# THE EUROPEAN COMMISSION AS AMICUS CURIAE OF ARBITRAL TRIBUNALS: IS IT A LEGITIMATE RELATIONSHIP?

A Comissão Europeia como amicus curiae do Tribunal Arbitral: uma relação legítima?

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Área do Direito: Arbitragem
Resumo: Este artigo irá analisar o papel da Comissão Europeia (EC) como amicus curiae dos tribunais arbitrais em litígios entre Estados Membros da União Europeia (EU) e investidores europeus, em particular no setor energético e ao abrigo do Tratado da Carta da Energia (ECT). Este trabalho foi escrito no rescaldo da muito controversa decisão do Tribunal de Justiça Europeu no caso Slowakische Republik v. Achmea BV. Contudo, o autor não se focará nos problemas substantivos subjacentes à posição da EC contra as arbitragens de investimento intra-EU, mas sim nas questões processuais em torno do papel da EC enquanto amicus curiae. Nessa medida, o autor apoiou-se em decisões de tribunais arbitrais sobre pedidos de intervenção como amicus curiae – como no caso Vivendi v. Argentina –, para defender que, apesar de os tribunais arbitrais terem vindo a adotar uma posição aberta e recetiva, a EC poderá não ter, na maioria dos casos, o conhecimento exclusivo, o interesse e a independência que a legitimem como uma interveniente terceira em relação à disputa. Nesse contexto, será também sugerido que a posição permissiva dos tribunais arbitrais tem sido justificada como uma reação a uma necessidade urgente de tornar a arbitragem de investimento mais transparente e legítima aos olhos do público. Finalmente, será concluído que a EC só deveria ter permissão de atuar como amicus curiae em casos excecionais, em que os benefícios de obter o entendimento da EC sobre o direito da UE compensam o potencial prejuízo causado ao demandante e à condução eficiente do processo.

Palavras-chave: Arbitragem de investimento – Comissão Europeia – Amicus curiae – Intra-UE – Tratado da Carta da Energia
Abstract: This article will analyse the role adopted by the European Commission (EC) as amicus curiae of arbitral tribunals in disputes between Member-States of the European Union (EU) and European investors, particularly in the energy sector and under the Energy Charter Treaty (ECT). This work was written in the aftermath of the very controversial decision of the European Court of Justice on the Slowakische Republik v. Achmea BV case. However, its focus is on the procedural issues around the EC's role as amicus curiae, rather than the substantive concerns underlying the EC's position against intra-EU investment arbitrations. The author focused on previous arbitral decisions on amicus curiae applications, such as the Vivendi v. Argentina case, in order to claim that, despite the open and receptive approach adopted by arbitral tribunals, the EC may not have, in the majority of the cases, the necessary unique knowledge, interest and independence, to be deemed as a suitable non-disputing party. In this context, the author will also suggest that arbitral tribunals have been adopting a rather lenient approach as a reaction to an urgent need to make the investment arbitration system more transparent and legitimate to the eyes of the public. Finally, the author will conclude that the EC should only be able to act as amicus curiae in exceptional cases, where the benefits of having the EC's insights on Union Law outweigh the potential harm

caused to the claimant and the efficiency of the proceeding.

Keywords: Investment arbitrations – European Commission – Amicus curiae – Non-Disputing parties Intra-EU – Energy Charter Treaty

Two centuries ago electricity played no role in the:

economy, and was used at most for arcane scientific

experiments and cheap magic tricks. A series of

inventions turned it into our universal genie in a lamp.

Yuval Noah Harari, Sapiens: a brief history of humankind.

Sumário:



## 1 Introduction

Investor-State Dispute Settlement (ISDS) is a legal instrument in Bilateral Investment Treaties (BITs) and other bilateral and international agreements such as the Energy Charter Treaty (ECT).[1] According to UNCTAD estimates, the number of ISDS cases has soared, particularly so over the last 15 years.[2] From 56 cases initiated between 1987 and 2000, the total had sextupled in 10 years and it considerably increased between 2010 and 2017.[3] This significant rise of ISDS cases has had the particular contribution of European Union (EU) countries and investors in the energy sector. Indeed, the majority of these disputes were initiated by investors from the EU and are related to the energy sector.[4] The ECT is, not surprisingly, the agreement under which more ISDS cases have been brought. [5]

This intense prominence of investment arbitration has also been followed by a severe public concern on the transparency and accountability of the arbitration mechanism to resolve disputes where states are involved.[6] The privacy and confidentiality inherent to the arbitration proceeding is, according to some voices, inadequate to resolve disputes where states are parties to.[7] Therefore, commentators and civil society groups have been calling for more public involvement on investment arbitrations.[8] One of the mechanisms that contributes to mitigate the opacity or impenetrability of investment arbitration is the intervention of third non-disputing parties, which can file submissions in arbitration proceedings when appropriate.[9]

The EU, facing several arbitrations brought by EU investors against EU Member-States under existing BITs or the ECT, has been enjoying this trend of openness in investment arbitration to file amicus curiae[10] briefs in those disputes.[11] The role that was traditionally attributed to nongovernmental organizations is now also performed by the European Commission (EC).

