



Identifying assisting function of amicus curiae in international investment arbitration

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Abstract

The participation of amicus curiae in international investment arbitration can play an important role in assisting the arbitral tribunal in resolving the legal of factual issues in dispute. However, the amicus curiae assisting function provisions in international arbitration rules are of a principled nature and not operational, while there is insufficient interaction between the arbitral tribunal and the rules. A textual interpretation approach of the provision and an examination of judicial practice can clarify the elements inherent in the auxiliary function and guide the arbitral tribunal in determining the auxiliary role at a micro level. This paper suggests that it is advisable for the tribunal to specify the correspondence between the petitioner's concerns and the issues at stake of the case based on moderate approach, while aligning itself with the direction of arbitration reform - consistency of the award. Petitioners are suggested to grasp the intrinsic elements of the amicus curiae supporting function and characteristics of interpretation by the arbitral tribunal in order to make better use of the amicus curiae mechanism.

Keywords: International investment arbitration; amicus curiae; assisting function

Introduction

I. The Importance of Amicus Curiae to International Investment Arbitration

Amicus Curiae (or “Friends of the Court”) is a person or group of persons who participate in a particular litigation or arbitration proceeding as a non-disputing party, presenting their views and assisting the court or arbitral tribunal in resolving the main issues of the case. Accordingly, in the context of international investment arbitration, amicus curiae is a person or group of persons who, through certain procedures, participates in a particular international investment arbitration as a non-disputing party and assists the tribunal in resolving the relevant factual or legal issues from a perspective, knowledge or insight that is different from the disputing parties. Nowadays, although amicus curiae is mainly found in common law domestic legal systems, particularly in the United States, its activity scope is not limited to the realm of domestic law and is, more importantly, equally suitable for resolving issues of international law. With the development and refinement of international dispute resolution in the last century, amicus curiae mechanism have already been introduced into international dispute settlement mechanisms, such as the WTO dispute settlement mechanism and the high-profile International Center for Settlement of Investment Dispute (hereinafter referred to as “ICSID”). This paper aims at showing that the introduction of amicus curiae mechanism in investor-state disputes settlement (ISDS) does more good than harm to the whole international dispute settlement regime.

The participation of an amicus curiae in international investment arbitration proceedings is able to assist the arbitral tribunal to focus on the public interest involved in the case, further reconciling the interests of the public to the largest extent. With amicus curiae involvement, the tribunal weights and balances different public interests to reach the final judgement. Generally speaking, international investment disputes are often more complex and sensitive than purely domestic law issues, as it usually involves important economic sectors of a state, such as hydraulic engineering construction, infrastructure development, the financial sector, mining, etc. Therefore, the outcome of an investment arbitration is bound to influence parties beyond the disputing parties, such as the interests of people living in the vicinity of hydraulic engineering, infrastructure construction sites, etc. The interest of the above-mentioned people would generally be included into the concept of “public interest” even under different legal context. In international law, the protection of the public interest shall never be ignored. However, it is generally considered that public interest protection in international investment arbitration is indeed overlooked to some extent even with the presence of a host state as a disputing party, who is responsible for common goods. Due to high volumes of case materials and sophisticated legal issues, host state is usually too overwhelmed to pay attention to public interest protection, not to mention the arbitral tribunal or the investor. The participation of amicus curiae fills this gap. Amicus curiae applicants are usually environmental organizations, human rights organizations, etc. These organizations aim at unfolding the public interest issues of the case well before the tribunal, providing relevant information and assisting the tribunal to focus on public interest issues that the tribunal is likely to overlook. In a word, one of the very prominent purposes of amicus curiae is to enable the judge or arbitrator to examine the case outside the established mindset of the disputing

parties and to resolve the dispute more appropriately from a perspective and knowledge that is worthy of attention but not raised by the disputing parties.

