Myopic Amici? The Participation of Non-disputing Parties in ICSID Arbitration

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I. The ‘Growing Pains’ of Investor-State Arbitration

Investor-state arbitration has been attracting substantial scrutiny and criticism over the last few years. Scrutiny because there has been a sharp increase in the number of arbitration proceedings being launched by investors against states, with some significant awards making the headlines.1 Criticism because a number of defending states, public interest groups, and other stakeholders have voiced concerns about the way in which this dispute settlement mechanism is structured and operated.2 While these criticisms focus on different issues with varying impact on the overall nature and efficiency of investor-state arbitration, together they have led to a sizeable literature on a purported ‘crisis’ of the system.3 So loud and

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vibrant was the tone of some of the critiques that some authors referred to the existence of a ‘backlash’ against investor-state arbitration. Signs of dissatisfaction can be seen in the fine-tuning of the substance and procedure of investment treaties in ways that reveal concerns about previous trends and, even more clearly, in the withdrawal of some states from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Taken together, these developments suggest the existence of, at least, ‘growing pains’ and call for a re-thinking and re-shaping of the of investor-state dispute settlement mechanism.

Two of the most frequent critiques that have been levelled against investor-state arbitration are of a procedural nature, as they focus on institutional features of the system that are considered problematic: the lack of transparency of the proceedings, and the existence of limited opportunities for public participation.

First, investor-state arbitration has been accused of lacking
Transparency is an essential constituent of good governance, for investors and states alike. In the realm of investment arbitration the concept refers to the extent to which the general public may be alerted to the existence of a dispute, have access to key arbitration documents including the final award, and attend oral hearings. For the most part, the investment arbitration process parallels the commercial arbitration mechanism, where disputing parties are masters of the proceedings and generally favour confidentiality. The applicable procedural rules are often the same as those applicable to ordinary commercial cases, except in disputes governed by the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID Arbitration Rules), which were designed specifically for investor-state arbitrations. As a result, confidentiality has been a traditional feature of investment arbitration. The topic has assumed considerable importance over the last years, not only in academic circles but also in the media, with some accusing the investor-state arbitration process of lacking transparency.

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arbitration system of being secret.\textsuperscript{13} Several commentators have criticised the emulation of the private and confidential model, as investor-state arbitration is a different creature from commercial arbitration.\textsuperscript{14} Investment disputes often raise public interests because their subject matter impacts on the provision of public services such as water, waste management, electricity, or gas;\textsuperscript{15} or touches upon sensitive socio-political concerns such as environmental protection – which are normally absent from commercial arbitration\textsuperscript{16}. In such proceedings, investors challenge measures adopted by the host-state that the latter frequently argues to be in the public interest.\textsuperscript{17} The arbitral tribunal scrutinises the conduct of the host state against the standards of protection prescribed in international investment agreements.\textsuperscript{18} As investor-state functions as an equivalent of judicial review of governmental measures, substantial public interests are


\textsuperscript{14} Kate Miles, Reconceptualising International Investment Law: Bringing the Public Interest into Private Business, in INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 295, 296 (Meredith Lewis & Susy Frankel eds., 2010) [hereinafter Reconceptualising].


involved. Because the controversy is so deeply connected with national policies, its resolution will have direct effects on the community. The public has an interest in assuring that decisions are made using proper procedures and taking due account of public interests. The outcome of the case may limit the future legislative and administrative freedom of manoeuvre of states, affecting their ability to pursue public welfare policies. The opacity of investment arbitration has been considered a “lamentable violation of public law principles” that may hamper efforts to track down disputes, evaluate their features, and gauge their consequences. While confidentiality suits commercial disputes well, it is not appropriate in investor-state arbitration, where tribunals are frequently required to balance investment protection with varied societal concerns. Such proceedings are public by their very nature and need to be accessible to the community at large.

A second common criticism regards the lack of openness of the investment arbitration system to public participation. Because it

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23 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 159 (2007).


26 See, e.g., Nathalie Bernasconi-Osterwalder, Transparency and Amicus Curiae in ICSID Arbitrations, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 191.
is modelled after commercial arbitration, where the only relevant interests are those of the disputing parties, normally investor-state arbitration does not permit public access to the proceedings. However, this confidential atmosphere is incompatible with the public interest nature of many investments disputes. While commercial arbitration is a system of settling disputes between (mostly) private parties, investor-state arbitration necessarily involves states with their public interest considerations. Since matters of public concern are frequently at the heart of the controversy, third parties such as public interest groups and non-governmental organisations (NGOs) want to have access to the decision-making process. The problems dealt with by investment tribunals are often societal challenges and quite understandably civil society wants to have its say. More specifically, third parties want to be allowed to submit briefs, consult the documents, and attend the hearings. This would increase the transparency of the proceedings but also allow for the incorporation of broader policy considerations into the dispute resolution process. While confidentiality and privacy are traditional features of arbitration, the political legitimacy of the dispute settlement mechanism is put at risk if genuine stakeholders cannot participate in decisions affecting their rights and interests. The deeper the connection between the dispute and public interests, the greater the need for transparency and public input in the decision-making process.