Therefore, with this work, the author intends to address the role of the EC in intra-EU arbitrations, particularly under the ECT. The importance and case load of arbitrations in the energy sector justifies a more in-depth analysis centred on those disputes. Thus, the aim of this paper is not to analyse the substantive issues supporting EC's intervention, but rather its procedural role. Ultimately, the author will seek to determine the legal framework applied to third non-disputing parties, to identify how arbitral tribunals have been dealing with that phenomenon and to critically examine if the EC fulfils all the procedural requirements to act legitimately as amicus curiae.

Hence, this paper will primarily offer a general view of the role of non-disputing parties in investment arbitrations (2.), which will be the starting point to analyse the particular

function of the EC as an amicus curiae in arbitrations under the ECT (3.). The appropriateness of the subject matter of those disputes (3.1) and EC's suitability to act as amicus curiae of tribunals constituted under ECT (3.2) will then be object of discussion, bearing always in mind the necessary procedural constraints applicable to any third-party intervention, and whether such constraints have been applied to EC's interventions (3.3). Some words will also be given as to the strategy adopted by the EC to tackle the alleged incompatibilities between the European Union law and intra-EU investment agreements (4.). Finally, it will be concluded that the friendship between arbitral tribunals and the EC is legitimate, as long as the procedural requirements are duly considered by arbitral tribunals (5.).

## 2 The Role of Non-disputing Parties in Investment Arbitration

The amicus curiae is an intervenient that is not a party to the dispute but has a strong interest in its subject matter and, thereby, pleads for the court's (or tribunal's) permission to file a brief with important information or expertise for the resolution of the action. It is, as results from the translation of the Latin term, a friend of the tribunal. A long-established example of this reality at least for common-law countries is the intervention of humanitarian or environmental non-governmental organizations.[12]

The trend has unquestionably been towards greater access of third parties to the courts.[13] As one author points out, considering that both litigation and arbitration are means to settle a dispute, 'it might be supposed that features and trends within the former would be likely to appear in the latter'.[14]

Effectively, non-disputing parties have been participating in investment treaty arbitrations since 2000, when the International Institute for Sustainable Development, the Communities for a Better Environment, the Bluewater Network of Earth Island Institute and the Center for International Environmental Law were allowed to participate jointly in the Methanex v. USA case as amici curiae.[15]

Following this case, several non-governmental organization have also participated in investment arbitration disputes. For instance, in Vivendi v. Argentina case, five Argentinean non-governmental organizations filed a 'Petition for Transparency and Participation as Amicus Curiae' which was admitted by the tribunal on the basis of public interest of the subject-matter of the case.[16] Likewise, similar decisions were rendered by arbitral tribunals in previous cases when confronted with petitions from similar entities, such as the Canadian Union of Postal Workers and the Council of Canadians.[17] Therefore, these interventions have traditionally been carried out by entities with no substantial legal interest in the outcome of the dispute, but keen to alert the tribunal to the repercussions of the dispute and its result.

However, the acceptance of non-disputing parties' interventions has been subject to certain conditions and limits imposed by tribunals.[18] Effectively, tribunals have determined that, to allow the intervention of non-disputing parties, the subject matter has to be appropriate and the non-disputing party has to be suitable for the proceeding.[19] According to these non-binding precedents, in case these requirements are met, the intervention of the amicus curiae would still be subject to some procedural limits, to be determined on a case-by-case basis, in order to safeguard the fairness, privacy and efficiency of the proceeding.[20]

As a matter of fact, the tribunals' understanding of non-disputing parties' role in investment arbitration gave rise to the codification of this practice in ICSID Arbitration Rules in 2006,[21] which followed the Free Trade Commission 2003 statement (FTA Statement).[22]

The FTA Statement requires for the tribunal, when determining whether to allow the submission of amici curiae briefs, to consider if:

(a) The non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration 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 matters within the scope of the dispute;

(c) The non-disputing party has a significant interest in the arbitration; and

(d) There is a public interest in the subject matter of the arbitration.[23]

Likewise, ICSID Arbitration Rules Article 37 (2) determines that the tribunal must consider, inter alia, if the amicus curiae has 'particular knowledge or insight that is different from that of the disputing parties', if the submission is 'within the scope of the dispute' and if it 'has a significant interest in the proceeding', bearing always in mind the potential disruption to the proceeding or unduly burden to either party.[24]

3 The Role of the EC in ECT arbitrations

The ECT was signed on 17 December 1994 and entered into force on 16 April 1998, for the purpose of promoting international cooperation in the energy sector. It is claimed to be one of the most successful multilateral treaties.[25] In fact, it was signed by the EU, by 28 EU Member-States and by 23 third States. The ECT imposes binding obligations on the signing states to support and stimulate investments in the energy sector.[26]

The first dispute arising under the ECT date back to the year of 2001[27]. However, in recent years an unusual number of claims was filed under the ECT, arising from investments on renewable energies in European countries. Indeed, after some governments' decisions to abolish or reduce subsidies which were being paid for the production of energy through renewable sources, several investors have sought compensation for their consequent losses under the ECT.[28] These claims have been filed, notably, against Bulgaria, Czech Republic, Italy and Spain and have given rise to some concerns, especially from the EC.[29]

Most of these claims were filed by European investors against European countries. [30] The EC has been fighting against these intra-EU arbitrations since the beginning, striving for the correct and uniform application of the Union law. One of the mechanisms adopted by the EC to take part in these arbitrations was through the participation in arbitral proceedings as amicus curiae.

