AMICUS INTERVENTION IN INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: CHINESE REFORM AND FUTURE CONSIDERATIONS

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Abstract

One of the main criticisms levelled against the investor-State dispute settlement system ["**ISDS**"] *is the lack of a transparency regime in the dispute resolution process, particularly the limited opportunities for amicus curiae intervention. This article aims to analyse the recent developments regarding amicus intervention in ISDS proceedings in the People's Republic of China* ["**China**"]. *The analysis reveals that the current amicus intervention provisions under the new generation of Chinese investment agreements still impose several restrictions on amicus intervention in arbitral proceedings. To strike a better balance between the protection of the interests of both parties and the external interests, this article proposes procedures for when and how an amicus may participate in arbitral proceedings under future Chinese investment agreements. In addition, the article proposes that to ensure that maximum benefits can be realised from amicus participation, China should establish safeguards to provide amici with the access to relevant arbitral documents and oral hearings. However, achieving the above goal should not come at the expense of undermining the confidential and protected information of both parties.*

I. Introduction

For the past two decades, with the rapid development of international investment agreements, the protection of foreign investment has been substantially increased and investors have been normally granted a derivative right to commence investor-State arbitration against host States. In parallel, a virtual explosion of investor-State arbitration can also be seen around the globe.[1] For instance, as of December 31, 2019, the International Centre for Settlement of Investment Disputes ["**ICSID**"] had registered 745 cases under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] and Additional Facility Rules.[2] However, over the last decade, the ISDS system has been attracting substantial criticism due to the way in which it is structured and operates.[3] One of the main

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1 Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality* (Allard Res. Commons, Working Paper No. 1, 2010), *available at* https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1193&context=fac_pubs.

2 *The ICSID Caseload – Statistics Issue 2020-1*, INT'L CTR. FOR SETTLEMENT OF INV. DISP. (2019), *available at* https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf.

3 Fernando Dias Simões, *Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration*, 42(3) N.C.J. INT'L L. 1 (2017) [*hereinafter* "Simões"]; *A Response to the Criticism against ISDS*, EUR. FED'N FOR INV. L. & ARB. 4 (May 17, 2015), *available at* https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf.

criticisms that has been levelled against the system is the lack of a transparent regime in the investor-State dispute resolution process, especially the existence of limited opportunities for public participation, which is achieved by submission of amicus curiae briefs.[4]

Transparency has become increasingly important in investor-State disputes, as an investment claim against a State may refer to the State's judicial, executive, and legislative measures concerning issues of public interest, such as water, waste management, electricity, and gas or touch upon sensitive socio-political concerns such as environmental protection, which are normally absent from commercial arbitration.[5] For instance, in *Methanex Corporation* v. *United States of America* ["**Methanex**"],[6] the tribunal stated that the proceedings involved public interest because the dispute concerned the provision of public services and matters relating to health, which "*extend far beyond those raised by the usual transnational arbitration between commercial parties.*"[7]

Traditionally, the ISDS system was based on a decidedly "*commercial*" approach to dispute settlement favouring confidentiality and privacy.[8] Thus, the legitimacy of the dispute settlement mechanism is put at risk if the public cannot participate in decisions affecting their rights and interests.[9] However, in practice, investment arbitral tribunals may be reluctant to consider public policies supporting a State's regulations. Pursuant to the award in *Metalclad Corp.* v. *United Mexican States*, the state governor's Ecological Decree was not taken into account by the tribunal because "*a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110*".[10] Therefore, the outcomes of investment disputes may often be heavily weighted against State interests.[11] When an award will potentially impact public interest, the general public has an interest in ensuring that the award is made "*using proper procedures and taking due account of public interests.*"[12] Also, suitable persons or entities, such as public interest groups and non-government organizations ["**NGO**"], may wish to intervene in the

4 Symposium, *Making the Most of International Investment Agreements: A Common Agenda* (2005), *available at* https://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf [*hereinafter* "Symposium"]; *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures* (Org. for. Econ. Co-operation and Dev., Working Paper No. 2005/01, 2005), *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf; Fiona Marshall, *Defining New Institutional Options for Investor-State Dispute Settlement*, INT'L. INST. FOR SUSTAINABLE DEV. 17-26 (Sept. 2009), *available at* https://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf [*hereinafter* "Marshall"].

5 Ruth Teitelbaum, *A Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We Do About It?*, 5 BERKELEY J. INT'L L. PUBLICIST 56 (2010); Daniel Magraw & Niranjali Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15(2) ILSA J. INT'L. & COMP. L. 337, 339 (2209); *See* Simões, *supra* note 3 at 6; *See* Marshall, *supra* note 4 at 6.

6 Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", (Jan. 15, 2001), Arbitral Tribunal constituted under the North American Free Trade Agreement [*hereinafter* "Methanex"].

7 *Id.* ¶ 49.

8 Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, *in* INTERNATIONAL. INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010).

9 *See* Marshall, *supra* note 4, at 5; Robert Argen, *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*, 40(1) BROOK. J. INT'L L. 209 (2014) [*hereinafter* "Argen"].

10 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 109-111 (Aug. 30, 2000) [*hereinafter* "Metaclad"].

11 Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 (3) VAND. J. TRANSNAT'L L. 775, 788 (2008) [*hereinafter* "Choudhary"].

12 *See* Simões *supra* note 3, at 5.

proceedings as "non-disputing parties" or "amicus curiae" by submitting their opinions on the public issues involved in the controversy.[13]

Amicus curiae, a commonly used Latin term that literally means "a friend of the court", is "*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.*"[14] In order to ensure that public interests involved in investment disputes are fully considered by tribunals, third parties who have no standing to participate as disputing parties have begun to petition tribunals to allow them to intervene as amicus curiae. For example, in *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A.* v. *The Argentine Republic* (Suez/Vivendi) ["**Suez**"],[15] five NGOs, representing the interests of millions of people, asserted that since the dispute centred on water and sewage services, any decision made in this case would potentially affect the whole community, and, therefore, necessitated submission of amicus briefs. After verifying the expertise and experience of the petitioners, the tribunal granted the NGOs the amicus status to file a joint submission to address the issues of public interest involved in the dispute.[16]

China has thus far been involved so far in at least eight ISDS cases, five of which are or were brought by Chinese investors[17] and three cases were brought against China as a respondent State.[18] Given China's increased role in inbound and outbound investments and its expanded web of international investment agreements for the last decade, the number of cases in which China is involved as the home or host State is quite low. China's rare involvement in ISDS proceedings not only reflects its lack of affinity for international arbitration and its preference for settling disputes through official negotiation but also shows foreign investors' concern over endangering future dealings with the Chinese government.[19] Most investment agreements concluded by China provide that an investment dispute can be arbitrated under the auspices of the ICSID. As pointed out by Professor Malanczuk, '*this reference implies that the relatively soft transparency elements that were introduced for ICSID proceedings by the reform in 2006 will equally apply to any ICSID proceedings involving China.*'[20]

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13 *See* Simões *supra* note 3, at 7.

14 *Amicus Curiae*, BLACK'S LAW DICTIONARY (8th ed. 2004).

15 Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19.

16 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 by Five Non- Governmental Organizations for Permission to Make an Amicus Curiae Submission, ¶ 21–28 (Feb. 12, 2007) [*hereinafter* "Suez/Vivendi"].

17 *See* Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6; *see* China Heilongjiang Int'l Econ. & Tech. Coop. Corp., Beijing Shougang Mining Inv. Co. Ltd., and Qinhuangdaoshi Qinlong Int'l Indus. Co. Ltd. v. Mongolia, Case No. 2010-20 (Perm. Ct. Arb.); *see* Ping An Life Insurance Co. Ltd. and Ping An Ins. (Group) Co. Ltd. v. The Gov't of Belgium, ICSID Case No. ARB/12/29; *see* Sanum Inv. Ltd. v. Lao People's Democratic Republic, Case No. 2013-13 (Perm. Ct. Arb.); *see* Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30.

18 *See* Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15; *see* Ansung Housing Co. Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25; *see* Hela Schwarz GmbH v. People's Republic of China, ICSID Case No. ARB/17/19.

19 Matthew Hodgson & Adam Bryan, *Investment Treaty Arbitration in Asia: The China Factor*, *in* CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 437 (Julien Chaisse ed., 2019).