The specific characteristics of investor-state arbitration justify a greater measure of transparency and public participation. The fact


27 See EFILA, supra note 7, at 14.

28 See generally OECD, supra note 10 (discussing Third Party [NGO] access to ISDS).


31 Buckley, supra note 16.

that tribunals are dealing with what are essentially public law issues requires that the population of the host state be informed about the conduct of governments and arbitrators.\textsuperscript{33} Citizens will not be pleased if they feel that unknown and unelected people are deciding the future of their country under a veil of secrecy.\textsuperscript{34} In the words of Nigel Blackaby, “there is a risk of this new child [investment arbitration] dying in infancy, delicate and overprotected by its parents from exposure to the outside world”.\textsuperscript{35} The perceived lack of transparency and openness poses a serious challenge to the investor-state mechanism. The system needs to be reformed under penalty of dying before it can survive its growing pains.\textsuperscript{36}

\textbf{II. Amicus Curiae as a Remedy for the Ills of the System}

Responding to public criticism and pressure, over the last decade the investor-state arbitration mechanism has been adjusting its structure to accommodate the participation of third parties, namely through the figure of amicus curiae. An amicus curiae, literally “a friend of the court”, is, according to Black’s Law Dictionary, “a person who is not a party to a law suit but who petitions courts or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.”\textsuperscript{37} Normally amici curiae are individuals or organisations who do not have the right to participate in the dispute as parties but want to intervene because the outcome of the proceedings may affect their interests.\textsuperscript{38}

The participation of non-disputing parties in investment arbitration has been justified as a useful tool to promote different public interests. First, amicus participation increases the

\begin{footnotes}
\footnotetext{33}{Stephan Schill, International Investment Law and Comparative Public Law – an Introduction, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 15 (Stephan Schill ed., 2010).}
\footnotetext{34}{Alexis Mourre, Are Amici Curiae the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration, 5 L. & PRAC. INT’L CTS. & TRIBUNALS 257, 266 (2006) [hereinafter Mourre].}
\footnotetext{35}{Nigel Blackaby, Public Interest and Investment Treaty Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 355, 356 (Albert Jan van den Berg ed., 2003).}
\footnotetext{36}{Franck, supra note 3, at 1625.}
\footnotetext{37}{Amicus Curiae, BLACK’S LAW DICTIONARY (8th ed. 2004).}
\end{footnotes}
transparency of the system. Their involvement in the proceedings draws the general public’s attention to a controversy that may have a significant impact on public interests and public finances. Second, the participation of third-parties also promotes greater accountability of investment arbitration, addressing a democratic deficit that has been identified in the system. Citizens are given a chance to assess how diligent the state is in the protection of public interests and in the use of public funds. Third, it increases the openness of investment treaty arbitration to civil society, ensuring that the broader community does not perceive it as “secretive.” This is in line with the changing nature of investment arbitration, where tribunals are increasingly required to settle disputes that touch upon public interests. The participation of civil society in the proceedings is meant to safeguard the public interests at stake and ensure the sensitivity of governmental entities towards the


40 Triantafilou, supra note 21, at 575.

41 Bastin, supra note 37, at 227; Choudhury, supra note 24, at 808; Amokura Kawharu, *Participation of Non-Governmental Organizations in Investment Arbitration as Amici Curiae*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 275, 285 (Michael Waibel et al. eds., 2010); VanDuzer, supra note 8, at 685.

42 Blackaby & Richard, supra 19 at 257; Choudhury, supra note 24 at 808; Chiara Ragni, *The Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations*, in *FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS* 86, 87 (Tullio Treves et al. eds., 2014) [hereinafter Ragni]; Triantafilou, supra note 21, at 575; Carl Zoellner, *Third-Party Participation (NGO’s and Private Persons) and Transparency in ICSID Proceedings*, in *THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS* 179, 200 (Rainer Hofmann & Christian Tams eds., 2007) [hereinafter Zoellner].

43 Triantafilou, supra note 21, at 575.

44 Levine, supra note 37, at 217.

possible consequences of the arbitral award.\textsuperscript{46} Without public input, public interests are less likely to be elaborated upon by the tribunal. Allowing for amicus curiae participation shows the community that investment tribunals are cognisant of societal concerns such as the protection of public health or the environment.\textsuperscript{47}

Besides contributing to the advancement of several public interests (greater transparency, accountability, and openness), amicus curiae participation has also been justified as a way to help investment tribunals in rendering better awards.\textsuperscript{48} For different reasons, disputing parties may lack the necessary ability or the appropriate incentives to submit all of the relevant facts, legal arguments, and policy implications to the tribunal.\textsuperscript{49} Amici can draw the attention of arbitrators to interests that do not necessarily coincide with those of the state,\textsuperscript{50} providing the tribunal with its scientific or technical knowledge and offering an additional lawyer of information relevant to the dispute.\textsuperscript{51} While arbitrators are required to have appropriate qualifications and experience, this does not mean that they are necessarily able to understand all the aspects of a dispute.\textsuperscript{52} The main function of amici curiae is, therefore, to assist the tribunal by offering information and arguments different from those of the disputing parties.\textsuperscript{53} Amici are given a role in investment arbitration and, in a broader sense, in the making of international law and policy\textsuperscript{54}, opening the door for some creative

legal thinking\textsuperscript{55} and possibly even helping to reduce the perceived fragmentation of international law.\textsuperscript{56} Third party involvement in the proceedings may contribute to improve the quality of awards but also to the development of international investment law as a whole.\textsuperscript{57}

Traditionally, investment treaties contained no express provisions concerning the participation of non-parties, neither prohibiting it nor giving an express legal ground for it.\textsuperscript{58} In proceedings conducted pursuant to the ICSID Arbitration Rules, Rule 32(2) required the consent of both investor and host state for third parties to attend the hearings.\textsuperscript{59} Regarding the submission of briefs by non-disputing parties, the rules were completely silent.

