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Amicus Curiae Participation in ICSID Arbitration: Evolution and Refinement

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The ICSID (International Centre for Settlement of Investment Disputes) began allowing amicus curiae participation in international investment arbitrations on the initiative of petitioners. As amicus curiae participation continued to grow, the existing rules were insufficient to provide clear guidance to amicus curiae petitioners and arbitral tribunals, and the ICSID updated its rules on amicus curiae participation again in 2022. While the new rules make some progress in strengthening amicus curiae eligibility and preventing procedural burdens, they still lack an effective confidentiality regime, and tribunals do not have an effective basis for how they should deal with potential cost increases arising from amicus curiae participation. Therefore, ICSID needs to continue to refine the protection of confidential or protected information, and to establish as soon as possible a system for amicus curiae to share the costs of the proceeding and a system of security for costs.

Keywords: ICSID, investment arbitration, amicus curiae

Introduction

The amicus curiae's participation in international investment arbitration began in Methanex Corp. v. California. The claim was brought by a Canadian investor under NAFTA (North American Free Trade Agreement) Article 1105.[1] Institute for Sustainable Development (IISD), Communities for a Better Environment, Earth Island Institute, and Center for International Environmental Law (CIEL), which believe that this case involves the public interests of the host country in terms of environmental protection and public health, and that it will have a profound impact on the formulation of relevant policies, laws, and regulations of the NAFTA member states in the future, have filed an application with the arbitral tribunal to participate in the arbitration as amicus curiae. The arbitral tribunal in this case relied on its discretion in procedural matters to allow these organizations to participate in the international investment arbitration proceeding.

Led by the Methanex case, international organizations, industry associations, experts, scholars, and other groups and individuals have proposed to intervene as amicus curiae in international investment arbitration proceedings, and in 2005, for the first time, the ICSID (International Centre for Settlement of Investment Disputes) allowed international organizations to intervene as amicus curiae in international investment arbitrations initiated

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[1] In this case, Methanex argued that California's executive order banning the production and use of MTBE severely impacted the manufacturing activities of Methanex, whose primary business is the production of methanol, the raw material for MTBE, and caused the company substantial damages, as well as hindering its future growth, constituting an indirect impose of its property.

by member companies. At that time, there was no amicus curiae provision in the ICSID Arbitration Rules, and the arbitral tribunal granted the amicus curiae petitioner's application on the basis of its discretionary power on procedural matters under the ICSID Convention. Since then, the ICSID has expressly addressed the issue of amicus curiae participation in arbitration proceedings in Article 37, Paragraph 2, of the 2006 version of the Arbitration Rules, which establishes the power of the arbitral tribunal to allow amicus curiae to submit briefs.

With the increase in the practice of amicus curiae participation in international investment dispute resolution, the existing rules are insufficient to provide detailed and clear guidance to amicus curiae applicants and arbitral tribunals, and also bring some new issues to be addressed in the international investment arbitration mechanism. In 2016, the ICSID initiated the fourth revision of its Arbitration Rules, in order to respond to the international community's doubts on the lack of legitimacy of the investment arbitration mechanism, and to help the investment arbitration mechanism adapt to the current reality and ensure the sustainable development of the mechanism. The participation of amicus curiae was also included as one of the issues to be considered in this revision. On June 22, 2022, the revised Arbitration Rules were published and came into force on July 1st.

How has amicus curiae participation in ICSID arbitration evolved? How does the new ICSID Arbitration Rules provide for amicus curiae participation in international investment arbitration and does it respond to the concerns of the international community? What progress has been made compared to the 2006 version of the Arbitration Rules, and what needs to be further improved? This article aims to analyze and answer these questions. The article is divided into five parts. The first part introduces the background of amicus curiae's participation in international investment arbitration and puts forward the main questions of the article; the second part compiles and analyzes the origins of amicus curiae's participation in ICSID arbitration; the third part analyzes the new development of ICSID Arbitration Rules on the issue of amicus curiae's participation, compares the old and the new rules as well as analyzes the unresolved issues of the new rules; the fourth part analyzes how to further improve the issue of amicus curiae participation. The fifth part contains the conclusions.

