

**The Backlash against State's Over-intervention in Treaty-based
Investor-State Arbitration Proceedings – An Examination of
Procedural Transparency Provisions in Canada-China Bilateral
Investment Treaty from Chinese Perspective**

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Résumé

Cette thèse cherche à explorer le rôle que l'État devrait jouer dans la promotion de la transparence en matière de l'arbitrage entre investisseurs et États fondé sur des traités, tout en adoptant une perspective chinoise. Après un survol sur le concept de la transparence et les règles d'arbitration connexes dans les règles d'arbitrage UNCITRAL, la convention ICSID, NAFTA et les BIT modèles du Canada et des États-Unis, cette thèse explique les raisons pour lesquelles l'arbitrage des différends relatifs aux traités d'investissement requièrent de la transparence au point de vue de la société civile, des investisseurs et des institutions de résolution des différends internationaux. Cet ouvrage poursuit ensuite avec un examen de l'application des règles sur la transparence et de leur incidence sur la pratique de l'arbitrage international dans la dernière décennie. Ensuite, cette thèse contraste ces conclusions avec les règles d'arbitrage dans les traités bilatéraux d'investissement chinois, avec une emphase sur l'accord sino-canadien sur la protection des investissements, signé le 9 septembre 2012, qui désigne le pays hôte au lieu du tribunal pour prendre en charge la question de transparence des procédures arbitrales. À partir de cette comparaison, cette thèse dérive quelques idées préliminaires sur une théorie de légitimité réflexive, soutenant que l'État ne doit pas intervenir directement sur la détermination de la question de transparence procédurale. Ayant analysé les contraintes dont la Chine fait face pour se conformer réellement avec la tendance de la transparence dans l'arbitrage fondé sur les traités d'investissement, cette thèse avance quelques suggestions pour les prochaines négociations chinoises de traité bilatéraux d'investissements avec d'autres pays tels que les États-Unis.

Abstract

This thesis endeavors to explore the role the state should play in the process of promoting transparency in treaty-based investor-state arbitration from Chinese perspective. After introducing the concept of transparency and relevant arbitration rules in UNCITRAL Rules, the ICSID Convention, NAFTA and the Model BITs of Canada and the U.S., this thesis explains why investment treaty arbitration requires transparency from the perspectives of civil society, investors and international dispute resolution institutions. It then reviews how the transparency rules have been applied and transformed in international arbitration practice over the last decade. Next, this thesis contrasts these findings with the arbitration rules in Chinese bilateral investment treaties, especially the Canada-China bilateral investment treaty signed on September 9, 2012, which designates the host State rather than the tribunal to decide on the transparency issue of arbitration proceedings. From this comparison, this thesis derives some preliminary ideas regarding a theory of reflexive legitimacy, arguing that the state should not directly intervene in the determination of procedural transparency issues during arbitration proceedings. Having analyzed the difficulties and feasibility for China to truly conform with the trend of transparency in investment treaty arbitration, this thesis proposes some suggestions for the upcoming Chinese bilateral investment treaty negotiations with the other states such as the U.S.

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Introduction

Gunther Teubner contends that globalization means that many social sectors have the chance to free themselves from the restrictions that nation-state politics had imposed on them.¹ His observation on globalization does not only refresh our conventional understanding of globalization as free trade across sovereign boundaries, it also indicates that non-state actors, the community of legal scholars, environmental organizations, human rights organizations, public opinion and media are playing increasingly important roles in the transformation of international law. The treaty-based investor-state arbitration system, as an important, if not the most popular, dispute resolution system for investment disputes around the world, has been increasing its transparency to the public on laws and in practice. The North America Free Trade Agreement (NAFTA) Chapter 11, International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, and United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules are making joint efforts to improve the transparency in treaty-based investor-State arbitration.

I . Procedural Transparency Rules on Investor-State Arbitration in Canada-China Bilateral Investment Treaty and its Inherent Problems

Following this strong trend in the international investment law community, China incorporated procedural transparency norms in its newly-signed Canada-China

¹ Gunther Teubner, Global Private Regimes – Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors in Karl-Heinz Ladeur, *Public Governance in the Age of Globalization* (Burlington: Ashgate Publishing, 2004) at 84. .

Bilateral Investment Treaty (BIT) for the first time in September 2012. The procedural transparency provisions in Canada-China BIT explicitly regulate public access to arbitral documents, third-party written submissions, and public access to arbitration hearings in Article 27, 28 and 29. Since China does not have its own history and model of procedural transparency rules in previous BITs, the procedural transparency rules in Canada-China BIT is mostly drafted under the 2004 Canada Model Foreign Investment Promotion and Protection Agreement (FIPA). Therefore, the procedural transparency clauses in Canada-China BIT appear to be highly similar to Article 38 and 39 of 2004 Canada Model FIPA.

However, this thesis argues that there actually exist significant differences in the understanding of “transparency” of arbitral tribunal between the two states. The procedural transparency rules shown in the Canada-China BIT reflect the fact that China has not fully understood or really accepted procedural transparency in the treaty-based investor-State arbitration. This is because the transparency norms in Canada-China BIT transform the final authority on the procedural transparency issue from the tribunal to the disputing Contracting State. In other words, only when the host State government determines the disputing issue concerns public interest can the arbitrators open the proceedings to the public. This thesis considers that this twists of transparency norms are conflicted against world society willingness and therefore going off the track of the transformation of international investment law. This thesis seeks to explore the question: what role the State should play in the process of improving transparency in treaty-based investor-State arbitration? It also does critical

analysis to the transparency provisions in Canada-China BIT, highlighting the State is authorized too much power in the determination of procedural transparency issue in investor-State arbitration.

This thesis suggests that China should not allow state intervention on the decision of procedural transparency in treaty-based investor-State arbitration and give more space to the world society and other social sectors to participate in the dispute resolution of international investment dispute.

II. A Road Map of this Thesis

The scope of this thesis is narrow. It focuses on the role of the State in the enhancement of transparency in investor-State arbitration. This topic is raised when I study the transparency provision in Canada-China BIT. This is the first time that China incorporated detailed procedural transparency provision in dealing with investor-State arbitration in BIT. On the one hand, this is a milestone breakthrough, suggesting that China is taking efforts to conform with international community's request and standards. On the other hand, the State's power in the decision of transparency issue recognized by Canada-China BIT demands more critical analysis. How much the procedural transparency provisions in Canada-China BIT depart from what is found in other recent investment treaties and international conventions? What are the specialties of China's procedural transparency norms? Will the procedural transparency norms encourage more investors to refer their investment disputes to the investor-State arbitration? Will the procedural transparency norms ensure the world

society's voice to be heard? Will it effectively protect public interest? What factors should be cautiously considered when China drafts procedural transparency provisions during BIT negotiations?

This thesis contends that investment arbitration regime should open itself more up to outside influences from the world society and less to the state intervention on procedure. The practice of international investment law indicates that fragmentation of interpretations in different tribunals severely damage the legitimacy of international investment arbitration. The international community is taking joint efforts to enhance the legitimacy of international investment arbitration by improving the transparency. McLachlan draws on the principle of “systemic integration” in treaty interpretation as a means of “taking into account” the broader normative environment in which international investment law operates besides the states.² In other words, the interaction between the world civil society and the tribunal can promote the legitimacy of international investment arbitration. And their interaction shall not be dictated by the host State.

In order to answer my research question, this thesis finds it very important to learn the development of laws on foreign direct investment in China and the current international regulations and practice on improving procedural transparency in investment arbitration. Therefore, this thesis is divided into two principal chapters:

² Campbell McLachlan, “The Principle of Systemic Integration and Article 31 (3) (C) of the Vienna Convention” (2005) 54:2 International Comparative Law Quarterly 279 at 318.

Chapter 1: Transparency in Treaty-based Investor-State Arbitration

This chapter explains the concept of transparency in treaty-based Investor-State arbitration. In this thesis, transparency in arbitration contains three subjects: public access to arbitral documents, third-party written submissions and public access to the arbitration hearings. Having clarified the concept of transparency, this chapter studies the reasons why the international community is making constant effort to promote transparency in international investment dispute resolution. The general public concern of the international investment disputes is discussed to show the reasons why transparency should be prioritized over absolute confidentiality in settling international investment disputes. It employs Gunther Teubner's theory to illustrate that non-state actors' participation in international investment arbitration can promote the legitimacy and coherence international investment law. The foreign investors' interests are also illustrated to explain the reasons why transparency facilitates their long-term and high-quality overseas investment rather undermine it. International investment dispute resolution institutions' policy is also discussed to demonstrate that improving transparency in international investment arbitration can better enhance legitimacy of the dispute resolution system. Then, this chapter elaborates the evolution of treaties and treaty practice on the issue of transparency in order to show in what way other States together with international community promote transparency in international investment arbitration. NAFTA, ICSID and UNCITRAL's arbitration rules are fully analyzed and addressed in this chapter. Relevant influential cases are also articulated to demonstrate how important the role of Tribunal in the

implementation of public access to arbitration documents, third-party written submissions and public access to arbitration hearings.

Chapter 2: Chinese Bilateral Investment Treaties Lacked Adequate Transparency Provisions Dealing with International Investment Arbitration

This chapter sets out the argument that although China continues to be the second only to German in the number of BITs that it has signed, procedural transparency provisions in dispute resolution part of BITs are underdeveloped. It starts with the evolution of the three generations of Chinese BITs. Then it specifically introduces the procedural transparency provisions in those BITs. Considering Canada-China BIT could be the first BIT signed by China which elaborately incorporated procedural transparency clauses, it introduces its substance and its specialties. The study shows that the main specialty is that the provisions designate the host state a final authority in the determination of procedural transparency issue during the arbitral proceedings. Then, this thesis explores the legal and social environment for transparency in China. It argues that China has a tradition of powerful government and weak civil society so that it could be understood that the government and the Chinese Communist Party eager to extend their power to investment dispute resolution process. After addressing the role of the state in promoting transparency in investment treaty arbitration from Chinese perspective, it explores the social, cultural and political feasibility for the promotion of procedural transparency in Chinese context. Then, this thesis does critical analysis to the procedural transparency provisions in Canada-China BIT.

Considering China is negotiating BIT with the U.S., this thesis also proposes suggestions for China's negotiators in drafting procedural transparency norms in the future BITs.

III. The Importance of this Research

It is relevant because promoting transparency in treaty-based investor-state arbitration has become a strong tendency in investment dispute resolution. Studying the transparency provisions in Canada-China BIT is important because as the second biggest BIT signatory and one of the largest trading countries in the world, it could be the first time that China has explicitly incorporated specific transparency provisions in investment treaty arbitration. This thesis is worthy to be read because in the current academic literature, seldom paper has tried to study procedural transparency clauses in BITs from Chinese perspective. Moreover, since China is currently negotiating a BIT with the US, this thesis will critically analyze the pros and cons of transparency provisions in Canada-China BIT in order to propose some suggestions to China's BIT negotiators for the upcoming negotiations with US.

IV. Methodology

This thesis employs comparative approach to suggest that China should learn from the international community's experience on promoting transparency in international investment arbitration. It also employs sociological and historical approach to explain the reasons why China lacked transparency in arbitration. By applying social theory,

this thesis adopts critical approach to analyze transparency provisions in Canada-China BIT.

Chapter 1: Transparency in Treaty-based Investor-State Arbitration

An increasing number of international investment disputes are being settled through arbitration. This is partly but mainly because many international investment treaties empower foreign investors to directly seek redress of their claim against the host State to an arbitral tribunal, without having to wait for their own state to espouse their claim or further their own interests by seeking damages.³ The treaty-based investor-State arbitration was traditionally presumed to be a confidential dispute resolution process like international commercial arbitration. However, this presumption has been questioned when the disputed domestic regulations, policy or *ad hoc* measures have some bearing on non-investment issues such as environment and public health. In the settlement of this type of investment disputes, the awards may not only have serious economic impact on the disputing parties but also make great influence on the world society. On one hand, this is because the award in favor of foreign investors will be paid out of the public fisc; on the other hand, the continuation or termination of this type of investment affects public life. Hence, more and more public interests groups, such as International Institute for Sustainable Development, Communities for a Better Environment and the Bluewater Network of Earth Island Institute, have shown an increasing interest in monitoring and participating in the investment disputes

³ Armand de Mestral, “The Contribution of International Investment Law to Public International Law” in Armand de Mestral & Céline Lévesque, *Improving International Investment Agreement* (London and New York: Routledge, 2013) at 343; Daniel M. Price, “17th Annual Symposium – Investment Sovereignty, and Justice: Arbitration under NAFTA Chapter Eleven: Some Observations on Chapter Eleven of NAFTA” (2000) 23 *Hastings International and Comparative Law Review* 393 at 421.

resolution process.⁴ This chapter introduces the concept of transparency in the context of international investment and trade dispute resolution. Then, this chapter explores the reasons why the other States and international community endeavor to promote transparency in international investment arbitration. It submits that transparency should be prioritized over confidentiality principle in investor-State arbitration since the economic disputes arose in the investment treaty arbitration affect the daily life of citizens, and in many cases impact the cost and availability of public services such as water waste management, electricity and management of important natural resources such as oil minerals forests fisheries and water.⁵ Secondly, transparency can promote predictability and reduce long-term costs of investment treaty arbitration for the investors. Thirdly, transparency can strengthen the legitimacy of international arbitration system so that international dispute resolution institutions also want more transparency in investment dispute resolution. Then, this chapter reviews how other States and international community improve the transparency clauses in treaties. The evolution of NAFTA, CISID and UNCITRAL's arbitration transparency rules are closely studied. Moreover, some influential cases are also addressed in this chapter. The revised arbitration rules and arbitration practice suggests that an open treaty-based investor-State arbitration process may equip with a reflexivity function, other than settling disputes. This chapter draws out that it is the

⁴ Armand de Mestral, *Supra* note 3 at 346; Junji Nakagawa, *Transparency in International Trade and Investment Dispute Settlement* (London & New York: Routledge, 2013) at 1; Andrea J. Menaker, "Benefiting From Experience: Developments in the United States' Most Recent Investment Agreements" (2005) 12:1 U.C. Davis Journal of International Law and Policy 121 at 124.

⁵ *Supra* note 4 at 88.

tribunal rather than the state has the final authority in the decision of transparency issue during the arbitral proceedings in other States and international community.

I. The Concept of Transparency in the Context of International Investment Arbitration

1. No Agreement on the Definition of Transparency in Arbitration

The proliferation of the discussion of ‘transparency’ in arbitration in the academic circle does not mean, however, that there is an agreement on what ‘transparency’ is and to what type of ‘arbitration’ it should apply.⁶ UNCITRAL Working Group, ICSID and some regional organizations such as NAFTA have been struggling with these issues for a decade. Traditionally, transparency refers to due process. Transparency means openness and clarity in a legal process or transnational business transaction should be guaranteed.⁷ A legal process or transaction is not transparent when someone, who is manifestly and directly affected by the issue, has not been given a legal right to know about or participate in it.⁸ However, this thesis points out that the recent debate regarding transparency in investor-State arbitration, however, greatly exceeds the confines of due process and enters the realm of politics and civil society.

Transparency in global governance meant to be only concerned with the governmental conducts of different states in a democratic society. Transparency in the treaty-based

⁶ Anibal Sabater, “Towards Transparency in Arbitration (A Cautious Approach)” (2010) 5 Berkeley Journal of International Law Publicist, Vol. 5 Riesenfeld Symposium 47 at 47.

⁷ *Black’s Law Dictionary*, 5th ed, *sub verbo* “transparency”.

⁸ *Siag & Vecchi v Egypt* (2009), ICSID Case No. ARB/05/15, Award, at 450 (Arbitrators: Mr. David A R Williams QC, Prof Michael Pryles, Prof Francisco Orrego Vicuna).

investor-State arbitration, in this thesis, means open the tribunal to non-governmental organizations, states and virtually anyone have significant interests to the covered investment dispute in order to make their voice be heard and submit evidence in to the tribunal. It usually contains three subjects: public access to arbitral documents, third-party written submissions and public access to the arbitration hearings. The next section presents the procedural transparency provisions stipulated by UNCITRAL Working Group, the ICSID and the NAFTA.

2. Transparency in Law, Regulations and Policies

Transparency in arbitration differs from transparency in law, regulations and policies, or transparency in governance. Some non-governmental organizations, think-tanks, and international organizations created ‘transparency indexes’ involving governmental conducts. These indexes analyze whether the conduct of governments conforms to standards or fairness, publicity, predictability, and observance of the law. Organizations creating and compiling these indexes regard the administrations that fail to meet those standards as non-transparent, meaning corrupt.⁹ Investment treaties do impose substantive transparency requirements on governments. This is, for instance, the case of article 17 of the 2012 Canada-China BIT, this article establishes that each contracting Parties shall make their laws, policies and relevant administrative documents concerning covered investment public and readily

⁹ The Center for International Environmental Law, “Major International Investment Arbitration Decision Acknowledges Role of Arguments Put Forward by NGOs” (August 4, 2008), online: The Center for International Environmental Law <http://ciel.org/Trade_Sustainable_Dev/Biwater_Arbitration_4Aug08.html>.

accessible.¹⁰ Moreover, the article requires that the Contracting Parties shall ensure that its laws, regulations and policies pertaining to the admission of investments are administered in a manner that the investors are enable to acquainted with them. If requested, the Contracting Party shall undertake the responsibility to explain specified laws and policies to the foreign investors. However, this thesis does not address this issue.

The application of the term ‘transparency’ in investment treaty arbitration, however, is different from the term to governmental conducts that have just been discussed. This thesis is focused on procedural transparency during the arbitration proceeding. It argues that to make tribunal transparent can improve the interactions between social reality and investment laws. In this situation, investment treaty arbitration is not only an investment dispute settlement mechanism but also a process shortening the gap between investment laws and global society. The interaction is beneficial to establishing reflexive legitimacy of international investment law.¹¹

3. Confidentiality and Transparency in Investment Treaty Arbitration

The related topics of confidentiality and transparency have sparked off vigorous debates in recent investor-state commentary¹² and arbitral awards.¹³ Confidentiality

¹⁰ Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, the People’s Republic of China and Canada, 9 September 2012, Article 17.

¹¹ David Schneiderman, “Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?” (2011) 2:2 Journal of International Dispute Settlement 471.

¹² Gary Born & Ethan G. Shenkman, “Confidentiality and Transparency in

is regarded as a common feature and advantage of international arbitration. On the contrary to transparency, confidentiality principle prevents the disclosure of allegations made by a party which may be distressing or even offensive to the other in order to avoid aggravating a dispute. Therefore, confidentiality is crucial for international commercial arbitration.¹⁴ However, confidentiality has been playing a less important role in treaty-based investor-State arbitration than in international commercial arbitration. While this thesis realizes confidentiality is important for efficiency and neutrality of international arbitration, it insists that the need for transparency in treaty-based investor-State arbitration has not overstated. Mr. Gary Born considered that the tribunals should take a balanced approach to confidentiality and transparency issue in investment arbitration.¹⁵ In a paper published in 2009, he argues that arbitration tribunal should preserve discretion on regulate public disclosures of and access to information during the pendency of the arbitral proceeding and the arbitral documents should be publicized after the arbitration is

Commercial and Investor-State International Arbitration”, in Catherine A. Rogers & Roger P. Alford, *The Future of Investment Arbitration* (Oxford: Oxford University Press, 2009) at 6; Cindy G. Buys, “The Tensions Between Confidentiality and Transparency in International Arbitration” (2003) 14 *American Review of International Arbitration* 121; Jessica L. Cambridge, “Privatization of Public Services, UNCITRAL and Transparency” (2007) 1:6 *World Arbitration and Mediation Review* 1.

¹³ *Biwater Gauff Ltd v. Tanzania* (2006), ICSID Case No. ARB/05/22, Procedural Order No. 3 (Arbitrators: Gary Born, Toby Landau QC, Bernard Hanotiau); *S.D. Myers Inc. v. Canada* (2000), Procedural Order No. 16, NAFTA Arbitration Under the UNCITRAL Arbitration Rules (Arbitrators: J. Martin Hunter, Bryan P. Schwartz, Edward C. Chiasson QC) at 8.

¹⁴ Gary B. Born, *International Commercial Arbitration* (The Netherlands: Wolters Kluwer, 2009) at 2249.

¹⁵ Gary Born & Ethan G. Shenkman, Confidentiality and Transparency in Commercial and Investor-State International Arbitration, in Catherine A. Rogers & Roger P. Alford, *The Future of Investment Arbitration* (Oxford: Oxford University Press, 2009) at 39.

completed.¹⁶ This thesis contends that arbitral documents should be publicized timely. This argument will be illustrated and expanded in the next section by explaining the reasons why treaty-based investor-State arbitration needs transparency. More importantly, this thesis raises a new question about the role of the state in the procedural transparency issue during the arbitration proceedings. Therefore, although this thesis agrees that cautious approach should be taken to deal with the procedural transparency in investment arbitration, it tends to concentrate more on discussing the role of the state in the transparency movement in investment treaty arbitration.

4. The Regulations of Transparency in the Context of Investment Treaty Arbitration

There are no unified procedural transparency rules in investment treaty arbitration till now. Different institutions have their individual procedural transparency policies. Moreover, the procedural transparency rules have been continuously enriched and transformed this decade by international investment institutions and arbitral tribunals. However, the structure of procedural transparency provisions is similar. The goal of this section is to offer readers an analysis of the similarities and differences in the procedural transparency regulations in public access to arbitral awards and documents, third-party written submissions and public access to arbitration hearings respectively. The section III of this chapter explains how the contents of procedural transparency are enriched and transformed by the arbitral tribunals.

¹⁶ Gary Born, *supra* note 12 at 27.

4.1 Public Access to Arbitral Awards and Documents

From July 2013 to October 2013, the UNCITRAL adopted a package of rules to improve transparency in investor-State arbitration. The new rules, which will officially come into effect on April 1, 2014, provide for a significant degree of openness through the arbitral proceedings.¹⁷ Article 2 and 3 stipulates the publication of information at the commencement of arbitral proceedings and publication of documents.¹⁸ It regulated that upon the receipt of the notice of arbitration from the respondent, the repository shall promptly publicize information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made. The Rules also listed out what documents can and cannot be publicized. It is worth to mention that the tribunal can publicize the list of exhibits to the arbitral documents including the expert reports and witness statements rather than the exhibit themselves. Moreover, it states that any written submissions by the non-disputing Parties and by their persons, even the transcripts of hearings can be made available to the public. As other transparency rules, the UNCITRAL Rules also underscore that the publicized documents should subject to the protection of confidential or protected information requested by the parties. More importantly, UNCITRAL Rules emphasize that the repository shall make all documents available

¹⁷ Lise Johnson & Nathalie Bernasconi-Osterwalder, “New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps” (August 2013), online: International Institute for Sustainable Development <<http://www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-a-application-content-and-next-steps-2/>>.

¹⁸ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2 October 2013, online: <<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>>, Article 2 & 3

in a timely manner, in the form and in the language in which it receives them. When it concerns to the cost of openness, it states that it is the person granted access to documents that should bear the administrative costs, such as the costs of photocopying or shipping.

The ICSID promulgated its new arbitration rules in April 2006. Unfortunately, the rules do not explicitly address the issue of public disclosure of the pleadings and other documents in the arbitration. However, it should be mentioned that arbitration practice has transformed ICSID attitudes towards transparency. This thesis will illustrate how the tribunals publicize their documents under ICSID Convention in practice when it discusses the concerted movement in the international community to make investment treaty arbitration more transparent.

NAFTA Free Trade Commission issued Notes of Interpretation of Certain Chapter 11 Provisions on July 31, 2001. In this Interpretation, it clarifies and reaffirms the meaning of certain provisions especially on access to documents.¹⁹ It emphasizes that nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration. It stipulates that each Party agrees to publicize all documents submitted by, or issue by a Chapter 11 tribunal in a timely manner, subject to redaction of information which is privileged from disclosure under the Party's domestic law or must be withheld pursuant to the relevant arbitral rules, as applied.

¹⁹ North America Free Trade Agreement Commission, Notes of Interpretation of Certain Chapter 11 Provisions of North America Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States (July 31 2001) online: Foreign Affairs, Trade and Development of Canada
<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx>>.

Specially, the Interpretation stipulates that the disputing parties may disclose the unredacted documents to other persons related to the arbitral proceedings if they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents. Nowadays, arbitral documents are timely published on governmental and private websites.

4.2 Third-Party Written Submissions

Article 4 and 5 of UNCITRAL Rules on Transparency issued on 2 October 2013 stipulate submission by a third person and submission by a non-disputing Party to the treaty.²⁰ The Rules emphasize that the arbitral tribunal should consult with the disputing parties before it allow a third person to file a written submission regarding a matter within the scope of the dispute. It also sets up standards for the submission. Among those standards, it is worth to mention that the submission should subject to the page limits and language requirements and describe the nature of the interest that the third person has in the arbitration. Besides, the Rules also address what factors the tribunal should consider in their determination of whether to allow such a submission. Whether the third person has significant interest in the arbitral proceedings and the extent to which the submission would assist the arbitral tribunal in deciding factual or legal issues are the two important factors. Meanwhile, the Rules also state that the tribunal shall ensure that the submissions do not ‘disrupt or unduly burden the arbitral

²⁰ *Supra* note 18, Article 4 & 5.

proceedings’, or ‘unfairly prejudice any disputing party’.²¹

ICSID Convention Arbitration Rules issued in April 2006 have similar regulations on non-disputing party submission. Rule 37 (2) stipulates that the tribunal may allow a person or entity that is not a party to the dispute after consulting both parties.²² Rule 37 (2) also regulates that when determine whether to allow non-disputing party submission, the tribunal shall firstly examine to what extent the submission assist its decision on a factual or legal issue; then it shall examine whether the matter in the submission is within the scope of the dispute; and last but not the least, the tribunal shall ensure that the non-disputing party has a significant interest in the proceeding. This thesis contends that the UNCITRAL Transparency Rules upgrade the ICSID Arbitration Rules regarding the non-disputing party submission.