As a result of the mounting pressure for greater public participation in investor-state arbitration, ICSID amended its Arbitration Rules in 2006.\textsuperscript{60} The new text of Rule 32(2) governs oral hearings as follows:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.\textsuperscript{61}

The amendment basically consisted in a change in language from ‘the tribunal shall decide, with the consent of the parties’ to ‘unless either party objects’.\textsuperscript{62} It now suffices that neither party objects for third parties to be allowed to attend oral hearings.\textsuperscript{63} The revised version contraries the private character of hearings but still

\begin{thebibliography}
\item De Chazournes, \textit{supra} note 37, at 335.
\item Bartholomeusz, \textit{supra} note 36, at 278.
\item Levine, \textit{supra} note 37, at 217.
\item Id. at 204.
\item Id. at 211.
\item Id. at 200.
\item \textsc{International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules} art. 32(2) (2006).
\item Id.
\item Id.
\end{thebibliography}
allows the parties to veto public access to them. While the result is thus essentially the same, the rationale is different. There is the also additional requirement that the tribunal has to consult with the Secretary General before allowing non-disputing parties to attend hearings. The last sentence of Rule 32(2), requiring the tribunal to establish procedures for the protection of proprietary or privileged information, did not exist prior to the amendment.

As regards the submission of briefs by third parties, a new provision – Rule 37(2) – was introduced:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

The new rule makes an express reference to the participation of non-disputing parties in arbitral proceedings, namely by allowing them to file written submissions. This basically corresponds to the figure of amicus curiae. Pursuant to Rule 37(2), the decision is

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64 Citation needed


66 ICSID, supra note 59, at r. 32(2).

67 Id.

68 Id. at r. 37(2).

69 Id.
within the full discretion of the tribunal, even though there is the obligation to consult both parties first and to consider, among other things, the three factors mentioned in paragraphs a) to c).\textsuperscript{70} The tribunal should also 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.\textsuperscript{71} The decision on whether to accept amicus curiae briefs cannot be vetoed by the parties.\textsuperscript{72} Naturally, if both parties object the tribunal may find it harder to justify the alleged advantages of third-party participation.\textsuperscript{73} Still, the final decision rests with the tribunal.

The new rule ratified past arbitral practice, as different investment tribunals had previously considered that they had the power to accept or refuse amicus submissions.\textsuperscript{74} It is a noteworthy example of a growing movement in favour of greater public participation in investor-state arbitration. This trend has been hailed as ‘one of the most important evolutions weathered by international law in recent decades’,\textsuperscript{75} a ‘groundbreaking’\textsuperscript{76} and ‘fascinating’ development.\textsuperscript{77} Amicus curiae is becoming an ‘entrenched’, ‘standardised’\textsuperscript{78} feature of investment arbitration, a symbol of the emergence of the idea of civil society in the settlement of investment disputes.\textsuperscript{80}

### III. Myopic Amici?

The involvement of amici curiae in investment arbitration is
becoming more common in disputes that raise public policy considerations.\(^{81}\) As a result, critiques of the system based on lack of transparency and openness to public participation are diminishing in tone.\(^{82}\) The 2006 amendments to the ICSID rules endowed the system with greater transparency and facilitated the participation of civil society in the proceedings.\(^{83}\) Despite these amendments, the ICSID Rules do not go far enough in ensuring a full application of the public participation principle. Amici curiae normally request permission from the tribunal to submit briefs.\(^{84}\) Moreover, frequently amici also seek authorisation to consult the disputing parties’ documents, respond to questions from the tribunal, attend the hearings and make oral submissions, and even cross-examine witnesses.\(^{85}\) However, the access by non-disputing parties to arbitration documents and hearings is still handled rather restrictively under the ICSID Arbitration Rules.\(^{86}\) The changes introduced in 2006 constituted a modest improvement, of limited practical effect.\(^{87}\) A review of the ICSID jurisprudence shows that arbitral tribunals have only occasionally allowed amici curiae a role which goes beyond the filing of written submissions.\(^{88}\)

While Rule 37(2) of the ICSID Rules empowers tribunals to grant third parties amicus curiae status, it does not regulate the access to documents.\(^{89}\) As a result, amici’s access to key arbitral documents is normally dependent upon the parties’ consent.\(^{90}\) Furthermore, the tribunal may deny access by arguing that documents are already publicly available or are privileged.\(^{91}\) Even if a tribunal decides to grant access to documents, it may still place conditions on the use of that information, for instance, by banning

\(^{81}\) *Id.* at 740.
\(^{82}\) *VanDuzer, supra* note 8, at 687.
\(^{83}\) *Id.* at 687.
\(^{84}\) *Id.* at 703.
\(^{85}\) *Bartholomeusz, supra* note 36, at 277; *Bastin, supra* note 37, at 212.
\(^{86}\) *Id.* at 210.
\(^{87}\) *Levine, supra* note 37, at 214; *VanDuzer, supra* note 8, at 722; *Zachariasiewicz, supra* note 30, at 221.
\(^{88}\) Citation needed
\(^{89}\) *Levine, supra* note 37, at 211.
\(^{90}\) *Id.*
\(^{91}\) *VanDuzer, supra* note 8, at 698.
any public disclosure.\textsuperscript{92}

