UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOVENERGIA II – ENERGY & ENVIRONMENT (SCA), Petitioner, v. THE KINGDOM OF SPAIN, Respondent.	Civil Action No. 1:18-cv-1148 (TSC)

THE KINGDOM OF SPAIN'S OPPOSITION TO MOL HUNGARIAN OIL AND GAS PLC.'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Local Civil Rule 7(o)(2), Respondent the Kingdom of Spain ("Spain") hereby opposes the motion of MOL Hungarian Oil and Gas Plc. ("MOL") for leave to file an *amicus curiae* brief in support of Petitioner's response to Spain's motion to dismiss. D.E. 24.

INTRODUCTION

MOL is a Hungarian (EU) company currently involved in an arbitration at the International Centre for Settlement of Investment Disputes ("ICSID") under the Energy Charter Treaty ("ECT") against the Republic of Croatia, an EU member State. MOL asks the Court for permission to submit an *amicus* brief addressing "a single issue presented by this case": whether an alleged "agreement to arbitrate pursuant to" Article 26 of the ECT "between an investor of an EU Member State and another EU Member State is enforceable in the Courts of the United States." D.E. 24 ¶ 3. MOL's proposed *amicus* brief does not touch on US law; the sole legal issue it addresses is whether the Court of Justice of the European Union's ("EU Court of Justice") decision in *Slovak Republic v. Achmea* prevents the formation of arbitration agreements

under the ECT between EU member states and nationals of other EU member States (the "*Achmea* issue"). D.E. 24-1 at 9. This issue of foreign law is already the subject of over 40 pages of the parties' briefing, 50 pages of party-submitted expert testimony and nearly 100 exhibits. Not surprisingly, MOL agrees with the position that Petitioner Novenergia II – Energy & Environment (SCA) ("Novenergia") has taken on this issue. D.E. 24 ¶ 12.

"Rather than seeking to come as a 'friend of the court' and provide the [C]ourt with an objective, dispassionate, neutral discussion of the issues, it is apparent that [MOL] has come as an advocate for one side" – Novenergia. *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991). An *amicus curiae* "does not represent the parties but participates only for the benefit of the Court. Accordingly, it is solely within the discretion of the Court to determine the fact, extent, and manner of participation by the amicus." *United States v. Microsoft Corp.*, Case No. 98-1232 (CKK), 2002 U.S. Dist. LEXIS 26547, at *10 (D.D.C. Mar. 4, 2002). Because "[t]he bane of lawyers is prolixity and duplication," "judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give [them] all the help [they] need." *Ryan v. CFTC*, 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, J.). Therefore, "[t]he filing of an amicus brief should be permitted if it will assist the judge 'by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.'" *Northern Mariana Islands v. United States*, Case No. 08-1572 (PLF), 2009 U.S. Dist. LEXIS 125427, at *3 (D.D.C. Mar. 6, 2009) (quoting *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003)). *See also American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (Cl. Ct. 1991) ("[p]erhaps the most important [factor] is whether the court is persuaded that participation by the amicus will be useful to it, as contrasted with simply strengthening the assertions of one party").

Local Civil Rule 7(o)(2) requires a proposed *amicus* to explain why the brief it seeks to submit "is desirable," why the "movant's position is not adequately represented by a party," and why "the matters asserted are relevant to the disposition of the case." In deciding whether to permit an *amicus* brief, courts in this District have found useful guidance in Judge Posner's decision in *Ryan*, 125 F.3d 1062. *See Hard Drive Prods. v. Does 1 - 1,495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008); *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003). There, Judge Posner identified three situations in which *amicus* briefs are desirable: (1) "when a party is not represented competently or is not represented at all," (2) "when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case)," and (3) "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan*, 125 F.3d at 1063.

As demonstrated below, this is not any one of these situations. Accordingly, MOL's motion should be denied.

ARGUMENT

I. THE PARTIES ARE COMPETENTLY REPRESENTED AND ALL LEGAL ISSUES ARE WELL-BRIEFED

An *amicus* brief is "allowed when a party is not represented competently." *Ryan*, 125 F.3d at 1063. Participation of an *amicus* is desirable in circumstances in which "the parties' briefs [likely] do not give [judges] all the help [they] need" to decide the legal issues presented. *Id*. at 1064. Here, MOL does not deny that Novenergia and Spain are competently represented. Nor has it explained how the parties' briefs have failed to "give [the Court] all the help [it]

need[s]" to decide the *Achmea* issue. *Id.* Indeed, it decided to seek leave to file an *amicus* brief before Novenergia even filed its Opposition.[1]

MOL acknowledges that it and Novenergia are aligned with respect to the *Achmea* issue. *See* D.E. 24 ¶ 12. MOL's "position is … [therefore] adequately represented by" Novenergia. LCvR 7(o)(2). MOL's proposed *amicus* brief does not concern "an issue [that was] not developed fully" in the parties' voluminous briefs and accompanying expert declarations. *Hard Drive Prods.*, 892 F. Supp. 2d at 338. Although MOL claims that it is "differently situated" than Novenergia in some respects, D.E. 24 ¶ 12, that does not mean that the parties' interests are not adequately represented.

MOL does not explain why any such differences are germane to resolving the *Achmea* issue in this case. The fact MOL's intra-EU ECT arbitration is at the International Centre for Settlement of Investment Disputes, whereas Novenergia's was heard at the Stockholm Chamber of Commerce, *id*. ¶¶ 13-14, has no bearing on the only legal question MOL's brief addresses, which does not turn on the choice of arbitral tribunal. Nor is the *Achmea* issue impacted by the "differences in the timing of EU accession" between Spain and Croatia, *id*. ¶ 15, which is utterly irrelevant. MOL is simply looking for an opportunity to "duplicate the arguments made" by Novenergia. *Ryan*, 125 F.3d at 1063.

