International investment arbitration is a preferred method for resolving investor-state disputes relating to alleged breaches of investment protection, forming part of substantive protection for cross-border investments within the vast network of international investment agreements. Since the birth of international investment arbitration in the 1960s, this institution has gone through notable developments, of which the presence of EU law and the European Commission as an intervening third party are some of the most recent changes. The role of the European Commission as a third party within the international arbitration regime has not, in this specific sense, been subject to academic research. It is therefore of interest and importance to research the role of the European Commission as a modern third party intervener in international investment arbitration.

This thesis examines the case law of investment arbitration tribunals, most prominently the International Centre for Dispute Settlement of Investment Disputes (ICSID), in which third party interventions have taken place. Amicus curiae or third party intervention is a procedural right for interested third parties to intervene within investment arbitration, expressing their opinions relating to the dispute. The amicus curiae institution helps the arbitral tribunal in its most inherent task, which is to find the right decision in the dispute at hand, by enlightening the tribunal with information that would in the absence of such third party submissions be left outside its knowledge.

As the international investment arbitration has gained more presence within the international judicial landscape it has also been put under the scrutiny of the public society. Through this public exposure the investment arbitration regime has been proven to lack important features of legitimacy and transparency and many initiatives have recently been taken in order to remedy these flaws. The investment arbitration regime has come to a modern era and simultaneously the amicus curiae institution has developed significantly. Through the codification of desires of various stakeholders and the practice of investment arbitration tribunals, there are today sufficient rules in order to establish the prerequisites for the acceptance of amicus curiae. Today, amicus curiae intervention is supported with the arguments that it enhances the transparency and legitimacy of international investment arbitration.

The European Commission has been actively participating as a third party intervener in investment arbitration since the adoption of the Lisbon Treaty in 2009, when investment law was incorporated into the exclusive competence of the European Commission. This thesis examines the situations where the European Commission has intervened, and comes to the finding that the role of the European Commission is incompatible with the modern amicus curiae institution. Notwithstanding these findings, I argue in this thesis that the role and the ample rights granted to the European Commission can be legitimized with support from the original meaning of amicus curiae, as its participation can also contribute to enhanced legitimacy of the international investment arbitration regime.
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*CETA*
Comprehensive Economic and Trade Agreement between the European Union and Canada, negotiations terminated in August 2014 but the agreement is not yet in effect

*EC Treaty*

*ECT*
Energy Charter Treaty, entered into force on 1 April 1998

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

BIT between Germany and Pakistan, signed 25 November 1959

BIT between France and Albania signed, 13 June 1995

BIT between Sweden and Egypt, signed 15 July 1978

*ICC Arbitration Rules*
International Chamber of Commerce Rules of Arbitration, in force as of 1 January 2012

*ICSI AF Arbitration Rules*

*ICSI Arbitration Rules*

*ICSI Convention*

*LCIA Arbitration Rules*
Arbitration Rules of the London Court of International Arbitration, effective 1 October 2014
Lisbon Treaty

Mauritius Convention

NAFTA
North American Free Trade Agreement, entered into force on 1 January 1994

SCC Arbitration Rules
Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as of 1 January 2010

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NAFTA website, North American Free Trade Agreement

SCC website, A Record Year for Investment Treaty Disputes

SIAC website, Draft Arbitration Rules

SIAC website, Public Consultation on Draft SIAC Investment Arbitration Rule

UNCITRAL website, Transparency Registry

UNCTAD website, Foreign Direct Investment (FDI)

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*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21

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Abbreviations and definitions

ADR: Alternative Dispute Resolution
BIT: Bilateral Investment Treaty
CIEL: Center For International Environmental Law
EC: European Commission
ECJ: European Court of Justice
ECHR: European Court of Human Rights
ECT: Energy Charter Treaty
FET: Faire and Equitable Treatment
FDI: Foreign Direct Investment
ICSID: International Centre for Settlement of Investment Disputes
ICC: International Chamber of Commerce
IIA: International Investment Agreement
IISD: International Institute for Sustainable Development
LCIA: London Court of International Arbitration
NGO: Non-Governmental Organization
PCA: Permanent Court of Arbitration
SCC: Arbitration Institute of the Stockholm Chamber of Commerce
SIAC: Singapore International Arbitration Centre
TFEU: Treaty Establishing the European Union
UNCITRAL: United Nations Commission on International Trade Law
UNCTAD: United Nations Conference on Trade and Development
USD: United States Dollar
WTO: World Trade Organization
1 Introduction

Amicus curiae, “a friend of the court”, is not a new concept within international investment arbitration. It is a procedural right granted to non-disputing parties to submit opinions within arbitral proceedings. The original intention of accepting amicus curiae or third party interventions is that it helps the arbitral tribunal in its essential task, which is reaching the right decision in an investor-state dispute; a dispute between a private investor and a sovereign state for alleged breaches of investments protection. Through the evolution of the investment arbitration regime and the increased criticism against this “flawed” and “non-transparent” dispute settlement method, amicus curiae has become a channel for interested non-parties to have their voices heard. The role of the amicus curiae regime as boosting transparency has been a beloved subject within legal literature and the general view is that an efficient use of amicus curiae enhances the transparency of investor-state arbitrations by taking into account the public interest. This simultaneously leads to greater legitimacy and some of the flaws of the investment arbitration system can be remedied.

Generally the amicus curiae parties that have expressed their opinions within investor-state arbitrations are NGOs, speaking for and protecting values such as the environment, peoples’ health or the right of indigenous people. The roles and impacts of these intervening organisations have likewise been much discussed in legal literature. Now a new player has entered the picture, the European Commission (EC), which has since 2010 intervened actively in investor-state arbitrations. The role of the EC as a third party intervener has not been studied anywhere near to the same extent as other amicus curiae actors. Furthermore, no studies have been made on what implications the presence of the EC has within the context of the modern amicus curiae institution. It is therefore well founded to research the role of the EC as an amicus curiae party in international investment arbitration. This thesis will serve as a humble and modest contribution to the debate of the so-called “transparency hub” by particularly addressing the specific questions of the role of the EC and what implications its presence has for the international investment arbitration regime.
Starting with the formalities, I first explain the objective of this thesis and the choice of research methods. After this I explain what type of source material has been used and what the exact scope of this thesis is and how it is delimited. Going over to the subject matter, I will first provide the reader with a short history and background of the international investment arbitration regime. Following a historical examination of the subject matter, the *amicus curiae* system is addressed in the third chapter, in which I research the application and acceptance procedure of such third party submissions. In the fourth chapter, I discuss the transparency notion that complements certain fundamental characteristics of the “modern” *amicus curiae* institution. In the fifth chapter, I approach the modern *amicus curiae* institution from an EU law perspective addressing the role of the EC as a third party intervener in investment disputes. I also examine whether the same rules generally accorded to *amicus curiae* participation apply to the EC. In a separate sixth chapter, I examine and argue the implications of those findings within the context of international investment arbitration. The thesis is finally concluded with a short summary of the answers to the research questions.

### 1.1. Objective of the Study

A legal research is complete if it is made thoroughly, its aim is set out clearly and the outcome of the research can contribute to some sort of development within its relevant academic scope, whether it is a point of view or suggestion for improvement.¹ It is also meaningful to provide the reader with a comprehensive description of the reasons for carrying out that specific research. This chapter therefore explains the objective of this thesis and why this research is important to carry out.

One subject that has been studied much within legal literature is whether or not the *amicus curiae* institution works efficiently and in what extent it enhances the transparency of international investment arbitration. Legal literature addressing these matters are for instance “Amicus Curiae in International Investment Arbitration: Can it Enhance the

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¹ Häyhä (1997), pp. 27-28; see also pp. 61-62, in which Lars D. Eriksson summarizes the idea behind his view on legal theory (appearing in ”Kritisk rättsteori såsom ideologikritik”, JFT 5/1975), in which he proposes five steps in order to reach a new practice.
Transparency of Investment Dispute Resolution?”, by Maciej Zachariasiewicz and the recent publication “Transparency in International Investment Arbitration, A Guide to the UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration”, that addresses the incorporation of transparency related improvements in international investment arbitralion. The general view is that the amicus curiae institution indeed is a procedural possibility in order to enhance transparency and that in certain circumstances it works efficiently. This thesis does therefore not go in depth into the arguments for or against the amicus curiae regime or whether or not it enhances transparency. Transparency is on its way to become a general principle within investment law and it has been proposed that the amicus curiae regime is an important channel for affected groups to be heard. I have chosen to instead research the specific role of the EC as a third party intervener and whether it is compatible with modern amicus curiae.

Let’s get to the point – As mentioned, this thesis focuses on the role granted to the EC as a third party intervener, and whether the EC speaks for the same goals underlying the legal framework of the amicus curiae regime today. Thus an important question to be answered is whether the admissions of the EC as amicus curiae follow the underlying arguments and rules for accepting third party interventions. This is the first research question that this thesis addresses. The answer to this question will primarily be found through examining case law from investment arbitration tribunals and other international tribunals applying the amicus curiae regime setting out the rules to grant amicus curiae submissions. In this connection I also argue that the traditional role of amicus curiae has changed through recent developments and now has become what I will call the “modern” amicus curiae.

When examining the EC in more detail, I take a closer look at EU law and the EU investment regime, which both have gone through some developments recently and where issues such as transparency are highly underlined. I will especially examine why the EC has taken a more active role with regard to third party submissions in investment disputes.

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3 Euler (2015).
4 The condition under which the amicus curiae institution could work efficiently is when the procedure of this participation is made publicly available. See for instance "Are Amici Curiae The Proper Response to the Public’s concerns on Transparency in Investment Arbitration?", Alexis Mourre, The Law and Practice of International Tribunals, Volume 5 Issue 2, 2006, p. 269.
The second research question is whether the participation of the EC serves the same goals generally accorded to the acceptance of *amicus curiae* interventions or whether it serves another goal. The third research question is what the implications of the outcome are and whether the role of the EC as a modern third party intervener can be acceptable.

### 1.2. Research Method

The notion of *research method* within legal science is diversified and no exhaustive definition can be found.⁵ The multifold character of law within the contemporary society also suggests that applying a certain predetermined research method is not only impossible, but also inappropriate.⁶ Instead of being able to talk about one prevailing research method within legal science, the methods used have to be adapted to the complex nature of law and to the eccentric character of different legal issues. The application of a variety of research methods is prominent for the legal research in Finland, even though we can distinguish clear patterns of more “traditional” methods used, such as legal dogmatic, legal history and comparative law.⁷ Historically the choice of legal research methods in Finland has generated some criticism as being perceived as too theoretical and lacking a pragmatic approach. As described by Lars D. Eriksson the legal discipline in Finland during the 50s’ and the 60s’ was a highly technically tainted discipline, where legal practitioners focused on the systemization and categorization of rules, legal definitions, jurisprudence and its foundations and methods of interpretation.⁸ A central point of criticism was the lack of argumentation and inquisitiveness; some themes that would later on be paramount in divers publications by Lars D. Eriksson, in which he often underlines that also *values* and *interests* make a great part of the legal argumentation.⁹ At a later stage, in the 20th and the 21st century, when the research in international arbitration increased in Finland, a more pragmatic approach was adopted.¹⁰ Since dispute resolution is highly anchored in societal aspects dissociated from purely theoretical legal dimensions,¹¹ a pragmatic approach is appropriate when researching international arbitration. Nevertheless, a reasonable opinion

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⁷ Aarnio (1997), pp. 36-37.
⁹ See for instance “Samhällstillvänd juridik” from 1986 and ”Värderingar, fakta och juridik” from 1969, both published by Lars D. Eriksson in JFT, a periodical by Juridiska Föreningen i Finland r.f.
¹¹ Ibid.
is that the most dynamic result is obtained by applying a myriad of research methods adapted to the subject matter of the research.\textsuperscript{12}

The aim in this thesis is to incorporate a divers set of research methods in order to tailor the approach to suit international investment arbitration. The research methods used are adapted to, first, the \textit{sui generis} characteristics of international investment arbitration. In order to get a broader picture of the investment arbitration regime in light of its surrounding legal frameworks, the underlying method used is holistic where the various procedural aspects of investment arbitration will be put in context and mirrored against underlying values and interests. The underlying research method is in other words \textit{law in context}. Secondly, the particular research methods used are adapted to the relevant sub subjects researched. An \textit{explanatory} research method is applied to the first part of the thesis, where the research focuses on the evolution of the \textit{amicus curiae} institution. In the second part, a \textit{legal dogmatic} method is used when the role of the EC is incorporated in the picture of the modern \textit{amicus curiae} institution. The last part of the thesis applies an \textit{evaluative} research method when the findings of the first and the second part are mirrored against each other.

\subsection*{1.3. Scope and Delimitation}

Starting from the broader picture, within the scope of this thesis lies an examination of the development of transparency within international investment arbitration. Therefore, some political discussion will be included, in which the different desires of different stakeholders regarding transparency is discussed. The discussion of recent regulatory initiatives that have been taken to live up to these expectations likewise falls within this same political discussion.

When narrowing down and focusing on the procedural aspect, we will see that the regime of investment arbitration includes a possibility for \textit{amicus curiae} interventions. Since the possibility to intervene in an investor-state arbitral proceeding is a procedural right,\textsuperscript{13} such

\begin{flushleft}
\end{flushleft}
interventions do not affect the substantial rights of the parties. Therefore an examination of the substantial rights of the parties will be left outside this research. As third party intervention is a procedural right within investment arbitration this thesis is categorized within procedural law.

The investor-state arbitration regime is per definition, a cross-boarder phenomenon. Such international disputes are solved according to various international institutional rules and the geographic scope is global. Even though some domestic Finnish source material is used, this research is purely international without any connection to any domestic legal system. Nevertheless, this thesis lays a specific focus on an EU perspective, by examining the interaction between EU law and international investment law. The scope of this thesis is therefore international with a specific interest in EU law.

Further, international arbitration can be divided into international investment arbitration and international commercial arbitration, at the same time forming the differentiation between public and private arbitration. The primary focus of this thesis is international investment arbitration, thus excluding a profound examination of international commercial arbitration, which is as a purely private method of dispute settlement.Nevertheless, this limitation is not strict, since, as we will see, the distinction between public and private dispute settlement is not always crystal clear and in order to get a better understanding of the investment arbitration regime, commercial arbitration is casually reviewed by way of comparison.

When discussing the notion of transparency within international investment arbitration some limitation is also necessary. From a broad perspective, transparency touches upon topics such as treaty negotiations, the availability of information concerning ongoing disputes, the right for non-disputing parties to access case material, the possibility to

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15 Regarding the classification of investment arbitration as public law see chapters 2.3. and 4.3. below.

16 Blackaby et al. (2015), §§. 1.04-1.05.
submit third party submissions and to attend hearings as well as the possibility to take part of rendered awards.\textsuperscript{17} Even if these aspects often go hand in hand and the separation of the same is not strict,\textsuperscript{18} this thesis \textit{primarily} focuses on the procedural right of third party to submit \textit{amicus curiae} submissions.

\textbf{1.4. Source Material}

As the subject of this research is international, likewise is the source material used. The sources material is found in legal literature, articles published in various academic periodicals, official publications from relevant international institutions and organisations, various press releases, information found on relevant websites as well as case law of international tribunal and courts. A prominent source material is the case law of international tribunals devoted to international investment arbitration as well as the case law from other international tribunals accepting \textit{amicus curiae} applications. Some arbitration tribunals clearly focusing on investment arbitration, such as the ICSID,\textsuperscript{19} provide annual reports and caseload statistics. Such statistics are used to get an overall picture of the amount of international investment agreements and bilateral investment agreements, concluded investment arbitrations and types of disputes. An important general remark regarding research on international arbitration is that relevant case law might not always be accessible to the public or, as is often the case, that only the final award is publicly available.\textsuperscript{20} This forms a restriction of the material that can be covered.

\begin{footnotesize}
\begin{enumerate}
\item The \textit{possibility} to submit third party-submissions is logically depending on whether or not non-disputing parties have access to information about on going disputes within relevant arbitration tribunals. The \textit{effectiveness} of third party submissions again is depending on the content of the case material submitted by the parties as well as the content of the material officially published. Not knowing in detail the content of the party submissions makes it useless for non-disputing parties to waste time and money on third party submissions. It is therefore natural that the rationale behind the \textit{amicus curiae}-system will loose its signification if the non-party would have to file a long shot submission.
\item International Centre for Settlement of Investment Disputes.
\item The reasons for this fact will be elaborated in chapter 2.3. when discussing the distinction between public and private arbitral proceedings.
\end{enumerate}
\end{footnotesize}
1.5. Terminology

This thesis centres on a number of keywords and it is necessary to describe these in an early stage in order for the reader to follow the discussion throughout this thesis. The underlying reason for the investment protection and the investment arbitration regime is to enable foreign direct investments (FDIs). FDIs are “investments made to acquire lasting interest in enterprises operating outside of the economy of the investor”, and which are accorded to boost economical and societal growth within a state. In this thesis the term “host state” is used to describe the state in which the FDI is made and “home state” to describe the state of the foreign investor. FDIs are protected by investment protection, which again can be defined as a broad economic term indicating any type of advance guarantee that an investment will be protected from being totally worthless.

A key aspect of investment protection is for instance that the contractual circumstances at the time of the investment decision stay unchanged during the lifetime of the investment. Investments can be protected through investment legislation or investment agreements, and substantive protection can take form through, e.g., the prohibition of illegal expropriation or the right of investors to investment arbitration. International investments are protected by a network of some 3000 international investment agreements (IIAs), which are agreements that sovereign states conclude in order to determine and protect investments between, reciprocally, the citizens of one of the state parties in the territory of the other state party. Within these treaties we can find both bilateral investment treaties (BITs), which are treaties between two states, and multilateral investment treaties, which again are treaties concluded between more than two states.

21 This definition by UNCTAD is found at the following address: http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx (accessed 1 October 2016).
22 Regarding the impacts of FDIs reference is made to chapter 2.1. below.
26 The definition investment is quite broad and there is actually no exact definition to be found. It has been proposed that the definition on investment is often left open within investment treaties to enlarge the scope of investments that would fall under the application of the investment protection provided by the investment agreement. A broader scope of application over the economic activities is naturally more attractive in the eyes of the foreign investor who now will be more eager to invest in that said state.
The rules for the conduct of the arbitral process are often separate from the rules providing substantive investment protection. The procedural rules applicable in arbitration are called the *lex arbitri*.\(^{28}\) Within arbitration the choice of the *lex arbitri* is *a priori* up to be decided between the parties,\(^{29}\) which is an aspect rooted in the basic principles of consent and freedom of choice known to alternative dispute resolution (ADR). The choice of the parties is in most cases confirmed by the signature of two or more parties of an IIA, which include their own procedural provisions or references to a set of rules regarding the conduct of the arbitration. The most prominently used arbitration rules are the rules in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),\(^{30}\) which will be much discussed in this thesis. When a dispute is settled before an ICSID tribunal, the set of procedural rules are the ones of the ICSID Convention and thus the *lex arbitri* is the arbitration rules in the ICSID Convention.\(^{31}\)

A last important keyword is the notion of *amicus curiae*.\(^{32}\) The *amicus curiae* right within investment arbitration is the right for third parties to intervene in the dispute. An *amicus curiae* is simply defined as a friend of the tribunal without becoming a party to the dispute.\(^{33}\) It is to be noted that within this thesis the words *amici curiae* and third party are used as synonyms for *amicus curiae* or simply *amicus*.

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\(^{28}\) McLachlan *et al.*, (2007), p. 84.

\(^{29}\) In case the parties cannot come to an agreement the tribunal might be the one deciding upon the applicable law to the dispute. Another case where there might be a derogation from the wish of the parties is in case there is obliging, underlying legislation pointing towards another direction, prohibiting the wish of the parties.

\(^{30}\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.


\(^{32}\) *Amicus curiae* will be further defined in chapter 3 below.

