"Belt and Road" and Non-Disputing State Submission on Treaty Interpretation in the China-ASEAN Free Trade Area*

ข้อริเริ่ม "หนึ่งแถบหนึ่งเส้นทาง" และ การยื่นความเห็นของรัฐที่มิได้เป็นคู่พิพาทในการตีความสนธิสัญญาการลงทุนในเขตการค้าเสรีจีนและอาเซียน

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Abstract

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Since the ambitious Belt and Road Initiative that focuses on connectivity and cooperation was officially proposed by China in 2013, the last five years have witnessed a dramatic increase of investment in the China and ASEAN Free Trade Area ("CAFTA"). The year of 2019 will mark the 10th anniversary of the conclusion of the Agreement on Investment between China and ASEAN ("Agreement on Investment"). Indeed, the Agreement on Investment, as a product of compromise between the eleven contracting states, inevitably contains vague provisions. Recent practice has shown that in case of ambiguity or lacunae in investment treaties, tribunals have always come to different conclusions, so how to interpret those provisions coherently, logically and consistently by adjudicatory bodies, especially arbitral tribunals, becomes a crucial task for China and ASEAN. In order to alleviate the above concern, the Article firstly aims to explore the significant role in terms of the mechanism of non-disputing state submission on treaty interpretation in arbitral proceedings. Subsequently, since China and ASEAN failed to explicitly incorporate the mechanism into the Agreement on Investment, the Article proposes China and ASEAN to increase their awareness of using the mechanism to avoid tribunals' unpredictable interpretations. In addition, the Article, based on the current practices and laws of non-disputing state submission worldwide, points out several factors to be considered by China and ASEAN while developing the consensus on the adoption of the non-disputing state submission mechanism in the CAFTA.

Keywords: Belt and Road Initiative, CAFTA, non-disputing state submission, treaty interpretation, joint interpretation mechanism

บทคัดย่อ

ตั้งแต่จีนเสนอข้อริเริ่ม "หนึ่งแถบหนึ่งเส้นทาง" (Belt and Road Initiative) ที่เน้นการเชื่อมโยงและความร่วมมือในปี ค.ศ. 2013 ในช่วงห้าปีมานี้การลงทุนในเขตการค้าเสรีจีนและอาเซียน ("CAFTA") เพิ่มขึ้นอย่างมาก ในปีค.ศ. 2019 จะครบรอบสิบปีของการทำความตกลงด้านการลงทุนระหว่างจีนและอาเซียน ("ความตกลงด้านการลงทุน") แน่นอนว่าความตกลงด้านการลงทุนในฐานะผลผลิตจากการประนีประนอมระหว่างรัฐภาคี 11 รัฐ ย่อมมีข้อกำหนดที่คลุมเคลืออย่างหลีกเลี่ยงไม่ได้ ทางปฏิบัติที่ผ่านมาสะท้อนว่าในกรณีมีความไม่ชัดเจนหรือช่องว่างในสนธิสัญญาการลงทุน คณะอนุญาโตตุลาการมักจะมีคำชี้ขาดแตกต่างกันออกไป ดังนั้นการจะทำให้คณะอนุญาโตตุลาการตีความบทบัญญัติเหล่านี้อย่างไรให้สอดคล้อง สมเหตุสมผล และไม่ขัดแย้งกันกลายเป็นหน้าที่สำคัญยิ่งสำหรับจีนและอาเซียน เพื่อจะบรรเทาข้อกังวลดังกล่าว วัตถุประสงค์ประการแรกของบทความนี้คือการศึกษาบทบาทที่สำคัญของกลไกการยื่น

