A Comprehensive Study on the Institution of Amicus curiae and the Current Practice inInvestor-State Arbitration

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Abstract

Amicus curiae, as a commonly used Latin term, the literal meaning is "friend of the court". Amicus curiae are ordinarily justified on the basis of the friends are in a position to provide courts or arbitral tribunals their special perspectives or expertise relating to a dispute. The emergence of amicus curiae in Roman times undoubtedly provided courts an essential method to avoid erroneous decisions, and this practice was well developed in both common law and civil law jurisdictions, also the modern international proceedings, such as the investor-state arbitration. Even though allowing amicus curiae participation in investor-state arbitration would increase disputing parties burdens because the parties have to spend extra times and costs for reviewing amicus submissions, amicus participation is indeed playing a crucial role in preserving the public interests involved in investment arbitration, assisting arbitral tribunals to reach legitimate awards, bringing allegations against state's illegal behaviours, contributing to the development of international investment law, and avoiding fragmentation of international law. Due to the benefits, the institution of amicus curiae has been officially adopted by modern investment treaty as well as prominent arbitration rules.

Keywords: Amicus curiae, Investor-State Arbitration, Public Interests, Transparency of Arbitration.

I: Introduction

Many scholars suggested that it is not feasible to give a comprehensive definition to *amicus curiae*, the reason underlying this concern is that the features and functions of *amicus curiae* have varied according to the historical moment and the country in which *amicus curiae* interventions have been accepted. *Amicus curiae*, as a commonly used Latin term, the literal meaning is "friend of the court".[1] *Amicus curiae* are ordinarily justified on the basis that the friends are in a position to provide courts or tribunals their special perspectives or expertise relating to a dispute.

Traditionally, investor-state arbitration was based on a decidedly "commercial" approach to dispute settlement favoring privacy and confidentiality.[2] Privacy of investor-state arbitration restricts general public's access to arbitral hearings and documents, and confidentiality restricts disputants, tribunals, and arbitral institutions from releasing any information regarding a dispute to outsiders.[3] Maintaining the confidentiality and privacy of arbitral proceedings aims to protect proprietary information, to avoid dissemination of trade secrets, and to block a similar claim from "free riders".[4] In order to protect these goals, *amicus curiae* who have significant personal interests or defend public interests, such as protection of human rights or environmental rights, by representing various and changing persons or collectives, are strictly forbidden to participate in arbitral proceedings. In addition, it has been widely acknowledged that allowing *amicus curiae* participation would increase disputing parties' burdens because the parties should spend extra times and costs for reviewing *amicus* submissions. If *amicus curiae* move beyond submission of written briefs, and seek "discovery of documents, evidence-taking, and

1 *Black's Law Dictionary (10th ed. 2014).*

2 *Asteriti Alessandra and Tams Christian J, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' (2010) International Investment Law and Comparative Public Law, 3.*

3 *Argen Robert, 'Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration' (2014) 40:1 Brooklyn Journal of International Law 207, 215.*

4 *Charles F Forer, 'Keeping the Confidential Arbitration Proceeding Confidential' (2015) The Legal Intelligencer.*

participation in oral arguments, there could be extra burdens placed on the efficiency of arbitral proceedings".[5]

For the last two decades, such traditional practice has received numerous criticisms because an investment dispute claim against a state normally refers to a state's judicial, executive, legislative measures concerning issues of public interests, like the interests of human right and environmental rights. One of the key goals of *amicus curiae* participation aims to ensure that arbitral tribunals take public interests or perspective of rights holders impacted by a potential award into account. In order to identify the necessity of *amicus* participation in investment arbitration, this Article will carefully examine the double-edged sword of *amicus* participation in arbitral proceedings and reach that even though the negative consequences of *amicus curiae* involvement have been claimed to refute the necessity of *amicus curiae* participation in investor-state arbitral proceedings, if the institution is well used, it could play an important role to preserve the public interests and improve the legal quality of arbitral awards.

In this Article, it firstly discusses how the traditional role of *amicus curiae* in Roman law has been undermined through analyzing the development of *amicus curiae* in both common law and civil law jurisdictions. The next section addresses the recent development of *amicus curiae* in WTO proceedings. In order to explore the current practice of *amicus* participation in investment arbitration worldwide, the following section firstly balances the concerns and benefits of *amicus curiae* participation and concludes that it is necessary to introduce *amicus curiae* into investment arbitral proceedings. The last section addresses the recent development of *amicus curiae* in investor-state arbitration.

II: *Amicus curiae* in Common Law and Civil Law Jurisdictions

It is still a controversial issue in terms of the origin of *amicus curiae*. Samuel Krislov suggested that this institution originated from Roman law and was well

5 *Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 Berkeley Journal of International Law 200, 219.*

developed in English common law. Since such institution cannot be found in Roman scripts and writings,[6] so many scholars, like Frank M. Covey. Jr, raised the doubt about the Roman origin[7] and further suggested "*amicus curiae* practice was an early institution used at common law, this can be seen from old definitions and description and early cases recorded in the Year Books."[8] Even though *amicus curiae* has not been expressly written in Roman scripts, like other renowned Roman institutions that cannot be traced back to the Roman scripts, it does not necessarily indicate that *amicus curiae* was not an institution from Roman times.[9]

One of the Roman traditions, as scholar John Crook discussed in 1955, is that "men in positions of responsibility should not take decisions alone".[10] In the Roman Republic, the consilium constantly assisted the Emperor by giving opinions and providing advice on legislative proposals and administrative orders, although these opinions and advice had no binding effect on the Emperor,[11] this tradition made a great contribution to the Roman origin of *amicus curiae*. The practice of Roman *amicus curiae* begun at the time when a group of jurists, or "academic lawyers", started to give opinions to courts on disputed point of law.[12] In addition, in the third century, the Roman emperors begun to hire leading jurists as members of the consilium,[13] and the Magistrates could depend on the opinions provided by the consilium while deciding cases.[14] As S. Chandra Mohan indicated, the members of

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6 *S.Chandra Mohan, 'The Amicus Curiae: Friends No More? ' (2010) Singapore Journal of Legal Studies 1, 10.*

7 *Frank M Covey. Jr., 'Amicus Curiae: Friend of the Court' (1959-1960) 9 DePaul L. Rev. 30, 34-35.*

8 *Mohan (n 6) 5.*

9 *ibid 13.*

10 *John Crook, Consilium Principis: Imperial Councils and Counsellors from Augustus to Diocletian (Cambridge: Cambridge University Press 1995) 4.*

11 *E.T. Salmon, Book Review of Consilium Principis: Imperial Councils and Counsellors from Augustus to Diocletian by John Crook, 11:1 The Phoenix 39 at 40.*

12 *A.D.E Lewis &D.J Ibbertson, eds., The Roman Law Tradition (Cambridge: Cambridge University Press 1994) 4.*

13 *Fritz Schulz, History of Roman Legal Sciences (Oxford: Clarendon Press, 1964) 101.*

14 *Wolfgang Kunkel, An Introduction to Roman Legal and Constitutional History (Oxford: Clarendon Press 1973) 97.*

the consilium should be independent and non-partisan legally trained persons. When a court needed the help of an impartial and wise friend, then, based on the invitation of the court, the members shall be called to offer their opinions.[15] So pursuant to the early Roman practice, *amicus* participation should be deemed an institution used in Roman law.

