 75, at 285.

standards of protection prescribed in international investment agreements.[102] State respondents face liability that can rise to several million of dollars, which can produce a tremendous impact on that state's budget.[103] Moreover, the outcome of the proceedings "may limit the future legislative and/or administrative freedom of manoeuver" of states, affecting their ability to pursue public welfare policies.[104] The community has an interest in checking that vital decisions are made using proper procedures and taking due account of public concerns. Amicus curiae intervention gives citizens a chance to be informed about the behavior of governments and arbitral tribunals.[105] The participation of non-disputing parties in the proceedings may help to address a democratic deficit that has been identified in the system.[106]

Third, it is posited that amicus curiae participation increases the openness of investment treaty arbitration to input from civil society.[107] Matters of public interest are almost always at the heart of the dispute because its subject matter impacts on the provision of public services such as water, waste management, electricity, or gas; or touches upon sensitive matters such as environmental protection, labor standards and other socio-political concerns—which are normally absent from

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102. CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 233–34 (2007); *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 133, 133 (2008).

103. Asteriti & Tams, *supra* note 14, at 792.

104. Knahr & Reinisch, *supra* note 93, at 113; Miles, *supra* note 50, at 373–74.

105. Triantafilou, *supra* note 27 at 575; Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 14–15 (Stephan Schill ed., 2010).

106. *See* Choudhury, *supra* note 43; Triantafilou, *supra* note 27 at 575; Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 187 (2009); Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253, 257 (Michael Waibel et al. eds., 2010); Chiara Ragni, *The Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations*, *in* FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 86, 87 (Tullio Treves et al. eds., 2013).

107. Levine, *supra* note 92, at 217; De Brabandere, *supra* note 25, at 353; MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS 111–12 (2008).

international commercial arbitration.[108] Oftentimes parties fail to introduce an accurate background of the dispute and their pleadings are "insufficient to provide the Tribunal with an exhaustive picture of the issues involved."[109] Amici may draw the attention of the tribunal to the "broader implications of a decision beyond the particular interests of the [disputing] parties."[110] This is crucial when matters under discussion touch upon crucial spheres of regulatory authority.[111]

Amicus participation may contribute to decisions that are more likely to be informed by, and responsive to, a wide range of interests, especially taking into account that generally civil society groups are better positioned to voice public concerns.[112] They can bring with them different social, non-economic perspectives and thus promote a competition of ideas.[113] It has been said that third–party participation "may bridge the gap between the legal procedures and the global or national public."[114] Amici curiae, to a certain extent, represent diverse public interest considerations,[115] acting as a sort of "trustees" for the

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108. Asteriti & Tams, *supra* note 14, at 792; Malintoppi & Limbasan, *supra* note 97, at 31–32; Mistelis, *supra* note 30, at 230.

109. Martins Paparinskis, *Inherent Powers of ICSID Tribunals: Broad and Rightly So*, *in* 5 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 11, 20 (Ian A. Laird & Todd J. Weiler eds., 2011).

110. Tomoko Ishikawa, *Third Party Participation in Investment Arbitration*, 59 INT'L & COMP. L.Q. 373, 403 (2010); Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALTIES, OPTIONS 174, 188 (Jose Alvarez et al. eds., 2011); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 618 (1994); Epaminontas Triantafilou, *Is a Connection to the "Public Interest" a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?* 5 BERKELEY J. INT'L L. PUBLICIST 38, 42 (2010).

111. Bastin, *supra* note 93, at 224.

112. Ishikawa, *supra* note 110, at 402; Hilary French, *The Role of Non-State Actors*, in GREENING INTERNATIONAL INSTITUTIONS 251, 256 (Jacob Werksman ed., 2009).

113. Boisson de Chazournes, *supra* note 93, at 335.

114. Armin von Bogdandy & Ingo Venzke, *International Courts as Lawmakers*, *in* INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS? 161, 209 (Rudiger Wolfrum & Ina Gätzschmann eds., 2012).

115. Triantafilou, *supra* note 27, at 574–75; Mary E. Footer, *Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 MICH. ST. J. INT'L L. 33, 46 (2009).

protection of collective interests.[116] "[T]here is a need for some sort of *avocat general* to voice the concerns of the public," and that function is performed, in the absence of an alternative, by the amicus curiae.[117] Non-parties "may also provide a measure of access to a particular third party whose interests may be affected by the decision because of their close relationship with the dispute."[118] Overall, the participation of non-disputing parties in the proceedings enlarges the number of stakeholders taking part in the proceedings, allowing for the introduction of public interests and common concerns in the arbitration system.[119]

Finally, amicus curiae participation has also been justified as a way to help investment tribunals to render better awards.[120] While arbitrators are required to have appropriate qualifications and experience, this does not mean that they are necessarily able to understand all the aspects of a dispute.[121] Arbitral panels may have limited ability to collect their own information on the subject-matter of the dispute.[122] Many NGOs and civil society groups have a unique capacity to provide relevant information because of their substantial level of funding and technical expertise,[123]

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116. Andrea Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*, *in* FROM BILATERALISM TO COMMUNITY INTERESTS: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 39, 50 (Ulrich Fastenrath et al. eds., 2011).

117. *Id.*; Mitsuo Matsushita, *Transparency, Amicus Curiae Briefs and Third Party Rights*, 5 J. WORLD INV. & TRADE 337, 338 (2004).

118. Ishikawa, *supra* note 110, at 403; *see* Bartholomeusz, *supra* note 3, at 211.

119. Ragni, *supra* note 106, at 87; *see* Magraw Jr. & Amerasinghe, *supra* note 43, at 343.

120. Comment P-13A to the Principles of Transnational Civil Procedure states: "The 'amicus curiae brief' is a useful means by which a nonparty may supply the court with information and legal analysis that may be helpful to achieve a just and informed disposition of the case." UNIDROIT, *supra* note 2. The submission may concern "important legal issues in the proceeding and matters of background information." *Id.* at P-13. *See also* PAUL COLLINS JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 3 (2008).

121. Gómez, *supra* note 73, at 544.

122. Ishikawa, *supra* note 110, at 402.

123. *Id.* at 402–03; Christina Knahr, *The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or Curse?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 319, 335 (Chester Brown & Kate Miles eds., 2011); Vernon Tava, *The Role of Non-Governmental Organisations, Peoples and Courts in Implementing International Environmental Laws*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 123, 126 (Shawcat Alam et al. eds., 2013).

offering a low-cost tool for information gathering.[124] Moreover, for different reasons parties to the dispute may lack either the necessary ability or the appropriate incentives to submit all of the relevant facts,[125] legal arguments, and policy implications to the tribunal.[126] Amici can draw the attention of arbitrators to interests that do not necessarily coincide with those of the state,[127] providing the tribunal with its scientific or technical knowledge and offering an additional lawyer of information relevant to the dispute.[128] The intervenor can provide the tribunal with its expert scientific or technical knowledge,[129] which may be particularly important when the topics under discussion are beyond the arbitrators' field of expertise, or are novel and complex.[130]

By bringing into the proceedings novel legal and factual information relevant to a decision, amici may help in improving the epistemic quality of decisions.[131] They can present evidence relevant for the decision of the dispute[132] or introduce legal arguments or perspectives not addressed by

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124. Boisson de Chazournes, *supra* note 93, at 335; Magraw Jr. & Amerasinghe, *supra* note 43, at 346.

125. Comment P-13D to the Principles of Transnational Civil Procedure provides: "Principle 13 does not authorize third persons to present written submissions concerning the facts in dispute. It permits only presentation of data, background information, remarks, legal analysis, and other considerations that may be useful for a fair and just decision of the case. For example, a trade organization might give notice of special trade customs to the court." UNIDROIT, *supra* note 2. Comment P-13B adds that "[f]actual assertions in an amicus brief are not evidence in the case." *Id.*

126. Shelton, *supra* note 110, at 615; Wong & Yackee, *supra* note 47, at 250–51; Ishikawa, *supra* note 110, at 393, 402.

127. Markus Gehring & Avidan Kent, *International Investment Agreements and Sustainable Development: Future Pathways*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 561, 571 (Shawkat Alam et al. eds., 2013).

128. Magraw Jr. & Amerasinghe, *supra* note 43, at 346–47.

129. Shelton, *supra* note 110, at 611; Bartholomeusz, *supra* note 3, at 211; De Brabandere, *supra* note 66, at 106–07.

130. Ishikawa, *supra* note 110, at 402–03.

131. Jens Steffek & Maria Paola Ferretti, *Accountability or "Good Decisions"? The Competing Goals of Civil Society Participation in International Governance*, 23 GLOBAL SOC'Y 37, 37 (2009); Magraw Jr. & Amerasinghe, *supra* note 43, at 346–47.

132. Rahim Moloo, *Evidentiary Issues Arising in an Investment Arbitration*, *in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 287, 310 (Chiara Giorgetti ed., 2014).

the parties in their own submissions.[133] This might open the door for some "creative legal thinking,"[134] grant third parties a role in investment treaty arbitration—and, in a broader sense, in the making of international policy and law[135]—and possibly even contribute to reduce the perceived fragmentation of international law.[136] Hence, third party involvement "serves both to improve the legal quality of the award and to assist in the systemic development of international investment law as a whole."[137]

II. THE EUROPEAN COMMISSION'S PARTICIPATION IN INVESTMENT PROCEEDINGS

The EC has thus far requested authorization to participate in investor-state arbitrations as amicus curiae in (at least) eleven cases.[138] The EC is

133. Magraw Jr. & Amerasinghe, *supra* note 43, at 347; Ishikawa, *supra* note 110, at 402.

134. Boisson de Chazournes, *supra* note 93, at 335.

135. Ishikawa, *supra* note 110, at 377.

136. *See* Bartholomeusz, *supra* note 3, at 278.

137. Levine, *supra* note 92, at 217.

138. Electrabel S.A. v. Republic of Hung., ICSID Case No. ARB/07/19; AES Summit Generation Ltd. v. Republic of Hung., ICSID Case No. ARB/07/22 [hereinafter, AES v. Hung.]; Micula v. Rom., ICSID Case No. ARB/05/20; Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic), PCA Case No. 2008-13 [hereinafter, Achmea v. Slovak]; European American Inv. Bank AG v. Slovak Republic, PCA Case No. 2010-17 [hereinafter, European American Inv. Bank v. Slovak]; U.S. Steel Glob. Holdings I B.V. (Neth.) v. Slovak Republic, PCA Case No. 2013-6 [hereinafter, U.S. Steel v. Slovak]; Iberdrola Energía, S.A. v. Republic of Guat., ICSID Case No. ARB/09/5 [hereinafter, Iberdrola v. Guat.]; Charanne B.V. v. Kingdom of Spain, Arb. Inst. Stockholm Chamber of Com. Case No. 062/2012 [hereinafter, Charanne v. Spain]; Antin Infrastructure Servs. Lux. S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/31 [hereinafter, Antin v. Spain]; Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36 [hereinafter, Eiser v. Spain]. The EC has also intervened in EDF International S.A. v. Republic of Hung., UNCITRAL Rules, Award (Dec. 4, 2014), but no further information is available. *See* Commission Decision (EC) C(2014) 1676 Final of Mar. 18, 2014, 3, n.5, http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-1676-EN-F1-1.PDF. See also U.S. Steel v. Slovak, Procedural Order No. 6 (Stipulated Termination Order), (June 16, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3237.pdf. Eastern Sugar B.V (Neth.) v. Czech Republic (Arb. Inst. Stockholm Chamber of Com. Case No. 088/2004) is frequently mentioned as the first case of intervention of the EC as an amicus curiae in investment arbitration proceedings. In fact, the EC played an indirect role in the proceedings as it submitted a letter to the Czech Deputy Minister of Finance, which is

also reported to have sought leave to intervene in investment proceedings initiated by photovoltaic energy investors against Spain[139] and the Czech Republic,[140] but there is no further information available. Non-disputing party applications have been filed to intervene in other energy-related ICSID cases against Spain[141] and Italy,[142] yet it remains unclear whether these applications have been filed by the EC, due to the fact that this information has not been made available to the public. The cases where information is available are discussed in the pages that follow.

On September 3, 2008, the ICSID Secretariat received an application from the EC, under ICSID Arbitration Rule 37(2), to file a written submission as a non-disputing party in *Electrabel S.A. v. Hungary*.[143] The EC believed that it could

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discussed in the partial award of Mar. 27, 2007 ¶ 119, http://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf. However, the EC did not formally request authorization from the tribunal to participate in the proceedings as amicus curiae.