Origins of Amicus Curiae Participation in ICSID Arbitration

First Practice of Amicus Curiae in ICSID Arbitration

Similar to the amicus curiae system in investment dispute settlement under NAFTA, the ICSID Arbitration Rules originally did not provide for amicus curiae, and the rules for amicus curiae participation were developed on the basis of the practice of participation that had already occurred.

ICSID tribunals did not initially allow non-disputing third parties to participate in international investment arbitration proceedings because of the inherent differences between international investment arbitration and proceedings before domestic or international courts.[2] In Aguas del Tunari SA v. Bolivia,[3] the tribunal rejected an application by citizens and environmental groups to join the investment arbitration proceedings because the parties did not consent to the participation of non-disputing third parties, noting that the consensual nature of the arbitration left the decision on non-disputing third party participation in the hands of the parties. In the absence of consent by the parties, the tribunal did not have the power to allow any form of third-party intervention.

[2] Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit Over Access to Water, CIEL.ORG, http://www.ciel.org/Ifi/ Bechtel_Lawsuit_12FebO3.html

[3] ICSID Case No. ARB/03/02.

The Aguas del Tunari SA v. Bolivia award was heavily criticized and the tribunal's decision was seen as depriving the public of legitimate expectations. In the subsequent case of Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentina (the Suez case)[4], the tribunal changed its approach to non-disputing party participation in investment arbitration, and the amicus curiae was able to proceed to ICSID arbitration.

In that case, five non-governmental organizations (NGOs), including CIEL (hereinafter referred to as the Petitioners), invoked the Methanex case and submitted an application to ICSID to participate in the arbitration proceedings as amicus curiae. The Petitioners claimed that everyone has the right to participate and have their voices heard in cases where their rights may be affected by the decision. As the case involves the public interest and the fundamental rights of citizens living in the area affected by the dispute, the tribunal was requested to grant the Petitioners' leave to present legal arguments as amicus curiae, to have timely, full, and unrestricted access to all documents in the case, to participate in the hearings in the case and to open the hearings to public.

First, on the question of whether the arbitral tribunal had the authority to decide to allow the Petitioners to submit an amicus curiae brief, the arbitrators unanimously agreed that the arbitral tribunal had the authority to decide on this matter. According to Article 44 of the ICSID Convention, the tribunal has the discretion to decide questions of procedure not dealt with in the Convention or in the rules applicable to the particular dispute. Procedural issues are those relating to the manner in which the arbitral proceedings are conducted. The acceptance of an amicus curiae brief meets this definition of a procedural issue because it can be seen as a step in assisting the arbitral tribunal to achieve its basic task—to reach the right decision in the case. In order to determine whether a petitioner qualifies as an amicus curia, the arbitral tribunal has also set out the criteria to be taken into account in deciding whether to allow the petitioner to be an amicus curia: the petitioner's identity and background, its connection to the dispute, its interest in the parties to the case, and the grounds on which its opinion should be admitted. Secondly, with regard to the petitioner's request for access to the case documents, the tribunal did not consider it necessary to rule on this at the present time. The purpose of access to records is to enable non-dispute parties to act as amicus curiae. It is only after the petitioner has become an amicus curia that the arbitral tribunal needs to decide on the issue of authorizing access to documents. After allowing the petitioners to participate in the arbitral proceedings as amicus curiae, the arbitral tribunal issued a further order stating that the role of the petitioners as amicus curiae was to assist the tribunal by providing their views, expertise, and arguments. The fulfillment of this role does not require comprehensive information about the case. Moreover, it appears from the material already submitted that the Petitioners have already obtained much of the information relevant to the case from other sources, which is sufficient to assist the Petitioners in fulfilling their role as amicus curiae in the arbitral proceedings. Thus, the tribunal would not grant the petitioners the right to access the case materials.[5] With regard to the Petitioner's request to participate in the hearing, the tribunal noted that the consent of the parties to the dispute is required for the attendance of persons other than those permitted to attend and participate in the hearing under Article 32, Paragraph 2, of the ICSID Arbitration Rules.

