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# More Than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration

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The controversial role of non-disputing parties has been the object of a significant amount of literature. While third party funding was a hot topic hitherto, the so-called *amicus curia*, and its evolving role, might be back in the spotlight. Since the first ICSID *amicus* case -the *Bechtel* case- until today, the rights, interests at stake and role of the *amici* have evolved.

Initially, NGOs and indigenous communities were the ones filing *amicus* briefs asserting impartiality in the outcome of the dispute and humanitarian concerns. However, the European Commission (EC) has recently readopted an active and ambitious role in investment arbitration, analyzing the relationship between intra-EU investment agreements and EU law. Such stance can be observed, amongst others, in the *amicus* petitions submitted in the Antin Infrastructure Services Luxembourg S.à.r.l., Antin Energía Termosolar B.V. v. Spain, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Spain and RENERGY S.à r.l. v. Spain cases.

The legal standard for access of the EC as a non-disputing party to investment arbitration has opened a broad debate. According to ICSID Arbitration Rule 37.2, the arbitral tribunal shall consider whether the non-party submission (a) "would assist the tribunal in the determination of a factual or legal issue – by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties", (b) "would address a matter within the scope of the dispute" and (c) would reflect "a significant interest in the proceeding" by the nonparty itself.

The current expansive role of EC participation in investment treaty proceedings between EU Member States and third countries could be explained by 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. Pursuant to its Art. 13 (b) "the Member State shall also 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".

**EC as amicus curia under ICSID's auspices**

The first case in which the EC filed an *amicus* brief in an ICSID case, was the *AES v Hungary* case, an ECT claim, already addressed in this blog by our colleague Epaminontas Triantafilou. The

arbitral tribunal ruled that the EC could intervene in the arbitration by submitting legal arguments; however it denied access to the parties' submissions. The *amicus* initially challenged the tribunal's jurisdiction; nonetheless the tribunal did not accept such stance as the parties had not raised the challenge. The EC's brief held that the agreement at issue was illegal as a matter of European Community Law. In particular, the EC claimed that the contract between the parties could violate the EC's restrictions on State aid and discussed the relationship between EU law and the ECT.

In the same vein, the EC discussed the aforementioned relationship between EU law and the ECT in the *Electrabel v Hungary* case in another *amicus* brief. In view of the EC, Hungary had not breached its treaty obligations since the changes in policy under scrutiny were introduced in order to comply with EU law. The arbitral tribunal accepted that the EC offered a distinct perspective and permited the access to the parties' submission.

Another interesting *amicus* petition was filed in *Micula v. Romania*. The interest at stake was EU state aid regulations. As stated in the EC's *amicus* brief, the BIT (Sweden-Romania) should be interpreted in light of EU law as otherwise the award would be unenforceable in the EU. Remarkably, after the arbitration the EC, by letter of 26 May 2014, informed Romania of its decision to issue a suspension injunction obliging Romania to suspend any action which may lead to the enforcement of the pending part of the award. According to the EC, such enforcement would constitute unlawful State aid. Thus, the EU launched a formal investigation under Art. 108 (2) of the Treaty on the Functioning of the EU at the beginning of last November.

A look into recent case law suggests a new approach. In two recent ECT-ICSID investor state arbitrations claims against Spain where the EC has also submitted *amicus* briefs, both arbitral tribunals have considered the EC's intervention to be premature (*Antin v Spain* and *Eiser v Spain*). Of particular note, the arbitral tribunals have rejected the *amicus* petitions, despite the fact that the EC might later succeed its attempt to obtain participation rights. This could imply the beginning of a new trend in *amicus* where the privacy of the dispute prevails and the legal interest of the EC is not considered as relevant as it used to be. Indeed, such decisions reveal that the EC does not enjoy a special procedural status. However, only time will let us know whether the EC finally appears in these two proceedings.

**The evolving nature of the EC's amicus interventions**

The wave of *amicus* petitions filed by the EC in most of the EU investor state claims can be a source of caution and concern. Truly, there is an ongoing debate. What is more, the role adopted by the EC, in the *Micula* case has evolved from its mere participation as *amicus* to an active stance against the enforcement of the ICSID award.

From the investor's perspective, the EC is clearly not a party to the proceeding and parties should not be burdened by its participation, which could undoubtedly lengthen and increase the cost of the proceeding. Consequently, such participation could "unfairly prejudice either party" contradicting ICSID Arbitration Rule 37. In the same light, the investor might consider that the privacy of the proceeding is jeopardized. Bear in mind that in accordance with Art. 13 of the EU Regulation the respondent EU Member State shall fully cooperate and take all necessary measures to ensure an effective defense.

By contrast, from the EC approach, the reasons that explain such stance are, inter alia, the protection of the public interest in the proceedings, a desire of transparency and the EU's direct

legal interest in the outcome of the dispute. Indeed, the EC is currently engaged in the EU investment protection policy. Likewise, the experience and expertise of the EC in energy matters and state aid (in line with the latest EU ICSID claims) might be a factor to be taken in consideration by the arbitral tribunals. However, the EC is not a mere third party to proceedings concerning EU Member States and EU law, a fact that clearly influences its expansionary intervention in such proceedings.

Under this panorama the following issue arises: should an investor against an EU Member State in an ICSID claim simply expect the participation of the EC as an *amicus*? Considering the current EU regulation, the answer seems to be in the positive. However, recent case law is a good illustration that the legal interest in the dispute is not always justified by the *amici* and its presence could even compromise the proceeding. To use the words of a senior practitioner, "the friend of the court should not be the friend of one of the parties". (A. Mourre, *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?*, LPICT, Volume 5, 2006, Issue 2, pp. 257-271). Only time will evidence whether the EC maintains its increasingly active presence as a non-disputing party and the effect of these interventions on investor-state proceedings.

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