2 The International Investment Arbitration Regime

Proceeding to the substantial part of this thesis, I start by describing the history and background of the international arbitration regime and some of its “fundamental” characteristics. International investment arbitration has its genesis in investment protection, taking form in international investment agreements, and it is the prominent dispute settling method for resolving investor-state disputes arising out of alleged breaches of investment protection. It comes naturally that a comprehension of the underlying system is essential before moving over to more detailed and specific issues. Before examining the procedural aspects of amicus curiae, I will therefore first address the history and the fundamental notions of investment protection and international investment agreements in general.

2.1. History and Background

“Money makes the world go around” is a well known saying, which also lies behind the birth of investment protection and consequently the investment arbitration regime. It is generally acknowledged that FDIs are extremely valuable for states wanting to boost their economical development. FDIs are in a key position in facilitating and boosting the economical growth of a country as well as in fighting poverty, especially in developing countries. For a state, FDIs bring in capital, which in turn creates more job opportunities and makes states and their businesses more competitive and inviting on the global market. FDIs formed a great part of the economic reconstruction after the Second World War. This applies especially to developing countries with rich natural resources, but lacking in technical and financial abilities to exploit these resources. The development of

34 The word fundamental is within citation marks because, as we well see later on, these characteristics have changed a lot through the evolution of the investor-state arbitration regime and with new winds blowing in it can be said that what used to be a fundamental characteristic might today be the opposite; the public society might want to impose principles that simply go against what used to be a basic feature of investment arbitration.
such countries was therefore depending on investments from more developed countries to boost the exploitation of their natural resources. In this way capital exporting states transferred technological knowledge to developing countries through FDIs.

In order to get the best benefits out of free trade and free flow of capital, the system has to be regulated and an enforcement system has to be available. Accordingly, in order for foreign investments to be effective and desired they need to be protected and regulated. FDIs are therefore controlled and protected through various IIAs.  

The regime of international investment arbitration is built on treaties between states protecting these important FDIs. Thus recourse to arbitration forms a part of different ways to protect foreign investments. The contemporary era of international investment protection treaties traces back to 1959, when the first BIT was adopted. The desire to set up investment protection treaties started to gain importance through the economic globalisation and when investments between countries, often between countries with different legislative traditions, was liberalised. When capital flow between private investors and foreign countries was liberalised and started to increase, investors felt that their investments needed to be protected from governmental acts taken by the state hosting their investments. These acts could include, i.a., political innovations, such as the implementation of new policies turned into regulatory changes, judicial rulings and other administrative decisions, which in turn could result in for instance expropriations and nationalisations of private property. Simultaneously, safeguards for the protection of foreign investments were needed to attract foreign investors and generally for the international investment regime to work efficiently.

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39 More about the impacts of IIAs, see for instance “The Impact of Investment Policy in a Changing Global Economy”, Roberto Echandi; Jana Krajcovicova; Christine Zhenwei Qiang, Trade and Competitiveness Global Practice Group, The World Bang Group, October 2015, pp. 21-25, in which it is concluded that ratified IIAs can increase FDI to the treaty parties, and that the impact of positive investment flow is especially evident in developing countries.


A special need to set up such a borderless system of guarantees and protections existed since there were great differences between the legislations and the legislative security between developing and developed countries.\(^4^4\) General rules of customary international law naturally applied to the relationship between an investor and a host state, but more detailed and straightforward substantial legislation was needed in order to achieve contractual stability.\(^4^5\) This development expanded the territories in which private investors were willing to take investment risks, which in consequence made it possible for the host states to benefit from the investments. These goals contributed to the establishment and development of IIAs.

Not only do the IIAs contribute to the system of international investment protection to be effective from the viewpoint of the host state, the IIAs also make an important contribution to the attractiveness of the international investment regime from the viewpoint of the investor.\(^4^6\) From the viewpoint of the foreign investor, an important feature is the contract stability, mentioned above. When foreign investors decide to carry out commercial projects in foreign states, which often can be characterised with long payback periods, they want to be safeguarded from unforeseeable and arbitrary national judicial decisions that can affect the profitability of the investments. In order for FDI to be attractive, there should thus be contractual stability regarding the determination and protection of the investments the private investor is making. Contractual stability is achieved through legal certainty, in which, according to the principle of the rule of law, the legal situation should be foreseeable and based on written and clearly defined rules separating the judicial from the political powers and applicable in a non-discriminatory manner.\(^4^7\) Only if these requirements are fulfilled, the risks generated by a foreign

\(^{4^4}\) Dolzr; Schreuer (2012), p. 5.
investment in an unknown territory are reduced, at least to some extent, and the system as a whole appears more attractive. A proper application of the rule of law thus enhances the contractual stability in favour of the foreign investor. In an attempt to fulfil the requirement of legal certainty, the international community has created a regime of treaties that serve as legal frameworks for the protection of cross-border investments. These IIAs contain detailed substantive rights for the protection of foreign investments. Notwithstanding the independent character of the IIAs, they belong to a wider legal framework of potentially applicable (national and/or international) law and do not constitute to a self-sufficient legal regime untouched by the surrounding legal frameworks. This should be kept in mind throughout this thesis.

The fact that there does not exist one big supranational institution addressing this question is mostly due to the failure of the international community to agree on one multilateral treaty, because of which states have signed such treaties separately with each other according to their specific needs. Therefore the international law community operates with BITs and IIAs. Multilateral treaties of importance according to their widespread use are the trilateral North American Free Trade Agreement (NAFTA) and the multilateral Energy Charter Treaty (ECT). These treaties include provisions that can be said to culminate to the general principles of international investment law. These general principles of substantive investment protection include, i.a., provisions of non-discrimination, most-favoured-nation clauses, requirements of fair and equitable treatment (FET) and rules regarding prohibited expropriation.

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49 There was an attempt to agree upon a multinational investment agreement, namely the Multilateral Agreement on Investment, which was negotiated within the OECD during 1995-1998 and which would give corporations wide rights to operate their international investments regardless of national laws. This attempt failed due to heavy criticism towards such an agreement by NGO’s, representatives for the civil society, and governments of developing countries.

50 Dolzer; Schreuer (2012), pp. 13, 15.

51 Ibid., pp. 98, 130, 191, 206.
2.2. Investment Arbitration

An important *procedural* mechanism that amounts to the protection of investments, included in most of the multi- and bilateral investment treaties, is the right for the investor to refer investment disputes directly before international arbitration courts. A breach of one of the aforementioned general principles, *e.g.*, the requirement of fair and equitable treatment, is a treaty breach for which the private investor can seek redress through arbitration. By doing so, the international investor does not have to rely on local domestic courts of the host state to have its claims heard and disputes resolved.

In the early stages, in the beginning of the 20th century, private investors had to rely on diplomatic protection between states to secure a fair treatment of their foreign investments, but some half a decade later, as arbitration was introduced as an alternative answer to solve investor-state disputes, investors could challenge states directly. Arbitration was initially introduced as a dispute settling method copied from what was already used between two private business parties, namely commercial arbitration. Hand in hand with the economic globalization after World War II, the use on investment arbitration also increased. The use of arbitration within investment law attained its foundation through the introduction of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (the New York Convention) together with the signing of the first BITs in the late 50s and later on through other multinational investment agreements. A significant milestone was the establishment of the ICSID in 1965 and the adoption of the ICSID Convention. Through these developments arbitration became a universal tool to solve investor states disputes.

Already at this stage a public law character was attached to investor-state arbitration. As McLachlan explains it, “[t]he result is dispute resolution which is arbitration in procedural terms, but which in substance has been said to share more of the characteristics of the

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56 The first BIT was signed on November 25, 1959 between Pakistan and Germany, the NAFTA came into force in 1994 and the ECT was signed in 1994 and came into force in 1998.
direct right of action before human rights courts”. In other words an analogy is drawn between investment arbitration and disputes before human rights courts, which are public procedures.

The growth of investment arbitration since the establishment of the ICSID was nevertheless slow and still 30 years after its establishment only about one case per year was registered. But since 2000 some 30 cases have annually been registered, where the trend since is clearly increasing. Even though the specific public law character of investment arbitration was already recognized in an early stage, it was not until the number of registered investor-state arbitration cases increased, that investment arbitration actually started to evolve in a direction away from traditional commercial arbitration.

Arbitration in general is characterized by the requirement of consent by the parties to arbitrate. The consent marks the willingness of the parties to resolve the dispute through ADR instead of relying on traditional domestic court proceedings. When the underlying character of this type of settlement is consent, it also brings about a certain degree of flexibility with regard of how the procedure should be conducted, meaning that parties to an arbitration process posses a great margin of freedom of choice. Flexibility constitutes one of the main aspects that make arbitration an attractive method for resolving commercial disputes and covers issues such as choice of forum, choice of procedural rules and choice of arbitrators. Another fundamental character is confidentiality, which is of relevance regarding this thesis. As we will see in the following chapter, confidentiality is the feature that probably differs the most between commercial and investment arbitrations.

It is to be noted that the use of arbitration to remedy an investment breach could be seen as a “last resort” remedy for the protection of the original investment. At the point where an investor has initiated an arbitral proceeding against the host state, the investment protection set up in the first place has actually already gone wrong, since the underlying IIA has

62 Blackaby et al. (2015), §§. 1.79, 1.104.
failed to accomplish its purpose. According to some scholars, investment arbitration should be seen only as an exit amongst different investment protection mechanisms. Despite the fact that arbitration should not be seen as the first method of investment protection, an arbitration clause is indeed imperative for the protection and the promotion of investments.

Additionally, previous case law shows that investment arbitration plays a huge role in the overall politics of investment protection, since both the awards in, and effects of investment arbitrations are rather impressive and sometimes quite dramatic. An impressive arbitral award that has been rendered is, for instance, the *Yukos* case under the UNCITRAL arbitration rules, in which Russia was held liable for a breach of investment protection towards three American claimants, former owners of the oil and gas company Yukos. The compensation awarded in 2014 amounts to 1.9 billion USD. Another significant award is the *Occidental Petroleum* case in 2012, in which the original award ordered Ecuador to pay compensation of 1.77 billion USD to two American companies. Of known concluded arbitral awards until the end of 2014, a total of five cases have resulted in awards where the respondent state has been ordered to pay compensations amounting to one billion USD or more.

### 2.3. Two Different Branches

We can clearly recognize two main branches of arbitration within international arbitration today. On the one hand we can distinguish *international commercial arbitration* and on the

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63 Professor Kim Talus noted this when lecturing about energy investment protection during the Helsinki Summer Seminar in 2014 held at the University of Helsinki by the Erick Castrén Institute of International Law and Human Rights with the title “International Investment Law: Between Public and Private”.


66 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, §. 876.

67 “Recent Trends in Investor-State Dispute Settlement”, Rachel L. Wellhausen, Journal of International Dispute Settlement, January 2016, p. 17. See also footnote 77 about recent dropouts from IIAs and BITs.
other hand international investment arbitration. These two types of arbitration rely on the same type of dispute settlement and still share many common features, which still form the fundamental characteristics of arbitration. Nevertheless, an inevitable fact is that since the whole concept of investment arbitration has evolved, these once shared features are more and more taking different directions depending on whether we are talking about commercial or investment arbitration. Taking confidentiality as an example, it is treated differently in investment arbitration than in commercial arbitration. In investment arbitration public law issues are resolved through a procedural playing ground that was originally drafted for private law disputes, which makes inevitable a certain degree of adaptation regarding the procedural aspects.

I argue that there are two main factors that contribute to the divergence of these two types of arbitration. These factors are, first, the difference in the substantive law, which is the underlying legal foundation and, secondly, the difference in the professional expectations on the arbitral tribunal. The underlying legal frameworks for international investment disputes are international investment agreements, concluded between sovereign states, such as BITs and other IIAs mentioned earlier, or alternatively the host state’s national investment law that includes protection for investors. In investment arbitrations the alleged violations are based on the promise of protection of investments derived specifically from treaties, and therefore concern matters of public international law. In

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69 When deliberating where to find the balance between the need for transparency and the need to protect the procedural integrity of the arbitration in the Biwater-case, the tribunal stated that “[c]onsiderations of confidentiality and privacy have not played the same role in the field of investment arbitration, as they have in international commercial arbitration. Without doubt, there is now a marked tendency towards transparency in treaty arbitration.” (Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, §. 114.); see also Blackaby; Richard (2010), p. 253; “Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012”, Arbitration International, The Journal of the London Court of International Arbitration, Volume 28 Issue 4, 2012, p. 586; Born (2014), p. 2823; Gehring; Euler (2015), pp. 8-9.

70 Blackaby; Richard (2010), pp. 245-255.


72 According to Black’s Law Dictionary (2014)”treaty” is defined as: ”An agreement formally signed, ratified, or adhered to between two countries or sovereigns; an international agreement concluded between two or more states in written form and governed by international law.”
the alleged treaty breach, the private investor challenges acts taken by the state signatory to a treaty that protects investments. Such acts usually consist of a state exercising its sovereign power, *e.g.*, by implementing a new policy in national regulations. This first main difference in comparison to commercial arbitration decisively places investment arbitration within public law.

International commercial arbitration again arises from the promises derived from commercial contracts between the disputing parties, such as, *e.g.* a contract between two private companies about the delivery of certain goods. Contracts between two private parties, such as two private companies, are generally affect the business of these two companies only. The legal foundation of the alleged breaches is thus very different in comparison to that of investor-state arbitration. Commercial arbitration is based on contracts belonging to private international law and investment arbitration is based on treaties and consequently under public international law. These two types include very different substantive provisions and therefore the underlying legal foundation, the substantive law, applicable in commercial and investment arbitration are to be distinguished.

The second factor that motivates the different categorisation of these two types of arbitration is that the professional tasks of the arbitral tribunal are very dissimilar. Within commercial disputes the arbitral tribunal will solve the disputes between the parties by focusing on the execution of the underlying commercial contract, whereas the tribunals in investment arbitration will focus on examining the acts taken by a sovereign state and whether or not such acts constitute a breach of the promised investment protection. A sovereign regulatory act can easily be said to differ fundamentally from a private company applying a certain business model, *e.g.*, a company not delivering the promised goods at a certain agreed time, and therefore breaching a contract. The tasks of the tribunal are

74 Blackaby *et al.* (2015), §§ 1.01-1.05.
therefore very different and poses two totally separate worlds of requirements of expertise and specialization upon the arbitral panel. To successfully follow the discussion throughout this research concerning the evolving role of transparency and all the spices that comes with it, the distinction between these two types of arbitration and the basis for such a differentiation is important to keep in mind.

2.4. International Investment Arbitration Today

Leaving aside commercial arbitration, I will talk briefly about how the investment arbitration scene looks like today and the characteristics defining it. Even if there have been some drop outs from IIAs due to a depreciation of the investment agreement regime, the signing of BITs and other multilateral investment agreements has firmly been increasing since the signing of the first BIT in 1959 and today there are around 3000 BITs. To be precise, at the end of 2015 there were 2926 BITs and 345 other IIAs. Since more states provide investment protection, and therefore a greater amount of private entities are within the scope of investment protection, consequently more investment arbitrations are initiated. According to the annual reports from leading arbitration centres, the number of registered investment disputes today is at its highest since contemporary investment arbitrations started to take place.

77 For instance Italy announced in early 2015 its withdrawal from the ECT (effective as of 1 January 2016), for reasons that are assumed to be due to the rising number of claims against Italy due to regulatory changes, and particularly against retroactive measures, within the renewable energy sector. In any case, according to the ECT as is the case in most IIAs and BITs, existing investment are protected during a 20 year long period following the withdrawal, according to the so-called “sunset-clause”. Earlier there have been some withdrawals from the ICSID; by Bolivia in 2007, Ecuador in 2010 and Venezuela in 2012, as well as Venezuela’s withdrawal from the BIT with the Netherlands.


A good practical example of this new trend is the new UNCITRAL Arbitration Rules and the Transparency Rules, which will be discussed more below.\(^{81}\) Furthermore, not only are many international organisations participating as *amicus curiae*, but also participating in the rulemaking by addressing matters relating to the procedural aspects of investment arbitrations and especially with regard to how the aspect of transparency should be intertwined in the whole process.\(^{82}\) This strongly supports the argument that transparency within international investment arbitration is a timely and important topic that concerns not only legal practitioners, but also governments, NGOs, other interest groups and the public society as a whole.

### 2.4.1. The popularity of Investment Arbitration

The top three most used “arbitration packages”, meaning arbitration institutes and/or legal frameworks for the settlement of investor-state disputes are, first, the already mentioned ICSID and its arbitration rules providing both procedural rules as well as a forum for the

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\(^{81}\) Another good example is the revision in 2016 of the 2013 arbitration rules of the Singapore International Arbitration Centre (SIAC). The revision would add to the arbitration rules separate rules applicable to investment disputes. The finalisation and publication of these rules, that was originally set to be during the first half of 2016, has seen some speed bumps due to substantial feedback from arbitration practitioners. Nevertheless the rules are incorporating the new trends within investment arbitration when it comes to transparency and third party submissions. In the words of the president of the SIAC Court of Arbitration, Gary B. Born the “The SIAC will also be introducing a new set of SIAC Investment Arbitration Rules, which are intended to provide an efficient alternative to the ICSID Rules and UNCITRAL Rules that States can adopt in their bilateral investment agreements or in other instruments. The SIAC Investment Arbitration Rules will contain provisions on early dismissal of meritless claims, transparency of arbitral proceedings and third party funding.” Even though the mention of transparency is only a vague promise, the draft version of the amendments to the 2013 SIAC arbitration rules does include a new provision allowing written or oral submissions by a “non-disputing contracting party” on the interpretation of the treaty or contract as well as a possibility for “non-disputing parties” to “file a written submission with the Tribunal regarding a matter within the scope of the dispute”. See p. 28 in the draft version of the SIAC Investment Arbitration Rules, which are available at: [http://www.siac.org.sg/images/stories/articles/rules/IA%20Rules%20%28rev%2020160115%29.pdf](http://www.siac.org.sg/images/stories/articles/rules/IA%20Rules%20%28rev%2020160115%29.pdf) (accessed 8 June 2016).

\(^{82}\) To name a few see, *e.g.*, the work of the UNCTAD, which is continuously and profoundly researching the policy trends within the international investment regime and simultaneously seeking to help developing countries to participate in the law-making of international investment regulation, the work of the IISD, particularly focusing on the effective use of rules and institutions governing international investment law to attract investment that foster sustainable development by, *e.g.*, introducing model BITs including sustainable development objectives. Regarding other initiatives by the IISD see particularly the “Investment Treaty News Quarterly” (available online under the topic “Investment” at [http://www.iisd.org/topic/investment](http://www.iisd.org/topic/investment), accessed 1 October 2016), in which the IISD addresses timely topics relating to investment arbitration) and the participation of CIEL in the negotiations of transparency within investor-state arbitrations within the UNCITRAL Working Group II Arbitration and Conciliation.
practical facilitation of investment arbitration. The second most used procedural legal framework is the United Nations Commission on International Trade Law (UNCITRAL) and its arbitration rules, however only providing arbitration rules without a specific governing institute. The third most used arbitration rules come from the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which consequently is the second most used forum for investor-state disputes. As the UNCITRAL only provides a legal framework of procedural rules without a specific institution for investor state-disputes, these are often conducted within the auspices of the ICSID, which also administer proceedings under other arbitration rules, such as ad hoc arbitrations.

ICSID is an administrative body, founded in 1965 within the World Bank Group, that provides services for the facilitation of investor-state disputes through giving out arbitration rules as well as providing, *i.a.*, hearing facilities and assistance in the appointment of arbitrators. As mentioned, the centre also administers arbitrations under other procedural rules, such as the UNCITRAL arbitration rules, and also provides administrative and technical support for other arbitration institutes. The self-contained arbitration system under ICSID is private and wholly independent from all domestic proceedings. ICSID only provides investors and states procedural rights without according parties any substantive rights in form of investment protection. The main legal instruments are, the ICSID Convention including the arbitration rules in chapter IV and the ICSID Additional Facility Arbitration Rules (ICISD AF Arbitration Rules).