[4] ICSID Case No. ARB/03/19.

[5] 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, February 12, 2007.

The Claimant in this case expressly refused to allow the petitioner to attend, and the tribunal had no authority to interfere with that decision.[6]

ICSID's First Attempt to Develop Amicus Curiae Rules

Following the Suez case tribunal's order, the ICSID updated its arbitration rules to specify the rules for amicus curiae participation in Article 37.2, which sets out simple criteria for determining the suitability of amicus curiae petitioners. The revised ICSID Arbitration Rules are very similar to the Suez tribunal's view on whether the tribunal has the authority to determine that amicus curiae submissions are permissible and the criteria for judging the amicus curiae's subject matter. Under the new provisions, the tribunal, after consultation with the parties to the investment dispute, may authorize amicus curiae submissions from non-disputing third parties. In deciding whether to grant leave to the petitioner to submit an amicus curiae brief, the tribunal is required to take into account factors such as whether the submission will assist the tribunal in making its decision, whether the content is within the scope of the jurisdiction, and whether the non-disputing party has a significant interest in the proceeding. It is also provided that the arbitral tribunal has an obligation to ensure the smooth running of the arbitral proceedings when accepting amicus curiae submissions.

The ICSID Arbitration Rules 2006 do not respond directly to amicus curiae's requests for access to information when participating in investment arbitration proceedings. However, with respect to amicus curiae participation in hearings, Article 32, which is relevant to the hearing process, provides that the tribunal may, with the consent of the parties, and after consultation with the Secretary General, allow amicus curiae to attend or observe the hearing. With respect to the confidentiality of amicus curiae participation in investment arbitration proceedings, the 2006 version of the Arbitration Rules provides that the arbitral tribunal has an obligation to protect proprietary or privileged information when allowing non-disputing third parties access to the hearing. The issues of increased costs and security for costs arising from amicus curiae participation are not mentioned in the arbitration rules.

Value Proposition of Amicus Curiae Participation in ICSID Arbitration

There is a growing enthusiasm among states, international organizations, non-governmental organizations, various interest groups, as well as experts and scholars to petition for amicus curiae access to investment arbitration proceedings to help resolve international investment disputes. In 2001, when approximately three amicus curiae applications were submitted to arbitral tribunals each year, in 2016 the number of applications received by ICSID tribunals increased to 26, and the frequency of amicus curiae's participation in international investment arbitration has since increased significantly. Currently, ICSID has received 136 amicus curiae applications, which is more frequent than proceedings in other international organizations and institutions such as the World Trade Organization, the International Criminal Court, and the European Court of Human Rights (Born & Forrest, 2019).

The participation of amicus curiae can effectively improve the quality of international investment arbitral awards. On the one hand, the settlement of international investment disputes may involve different fields such as finance, technology, energy, and so on, but the arbitrators for the settlement of investment disputes are often lawyers, jurisprudence experts, and other legal practitioners, so amicus curiae can make use of the professional

[6] ICSID Case No. ARB/03/19, Order in Response to a Petition for Participation as Amicus Curiae, May 19, 2005.

knowledge to bridge the limitations of the arbitrators in the specialized issues. On the other hand, the facts of the case on which the arbitral tribunal relies to reach its decision are usually presented by both parties to the dispute (Zhang, 2014). An amicus curia can supplement the tribunal with facts or evidence that the parties have not submitted to the tribunal in order to maintain their own favorable position, helping the tribunal get closer to the truth of the case.