The emergence of *amicus curiae* in Roman times undoubtedly provided courts an essential method to avoid erroneous decisions, and this practice was well developed in both common law and civil law jurisdictions, also the modern international proceedings. This section reviews the developments of *amicus curiae* in a number of domestic legal systems.

1. Common law Jurisdiction

The practice of *amicus curiae* in common law jurisdiction started at the time when the courts in England officially acknowledged the term, "bystander", in the 13th century.[16] A bystander, who is not necessarily a lawyer, can be permitted to provide factual and legal information to a court.[17] This practice was formed because criminal defendants were not entitled to defense by counsels,[18] so in order to avoid judicial errors and ensure justice, a court could allow a bystander that is "present may inform the court for the benefit of the prisoner of anything that may make the proceedings erroneous". As Krislov described, "common law role of *amicus curiae* as that of the disinterested bystander who offered the court important information or suggestion."[19] In addition, the early English barristers, or the "serjeants-at-law",[20] were regularly consulted to provide services to the courts. Furthermore, at that

15 *Mohan (n 6) 14-17.*

16 *Ernest Angell, 'The Amicus Curiae: American Development of English Institutions' (1967) 16 Int'l & Comp. L.Q. 1017.*

17 *Helen A Anderson, 'Frenemies of the Court: the Many Faces of Amicus Curiae' (2015) 49 U. Rich. L. Rev 361, 367.*

18 *Herman Cohen, A History of the English Bar and Attornatus to 1450 (London: Sweet & Maxwell Ltd 1929) 12-13.*

19 *Mohan (n 6) 7*

20 *Cohen (n 18) 218-219*

time, due to the insufficiency of reporting cases in England,[21] courts urgently needed assistances from outsiders. The emergence of "oral shepardizer"[22] has resolved the obstacle because the "oral shepardizer" intended to provide the court with impartial information.[23]

As noted above, the institution of *amicus curiae* originally served as the judiciary's impartial friends, but the adversarial system of common law gradually undermined the traditional role. "Trail by duel", as the key norm of common law, provides that parties to a dispute are the only masters to the suit, and any stranger cannot interfere.[24] Thus, during the proceeding under the adversarial system, the interests of third parties were normally ignored. In response to this inequity, common law courts have begun to accept *amicus* who can represent third party interests since 1736. In *Coxe v. Phillips,*[25] the common law court, for the first time in history, permitted an *amici* submission in order to preserve the court honor by avoiding mistakes, and also to serve the purpose of representing third-party interests. As Michael K. Lowman stated, the *Coxe* enabled *amicus curiae* to serve dual masters: the interests of both courts and *amicus curiae*.[26]

Amicus curiae practice started relatively late in the United States due to the concept of dual state and federal sovereignties, which increased "the number of third party interests potentially left without representation in the course if a two-party trial."[27] The reasons are well presented by Michael K. Lowman, firstly, the legal notion of trail by duel was adopted by the United States. Since controlling the course of litigation was the sole privilege of the parties, third party intervention

21 *Mohan (n 6) 8*

22 *Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' 72 Yale LJ, 694, 695.*

23 *Allison Lucas, 'The Ethics of Amicus Curiae Brief Writing in First Amendment Litigation' (1998-1999) 26 Fordham Urb. L.J 1605, 1607*

24 *Michael K Lowman, 'The Litigating Amicus Curiae: When does the Party Begin After the Friend Leave' (1992) 41 The American University Law Review 1243, 1249.*

25 *Coxe v. Phillips, 95 Eng. Rep. 152 (K.B. 1736).*

26 *Lowman (n 24) 1250*

27 *ibid.*

was commonly restricted.[28] Furthermore, due to the "two procedural concepts, the standing[29] and the complete diversity of citizenship[30], which further limited the opportunity of third parties to represent their interests in the federal forum".[31] Federal courts did not welcome intervention from a third party, however, faced a growing number of interests, especially public interests, with a need for proper representation in the courts of private suits.[32] In response to the imbalance, based on the courts' inherent power to control its processes to prevent abuse, oppression, and injustice, the courts began to rely on informal means to assure that those interested parties should be granted a chance to represent themselves.[33]

The turning point for *amicus* intervention was the *Green v. Biddle*[34] in 1823, it is the first time that the federal system has officially accepted *amicus curiae*. In *Green,* Henry Clay, who acted on behalf of the government of Kentucky, filed a motion to rehear a case involving land holding of the State of Kentucky because the State's interest was left to be represented in trial. Pursuant to the decision rendered by the Federal court, the role of *amicus curiae* in the United States was no longer as an impartial party aiming to offer assistance to courts.[35] Since then, both the Federal and State governments have constantly acted as *amicus curiae* in civil litigation.[36] After nearly two centuries' development of *amicus curiae* in the United States, *amicus curiae* practice has become a fixture in the federal judicial system. As Professor Anderson suggested, *amicus curiae* falls into six types at present, which are governmental *amici*, the court's lawyer, the invited friends, friends of a party, independent friend, and near intervenors.[37] One conclusion the Article

28 *Krislov (n 22) 698.*

29 *Lowman (n 24) 1252.*

30 *ibid 1252-1253.*

31 *ibid 1251*

32 *Krislov (n 22) 697*

33 *Krislov (n 22) 699.*

34 *Green v. Biddle, (1823) 21 U.S. (8 Wheat.) 1, 17-18.*

35 *Lowman (n 24) 1254.*

36 *Krislov (n 22) 701-702*

37 *Anderson (n 17) 374-384.*

can reach here is that traditional role of *amicus curiae*, serving as impartial assistants to the judiciary as well as providing advice and information to a mistaken or doubtful courts, has been undermined due to the adversary judicial process of the United States.