20 Peter Malanczuk, *China and The Emerging Standard of Transparency in Investor-State Dispute Settlement*, *in* TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 94 (Vic. Univ. of Wellington, Hors Serie 2015).

To date, the admission of amicus curiae has generated broad debate among practitioners, scholars, and recent years have witnessed the Chinese government's attitude shift towards a more transparent proceeding in ISDS proceedings. The international investment arbitration community has extensively discussed the role played and the potential drawbacks caused by amicus curiae intervention in ISDS proceedings. However, although several Chinese professors have systematically reviewed the current law and practice of amicus curiae in the investment law system,[21] no commentary goes so far as to comprehensively examine the Chinese attitude towards the concept of amicus curiae in investment arbitration. Additionally, a growing number of States and arbitration institutions have started to incorporate provisions of amicus curiae into their recently concluded investment agreements or adopted investment arbitration rules.[22] However, no study has been conducted on the recent reforms introduced by China and their shortcomings. The purpose of this article, therefore, is to review the reforms on amicus intervention in the ISDS system, put forward by China. Moreover, although a movement towards the expansion of participatory rights of amicus intervention is noticeable in the Chinese investment treaties and arbitration rules, certain shortcomings continue to exist, which will be explored in detail in the next part. Confronting the shortcomings, the article will also propose several suggestions for China for negotiating new investment treaties with its counterparties to give a greater role to the participation of amicus curiae in the ISDS system.

II. Debate and Expansion of Amicus Curiae Intervention in the ISDS System

The last decade has witnessed debates on the legality of amicus curiae intervention through submission in the ISDS system. The debates primarily centre around issues of undue burden, privacy and confidentiality, legitimacy etc.[23]

The first argument against its use in ISDS proceedings is the undue burden caused by amicus briefs.[24] Accepting amicus briefs increases the burden of disputing parties because they would have to spend extra time and money to review the briefs addressing matters within or even beyond the scope of the dispute and/or those simply repeating the arguments provided by both disputing parties.[25] If the amicus goes beyond the submissions made in the written briefs, and seeks discovery of documents, evidence-taking, and participation in oral arguments, there could be an additional burden placed on the efficiency of the process.[26] Faced with this concern, commentators have argued, that the underlying investment agreement, arbitration rules, or the tribunal should clearly provide procedures for when and how an amicus may participate. For

21 *See* Qinglin Zhang, *Research on Third Party Intervention in International Investment Arbitration*, 190(11) J. JINAN U. (PHIL. & SOC. SCI.) 70-82 (2014); Xiaohong Liu & Xiaojun Yuan, *Third Party in Investment Treaty Arbitration*, 24(3) J. SHANGHAI U. OF INT'L BUS. & ECON. 17–29 (2017).

22 *See* Simões, *supra* note 3; *see* Symposium, *supra* note 4; *see* Marshall, *supra* note 4; Eric De Brabandere, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) CHI. J. INT'L. L. (2011) [*hereinafter* 'Brabandere"]; Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. (2011) [*hereinafter* "Levine"]; Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 3 (1) CAMBRIDGE J. INT'L & COMP. L. 208-234 (2012); Olivia Bennaim-Selvi, *Third Parties in International Investment Arbitrations: A Trend in Motion*, 6(5) J. WORLD INV. & TRADE (2005) [*hereinafter* "Bennaim-Selvi"].

23 *See* Brabandere, *supra* note 22 at 85-133.

24 *See* Levine, *supra* note 22, at 219.

25 *Id.*

26 *See* Levine, *supra* note 22, at 219-220.

instance, a written brief should be permitted to be submitted only in the merits phase, with limitations on length of the submission to be made within the time period set up by the tribunal.[27] In any case, since amici are not experts invited to give their opinions to the dispute, they are not remunerable for the voluntarily intervention, and the tribunal receiving additional information would not direct costs to both disputing parties.[28] Thus, amicus submissions are unlikely to over burden the entire arbitral proceedings.

The second argument against amicus participation is based on the traditional features of confidentiality and privacy characteristic of arbitration, which lead parties to prefer submitting disputes to the court.[29] However, privacy considerations restrict the access of the general public to arbitral hearing and records, and the confidentiality consideration restricts what the disputing parties, the tribunal, and the arbitral institution may disclose to the public.[30] Thus, it has been argued that if a non-disputing party is permitted to participate in the ISDS proceedings, either through submitting amici brief or attending oral presentations, the privacy feature of arbitration will be undermined. Moreover, disclosing information, especially confidential or protected information, to a non-disputing party without the consent of the disputing parties to prepare amicus briefs would destroy the goals promoted by the feature of confidentiality. In addition, in *Aguas del Tunari* v. *Republic of Bolivia,*[31] the tribunal eventually denied amicus participation because both disputing parties unanimously opposed amicus participation in the proceedings. It is therefore suggested that, without the permission given by both parties to allow amicus participation, amicus intervention would against the concept of party autonomy.[32] However, as noted above, an investment claim refers to the host State's judicial, executive, and legislative measures concerning issues of public interest, which are normally absent from commercial arbitration. Therefore, the ISDS system strongly requires a transparent regime applicable to the proceedings. This transparent regime could enable the public to ensure that the award is rendered by using proper procedures and after taking due account of public interests, as well as provide genuine stakeholders an opportunity to submit their unique understanding to the tribunal. Indeed, a transparent regime cannot ignore the necessity to preserve confidential and protected information, and this concern can be dealt with quite easily. For instance, a document containing information to be regarded as confidential or sensitive can be redacted before its release to genuine stakeholders. Moreover, as oral hearings could involve confidential information, the tribunal can make logistical arrangements to hold the part of the hearing requiring protection in private.[33]

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27 Kyla Tienhaara, *Third Party Participation in Investment-Environment Dispute: Recent Development*, 16(2) REV. EUR. COMP. & INT'L ENVTL. L. 230, 240 (2007) [*hereinafter* "Tienhaara"].

28 *See* Bennaim-Selvi, *supra* note 22 at 804.

29 Valerie Li, *Protecting Confidentiality in Investor-State Arbitration, International Arbitration Law Network & Resources*, INT'L ARB. L. (Mar. 1, 2017), *available at* http://internationalarbitrationlaw.com/blog/protecting-confidentiality-in-investor-state-arbitration/.

30 *See* Argen, *supra* note 9 at 215.

31 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction (Oct. 21, 2005).

32 Letter from David D. Caron, President of the Tribunal, to J. Martin Wagner, Amicus Petitioner, *in re* Aguas del Tunari v. The Republic of Bolivia, ICSID Case No. ARB/02/3 (Jan. 29, 2003).

33 *See* Tienhaara, *supra* note 27, at 240.

Public interest represented by amicus curiae can either be general and related to human rights or environmental issues, or relatively specific, such as the representation of the rights of a particular social group affected by the tribunal's decision.[34] As Rubins suggested, allowing amicus intervention could potentially "re-politicize" disputes because "*the concern here is that third-party involvement could lead to the arbitration becoming a "court of public opinion.*"[35] Additionally, encouraging amicus participation would increase the pressure on both parties, especially the respondent State, to follow through on the substantive outcome of the case because the claim will be exposed to the public domain.[36] Alternatively, from another perspective, opening the door for amicus intervention would contribute to the transparency of ISDS proceedings. Amicus involvement could promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration as secretive.[37] Thus, amicus participation would infuse the arbitral proceedings with democracy and help reduce criticism concerning secrecy.[38] The debate on amicus intervention also involves discussions on independence and impartiality of arbitrators. On the one hand, judicial independence ensures the ability of the judiciary to produce fair and unbiased judgments while judges remain accountable to the public through open hearings and potential legislative override.[39] However, in the ISDS system, in the absence of tenure or financial security, an arbitrator may constantly "*bargain for new appointments and appropriate compensation*."[40]

Moreover, since an arbitrator can act as judge in one case and advocate in another, it has been suggested that the independence and impartiality of arbitrators might be in question. If an award is rendered under such a scenario, the decision cannot be overturned due to the lack of an appellate mechanism in the ISDS system.[41] In order to resolve the above concern, a sound solution to the lack of arbitrator accountability is to provide a transparent regime for arbitral proceedings. Granting third parties who may be directly impacted by a potential award with the right to offer their distinct arguments on public concerns or to participate in oral hearings would allow scrutiny and evaluation of the tribunal's work. Increasing the accountability of arbitrators could enhance the democratic nature of arbitral proceedings because accountability enables the public to hold the appointed arbitrators responsible for their actions.[42]

Another dispute regarding amicus intervention involves the legitimacy of third parties to participate in ISDS. It has been argued that third parties, especially NGOs, may have "*specific agendas and are not accountable to their own members, much less to the general public*,"[43] making their

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34 Christian Schliemann, *Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15*, 12(3) L. & PRAC. INT'L CTS. & TRIB. 374 (2013).

