# Katia Fach on Arbitration

Dr. Katia Fach (Universidad of Zaragoza) is author of “Rethinking the Role of Amicus Curiae in International Investment Arbitration”, to be found in 35 *Fordham International Law Journal 510,* and also here (SSRN)

> The intervention of amicus curiae in investment arbitration is a matter of great interest and it will continue generate a legal debate in the future. In the wake of multiple courts and some tribunals, several rules on investment arbitration have increasingly recognized the possibility that the general interest is protected through amicus submissions. The fact that a party of the investment arbitration is a state and problems transcend the interests of the specific parties involved in the arbitration justify the progressive implementation of the principle of transparency, which has been traditionally rejected in commercial arbitration, in the field of investment arbitration.The acceptance of the institution of amicus curiae in BITs and arbitration rules has resulted recently in various NGOs submitting amicus briefs in relevant international arbitrations. Additionally, UNCITRAL and ICC are currently developing two projects in the field of investment arbitration that are going to address the issue of amicus briefs. Taking all of this data as reference, this Note reflects on the most appropriate regulation of the institution of amicus curiae. This means taking into account a multiplicity of factors, both internal -concerning the content and the submission process- and external -referring to the relationship of these non-parties with other participants in investment arbitration-. The approach taken regarding this regulation is multiple, since the institution of amicus curiae is controversial. Against the multiple benefits preached mainly by NGOs, investors believe that the acceptance of amicus curiae brings various injustices. The proposal advocated by this Note is twofold. On the one hand, the acceptance of unsolicited amicus briefs should be governed by a set of criteria able to block any submission that do not benefit the outcome of arbitration and are excessively detrimental to the parties and arbitrators of the investment dispute. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. This proposal, although suggestive, would imply a major change in the system and therefore their perspectives of success would possibly materialize in the

medium to long term.

Also from Katia Fach, see "Ecuator's Atteinment of the Sumak Kawsay and the Role Assigned to International Arbitration", the *Yearbook of International Investment Law and Policy*, 2010-2011, pp. 451-487:

> Article 422 of the 2008 Ecuadorian Constitution prevents the Ecuadorian State from ceding its sovereign jurisdiction to international arbitration entities through entering into Treaties or international instruments. This provision is a clear manifestation of the rejection generated in Ecuador by an *ex ante* and general submission to international tribunals. This chapter discusses in detail the wording of Article 422, highlighting the doubts and difficulties of interpretation posed by this constitutional provision. It also reflects on two events derived from the approval of Article 422: the denunciation of the ICSID Convention and the denunciation of a number of Bilateral Treaties on the Promotion and Guarantee of Investments signed by Ecuador. The chapter also studies some recent judgments of the Ecuadorian Constitutional Court, which have declared many BITs as unconstitutional. A detailed review of these decisions will lead us to make a critical assessment. Finally, it analyzes the most recent manifestations of the Ecuadorian government regarding international investments. These latest contractual and legislative developments force us to reconsider the real impact that Article 422 of the Constitution is having on Ecuadorian economic life.