II. MOL DOES NOT HAVE AN INTEREST IN SOME OTHER CASE THAT MAY BE AFFECTED BY THIS COURT'S DECISION

MOL next argues that because it allegedly has "an interest in another case that may be affected by the decision in the present case," *id*. at 1063, it should be permitted to submit an

[1] MOL sought Spain's views on its participation as *amicus* in the afternoon of November 30, 2018, while Novenergia's brief was filed late in the evening the same day.

amicus brief. D.E. 24 ¶ 17. But there is no ongoing case in which MOL has an interest "that may be affected by the decision in the present case." True, MOL, an EU national, is involved in an ICSID arbitration under the ECT where the respondent is another EU member State. *Id*. ¶ 6. It is "now awaiting an Award," *id*., in which the arbitrators may purport to determine whether *Achmea* applies to the ECT. According to MOL, that "case may be affected by the decision in the present case." *Id*. ¶ 17. This is, at best, speculative. It is far from certain that a panel of private arbitrators arbitrating a dispute between Croatia and a Hungarian company would feel compelled to follow a United States District Court's ruling on a crucial issue of EU law. Moreover, under MOL's logic, each of the "approximately 60 EU investors who are currently involved in arbitrations against EU Member States under the ECT," D.E. 24-1 at 9, and the EU Member States that are respondents in those arbitrations, would be equally entitled to act as *amici*.

MOL also contends that it has an "interest" in this case because the Court's decision may affect MOL's "ability to enforce any award rendered in its favor in the arbitration." D.E. 24 ¶ 6. This "interest" is again conjectural. To recognize it, the Court must assume that MOL will win its arbitration against Croatia, Croatia will refuse to pay, and that MOL will then bring an enforcement action in the United States in which the *Achmea* issue will be dispositive.

Even if MOL's hypothetical interest in a potential enforcement case in the United States constituted a cognizable interest, it would not be sufficient to permit MOL to act as an *amicus* on the *Achmea* issue because this Court can decide this case without reaching that legal issue. The plain text of Article V(1)(e) of the New York Convention provides the clearest and least controversial basis to resolve the case: refusing recognition and enforcement because the Award has been suspended by the Svea Court of Appeal in Sweden, the seat of the Novenergia-Spain

arbitration. Dismissing this case on that narrow statutory basis would have no impact on MOL's purported interest and leave the courts in Europe to address the *Achmea* issue.

In the event this Court does not dismiss this case on account of the suspension in the primary jurisdiction, and confronts the *Achmea* issue head on, MOL's putative "interest" is still not substantial enough for it to participate as an *amicus* here. First, any effect this Court's decision would have on a future US enforcement action by MOL is likely to be minimal. The Court's decision, especially on an issue of foreign law, will not "set a controlling precedent regarding a claim of" MOL. This is because such a "decision by this trial court does not bind any other judge, or have res judicata or collateral estoppel effect on anyone other than the parties and those in privity with them." *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285 (Cl. Ct. 1996).

Second, a hypothetical US enforcement action brought by MOL against Croatia would be governed by a completely different statutory regime and standard for enforcement. Unlike Novenergia's confirmation petition, which is governed by the New York Convention's "carefully crafted framework for the enforcement of international arbitral awards" that envisions substantial judicial review, including the ongoing review by the Swedish courts, *see Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3 928, 935 (D.C. Cir. 2007), an action by MOL would proceed under 22 U.S.C. § 1650a, according to which its award would "be given the same full faith and credit as if [it] … were a final judgment" of a US state court. MOL "will have its day in court on its own case or cases whenever [or if the] occasion arises." *United States v. Winkler-Koch Eng'g Co.*, 209 F.2d 758, 760 (C.C.P.A. 1953). It does not belong in this action.

III. MOL DOES NOT HAVE UNIQUE INFORMATION OR PERSPECTIVE HELPFUL TO THE COURT

Finally, MOL contends that it has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." D.E. 24 ¶ 18.

Essentially, however, MOL's arguments on the *Achmea* issue "simply repeat the arguments presented by" Novenergia. *Cobell*, 246 F. Supp. 2d at 63. This is not a situation where the proposed *amicus* is at odds with both parties. *See, e.g., District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 232, 237 (D.D.C. 2011) (*amicus* permitted where both parties supported the entry of a consent decree and the proposed *amicus* opposed it).

Instead of providing helpful "unique information or perspective" on the *Achmea* issue, MOL's proposed 23-page *amicus* brief spends five pages regurgitating Novenergia's and its experts' EU law arguments. *See* D.E. 24-1 at 24-28. The bulk of the proposed brief comprises 12 pages on policy issues regarding the importance of investor-state arbitration and why MOL believes it cannot have a fair hearing in Croatian courts. *See id.* at 12-24. MOL's motion does not explain why these "matters asserted are relevant to the disposition of the case." *See* LCvR 7(o)(2). The ostensible public policy perspective MOL proposes to add here has little, if any, relevance to the Court's decision on the "single issue presented by this case" regarding which MOL seeks to provide argument, D.E. 24 ¶ 3: whether the CJEU's *Achmea* decision applies to the ECT. To the extent that there are any public policy considerations that bear on this issue, they are apparent on the face of the EU Court of Justice's *Achmea* decision. This Court does not need MOL's help on this score.

CONCLUSION

For the foregoing reasons, Spain respectfully requests the Court reject MOL's request to submit an *amicus* brief in this matter.

Dated: December 21, 2018

Respectfully submitted,

KINGDOM OF SPAIN

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I caused a true and correct copy of the foregoing to be filed with the Clerk of the Court using the ECF system and thereby served upon all counsel of record.

/s/ *Derek C. Smith*
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