139. Isolux Infrastructure Neth. B.V. v. Kingdom of Spain (Arb. Inst. Stockholm Chamber of Com.) (case registered Oct. 3, 2013). *See* Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?,* 48 VAND. J. TRANSNAT'L L. 1285, 1341 (2015).

140. *See* Antaris Solar v. Czech Republic (Perm. Ct. Arb. 2013); Natland Inv. Grp. NV v. Czech Republic (UNCITRAL Rules)(2013); Voltaic Network GmbH v. Czech Republic (UNCITRAL Rules)(2013); ICW Europe Invs. Ltd. V. Czech Republic (UNCITRAL Rules)(2013); Photovoltaik Knopf Betriebs-GmbH v. Czech Republic (UNCITRAL Rules)(2013); WA Invs.-Europa Nova Ltd. V. Czech Republic (UNCITRAL Rules)(2013). *See also* Pietro Ortolani, *Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance*, 6 J. INT'L DISP. SETTLEMENT 118, 126 (2015).

141. RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/30; Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1; NextEra Energy Global Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11; InfraRed Environmental Infrastructure GP Ltd. v. Kingdom of Spain, ICSID Case No. ABR/14/12; RENERGY S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18. *See Decisions on Non-Disputing Party Participation*, ICSID, https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Non-Disputing-Party-Participation.aspx.

142. Blusun S.A. v. Italian Republic, ICSID Case No. ARB/14/3.

143. Electrabel S.A. v. Republic of Hung., ICSID Case No. ARB/07/19, Procedural Order No. 4 (Apr. 28, 2009), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC7386_En&caseId=C111.

> assist the Tribunal in the determination of a number of legal issues arising under the Energy Charter Treaty in these proceedings . . . and would seek to address the question whether an ICSID Tribunal has or should exercise jurisdiction over disputes between an investor from an EU Member State against an EU Member State under the Energy Charter Treaty, including on matters that substantially fall under Community competence, and that it would also address the question of the applicable law in this dispute and how possible conflicts between several bodies of applicable law should be resolved.[144]

After considering the parties' oral and written submissions, the tribunal issued a procedural order deciding

> in principle to allow the European Commission, as a non-disputing party . . . to file a written submission to the Tribunal regarding a legal matter within the scope of the Parties' dispute . . . subject to the Tribunal hereafter first determining the practicalities and timing of such a submission in further consultation with the Parties, bearing in mind the factors listed in the last paragraph of Rule 37(2).[145]

After receiving observations and proposals from the parties, the tribunal issued another procedural order allowing the EC to file a written submission as a non-disputing party.[146]

In September 2008, the EC also requested leave to participate as a non-disputing party in *AES v. Hungary*.[147] Later that month the EC was notified to clarify some aspects of its application.[148] The EC's response was communicated to the parties, who were given the chance to submit comments on the application.[149] The arbitral tribunal then issued a procedural order allowing the EC to file a submission "within certain

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144. *Id.* ¶ 2.

145. Electrabel v. Hung., ICSID Case No. ARB/07/19, Procedural Order No. 1, ¶ 4C (Nov. 19, 2008), http://www.italaw.com/sites/default/files/case-documents/italaw7050.pdf.

146. Electrabel v. Hung., ICSID Case No. ARB/07/19, Procedural Order No. 4, ¶ 22.

147. AES v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 3.18 (Sept. 23, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf.

148. *Id.*

149. *Id.*

prescribed limits."[150] The EC filed a written submission[151] and each party was given to opportunity to offer their observations on the submission.[152]

On April 2, 2009 the EC sought to intervene in *Micula v. Romania*.[153] The claimants opposed the request.[154] Romania argued that the EC's request was "one that could not be reasonably opposed, but in the event that the Claimants opposed that request, it requested the opportunity to provide a fuller response."[155] After considering the competing claims, the tribunal accepted the EC's participation in the case as a non-disputing party.[156] The tribunal eventually issued a final award against Romania,[157] which Romania sought to have annulled.[158] In May 2014, the EC formally enjoined Romania from satisfying the ICSID award, claiming that the award was compensation for incentives that Romania had to remove in order to join the European Union; and therefore, any payment of compensation for the withdrawal of such illegal state-aid would be considered illegal state aid itself. [159] As a part of the annulment proceedings initiated by Romania, the EC submitted an application to intervene a second time as a non-disputing party."[160] This request was accepted by the ad hoc committee.[161] The EC also submitted an amicus curiae brief in support of Romania before the United States Court of Appeals.[162]

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150. *Id.* ¶ 3.22.

151. *Id.* ¶ 3.25.

152. *Id.* ¶ 3.27.

153. Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 23 (Dec. 11, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

154. *Id.* ¶¶ 23, 25.

155. *Id.* ¶ 23.

156. *Id.* ¶ 27.

157. *See generally Id.*

158. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 1 (Feb. 26, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw7161.pdf.

159. European Commission Letter to Romania on State Aid Investigation C(2014) 6848 final, State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award Micula v. Romania of 11 December 2013 (Oct. 1, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw4066.pdf.

160. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 53.

161. *Id.* ¶ 61.

162. Brief for European Commission as Amici Curiae Supporting Appellants, Micula v. Rom., No. 15 Misc. 107(LGS), 2015 WL 5257013, at 1 (S.D.N.Y. 2015),

On April 14, 2010, in *Achmea v. Slovak Republic*, a case governed by the UNCITRAL Rules, the respondent state "proposed that the [EC] be invited to participate in the Intra-EU Jurisdictional phase of the arbitration proceedings as *amicus curiae*."[163] In response to the respondent's proposal, the tribunal considered requesting commentary from the EC and the government of the Netherlands (the home state of the investor), specifically on the issue of jurisdiction.[164] After discussions with both parties, the tribunal contacted the Director General of the Legal Service of the EC with an invitation to submit any further observations.[165] The EC accepted the tribunal's invitation to participate and outlined its views on the Intra-EU jurisdictional objection.[166] The parties were then given the chance to submit comments on the observations provided by Netherlands and the EC.[167] Even though the original impulse came from a request by the respondent state, the *Achmea* tribunal was "the first investment tribunal to request amici curiae submission *propio motu* [and] also the first to receive such a submission from a State."[168] While

> the Tribunal did not elaborate on the legal basis of such a request . . . it is . . . plausible to treat this conduct as an exercise of inherent powers to request information from persons and entities that may be necessary or conducive to a fair and accurate settlement of disputes.[169]

On September 6, 2011, another tribunal operating under the UNCITRAL Rules invited Austria, the Czech Republic, and the EC to

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appeal filed, No. 15-3109 (2d Cir. 2015), http://www.italaw.com/sites/default/files/case-documents/italaw7096.pdf.

163. Achmea v. Slovak, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶¶ 26, 151 (Oct. 26, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0309.pdf.

164. *Id.* ¶ 30.

165. *Id.* ¶ 31.

166. *Id.* ¶¶ 37, 175–96.

167. *Id.* ¶ 41.

168. Bastin, *supra* note 90, at 130.

169. Paparinskis, *supra* note 109, at 33.

file amicus curiae briefs in *European American Investment Bank v. Slovak Republic*.[170] Initially,

> the Claimant . . . submitted a request to the Tribunal to invite . . . Austria to submit an *amicus curiae* brief, indicating its agreement that, if . . . Austria were invited to intervene as *amicus curiae*, the EU Commission be invited to do the same if the Respondent requested it or if the Tribunal wished to extend such an invitation.[171]

In the end, Austria, the Czech Republic, and the EC were all invited to file amicus curiae submissions,[172] with the parties to the arbitration being given the opportunity to provide commentary on the submissions.[173]

On March 18, 2014 the EC decided to request leave to intervene as a non-disputing party in *U.S. Steel v. Slovak Republic*.[174] However, the proceedings were terminated a few months later.[175] In May 2014, the EC submitted a request for amicus curiae participation in the annulment proceedings in *Iberdrola v. Guatemala*.[176] After listening to the parties' observations, the tribunal, operating under the ICSID Arbitration Rules, decided to reject the application.[177] Later that year, the EC filed an application to participate as amicus curiae in *Charanne v. Spain*.[178] "The Arbitral Tribunal informed the Parties of the application and invited them to submit their comments on the [EC]'s application."[179] After receiving

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170. European American Inv. Bank v. Slovak, PCA Case No. 2010-17, Award on Jurisdiction, ¶ 25 (Oct. 22, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw4226.pdf.

171. *Id.* ¶ 18.

172. *Id.* ¶¶ 24–25.

173. *Id.* ¶¶ 26–29.

174. *See* European Commission Decision C(2014) 1676 final, On Action as a Non-Disputing Party in the Case U.S. Steel Global Holdings I B.V. (The Netherlands) v. Slovak Republic (Mar. 18, 2014), http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-1676-EN-F1-1.PDF [hereinafter European Commission Decision].

175. *See* U.S. Steel v. Slovak, Procedural Order no. 6, (Perm. Ct. Arb. 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3237.pdf.

176. Iberdrola v. Guat., Caso CIADI No. ARB/09/5, Decision on Annulment, ¶ 25 (Jan. 13, 2015), https://arbitrationlaw.com/sites/default/files/free_pdfs/2015-01-13_-_decision_on_annulment_sp.pdf.

177. *Id.*

178. Charanne v. Spain, Final Award 062/2012, ¶ 49 (Arb. Ct. of Madrid 2016), http://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.

179. *Id.*

comments from the parties, the tribunal allowed the EC "to submit an *amicus curiae* brief, but denied [it] access to the case file and participation in the hearings."[180] In both *Antin v. Spain*[181] and *Eiser v. Spain*,[182] the EC is reported to have requested authorization to participate in the proceedings. The two arbitral tribunals refused the requests, however, stating that the presentation of amicus curiae submissions were "premature" at that time.[183]

This set of cases is just part of the embryonic jurisprudence on participation of the EC in investor-state proceedings. While this topic is evolving, it is already possible to analyze the main features of this phenomenon and identify the main challenges that it poses to arbitral tribunals. Such is the goal of the following section.

III. THE EUROPEAN COMMISSION AS A DISTINCTIVE AMICUS

A. *The Guardian of European Law*

A person or entity that is not a disputing party has legitimacy to apply for amicus curiae status it if has a noteworthy interest in the arbitral proceedings.[184] The ICSID Arbitration Rules provide that "the Tribunal shall consider, among other things, the extent to which . . . the non-disputing party has a significant interest in the proceeding."[185] Third–party participation in investment arbitration therefore depends upon the existence of a relevant interest in the dispute, making it necessary to enquire about the interests pursued by potential amici. The concept is normally said to encompass in broad terms any individual or organization that does not have a direct interest in a dispute, and is not acting in a shareholding capacity, but wishes to represent people or

180. *Id.* ¶¶ 51, 56.
181. ICSID Case No. ARB/13/31.
182. ICSID Case No. ARB/13/36.
183. Joseph M Tirado, *Renewable Energy Claims under the Energy Charter Treaty: An Overview*, 13(3) OIL, GAS & ENERGY L. INTELLIGENCE 1, 17–18 (2015).
184. *See supra* Section I.
185. ICSID Convention Arbitration Rules, *supra* note 19, Rule 37(2).

groups who cannot advocate for themselves and might be affected by the decision of an arbitral tribunal.[186]

It is evident that the EC pursues interests of a different nature than those of traditional participants, such as NGOs and civil society groups. Since the European Union is not a signatory to the ICSID Convention, it cannot participate in ICSID arbitral proceedings as a party, namely, as a respondent to claims filed by foreign investors.[187] However, when such claims also raise matters of European law, in particular where the defendant is a European member state and the impugned state measure was done in compliance with or in order to execute European Union law, the dispute becomes a matter of interest for the European Union. In such cases, the only procedural mechanism that European institutions have to make their opinion heard by the arbitral tribunals is to request authorization for leave to intervene as an amicus curiae.[188]

Like any prospective amicus, however, the EC needs to demonstrate a significant interest in the proceedings. The nature of the interests pursued by the EC relates to its three key functions: "motor of integration, guardian of the treaties, and executive body of the EU."[189] The EC has legislative and executive functions, namely as regards the implementation of policies and European laws. The EC has a legal guardianship function that closes relates to and overlaps with its executive tasks—ensuring that the European Union's treaties and legislation are respected.[190] The legal guardian role requires the EC to act as a watchdog, doing what it can to ensure—together with the Court of Justice—that European Law is applied and respected throughout the Union.[191] Therefore, the interest pursued by the EC in investment

186. Mary B. Ayad, *The Quest for the Holy Grail of Social Justice: Substantive and Procedural Law Provisions for Amicus Curiae in Investor-State ICSID Arbitration Law and Practice*, 9 MACQUARIE J. BUS. L. 17, 25 (2012).