2. Civil Law Jurisdiction

As previously mentioned, *amicus curiae* is an institution dating back to Roman times, but the practice of *amicus curiae* started relatively late in civil law jurisdictions. As commentator Steven Kochevar suggested, *amicus curiae* development in civil law jurisdictions can be split into two trends, namely formal recognition of *amicus* briefs and informal acceptance of *amicus* briefs in civil law courts.[38]

Numerous civil law countries have formally established the practice of *amicus curiae* by modifying the procedural rules and statutes, or court decisions. For instance, several Latin American countries, like Brazil, Argentina, Peru, Mexico, have altered their court's procedural rules to cater to the demand for *amicus* participation.[39] Across the Atlantic, France, as one of the main European civil law countries, has officially acknowledged this institution in its procedural system as far back as the 1990s.[40] In 1998, the Paris Court of Appeal invited the President of the Paris Bar to "provide in the presence of all interested parties, all the observations that may enlighten the court in its process of solving the dispute"[41] as an *amici*. Under the definition given by the court, *amici* is neither a witness who certifies facts nor an expert who offers a technical opinion to the courts, but gives its opinion and shares its knowledge "within the court on a general topic that may impact several disputes and that often relates to a subject giving rise to debates within the society."[42]

38 *Steven Kochevar, 'Amici Curiae in Civil Law Jurisdiction' (2013) 122 Yale L.J 1653, 1659.*

39 *ibid.*

40 *Hogan Lovells, 'France and the Concept of Amicus Curiae: What Lies Ahead' (2012) Lexology <http://www.lexology.com/library/detail.aspx?g=5863bcb7-8662-43ba-b66a-812bfc23b409 > accessed 28 July 2017.*

41 *ibid and Paris Court of Appeal, 21 June and 6 July 1988, Gaz. Pal. 1988, 2, 700, Note Laurin*

42 *Kochevar (n 38).*

At that time, *amicus curiae* practice was not acknowledged by the rules of the French Code of Civil Procedure due to the objection of the French courts. In 2010, the concept was officially codified in Article R. 625-3 of the French Code of Administrative Justice (Decree no. 2010-164) and followed by Article L. 621-20 of the French Monetary and Financial Code. Due to the development of *amicus curiae* in each independent European country, European laws have been altered to meet the demand. For instance, pursuant to Article 15 (3) of the Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition Laid Down in Article 81 and 82 of the Treaty, European courts are bound to allow competition authorities of the member states as well as the European Commission to make written submission concerning issue of antitrust. In addition, with the permission of the courts, they are allowed to provide oral observations.[43]

Compared with formal acknowledgement of *amicus curiae*, the method of informal submission of *amicus* is more widespread in civil law jurisdictions. The practice normally takes place with the participation of Non-Governmental Organizations ("NGOs") or not-for-profit organizations where a civil law country has no explicit codes or court procedural rules to govern *amicus* participation. To be more specific, the International Trademark Association, acting as an *amici*, offered expertise in trade law to several civil law courts around the world through *amicus* briefs, even though these courts have not formally recognized *amicus curiae* practice.[44] Presently, NGOs are playing a more important role in civil law jurisdiction by assisting courts with their expertise in a broad range of subjects. As Kochevar concluded, "it is difficult to comprehensively measure the scale and success of informal NGO *amicus* operations in civil law courts. However, the variety of prominent NGOs involved suggests that the practice is perceived to be worthwhile."[45]

43 *Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 15(3). " <http://www.wipo.int/wipolex/en/text.jsp?file_id=181659 > accessed 28 July 2017.*

44 *Kochevar (n 38) 1662.*

45 *ibid 1663.*

III: *Amicus curiae* Participation under International Proceeding: WTO

The concept of *amicus curiae* has been accepted in a number of domestic legal systems, also it gained the recognition in various international proceedings, such as the WTO. The Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"),[46] as the Rules governing the settlement of disputes under the WTO, does not contain any specific language allowing *amicus* participation. Even though non-member countries, law firms, and NGOs have put numerous efforts in persuading the Dispute Resolution Panels ("the DRP") and the Appellate Body ("the AB") chosen by the Dispute Settlement Body ("the DSB") to consider their *amicus* petitions before 1998,[47] none of them have been permitted because both the DRP and the DSB regarded the WTO dispute settlement system to be "strictly inter-governmental in nature, and believed they should address only those claims and arguments submitted by parties to the disputes".[48] The turning point was reached in the *Shrimp - Turtle* Decision.[49] Since then, the practice of *amicus curiae* has been gradually developed at the WTO through a series of cases.

1. Power to Accept *Amicus* Briefs by the DRP: the *Shrimp -Turtle* Decision

In *Shrimp - Turtle*, four WTO Member States, India, Thailand, Malaysia, and Pakistan, brought a claim against the import ban of shrimp issued by the United States. The claimants claimed that the ban was discriminatory because the U.S. breached the duty pursuant to Article 11 of the GATT. On the contrary, the U.S. refuted that in accordance with the 1973 Endangered Species Act, all shrimping vessels must be fitted with Turtle Excluder Devices ("TED"), since the claimants

46 *Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO) (adopted 15 April 1994) <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 29 July 2017.*

47 *Jared B Cawley, 'Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organization', (2004) 23:1 Penn State International Law Review 47, 61.*

48 *Henry S Gao, 'Amicus Curiae in WTO Dispute Settlement: Theory and Practice', (2006) 1 China Rights Forum 51, 52.*

49 *U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 1, 12 October 1998 [hereinafter Shrimp-Turtle].*

failed to use TED to protect turtles, the U.S. is entitled to ban importation of shrimps from these countries to preserve the endangered sea turtles. During the proceeding, two *amicus* submissions were made to the DRP by three NGOs, and the main issue that the DRP needed to confirm was whether Article 13 of the DSU specifically granted the right for NGOs participation.[50] Article 13 states that:

> "each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate, also panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter"[51]

Based on that, the claimants argued against the NGOs' submissions based on, firstly, only the DRP has discretion in seeking information relating to the case, when seeking information, the panel has to notify the contending Members that such information was being sought. Furthermore, WTO Member States cannot be granted the chance to make *amicus* submission, so it would be unfair for the DRP to accept submissions from the NGOs. Thirdly, *amicus* briefs would cause undue burdens to the opposing party as well as the DRP.[52] So the DRP should reject the submissions in this dispute. The U.S, on the opposite side, argued "Article 13 permitted a panel or appellate body to accept *amicus* submission by any source it so chose, it does not specifically deny the submission of those *amicus* merely because they were unsolicited."[53] The DRP, based on the arguments made by the claimants, denied the *amicus* submissions but admitted that any party to the dispute could attach the *amicus* submissions to their own submission.[54] Finally, the DRP made the determination that "the import ban by the U.S. was a threat to the multilateral trading system."[55]