The involvement of *amicus curiae* in international investment arbitration proceedings is able to assist arbitral tribunals in resolving complex legal or factual issues. The concept of *amicus curiae* can be traced back to Roman law, which expressly provided for judges to refer to the legal opinion of an “*amici*” (Latin word of “*amicus curiae*”) on such issues in cases beyond their intellectual capacity. As can be seen, the meaning and original purpose of *amicus curiae* participation in litigation proceedings is to assist the court in resolving disputes, and *amicus curiae* should actively seek to play a supporting role to the court or arbitral tribunal in the dispute resolution process. Allowing *amicus curiae* who is aware of the facts of the case or who have professional knowledge and hold impartial legal opinions to participate in the proceedings would help the judge to make a fairer decision ^[1]. International investment disputes often involve other areas of international law, such as international environmental law and international humanitarian law. The unsystematic nature of international law makes it possible for states or other subjects of international law to have different, and sometimes conflicting, obligations under different areas of international law. Given this, allowing groups representing supranational organizations to participate in arbitration can help arbitral tribunals to discern the extent to which the law is implicated under different systems of international law. Friends of the Court under the regime of WTO regulation, for example, can help panels or appellate body to avoid burdening host states with obligations that conflict with other international responsibilities in their decisions, thereby effectively preventing the fragmentation of international law. Some scholar pointed out that enhancing the transparency of international judicial working procedure could be helpful to alleviate fragmentation of international law, for that it could make these international judicial bodies be aware of not only the necessity of common international law but also views of other international judicial bodies. Through this, every international judicial institution shall, in good faith, ensure dispute settlement to be accompanied with consistency of international law ^[2]. Similarly, the participation of *amicus curiae* in international investment arbitration proceedings can remind arbitral tribunals of the host State's obligations under other areas of international or national law, thereby promoting the harmonious development of different areas of international law and also between international and national law.

Amicus curiae involvement therefore has a positive contribution to the positive development of international investment arbitration, as evidenced by the fact that *amicus curiae* can assist the arbitral tribunal in focusing on the public interest issues in the case and in reconciling conflicts that may arise under the different obligations undertaken by the host State. In short, *amicus curiae* plays a complementary or auxiliary role in international investment arbitration. This auxiliary role can also be derived from the definition of *amicus curiae* provided by legal dictionary, i.e. Black's Law Dictionary emphasizes that *amicus curiae* shall be able to assist arbitral tribunal in resolving a dispute. Black's Law Dictionary defines an *amicus curiae* as “A party that is not involved in litigation but gives expert testimony when the court asks. They can support public interest not being addressed in the trial.” ^[3] The expression “support” points to an important factor of *amicus*, i.e. assisting role. It can be reasonably believed that the auxiliary role is the linchpin of *amicus curiae* mechanism.

However, not all petitioners in all cases are able to become *amicus curiae* as they wish. Before *amicus curiae* written submission being accepted, the applicant is required to apply to the arbitral tribunal by way of *amicus* request to participate in the arbitration proceedings as an *amicus curiae*. The arbitral tribunal then would examine the content of the *amicus* request to adjudicate whether the applicant meets the criteria for *amicus curiae* in accordance with certain procedural and substantive rules, including the examination of the auxiliary role of the *amicus curiae*. Only petitioners who meet all the criteria is able to participate in the proceedings. However, in practice, there is a problem of a) excessive discretion of the arbitral tribunal when determining the *amicus curiae* assisting role and b) neglecting to explore the assisting role of *amicus curiae*.

II. Problems in Identifying the Assisting Role of Amicus Curiae

(i) The Existing Provisions on the Assisting Role of Amicus Curiae are of a Principled Nature

Several international arbitration rules provide that *amicus curiae* shall be auxiliary to the arbitral tribunal, but the provisions concerned are of a principled nature, leaving a large margin of discretion for the arbitral tribunal. In the field of international investment law, many legal texts, such as multilateral investment agreements, bilateral investment agreements and international conventions, have explicitly included an *amicus curiae* mechanism and required that the *amicus curiae* be able to assist the arbitral tribunal in resolving factual or legal issues in the case. Currently, the main international rules and regulations that contain *amicus curiae* provision include but not limited to NAFTA (updated and modernized version of the US-Canada-Mexico Agreement) Free Trade Commission Statement on Non-Disputing Party Participation 2003 (FTC Statement), the ICSID Arbitration Rules and the ICSID Additional Facility Rules (“ICSID Arbitration Rules”) and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“UNCITRAL Transparency Rules”).