Year 2015 was the 50th anniversary of the ICSID Convention and it was also the busiest year in its history with the highest number of cases, 53 cases concluded, in one year. As a fun fact ICSID also experienced its 500th case since its establishment. The ICSID Annual Report for the fiscal year 2015 provides for excellent examples over the popularity of the use of the ICSID in investor-state disputes and as an indicator of the growing number of such

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83 SCC is mentioned in at least 120 of the BITs globally and, *e.g.*, in the ECT as one of the alternative forums for investor-state disputes. With a total number of 85 registered cases since the first case in 1993, the SCC constitutes the second most popular institute for such disputes after the ICSID with over 500 registered cases.

84 The "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" entered into force 14 October 1966 and is today ratified by 153 countries and signed by eight. Updated information can be found on the website of the ICSID: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=AtoE&ordo=BOTH (accessed 11 September 2016).

85 ICSID Additional Facility Arbitration Rules, in force since 10 April 2006.

disputes generally. Exclusively focusing on investment arbitration, and thus excluding commercial arbitrations from its activity, the ICSID is clearly the leading institution for the settlement of investor-state disputes administering about 65% of the overall investor-state cases, and accordingly my research will mainly focus on the case law within the ICSID.

2.4.2. Some Timely Topics

The growing number of registered cases has also amplified the public’s attention to the investment arbitration regime generating debates about its flaws. Investment disputes cover very different subject matters reaching from environmental issues, human rights, public health and social wellbeing issues as well land and building rights and the rights of indigenous people. An economic sector that has been increasing within investment arbitrations is the energy sector, with an investment protection treaty of its own kind, the Energy Charter Treaty (ECT). Energy arbitration today fills up about one third of the ICSID’s caseload. Already a listing of these diversified and important subjects, prone to be underlying themes of the disputed matters, makes the reader understand that there is a myriad of concerned entities and voices that want to be heard. Heavy public scrutiny and criticism proves that international investment arbitration today is on thin ice and that its future potential and endurance as a dispute settlement method is indeed pushed to its edges. Numerous scholars also suggest that investment arbitration is facing a backlash against a system burdened by too many applicable regulatory instruments amounting to, i.a., conflicting awards, high costs and longer delays, not to mention the issues of too little transparency and lack of legitimacy that have since decades been subject to vast debate. The question whether this institution will prevail based only on the traditional

89 ICSID 2015 Annual Report, p. 25.
characteristics of arbitration seems to have been answered long ago, and the answer is definitely in the negative. What now is being done on many levels is that stakeholders representing different regimes and underlying values are cooperating in an effort to reconstruct the system. These interest groups includes scholar, practitioners, state representatives and representatives of the private sector as well as institutions speaking for the greater public.

Today there are many ongoing negotiations of international investment agreements and a timely debate, which also includes some important discussions about the transparency issue, the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the EU can be mentioned. It is of relevance to discuss this here, since the question concerning the inclusion of an Investor State Dispute Settlement (ISDS) mechanism in the TTIP has launched a rough debate regarding investment arbitration generally. The flame that is keeping this debate on fire is the claim that investment arbitration is deemed to lack legitimacy, as does accordingly the ISDS mechanism. The EU has, in order to relieve these concerns, expressly stated that it will

Blackaby; Richard (2010), pp. 255-256; Waibel, Kaushal, et al. (2010), p. xxxvii-xli; “Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest”, Katia Fach Gómez, Fordham International Law Journal, Volume 35, 2012, pp. 545-555. Already in 2001 the problem of legitimacy was identified in the Methanex-case when the tribunal (in Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “amici curiae”, 15 January 2001, §. 49) states that “[t]here is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.” In 2005 the OECD Investment Committee further underlined the issue in a statement, where it states that the effectiveness and legitimacy of investment arbitrations would benefit of an increased transparency. Even though the OECD in its statement primarily mentioned a more unforced view on the publication of arbitral awards it also underlined the importance of third party participation in investor-state disputes that are prone to address matters of great public interest.

93 The UNCTAD stated already in 2007 that even though only a minority of the BIT included provision on transparency, the trend forecasted a more open approach to transparency matters from different stakeholders and not only limited to the exchange of information but with a broader perspective covering new procedural grounds. See “Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking”, United Nations (2007), p. xiii. Since then many other stakeholders have contributed to the development and as for some of the most recent contributions the following can be mentioned: the revision of the UNCITRAL Arbitration Rules including the Transparency Rules, which started in 2010 by the UNCITRAL Working Group II (Arbitration and Conciliation), and ran until 2014 when the Transparency Rules came into. Consequently this work generated a lot of research and debates and discussions concerning the transparency-issue, undoubtedly leading to significant regulatory changes.
apply transparency not only to the negotiations but also regarding the eventual ISDS-mechanism attached to the TTIP.\textsuperscript{94} As the negotiations are still not finalized and the contract not yet signed, the discussion within this thesis will stay at a speculative level and the negotiations and the surrounding debate will instead serve as examples of a timely topic. However, the TTIP discussion is not be given much weight in this thesis, since it does not actually propose anything novel with respect of transparency within investor-state arbitration or the investment arbitration regime. There are already existing “transparency” tools that can, and probably will, be used within the integration of the ISDS into the TTIP.\textsuperscript{95}

It is nevertheless today an accorded opinion that the investment agreement regime as it is today is out-dated and serves the wishes of the stakeholders from the early times when the treaties where drafted. Another identified important reform challenge relates to that the investment dispute settlement method goes through a “legitimacy crisis” as certain flaws of the system are now affecting the originally valuable benefits gained through FDIs. Consequently, this might this lead to that investor-state arbitration today actually exposes the host state to greater legal and financial risks. These issues will be addressed further in chapter 4, when talking more about the legitimacy argument. Nevertheless, it should already be mentioned that a recent trend amongst arbitration centres and organisations providing procedural legal frameworks for investor-state arbitration is the revision of the arbitration rules to better meet the desires and opinions of the increasingly active public society.

\textsuperscript{94} In March 2014 The EU launched a public consultation on investment dispute resolution within the TTIP negotiations with the aim of effectively integrating various stakeholders’ opinions and ideas to EU’s approach towards the dispute settlement mechanism that was to be included in the future treaty. The European Commission particularly stated that it would aim for a more transparent dispute settlement method than currently available according to the BITs in force. The EU’s policy on the subject will not only be applicable to the TTIP but also to future BITs signed between an EU member state and a non-EU state. The European Commission received almost 150 000 online contributions of which a clear majority was made by individuals representing the civil society. The consultation process involving many stakeholders representing different interest groups provides for an excellent example of initiatives towards a lucrative development of the investor-state arbitration regime. The report of the consultation was published in January 2015 and can be found at the following address: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (accessed 30 July 2016).

\textsuperscript{95} The UNCITRAL Transparency Rules are already inserted in the newly adopted free trade agreement between the EU and Canada, the CETA, and it is proclaimed that a similar mechanism will be incorporated in the TTIP, which means that the EU could simply use this mechanism instead of trying to come up with a new solution.
2.5. International Investments within the EU

The TTIP discussion concerns a potential multilateral investment agreement and it would be binding between the United States and the member states of the European Union. In addition, there are numerous BITs in force between EU member states and third countries, which like today will continue to be under the administration of the EU. The EU has recently taken a more active role regarding international investments and the EU investment policy is being reshaped. With the aim of harmonising investment agreements and the negotiations of such agreements, which used to be within the discretion of the member states, the EU now has more leverage to manage international investments and rewrite the entire EU investment policy. This new common investment policy has to be shaped in connection with questions regarding international investment policy more generally, like the desire to improve transparency, which is a very prominent theme in the EU’s investment policy.96 The task of the EU will certainly not be easy when the interplay between the desired level of investment protection, the existing freedoms of member states and the opinions of the public society all have to be taken into account. This chapter serves as support for the understanding of the underlying policies and desires that the EU has imposed within the investment law context. The underlying reasoning and argumentation will be of relevance when the goals of the EU will be balanced against the aims voiced within the international investment arbitration community regarding transparency.

The approach and the policy of the EU, will become apparent during the ongoing negotiations of the TTIP, and since the negotiations are still under progress, the description in this chapter will be made on a rather superficial and speculative level. The basic background of the EU investment policy will instead be based on the approach the EC has taken with regard to BITs that are in force within member states of the EU and with third countries. Additionally, reference is made to chapter 5, where the discussion covers the interaction between EU law and investment law by focusing on the role granted to the EC as an amicus curiae party in investment arbitration.

Today FDIs form a part of the EU’s common commercial policy, and the EU has an exclusive mandate regarding EU investment issues. This means, i.a., that the EU can impose legislation concerning foreign investments and that the EU is empowered to conclude trade and investment agreements with third countries. The basis for the EU’s leveraged approach regarding international investments was approved through the signing of the Lisbon Treaty, which entered into force 1 December 2009. According to the Lisbon Treaty, the EU now has exclusive competence to conclude international agreements concerning FDIs in its territory. There are still some 1200 BITs within the EU member states and the extended competence of the EU does not mean an automatic termination of these treaties, rather an implication of efforts of harmonizing the field of investment protection by means of reshaping it.

The “new” EU investment policy aims at a better investment environment through market access for investors, legal certainty as well as stable and predictable atmosphere that builds on aspects such as the free flow of investment-related capital and especially on long-term investments. It is on the agenda of the EU to progressively replace the BITs that member states have signed with third countries by so called EU agreements. This processes strives to fulfil one of the main goals of the new EU investment policy, which is to support legal certainty and transparency, but naturally at the same time by ensuring that the member states’ right to regulate on a national level stays intact for both the host and home states. In the heart of the EU investment policy today is the fostering of transparency both in treaty

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97 The term ”common commercial policy” is used in the TFEU and is one of the main pillars of EU’s integral functions. The scope of EU’s exclusive competence covers the area of the common commercial policy and through the amendments in the Treaty of Lisbon, also FDIs’ are covered by the EU’s common commercial policy.
99 In accordance with point (e) of Article 3(1) of the TFEU, the EU has exclusive competence regarding the common commercial policy and may be a party to international agreements including provisions on foreign direct investment. This provision was inserted through the Treaty of Lisbon.
100 International Investment Law and EU Law (2011), Annex: Communication of the Commission “Towards a comprehensive European International Investment Policy”, p. 12. Through the ratification of the Lisbon treaty the TFEU now includes in its article 207 the mandate for the EU to determine regulatory matters regarding FDIs through scoping them within the common commercial policy.
101 Updated information on the international investment treaties and bilateral investment treaties in force see the following website: http://investmentpolicyhub.unctad.org/IIA (accessed 4 September 2016).
103 Ibid.
negotiations as well as within investor-state dispute settlement. In order to “foster transparency” the goals of the EU policy is, *i.a.*, to clarify the regulatory framework behind legislation related transparency.

The competences of the EU have further been empowered through the Regulation establishing transitional arrangements for bilateral investment agreements between member states and third countries, which came into force on the 12 December 2012 (EU Regulation),\(^{104}\) the aim of which is to progressively replacing the BITs in force within the EU and third countries. One of the main goals of the EU Regulation is to create better legal certainty for investors operating within the EU and third countries. In practice the regulation brings upon member states an obligation to notify the EC of BITs in force as well as of amendment negotiations of such BITs. This enables the EC to assess the provisions in force or to be taken into force in case of amendments, and to ensure that these do not pose obstacles to the negotiations or conclusion by the EU of BITs with third countries.\(^{105}\) The EU Regulation was a first step of the EU to embody its competences regarding investment policy as granted through the Lisbon treaty, but it is of importance to notice that the treaty excludes intra-EU BITs from its application.\(^{106}\)

### 3 Amicus Curiae

We now go over from a political discussion to the theoretical aspects of investment arbitration procedures, and it is time to get a deeper knowledge of first, where the tribunal derives its power to accept third party submissions, secondly, what the prerequisites to file such submissions are, and lastly, what rights the most recent procedural legal framework,
the UNCITRAL Transparency Rules, gives an amicus curiae-actor. Again for a better understanding of the big picture, I start by addressing the definition, history and background of amicus curiae. Following the research of the prerequisites to act as amicus curiae, I will show how the duty and function of the amicus curiae institution has evolved. As we will see in the next chapter, the arguments behind accepting third party interventions are those in favour of public interest and enhanced legitimacy of the investor-state arbitration regime, which together are characteristics of the modern role of the amicus curiae institution. It is essential to provide the reader with these general notions of amicus curiae in order to follow the discussion whether or not the acceptance of the EC as a third party is based on the said prerequisites and arguments.

Amicus curiae submissions are generally accepted in order to aid the tribunal in finding the right decision with regard to matters of either fact or of law. As we will see in chapter 4, the amicus curiae regime has recently been strengthened and cases before the ICSID tribunal with third party participation have increased heavily. An example that can be mentioned is the Eli Lilly case, which is a dispute under the NAFTA that addresses matters of patent law, and which saw many contributions by third parties. In the said case the tribunal received nine separate applications of petitioners that filed for amicus. These applications included applications from three groups of trade associations, regional organisations, a group of academics and seven intellectual property law professors. The hearings in the Eli Lilly-case, that lasted for over a week between May and June 2016 where de facto held in public within the auspices of the ICSID in Washington.

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107 Since the UNCITRAL Transparency Rules are relatively new, and have been pointed out to be applicable in only two known cases so far the impact of these rules are still difficult to examine. These known cases are the case of Iberdrola, S.A. and Iberdrola Energia. S.A.U. v. Bolivia (PCA Case No. 2015-05) and BSG Resources Limited v. Republic of Guinea (ICSID Case No. ARB/14/22). In addition the application of these rules are still rather limited and the application is vastly dependent on the will of their application by the arbitrating parties.

108 Rule 37 (2) (a) in the ICSID Arbitration Rules refers to that “the non-disputing party submission would assist the tribunal in the determination of the a factual or legal issue related to the proceeding...”. Likewise the UNCITRAL Arbitration Rules (Article 4 in the UNCITRAL Transparency Rules) gives a third party the right to address matters of legal or factual nature.


3.1. General Remarks on Amicus Curiae

3.1.1. Definition

Even though *amicus curiae* was briefly defined in the beginning of this thesis, its importance necessitates a more detailed explanation. In the literary sense *amicus curiae* is described as “a friend of the court”. This term will serve as a suitable starting point for the description of an *amicus curiae* or a third party intervener, as it is also called, within investment arbitration proceedings. To enlighten the contextual definition of the term, we can turn to relevant case law. In one of the first ICSID cases where the tribunal has accepted *amicus curiae* submissions according to the ICSID Arbitration Rules, namely the *Aguas Argentinas* case, the tribunal defined *amicus curiae* as the following:

“Our role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an amicus curiae in an ICSID proceeding would also be that of a nonparty. 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.”

111 Within legal literature today synonyms for *amicus curiae/amicus curiæ/amici curiæ* is “third party”. Historically the use of the Latin wording originates from the development within the common law system, whereas the English wording was used in civil law traditions. Even though the approaches to the institution of *amicici did differ between these two legal traditions, the core meaning of the terms used is evidently the same. In this thesis, I use both of these terms as synonyms, owing exactly the same meaning and without prejudicing or privileging either the civil law or common law traditions regarding the non-party mechanism.


113 Black’s Law Dictionary (2014) defines “amicus curiae” as “someone who is not a party to a lawsuit 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.” See also Schwarzenberger (1986), p. 811, where *amicus curiae* is defined as “attempted or accepted intervention in proceedings by an outsider to assist a court or an unrepresented interest.”

114 *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, §. 13. The tribunal derived its power to accept third party interventions from the reserved power granted to it by Article 44 of the ICSID Convention to decide on unanswered procedural questions (see §. 10, 16). The provision in rule 37 (2) of the amended ICSID Arbitration Rules allowing third party submission came into effect 10 April 2006, and was thus not applicable to this case. Nevertheless
The tribunal here provides for a rather exhaustive definition of the term and many aspects can be read from this passage. First, the tribunal makes an analogous application in this ICSID proceedings of what has been declared about the role of an *amicus curiae* in other forums, stating clearly that the *amicus curiae* is not a party to the dispute tried before the tribunal,\textsuperscript{115} neither does an *amicus* party have any adjudicating role.\textsuperscript{116} It is important to underline that the *amicus* will not be recognized as a party to the dispute. The difference between a party and a non-party is naturally the different scope of the rights that the actors are entitled to within the proceedings as well as the rights and obligations of the parties that the award may impose.

The NAFTA *Methanex* case, to which the tribunal in the *Aguas Argentinas* case makes reference, should also be mentioned. In the *Methanex* case from 2001, which was resolved under the 1976 UNCITRAL Arbitration Rules, the tribunal stated that “… the receipt of written submissions from a person other than the Disputing Parties is not equivalent to

\textsuperscript{115} In this connection the tribunal does not make a direct reference to any specific case or system but in general terms it often refers to the *Methanex*-case (*Methanex Corporation v. United States of America*, UNCITRAL) relating to the role of an *amicus curiae*. Furthermore, in the means to support acceptance of qualified *amicus curiae* submissions in appropriate circumstances the tribunal makes reference to international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal, and the WTO.

\textsuperscript{116} In the *Aguas Argentinas* case the tribunal also makes reference to the *Methanex* case in support of the view that admitting submission from non-parties to the dispute does not make them parties to the arbitration (see Order in Response to Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, §. 14). The wording of the tribunal in the *Methanex* case is also approved in the *UPS*-case (see *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, §. 39). The application to intervene as a third party in the *Methanex* case was made according to the UNCITRAL Arbitration Rules 1976. The wording of the tribunal in the *Methanex* case was the following: “[article 15(1)] cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party” (§. 27) and that “[t]he Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration.” (§. 29).
adding that person as a party to the arbitration”,\(^{117}\) by adding that the party intervening as an *amicus curiae* is neither to be seen as an expert nor as a witness.\(^{118}\) On the other hand the tribunal has noted that the line might be blurred and that the submission of an *amicus* might cover such issues that generally can be provided by independent experts.\(^{119}\) Nevertheless, this characterisation of the role of an *amicus curiae* will facilitate the determination of the rights and powers of a third party intervener within investment arbitration.

Secondly, the tribunal gives the third party intervener quite free hands regarding the content of its submission. Instead of being a party, a witness or an expert, the role of an *amicus curiae* consists of aiding the court within its fundamental task of finding the correct solution to the dispute by providing “arguments, perspectives and expertise” related to the subject matter of the case. In its third party submission, the “outsider” will provide the tribunal with viewpoints on either points of law or of fact, which in absence of the said intervention would not come to the knowledge of the tribunal.\(^{120}\) As a second remark it can be mentioned that by connecting the traditional role as a “friend to the court” with the formulation of its own definition, the *Aguas Argentinas* tribunal furnishes the third party intervener with a wide range of possibilities of intervention forming an excellent channel for unrepresented voices to be heard in disputes, the effects of which may stretch further than only to the disputing parties.

Thirdly, the tribunal also stated that the request to act as *amicus curiae* is sort of an “offer of assistance”, which is thereafter to be either accepted or declined by the tribunal. As we will see later on in chapter 3.2.2., this forms a basis for the fact that the tribunal does not have an obligation to accept even fully qualified requests for third party interventions. Before going into this question it is however relevant to map out the different criteria that a qualified request should contain. Consequently it can be seen from this case, as will be


supported by other case law, that instead of having an obligation or a prohibition, the tribunal has a large margin of appreciation in either accepting or declining a request to intervene, or even to invite amicus participation on its own initiative.

3.1.2. Background

The history of amicus curiae traces as far back as to Roman law, where it was used to bring into the attention of the judicial system facts and views that would otherwise not come to its knowledge. During the developments of the amicus curiae institution after the Roman traditions, the institution became quite vastly established in common law, especially in the US legal system within the jurisprudence of the Supreme Court. The developments within the common law system rejected the view of the amicus as a party to the dispute, whereas the civil law tradition was more willing to grant interveners wider rights. In more recent history, during the later part of the 20th century, and especially since two and a half decades, the system of third party intervention has become broadly known within the field of international law in connection with disputes in front of various international courts and tribunals.