NAFTA promulgated a Statement of the Free Trade Commission on Non-disputing Part Participation on October 7, 2003. NAFTA’s Statement provides more detailed practice guidance for the arbitral tribunals. The Statement sets out specific standards not only for the application document of non-disputing party submission but also for the submission itself. More importantly, the Statement illustrates how the tribunal deals with the non-disputing party submission in details. Considering NAFTA is a multi-lateral treaty of the Governments of Canada, the United Mexican States and the United States of America, the Statement underscores that the non-disputing party is expected to be a person of a Party, or that has a significant presence in the territory of

²¹ *Ibid*, Article 4 (5).

²² ICSID, ICSID Convention, Regulations and Rules, Rule 37 (2) of Arbitration Rules, April 2006.

a Party. The application for non-disputing party submission shall be no more than 5 typed pages while the submission itself shall be no longer than 20 typed pages, including any appendices. Regarding what factors the tribunals will consider in the determining whether to grant a non-disputing party submission, NAFTA statement declares that the tribunal will also consider whether there is a public interest in the subject-matter. More importantly, the NAFTA statement declares that

“The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.”²³

4.3 Public Access to Arbitration Hearings

The UNCITRAL Transparency Rules state that arbitration hearings, including the presentation of evidence and oral argument, shall be public. It mentions that the arbitral tribunal shall make logistical arrangements to facilitate public hearings through video links or such other means as it deems appropriate.²⁴ Meanwhile, the Rules also set out some exceptions. The tribunal shall not be publicized if the hearings concern protected confidential information or for the sake of the integrity of the

²³ North America Free Trade Agreement, Statement of the Free Trade Commission on Non-Disputing Party Participation (October 7, 2004) Article B.9, online: Office of the United States Trade Representative <http://www.state.gov/documents/organization/38791.pdf> >.

²⁴ *Supra* note 18, Article 6.

arbitral process. Moreover, it stipulates that the arbitral tribunal may hold the hearings in private where there are logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

ICSID Convention Arbitration Rules declares that the tribunal may allow other persons to attend or observe all or part of the arbitration hearings, subject to appropriate logistical arrangements after it consults with the Secretary-General.²⁵ During the hearings, the tribunal has the responsibility to establish procedures for the protection of proprietary or privileged information.

NAFTA does not have explicit regulations on public access to hearings in details. But the commission has been discussing this issue for a long period. There is no doubt that following the trend of transparency in investment treaty arbitration, NAFTA will issue a statement on public access to hearings in the near future.

II. Reasons to Promote Transparency in Investment Treaty Arbitration

Different countries at different stages of development have different justifications to promote openness in investment treaty arbitration. In the last decades, while the countries with developed legal system and vigorous civil society regard transparency as a way to make the public voice to be heard and undertake political accountability, countries struggling in poor legal environment and underdeveloped civil society take transparency as a chance for the state to intervene and control the investment dispute resolution proceedings. However, this thesis argues that improving transparency in

²⁵ *Supra* note 22, Rule 22 (2).

investment treaty arbitration can promote ‘reflexive legitimacy’ in investment law system. In a functionally differentiated society, to ensure the interactions between different social sectors are crucial for legitimacy.²⁶ Therefore, to understand the needs of different actors in investment treaty arbitration is of great importance.

This section firstly analyzes the general status quo in the two types of countries mentioned above. Next, it explains the reasons why the general public, the investors and the investment arbitration system need transparency respectively. In the end, this thesis emphasizes that ‘reflexive legitimacy’ does not merely mean simply adding more participants in the arbitration proceedings, increasing unnecessary costs and the contempt of state sovereignty. What ‘reflexive legitimacy’ in this thesis means is that the state provide more room for tribunals to arrange the interactions during the opened arbitration proceedings so that the system can be controlled and developed by regulating themselves and controlling each other.²⁷

1. The Growing Involvement of Non-economic Concerns in International Investment

On May 25 1998, civil society groups in Montreal gathered together by deploying the Internet and mass media to protest against the Multilateral Agreement on Investment’s Drafting, considering it would show little concern for the environmental and human

²⁶ Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell Publishers, 1993) at 69.

²⁷ Walter Buhl, “Genzen der Autopoiesis” in *Kolner Zeitschrift fur Soziologie und Sozialpsychologies*, 1987 at 247; *Supra* note 26 at 68.

rights interests involved in foreign investment.²⁸ The charge against economic globalization is that it focused too much, if not entirely, on the protection of the foreign investors' interests while the interests of local communities are neglected. This movement reflected that as the development of international trade and investment, non-economic issues especially environmental and human rights issues are also brought to the picture. This section firstly addresses how the international investment treaties react to the environmental and human rights issues arising directly out of investment in policy-making documents step by step. This thesis contends that those treaties and documents constitute the presumption and important source for the promotion of transparency in investment treaty arbitration.

1.1 The Interests of Environmental Protection Groups

In the Montreal protest, environmental groups consider that multinational corporations should be responsible for pollution caused particularly in developing countries, where the environmental standards are relatively lax. Due to the lax regulations, multinational corporations usually regard developing countries as paradises where they may make profits without bearing the costs associated with compliance with the strict regulatory standards they encounter in their home states.²⁹

Non-governmental organizations argue that investment treaties deter actions being

²⁸ Global Nonviolent Action Database, International Campaign Against the Multilateral Agreement on Investment 1996-98, online: Swarthmore College <<http://nvdatabase.swarthmore.edu/content/international-campaign-against-multilateral-agreement-investment-1996-98>>.

²⁹ M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010) at 225.

taken against polluters because the treaties ensure that infringements of existing rights of investors are regarded as expropriations under the treaties.³⁰ Furthermore, although the expropriations were under disputes, confidentiality of investment arbitration deprived the rights of the public to make their voice heard in the tribunal. For this reason, these groups have argued that on one hand, investment treaties should contain exemptions to allow host states to protect the environment;³¹ on the other hand, the investment dispute resolution process should be transparent.

Some countries have taken this concern into consideration when they are signing treaties. Such provisions can be found in NAFTA. Article 1114(1) of NAFTA stipulates that a Party cannot be construed to adopt, maintain or enforce any measure aiming to ensure that the investment activity in its territory is undertaken in a manner sensitive to environmental concerns.³²

However, in *S.D. Myers v. Canada*, the Tribunal interpreted this provision by saying its nature was merely 'hortatory'. As a result, the Tribunal refused to acknowledge the merit of the Canadian defense – that Canadian hazardous waste should be disposed of in Canada and not sent across the border into the United States.³³ The Tribunal took this position despite the fact that Canada's argument is based on the obligations under the Basel Convention on the Trans-boundary Movements of Hazardous Wastes.

In contrast, the Canadian 2004 Model FIPA contains far stronger statements on

³⁰ *Santa Elena v. Costa Rica* (2000) 39 ILM 317; (2002) 5 ICSID Reports 153 (Arbitrators: L. Yves Fortier, Professor Elihu Lauterpachit, Professor Prosper Weil).

³¹ *Supra* note 29 at 225.

³² North America Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, (entered into force 1 January 1994), Article 1114 (1).

³³ *S.D. Myers Inc.* *Supra* note 13, 40 ILM 1408; (2002) 121 ILR 7.

exceptional situations where the State would intervene in the liability of foreign investors for environmental grounds. Article 10 states:

“1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources.”³⁴

This article ensures that the provision can no longer be considered ‘merely hortatory’. It is important to mention that the Canadian treaty also contains a prohibition against the reduction of environmental standards as a means of attracting foreign investment. Such exception for environmental protection has not been explicitly spelt out in most other treaties because it is considered to amount to a regulatory interference. Norway is among the few countries that officially acknowledge economic interests have been weighed against a number of other important social considerations in concluding new investment agreements. In its explanatory notes, it declares that in order to conduct a satisfactory environmental protection policy, it is important that national authorities

³⁴ Canadian 2004 Model FIPA, Article 10, online: International Treaty Arbitration <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>>.

have a right to employ effective instruments relevant to meet the needs dictated by environmental problems at any given time. As a consequence, Norway emphasizes that it has been a primary consideration for the Government to ensure that investment agreements are drafted in such a way that they do not limit the freedom of action of the environmental protection authorities in providing national instruments for protection of the external environment.³⁵

Norway is setting a preliminary guidance for taking environmental issues into consideration. However, as pointed out, governmental interference on environmental grounds will be regarded as a regulatory interference that is unjustifiable. Consequently, the State should set up mechanism and regulatory framework to provide environmental protection groups to exercise their rights themselves instead of speaking for them.

1.2 The Interests of Human Rights Protection Associations

Compared to the environment, human rights are seldom, if at all, referred in bilateral investment treaties. However, human rights violations related to the suppression of dissent against particular projects initiated by multinational corporations have come to light in recent years.³⁶ Human rights problem in foreign investment is exposed in

³⁵ *Supra* note 29 at 227.

³⁶ *CMS Gas Transmission Company v. The Argentine Republic* (2005) ICSID No ARB/01/8 (Arbitrators: Professor Francisco Orrego Vicuna, The Honorable Marc Lalonde, H.E. Judge Francisco Rezek); *Azurix Corp. v. The Argentine Republic*, Annulment Proceeding (2009) ICSID Case No. ARB/01/12 (Arbitrators: Dr. Gavan Griffith QC, Judge Bola Ajibola, Mr. Michael Hwang S.C.); *Tecnicas Medioambientales Tecmed SA v Mexico* (2003) ICSID Case No. ARB (AF)/00/2 (Arbitrators: Dr. Horacio A. Grigera Naon, Prof. Jose Carlos Fernandez Rozas, Mr.

recent litigation before host state courts against parent companies of multinational corporations allege violations of human rights committed by agents of those multinational corporations in association with the political elites in developing countries.³⁷ Unfortunately, there are few treaties to address this issue. Although there is no doubt that the issues of health, morals and public welfare have found its way in some investment treaties, the scope of use of those phrases has not yet been determined.³⁸

In Asia and Africa, many states use their laws to attempt to forestall human rights problems by allocating the economic pie in accordance with ethnic policies devised to ensure the majority's economic role. In Malaysia and South Africa, these policies are even enforced by legislations.³⁹ Investment treaties sit uneasily with such social experiment as they contain national treatment standards that usually request that the best national standards are given to foreign investors. There is an urgent need to remove those provisions in favor of the disadvantaged sections of the community from the scope of the investment treaties. However, there have been few efforts made in this regard.⁴⁰

Studies by non-governmental organizations in this field show that many natural resource projects are carried out despite the fact that they would probably have

carlos Bernal Vereja) para. 122.

³⁷ *Supra* note 29 at 227; Economic and Social Council, 62nd Sess, UN Doc. E/CN.4/2006/97 (22 February 2006), para. 59.

³⁸ *Supra* note 29 at 227.

³⁹ *Supra* note 29 at 228.

⁴⁰ A. Van Aeken, "Fragmentation in International Law: The Case of International Investment Law" (2008) 19 Finnish Yearbook of International Law 128.

adverse human rights consequences, particularly on aboriginal peoples.⁴¹ Moreover, considering these projects involve water, electricity and other essential items, the prices that have to be paid under the building, operation and transfer agreements under which the projects are undertaken are fixed by the foreign investors.⁴² They are prohibitively high, denying the local people the means of access to life-sustaining resources. It is without doubt that if the violations of human rights involve rights that are protected by *ius cogens* principles such as the prohibition of genocide, torture or racial discrimination, they will be sanctioned. The Vienna Convention on the Law of Treaties states that *ius cogens* principles should be given precedence over such treaties.⁴³ However, where lesser types of human rights are violated, the courts and tribunals are supposed to make a balanced decision between promotion of foreign investment and protection of human rights. Thus, the issue arises whether arbitrators who are appointed to decide investment disputes have sufficient expertise to decide on such questions of international law. The legitimacy of an award by a confidential tribunal which shows a lack of concern for the competing norms based in human rights is to be doubted.⁴⁴ Therefore, non-governmental organizations' participation in proceedings through the submission of *amicus curiae* has been regarded as a good way to resolve this problem.⁴⁵

⁴¹ Amnesty International, 2006, AI Index POL/34/001/2006 "Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws".

⁴² Biwater, *supra* note 13; *Bayview Irrigation District et al. v. United Mexican States*, (2007) ICSID Case No. ARB(AF)/05/1 (Arbitrators: Professor Vaughan Lowe, Professor Ignacio Gomez-Palacio, The Honorable Edwin Meese III).

⁴³ *Supra* note 29 at 228.

⁴⁴ *Ibid* at 229.

⁴⁵ Eric De Brabandere, "Human Rights Considerations in International Investment

The non-state sectors' interests are increasingly respected in the international community and recognized in the preamble of many international treaties. As stated in Canada-China BIT, the BIT recognizes 'the need to promote investment based on the principles of sustainable development.'⁴⁶ The concept of sustainable development focuses on 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'⁴⁷. Section 2 of this Chapter delineates that procedural openness in investment treaty arbitration guarantees that arbitral tribunals' decisions are more sounded for the development of legal resources to secure and serve the needs of non-state sectors and future generation.

1.3 The Involvement of States in International Investment

While some countries improve transparency because of the public interests involved in the investment disputes, some countries regard procedural transparency to extend its state control over foreign investment development. Goldstein and Pusterla said, "It is important to remind that in the investment development path framework, the role of the government is important in shaping the country's investment conditions, hence in

Arbitration", in Malgosia Fitzmaurice & Panos Merkouris, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Leiden/Boston: Martinus Nijhoff Publishers, 2012) , online: Social Science Research Network

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230305>.

⁴⁶ *Supra* note 10.

⁴⁷ World Commission on Environment and Development, *Our Common Future: The Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987), at ix.

affecting the country's net outward investment position".⁴⁸ The state intervention in foreign investment is normal in socialist developing countries such as China. However, this thesis claims that there are three different levels of state intervention: regulatory or policy making intervention, intervening as an actor in foreign investment and making direct influence on dispute resolution process. The former two types of state intervention lead to the state's intervention in dispute resolution process. This thesis holds: On one hand, the lack of developed free market economic system and the transplanted but not adaptive legal protection for private sectors lead to the phenomenon that state-owned enterprise still plays active and crucial role in overseas investment. Considering state-owned enterprise concerns a country's economic stability and usually invested in strategic sectors like oil and gas, the states like China will not allow 'uncontrolled' public movement to fuel the struggle and thereby escalating the struggle into a diplomatic problem. From this perspective, the host state government is supposed to be the optimal agency to 'control' the public participation. On the other hand, in the countries with politicized judicial system and underdeveloped legal system, state intervention in dispute resolution process is regarded to be an assurance to maintain harmonious society. Considering China is a typical country that expand its governmental influence on every stage of foreign investment, this sections takes China as the main example.

⁴⁸ Andrea Goldstein & Fazio Pusterla, "Emerging Economies' Multinationals: General Features and Specificities of the Brazilian and Chinese Cases" (2008), working paper n. 223, Università Commerciale Luigi Bocconi, Milan, Italy, at 14, online: IDEAS <<http://ideas.repec.org/p/cri/cespri/wp223.html>>.

1.3.1 Policy-making Intervention in Foreign Investment

The treatment and policy provided to the foreign investors are closely related to the state policy in socialist emerging countries. Therefore, if the foreign investors in these countries claim to be mistreated, the investor-State arbitration tribunal usually acts as an administrative review mechanism. Publicizing the dispute resolution proceedings seems to be the basic requirement to implement most-favored nation treatment in practice. In the countries undergoing a period of economy transmission, transparency is of great importance.

The history of foreign direct investment in China is usually divided into four stages: nationalization and exclusion (1949-1978), gradual resumption (1979-1991), first surge (1992-2000) and second surge (2001-present).⁴⁹ In every stage, it is always the State instead of the market that decides the investment strategies, target market and relevant measures. Although the People's Republic of China was founded in 1949, foreign direct investment was not welcome by the state until 1978 with Deng Xiaoping's adoption of the open-door policy. Deng Xiaoping had a pragmatic perspective when making economic development strategies. He said, "it does not matter whether a cat is black or white, as long as it catches mice."⁵⁰ Accordingly, China promulgated domestic laws and regulations to improve the local legal environment for foreign investment and started signing investment treaties with other

⁴⁹ Thomas N. Thompson, "China's Nationalization of Foreign Firms: The Politics of Hostage Capitalism, 1949-1957" (1979), 6 University of Maryland Law School Occasional Papers/Reprints Series in Contemporary Asian Studies 27, at 3.

⁵⁰ Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties – Policies and Practice* (Oxford: Oxford University Press, 2009) at 6.

States. Thanks to this policy, there was a tenfold increase of annual foreign direct investment inflow in China, from merely \$4.3 billion in 1991 to \$45.2 billion in 1997.⁵¹ During this period, the Chinese government decided to accept “market economy” principles and officially incorporated “socialist market economy” as the goal of economic reform. In 1993, even the Constitution was revised to conform to the government’s new policy. The development of a socialist market economy thus became one of the fundamental policy goals of the State. In 2002, China joined the World Trade Organization. China’s entry into the world trading system, including the efforts made by the Chinese government with the assistance of other members in WTO to bring its laws and regulations into line with the WTO requirements, played a key role in this foreign investment development.⁵² Having experienced the dramatic economic growth, Chinese government now concerns more about the quality instead of quantity and stable, long-term development of foreign direct investment. This can be demonstrated by the 11th Five-Year Plan on the Utilization of Foreign Investments published in 2006 and 12th Five-Year Plan. The 2006 Plan’s key word is “quality”, as against “quantity”. The 2007 Plan emphasizes that it is of great importance for China to enhance the efficient use of foreign loans and promote the stable development of foreign investment in China. 2007 Plan also mentions that China will expand outbound investment through actively participating in energy and mineral resource development projects and encouraging qualified enterprises to work together with

⁵¹ *Ibid* at 7.

⁵² *Ibid* at 8.

foreign institutions in technology developing projects.⁵³

The intervention from the states, including the developed countries, in the policy-making process of foreign investment becomes more common in strategic sectors like natural resources. Moreover, emerging countries like Singapore and Brazil usually update its economic development policy according to their political ambition. Therefore, to improve the transparency of treaty-based investor-State arbitration is important.

1.3.2 State's Direct Involvement in Foreign Investment

Governments always influence and manage international investments. What differs considerably among states is how much and in what way the governments interfere. While the governments of India, China, Thailand, Indonesia, South Korea, and Malaysia controlled at least 60% of their countries' cross-border investments as of the end of 2005, the USA's government just controlled 2.5%.⁵⁴ For decades, a typical private sector business did not exist in China. With economic opening and the introduction of private ownership in the 1980s, private sectors got access to the business transaction. However, they had been still partially driven by state policies such as privatization, and local governments' special treatment. Even some foreign investors have to intensively interact with certain levels of governments in order to do

⁵³ China's National Development and Reform Commission, 12th Five-Year Plan on Foreign Investment Utilization and Outbound Investment, Online: Herbert Smith Freehills

<<http://www.herbertsmithfreehills.com/-/media/HS/SIBEHK130812371025.pdf>>.

⁵⁴ Edwin M. Truman, "Sovereign Wealth Funds: The Need for Greater Transparency and Accountability" (2007), No. PB07-6 Policy Brief, online: Peterson Institute <<http://www.iie.com/publications/pb/pb07-6.pdf>> at 3.

business in China.

Governmental control became much stronger when it comes to strategic sectors. State-owned enterprises usually play crucial role in some strategic industries, such as natural resources, telecommunications, broadcasting, infrastructure or some politically sensitive business. The members in board of directors of those enterprises have been usually appointed by the State-owned Assets Supervision and Administration Commission of the State Council.⁵⁵ Some of the directors are traditional state bureaucrats and members of the Chinese Communist Party. For these Party bureaucrats, the fact that companies may act as private company was a comparatively new phenomenon. Managerial work in the state-owned enterprises has been thus characterized by managers' established and ongoing trust and responsibility to national interests. They view their work in the "private sector" largely as continuing their career as civil servants.⁵⁶

In addition to state-owned enterprise, sovereign wealth funds have also increased exponentially these years, with the establishment of 20 new sovereign wealth funds since 2000 including 12 new sovereign wealth funds since 2005.⁵⁷ For example, China's sovereign wealth funds, under the name of China Investment Corporation, invested US\$5 billion in Morgan Stanley in December 2007 in return for a 9.9 per

⁵⁵ Chen Qing & An Lin, *Governance Guidelines for the Board of Directors of Chinese State-owned Enterprises* (Beijing, China Machine Press, 2007) at 63.

⁵⁶ Randall Morck, Bernard Yeung & Minyuan Zhao, "Perspectives on China's outward foreign direct investment" (2008), 39 *Journal of International Business Studies*, 337 at 344.

⁵⁷ Mathias Audit, "Is the erecting of barriers against sovereign wealth funds compatible with international investment law?" (2009), 10 *Journal of World Investment and Trade* 617; Gerard Lyons, "State Capitalism: The Rise of Sovereign Wealth Funds" (2008), 14 *Law and Business Review of the Americans* 179.

cent stake.⁵⁸ However, the commercial-driven nature of sovereign wealth funds is questionable. Certain sovereign wealth funds appear to target more sensitive sectors of a host State's economy such as the financial or energy sectors.⁵⁹

This section has illustrated that some states make direct influence on foreign investment, especially in strategic sectors. Chinese governments have been also largely directly involved in Chinese foreign direct investment. However, new studies published jointly by the Canadian Council of Chief Executives and the Canadian International Council conclude that Chinese state-owned enterprises nowadays operate much like their sector counterparts in Canada and elsewhere – buying and selling oil and minerals on a regional basis to the highest bidder rather than acting for political or diplomatic interests.⁶⁰

1.3.3 State's Intervention in Investor-State Disputes Resolution

In the most of Chinese investment treaties, exhaustion of local remedies is the conditions precedent to submission of a claim to arbitration.⁶¹ So it is useful to briefly review some essential elements of Chinese law regarding investor-state dispute

⁵⁸ New York Times, News Release, "Morgan Stanley Posts Loss, Sells Stake to China" (19 December 2007) online: http://dealbook.nytimes.com/2007/12/19/morgan-stanley-to-sell-stake-to-china-amid-4th-quarter-loss/?_r=0.

⁵⁹ Markus Burgstaller, "Sovereign Wealth Funds and International Investment Law", in Chester Brown & Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) at 166.

⁶⁰ Margaret Cornish, "Behavior of Chinese SOEs: Implications for Investment and Cooperation in Canada" (February 21 2012), online: Canadian Council of Chief Executives Report <http://www.ceocouncil.ca/news-item/chinese-state-owned-enterprises-are-motivated-by-profit-not-national-interest-study-concludes>.

⁶¹ *Supra* note 50 at 367.

settlement. In China, state-investor disputes are usually handled through administrative channels, namely administrative review and administrative litigation.

Administrative Review

Administrative Review in China is a hierarchical supervision mechanism within the administrative system designating administrative organs of a higher level to review any specific administrative acts of lower-level organs for legality and propriety when citizens, legal persons and other organizations request. According to Article 6 of the Administrative Review Law of 1999 (replacing the Administrative Review Regulation of 1990),⁶² such “specific administrative acts” under review include administrative sanction, a compulsory administrative measure, an administrative decision of altering, suspending or discharging certificates, an administrative decision of confirming ownership or right to use of natural resources, infringement upon one’s managerial decision-making power, etc. Article 7 of Administrative Review Law stipulates that administrative review may also be conducted against “provisions” adopted by lower-level administrative authorities when they constitute the basis of a specific administrative act in question.⁶³ Such provisions include:

- “(1) provisions of departments under the State Council;
- (2) provisions of local people's governments at or above the county level and their departments;

⁶² Administrative Review Law of the People’s Republic of China (adopted at the Ninth Meeting of the Standing Committee of the Ninth national People’s Republic of China on 29 April 1999, and effective as of 1 October 1999.)

⁶³ *Ibid*, Article 7.

(3) provisions of people's governments of towns or townships.

The provisions set forth in the preceding paragraph do not include rules of departments and commissions under the State Council, and local people's governments. Review on rules shall be handled according to relevant laws and administrative regulations.”