At the same time, an amicus curia is also of great importance in alleviating the crisis of legitimacy of the international investment arbitration mechanism. The participation of amicus curiae is conducive to safeguarding the public interest in international investment disputes (Liu & Yuan, 2017). The involvement of non-disputing third parties can also enrich the types of public participation in investment arbitration procedures, strengthen public supervision of investment dispute settlement procedures, and alleviate the international community's accusation that there is a democratic deficit in investment arbitration. The amicus curiae's participation in the arbitration process requires in-depth knowledge and investigation of the investment dispute, which will also promote the disclosure of information on investment disputes and help the international investment arbitration mechanism improve procedural transparency (Sun, 2022).

This has led to a gradual tolerance of amicus curiae by arbitral tribunals, which have begun to try to give more organizations and institutions more opportunities to intervene as amicus curiae in investment arbitration. Arbitral tribunals have changed their previous skepticism and mistrust and have become more receptive to amicus curiae. The tribunal in Eureko v. Slovak even took the initiative of inviting some public interest organizations to respond to specific issues in the case as amicus curiae,[7] thus helping the tribunal to make its decision.

New Developments in Amicus Curiae Participation in ICSID Arbitration

Reflections on Amicus Curiae Participation in ICSID Arbitration

Along with the increase in the frequency of amicus curiae's participation in international investment arbitration, it can be seen that although amicus curiae have significance in improving the quality of arbitral awards and making up for the lack of legitimacy of the international investment arbitration mechanism, amicus curiae's participation has also given rise to other problems, and there is still room for further improvement and refinement of the relevant rules.

On the one hand, the intervention of amicus curiae as a non-disputing third party in investment arbitration breaks the consent of the disputing parties as to how the dispute should be resolved, and strikes at the cornerstone of the arbitration system, "party autonomy". On the other hand, amicus curiae participation conflicts with the confidentiality of the arbitration system. Confidentiality is one of the main features of arbitration over litigation and one of the main reasons why parties are willing to settle their disputes through arbitration (Kong & Yu, 2024). Amicus curiae participation may result in the disclosure of information that the parties need to keep confidential, violating the confidentiality requirements of arbitration. In addition, amicus curiae participation may increase the cost of time and money for parties to initiate investment arbitration. The need for the tribunal to review the applicant's qualifications before deciding whether to allow the applicant to participate in the investment arbitration, and the need to read the amicus curiae's submissions once the applicant has been allowed, result in

[7] UNCITRAL, PCA Case No. 2008-13.

an increase in the tribunal's workload and an extension of the time period for the tribunal to settle the investment dispute. Parties to investment disputes are also required to respond to issues raised in amicus curiae submissions, placing additional procedural burdens on the parties.

As mentioned earlier, the 2006 version of the ICSID Arbitration Rules contains direct provisions on amicus curiae participation, mainly in Article 37.2, but the content only includes the right of the arbitral tribunal to accept the briefs from amicus curiae petitioners and the three criteria for the acceptance of amicus curiae briefs, and makes no reference to the premise that investment disputes in which amicus curiae intervenes need to be related to the public interest. However, in practice, almost all amicus curiae petitioners apply to intervene in investment arbitration proceedings on the grounds that the public interest may be jeopardized. At the same time, the rule also omits the requirement for amicus curiae petitioners to provide information about their background and the existence of an interest in the disputing parties, fails to establish the right of amicus curiae to participate in investment arbitration hearings and to have access to the information of the investment dispute, and fails to set out the regime to guard against the risk of leakage that may be caused by the entry of non-disputing third parties, as well as how to prevent amicus curiae participation from burdening the parties or disrupting the arbitral process through specific institutional arrangements.

ICSID's Renewed Attempt to Develop Amicus Curiae Rules of Engagement

The ICSID launched the fourth revision of its Arbitration Rules in October 2016, in an attempt to modernize the ICSID Arbitration Rules based on existing case experience, in order to improve the efficiency of the investment arbitration process, save the cost of investment arbitration, and maintain the balance of interests between the investor and the host state while ensuring the legitimacy of investment arbitration proceedings. In January 2022, after the release of six amendments, ICSID concluded a five-year revision process by submitting its revised arbitration rules to the administrative council.