ความเห็นของรัฐที่มิได้เป็นคู่พิพาทในคดีในเรื่องการตีความสนธิสัญญาในกระบวนการอนุญาโตตุลาการประการถัดมา เนื่องจากจีนและอาเซียนไม่ได้ระบุกลไกไว้ในความตกลงด้านการลงุทน บทความนี้เสนอให้จีนและอาเซียนเพิ่มความตระหนักในการใช้กลไกที่จะหลีกเลี่ยงการตีความที่ไม่อาจคาดหมายได้ของคณะอนุญาโตตุลาการ นอกจากนี้จากการพิจารณาทางปฏิบัติและกฎหมายในปัจจุบันเรื่องการยื่นความเห็นของรัฐที่มิได้เป็นคู่พิพาทในคดีทั่วทั้งโลก บทความนี้ชี้ให้เห็นว่าจีนและอาเซียนควรพิจารณาปัจจัยหลายประการในการพัฒนาไปสู่การรับกลไกการยื่นความเห็นของรัฐที่มิได้เป็นคู่พิพาทในการลงทุนมาใช้ในเขตการค้าเสรีจีนและอาเซียน

คำสำคัญ: ข้อริเริ่ม “หนึ่งแถบหนึ่งเส้นทาง” การลงทุนในเขตการค้าเสรีจีนและอาเซียน การยื่นความเห็นของรัฐที่มิได้เป็นคู่พิพาท การตีความสนธิสัญญา วิธีการตีความร่วมกัน

1. Introduction

> "Accelerating the building of the Belt and Road can help promote the economic prosperity of the countries along the Belt and Road and regional economic cooperation, strengthen exchanges and mutual learning between different civilizations, and promote world peace and development. It is a great undertaking that will benefit people around the world."[1]

China, as a long-term participant and factual beneficiary of the Ancient Silk Road, is currently propagating the significance of inheriting the key sprit, "peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit", of the Ancient Silk Road,[2] In 2013, the initiative of jointly constructing the Belt and Road, including the Silk Road Economic Belt and the 21st-Century Maritime Silk Road, was officially proposed by Chinese President Xi Jinping during his visits in Central Asia and Southeast Asia.[3] Pursuant to the plan of the Belt and Road Initiative ("B&R Initiative"), five major goals have been set up, including policy coordination, facilities connectivity, investment and trade cooperation, financial integration and people-to-people bonds.[4]

The Association of Southeast Asian Nations ("ASEAN") has become a key region along the B&R and is positively coordinating with China to boost the five goals set up by the Initiative. For instance, Vietnam, Laos, Cambodia, Philippine, and Malaysia[5] have reached the joint declarations with China to actively promote the construction of the Initiative. With respect to the relation between China and ASEAN, it can date back to the

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[1] "Action Plan on the Belt and Road Initiative", accessed 16 November 2018, from http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

[2] *Ibid*.

[3] "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road", accessed 16 November 2018, from http://www.xinhuanet.com/english/bilingual/2015-03/28/c_134105922.htm.

[4] Saleh Shahriar, Lu Qian, Muhammad Saqib Irshad, Sokvibol Kea1 Nazir Muhammad Abdullahi, and Apurbo Sarkar, "Institutions of the 'Belt & Road' Initiative: A Systematic Literature Review", Journal of Law, Policy and Globalization, Vol.77, (2018).

[5] "Joint Declarations", accessed 16 November 2018, from https://www.yidaiyilu.gov.cn/zchj/sbwj/34528.htm; https://www.yidaiyilu.gov.cn/zchj/sbwj/34706.htm; https://www.yidaiyilu.gov.cn/zchj/sbwj/43763.htm; https://www.yidaiyilu.gov.cn/zchj/sbwj/35101.htm; and https://www.yidaiyilu.gov.cn/zchj/sbwj/2415.htm.

first dialogue launched between the two sides in 1991.[6] On 15 August 2009, China and ASEAN concluded the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China[7] ("the Agreement on Investment") during the ASEAN - China Summit meeting in Bangkok. The intention to establish the China and ASEAN Free Trade Area ("CAFTA") aiming to promote trade, eliminate tariff, and encourage investment was reaffirmed by the Agreement on Investment,[8] subsequently, the CAFTA was officially established in 2010. Up to date, according to the 2017 Chinese Foreign Investment Report released by the Chinese National Development and Reform Commission, Singapore, Indonesia, Vietnam, and Thailand have ranked the top 20 chosen investing destinations for Chinese investors.[9]