35 *See* Levine, *supra* note 22. at 220.

36 *Id.*

37 *See* Simões, *supra* note 3, at 288.

38 *See* Choudhury, *supra* note 11, at 818.

39 *Id.* at 819.

40 *Id.* at 820.

41 *Id.* at 819.

42 *See* Simões, s*upra* note 3, at 31.

43 *See* Tienhaara, *supra* note 27, at 239; C.H. Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36(1) VAND. J. TRANSNAT'L. L. 73 (2003).

legitimacy to act in public interest questionable.[44] It has also been voiced that it is the respondent State that should act on behalf of the public.[45] In order to refute this argument, a commentator has pointed out that although the variety of arbitration rules require qualified persons to be appointed as arbitrators, this does not imply that they can understand all aspects of a dispute.[46] To protect parties against this, NGOs may have relevant expertise or experience and could provide relevant data about the actual public impact of investors' activities or regulatory States' action that is hard to obtain.[47] This perspective has been accepted in *Suez*, where the tribunal affirmed that, "*it is possible that appropriate non-parties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision.*"[48]

The need for different perspectives exists, despite the fact that under modern arbitration rules, for instance, under Rule 34 of International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings ["**ICSID Arbitration Rules**"],[49] tribunals are granted a broad discretionary power to gather information needed to resolve the case, which can be exercised by calling the disputing parties to produce the required information. This is because, in practice, for different reasons, respondent States may lack the relevant knowledge and expertise on issues relating to public interests, or both disputing parties may lack the appropriate incentives to submit all of the facts, legal arguments, and policy implications to the tribunal.[50] Therefore, granting a third party who has the relevant knowledge and expertise on public interest to make a submission would assist tribunals by providing scientific or technical arguments different from those of the disputing parties. Pursuant to this, the tribunal delivering the final award in *Biwater Gauff (Tanz.) Ltd.* v. *United Republic of Tanzania* ["**Biwater**"], recognized that the petitioners approached "*issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings.*"[51] Although the amicus brief was useful, the award did not make clear how the perspectives offered by the petitioners had been applied and whether the brief had in any way impacted the outcome of the dispute. In the future, tribunals need to take the amicus petitions into account by "*at least summarizing the arguments contained therein and providing an explanation as to why they have or have not used those arguments within their legal reasoning*".[52]

A. Contemporary Developments and Justifications for Amicus Intervention in ISDS System

44 *See* Tienhaara, *supra* note 27, at 239.

45 *Id.*

46 Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorable for the Public Interest*, 35 FORDHAM INT'L. L. J. 510, 544 (2012) [*hereinafter* "Gomez"]; *see* Simões, *supra* note 3, at 9.

47 Epaminontas E. Triantafilou, *Is a Connection to the 'Public Interest' a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?*, 5 BERKELEY J. INT'L. L. PUBLICIST 38, 44 (2010).

48 *See* Suez/Vivendi, 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, ¶ 21.

49 International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings, r. 34(2), Apr. 2006 [*hereinafter* "ICSID Arbitration Rules"].

50 *See* Simões, *supra* note 3, at 9.

51 Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 359 (July 24, 2008).

52 *See* Schliemann, *supra* note 34, at 390.

Presently, the concept of amicus curiae is no longer a novelty under international investment law. Amicus curiae have been regularly granted the status to participate in investment arbitral proceedings based on three legal justifications.[53]

The first is a tribunal's inherent discretionary power to allow amicus intervention, which was established by the *Methanex* tribunal in 2001.[54] In *Methanex*, since the North American Free Trade Agreement ["**NAFTA**"] and the applicable arbitration rules, i.e., the United Nations Commission on International Trade Law ["**UNCITRAL**"] Arbitration Rules, failed to establish a mechanism governing amicus intervention, the tribunal, for the first time, under its discretionary power to regulate amicus intervention as a procedural issue of arbitral proceedings, pursuant to Article 15(1) of the UNCITRAL Arbitration Rules,[55] granted several NGOs the status to submit a joint brief concerning environmental issues within the scope of the dispute.[56] In 2003, the NAFTA Free Trade Commission ["**FTC**"][57] issued a joint statement titled "The NAFTA Statement of the Free Trade Commission on Non-Disputing Party Participation",[58] recommending the standards to be considered by tribunals while deciding amicus petitions. Since then, a growing number of NGOs who have a significant interest or defend public interests by representing various and changing persons or collectives have been positively contributing their unique perspectives, particular knowledge or insight to NAFTA tribunals.

In addition, outside the NAFTA context, ICSID tribunals have also granted genuine petitioners the status to submit written briefs based on their discretionary power to regulate amicus intervention as a procedural matter. For instance, in 2005, the *Suez* tribunal clarified that it had the power to regulate procedural questions in accordance with Article 44 of the ICSID Convention.[59] It held that it had the discretion to accept amicus briefs because the admission of the briefs fell within the scope of procedural questions.[60]

The second type of legal justification is a treaty provision allowing amicus participation through submitting briefs. For instance, pursuant to the model investment agreement released by the United States and Canada,[61] a qualified person or entity, who has significant interest in an

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53 Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30(1) ARB. INT'L 125, 137 (2014).

54 *See* Methanex, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001), Arbitral Tribunal constituted under the North American Free Trade Agreement.

55 United Nations Commission on International Trade Law ["UNCITRAL"] Arbitration Rules art. 15(1), 2010 provides "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

56 *See* Methanex, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001), Arbitral Tribunal constituted under the North American Free Trade Agreement, ¶ 52; *See* Brabandere, *supra* note 22, at 100.

57 Pursuant to North American Free Trade Agreement ["NAFTA"], art. 2001, the Free Trade Commission ["FTC"] composing cabinet level representatives of the NAFTA parties or their designees was established. One of the main functions of the FTC is that, in accordance with art. 1131 (2), any interpretations to the NAFTA provisions issued by the FTC shall be binding upon arbitral tribunals established under Chapter 11.

58 OFF. OF THE U.S. TRADE REP., NAFTA Statement of the Free Trade Commission on non-disputing party participation (Oct. 7, 2003), *available at* http://www.sice.oas.org/TPD/NAFTA/Commission/Nondispute_e.pdf [*hereinafter* "NAFTA Statement"].

59 *See* Suez/Vivendi, 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, ¶ ¶ 10–16.

60 *Id.* ¶ 10.

61 United States Model Bilateral Investment Treaty, art. 28, 2012, *available at*

investment dispute, may petition the tribunal to grant him amicus status to intervene through submitting written briefs.