FTC Statement. The FTC Statement sets out the conditions that a person or entity should meet when applying for *amicus curiae*. In procedure, the applicant should disclose in the application whether there is an affiliation, direct or indirect, with the parties to the dispute and whether it has been financially supported by the government or other organization. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will 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 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; (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^[4]. Among these, the FTC Statement stipulates that the tribunal shall ensure that any non-disputing party submission avoids disrupting the proceedings and neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

The ICSID Arbitration Rules. Article 37(2) of the ICSID Arbitration Rules as amended in 2006 and Article 41(2) of the ICSID Additional Facility Arbitration Rules contain the relevant provisions. Article 37(2) of ICSID Convention provides that in determining whether to allow the written submission of any person or entity that is not a party to the dispute, 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. This is similar to the rules stated by the FTC in that they also require the non-disputing party to a) be able to assist the tribunal; b) to resolve matters within the scope of the dispute; c) to have a substantial interest. One exception is that the ICSID Arbitration Rules do not mention the requirements of public interest and independence, although in practice, ICSID tribunals constantly look at these two elements^[5].

UNCITRAL Transparency Rules.

UNCITRAL Transparency Rules, to which the topic of transparency reform in investor-state arbitration and amicus curiae participation in arbitration has been given great attention, contains third party participation clause in Articles 4 and 5. These two articles are almost identical to the FTC Statement, with only minor differences in the wording.

Although the exact wording of the different rules varies slightly, the frequent occurrence of the phrase "to assist the arbitral tribunal in resolving the issues in dispute" suggests that a supporting role is one of the standard elements of an amicus curiae and is a prominent factor to be considered by the arbitral tribunal when examining whether the petitioner could participate in the arbitration proceeding. However, the above-mentioned international arbitration rules only specify the assisting requirement, without further expressing the circumstances under which an amicus curiae can be considered by the tribunal to play a supporting role or what information, knowledge or perspective provided by the amicus curiae can be considered as assistance. In other words, the provisions of the existing international arbitration rules on the auxiliary role of amicus curiae are of a principled nature. Principle provisions can only guide the tribunal at a macro level. Based on the vague principles of the above rules, the arbitral tribunal has a wide discretion to review this requirement and can consider the issue from different perspectives in different cases, leading to inconsistent decisions and seriously weakening the certainty and predictability of the arbitration. In addition, according to the procedure rules, the applicant is required to submit a statement to the tribunal in which the applicant sets out how it would assist the tribunal in resolving the dispute before the petitioner could actually participate in the proceeding. The statement is usually subject to a page limit, ranging from 8 to 20 pages. The consequence of the aforementioned problem is that the applicants do not know how to articulate their value to the tribunal in the limited pages available to them, i.e. what information, perspective or knowledge they share to assist the tribunal. It certainly would undermine the value of amicus curiae mechanism.

(ii) Insufficient Interaction Between the Tribunal and Amicus Curiae Assisting Role Clause

In some cases, there is a lack of interaction between the arbitral tribunal and the amicus curiae assisting role clause. As assisting requirement is not the only element, arbitral tribunal may not go as far as exploring whether the petitioner has an auxiliary role to the case in practice. International arbitration rules and international legislation and arbitration practice suggest that the current standard elements of amicus curiae include a) that the amicus curiae has a supporting role to the tribunal; b) that the case is of public interest; c) that the amicus curiae has a significant interest in the case; d) that the amicus curiae is independent; e) that the amicus curiae involvement does not impose an extra burden or unfairly prejudice the parties to the dispute, and f) that the amicus curiae must resolve matters within the scope of the dispute in the case. It is clear that the assisting role is one of the vital standard elements, it is not the only one. In theory, the tribunal shall equally look at whether the applicant satisfies the six elements. It is improper to neglect to consider the other elements even when one element is prominent in a case. However, in practice, equal consideration to six elements is not the norm. In *Lone Pine Resources Inc. v. Canada*, the claimant, Lone Pine Resources Inc., is an oil and gas resource development and production company, who has gas resource development activities in the Province of Quebec, Canada. In this case, Quebec government passed a bill, namely, *An Act to limit oil and gas activities* ("the Act"), where the Lone Pine Resources Inc.'s exploration licence on the St. Lawrence River was revoked. The investors argued Canada violated the minimum standards of treatment required by Article 1105 under NAFTA. When the investor brought the dispute to ICSID tribunal, an environmental organization established under Quebec law applied as amicus curiae in the case, arguing that *the Act* was passed in response to the results of a strategic environmental study on hydrocarbon development in the Ocean Estuary Basin and the Northwest Gulf of St. Lawrence, which concluded that this environment was not suitable for hydrocarbon development activities. Given that the case involved large number of environmental issues, the petitioner pointed out that it was able to assist the ICSID tribunal in the legal aspects of the environmental issues, in particular the precautionary principle