The access of non-disputing parties to hearings is also problematic. Rule 32(2) stipulates that the tribunal can allow non-parties to attend the arbitration hearings unless either party objects.\textsuperscript{93} Proposals for the inclusion of an expanded right of non-disputing parties to attend hearings failed to reach the required majority during the discussions that led to the 2006 amendments.\textsuperscript{94} The revised rule is disappointing\textsuperscript{95} and of limited practical impact,\textsuperscript{96} as the opening of the hearings to amici can still be blocked by the parties. Without public access to the hearings, investment arbitration remains rather opaque.\textsuperscript{97}

According to information provided by the ICSID,\textsuperscript{98} amicus curiae participation has been requested in a total of 20 cases. Requests were denied in six\textsuperscript{99} and granted in at least ten cases.\textsuperscript{100} In


\textsuperscript{93} CATHERINE A. ROGERS \& ROGER P. ALFORD, \textit{THE FUTURE OF INVESTMENT ARBITRATION} 79 (2009).


\textsuperscript{95} Mourre, \textit{supra} note 32, at 270.


\textsuperscript{97} Miles, \textit{supra} note 14, at 304–05.


\textsuperscript{100} Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae Granted (Mar. 17, 2006); Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency
four cases a request was decided by the tribunal, but whether it was accepted is unknown. The continuation of the proceedings without any reference to the submission of amicus briefs in the case details provided by ICSID allows one to assume that the requests were denied. A review of the ten cases where the participation of non-disputing parties was accepted shows that the position of arbitral tribunals regarding the access of amici curiae to arbitral documents and oral hearings has varied according to the circumstances of the case.

In *Suez and Vivendi v. Argentina*, the amici’s request for access to arbitral documents was refused. The tribunal recalled that Rule 37(2) did not deal with the amicus curiae’s access to the record and thus provided no guidance. While recognising that amicus must have sufficient information on the subject matter of the dispute in order to be of any assistance, the tribunal considered that the petitioners had sufficient information without access to the

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101 Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12; RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain ICSID Case No. ARB/13/30; Antin Infraestructure Services Luxembourg S.à.r.l. v. Kingdom of Spain , ICSID Case No. ARB/13/31; Eiser Infrastructure Ltd. v. Kingdom of Spain (ICSID Case No. ARB/13/36).

102 *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission Granted, at No. 24 (Feb. 12, 2007).*

103 *Id.*
arbitration record. The amici’s request to attend the hearings was also rejected based on the opposition of the claimants. In *Suez and Interagua v. Argentina*, the tribunal was exactly the same and the decision closely similar. In *Biwater v. Tanzania*, the tribunal denied access to the parties’ written pleadings due to the investor’s objection. The tribunal did not feel that the information was necessary, as this was a “very public and widely reported dispute” and the information that led to the amici’s application to intervene was sufficient to make further submissions. The tribunal also denied access of amici to the oral hearings in the absence of both parties’ consent. Nevertheless, the tribunal reserved the right to ask the amici specific questions in relation to their written submission. This case provides a good illustration of the limitations of the current ICSID Rules. The amici had to file a written submission without knowing key arbitral documents. The potential relevance and usefulness of their submission was irremediably affected because they had no access to the allegations made by the claimant and the respondent’s defense. The tribunal later justified its divergence on one of the amici’s assertions by noting that they did not have all the relevant information.

Because they were denied access to the key arbitral documents, the amici were, if not totally blindfolded, at least myopic. They were not totally ignorant of the circumstances of the case – because it was a “very public and widely reported dispute” – but did not perceive

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104 *Id.*
105 *Id.* at No. 4.
106 *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae Granted* (Mar. 17, 2006).
107 *Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status Granted,* at No. 62–68 (Dec. 1, 2016).
108 *Id.* at No. 65.
109 *Id.* at No. 69–72.
110 *Id.* at No. 72.
111 *Id.*
113 See *Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status Granted,* at No. 60(c) (Dec. 1, 2016) (holding that the Arbitral Tribunal “will be better placed after the April hearing to make further determination on this issue”).
it with a clear vision. Their comprehension of the facts and issues raised was blurred. Because they were not given the chance to read the claim and reply, go through the parties’ submissions, and attend the hearings, they were seriously prevented from exercising their function. Restraining public input in this way seems a perverse decision.

In *Piero Foresti and others v. South Africa*, the tribunal allowed the access of amici to a redacted version of the parties’ key documents despite the strong objections of the claimants. While the arbitration was discontinued shortly afterwards, the fact is that this decision, the first of its kind by an ICSID tribunal, was a clear step towards greater transparency in investment arbitration. The tribunal held that access to documents was necessary to enable the non-disputing parties to focus their submissions upon the issues arising in the case and to know the parties’ positions on those issues. The adopted solution preserved the confidentiality of sensitive information while giving amici the opportunity to make a useful contribution.