The third legal justification is when the arbitration rules provide for amicus participation. In 2006, the ICSID Administrative Council adopted the new amendments establishing the criteria to be considered by tribunals when deciding amicus petitions. Pursuant to the new ICSID Arbitration Rules, the most significant innovation was Rule 37(2), which explicitly grants tribunals the discretion to allow and consider amicus submissions.[62] As one commentator points out, the criteria set out in the amendments "*are virtually identical to those enumerated in the FTC Statement.*"[63] It is not surprising that the UNCITRAL Arbitration Rules do not adopt a transparent regime for arbitral proceedings because these Rules were drafted and primarily designed to address international commercial disputes between private parties. While the UNCITRAL Arbitration Rules emphasize upon confidentiality and privacy, such an emphasis is not suitable for the ISDS system, where private versus public interests are at stake. As discussed earlier, since allowing amicus participation falls within the scope of procedural questions pursuant to Article 15 of UNCITRAL Arbitration Rules, NAFTA tribunals have held that they have the discretionary power to allow amicus submissions. However, this acknowledgement is only limited to the framework of the NAFTA. Faced with the urgent demand to establish a more transparent regime in the ISDS system, in 2013, the UNCITRAL promulgated the UNCITRAL Transparency Rules in Treaty-Based Investor-State Arbitration ["**UNCITRAL Transparency Rules**"],[64] aiming to change the landscape of transparency in investor-State arbitration.[65] One of the key innovations set out by the UNCITRAL Transparency Rules is allowing a third party to make briefs before the tribunal where the brief would be helpful and relevant and would not unduly delay, interfere with, or increase the costs, of the proceedings.[66] The principle of transparency, especially through amicus intervention, established by the UNCITRAL Transparency Rules has been elevated into one of "*the global norms in international investment law*."[67]

III. China's Position on Amicus Submission in the ISDS System

In October 2013, when the United Nations General Assembly discussed the work of the UNCITRAL and its Rules on Transparency, the Chinese delegation acknowledged that arbitral transparency would reinforce "*social monitoring of the implementation of host countries' legislations related to foreign investment management, thus building the overall trust of the international community in investment arbitration mechanisms.*"[68] Although the admission of amicus curiae generated broad debate among practitioners, scholars, and parties involved in arbitral proceedings, since 2012, China has put

https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; Canada Model Foreign Investment Promotion and Protection Agreement, art. 33(5), May 20, 2004, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download.

62 *See* ICSID Arbitration Rules, *supra* note 49, r. 37(2).

63 J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 717 (2007).

64 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, Apr. 1, 2014 [*hereinafter* "UNCITRAL Transparency Rules"].

65 *Id.* at 1.

66 *Id.* art. 4(1)–(6).

67 *See* Simões, *supra* note 3, at 31.

68 People's Republic of China Mission to the United Nations, Statement of Mr. Shang Zhen (Chinese Delegate) at the 68th Session of the United Nations General Assembly (Oct. 14, 2013).

forward reform regarding its position towards greater transparency and amicus curiae intervention in the ISDS system.

As to the first type of reform, the adoption of the Agreement between the Governments of Canada and the People's Republic of China for the Promotion and Reciprocal Protection of Investments ["**China-Canada FIPA**"][69] has been deemed to be the most progressive treaty China has so far accepted in the area of transparency in investor-state arbitration.[70] The China-Canada FIPA, for the first time in the history of Chinese investment agreements, acknowledges the right of a third party to participate in arbitral proceedings through making amicus briefs. As per Article 29, where a non-disputing party (either a person or an entity that is not a disputing party) has a significant interest in the arbitration, the tribunal may accept written submissions made by such a party after consultation with the disputing parties.[71] Similarly, the China-Australia Free Trade Agreement ["**China-Australia FTA**"][72] permits that the tribunal shall, upon the written agreement of the disputing parties, allow an interested party or an entity that is not a disputing party to file a written amicus brief addressing a matter within the scope of the dispute.[73] Although the China-Australia FTA has explicitly addressed the issue of amicus intervention, it is still within the disputing parties' power to make the final determination on whether or not to accept the voluntary involvement of an amicus.

As far as transparency related changes to arbitration rules are concerned, since 2016, a number of arbitration institutions, including the China International Economic and Trade Arbitration Commission ["**CIETAC**"], the Shenzhen Court of International Arbitration ["**SCIA**"], and the Beijing Arbitration Commission ["**BAC**"], have started to adopt and implement a set of procedural rules to provide a more transparent regime for dispute settlement between investors and states. With the expansion of international investment activities, the global need for investment arbitration is growing. Against such a background, Chinese commercial arbitration institutions therefore believe it necessary to promulgate a set of specialised arbitration rules for the settlement of investor-state disputes. In 2016, SCIA released the SCIA Arbitration Rules ["**2016 SCIA Rules**"],[74] which enable the Court to hear investor-State disputes. The Rules went into effect on December 1, 2016 and make SCIA the first arbitration institution in China to administer investor-State arbitration. Additionally, in accordance with Article 3 of the Rules, where the parties submit an investment dispute before SCIA, SCIA shall administer the case pursuant to the UNCITRAL Arbitration Rules and the SCIA Guidelines for the Administration of Arbitration ["**SCIA Guidelines**"] under the UNCITRAL Arbitration Rules.[75] All parties involved in the arbitration are bound to follow the SCIA Guidelines, which clarify how the UNCITRAL Arbitration Rules apply to SCIA cases. Thus, both disputing parties may select the

69 Agreement for the Promotion and Reciprocal Protection of Investments, Can.-China, Sept. 9, 2012 [*hereinafter* "Canada-China FIPA"].

70 Peter Malanczuk, *China and The Emerging Standard of Transparency in Investor-State Dispute Settlement*, *in* L'HARMONISATION DU DROIT COMMERCIAL FACTEUR DE DÉVELOPPEMENT DU COMMERCE [TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW], 19 HORS SERIE 94, 96 (2015).

71 *See* Canada-China FIPA, *supra* note 69, art. 29.

72 China-Australia Free Trade Agreement, China-Austl., Dec. 20 2015 [*hereinafter* "China-Australia FTA"].

73 *Id.* art. 9.16.3.

74 Shenzhen Court of International Arbitration Rules, Dec. 1, 2016 [*hereinafter* "SCIA Rules 2016"].

75 Shenzhen Court of International Arbitration Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules, Feb. 21, 2019 [*hereinafter* "SCIA Guidelines"].

UNCITRAL Transparency Rules as the arbitration rules to govern their case administered by SCIA. Subsequently, the 2016 SCIA Rules were replaced by the Shenzhen Court of International Arbitration Rules, 2019 ["**2019 SCIA Rules**"],[76] but the wording on the jurisdiction over investment arbitration remains unchanged under Article 2 of the revision.

On October 1, 2017, under the support of the China Council for the Promotion of International Trade, CIETAC implemented and adopted the International Investment Arbitration Rules of the CIETAC[77] ["**CIETAC Rules**"], specifically designed for the resolution of international investment disputes. In February 2019, BAC also released the BAC International Investment Arbitration Rules (Draft for Comments)[78] ["**BAC Rules**"] for public consultation. Pursuant to the above Rules, persons or entities who are neither parties to the dispute nor contracting States to the investment treaty may, after informing both disputing parties or the BAC in writing, be permitted as amici to submit briefs regarding particular issues within the scope of the dispute. In addition, the tribunal may, after having regard to the circumstances of the dispute or considering the views of both parties, invite a non-disputing party to make a submission on the disputed issues.[79] If there is a need for further clarification from the non-disputing party, the tribunal shall fix the period of time for submitting such a further written submission.[80] The above Rules show China's attempt to address the '*growing public concern over what is widely perceived as highly opaque procedure*'.[81] For investment treaties to which China is a party, Chinese investors may likely refer their claims to CIETAC or BAC for resolution. Once they agree on the above Rules to govern their claims, a suitable interested party or entity can be permitted to involve in the proceedings as an amicus.

China's reform on amicus intervention in arbitral proceedings follows many practices established by the NAFTA, the ICSID, as well as the UNICITRAL Transparency Rules. For instance, under the Canada-China FIPA, in order to be granted the right to intervene as an amicus, a non-disputing party shall first petition the tribunal for leave to grant the amicus status.[82] Under the CIETAC Rules, in determining whether to allow such a filing, the tribunal is required to take certain factors into account.[83] Additionally, the investment agreements as well as the CIETAC Rules require that a petitioner must be equipped with relevant expertise and experience on the issue he aims to address and be independent to both disputing parties.[84] Further, in order to justify his inclusion as a suitable party to intervene, the reforms require that the tribunal seriously considers whether the petitioner has a significant interest in the proceedings.[85] Moreover, in

76 Shenzhen Court of International Arbitration Rules, Feb. 2, 2019 [*hereinafter* "SCIA Rules 2019"].

77 China International Economic and Trade Arbitration Commission International Investment Arbitration Rules, Oct. 1, 2017 [*hereinafter* "CIETAC Rules"].

78 Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration (Draft for Comment), Feb. 12, 2019 [*hereinafter* "BAC Rules"].

79 *See* CIETAC Rules, *supra* note 77, r. 44(2); BAC Rules, *supra* note 78, art. 36 (2).

80 *See* CIETAC Rules, *supra* note 77, r. 44(9); BAC Rules, *supra* note 78, art. 36 (7).