Therefore, the threshold for review is also relatively high. It not only reviews “illegal” acts but also does “improper” acts. This is in contrast to administrative litigation, which is only applied when the “specific administrative acts” are illegal. According to Article 31, the time limit for administrative review is normally 60 days, with 90 days as the maximum time allowed.⁶⁴ This is probably the reason for China’s insistence on the three-month, or ninety-day, maximum administrative review time limit in its BITs. An administrative review decision, however, may be challenged by bringing an administrative lawsuit to the People’s Court, unless otherwise stipulated by the law. Further details with regard to the implementation of the law are included in the Implementing Regulations for the Administrative Review Law adopted in 2007.⁶⁵

Unlike administrative review, which is essentially an internal supervision system conducted within the administrative system, administrative litigation is conducted within the general judicial system. Since 1989, the promulgation of the Administrative Procedures Law has made it possible for all citizens, juridical persons, and other organizations to bring an action before a court against “specific administrative acts”

⁶⁴ *Ibid*, Article 31.

⁶⁵ Standing Committee Meeting of the State Council, Implementing Regulations for the Administrative Review Law, adopted on 23 May 2007, effective as of 1 August 2007.

by administrative authorities. According to Article 11, the “specific administrative acts” are similar to the regulations in Administrative Review Law. However, abstract administrative acts such as administrative regulations, rules, or decisions and orders with general binding force formulated by administrative organs, including provisions that may be reviewed under the administrative review process, are not subject to administrative proceedings.⁶⁶ Further, in accordance with the Administrative Procedures Law, if these specific administrative acts have caused damage, the injured person may claim compensation.⁶⁷ The State Compensation Law was formulated in 1994 to deal with claims of damages.

Other than the laws, it is also important to mention that the government, the Chinese Communist Party also imposes their influence on the People’s Court. In modern judicial system, a judge should make judicial decisions based on the facts and laws. The independence suggests that judges remain impartial to form legal ascertainment without any outside interferences. In contrast to this ideal model, judicial decision-making in China is very complicated in which many kinds of characters play different roles. For example, a case involving a foreign investment dispute usually includes the chief judge of a tribunal, the president or vice president of a people’s court, the adjudication meeting of that court, the branch Committee of Communist Party of China in that court, the local Committee of Political and Legislative Affairs of Communist Party of China in the jurisdiction, the higher-level court, people’s

⁶⁶ *Supra* note 50 at 370.

⁶⁷ Administrative Procedure Law of the People’s Republic of China, adopted on April 4 1989, effective as of October 1, 1990, Article 12.

Congress at the same and higher level, local government, local Committee of Communist Party of China, experts outside the court, lawyers, the press the public and so forth.⁶⁸

2. General Public Concern in International Investment Disputes Demands Transparency in Treaty-based Investor-State Arbitration

Public scrutiny is crucial for the improvement of legitimacy of investment treaty arbitration system.⁶⁹ As mentioned in the last section, the level of public interest in arbitration proceedings is normally higher in investment arbitration than in ordinary commercial arbitration. This is not only because States and enterprises providing public services are frequently parties in investment arbitration, but also because the subject matter of investment disputes usually involve governmental measures and public interest.⁷⁰ The tension between confidentiality and transparency is a concern more sharply at stake in international investment arbitration, where the parties' interest in maintaining privacy and confidentiality often clash resoundingly with the general public interest in knowledge of economic development activities and accountability of public officers of the host state and officials of foreign corporations and sometimes the officials and equity owner of the local partners or associates of the

⁶⁸ Shuoshuang Li, *The Legal Environment and Risks for Foreign Investment In China* (Berlin & New York: Springer, 2007) at 299.

⁶⁹ *Aguas Del Tunari, S.A. v. Republic of Bolivia* (2002), ICSID Case No. ARB/02/3, Petition by NGOs and people to participate as an intervening party or *amici curiae*, (Arbitrators: David D. Caron, Jose Luis Alberro-Semerena, Henri C. Alvarez) at 31.

⁷⁰ Christina Knahr & August Reinisch, "Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise" (2007), 6 *The Law and Practice of International Courts and Tribunals* 97 at 113.

foreign corporation.⁷¹

2.1 Confidentiality shall not be the Assumption of Investor-State Arbitration

The advantages of confidentiality discussed in the context of commercial arbitration have been traditionally acknowledged to be also applicable to investment treaty arbitration. The reasons are: firstly, it has been usually assumed that many firms appreciate business secrets and may help to protect the public image of companies when even the mere fact released to the public might cause harm to its reputation; secondly, confidentiality may contribute to a reduction of tensions between the parties. In the absence of the requirement to publicly comment on various procedural steps during dispute settlement procedures, it is supposed to be easier to agree on certain non-disputed aspects of a case and thus to accelerate the proceedings;⁷² thirdly, the confidential nature of proceedings may also facilitate settlement talks between the parties.⁷³

There is no doubt that the protection of business secrets as well as of certain governmental secrets has to be safeguarded by investment treaty arbitration. The confidentiality, at least during proceedings, can contribute to the de-politicization of

⁷¹ Loukas Mistelis, “Confidentiality and Third Party Participation: UPS v. Canada ad Methanex Corp v. United States”, in Todd Weiler ed., *International Investment Law and Arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron, 2005) at 170.

⁷² Florentino P. Fliciano, “The Ordre Public dimensions of confidentiality and transparency in international arbitration: Examining confidentiality in the light of governance requirements in international investment and trade arbitration” in *Supra* note 4 at 20.

⁷³ *Ibid* at 21.

investment disputes, one of the avowed purposes of ICSID arbitration.⁷⁴ In view of the typical long-term relationship between an investor and a host State, it may be particularly important to facilitate any move towards a negotiated settlement between the parties.⁷⁵

However, transparency is becoming one of the central aspects of legitimacy and good governance claims directed against States. There exist many reasons to promote transparency in investment treaty arbitration. On one hand, investment treaty arbitration consists of a supranational review of state acts. The state conduct and state responsibility ascribed according to standards of treatment which are set out in the relevant treaty as supplemented by customary international law and are independent of any underlying contractual obligations, should be scrutinized by the public.⁷⁶ More specifically, the subject matter of investment disputes regularly concerns governmental measures. This often transforms investment treaty arbitration into a functional alternative to judicial review of governmental measures which would otherwise be reserved to the national courts.⁷⁷ For instance, in cases where the legality of environmental or health measures or their potential qualification as expropriatory acts is at issue, the public will show greater interest in the proceedings and outcome which may affect future legislative or administrative freedom of

⁷⁴ Ibrahim F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986), 1 ICSID Review 1.

⁷⁵ ICSID Convention, *Supra* note 22 Articles 28-35.

⁷⁶ Michael Waibel, *The Backlash Against Investment Arbitration: Perception and Reality* (The Netherlands: Kluwer Law International, 2010) at 255

⁷⁷ Gus Van Harten & Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 *European Journal of International Law* 121; Thomas Wilde, "Transparency, Amicus Curiae Briefs and Third Party Rights" (2004), 5 *The Journal of World Investment and Trade* 37.

manoeuvre.⁷⁸ This justified interest is frequently expressed in specific legal disclosure requirements imposed upon companies by national law. On the other hand, unlike commercial arbitration where the tribunal's role is limited to the resolution of disputes arising out of the parties' contractual obligations, there is a justified public interest in the outcome of certain investment disputes which affects not only the parties to the dispute but also the public at large or certain segments of the public.⁷⁹ As a consequence, the public has shown an increasing interest in monitoring and participating in the investment dispute resolution process. Therefore, the urgent public matters arose in the investor-State arbitration shall not be decided behind a shroud of secrecy, without public vigilance and participation.⁸⁰

2.2 Transparency in Investor-State Arbitration Gives the Civil Society a Chance to Make the Public's Voice to be Heard

What the State considers is for the best of its own interests as sovereignty. This is not necessarily best for the public interest.⁸¹ Arbitration is a dispute resolution process run by arbitrators without over-intervention from political elites. Making arbitration proceedings transparent can be one of the most efficient approaches to make the

⁷⁸ Kaj I. Hobér, Arbitration Involving States, in Lawrence W. Newman & Richard D. Hill (eds.), *Leading Arbitrators' Guide to International Arbitration* (Huntington/New York: Juris Publishing, 2008) at 139-54.

⁷⁹ *Esso Australia Resources Ltd and Others v. Plowman (Minister of Energy and Minerals) and Others* (1995) 128 ALR 391; Andrew Tweeddale, "Confidentiality in Arbitration and the Public Interest Exception" (2005), 21 *Arbitration International* 59 at 61.

⁸⁰ *Supra* note 69, para. 30.

⁸¹ Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012) at 149.

global society's voice be heard.

Amicus curiae submissions can help the arbitral tribunal better understand the dispute before it. This is because considering that both the investor and the host state have strategic and political interests, their scope of information and argumentation will be limited and restricted. Parties and their counsels to the investment treaty arbitration are probably selective about the way they present their case in order to ensure they are best positioned for the optimal strategy to win their case. This can become a problem if the national state's interest is different from public interest. In other words, the state counsels fail to represent the public interest. For instance, some important information such as the environmental impact of a measure is not always thoroughly at the disposal of the government, or even deliberately discarded for reasons of bureaucratic or diplomatic capture. But non-governmental organizations sometimes can find avenues to gather those data and present views to the tribunal in their submissions.⁸²

Public interest considerations has permeated a large number of investment awards thanks to the influence of transparency movements, although this thesis acknowledges that investment tribunals' reasoning currently comes short of presenting a consistent theoretical foundation.⁸³ And some of their submissions did affect arbitration decisions. *Inceysa* is the dispute involved contract for installation, management and operation of mechanical inspection stations for vehicles between the Ministry of the

⁸² Noah Rubins, "Investment Arbitration – "Transparency" in Investment Arbitration: A Call to Cost-Benefit Analysis" in Christian Klausegger, Petter Klein, et al (eds) *Austrian Yearbook on International Arbitration* (Manz'sche Verlags- und Universitätsbuchhandlung, 2010) at 296.

⁸³ *Supra* note 81 at 127.

Environment and Natural Resources of the Republic of El Salvador and Inceysa Vallisoletana, SL, a Spanish company.⁸⁴ Thanks to the public scrutiny during the arbitral proceedings, the Tribunal rendered a publicly acceptable award. In this case, while Inceysa asserted that El Salvador *de facto* terminated the contract in an unjustifiable manner, leading to an indirect expropriation, the host government countered that Inceysa, during the procurement procedure, had illicitly influenced the outcome of the tender by a multitude of fraudulent acts, among them making false financial statements, submitting forged documents and misrepresenting its actual level of experience in vehicle inspections.⁸⁵ Although the El Salvador challenged the Tribunal's jurisdiction on the ground of Article 25 ICSID, the Tribunal made Inceysa be accountable for its conduct based mainly on the principle of good faith and on the principle that nobody should benefit from fraud – *Nemo Auditur Propriam Turpitudinem Allegans*.

This thesis contends that the award would be different if there was no any pressure from the public society. It is also worth to emphasize that the *amicus* brief can hardly fills the gaps in the parties' submissions unless the arbitral documents can be publicly accessible promptly. Therefore, this thesis underscores that *amicus* submissions can advance the tribunal's analysis and fully represent public interest only when the non-disputing parties can get access to all relevant arbitral documents timely.⁸⁶

⁸⁴ *Inceysa Vallisoletana, SL v. Republic of El Salvador* (2006) ICSID Case No. ARB/03/26 (Arbitrators: Rodrigo Oremano Blanco, Burton A. Landy, Claus von Wobeser).

⁸⁵ *Supra* note 84 at para. 53.

⁸⁶ Todd Weiler, "Restrictions on Submissions of Amicus Briefs to NAFTA Investment Arbitral Tribunals" (2004), 1:1 Transnational Dispute Management, online:

3 Transparency of Treaty-based Investor-State Arbitration can Facilitate ‘Reflexive Legitimacy’ in the Investment Arbitration System for the International Investment Dispute Settlement Institutions

The legitimacy problem usually arises from the contradictory holdings of different tribunals on identical investment disputes.⁸⁷ Due to the confidentiality and secrecy of international arbitration and great discretionary power of arbitrators, different interpretations of BITs usually result in contradictory awards in investment treaty arbitration. And this fragmentation has led to serious questions as to the legitimacy and viability of the ICSID arbitration system in 2008 during Argentina’s financial crisis. This section submits that fragmentation in arbitral awards is inevitable in the increasingly functionally differentiated investment environment. Transparency may not decrease contradictory awards. However, this section argues that openness in investment treaty arbitration can alleviate the drawback of fragmentation, which is lack of systemic integrity. This is because openness can promote ‘reflexive legitimacy’ in investment system.

3.1 Contradictory Awards Negatively Affect the Legitimacy of Investor-State Arbitration System

The four awards, rendered in the Argentine cases in early 2008, consider both the

Transnational Dispute Management
<<http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article60.htm>>.

⁸⁷ *Supra* note 76 at 425.

non-precluded measures exception and the necessity defense argued by Argentina and reach poor legally inaccurate reasoning and opposite awards. While the tribunals in the cases of *CMS v. Argentina*, *Enron v. Argentina*, and *Sempra v. Argentina* found both the non-precluded measures clause and the necessity defense inapplicable, the tribunal in *LG&E v. Argentina* found that the non-precluded measures clause had been properly invoked and that the necessity defense was applicable to Argentina.⁸⁸

The three tribunals' awards reflect the fact that they not only ignored the treaty based non-precluded measures exception and restrict the necessity defense, but also appeared to overlook the basic bargain between investor protection and state freedom of action inherent in a BIT, thereby, limit the state's ability to respond to exceptional situations, such as financial crisis, terrorist attack, and response to public health emergency. As a consequence, it may threaten the long-term willingness of states to participate in investor-state arbitration. Many scholars in China employ the lessons of Argentina's arbitrations to argue against the incorporation of arbitration in China's BITs.⁸⁹

In addition, the contradictory awards severely damaged the legitimacy and viability of the ICSID arbitral system. Besides Argentina's cases, several other investor-state arbitrations have also produced contradictory awards. The *Lauder v. Czech Republic* case, in which Lauder claimed breaches of BIT and contract rights based on the Czech

⁸⁸ *Ibid* at 416.

⁸⁹ An Chen, "Four Safeguards in Bilateral Investment Agreements Shouldn't be Rashly Dismantled during Sino-foreign Negotiation-Comments on of Critical Provisions concerning Dispute Settlement in the U.S. and Canada's Model BITs text" (2006), 1 *Journal of International Economic Law* 4 at 28.

Republic's interference with media licenses, involved two separate arbitrations: one is under the US-Czech BIT brought by Lauder and the other is under the Netherlands-Czech BIT brought by CME, a Dutch corporation.⁹⁰ The two tribunals reached directly opposite conclusions with respect to whether a causal link existed between the Czech Republic's actions and the harms done to Lauder.⁹¹ Those contradictory awards resulted in numerous calls for reforms to the investor-state arbitration system, and the establishment of an appellate review system.

This thesis contends that the fragmentation in arbitral decisions do not necessarily emerge as legal-technical 'mistake' or systemic problem. The phenomenon of fragmentation reflects the different political or economic pursuits and preferences of actors in a pluralist society.⁹² With the growing diversification and expansion of international investment law, fragmentation is inevitable but its side effect can be reduced through enhancing openness of investment treaty arbitration. This thesis argues that improving the transparency of investor-State arbitration can make a contribution to establishing legitimacy of arbitration system.

3.2 Improving Transparency can Reduce the Negative Effect Caused by Fragmentation in Investor-State Arbitration System Through Creating

⁹⁰ *Lauder v. Czech Republic* (2001), In the matter of an UNCITRAL Arbitration, Final Award, para. 313 (Arbitrators: Lloyd Cutler, Robert Briner, Bohuslav Klein); *CME Czech Republic BV v. Czech Republic* (2001), Partial Award, para. 575; *CME Czech Republic BV v. Czech Republic* (2003), Final Award, paras. 446-47.

⁹¹ *Supra* note 76 at 426.

⁹² International Law Commission, 58th session (1 May – 9 June and 3 July – 11 August 2006) General Assembly Official Records 61st Session Supplement No.10 (A/61/10) at 406.

‘Reflexive Legitimacy’

After formal rationality and substantive rationality, Teubner proposes the third form of rationality, reflexive rationality, concentrating on law’s coordinating function which ‘retreats from taking full responsibility for substantive outcomes’.⁹³ Reflexive law is sensitive to ‘outside effects’ in the course of maximizing internal rationality. But reflexive law is not a mere reflection of the ‘outside effects’ or only a mirror to societal usage and norms. Reflexive law strives to enable and promote societal self-regulation by providing for the necessary public legal framework for private ordering.⁹⁴ *Lex mercatoria* is a good example of reflexive law. Reflexive law theory regards law as a communicative system. Therefore, the framework of reflexive law theory does not only fulfill the function of promoting interactions between the national state and the civil society,⁹⁵ it also sets up the limits of self-regulation and tries to modulate the regulated discourse towards a reflection of third party interests and of common good.⁹⁶ Teubner contends that the conflicts between function and performance of different tribunals can be solved by imposing internal restrictions on given sub-systems, such as civil society, so that they can improve the legitimacy of the system by playing a role in the ‘normatively closed’ but ‘cognitively open’

⁹³ Gunther Teubner, “Substantive and Reflexive Elements in Modern Law” (1983), 17 *Law & Society review* 239 at 254.

⁹⁴ Galf-Peter Calliess & Frankfurt/Main, “Reflexive Transnational Law - The Privatisation of Civil Law and the Civilisation of Private Law” (2002), in 23 *Zeitschrift für Rechtssoziologie* at 205.

⁹⁵ Kerber/Vanberg, “Constitutional Aspects of Party Autonomy and Its Limits – The Perspective of Constitutional Economics”, in Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill (ed.), *Party Autonomy and the Role of Information in the Internal Market* (Berlin/New York: Walter de Gruyter, 2001) at 49-79.

⁹⁶ Henry H. Perritt, “Cyberspace Self-Government: Town-Hall Democracy or Rediscovered Royalism” (1997), 12 *Berkeley Technology Law Journal* 413.

arbitration system.⁹⁷

Through publicizing the arbitral documents, the international dispute resolution institutions can get supervision over the arbitrators' discretionary power. By rewarding the civil society's the rights to participate in the arbitral proceeding, the tribunal can gain more helpful facts and evidence to improve its reasoning. The public responses to similar disputes taking place in different tribunals are more likely to be consistent compared to tribunals' reasonings which are separately written according to different sources of laws and various approaches of interpretation. More importantly, through giving the third parties the right to make submissions to the tribunal, it creates 'reflexive legitimacy' in investment arbitration system.⁹⁸

The openness of investment treaty arbitration is crucial for the establishment of reflexive legitimacy in the investment law regime.⁹⁹ Improving the reflexive legitimacy of international investment law regime can be accomplished through the combination of two diverse mechanisms: information and intervention.¹⁰⁰ Therefore, arbitral awards and relevant documents should be publicly accessible for the civil society because this is the information. On the other hand, *amicus* submission is the intervention that can help the tribunals gather necessary evidence and facts to reach legitimate and publicly-acceptable decisions. By ensuring the publication of arbitral documents and public participation, treaty-based investor-State arbitration can 'proceduralize' the investment treaty, which means maintaining its 'cognitive

⁹⁷ *Supra* note 11 at 477.

⁹⁸ *Supra* note 11 at 476.

⁹⁹ *Supra* note 94 at 197.

¹⁰⁰ *Supra* note 26 at 65.

openness' to the societal environment during legal discourse involved the state, the investors and the civil society, and thereby enhancing the reflexive rationality in order to respond to the higher degree of 'competitive legal pluralism'.¹⁰¹ Reflexive legitimacy will be further explained when this thesis does critical analysis on transparency provisions in Canada-China BIT in Chapter 3.

3.3 Public Participation can Remind the Tribunals to Consider Non-economic Purposes of BITs during Interpretation

Tribunals should take the purposes of BITs into account during the interpretation. According to article 31(1) of the Vienna Convention, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The most frequent way to find a treaty's object and purpose was to look at the preamble.¹⁰² Moreover,

¹⁰¹ *Supra* note 26 at 67; *Supra* note 94 at 213.

¹⁰² *SGS Société Générale de Surveillance v. Philippines* (2004) ICSID Case No. ARB/02/6, Decision on Jurisdiction, para. 116 (Arbitrators: Dr. Ahmed S. El-Kosheri, Professor James Crawford, Professor Antonio Crivellaro); *Occidental Exploration and Production Co. v. Ecuador* (2004), London Court of International Arbitration Administered Case No. UN 3467, Award, para. 183 (Arbitrators: Professor Francisco Orrego Vicuna, The Honorable Charles N. Brower, Doctor Patrick Barrera Sweeney); *CMS Gas Transmission Company v. Argentina* (2005), ICSID Case No. ARB/01/8, Award, para. 274 (Professor Francisco Orrego Vicuna, The Honorable Marc Lalonde P.C., O.C., Q.C., H.E. Judge Francisco Rezek); *Yury Bogdanov v. Moldova* (2005), Arbitration No. V (114/2009), The Stockholm Chamber of Commerce, Award, section 4.2.4 (Arbitrators: Advokat Bo G.H. Nilsson); *Agua del Tunari v. Bolivia* (2005), ICSID Case No. ARB/02/3, Decision on Jurisdiction, para. 241, (Arbitrators: David D. Caron, Jose Luis Alberro-Semerena, Henri C. Alvarez); *Saluka v. Czech Republic* (2006), The Matter of an Arbitration under the UNCITRAL Arbitration Rules 1976, Partial Award, para. 299, (Arbitrators: Sir Arthur Watts KCMG QC, Maitre L. Yves Fortier CC QC, Professor Dr Peter Behrens); *Azurix v. Argentina* (2006), ICSID Case No. ARB/01/12, Award, para. 360, (Arbitrators: Dr. Andres Rigo Sureda, The Honorable Marc Lalonde P.C., O.C., Q.C., Dr. Daniel Hugo Martins).

Article 31 indicates that ‘the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes’.

The NAFTA negotiations in the 1990s publicly discussed non-economic concerns and their impact on investments. As a result, Chapter 11 of NAFTA references the promotion of sustainable development and to not lowering the standards of domestic health, safety or environment measures by trying to promote investment.¹⁰³ The Canadian Model BIT states that ‘recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development’. However, a majority of developing, capital-importing states do not have enough negotiating power to insert social provisions into BITs. One of the exceptions of this rule is the government of South Africa in their current revision of South African BITs. This review of BITs was partially motivated by a case against South Africa, where a group of European investors argued before the arbitral tribunal that the new South African legislation had interfered with their investment rights and specifically had violated their right of ‘fair and equitable’ treatment under the concerned BITs. In June 2009, the South African government published a position paper named ‘Bilateral Investment Treaty Policy Framework Review: Government Position Paper’. It expresses the South African government’s concern that existing BITs are based on a 50-year-old BIT Model that mostly focuses on protecting the

¹⁰³ North American Free Trade Agreement, *Supra* note 32, Chapter 11.

rights and interests of investors. The draft Policy Framework emphasizes that BITs ‘extend far into developing countries’ policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development.¹⁰⁴ In addition, in the preamble of newly-signed Canada-China BIT, it states that the Contracting Parties recognize the need to promote investment based on the principles of sustainable development.¹⁰⁵ Therefore, it emphasizes that the purpose of Canada-China BIT is not merely to foster bilateral investment at any cost. Sustainable development, such as environment protection, human rights protection, and public healthcare, cannot be ignored. The objective of sustainable development does not inherently conflict with the objective of international investment law because both aim to achieve attainable economic progress for both investors and host states.¹⁰⁶

Arbitrators are taking the responsibility of interpreting investment treaties. Public participation in the tribunals can remind tribunals of considering sustainable development, another important purpose of BITs other than economic development, during their interpretation.¹⁰⁷ The amicus curiae can help the decision maker arrive at

¹⁰⁴ South African Department of Trade and Industry, “Bilateral Investment Treaty Policy Framework Review Government Position Paper” (2009), at 11, online: Parliamentary Monitoring Group <<http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/ytLj4qNhFQF68gWXv7JeHPOYolZS-Qi-wissKlQmACg/mtime:1381177270/files/docs/090626trade-bi-lateralpolicy.pdf>>

¹⁰⁵ Canada-China BIT, *Supra* note 10.

¹⁰⁶ Yulia Levashova, “Role of Sustainable Development in Bilateral Investment Treaties: Recent Trends and Developments” (2011), 1:3-4 *Journal of Sustainable Finance and investment* 222 at 227.

¹⁰⁷ *Biwater*, *Supra* note 13; *CME Czech Republic BV*, *Supra* note 81; *Glamis Gold, Ltd. v. United States of America* (2009) UNCITRAL & NAFTA, Award, (Arbitrators: Michael K. Young, Professor David D. Caron, Kenneth D. Hubbard); *Metalclad Corp. v. The United Mexican States* (2000), ICSID Case No. ARB(AF)/97/1, Award, (Professor Sir Elihu Lauterpacht, QC. CBE President, Mr Benjamin R. Civiletti, Mr.

its decision with the awareness of sustainable development by providing the decision maker with more facts, evidence and expertise besides policy and documents. From the perspective of sociology of law, public participation during the investor-State dispute resolution proceedings can promote the interactions between policy makers and the public, which can highly improve the rule of law in international investment law. Public concern about an uncertain risk is legitimately a primary factor.