In August 2008, the European Commission (EC) applied to the tribunal in *Electrabel v. Hungary* for permission to make a written submission as a non-disputing party. After consulting the parties, the request was accepted by the tribunal. The EC was granted access to some of the parties’ pleadings (in redacted form) but was not authorised to attend the hearing. In September 2008, the EC also requested participation as a non-disputing party in *AES Summit*

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114 Id. at No. 65.
120 Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission Granted (Apr. 28, 2009).
121 Id.
122 Id.
Generation and other v. Hungary.\textsuperscript{123} The EC also petitioned for access to the parties’ written submissions but it was refused due to lack of consent by both parties.\textsuperscript{124} The EC did not request permission to attend the hearings.\textsuperscript{125} In April 2009, the EC also requested authorisation to take part in the case Ioan Micula and others v. Romania.\textsuperscript{126} The petition was accepted and the EC was allowed access to the parties’ pleadings, except for confidential or legally privileged documents.\textsuperscript{127} The representatives of the EC attended the oral hearing where they provided clarifications to their written submission and answered the parties’ questions.\textsuperscript{128} In these three cases the amicus curiae was none other than the EC, who participated in the proceedings in order to clarify issues relating to the scope and content of European Law related to the disputes.\textsuperscript{129} Being the ‘guardian of the treaties’, the EC has a vested interest in becoming involved in such arbitrations.\textsuperscript{130} This is a significant development in that it means that the grant of amici curiae status is not limited to non-government or private organisations.\textsuperscript{131}

In another case, Pac Rim Cayman v. El Salvador, the tribunal invited non-disputing parties to make applications for participation as amici curiae.\textsuperscript{132} Several public interest groups successfully

\begin{footnotesize}
\bibitem{123} AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award Decision, at No. 3.18 (Sept. 23, 2010).
\bibitem{124} Id. at No. 3.22.
\bibitem{125} Id. at No. 3.1–3.39.
\bibitem{126} Micula v. Romania, ICSID Case No. ARB/05/20, Application of a Non-Disputing Party to File a Written Submission Granted (May 15, 2009).
\bibitem{127} Micula v. Romania, ICSID Case No. ARB/05/20, Award Decision, at No. 36(6) (Dec. 11, 2013).
\bibitem{128} Id. at No. 73.
\bibitem{129} The same happened in a case administered by the UNCITRAL. Achmea B.V. v. The Slovak Republic, UNCITRAL PCA Case No. 2008-13, Award (Dec. 7, 2012).
\end{footnotesize}
submitted requests. For the first time in the history of investment arbitration, oral hearings were transmitted live via internet. Amici were also provided with access to the transcripts.

Finally, in Philip Morris and others v. Uruguay, the ICSID received a request for amicus participation from the World Health Organization and the WHO’s Framework Convention on Tobacco Control Secretariat. The request was accepted. The amici did not request access to documents or hearings.

This excursion through the ICSID case law shows that while initial requests for access to documents and hearings were rejected, recently non-disputing parties have occasionally been granted rights beyond the mere submission of briefs. In Piero Foresti and others v. South Africa the tribunal granted access to the parties’ key documents. In Ioan Micula and others v. Romania the amicus was allowed not only access to the parties’ pleadings but also to hearings. In Pac Rim Cayman v. El Salvador, amici had access to the arbitral documents and followed the hearings via the internet. However, this only happened because the dispute was

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133 See Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, http://www.italaw.com/cases/783 [https://perma.cc/83L8-785X]. Furthermore, the Republic of Costa Rica and the United States of America have also made written submissions on the interpretation of the Dominican Republic – Central America – United States Free Trade Agreement. Id.


135 Id.


137 Id. at para. 29.

138 Id.

139 Citation needed


142 See Zengerling, supra note 134, at 127.
subject to the Dominican Republic – Central America – United States Free Trade Agreement, whose article 10.21(1) provides that arbitral documents shall be made available to the public, and that hearings shall be conducted in public.\footnote{CAFTA-DR, Chapter 10, at 16 \url{https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf} \url{https://perma.cc/XJA8-DQKJ}.} In one case subject to the ICSID Rules (Electrabel v. Hungary) the amicus was allowed access to key documents but not to hearings.\footnote{Electrabel v. Hungary, ICSID Case No. ARB/07/19, Procedural Order No. 4, 6–9 (Apr. 28, 2009), \url{http://www.italaw.com/sites/default/files/case-documents/italaw7053.pdf} \url{https://perma.cc/M99K-UP67}.} In another case (AES Summit Generation and other v. Hungary) the request for access to the parties’ written submissions was rejected, and there was no request for permission to attend the hearings.\footnote{AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010), \url{http://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf} \url{https://perma.cc/8AUM-U479}.} Finally, in one case (Philip Morris and others v. Uruguay) the amici did not require permission for access to documents or hearings, so it is not possible to know how the tribunal would have decided such requests.\footnote{See Morris v. Uruguay, supra note Error! Bookmark not defined., at para 16.}

This survey shows that the extension of participatory rights of amici curiae beyond the presentation of written submissions has been timid. There were a few exceptions but they do not allow to identify a clear trend towards greater transparency and public participation in proceedings under the ICSID Rules. As a result, amici have a myopic vision of the dispute. The efficiency of amicus participation without access to arbitral documents and hearings is doubtful for different reasons. First, without having access to the key arbitral documents, potential amici cannot fully understand the nature of the dispute and the issues raised therein and decide whether they want to intervene.\footnote{See Bernasconi-Osterwalder, supra note 25, at 206.} Non-parties are unlikely to have a complete picture of the dispute by relying solely on the tiny description available on the ICSID website or by reading press reports.\footnote{See Blackaby, supra note 19, at 272.} Second, if not granted access to the parties’ submissions, amici have difficulties in determining whether they can actually ‘assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular
knowledge or insight that is different from that of the disputing parties’, as stipulated in the ICSID Arbitration Rules.\textsuperscript{149} Without access to relevant documents and proceedings, the ability of amici to formulate effective, meaningful, and informed submissions is seriously limited;\textsuperscript{150} even worse, they may end up giving opinions based on inaccurate or incomplete information.\textsuperscript{151} As they do not know whether the parties have already addressed their main concerns or what arguments they have already presented,\textsuperscript{152} there is also a risk of overlap or redundancy. As a result, the disputing parties may have to comment on submissions which may be useless or repetitive.\textsuperscript{153}