187. Frank Hoffmeister, *The European Union and the Peaceful Settlement of International Disputes*, 11 CHINESE J. INT'L L. 77, 83 (2012).

188. *Id.*

189. GERHARD SABATHIL ET AL., THE EUROPEAN COMMISSION: AN ESSENTIAL GUIDE TO THE INSTITUTION, THE PROCEDURES AND THE POLITICS 5–6 (2008).

190. MICHELLE CINI, THE EUROPEAN COMMISSION: LEADERSHIP, ORGANIZATION AND CULTURE IN THE EU ADMINISTRATION 14 (1996); NEILL NUGENT & MARK RHINARD, THE EUROPEAN COMMISSION 16–17 (2d ed. 2015).

191. NUGENT & RHINARD, *supra* note 190; *see also* STINE ANDERSEN, THE ENFORCEMENT OF EU LAW: THE ROLE OF THE EUROPEAN COMMISSION (2012).

arbitrations relates to the clarification of issues concerning the scope and content of European laws that are connected to the dispute.

The EC's participation in investment arbitration is a striking example of amicus curiae representing a "direct legal interest" in the outcome of the dispute, as opposed to a broad public interest mandate.[192] The interest pursued by the EC is the correct and uniform application of European Law. While the European Union cannot make use of any specific procedural mechanism, it should not be seen as mere third party in investment arbitration proceedings that involve European member states and the application of European law.[193] It is clear that the European Union has a "direct legal interest in the outcome of the dispute."[194]

> The nature of the EC's interest in [such cases is] broader and more substantial than ensuring that the tribunal was aware of, say, environmental or cultural implications of the project at issue. The EC [seeks] to assert the relevance of its legally prescribed regulatory mandate, which is replete with policy implications for the entire European Union, and to address the consequences of a conflict between that mandate and the tribunal's jurisdiction.[195]

The role played by the EC in investment arbitration is similar to that of "public prosecutor" regularly played by the EC in competition law matters, where the EC frequently intervenes as amicus curiae in arbitral proceedings.[196] Being the "Guardian of the Treaties," the EC is interested in taking part in such proceedings and helping the tribunal to elucidate potential conflicts of legal rules and principles.[197] The amicus curiae mechanism is a useful tool for the EC, not only to offer its views on how

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192. Triantafilou, *supra* note 92; Levine, *supra* note 92, at 215.

193. Carlos Gonázlez-Bueno & Laura Lozano, *More than a Friend of the Court: The Evolving Role of the European Commission in Investor–State Arbitration*, KLUWER ARB. BLOG (Jan. 26 2015), http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration; Vadi *supra* note 139, at 1339.

194. Gonzalez-Bueno & Lozano, *supra* note 193; Vadi, *supra* note 139, at 1339–40.

195. Triantafilou, *supra* note 92.

196. GORDON BLANKE, THE USE AND UTILITY OF INTERNATIONAL ARBITRATION IN EC COMMISSION MERGER REMEDIES: A NOVEL SUPERNATURAL PARADIGM IN THE MAKING? 155 (2006).

197. Knahr, *supra* note 123, at 320.

European Union laws should be interpreted, but also "to raise awareness on the existing interactions between [different] international legal subsystems."[198]

The investor-state dispute settlement system is designed to determine the rights and obligations arising under international investment treaties. Disputes which touch upon European Union laws and policies are thereby put in the hands of arbitrators, who may not feel compelled to give due consideration to those Union interests. It is therefore understandable that the EC wants to be heard as amicus curiae.[199] "Where [European Union] law is at issue in cases brought against EU Member States, the [EC] is likely to intervene to protect the EU interest in the proper interpretation and application of European law."[200]

In the abovementioned cases, three situations of potential conflict between European and International Law were under discussion. First, there may be an issue of jurisdiction.[201] In *Electrabel S.A. v. Hungary*, the EC challenged the tribunal's jurisdiction under the Energy Charter Treaty, claiming that a "[t]ribunal established under the ICSID Convention, ha[d] no jurisdiction over the Claimant's [Power Purchase Agreement] termination claim,"[202] and that such a claim should have been brought before the Community courts.[203] The tribunal's jurisdiction was disputed by the EC, but not by the parties.[204] In the annulment

198. Francisco J. Pascual Vives, *Shaping the EU Investment Regime: Choice of Forum and Applicable Law in International Investment Agreements*, 6 CUADERNOS DE DERECHO TRANSNACIONAL 269, 272 (2014).

199. Kleinheisterkamp, *supra* note 82, at 220.

200. Hoffmeister, *supra* note 187, at 104.

201. *See*, *e.g.*, Steffen Hindelang, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties?*, 39 LEGAL ISSUES ECON. INTEGRATION 179 (2012); Konstanze von Papp, *Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ?*, 50 COMMON MKT. L. REV. 1039 (2013); Anna Stier, *The Jurisdiction of the Arbitral Tribunal in Intra-EU Investment Treaty Disputes after the Decision in Electrabel v Hungary*, 31 ARB. INT'L 163 (2015).

202. Electrabel v. Hung. (Belg. v. Hung.), ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 4.101, 5.9 (Nov. 30, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf.

203. *Id.* ¶ 5.10.

204. *Id.* ¶¶ 4.89-.90, .92.

proceedings in *Micula v. Romania*, the EC also argued that the tribunal lacked jurisdiction to hear the case.[205]

In *Achmea v. Slovak Republic*, the EC argued that,

> in the [European] judicial system, the Luxembourg courts have exclusive jurisdiction (i) to determine, in infringement proceedings, whether EU Member states have fulfilled their [legal] obligations, and (ii) to give preliminary rulings on questions of [European Union] law as requested by EU domestic courts and tribunals.[206]

"As a consequence, [European Union] member states that resort to [an] *inter-State* arbitration mechanism provided for under an intra-EU BIT for matters partially covered by [European Union] law, are in breach of Article 344 of the TFEU."[207] The EC also "considers [that] there is serious potential for discrimination between [] investors from different Member States, which is incompatible with [European Union] law."[208] This might happen when

> some investors are covered by a BIT and granted the opportunity to resort to investor-State arbitration while others are not. . . . [T]he availability of a *choice* of dispute resolution procedures [for] some investors [is seen as an] advantage over investors from other Member States, and thus constitutes forbidden discrimination against those other [European Union] nationals.[209]

The EC argued that if the arbitral tribunal rendered an award in this case, it risked coming to a conclusion that would be at odds with the views of the Commission, or even the European Court of Justice.[210] In addition, there is the risk that the arbitral award may be incompatible with European Union law, and thus unenforceable.[211] In the *Achmea* case the EC suggested that the tribunal suspended the arbitration until the EC

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205. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶¶ 329–30.

206. Achmea v. Slovak, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 178.

207. *Id.*

208. *Id.* ¶ 183.

209. *Id.*

210. *Id.* ¶ 194.

211. *Id.*

and/or the European Court of Justice had come to a decision on the European Union law aspects of the infringement case.[212]

In *European American Investment Bank v. Slovak Republic*, the EC also argued that, in the European judicial system, it is for the European Union courts to ensure the authentic interpretation of European Union law.[213] The EC posited that the Court of Justice of the European Union has exclusive jurisdiction to review the legality of acts adopted by European Union institutions, to determine whether member states have fulfilled their obligations under European law in infringement proceedings brought by the EC against them, and to give preliminary rulings on questions of European Union law as requested by European domestic courts and tribunals.[214]

In *Charanne v. Spain*, a dispute under the Energy Charter Treaty, Spain argued

> that the submission of the dispute to the [Energy Charter Treaty] rather than to the dispute resolution mechanisms of the [European Union] would constitute a violation of public policy under Spanish law, and [that] if the arbitral tribunal render[ed] an award there would be a risk of unenforceability or annulment of such award.[215]

The second instance of potential conflict between European and International Law is of a substantial nature. In some cases the national measures challenged by the investor, which purportedly violate the international obligations protected under investment treaties (i.e., the Energy Charter Treaty or Bilateral Investment Treaties), have been adopted in order to comply with the host state's obligations within the European integration process. In *Electrabel S.A. v. Hungary*, for instance, the EC supported the respondent state's position, arguing that the state aid was illegal and the country did not violate its contractual

212. Achmea v. Slovak, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 196.

213. PCA Case No. 2010-17, Award on Jurisdiction, ¶¶ 119, 253.

214. European American Inv. Bank v. Slovak, PCA Case No. 2010-17, Award on Jurisdiction, ¶ 242, n. 259.

215. Charanne v. Spain, Final Award 062/2012, ¶ 49 (Arb. Ct. of Madrid 2016).

obligations, because policy changes were introduced to conform to European Union legislation.[216] According to this perspective,

> [European Union] member states are obliged . . . to carry out State aid decisions issued by the [EC]. If the Tribunal were . . . to make an arbitration award that was contrary to obligations legally binding on the Respondent as an EU Member State, such an award could not be implemented by virtue of the supremacy of [European Union] law.[217]

AES v. Hungary was another dispute under the Energy Charter Treaty that concerned the host state's decision to change the legal regime governing the price the government paid for electricity.[218] One of Hungary's defenses was that the EC regarded the preferential pricing scheme granted in a 2001 settlement of a dispute regarding the fees payable under a Power Purchase Agreement to be state aid incompatible with European Union competition laws, and that Hungary had changed its pricing mechanism in response to concerns expressed by the EC.[219]

In *Micula v. Romania*, a group of foreign investors initiated a claim under the Sweden-Romania BIT alleging that Romania had withdrawn a number of incentives in breach of the BIT.[220] The EC intervened as amicus curiae to support Romania's defense, arguing that the interpretation of the BIT should take into account the European Union's state aid rules and that "any payment of compensation arising out of [the] Award would constitute illegal state aid under [European Union] law and render the award unenforceable within the EU."[221] In its submission in the annulment proceedings, the EC argued, inter alia, that the award had to be annulled because "the Tribunal failed to apply the applicable law . . . [and] to address the question of enforceability of the Award."[222]

In *Achmea v. Slovak Republic* the EC put forward a fundamental distinction between 'extra-European Union BITs' and 'intra-European Union BITs', expressing concern about "the compatibility of such BITs

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216. Electrabel v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 4.110.
217. *Id.* ¶ 5.16.
218. AES v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 4.
219. *Id.* ¶ 10.3.15.
220. Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 1.
221. *Id.* ¶¶ 313, 316–17, 330, 334–35.
222. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 308.

with mandatory provisions of [European] law and with the [European] judicial system."[223] From the EC's perspective, "[i]ntra-[European Union] BITs amount to an 'anomaly within the EU internal market.'"[224] They create the risk of "a partial overlap between intra-[European Union] BITs and the internal market provisions of the [European Union] . . . call[ing] into question the permissibility of the continued existence of intra-[European Union] BITs."[225] The EC stressed

> that where there is a conflict with [European Union] law, the rule of *pacta sunt servanda* does *not* apply to agreements between [] Member States, because of the . . . supremacy [of European Union Law] not only over national legal systems, but also over bilateral agreements concluded between Member States.[226]

The tribunal declared that it could apply European Union Law in the merits phase, if necessary.[227] This is a noteworthy decision, as it is improbable that the tribunal would make such a finding if the EC had not raised the question in its submission.[228]

Similarly, in *European American Investment Bank v. Slovak Republic*, the EC argued where the dispute touches upon questions of application and interpretation of law covered by European Treaties, European Union Law prevails.[229] In cases of conflict with European Union Law, the general international law rule of *pacta sunt servanda* could not be applied to treaties concluded between member states.[230] The EC was also poised to make the same argument in *U.S. Steel v. Slovak Republic* when the proceedings were terminated.[231]

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223. PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶¶ 176–77.

224. *Id.* ¶ 177.

225. *Id.*

226. *Id.* ¶ 180.

227. Vives, *supra* note 198, at 286.

228. *Id.*

229. Letter from the Director General of the European Commission Legal Service to Legal Counsel at the Permanent Court of Arbitration 2 (Sept. 6, 2011), http://www.italaw.com/sites/default/files/case-documents/italaw4243_0.pdf.

230. *Id.* at 3.

231. European Commission Decision, *supra* note 174, at 3.

In the different proceedings against the Czech Republic the EC is also reported to have raised a conflict with the provisions of European Union Law.[232] According to the EC, "former benefits and incentives accorded to solar investors could constitute . . . state aid that needed to be eliminated in order for the Czech Republic to remain in compliance with [European Union] law."[233]

Finally, some cases specifically raise the issue of the relationship between the Energy Charter Treaty and European Union Law.[234] The European Union is, alongside its member states, a party to the treaty.[235] Indeed, the European Union has signed the Energy Charter Treaty as a Regional Economic Integration Organization.[236] It is apparent from the statement made by the EC at the conclusion of the Energy Charter Treaty that the EC can become a party to an investment arbitration proceeding if

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232. Vadi, *supra* note 139, at 1340–41.