in environmental law, which none of the parties to the dispute had addressed. Since the tribunal is required to communicate with the disputing parties under Article 37 of the ICSID Arbitration Rules, the investor paid considerable attention to argue that the written submissions of the environmental organization were in fact similar to that of the Canada, the Respondent in that case. The investor detailed specific similarities between the Respondent's argument and the applicant's submission, stating that the petitioner was unable to assist the ICSID tribunal because it had provided the same information as the Canadian government ^[6]. However, the tribunal focused on the public interest issue of the case. It considered that as the case involved sensitive environmental safety issues affecting the living environment and health of the surrounding population, it was necessary for the environmental organization to participate in the proceedings as *amicus curiae* in order to facilitate the proper resolution of the dispute, maintaining a tacit attitude towards the other five elements ^[7]. It is noteworthy that the above-mentioned international arbitration rules all specify that the arbitral tribunal is required to consider the attitudes and opinions of both parties to the dispute when examining whether the *amicus curiae* is acceptable. The arbitral tribunal in this case did not consider the six standard elements equally, nor did it give sufficient consideration to the views of the disputing parties, contrary to the clear provisions of the international arbitration rules. This approach may have been resented by disputing parties, as it reflected a lack of interaction between express rules and the arbitral tribunal, making the *amicus curiae* application process a "personal show" for the arbitral tribunal.

In summary, both the non-operability of *amicus curiae* clause and the insufficient interaction between the rules and the arbitral tribunal undermine the value and significance of the *amicus curiae* mechanism. How should an *amicus curiae* auxiliary role be defined? This paper argues that even though the *amicus curiae* auxiliary role in existing rules is a principle-based provision, the determination of the auxiliary role should not be separated from the provision itself. But rather, it should be clarified based the context and wording of the provision to provide clear and detailed rules to guide the arbitral tribunal.

III. Elements Inherent in Amicus Curiae Assisting Role Clause

In the context of the above-mentioned international arbitration rules, the auxiliary role of *amicus curiae* refers specifically to the applicant's ability to assist the arbitral tribunal in resolving factual or legal issues from a perspective, knowledge and viewpoint that is different from the disputing parties. From the point of view of textual interpretation approach, the auxiliary role clause implies at least three elements: first, the petitioner has a certain perspective, knowledge and viewpoint; second, the petitioner is able to assist the arbitral tribunal in resolving questions of fact or law in the case; and third, the petitioner possesses a perspective, knowledge and viewpoint different from that of the parties to the dispute.

(i) The Applicant Has A Certain Perspective, Knowledge Or Insight

The applicant had a certain perspective, knowledge and viewpoint, i.e. a certain level of expertise, literacy, etc. in the relevant field. For example, in *Apotex v. USA*, a consulting management company applied for *amicus curiae* in a case where the tribunal found that the company only shared a legal analysis of the wording of NAFTA and a simple stacking of previous tribunal determinations of the definition of "investment" therein, none of which reflect the petitioner's particular background or experience ^[8]. Therefore, the tribunal reached a negative decision on *amicus* request on the grounds that it did not reflect the applicant's particular background or experience. It follows that if the applicant's perspective, knowledge and views are able to be accomplished by the parties to the dispute or by the tribunal itself, then the applicant is not considered to have a certain perspective, knowledge and views and is naturally unable to assist the tribunal. Conversely, allowing him or her to participate in the arbitral proceedings may result in overburdening the arbitral process, contrary to the principle of efficiency in arbitration.