In their current state the ICSID rules provide a limited solution to the perceived problem of lack of public participation in investment arbitration. Amicus curiae have been justified as a useful tool to, inter alia, increase the transparency of the dispute settlement mechanism.\textsuperscript{154} However, this objective is ancillary to the true purpose of amicus curiae, which is to assist the tribunal by providing the arbitral panel with arguments, perspectives and expertise that

\begin{itemize}
  \item \textsuperscript{149} See Bernasconi-Osterwalder, \textit{supra} note 24, at 205; Orellana, \textit{supra} note 113, at 101.
  \item \textsuperscript{151} See James Harrison, \textit{Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?}, in \textit{Human Rights in International Investment Law and Arbitration} 396, 406 (Pierre-Marie Dupuy et al. eds., 2009); Triantafilou, \textit{supra} note 21, at 577.
  \item \textsuperscript{153} See Andrea K. Bjorklund, \textit{The Emerging Civilization of Investment Arbitration}, 113 \textit{P.A. St. L. Rev.} 1269, 1294 (2009); Blackaby, \textit{supra} note 19, at 272; Charles N. Brower, \textit{The Ethics of Arbitration: Perspectives from a Practicing International Arbiter}, 5 \textit{Publicist} 1, 29 (2010).
  \item \textsuperscript{154} Probably referencing Maxwell piece below.
\end{itemize}
the disputing parties may not provide.\textsuperscript{155} Granting amicus curiae status to non-disputing parties is a fundamental gateway for public participation in the arbitration process. Naturally, the effectiveness and usefulness of this participation will depend upon the transparency of the proceedings, in particular the extent of access to key documents which enables the amici to understand the nature of the dispute and the arguments under discussion. Hence, a distinction should be drawn between transparency and public participation. One thing is to have access to information on the dispute; another is to be able to take part in the arbitral proceedings, not passively but actively, having a chance to influence the course of the proceedings. If amici are not given a proper chance to get acquainted with the statements of claim and defence and other essential documents, and attend the hearings, they are seriously prevented from exercising their role. Without effective knowledge of the essential elements of the dispute, amici are precluded from making informed submissions and instil public concerns into the decision-making process. The openness of proceedings to civil society through the participation of amici curiae requires a higher measure of transparency. Indeed, openness implies a form of active transparency – amici need to be able not only to ‘see’ what is going on but also to actively participate in the proceedings. Naturally, the issues of transparency and third party participation are intimately linked. Transparency allows for more informed public participation; just like third party participation increases the transparency of the process.

**IV. The Need for a More Efficient Therapy**

Amicus curiae participation has been hailed as a mechanism that raises public policy considerations which are necessary to properly decide disputes deeply associated with public interests.\textsuperscript{156} In some cases the legitimacy of adjudicative decisions which affect regulatory concerns requires views other than those of the investor and host state to be represented in the process.\textsuperscript{157} The participation of non-disputing parties in the proceedings allows for the introduction of public interests and common concerns in the


\textsuperscript{157} See Van Harten, *supra* note 23, at 159.
arbitration system.\textsuperscript{158} However, concerns regarding the openness of the dispute settlement mechanism may continue to linger in the absence of rules that endow amici curiae with proper participation rights.\textsuperscript{159} The ICSID Rules grant amici curiae the right to file amicus briefs without simultaneously granting them access to the arbitration proceedings.\textsuperscript{160} The 2006 reform seems to have stopped in the middle of the road towards greater public participation,\textsuperscript{161} constraining the potential advantages of amicus curiae intervention.\textsuperscript{162} Admitting amici without granting them true participatory rights is at most a ‘political quick fix’.\textsuperscript{163} Ten years have elapsed since the last amendment to the ICSID Arbitration Rules.\textsuperscript{164} Over the last decade, tribunals, disputants, and non-disputing parties had the opportunity to get acquainted with the ICSID provisions on the participation of non-disputing parties and to test their advantages and shortcomings. The time is ripe to fine-tune them according to the lessons learned from the existent case law.

A movement towards the expansion of participatory rights of amici curiae is already noticeable in the negotiation of international investment treaties. A few recent investment agreements have incorporated express rules allowing for amicus curiae participation and granting them access to arbitral documents and hearings. In arbitral proceedings conducted under these instruments the disputing parties will not have the possibility of refusing public participation since the procedure to be applied by the tribunal is determined not only by the applicable rules of the arbitration institution but also by those laid down in the investment treaty.\textsuperscript{165} “While this method of attaining amicus curiae participation is not as all-encompassing as amending the ICSID Arbitration Rules, it has an incremental effect.”\textsuperscript{166} If this trend becomes widespread, the ICSID may consider that extensive participatory rights are an

\textsuperscript{158} See Magraw Jr., \textit{supra} note 8, at 343; Ragni, \textit{supra} note 40, at 87.
\textsuperscript{159} Citation needed
\textsuperscript{160} See Magraw Jr., \textit{supra} note 8, at 344.
\textsuperscript{161} See Zachariasiewicz, \textit{supra} note 30, at 223.
\textsuperscript{162} See Ragni, \textit{supra} note 40, at 98.
\textsuperscript{163} See Blackaby, \textit{supra} note 19, at 274.
\textsuperscript{164} See ICSID Regulations and Rules, \textit{supra} note 59.
\textsuperscript{165} See De Brabandere, \textit{supra} note 62, at 163.
\textsuperscript{166} See Bastin, \textit{supra} note 37, at 232.
integral part of the concept of amici curiae and should therefore be granted whenever this status is conceded to non-disputing parties.