233. *Id.* (quoting Luke E. Peterson, *Brussels' Latest Intervention Casts Shadow Over Investment Treaty Arbitrations Brought by Jilted Solar Energy Investors*, INV. ARB. REP. (Sept, 8, 2014), http://www.iareporter.com/articles/brussels-latest-intervention-casts-shadow-over-investment-treaty-arbitrations-brought-by-jilted-solar-energy-investors).

234. *See, e.g.*, Rafael Leal-Arcas & Andrew Filis, *The Energy Community, the Energy Charter Treaty and the Promotion of EU Energy Security*, *in* THE ENERGY COMMUNITY: A NEW ENERGY GOVERNANCE SYSTEM 551 (Dirk Buschle & Kim Talus eds., 2015); Ernesto Bonafé & Gökçe Mete, *Escalated Interactions Between EU Energy Law and the Energy Charter Treaty*, 0 J. WORLD ENERGY L. & BUS. 1 (2016); Graham Coop, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, 27 J. ENERGY & NAT. RESOURCES L. 404 (2009); János Katona, *The Role of EU Law in 'Intra EU' ISDS Under the ECT: Some Thoughts on the Electrabel v. Hungary Award*, 1 ELTE L.J. 57 (2015); Jan Kleinheisterkamp, *Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*, 15 J. INT'L. ECON. L. 85 (2012); Rafael Leal-Arcas & Andrew Filis, *The Energy Community and the Energy Charter Treaty: Special Legal Regimes, Their Systemic Relationship to the EU, and Their Dispute Settlement Arrangements*, 12 OIL, GAS & ENERGY L. INTELLIGENCE 1 (2014).

235. *Constituency of the Energy Charter Conference*, INT'L ENERGY CHARTER, http://www.energycharter.org/who-we-are/members-observers/ (last accessed March 23, 2017).

236. Pursuant to art. 1(3) of the Energy Charter Treaty, "'Regional Economic Integration Organisation' means an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters." THE INTERNATIONAL ENERGY CHARTER CONSOLIDATED ENERGY CHARTER TREATY, ENERGY CHARTER SECRETARIAT 39 (Jan. 15, 2016).

that proceeding pertains to issues for which it bears competence.[237] In *Electrabel S.A. v. Hungary*, the EC, in its written submission, stated "that, whilst the Tribunal had invited it to express views as an expert commentator on European Community law, the [EC] was presenting its Submission as the external representative of the European Communities as a Contracting Party to the Energy Charter Treaty."[238] This competence has also been an important element for the EC to request a leave to intervene as a non-disputing party in *AES v. Hungary*.[239] "The fact that the status of the EC as an [Regional Economic Integration Organization] has been explicitly recognized by the [Energy Charter Treaty] is an additional element not usually present in arbitrations based on a BIT."[240]

The Energy Charter Treaty and European and national legislation each establish different regulatory layers governing energy markets. Although those layers are in principle complementary, different rules may cause inconsistencies.[241] The EC has long maintained the position that the Energy Charter Treaty does not apply to intra-European Union disputes. In *Electrabel S.A. v. Hungary*, the EC submitted that European Union law prevailed over the Energy Charter Treaty.[242] In *Charanne v. Spain*, Spain argued that

> intra-European investment relations are subject to the specific regulatory framework of the [European Union], which thoroughly deals with all matters governed by investment treaties, including those covered by the [Energy Charter Treaty]. Therefore, the [Charter] is not applicable to investments made within the [European Union] by nationals of EU Member States.[243]

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237. Council and Commission Decision (EC) No. 98/181 of 23 Sept. 1997, art. 2, 1998 O.J. (L 69/1) 1, 2.

238. Electrabel v. Hung. (Belg. v. Hung.), ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 5.5.

239. AES v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 8.2.

240. Hoffmeister, *supra* note 187, at 92.

241. Bonafé & Mete, *supra* note 234, at 3.

242. Electrabel v. Hung. (Belg. v. Hung.), ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 4.109.

243. Charanne v. Spain, Final Award 062/2012, ¶ 208 (Arb. Ct. of Madrid 2016).

In the post-hearing phase, Spain argued once again that the Energy Charter Treaty contains a sort of 'implicit disconnection clause' concerning intra-European Union BITs.[244]

Thus far the EC has been allowed to intervene in several investment arbitrations as amicus curiae. This enabled to EC to inform the arbitral tribunal about the contents and scope of the European Union Law provisions related to those disputes. The intervention of the EC in the proceedings may, naturally, raise the technical complexity of the proceedings due to the possible collision between the provisions of investment treaties and of European Union laws.[245] "The evolving role of the [EC] in energy-related investor-state arbitrations" has been said to be

> part of a larger series of ongoing "thematic dialogues" . . . between public international law and European Union [] Law. Whether [European Union] law is just a component of public international law . . . or whether it constitutes an autonomous legal order . . . remains a debated issue.[246]

The relationship between bilateral investment treaties and European Union law is extremely complex, having been the subject of a copious amount of literature.[247] The cases discussed above illustrate how the

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244. *Id.* ¶ 223.

245. Knahr, *supra* note 123, at 320.

246. Vadi, *supra* note 139, at 1337.

247. *See* Cornel Marian, *The European Union Investment Arbitration Regime and Local Governments: The Need for a Synchronization of Efforts*, *in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 361 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2014); Marek Wierzbowski & Aleksander Gubrynowicz, *Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 544, (Christina Binder et al. eds., 2009); Christoph G. Benedict, *The Multilateralization of Investment Protection Under the Lisbon Treaty: Fears and Hopes of Investors*, 24 ICSID REV. 446 (2009); George A. Bermann, *Navigating EU Law and the Law of International Arbitration*, 28 ARBITRATION INTERNATIONAL 397 (2012); Jan A. Bischoff, *Just a Little Bit of "Mixity"? The EU's Role in the Field of International Investment Protection Law*, 48 COMMON MKT. L. REV. 1527 (2011); Markus Burgstaller, *Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems*, 15 J. WORLD INV. & TRADE 551 (2014); Markus Burgstaller, *Investor-State Arbitration in EU International Investment Agreements with Third States*, 39 LEGAL ISSUES ECON. INTEGRATION 207 (2012); Angelos Dimopoulos, *The Involvement of the EU in Investor-State Dispute Settlement: A Question*

increasing interaction between international investment law and European Union law raises complex and unresolved legal issues.

> These arbitrations . . . raise the important question, among many others, of how [European Union] law has to be taken into account when interpreting the rights and obligations flowing from [international investment] agreements. It is therefore very useful that the [European Union], represented by the [EC], was granted leave to intervene in [most of these] cases.[248]

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of Responsibilities, 51 COMMON MKT. L. REV. 1671 (2014); Angelos Dimopoulos, *The Validity and Applicability of International Investment Agreements Between EU Member States Under EU and International Law*, 48 COMMON MKT. L. REV. 63 (2011); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MKT. L. REV. 383 (2009); Ahmad A. Ghouri, *Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options*, 16 EUR. L.J. 806 (2010); Steffen Hindelang, *Member State BITs – There's Still (Some) Life in the Old Dog Yet. Incompatibility of Existing Member State BITs with EU Law and Possible Remedies – A Position Paper*, *in* 2010-2011 Y.B. INT'L INV. L. & POL'Y 217 (Karl Sauvant ed., 2012); Tamás Kende, *Arbitral Awards Classified as State Aid Under European Union Law*, 1 ELITE L.J. 37 (2015); Ursula Kriebaum, The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective, 1 ELITE L.J. 27 (2015); Nikos Lavranos, *Member States' Bilateral Investment Treaties (BITs): Lost in Transition?*, 24 HAGUE YEARBOOK INT. L. 281 (Nikos Lavranos et al. eds., 2011); Hannes Lenk, *Challenging the Notion of Coherence in EU Foreign Investment Policy*, 8 EUR. J. LEGAL STUD. 6 (2015); Ana M. López-Rodríguez & Pilar Navarro, *Investment Arbitration and EU Law in the Aftermath of Renewable Energy Cuts in Spain*, 25 EUR. ENERGY & ENVTL. L. REV. 2 (2016); Smaranda Miron, *The Last Bite of the BITs – Supremacy of EU Law Versus Investment Treaty Arbitration*, 20 EUR. L.J. 332 (2014); Ortolani, *supra* note 140; Luca Pantaleo, *Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment*, 19 EUR. FOREIGN AFF. REV. 307 (2014); Anca Radu, *Foreign Investors in the EU: Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law*, 14 EUR. L.J. 237 (2008); August Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 39 LEGAL ISSUES ECON. INTEGRATION 157 (2012); Davide Rovetta & Maurizio Gambardella, *Intra-EU BITs and EU Law: What to Learn from the Micula Battle*, 10 GLOBAL TRADE & CUSTOMS J. 194 (2015); Christer Söderlund, Intra-EU BIT Investment Protection and the EC Treaty, 24 J. INTL. ARB. 455 (2007); Konstanze von Papp, *Solving Conflicts with International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited*, 42 LEGAL ISSUES ECON. INTEGRATION 325 (2015).

248. Wölker, *supra* note 82, at 437.

Pursuant to the ICSID Arbitration Rules, amici curiae are expected to "assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[249] In the cases under discussion, the EC played an especially useful role not only by clarifying the scope and contents of European Union Law, but also by ensuring that the tribunal's interpretation of the relevant investment treaty was in accordance with respondent state's obligations under European Union law.[250] According to Schill, investment tribunals should adopt a comparative law approach encompassing both domestic and international public law, [251] with the latter being defined to include human rights, trade law, and European Union law. The participation of the EC may be useful to achieve a holistic interpretation and application of international law, especially taking into account that, pursuant to Article 3(5) of the Treaty on the European Union, the European Union shall contribute to "the strict observance and the development of international law."[252]

In the amicus curiae brief submitted to the United States Court of Appeals in the aftermath of *Micula v. Romania*, the EC claimed that its "sovereign interest is to ensure that the U.S. courts, in accordance with the settled rules of international comity, avoid unnecessary interference with the enforcement and efficacy of the E.U. legal order."[253] The EC presented itself as the "guardian" of the European Union treaties, and claimed to have a "compelling interest" in the appeal,[254] namely, that it had a "strong interest in ensuring that the propriety of its decisions be reviewed by the European Union's highest court, and that other countries' courts defer to these proceedings in the interests of comity."[255] The EC added:

249. ICSID Convention Arbitration Rules, *supra* note 19, Rule 37(2)(a).

250. Cross & Schliemann-Radbruch, *supra* note 91, at 69.

251. Schill, *supra* note 105, at 3–4.

252. Consolidated Version of the Treaty on European Union art. 3, Oct. 26, 2012 O.J. (C 326/15).

253. Brief for Gov't of Romania as Amicus Curiae Supporting Defendant-Appellant, Micula v. Rom., No. 15-3109-CV, 6 (S.D.N.Y.).

254. *Id.* at 7–8.

255. *Id.* at 11.

> As the "guardian" of the E.U. Treaties, and as an active participant in a variety of legal proceedings concerning the legality of the Award under E.U. law, the Commission is well placed to offer a unique perspective on the important implications of E.U. law and international comity to this appeal. The Commission has previously filed *amici* briefs before the U.S. Supreme Court and this Court where the European Union's vital interests were implicated, as they are in this case.[256]

The EC wishes to intervene in proceedings in order to make sure that European Union Law is enforced, but also to present its views on how possible conflicts between the rules and principles of European Law and those of international investment law should be solved. Investment tribunals seem to acknowledge the special interest pursued by the EC. In *Electrabel S.A. v. Hungary* the tribunal noted that the EC "is an expert commentator on European [Union] law and could accordingly assist the Tribunal by addressing several legal issues."[257] In the opinion of the tribunal, the EC had "much more than 'a significant interest'" in the case, which was distinct from the positions of the parties.[258] However, the tribunal also noted that

> the scope of [the EC's] legal opinion should in principle be directed to addressing the following issues: (a) European Community Law and its connection with the Energy Charter Treaty; (b) Community Law and the State Aid investigation concerning the Power Purchase Agreements signed by Hungary; and (c) the Effect of Community Decisions on the European Union's Members States, particularly Hungary. As to purely factual questions, the Tribunal notes that, in principle, the European Commission is unlikely to assist the tribunal.[259]

The Tribunal in *Micula v. Romania* stated that it was "particularly sensitive to the fact that the European Community may bring a factual or legal perspective that could assist the Tribunal in the adjudication of the

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256. *Id.* at 11–12.