81 Jessica Fei et al., *Facilitating the Belt and Road: CIETAC Launches Investment Arbitration Rules,* HERBERT SMITH FREEHILLS (Dec. 4, 2017), *available at* https://hsfnotes.com/arbitration/2017/12/04/facilitating-the-belt-and-road-cietac-launches-investment-arbitration-rules/.

82 *See* Canada-China FIPA, *supra* note 69, annex C.29.

83 CIETAC Rules, *supra* note 77, art. 44 (4).

84 *See* Canada-China FIPA, *supra* note 69, annex C.29(1); China-Australia FTA, *supra* note 72, art. 9.16; *see* CIETAC Rules, *supra* note 77, r. 44(4).

85 *Id.*

order to ensure that the additional costs brought by the potential submission are a necessary price to pay, the amicus submission should only address a matter within the scope of the dispute. If the petitioner fails to meet these requirements, the tribunal is entitled to disregard the submission.[86] Besides the above conditions, the reform also requires that the submission should not disrupt the proceedings or unduly burden or unfairly prejudice either of the disputing parties.[87] Lastly, a disputing party is allowed to orally present its observations in case of any undue burden caused by an amicus brief.[88]

IV. China and the Expansion of Participatory Rights of Amicus

The participation of non-disputing parties in arbitral proceedings is not always restricted to making amicus submissions. Where a petitioner lacks enough information to prepare the written submission, the petition may contain a request to obtain key arbitral information from the tribunal.[89] Additionally, if a petitioner has a truly significant interest in the proceedings, he might be willing to make the necessary trip to attend the oral hearings and further provide oral arguments to the tribunal.[90] Although amicus involvement in the ISDS system is becoming more common nowadays, maintaining the confidential and private nature of arbitral proceedings remains the general rule.[91] For instance, under the ICSID Arbitration Rules, case documents cannot be disclosed to the public without the consent of both parties.[92] Thus, it would be difficult for amicus curiae to obtain key information since the disadvantaged party will always favour confidentiality.[93] Additionally, although Article 32(2) stipulates that the tribunal may allow an amicus to attend oral hearings, an objection by one party would render the amicus unable to engage in the oral hearings. Therefore, the revised Article is "*disappointing and of limited practical impact, as the opening of the hearings to amici can still be blocked by the parties.*"[94] As a result, though amici are not totally unaware of circumstances, they remain deprived in material respects.[95]

Bearing in mind the relatively limited transparency requirements contained in the ICSID Arbitration Rules, a movement towards the expansion of participatory rights of amicus curiae is already noticeable in the UNCITRAL Transparency Rules. *First*, pursuant to Article 3, three types of documents are categorized as follows: (i) documents that are to be mandatorily and automatically disclosed; (ii) documents that are to be mandatorily disclosed once any person requests their disclosure from the tribunal; and (iii) documents for which the tribunal has discretion regarding whether or not to order disclosure.[96] Once the documents listed in

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86 *Id.*
87 *Id.*
88 *Id.*
89 *See* Simões, *supra* note 3, at 14-15.
90 *Id.*
91 *Id.* at 13-14.
92 As per art. 48(5) of the ICSID Convention and art. 53(3) of the Arbitration (Additional Facility) Rules, 2006, the ICSID Secretariat cannot publish the award without the consent of both parties, but must make excerpts of the award public.
93 *See* Levine, *supra* note 22, at 217.
94 *See* Simões, *supra* note 3, at 14.
95 *Id.* at 16.
96 Lise Johnson & Nathalie Bernasconi-Osterwalder, NEW UNCITRAL ARBITRATION RULES ON TRANSPARENCY: APPLICATION, CONTENT AND NEXT STEPS 15, *available at* http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf [*hereinafter* "Johnson & Osterwalder"].

paragraphs (i), (ii) and (iii) have been communicated to the depository from the tribunal, these documents shall be made available to the public in a timely manner.[97] Although the Rules impose a mandatory requirement concerning publication of documents, such a principle is subject to exceptions to transparency.[98] Additionally, Article 6 provides for a mandated public hearing for the presentation of evidence or for oral arguments. Where there is a need to protect the confidentiality of the information or the integrity of the arbitral process, the tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.[99] A notable departure from other arbitration rules is that Article 6 requires hearings to be open, subject to three limitations: (i) to protect confidential information; (ii) to protect the "integrity of the arbitral process"; and (iii) for logistical reasons. No disputing party can veto open hearings.[100]

In line with the trend towards transparency in investor-State arbitrations, the ISDS provisions in the China-Canada FIPA, the China-Australia FTA and the CIETAC Rules incorporate a high degree of transparency in the arbitration process. Examples of China's attempt to increase transparency, and therefore the role of amicus curiae in the ISDS system have been illustrated above; but in order to ensure that amicus are truly providing unique arguments on matters within the scope of the dispute and are granted a chance to attend oral hearings, especially to provide oral opinions, there is a need to examine the current practices established in accordance with the reforms.

A. Access to Documents

As far as publication of documents is concerned, pursuant to the China-Canada FIPA, where a disputing party determines that it is in the public interest to do so and notifies the tribunal of that determination, all other documents, except the award, produced during the proceedings shall be made available in the public domain, subject to the redaction of confidential information.[101] Under the China-Australia FTA, the respondent State should make the request for consultations, notice of arbitration, orders, and awards of the arbitral tribunal available to the public.[102] In this regard, the provisions stop short of full transparency. However, other documents, including the pleadings, memorials and briefs, and minutes or transcripts of hearings of the tribunal, may be disclosed to the public if the respondent state agrees.[103] Additionally, only after prior consent is obtained from amicus curiae involved in the proceedings, can the written amicus submission submitted during the proceedings be disclosed to the public.[104] Since arbitral documents would be released to the public, any parties wishing to intervene in the proceedings would have sufficient information to prepare their submissions.

With respect to the access to arbitral documents by amicus curiae, the CIETAC Arbitration Rules can be deemed as the first document granting the tribunal the discretion to determine the matter in China so far. Pursuant to Article 44(10), the tribunal may order that an amicus be

97 UNCITRAL Transparency Rules, *supra* note 64, art. 3(4).
98 *Id.* art. 7.
99 *Id.* art. 6; *See* Johnson & Osterwalder, *supra* note 96, at 14.
100 UNCITRAL Transparency Rules, *supra* note 64, art. 6.
101 *See* Canada-China FIPA, *supra* note 69, art. 28 (1).
102 China-Australia FTA, *supra* note 72, art. 9.17
103 *Id.*
104 *Id.*

provided with access to relevant documents related to the proceedings as may be necessary for his participation in the arbitration.

Although the above rules concerning transparency and access to documents are regarded as key steps towards a greater role for amicus participation in the ISDS system, two main concerns need to be highlighted here. *First*, publication of key documents is still under the discretion of disputing States or tribunals. For instance, under the China-Canada FIPA, all relevant documents can be made available to the public where the respondent State determines that it is in the public interest to do so. Since the FIPA failed to define and confirm the scope of public interest, the respondent State may have a broad discretion over the determination of public interest. Moreover, under the CIETAC Rules, it is within the tribunal's discretion to decide what circumstances would constitute the necessity for preparing amicus briefs. Thus, in order to be granted access to key documents, an amicus has to carefully draft the reasons supporting its petition for obtaining necessary information. Moreover, there is concern over the delay of document disclosure since both treaties failed to establish a time period applicable to the disclosure of documents. Due to the time lag between the date of submitting the documents and the date on which they are posted, amicus curiae may lack necessary documents to prepare for their submission at the time when they plan to intervene in the proceedings.

B. Participation in Hearings

With respect to open hearings as well as the access for amicus curiae to participate in oral hearings, the China-Canada FIPA explicitly provides that if the respondent State, after consulting with the disputing investor, deems that open hearings could preserve the public interests involved in the proceedings, it may notify the tribunal that the oral hearings shall be opened to the public.[105] For the sake of the protection of confidential information, the tribunal may hold portions of hearings in camera.[106] Furthermore, under the China-Australia FTA, upon consultation with both disputing parties, the tribunal shall conduct hearings open to the public if consent is given by the respondent State.[107] However, any disputing party that intends to use information designated as protected information in a hearing shall so inform the tribunal, and the tribunal has the duty to protect that information by making appropriate arrangements.[108] Lastly, pursuant to Article 44(8) of the CIETAC Arbitration Rules, the tribunal may, if either disputing party so requests or the tribunal so decides, hold a hearing for amicus curiae to elaborate on or be examined on its written submissions. The rule established by the CIETAC is regarded as a ground-breaking development concerning the right of amicus curiae to participate in oral hearings.