The first case in which the EC filed an amicus curiae written submission was in Eastern Sugar BV v. Czech Republic in 2003.[31] Since then, the EC has intervened in several other cases under the ECT. In the AES v. Hungary case, the EC's submission was filed because the contract between the respondent and the claimant, which was the object of the arbitration, allegedly violated the European Union competition law.[32] The tribunal allowed the EC to file the brief pursuant to ICSID Arbitration Rules article 37 (2), but denied EC's request for copies of the parties' written submissions. In addition, the Tribunal rejected the possibility of the EC to challenge its jurisdiction since such objection was not brought to the proceedings by the parties.[33]

By the same token, in 2008 the EC filed another amicus brief in the Electrabel v. Hungary case based on the violation of European Union competition law.[34] The tribunal allowed the EC intervention as a non-disputing party.[35] However, in this case, the tribunal differed from the AES v. Hungary tribunal to the extent that it admitted EC's access to the parties' submissions because, otherwise, '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'.[36] More recently, the EC has also

acted as amicus curiae in renewable energy arbitrations, such as Charanne v. Spain, Antin v Spain and Eiser v. Spain cases.[37]

On 1 December 2009, the Treaty of Lisbon entered into force shaking the investment treaty law scenario. [38] Indeed, this treaty has included foreign direct investment as one of the basis of the common commercial policy (Article 207(1) TFUE),[39] making the EU exclusively competent on investment treaty law. [40]

Despite the apparent acceptance by tribunals, the EC's role as amicus curiae is not free from controversy. It is not clear that all the requirements applicable to non-disputing parties' interventions are fulfilled by the EC when attempting to participate in ECT arbitrations. In particular, it is questionable if the EC is indeed a suitable non-disputing party to act as amicus curiae in ECT arbitration. Therefore, said requirements will be herein critically analysed.

3.1 Appropriateness of the Subject Matter

A suitable non-disputing party is only eligible for an intervention in a private dispute before arbitration tribunals if the subject matter of the dispute extrapolates the sphere of interest of the disputing parties. This requires the dispute to have a public dimension with the potential to, directly or indirectly, affect other persons beyond the parties involved in the case. In Metanex v. USA, for instance, the tribunal clearly sought for the public interest of the dispute in order to allow the intervention of the non-disputing parties, having ultimately concluded for its 'undoubtedly public interest'.[41] In Vivendi v. Argentina the tribunal relied on the position commonly adopted by courts on amicus curiae, to precisely conclude that public interest was a condition precedent for the acceptance of an amicus curiae intervention.[42]

In Intra-EU ECT arbitrations, in the context of which the EC has been submitting amicus curiae briefs, there appears to be an undisputable public interest arising from the potential violation of the Union law. If the investor based in a Member-State is awarded with a compensation for damages, the execution of such decision may constitute, according to the EC, an unlawful State aid incompatible with the EU's internal market. The EU legal order is based on founding treaties and secondary regulation adopted under those treaties, which have primacy over the national laws of the Member-States.[43] According to the Article 17 of the Treaty on European Union the EC must:

[P]romote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.[44]

Therefore, ECT arbitrations may involve the application of the Union Law, which is a subject that goes beyond the parties' interests, entering the EC's area of competence on promoting the correct application of the Union law. In this context, some commentators have been establishing a difference between the EC's and NGOs' role as amici curiae of arbitral tribunals.[45] Indeed, the EC may be pursuing a stronger and legally protectable interest in the correct and uniform application of the Union law, rather than just a more general interest on health care or human rights as advocated by NGOs. As one author stressed:

The nature of the EC's interest in this case was broader and more substantial than ensuring that the tribunal was aware of, say, environmental or cultural implications of the project at issue. The EC sought to assert the relevance of its legally prescribed 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.[46]

Notwithstanding, even if one considers this allegedly stronger legal interest, it is debatable that it would per se entitle the EC with a procedural right of participating in

ECT arbitrations as amicus curiae. Perhaps, the appropriate forum for the EC to 'redress any violations of Union law would be through Union law mechanisms', rather than through participations in investment arbitrations.[47]

3.2 Suitability of the Non-Disputing Party

Usually, a tribunal seeks assistance from witnesses, experts and advocates. In all cases, those intervenients are either under procedural or deontological obligations to provide that assistance.[48] However, occasionally, tribunals may need support in specific subjects or areas of expertise that cannot be provided by those intervenients. Therefore, the contribution of a non-disputing party may be valuable for the tribunal, in case it is able to provide a materially different perspective or insight in regard to certain issues, on the basis of either substantive knowledge or relevant expertise or experience, that goes beyond or differ from that of the disputing parties and other intervenients.