In order to fully utilize the positive impact of amicus curiae participation in investment arbitration and to effectively prevent the risks that may arise, the amicus curiae participation rules have also been updated in the fourth revision. In the new ICSID Arbitration Rules, the provision directly providing for amicus curiae participation is Article 67. Under Article 67, any person or entity may petition the arbitral tribunal to make written submissions as amicus curiae. Factors to be considered by the arbitral tribunal in determining the suitability of a petitioner to be amicus curiae include whether the submission will assist the arbitral tribunal in making its decision, whether its content is within the scope of the matter in dispute, whether the non-disputing party has a significant interest in the proceeding, whether there is any conflict of interest between the petitioner and the disputing parties, and whether the petitioner has received financial support or other forms of assistance from any person or entity.

In addition, the new provisions create rights and obligations for the various categories of subjects involved in the amicus curiae participation: in the case of the arbitral tribunal, reaffirming the tribunal's obligation to ensure that the amicus curiae's participation does not jeopardize the conduct of the arbitral proceedings, and restricting the time within which the tribunal may render its decision; in the case of the petitioner, providing for amicus curiae petitioners to obtain materials with the consent of the parties; and, in the case of the parties, giving the disputing parties the right to express their views on whether a non-disputing party should be allowed to make

a written submission in the proceedings, the conditions under which that submission should be made, and the submission itself. As for participation in hearings, Article 65 of the Arbitration Rules permits the tribunal to allow a non-disputing party to observe a hearing with the consent of the parties, provided that appropriate procedural arrangements should be made to prevent the disclosure of confidential information. ICSID has specifically provided for specific types of information to be kept confidential through Article 66. In addition, the ICSID rules on costs still do not address the issue of increased costs and security for costs arising from amicus curiae participation.

Comparison and Analysis of the Old and New Rules for ICSID Amicus Curiae Participation

A comparison of the old and new ICSID rules on amicus curiae participation shows that, firstly, the arbitral tribunal has been given the power to decide on its own as to whether the tribunal has the authority to decide on an amicus curiae petitioner's application, and even though the parties may express their views on the issue, the final decision still rests with the arbitral tribunal. Secondly, the criteria to be considered by the tribunal in determining whether to allow a petitioner to participate in the arbitration have been refined, with the 2022 Arbitration Rules adding to the original criteria a review of the amicus curiae petitioner's independence and impartiality, as well as a requirement for the petitioner to disclose whether or not it has received financial or other forms of support for the filing of submissions. Once again, the obligation of the tribunal to ensure that amicus curiae participation cannot affect the smooth running of the proceedings has been emphasized. The new rules also provide guidance to arbitral tribunals on how to prevent amicus curiae participation from unduly influencing the arbitral proceedings, including limitations on the format, scope, and timing of submission, time limitations for the tribunal in deciding whether to authorize the petitioner's participation, and the establishment and refinement of confidentiality obligations. At the same time, amicus curiae's rights to access case materials and observe hearings were also confirmed.

Compared to the 2006 version of the rules on amicus curiae participation, the new rules are a significant upgrade on the issue of amicus curiae participation. However, some of the concerns of the international community regarding amicus curiae participation remain unanswered. On the one hand, while the current arbitration rules provide for the specific content of information to be kept confidential in an arbitration, it still lacks a functioning confidentiality regime. Arbitral tribunals do not have an effective basis for dealing with possible cost increases arising from amicus curiae participation, and the scope of application of the security for costs regime is still limited to the parties. Therefore, the new ICSID rules on amicus curiae participation have room for further development and progress.

Suggestions for Further Improvement of the ICSID Amicus Curiae Participation Rules

Refinement of the ICSID Information Confidentiality System

Although the ICSID Arbitration Rules 2022 have made provisions on the scope of information that needs to be kept confidential in arbitration, there is still a lack of effective institutional system. ICSID can learn from the European Union's trade secret protection system to protect confidential information in arbitration and ensure that the legitimate rights and interests of the parties will not be infringed upon.