Traditionally we can distinguish two sorts of third party interventions where the interest to intervene might vary. The intervention can first address questions of treaty interpretation, by another, third treaty party. In this situation the intervening third treaty party will submit worthy information about the interpretation of the treaty connecting the parties to the dispute, but not owing a particular interest in the subject matter of the case but instead on the general interpretation of the treaty. Secondly, a special interest in the subject matter of the dispute can be the incentive for a non-party to intervene. An excellent example of a third party intervention with a special interest in the subject matter is a NGO with the mission of protecting the environment, e.g, intervening in a dispute regarding alleged

123 Ibid., p. 616.
126 Ibid.
breaches of investment protection due to the adoption of new “green policy” regulations by the state where the investor has invested.

Third party interventions have gained an especially strong foothold within human rights issues in connection with international institutes and courts such as the European Court of Human Rights (ECHR), the Inter-American Commission on Human Rights and the Inter-American Court of Human rights. To recognize the purpose of the amici curiae intervention mechanism within disputes that concern human rights is of importance, since the human rights aspect, in connection with environmentally important issues, explains the flared scope of the amicus curiae intervention even within international investment arbitration. It can be mentioned that third party briefs in front of the ECHR are poorly documented and that third party interventions before the ECHR have not been subject to much research. Amicus curiae submissions are also possible before the dispute settlement method of the WTO Appellate Body, where mostly NGOs submit observations regarding issues such as health and the environment. The system before the WTO Appellate Body is a system quite unique and the Appellate Body has broad procedural authority. The application procedure likewise includes a consideration whether such a submission will help the tribunal in finding of the right conclusion.

The main task of a third party interveners is to provide the court with valuable information concerning the resolution of the case at hand, consisting of information that the tribunal could not otherwise acquire. Generally third party submissions can be presented by

\[127\] Even though investor-state disputes are solved through arbitration this mechanism was by some scholars nevertheless seen to look a lot like the procedures initiated before the ECHR, which is a public international tribunal applying public international law (see "Nouvelles Perspectives pour l’arbitrage dans le contentieux économique intéressant les États", Geneviève Burdeau, Revue de l’Arbitrage, Volume 1995 Issue 1, p. 16). It is therefore also of interest to examine the application of the amicus curiae-regime from this perspective.


\[130\] See the Understanding on rules and procedures governing the settlement of disputes, available at the following address: https://www.wto.org/english/tratop_e/disp_e/dsu_e.htm#17 (accessed 1 October 2016).
individuals, states, and governmental, non-governmental or intergovernmental organizations as well as by private companies.\textsuperscript{131} What is of importance is that the intervener should fulfil a certain degree of independency from both the parties and the tribunal itself, therefore the use of the term “third party” or “non-party” intervention.

The intervener should first convince the tribunal that the information it is about to submit will be of value for the resolving of the dispute. In practice the intervener should in this connection submit an application to the tribunal for permission to actually file an \textit{amicus curiae} submission. Secondly, the legal instruments accepting third party interventions also generally include the power for the tribunal to pose procedural guidelines, \textit{e.g.,} rules limiting time and length of the non-party submissions. Thirdly, the tribunal will, before granting leave, make sure that the submission will not unfairly prejudice any of the disputing parties in breach of the principle of equality.\textsuperscript{132} The principle of equality of the parties is a fundamental principle within investment arbitration (and within any judicial proceeding), and is often emphasized in connection with the tribunal’s deliberation whether or not to accept third party interventions.\textsuperscript{133} Taken cumulatively, these rules aim to ensure a smooth and productive regime of third party intervention without unfairly burdening any of the parties or hindering the proceeding.

\subsection*{3.2. \textit{Amicus Curiae} within International Investment Law}

In the following I explain according to which rules \textit{amicus curiae} interventions are possible within investment arbitration and where the arbitral tribunal derives its power to accept such submissions. Thereafter I address the specific prerequisites set out in case law for accepting third party submissions. In setting up these prerequisites within the international law community, case law from investment tribunals is supplemented by legal literature and initiatives from the public society, and therefore these sources form part of the material researched. At the end of the chapter regarding \textit{amicus curiae}, I address some

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recent and significant regulatory developments concerning the admission of *amicus curiae* application.

### 3.2.1. The Lex Arbitri

The answer whether or not there is a possibility to intervene as *amicus curiae*, is found in the underlying legal foundation of the dispute, the *lex arbitri*. We have to look whether the rules determining the conduct of the process give an opportunity to apply for *amicus curiae* intervention. Investment disputes concern alleged *treaty* breaches, and to find the *lex arbitri* the first place to look is, therefore, the treaty protecting the disputed investment in question and whether the said treaty makes reference to any arbitration rules. Concerning investment arbitration, procedural rules are found in, *e.g.*, the ICSID Convention, the UNCITRAL Arbitration Rules, the NAFTA, the arbitration rules of any arbitration institute, such as *e.g.* the arbitration rules of the SCC, the ICC or the LCIA. The NAFTA includes both provisions protecting free trade and investments, as well as its own procedural rules for dispute settlement. It is thereafter up to the parties to choose which of such relevant procedural rules are to be applicable to potential disputes, in case the investment protection instrument as such lacks its own procedural rules.

Numerous IIAs and BITs make reference to the ICSID Convention as the procedural framework for resolving disputes about investment protection and today the ICSID Convention is the most frequently used procedural framework in investment arbitration. As mentioned in chapter 2.4.2., the ICSID Convention differs from, *e.g.*, the NAFTA and other BITs by not including any substantial investment protection provisions, but by only serving as a procedural framework, a sort of facility tool, for the settlement of investment arbitration. The ICSID Convention as such is a much used instrument for the procedural

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134 NAFTA Chapter 11 that establishes a mechanism for the settlement of disputes between signatories to the NAFTA.

135 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.

136 The NAFTA and the ECT make reference to the ICSID Arbitration Rules, amongst a variety of applicable rules to choose between, in case the both parties are parties to the ICSID Convention. The ECT also makes reference to the UNCITRAL Arbitration Rules or even the arbitral rules of the Stockholm Chamber of Commerce. It is to be noted though that the ECT in the first place leaves it open to the parties to choose the set of procedural rules meaning that parties can likewise choose to rely on simply domestic proceedings or which ever, previously agreed, dispute settling procedure (article 26 (2) (a-b)). Regarding BITs making reference to the ICSID, see for instance Article 9 in the BIT between France and Albania signed, 13 June 1995, or Article 6 in the BIT between Sweden and Egypt, signed 15 July 1978.
execution of investment protection. For example, when the parties to an investment dispute have chosen, or when the investment agreement between them calls for the ICSID Arbitration Rules, the *lex arbitri* is thus the ICSID Convention and the therein included Arbitration Rules. The ICSID Arbitration Rules thus become applicable if the parties have chosen to make reference to them in their mutual agreement.

In case investment protection is established through a BIT between two states, or through a multilateral investment treaty between three or more states, it is consequently of relevance to look at what these treaties refer to in order to establish the *lex arbitri*. BITs are treaties including substantial investment protection provisions securing rights to foreign investors, and they rarely include any procedural rules. The substantial rules can only be secured with accompanying procedural rules and therefore BITs have to be supplemented with another set of rules. BITs can make reference to, *e.g.*, the ICSID Convention, the UNCITRAL Arbitration Rules, the ICC Arbitration Rules or the SCC Arbitration Rules, just to list some examples. Since, as we already know, the underlying principle is the freedom of choice, and therefore reference can basically be made to any other set of procedural rules that the parties wish to use.\(^\text{137}\)

### 3.2.2. *The Power to Accept Amicus Curiae*

Formerly the power to accept third party interventions by the investment arbitration tribunal was derived from Article 44 in the ICSID Convention, which later on was subject to a reform in 2006. Along with the amendments, the powers of the tribunal were clarified. These clarifications and the other elements of the previous Article 44 are now contained in the new rules, Rule 37 (2) in the Arbitration Rules and Rule 41 (3) in the Additional Facility Arbitration Rules. A similar empowerment is given in Article 15(1) of the UNCITRAL Arbitration Rules. As for NAFTA, the authority to accept third party submissions can be found in Chapter 11 and supported by a statement of the Free Trade Commission (FTC Statement), which will be discussed in more detail below.

\(^{137}\) Dolzer & Schreuer (2012), p. 241. According to Article 24 (3) in the 2012 U.S. Model Bilateral Investment Treaty reference is made explicitly to the ICSID Convention and to the UNCITRAL Arbitration Rules. Nevertheless the model BIT mentions the possibility for the parties to choose “any other arbitration institution or under any other arbitration rules”. In Article 1120 in Chapter 11, the NAFTA makes reference to the ICSID Convention and the UNCITRAL Arbitration Rules. The ECT again makes reference to both the ICSID Convention and the UNCITRAL Arbitration Rules, as well as to the procedural rules of the SCC Arbitration Institute.
In 2006 both the ICSID Arbitration Rules and the ICSID AF Arbitration Rules were amended to include explicit provisions allowing third party interventions. The amendments were the result of codification of earlier practice before the ICSID. Since tribunals had already before the amended rules granted leave to petitioners to file *amicus curiae* submissions, there was an incentive to codify the practice of investment arbitration tribunals into legal norms. The amendments were also an expression of the explicit authority of the tribunal to accept such submissions and the desire to add clarity to the *amicus curiae* system.

Non-disputing party submissions are possible according to Rule 37 (2) of the ICSID Arbitration Rules, which states as follows:

“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 the 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.”

In case the parties are arbitrating under the ICSID Convention, the possibility for third party intervention is thus recognized and the tribunal may use this tool in order to arrive at the best possible decision. The tribunal can accept third party submissions after having

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138 Encompassing dispute resolution under the both the NAFTA and the ICSID rules.
139 This was the case for instance in *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in response to petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005.
141 *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del*
consulted the parties, meaning that the parties should have the possibility to at least comment on the intervention of a third party. For instance in the Biwater case, the tribunal allowed the participation of amicus even after objections from one of the parties, strongly suggesting that an unanimous consent by the parties is not needed. In a situation where both parties object to the intervention, there may evidently be a strong implication that the amicus submission would not bring anything novel to the knowledge of the tribunal. In the Chevron case both the claimant and respondent objected to an amicus submission during the jurisdictional phase, arguing that the submission would not be helpful to the tribunal. Consequently, the tribunal took this into consideration when rejecting the third party submission on the basis that the amicus submission would not assist the court beyond the submissions made by the disputing parties. Nevertheless, Rule 37 (2) leaves the matter within the ample discretion of the tribunal, in that even though neither one of the parties have consented to a third party intervention, the tribunal can still accept such submissions provided that the prerequisites set forward in Rule 37 (2) are fulfilled.

Whether the tribunal is obliged to accept amicus applications that fulfil the prerequisites set out in Rule 37 (2) is a sensitive and quite problematic question, the answer to which seems to be in the negative. According to the wording in Rule 37 (2) “the Tribunal may allow” a non-disputing party to file an amicus submission. Additionally, the list of factors that the tribunal should weigh in the determination process is not exhaustive. Legal literature also strongly supports this view, and as stated by Working Group II, the tribunal has been given the role as a “gate-keeper” with regard to allowing third parties to

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Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, §. 11; Bernhard Von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural order No. 2, 26 June 2012, §. 49; Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5, 21 July 2016, §. 36.


Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.


Ibid., §§. 18-20.


Rule 37 (2) is written in a non-exhaustive manner: "... the Tribunal shall consider, among other things,..."
intervene. The answer is clearly that Rule 37 (2) does not pose an obligation on the tribunal and even if all the prerequisites set out in Rule 37 (2) for allowing an *amicus* submission are fulfilled, the tribunal can still within its discretion decide to reject such submissions.

Additionally, the opinions set out in the *amicus* submission should address matters *within the scope of the dispute*, meaning that the substantive legal questions that the tribunal is facing should also be the subject addressed within the third party submission. As has been pointed out in legal literature, it would be rather difficult to picture a situation where an *amicus* would assist the court in arriving at the right conclusion regarding a matter which is not actually within the scope of the dispute. It is the task of the third party intervener to assure that its submission is limited to the subject matter of the dispute when applying for leave, but also the task of the tribunal to take this into consideration *ex officio*. In this connection it is important to underline that the submission of *amicus* should by no means broaden the subject matter of the case by adding to it elements that have not been initially challenged by the disputing parties. Instead it should *assist* the tribunal in finding a conclusion in the matter already put before it.

The information provided by third parties is often aimed at, but not limited to, assist the tribunal in questions of law or of fact regarding the *substantial matter* of the dispute, in other words the substantial rights of investment protection conferred to an investor through an investment agreement. Even though it is more of the exception, the tribunal may as well accept *amicus curiae* interventions regarding the *jurisdictional matter* of the dispute. Nevertheless, arbitral tribunals seem to have divided views regarding the

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152 *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, §. 71. For instance in the *Pac Rim Cayman* case the tribunal invited non-disputing parties to file
appropriateness of amicus submissions in the jurisdictional part. According to a restrictive interpretation of rule 37 (2) in the ICSID Arbitration Rules, jurisdictional matters can be excluded and it is not seen as appropriate to submit jurisdictional questions within the scope of amicus submissions. Whether or not jurisdictional claims will be approved will nevertheless depend on whether such submissions comply with the prerequisites established for allowing third party interventions.

The ICISD AF Arbitration Rules, which is a set of procedural rules used for a facilitated arbitration, likewise include an identical provision explicitly allowing third party interventions. In the case of Piero Foresti, the tribunal granted amicus participation to two South-African NGOs and two international NGOs according to the 2006 ICSID AF Arbitration Rules. The tribunal also explicitly stated that the non-disputing parties should have access to the papers submitted by the parties in order for the amicus to focus on the specific issues at hand in the case and to see what position thereto the parties have taken.

In investment arbitrations under the NAFTA, the acceptance of third party interventions follow the prerequisites given on 7 October 2003 in the Free Trade Commission statement on non-disputing party participation (FTC Statement). The FTC statement was given subsequently to the rendering of the awards in the cases of Methanex and UPS. The statement, which is a codification of practices before arbitral tribunals under the NAFTA, and that also takes some example from the mechanism of amicus curiae before the WTO, sets out detailed standards on third party participations. The FTC Statement is not legally binding on arbitral tribunals, but it has been largely relied upon in jurisprudence and other tribunals have found support therefrom. These two cases are also noteworthy.

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153 Article 41 (3) ICSID Additional Facility Arbitration Rules, in force since 10 April 2006.
154 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01.
155 Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009. As amicus in the case were The Centre for Applied Legal Studies, The Legal Resources Centre, The Center for International Environmental Law (acted as amicus also in the cases of Methanex, Aguas Argentinas and Biwater) and The International Centre for the Legal Protection of Human Rights
156 Dimsey (2015), pp. 138-139.
since the proceedings where held in public, which is something the tribunal may allow subject to the consent of both disputing parties.\textsuperscript{157}

In the \textit{Glamis Gold} case, a NAFTA arbitration governed by the 1976 UNCITRAL Arbitration Rules, the tribunal accepted \textit{amicus} submissions from the Quechan Indian Nation stating that the tribunal no longer has to assess whether article 15(1) of the UNCITRAL Arbitration Rules empowers it to accept non-party submissions, since the FTC Statement is an expression of the three NAFTA states (Canada, Mexico and the United States) accepting non-disputing party submissions.\textsuperscript{158} The same approach has been taken in connection with arbitration under the ICSID AF Arbitration Rules. In the \textit{Apotex} case the standards in the FTC Statement were applied, as the tribunal held that article 41 (3) of the ICSID AF Arbitration Rules does not pose an exhaustive list of criteria for accepting \textit{amicus} submissions, but instead leaves the tribunal free to address “other things” in its determination.\textsuperscript{159} The tribunal also stated that the standards set out in article 41(3) and those of the FTC Statement are in conformity and that an application of the FTC Statement was therefore legitimate.\textsuperscript{160}

As we have seen, the development is evidently heading for a more tolerant approach towards \textit{amicus curiae} participation within the drafting of new investment agreements and their adjoining arbitration. This is in contrast to what can be said about the standards for accepting third party interventions before. Today \textit{amicus curiae} participation within investment arbitration has gained enough foothold foreseeing, through case law and legal literature, the establishment of certain patterns constituting the prerequisites and the legal standards for accepting \textit{amicus curiae} interventions. These will be elaborated in the following.

\textsuperscript{157} The possibility to organize the proceedings open for the public is stated in Rule 32 (2) of the ICSID Arbitration Rules.
\textsuperscript{158} \textit{Glamis Gold, Ltd. v. The United States of America}, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, §. 9.
\textsuperscript{159} \textit{Apotex Holdings Inc. and Apotex Inc. v. United States of America}, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013, §. 18.
\textsuperscript{160} \textit{Apotex Holdings Inc. and Apotex Inc. v. United States of America}, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013, §§. 18-19.
3.3. Prerequisites for Amicus Curiae Interventions

In *Aguas Argentinas*,\(^{161}\) which is one of the first cases where *amicus curiae* submissions were allowed in accordance to the amended 2006 ICSID Arbitration Rules, the tribunal set out three basic prerequisites to be fulfilled prior to the acceptance of an *amicus* brief.\(^{162}\) The case concerned a 30 year concession right for water and wastewater services granted to the Argentine company AASA\(^{163}\). After ten years of operation, the claimants initiated proceedings against Argentina in 2003 claiming that Argentina had breached investment treaties through actions in violation of the prohibition of unlawful expropriation and the requirement of FET. Through such state actions, Argentine did not safeguard full protection and security to be provided to the investors, as afforded in the underlying BITs. The challenged state actions were part of a governmental regulatory reshaping program, following the difficult economical crisis that Argentina was suffering at the time. The case concerned the water distribution and sewage system in the city of Buenos Aires. Consequently the case also concerned environmental and human rights issues and the right of millions of people to basic public services. The Argentine state defended its actions by, *i.e.*, referring to the demanding economical circumstances. The ICSID tribunal accepted *amicus curiae* submissions from five different NGOs,\(^{164}\) but at the same time denied the

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\(^{162}\) The first time the ICSID tribunal was in front of an *amicus* application was in 2003 during the case of *Aguas del Tunari v. The Republic of Bolivia*, ICSID Case No. ARB/02/03, in which the president of the tribunal, in a letter dated 29 January 2003 addressed to J. Martin Wagner, rejects the intervention of three NGOs on the basis that the tribunal does not have the authority to grant leave for the application to intervene. In the letter the president, David D. Caron, states, on behalf of the tribunal that “… it is the Tribunal’s unanimous opinion that your core requests are beyond the power of the authority of the Tribunal to grant. The interplay of the two treaties involved, …, and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular it is manifestly clear to the tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, a fortiori, to the public generally; or to make the document of the proceedings public.” In its rejection the tribunal did in other words rely on the fact that the parties to the dispute had not given their consent to the addition of a party to the dispute or the intervention of a non-party to the dispute.

\(^{163}\) AASA was funded by foreign investors, including the claimants Suez, Vivendi Universal S.A., Sociedad General de Aguas de Barcelona S.A. and Anglian Water Group Ltd.

\(^{164}\) The petitioners to file third party submissions were Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.
petitioners request to access hearings and case material.\textsuperscript{165} The non-disputing parties motivated the intervention by the fact that the case affected fundamental environmental and human rights, which were in their scope of public interest.

What makes the \textit{Aguas Argentinas} case noteworthy is that the tribunal explicitly declared the special need to set out the criteria for the acceptance of \textit{amicus curiae} submissions since lacked previous custom and clarity relative to the ICSID Convention on the question of third party interventions.\textsuperscript{166} What is nevertheless fairly unfortunate is that the tribunal seems to codify the characteristics for the appropriate circumstances to accept \textit{amicus curiae} submissions from what has been established in previous international case law without making any explicit references. The \textit{Aguas Argentinas} case can nevertheless be seen as a landmark case when examining the prerequisites for the acceptance of \textit{amicus curiae} submissions within ICSID arbitrations.\textsuperscript{167}

The three basic criteria that the tribunal set out to consider were i) “the appropriateness of the subject matter of the case”, ii) “the suitability of a given non-party to act as \textit{amicus curiae} in that case”, and iii) “the procedure by which the \textit{amicus} submission is made and considered”.\textsuperscript{168} The tribunal reasoned that a wise application of these prerequisites would enable the tribunal to balance the rights and interests of non-disputing parties and simultaneously guarantee the substantive and procedural rights of the disputing parties. By

\textsuperscript{165} \textit{Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic}, Order in response to petition for Transparency and Participation as \textit{Amicus Curiae}, ICSID Case No. ARB/03/19, 19 May 2005, § 33.