257. Electrabel v. Hung. (Belg. v. Hung.), ICSID Case No. ARB/07/19, Procedural Order No. 4, ¶ 24.

258. Electrabel v. Hung., ICSID Case No. ARB/07/19, Award, ¶ 4.92 (Nov. 25, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf.

259. Electrabel v. Hung., ICSID Case No. ARB/07/19, Procedural Order No. 4, ¶¶ 24–25.

Parties' rights,"[260] "specifying that the purpose of such participation would be to assist the Tribunal in its adjudicatory work."[261] The tribunal also specified that the

> [EC]'s written submission shall not respond or comment upon the Parties' prayers for relief, but shall be focused on assisting the Tribunal in the determination of factual or legal issues at stake in the present dispute. It is expected that the scope of the Community's input will be limited to facts within its own knowledge and to European law rather than to any other facts or legal matters at issue in this arbitration. The Community may within this scope decide which facts and laws are relevant to the dispute.[262]

On its request to intervene as a non-disputing party in the annulment proceedings that ensued, the EC argued that it was able to do so under Rules 37(2) and 53 of the ICSID Arbitration Rules (2006).[263]

> The EC also stated that Article 23(a)(2) of Council Regulation (EC) No. 659/1999 [of March 22, 1999,[264]] which is applicable to all EU Member States, supports its claim that it has a significant interest in arbitration proceedings in which [European Union] state aid rules may be discussed. As a guardian of the treaties relating to investment protection within the [European Union], and as it has a central role in the interpretation and application of the rules on State aid under the [Treaty on the Functioning of the European Union], the EC claimed that it had a particular interest in the annulment proceedings and could assist the Committee in the determination of a factual or legal issue related to the proceeding by bringing perspective, particular knowledge and/or insight that differs from that of the disputing parties. In addition, the EC noted that it had been allowed to participate as a non-disputing Party in the Original Proceeding.[265]

The investors

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260. Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 27.
261. *Id.* ¶ 36.
262. *Id.* ¶ 36(2).
263. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 54.
264. Council Regulation 659/1999, art. 23, 1999 O.J. (L 83) (EU).
265. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 54.

> contended that the Committee did not have the power to allow the EC to intervene in the proceedings under the applicable 2003 Arbitration Rules, as these do not provide for non-disputing party participation. Furthermore, according to the Claimants, there ha[d] never been a successful application for intervention by a non-disputing party in an annulment proceeding.[266]

The claimants quoted the case *Iberdrola v. Guatemala*, where

> the committee had rejected a similar application because of the "narrow nature of annulment proceedings." The Claimants argued that, in any event, the Application must be denied because it [did] not meet the requirements. The circumstances in the annulment proceeding [were] very different from those in the Original Proceeding in which the Tribunal allowed the EC to participate . . . the EC [could not] re-argue issues which [had] already been decided by the Tribunal and which [were] irrelevant for the purposes of the annulment.[267]

From the claimants' perspective, the EC did not "have a significant interest in the proceeding and [could not] provide the Committee with the relevant expertise relating to Article 52(1) of the ICSID Convention."[268]

> Romania argued that the EC's Application [met] the requirements established by the jurisprudence at the time of the application of the 2003 Rules . . . [and] that the Committee would be assisted by the EC's expertise on [European Union] State aid rules and the interaction between [European Union] law and public international law, which [were] matters of the public interest since they impact other [] Member States.[269]

Ultimately, the committee allowed the EC to participate in the annulment proceedings as a non-disputing party.[270] It noted, however,

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266. *Id.* ¶ 56.
267. *Id.* ¶ 56-57.
268. *Id.*
269. *Id.* ¶ 60.
270. *Id.* ¶ 61.

> that due to the limited scope of annulment proceedings, a request for leave by a non-disputing party must be dealt with in a more restrictive and circumscribed manner. However, as long as that limited scope is fully observed, a non-disputing party may be allowed to file an *amicus curiae* submission limited to matters directly related to the grounds for annulment. The Committee accepted the EC's position that it had an interest in acting as a non-disputing Party and found that the EC had satisfactorily established that it had the "expertise, experience and independence to be of assistance" in the annulment proceeding. It also found that an intervention by the EC would not be prejudicial to the Parties or prolong the proceedings, as long as its submission adhered to certain conditions.[271]

With the exceptions of *Iberdrola v. Guatemala*,[272] *Antin v. Spain*,[273] and *Eiser v. Spain*,[274] arbitral tribunals have recognized that the EC has a significant interest in participating in investor-state proceedings where matters of European Union law are potentially implicated. The EC may assist the tribunal in the determination of a legal issue related to the proceedings, namely, elucidating the potential application of European Union Law to the dispute. The nature of the interest pursued by the EC in investment proceedings is, therefore, significantly different from that of traditional amici such as NGOs and civil society organizations. The EC is not acting as an advocate for social concerns, but rather as the guardian of European Union laws. Its main goal is not to promote the transparency or openness of the proceedings to civil society, but instead to assist the tribunal in reaching to a correct decision.

B. *A Political Friend?*

Opening up investor-state arbitration to the participation of non-disputing parties significantly alters the philosophy that traditionally inspired this dispute settlement mechanism and the structure on which it is sustained. Such a weighty process of reform raises diverse concerns, namely as regards its impact on investment arbitration as an orderly and efficient system for the settlement of disputes between foreign investors

271. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 63.
272. Caso CIADI No. ARB/09/5.
273. ICSID Case No. ARB/13/31.
274. ICSID Case No. ARB/13/36.

and host states. Scholars and practitioners have expressed apprehension about several possible negative effects of amicus curiae participation in investment arbitration. The benefits brought about by the introduction of mechanisms for third-party participation need to be weighted against its potential disadvantages.

A concern expressed frequently is that the participation of outsiders in the proceedings may affect the equality of arms between the positions of the claimant and respondent. Amici tend to support only one of the disputing parties.[275] This may force the other side to respond to a disproportionate number of opposing submissions,[276] thus devoting more effort and expense into its representation.[277] Normally amici support the respondent state's position in their submissions,[278] even though in some cases they also intervene to support the claimant.[279] The participation of non-disputing parties may increase the burden on claimants substantially, as they have to review the amicus briefs and attempt to rebut them. As they stand to benefit from amicus intervention, host states may feel tempted to use amici as a tool to put pressure on the investor.[280]

Amicus curiae intervention may disturb the parties' carefully designed procedural strategies. Parties are sometimes unwilling to reveal all the information related to the dispute because they may be subject to political pressure, or they might believe that the disclosure will be

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275. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113(4) PENN ST. L. REV. 1269, 1293 (2009).

276. Charles N. Brower, *The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, 5 BERKELEY J. INT'L L. PUBLICIST 1, 29 (2010).

277. Epaminontas E. Triantafilou, *Is a Connection to the "Public Interest" a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?* 5 BERKELEY J. INT'L L. PUBLICIST 38, 43 (2010).

278. Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, *in* 3 THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 213, 216 (Rainer Hofmann & Christian Tams eds., 2007); Magraw Jr. & Amerasinghe, *supra* note 43, at 355; Thomas W. Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26(1) ARB. INT'L 3, 33 (2010).

279. Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16(2) REV. EUR. COMP. & INT'L ENVTL. L. 230, 240 (2007).

280. Wälde, *supra* note 278, at 33–34.

against their best interests.[281] "Amicus briefs, therefore, can negatively affect the parties' degree of autonomy and control over their arbitration."[282] In investment treaty arbitration, as international commercial arbitration, tribunals rely primarily on the arguments of the parties.[283] The acceptance of amicus curiae submissions introduces a change to this structure. As an independent third party, an amicus will, and is supposed to, make arguments from its own perspective. Indeed, in the WTO context, it is argued that "for many private actors seeking to participate in a WTO dispute, the primary purpose is to present factual information or express an argument left ignored by governments."[284] If such arguments of amici affect the tribunals' decision on substantive issues, it may surprise the disputing parties. "Such a consequence not only is an interference with the parties' strategy to win, but also brings a substantial change to the arbitration system designed by the parties."[285]

In extreme situations, the opening up of proceedings to outsiders may even harden the parties' positions, exacerbating disputes and making the peaceful settlement of disputes more difficult.[286] This may result in the case being decided also by the "court" of public opinion, re-politicizing the dispute and thus "undermin[ing] one of the main policy objectives behind investor-state arbitration, namely the de-politicization of [investment] disputes."[287] Turning a legal dispute into a political quarrel disturbs the normality of proceedings, reduces the chances of settlement between parties, and may even reduce investor confidence in the system, having a chilling effect on foreign investment.[288]

The exact role that amici curiae should play, and whether it should be characterized by impartiality, is a controversial issue. It is axiomatic that amici should have an interest in the dispute—but should they be

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281. Ishikawa, *supra* note 110, at 393.

282. Gómez, *supra* note 73, at 550–51.

283. LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 310 (2d ed. 2010).

284. James Durling & David Hardin, *Amicus Curiae Participation in WTO Dispute Settlement: Reflections on the Past Decade*, *in* KEY ISSUES IN WTO DISPUTE SETTLEMENT 229 (Rufus Yerxa & Bruce Wilson eds., 2005).

285. Ishikawa, *supra* note 110, at 393.

286. Rubins, *supra* note 278, at 218.

287. Triantafilou, *supra* note 277; Bastin, *supra* note 90, at 140-41; *see* Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1, 5 (1986).

288. Levine, *supra* note 92, at 220.

independent from the dispute? Should they only be a friend of the tribunal, or can they also be a friend of one of the parties? According to the Principles of Transnational Civil Procedure, amici can be a disinterested source or a partisan one.[289] Taking into account that most amici are NGOs and special interest groups, it is unrealistic to expect that they will not openly endorse the position of one of the parties.[290] While amici are not expected to be indifferent to the dispute, or even take the side of one of the parties, they should not be the duplicate of a party, or directly connected to it.[291] If clearly biased and partisan entities are authorized to take part in arbitral proceedings, this opens the door to the re-politicization of investment disputes, potentially disrupting the arbitral proceedings.[292]

The approach of arbitral tribunals to this question is not uniform. NAFTA tribunals appear to have accepted that amici can be biased towards one of the parties. The tribunal in *Methanex Corp. v. United States* held that "*Amici* are not experts; such third persons are advocates (in the non-pejorative sense) and not 'independent' in that they advance a particular case to a tribunal."[293] Arbitral tribunals operating under the ICSID Arbitration Rules, however, seem to view amici under a different light. In the *Suez/Vivendi v. Argentina* case, the tribunal defined the role of amici in the following terms:

> The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.[294]

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289. UNIDROIT, *supra* note 2, § 13 cmt. P-13A.

290. Blackaby & Richard, *supra* note 106, at 273.

291. Crema, *supra* note 2, at 114.

292. Rubins, *supra* note 278, at 217–19; Triantafilou, *supra* note 27, at 576–77; Blackaby & Richard, *supra* note 106, at 273.

293. Methanex Corp. v. USA, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," ¶ 38.

294. Aguas Argentinas, S.A. v. The Argentine Republic, ICSID Case. No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as

The same tribunal later held "that the role of an *amicus curiae* is not to challenge arguments or evidence put forward by the Parties. This is the Parties' role."[295] The tribunal in *Biwater v. Tanzania* stated that amicus are

> not expected . . . [to] consider themselves as simply in the same position as either party's lawyers, or . . . see their role as suggesting to the Arbitral Tribunal how issues of fact or law as presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself).[296]

It is clear that amici should not confuse their role with that of disputing parties.[297] However, it is difficult to determine with rigor the precise contours of the role of amicus curiae in investment arbitration. Investment treaties and arbitral rules focus on the existence of a relevant interest as a necessary condition for third parties to intervene in the proceedings, but are silent on whether they should remain strictly independent from parties' positions. On occasion amici may remain appropriately independent from the parties' positions, but still find themselves in agreement with one of the parties' arguments. "An *amicus curiae* should not be expected to be independent in the same way as an expert or a witness because . . . [it] has a purported interest in the outcome of the dispute."[298] However, it should "be expected to put forward [its] point of view in a way which is independent from the parties' procedural strategies."[299]

The intervention of a political actor, such as the EC, adds specific difficulties to this issue. The EC is the European Union's politically

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Amicus Curiae, ¶ 13 (May 19, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0815.pdf.