4 Investors Need Transparency in Treaty-based Investor-State Arbitration to Seek Long-term Benefit and Predictability

The publication of judicial and arbitral decisions is a precondition for the evolution of consistent case-laws¹⁰⁸ which create legal certainty in the form of assurance that all cases are treated equally. It thus can better improve predictability and enhance long-term benefits for its actual and potential users, such as investors. This will in turn increase the credibility in the system of dispute settlement.

4.1 Procedural Transparency in Investor-State Arbitration can Save Investors'

Long-term Costs

Jose Luis Siqueros); *Methanex Corp. v. United States of America* (2005), UNCITRAL & NAFTA, Final Award, (J. William F. Rowley, Professor W. Michael Reisman, V.V.Veeder); *SGS Société Générale de Surveillance S. A. v. Islamic Republic of Pakistan* (2003), ICSID Case No. ARB/01/13, Award, (Arbitrators: Florentino P. Feliciano, Christopher Thomas Q.C., Andre Faures); *Tecmed*, *Supra* note 36.

¹⁰⁸ Klaus Peter Berger, "The International Arbitrators' Application of Precedents" (1992), 9:4 *Journal of International Arbitration* 5 at 19; Lew, J.D.M., "The Case for the Publication of Arbitration Awards", in Pieter Sanders, Jan C. Schultsz & Albert Jan van den Berg, *The Art of Arbitration, Essays on International Arbitration*, (The Netherlands: Kluwer Law and Taxation Publishers, 1982), at 229.

Investors have been complaining that the transparency would increase the procedural costs and politicize the dispute resolution process. However, this thesis contends that investors would gain long-term benefit from the procedural transparency in investor-State arbitration. Procedural transparency guarantees investors' long-term benefit in two aspects: improving the enforceability of arbitral awards and minimizing future risks through enhancing credibility and justification of arbitral proceedings.

One of the most important purposes for arbitrating investment disputes is to recover damages for the host State's wrongful acts. As illustrated above, ICSID regime provides increasingly comprehensive procedural transparency provisions in investment dispute resolution, while it also offers the broadest mechanisms for enforcing arbitral awards rendered in favor of private claimants against the states.¹⁰⁹

These double features of the ICSID rules ensure the investors to have the greatest degree of enforcement subject to the procedural transparency.¹¹⁰

Procedural transparency also minimizes the future risks of non-enforcement by raising the credibility of arbitral process. An arbitral tribunal's decision receives credibility and compliance, no matter it is favorable or not to the claimant, when it is reasonably open for the public participation and it is enforced publicly.¹¹¹ *Methanex* case underscores the importance of the public to comment on the issues that affect them

¹⁰⁹ Yas Banifatemi, "Defending Investment Treaty Awards: Is There an ICSID Advantage?", in Albert Jan Van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Conference Series, v. 14 (The Netherlands: Kluwer Law International, 2009) at 318-20.

¹¹⁰ Cornel Marian, "Sustainable Investment Through Effective Resolution of Investment Disputes — Is Transparency the Answer?" (Paper delivered at the Sustainable Development Conference in Oslo. 2011), at 10, online: Social Science Research Network <<http://ssrn.com/abstract=2070676>>.

¹¹¹ *Ibid* at 11.

directly or indirectly. Even in instances where the state loses, publicity of the hearings and the award guarantees that the public is aware of the issues mandating the payment of damages. *Kardassapolous and Fuchs v. Georgia* case implies how risky it is for an investor if the state pays the award in secret and later this information comes to light.¹¹² In *Kardassapolous*, a Greek and an Israeli investors brought a claim against Georgia in a dispute arising from the construction of a transit corridor connecting the Caspian oil and gas reserves from Azerbaijan to the Black Sea.¹¹³ In March 2010, the Tribunal found Georgia liable for having violated the Energy Charter Treaty provisions of expropriation. Consequently, the Tribunal awards Ioannis Kardassapolous and Ron Fuchs a compensation for an estimated USD 98 million.¹¹⁴ After the award was issued, Georgia changed counsel and requested for the annulment of the award, on the limited grounds permitted by the ICSID Convention. However, the Israeli investor Ron Fuchs was arrested in Georgia on grounds that it has attempted to bribe Georgian officials in the amount of 7 million to secure enforcement of the award. The ICSID annulment proceedings were suspended because Fuchs was currently serving his sentence in Georgia and his legal team launched numerous charges of entrapment and violations of human rights.¹¹⁵

Fuchs' story stands as a cautionary tale. The transparent ICSID regime can provide

¹¹² *Ioannis Kardassapolous v. Georgia* (2010), ICSID Case No. ARB/05/18, Final Award para. 12, (Arbitrators: Mr. L. Yves Fortier, C.C., O.Q., Q.C., Professor Francisco Orrego Vicuna, Professor Vaughan Lowe, Q.C.); *Ron Fuchs v. Georgia* (2010), ICSID Case No. ARB/07/15, ((Arbitrators: Mr. L. Yves Fortier, C.C., O.Q., Q.C., Professor Francisco Orrego Vicuna, Professor Vaughan Lowe, Q.C.).

¹¹³ *Kardassapolous and Fuchs*, *Supra* note 112 paras. 69-76.

¹¹⁴ Alison Ross, "Ron Fuchs Sentenced to Seven Years" (2011), 6:2 Global Arbitration Review at 8; *Kardassapolous and Fuchs*, *Supra* note 112.

¹¹⁵ *Supra* note 114 at 8.

the investor with stronger guarantee of enforcement: in the event that Georgia did not seek to abide by the ICSID award, it would have been subject to sanctions by the World Bank and the whole international community.

4.2 Investors Need Previous Cases to Refer to Although They Don't Constitute Precedents

Reliance on past decisions is a fundamental feature of an orderly decisions process. However, the first part of Article 53(1) of the ICSID Convention states: “The award shall be binding on the parties...”. This may be read as excluding the applicability of the principle of binding precedents to successive ICSID cases.¹¹⁶ Moreover, nothing in Convention’s *travaux préparatoires* suggests that the doctrine of *stare decisis* should be applied to ICSID arbitrations. But this thesis considers that it does not necessarily reduce the significance of previous cases on investors. This is because previous decisions are usually rendered by arbitrators versed in international law. They are valid evidence of the state of international law on such issues as international responsibility, the extent of the power of expropriate, discretion of treaty interpretation and the role of general principles of law.¹¹⁷

So far, the most extensive discussion of the value of previous decisions as ‘precedents’

¹¹⁶ Statute of the International Court of Justice, June 26 1945, Can TS 1945/7 at article 59; Armand de Mestral, “The Contribution of International Investment Law to Public International Law”, in Armand de Mestral & Céline Lévesque, *Improving International Investment Agreements* (New York and London: Routledge, 2013) at 353.

¹¹⁷ Armand de Mestral, *Ibid.*

can be found in *AES Corp. v. Argentina*.¹¹⁸ In that case the Claimant pointed out that all of Argentina's objections to jurisdiction had been raised repeatedly in similar terms in other cases and that these same objections had been rejected consistently by other tribunals.¹¹⁹ As customary international law, this interpretation is derived from "general and consistent practice of states followed by them out of a sense of legal obligation or *opinio juris*." Respondent in *Glamis Gold* reiterated that "international tribunals do not create customary international law. Only nations create customary international law."¹²⁰ The *AES* Tribunal pointed out that each BIT had its own identity and that striking similarities in the wording of many BITs often dissimulate real differences.¹²¹ At the same time the Tribunal stated that in case of a high level of similarity or identity of underlying legal questions, the Tribunal did not feel barred as a matter of principle from considering the position taken by other tribunals.¹²² Having made these broad statements on the limited value of "precedents", the Tribunal actually proceeded to examine and rely on previous decisions by other tribunals.¹²³

Because of the gap between the law on book and law in practice, previous cases and arbitral reasoning of the relevant disputes are crucial for investors' decision-making of investment policy, appointment of arbitrators, and preparation of their defense. Since

¹¹⁸ *AES Corp. v. Argentina* (2005), ICSID Case No. ARB/02/17 Decision on Jurisdiction, paras 17-33.

¹¹⁹ *Ibid*, paras 17-8.

¹²⁰ *Glamis Gold*, *Supra* note 107, para. 543

¹²¹ *Supra* note 118, paras 24-5.

¹²² *Ibid*, paras 28.

¹²³ *Ibid*, paras. 51-9, 70, 73, 86, 89, 95-7; *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Pakistan* (2005), ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 76 (Arbitrators: Prof. Gabrielle Kaufmann-Kohler, Sir Franklin Berman, Prof. Karl-Heinz Bockstiegel).

tribunals can become aware of the reasonings of other tribunals dealing with similar cases in their awards and open hearings, transparency can usually promote consistency in interpreting and applying arbitral rules and in reaching substantive outcomes.¹²⁴

This section has explained the reasons why procedural transparency in investment treaty arbitration is needed. It has analyzed the public concerns of investment disputes, the investors' calls for predictability and saving long-term costs, and international dispute resolution institutions' demand of systemic legitimacy. The next section describes that the evolution of transparency clauses and how the international community and other states enhance transparency in international investment arbitration in treaty practice.

4.3 Transparent Investor-State Arbitration is a Better Alternative to Court System Especially in Countries Lack of Developed Foreign Investment Legal Environment

For countries that are lack of stable legal environment and independent judicial system, transparent investment treaty arbitration can provide foreign investors with a more credible and efficient dispute resolution mechanism. The lack of consistency and the lack of a standard of correctness in law stand as major drawbacks for the foreign investment in developing countries like China.¹²⁵ The complexity of

¹²⁴ Peter Muchilinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press) at 762.

¹²⁵ Howard Mann, "Reconceptualizing International Investment Law: Its Role in Sustainable Development" (2013), Remarks delivered at the 17th Annual Lewis &

administrative regulations and public policy as well as the vagueness of BITs leave investors much confusion and award arbitrators much discretion to interpret.

On the other hand, transparency of proceedings can avoid corruption, which is a big problem in some developing countries like China. Arbitration is now playing a more and more significant role in the resolution of disputes in modern trade society, featuring elements of high market-orientation and globalization. China's arbitration system is composed of China International Economic Trade Arbitration Commission ("CIETAC") and China Maritime Arbitration Commission ("CMAC"). Although CIETAC has achieved a remarkable reputation in settling investment disputes in China, it encountered an unparalleled crisis since the finding of corruption involving its main leaders, Wang Shengchang, in 2006. He had been credited as the most brilliant star in the Chinese arbitration profession. As a well-trained young arbitration expert, Mr. Wang participated in hundreds of cases involving international commercial and investment arbitration. However, as the former director of Legal Department and the Secretary-General of CIETAC, Shengchang Wang was prosecuted for the charges of committing the crime of "private misappropriation and bribery".¹²⁶ In the well publicized Case of "Pepsi arbitration", Wang was designated by Pepsi as the arbitrator and made a notorious role of it. His impartiality in this case was seriously questioned.¹²⁷ However, this was just the preview of a quake in the entire

Clark Business Law Forum: Balancing Investor Protections, the Environment and Human Rights, at 532.

¹²⁶ Shoushuang Li, *The Legal Environment and Risks for Foreign Investment In China* (New York: Springer, 2007) at 306

¹²⁷ *Ibid* at 307.

arbitration system in China. Afterwards, the Council for the Promotion of International Trade (CCPT), as the superior organ of CIETAC, made a large cross-sectional reorganization. In the rearrangement, CIETAC was put back into the administration system of China's public institutions. This indicated the drastic decrease of salaries and termination of bonuses and subsidies. As a consequence, some employees posted a 25-second video on a website. It exposed that on January 17, 2006, Qi Tianchang, an arbitrator of the Arbitration Commission of Tian Jin, illegally had dinner with the representative attorney, Zhang Decai from Beijing Zhonglun Jintong Law Firm and legal counsel of Fuji Xerox involved in an ongoing case.

Public scrutiny of the arbitration proceeding can decrease the possibility of corruption during the dispute resolution. Investors can focus more on the legal arguments than employing corruption to fight against state intervention in the arbitration.

III. The Concerted Movement to Make Investment Treaty Arbitration More Transparent

Investor-State arbitration is widely considered as an alternative to regular court proceedings. Arbitration mechanism is less public venue than the judicial system, thereby lending support to the general perception that confidentiality is crucial for the sustainability of arbitration across national borders. However, as demonstrated above, the concern for confidentiality was in fact not the main, if not only, impetus for the establishment of arbitration as a valuable mode of settling disputes. Recourse to investor-State arbitration has been motivated by the possibility that the investors can

disassociate themselves from a given domestic judicial system involved political intervention and the insistence on party autonomy in determining the rules of law that would govern the relationship between the investor and host state.¹²⁸

Transparency in this thesis contains three respects: firstly, the public availability of orders pleadings, transcripts, letters and other documents submitted to or created by the tribunal, including award; seconding, the participation of *amici* in the arbitration; thirdly, the public viewing of the hearing.

1. United Nations Commission on International Trade Law (UNCITRAL)

The 1976 Arbitration Rules of UNCITRAL contained the most restrictive confidentiality provisions. According to article 32 (5), the award may be made public only with the consent of both parties. Moreover, according to article 25 (4) of the 1976 Rules, hearings shall be held in camera unless the parties agree otherwise. These clauses reflect that confidentiality is the presumption of investment arbitration. However, the 1976 Rules has been amended in 2010 (“2010 Rules”) to meet and conform changes that had taken place in arbitral practice, and to enhance the efficiency of arbitration.¹²⁹ According to article 34 (5) of the 2010 rules, an award may now be made public “if disclosure is required of a party by legal duty, to protect and pursue a legal right or in relation to legal proceedings before a court or other competent authority even without the consent of all the parties.” However, there is

¹²⁸ Supra *note* 4 at 15.

¹²⁹ UNCITRAL Arbitration Rules as revised in 2010, GA Res 65/22, UNCITRAL, 2010, UN Doc A/65/465.

still nothing in the 2010 Rules relating to the public availability of arbitral documents and public viewing of hearings. The absence of provisions here could imply that the matter of their publication is to be decided by the parties or to be determined by the discretion of the arbitral tribunal in a particular case.¹³⁰ Furthermore, before 30 July 2013, there was no specific channel under the UNCITRAL Arbitral Rules for third-party submissions, although it has been held that the broad discretion bestowed on tribunals to conduct the procedural aspects of the arbitration in article 17 (1) of the 2010 Rules encompasses the power to admit amicus curiae briefs.¹³¹ On 30 July 2013, UNCITRAL adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”). It will come into effect on 1 April 2014. The Transparency Rules stipulates third party submission in articles 4 and 5 in detail. The Transparency Rules create an innovative approach to balance the public interest in an arbitration involving a State, and the private interest of the disputing parties in a fair and efficient resolution of their dispute.¹³²

2. International Centre for Settlement of Investment Disputes (ICSID)

Under the ICSID regime, the Centre and the arbitrators are obliged to maintain

¹³⁰ 1976 UNCITRAL Arbitration Rules, GA Res 31/98, UNCITRAL, (1976); *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, 14th Session, UNCITRAL, A/CN.9/207, (1981); C Knahr & A Reinisch, “Transparency versus Confidentiality in International Investment Arbitration” (2001), 12 (1) ICC International Court of Arbitration Bulletin 18; *S.D. Myers Inc.*, *Supra* note 13, Procedural Order No. 16 at para. 8.

¹³¹ Gary Born, *Supra* note 12, at 30; *Methanex Corp.*, *Supra* note 107; *Glamis Gold Ltd.*, *Supra* note 107, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005.

¹³² UNCITRAL Transparency Rules, *Supra* note 18.

confidentiality. Once registered, only the Requests for Arbitration, the subject matter of the dispute, the identity of the arbitrators, and the procedural status of the case, including dates of hearings, whether an award has been issued, and whether the proceedings have been discontinued at the request of the parties can be published by ICSID on its Website. Article 48 (5) of the ICSID Convention provides that the Centre shall not publish the award without the consent of the parties. This prohibition, which is addressed to the Centre itself only, is reiterated in rule 48 (4) of the ICSID Arbitration Rule, in cases where the parties do not consent to ICSID publication, the ICSID Rules provide that ICSID “shall promptly include in its publications excerpts of the legal reasoning of tribunal”.¹³³ Before the 2006 Amendments to the ICSID Rules, those Rules provided only that ICSID may include in its publications excerpts of the legal rules applied by the tribunal.¹³⁴ On this basis, Regulation 22 (2) of the Administrative and Financial Regulations provides that ICSID’s Secretary-General shall arrange for the publication of awards and other records of proceedings if both parties consent.

It is worth to mention that nothing in the Rules prohibits a party from publishing documents generated during the course of the arbitration. Neither does the Rules mandate such disclosure. However, in *Amco Asia*, one of the earliest ICSID cases, the tribunal rejected a request for a provisional measure enjoining a party from providing details of the ongoing dispute to the press. That tribunal noted that although neither

¹³³ ICSID Arbitration Rules 2006, *Supra* note 22.

¹³⁴ ICSID Convention, Regulations and Rules. ICSID/15/Rev.1, 2003, Article 48 (4); ICSID Additional Facility Rules (2003), Article 53(3).

the Rules not the ICSID Convention prevented the parties from disclosing such information, it did warn that the parties should refrain, in their own interests, to do anything that could aggravate or exacerbated the dispute.¹³⁵ In addition, Rule 37 of ICSID Arbitration Rules provides that “after consulting both parties, the Tribunal may allow non-disputing party to file a written submission with the Tribunal regarding a matter within the scope of the dispute.” This provision also elaborates what factors the Tribunal shall consider in determining whether to allow such a filing.¹³⁶ The *World Duty Free* ICSID tribunal noted “though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the Parties includes such a restriction, each of them is still free to speak of the arbitration” as long as the party’s statements are ‘factually accurate’ and do not ‘aggravate or exacerbate the dispute’¹³⁷ However, recent ICSID practice suggests that publication of the parties’ submissions will not become common place. The issue of public disclosure of submission has arisen in the context of request by third parties. *Biwater* tribunal found that “the risk to the integrity of the ... proceedings, and the danger of an aggravation or exacerbation of this dispute...have yet to manifest themselves in concrete terms,” but, given the high level of media attention to the case, the tribunal was “satisfied that there exists a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some control over the public disclosure of

¹³⁵ *Amco Asia Corp. v. Republic of Indonesia* (1983), ICSID Case No. ARB/81/1, (Arbitrators: Prof. Berthold Goldman, Mr. Edward Rubin, Prof. Isi Foighel).

¹³⁶ ICISD Arbitration Rules, *Supra* note 22, Article 37 (2)

¹³⁷ *World Duty Free Co. Ltd. v. Republic of Kenya* (2006), ICSID Case No. ARB/0017, Award, para. 16 (Arbitrators: H.E. Judge Gilbert Guillaume, Hon. Andrew Rogers, V.V. Veeder, QC).

documents”. Thus, it ordered that neither party could publish tribunal decisions or orders without obtaining the tribunal’s prior consent.¹³⁸

Following the orders of the ICSID tribunals in *Aguas Argentinas* and *Aguas Provinciales* on *amici curiae* participation and the amendments to the ICSID Arbitration Rules of April 2006 the issue of transparency, more particularly, the participation of non-disputing parties as *amicus curiae* is becoming a debatable issue.¹³⁹ The first publication case in which an ICSID tribunal engaged in substantive discussion of third-party submission was *Aguas del Tunari v. Bolivia*.¹⁴⁰ That dispute arose out of Bolivia’s attempt to privatize the water services of its third largest city, Cochabamba. A few hundred health and safety and environmental organization and individuals, filed a petition with the tribunal requesting the right to participate in the proceedings by making written and oral submissions.¹⁴¹ The tribunal found that it was beyond the power or authority of the tribunal to grant their request. The tribunal emphasizes that the interplay of the treaties (ICSID Convention and 1992 Netherlands-Bolivia BIT) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal.¹⁴² The tribunal emphasized that its decision was predicated on presenting the procedural integrity of the

¹³⁸ *Biwater, Supra* note 13 Procedural Order No.3, para. 153.

¹³⁹ Christina Knahr, “Transparency, Third Party Participation and Access to Documents in International Investment Arbitration” (2007), 23 *Arbitration International* 309; Alexis Mourre, “Are Amici Curiae the proper response to the public's concern on transparency in investment arbitration?” (2006), 5:2 *The Law and Practice of International Courts and Tribunals* 257.

¹⁴⁰ *Aguas del Tunari, S.A. v. Republic of Bolivia* (2005), ICSID Case No. ARB/02/3, (Arbitrators: David D. Caron, Jose Luis Alberro-Semerena, Henri C. Alvarez).

¹⁴¹ *Ibid.*.

¹⁴² *Ibid.*

arbitration, and not on any general implied duty of confidentiality of the proceedings.¹⁴³ However, in Rule 37 (2) of ICSID Convention, which became effective on April 10, 2006, it establishes firmly an ICSID tribunal's authority to accept third-party written submissions, even where the consent of the disputing parties is lacking. Moreover, the Rule does not restrict the type of third party that may make a submission, since it refers to, any "person or entity" that meets the Rule's requirements. It also incorporates procedural safeguards which aim to ensure that the disputing parties are treated with equality and accorded due process.¹⁴⁴

On May 19 2005, the *Suez II* tribunal, a case arose from another water concession granted by Argentina to a consortium of companies, including *Suez*, ruled on a petition by five NGOs to participate in the proceedings before it as *amici curiae*.¹⁴⁵

Although *Suez II* asserted similar reasons warranting their participation by the petitioners in *Tunari*. Specifically, they referred to the "basic public interest" implicated in the case, and "fundamental rights of people living in the area affected by the dispute."¹⁴⁶ The tribunal ruled in accordance to article 44 of the ICSID Convention, because the 2006 ICSID Convention has not yet been accomplished, that the tribunal established the following criteria by what it would evaluate an amicus petition: (i) the appropriateness of the subject matter of the case; (ii) the suitability of

¹⁴³ *Biwater*, *supra* note 13, para.121.

¹⁴⁴ ICSID Arbitration Rules, *Supra* note 22, Article 37 (2)

¹⁴⁵ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina Republic* (2007), ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, para. 30, (Arbitrators: Professor Jeswald W. Salacuse, Professor Gabrielle Kaufmann-Kohler, Professor Pedro Nikken).

¹⁴⁶ *Ibid* at 2.

the petitioning third party to act as amicus in a given case and (iii) the procedure by which the amicus submission is made and considered.¹⁴⁷

Until 2003, open hearings under the ICSID Rules still subjects to the parties' consent.¹⁴⁸ In advance of the 2006 Amendments to the Rules the ICSID Secretariat proposed draft Rule 32 (2), in which the ICSID tribunal has discretion to open hearings after taking into account the parties, views on the matter.¹⁴⁹ However, the proposed rule was not adopted. Rather, amended Rule 32 (2) places ultimate determination in the hands of the parties: Either party refuses to open hearings can raise an objection and prevent the tribunal from exercising its discretion to open them. Furthermore, the Rule addresses confidentiality concerns by requiring the tribunal to extend protection over propriety or privileged information. In May 2010, the ICSID for the first time webcasted its hearings in real time to the public in the *Pac Rim Cayman LLC v. Republic of El Salvador* Case. This case involves a dispute on the rights to explore and exploit precious metals in El Salvador and the general shifts of Salvadoran public policy. ICSID webcasted the proceedings allowing people in El Salvador and elsewhere greater access to information affecting their health and environment. ICSID followed this precedent by webcasting proceedings in two followed this precedent by webcasting proceedings in two other investor-State disputes: *the Commerce Group v. Republic of El Salvador* case and the *Railroad*

¹⁴⁷ *Ibid* at 17.

¹⁴⁸ *Supra* note 134, Rules 32 (2).

¹⁴⁹ *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat, 2005, online: ICSID <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement22>.

Development Corporation v. Republic of Guatemala case. ICSID based its decision in all 3 cases on Article 10.21.2 of the Dominican Republic-Central America-United States Free Trade Agreement, which requires hearings to be “open to the public and parties consent”. It is worth to mention that the proceedings, in each of the cases were webcast in both English and Spanish. For example, in the *Pac Rim* case. On the first day of the hearing, there were 150 hits during the live webcast, out of the 150 hits, 120 of them viewed the hearings in English, and 30 in Spanish.¹⁵⁰ The hearings have been archived on ICSID’s website for further viewing.

3. North American Free Trade Agreement

NAFTA Chapter 11 does not provide for its own arbitration rules. Instead, it provides a choice, frequently also found in BITs, between ICSID, ICSID Additional Facility and UNCITRAL Arbitration.¹⁵¹ While NAFTA’s Chapter 11 does not contain any express rules on confidentiality, it does contain a number of provisions aimed at more transparency such as rules concerning the information of NAFTA States about pending cases, their possibility to intervene, etc. The filing of the Request for Arbitration and the publication of the ensuring award are the only two matters that are expressly addressed in the text of the Argument. The lack of any specific rules on confidentiality has been noted by various NAFTA tribunals which have generally concluded that Parties therefore remained free to publicly discuss cases to which they

¹⁵⁰ Sofia Plagakis, “Webcasting, A Tool to Increase Transparency in Judicial Proceedings”, in Junji Nakagawa, *Supra* note 4 at 111.