Subsequently the U.S. has made an appeal to the AB. During the appellate

50 *Cawley (n 47) 64.*

51 *DUS (n 46) art13.*

52 *Shrimp - Turtle (n 49) 10.*

53 *Cawley (n 47) 64*

54 *Gao (n 48).*

55 *Shrimp - Turtle (n 49) 5.*

proceeding, the AB made an official explanation in terms of Article 13, "Article 13 grants each panel the authority to seek information, as well as the authority to seek no information at all."[56] This authority should be considered with the Article 12.2, which authorizes panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process. This authority "grants to the panels by the DSB, does not seek to limit the information available to the panels in deciding a dispute; on the contrary, it grants the panel the authority to accept or reject any information that is submitted, even without being requested."[57] So the AB held that denying to consider *amicus* briefs from these NGOs by the panel was unjust. This case confirmed that the DRP has the discretionary power to accept *amicus* briefs from NGOs even if the briefs are unsolicited.

2. Power to Accept *Amicus* Briefs by the AB: the EU- British Decision

The case of *EU- British*[58] has made a further contribution to the development of *amicus curiae* practice at the WTO because the AB has officially acknowledged its authority to receive and consider NGOs' *amicus* briefs. During the panel proceeding of *EU-British*, the panelists rejected the *amicus* brief submitted by the American Iron and Steel Institute ("AISI") because they hold that the brief was not submitted in time.[59] AISI, along with the Specialty Steel Industry of North America, resubmitted the brief at the time when the U.S. appealed. During the appellate proceeding, after taking the objection made by the claimants into account, the AB reclaimed that the DRP has the authority to decide whether or not to receive *amicus* brief pursuant to the interpretation of Article 13 made by the AB in *Shrimp –Turtle*.[60] The AB held it has the authority to accept *amicus* briefs on the basis that, firstly, the

56 *Cawley (n 47) 66.*

57 *ibid.*

58 *U.S.-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R 1, 10 May 2000 (hereinafter EU-British).*

59 *Adideh Ala'i, 'JudicialLobbying at the WTO: The Debate Over the Use of Amicus Curiae Briefs and the U.S. Experience', (2000) 44 Fordhan Int'l L.J. 62, 77.*

60 *Cawley (n 47) 70.*

DSU and the Working Procedures for Appellate Review[61] ("Working Procedures") neither specifically provide nor explicitly prohibit the acceptance or consideration of *amicus* briefs by AB.[62] Furthermore, Article 17.9 of the DSU and Article 16.1 of the Working Procedures state that:

> "in the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules."

Thus combining the reasons above, the AB found that it has the authority to accept or consider unsolicited *amicus* briefs submitted by NGOs.

3. Establishing Procedural Conditions Concerning *Amicus* Submission for the Appellate Proceedings

In order to secure *amicus* participation rights as well as to protect public interests, the AB of the *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*[63] created another set of procedural rules, the "Additional Procedure", pursuant to Rule 16(1) of the Working Procedures in spite of continued criticism.[64] The AB stated that any natural or legal person, other than a party or a third party to the dispute, who desires to make *amicus* brief, must petitions the AB for leave to grant *amicus* status in the first instance.[65] The paragraph 3 lists seven detailed criteria for the application for leave to be granted *amicus* status, and the most important one for the applicant is:

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61 *Working Procedures for Appellate Review (adopted on 16 August 2010) <https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm > accessed 1 July 2017.*

62 *ibid.*

63 *Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products ("EC-Asbestos"), WT/DS135/AB/R, adopted 5 April 2001; Panel Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products ("EC—Asbestos"), WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R.*

64 *Gao (n 48) 53.*

65 *Additional Procedure, para. 2.*

> "to state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute."[66]

After releasing the "Additional Procedure", 17 applications requesting leave to make submission have been made, 6 briefs were denied on the ground that they were not filed on time. Even though the rests were filed on time, but all were denied because the AB found none of them sufficiently compliant with the requirements set forth in the "Additional Procedure".[67] Since then, both the DRP and the AB have officially acknowledged the practice of *amicus curiae* at the WTO, which makes a great contribution to the emergence of *amicus curiae* practice in other international proceedings, especially the mechanism of investor-state arbitration.

VI: Double-Edged Sword of *Amicus curiae* Participation in Investor-State Arbitration

Before surveying the recent development of *amicus curiae* participation in investor-state arbitration, this section firstly discovers the double-edged sword of *amicus* participation in investment arbitral proceedings, and further summarizes that promoting *amicus curiae* participation in investor-state arbitration is imperative. After proving the need for *amicus* participation, the following sections will address the current practice of *amicus* participation based on treaty provisions, arbitral rules, as well as prominent tribunal decisions.

66 *ibid, para 3.*

67 *Gao (n 48) 53.*

1. Negative Impacts of Allowing *Amicus curiae* Participation

In order to fully answer the question of the potential benefits of *amicus* involvement in arbitral proceeding, there is a strong demand to conduct a research on the potential negative consequences of *amicus* participation in the first place. There are several main arguments against a radical expansion of *amicus* participation in investor-state arbitration.

To begin with, it has been widely acknowledged that allowing *amicus curiae* participation would increase disputing parties burdens because the parties shall spend extra times and costs for reviewing *amicus* submissions.[68] If *amicus* move beyond submission of written briefs, and seek discovery of documents, evidence-taking, and participation in oral arguments, "there could be extra burdens placed on the efficiency of the process."[69] Compared with domestic litigation, efficiency is deemed as one of the most prominent advantages of arbitration. So if tribunals voluntarily open the door for *amicus* participation, the arbitral process in this manner "would result in the arbitration procedure becoming "court-like" adjudication."[70] Secondly, confidentiality of arbitration would be undermined, especially where the tribunals permit *amicus curiae* to access to key arbitral records.[71] Furthermore, *amicus curiae* normally arise from those investment disputes relating to public interests, so it has been argued that the increased *amicus* participation could lead to lessening of settlement opportunities if the *amicus* are the best parties or persons representing the public interest.[72] As arbitration specialist Noah Rubins stated, it is unavoidable that where a "claim gains exposure to the public domain, the parties could face increased pressure to continue the substantive outcome of the case."[73] This is even true where a state, as a disputing party to an

68 *Levine (n 5), 219.*

69 *ibid.*

70 *Noah Rubins, 'Opening the Investment Arbitration Process: What Cost for What Benefit?' (2006) Transnat'l Disp. Mgmt, 137.*

71 *Levine (n 5) 220.*

72 *ibid.*

73 *Rubins (n 70) 137.*

investment dispute, faces additional pressures because given its perceived obligation to protect the right to regulate and the public good generally.[74] As Rubins suggested, allowing *amicus curiae* involvement 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."[75] As illustrated above, the concerns of increasing costs, severe delay, losing confidentiality, and potential politicization drive investors to rethink the choice of resolving their disputes through investor-state arbitration mechanism, which could cause investors to cut down or suspend their investments in those countries with uncertain or less stable investment environment.