295. Suez/Vivendi v. Argentina, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 25.

296. Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 64, (Feb. 2, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf [hereinafter Biwater Gauff v. Tanzania].

297. UNIDROIT, *supra* note 2, cmt. P-13B ("An amicus curiae does not become a party to the case but is merely an active commentator.").

298. Mourre, *supra* note 76, at 269.

299. *Id.*

independent executive arm.[300] Its participation in the proceedings raises questions about the influence that a highly influential political institution should exercise on investment tribunals. Knahr rightfully asks: "Is this a positive development or does increased participation of potent non-disputing parties cause more harm to the system of investment arbitration than it creates benefits?"[301] In this case the third party has a purpose and structure that is totally different from a civil society group or NGOs. Investors may argue that its intervention creates an imbalance between the parties as the non-disputing party might support the arguments of the host state, increasing the risk of politicization of the dispute. Especially when the EC submits arguments supporting one side's position over the other, tribunals may be wary of any prejudice introduced by amicus participation. Arbitral panels may also feel inclined to attach greater importance to amicus briefs submitted by an institution that, like the responding state, has a political nature. The question is whether political influence should be accounted for in an arbitral proceeding, and whether this influence creates an additional risk of politicization of investment disputes to the detriment of party equality.[302]

Arbitral tribunals seem to be aware of the need to ensure that the intervention of the EC does not disturb the balance between the parties, nor the efficiency of the dispute resolution mechanism. In *Micula v. Romania* the tribunal started by stating:

> In granting leave to the European Community to participate as a non-disputing party, the Arbitral Tribunal is mindful of the need to preserve due process and the good order of the proceeding. In particular, the European Community shall act as *amicus curiae* and not as *amicus actoris vel rei*. In other words, the non-disputing party shall remain a friend of the court and not a friend of either Party.[303]

Later, during annulment proceedings, the investors opposed the EC's participation, arguing that it "would cause them unfair prejudice because it would prolong the proceedings and enable the EC to pursue a policy

300. JOHN MCCORMICK & JONATHAN OLSEN, The EUROPEAN UNION 157 (5th ed. 2013).

301. Knahr, *supra* note 123, at 320.

302. *See Id.* at 335–36.

303. Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 27.

objective aligned with that of the Applicant, in effect acting as an advocate for Romania."[304] "Romania [responded] that tribunals have consistently allowed the EC to participate in investment arbitration cases and that it [was] not aware of any cases in which the EC was not permitted to participate as a non-disputing party due to perceived lack of independence in relation to the parties."[305] The annulment committee decided to allow the EC to participate in the proceedings.[306] Probably fearing renewed accusations of lack of independence, in the amicus curiae brief submitted to the Second Circuit of the United States Court of Appeals the EC stated that "no party or person other than the *amicus* and its counsel made a monetary contribution for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party. All parties have consented to the filing of this amicus brief."[307]

In *Achmea v. Slovak Republic* the respondent state complained that there had been an *ex parte* communication between the investor and the EC.[308] The investor submitted a copy of the communication to the respondent and the tribunal, and the Slovak Republic presented its reply.[309] A few days later, the tribunal rejected a request by the Slovak Republic "to allow disclosure of the EC's observations in [that] arbitration to an arbitral tribunal constituted in another arbitration involving the Slovak Republic under the same BIT."[310]

The EC is presumably willing to co-operate with states to help them construct their arguments.[311] In disputes arising from BITs between member states and third countries, article 13 of Regulation (EU) No.

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304. Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 58.

305. *Id.* ¶ 60.

306. *Id.* ¶ 61.

307. Brief for *Amicus Curiae* The Commission of the European Union in Support of Defendant-Appellant, at 6, n. 1, Micula v. Rom., (2nd Cir. 2016) (No. 15-3109-cv), 2016 WL 2851793, http://www.italaw.com/sites/default/files/case-documents/italaw7096.pdf.

308. Achmea v. Slovak, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 39.

309. *Id.*

310. *Id.* ¶ 61.

311. Andrea K. Bjorklund, *The Participation of Sub-national Government Units as* Amici Curiae *in International Investment Disputes*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 298, 312 (Chester Brown & Kate Miles eds., 2011).

1219/2012 requires member states to cooperate fully with the EC and take all necessary measures to ensure an effective defense which may include, where appropriate, the participation in the procedure by the EC.[312] Article 10 of Regulation (EU) No. 912/2014 requires that the member state provide the EC in a timely manner with relevant documents relating to the proceeding, inform the EC in a timely manner of all significant procedural steps, and permit representatives of the EC, at its request and its own expense, to form part of the delegation representing the member state.[313] The former regulation appears to be directed at the participation of the EC in the proceedings as amicus curiae, because for now there is no legal ground for another type of intervention.[314] It is possible that this regime was intended to create a right for the EC to participate in the proceedings. At the same time, it would not normally be possible for the EU to be a party to the proceedings as the arbitration would take place under a member state BIT.[315] Some commentators therefore note that it could only mean that the EC would participate as amicus curiae.[316]

However, while the EC appears to be interested in having a close involvement in most arbitral proceedings, such involvement might not always be possible. It is not entirely clear how the abovementioned provision should be interpreted or what practical effects they might have. "While the [EC] may put pressure on the member states to allow [its] intervention, it would appear that little more can be done, and this question will have to be decided by tribunals on a case-by-case basis."[317]

A further issue relates to the sharing of information in arbitral proceedings. Most arbitral rules and investment treaties still establish the confidential nature of the arbitral record.[318] The fulfillment of the duty of cooperation between the member state and the EC would necessarily involve the communication of a number of documents and information

312. *See supra* Sec. II.

313. *Id.*

314. Claudia Reith, *Investor-State Arbitration: A Tale of Endless Obstacles?*, *in* FLEXIBILITY IN MODERN BUSINESS LAW: A COMPARATIVE ASSESSMENT 123, 142 (Mark Fenwick & Stefan Wrbka eds., 2016).

315. Kleinheisterkamp, *supra* note 82, at 220.

316. *Id.* at 221.

317. Kendra & Kozyreff, *supra* note 82, at 256.

318. *See, e.g.*, ICSID Convention Arbitration Rules, *supra* note 19, Ch. II, Rule 15(1).

relating to the arbitration proceedings. Article 14 of Regulation (EU) No. 1219/2012[319] provides that the member states may indicate which documents or information are confidential and should not be communicated to the other member states.

> However, this single provision on confidentiality does not deal with the question of the communication of information to the [EC] itself, as where the proceedings are confidential the member state would technically be barred from communicating such documents or information to the [EC]. It is uncertain what this provision will entail for the parties. It is not entirely clear whether it is possible for the regulation to allow the [EC] to participate in the arbitration or to be kept informed of the proceedings.[320]

> [M]ember states could do little more than to seek the investor's agreement or, where the rules so provide, to support the [EC]'s petition to the tribunal to allow the [EC] to submit observations in writing and to attend hearings. The latter can be prevented by the investor by simply objecting to such a petition; the tribunal then has no powers to admit the [EC] under [Rule 32(2) of] the ICSID Rules. The former can be granted by the tribunal on a discretionary basis [pursuant to Rule 37(2)]. . . . [According to Rule 39(1),[321] t]he tribunal also has discretion as to whether to order the confidentiality of arbitral proceedings, as well as of the documents produced therein. . . . A breach of the obligation of confidentiality could have serious repercussions for the procedural position of the member state.[322]

In those cases where the EC is allowed to intervene as amicus curiae, as illustrated by the *Micula* case,[323] arbitral panels will scrutinize the parties' behavior closely in order to ensure that the amicus does not become a friend of one of the parties (namely, the respondent state)

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319. *See supra* Sec II.

320. Kendra & Kozyreff, *supra* note 82, at 256.

321. ICSID Convention Arbitration Rules, *supra* note 19, Ch. V, Rule 39(1).

322. Kleinheisterkamp, *supra* note 82, at 220.

323. Micula v. Rom., ICSID Case No. ARB/05/20; *see e.g.* Electrabel v. Hung., ICSID Case No. ARB/07/19; AES v. Hung., ICSID Case No. ARB/07/22; Achmea v. Slovak, PCA Case No. 2008-13; European American Inv. Bank v. Slovak, PCA Case No. 2010-17; U.S. Steel v. Slovak, PCA Case No. 2013-6; Iberdrola v. Guat., ICSID Case No. ARB/09/5; Charanne v. Spain, Case No. 062/2012 (Arb. Ct. of Madrid 2016).

instead of a friend of the tribunal. Arbitrators are used to monitoring the behavior of disputing parties and enforcing the applicable rules when they abuse the rights granted to them. They should do the same regarding the EC, making sure that it does not use the amicus curiae mechanism in a way which compromises or undermines the procedural integrity and legitimacy of investor-state arbitration.

By granting an opportunity for a political actor to access the dispute resolution process, the amici curiae mechanism naturally entails a risk that the discussion will become politicized. However, this risk should not be over emphasized. First, it exists even if third-parties are not allowed to intervene in the proceedings. Some information about the dispute is likely to reach the public domain whether investment arbitration is open to amici or not,[324] potentially causing strong public reactions.[325] Moreover, if third parties are prevented from having access to the proceedings, the overall community may perceive investor-state arbitration as secret and suspicious. The lack of access to the factual and legal issues under discussion may ignite debates of a political nature that could be avoided or at least mitigated by providing the overall community with a clear picture of the contours of the dispute. If the public has access to more accurate and balanced information, the opportunity for political campaigns against either the respondent state or the claimant is reduced.[326] Second, the disputing parties are always given the possibility to respond to the amicus curiae briefs submitted.[327] They may draw the attention of the tribunal to situations that have the potential to undermine the independence of the amicus or affect the integrity of the proceedings. Third, it should be expected that arbitrators will be able to identify situations where amici are moving the discussion from the legal or factual level to a political dimension, and that they will exercise their powers, restraining the discussion to the issues in dispute.[328]

Bastin argues that the participation of the EC has, thus far, been neutral, truly focusing on elucidating a legal issue for the tribunal rather than supporting a claimant's endeavors or a state's position.[329] The EC

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324. Tienhaara, *supra* note 279, at 240.
325. Ishikawa, *supra* note 110, at 399.
326. Tienhaara, *supra* note 279, at 240.
327. Ishikawa, *supra* note 110, at 398.
328. Magraw Jr. & Amerasinghe, *supra* note 43, at 355.
329. Bastin, *supra* note 90, at 136.

has been using the amicus curiae mechanism to clarify issues relating to European Union law and the interpretation of the applicable investment treaty. While the resolution of these issues undoubtedly had consequences for the parties in each arbitration, the purpose of the amici curiae participation was not to advocate for an interest that they shared with one of the parties, but rather only to articulate a legal position.[330] As more information becomes available on other cases where the EC is intervening, it will be possible to have a clearer picture of how arbitral tribunals are minimizing the risk of politicization of the dispute and ensuring the integrity of the dispute settlement mechanism.

C. *Breadth of Participatory Rights*

When arbitral tribunals decide to allow the intervention of the EC as amicus curiae according to the applicable rules (namely, in ICSID arbitrations, Rule 37(2) of the ICSID Arbitration Rules[331]), it is necessary to determine the range of participatory rights of the EC. Amici curiae normally request permission from the tribunal to submit briefs; however, sometimes amici also seek authorization to consult the disputing parties' "documents, attend the hearings, make oral submissions, and[] respond to questions from the tribunal."[332]

In *Electrabel S.A. v. Hungary* the EC requested that it receive copies of the parties' submission filed to that date in order to properly prepare its submission.[333] The tribunal noted

> a particular difficulty arises on the issue whether the Parties should be ordered to disclose their memorials to the European Commission for the purpose of assisting the Commission to prepare its submission to the Tribunal. The resolution of this difficulty is not made easier given that (as it appears) no tribunal has yet ordered any party to disclose its written submission in like circumstances to an *amicus*, without the parties' consent.[334]

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330. *Id.*
331. ICSID Convention Arbitration Rules, *supra* note 19, Ch. IV, Rule 37.
332. Bastin, *supra* note 93, at 212.
333. Electrabel v. Hung., ICSID Case No. ARB/07/19, Procedural Order No. 4, ¶ 2.
334. *Id.* ¶ 28.