The EC has unique experience and expertise in matters involving European Union law, such as State aid issues. Therefore, tribunals tend to consider that its intervention may contribute with distinct knowledge on some critical issues of ECT arbitrations.

Notwithstanding, while EC's distinct knowledge of European Union law seems unquestionable and does not vary between disputes, its uniqueness should be assessed on a case-by-case basis. Indeed, tribunals should analyse if, in a specific case, there is an actual need for an intervention of the EC. Effectively, for example, tribunals may deem external insights unnecessary, because counsels and experts have fully enlightened them. In other words, in certain cases, the tribunal may not need EC's friendship because the intervenients in the arbitration have provided enough clarification on the subjects that the EC could potentially address.

Furthermore, the EC should also be independent from the parties to be able to participate in the proceedings.[49] As Alexis Mourre has rightly asserted, '[t]he friend of the court should not be the friend of one of the parties'.[50] The non-disputing party has to be independent from the disputing parties. [51] In Vivendi v. Argentina, the Tribunal has very clearly expressed this condition as follows:

Drawing on the experience of relevant NAFTA cases administered by ICSID, as well on the Statement of the North American Free Trade Commission on Non-Disputing Party Participation of October 7, 2003 … the Tribunal has determined that non-parties seeking to make an amicus submission in the present case should file a petition with the Tribunal for leave to submit an amicus curiae brief and that such petition should include the following information:

a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.

b. The nature of the petitioner's interest in the case.

c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.

d. The reasons why the Tribunal should accept petitioner's amicus curiae brief.[52]

However, it seems that the EC's fulfilment of all these requirements is questionable. Indeed, as will be further explained, in several cases, the EC may not have the necessary (i) unique knowledge, (ii) interest or (iii) independence.

(i) Uniqueness

According to article 13 (b) of the EU Regulation on establishing transitional arrangements for BITs between Member-States and third countries (Regulation (EU) no 1219/2012), a Member-States must:

(b) … 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; [53]

Consequently, in ECT arbitrations, upon becoming aware of a request for the arbitration, Member-States must notify the EC and must 'fully cooperate' with it to guarantee an effective defence.

Besides other issues addressed below, the cooperation between the EC and the respondent may turn the former's intervention superfluous. Effectively, if the EC is actually briefing the respondent Member-State, those inputs can be included in the submissions filed to the tribunal by the latter.[54] Therefore, in such cases, EC's amicus curiae statement should not be admitted for lack of uniqueness and, consequently, for being unnecessary.

On the other hand, regardless of the cooperation between the EC and the Member-State, tribunals should also consider the fact that the EC has already intervened in various investment arbitrations submitting the same arguments, so its arguments are now of public domain, either by accessing the proceedings which were made public or by consulting the publicly available EC's decisions, regulations or press releases on these matters.

In this context, it is important to bear in mind that the practice in investment arbitration is to prevent the amicus curiae to access the written statements produced by the parties in the proceeding. Consequently, the EC has no specific knowledge about the cases, which could give a slightly different framework for the amicus curiae brief.

Therefore, tribunals should carefully assess if the EC's expertise and experience are actually necessary in the particular dispute and decide on the admission of the amicus curiae briefs accordingly. In many cases, the EC's amicus curiae brief may not be necessary, causing an undue burden to the parties.

(ii) Interest

Furthermore, considering that the EC has the opportunity of cooperating with the respondent, its interest in participating in the dispute as amicus curiae may be questioned. Indeed, the EU has regulated itself on how its interest in investment arbitrations should be taken into consideration. This Regulation (EU) no 1219/2012, as already seen, sets forth that EU's interest in ECT proceedings are safeguarded by the respondent in cooperation with the EC.

Therefore, the responsibility of ensuring an effective defence, inter alia, on issues related to the European Union law, lies with the respondent and the EC, which may cooperate with the former. In other words, if there is any specific public interest to be safeguarded by the EC in these investment arbitrations, that interest is, according to Union Law, to be protected by the EC, but through its Member-States as parties to those disputes.

Thus, the mere possibility of cooperation can, in theory, justify a rejection of the EC's application to be an amicus curiae for lack of interest. However, there is always – at least, in theory – the possibility of the Member-State not cooperating with the EC, even if summoned to do so. In such case, an interest that was beyond the parties to the dispute would remain unprotected. This scenario, despite having been caused by a regulation concluded by the guardian itself (EC), might be considered intolerable.

Hence, one may argue that the EC should be required to, at least, proof the absence of cooperation with the respondent or, otherwise, in light of Regulation (EU) no 1219/2012, its amicus curiae briefs should be rejected for lack of interest of the applicant.