2. Benefits Stemming from *Amicus curiae* Participation

The negative consequences of *amicus curiae* involvement have been used to refute the necessity of *amicus* participation in investor-state arbitral proceedings, but if the institution of *amicus curiae* is used well, it may legitimize the overall arbitration system. Based on previous studies on the potential benefits stemming from *amicus curiae* participation in investment disputes made by many scholars, there are at least five reasons:

Firstly, due to the general public interests involved in investment disputes, increasing transparency of arbitral proceedings could preserve those interests and promote the procedural legitimacy of investment arbitration. Generally speaking, *amicus curiae* involvement, as a component of transparency in investment arbitration, can "promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration as secretive."[76] In addition, specific public interests, such as human rights and environmental rights, are involved in most of the investment disputes. These interests are often left to be well represented because both of the disputing parties are strictly bound to focus on the legal and factual issues. Any disputing party may find it advantageous to raise

74 *Levine (n 5) 220.*

75 *Rubins (n 70) 137.*

76 *Levine (n 5) 217.*

the public interests during the proceedings, but the disputing party is not always the expert or specialist concerning the public interest. Therefore lacking sufficient expertise, tribunals might not be persuaded to rely on the statements made by the party while making the determination on the issue of public interests. Admitting *amicus curiae*, especially NGOs, could resolve the concern since most of the NGOs are equipped with the expertise, they could provide distinct and important perspectives on public interests that the disputing parties might not be able to provide, so giving *amicus curiae* a chance to address the matter within the scope of the dispute shall preserve the public interests.[77]

Secondly, *amicus* participation plays an important role in improving the legal quality of arbitral awards. For instance, pursuant to Rule 37(2)(a) of the ICSID Arbitration Rules, *amicus curiae* shall be permitted to make a written submission where "the submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[78] So where a factual or legal issue has not been well addressed by neither of the disputing parties, allowing *amicus* submission could provide the tribunal an extra layer of expertise or perspective on issues that was not provided by the disputing parties, and could further improve the quality of award.[79]

Thirdly, *amicus curiae* participation could be regarded as the mechanism to bring relevant allegations against illegal behaviors conducted by both disputing parties. It is undeniable that an investment agreement may be concluded based on illegal behaviors of the host state and the investor, for instance, violation of state's duties, or corruption and bribery, but there are likely to be situations where neither the host state nor the investor would consider it would be advantageous to disclose

77 *ibid.*

78 *ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (adopted April 2006). <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-Rules.aspx> accessed 29 July 2017.*

79 *Katia Fach Gomez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorable for the Public Interest' (2012) 35 Fordham International Law Journal 510, 545.*

the illegal behaviors. From the perspective of the investor, bringing the illegality before the tribunal would not be a sound strategy because an illegal investment agreement could impede the investor's ability to claim compensation. For the state, it might not voluntarily disclose its illegal behaviors before the tribunal because its acknowledgement of illegality might cause further legal actions against the illegal conducts by authorized entities. Therefore, offering *amicus curiae* a chance to participate in arbitral proceedings could help the public to get access to the key information about the dispute, especially whether the investment agreement was illegally concluded. In addition, if there is a mandatory requirement of *amicus curiae* participation in investment arbitration, host states and investors may reconsider their illegal investment conduct before entering into an illegal agreement on the basis of the illegality of the agreement might be exposed to the public.

Furthermore, as some commenters suggested, *amicus curiae* participation would have the positive effect of public scrutiny on the future of the investment system. To be more specific, *amicus curiae* arise from investment disputes with important public interests, when the *amicus* submission has been made before the tribunal, the submission could attract media interests and influence public debates on these public interest topics.[80] Therefore, the submission made by *amicus curiae* could have a "long-term educational impact or even be an influence for significant changes in the future, such as a national legislative modification or the establishment of an international instrument to regulate a particularly sensitive issue."[81]

The last point is that the fragmentation of international law has been criticized for many years because even if international conduct is legal under one international regime,[82] it could be deemed as illegal under another international regime. So it has been argued that it is a massive challenge for international investment law to be interpreted consistently with international laws, such as

80 *Camilla Graham, 'Amicus Curiae & Investment Arbitrations' Part Two (2012) A4ID Advocates for International Development, 6-10.*

81 *Gomez (n 79) 548.*

82 *Levine (n 5) 218.*

human rights law, environmental treaties and WTO law. Many commentators stated that "a lack of coordination at the international level may lead to national authorities increasingly becoming subject to conflicting commands from different supranational systems."[83] In order to prevent the fragmentation of international law, especially international investment law, increasing participation by representative of supranational regimes, such as the European Union Commission, could assist investment arbitral tribunals to reach a more consistent decision, which will avoid causing conflicting obligations for national governments.[84]

V: Current Practice of *Amicus* Participation in Investor-State Arbitration

As noted above, *amicus* participation in investment arbitration could cause negative impacts and bring potential benefits to the international investment law system. It is undeniable that the negative impacts could cause both host states and investors to rethink the efficiency of investor-state arbitration, but if the *amicus curiae* regime is used well during arbitral proceedings, the benefits will prevail. For instance, the North America Free Trade Agreement[85] issued a Statement of the Free Trade Commission on Non-Disputing Party Participation ("NAFTA Statement") in 2003[86] to cater to the urgent demand for *amicus curiae* participation. In 2006, the ICSID Arbitration Rules was rewritten to allow *amicus* participation and with certain admission criteria attached. The most unprecedented UNCITRAL Transparency Rules, came into effect in 2014, providing greater transparency in terms of the arbitral proceedings, especially by attaching the detailed criteria on *amicus curiae* participation. Moreover, provisions on *amicus* participation in recent

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ibid.