(ii) Perspective, Knowledge or Insight Shall Be Able to Assist The Tribunal in Factual or Legal Issue

The petitioner has knowledge, experience and perspective that can assist the tribunal in resolving a disputed issue, whether a factual issue or a legal issue. For example, in *Bear Creek Mining v. Peru*, one of the applicants, the Colombian Centre for Sustainable Investment (CCSI), was rejected by the tribunal because it considered that the so-called "broader and holistic knowledge and experience" in the statement presented by CCSI would not assist the tribunal in resolving the dispute ^[9]. The tribunal pointed out that in the present proceeding both disputing parties are represented by distinguished international law firms with extensive experience in international investment arbitration and the parties have filed lengthy and detailed submissions and evidence regarding every aspect of the case. Against this background, the fact that CCSI only stated it it could provide "broader and holistic knowledge and experience" without further specifying what that knowledge and experience was, is not sufficient to prove its assisting value. The tribunal took a conservative measure to avoid additional burdens in the arbitral proceedings. In short, the fact that an arbitral tribunal states that the petitioner has a certain perspective, knowledge and experience does not in itself necessarily mean that it can assist the tribunal in resolving the factual or legal issues of the case.

(iii) Perspective, Knowledge or Insight That Is Different From The Disputing Parties

The applicant shall have a different perspective, knowledge and viewpoint from that of the parties to the dispute. Conversely, if the petitioner provides the same perspective, knowledge and views as the parties to the dispute, it

is possible for the amicus curiae to be a "proxy" for one of the parties in the proceedings, speaking on its behalf. Amicus curiae is not intended to represent the interests of the parties to the dispute, nor is intended to provide knowledge or fact to support the views of the parties to the dispute. However, the fact that the non-disputing party does not represent the interests of a disputing party does not mean that its views are different from any disputing party, but rather that its intervention in the proceedings is intended to assist the tribunal rather than to assist the disputing party. That is, amicus curiae does not subjectively seek the interests of any party and provides relevant knowledge or facts to the arbitral tribunal from the standpoint of a third party.

There is a correlation between the three intrinsic elements of the auxiliary role of amicus curiae, and it is not appropriate for an arbitral tribunal to lose sight of any elements. Specifically, having knowledge and experience does not mean having a supporting role; there is a gap between the two. How to move from the former to the latter is a matter of discretion for the arbitral tribunal, but also includes factors such as the views of the parties to the dispute and the way and extent to which the applicant presents his or her qualifications. At the same time, having knowledge and experience does not mean that the applicant can assist the arbitral tribunal. It is also necessary that this knowledge and experience be different from that of the parties to the dispute. Otherwise, the arbitrary participation of amicus curiae in the arbitral process would not only be detrimental to the development of arbitration itself, but would also be a stumbling block to the development of the amicus curiae mechanism.

(iv) Rationality of Three Intrinsic Elements of Amicus Curiae Assisting Role Clause

As mentioned above, the auxiliary role of amicus curiae entails at least three elements: first, the applicant has a certain perspective, knowledge and insight; second, it is able to assist the arbitral tribunal in resolving legal or factual issues of the case; and third, the applicant possesses a perspective, knowledge and insight that is different from the disputing parties. Only if the applicant satisfies all three elements may it be deemed to be accepted as an amicus curiae in the arbitral proceedings.

It has been argued that it would be difficult to require the applicants to meet all the above three requirements. In other words, it would raise the threshold for amicus curiae, rendering the amicus curiae mechanism ineffective. This paper argues that the above three elements of amicus curiae assisting role are based on a textual approach of existing international rules, which is the intrinsic in amicus curiae mechanism. Moreover, from the perspective of contextual or object and purpose approach, the three elements are also consistent with the object and purpose of amicus curiae provisions, which is to assist the arbitral tribunal to resolve the dispute more appropriately without unduly burdening the parties to the dispute or delaying the arbitral proceedings. It would not be helpful for the tribunal to solve the case if the applicant does not have a perspective, knowledge and insight different from that of the parties to the dispute, or if this perspective, knowledge and insight does not contribute to the resolution of the factual or legal issues of the case. On the contrary, granting leave to such written submissions from non-disputing parties violate the principle of efficiency of arbitration. When we talk about efficiency of arbitration, we usually talk about the relationship between three things: time, cost and quality^[10]. Granting leave to written submissions that are of no use to the tribunal would cost more money and time. And the quality of arbitration is not guaranteed as well. There are some hints in the international arbitration rules to respect the efficiency of arbitration. For example, the number of pages of the written submission from the non-disputing party is set at eight to twenty, where it can be seen the intention to avoid excessive time and effort being expended by the arbitral tribunal on amicus curiae issues. On the balance of interests, therefore, only if the three intrinsic elements mentioned above are met is it possible for an amicus curiae to actually assist the arbitral tribunal in resolving the dispute and to fulfil its proper value, offsetting the negative effects of its intervention in the arbitral proceedings.