In the framework of the North American Free Trade Agreement (NAFTA)\(^\text{167}\), the public access to arbitration documents is much easier than under the ICSID Arbitration Rules. In a 2001 Statement,\(^\text{168}\) the Free Trade Commission clarified that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.\(^\text{169}\) The NAFTA parties agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of confidential business information; information which is privileged or otherwise protected from disclosure under the Party’s domestic law; and information which the Party must withhold pursuant to the relevant arbitral rules, as applied.\(^\text{170}\) The parties reaffirmed that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.\(^\text{171}\)

Similarly, article 29(1) of the 2012 U.S. Model Bilateral Investment Treaty\(^\text{172}\) provides that the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing party and make them available to the public: pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal.\(^\text{173}\) Article 3 of the UNCITRAL Rules on

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\(^{167}\) See http://www.naftanow.org/.


\(^{169}\) Id.

\(^{170}\) Id.

\(^{171}\) Id.


\(^{173}\) Id.
Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014, also requires the following documents to be made available to the public, subject to some limitation on confidential or protected information: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.\footnote{174}{See Christopher Kee, 

The ICSID Arbitration Rules contain no express provision on the access of non-disputing parties to arbitral documents. Thus, the tribunal can decide the question under the general procedural powers contained on Article 44 of the ICSID Convention.\footnote{176}{ICSID Convention, Regulations and Rules, art. 42 (Apr. 2006).} Such a decision is not subject to the consent of the parties, unless there is a confidentiality order made earlier in the proceedings.\footnote{177}{Maciej Zachariasiewicz, Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?, 29 J. INT’L ARB. 205, 218 (2012).}
file informed submissions, amici normally need to have access to more information than that publicly available.\textsuperscript{178} However, sometimes tribunals consider that the information in the public domain is sufficient and thus deny access to the arbitral record.\textsuperscript{179} This approach to the problem is also a result of the traditional assimilation of the principle of confidentiality – habitually seen as one of the cornerstones of arbitration – in the settlement of investor-state disputes.\textsuperscript{180} However, investment disputes are frequently associated with public interest and common concerns.\textsuperscript{181} Therefore, the level of confidentiality should be lower in investment arbitration than in commercial arbitration. As the ICSID Arbitration Rules are silent on which documents should be made public and which should remain confidential, the tribunal has the discretion to determine which documents should be made accessible to amici in each case.\textsuperscript{182}

The ICSID Arbitration Rules should be amended, expressly granting amici the right to access key arbitral documents. The existence of public interests associated with investor-state arbitrations should lead to a presumption of publicity of the proceedings, unless confidentiality can be justified, in whole or in part.\textsuperscript{183} If amici are provided with essential documents they have a better opportunity to make an insightful contribution to the proceedings. Timely disclosure of information is vital to better participation, and the disadvantages are minimal.\textsuperscript{184} In cases where parties express legitimate concerns about the disclosure of confidential or privileged information the tribunal should ask the disputing parties to summarize the facts, issues and arguments.\textsuperscript{185} The legal instruments mentioned above are useful sources of

\textsuperscript{178} Id.


\textsuperscript{180} Id. at 374.

\textsuperscript{181} Id.


inspiration in shifting the role of amici in ICSID arbitrations from passive witnesses to active participants.

The last years have also witnessed a growing trend in favour of allowing public access to the arbitral hearings. Within NAFTA, Canada, the United States, and Mexico have agreed that investor-state hearings should be open to the public.\(^\text{186}\) Similarly, article 29(2) of the 2012 U.S. Model Bilateral Investment Treaty provides: ‘The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.’\(^\text{187}\) However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal.\(^\text{188}\) The tribunal shall make appropriate arrangements to protect the information from disclosure.\(^\text{189}\) Pursuant to article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, hearings for the presentation of evidence or for oral argument shall be public.\(^\text{190}\) Where there is a need to protect confidential information or the integrity of the arbitral process, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.\(^\text{191}\) The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate).\(^\text{192}\) However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.\(^\text{193}\) The second paragraph of article 9.24 of the Trans-Pacific Partnership also establishes the open nature of


\(^{187}\) 2012 U.S. Model Bilateral Investment Treaty, article 29(2).

\(^{188}\) Id.

\(^{189}\) Office of the U.S. Trade Representative, U.S. Model Bilateral Investment Treaty 1, 32 (2012).


\(^{191}\) Id.

\(^{192}\) Id.

\(^{193}\) Id.
hearings. The tribunal is required to determine, in consultation with the disputing parties, the appropriate logistical arrangements and make appropriate arrangements to protect protected information. The approach taken in the Trans-Pacific Partnership is different from previous provisions on procedural transparency because its application is mandatory and arbitral hearings can only be closed temporarily. It is a substantial step towards greater transparency and openness in investment arbitration.