¹⁵¹ NAFTA *Supra* note 32, Art. 1120 & Art. 1129.

were parties. In early practice of NAFTA Chapter 11 cases, the parties frequently disagreed as to whether a party was entitled to publicize aspects of the dispute and documents generated during the arbitration in the absence of confidentiality agreement or order.¹⁵² While tribunals generally recognized the Parties, obligations to comply with domestic disclosure laws, such as the Freedom of Information Act in the United States (FOIA),¹⁵³ they disagreed on whether to permit the parties to disclose publicly arbitration materials where there was no legal duty to do so. In the *Metalclad* Tribunal, ruling on the basis of the ICSID Additional Facility Rules, held that though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration.¹⁵⁴ However, the tribunal went on to state that “it still appears to the Arbitral tribunal that it would be of advantage to the order by unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties of during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any extremely imposed obligation of disclosure by which either of them, may be legally bound.”¹⁵⁵ The *Lowen* tribunal concurred with the *Metalclad* tribunal that the parties should limit disclosure of information pertaining to the case to what was necessary.¹⁵⁶

¹⁵² Andrea, J Menaker, “Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration” in Kate Yannaca-Small, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, (Oxford/New York: Oxford University Press, 2010) at 132.

¹⁵³ *Metalclad*, Supra note 107.

¹⁵⁴ *Ibid*, para. 13.

¹⁵⁵ *Ibid*, Procedural Order No.1 para. 9

¹⁵⁶ *Biwater*, Supra note 13, Procedural Order No.3, at 132.

In July 2001, the NAFTA Free Trade Commission (FTC) adopted an interpretation of Chapter 11 regarding provisions on access to arbitral documents.¹⁵⁷ Section A of this Interpretation establishes that:

[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137 (4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal.¹⁵⁸

According to this provision, parties to a dispute are allowed to make available documents without breaching the confidentiality of the arbitration. It emphasizes the agreement of the NAFTA Parties to provide for public access to documents. However, it also stipulates that confidential business information, information which is privileged or otherwise protected from disclosure under the Party's domestic law and information which the Party must withhold pursuant to the relevant arbitral rules must be kept unpublished.¹⁵⁹ This Interpretation confirms that disputing parties are allowed to disclose to other persons in connection with the arbitral proceeding documents necessary for the preparation of their cases but have to ensure that these persons protect confidential information that might be included in the documents.¹⁶⁰ It also contains an affirmation that the governments of the NAFTA Parties are allowed to

¹⁵⁷ Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, online: Foreign Affairs, Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx>>.

¹⁵⁸ *Ibid*, para. 1.

¹⁵⁹ *Ibid*, para. 2(b).

¹⁶⁰ *Ibid*, para. 2(c).

share relevant documents, including confidential information, with officials of their federal, state or local governments.¹⁶¹ Furthermore, submissions of the parties and other documents have in fact been made available to the public on a regular basis.

Methanex case is the first recent investor-State arbitration case to confront the question of third-party submissions. Since the case had potential impact on states' willingness to adopt environmental legislation, four NGOs filed petitions to participate as *amici* in the arbitral proceedings.¹⁶² Faced with these petitions, the United States argued that article 15(1) of the UNCITRAL Rules, which grants the tribunal authority to conduct the arbitration in the manner it deems appropriate, provided the tribunal with the necessary authority to accept third-party submissions.¹⁶³ Canada, in a submission made pursuant to article 1128, likewise supported tribunal's authority to accept such petitions.¹⁶⁴ Although the Mexico and the Claimant, on the other hand, rejected *amici* participation, the tribunal determined that the participation of *amici* through written submission would not violate the parties' right to be treated equally and not to be burdened unfairly.¹⁶⁵ Nine months after the *Methanex* decision, *UPS* tribunal, another NAFTA Chapter 11 tribunal, effectively adopted the reasoning of *Methanex*, finding that it had authority under Article 15(1) of the UNCITRAL Arbitration Rules to accept the *amicus*

¹⁶¹ *Ibid*, para. 2(d).

¹⁶² *Methanex*, *Supra* note 107, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", paras. 6-8.

¹⁶³ *Methanex Supra* note 107, Statement of Respondent United States of America Regarding Petitions or Amicus Curiae Status, at 7; *Ibid*, Decision, paras. 17-19.

¹⁶⁴ *Ibid*, Decision, para. 10.

¹⁶⁵ *Ibid*, Decision, para. 36

submissions.¹⁶⁶ In October 2004, the NAFTA Free Trade Commission issued nonbinding guidelines setting forth the criteria by which to evaluate *amicus* petitions. *Glamis* tribunal applied the FTC's guidelines.¹⁶⁷ This case, which concerned a challenge to federal and state action in connection with Claimant's unlicensed mining claims, gave rise to petitions from numerous sources. In addition to NGO groups, the petitioners included the Quechan Indian Nation as well as the National Mining Association. After *Methanex*, most of NAFTA Chapter 11 arbitration hearings are opened. The hearing was broadcast to a separate room for public viewing. In each case, the public viewing room was situated in an area that allowed members of the public to come and go as they pleased, without obtaining building passes in advance. Attendees contain reporters, students, and in at least one case, opposing counsel who had a pending arbitration against the respondent State in a nearly identical case.¹⁶⁸

It is clear that both confidentiality and transparency are important and should be protected. The difficulty lies in finding the right balance. It is well known that *Biwater* Tribunal's approach of differentiating between different types of documents represents a useful and pragmatic, though not easily implemented case-by-case solution for solving the problem.

It is agreed that parties are free to conclude any agreement they choose concerning confidentiality. However, such an agreement had seldom been reached. Similarly, the

¹⁶⁶ *United Parcel Service of America Inc. v. Canada*, (2001) Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, para. 61 (Arbitrators: Dean Ronald A Cass, L Yves Fortier CC, QC, Justice Kenneth Keith)

¹⁶⁷ *Glamis Gold*, *Supra* note 107. Decision on Application and Submission by Quechan Indian Nation, para. 8-11.

¹⁶⁸ Andrea J. Menaker, *Supra* note 152 at 155.

BITs usually did not contain any provision on confidentiality or provided vague guidelines. For instance, in *Biwater case*, the BIT between the United Kingdom and Tanzania, pursuant to which the case had been brought, did not contain any provision on confidentiality. The Tribunal state that “there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.”¹⁶⁹ Therefore, so far, it is within the discretion of each individual tribunal to find the right balance when conducting proceedings. It is difficult to determine how much guidance or interference by a tribunal was needed during the process and how much should be left to party autonomy and their discretion to disclose certain information to the public or to retain confidentiality.

In the most important part of the procedural order, the Tribunal distinguished between various kinds of documents of the proceedings, i.e., minutes of hearings, pleadings or written memorials of the parties, and decisions or orders of the tribunal. In addition to distinguishing between different types of documents the Tribunal also differentiated between the release of documents while proceedings are pending and after the conclusion of the proceedings and the publication of final awards. The Tribunal concluded that disclosure of documents during the proceedings was problematic and should therefore be handled restrictively. The publication of awards, other tribunal decisions, but also pleadings and written memorials after the conclusion of

¹⁶⁹ *Biwater Gauff, Supra* note 13, para. 121.

proceedings would cause less trouble.¹⁷⁰

Amicus participation raises concerns somewhat more complex than does open hearings and publication of awards. This is because amicus participation has greater potential to affect the scope, complexity and length of arbitration, in turn increasing the cost of the arbitration.¹⁷¹ Since 2001, significant developments have occurred to improve the transparency and accountability of investor-State arbitration system. Principal among these developments is the participation of *amicus curiae* in investor-State arbitration. In the context of both NAFTA and ICSID arbitrations, the admission of *amicus curiae* briefs resulted from initiatives taken by arbitral tribunals in the exercise of the broad procedural discretion granted by the applicable arbitration rules. These initiatives were later endorsed through additions to the rules specifically addressing the conditions for the admission of amicus briefs.¹⁷²

Methanex Corp. v U.S.A. case is the first case in NAFTA that involved NGOs' intervention as *amicus curiae*. Concerning that "the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region"¹⁷³ and "there was no overriding principle of confidentiality in arbitration that should exclude *amici*",¹⁷⁴ the tribunal decided to satisfy the special interest tests under both Canadian and US law to

¹⁷⁰ *Ibid*, Para. 142.

¹⁷¹ Meg Kinnear, "Transparency and Third Party Participation in Investor-State Dispute Settlement" (Paper delivered at the Symposium Co-organised by ICSID, OECD and UNCTAD Making the Most of International Investment Agreements: A Common Agenda, Paris, 12 December 2005) at 5.

¹⁷² *Supra* note 76, at 255

¹⁷³ *Methanex Corp. Supra* note 107, Decision of the Tribunal on Petitions from third persons to Intervene as "Amici Curiae" at 7, para. 5.

¹⁷⁴ *Ibid*, para. 6.

enable NGOs to appear as amici in equivalent court proceedings.¹⁷⁵ In the *United Parcel Service of America Inc. v. Government of Canada*, the tribunal confirms that article 15 (1) supports tribunal's power to allow submission by *amici curiae*. In other words, this tribunal considers that the permission of *amici curiae*'s participation is a matter of procedure.¹⁷⁶ However, during this periods, the *amici* had no right to access the documents submitted to or issued by the NAFTA tribunals or to attend the hearings, absent the consent of the parties.¹⁷⁷

Summary

Chapter 1 has explained the concept of transparency in treaty-based investor-State arbitration. By dividing transparency into public access to arbitral documents, *amici* participation and public access to hearings, this Chapter introduces how the UNCTRAL, ICSID and NAFTA regulate on procedural transparency in investment arbitration. Furthermore, this chapter has explored the reasons why and in what way the international community is making joint efforts to improve transparency in investment treaty arbitration persistently in order to enhance the legitimacy of arbitration system. This chapter mentions 'reflexive legitimacy' in arbitration system, which will be emphasized and expanded in the following chapter. According to the international community and other states' experience on enhancing transparency in investment treaty arbitration, it is the tribunal that has the final authority to decide the

¹⁷⁵ *Ibid.*

¹⁷⁶ *Supra* note 166, at 24, para. 60

¹⁷⁷ *Supra* note 76, at 261.

transparency issue in investment treaty arbitration practice. The states have been encouraged to incorporate transparency provisions in their BITs on regulatory level. It is not advisable that the state intervenes in the tribunal's proceeding directly to decide the transparency issue.

Chapter 2: Chinese Bilateral Investment Treaties Lack Adequate Regulations on Transparency in Dispute Resolution Provisions.

China has been undergoing economic transition since 1979. In order to provide foreign investment as well as domestic investors with a better legal and political environment, China kept improving its legal system by learning and transplanting western countries' legislations. The number of laws and regulations promulgated at the national level and by local peoples' congresses between 1992 and 2004 exceeds 7,100.¹⁷⁸ However, embedded in Confucianist-Legalist compromised legal culture, the central dynastic legal system remained in place with relatively little disruption or fundamental alteration despite numerous political, social, demographic, and economic developments.¹⁷⁹ In other words, not all foreign influences faced by China were deflected like arrows careening off of metal armor, but were instead filtered and "sinified" by the Chinese government and the Chinese Communist Party.¹⁸⁰ This chapter addresses procedural transparency regulations in Chinese BITs, especially the Canada-China BIT. It firstly introduces the evolution of China's BITs program by dividing it into three generations. The procedural transparency provisions in those BITs are studied in a specific section. Then, this chapter addresses the substance of procedural transparency provisions in Canada-China BIT. It also points out the

¹⁷⁸ Liang Bin, *The Changing Chinese Legal System, 1978-Present* (London/New York: Routledge, 2008) at 35; James M. Zimmerman, *China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises* (Chicago/Washington: American Bar Association, 2010).

¹⁷⁹ John W. Head, *Great Legal Traditions – Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (Durham: Carolina Academic Press, 2011) at 527

¹⁸⁰ *Ibid* at 530.

specialties in these clauses compared with the transparency rules in BITs signed by Canada and the U.S. It argues that the main specialty in Canada-China BIT is that the host State is designated to have final authority in the determination of procedural transparency issue during dispute resolution proceedings. In order to explain the underlying reasons for this Chinese characteristic, this Chapter then reviews the legal and social environment for transparency in China. It emphasizes that China has a tradition of powerful government but weak civil society. Therefore, this thesis finds that this historical factor shapes China's specialty in BIT procedural transparency provisions. On the other hand, this thesis mentions that Argentine lessons suffered during the financial crisis also constitute one reason why China has not been in favor of transparency in investment treaty arbitration. However, thanks to the globalization, China keeps making efforts to meet the international standards. Therefore, this chapter then explores the political and social feasibility of promoting procedural transparency in China by analyzing the situation of civil society, the dispute resolution culture and the political conditions for foreign investment in China. Based on this analysis, this thesis then critique the transparency clauses in Canada-China BIT. Although it seems that China has made a great breakthrough in Canada-China BIT with respect to following the international trend to make treaty-based investor-state arbitration transparent, this thesis considers that based on the transparency articles in Canada-China BIT, China regards transparency provision as a way to strengthen state's or political intervention in arbitration, while international community regards promoting transparency in investor-state arbitration is for the protection of public

interest and systematic integrity. This chapter answers the question: do the provisions in Canada-China BIT constitute a good model for future Chinese BIT? At the end of this chapter, it proposes suggestions for upcoming transparency movement in China as well as implications for future Chinese BITs.

I. Evolution of China's Bilateral Investment Treaties Program

With the launch of "Open Door" policy, China has been broadening its foreign investment network in international level. This section reviews the development of Chinese bilateral investment treaties program by dividing it into three periods. More specifically, this section tracks the trace of procedural transparency related sentences in investor-State arbitration provisions in China BITs with States other than Canada.

In the last three decades, continuing efforts had been made both in bringing laws and regulations into conformity with internationally recognized standards and in ensuring their implementation at domestic level in China.¹⁸¹ It is well acknowledged that China has been very active in entering into bilateral investment treaties and other international investment instruments. This treaty network contains multilateral agreements such as the ICSID Convention, the WTO agreements, and the Multilateral Investment Guarantee Agency Convention, regional instruments such as the Asia-Pacific Economic Cooperation Non-Binding Principles on Investment, BITs and free trade agreements (FTAs).¹⁸² The focus of this thesis is, however, the BIT.

¹⁸¹ OECD, OECD Investment Policy Reviews - China: Progress and Reform Challenges, 2003, at 14.

¹⁸² *Supra* note 50, at 29.

China continues to be the second only to Germany in the number of BITs that it has signed. Since the first BIT was signed with Sweden in 1982, China has signed over 130 BITs till 2013. Over half of them (28 BITs) were entered into in the 1990s; others were signed in the 1980s (24 BITs) and post-2000. Therefore, most of BITs do not have detailed investor-State arbitration clauses, not to mention procedural transparency rules. Meanwhile, it is also important to point out that eleven BITs were renegotiated (in the form of either a new BIT or an amendment protocol) in the 2000s. Most of these renegotiated BITs were with European states, which signed BITs with China in the early years and wanted to update and upgrade them. In addition, China has concluded very liberalized FTAs with New Zealand and Pakistan in 2000s. In 2012, China has signed a multilateral investment treaty with Japan and the Republic of Korea, and a BIT with Canada. Geographically, Chinese BITs cover most continents including, Asia, Europe, Africa, Latin America, Oceania and North America.¹⁸³ The Chinese BIT network is most dense in Asia, which covered forty out of forty-four states in the continent. Important investment partners such as Japan, Korea, Singapore, India, Russia, Iran, Saudi Arabia, Kuwait and Kazakhstan are all covered by the BIT network. Europe is the second continent in terms of numbers of treaties. In Africa, more than half of the states have BIT arrangements with China. They include important investment partners such as South Africa, Egypt, Nigeria, Sudan, Congo, and Kenya. The Chinese BIT network also covers four Pacific states

¹⁸³ *Foreign Investment and Cooperation Country Guide*, online: Ministry of Commerce of the People's Republic of China Department of Outward Investment and Economic Cooperation, <<http://fec.mofcom.gov.cn/gbzn/gobiezhinan.shtml>>.

including Australia and New Zealand. In Latin America, Chinese BITs cover thirteen countries, including major states such as Argentina, Bolivia, Uruguay, Ecuador, Chile and Peru. In North America, Chinese BITs cover Mexico and Canada. China's treaty-making practice is governed by the Law on the Procedure of the Conclusion of Treaties.¹⁸⁴ According to this law, treaties or agreements negotiated and signed in the name of the Government of the People's Republic of China should be examined and decided by the State Council, upon recommendation of the Ministry of Foreign Affairs (MFA) or recommendation of a department concerned under the State Council after consultation with the MFA.¹⁸⁵ But the Law does not provide detailed rules on the negotiation and approval process. In practice, the making of an investment treaty in China is primarily undertaken by the Directorate-General of Treaty and Law (DGTL) under the Ministry of Commerce, and it normally involves nine steps: request for authorization, approval, negotiations, initialing, formal request for authorization, formal request for authorization, formal signature, record, exchange of diplomatic notes and entry into force.¹⁸⁶ This treaty-making practice is relatively sophisticated. But it may not deviate very significantly from practice in other countries.

1. The Three Generations of Chinese Bilateral Investment Treaties

¹⁸⁴ Law on the Procedure of the Conclusion of Treaties (adopted at the seventeenth Meeting of the Standing Committee of the Seventh National People's Congress on 28 December 1990, promulgated by Order No. 37 of the President of the People's Republic of China on 28 December 1990, and effective as of the same date).

¹⁸⁵ Article 5 (2) of Law on the Procedure of the Conclusion of the Treaties.

¹⁸⁶ *Supra* note 50 at 34.

Chinese bilateral investment treaties are by no means uniform, especially the dispute resolution provisions. The Chinese BIT program, since its inception in 1982, has experienced three periods and three generations of BITs. The 1980s was the first period featured by the first-generation of Chinese BITs; most of the 1990s was the second period characterized by the second-generation BITs; the third-generation BITs emerged in the late 1990s and marked a commencement of a third period in the history of Chinese BITs. It emphasizes that although each generation of BITs characterized a given period, there could be BITs of different generations coexisting in a given period. Therefore, it is possible that BITs signed in the second or third period that display essential features of the first-generation BITs. The features of BITs sometimes also depend on economic situation of the States. But for readers' convenience, this thesis reviews China's BITs by dividing them into three periods.

1.1 1982-1989: The Launch of the BIT Program and the First-generation BITs

The launch of the Chinese BIT program was a result of the "open-door" policy adopted in 1970s. In order to fuel economic growth, China adopted an extensive plan of modernization, in which the introduction of FDI as well as advanced management skills and technology was listed among the top goals.¹⁸⁷ Although many special treatments have been provided to the foreign investors, such as the new article specifically referring to the protection of foreign investment incorporated in the

¹⁸⁷ *Supra* note 50 at 35; Chunbao Liu, "The Evolution of Chinese Approaches to IIAs", in Armand de Mestral & Céline Lévesque, *Improving International Agreements* (London and New York: Routledge, 2013) at 60.

amended 1982 Constitution,¹⁸⁸ the special protection accorded by domestic law and *ad hoc* policy, the mistrust over the politicized judicial system cannot in a short time be erased in western foreign investors' minds. It is believed that their trust can be won by committing to international obligations through bilateral agreements.¹⁸⁹ In the three years after the signature of the first BIT with Sweden, most of China's BITs were entered into with developed countries such as Germany, France, Belgium-Luxembourg, Finland, Norway, the Netherlands, the UK, New Zealand, Australia and Japan. Negotiations for a BIT with the US were also initiated in 1983, but these eventually failed. Another motivation for BITs was the protection of overseas Direct Investment (ODI). This can be more clearly seen in Chinese BITs entered into with other developing states and transition economies, which aimed at promoting south-south cooperation and "comradely relationship". Thailand became the first developing state to sign a BIT with China. This was followed by Singapore, Kuwait, Sri Lanka, Malaysia, Pakistan, and Ghana. Since China had not signed ICSID Convention during this period, the investor-State arbitration provisions are reflected to be very conservative.

The first generation of BIT stipulates that investor-state disputes merely concerning the amount of compensation for expropriation could be submitted to an *ad hoc* arbitral

¹⁸⁸ 1982 Constitution of the People's Republic of China (adopted on 4 December 1982 by the Fifth Session of the Fifth National People's Congress), Article 18.

¹⁸⁹ Shishi Li, "Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China" in Paul de Waart, Paul Peters, & Erik Denters eds, *International Law and Development* (Boston: Martinus Nijhoff Publishers, 1988) at 165.

tribunal whilst other investment disputes should be dealt with by local courts.¹⁹⁰ It is also worth to mention that Chinese BIT entered into with developing countries displays certain special features, compared with BITs with developed countries.¹⁹¹ For example, in the BITs with developing countries such as Thailand, Singapore, and Sri Lanka, they all required that investments must be specifically approved by the host state before they could benefit from the BIT protection. These BITs addressed that the question of legality of an expropriation should be determined by competent local courts rather than any international tribunals.¹⁹² Nevertheless, more flexibility was given to developed countries especially on the dispute resolution mechanism and in the area of monetary transfer provisions.

1.2 1990-1997: ICSID Accession and the Second-generation BITs

Created in 1965 by the ICSID Convention, the ICSID is the world's primary institute for the settlement of investor-state disputes, which have risen sharply in recent years. Like many other developing states, China was originally rather skeptical or resistant to the Convention and the Centre, regarding it as a threat to state sovereignty and national jurisdiction.¹⁹³ This is because China and Chinese people suffered a lot from the failure of the Opium War in 1840. Since the failure of this war, China was buried in many unequal treaties. Those treaties made China lose its jurisdiction on

¹⁹⁰ *Supra* note 50 at 421.

¹⁹¹ *Supra* note 189 at 177-80.

¹⁹² *Ibid* at 178-9.

¹⁹³ An Chen, *International Investment Law and the New Practice of Chinese Bilateral Investment Treaty* [*Guoji touzifa de xinfazhan yu zhongguo shuangbian touzi tiaoyue de xinshijian*] (Shanghai: Fudan University Press, 2007) at 361.

foreign-related disputes. Having learnt from the history, China took three years to decide the ratification of ICSID Convention. Although China ratified ICSID Convention in 1993, Chinese government normally still reserved some rights: (1) the exhaustion of local remedies; (2) intent of arbitration should be examined and approved by the host state, except expropriation compensation; (3) the domestic law shall be the governing law of Tribunal. Despite the reservation, the accession of China to the ICSID Convention was significant for Chinese investment treaty making since it possible for treaty negotiators to make reference to ICSID jurisdiction. The Lithuania BIT signed in November 1993 was probably the first BIT that included a reference to CISID arbitration. It stipulates that an amount of compensation dispute may be submitted to the Centre for arbitration if it cannot be settled in six months by negotiation.¹⁹⁴ Since then, a second-generation of Chinese BITs has emerged, with direct reference of amount of compensation disputes to the Centre being its key feature. However, not all BITs China signed following the Lithuania BIT employ the direct reference to ICSID arbitration.¹⁹⁵ This demonstrated the persistent reluctance of China in accepting ICSID arbitration. On the other hand, the second generation of BITs includes a more qualified national treatment standard (subject to local laws) and an umbrella clause. The stipulations on compensation for expropriation were also modified. The concept of market value and elements of evaluation were contained in the provisions on expropriation.¹⁹⁶

¹⁹⁴ Lithuania BIT, Article 8 (2)

¹⁹⁵ Uruguay BIT (December 1993), Article 9; Azerbaijan BIT, Article 9, and Ecuador BIT, Article 9.

¹⁹⁶ *Supra* note 50 at 427.

1.3 1998-Present: The Canadian BIT Talks and the Third-generation BITs

China's third-generation BITs, as illustrated by her latest and current Model BIT, were adopted in the late 1990s. There were a number of reasons behind Chinese authorities' willingness to adopt the new BIT regime in the 1990s. Within China, FDI had increased sharply since the early 1990s, particularly after Deng Xiaoping's talks during the 'South tour' in 1992. In the meantime, ODI from China to the rest of the world also surged. Beyond China, the world had experienced dramatic changes in the aftermath of the collapse of the Soviet Union. The former USSR states, the Eastern European states, and even the Latin American states had also adopted neo-liberalist investment policies, trying to bring their laws and treaty practice in line with international practice. The competition for FDI from those countries had drastically intensified. Thus the Chinese authorities felt an urge to further liberalize the regime. On a technical level, the negotiation processes of BITs would be much simplified if a more liberal approach had been adopted on sticky points such as dispute resolution.¹⁹⁷ Most notably, this latest model granted access to international arbitration including ICSID arbitration for all investor-state disputes. There are also some subtle and generally liberal changes in some of the substantive provisions of the current Model BIT including national treatment. The first BIT based on this model was the Barbados BIT, which entered into force on 20 July 1998, in which China for the first time implemented the third-generation BIT including, most notably, access of all

¹⁹⁷ *Ibid* at 41.

investor-state disputes to ICSID arbitration.¹⁹⁸

2. Procedural Transparency Clauses in Chinese Bilateral Investment Treaties

According to China's first Model BIT which was formulated in around 1984, after the China-France BIT was signed, there was no an separable clause to elaborate investor-State arbitration, not to mention its transparency rules. After the accession of ICSID, China has incorporated investor-State arbitration into its bilateral investment treaties. However, there was still not any procedural transparency related rules in arbitration. The current China Model BIT allows all investment disputes to be submitted to investor-State arbitration. However, many Chinese scholars proposed that publicizing the investor-State arbitration will make the arbitration procedure even more complicated.¹⁹⁹ Considering the civil society is far from robust and vigorous in China to protect public interest, Chinese scholars insisted that China will lose national interest during the process of globalization if procedural transparency clauses, such as amicus curie clause, are incorporated in BITs.²⁰⁰ This thesis contends that although China's strict registration and management system, and the lack of public participation in non-governmental organizations make civil society in China relatively underdeveloped, it is undeniable that in environmental protection, consumer protection, labor rights protection field, non-governmental organizations are playing

¹⁹⁸ Barbados BIT, Article 9.