(iii) Independence

Additionally, the reverse side of EC's lack of interests, is EC's lack of independence. Indeed, the cooperation between the disputing party and the non-disputing party creates a relation that does not seem to be within the independence standards addressed above. The Regulation (EU) no 1219/2012 unveils a special relation existing between these two parties whereby the simple fact that the applicant to amicus curiae has the opportunity to cooperate with the respondent, even if there is not an effective cooperation, may put the EC's independence in question.

Furthermore, the EU is a supra-national organisation comprising 28 nations. Despite the recent Regulation (EU) no. 1219/2012, the relation between these states and the EU itself is, naturally, very close. The existence of complex legal relations between EU Member-States and the EU may denote a relation of dependence. The clearest example of this dependence is, most certainly, the fact that the EU is financially supported by its members' contributions to the EU's budget.[55]

In conclusion, the EC's struggles to fulfil the requirements to legitimately act as amicus curiae in ECT arbitrations. Indeed, EC's knowledge is hardly unique, its interests in participating in the arbitration is dubious and its relation with the respondents Member-States barely satisfies the independence standards.

3.3 Procedural Limits

If the tribunal is to grant a leave to a non-disputing party to participate in the proceeding, it will, simultaneously, order the limits to its intervention. Indeed, tribunals have been aware of the risks of having third parties filing submissions in a proceeding to which they are not part. Therefore, tribunals have been making efforts to, while allowing such interventions, also guaranteeing that the substantive and procedural rights of the parties are safeguarded.[56] Despite the benefits that amicus curiae briefs might bring (by helping the tribunal), the disputing parties should not be unduly burden with more costs and delays caused by the intervention of a third party[57].

For this reason, tribunals have sought to reduce the impact of amici curiae interventions in the arbitration proceedings by, for example, limiting the length of the submissions and ordering joint submissions.[58] Additionally, tribunals have also taken efforts to ensure that the confidentiality and privacy of the proceedings are not compromised.[59] For this reason, amici curiae are usually prevented from accessing the written submissions filed by the parties and from attending the hearings.[60]

Furthermore, Tribunals have consistently highlighted the need to satisfy a call for transparency in investment arbitration, increasing the public acceptance of the mechanism. As expressed in the Vivendi v. Argentina case, 'through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.'[61] Actually, the participation of an amicus has also been recognized by the OECD Investment Committee, which has issued a report on transparency and third party participation in ISDS procedures.[62] As asserted by Nigel Blackaby and reaffirmed by Alexis Mourre[63] '[t]here is a risk of this new child in the world of international arbitration dying in infancy, delicate and overprotected by its parents from exposure to the outside world.'[64]. Thus, the sustainability of investment arbitration mechanisms calls for a less opaque system, more open to the public eyes. Something that tribunals have been aware of when deciding on the admission of amicus curiae briefs.

Though, the intense critic against investment arbitration should not serve as grounds to surpass the failure to comply with the other procedural conditions, thereby violating the rights and interests of the claimant in the arbitrations. The satisfaction of public concerns and, in general, the sustainability of the system can hardly be the sole reason for admitting amicus curiae briefs.[65] Openness of the proceeding cannot be sought at all

costs, or otherwise it may actually have the opposite effect and jeopardize the entire system. Therefore, the approach taken by the tribunal in the Biwater v. Tanzania highlighting the importance of the increased transparency of the system, disregarding the other requirements is very controversial. [66]

Furthermore, one may also question whether the admissibility of an amicus brief is indeed contributing to a more transparent proceeding.[67] As seen throughout this work, arbitral tribunals usually only allow the submission of a brief by the amicus curiae, rejecting the leave to access the written submissions filed by the parties and to attend the hearings. Thus, it seems that those proceedings remain closed and private, with no information or documentation being available to third parties. In these cases, there is only a stream of information coming from the outside to the proceeding. It might reflect a more permeable system to external influences, but it does not allow the amici curiae or the public to gain any insights into the investment treaty arbitration process or satisfy calls for greater transparency.'[68]

Hence, the argument of allowing amici curiae briefs to enhance the transparency of the proceeding seems to be, also for this reason, fragile and not very effective. When deciding on the acceptance of amici interventions, tribunals should determine if the pros of accepting outweigh its cons. In other words, tribunals should carefully analyse if the contribution to a more open and transparent proceeding is actually substantial enough to, eventually, create some delays and inefficiencies at the costs of the parties.

Likewise, tribunals should always be mindful of the potential importance of amici curiae in disputes where public interests are at stake. However, they cannot neglect the interests and rights of the parties, namely when it comes to the right to have a fair proceeding and equal treatment by the Tribunal. In this context, claimants have already argued that the intervention as amici curiae is, to a certain extent, not fair to the party with conflicting interests. In the Methanex v. USA case, for instance, the claimant stressed the possibility of the applicant to amicus curiae to be called as a witness and, more important, the differences between those two procedural roles.[69] Indeed, if a witness is called by the respondent, the claimant has the opportunity of examining that witness. Contrariwise, if a third non-disputing party submits an amicus curiae brief, the claimant cannot examine it.