IV. The Determination of Amicus Curiae Assisting Role Should Be Refined Based on Moderate Interpretation Approach and Focus on Consistency of the Awards

All rules must be put into practice. In the practice of international investment arbitration, the examination of the auxiliary role of amicus curiae is even more complicated. Although the three elements mentioned above are easy to understand in textual terms, it is not easy to apply them to specific cases in practice. This paper suggests that it is advisable for arbitral tribunals to a) adopt a moderate interpretation approach of the amicus curiae assisting role; b) refine the correspondence between the concerns of the petitioner and the issues at stake in the case based on moderate interpretation approach, and c) pay attention to consistency of the arbitral award.

(i) Identifying Assisting Function With Moderate Interpretation Approach

Historically, arbitral tribunals have tended to adopt moderate interpretation approach when determining whether an applicant has a supporting role, that is, assuming that the information or perspective that the petitioner provides has a potential role in helping the tribunal to resolve the dispute. A well-known case where moderate interpretation approach is established is *Methanex v. USA*. In this case, the tribunal, in determining whether the applicant, The International Institute for Sustainable Development ("IISD"), had an auxiliary function, presumed that the opinion of amicus curiae may be of assistance to the tribunal, even though simultaneously it believed that the parties to the dispute would provide all necessary materials required to make its case^[11].

The assumption that the opinion of amicus curiae might be of assistance to the tribunal is the manifestations of moderate interpretation approach. On one hand, when a case is not at the substantive stage, the arbitral tribunal is unlikely to determine whether the written submissions currently submitted by the petitioner would be of

assistance to the future proceedings. It makes it possible that most of the information and materials submitted by the applicant, whether directly or indirectly relevant to the case, have the potential to assist the arbitral tribunal. On the basis of the above assumption, the applicant is more likely to pass the assistance test. In other words, as long as the statement submitted contains information relevant to the case, which is at the same time required by the tribunal, it is considered to be of assistance to the tribunal. On the other hand, the *Methanex v. U.S.* tribunal used the wording "may" in its decision on amicus curiae involvement, which significantly lowers the threshold. The usage of "may" means that the burden of proof is not like "beyond reasonable doubt", it only places a very low burden of proof on the petitioner, allowing the applicant to pass this standard by focusing on the presentation of qualifications. Subsequent cases that have adopted the view of the *Methanex v. U.S.* tribunal include *AS Norvik Banka v. Latvia*, among others.

Similarly, until 2016, the *Bear Creek Mining v. Peru* tribunal inherited the moderate interpretation approach standard of the *Methanex v. U.S.* tribunal in a more moderate manner. In *Bear Creek Mining v. Peru*, the petitioners include a human rights and environmental organization and a senior legal adviser. The two applicants each set out their qualifications and experience in their own statement. The tribunal ultimately passed the test of their supporting role. The tribunal considered that the legal counsel's expertise, combined with the local experience of the human rights and environmental organization, may provide the tribunal with a different perspective, knowledge and insight that would assist the tribunal in resolving the factual and legal issues of the case^[12].

It can be seen that the *Bear Creek Mining v. Peru* tribunal also used the word "may", similar to *Methanex v. U.S.* tribunal. As noted above, this wording significantly reduces the burden of proof on the applicants. What is particularly worthy of attention in this case is the discretion enjoyed by the tribunal. Specifically, the tribunal acknowledged that it was true that the two petitioners did not provide the tribunal with new and different information, given that the lawyers representing the parties to the dispute had provided sufficient pleadings and evidence,^[13] but then turned to reason that the combination of these two separate statements would be likely to be useful. The combination idea is not advanced by the applicants, but by the tribunal itself. The introduction of "combination of information" argument is evidence that the arbitral tribunal conducted assistance test with a more relaxed standard.