¹⁹⁹ *Supra* note 193 at 365.

²⁰⁰ Danni Liang "The Study of International Investment Arbitration Procedural Transparency – From 2006 ICSID Arbitration Rules and the Amendments of UNCITRAL Arbitration Rules" (2010), 17 Journal of International Economic Law 1.

increasingly important role in promoting sustainable development and the rule of law development, as proved in the last section. As a consequence, China should also conform to the international trend to improve procedural transparency in investment treaty arbitration. In fact, China is taking efforts to enhance transparency step by step. According to article 157 of the China-New Zealand Free Trade Agreement signed in April 2008, it authorizes the State party to ensure public availability of all tribunal documents if it considers appropriate.²⁰¹ Then, it expands to regional investment treaty in Asia. For example, Article 17.2(C) of China-Japan-Korea Trilateral Investment Treaty signed in 2012 stipulates that the third Contracting Party may make submissions to the arbitral tribunal on a question of the interpretation of this Agreement, upon written notice to the disputing Parties. Article 17.2(d) gives the third Contracting party right to participate in the arbitration proceedings when it considers that the dispute has a substantial interest in the dispute.

This section has elaborated the evolution of the three generations of Chinese BITs. Having learnt the development of Chinese BITs, especially the changes of dispute resolution provisions in the BITs, it is fair to draw the conclusion that China is rather hesitant to incorporate the complete terms of investor-state arbitration in its BITs. However, it is also undeniable that China has been making constant but cautious efforts to meeting the internationally-agreed standards especially on the design of investment dispute resolution mechanism. The next section concentrates on the study of procedural transparency provisions in Canada-China BIT.

²⁰¹ Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, Article 135.

II. Procedural Transparency Provisions in Canada-China Bilateral Investment Treaty

In the Canada-China BIT, there are more detailed regulations on investor-State arbitration. It stipulates the jurisdiction of the arbitral tribunal in more details. It clarifies the common and different regulations on the conditions precedent to submission of a claim to arbitration. Most impressively, it states out non-disputing contracting party participation and public access to hearings and documents during the investor-State arbitration.²⁰² This could be the first time that the transparency of arbitral proceeding is elaborately stipulated in the Chinese BIT. However, it is also disappointing to point out that state intervention in the tribunal's decision of transparency issue is recognized in Canada-China BIT. Therefore, this section also addresses the specialties of the transparency provisions in Canada-China BIT.

1. The Substance of Procedural Transparency Provisions in Canada-China BIT

The provisions on the transparency of arbitral proceeding appears to be similar to the 2004 Canadian Model FIPA. Article 27 rewards non-disputing Contracting Party to get access to a copy of evidence, pleadings written argument at its cost. The non-disputing Contracting Party have right to attend any hearings of tribunal without consulting disputing investor. They can also make submissions to a Tribunal on a

²⁰² *Supra* note 10, Article 27 & 28.

question of interpretation of this Agreement.²⁰³ Article 28 set three different conditions for public access to hearings and documents. For tribunal awards, it shall be always publically available. For other documents, it shall be publicly available if it relates to the public interest. For hearings, if the case concerns public interest, it can be open to the public only after consulting with a disputing investor. If there involves business confidential information, the Tribunal may hold portions of hearings in camera. When there exists contradiction between Tribunal's confidentiality order and a Contracting Party's law on access to information, Contracting Party's law prevails. Article 29 concerns the *amicus curiae*. It seems that China has made a great breakthrough in Canada-China BIT with respect to following the international trend to make treaty-based investor-State arbitration more transparent.

However, this thesis considers that based on the analysis of articles on transparency in Canada-China BIT, China is twisting the spirit of transparency in investor-state arbitration. In other words, while Canada and international community regard promoting transparency in investor-state is for the protection of public interest and systemic integrity, China is using transparency provision to strengthen state's or political intervention in arbitration.

2. Specialties of Procedural Transparency Clauses in Canada-China BIT

This section analyzes how much the provisions depart from what is found in other recent investment treaties and 2004 Canada Model BIT. It elaborates that the

²⁰³ *Ibid*, Article 27.

Canada-China BIT highly strengthens the state control on the transparency of arbitration proceedings. This section illustrates this argument in three parts.

2.1 Public Access to Arbitral Documents

According to Article 28.1, any Tribunal award shall be publicly available, subject to redaction of confidential information. However, whether other documents could be publicly available depends on the disputing Contracting Party. The article stipulates, “where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.” This is very different from the Canada Model FIPA and other investment arbitration rules. According to Article 38.1 of Canada 2004 Model FIPA, all documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.

2.2 Third-party Written Submissions

On one hand, according to the Canada-China FIPA, the non-disputing Contracting Party can make submissions to a Tribunal on a question of interpretation of this Agreement. On the other hand, Article 29 indicates that after consultation with the disputing parties, a Tribunal may accept written submissions from a person or entity that is not a disputing party if that non-disputing party submission does not disrupt the

proceedings and that neither disputing party is unduly burdened or unfairly prejudiced by it. Annex C.29 illustrates more procedural standards for the non-disputing party submission, which are very similar to the Annex C.39 of Canada 2004 Model FIPA. However, there are four main specialties: Firstly, Canada-China FIPA does not mention the legal effect of Party's interpretation. The US Model BIT stipulates that a joint decision of the Parties declaring their interpretation of a provision of the Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.²⁰⁴ Secondly, it requires the non-disputing parties to explain how the submission would assist the Tribunal in determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. It increases the requirements for non-disputing parties' submission. Thirdly, the non-disputing party is not necessarily a person of or that has a significant presence in the territory of the disputing State. In other words, even the non-disputing party is from the investors' country, he or she is entitled to make submissions. This change to the Canada 2004 Model FIPA breaks the stereotype that non-disputing party submission always defends for the host state. Fourthly, Canada-China BIT requires Tribunal to consult with the disputing parties before it accepts non-disputing party submission. This change reflects that Canada-China BIT is exploiting Tribunal's discretion on this issue.

2.3 Public Access to Arbitration Hearings

²⁰⁴ Article 30.3 of American Model BIT

According to Article 28.2 of Canada-China BIT, the Tribunal shall open the hearings to the public when the disputing Contracting Party determines that it is in the public interest after consulting with a disputing investor. To ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera. This change to Canada 2004 Model FIPA reflects that the host state's control over the arbitral proceeding is strengthened again. Next section proposes a legal and social reason for the specialties existing in Canada-China BIT's procedural transparency clauses.

III. Reviewing Legal and Social Environment for Transparency in China - Foreign Direct Investment Policy and Civil Society Development

The concepts of law are unavoidably contentious and embedded in legal traditions and local cultural context.²⁰⁵ Although most of contemporary Chinese laws are transplanted from western countries, especially German and the U.S.A, the Chinese Communist Party and National People's Congress usually "signify" the western laws for better adaption and implementation in China. China's foreign direct investment policy and relevant administrative regulations reflect these characteristics.

1. The State Intervention in Foreign Direct Investment Policy-making Process

The legal regime for foreign business relations in China reflects a basic tension between policies emphasizing state control and those emphasizing market

²⁰⁵ Sanzhu Zhu, *Law and Institutions of Modern China* (London/New York: Routledge, 2011) at 37.

incentives.²⁰⁶ In the countries of East Asia, the role of the state is crucial in the legal and economic development.²⁰⁷ In the People's Republic of China (PRC), the Chinese Communist Party has been making strong influence in the legislatures, the administrative and the judicial system. As a consequence, the role of law in China's economic growth was not as important as the political influence from the Chinese Communist Party. While Lubman suggests that the Chinese Communist Party's dominance restricts the role of law to such an extent that China cannot be said to have a legal system,²⁰⁸ Peerenboom contends that the "open-door policy" and expansion of foreign investment is requiring the Chinese Communist Party rely increasingly on laws and regulations to provide more stable legal environment for foreign investors.²⁰⁹ Under the influence from western countries with developed legal system, the Chinese Communist Party starts to realize the importance of the rule of law in the economic development. As a consequence, the Chinese Communist Party started to use governmental documents, administrative regulations, laws and even international treaties to advocate and to "regularize" its political ambition. This section explains the reasons why the State, more specifically, the Chinese Communist Party, plays such an important role in legal system by reviewing Chinese legal tradition and culture. After reviewing the historical reasons, this section is continued with the analysis on how the Chinese Communist Party imposes its political strategies in laws.

²⁰⁶ Pitman B. Potter, *The Chinese Legal System Globalization and Local Legal Culture* (London/New York: Routledge, 2001) at 109.

²⁰⁷ *Ibid* at 111.

²⁰⁸ Stanley B. Lubman, *Bird on a Cage – Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999).

²⁰⁹ Randall P. Peerenboom, *China's Long March toward Rule of Law* (New York: Cambridge University Press, 2002)

Considering that it is unfair to ignore the role of civil society in the economic development, the next section addresses the increasing role of civil society played in Chinese legal environment.

1.1 The Influence of the State's Attitudes to the Rule of Law and Transparency in Governance in Ancient China on the Modern Chinese Foreign Investment Policy

Unlike western legal traditions, Chinese law retained – for dynasty upon dynasty – for century after century – a distinctly inward focus, not only developing with little direct external influences but also remaining isolated rather than getting wide transported around the world through colonization and conquest.²¹⁰ In this relatively conservative social context, Confucianism that emphasizes the role of *Li* gained the emperors' recognition. Confucius relegated law to a very minor role as a method of ruling society. He considered that the cohesion and well-being of society are to be secured not through legal rules and punishments but through the observance of proper rituals of *Li*. According to *Analects*, *Li* refers to proper behavior generally, based on the place or status of a person within the family or the social and political system.²¹¹ Confucius said: "Lead them by political maneuvers, restrain them with punishment, the people will become cunning and shameless. But lead them by virtue, restrain them with ritual, they will develop a sense of shame and a sense of participation."²¹² However, compared with law, the power of interpretations over *Li* totally belongs to the

²¹⁰ *Supra* note 179 at 459.

²¹¹ *Ibid* at 465.

²¹² *Ibid* at 467.

emperors. In order to secure absolute obedience, Confucius contends: “The rule can only let the public obey their orders, but not make them aware why they should obey.”²¹³ Thus, the emperors in most of dynasties adopted Confucianism as a political tool for demanding public obedience. Even the Chinese former state president and party leader, Hu Jintao’s political views are influenced by Confucius’ philosophy, which is to “build a socialist harmonious society” through promoting judicial mediation rather than litigation.

Embedded in this legal tradition, the awareness of the rule of law is relatively weak. And since modern China is in a one-party system which is called as multi-party cooperation and political consultation under the leadership of the Chinese Communist Party, the Party’s political influence has been playing significant role in the modern China’s development.

1.2 The Influence of the Chinese Communist Party on Economic Development Policy-Making

The Chinese Communist Party’s actual control mechanism is rarely known both inside and outside China.²¹⁴ What is known is that the Party has a Politico-Legal Committee which imposes direct control over major national legal affairs including law-making. Further, all state, government authorities and even law firms have Party committees within their structure which form the leadership and are directly involve

²¹³ Confucian Analects, “民可使由之，不可使知之” Min ke shi you zhi, bu ke shi zhi zhi, online: <<http://tieba.baidu.com/f?kz=328275029>>.

²¹⁴ Jianfu Chen, *Chinese Law: Context and Transformation* (Boston: Martinus Nijhoff Publishers, 2008) at 192.

in the work of their respective organizations.²¹⁵ It is acknowledged that institutionally certain efforts have been made to formally separate the Party from legislative authorities. Among these the most crucial official effort was the establishment of a Law Commission (*Fazhi Weiyuanhui*) in accordance with Article 27 of the 1978 Constitution. However, it would be mistaken to think that the Party has consequently departed from the legislative scene. In 1991 the Chinese Communist Party issued its *Several Opinions on Strengthening Leadership in State Law-making*, which was seen as the first ever the Party document defining the scope and procedures for its involvement in law-making.²¹⁶

On the economic development, the State, the Chinese Communist Party also plays an irreplaceable role by imposing its policy to the State Council of the PRC. Due to the rapid economic globalization, in order to catch up with the pace of international investment and trade market, *ad hoc* policies have been issued by the Party in the name of Red Letters or administrative documents instead of legislative sanctions in order to provide guidance for foreign investment development.²¹⁷ Thanks to the Party's policy, since 1993, China has consistently maintained its position as the largest Foreign Direct Investment (FDI) recipient among developing countries and one of the largest trading partners in the world.²¹⁸ In 2002, China outstripped the US and

²¹⁵ Murray Scot Tanner, "The Erosion of Communist Party Control over Lawmaking in China" (1994), 138 *The China Quarterly* 381.

²¹⁶ *Supra* note 214 at 194.

²¹⁷ *Ibid* at 641.

²¹⁸ For details of China's position in the world's FDI recipients table, see UNCTAD, World Investment Report series (since 1991), available at <http://www.unctad.org/Templates/Page.asp?intItemID=1485&lang=1>

became the largest FDI recipient in the world.²¹⁹ In late 1998, the Party adopted the ‘going abroad’ policy and effectively implemented in recent years. China’s WTO entry in 2001 and the sharp increase of foreign change reserve also promoted the Outbound Direct Investment (ODI). In 2012, the total outward direct investment reached 87.8 billion USD, increasing by 17.6% compared to 2011.²²⁰

1.3 Relevant Administrative Regulations and the Implications for Transparency in Governance

The state council effectively controlled which type of investors can participate in overseas investment and how they should act abroad by issuing regulatory documents to complicate the approval process and strict supervision in practice. On promoting ODI, MOFCOM (the Ministry of Commerce of the People’s Republic of China) focuses on international relations in determining whether to approve investments.²²¹ In 2006, the State Council issued *The Opinion on Encouraging and Normalizing our Enterprises’ Investment Cooperation*. It emphasizes the importance of compliance with local laws and regulations, exercising social responsibility to protect local employees and awareness of environmental protection and the importance to maintain

²¹⁹ World Investment Report 2003 FDI Policies for Development: National and International Perspectives, UNCTAD, New York and Geneva, Overview, at 8, online <http://unctad.org/en/docs/wir2003light_en.pdf>.

²²⁰ Outward Investment and Economic Cooperation, “2012 China’s Non-financial Overseas Direct Investment Condensed Statistics” online: Ministry of Commerce of the People’s Republic of China Department of Outward Investment and Economic Cooperation< http://fec.mofcom.gov.cn/article/tjzl/jwtz/201301/1722432_1.html>.

²²¹ Vivienne Bath & Luke Nottage, *Foreign Investment and Dispute Resolution and Practice in Asia* (Abingdon/Oxon/New York: Routledge, 2011) at 74.

China's good image and corporate reputation.²²² In 2010, MOFCOM issued the *Guiding Opinion of the Ministry of Commerce on the Work Regarding the Nationwide Work in Overseas Investment and Cooperation*. This opinion emphasizes again that the Chinese investors undertake political accountability, such as strengthening external publicity, creating a good image through respecting local laws and religious practices, and implementing social responsibility.²²³ Since the influence by MOFCOM in ODI is significant and the system is highly bureaucratic and time-consuming, private investors can hardly undertake all the costs and meet all the requirements during the administrative procedure. As a result, state-owned-enterprises are always the prominent participants in overseas investment,²²⁴ such as China National Offshore Oil Corporation (CNOOC) in Canada. In that case, securing the national supply of natural resources has therefore become an important strategic objective for Chinese outbound investments.²²⁵ The state-owned enterprises, in this thesis, refer to the companies whose majority shareholder is the state but the board of directors may be appointed by other government agencies. Because of the high degree of control from the state, the state-owned enterprises usually create concern about possible political motivations and uncertain commercial practices.²²⁶ Hence, national

²²² *The Opinion on Encouraging and Normalizing our Enterprises' Investment Cooperation*, October 25, 2006, State Council, Principle 5 & 9.

²²³ *Guiding Opinion of the Ministry of Commerce on the work Regarding the Nationwide Work in Overseas Investment and Cooperation*, MOFCOM, March 8, 2010, article 5.

²²⁴ *Supra* note 221 at 74.

²²⁵ *Verification and Approval of Overseas Investment Projects Tentative Administrative Procedures*, October 9 2004, the National Development and Reform Commission, Article 18 (2).

²²⁶ J. Doleschal – Ridnell, "Chinese Foreign Investment in Australia Balancing Openness and Strategic Relationships", 7:4 *Transnational Dispute Management*, at 3.

security issue and public interest is usually invoked during the disputes between state-owned enterprises and the state. Therefore, more transparency of the corporate governance and dispute resolution process are in demand.

On promoting FDI, besides the Chinese Communist Party's powerful influence, it is also important to mention the function of local governments in attracting foreign investment. The complicated policy-making process designed by local governments also constitutes an obstacle for China to fully incorporate transparency in arbitration. This is because to let the local governments know about how the State settles the disputes may raise unpredictable tension between the State Council and the local administrations. In the current mode of investment driven economy, in order to attract more foreign investment, local governments commonly think of two things to welcome foreign investors: one is to improve the local investment environment and the other is to provide favorable policies. The local governments in China are more likely to choose the latter because the former takes a longer time to realize. As a result, they take all kinds of measures such as selling land at an extremely low price or even giving it away, ignoring environmental protection and exempting enterprises from their environmental responsibilities, tax and fee reductions or exemptions, providing governmental guarantees for large loans, or underground direct financing of enterprises.²²⁷ Lax execution of rules, severe competition and insufficient funds are the basic reasons as to why underdeveloped areas recklessly increase the subsidies offered without too much concern for the quality of investing enterprises. The poorer

²²⁷ *Supra* note 126, at 125.

the area is, the more subsidies are offered by the local governments. In China's western regions, some local governments provide full subsidies to investments of 5-years or more and half subsidies for 10-year investments. Some even offer land for a nominal sum to factories that under construction or restructuring which then rent this out to investors for a low price. Sometimes this special treatment is not known by the State Council.

Therefore, if the investor-state arbitration tribunals are publicized, the tension between the central government and local governments will be terribly triggered during the arbitration proceedings. The Chinese Communist Party can never allow the struggles between different levels of his regime be publicized to the world society. Moreover, the role of local governments during the arbitral proceeding would be difficult to identify.

This section has elaborated the importance of state, more specifically, the Chinese Communist Party in the strategy-making process of foreign investment development. The Confucius ideas of ruling people with virtue, avoiding social riot and establishing the legal authority by exploiting people's rights to know and speak out constitute an important part in the Chinese legal tradition. Embedded in such a dictatorial legal tradition, the Chinese Communist Party intervenes in almost every field of economic development in modern China. Even with the influence of globalization, in order to maintain its authority, the Chinese Communist Party makes every effort to use administrative regulations, regulatory documents, laws and even international treaties to enforce its political ambition. On the other hand, in order to attract more foreign

investment, the local governments in China prefer to offer foreign investors favorable policies such as exempting corporate environmental responsibilities. Therefore, this section has proved that the legal and political environment for improving procedural transparency in investment treaty arbitration is far from mature.

2. Civil Society's Passive Participation in Chinese Legal Environment

Civil society is arguing for permit to participation in the investment dispute resolution process. Civil society is regarded as a western concept formed and developed in western ideology, culture and capitalism. When studying civil society in China, a fundamental issue is whether civil society actually exists.

According to my research, there are two types of civil society in China. One is the type, which emphasizes the opening up of the political system, limitation on state power, and the advancement of the rights of autonomous groups and individuals.²²⁸

They are gathered and established by private initiative. They usually keep a certain distance from the government. They are self-reliant in funding, human resources, management and policy, or they rely on project funds from foreign sources. They usually resist direct administrative interference or control. Rather, they keep close contact with citizens, stimulate and use social forces through their members and volunteers.²²⁹ This civil society is still poorly developing and is struggling to survive in China. But they are increasingly valued both inside China and abroad. For example, the Friends of Nature, which was established by Liang Gongjie in 1994, has become

²²⁸ *Supra* note 205, at 205.

²²⁹ *Ibid* at 214.

one of the best-known Chinese Environmental Non-Government Organizations.

The second type of civil society is the so-called “state-led civil society”, which refer to “the recent creation by the state of literally hundreds of thousands of organizations and groups that serve as support mechanism to the state.”²³⁰ The state-led civil society in China has four characteristics. First, the association and groups are not against the state but a part of it. Second, they serve as training grounds for the development of civic consciousness. Third, they are the intermediaries between the state and the public. For example, the Chinese Society of Environment Science, Chinese Society of Natural Resources, and Chinese Society of Environmental Industry are registered, partly funded by government, and consequently operated dependent on government in varying degrees. But they have some characteristics of civic and autonomous organizations, and are to some extents distinct from governmental departments. As a consequence, such organizations usually could obtain the trust of both the government and society.²³¹ Fourth, state-led civil society is not driven by the conflict between its civil society components and the state. Rather, it is the marriage of convenience. Furthermore, there are many limitations to restrict the establishment and development of civil society. According to *1998 Regulations on Registration and Management of Social Organizations*, there are four main limitations: dual administrative system, excessive restrictions on the establishment of social organizations, broad discretionary power of the registration department to social

²³⁰ B. Michael Frolic, “State-led Civil Society” in Timothy Brook & B. Michael Frolic (eds.), *Civil Society in China* (Armonk: M.E. Sharpe, 1997), at 56.

²³¹ *Supra* note 205, at 212.

organizations, and annual review system.

Embedded in such a strict administrative environment, civil society is still playing an increasingly influential role in the sustainable development in China. During the China's annual parliamentary session on March 11, 2013, an NGO submitted a draft of Nature Reserve Law to the National People's Congress. The Nature Reserve Legislation Group is an NGO of more than 100 people from various fields of science, law, culture and education, and civil society.²³² However, since China does not have the judicial tradition of *amicus curiae*, the direct influence of civil society on the dispute resolution process is very limited. Therefore, thesis contends that civil society exists in China but is suffering from many obstacles to expand. A more active role for the general public and non-governmental organizations requires a relaxation of the state's grip over civil society.²³³

Therefore, the above section has explained the reasons why the State, Chinese Communist Party, plays a significant role in legal system and economic development by reviewing Confucianism in China. It has also briefly analyzed main foreign direct investment policy and administrative regulations. At the end of this section, it has described the current situation of civil society in China. Having analyzed Chinese legal and social background for foreign direct investment, it then concludes that China is lack of complete set of democratic system for fully implementing procedural

²³² "Civil Society's Changing Role in the Chinese Political System – A New NGO-proposed Law on Nature Reserves is a Sign of an Increasingly Active Civil Society Movement, Pushing to be Involved in the Chinese Political Process", Chinadialogue, March 18, 2013, online: <<https://www.chinadialogue.net/article/show/single/en/5804-Civil-society-s-changing-role-in-the-Chinese-political-system>>.

²³³ *Supra* note 209, at 17.

transparency in investor-state arbitration because of the excessive intervention from the state, more specifically, the Chinese Communist Party. Nevertheless, thanks to the ‘open-door policy’ and globalization, China has also started to consider transplanting some advanced legislative technique to create a promising blueprint of legal environment in front of foreign investors. Among the series of efforts that China has made, signing amounts of BITs deserve to be mentioned. In the next section, this thesis analyzes the role of the State in promoting transparency in investment treaty arbitration from a Chinese perspective.

3. The Role of the State in Promoting Transparency in Treaty-based Investor-State Arbitration from a Chinese Perspective

The attitudes of the State Council together with the Chinese Communist Party not only have affected the foreign direct investment policy-making process, but also have been authorized to influence the tribunal’s decision in every single case, according to the Canada-China BIT. This section discusses that the historical and political reasons for this phenomenon.