Firstly, the duty of confidentiality of information obtained by amicus curiae when participating in arbitration should be clarified. The protection of confidential or protected information should not be the task of the parties

and the arbitral tribunal alone, but the amicus curiae, as one of the reasons for the increased likelihood of disclosure of the information also needs to bear a corresponding responsibility.

Secondly, a standardized system for the protection of confidential or protected information should be constructed to prevent possible disagreements in the handling of similar cases by the arbitral tribunal. Above all, the right of the parties to apply for the protection of confidential information should be clarified. The party submitting confidential information may apply to the arbitral tribunal for protection. Next, when the amicus curiae are granted access to the relevant materials of the case after the arbitral tribunal's approval, the tribunal and the parties should cleanse the materials of the confidential information contained therein. Thirdly, with reference to the provisions issued by the European Commission, such special protection measures shall remain effective even after the conclusion of the investment arbitration proceedings, as long as the relevant information protected by the secrecy has not entered into the public domain (Sun, 2014). Fourthly, liability clauses and penalty mechanisms should be set up for breaching the confidentiality rules, so as to strengthen the awareness of confidentiality of the arbitrators, amicus curiae, and the parties, and to minimize the possibility of leakage of confidential information by the participating parties.

Establishment of a System of Cost-Sharing and Security for Costs of Amicus Curiae Participation

Where amicus curiae submissions impose additional costs or burdens on the parties to the arbitration, particularly where the amicus curiae submissions substantially favor one of the disputing parties or where the burden and costs of responding to amicus curiae submissions fall disproportionately on one of the parties, the adoption of a system of amicus curiae cost-sharing and security for costs requiring amicus curiae to pay for additional costs is also one way to effectively alleviate the additional burdens imposed on the parties, as pointed out by Noah Rubin (2007), who argued that it made sense to develop a system whereby these interveners would share in the costs of the arbitration in exchange for the benefits that they would receive from amicus curiae participation.

In Electrabel S.A. v. Republic of Hungary,[8] the tribunal made it clear that the serious impact of amicus curiae participation on the parties' procedures could be taken into account in the allocation of arbitration costs. In its award, the tribunal in that case, in the section on arbitration costs, noted that the European Commission's amicus curiae submissions to the tribunal, which dealt with jurisdictional issues and the application of the law in relation to the case, had been fatal to the claimant. Electrabel had to incur substantial time and costs to deal with the submissions, which had caused an extremely heavy burden on Electrabel.[9]

The issue of security for costs was also addressed in Philip Morris v. Uruguay (Quan, 2019). In its order addressing the issue of amicus curiae participation, the arbitral tribunal stated that the arbitral tribunal has the power to require an amicus curiae petitioner to pay the costs of an amicus curiae submission at the appropriate time, if the disputing parties submit that the amicus curiae's submission has resulted in increased costs for the parties and if the parties have clear documentary evidence of that fact.[10] Although the tribunals in the above cases did not mention in their final awards the need for amicus curiae to pay the increased costs of arbitration resulting from its participation, it is not difficult to infer from these practices the attitude of the tribunals in

[8] ICSID Case No. ARB/07/19.
[9] ICSID Case No. ARB/07/19, Award, Para. 234.
[10] ICSID Case No. ARB/10/7, Procedure Order No. 4.

utilizing the means of cost-sharing to limit undue procedural burdens, and to prove that an order for security of amicus curiae's costs can limit to a certain degree the procedural delays triggered by amicus curiae's participation, and to provide new ways for arbitral tribunals to mitigate the risk of undue interference by amici.

Requiring amicus curiae to give security for costs is not an unfounded option. There are other international arbitration institutions whose arbitration rules provide for similar regulation. For example, Article 3.10 of the Arbitration Rules of the Stockholm Chamber of Commerce also provides for amicus curiae to pay additional costs incurred as a result of their participation. Under that article, the arbitral tribunal is to have the power to seek security from the amicus curiae for costs incurred by the disputing parties in submitting a response to the amicus curiae's opinion.