\textsuperscript{166} \textit{Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic}, ICSID Case No. ARB/03/19, Order in response to petition for Transparency and Participation as \textit{Amicus Curiae}, 19 May 2005, § 9. In the words of the tribunal: “This lack of specificity in the ICSID Convention and the Rules requires the Tribunal in this case to address two basic questions: 1) Does the Tribunal have the power to accept and consider amicus curiae submissions by nonparties to the case? and 2) If it has that power, what are the conditions under which it should exercise it?”.

\textsuperscript{167} The tribunal has additionally referred to the decision on the participation of \textit{amicus curiae} in the \textit{Aguas Argentinas} case in a very identical request in the case of \textit{Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A v. The Argentine Republic}, ICSID Case No. ARB/03/17, Order in response to a petition for participation as \textit{Amicus Curiae}, 17 March 2006. In the latter case the tribunal mentioned that it had “established a process by which appropriate third parties might apply for and be granted leave to make amicus submissions to the Tribunal in that case”, and applied the same prerequisites established, see § 4.

\textsuperscript{168} For the sake of clarity this thesis will follow the same terminology categorising these three prerequisites as used by the tribunal in the relevant case. See \textit{Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic}, ICSID Case No. ARB/03/19, Order in response to petition for Transparency and Participation as \textit{Amicus Curiae}, 19 May 2005, § 17.
clarifying the legal foundation for third party submissions and by sensibly approving them, the tribunal would be able to find a sort of middle ground where it at the same time safeguards of the important procedural features to the benefit of the disputing parties and the right for the public to participate. In this case the tribunal declared *fairness, effectiveness* and *promptness* to be aspects that alongside the acceptance of third party interventions should be respected.\(^\text{169}\)

### 3.3.1. The Appropriateness of the Subject Matter of the Case

Within the test of appropriateness of the subject matter of the case, the nut to be cracked is whether the case involves matters of *public interest*. In the decision on the participation by third parties, the tribunal found in *Aguas Argentinas* that the subject matter at hand acquired the level of “public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable non-parties.”\(^\text{170}\) Additionally the tribunal points out that a public interest has in these previous cases been seen to exist when the decision in such cases have potential, direct or indirect, effects on others than the disputing parties.\(^\text{171}\) The tribunal thus makes reference to existing practice within international judicial proceedings where *amicus curiae* interventions have been accepted, but as mentioned without referring to any case law in specific.

In *Aguas Argentinas* the tribunal mentioned that the case at hand includes questions of a *particular* public interest. This reasoning seems to suggest that there needs to be something more than simply a ‘public interest’ for the subject matter to be appropriate for third party interventions. It can nevertheless be argued whether the higher level of particularity was something that the tribunal wanted to set up as a general requirement. The tribunal noted that nearly all arbitrations resolved under the ICSID comprise a certain public interest, but it did not explicitly state that there has to be a particular public interest for *amicus curiae* submissions to be possible. Instead the tribunal simply makes reference to other international fora and the *nature* of public interest that in these cases have legitimized the

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acceptance of third party submissions.\(^{172}\) Even though the tribunal neither addressed the notion of “particularity” in more detail nor whether it is a character that should be present for the prerequisite to be fulfilled, it specified that certain types of legal questions are by their nature of public interest and present in nearly every ICSID arbitration.\(^{173}\) It is therefore highly questionable whether the tribunal in the *Aguas Argentinas* case can be said to have instituted a requirement of a ‘particular public interest’, as has been put forward in some legal literature.\(^{174}\) Rather, what in this connection can be read out from the decision is that the required nature of public interest is depending on a bigger picture.

Highly relevant is that in connection with the ‘public interest’ debate, the tribunal also stated that not only will the acceptance of third party submissions help the court in its task, but it will also contribute to a more accepting view by the public towards international investment arbitral processes through enhanced legitimacy, openness and transparency.\(^{175}\) The tribunal also confirmed that the participation of potentially affected civil society representatives will contribute to a higher level of understanding by the public of the ICSID arbitration processes.\(^{176}\) This ICSID tribunal in other words acknowledged the need for an improved image of investment arbitration in order to be more accepted by the public society as a whole, as a mechanism to settle this type of disputes. Other arbitral tribunals had already earlier acknowledged the same. The NAFTA cases *Methanex* and *UPS* from 2001, both under the 1976 UNCITRAL Arbitration Rules, addressed, as mentioned above, the matter of enhanced legitimacy through added transparency.\(^{177}\) We here thus see a

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\(^{172}\) The tribunals does not enlighten the comparison by making reference to any specific case but simply refers to previous proceedings in the practices where the NAFTA has been used, in front of the Iran-United States Claims Tribunal and the WTO (see *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “amici curiae”, 15 January 2001, §§. 32-33).


\(^{176}\) *Ibid*. See also *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in response to a petition for participation as *Amicus Curiae*, 17 March 2006, §. 21.

connection with the two arguments, public interest and legitimacy, that are discussed in chapter 4 below, regarding the underlying reasons for added transparency within investment arbitration.

3.3.2. The Suitability of a Given Non-party to act as Amicus Curiae

As for the second criteria, the test will be whether the non-party in question is actually suitable to act as an amicus curiae. In this connection the tribunal will test whether the intervener succeeds in convincing the tribunal that it has the experience, expertise and independence to actually be of help to the court.\(^\text{178}\) As mentioned, the fundamental idea behind the system of amicus curiae is that such submissions should in some way assist the court in its task of finding the correct decision. Therefore the intervener has to, already at an early stage, show the tribunal that it will actually provide added value to the resolution of the case. The burden of convincing the tribunal that it has solid reasons to accept amicus submissions is, naturally, left to the party wishing to intervene.\(^\text{179}\) The proof should generally encompass rather detailed information about the identity and background of the intervening party, enabling the tribunal to be convinced that the petitioner is experienced, beholds expertise and is independent.\(^\text{180}\)

The process of convincing the tribunal is initiated by, first, filing for leave through a separate application to act as amicus curiae. Secondly, the intervener should file a petition including relevant information about the intervener, the intervener’s interest in the case, the financial and/or material relationship between the intervener and the parties, as well as the reasons why the tribunal should accept the amicus curiae intervention. The tribunal will generally weigh the different factors taking also into account the remarks and comments of the disputing parties in order to come to a conclusion on whether the submission will actually help the tribunal. As noted the attempt is to find the perfect


\(^\text{179}\) Suez, Sociedad General de Aguas de Barcelona SA, and Inter Aguas Servicios Integrales del Aqua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in response to a petition for participation as Amicus Curiae, 17 March 2006, §. 33.

\(^\text{180}\) Ibid., §§. 30, 33; Bernhard Von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural order No. 2, 26 June 2012, §. 49; Dimsey (2015), pp. 164-165.
environment in which the rights of the non-party and the rights of the disputing parties can be balanced, so as not to unfairly burdening one of the parties and not hindering the efficiency of the process.

It is here, when deciding on the suitability of a given non-party to intervene, where the arbitral tribunal’s vast margin of appreciation comes into play. Since rule 37 (2) in the ICSID Arbitration Rules does not provide for an exhaustive list of standards, the tribunal has broad possibilities to apply a versatile set of arguments in order to accept or decline the participation of *amicus*. The arguments that the tribunals have based their decisions on in creating these prerequisites will be addressed further below, however after looking into the procedural restrictions tribunals have set up for accepting an *amicus* to participate.

The remarks of the disputing parties may be decisive, as in the *Chevron* case, but in the end it is, nevertheless, up to the tribunal to finally decide whether or not it will accept a third party intervention. In *Chevron*, which was conducted according to the UNCITRAL Arbitration Rules\textsuperscript{181} under the auspices of the Permanent Court of Arbitration, the tribunal declared that the intervention of the petitioners, one Ecuadorian NGO and one international NGO,\textsuperscript{182} would not help the court in its determination of the legal issues in the case. The tribunal was in front of the task to determine questions that concerned the jurisdiction of the tribunal, raised during the jurisdictional phase of the dispute, to which the *amicus* petitioners wished to express their viewpoints.\textsuperscript{183} Both the claimant and the respondent proposed that additional information would not bring anything novel to the tribunal’s knowledge and the tribunal therefore rejected the application offering a similar reasoning as the parties.\textsuperscript{184}

### 3.3.3. The Procedure by which the Amicus Submission is Made and Considered

The third criterion will only become relevant if the two preceding prerequisites are fulfilled. The third criterion consists of the tribunal putting up certain procedural rules,

\textsuperscript{181} UNCITRAL Arbitration Rules from 1976.

\textsuperscript{182} The third party interveners in the case were the Fundación Pachamam and the International Institute for Sustainable Development.


once it has granted leave for the intervener to file an amicus curiae submission. Alongside with acknowledging the importance of the amicus curiae institution as a transparency booster, tribunals have within jurisprudence likewise underlined the importance of the fairness and efficiency of the arbitral proceeding.\textsuperscript{185} The purpose of the procedural rules under which the amicus submission is to be made and considered imposed by the tribunal is to ensure that the arbitral process in itself is not burdened or disrupted by the third party submission.\textsuperscript{186} It is also important that neither of the parties is being unfairly prejudged by the amicus submission. As expressed by tribunal in Aguas Argentinas, the aim is to “enable an approved amicus curiae to present its views and at the same time to protect the substantive and procedural rights of the parties. In this latter context, the tribunal will endeavour to establish a procedure that will safeguard a due process and an equal treatment of the parties as well as the efficiency of the proceedings.”\textsuperscript{187} This means that an amicus petitioner passing the first filter and deemed to be a suitable non-party will nevertheless be put under certain procedural restrictions in order for the tribunal to ensure a fair and efficient proceeding.

3.4. Justifications Behind Amicus Curiae

In all of the three cases, Methanex, Aguas Argentinas and Biwater, the tribunal referred to the “transparency” argument. The tribunal in the Methanex case stated that the “arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.”\textsuperscript{188} This approach was emphasized in the Aguas Argentinas case where the tribunal stated that “the acceptance of amicus curiae...
submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration.\(^{189}\)

In the *Biwater*\(^{190}\) case the tribunal on the one hand, like in *Aguas Argentina*, confirms the statement made in *Methanex* that the “acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration”,\(^{191}\) but on the other hand emphasized the somewhat restrictive approach of the tribunal towards the *amicus curiae* system in general. The tribunal points out in *Biwater* that to ensure the integrity of the arbitral process and to safeguard the expectations of the parties concerned, the reliance on *amicus curiae* submissions is accepted on an *ad hoc* basis and that the provisions allowing third party interventions (under the ICSID) should be interpreted narrowly.\(^{192}\)

As stated above, the core justification behind the *amicus curiae* system is that an objective viewpoint will help the court in its determination. In *Biwater* the tribunal came to the conclusion that “it may benefit from a written submission” by five different third party interveners.\(^{193}\) Furthermore, and quite importantly, the tribunal held that even if the Claimant would have showed that the claims alleged by the third party intervenor were raised on matters originally and substantially not disputed by the parties, the *amicus curiae* intervention was accepted with support of the “transparency argument”.\(^{194}\) It is important to notice that the tribunal did not base its decision on the argument that the subject matter of the dispute, which in the case concerned human and environmental rights with regard of the privatisation of water and infrastructure services, touched upon issues of public interest but more or less on the argument that an acceptance of such a third party intervention


\(^{190}\) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. In the award rendered in the Biwater case, the *amicus curiae* submission did have relatively much bearing in the final conclusion of the tribunal.


\(^{192}\) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007, §§. 46-47.

\(^{193}\) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007, §. 50.

\(^{194}\) *Ibid.*, §. 55.
would foster transparency within investor-state arbitrations in echo with the words of the Methanex tribunal. Even though the tribunal stated that accepting such a submission would help it in its task of finding the right decision, this inherently strong application of the transparency leads one to hesitate on the bearing of the criteria that the matters raised by the amicus should be within the scope of the subject matter of the dispute.

4 The Desire for Transparency in International Investment Arbitration

Originally the need for transparency was something that the spokesmen for democracy pursued, but today the rule of transparency has become a somewhat generally accepted rule within investor-state arbitration.195 The view of some scholars in 2007 was that there was already clearly a distinction between commercial arbitration and investment arbitration and that “transparency and accountability is starting to overweight privacy and confidentiality” in investment arbitration since states are involved and public issues are being settled.196 Even though the discussion of increased transparency is largely political and it can be questioned whether this change is supported by legal needs, it is a fact that the legal situation has significantly changed through recent initiatives and that the amicus curiae regime has obtained a new role.

Today stakeholders have realized that transparency within international investment arbitration cannot be bypassed when the desire is to safeguard the future of investment arbitration. To secure the future of the international investment arbitration, the regime has to the public eye be seen as a legitimate means of resolving disputes, since sovereign states are involved. Added transparency could thus work as a quality stamp in this connection. In this chapter I address the issue of transparency and why we are talking about it in the first place, thereby providing a background for the discussion of the role of the EC as a possible enhancer of these desires. I will also review the stance of transparency as a public principle of international law. As an introduction to this chapter I will enlighten the discussion with

195 Speaking for this argument are the various regulatory reforms that are being explained within this thesis. See also, e.g., “Transparency and Third Party Participation in Investor-State Dispute Settlement”, Meg Kinnear, Symposium Co-Organised by ICSID, OECD and UNCTAD, 2005, p.10 and Gehring; Euler (2015), pp. 9, 27.
some thoughts of practitioners from the Methanex case. It is since this time that the notion of transparency within investor-state arbitration has gone through its early years, its struggle of being perceived sincerely and a period of relatively sluggish regulatory integration to finally gain the status of a public principle that will persist.

In the Methanex case in 2001 the tribunal made some important remarks about the nature of investment disputes and the bolstering effect of added transparency by declaring that:

"There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm".

As mentioned earlier, an often occurring character of investment arbitration is that the matters that are being solved concern acts of sovereign states and encompass an analysis of national regulation, which is of interest to the public community. The subject matter in the Methanex case concerned allegations by the private investor, the methanol producing Methanex Corporation, that the acts of the state of California constituted discrimination against it as a foreign investor. The state of California implemented a policy to ban the use of MTBE as a gasoline additive, since it was considered to be hazardous with respect of the environment as well as people’s health and safety, when this additive, produced by Methanex, could come in contact with the drinking water. In this connection the tribunal stated that the subject matter of the case by character clearly is of public interest.


Already in the *Methanex* decision in 2001 the tribunal addressed the transparency issue through a twofold argument by reasoning that not only does the public interest call for openness, but also that the NAFTA “Chapter 11 arbitral process”\(^{199}\) of investment arbitration would, through allowing third party submissions, to the public eye be perceived as more rightful, adding to it a quality stamp. In the following chapters I address these two key arguments, initially proposed by the *Methanex* tribunal, which have later on been prominent within the legal debate regarding the *amicus curiae* institution. Before studying these arguments I will briefly discuss which aspects of the arbitral process are within the scope of transparency and what can be said about the level of transparency today.

### 4.1. What is Transparency?

It should be kept in mind that two of the traditional characteristics owed to arbitration are privacy and confidentiality, which together with consensuality form the cornerstones of arbitration.\(^{200}\) These aspects contribute to the fact that stakeholders choose arbitration in the first place, instead of relying on public litigation in national courts. It is therefore also natural that users of arbitration services, parties, counsels and arbitrators, have and in the future will advocate for the preservation of privacy and confidentiality.\(^{201}\) Privacy and

\(^{199}\) “Chapter 11 arbitral process” is often used as a term to simply describe an investor-state dispute initiated under the protection of investments granted by NAFTA. According to the websites of NAFTA, “[c]hapter 11 establishes a mechanism for the settlement of investment disputes between investors and NAFTA partners. This process assures both equal non-discriminatory treatment among NAFTA investors (in accordance with the principle of international reciprocity) and due process before an impartial tribunal.”, [http://www.naftanow.org/dispute/default_en.asp](http://www.naftanow.org/dispute/default_en.asp) (accessed 10 January 2016).

\(^{200}\) See in particular chapters 2.2. and 2.3.

\(^{201}\) This applies to both private investors as well as states. For example within the significant work and the surrounding discussions of the UNCITRAL of the implementation of transparency to investor-state arbitration and the drafting of the new Transparency Arbitration Rules, actors representing the private investors raised their voice for the conservation of confidentiality. Representing arbitrators the Milan Club of Arbitrators asserts their opinion for the preservation of confidentiality (see the statement by The Milan Club of Arbitrators in “Report of the Working Group II (Arbitration and Conciliation) on the work of its forty-eighth session” (New York, 4-8 February 2008) (A/CN.9/646), in UNCITRAL Yearbook Volume XXXIX, 2008, p. 625). Later on in the working process The Russian federation stated that “when, within the UNCITRAL framework, a model law or some other instrument regulating questions relating to arbitration in connection with possible disputes between a State and a foreign investor is being developed, careful consideration should be given to the question of the advisability of replacing (or supplementing) the principle of confidentiality by the principle of transparency in investment dispute arbitration, in view of the importance of maintaining a balance between public and private interests.” and Turkey leaned to the same direction by pointing out that “since the party autonomy
confidentiality within arbitration means that the procedure is conducted between the parties and the arbitral tribunal, and in the absence of the consent of both parties, without a third party having a say or even knowing what is going on in the arbitral proceeding.\textsuperscript{202} A separation is made between the notion of confidentiality and of privacy even if they overlap with each other.\textsuperscript{203} The \textit{confidentiality} of an arbitral proceeding includes the protection of disclosure of case related information and material to third parties, safeguarding for instance the disclosure of commercially sensitive information.\textsuperscript{204} \textit{Privacy} on the other hand encloses the protection of the actual access to the hearings and the arbitral proceedings, which, when they are held under total privacy are held \textit{in camera}, meaning that only the disputing parties have access to the hearings and that only the disputing parties have knowledge of the ongoing dispute.\textsuperscript{205}

A completely opaque system would mean that information about ongoing cases, the hearings, case material (such as submissions by the parties) and final awards would never be made public. Total privacy and confidentiality would in other words mean that no one will know who the parties to a dispute are and what the dispute concerns, not to mention the outcome in the dispute. As arbitration is characterised by consensuality, the starting point for both commercial and investment arbitration is that the consent of the parties is needed for the publication of any case material.\textsuperscript{206} The practice within ICSID arbitration is nevertheless that at least the basic information concerning an ongoing case is published. In addition, as part of the reform of the rules in 2006, rule 48 (4) of the ICSID Arbitration Rules provides that excerpts of the legal conclusions of the tribunal in the award shall be


\textsuperscript{205} \textit{Ibid.}

published even in the absence of the parties’ consent.\textsuperscript{207} Total privacy might be the case for commercial arbitration, but not to the same extent with regard of investment arbitration, at least when the dispute is resolved under the ICSID Arbitration Rules.

The other extreme, a totally open arbitration procedure, would naturally resemble that of a public judicial process conducted in a domestic court. In its culmination a totally transparent proceeding means that also non-disputing parties would have (i) accurate and up to date knowledge about ongoing cases, (ii) open access to case material, such as written submissions by the parties including their argumentation, (iii) access to hearings that would be open for the public and (iii) access to rendered awards in its totality, including the legal reasoning made by the tribunal.