As stated in Chapter 1, the reason why China has been making efforts to incorporate arbitration in BIT is that the outward foreign direct investment from China is increasing these years. According to the MOFCOM *2010 Guidance on the Work of Outward Foreign Direct Investment*, Chinese central government encourages enterprises to explore and develop energy resources cooperation and innovation in the foreign countries, and to realize mutual benefit and win-win cooperation, common

development. Echoing with the policy, CNOOC achieved to acquire control of Nexen Inc, a Canadian-based global energy company focusing on oil sands and shale gas in western Canada and conventional exploration and development primarily in the North Sea, offshore West Africa and deepwater Gulf of Mexico.²³⁴ Considering that energy resource is strategic resource that closely relevant to national security, the transparency of the investment and dispute resolution process becomes crucial for the accomplishment of this bilateral investment between China and Canada. As a result, China intends to employ arbitration process to protect Chinese investors' interests abroad. On the other hand, despite the fact that the amount of foreign investment has been increasing for a decade, from 2.7 billion USD in 2002 to 87.8 billion USD in 2012,²³⁵ China is still one of the largest foreign investment destination all over the world, with total amount of 111.72 billion USD actually used foreign capitals in 2012. As a consequence, the risk of Chinese government being sued by a foreign investor in a tribunal is much higher than a Chinese investor brings a case against a foreign government in a international arbitration tribunal. Moreover, what concerns Chinese government now is no longer merely how to attract much more FDI but how to attract FDI of higher 'quality' and how to create more investment-friendly environment for foreign investors.²³⁶ According to the Global Competitiveness Report 2013-2014

²³⁴ Financial Post, News Release, "CNOOC completes contentious \$15.1-billion acquisition of Nexen" (February 25, 2013) online: http://business.financialpost.com/2013/02/25/cnooc-completes-contentious-15-1-billion-acquisition-of-nexen/?__lsa=b27e-08df

²³⁵ Outward Investment and Economic Cooperation, Ministry of Commerce of the People's Republic of China Department of Outward Investment and Economic Cooperation, online: <http://fec.mofcom.gov.cn/list/tjzl/jwtz/1/cateinfo.html>.

²³⁶ *Supra* note 50, at 9

published by World Economic Forum, the investment environment is highly determined by the legal administrative framework within which individuals, firms and governments interact to generate wealth.²³⁷ However, China, a transition economy, is now in the policy adjustment period. It cannot estimate new policies' practical impact on foreign investors. Moreover, the lack of independence of China's judicial system and complicated administrative process are negatively affecting dispute resolution efficiency. As a result, many foreign countries argue for employing transparent investor-state arbitration to resolve investment dispute.²³⁸ However, many Chinese scholars fiercely oppose the application for investment arbitration in settling investment disputes.²³⁹ This is because China's foreign investment development over these years has been built on the serious lack of labor protection system and the super national treatment for foreign capital. Transparent and flexible dispute resolution process can easily trigger public reaction, especially domestic investors' discontent. Those negative reactions from the public will threaten national economic stability. Hence, it is fiercely against China's political philosophy to leave investment disputes to be dealt by the independent arbitration tribunal, which is usually out of state's control. Investment treaty arbitration had been supposed to be a confidential, neutral, expert and efficient dispute resolution process escaping from the political control

²³⁷ World Economic Forum, The Global Competitiveness Report 2013-2014, at 4, online: World Economic Forum

<http://www3.weforum.org/docs/GCR2013-14/GCR_Rankings_2013-14.pdf>

²³⁸ Gus Van Harten, "Fairness and Independence in Investment Arbitration: A Critique of 'Development and Outcomes of Investment Treaty Arbitration'" (2010), Online: International Institute for Sustainable Development
<<http://www.iisd.org/itn/2010/12/16/fairness-and-independence-in-investment-arbitration-a-critique-of-development-and-outcomes-of-investment-treaty-arbitration/>>.

²³⁹ An Chen, *Supra* note 214 at 365.

imposed by state, although the expectations for confidentiality are less.²⁴⁰ However, confidentiality in investment treaty arbitration may result in fragmentation in international law and further economic instability. Having learnt from the Argentina's lessons during the financial crisis, many scholars and lawyers in China argued that confidential investment arbitration will threaten the economic stability of China. The series of Argentina's cases are of extraordinary importance. This is not only because they expose immense financial liability to Argentina, but also because, in response, Argentina has invoked a broad set of legal arguments about the rights and power of states to craft policy responses to extraordinary situations such as a massive financial collapse.²⁴¹ Argentine has become the top respondent state in the history of investment treaty arbitration and therefore has suffered huge economic, legal and political risk. Thus, Argentine experience provides international community, especially the developing countries, with valuable lessons and experience to rethink international investment dispute resolution mechanism. According to the volume of disputes, until September 23, 2006, 40 cases in the ICSID system concerned Argentine. 5 of them happened before economic crisis, 35 of them are about the government of Argentina's management measures to overcome the economic crisis. The disputes involve industry concerning water, gas, oil, electricity, telecommunications, automotive, information service. Public sectors were the heavy

²⁴⁰ Gary Born, *International Commercial Arbitration* (The Netherlands: Wolters Kluwer Law & Business, 2009) at 2275.

²⁴¹ William W. Burke-White, "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System", in Michael Waibel et al, *Supra* note 76 at 412.

disaster area. Compared with the ICSID arbitration mechanism, high standard treatment offered in bilateral investment treaties are more in favor of foreign investors in Argentina. From the procedural perspective, Argentina totally accepted international arbitration mechanism especially when it signed treaties with developed countries in order to provide better investment legal environment for foreign investors. During that period, investor-State arbitration is still very confidential. As a result, the tribunals have produced contradictory awards especially on the issue of Argentina's customary defense of necessity and non-precluded measures provisions. Besides, the cases show that the tribunals have yet to reach a consensus on the issue of whether investors can apply most favored nation treaty to dispute resolution clauses.²⁴² But several ICSID arbitration tribunals allowed foreign investors to apply most favored nation treatment to dispute settlement provisions. Therefore, Argentina is facing huge legal risk if foreign investors apply most favored nation treatment to dispute resolution clauses. The vague stipulations and contradictory awards raise serious questions as to the legitimacy and viability of the investment treaty arbitration system. Based on the historical lessons, some countries decide to withdraw from the ICSID system or even totally refuse the incorporation of arbitration mechanism in BIT. For instance, in May 2007, Bolivia notified the World Bank that it withdrew from the

²⁴² *AES Corp. v. Argentina* (2005), ICSID Case No. ARB/02/17, Decision on Jurisdiction, (Arbitrators: Professor Pierre-Marie Dupuy, Professor Karl-Heinz Bockstiegel, Professor Domingo Bello Janeiro); *National Grid PLC v. The Argentine Republic* (2004), UNCITRAL, (Arbitrators: Dr. Andres Rigo Sureda, E. Whitney Debevoise, Esq., Professor Alejandro Garro); *Siemens A.G. v. The Argentine Republic* (2007), ICSID Case No. ARB/02/8, (Arbitrators: Dr. Andres Rigo Sureda, Judge Charles N. Brower, Professor Domingo Bello Janeiro).

ICSID Convention and urged its Latin American counterparts to do the same.²⁴³

Australia has also realized the threats to economic stability resulted from investment arbitration. In April 2011, the Australian Government issued a trade policy statement announcing that it would stop including investor-state arbitration clauses in its future investment treaty arbitrations. Explaining this decision, the Government of Australia stated that investor-state arbitration would give foreign businesses greater legal rights than domestic businesses and would constrain the Government's public policymaking ability (e.g. the adoption and implementation of social, environmental and economic law).²⁴⁴

Having learnt from Argentina's historical lesson, Chinese scholars conclude that the majority approach of investment treaty arbitration has eroded the public policymaking ability that the states parties sought to preserve for themselves to respond to extraordinary situations during the dispute resolution process.²⁴⁵ By this logic, if the investment treaty recognizes the state control over arbitration proceeding, the negative influence on economy stability will be decreased.²⁴⁶ As a consequence, China uses transparency clauses to strengthen state influence in investment dispute resolution process.

²⁴³ International Institute for Sustainable Development, Investment Treaty News Release, "Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions" (7 May 2007), online: [bilateral.org](http://www.bilaterals.org/article.php3?id_article=8221) <http://www.bilaterals.org/article.php3?id_article=8221>

²⁴⁴ Australian Government Department of Foreign Affairs and Trade, "Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity", April 2011, online: <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>>

²⁴⁵ *Supra* note 193 at 367.

²⁴⁶ *Ibid* at 368.

This phenomenon seems to be very surprising. But the role of the state was a crucial factor in the development experiences not only in China, but also in Japan and the newly industrialized countries of East Asia. In Japan, the state played a central role in managing economic policy,²⁴⁷ while in South Korea, the state transformed national industrial structures as a precondition for development. In Singapore too, the state has used market-oriented economic policies to channel foreign investment toward the achievement of long-term development goals, including the establishment of export-oriented industries, while also developing indigenous technology and infrastructure.²⁴⁸ However, it is China that makes the breakthrough in BIT to explicitly recognize the authority of the host state in the transparency issue decision process of treaty-based investor-State arbitration tribunal. This thesis contends that the recognition of the direct intervention of the State to the tribunal reflects Chinese characteristics but cannot be a good model for the future Chinese BITs and other BITs signed by East Asian countries. Next section analyzes the political and cultural feasibility to promote transparency in treaty-based investor-State arbitration in China.

IV. Difficulties that China has Encountered on the Process to Promote Procedural Transparency in Treaty-based Investor-State Arbitration

1. The Civil Society in China is so Under-developed that they are not Capable

²⁴⁷ Chalmers A. Johnson, *MITI and the Japanese Miracle: The Growth of Japanese Industrial Policy 1925-1975* (Stanford: Stanford University Press, 1982).

²⁴⁸ Chong-Yah Lim, *Economic Restructuring in Singapore*, (Singapore: Federal Publications, 1984); Julie Bringe, *East Asia: Regional Economic Integration and Implications for the United States* (Washington: Diane Publishing, 1993) at 12.

Enough to Represent Public Interest in the Arbitration Tribunals

One of the objectives to improve openness in treaty-based investor-State arbitration is to ensure public interests could be properly addressed in the tribunals through the civil society participation. However, compared with the scale and maturity of civil society in western countries, civil society in China is very weak. According to a speech delivered by a senior official of the Ministry of Civil Affairs in charge of social organizations, the underdevelopedness of NGOs in China is due to the objective conditions of its economic base and superstructure.²⁴⁹ Thus, NGOs in China have been regarded as not ready to operate independently. Then, the officials conclude that it is not the right time for Chinese civil society to present their case independently in front of the tribunals.

Besides the current national economic base and superstructure, this thesis considers that the crucial obstacle against the growth of NGOs in China is the over-restrictive administrative control under the Constitutional law. Like many western countries, the Chinese Constitution stipulates that citizens of the People's Republic of China enjoy freedom of speech, press, assembly, association, procession and demonstration.²⁵⁰ Thus, one can be certain that freedom of association is recognized as a constitutional right. However, this general constitutional provision is not sufficient enough to ensure that individual citizens in China can exercise the right. This is because unlike most western countries, the Chinese government has issued a number of specific

²⁴⁹ Guanyao Chen, "China's Nongovernmental Organizations: Status, Government Policies, and Prospects for Further Development" (2001), 3 *The International Journal of Not-for-Profit Law* 3.

²⁵⁰ Constitution of People's Republic of China, Article 35.

regulations and documents that legitimate strict government control over associations.²⁵¹ These contain: the 2004 Regulations for the Management of Foundations; the 1989 Interim Regulations on Administration of Foreign Chamber of Commerce, the 1998 Provisional Regulations for Registration and Management of Popular Non-Enterprise Work Units, and the 1998 Regulations for Registration and Management of Social Organizations. These laws share the characteristics of strict administrative control over associations and foundations.

According to the 1998 Regulations for Registration and Management of Social Organizations, there are four main obstacles to establish associations in China: a ‘dual administrative system’; clauses imposing excessive restrictions on the establishment of social organizations; a broad discretionary power of the registration department to an association; and an annual review system (annual inspection). On the dual administrative system, according to Article 6 of the 1998 Regulations, a social organization shall be administered under both the civil affairs department of the government and professional leading units from its establishment to its operation. The dual administration system is mainly designed to facilitate the management and control of associations by the government. Article 28 of 1998 Regulations even imposes a wide range of supervisory and management responsibilities on leading units. It gives leading units some political responsibility for social organizations, namely that leading units shall ensure that a social organization’s purpose and activities are politically correct. On the excessive restriction clauses, according to

²⁵¹ *Supra* note 205 at 221.

Article 10 of the 1998 Regulations, a social organization must meet the following six conditions: number of members (more than 50 individual members or 30 institutional members, or a total of over 50 members if a social organization consists of both individual and institutional members); a standardized name and corresponding organizational structure; a fixed domicile; full-time staff with qualifications appropriate to the professional activities of the organization; lawful assets and sources of funding and the ability to bear civil liability independently. These standards are much higher than standards set by western countries. On the broad discretionary power of the registration department to refuse the registration to social organizations, according to Article 13 of 1998 Regulations, the department has broad power to reject an application if one of the five following situations occurs: existing evidence proves that the purposes or the scope of the business of a proposed social organization are contradictory to article 4 of the 1998 Regulations; there is no need to establish a new organization if there is already a social organization active in the same or similar field in the same administrative area; founder or proposed responsible officers who are currently, or who were once under the criminal penalty of deprivation of political rights, or without full capacity for civil conduct; if falsification occurred in the application; any other situations prohibited by laws and administrative regulations. On the annual review system, according to Article 31 of the 1998 Regulations, the social organizations must submit their annual work report to their leading units by 31st March each year. The work report should include details of its compliance with State policy and any issues relating to a change of staff, internal structure and financial

management.

These limitations result in the phenomenon of weak civil society but powerful government. The structures of some NGOs cannot meet the requirements of a market economy.²⁵² Therefore, they are known to have a tendency to rely overly much on the government.²⁵³ Congenitally defective as Chinese NGOs are, they usually cannot achieve their goals and protect their interest independently. Therefore, the official view states that the special national condition in China is not developed enough to adapt to the international standards of procedural transparency in treaty-based investor-State arbitration.

2. Dispute Resolution Culture with Chinese Characteristics is Different from Western Dispute Resolution Culture

China is a transition economy with unstable and political legal environment. The judicial system in China is lack of fairness, independence and efficiency. In contrast to this ideal model, judicial decision-making in China is a very complex process in which many kinds of characters play different roles. For example, a case involving a foreign investment dispute usually includes the chief judge of a tribunal, the president or vice president of a people's court, the adjudication meeting of that court, the branch Committee of CPC in that court, the local Committee of Political and Legislative Affairs of CPC in the jurisdiction, the higher-level court, people's congress at the

²⁵² *Supra* note 249.

²⁵³ *Ibid.*

same and higher level, local government, local Committee of CPC, exerts outside the court, lawyers, the press, the public and so forth. In this circumstance, judges of the trial panel are only nominal decision-makers on the front stage. Behind this game, there is myriad of different powers balancing one another to attain the final result, which are all mysterious and uncontrollable for foreign investors.²⁵⁴ Moreover, despite the authorities are taking measures to combat excessive judicial delay, the inadequate structure of the courts, unqualified and unspecialized judges, complex and rigid procedures result in severe judicial delay and “hollow” judgment.²⁵⁵ In addition, it is worth mention that mediation has played a prominent role throughout Chinese dispute resolution history and has revived in recent times. However, foreign investors usually cannot understand this procedure. As a result, the wide adoption of judicial mediation to resolve investment dispute in China’s Court always confuses foreign investors. On the other hand, although letters of expert opinions or expert jury is increasingly becoming accepted in China’s court system,²⁵⁶ there is no so-called *Amicus Curiae* in China’s judicial system.²⁵⁷ Thus, the unstable and government-like judicial system leads to a basic tension between policies emphasizing state control and those emphasizing parties’ autonomy.²⁵⁸

3. Conflicts between the State Council and Local Governments can be

²⁵⁴ *Supra* note 126 at 299.

²⁵⁵ *Ibid* at 293

²⁵⁶ Supreme People’s Court Work Report on the Regulations and Implementation of People’s Jury System, para. 6, At the 5th Session of the Twelfth Standing Committee of National People’s Congress, October 22, 2013.

²⁵⁷ *Supra* note 126 at 303

²⁵⁸ *Supra* note 206 at 109.

Exacerbated during Transparent Investment Treaty Arbitration which may Threaten National Stability

As mentioned in chapter 2, one of the worries of the state on opening the arbitral tribunal to the public is that transparency can trigger the conflicts between the central government and local administrations. In order to attract foreign investment, local governments get used to provide foreign investors with favorable policies, including exempting environmental protection responsibility. This thesis contends that keeping the hidden conflicts private is not the best strategy to solve the contradictions. As a dispute resolution mechanism that improving reflexive legitimacy, transparent investment treaty arbitration can be a channel for the sub-national governments or departments to present their considerations on foreign investment projects in front of the state council. In other words, the local governments or departments can participate in the tribunals as *amici curiae*.²⁵⁹

The central government represents national interest instead of the interests of all its people. The Quechan Indian submission in the *Glamis Gold* case is a good illustration of the different perspectives offered by a governmental entity other than the central government. As *amici*, the Quechan tribe argued persuasively that their stance was not altogether represented by the United States, especially with respect to the protection of cultural heritage sites and sacred places.²⁶⁰ Countries like China with a large

²⁵⁹ Andrea K. Bjorklund, "The Participation of Sub-national Government Units as *amici curiae* in International Investment Disputes", in Chester Brown and Kate Miles ed. *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) at 300.

²⁶⁰ *Glamis Gold*, *Supra* note 107 Non-Party Submission.

population and 56 minorities, more transparency in governance and more channels for inter-departments communication should be provided. Therefore, this thesis submits that local governments or departments shall be authorized the right to participate as *amici curiae* in order to foster communications between the State Council and the local governments.

V. Critical Analysis to the Procedural Transparency Provisions in Canada-China BIT

International law has been regarded to rely on a political theory of sovereignty to buttress its conceptual framework.²⁶¹ But given the rapid globalization of the economy, the growth of regional institutions like the European Union, the emergence of international regulatory regimes, and the enhancement of non-governmental organizations like International Institute for Sustainable Development, the conventional notion of sovereign State has limited efficacy. Nowadays, the concept of sovereignty should be a distinctive concept that enabled not only a set of external economic relations among formally equal States,²⁶² but more importantly, allowed the constitution of separate public and private spheres to participate in the dispute-resolution process as well as rule-making process. With the globalization of economic relations, there is an increasing incongruity between the national interest and the interests of civil society and other private sectors. In China, various agencies

²⁶¹ Kanishka Jayasuriya, "Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance" (1999) 6:2 Indiana Journal of Global Legal Studies 425.

²⁶² *Ibid* at 432.

and non-governmental organizations within the State are being developing a high degree of autonomy and independence. This diversity of interests groups and the fragmentation of the policy and rules that stand in sharp contrast to the monistic legal order generate much complaint within the State. Hence, having constituted distinct arenas of law for foreign groups and interests, China shall also truly take the social groups interests into consideration during the foreign investment dispute resolution process.

International investment law is not something that is simply established and maintained dependent on powerful political support and then, enforced. International investment law, as a transnational legal rule, should not solely be determined hierarchically from top down but collaterally through neighborhood networks.²⁶³ Investor-state arbitration tribunals can create the neighborhood networks that making strong influence on the transformation of international investment law.

However, the fragmentations of interpretations by different tribunals have made the international investment law regime face legitimacy crisis. But legitimacy of international investment law can be established by enhancing the ‘reflexive legitimacy’ of investment treaty arbitration system. This is because it is not the legal rules themselves make people believe in the legitimacy of the social orders; it is the formal procedures that guide the formulation of legal rules and the outcome of arbitral decisions that make people believe in the legitimacy of the system.²⁶⁴ Usually,

²⁶³ Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004) at 157.

²⁶⁴ Max Weber, *Economy and Society – An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1990) at 191.

people's beliefs in the legitimacy of a social order are premised on how they orient themselves to that order.²⁶⁵ As a consequence, it is of great importance to give sufficient rights to diverse interests group to play a role in the arbitration proceedings.

1. The Provisions Lack Sufficient Reflexivity Function

As a legal framework of global governance, the provisions of BIT should equip with reflexivity function. Reflexivity function in this thesis means a kind of blueprint for modern forms of co-regulation between states, international organizations, industries and civil society actors.²⁶⁶ Thanks to rapid globalization, international investment law regime appears to move into a new era of de-politicization, de-centralization and de-individualization. As mentioned in the chapter 1, the sources of law are now to be found at the boundaries with other sectors of world society.²⁶⁷ Many private regulations, such as *lex mercatoria*, are spontaneously growing 'alongside the state'.²⁶⁸ Therefore, it is crucial that the BITs can provide enough discretion for the arbitrators to maintain the reflexivity function of the international investment law. In other words, the arbitration tribunals should keep the responsiveness with 'irritations' or submissions from civil society. Procedural transparency provisions can usually provide arbitration tribunals with sufficient reflexivity function since they allow civil society to know and react to the tribunal decisions. However, the procedural

²⁶⁵ *Ibid* at 185.

²⁶⁶ *Supra* note 260 at 425.

²⁶⁷ Gunther Teubner, "Global Private Regimes – Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors" in *Supra* note 1 at 74.

²⁶⁸ Volker Ronge, *Am Staat vorbei* (Frankfurt: Campus, 1980).

transparency provisions in Canada-China BIT fail to provide the international investment law regime with sufficient reflexivity function because they mistakenly award the host-state the final authority to decide whether an investment dispute concerns public interest.

1.1 Whether the Dispute Concerns Public Interest should be Proposed by the World Society Rather than Notified by the State Party

The objective to improve the openness of investment treaty arbitration proceeding is to ensure civil society's voice be heard during the dispute resolution process. Naturally, whether the dispute concerns public interest should be decided by the tribunal according to the civil society's submission and treaty law. The intervention of the state party in the transparency issue decision process will damage the interaction between the tribunal and the civil society. This is because state intervention can probably politicize the arbitral proceedings.

Arbitration is widely acknowledged as a dispute resolution channel that can avoid political intervention. Its independence from judicial system and political supervision make it more investor-friendly and segregate from unstable and political legal environment. Both Canada and China generally support international trading system, which is undoubted based on their membership in the World Trade Organization, the Asian-Pacific Economic Cooperation forum, their ratification of ICSID Convention and the New York Convention, and other investment agreements.²⁶⁹ As ardent

²⁶⁹ Frédéric Bachand, "Overcoming Immunity-based Objections to the Recognition

facilitators of international investments, they both thrive to ensure that the relationship between the foreign investor and the host state can be as depoliticized as possible. In other words, depoliticization of the relationship between foreign investors and the state – both in substantive and procedural terms – should be the fundamental common purpose pursued by the investment treaties entered into by Canada and China.²⁷⁰ However, when the host state get the discretion to decide whether the arbitration proceeding should be transparent, the host state may easily abuse this power to take advantage of “public interest” to cover its fault of unstable policy. This is because giving the state the right to decide how the proceedings shall go means that giving the state the right to decide what is public interest.

Public interest does not merely refer to the host state regulatory autonomy and the legitimate public purposes behind host state regulations in circumstances where legislative measures are the subject of challenge under investment treaties. Public interest in international investment law that increasingly values sustainable development also means environmental issue, public health and labor protection, etc.²⁷¹ If the BIT allows the host state to define “public interest” and decide whether

and Enforcement in Canada of Investor-State Awards” (2009) 26:1 Journal of International Arbitration 59 at 72-3; ICISD, News Release, “Canada Ratifies the ICSID Convention” (November 1 2013) online: ICSID <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement138>>

²⁷⁰ Frédéric Bachand, *Supra* note 26970 at 73.

²⁷¹ United Nations Commission for Trade and Development, “Investment Policy Framework for Sustainable Development” (4 July 2012) online: UNCTAD <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>; Aldo Caliarì, “UNCTAD’s Investment Policy Framework for Sustainable Development: Potential” and Issues” (2013) online: International Institute for Sustainable Development <<http://www.iisd.org/itn/2013/01/14/unctads-investment-policy-framework-for-sustai>

arbitral documents shall be publicly available or whether arbitral hearings shall be open to public, it infringes civil society's right to know and participate at the very beginning.

1.2 The Participation of Global Society Enhances Reflexive Legitimacy of Treaty-based Investor-State Arbitration System

In the investment treaty arbitration regime, host state law and vague international treaty law perform certain functions. But only resort to these sources of law will lead to sporadic decisions and conflicting jurisprudence.²⁷² This is because arbitrators in investment treaty arbitration seem to have huge discretionary power. As a consequence, one way to enhance reflexive legitimacy in treaty-based investor-State arbitration system is to open this regime to outside influence.²⁷³ Civil society's participation can make the 'normatively closed' investment law system become 'cognitively open' system.²⁷⁴ By being sensitive to 'outside effects' reflected by non-disputing party submission and participation to the hearings, the arbitrators can maximize internal rationality and identify opportunities to self-restrict discretionary power; and more importantly, self-correct without 'irreversibly' destroying the efficiency and legitimacy of investment treaty arbitration.²⁷⁵

However, the transparency provisions in Canada-China BIT underestimate the role of

nable-development-potential-and-issues/.>

²⁷² *Supra* note 11 at 473.

²⁷³ *Ibid* at 474.

²⁷⁴ *Supra* note 26³⁴ at 106.

²⁷⁵ *Supra* note 11 at 478.

the public or world society in improving reflexive legitimacy of international investment law. Traditionally, the international investment disputes involved the utmost secrecy and law far beyond the reach of the public. This does not mean that states stubbornly rejected the involvement of citizens; rather, citizens themselves tended to be indifferent to the international investment dispute resolution process that was regarded to be mainly concerned with interstate relationships.²⁷⁶ Nor was the settlement of international trade disputes a matter of major concern to citizens who were mostly self-sufficient in the local or domestic economy.²⁷⁷ In that period, citizens did not have a strong incentive to involve themselves in the international law process. However, as foreign investment expands, investment disputes have greater impact on citizens' daily lives. The increasing complexity of socio-economic processes, the contradictory imperatives of economic crisis management, and the cognitive limits of our mechanisms of political-legal control make the international investment law with strong state intervention encounter what Habermans calls a "rationality crisis".²⁷⁸ Therefore, the public or world society themselves now want to know and should be given the right to decide whether the dispute affects their interests instead of the states.