Nonetheless, the tribunal stated that it was is mindful that the EC's "significant" interest as an amicus in the proceedings was

> not limited to pure legal questions but may extend to hybrid issues (i.e., issues of mixed fact and law) and that, in order properly to address the latter, the Commission may need access, in material part, to the substance of the Parties' memorials in this case. The Tribunal is concerned that, without such access, the European Commission would be restricted to what could be regarded as a pure legal moot of academic interest only and thus deprive it of any effective role as an amicus in this case under ICSID Arbitration Rule 37(2).[335]

Taking into account all these factors, the tribunal decided to invite the parties to "consider the most appropriate method of providing such access to the [EC]," proposing two different methods.[336] Eventually the parties provided to the EC with redacted versions of the memorial, the amended memorial and the counter-memorial for the preparation of the EC's submission.[337]

In *AES v. Hungary* the EC also petitioned for access to the parties' written submissions, but it was refused due to lack of consent by both parties.[338] In *Micula v. Romania* the EC was granted access to the parties' pleadings, except for confidential or legally privileged documents.[339] The tribunal also invited the representatives of the EC who had drafted the EC's amicus brief to provide clarifications on that submission at the hearing.[340] In the annulment proceedings the EC also requested to be granted access to documents filed in the annulment proceeding and to provide oral testimony at hearings.[341] The annulment committee decided that

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335. *Id.* ¶ 29.
336. *Id.* ¶ 30.
337. Electrabel v. Hung., ICSID Case No. ARB/07/19, Award, ¶ 5.6.
338. *Id.* ¶ 3.22.
339. Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶36(6).
340. *Id.* ¶¶ 73, 78, 80.
341. Micula v. Rom., ICSID Case No. ARB/05/20, Annulment Proceeding, ¶53 (Feb. 26, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw7161.pdf.

> the EC would not be granted access to the documents filed by the Parties in the annulment proceeding; and [that] the EC would not be permitted to attend the hearings as the Claimants had opposed such attendance. The committee stated that the EC's role in the annulment proceeding was different than in the Original Proceeding, and was limited to its knowledge and perspective directly related to the grounds for annulment.[342]

In *Achmea v. Slovak Republic* the EC requested copies of the investor's claims.[343] The Tribunal compromised, providing the EC with only the Notice of Arbitration and Statement of Claim. [344] The Parties further provided the EC and the government of the Netherlands with a copy of the Award on Jurisdiction, Arbitrability and Suspension.[345] In *European American Investment Bank v. Slovak Republic* the parties agreed to provide excerpts of their written submissions to the amicus curiae.[346] The tribunal provided the amici curiae with several alternative translations of the relevant treaty, in addition to the redacted submissions the parties had consented to disclose.[347] Finally, in *Charanne v. Spain* the tribunal relied on article 46 of the Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce when it denied the EC access to the case files and participation in the hearings, due to the confidentiality of the arbitration.[348]

The access by non-disputing parties to arbitration documents and hearings is still handled rather restrictively under the ICSID Arbitration Rules. While Rule 37(2) of the ICSID Rules empowers tribunals to grant third parties amicus curiae status, it does not regulate the access to documents.[349] As a result, amici's access to key arbitral documents is

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342. *Id.* ¶ 63.

343. Achmea v. Slovak, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 33.

344. *Id.*

345. Achmea v. Slovak, PCA Case No. 2008-13, Final Award, ¶ 27 (Dec. 7, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf.

346. European American Inv. Bank v. Slovak, PCA Case No. 2010-17, Award on Jurisdiction, ¶ 23.

347. *Id.* ¶ 25.

348. Charanne v. Spain, SCC ARB No. 062/2012, Final Award, ¶¶ 56–57 (Jan. 21, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf (Mena Chambers trans.).

349. ICSID Convention Arbitration Rules, *supra* note 19, Ch. IV, Rule 37.

normally dependent upon the parties' consent. Furthermore, the tribunal may deny access by arguing that documents are already publicly available or are privileged. Even if a tribunal decides to grant access to documents, it may still place conditions on the use of that information, for instance, banning any public disclosure.[350] The access of non-disputing parties to hearings is also problematic. Rule 32(2) stipulates that the tribunal can allow non-parties to attend the arbitration hearings unless either party objects.[351] Proposals for the inclusion of an expanded right of non-disputing parties to attend hearings failed to reach the required majority during the discussions that led to the 2006 amendments.[352]

As demonstrated, in some cases the EC has been denied access to key arbitral documents, namely the parties' submissions. In some proceedings they were also prevented from voicing their opinion in hearings. This is consistent with previous practice by ICSID tribunals, where the participation rights of third parties remain extremely limited.[353] However, some authors question whether such restrictions should be applied when the amicus curiae is the EC.[354] The participation by the EC in investment arbitrations implicates the issue of whether institutional rules and tribunals need to expressly take into account the nature, significance, and directness of its claimed interest in a dispute when deciding upon rights of intervention.[355]

Since existing restrictions were designed essentially having in mind submissions by NGOs, it is debatable whether they should apply to amici with a significant, direct, and legally protectable interests in the outcome of the dispute.[356]

> The contrast between NGO participation and that of third parties such as the [EC] raises a crucial issue regarding the need for investment tribunals to recognize that certain third parties may have more

350. Leon Trakman, *The ICSID and Investor-State Arbitration*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 253, 283 (Leon Trakman & Nicola Ranieri eds., 2013).

351. ICSID Convention Arbitration Rules, *supra* note 19, Ch. IV, Rule 37.

352. Asteriti & Tams, *supra* note 14, at 794.

353. Levine, *supra* note 92, at 214.

354. *Id.* (citing Triantifilou, *supra* note 92).

355. *Id.* at 215.

356. Triantafilou, *supra* note 92.

> significant legal interests in the outcome of the dispute, and as such, may merit broader participation rights.[357]

Since the EC "has a particular mandate to ensure that [European Union] law is interpreted consistently in all forums," it seems justified to give "greater weight to its submissions" than those of NGOs in investment arbitrations.[358] A relaxation of the current restrictions on amicus participation in the case of legally interested third parties would not only serve better the interests of those parties. "Tribunals may also be able to achieve more comprehensive resolutions of the disputes before them, with greater likelihood of enforcement of the resulting award."[359]

As mentioned previously, one of the strongest arguments in favor of third party participation in investment arbitration is that it can help to improve the legal quality of the award and to assist in the systemic development of international investment law as a whole.[360] This is, without doubt, the strongest reason to allow the intervention of the EC in investment proceedings, in its capacity as an expert in European Union Law. The EC presents itself in a role different from that of NGOs, according "itself authority on questions of applicable law, enforceability and jurisdiction."[361] As has also been pointed out, in some cases parties to a proceeding may have a specific vested interest in not disclosing all the facts pertinent to the issues in dispute.[362] Commenting on the *AES v. Hungary* case, scholars have argued that it is possible that "neither Hungary nor the investor would have an interest in emphasizing the fact that the contracts between them may violate the EC's restrictions on State aid."[363] As a result, the EC's "involvement [can] potentially highlight relevant legal issues that may not otherwise have prominence."[364] Amicus curiae may also have a role to play in unearthing cases of bribery or corruption.[365]

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357. Levine, *supra* note 92, at 214–15.
358. *Id.* at 215.
359. Triantafilou, *supra* note 92.
360. *See supra* Sec. I.
361. Cross & Schliemann-Radbruch, *supra* note 91, at 99.
362. *See supra* Sec. I.
363. Levine, *supra* note 92, at 217; Triantafilou, *supra* note 92.
364. Levine, *supra* note 92, at 217.
365. *Id.* at 217–18.

Moreover, it has been argued that participation by representatives of supranational regimes, such as the EC, can assist in preventing the fragmentation of international law.[366] "A lack of coordination at the international level may lead to national authorities increasingly becoming subject to conflicting commands from different supranational systems."[367] The EC can contribute to prevent fragmentation of European Union Law and enforcement in the European territory of awards contrary to European Union public policy.[368]

The participation of third parties in investor-state arbitration proceedings is justified by many reasons.[369] What is more, "decision-makers should consider introducing potentially broader participation rights than merely making written submissions, on the basis that amicus contributions could create substantial benefits for the arbitral proceedings and for the investment arbitration regime in the wider context of international law."[370]

D. *Impact on the Proceedings*

Time and cost-effectiveness are major concerns in any dispute resolution process. One of the advantages of arbitration is that it is, as a rule, faster and cheaper than court proceedings.[371] Parties to investment disputes attach great importance to these factors as most proceedings run several years and entail large costs.[372] With the introduction of mechanisms for third-party participation, investment tribunals must take into account the additional costs generated by the proceedings, including extra time (and thus, money) spent by the tribunal and the parties.[373]

Amicus participation disrupts the ordinary timeline of arbitration and can severely slow down the proceedings. It requires both the parties and the tribunal to expend time reviewing, evaluating, and if necessary

366. *Id.* at 218.
367. *Id.*
368. *Id.*
369. *Id.* at 219.
370. Levine, *supra* note 92, at 219.
371. JULIAN LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 8–9 (2003).
372. Tienhaara, *supra* note 279, at 240.
373. Brower, *supra* note 276, at 28–29.

responding to amicus submissions.[374] First, arbitrators have to determine whether a brief will be accepted at all, then review the submissions once made, and finally analyze whether the contents of the submission are relevant for their decision.[375] Parties may have to comment on applications for amicus curiae status and, if the tribunal accepts them, respond to amicus curiae briefs.[376] This all creates an additional burden on parties, who need to put in the extra effort of addressing facts or legal arguments presented by the amicus,[377] which may disorganize their strategy.[378] This burden can be quite significant for the party opposing the amicus submission.[379] "In order not to jeopardize due process the disputing parties ought to be awarded sufficient time to react to such written submissions, which of course takes time and hence prolongs the process."[380] These delays are multiplied if a third party is given the opportunity to reply to critiques of its opinion raised by the parties.[381] On the other hand, it also needs to be taken into account that the arbitral tribunal is receiving information that can be of high relevance for the resolution of the dispute "at no direct cost to either party, (as amici, unlike experts, are not remunerated for their services.)"[382] As a result, the potential benefits of third party participation may well outweigh the additional expenses that it entails.

The intervention of amici curiae, however useful, should not overburden the process.[383] Arbitral tribunals have affirmed this point

374. Magraw Jr. & Amerasinghe, *supra* note 43, at 352.

375. Rubins, *supra* note 278, at 219.

376. Gómez, *supra* note 73 at 552

377. Levine, *supra* note 92, at 219; Filip Balcerzak, *Amicus Curiae Submissions in Investor-State Arbitrations*, 12 COMMON L. REV. 66 (2012).

378. Nicolas Hachez & Jan Wouters, *International Investment Dispute Settlement in the Twenty-first Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?*, 417-439 (Leuven Ctr. for Glob. Governance Studies, Paper No. 81, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009327.

379. Friedland, *supra* note 26, at 328.

380. Knahr, *supra* note 43, at 352.

381. Rubins, *supra* note 278, at 219.

382. Tienhaara, *supra* note 279, at 240; Olivia Bennaim-Selvi, *Third Parties in International Investment Arbitrations: A Trend in Motion*, 6 J. OF WORLD INV. AND TRADE 773, 804 (2005).

383. Stern, *supra* note 110, at 188–89.

repeatedly.[384] Several tools have been developed in arbitral practice in order to reduce the negative impact of amicus curiae participation in the proceedings. The expectable increase in cost and length of the proceedings can be minimized by clear procedures for when and how amici may participate.[385] For example, arbitral tribunals typically limit amicus curiae briefs to a fixed number of pages. This tool limits the amount of material that disputing parties have to respond to and that tribunals have to assess. In cases where the EC intervened as amicus curiae, arbitral tribunals have limited written submissions to limits ranging from 25 to 50 pages.[386] However, it is debatable whether it is possible for the EC to develop its arguments on highly technical legal issues within such limits.[387] Again, the expansion of the scope of participation rights of amici comes into play. Tribunals are required to balance the interests of time and cost efficient dispute settlement with the direct legal interest of the EC in the proceedings, and the wordiness that is normally associated with intricate legal debates.

Naturally, the extended length of proceedings resulting from third-party participation can also make arbitration more expensive,[388] as this is a new expense that will have to be borne by the parties.[389] From the perspective of respondents, raising costs may work against the public interest[390] especially when they are developing states. Increased costs and delays risk turning arbitration into something too similar to judicial proceedings and therefore look less attractive for disputing parties.[391]

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384. *See, e.g.*, Suez/Vivendi v. Argentina, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 15 ; Suez/InterAgua v. Argentina, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, ¶ 15; Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 56–59.

385. Tienhaara, *supra* note 279, at 240.

386. Triantafilou, *supra* note 92; Electrabel v. Hung., ICSID Case No. ARB/07/19, Award, ¶ 26; Micula v. Romania, ICSID Case No. ARB/05/20, Award, ¶ 36(3); Letter from Luis Romero Requena, Dir. Gen., European Comm'n Legal Serv., to Mr. Martin Doe, Legal Counsel (Oct. 13, 2011).