An amicus curiae is not disinterested, impartial or neutral. It is interested in the outcome of the dispute and in ensuring that the tribunal takes into consideration certain facts or arguments to render a decision. When the EC submits a brief in an ECT arbitration, it is doing so to ensure the Union law is well interpreted and applied and, thereby, its Member-States are not ordered to pay any damages to the investors. Before this scenario, it does not seem unreasonable, but rather appropriate, to allow the claimants to examine the EC, thereby ensuring a fair proceeding.[70]

Bottom line, the tribunal has to guarantee that the amicus curiae interference in the proceeding is as efficient as possible – both in terms of cost and time – and that the harm to the parties' interests in the dispute is minimum. The benefits of an intervention from a third non-disputing party in an arbitration proceeding – which, according to the nature of this mechanism, is always an anomaly – have to overcome the potential harm it may also cause.

4 EC's Strategy Against ECT Arbitration

The EC stance on intra-EU investment arbitrations is peremptory. The EC considers that intra-EU investment arbitrations are incompatible with the Union law and awards rendered under such treaties are unenforceable.[71] Therefore, the EC has been intensifying its efforts to eliminate intra-EU investment arbitration cases, with special focuses on the battle against intra-EU ECT arbitrations.[72]

For the European Court of Justice, the EU Treaty 'has created its own legal system' which 'constitutes a new legal order of international law'.[73] As a matter of fact, in a

much-anticipated ruling influencing approximately 200 BITs treaties between EU Member-States in the Achmea case, the European Court of Justice decided that the investor-state arbitration clause in a BIT between the Netherlands and Slovakia was not compatible with Union law and its autonomy.[74]

The EC has been requesting its intervention as amicus curiae while, simultaneously, pleads for the tribunals to recognize their lack of jurisdiction. Effectively, the EC has been, on the one side, seeking participation in arbitration proceedings and, on the other side, refuting their legitimacy and objecting against the enforceability of awards arising thereof.

In 2009, in Micula v. Romania case, the EC submitted a brief, which was accepted, stressing that '[i]f the Tribunal rendered an award that is contrary to obligations binding on Romania as an EU Member-State, such award could not be implemented in Romania by virtue of the supremacy of EU law, and in particular State aid rules'.[75] In accordance with this position, after an award which ordered damages to be paid by Romania to the claimant, the EC informed Romania by letter 'that any implementation of the Award would constitute new aid and would have to be notified to the Commission' and ordered the suspension of its execution.[76] Thereafter, being aware of the execution of the award by Romania, the EC 'has decided to initiate the procedure laid down in article 108(2) of the Treaty on the Functioning of the European Union (TFEU)'.[77] Effectively, the EC participated in the proceeding as amicus curiae and, concurrently, claimed its lack of jurisdiction and summoned Romania to prevent the Member-State from complying with the award, under penalty of sanctions grounded on violation of Union law.

The EC has also expressed its disagreement with awards against the Member-State in the Eiser v. Spain ECT arbitration:

[T]he Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation.[78]

Thus, the EC has adopted an active stand by filing amicus curiae briefs, encouraging Member-States not to comply with awards rendered by arbitral tribunals and initiating infringement proceedings against Member-States.[79] The EC's strategy consists in attacking all fronts and trying to pressure tribunals and Member-States to comply with its understanding of the Union law. However, this strategy may be deemed incoherent and, from a purely procedural perspective, it may not be admissible.

Arbitration is a mechanism characterised as an alternative to the national judicial system, widely used in commercial disputes due to its neutrality. Likewise, in investment arbitrations, '[i]nvestors usually have little faith in the courts of the host country' and 'states are rarely willing to submit to foreign courts'.[80] Arbitration is not part of the judicial system of any country and the tribunal's mandate is defined by the parties' will. Hence, the tribunal has no mandate to pursue claims filed by third non-disputing parties.[81]

Different perspectives may be adopted as to the nature of arbitration.[82] However, regardless of the approach deemed more adequate, it is undisputed that arbitral tribunals have their mandate limited by the parties. the EC has no special procedural powers in investment arbitrations. As tribunals have rightly found, claims of lack of jurisdiction must be brought by the parties to the proceeding. The EC has no power to claim for the lack of jurisdiction of the tribunal. In fact, pleading simultaneously for the tribunal to admit its 'friendly' brief and for the tribunal's lack of jurisdiction may be nonsensical.

When the EC requests arbitral tribunals to allow its intervention in the case, it should be implied that the EC recognizes its existence and legitimacy. Otherwise, why should the EC assist a tribunal to render a decision which it considers, regardless of its content,

invalid? If the EC believes that arbitral tribunals have no jurisdiction to resolve disputes between Member-States under the ECT, it should be coherent in its fight against it.