In contrast to commercial arbitration and according to what has been described in chapter 2.3., investment arbitration encompasses matters of public international law that generate public interest. These public matters are then resolved through a private dispute settlement tool. It has therefore frequently been put forward that investment arbitration presents a hybrid and \textit{sui generis} form of dispute settlement and that the values and rights, such as confidentiality and privacy that traditionally characterize arbitration, cannot to the same extent be granted to investment arbitration as to classic commercial arbitration.\textsuperscript{208} The possibility to open up the procedural phases to the public and to grant investor-state arbitration more transparency lies in the fact that there does not exist a principle or an obligation of confidentiality within investment arbitration.\textsuperscript{209} In practice we can distinguish

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{207} From only giving a possibility to the tribunal of the publication of excerpts of the legal conclusions, the change in the Arbitration Rules in 2006 included that the tribunal would according to the new rules have an obligation to publish such excerpts. A same reform was made to the Additional Facility Arbitration Rules; see: Suggested Changes to the ICSID Rules and Regulations (2005), p. 9.
\item \textsuperscript{209} S.D. Myers, \textit{Inc. V. Government of Canada}, UNCITRAL, Procedural Order No. 16 (concerning confidentiality in materials produced in the arbitration), 13 May 2000, §. 8; ”Transparency and Third Party Participation in Investor-State Dispute Settlement”, Meg Kinneir, Symposium Co-Organised by ICSID, OECD and UNCTAD, 2005, p. 4; De Brabandere (2015), p. 148. Regarding arbitrations according to the NAFTA, see in particular the Free Trade Commissions interpretations of Chapter 11 in the NAFTA from 2001 available at: \url{http://www.state.gov/documents/organization/38790.pdf}, accessed 31 July 2016), in which it is stated that “[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and subject to the application of Article 1137(4), nothing
\end{itemize}
\end{footnotesize}
three main procedural categories to which added transparency pertains and that throughout the evolution of investor-state arbitration have been developed to become more accessible for the public.\textsuperscript{210} These three categories are comprised of (i) the access by the public to information about existing arbitral proceedings and to obtain information and documents submitted within the proceedings, (ii) the right to be present at the arbitral proceedings (hearings) and (iii) the right to obtain final awards. Even though this research focuses on the possibility to intervene as an \textit{amicus curiae}, the scope of transparency is relevant to explain, as these third party submissions naturally are dependent on the information about ongoing arbitration and the access to case material submitted by the parties.

\section*{4.2. The Need for Transparency}

As seen above the \textit{Methanex} tribunal offered two arguments in support of the acceptance of \textit{amicus} to intervene. These arguments that have since been present in the defence for added transparency establish the logic behind, what I call, the modern \textit{amicus curiae} institution.\textsuperscript{211} I will now address these arguments. The main arguments supporting enhanced transparency are (i) that a certain public interest is inherent for investor-state arbitration and (ii) that broader transparency enhances the legitimacy of the investment arbitration regime. Without going too much into the political discussion, the focus is on the developments the \textit{amicus curiae} institution has seen recently. The discussion here will support and enable the understanding of the findings later on concerning the procedure of admitting the EC to participate as a third party-intervener.

The notion of transparency poses some contradictions since traditional commercial arbitration is characterized as confidential, private and adhering to the principle of party autonomy. Such features do not seem to fit with notions such as transparency, publication

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\textit{in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.”}


\textsuperscript{211} Regarding the argumentation in support for legitimacy and transparency see for instance: Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (A/CN.9/WG.II/WP.159 and Add.1-4) in the UNCITRAL Yearbook, Volume XLII: 2011, pp. 186-187 (in which alongside the legitimacy argument the usefulness of the \textit{amicus curiae}-institution was underlined); “Transparency and Third Party Participation in Investor-State Dispute Settlement”, Meg Kinnear, Symposium Co-Organised by ICSID, OECD and UNCTAD, 2005; Suggested Changes to the ICSID Rules and Regulations (2005).
of procedural documents and tribunals having the power to accept third party interventions. To explain the need for transparency within investment arbitration we have to primarily, here again, underline the difference between investment arbitration and traditional commercial arbitration. Investment arbitration cannot be seen as a wholly private method of resolving disputes, but more of a hybrid institution sharing features from both private and public areas of law. Even though the hybridity of investor-state arbitration has been put forward by scholars, many arbitration institutes nevertheless provide for application of the same arbitration rules regardless of whether the disputes are classified as commercial arbitration or investment arbitration. This fact is an indication that the classification of investment arbitration as a public dispute resolution process, or at least as a melange of public and private, still needs to be seriously taken into account within the procedural legal framework of investment arbitration.

4.2.1. The Public Interest Argument

As was stated by the Methanex tribunal, investment arbitrations are characterised with a public interest. A vast majority of the alleged breaches of investment protection come from state acts exercised within its power to regulate. It is quite common that a newly adopted state policy or a regulatory act aiming at fulfilling new improvements within a state, whether it concerns, e.g., national health, environmental issues, sustainable development or human rights, is targeted by a foreign investor causing a less profitable atmosphere. This in turn means that issues resolved within investment arbitration target fundamental notions of state sovereignty, such as the right to regulate. At the same time these state policies and regulatory matters that are being examined by arbitral tribunals also affect the people living within the jurisdiction of the state subject to the arbitration. The impact of the arbitral process thus expands beyond the disputing parties and, consequently

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213 For example the much used arbitral institution within investment arbitrations, the SCC, provides for only one set of rules, likewise the ICC International Arbitration Court can hear investor-state disputes under the ICC Rules also applicable on commercial disputes, even though in comparison to the SCC the ICC does not publish its case-load statistics and therefore the scope of its use within investor-state arbitrations impossible to define.
215 Brownlie (1979), p. 60.
there exists an increased level of sensitivity and a higher demand of public interest for participation in the disputes.

There are many cases in which the investor has attacked the regulatory acts by states and their newly adopted policies where the underlying regulatory changes aim to enhance the overall public welfare of the people within their respective jurisdiction, in terms of health, security, human rights or environmental aspects. One good example is the quite recent Vattenfall case\(^2\) where the German state executed a new policy with the goal of reducing or potentially eliminating the use of nuclear power. It is obvious that the issues in dispute in the Vattenfall case concerned matters that affect the entire nation and the people living in Germany. Another case that has caught much media attention is the case of Philip Morris v. Australia\(^3\) and Philip Morris v. Uruguay\(^4\) where the relevant governments posed new restrictions against the contents of cigarette packaging, in an effort to reduce the willingness to buy cigarettes. In both cases the claimants argued that due to these regulatory changes, the respondent state had committed a breach of investment protection and that the claimants therefore had suffered losses in their investments.\(^5\)

As such matters are being resolved by investment tribunals, the issue that has generated concerns is that investment arbitration is often conducted behind closed doors, making information about cases hard to find. Even though the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules do not include provisions obliging the arbitration to take place *in camera*, the parties can naturally so choose by their own initiative.\(^6\) Fortunately it is hardly ever the case that investor-state arbitration would occur totally in the dark when the arbitration is taking place under the ICSID, since the ICSID has a common policy to

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\(^3\) Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12.


\(^5\) In the case against Australia the tribunal did not try the case on the merits but rendered a decision where it held that due to jurisdictional matters the initiation of an investor-state dispute was an abuse of right or abuse of process (see Award on Jurisdiction and Admissibility of 17 December 2015) and in the case against Uruguay the tribunal upheld the respondent states defence and did not agree that these state acts constituted illegal expropriation or a denial of faire and equitable treatment as argued by the claimant (see Award of 8 July 2016).

\(^6\) Rule 32 in the ICSID Arbitration Rules, Article 28 in the UNCITRAL Arbitration Rules.
publish at least some information about ongoing disputes.\textsuperscript{221} The situation is different when an investor-state arbitration is held within one of the institutional arbitration centres, like the SCC. The SCC solved 12 investment disputes in 2015 from a total of 85 investment disputes since 1993.\textsuperscript{222} Of these 85 investor-state disputes the SCC published none on the website of the SCC. The confidentiality of the arbitral hearings is safeguarded in article 27.3 of the SCC Arbitration Rules, whereas the arbitration and its award are protected from disclosure in article 46.

The intention is not to claim that states when implementing new policies always act in \textit{bona fide} and that such acts could not constitute scape goats for an underlying bad treatment of a foreign investor, but instead that such allegations raise questions with far reaching impacts, making it well founded that the public can get its voice herd.\textsuperscript{223} It is also not argued that only investment arbitration raise issues of public interest. Commercial arbitration too can have huge impacts on other non-disputing parties, and investment arbitration can lack this feature in some cases. But since sensitive issues are often under examination within investment arbitration, the public interest argument has gained prominence within the transparency debate.

\textit{Amicus curiae} interventions will enable interested third parties to submit opinions in front of the tribunal in matters of public interest. The participation of an \textit{amicus} will bring to the attention of the tribunal important aspects on matters such as human rights, sustainable development and environmental issues,\textsuperscript{224} as such interested organizations are experts in their respective areas. As put by Born, it holds true that a purely commercial dispute can as well have a greater impact spanning over the public society than simply on the disputing parties, and that likewise an investment dispute can concern a matter raising no public

\begin{itemize}
\item \textsuperscript{221} Bianco (2015), p. 66.
\item \textsuperscript{222} Statistics over the investment disputes concluded within the SCC are available here: \url{http://www.sccinstitute.com/statistics/investment-disputes-2015/} (accessed 31 July 2016).
\item \textsuperscript{223} There can be said to exist public interest also when looking from the other perspective, namely, in the case when a state actually has acted in breach of an investment treaty and being held liable for its acts. When in breach and condemning award can include quite large amounts of compensation to be paid to the private investor by the state and in turn this affects the tax-payers of that state.
\item \textsuperscript{224} “Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest”, Katia Fach Gómez, Fordham international Law Journal, Volume 35, 2012, p. 452.
\end{itemize}
interest. Born also points out that nothing in the nature of investor-state arbitration should legitimate a blanket refusal of confidentiality for such proceedings and the application of a general principle of transparency should be opposed. Nevertheless, it is precisely an application of total confidentiality over such disputes that have caused worried reactions from the civil society, as the need to have public voices heard and arguments of public interest issued is well-founded. In order to tone down the point raised, it has to be remembered that the “public interest” argument is merely an argument and is often also a political one. It is therefore questionable whether the presence of the amicus actually brings more value to the resolving of the dispute from a legal point of view.

4.2.2. The Legitimacy Argument

We now turn to a more general viewpoint over investment arbitration and to what the Methanex tribunal stated about the perception of investor-state arbitration. The perception of legitimacy is lacking within international investment arbitration and there is said to be a “legitimacy crisis”. As put by investment tribunal as we have seen before, a strengthened role of amicus curiae could in different ways attempt to fix some of these flaws. There are two main problems that seem to tear upon the legitimacy of investment

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226 Ibid., pp. 2828-2829.
227 See footnotes 191 and 198.
229 In general about transparency see: Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (A/CN.9/WG.II/WP.159 and Add.1-4) in the UNCITRAL Yearbook, Volume XLII: 2011, p. 181), in which is it expressed that “[i]n addition to the broader objective of promoting sustainable development through international investment law, ensuring transparency and meaningful opportunity for public participation in treaty-based investor-State arbitration was said to constitute a means to promote the rule of law, good governance, due process, fairness, equity and rights to access information. It was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. Those challenges were said to include, among others: an increasing number of treaty-based investor-State arbitrations, including an increasing number of frivolous claims; increasing amounts of awarded damages; increasing inconsistency of awards and concerns about lack of predictability and legal stability; and uncertainties regarding how the investor-State dispute settlement system interacted with important public policy considerations. It was said that legal standards on increased transparency would enhance the public understanding of the process and its overall credibility. Furthermore, as put by scholars Nigel Blackaby and Caroline Richard ”[t]he admission of these [third party-] briefs was justified on the basis that they assist tribunals by providing them with perspectives and expertise different from those provided by the parties, they increase transparency in investment arbitration by providing the public with insight into the
arbitration. The first problem is that the investment arbitration system does not completely adhere to the rule of law, while the second problem arises from the seemingly endless questions caused by the fragmentation of international law.

International investment arbitration has caught itself in the crossfire between private and public dispute settlement, causing a dilemma with regard of the *rule of law*. The issue relates to the nature of arbitration as a private dispute settling mechanism, in which the principle of party autonomy is followed and the dilemma arises since matters of great public interest are solved through such methods. Since the parties in arbitration are free to choose the seat of the tribunal as well as the composition of the tribunal,\textsuperscript{230} every arbitral proceeding is different and established *ad hoc*, *i.e.*, explicitly for the specific case at hand. There has therefore not been a clear development of coherent jurisprudence within investment arbitration. What additionally has aggravated this problem is that the decision-making by the arbitral tribunal is not bound by the principle of *stare decisis*.\textsuperscript{231} In other words the arbitral tribunal has no obligation to follow precedents established in earlier case law by other tribunals. These issues are highlighted when the procedural material and the rendered arbitration awards concerning disputes of public interest are not made available to the public, making the conduct of the arbitration impossible to scrutinize.

The legitimacy of investment arbitration is also burdened by the complex issue of *fragmentation of international law* and it can be seen that investment arbitration is an illegitimate means to administer global governance. The fragmentation of international law was already predicted in the 1970s by the German sociologist Niklas Luhmann. The prediction was that “global law” would go through a fragmentation on the level of social

\textsuperscript{230} The parties are generally free to appoint arbitrators according to their needs and often in order to match the specific needs of expertise posed by the subject matter of the dispute with the proper arbitrators.

Another timely spokesman regarding the fragmentation of international law is Martti Koskenniemi, Professor in International Law, who has lead a study explicitly focused on this subject in 2006. Koskenniemi’s central views regarding fragmentation of international law, caused by globalization, is that various specialized areas of law are shaped in their own self-contained systems, in which independent principles and institutions are developed without regard to surrounding legal developments and values. This leads to what Koskenniemi calls a “loss of an overall perspective of the law.” Koskenniemi has also contributed to the discussion in particular regarding the legitimacy of international investment arbitration with numerous points of view, amongst which one is that the collisions of regimes has surfaced through investment arbitration. The discussion of the fragmentation of international law would serve as a separate thesis, and except fore some concluding remarks, I will not address this question further here.

4.3. The “Modern” Amicus Curiae

“No modern rules of investor-State arbitration procedure would be complete without the possibility of allowing submissions by third persons”, is the first sentence in the introduction to “Article 4. Submission by a third person”, by Mariel Dimsey in a work regarding the new UNCITRAL Rules on Transparency. This chapter discusses the position of transparency as a public principle within investment law and the strong status that amicus curiae has gained. Further I look at how transparency today takes an evolved role creating, what I call the modern amicus curiae. The amicus curiae institution has gone through some noteworthy developments, serving initially as a tool within international tribunals to gather facts otherwise left outside the knowledge of the court and later


234 Ibid., p. 11.

235 See, e.g., in particular his participation in the Helsinki Summer Seminar in 2014 held at the University of Helsinki by the Erick Castrén Institute of International Law and Human Rights with the title “International Investment Law: Between Public and Private”, where Koskenniemi lectured about the fragmentation of international law by specifically addressing the regime collision between the law of human rights and trade and investment law, which according to Koskenniemi is an extreme type of fragmentation.

additionally becoming a channel for the echo of the public voice. In the modern amicus curiae these rights of the civil society are shadowing those of the disputing parties.

An international custom could be defined as a somewhat generally accepted manner of conduct between sovereign states in their relations inter se, to the extent that it can be regarded as law. International custom is an important source of law within the international law-making sphere, since there exists no regulatory body that could impose legally binding instruments upon all states. Custom therefore likewise plays an important role within international investment law and therefore the nature of amicus curiae is approached from a practical point of view. The case law discussed earlier is therefore of relevance to prove the strong role that transparency has been given.

The codification of such case law can be seen for instance within the ICSID. ICSID being, according to its own words the “premier international investment arbitration facility in the world”, has already before the reformed Arbitration Rules in 2006 recognized the importance of public understanding of investment law an investment arbitration, and continues on an ongoing basis to propose an outreach to enhance such factors. Even though idea behind the amicus curiae institution as an enhancer of legitimacy derives from political motivations it has de facto resulted in significant regulatory changes recently. As a result the status of transparency within investment arbitration is stronger than it ever has been, forming a subtle growing ground for the modern amicus curiae.

237 Brownlie (1979), pp. 6-8.
239 ICSID Annual Report 2015, p. 5.
240 Ibid., p. 51.
241 The desire for more transparency has been codified through the NAFTA FC Statement in 2003, following the revision of the ICSID Arbitration Rules in 2006 implementing the same principles as in the NAFTA FC Statement, the UNCITRAL Transparency Rules from 2013 adding a provision for the enhancement of transparency to the 2010 rules, the free trade agreement between Canada and the EU, CETA, which makes reference to the UNCITRAL Transparency Rules and the United Nations Convention on Transparency in Treaty-based Investor-state Arbitration (Mauritius Convention) that extends the scope of application of the UNCITRAL Transparency Rules as well as the revision of the SIAC Arbitration Rules that aim to implement transparency through enabling third party participation in their new investment arbitration rules.
242 With the new UNCITRAL Transparency Rules the regulatory base for transparency clauses within investment arbitration is as it’s highest as present, in addition to new rules being implemented and revised in other arbitration centres as for example in the SIAC. See also for instance an announcement in January 2015 by the European Commission to contribute with 100 000 € to the UN secretariat, for the administration of a public registry, established in the wave
There has been a lot of discussion about transparency becoming a public principle in investment arbitration and thus for amicus curiae becoming universally applicable as a key element of transparency. Examples of this are the new initiatives within various regulatory frameworks, such as the new UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration from 2013 (UNCITRAL Transparency Rules), which are the result of a long revision process by UNCITRAL Working group II commenced in 2010. Article 4 of these rules gives the explicit power to the arbitral tribunal to accept third party submissions. This can be illustrated by citing Dimsey as being “the most recent step in a long, slowly developing trend of increased acceptance of third person participation in investor-State arbitral proceedings” and forms another effort to codify best practices from other legal instruments and previous jurisprudence in the area.

Some scholars suggest that transparency should indeed be regarded as a general principle within investment law, arguing that the benefits of a more transparent system outweighs a strict application of confidentiality. On the other hand, some scholars oppose this view, as discussed above. Even though the views in legal literature on whether or not transparency should be considered as a general principle within investment law are evidently still split, it cannot be ignored that the amicus curiae institution, hand in hand with the development and incorporation of transparency, has de facto been reshaped considerably.


Two arguments were elaborated above, that a certain public interest is often prominent in investment arbitration and that in order to safeguard the legitimacy of the investment arbitration mechanism added transparency is indispensible. These evidently recognized and well-founded arguments promote transparency and convey the incorporation of procedural rules, such as the *amicus curiae* right, to international investment law. To summarize it can be argued that transparency has become a public principle within international law and applies to matters of public interest. Even though investment arbitration originates from a dispute settling method that was designed for private purposes, this should not be a factor that hinders the reclassification of investment arbitration, thereby giving more room for adaptation and modernization. When making a proper classification of investment arbitration, placing it in its pertinent category of public international law, the same principles applies as for other matters of public international law in general. Transparency will thus become generally applicable also with regard to investment arbitration and thereby also the application of *amicus curiae*.

It has also been noted that the *amicus curiae* institution is an efficient remedy to repair flaws in the public perception of the investor-state dispute settlement mechanism, which presupposes a more limited use of the principle of confidentiality. It is already a fact that confidentiality has had to bow within investment arbitration and instead creating more room for transparency. The point that Born puts forward seems therefore already outdated, since this line has already been bypassed; the modern *amicus curiae* institution is here to stay as a messenger for transparency.

### 4.1. Recent Transparency Initiatives

As yet another proof of the principal standing of transparency in investment arbitration is the novel endeavour of the UNCITRAL to introduce a model legal framework including rules for more open investor-state arbitration in the “new” revised rules from 2013. Nevertheless, since the rules are relatively fresh, the question still remains whether the rules actually will change the scene or whether they become a legal instrument of which the goals only remain at an illusory level.

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247 See footnotes 225 and 226.
The UNCITRAL Arbitration Rules today come in three different versions; the original rules from 1976, the revised rules from 2010 and the “new” revised rules from 2013. Article 1 paragraph 4 of the new UNCITRAL Arbitration Rules from 2013 incorporates the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration\(^\text{248}\) (the UNCITRAL Transparency Rules), which like the new Arbitration Rules also came into effect 1 April 2014. The new rules from 2013 are as such the same as the previous rules with the addition of a specific inclusion of the UNCITRAL Transparency Rules and with the aim of clarifying the application of these. The main goal of the UNCITRAL Transparency Rules is to enhance transparency within investor-state arbitration and they are a result of nearly three years of negotiations by the Working Group II on Arbitration and Conciliation. The reformed rules are a ground breaking step towards a more open institution of investor-state arbitration by taking into account the interests of the public in a more formal and official way. Article 4 in the UNCITRAL Transparency Rules explicitly confirms that investment tribunals can accept *amicus curiae* submissions. The article also describes in detail under what conditions third-party submissions can be accepted.