84 *ibid.*

85 *North America Free Trade Agreement, ("NAFTA") (US-Canada-Mexico) (adopted October 1992, entered into force 1 July 2003) <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed 29 July 2017.*

86 *NAFTA Statement of the Free Trade Commission on Non-Disputing Party Participation ("NAFTA Statement"), (US-Canada-Mexico) (issued 7 October 2003), B para 6. <https://www.state.gov/documents/organization/38791.pdf> accessed 29 July 2017.*

Model BITs have seen the light of day.[87] In the following sections, a detailed study concerning the current practice of *amicus curiae* pursuant to the NAFTA, the ICSID Arbitration Rules, the UNICITRAL Transparency Rules, as well as the recent model IITs will be conducted.

1. *Amicus curiae* Participation Pursuant to the NAFTA

The development of *amicus curiae* in investor-state arbitration was lead by the NAFTA.[88] The NAFTA context itself did not create any discretionary power for the tribunals to allow *amicus curiae* involvement, also the arbitral rules governing arbitral proceedings contemplated in NAFTA Chapter 11 spent no ink on this issue at that time.[89] Thus the NAFTA tribunals have not permitted a single *amicus curiae* petition for many years on the ground that, unless mutual consent has been reached by both disputing parties, they lack the power to add a third party into the arbitral proceedings. This traditional view has been given a critical strike when the NAFTA tribunal of *Methanex Corporation v. United States of America* ("Methanex") reached the conclusion that they have discretionary power to decide whether it is proper to introduce *amicus curiae* into the arbitral proceedings.

In *Methanex*, Methanex Corporation, as a Canadian corporation producing a gasoline additive, MTBE, in the United States, filed a claim against the State of California before the NAFTA tribunal pursuant to the UNCITRAL Arbitration Rules in 2000. Methanex alleged that the State's executive order requiring the removal of MTBE was tantamount to expropriation of its business in accordance with Article 1110 of NAFTA. On the contrary, the State of California argued that MTBE is banned for the purpose of protecting public health and environment since MTBE was dam-

87 *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' (2013) 12 The Law and Practice of International Courts and Tribunals 365, 366.*

88 *James Harrison, 'Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration' (2011) 01 University of Edinburgh School of Law Working Paper Series, 2, 15.*

89 *J. Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation' (2007) 52 Mcgill Law Journal 681, 708.*

aging drinking water in California. During the merits phase of the proceeding, the International Institute of Sustainable Development, with several NGOs, submitted a petition for permission to make a written *amicus* submission by arguing that "they could provide an important and distinctive perspective on the environmental issues in the case and that their participation would be important to the public acceptance of the Chapter 11 process."[90] Methanex promptly raised a rejoinder against the petition and claimed that the tribunal had no authority to permit the petition.

During the proceedings, the core issue was whether Rule 15 of the UNCITRAL Arbitration Rules included the right of making submission by *amicus curiae*. Since the Rule only explicitly provides that all parties to a dispute shall be treated with equality and allowed to present their case, but does not expressly indicate whether a third party is entitled to file submission before the tribunal. The tribunal heard vigorous arguments from the disputing parties as well as the Contracting States to the NAFTA. Firstly, the United States and Canada argued that *amicus curiae* should be allowed under Rule 15 based on the ground that *amicus curiae* is a well established institution in both domestic legal systems. But Methanex Corporation and the Contracting State, Mexico, on the opposite side, argued that "the right to file an *amicus* submission was a substantive right that could not be read into a procedural provision such as Rule 15."[91] The tribunal held that any investment disputes arising out of NAFTA should be resolved pursuant to international law, but not domestic law. So the acknowledgement of *amicus curiae* in both American and Canadian domestic legal systems does not imply an absolute right for *amicus* participation in investment arbitration. Furthermore, the tribunals pointed out that Rule 15 provides them the discretion regarding procedural issues, and due to the public interests involved in the case[92] and "accepting *amicus curiae* briefs from a party other than a disputing party is not the equivalent of adding that entity as

90 *ibid 709.*

91 *Meg Kinnear, General Counsel, Trade Law Bureau, Departments of Justice & International Trade Canada 'Transparency and Third Party Participation in Investor-State Dispute Settlement' (SYMPOSIUM CO-ORGANISED BY ICSID, OECD AND UNCTAD, Paris, 12 December 2005) <http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf > accessed 29 July 2017.*

92 *VanDuzer (n 89) 711.*

a party to the arbitration."[93] The tribunal held that *amicus* involvement must be limited to submitting written briefs on the issues raised by the parties. The tribunal did not illustrate the procedures and criteria applicable to *amicus* participation. In order to give a specific guideline for tribunals as well as to avoid potential negative impacts that *amicus* participation could bring, the NAFTA Free Trade Commission, in 2003, issued the NAFTA Statement recommending that the tribunals could adopt the procedure specified therein to deal with *amicus* participation.

The first section claims that "no provision of the NAFTA limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party."[94] The second section, the Procedures, recommends that Chapter 11 tribunals to adopt the attached specific procedure. Under the Procedures, any non-disputing party who wishes to file a written submission should apply for leave from the tribunal to file such a submission, and the submission shall be attached to the application. The second paragraph of the Procedures outlines the specific requirements for the application, for instance, it requires the *amici* to describe whether it has any direct or indirect affiliation with any disputing party, and to specify the nature of interests that the applicant has in the arbitration, etc. The third paragraph addresses that the *amici* has to provide a precise statement supporting the position only on the issues raised by disputing parties. Paragraph 6 provides several criteria to be applied by tribunals when deciding if an application may be granted. The tribunal should consider the extent to which:

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

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

93 *Eric De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' (2011) 12 Chicago Journal of International Law 85, 100.*

94 *NAFTA Statement (n 86) A para 1.*

(c) the non-disputing party has a significant interest in the arbitration; and

(d) there is a public interest in the subject-matter of the arbitration.[95]

In addition, in determining whether to grant leave for making a submission, the tribunal must ensure that the submission does not disrupt the proceedings and unduly burden or unfairly prejudice neither disputing party. The statement itself is not binding on the future NAFTA tribunals because it is just a recommendation regarding a process for tribunals to follow.[96] In conclusion, notwithstanding the absence of any reference to *amicus curiae* participation in both of the NAFTA and the applicable arbitral rules as well as the non-binding nature of the Statement, the NAFTA tribunal established under the NAFTA have demonstrated that: "they are open to the possibility that submissions from NGOs of varying political orientations may be of assistance in resolving the issues before then and have applied a process and criteria for the acceptance of *amicus curiae* submissions that follows the FTC Statement."[97]

2. *Amicus curiae* Participation in Accordance with the ICSID Arbitration Rules

Before 2006, the ICSID Convention, the ICSID Arbitration Rules, and the Additional Facility Rules, sharing the practice of the NAFTA context, have no explicit words indicating ICSID tribunals' discretionary power to accept *amicus* submissions. With more *amicus* briefs being accepted under NAFTA arbitrations, the ICSID urgently needed to adopt a new version of the arbitral rules, especially granting the tribunals the discretionary power to consider and accept *amicus* briefs.