In short, the two recent investment agreements, which have been concluded by China and analysed above, explicitly grant amici curiae the right to file briefs; but the practice of oral hearings being mandatorily open has not been established. Only upon the determination of public interest involved in the case by the respondent State, can the tribunal open the oral hearings to the public. Additionally, the CIETAC Rules do not go further to explain the

105 *See* China-Canada FIPA, *supra* note 60, art. 28(2).
106 *Id.*
107 China-Australia FTA, *supra* note 72, art. 9.17.3.
108 *Id.* art. 9.17.3.

possibility of amici making oral arguments on their submissions. As pointed out by one commentator: "*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.*"[109] Nevertheless, the CIETAC Rules constitute a milestone relating to the access to arbitral documents as well as oral presentation to amicus submission for amicus curiae. In arbitral proceedings conducted under the Rules, a disputing party has no veto right to refuse oral presentation made by amicus curiae. This is because once another disputing party so requests, or the tribunal itself so decides, a chance for amicus curiae to elaborate on or be examined on its written submissions should be granted during the proceedings.[110]

V. Amicus Intervention in ISDS System in China: Future Considerations

China has so far concluded international investment agreements with nearly 140 States and regions.[111] Although the China-Australia FTA constitutes a landmark in the history of China's treaty practice on amicus intervention, the number of treaties containing amicus participation provisions is relatively modest. For agreements that have not incorporated amicus provisions, tribunals can rely on the governing arbitration rules to determine whether amicus status should be granted. If a dispute is arbitrated under recent amended or adopted arbitration rules, a genuine stakeholder has a better chance of being invited as an amicus to assist the tribunal with its relevant expertise and experience. If the governing arbitration rules fail to grant the tribunal the discretionary power to decide amicus petitions, petitioners may face uncertainty because not all tribunals favour openness and transparency, even if they have the inherent power to regulate amicus intervention as a procedural matter. China and Australia introduced the concept of amicus curiae into China-Australia FTA, but a tribunal may allow an amicus submission only upon the written agreement of the disputing parties.[112] Hence, although tribunal members may find that the unique perspectives provided by an amicus would assist them in the determination of a factual or legal issue within the scope of the dispute, any party who is in a disadvantaged position can veto the decision to accept the amicus brief. Such a practice is much more an '*onerous requirement and represents a significant barrier to third party participation in ISDS proceedings*'.[113] This article advocates that future Chinese investment agreements adopt the practice that it is the tribunal's discretion to consider amicus submission and that both disputing parties shall be given the right to provide their opinions but cannot veto the tribunal's decision on accepting an amicus submission.

The participation of amici in investor-State arbitration has been justified as a useful tool to assist tribunals' determination of legal and factual issues. In addition, allowing amicus intervention can '*enhance transparency and legitimacy of ISDS, which in turn enhances the rule of law*'.[114] However, it is also necessary to ensure that both parties will not be unduly burdened or unfairly prejudiced by such

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109 *See* Simões, *supra* note 3, at 22.

110 *See* CIETAC Rules, *supra* note 77, art. 44(4).

111 *International Investment Agreements Navigator*, UNCTAD INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china?type=bits.

112 China-Australia FTA, *supra* note 72, art. 9.16.3.

113 Letter from Kyla Tienhaara, Research Fellow, Australian National University to Committee Secretary Senate Foreign Affairs, Defence and Trade Reference Committee 10 (July 24, 2015).

114 Nicolette Butler, *Non-disputing Party Participation in ICSID Disputes: Faux Amici*, 66 NETH. INT'L L. REV. 143, 147, 176 (2019).

intervention. Furthermore, it is important for tribunals to preserve confidential information while allowing amici to be provided with access to relevant documents and oral hearings. China, thus, needs to strike a better balance between the protection of the interests of both parties and external interests, such as public interests or the significant interests of non-disputing parties. This article therefore proposes that it should be ensured that amicus submissions will not disrupt the proceedings or unduly burden or unfairly prejudice either disputing party. To achieve the above goal, procedures for when and how amici may participate in arbitral proceedings should be well-tailored under future Chinese investment agreements. In addition, to ensure that maximum benefits can be realised from amicus participation, China should incorporate safeguards to provide amici access to relevant documents and oral hearings. Indeed, achieving the above should not come at the expense of undermining the confidential and protected information of both parties.

A. Timing Concern of Filing Amicus Petitions and Submissions

As noted above, when a third party aims to participate in arbitral proceedings, a petition for leave to make submission should be made first. The time limit to petition for amicus status is determined by the stage the dispute has reached and the arbitral rules governing the arbitration. The two Chinese treaties studied above have failed to address the time component of a third party's petition. In *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*,[115] two petitioners filed a joint petition to request permission from the tribunal to participate as amicus curiae during the jurisdictional phase. After considering the petition, the tribunal ruled that the arguments and perspectives submitted by the petitioners were not helpful to the tribunal during the jurisdictional phase since at that stage, the tribunal primarily focuses on whether it has jurisdiction over the investor-State dispute.[116] Based on this reasoning, the tribunal decided to exercise its discretion to not grant the petitioners the amicus status at this stage of the arbitration.[117] In short, when a petitioner has a strong basis to make a submission addressing matters within the scope of a dispute, choosing the appropriate time to intervene is essential since an amicus submission is unlikely to help the tribunal reach a decision on jurisdiction during the jurisdictional phase. Hence, a petition would be more suitable during the merits phase.

In practice, the above ruling does not simply imply that non-disputing parties may lack the capability to raise arguments on jurisdictional issues during the jurisdictional phase. Even though the tribunal in *United Parcel Service of America* v. *Government of Canada* has explicitly stated a procedural question is an unsuitable subject for amicus submissions,[118] several tribunals, of the opposite view, have granted the petitioners a chance to make arguments on issues of jurisdiction. In *Pacific Rim Cayman LLC* v. *Republic of El Salvador*, the petitioners filed a petition to reject the tribunal's jurisdiction because a strong public interest issue was raised during the jurisdictional phase of the arbitration.[119] After taking into account the arguments made by the petitioners, the

115 Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador, Case No. 2009-23, Procedural Order No. 8 (Perm. Ct. Arb. 2011).

116 *Id.* ¶ 19.

117 *Id.* ¶ 20.

118 United Parcel Serv. of Am. v. Gov't of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 71 (Oct. 11, 2001) [*hereinafter* "United Parcel Service"].

119 Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Application for Permission to Proceed

tribunal decided to allow them to make a submission and required that this written submission take the form of the applicants' existing submission but it had to be "*edited with a view to assisting the Tribunal's determination of the jurisdictional issues raised by the Parties (not the merits).*"[120] In *Apotex Inc.* v. *The Government of the United States of America*, the tribunal acknowledged that "*it is perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspectives or insights beyond those of the disputing parties.*"[121] Thus, pursuant to the above discussion, the suitable time for a genuine stakeholder to file their petition, either addressing substantive or procedural matters, should also be clarified in upcoming Chinese investment treaties.

B. Strict Criteria Applicable to Amicus Intervention

Nowadays, although the practice of setting up fixed criteria applicable to amicus intervention has been widely adopted by the modern investment treaties, for example, Canada's Model Bilateral Investment Treaty (2004), it is still difficult to create a harmonized approach for amicus participation in the investment treaty system.[122] Creating fixed criteria is essential because equal treatment to amicus petitions requires that the same procedures and standards be applicable to all amicus participations. Tribunals would have failed on their part to treat petitioners equally if they operate on different criteria for identical cases.[123] Additionally, establishing strict criteria would contribute to the predictability of law. This is important because it not only provides peace of mind for petitioners but also enables them to predict the consequences of their petitions.[124] With clear criteria set up by the agreement, it would be easier for petitioners to predict the tribunal's decision on their petition. Moreover, establishing criteria would promote the legitimacy of a procedural decision or order on amicus petitions since the practice of allowing amicus intervention would be governed by fixed standards established by the treaty rather than the uncertain standards of traditional commercial arbitration rules. Therefore, decisions with respect to petitions would be more acceptable among the petitioners.[125] In order to preserve the role played by amicus curiae in investment arbitration, China should seriously establish its own legal criteria in its subsequent investment treaties.

i. Expertise, Experience and Independence: Three Indispensable Factors

An interested petitioner normally aims to represent a large group of people with a common interest through their submission on factual and legal issues within the scope of the dispute. Therefore, the relevance of the submission in assisting the tribunal to render a better award can be seriously questioned if the petitioner lacks the required expertise and experience in the relevant field.[126]

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as Amici Curiae, § IV (Mar. 2, 2011).