As noted above, the UNCITRAL Arbitration Rules are often pointed out as the relevant procedural rules for the conduct of investor-state arbitrations and the Transparency Rules will apply to the agreements referring to these rules that have been entered into as of 1 April 2014. Alternatively, the Transparency Rules will be applicable in the case the agreement is concluded earlier than 1 April 2014 if the parties have explicitly “opted in” for the use of these new rules.\(^\text{249}\) The first case where the Transparency Rules are applied is the pending *Iberdrola v. Bolivia* case conducted under the auspices of the PCA.\(^\text{250}\) Another recent case applying the Transparency Rules is the ICSID case *BSG Resources Limited v.*

\(^\text{248}\) Article 1 paragraph 4 states: “For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), subject to article 1 of the Rules on Transparency.”

\(^\text{249}\) Mauritius Convention, adopted 10 December 2014 with a signing ceremony opened 17 March 2015 in Port Louis, Mauritius, is an instrument aiming at the facilitation of states to agree upon the usage of the Transparency Rules, though it has not yet come into force. The idea with the Convention is that upon signature the UNCITRAL Transparency Rules will even be applicable on disputes arising out of already existing investment treaties between states (*i.e* treaties that are signed before 1 April 2014, thus before the 2013 UNCITRAL Arbitration Rules came into effect), independent of the arbitration rules applicable to the investment protection dispute. According to article 7 (1), the Convention is up for signature for ”any (a) state; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty”, this thus including *e.g.* the EU.

Republic of Guinea.\textsuperscript{251} Even though the amended UNCITRAL Arbitration Rules and the Transparency Rules are steps towards from transparency point of view there are still some speed bumps in the way of an efficient application of the Transparency Rules since states are allowed to make reservations to the application of these rules.\textsuperscript{252}

In addition to the new UNCITRAL Arbitration Rule, another example that can be mentioned is the draft investment arbitration rules of the Singapore International Arbitration Center (SIAC Draft IA Rules),\textsuperscript{253} which aim at addressing timely matters and at providing for a modern set of arbitration rules applicable to investor-state\textsuperscript{254} Rule 28.2 in the SIAC Draft IA Rules address *amicus curiae* submissions. The rules look very much like the ICSID Arbitration Rules and the UNCITRAL Transparency Rules when it comes to third party submissions with the exception that instead of "significant interest" the term "sufficient interest" is used for the determination of whether or not the tribunal should allow third party submissions. It would in other words suffice for an *amicus* wishing to intervene to have a "sufficient interest" in the arbitration under the application of the SIAC Draft IA Rules. Consequently the threshold to accept third party submissions would be lowered. What is also novel about the SIAC Draft IA Rules is that they are a truly hybrid set of rules, since the rules for investment arbitrations would be separate from the rules for commercial arbitrations, which is not the case in many other arbitration centres. The idea behind the SIAC Draft IA Rules take into account the particular character and special needs of investment arbitration and they provide as a practical example of how the distinction between commercial arbitration and investment arbitration, including the desire for greater transparency, is taken into consideration.

5 EU law, Investment Law and *Amicus Curiae*

Until now this thesis has discussed third party interveners by non-governmental regional and international organisations, various unions, interest centres and groups of civil society,

\textsuperscript{251} BSG Resources Limited v. Republic of Guinea (ICSID Case No. ARB/14/22).
\textsuperscript{252} See Article 1, scope of application of the Transparency Rules, where it is enabled for parties to derogate and make reservations to the application of the relevant rules even in the case the underlying investment treaty making reference to the said rules is concluded.
\textsuperscript{253} See also footnote 81.
which can be said to form the traditional types of *amicus curiae* parties within investment arbitration proceedings. The case law that has so far been researched also almost exclusively covers these sorts of interveners. More recently though, the EC has showed a more active role to intervene and submit its viewpoints within ongoing investor-state arbitrations. In this connection the EC has often opined and challenged the jurisdiction of the arbitral tribunal, stating that EU law prevails over the international investment agreement in which the relevant investment protection is included. In this chapter I take a closer look at the EC’s active role as a third party intervener in investment disputes and the admission process by which the EC has been accepted as a third party. First, I explain how EU law and investment law are intertwined through a research of the *reasons* the EC has raised to motivate its interventions – what has it argued and why? In this connection I explain the “MOX Plant” jurisprudence, established by the ECJ. Secondly, I discuss in more detail the situations in which the EC has intervened and under what conditions. Finally, I discuss whether the reasons for accepting its participation are legitimate and based on the arguments that underpin the contemporary role of *amicus curiae*. The question to be answered in its culmination is what implications the role granted to the EC has when taking into account the contemporary role of *amicus curiae*. I answer this question primarily by researching how third party interventions by the EC have taken place within the jurisprudence of the ICSID. 

5.1. The Relationship Between International Investment Law and EU Law

In order to better understand the mandate and the motivation for the EC to intervene and its role within investment arbitration, not to mention the difficulties this poses, international investment law has to be mirrored against EU law and vice versa. It is important to understand, first, how these two legal frameworks can coexist in harmony and, secondly, what the approach of the EC is towards the investment law regime, *i.e.*, whether their respective goals are compatible with each other. Answering this question is also of importance since we will see that it opens a door to something bigger and maybe

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255 Due to availability of case material the research will be limited to study the cases before the ICSID and thus leaving outside other possible tribunals. In addition the known cases where the EU Commission has acted as amicus curiae has mostly been in cases before the ICSID, and thus another reason for the delimitation of the research.
something more problematic, which is the issue of treaty conflict and the possibilities of resolving disputes concerning matters governed by EU law in front of an arbitral tribunal.

5.1.1. The Coexistence of Investment Law and EU Law

As explained in chapter 2.5. above, the EC has, since the adoption of the Lisbon Treaty in 2009, a mandate to negotiate and sign investment treaties with third countries as well as to regulate on matters concerning FDIs and the protection of such investments. This power is established in Article 207 of the TFEU. During the time before the Lisbon Treaty, investment protection and treaties including investment protection mechanisms were left to the discretion of the member states. Since the scenery has changed, difficult questions regarding the interaction between investment protection and EU law have arisen, especially regarding EU obligations that member states are bound to observe. Today the investment protection regime, including the dispute settlement mechanisms, is built on a few multilateral investment agreements and approximately 3 000 BITs, of which about 1 200 are within the EU. Additionally it is of importance to note the differentiation between “intra-EU” and “extra-EU” bilateral investment relationships. Intra-EU BITs are treaties signed between two EU member states, whereas extra-EU BITs are treaties concluded between one EU member state and a third non-EU state. There are still some 190 intra-EU BITs and it is these treaties that are of relevance here. After the adoption of the Lisbon Treaty including the new mandate of the EU to regulate on international investments, the challenges that where identified at the crossroad of international investment law and EU law, were, i.a., the promotion of transparency, consistency and predictability.

However, the particular challenge of the coexistence of already existing international investment agreements and the new EU competence was not foreseen, and the possibility of the EC participating actively in order to contribute to treaty conflicts was not even discussed.

Both EU law and international investment law address investment protection through substantive provisions and provide remedies for the enforcement of such provisions. In other words they address identical substantive matters. The issue arises since both legal

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256 Of these 1200 approximately 1000 are extra-EU BITs and about 190 consists of intra-EU BITs.
257 Dolzer; Schreuer (2012), pp. 11-12.
frameworks make reference to their prominent competent instances for the resolving disputes under investment protection. When applying EU law in a case where the parties face an investment dispute, the parties should seek recourse through the European Court of Justice (ECJ). On the other hand when applying an IIA, reference is, as we have seen, often made to the ICSID. There have been numerous cases before the ICSID that address this specific question, namely that EU law and international investment law address the same matters. Within such disputes many member states as well as the EC have tried to intervene in order to opine on the interpretation of the conflict between EU law and investment law, claiming that EU law prevails over investment agreements and that the substantive rules provided for within EU law will rule over the competing IIA. The arbitral tribunal has in the vast majority of such cases that have been made publically available dismissed these objections and concluded that it has jurisdiction to hear the case initially brought before it by the private investor. It goes without saying that the existence of such a legal uncertainty means that the private investor is exposed to a rather uncertain investment environment. The question posed earlier can for the time being be answered by stating that international investment law and EU law are not coexisting in harmony.

5.1.2. The MOX-Plant Jurisprudence

When discussing the second difficult question, namely the approach of the EC towards investment law and investment arbitration, the role of the EC more concretely comes into play and it is in respect of this issue that the EC has been an active intervener in investor-state arbitrations. The EC’s opinion and approach towards the relationship between investment law and EU law can be summarized from reading its third party submissions for instance in the *Eureko* case, which was a PCA arbitration conducted under the 1976 UNCITRAL Arbitration Rules. The *Eureko* case touched upon the relationship between international investment law and EU law, and one of the questions was whether EU law can render arbitration clauses in intra-EU BITs inapplicable. According to the respondent

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259 This will be elaborated further below when discussing the *Commission v. Ireland* case below (ECJ C-459/03, *Commission v. Ireland* [2006] E.C.R., Judgment of the Court (Grand Chamber), 30 May 2006, I-4657).


state, the Slovak Republic, an arbitration clause found in a BIT is deemed to be invalid since EU law governs the same subject matter as the intra-EU BIT, and in such cases the EU law should prevail and consequently render the arbitration clause invalid. According to the respondent, the termination of the BIT would, by virtue of article 30 and 59 in the Vienna Convention on The Law of Treaties (VCLT), be a consequence of the membership of the Slovak Republic to the EU, since the later treaty addressing the same subject matter terminates an earlier treaty.

In the *Eureko* case the EC builds the basis for its claims in its third party submission on the jurisprudence that was established by the ECJ in *Commission v. Ireland*, also called as the MOX-Plant jurisprudence. This decision held that the ECJ has exclusive mandate to resolve matters between two EU member states when the subject matter of the case is to some extent covered by EU law. The exclusive mandate of the ECJ to rule on matters governed by EU law is derived from the obligation of the member states to submit disputes to the community judicial system as established in article 292 of the Treaty Establishing the European Community (EC Treaty). Correspondingly, in cases where another international agreement addresses the same questions as EU law, the ECJ should be the body interpreting the regulation addressing such matters, and to submit such disputes before another judicial body would be in breach of obligations imposed by EU law. Analogically applied to the relationship between EU law and investment law, this means that intra-EU matters should according to the MOX-Plant jurisprudence not be pursued within arbitral tribunals, but instead before the ECJ which has exclusive jurisdiction to rule upon such matters.

Moreover, what is quite interesting, it was the respondent in the *Eureko* case that asked the tribunal to invite the EC (and the Government of the Netherlands) to act as amicus curiae in order to assist in the interpretation of the BIT. The tribunal finally did so after having

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262 Article 59 in the VCLT states that "[a] treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter…".


265 Treaty Establishing the European Community (Consolidated version 2002), OJ C 325, 24 December 2002, pp. 33-184. Article 292 of the EC Treaty states that "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."
reached an agreement with the claimant. This can be contrasted to what the tribunal stated in *Aguas Argentinas* where it described the request to act as amicus curiae as an “offer of assistance”. The *Eureko* tribunal thus goes quite far by actually inviting the EC to participate. In *Eureko* the tribunal assumed jurisdiction to hear the case by postponing the question of the application of EU law to the merits phase of the proceeding, in which it later rejects the claims for the application of EU law to the dispute. In the jurisdictional phase, the respondent and the EC claimed that the arbitral tribunal would not have jurisdiction to hear the case, since EU law would prevail over international treaties and recourse should be made to the ECJ. Nevertheless, the tribunal clearly rejected the argument that the ECJ would have “interpretative monopoly” to rule on matters of EU law, and further stated that even the application of EU law in the merits stage would by no means withdraw its competence to hear the dispute.

By first rejecting the claims on lack of jurisdiction, the tribunal addressed the applicability of EU law in the merits phase, as part of the applicable law set out in the BIT between the disputing parties. In the final award the tribunal stated that there are no such provisions in EU law that would burden the decision making of the tribunal so as to render a decision based on the BIT between the Netherlands and the Slovak Republic to be in breach with EU law. Regarding the correlation between EU law and the treaty between the parties, the tribunal further noted that “insofar as they are applicable to the facts in the present case, nothing in those Treaty standards is in conflict with any provision of EU law. Nothing in this Award amounts to, or implies, a decision that Respondent or Claimant has acted in conformity with EU law or contrary to EU law in any respect. This Award has no bearing upon any question of EU law. This Award relates only to the compliance by Respondent with the terms of the obligations it has assumed under the agreement that it made with the Treaty.”

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267 Ibid., §§. 178-182, 278.
268 Ibid., §. 282.
269 Ibid., §. 283.
271 Ibid., §. 276.
The arbitral tribunal in *Eureko* in other words both assumes its jurisdiction and rejects the application of EU law, since the parties did not raise any specific objections regarding any EU law provision. Nevertheless, the tribunal further notes that the obligations under the investment treaty are not in conflict with EU law. Thereby the tribunal *de facto* addresses the relationship between EU law and international investment law. Should the tribunal have found EU law applicable to the dispute it would have addressed matters governed by EU law since having already assumed jurisdiction, meaning that the MOX-Plant jurisprudence would have been bypassed.

The *Eureko* case is a great example of the problematic relationship between international investment law and EU law, where fragmentation of international law takes place in practice.\(^\text{272}\) International arbitration procedures are sort of battlefields for conflicting legal frameworks and competing judicial and arbitral mechanisms and through such disputes the approach of the EC has become clear. In *Eureko* not only was the issue of fragmentation of international law pointed out; the EC in its submission also addressed the issue of *forum shopping* that a system comprising of competing judicial systems can lead to.\(^\text{273}\) In *forum shopping* parties can freely choose which instance they make recourse to, according to their desires, leading to a fragmented and legally uncertain situation. The risk of *forum shopping* is evident in a situation where it is not clear which judicial body is the correct instance to resolve the dispute at hand and where multiple instances can be addressed.

\section*{5.2. The EC: a True Friend of the Court or an Intruder?}

In the previous chapter I addressed the underlying reason for the EC to participate as *amicus curiae*. The EC has recently participated for reasons related to the interaction

\(^{272}\) This problematic can further be illustrated for instance by the reasoning of the ECJ in the *Commission v. Ireland* case (ECJ C-459/03, *Commission v. Ireland* [2006] E.C.R., Judgment of the Court (Grand Chamber), 30 May 2006, I-4657), where it states that “[t]he act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of the obligations imposed on the Member States pursuant to Community law.” The distress of the ECJ arouse from the fact that this course of action would lead to that matters that should belong to the exclusive mandate of the ECJ would now be ruled within another judicial forum (ECJ C-459/03, *Commission v. Ireland* [2006] E.C.R., Judgment of the Court (Grand Chamber), 30 May 2006, \S\. 177).

\(^{273}\) *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, 26 October 2010, \S\. 185. The same had already earlier been stated by the EC in the case of *Eastern Sugar (Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, \S\. 126).
between EU law and international investment law as well as questions of the applicable law. As has also been discussed above, the desire for transparency in connection with the rulemaking and the resolving of disputes is especially high within the EU, and has surfaced in relation to the recent and on-going TTIP negotiations. In this chapter I research the role of the EC as *amicus curiae* in light of these underlying issues. I will in more detail answer the question whether the prerequisites for accepting third party intervention, set up in the case law of the ICSID, equally apply to the EC. Does the participation of the EC in other words fulfill the requirements for accepting a third party intervention? I also examine whether the position granted to the EC as *amicus curiae* is legitimate. In this connection I research the role of the EC within the doctrine of the modern *amicus curiae*.

The participation of the EC might lead to certain concerns. As we have seen above, the participation of *amicus* in investment arbitrations has traditionally been conducted by regional or international NGOs. It is not until recently that the EC has taken an active role as *amicus curiae* before investment tribunals. According to Rule 37 (2) in the ICSID Arbitration Rules, a tribunal may allow an *amicus* to opine on matters of law or fact within the scope of the dispute, to the extent it can provide the arbitral tribunal with objective viewpoints in addition to those of the disputing parties. Additionally, the third party intervener should be independent from the disputing parties and have a significant interest in the dispute. The concerns that arise can be divided into three categories. First, concerns relate to the requirement to have a significant interest in the dispute. Is this interest stretched too far when it comes to the EC, and can it be said that the EC has actually, instead of being regarded as an independent and neutral advisor, sought to achieve certain politically motivated outcomes? In this connection the criticism in legal literature towards the political motivation of the EC to participate especially in *AES v. Hungary* can be mentioned. As we will see in the following, it is not only in *AES v. Hungary* where the EC has showed great interest to express its opinions; the picture is indeed much bigger than this one case. Further, concerns might likewise relate to other purely procedural aspects of the participation of the EC as *amicus*. The second concern relates to the requirement that the issues raised by the *amicus* intervener should be within the scope of the subject matter as put forward by the disputing parties. This is not always the case when it comes to the EC. Thirdly, the requirement that the intervening party should be independent from the

original parties without them being prejudiced by the intervention likewise poses some problems. These three concerns will be discussed below.

5.2.1. Interest in the Dispute

Concerns relating to the political motivations behind the intervention of a third party have been expressed by the scholar and practitioner Mariel Dimsey, who in particular has criticised the political incentives of the EC to participate as amicus in the AES v. Hungary arbitration. The EC was allowed to act as a third party intervener within the merits phase in AES v. Hungary, which was an ECT arbitration ruled under the ICSID Arbitration Rules, even though it was denied access to the parties written submissions. Unfortunately the deliberations and the decision of the tribunal when accepting the EC as amicus curiae are not publicly available, which leaves us with no possibility to further analyse the procedure in which the EC was granted leave to intervene in AES v. Hungary. Nevertheless, the arguments raised by the EC are analogic to those raised by it when participating in other investor-state arbitrations and thus the concern of the politicisation of investment arbitration is connected with the role of the EC as amicus in investor-state disputes more generally.

Dimsey also points out that “a fine line must be trod: a party must have an interest in the subject matter of the dispute, but cannot be interested in its outcome”. As we have seen, the prerequisites for a party to be granted leave to intervene as amicus are mentioned in various arbitration rules and have moreover been shaped through case law. First, Rule 37 (2) of the ICSID Arbitration Rules states that the party wishing to intervene should have a “significant interest in the proceeding”, but at the same time the arbitral tribunal has to be reassured that such submission would not “unduly burden or unfairly prejudice either party”.

Addressing the concerns raised, it can firstly be noted that it would be highly unlikely to expect that a non-disputing party wishing to intervene in a matter of significant interest

276 Ibid., pp. 175-176.
would not likewise have a strong interest in the outcome of the dispute. To illustrate this situation the *Aguas Argenitans* case can be mentioned, which is the very case where the prerequisites to allow *amicus* was set up. In the case the *amicus* represented the interests that where at issue, namely the right to some basic public services, as well as environmental and human rights issues. It is natural that the outcome of the dispute, namely whether the acts of the state for protecting the public access to some basic public services are condemned or not by the arbitral tribunal, is in the interest of the NGOs protecting precisely these rights, whether these interests are political, environmental on regarding human rights.

The Center for International Environmental Law (CIEL), which is an active *amicus* participator in investor-state disputes (amongst many cases it participated as *amicus* in the *Aguas Argentinas* case), has listed the goals of NGOs when intervening as *amicus* very clearly in a publication together with a human rights interest organisation. The publication states that: *“One of the key goals of amicus intervention for NGOs has been to ensure that tribunal decisions take into account human rights law obligations and/or take into account the perspective of rights holders impacted by the decision.”* It is thus clear that the intervening party not only has an interest in a dispute, but also in its outcome.