The practice in terms of the tribunals' power to accept *amicus curiae* briefs started from the *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic* (Suez/Vivendi)[98] in 2005. During the arbitral

95 *ibid B para 6.*

96 *VanDuzer (n 89) 709.*

97 *) ibid, 716-7.*

98 *Suez/Vivendi, ICSID Case No. ARB/03/19. <http://www.italaw.com/cases/1057> accessed on 27 July 2017.*

proceedings, five NGOs asserted that the case involved basic public interests and fundamental rights of the people living in the area. Even though the old ICSID Arbitration Rules did not explicitly grant the tribunals the power to accept *amicus curiae* petition, the tribunal held it had the power to regulate procedural questions in accordance with Article 44[99] of the ICSID Convention. Since the admission of *amicus* briefs falls into the content of procedural questions, the tribunal, for the first time in ICSID history, held that it had the power to accept *amicus* briefs.[100] In *Suez*, the tribunal also set out three criteria under which such submissions could be admitted:

> "(a) the appropriateness of the subject matter of the case;
>
> (b) the suitability of a given nonparty to act as *amicus curiae* in that case; and
>
> (c) the procedure by which the *amicus* submission is made and considered."[101]

The tribunal examined whether the petition fully satisfied the conditions stated above, as to the first criterion, the tribunal believed that this case had significant public interests because the dispute centered on water and sewage services to millions of people, and any decision made in this case would potentially affect the operation of those systems and thereby the public they serve.[102] With respect to the second criterion, after identifying the expertise, experience, and independence of the petitioners, the tribunal members held that the submission made by the petitioners would assist them arriving at a correct decision.[103] Lastly, as to the appropriate procedure, the tribunal concluded that when an appropriate procedure has been determined, the goal of such procedure "will be to enable an

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99 *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ("ICSID Convention") <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.p> accessed 28 July 2017.*

100 *Order in Response to a Petition for Participation as Amicus Curiae, para 10-16 (19 May 2005). <http://www.italaw.com/sites/default/files/case-documents/ita0815.pdf> accessed 29 July 2017.*

101 *ibid para 17.*

102 *ibid para 18-23.*

103 *ibid para 24-28.*

approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties."[104] Then the tribunal concluded that the three criteria had been met, and decided to grant the petitioners a chance to file submission.

In 2005, the ICSID Secretariat made a proposal to update its arbitral rules for greater transparency, especially granting the tribunal the discretionary power to allow *amicus* participation. In the following year, the ICSID Administrative Council adopted the new 2006 amendments establishing the criteria to be applied by tribunals when considering *amicus* petitions. As Professor VanDuzer suggests, the criteria set out in the amendments "are virtually identical to those enumerated in the FTC Statement."[105] Pursuant to the new Rules, the most significant change was the Rule 37(2), the second paragraph stipulating that:

> "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
>
> *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
>
> *(c) the non-disputing party has a significant interest in the proceeding.*
>
> *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present*

104 *ibid para 29.*

105 *VanDuzer (n 89) 717.*

their observations on the non-disputing party submission."[106]

3. *Amicus curiae* **Participation Bases on the UNCITRAL Transparency Rules**

As previously mentioned, the main purpose of the UNCITRAL Arbitration Rules aims to address commercial arbitration between private parties, but the Rules has also become one of the most common choices for investors and states to govern their arbitral proceedings. As discussed earlier, even though several NAFTA tribunals held that considering and allowing *amicus* participation is a procedural question pursuant to Rule 15, the tribunals have discretionary power to permit *amicus* petitions and submissions. But such acknowledgement is limited to within the framework of the NAFTA only. In 2013, the United Nations Commission adopted the new Arbitration Rules, UNCITRAL Transparency Rules[107], which "would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment dispute, increasing transparency and accountability and promote good governance."[108] In line with previous practices of the NAFTA and the ICSID tribunals, the Rules affirm the tribunals' authority to accept submission from a third party, but also one of the biggest breakthroughs of the Transparency Rules is that it explicitly grants non-disputing Contracting States to the treaty the right to make submission on treaty interpretation or further matters within the scope of the dispute.

A third party refers to a person who is not a disputing party to the dispute or a Contracting State to the treaty. Before making a submission to address matters within the scope of the dispute, a third party should petition the UNCITRAL tribunal to be granted *amicus* status in the first place, this practice follows the practices of the NAFTA and the ICSID Arbitration Rules. In order to persuade the tribunal to grant *amicus* status, the party is bound to provide the necessary information specified in

106 *ICSID Arbitration Rules (n 78) Rule 37(2).*

107 *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ("UNCITRAL Transparency Rules") (came into force 1 April 2014) <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 29 July 2017.*

108 *ibid.*

Article 4(2), for example, the description of the third party, the direct or indirect connection with any disputing party, the financial support or other assistance that it receives from any government, person or organization, the nature of its interest in the arbitration, and the issues of fact or law in the arbitration that it wishes to address.[109] Upon receiving the petition, the tribunal must take the following two criteria into account in determining whether to grant *amicus* status: (a) whether a significant interest can be represented by the party; (b) whether the potential submission could assist the tribunal in the determination of the factual and legal issue related to the arbitral proceedings.[110] If the petition satisfies both factors indicated above, then the third party is permitted to file a submission to address matters within the scope of the dispute by setting out a precise statement of its position on the specific issues.[111] Besides the guideline discussed above, the Rules have also shared another aspect with the NAFTA Statement and the ICSID Arbitration Rules, which requires that the tribunal shall "ensure any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party."[112]

Before the Transparency Rules entered into force, non-disputing Contracting States to treaties played a limited role in helping the tribunals to shape the treaty interpretation. Pursuant to Article 5 of the Rules, for the first time in arbitration rules history, the UNCITRAL has officially acknowledged that investment arbitration might affect the rights and obligations of the Contracting States to the treaty because they are the masters and creators of the treaty, thus the States should have strong interests in the interpretation and construction of the treaty that it negotiated and entered into. Pursuant to Article 5, the tribunal can accept submissions made by non-disputing State in the following situations. In the first place, the arbitral tribunal may allow a non-disputing State to make a submission on issues of treaty interpretation, or may, on its own initiative, invite a non-disputing State to address any issues concerning treaty interpretation after consultation with the disputing

109 *ibid art 4 (2).*

110 *ibid art 4 (3).*

111 *ibid art 4 (4).*

112 *ibid art 4 (5).*

parties.[113] In addition, if the non-disputing State aims to address issues other than treaty interpretation, the submission shall be made only based on the application by the non-disputing State, the arbitral tribunal itself has no power to invite such submission. In determining whether to allow such submission, the arbitral tribunal must take into consideration the same factors as these applied to a third party and, "for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection."[114] Under both situations, the arbitral tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.[115]

4. *Amicus curiae* **Participation in the Context of the U.S. and Canada Model Treaties**

The previous sections have examined the current practice of *amicus curiae* under the NAFTA, the ICSID Arbitration Rules, and the UNCITRAL Transparency Rules. Besides these developments, a few BITs have also begun to address *amicus* submission in either a general or detailed approach, especially those treaties concluded by States, such as the U.S. and Canada.