As the current text of rule 32(2) requires the consent of the parties, public access to the proceedings remains conditional. In practice, most hearings and are not open because one of the parties objects to the presence of third parties at the hearings, even when the dispute presents a clear public interest. ICSID tribunals should have the power to decide for themselves whether to permit amici’s access to hearings. This could be achieved simply by removing the prerequisite of ‘the consent of the parties’ mentioned on rule 32(2) or by introducing criteria similar to those contained in rule 37(2) concerning written submissions. This change has been suggested previously but was not included in the amendments of 2006. The removal of the veto power of the parties would increase the sphere of activity of amici curiae. An evolution of the rule in this sense seems unstoppable in the long run.

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194 Trans-Pacific Partnership, article 9.23.
195 Id.
197 ICSID Convention, Regulations and Rules, r. 32(2) (Apr. 2006).
199 ICSID Convention, Regulations and Rules, r. 32(2) (Apr. 2006).
200 Id. at r. 32(7).
Treaty-based Investor-State Arbitration and Chapter 9 of the Trans-Pacific Partnership constitute powerful examples of how the publicness of arbitral hearings is becoming an entrenched principle in modern investment instruments. According to Parra, the time may have come for ICSID to reverse the general rules regarding access to documents and attendance at hearings; more specifically, ICSID might amend its rules to provide for the publication of all documents generated in proceedings, unless or to the extent decided otherwise by the arbitrators, and for tribunals to have full authority to allow third parties to attend or observe hearings.204

The expansion of the participatory rights of amici curiae should, naturally, be made with caution. Still, if concerns regarding confidential information and the cost and time-efficiency are properly taken into account, it seems possible to strike an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of state-investor dispute resolution.205 Most, if not all, potential costs of increased transparency can be avoided if tribunals carefully exercise their discretion in the fields of transparency and third party participation. And, because the parties choose their arbitrators and trust them to rule on the substantive issues, there is no convincing reason why tribunals should be unfit to properly manage these procedural competence as well.206

While ICSID Arbitration Rules and international investment agreements are not amended, the expansion of the role of amici curiae will depend, to a large extent, on the efforts of amici themselves. A revision of these instruments takes time and requires negotiating efforts. As a result, the conditions of confidentiality and lack of capacity for amicus submissions are likely to remain the predominant practice for investor-state arbitration for the years to come.207 The scenario does seem likely to change in the near future,

207 Kate Miles, Reconceptualising International Investment Law: Bringing the Public Interest into Private Business, in INTERNATIONAL ECONOMIC LAW AND NATIONAL
particularly due to the nature of arbitration as a process driven by the parties’ agreement.208 Still, amicus status may be the only available route for public participation in many cases.209 Third parties interested in having access to the proceedings and actively taking part in them should strive to win and deepen the familiarity and trust that states and tribunals have with and in them. By making reasonable and targeted demands, which seek to augment by gradations the current structure of the system and not to overhaul it holistically, amici curiae will be more likely to achieve institutional reform granting them greater access.210 As the participation of non-parties becomes more frequent, amici curiae may strive for tribunals to lessen current limits on access to documents and hearings. Alternatively, parties – namely, states – with an interest in hearing from a particular third party may request the tribunal to hear them as a fact or expert witness. In this case they will have access to the record and their testimony will be subject to the same scrutiny at the oral hearing as that of any other witness.211

Civil society plays an increasing role in the debate surrounding the evolution of the international investment law and policy regime. This process will more and more involve, if not require, a multi-stakeholder process that takes into account the concerns of civil society, reflecting the pluralistic nature of modern societies.212 It may be said that non-disputing parties are filling a gap in regulatory order by placing certain issues on the political agenda, and

AUTONOMY 375, 396 (Meredith Lewis & Susy Frankel eds., 2010).


contest ing the very future of that regulatory order by their actions.\textsuperscript{213} Overall, the nature of investor-state arbitration calls for a greater measure of public participation. When crucial public interests are involved, public interest groups and NGOs should be given a fair and adequate opportunity to voice their concerns about the possible impact of the arbitral award in the community at large. Greater public participation also adds a measure of accountability for the arbitrators, giving them greater incentive to consider the public’s interest.

The ICSID Arbitration Rules, as they currently stand, are clearly unsatisfactory. The procedural flaws identified previously perpetuate a system and culture that is antagonistic to the proper consideration of public policy issues in investment disputes.\textsuperscript{214} A reform is necessary so as to strike a proper balance between public policy concerns and investment promotion and protection. The principle of public participation should be, if not completely assimilated, at least better balanced against other rationales of the investor-state dispute settlement mechanism.\textsuperscript{215} The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Transparency elevated the principle of transparency into one of the global norms in international investment law.\textsuperscript{216} NAFTA, the 2012 US Model BIT and similar BITs and Chapter 9 of the Trans-Pacific Partnership also set higher standards that turn public participation into a cornerstone of the investor-state arbitration system. After one decade of consolidation of the figure of amici curiae, the time is ripe for ICSID to endow non-disputing parties with the necessary tools to perform their function with greater benefit to the parties, the arbitration community, and the public at large.

\textsuperscript{213}Peter Muchlinski, \textit{Policy Issues, in The Oxford Handbook International Investment Law} 3, 8 (Peter Muchlinski et al. eds., 2008).

\textsuperscript{214}Kate Miles, \textit{Reconceptualising International Investment Law: Bringing The Public Interest Into Private Business, in International Economic Law and National Autonomy} 307 (Meredith Lewis & Susy Frankel eds., 2010).