To demand that the interest of the non-disputing party should not extend to the outcome of the dispute would deprive a fundamental notion of the *amicus curiae* institution, namely the right of non-disputing parties to opine on matters *within their substantial interests*. Posing such a restriction would render the *amicus curiae* institution illusory. In such a case the *amicus* would more or less be comparable to a witness witnessing within the arbitral process, which is something the arbitral tribunals have clearly stated should not be the case. Secondly, as concerns the examination of whether the non-disputing party is suitable to act as *amicus*, the arbitral tribunal has a wide margin of appreciation when

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279 The third party petitioners were Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.

280 “Guide for Potential Amici in International Investment Arbitration”, January 2014, produced by the International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law and the Center for International Environmental Law (CIEL), p. 12.

weighing the rights of all parties. It is here where the tribunal will have to decide whether the political incentives the amicus might have are outweighed by the added value a third party submission will bring to the resolution of the dispute. I thus argue that the concerns regarding the incentive of the EC to participate are unfounded.

5.2.2. Within the Scope of the Dispute

The second concern relates to the scope of the matter on which the amicus curiae can address its opinions. In this connection, the Electrabel case serves as a good example. In Electrabel the claimant, Electrabel S.A., which a Belgian energy company, advanced claims of expropriation and breach of fair and equitable treatment by Hungary under the ECT due to the early termination of a power purchase agreement. The respondent argued that the acts taken by the Hungarian government was the response by Hungary to comply with a decision by the EC, posing an obligation to terminate the said power purchase agreement based on a finding that compensation under the power purchase agreement constituted illegal state aid. In Electrabel the EC, which in the words of the tribunal, has “much more than a significant interest” in the dispute, was admitted to participate as amicus concerning matters relating to both the jurisdiction of the tribunal as well as the applicable law. The tribunal granted leave to the EC to submit third party submissions since it held that the EC, as “an expert commentator on European Community law”, could assist the tribunal by “addressing several legal issues” including the harmonious application of EU law and the ECT. One question was whether EU law should be applicable to the dispute as applicable law or as supporting facts within the analysis of the actions taken by the respondent. Also, the EC was admitted access to the parties written submissions, since the EC was seen to have a significant interest as an amicus. Such broad access was justified in order not to limit the EC’s participation to a “pure legal moot of

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282 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19. Since the claims by the claimant were advanced solely under the ECT, the Tribunal particularly excluded this case from the context of other intra-EU BIT cases.


286 Ibid., § 24.

academic interest only and thus deprive it of any effective role as an amicus.”\(^{288}\) Such a practice, in which the amicus is given access to the parties’ submissions without both parties consent, had not previously been applied before an ICSID tribunal.\(^{289}\)

Not only did the tribunal give the EC broad procedural rights with regard to access to case material, it also granted the EC leave to opine on the jurisdiction of the tribunal, which was a matter originally not disputed by the parties.\(^{290}\) According to what have been stated above regarding rule 37 (2) (b) of the ICSID Arbitration Rules, the submission of the third party intervener should be within the scope of the dispute. Case law suggests the same and therefore the practice by the Electrabel tribunal is clearly opposing the prerequisites as set out in Aguas Argentinas. Even though the tribunal dismissed the EC’s arguments on non-jurisdiction, the present case certainly leads one to question why the tribunal in Electrabel gave the amicus such a wide mandate.

The views of arbitral tribunals regarding which matters amicus are fit to address are divided. Tribunals have previously stated that amicus would not be suitable to address matters concerning the jurisdictional phase,\(^{291}\) but has admitted amicus to do so in other cases,\(^{292}\) as has been seen for instance in the cases discussed in connection with the EC as a third party intervener. The significant difference in the Electrabel case in comparison to other cases where amicus has addressed jurisdictional matters is nevertheless that the parties did not initially dispute the issue of jurisdiction. Moreover, the tribunal took the opinion of the EC on questions of jurisdiction into great consideration. The rule expressed in article 37 (2) (b) is an expression of the consensuality of arbitration, \textit{i.e.}, the parties are free to define the matter under dispute. Therefore a third party submission should not extend the scope of the dispute in front of the arbitral tribunal. It is, however, the task of


\(^{289}\) Ibid., §. 28.


the tribunal to independently and ex officio decide on its own jurisdiction, according to the competence-competence principle, but to extend the reasoning and to take into account the submissions made by a third party, regarding matters that were originally not disputed by the parties, is giving the amicus an inherently strong standing.

A further analysis of the procedure itself by which the tribunal in Electrabel accepted the EC to intervene is unfortunately impossible, since the tribunal simply accepted the amicus application based on an exercise of its discretion under Rule 37 (2) of the ICSID Arbitration Rules, noting that it took into consideration the parties diverse observations on the application of the EC to participate as amicus. What nevertheless can be read out from this case in comparison to previous amicus case law is that the role of the EC seems as very significant and that its opinions are given way more weight than has traditionally been accorded to third parties. What might justify the inherently strong role of the EC in this case is the fact that the EC, like the disputing parties, is a member of the ECT as well as the driving force of the EU behind the drafting of the ECT.

5.2.3. The Independence of Amicus

In addition to the broad scope of matters that the EC has been allowed to express its opinions on, it is highly questionable whether or not accepting the EC as amicus is sometimes burdensome and prejudicing for one of the parties, most often the claimant, which is nearly always a private investor. A fundamental issue that investment tribunals have underlined in connection with accepting amicus submissions is the safeguarding of procedural fairness, which was set out in Aguas Argentinas and further underlined in

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294 The competence of the ICSID to determine its own competence is established in Article 41, where it is stated that “the tribunal shall be the judge of its own competence”. Of the ICSID Convention. See also Reed et al. (2010), pp. 126-127; “Ménage à trois? Jurisdiction, Admissibility, and Competence in Investment Treaty Arbitration”, Veijo Heiskanen, ICSID Review, Volume 29 No 1, 2014, p. 233.
295 The strong presence and impact of the EC in the Electrabel-case can further be read from the wordings of the Tribunal in §§ 4.91-4.92 (Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012).
posterior case law. As for the three criteria set out in the said case, we have seen that the tribunal has to make sure that the party wanting to intervene is independent from the original disputing parties and that accepting amicus would not burden one of the disputing parties, but instead raise with viewpoints that are supplementary to those provided by the parties.298 As it comes to the EC participating as amicus curiae, the independency is questionable. Since the respondent state is a member state of the EU, common financial and political interests are shared between the respondent state and the EC, intervening as a third party. Therefore the independency of the EC as an amicus intervener is questionable with regard to the burden it might have on the claimant, the individual investor.

The approach of the tribunal with regard of the independency of the EC, as well as the requirement of addressing issues within the scope of the dispute, can be compared to the case of Von Pezold.299 The claimant in Von Pezold alleged an investment treaty breach through unjustified and illegal expropriation, whereas these act where alleged by the respondent to be part of a land reform program taken by the Zimbabwean government. In front of the Von Pezold tribunal were four Zimbabwean indigenous communities, claiming territorial rights to the disputed land, as well as an European NGO wishing to join in the amicus submission.300

The petitions for amicus submissions in Von Pezold were dismissed since the tribunal held, first, that the matter claimed by the amicus did not fall within the scope of the subject matter of the dispute. The dispute concerned landowners rights to land, but what the amicus petitioners wished address was the application of international human rights in the merits phase. The tribunal agreed with the claimant that “the reference to “such rules of general international law as may be applicable” in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs” and that since the disputing parties had not relied upon the rights of indigenous people under international law, the latter would not be applicable within the dispute and therefore the

299 Bernhard Von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15.
issues addressed by the *amicus* fell outside the scope of the matters in front of the tribunal.\(^{301}\)

Secondly, the tribunal held that the *amicus* did not fulfil the criteria of independency, which is the criteria that in *Von Pezold* actually resulted in a dismissal of *amicus curiae* submissions.\(^{302}\) The claimants in the case attested that the *amicus* are not independent, since their interests are aligned with those of the respondent and that the indigenous communities acting as *amicus* are *de facto* organs of the state and therefore not independent from the respondent.\(^{303}\) The tribunal was of the view that an *amicus* participation in *Von Pezold* would unfairly prejudice the claimant, wherefore it did not accept the third party intervention.

In contrast to the cases where the EC has participated as *amicus*, the approach taken by the tribunal in *Von Pezold* is significantly more restrictive, even in light of the quasi identical conditions. When it rejected the petitions due to lack of independency and that the matter submitted by third parties fell outside the scope of the subject matter of the dispute. When taking into consideration the role of the EC as a representative of all of its member states, their common financial interests and generally the similarity of the interests and arguments put forth by the EC and the respondent state in investment disputes, the divergent approach of arbitral tribunal with regard of the EC proves that the traditional prerequisites are not followed.

### 5.2.4. *The Ioan Micula History*

The *Ioan Micula* case\(^{304}\) is a dispute under the Sweden-Romania BIT, which concerns breaches of investment protection alleged by the Swedish Micula brothers due to Romania’s implementation of certain regulatory changes, which according to the respondent state Romania were obligatory due to its accession to the EU and in order for the Romanian legislation to be in line with EU obligations. The *Ioan Micula* case is not merely a case providing an example of the EC acting as an *amicus curiae* giving useful

\(^{301}\) *Ibid.*, §§. 57, 60.


information to the arbitral tribunal on treaty interpretation. It is rather a case to further illustrate the complexity and the obscurity of the role of the EC as a third party intervener and should be read as an extension of the aforementioned cases. Additionally, through various probative facts of the case, some conclusions regarding the interests of the EC in investor-state disputes can be drawn to add another piece to the puzzle.

Before the Ioan Micula tribunal was the disagreement between the parties, not about the jurisdiction of the arbitral tribunal, but concerning the law applicable to the dispute during the merits phase. In this case the EC again participated as amicus curiae. The tribunal noted that a submission by the EC could enlighten the tribunal regarding factual or legal perspectives, and by underlining the procedural rights of the parties, the tribunal added that “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”. In its amicus briefs the EC took the same position as the respondent state, Romania, by stating that the interpretation of the BIT should be made in the context of EU law and that the latter should prevail in case of a conflict of norms. Consequently, the EC, hand in hand with the respondent, stated that an arbitral award obliging the respondent Romania to the payment of a compensation for an alleged breach of investment protection would render the award unenforceable within the EU. Nevertheless, the arbitral tribunal asserted it’s authority to resolve the dispute by primarily relying on the BIT between the parties, and instead of interpreting the BIT in light of EU law, the acts of the respondent state were interpreted within the EU law context and its associated regulatory obligations in determining whether a treaty breach exists or not, thus applying EU law only as factual support. In a final award rendered on 11 December 2013 the tribunal held Romania liable for a breach of investment protection under the Sweden-Romanian BIT, dismissing Romania’s arguments that these acts were obligatory in order to comply with EU law, and

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306 Ibid., §§. 27, 316, 317.

307 Ibid., §. 27.

308 Ibid., §. 317.

309 Ibid., §§. 330-336. In this connection the tribunal dismissed the claims by stating that “it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decision in this case on matters of EU law that may come to apply after the Award has been rendered.” (see §. 340).

ordered Romania to compensate damages to the claimant amounting to approximately USD 250 million.  

The EC now seeks to prohibit the enforcement of the arbitral award rendered in the Ioan Micula case in the United States. Through an amicus brief submitted on 4 February 2016 to the United States Court of Appeals, in support of Romania’s appeal, the EC challenged a previous decision of the first instance rendering the arbitral award enforceable in the United States. In the submission the EC argues that the first instance US court failed to take into account the decision of the EC, where it stated that compensation paid by Romania in accordance with the final arbitral award constitutes unlawful state aid under EU law, because of which the enforcement of the arbitral award could not be upheld.

The submission by the EC before the US Court of Appeals is a prolongation of its active participation in the Ioan Micula case. The EC has also initiated actions against Romania and Sweden, ordering them to terminate their underlying BIT, i.e., the legal instrument that operated as the legal foundation for the arbitral proceeding in Ioan Micula. The amicus curiae participation in the original arbitral proceeding was thus only a starting point for the EC in the Ioan Micula history.

Unfortunately, here again the deliberations regarding the acceptance of a third party intervention by the arbitral tribunal in the original dispute are not fully made publicly available, making the approach of the tribunal difficult to scrutinize. Instead, the important issue to understand from the overlapping proceedings in the Ioan Micula history is that the EC is trying to tackle a much broader problem than a pure opinion on treaty interpretation

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311 Ibid., §. 1329.
312 The “Opinion and Order” given 5 August 2015 by the United States District Court for The Southern District of New York proclaims the arbitral award enforceable and is now subject for appeal before the United States Court of Appeals.
313 The brief of the EU Commission is supported by its decision declaring that the payment on the basis of the award by Romania would be illegal. See Commission Decision (EU) 2015/1470, 30 March 2015, on State aid SA.38517, Arbitral award Micula v. Romania of 11 December 2013, notified under document C(2015)2112, 2015 O.J. (L 232) 43. The challenge of validity of this decision is at writing time pending before the ECJ.
in one particular case. The issue extends from jurisdiction and applicable law to the validity and enforceability of arbitral awards. This speaks for the view that the EC indeed has a strong political motivation in these proceedings, which *per se* does not make its participation unjustified. Nevertheless, what can be questioned is the broad procedural rights that has been granted to the EC when acting as *amicus* in investor-state arbitrations.

### 6 Implications of the EC as *Amicus Curiae*

The fragmentation of international law is one of the underlying reasons for why the investment arbitration regime is going through some turbulence. The core problem lies in the conflict between societal rationalities and different policy regimes that legal instruments and judicial bodies simply cannot solve. The issue at stake is not simply two opposing legal bodies of arguments that can be solved through arbitration, but instead fundamentally opposing desires and values. When an investment dispute is at hand, it is no longer a question about a conflict on an individual level, *i.a.*, a conflict between the disputing parties. The conflict is about something much bigger, reaching to the level of a regime battle. The underlying different social regimes, and their pertinent conflicts, are simply embodied through these judicial questions and take form in arbitral proceedings.

One might think that once a law is adopted, the underlying values are protected from conflicts in that they have been codified and written down. As legal theorists propose this is not the case. Instead the battle continues on a legal level and certain *a priori* democratically agreed values are actually found incompatible.\(^{316}\) It is thus argued that the core regime battle between conflicting interests, as we have seen is the case between investment law and EU law, will actually not start until when such interests are actually put up against each other, in front of for instance an arbitral tribunal. The regime battle between these two legal bodies is simply personified through the arbitral proceeding. In such regime battles, the *amicus curiae* institution might be adding fuel to the juxtaposition, broadening the scope of points of views that are taken into account. As comes to the EC,

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the right to *amicus curiae* intervention has thus enabled the tribunal to take into consideration an outside voice that simultaneously is an expert on such legal questions disputed. The EC thus has contributed to solving such situations of treaty conflict.

In order to further enlighten and encourage the application of this theory to the practical issue at hand, a recent publication by scholar Ahmad Ghouri can be mentioned. Ghouri argues that the investor-state arbitral tribunals are in a good position in striking a balance between conflicting normative rules where, on the one side, are the rights of foreign investors and, on the other side, the rights of citizens. In the words of Ghouri, "[a]lthough international courts and tribunals have previously shown a tendency to avoid treaty conflicts instead of resolving them, investor-State tribunals must take up and resolve such conflicts, when they arise, for a just settlement of investment disputes, and to address the challenges posed to the system’s legitimacy and utility." Precisely the same defence can be given in support of the resilient role that has been granted to the EC as *amicus curiae* by recent investment arbitration tribunals.

The fear of Blackaby and Richard in 2010 was that “[a]t worst, the presence of amicus curiae—a further partisan party advocating a position on behalf of persons to whom it is unaccountable, behind closed doors, and without being afforded a full opportunity to make a meaningful contribution—may exacerbate the democratic deficit, politicize investment disputes, and disrupt proceedings, without assisting the tribunal to decide the matters in dispute.” These fears and risks of a wrongful application of the *amicus curiae* regime summarize, from a critical point of view, quite well the situation of the EC as *amicus* before investment tribunals, echoed with some of the concerns discussed in the previous chapter. I argue that the issue should instead be approached by highlighting the added value that an *amicus curiae* can provide in such situations of legal uncertainty. Further, notwithstanding such fears and criticism, the final outcome could *de facto* be enhanced legitimacy since the wisdoms of the EC through *amicus* submissions with regard of difficult questions of treaty conflicts will contribute to clarifying the situation of applicable law. This in turn would enforce the legal certainty and therefore also the legitimacy of investment arbitration. Nevertheless, the issue still relates to transparency. As we have

318 Ibid., p. 6.
seen, in many of the cases where the EC has participated as amicus, the case material is not made publicly available, making the presence of the EC sometimes difficult, if not impossible, to analyse. The suggestion is therefore, that in order to likewise fully enhance the transparency of investment arbitration, the participation of such third party interventions, when contributing to solving difficult questions expanding over the international law community as a whole, should be made publicly available.

The amicus curiae institution is originally seen as a tool for the arbitral tribunal in fulfilling its most essential task, namely to arrive at the most rightful decision. In order to remind, the words of the Aguas tribunal can be cited once more: “The purpose of amicus submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept amicus submissions from persons who establish to the Tribunal’s satisfaction that they have the expertise, experience, and independence to be of assistance in this case. ...”. As was argued in chapter 2.3., the tasks of the arbitral tribunal differs from the one in commercial arbitration and it is often in front of difficult public law questions represented with a public interest. As the right to participate as amicus curiae is specific for investment arbitration, this right might as well assist the tribunal in resolving complex issues such as treaty conflicts.

When examining the role granted to the EC as a third party intervener in investor-state arbitrations, it is clear that the arguments for accepting such interventions follow what have traditionally been the case for amicus curiae, which is that it will help the court to come to a right conclusion. The acceptance of the EC as amicus curiae before investment tribunals does not follow the prerequisites as established in the discussed case law. As argued, there are nevertheless many reasons for which the role of the EC as it has been granted can be accepted.

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7 Conclusions

The answers to the research questions in this thesis will in the following be summarised. First, the participation of the EC as *amicus curiae* in investment arbitration does not follow the prerequisites for accepting third party interventions, as set out within the modern *amicus curiae* institution. Instead the participation of the EC follows the more classic definition of *amicus curiae* as simply helping the court come to a right conclusion. Secondly, the presence of the EC does not follow the underlying arguments of transparency and legitimacy, for accepting *amicus curiae* intervention. The participation of the EC does not follow the underlying argument of transparency for accepting such submissions, since proceedings involving the EC have not to extensively been made public. Neither is legitimacy enhanced *a priori*, since the EC as a third party has been granted evidently wide rights when intervening. The last research question is whether the role of the EC as a modern third party intervener in international investment arbitrations nevertheless can be accepted. The answer is in the positive. The participation of the EC serves an inherently important task in helping the court arrive at its most righteous decision regarding treaty interpretation in investor-state disputes and simultaneously contributing to solving a wider legal issue, which is the treaty conflict between EU law and international investment law. The role of the EC as a modern third party intervener in international investment arbitrations can therefore be accepted.

As mentioned earlier the active role of the EC in investment arbitration proceedings was a situation not foreseen in the aftermath of the adoption of the Lisbon treaty. It was at that time noted that, in order to support further transparency within the investor-state dispute settlement mechanism, the *amicus curiae* institution should be promoted, but by no means was the active role of the EC in the resolving of treaty conflicts foreseen. This is an important observation showing the scope of the impact that the *amicus curiae* institution can have on such fundamental legal conflicts. Regardless of whether the EC fits into the modern *amicus curiae* institution, its active participation as widely as it has been accepted by investment tribunals can be seen as a pragmatic solution to solving many of the problems international investment arbitration is facing.

In order to conclude this thesis, it is essential to point out that the political discussion that the *amicus curiae* has been tainted with should be overseen and instead the focus should be
laid on the inherently important and fundamental role of the amicus curiae institution as such. The participation of the EC as third party intervener is a proof of the essential benefits the amicus curiae institution can bring to the international investment arbitration regime. This thesis comes to the conclusion, that, at best, amicus curiae is a friend of the court, and through that also a friend of the public society.