In 2004, the U.S. Government adopted the Treaty Between the Government of the United States of the America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection Investment. ("US Model 2004 BIT").[116] Under the Model BIT, Article 28 (2) and Article 28 (3) grant arbitral tribunals the authority to accept non-disputing Contracting State's oral and written submissions regarding the interpretation of the BIT and to consider submissions from a person or entity that is not a disputing party to the dispute.[117] The articles are very general without giving a guideline concerning the criteria applicable to *amicus* participation. After the adoption of the Model BIT, the most recent U.S. BITs have

113 *ibid art 5 (1).*

114 *ibid art 5 (2).*

115 *ibid art 5 (4).*

116 *US Model 2004 BIT <http://www.state.gov/documents/organization/117601.pdf> accessed 10 July 2017.*

117 *ibid art 28-29.*

reflected these principles.

For instance, under the Article 10.20 (3) of the U.S. – Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"),[118] the same texts have been provided to address *amicus curiae* participation, the tribunal "shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party." The Free Trade Agreement Between the United States of America and the Republic of Korea ("KORUS-FTA")[119] adopted a more detailed approach by specifying that:

> "After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:
>
> (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;
>
> (b) the *amicus curiae* submission would address a matter within the scope of the dispute; and
>
> (c) the *amicus curiae* has a significant interest in the proceeding.[120]

Also the treaty states that the tribunal shall ensure the submission should not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and the disputing parties should have an opportunity to present their

118 *U.S. – Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) (signed 5 August 2004, entered into force 1 April 2006) <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf> accessed 27 July 2017.*

119 *Free Trade Agreement Between the United States of America and the Republic of Korea (US-Korea) (singed 30 June 2007, renegotiated and singed in early December 2010) <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text > accessed 29 July 2017.*

120 *ibid art 11.20.5.*

observations on the submission. In 2012, the Government of U.S. revised the US Model 2004 BIT, but as to the issue of *amicus curiae* participation, the government kept the same texts as stated in the 2004 version.

In 2004, based on the practice of *amicus* participation under the investment chapter of the NAFTA and the previous experiences of NAFTA investor-state arbitration, Canada released a new Model Foreign Investment Promotion and Protection Agreement ("FIPA") to cope with the growing demand of *amicus* participation in investment arbitration. Like the US Model 2004 BIT, the FIPA provides a basic framework concerning the question of arbitral transparency:

> "apart from ensuring that all documents will be promptly made available to the public and that all hearings will be open to the public, confirm in Article 39 the possibility of submitting *amicus* briefs to the tribunals and develops guideline for their acceptance."[121]

Besides the rapid development of *amicus* participation reviewed above, the Canada-China FIPA[122] constitutes a landmark concerning the issue of *amicus* participation. The FIPA, for the first time in the history of Chinese BITs, has acknowledged the right of a third party to participate in arbitral proceedings through making *amicus* briefs. In accordance with the FIPA, *amicus curiae* fall into non-disputing Contracting States and non-disputing parties to the dispute. Pursuant to Article 27, a non-disputing Contracting State is entitled to "receive from the disputing contracting party a copy of the evidence that has been tendered to the tribunals, copies of all pleadings filed in the arbitration, and the written argument of the disputing parties."[123] And it may make submission on a question of interpretation of the Agreement to the tribunal upon written notice to the disputing parties. The non-disputing State is also granted the power to attend oral hearings.[124]

121 *Gomez (n 79) 529-530.*

122 *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014) (Canada-China FIPA) <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/778> accessed 26 July 2017.*

123 *ibid art 27.*

124 *ibid.*

In addition, where a non-disputing party (either a person or an entity that is not a disputing party) could represent public interests, the tribunal shall allow written submission made by such party after consultation with the disputing parties.[125] Sharing the practice of the NAFTA and the ICSID Arbitration Rules, before filing an *amici* submission to the tribunal, the non-disputing party has to file an application for leave to file such the submission in the first place. The Agreement also provides a detailed approach by stating the requirements applicable to the application, like describing the membership and legal status of the applicant, disclosing any direct or indirect affiliation with any disputing parties, identifying any financial or other assistance in preparing the submission which is provided by any government, person or organization, and specifying the nature of the interest that the applicant has in the arbitration, etc.[126] If the tribunal grants the petition, the non-disputing party should make the submission in accordance with Annex C.29(2)(c) and C.29(2)(d) by setting out a precise statement supporting the party's position on the issues within the scope of the dispute. In addition, the tribunal should also ensure that the submission "does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudice by it."[127]

VI: Conclusion

This Article, from a comparative perspective, reviewed the different roles of *amicus curiae* in both common law as well as civil law jurisdictions, and further identified the current practice in the WTO proceedings. In addition, in order to illustrate the necessity of *amicus* participation in investor-state arbitral proceedings, the Article also balanced the potential benefits served and drawbacks brought by *amicus* invlovement, especially from the perspective of the public interests and the legitimacy of investor-state arbitration. After conducting the balancing act, the Article reached the conclusion that *amicus* participation is actually playing an

125 *ibid art 29.*

126 *ibid Annex C.29(2)(c) and Annex C.29(2)(d).*

127 *ibid art 29.*

essential role in perverting the public interests involved in investor-state arbitration and assisting tribunals to reach a more legitimate award. In accordance with this demand, the modern investment treaties, along with the recent modified arbitration rules have altered the traditional "commercial" approach to a more transparent approach. In order to avoid undue burdens caused by *amicus* participation in arbitral proceedings, the modern contexts also impose strict requirements to be applied to *amicus* participation. Only upon satisfying with these strict requirements examined above, *amicus curiae* can be justified to involve in arbitral proceedings.

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