120 Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Procedural Order No. 8 (Mar. 23, 2011).

121 Apotex Inc. v. Gov't of U.S., ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party, ¶ 33 (Oct. 11, 2011).

122 *See* Levine, *supra* note 22, at 222.

123 Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L.418, 448 (2013).

124 *Id.* at 453.

125 *Id.* at 455.

126 *See* Schliemann, *supra* note 34, at 378; Suez/Vivendi Order, 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, ¶ 24

Moreover, a petitioner normally takes a clear position either in favour of the claimant investor or the defendant State, but a position taken by the petitioner does not necessarily mean that the submission could unfairly prejudice the opposing party if the petitioner is deemed as independent.[127] As pointed out by a commentator, the relevant question to assess whether an amicus petitioner remains independent is "*whether a relationship of control or the determinative influence of a party to the dispute on the writing of an amicus brief and therefore on its content can be ascertained.*"[128] The independence requirement has been included to ensure that the petitioner will truly be a friend of the tribunal as opposed to a friend of a party. In order to be considered as a suitable party with relevant expertise and experience to intervene in the proceedings pursuant to the reform made by China, petitioners should describe their membership, legal status, general objectives, and any organization that directly or indirectly controls them. Also, in order to confirm the independence of the petitioner, any direct or indirect affiliation with any disputing parties and any financial or other assistance provided by any government, persons, or organization must be disclosed and identified by the petitioner in the petition.[129] When a tribunal considers whether or not to grant the amicus status to a non-disputing party, the paramount concern should be that "*the intervening party takes part in the proceedings as a genuine "friend of the court"*.[130] A genuine friend to the investor-State arbitration aims to provide distinct expertise, perspectives, and arguments on important public interest issues to the tribunal. Therefore, a petition that is perceived to be "*politically motivated, frivolous, or potentially abusive of the process*"[131] should not be accepted. For subsequent investment treaties to be concluded by China, such a standard needs to be well-considered.

ii. Bringing a New and Special Legal or Factual Perspective

It has been highlighted that amicus intervention could impose an additional burden on the parties and arbitral proceedings, as well as lead to rising costs and delays.[132] If a non-disputing party's perspective is simply a repetition of the arguments provided by either of the disputing parties, the tribunal and disputing parties have to spend extra time and resources to review the repetition. Confronted with this concern, under the reform conducted by China, a perspective, particular knowledge or insight brought by the petitioner, that is different from that of the disputing parties, shall be deemed to be a key element in justifying amicus intervention.[133] The above reform is supported as, without a new and special legal and factual perspective, the petitioner would fail to fulfil the role ascribed to him of helping the tribunal reach a more legitimate award. Therefore, this practice should be introduced into future Chinese investment treaties.

iii. Significant Interest of a Petitioner

(Feb. 12, 2007).

127 Schliemann, *supra* note 34, at 378-380.

128 *Id.* at 380.

129 *See* Canada-China FIPA, *supra* note 69, annex C.39(1)(c)-(e); China-Australia FTA, *supra* note 72, art. 9.16.4; CIETAC Rules, *supra* note 77, art. 44(3).

130 Camilla Graham, *Amicus Curiae & Investment Arbitrations*, *in* 2 ADVOCATES FOR INTERNATIONAL DEVELOPMENT 6 (2012).

131 *Id.*

132 *See* Levine, *supra* note 22, at 219.

133 *See* Canada-China FIPA, *supra* note 69, annex C.39(1)(f); China-Australia FTA, *supra* note 72, art. 9.16.3; CIETAC Rules, *supra* note 77, art. 44(4).

As studied earlier, an investment dispute may involve public interests, such as environmental and health protection, human rights, sustainable development, etc.[134] When a petitioner has no direct interest in the outcome of a dispute but is equipped with relevant expertise and experience, it has been argued that such party is justified to intervene on the basis that it could "*defend a public interest by representing various and changing persons or collectives, affected "only" by a paradigmatic action embodied in a given, concrete dispute.*"[135] Although the two investment treaties and the CIETAC Rules have failed to explicitly require tribunals to ascertain that public interest is involved in the dispute, in practice, tribunals frequently require that the dispute should be a matter of public interest for petitioners to be admitted as amici.[136] For example, as indicated earlier, in *Suez*, the tribunal believed that the case involved significant public interests because the dispute centred around sewage systems and water distribution to millions of people, and any decision made by the tribunal would potentially affect the operation of those systems, and thereby, the public they serve.[137] Hence, for subsequent reform to be undertaken by China, and with the willingness of NGOs with a special interest, the tribunal should require that the dispute be a matter of public interest.

iv. Addressing Matters within the Scope of the Dispute

As indicated earlier, after an amicus has filed a brief, arbitrators and both parties have to comment on the unique perspectives contained therein, and the tribunal would also issue a procedural order or decision based on the petition. Thus, the amicus submission would entail extra fees for both parties. In order to render the international arbitral system more legitimate through transparency, these additional costs seem to be the necessary price to pay.[138] But where an amicus raises arguments addressing matters beyond the scope of the dispute, it will inevitably place an extra burden and increase additional costs on both the tribunal and the disputing parties. The ISDS system aims to resolve issues brought by the disputing parties, and since the resolution process is not a forum for debating wider socio-political, environmental or policy issues, an amicus submission should only address issues within the scope of the dispute.[139] Such a consideration requires that any arguments ventured by an amicus should be strictly related to the substantive or legal questions to be resolved in the arbitration. With respect to the reform made by China, amicus submissions should only address a matter within the scope of the dispute in order to ensure that the additional costs brought by an amicus submission is the necessary price to pay. If it fails to meet this requirement, the tribunal is entitled to disregard the submission.[140] Such a standard should continue to be followed in subsequent investment treaties concluded by China.

v. No Undue Burden or Unfair Prejudice to Any Party

134 *See* Gomez, *supra* note 46, at 543-544.

135 *See* Schliemann, *supra* note 34, at 374.

136 *Id.* at 373.

137 Suez/Vivendi, 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, ¶ 19.

138 Eloïse Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22(2) ICSID REV. – FOREIGN INV. L. J. 349-379, 377 (2007).

139 *See* Graham, *supra* note 130, at 8.

140 *See* Canada-China FIPA, *supra* note 69, annex C.29; China-Australia FTA, *supra* note 72, art. 9.16.3; CIETAC Rules, *supra* note 77, art. 44(4).

Besides the above conditions, the current reform examined above also requires that an amicus submission should not disrupt the proceedings or unduly burden or unfairly prejudice either disputing party.[141] This standard reflects China's determination to respect the traditional features of arbitration aiming to provide a speedy, low-cost, and flexible dispute resolution for both parties. As commentators have suggested, even though amicus submissions would substantially impact the proceedings, establishment of procedural safeguards, such as time limits, the tribunal would ensure that the submission does not overly burden the proceedings.[142] For instance, the China-Canada FIPA adopted several procedural guarantees, including a requirement for timely submission, a limitation on the length of the brief and the requirement of setting out a precise statement supporting the amici's position on the issue.[143] The CIETAC Rules also explicitly grant the tribunal the discretion to determine the form and content of the submission.[144] Besides, amici usually take a clear position in favour of either the claimant investor or the respondent State; therefore, it has been argued that the submission would cause undue burden to the disadvantaged party. In practice, such concern can be easily dealt with since both the disputing parties are given a chance to present their observations on the brief. In the future, China also needs to follow the above practice of allowing a disputing party to present its observations on the amicus submission in case of any undue burden caused by an amicus brief.[145]

C. Access to Relevant Documents and Oral Hearings

In practice, the efficiency of amicus participation without access to arbitral documents is doubtful for the following reasons. *First*, without providing the key arbitral documents to genuine stakeholders, the limited information released by the respondent State or other private sources will be the only information available for amici to prepare their briefs.[146] The reliability of the information obtained from private sources will likely be questioned since it is not as precise and accurate as the information released by the official organs. Since potential amici lack the necessary information to fully understand the nature of the dispute and the issues raised therein, they may produce opinions based on inaccurate or incomplete information.[147] In addition, as amici have no information on whether the parties have already addressed their main concern or what perspectives they have already presented, it would be difficult for them to produce distinct arguments to the tribunal and address matters within the scope of the dispute.[148] As a result, disputing parties may have to make observations on briefs which are useless and repetitive.