The proposed amendments to the ICSID Arbitration Rules, published in August 2018, expressly provide arbitral tribunals with the power to order costs sharing against amici curiae. The amendment permits the arbitral tribunal, in determining the question of allocation of the costs of the arbitration, to consider a claim against amicus curiae. The commentary to the proposed amendment explains that this observation was made in response to comments made by many disputing parties and ICSID arbitral tribunals that amicus curiae participation results in increased costs of the arbitration, and that it was intended to give arbitral tribunals the discretion to order amicus curiae applicants to provide funds as a prerequisite to the filing of amicus curiae submissions (ICSID Secretariat, 2018). Regrettably, however, the ICSID did not ultimately adopt this comment, and this proposal was dropped in the second round of proposed amendments published in March 2019.

The effectiveness of the amicus curiae security system can be seen from the attitudes of various ICSID arbitral tribunals, the comments made by states on the ICSID amendments, and the relevant rules of other arbitral institutions. Therefore, ICSID should reopen its consideration of the establishment of an amicus curiae security for costs system.

However, this may raise questions as to whether the arbitral tribunal has jurisdiction. It has been argued that amicus curiae are not parties to the arbitration agreement or the arbitration, and therefore would not be subject to the jurisdiction of the arbitral tribunal in the same way as parties (Schreuer, 2012). It is beyond the jurisdiction of the arbitral tribunal to order an amicus curia to bear costs arising from its participation in the arbitration or its procedural misconduct (Bjorklund, 2008). However, the very act of the petitioner in proposing to the tribunal to participate in the investment arbitration proceedings represented a willingness to accept the arrangements of tribunal and the limitations of the Arbitration Rules. At the same time, under Article 61 of the ICSID Convention, the arbitral tribunal has the power to determine who will pay the costs of the arbitration and how they will be paid. This provision of the Convention, which does not limit the subject of the payment of the costs, also provides the rule basis for the tribunal to hold the amicus curiae liable for the increased costs of its participation.

Therefore, ICSID could start to consider establishing a system of cost-sharing and security for costs to ensure that only petitioners who are genuinely interested in resolving investment disputes can participate in investment arbitration as amicus curiae, to prevent unnecessary procedural burdens from the parties and the arbitral tribunal. In terms of procedural design, ICSID may indicate to the petitioner at the time it submits its application to participate in the arbitration the possibility of having to pay arbitration fees or providing security for costs. At any time during the arbitration proceedings, the tribunal would have the power to order security for costs in relation to an increase in costs triggered by the amicus curiae. At the same time, the indication that the amicus

curiae are required to contribute to the costs of the arbitration should also form part of the arbitral award. Of course, certain exceptions may be made to the requirement that the amicus curiae pay the additional costs resulting from its participation: If the amicus curiae petitioner shows evidence of a lack of financial ability to pay the corresponding costs, the arbitral tribunal may also decide not to issue a security for costs order or to re-determine the amount of the costs to be incurred.

Conclusion

Amicus curiae participation in ICSID started from the application by international organizations on its own initiative, and went through an iterative evolutionary process from practice to rule-making. Compared with the Arbitration Rules 2006, the 2022 version of the amicus curiae participation rules has made great progress in strengthening the qualifications of amicus curiae and preventing amicus curiae participation from increasing the burden of the proceedings, but there is still room for improvement in preventing the disclosure of confidential information as well as the cost sharing and security for costs. The international community and ICSID need to sum up the lessons learned in practice, continue to discuss the issue of amicus curiae participation, and optimize the rules.

With the continuous development of the Belt and Road Initiative, it is also an inevitable result that China, as a developing country attracting foreign capital and investing abroad, encounters investment disputes. Therefore, China also needs to actively participate in the international community's discussion of amicus curiae's participation in investment arbitration, based on China's national conditions, and make its voice heard, so as to effectively safeguard China's national interests and the legitimate interests of Chinese investors in the process of resolving international investment disputes.

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