Consequently, it appears that, for the sake of coherence and from a procedural perspective, the EC strategy could only be adopting one of the following two positions:

i) Recognizing the jurisdiction of investment arbitration tribunals to rule on investors' claims against Member-States under the ECT and participating in the proceedings as amicus curiae, helping the tribunals on issues concerning Union law;

ii) Rejecting the jurisdiction of investment arbitration tribunals to rule on investors' claims against the Member-States under the ECT and exert its powers before the Member-States, encouraging Member-States not to comply with awards rendered by arbitral tribunals and initiating infringement proceedings against Member-States.

From a theoretical standpoint, the EU could have opted to reject the jurisdiction of arbitral tribunals, denying its effectiveness and informing all Member-States of its position through Union law mechanisms. However, it is clear that the EC adopted another tactic since, apparently, it has nothing to lose in doing so. Even if, from a procedural perspective, it may be incoherent, in practical terms it makes no harm to the EC's position and actually gives it a louder voice in its fight against intra-EU ECT arbitrations and intra-EU BITs.

## 5 Conclusion

It is questionable whether the EC may act as amicus curiae in ECT arbitrations. As seen above, previous investment arbitration cases and the legal framework clearly set out some requirements for this third-party intervention. In the Vivendi v Argentina case the tribunal has put it as follows: 'to accept amicus should depend on … the appropriateness of the subject matter of the case [and] the suitability of a given non-party to act as amicus curiae in that case'.[83] As argued in this work, the EC may struggle to fulfil both requirements according to the terms that have been established by arbitral tribunals.

In the end, whether the EC should be admitted as a friend of the tribunal should depend on whether the benefits of that intervention overcome the potential harm caused to the claimant and the proceeding itself. Considering the inconvenience of an interference by a third non-disputing party in an investment arbitration and the anomaly it constitutes to a proceeding founded in the autonomy of the parties, tribunals should be keen to avoid any disruption when the same result may be achieved through less harmful means. Hence, under the context described in this work, tribunals should have little room to accept EC's amicus curiae briefs in ECT arbitrations. The EC should only be able to act as amicus curiae in special cases, where both the tribunal and the EC have a very strong interest in accepting and filing, respectively, the amicus curiae brief.

However, probably as a reaction to an urgent need to make the investment arbitration system more transparent and legitimate to the eyes of the general public, arbitral tribunals have been adopting a wider interpretation of the procedural requirements which have been applied in investment arbitration. Nevertheless, transparency should be carefully sought. Following Nigel Blackaby's parental advice,[84] it does not seem appropriate for an overprotected child to be abruptly overexposed to the outside world. In fact, an overprotected child must be prepared and well equipped by his parents to be able to adapt and survive when he finally faces the rest of the world. Otherwise, that child, who was once used to be safe in his privacy, will not have the bone structure to survive in such an environment.

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8 See Christina Knahr and August Reinisch, Transparency versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise, The Law and Practice of International Courts and Tribunals 6 (2007) and Eugenia Levine, Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation 29 Berkeley Journal of International Law 200 (2011).

9 Blackaby, et al., supra n. 7, at 256.

10 Throughout this work, the term amici curiae will be used as plural for the term amicus curiae, which refers to a third non-disputing party.

11 Roderick Abbott, et al., Demystifying Investor-State Dispute Settlement (ISDS) 5 ECIPE Occasional Paper 10 (2014).

12 For more information on the origin of the notion of amicus curiaesee Katia Fach Gomez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw
the Line Favourably for the Public Interest 35 Fordham Int'l L.J. 510 (2012), John Bellhouse and Anthony Lavers, The Modern Amicus Curiae: A Role in Arbitration? 23 Civ. Just. Q. 187 (2004) and Ernest Angel, The Amicus Curiae American Development of English Institutions 16 Int. and Comp. L. Q. 1017 (1967).

13 S. Carol Harlow, Public Law and Popular Justice 65 M.L.R. 7 (2002).

14 Bellhouse, et al., supra n. 12, at 7.

15 SeeMethanex v. USA, Application for Amicus Standing (25 August 2000); Supplemental Application for Amicus Standing (6 September 2000); Application for Amicus Standing (13 October 2000); Final Submission in support of Application for Amicus Standing (16 October 2000).

16 Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID case no. ARB/03/19.

17 United Parcel Service of America Inc. v. Government of Canada, ICSID case no.

UNCT/02/1.

18 Vivendi, supra n. 16, at Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005) para. 17.

19 Ibid para. 18-28.

20 Ibid para. 29.

21 ICSID Arbitration Rules Article 37 (2).

22 The NAFTA Free Trade Commission comprises the ministers responsible for international trade in the three NAFTA countries, Canada, Mexico and the USA.

23 Statement of the Free Trade Commission on non-disputing party participation.

24 ICSID Arbitration Rules Article 37 (2).

25 See International Energy Charter Consolidated Energy Charter Treaty (15 January 2016) Foreword 2.

26 Norah Gallagher, ECT and Renewable Energy Disputes in Maxi Sherer (eds), International Arbitration in the Energy Sector 256 (OUP 2018).