The above consequence is in contrast to the well-established rule that an amicus should provide tribunals with arguments, perspectives and expertise that the parties may not provide and amicus submission should only address matters within the scope of the dispute.[149] Therefore, if amici are

141 *See* Canada-China FIPA, *supra* note 69, art. 29.

142 *See* Schliemann, *supra* note 34, at 380; United Parcel Service, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 69.

143 *See* Canada-China FIPA, *supra* note 69, annex C.29(2).

144 *See* CIETAC Rules, *supra* note 77, art. 44(6).

145 *See* Canada-China FIPA, *supra* note 69, Annex C.29; China-Australia FTA, *supra* note 72, art. 9.16.4; CIETAC Rules, *supra* note 77, art. 44(7).

146 *See* Simões, *supra* note 3, at 20-21.

147 Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253, 255 (2010); *see* Simões, *supra* note 3, at 20.

148 *See* Simões, *supra* note 3, at 20–21.

149 *Id.*

provided with essential documents, they will have a better opportunity of making an insightful contribution to the whole proceeding.[150] While the acceptance of amicus curiae briefs has become a common practice in the investment arbitration system, disclosure of documents appears to be far more difficult to achieve. As a result, the efficiency of amicus intervention will undoubtedly be limited.[151] In order to alleviate the above concern, China should seriously consider the necessity of disclosing relevant documents for amici to prepare their briefs. In order to prevent disclosure of any confidential and protected documents to amicus curiae, the disputing party that produces such documents shall advise the tribunal for their protection. The tribunal should strike an appropriate balance between preserving the confidentiality of protected documents and enhancing the systemic legitimacy of the ISDS system. When the tribunal holds that a protected document is essential for an amicus to draft his brief, a redacted version of the document should be made available to the amicus.

The debate on open hearings is still ongoing. The arbitration settlement itself aims to resolve the dispute between the disputing parties in a flexible manner, therefore, allowing amici to attend oral hearings, especially giving oral submissions and commenting on the disputing parties' evidence could definitely cause undue burden to the arbitral proceedings.[152] Also, parties may be worried that the confidentiality of the information or the integrity of the arbitral process will be undermined due to the amicus involvement in oral hearings. Bearing in mind the potential drawbacks, scholars have argued that given the general or specific public interests involved in investor-State arbitration, the public would be more accepting of an award if an amicus defending the interest is granted a chance to attend oral hearings.[153] Besides, giving amici the right to attend oral hearings could enable them to give oral arguments on their submissions and offer opinions on key evidence. As one commentator pointed out, why should all other presenters of fact or expertise be subject to questioning, so the tribunal can evaluate the persuasive value, but not the amici? In other words, if the very reason for allowing the submission is that the amicus curiae arguably offers some special factual knowledge or technical expertise, shouldn't the parties have an opportunity to test its assertions through cross-examination?[154] Hence, while negotiating new investment agreements with its counterparties, China needs to consider that it is the tribunal's power to decide for itself whether to permit amici's access to hearings. This could be achieved simply by introducing a provision granting the tribunal the discretion to hold a hearing for an amicus to elaborate on or be examined on its written submission if either party so requests or the tribunal so decides.

VI. Conclusion

For the last decade, amicus intervention has become a central concept in the investment arbitration lexicon because it increases the transparency, accountability, and openness of arbitral proceedings, assisting tribunals in reaching more legitimate awards.[155] Although, the adoption of

150 *Id.*

151 *Id.*

152 *See* Levine, *supra* note 22, at 219.

153 *See* Simões, *supra* note 3, at 31.

154 Jean E. Kalicki, *The Prospects for Amicus Submission, Outside the ICSID Rules*, KLUWER ARB. BLOG (Sept. 14, 2012), *available at* http://kluwerarbitrationblog.com/2012/09/14/the-prospects-for-amicus-submissions-outside-the-icsid-rules/.

155 Fernando Dias Simões, *A Guardian and a Friend: The European Commission's Participation in Investment Arbitration*, 25(2)

amicus curiae provisions into the investment agreements has increased in China in recent years, it has been done cautiously because of concerns regarding the cost, time efficiency, and confidentiality of the ISDS system. This caution is well-reflected under the China- Australia FTA because the decision to allow amicus submission is still within the power of both disputing parties. Against this backdrop, this article proposes that China should strike a proper balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of ISDS in the upcoming investment agreements. This requires China to acknowledge that it is the discretion of tribunals to allow or accept amicus submissions and that both disputing parties cannot veto their decision. In parallel, to ensure that both parties will not be unduly burdened or unfairly prejudiced by amicus submission, this article proposes a procedure for when and how non-disputing parties may participate in arbitral proceedings. Only upon satisfying the strict criteria suggested above is a non-disputing party entitled to be invited as a genuine friend to intervene in arbitral proceedings.

A recent study showed that amicus submissions might have a positive impact on the outcome of investment arbitrations.[156] However, because of lack of access to relevant documents or oral hearings for amici, whether they have a better opportunity to make insightful contributions to the whole proceedings is in question. To ensure that maximum benefits can be realised from amicus participation, this article proposes that China establish the practice of granting amici access to relevant documents and oral hearings under the future investment agreements. Once amici curiae are provided with relevant documents and granted a chance to make oral examinations on their submissions, they may perform their function with greater benefits to the parties, the arbitration community and the public.[157] However, achieving the above should not come at the expense of undermining the confidential and protected information of both parties. Recently, although tribunals are willing to accept amicus briefs, in the absence of explicit treaty provisions that require the tribunals to take into account the amicus briefs in the decision-making process, they might rarely refer to the submissions.[158] As a result, the impact of amicus submissions on final awards would be negligible. An amicus submission normally provides a unique perspective concerning the protection of public interests, so it is essential for the tribunal to take the submission into account by at least summarising the unique perspectives provided therein and providing a detailed explanation as to why it has or has not used this perspective in the legal reasoning.[159] Pursuant to the BAC Rules, one of the most important developments regarding amicus intervention is that the Rules explicitly allow the tribunal to refer to and rely on amicus submissions in its orders, decisions and awards.[160] Hence, while negotiating new investment agreements with the counterparties, China needs to raise the above concern for debate.

This article examines the current Chinese attitude towards amicus intervention in ISDS proceedings. Through the analysis, the article concludes that the current amicus provisions under

MICH. ST. INT'L REV. 233, 234 (2017) [*hereinafter* "Simões - *Guardian*"].

156 *See* Butler, *supra* note 114, at 176.

157 *See* Simões, *supra* note 3, at 31.

158 *See* Simões - *Guardian*, *supra* note 155, at 234; Schliemann, *supra* note 34, at 389; Butler, *supra* note 114, at 176.

159 *See* Schliemann, *supra* note 34, at 390.

160 *See* BAC Rules, *supra* note 78, art. 36(10).

Chinese investment treaties still impose several restrictions on amicus participation in arbitral proceedings. Thus, non-disputing parties may find it difficult to persuade tribunals to grant them sufficient arbitral information and consider their submissions. Since 2017, leading arbitration institutions in China have showed their willingness to allow amicus submissions to help them render better awards by granting amici the access to relevant arbitral information and oral hearings. In addition, recent years have witnessed that the European Union and the United States are more willing to grant amici sufficient documents to prepare for their briefs and the opportunity to participate in oral hearings. Therefore, it can be predicted that a movement towards the expansion of the participatory rights of amici will be more noticeable under new Chinese investment agreements.