As a matter of fact, in practice, this moderate interpretation approach is inextricably linked to the stage of arbitration proceeding. Generally speaking, the petitioner applies for admission to the arbitral proceedings before the substantive issues review. At that stage, even the arbitral tribunal has some knowledge of the case, but it is not yet sufficient to determine immediately whether the applicant's admission will contribute to the resolution of the dispute. Under this circumstance, the tribunal is intended not to deny leave of amicus curiae.

However, moderate interpretation approach is, after all, a principle and an attitude that involves a wide margin of discretion. At the same time, the above-mentioned view of the *Bear Creek Mining v. Peru* arbitral tribunal on the "combination of information" suggests that there is a suspicion that the discretion of the tribunal is being exercised beyond what is reasonably expected by the disputing parties. Specific rules of review and guidance for assistance test are necessary to reasonably regulate the tribunal's discretion, enhancing the predictability and certainty of amicus participation or non-participation in arbitral proceedings. In this regard, the following refinements may provide specific guidance.

(ii) Refinement of Interpretation: Correspondence Between the Applicant's Concerns And Focus Of The Case

The tribunal, while largely adhering to moderate interpretation, has become more detailed in the way it addresses amicus request. For example, the *Tallinn v. Estonia* tribunal specified that the specific content of the European Commission's written opinion - the legal consequences of the Court of Justice of European Union's decision in *Achmea* case - possibly could assist in adjudicating the jurisdiction of the ICSID tribunal^[14], and therefore reached a positive decision on its amicus request. In this decision, the tribunal specified not only which part of the case was at stake, but also which part of the amicus curiae submission was subsidiary to the former. This opinion is certainly more persuasive than the simplistic approach of the tribunals in *Methanex v. U.S.* and *Bear Creek Mining v. Peru*. Moreover, it is worth noting that this more persuasive decision does not abandon moderate interpretation approach, as is evident from the wording - could - of the decision. A similar approach was adopted by the arbitral tribunal in *Philip Morris v. Uruguay*. In its decision, the tribunal set out in detail how the petitioner satisfied the element of auxiliary role by listing the information that it could provide and the corresponding issues in dispute^[15]. Specifically, the tribunal found that the applicant, the World Health Organization (WHO), was able to provide information on global tobacco control and the tobacco control environment of the host state, which could be used to address the legal issue of reasonable expectations raised by the investor and to clarify the respondent's rights and obligations under the relevant bilateral investment agreement.

The analysis of the arbitral tribunals in the case of *Tallinn v. Estonia* and the case of *Philip Morris v. Uruguay* are certainly more persuasive for the disputing parties who agree or disagree with the amicus curiae intervention. By specifying the correspondent relationship between the information provided by the amicus and the issues at question, it facilitates the amicus to focus on specific part of the case as well as to communicate fully and efficiently with the tribunal, satisfying the interests of the amicus.

Of course, whether the tribunal could reach the decision with correspondence depends on the quality of the amicus request, that is, what information is provided in the amicus request that would give the tribunal room to consider. Therefore, when an individual or an organization applies to participate, it is crucial to summarize a full and effective statement of its qualifications and expertise in the amicus request and, if possible, a specific list of information that it can help the tribunal with, such as a particular document relevant to the case. By doing this, the tribunal is given more and more detailed factors to consider and increase the likelihood and certainty of being admitted.

(iii) Going Along with The Direction of International Arbitration Reform: Consistency of Awards

In cases where the petitioner is the same person or the same organization, the tribunal, for reasons of sticking to consistency of awards, may treat the case in a consistent manner. For example, in *AS PNB Banka and others v. Latvia*, where the European Commission applied for amicus curiae, the investor and the host State explored adequately whether or not it could meet the elements of the amicus curiae criteria, including assisting function. The ICSID tribunal, on the other hand, took the alternative route and considered that, given that previously European Commission's amicus requests have been constantly adopted, it was desirable for this ICSID tribunal to be consistent^[16]. The outcome was obvious - European Commission's amicus request was accepted. In fact, the European Commission has been actively involved in international investment arbitration since 2008 because it considers that referral to an international investment arbitration institution such as ICSID to settle intra-EU investment disputes would be contrary to the principle of independence of EU law as well as the principle of autonomy of EU law. The European Commission considered that it has a strong interest in the case as the guardian of EU law and could help the tribunal to clarify the jurisdiction issue. As of January 2021, the European Commission has submitted 42 amicus requests for amicus curiae, among which have been accepted 31. Even it has been invited by the tribunal to become an amicus curiae for one time. Thus, considering that the European Commission has been accepted as amicus curiae by arbitral tribunals in other related cases, the tribunals tend to make the same decision for the sake of consistency and do not pay much attention to whether the applicant actually satisfies the standard elements.