27 AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID case no. ARB/07/22.

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32 AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary , ICSID case no. ARB/07/22, Award (23 September 2010).

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34 Electrabel S.A. v. Republic of Hungary, ICSID case no. ARB/07/19.

35 Ibid, Procedural Order no. 4 para. 22.

36 Ibid, Procedural Order no. 4 para. 29.

37 Charanne and Construction Investments v. Spain, SCC case no. V 062/2012, Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID case no. ARB/13/31 and Eiser Infrastructure Limited and Energía Solar

Luxembourg S.à r.l. v. Spain, ICSID case no. ARB/13/36.

38 Treaty of Lisbon, [2008] OJ C115/1.

39 The Treaty on the Functioning of the European Union, (2012) OJ C326/49.

40 Jan Kleinheisterkamp, The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European law perspective, 7 LSE Law, Society and Economy Working Papers 1 (2011).

41 Methanex, supra n. 15, at Decision of the Tribunal on Petitions from Third Persons to Intervene as amici curiae (15 January 2001) para. 49.

42 Vivendi, supra n. 18, at para. 18.

43 EU decision, supra n. 30.

44 Consolidated Version of the Treaty on European Union [2008] OJ C115/13

45 Levine, supra n. 8, at 215.

46 Triantafilou, supra n. 33.

47 Levine, supra n. 8, at 216.

48 See, for example, Code of Practice on Expert Witnesses Engaged by Solicitors 1995 Law Society s. 25, which determines that when giving evidence at court, 'the role of an expert is to assist the court, and remain independent of the parties'.

49 Alexis Mourre, Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration? 5 LPICT (2006).

50 Ibid 269.

51 The FTA Statement requires for the non-disputing party to:

(c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, 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 applicant);

(d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;

(e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;

(f) specify the nature of the interest that the applicant has in the arbitration;

…

52 Vivendi, supra n. 18, at para. 25.

53 Regulation (EU) no 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member-States and third countries.

54 C. Kittelmann and B. Kasolowsky, The Participation of the European Commission as a Non-Party in Investment Treaty Disputes: an Appraisal of the Procedural Framework in

Light of the Draft Regulation on Transitional Arrangements 2 TDM 9 (2013).

55 See TFUE article 311.

56 Vivendi, supra n. 18, at para. 29.

57 See ICSID Rules article 37 (2): '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.'

58 SeeMethanex, supra n. 41, at para. 52, Vivendi, supra n. 18, at para. 27 and Electrabel v. Hungary, supra n. 34, at Procedural Order no. 4 (28 April 2009) para. 26.

59 SeeMethanex, supra n. 41, at para. 12 and Electrabel v. Hungary, supra n. 58, at para. 27-36.

60 Ibid.

61 Vivendi, supra n. 18, para. 22.

62 OECD, Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, OECD Working Papers on International Investment (2005).

63 Mourre, supra n. 49, at 266.

64 Nigel Blackaby, Public Interest and Investment Treaty Arbitration, 1 TDM 2 (2004).

65 Blackaby, et al., supra n. 7, at 270.

66 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID case no. ARB/05/22 para. 22.

67 Blackaby, et al., supra n. 7, at 266.

68 Blackaby, et al., supra n. 7, at 267.

69 Methanex, supra n. 15, at Application for Amicus Standing (25 August 2000) para. 14.

70 Mourre, supra n. 49, at 270.

71 Christer Soderlund, The future of the Energy Charter Treaty in the Context of the Lisbon Treaty, in Coop, supra n. 28, at Ch. 6, 99 et seq.

72 Ibid 104 et seq.

73 Case 6/64, Costa v ENEL (ECR 1964) 585, 593; Case 26/2, Van Gend en Loos (ECR 1963) 1, 12.

74 Case C284/16, Slowakische Republik v. Achmea BV (ECJ 6 March 2018).

75 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID case no. ARB/05/20 (award) para. 334.

76 Ibid Letter of 31 January 2014 sent by the EC to the Romanian authorities.

77 Ibid Letter of 1 October 2014 sent by the EC to the Romanian authorities.

78 EU decision, supra n. 30, at para. 165.

79 See Cases C-205/06 Commission v Austria (ECJ I-1301, 2009); C-249/06 Commission v Sweden (ECR I-1335, 2009); C-118/07 Commission v Finland (ECR I-1301, I-1335 and I-10889, 2009).

80 Julian D. M. Lew, Loukas A. Mistelis and Stefan Michael Kroll, Comparative International Commercial Arbitration, (Kluwer Law International 2003) para. 28-5 and Thomas W. Walde, Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, 12 Arbitration International OUP 429 et seq (1996).

81 Eastern Sugar, supra n. 31.

82 There are four theories on the nature of the arbitration mechanism by describing its relation with the legal system, usually known as the jurisdictional, contractual, mixed or hybrid and autonomous theories. For more information on this subject see Lew, et al., supra n. 80, at ch. 5.

83 Vivendi, supra n. 18, at para. 17.

84 Blackaby, supra n. 64.