387. Triantafilou, *supra* note 92.

388. Knahr, *supra* note 43, at 352.

389. Gómez, *supra* note 73, at 553; Bjorklund, *supra* note 275, at 1293.

390. Hachez & Wouters, *supra* note 378, at 18.

391. Levine, *supra* note 92, at 220; Gómez, *supra* note 73, at 552.

Furthermore, if costs are unevenly distributed, this may affect party equality.[392]

In the decision on costs in *Electrabel S.A. v. Hungary*, the tribunal acknowledged that the investors had to expend much time and cost to deal with the EC's submissions. In the words of the tribunal,

> far from exercising the traditional role of an "amicus curiae," the Commission became a second respondent more hostile to Electrabel than Hungary itself. If accepted by the Tribunal, the Commission's submissions would have been fatal to Electrabel's case. The Tribunal was required to decide these issues at length in its Decision and there reject a material part of the Commission's submissions. Overall, the Commission's participation in this arbitration was a hugely complicating factor . . . For all these, Electrabel bore by far the greatest burden.[393]

The tribunal in *Micula v. Romania* specified that the EC should "bear its own costs incurred in connection with its participation in the proceeding, including any costs relating to any appearance by the [EC]'s representative(s) . . . at the hearing."[394] On the annulment proceedings that ensued, on its decision on costs, the committee held that "the present case involved a 'difficult and novel question of public importance' due to the intervention of the EC representing the EU's interests."[395]

In *European American Investment Bank v. Slovak Republic* the tribunal discussed in some depth how costs arising from the participation of Austria, the Czech Republic, and the EC in the proceedings should be borne by the disputing parties.[396] In the tribunal's opinion, there was "no reason to hold the Claimant responsible for the increased procedural costs arising from" that intervention.[397]

> While such invitation was prompted by a request from the Claimant, the Tribunal invited these submissions on the basis that they would

392. Bastin, *supra* note 93, at 225.
393. Electrabel v. Hung., ICSID Case No. ARB/07/19, Award, ¶ 234.
394. Micula v. Rom., ICSID Case No. ARB/05/20, Award ¶ 36(8).
395. Micula v. Rom., ICSID Case No. ARB/05/20, Annulment Proceeding ¶ 352.
396. European American Inv. Bank v. Slovak, PCA Case No. 2010-17, Award on Costs ¶ 58 (Aug. 20, 2014), http://www.italaw.com/cases/1706.
397. *Id.*

> usefully contribute to the tribunal's own analysis . . . Moreover, the Claimant had only requested that Austria be invited to make an *amicus curiae* submission. It was the Respondent's [] request that the [EC] and the Czech Republic also be invited to make *amicus curiae* submissions.[398]

A question that is not addressed in investment treaties or arbitral rules regards the contribution of amicus curiae to the costs of arbitration. In the current system, investors and host states bear the costs derived from the time that arbitrators and lawyers devote to analyze or respond to the amicus briefs.[399] This invites the question of whether it would be useful to create a system where interveners would contribute to the arbitration costs in exchange for the benefit they receive from amicus participation.[400] Some propose that amici curiae be asked to "pay in advance a lump sum to cover the attorneys' fees of the party opposing the submission, as a form of security for costs. The security would then be allocated at the time of the final award, and potentially returned to the *amicus*."[401] While this proposal may be contentious, it is certainly understandable.[402] The disadvantage of this system is that it would pass the costs to the amicus, making the presentation of valuable contributions cost prohibitive. Authors have suggested the creation of a fund to cover the expenses of amicus curiae intervention, but the international agreement needed for such a fund may prove politically difficult to secure.[403]

E. *Impact on the Decision*

Arguments submitted by amicus curiae may influence the outcome of the dispute.[404] At least that is what amici hope. However, the actual impact of amicus curiae briefs on the outcome of the proceedings is difficult to assess. Past practice shows that even when amicus curiae

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398. *Id.*
399. Rubins, *supra* note 278, at 218–22.
400. *Id.*
401. Friedland, *supra* note 26, at 328.
402. Bastin, *supra* note 93, at 227–28.
403. Gómez, *supra* note 73, at 560, n. 235.
404. Ishikawa, *supra* note 110, at 393.

briefs are accepted, tribunals seldom refer to them.[405] Their impact in the final award is, in many cases, negligible.[406] Naturally, "the degree of credibility and relevance granted by the court to the amicus brief . . . depend[s] on its quality."[407] Whether amicus curiae participation will fulfill its potential depends on how each arbitral tribunal uses amicus submissions.[408]

Nevertheless, arbitral tribunals frequently thank the EC for its participation and underline how useful it was for the good decision of the dispute. In *Electrabel S.A. v. Hungary* the tribunal stated that it wished to "record its thanks and appreciation to the European Commission for its Submission, as regard both applicable law and jurisdiction. It is a lengthy, scholarly and important document for these arbitration proceedings."[409] The tribunal added that it had, with the assistance of the parties and their expert witnesses, "considered at length the terms and effect of the European Commission's Submission in these arbitration proceedings."[410] It further stated:

> Albeit with hindsight, it is unfortunate that the European Commission could not play a more active role as a non-disputing party in this arbitration, given that . . . the European Union is a Contracting Party to the ECT in which it played from the outset a leading role; and, moreover, that the European Commission's perspective on this case is not the same as the Respondent's and still less that of the Claimant. In short, the European Commission has much more than "a significant interest" in these arbitration proceedings.[411]

The tribunal in *AES v. Hungary* also acknowledged the "efforts made by the European Commission to explain its own position to the Tribunal," stating that it had "duly considered the points developed in its amicus curiae brief" in its decisions.[412] In *Achmea v. Slovak Republic* the

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405. Blackaby & Richard, *supra* note 106, at 271; Schliemann, *supra* note 77, at 389.
406. Levine, *supra* note 92, at 217; Tava, *supra* note 123, at 126.
407. Gómez, *supra* note 73, at 557.
408. Ishikawa, *supra* note 110, at 404.
409. Electrabel v. Hung., ICSID Case No. ARB/07/19, Award, ¶ 4.91.
410. *Id.* ¶ 4.92.
411. *Id.*
412. AES v. Hung., Award, ICSID Case No. ARB/07/22, Award, ¶ 8.2.

tribunal stated that it has "considered carefully the submissions made by the Parties, as well as the observations of the Government of the Netherlands and of the European Commission, all of which were helpful and for all of which the Tribunal thanks their respective authors."[413] In *Charanne v. Spain* the tribunal started by clarifying that it has

> given the most careful consideration to the *Amicus EC*, which it has found very useful. The Tribunal wishes to thank the European Commission for it. However, the Tribunal recalls that the European Commission is not party to these proceedings and, therefore, in this award the Tribunal will only respond to the arguments of the Parties, in light, of course, of the elements of reflection provided by the EC.[414]

The arguments presented by the EC are frequently cited and discussed in the decisions of tribunals. In *Electrabel S.A. v. Hungary* the tribunal devoted several pages to commenting on the arguments made by the EC.[415] In *Micula v. Romania* the tribunal addressed the comments made by the EC in its capacity as amicus curiae.[416] In the annulment proceedings that followed, the EC's arguments, claiming that the award had to be annulled, are also discussed at length.[417] In *Achmea v. Slovak Republic* the tribunal stated that all of the points made in the EC's submission have been taken into account, even though it did not consider necessary to address and decide in turn each and every one of them.[418] The tribunal in *European American Investment Bank v. Slovak Republic* stated that it had

> considered carefully the submissions made by the Parties, as well as the observations of the Government of Austria, the Government of the Czech Republic and the European Commission, all of which were helpful and for which the Tribunal thanks their respective authors. All of the points made in those submissions have been fully taken into

413. Achmea v. Slovak, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 217.

414. Charanne v. Spain, SCC ARB No. 062/2012, Award, ¶ 425 (Jan. 21, 2016), http://www.italaw.com/cases/2082.

415. Electrabel v. Hung., ICSID Case No. ARB/07/19, Award, ¶ 1.18.

416. Micula v. Rom., ICSID Case No. ARB/5/20, Award, ¶ 290.

417. Micula v. Rom., ICSID Case No. ARB/5/20, Annulment Proceeding, ¶ 308.

418. Achmea v. Slovk, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 217.

> account by the Tribunal even if the Tribunal does not repeat them in its reasoning.[419]

The intervention of the EC may influence the final outcome of the arbitration. While substantive arguments submitted in the amicus petitions of NGOs have seldom been into account by arbitral tribunals, *Electrabel S.A. v. Hungary* and *AES v. Hungary* seem to suggest a different trend.[420] In the latter case the arguments of the EC were substantively taken into account.[421] Considering that the European Union is a member of the Energy Charter Treaty, Hoffmeister argues that the activity of the EC in *AES v. Hungary* certainly influenced the final outcome of the award, where the arbitrators did not find any violation by Hungary of Energy Charter Treaty standards, having in mind that a contrary award might have conflicted with European Union law.[422]

These cases demonstrate that the identity of third parties making amicus curiae submissions may affect how the tribunal perceives them.[423] The EC has been building up its investment expertise through the submission of amicus curiae briefs to arbitration tribunals. Its major contribution to the proceedings relates to its expertise in European Union and International Law, and not to diverse and generic interests represented by NGOs or civil society groups. Acceptance of the EC as amicus curiae has shown that independence of such a regional organization from its individual members did not raise serious concerns with the tribunal. "On the contrary, expertise and experience in the manifold activities undertaken by such organizations make them . . . perhaps more desirable than NGOs as *amicus curiae*."[424]

IV. FINAL REMARKS

Over the last 15 years the submission of amicus curiae briefs became a regular feature of international investment arbitral proceedings.

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419. European American Inv. Bank v. Slovak, PCA Case No. 2010-17, Award on Jurisdiction, ¶ 54.

420. Cross & Schliemann-Radbruch, *supra* note 91, at 98–99.

421. Hoffmeister, *supra* note 187, at 92.

422. *Id.*

423. Cross & Schliemann-Radbruch, *supra* note 91, at 99.

424. Levine, *supra* note 92, at 215–16; Cross & Schliemann-Radbruch, *supra* note 91, at 104.

Investment tribunals play a significant role in shaping the understanding and evolution of international investment law. They provide fora where important socio-legal, political, and commercial matters are resolved. The intervention of non-disputing parties in the proceedings is not limited to public interest advocacy groups, as various types of legal entities may be admitted as amicus curiae. International investment disputes are increasingly attracting the attention of the European Union. The EC has discovered this procedural tool, enabling its participation in investment arbitrations that have been instituted against European Union members. The European Union, through the EC, may contribute to the quality of arbitral awards by offering its legal expertise in European Union Law matters, possibly even contributing to mitigate the fragmentation of international law, thus improving the legitimacy and efficiency of the overall legal framework.

Naturally, the intervention of an amicus with political, legislative, and executive functions, also presents challenges for arbitral tribunals. This paper argues that the EC plays a role that is quite different from that of NGOs and civil society groups. The distinctive nature of this amicus explains may justify the extension of its participatory rights. As more awards become public, it will be possible not only to examine how arbitral tribunals are approaching these problems, but also to determine with higher clarity the real influence that the participation of the EC is playing the investment proceedings.

Under Article 207(1) of the Lisbon Treaty, the European Union has competence to conclude international investment treaties.[425] The EC cannot not be made a party in arbitration proceedings involving European Union members because of the privity to the arbitration agreement.[426] "This is all the more true for ICSID arbitrations, to which most member state BITs dispute resolution clauses refer, since the European Union, as a supranational organisation, can at present not become a party to the ICSID Convention since its signature is only open to 'states.'"[427] It remains an open question, however, how the ICSID Convention itself could be changed to accommodate such parties, given

425. Kessedjian, *supra* note 68, at 775.
426. Kleinheisterkamp, *supra* note 82, at 220.
427. *Id.*

that it currently does not foresee accession by an international economic integration organization.[428]

In the future, under the forthcoming European investment regime, the EU will be able to take part in investor-state proceedings as a party. Until the European Union concludes its own investment agreements, the amicus curiae mechanism will continue to be the only effective tool for the EC to intervene in investor-state arbitration proceedings that touch upon matters that are considered to fall within the remit of the EC as the "guardian of European Union Law." The case law discussed in this paper allows analysis of the main features of a phenomenon which is only at its inception stage and which will probably evolve and mature in the near future. The diversification in the nature of amici and in the interests they pursue is also a token of the dynamic, ever-changing nature of modern investment law and arbitration.

428. Hoffmeister, *supra* note 187, at 83.