The centre of gravity of legal development from time immemorial has not lain in the activity of the state, but in society itself.²⁷⁹ The public affect every stages of the

²⁷⁶ Yuka Fukunaga, "Transparency and the Role of Domestic Process" in *Supra* note 4 at 32

²⁷⁷ John. O. McGinnis & Mark L. Movsesian, "The World Trade Constitution" (2000) 114 Harvard Law Review 511.

²⁷⁸ *Supra* note 11 at 268.

²⁷⁹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New York: Arno

construction of international investment treaty arbitration. When deciding on the quantum of damages or compensation to be awarded to claimant investors, although concepts such as the public interest and sustainable development have seldom been referred to by investor-state tribunal,²⁸⁰ UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) suggests a policy option providing for the amount of compensation to be "equitable in light of the circumstances of the case" and goes on to suggest that specific rules on damages for treaty breach could be delineated, such as excluding the recoverability of punitive and/or moral damages, limiting the recoverability of lost profits or ensuring that the amount of damages payable is commensurate with the country's level of development. IPFSD also suggests that future IIAs could provide that non-compliance with universally recognized standards, such as the International Labor Organization's Tripartite Multinational Enterprises Declaration,²⁸¹ the UN Guiding Principles on Business and Human Rights,²⁸² or with applicable Corporate Social Responsibility standards,²⁸³ may be considered by a tribunal when interpreting and applying treaty provisions and

Press, 1975) at 390.

²⁸⁰ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (2000) ICSID Case No. ARB/96/1, Award, paragraphs 71-72, (Arbitrators: L. Yves Fortier, Elihu Lauterpacht, Prosper Weil).

²⁸¹ International Labour Organization, "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (4th Edition) (1 January 2006) online: International Labour Organization <
http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf>.

²⁸² Human Rights Council of United Nations, "United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" 17th Sess, A/HRC/17/31 (21 March 2011).

²⁸³ Human Rights Council, "Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights" (15 February 2005), U.N. Doc. E/CN.4/2005/91, paragraph 7.

when determining the amount of damages due to the investor.²⁸⁴ It cannot be overemphasized that the dominant sources of law are now to be found at the peripheries of law, at the boundaries with other sectors of world society that are successfully engaging in regional competition with the existing centers of lawmaking, such as national parliament, global legislative institutions and intergovernmental agreements.²⁸⁵

This section has addressed that the direct intervention of state in transparency issue decision recognized in Canada-China BIT undermines the reflexive legitimacy of the treaty-based investor-State arbitration between Canada and China. This section has further argued that the interactions between arbitrators and civil society are of great importance for the promotion of legitimacy of international arbitration system and sustainable investment. Next section studies whether the procedural transparency rules in Canada-China BIT are in conformity with the international trends.

2. The Provisions are not in Conformity with the Trend of International Investment Treaty Arbitration

Canada-China BIT is a part of international investment treaty law. Therefore, the dispute resolution mechanism in this BIT is supposed to be integrated well with international arbitration rules, such as ICSID Convention and UNCITRAL Rules. The procedural transparency rules in BIT are regarded as distinct provisions performing specialized tasks for bilateral investment dispute resolution, but working together to

²⁸⁴ *Supra* note 27~~12~~, at 58.

²⁸⁵ *Supra* note 1.

help the international investment arbitration system maintain an orderly state of equilibrium.²⁸⁶ The differentiated and interrelated rules in BIT can usually achieve the state of equilibrium in international community in two ways: first, by fulfilling the needs of international legal system, and second, by subduing disorder in the international legal system.²⁸⁷ The procedural transparency rules in Canada-China BIT fail in satisfying the needs of international investment arbitration in promoting openness. Furthermore, if these provisions become the model of the following Chinese BITs or other Asian countries' BITs, it will constitute a disorder in the transformation of international investment law.

The trend of investment arbitration is to more embrace civil society's participation in the proceedings. The trend of investment arbitration is to enhance the consistency and legitimacy in international investment law. However, improving the standards of non-disputing party submission will reduce civil society's participation. To let the state to decide whether the Tribunal documents should be publicized and whether the Tribunal hearings should be open to the public is making treaty-based investor-State arbitration become an instrument of global administrative law. China is trying to learn from the WTO disputing resolution system. It is truth that WTO has weathered its legitimacy storm much better than has the investment rules regime.²⁸⁸ And its

²⁸⁶ *Supra* note 2645 at 312; Daniel Jutras, "The Legal Dimensions of Everyday Life", in 16:1 Canadian Journal of Law and Society 45 at 55.

²⁸⁷ *Supra* note 2645 at 312.

²⁸⁸ Thomas Cottier, "The Legitimacy of WTO Law" (2008) NCCR Trade Working Papers 2008/19, online: <http://phase1.nccrtrade.org/images/stories/publications/IP2/The_Legitimacy_of_WTO_Law_cottier_final%200808.pdf>; Carlos Correa, "Implications of Bilateral Free Trade Agreements on Access to Medicines" (2006) 84 Bulletin of the World Health

legitimacy is hampered by the continuing oversight of national states.²⁸⁹ With too much state intervention during the proceeding, investment treaty arbitration, which is very different from WTO dispute resolution process, may lose its function to resolve investment disputes fairly and independently. Moreover, treaty-based investor-State arbitration should be maintained to be an alternative to administrative channels. Although investment treaty arbitration is often viewed as a form of reciprocally consensual adjudication between an investor and a state, the system is actually established by a sovereign act of the state and it is predominantly used to resolve disputes arising from the exercise of sovereign authority. Although it allows an investor to claim investment treaty rights directly against the host State, investment treaty arbitration engages the regulatory relationship between state and individual, rather than a reciprocal relationship between juridical equals.²⁹⁰ There has been increasingly papers illustrating that international investment arbitration is neither international commercial arbitration, nor is it public international law; rather it is global administrative law. Now in this Canada-China BIT, the host State is authorized to decide the publicity of arbitral proceeding. Therefore, investment treaty arbitration is further administratified. Foreign investors will hesitate to take a confrontational approach with Chinese government for fear of retaliation against their business

Organization 399.

²⁸⁹ Peter Gallagher, Patrick Low & Andrew L Stoler (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge/New York: Cambridge University Press, 2005).

²⁹⁰ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press, 2007).

interests.²⁹¹ As a consequence, resorting to investment arbitration against China would be regarded to be a last resort for foreign investors.²⁹²

This section has addressed that the procedural transparency rules in Canada-China BIT deviate from the trend of international investment arbitration. It argues that these provisions cannot be the model of future Chinese BIT and other Asian countries' BIT since the over-intervention of the State during the arbitral proceeding is administratifying the investment dispute resolution. Next section predicts how the actors in the field of foreign investment will react to the procedural transparency provisions in Canada-China BIT.

3. The Provisions do not Provide Foreign Investors Predictability but Facilitate Corruption

The stability and predictability of legal procedure are of great significance.²⁹³ Usually, investors who are in possession of economic power look upon a formal rational administration of justice as a guarantee of freedom and efficiency. This is repudiated not only by theoretic or patriarchal-authoritarian groups such as the Chinese Communist Party, but under certain conditions also by non-governmental groups.²⁹⁴ Over-intervention from the State to the tribunals does not only damage the predictability of investment treaty arbitration system but also increase corruption.

²⁹¹ James. J. Saulino, "The Canada-China Investment Treaty – Lessons for a U.S. – China BIT?" 9:4 Transnational Dispute Management, at 14.

²⁹² *Ibid* at 15.

²⁹³ *Supra* note 262 at 812.

²⁹⁴ *Ibid* at 813.

To let the state to decide transparency issue during arbitration process gives the state party a chance to take advantage of transparency to politicize the disputing issue. It may give the state a chance to cover their policy mistake through the rejection of transparency; on the other hand, it may give the state the right to use media, civil society and other non-disputing parties to put pressure on foreign investors. Usually, for the investors, transparency means moving investment disputes back to the realm of domestic bureaucracy and diplomacy.²⁹⁵ Investors will undertake more political risks such as the complication of a multitude of domestic investors demanding diplomatic protests.²⁹⁶ The state may make advantage of transparency during the course of the proceedings in order to politicize the arbitration, and force the respondent investor into a settlement prior to the award. In other words, transparency can be a tool for the state to avoid state responsibility. To let the state to decide transparency issue may lead to lobbying and administrative corruption. There has already existed severe investor corruption during the foreign investment approval procedure with the growth of international investment agreements and FDI in the areas of public procurements and other public projects, particularly in developing countries. Due to the limited fund in a short run, the infrastructure projects are usually carried out in the forms of Public-Private Partnership (PPP) particularly between

²⁹⁵ Horatio A. Grigera Naon, "The Settlement of Investment Disputes between States and Private Parties: An Overview from the Perspective of the ICC" (2000) 1 *Journal of World Investment* 59, at 59-60; Ibrahim Shihata, "Towards a Greater Depolitization of Investment Disputes: The Roles of ICSID and MIGA" at 1-10 (1992).

²⁹⁶ Noah Rubins & N. Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution A Practitioner Guide*, (New York: Oceana Publications, 2005) at 414

host-state entity and foreign investors.²⁹⁷ Some claimant investors even argue that bribery is in a form of local custom of a certain host states, alleging its general acceptance as a matter of fact.²⁹⁸ If the investor-state arbitration provision opens a door for foreign investors to bribe during the dispute resolution proceeding, it will severely damage the legitimacy and credibility of investment arbitration system.

However, this provision design may give foreign investor a chance to “bribe” domestic officials for non-transparency. This is because the host State instead of the tribunal has the final authority to decide transparency issue, thereby it may set another barrier for tribunal’s jurisdiction. Furthermore, the relationship between investor corruption and the adjudicative power of investor-state arbitral tribunals in international investment law is an increasingly important but tricky problem. So far, there is no clear answer to the question: to what circumstance should an arbitral tribunal refer allegations or suspicions of corruption to domestic authorities.²⁹⁹ This is because there is no international law, international custom or arbitral rules requiring an arbitrator to report suspicions of corruption to domestic authorities.³⁰⁰ It is

²⁹⁷ Florian Haugeneder & Christoph Liebscher, “Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof”, in: C. Klausseger and P. Klein (eds.), *Austrian Arbitration Yearbook* (C.H. Beck, Stämpfli & Manz Vienna, 2009) online:

<http://www.law.yale.edu/documents/pdf/sela/Haugeneder_Liebscher_Corruption.pdf>

²⁹⁸ *World Duty Free Co Ltd v. Kenya* (2006), ICSID Case No. ARB/00/7 (Arbitrators: H.E. Judge Gilbert Guillaume, Honorable Andrew Rogers, QC, V.V. Veeder, QC)

²⁹⁹ Richard H. Kreindler, “Aspects of Illegality in the Formation and Performance of Contracts, in *International Commercial arbitration: Important Contemporary Questions*” (2003), 11 ICCA Congress Series 209 at 259; Michel Hwang & Kevin Lim, “Corruption in Arbitration – Law and Reality” (2012), 8 *Asian International Arbitration Journal* 1.

³⁰⁰ David M. Biggie & Kiera S. Gans, “The Potential for Arbitrators to Refer Suspicious of Corruption to Domestic Authorities” (2013), 3 *Transnational Dispute Management* 1, at 10.

acknowledged that to investigate and prosecute bribery of foreign corporations and individuals is particularly timely and costly and governed by a number of competing factors.³⁰¹ However, in *Wena Hotels Ltd. V. Arab Republic of Egypt*, an ICSID tribunal held that bribery and corruption is contrary to international *bonos mores*.³⁰² Most famously, in the landmark ICC Case, Judge Leegergren characterized bribery and corruption as a gross violation of good morals and transnational public policy.³⁰³ Therefore, to let the state party decide whether the tribunal should be transparent can actually increase the foreign investors' worries rather than address the root of Chinese judicial problem.

VI. Suggestions for China to Engage in the Trend of Enhancing Procedural Transparency in Treaty-based Investor-State Arbitration and Implications for Future Chinese BITs

1. The State should not Directly Intervene in the Transparency Issue Decision-making Process

The experience of revising and interpreting procedural transparency rules in Canada, as well as some influential international investment dispute resolution institutions such as ICSID, UNCITRAL and NAFTA can be the guidance for China to improve its drafting and practice of transparency rules in the future. As stated by the Secretary General of ICSID, the fundamental objective of this institution is to 'depoliticize' the

³⁰¹ *Ibid*, at 16.

³⁰² *Wena Hotels Ltd. v. Arab Republic of Egypt* (2002), ICSID Case No ARB/98/4, Award, (Arbitrators: Dr. Klaus Sachs, Prof. Ibrahim Fadlallah, Mr. Carl F. Salans)

³⁰³ ICC Case No. 1110 at 294.

resolution of investment disputes by affording both states and investors access to a truly neutral forum and precluding the investors' countries from intervening meanwhile.³⁰⁴ And this has been well acknowledged that the right to binding arbitration against States, whether granted through contract, treaty, or domestic investment law, was devised to ease political relations between sovereigns by removing investment disputes from the realm of diplomacy and domestic administration.³⁰⁵ Therefore, Chinese government shall not be given the authority to decide whether the investment dispute is in public interest. Moreover, besides the tribunal award, all other documents submitted to or issued by the tribunal shall be publicly available, subject to the redaction of confidential information. In this way, the public, the civil society, can have sufficient information to decide whether their interest has been fully addressed in the tribunal.

Despite the fact that the civil society in China is relatively weak, this thesis contends that the rapid development of civil society in China in this decade should not be ignored. China shall conform with the international standards when it signs the future BITs by providing civil society with sufficient autonomy and legitimate mechanism to present their case in front of the tribunal. In order to meet the international standards, Chinese government and relevant administrations shall liberalize the restrictions on the establishment and expansion of social organizations. In recent years, some Chinese legal scholars have taken a critical approach to studying the domestic legal

³⁰⁴ Jack J. Coe Jr., "The State of Investor-State Arbitration – Some Reflections on Professor Brower's Plea for Sensible Principles", 20:5 American University International Law Review 930 at 955.

³⁰⁵ *Supra* note 126 at 414.

system relating to freedom of association in China.³⁰⁶ They have challenged the dual administration system, and appealed for the liberalization of legal environment conducive to the development of NGOs and NPOs. Some governmental officials were agreed with the academic critics. As a consequence, since 2008, Ministry of Civil Affairs together with the relevant departments in State Council have been making efforts to revise 1998 Regulations. The new Regulations on Registration and Management of Social Organizations emphasize the self-administration and independent operation.³⁰⁷ Although it has not been officially issued, the Minister of Civil Affairs Li Liguo announced that the amendments of Regulations would be enacted before the end of 2013 during the National Civil Legal Work Conference on July 4, 2013.³⁰⁸

Therefore, the state shall give the social organizations more rights to present their case in front of the tribunal. What the state shall do is to provide the world society with developed dispute resolution mechanism rather than represent the non-disputing parties' interest directly in the tribunal. This section argues that the first two paragraphs of Article 28 shall be revised as "1. Any Tribunal award and all documents submitted to, or issued by, the Tribunal shall be publicly available, subject to the

³⁰⁶ *Supra* note 205 at 232.

³⁰⁷ "Strengthen social organizations management, the ongoing revision of the 'Regulations on Registration and Management of Social Organizations' – Interview with Ming Wu, the director of Legislative Affairs Ministry of Civil Affairs" *Legal Daily* (3 August 2008) Online: News Sohu <<http://news.sohu.com/20080803/n258558063.shtml>>

³⁰⁸ "Insiders said the promulgation of 'revised Regulations on Registration and Management of Social Organizations', 'Foundation Management Regulations' and 'Regulations on the Registration and Administration of Private Non-enterprise Units' may be postponed" *Jinghua Times* (4 November 2013) Online: China News <<http://www.chinanews.com/gn/2013/11-04/5459137.shtml>>

redaction of confidential information. 2. The Tribunal shall make the hearings open to the public when it considers that the disputing issue concerns public interest based on the request of disputing parties.”

2. The State should Promote the Multi-lateralization of International Investment Law in Asia for More Arbitration Practicing Experience

China, as one of the biggest trading countries in the world, should take a lead to promote multi-lateralization of international investment law in Asia. Enhancing the multi-lateralization of investment law in Asia can help to establish and develop a regionally-acceptable procedural transparency rules. Creating mutual rights and obligations and coordinate State behavior on a bilateral basis allows flexible solutions depending on the interests of the States, such as Chinese characteristics, but inhibits the emergence of an international community that share uniform understanding of investor-State arbitration.³⁰⁹ Bilateralism puts the State, its sovereignty and its consent to the formation of investment dispute resolution mechanism center stage and secures the precedence of State interests over interests beyond its realm.³¹⁰ By contrast, multilateralism respects international law subjectivity to non-State actors and distribution of power in a non-hierarchical order.³¹¹ Multilateralism orders inter-State relations on the basis of general principles that establish a general framework for the interactions among States and their citizens. Typically, multilateralism is implemented

³⁰⁹ Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009) at 362.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

on the basis of multilateral treaties that ‘serve as the vehicle par excellence of community interest.’³¹²

Canada is a member of NAFTA. Therefore, investment disputes raised among Canada, the U.S.A. and Mexico can be submitted to the international investment arbitration tribunals under NAFTA Chapter 11. With this regional agreement, Canada gains more chances to practice investor-State arbitration rules. Based on the observation that investment treaties converge considerably, the related claim that continuously multilateralization of investment law allows the reconstruction of international investment law to form sub-system of international law that follows and practice rationalities that apply also independently of the specific bilateral treaty relationship.³¹³

Moreover, the international dispute resolution practice demonstrates that the increasing emphasis on decisions of international courts and tribunals rather than on treaties, custom and general principles as the primary sources of international law. Therefore, engaging in more practice of transparent investor-State arbitration is the priority for China. In the early 2012, Japan, China and Korea have signed the trilateral investment treaty. This thesis contends that China should improve the procedural transparency provisions in this agreement. And encourage Chinese investors abroad and foreign investors in China to adopt investor-State arbitration to resolve their investment disputes.

³¹² Bruno Simma, “From Bilateralism to Community Interest in International Law”(1994), 250 *Recueil des Cours* 217 at 323

³¹³ *Ibid* at 18.

3. Implications for Future Chinese BITs

China and the U.S. declared to launch the BIT negotiations these years. Given that the Canada 2004 Model FIPA and the U.S. 2004 Model BIT take broadly similar approaches in the transparency of investor-State arbitration, the compromises that were made between Canada and China in the course of Canada-China BIT negotiations on their treaty offer a potential roadmap. When it concerns to the investor-State dispute resolution mechanism, the U.S. has always sought to create international investor-State disputes settlement mechanisms for overseas investors. However, in order to reduce the risk of being claimed, the United States recently taken two far-reaching steps: first, it has substantially liberalized the investor-State dispute settlement mechanism.³¹⁴ 2004 U.S. Model BIT witnesses many creative innovations in order to make dispute settlement process more transparent,³¹⁵ more controllable,³¹⁶ more consistent,³¹⁷ and less costly³¹⁸; second, it totally refused to incorporate investor-State dispute resolution provisions, such as US-Australia FTA (2004). This FTA does not provide investor-State disputes settlement mechanism at all.³¹⁹ However, since China does not have developed and independent judicial

³¹⁴ Gilbert Gagne, “The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT” (2006), 9 *Journal of International Economic Law* 357 at 368.

³¹⁵ 2004 US Model BIT, Articles 28, 29.

³¹⁶ *Ibid* Articles 30(3), 31.

³¹⁷ *Ibid* Articles 33.

³¹⁸ *Ibid* Articles 33.

³¹⁹ William S. Dodge, “Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement” (2006) 39 *Vanderbilt Journal of Transnational Law* 1.

system as in Australia, US is more tended to employ investor-State dispute resolution mechanism in US-China BIT.

However, this thesis considers that China should not take the same approach to regulate the procedural transparency of investor-State arbitration in BIT with the U.S. as it did to Canada-China BIT. The intervention of the state in the tribunal's procedural openness decision-making process should be prohibited. China should distribute its power to the tribunal and non-state actors to promote the legitimacy of investment treaty arbitration system collaterally. It doesn't mean that China should wholly transplant the U.S. type of procedural transparency provisions into the future Chinese BITs. Nevertheless, China and the other States should be more cautious when they are discussing whether they should allow the State play a direct and crucial role in the decision of procedural transparency issue during dispute resolution process. Whether distributing power to the tribunal is the right or the best method for addressing public interests in investor-State arbitration will depend on the objectives of the legal regime in place. If the goal of the investment treaties is merely to protect and promote states' political interests – even one that may sacrifice public interests on environmental protection and human rights protection – Canada-China BIT approach may be unassailable. If, however, the aim is to recognize and respond to the real interests of the civil society, Canada-China BIT approach must be revisited to take into account the non-State actors' observations.

Conclusion

This thesis was an attempt to explore the role the state should play in the process of promoting transparency in treaty-based investor-State arbitration. This research question is raised when I read Canada-China BIT which was promulgated in 9 September 2012. Although China incorporated transparency provisions in treaty-based investor-State arbitration in this bilateral treaty, this thesis argued that the provisions are more likely a twisting of transparency spirit than a real breakthrough of accepting openness in treaty-based investor-State arbitration.

This thesis started with the concept of transparency. It firstly pointed out that there is no agreement on the definition of transparency in arbitration. Then it introduced another two different but relevant concepts: transparency in governance and confidentiality in international arbitration. In order to provide with a more thorough and clear impression of procedural transparency, this thesis introduced the transparency regulations on public access to arbitral documents, third-party written submissions and public access to arbitration hearings in UNCITRAL Arbitration Rules, ICSID Convention and NAFTA Chapter 11 respectively.

The above introduction demonstrated the fact that procedural transparency has become a strong trend in the transformation of investor-State arbitration. Behind this fact, there exist many social, economic and legal justifications. Exploring the reasons for transparency is beneficial to the critical analysis of the procedural transparency provisions in Canada-China BIT. Therefore, this thesis analyzed the justifications of

promoting transparency in treaty-based investor-State arbitration from the perspectives of civil society, investors and international dispute resolution system. It submits that transparency should be prioritized over confidentiality principle in investor-State arbitration since the economic disputes arose in the investment treaty arbitration affect the daily life of citizens, and in many cases impact the cost and availability of public services. In addition, transparency can promote predictability and reduce long-term costs of investment treaty arbitration for the investors. Most importantly, transparency can promote the reflexive legitimacy of the investment treaty arbitration system. Having finished the analysis of justifications for promoting transparency, this thesis studied how the transparency provisions are transformed during the arbitration practice.

Chapter 1 draws out that according to the international community and other states' arbitration experience, it is the tribunal that has the authority to decide the transparency issue during the proceedings. The states usually maintain the regulatory or policy-making involvement during the international treaties negotiations.

Bearing this in mind, this thesis was continued with the study of the history of Chinese bilateral investment treaties.

Bearing this in mind, this thesis was continued with the study of the history of Chinese bilateral investment treaties. It specifically studied the procedural transparency provisions in those BITs. Next, Chapter 2 introduces the substance and specialties of procedural transparency clauses in Canada-China BIT. It argued that state's over-intervention in the determination of transparency issue during the

arbitration proceedings is the main characteristic. Afterwards, this thesis reviewed the legal and social environment for transparency in China. In this section, it illustrated how the government and the Chinese Communist Party intervene in the foreign direct investment policy-making process and how the social organizations in China participate in Chinese legal environment. The legal tradition of Confucius ideology on transparency in governance was also mentioned in this section. In addition, it analyzed the role of the State in promoting transparency in treaty-based investor-State arbitration from Chinese perspective. Before doing critical analysis to the transparency clauses, this thesis analyzed the social, cultural and political feasibility to promote procedural transparency in China. Based on the analysis, this thesis found out that: first, the civil society in China is so under-developed that they are not capable enough to represent public interest in the arbitration tribunals; second, the dispute resolution culture with Chinese characteristics is very different from western dispute resolution tradition; third, transparent investment treaty arbitration may exacerbate the conflicts between the State Council and local governments in China.

With this background, this thesis furthered its study to the critical analysis of the transparency clauses in Canada-China BIT. Based on the analysis, it concludes that these provisions are: first, lack of sufficient reflexivity function; second, not in conformity with the trend of international investment treaty arbitration; third, facilitating corruption. Then, this thesis proposed that the state should not directly intervene in the transparency issue decision-making process since the civil society in China is rapidly developing. Furthermore, in order to earn more arbitration practice

experience, China should facilitate the multi-lateralization of international investment law in Asia.

Chapter 2 concludes that whether distributing power to the tribunal and the civil society is the right or the best method for addressing public interests in investor-State arbitration will depend on the objectives of the legal regime. If the goal of the investment treaties is merely to protect and promote states' political interests – even one that may sacrifice public interests on environmental protection and human rights protection – Canada-China BIT approach may be unassailable. If, however, the aim is to recognize and respond to the real interests of the civil society, Canada-China BIT approach must be revisited to take into account the non-State actors' observations.

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