Improving the consistency of awards has been one of the objectives of ISDS reform in recent years. As with increased transparency in arbitration, increasing the consistency of arbitral awards has been given a very standout place as one of the measures to increase the credibility of arbitration. As the number and quality of amicus curiae cases in arbitration increases, it follows that it becomes more complex for arbitral tribunals to identify what constitutes a similar situation. In order to conquer this difficulty, it is advisable for the petitioner to remind, where possible, the tribunal of previous similar decisions and of maintaining consistency of awards.

Conclusion

The triangulation of international investment has led to the consequence that international investment disputes often involves public interest, which should not be discounted under international law. The involvement of an amicus curiae is able to bring the public interest of a case into the attention of the tribunal. Its written submission, even in limited pages, is able to help the tribunal to resolve investment disputes more appropriately. At the same time, amicus curiae have the expertise and experience to assist the tribunal in resolving complex case issues. In short, the amicus curiae supporting role agrees with the intrinsic nature of international investment disputes, which is one of the reasons why the amicus curiae, as a regulation born in the domestic law, is so well embedded in the international investment arbitration. Existing international arbitration rules provide macro-level guidance on the auxiliary role of amicus curiae. Facing the dilemma of identifying the auxiliary role of amicus curiae, an understanding of the intrinsic elements of the auxiliary role can guide the tribunal's judgement at a micro-level. It is advisable for arbitral tribunals to adopt moderate interpretation approach, specifying the correspondence between the applicant's concerns and the issues at stake. By doing this, it would improve the reasonableness of the decision. Consistency of award shall also be considered so as to enhance certainty and predictability of arbitration.

References

1. Zetao Zhang: A study of Amicus Curiae Mechanism in the United States, *China Legal Science*, 2004(01):175-184.
2. Desheng Dai, Expansion of International Judicial Institutions And Its Impacts On International Law System, *Jiang-huai Tribune*, 2007:(06):84-90.
3. Bryan A. Garner, *Black Law's Dictionary* (9th ed), West Group, 2009, 98.
4. Statement of the Free Trade Commission on Non-disputing Party Participation.
5. Case considering the independence of the applicant: *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II)*, 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 - 12 Feb 2007 ; cases considering public interest: *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2. Procedural Order No. 4 - 23 Feb 2016 In the public interest, *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2. Procedural Order No. 2 (On The Participation of a Non-Disputing Party) - 11 Oct 2011 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. Procedural Order

- No. 5 - 2 Feb 2007 ...; Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2 – 26, 2012.
6. Lone Pine Resources Inc. v. Canada, ICSID Case No. UNCT/15/2, Claimant's Observations on Non-Disputing Party Applications, 2017.
 7. Lone Pine Resources Inc. v. Canada, ICSID Case No. UNCT/15/2, Procedural Order on Amici Applications for Leave to File Non-Disputing Party Submissions.
 8. Apotex Inc. v. The Government of the United States of America, Procedural Order No. 5 on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4,2013:8:26.
 9. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 6, para. 37.
 10. Jacques Werner, 'Arbitral Chronicle VII: The Arbitrator as Master of Time' (2011) 12 J World Investment & Trade 299
 11. Methanex v. USA, Decision on the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, 15, 2001, 22. Para. 48.
 12. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5, para. 38.
 13. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5, para. 37.
 14. United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, Decision on the Application for Leave to Intervene as a Non-Disputing Party Submitted by the European Commission, 2 October 2018, para. 12. ARB/14/24, Decision on the Application for Leave to Intervene as a Non-Disputing Party Submitted by the European Commission, 2 October 2018, para. 12.
 15. Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 3, 2015, para.6
 16. AS PNB Banka, Grigory Guselnikov and others v. Republic of Latvia, ICSID Case No. ARB/17/47, Procedural Order No. 3 (Decision on the European Commission 's Application pursuant to Rule 37(2)), 30 Otc 2018, Para. 56.