Bearing in mind one of the key goals promoted by the Initiative is the cooperation on foreign investment, where a host state fails to fulfill its duty in accordance with an international investment treaty or an investment contract, from the perspective of foreign investment protection, the remedies available for the investor is a fundamental question in the international investment law system. For the last two decades, given the traditional features, such as efficiency, confidentiality, and flexibility of investor-state arbitration, such settlement has been commonly used between host states and investors. For examples, pursuant to Article 14 of the Agreement on Investment, an investment dispute arising out of the Agreement shall be submitted before the investor-state tribunal with relevant competence.[10] Accompanying with the rapid development of the investor-state arbitration, voices against this settlement have been raised due to the way in which this dispute settlement is structured and operated.[11] Especially because of the lack of a formal system of stare decisis within the investment treaty regime, many scholars raised

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[6] "Overview of ASEAN-China Dialogue Relations", Association of Southeast Asian Nations, accessed on 4 February 2019, from https://asean.org/?static_post=overview-asean-china-dialogue-relations.

[7] *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China* ("Agreement on Investment"), adopted 15 August. 2009, entered into force 1 August 2010.

[8] *Agreement on Investment*, art. 2.

[9] "Chinese Foreign Investment Report", Chinese National Development and Reform Commission, accessed 16 November 2018, from http://wzs.ndrc.gov.cn/gzdt/201711/t20171130_868881.html.

[10] *Agreement on Investment*, art. 14.

[11] Fernando Dias Simoest, "Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration", North Carolina Journal of International Law, Vol. 42, No. 3, p.797 (2017).

the concern that treaty provisions have not been interpreting coherently, logically and consistently.[12]

In order to alleviate the above concern, Section 2 aims to analyse the significant role played by non-disputing states in treaty interpretation. Section 3, based on the modern investment agreements and investment arbitration rules, reviews the current practices and laws concerning non-disputing state submission on treaty interpretation in investor-state arbitration. Since the Agreement on Investment failed to explicit establish a mechanism to preserve the right of non-disputing states to interpret treaty provisions in investor-state arbitration, Section 4 uses China and Singapore as examples to demonstrate the feasibility to officially acknowledge the significance of non-disputing state submission in the CAFTA. Section 5 proposes three key steps for China and ASEAN to promote a greater role for non-disputing states to interpret treaty provisions in investor-state arbitration in the CAFTA.

2. Accessing the Significance of Non-Disputing State Submission on Treaty Interpretation in Investor-State Arbitration

Infamously ambiguous languages, unclear provisions, and unwritten understandings in existing investment treaties could give rise to "costly litigation, and creates openings for tribunals to give unintended or incorrect interpretations to treaty provisions."[13] In order to overcome the risk, the contracting states to an investment treaty can rely on several options, such as termination of the treaty, negotiation of amendment, or treaty interpretation, to assure that the provisions of the treaty best reflect their intent.[14] Based on the current practice, the former two options have been deemed as costly and time consuming, so interpretation option has been frequently using by states

[12] Meg Kinnear, "Transparency and Third Party Participation in Investor-State Dispute Settlement", accessed 16 November 2018, from http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.

[13] Lise Johnson and Merim Razbaeva, "State Control over Interpretation of Investment Treaties", (April 2014), accessed 16 November 2018, from http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf, p.1.

[14] *Ibid*.

because it is lower-cost, faster and more feasible[15] to avoid unpredictable arbitral rulings. Treaty interpretations can be conducted through unilateral, bilateral, and multilateral actions. Non-disputing state submission on treaty interpretation, as a unilateral action made by a non-disputing state to an investment treaty, should be given appropriate consideration by the tribunal.[16] Even though the definition of non-disputing state has not been addressed in many investment treaties, a non-disputing state is normally defined as "a party to a treaty pursuant to which the dispute has been referred to arbitration….and that is not a Party to the arbitration."[17] For instance, if an American investor institutes an arbitration against Canada before an arbitral tribunal on the basis that the Canadian government failed to fulfill its duties in accordance with the North American Free Trade Agreement ("NAFTA").[18] Under this scenario, a non-disputing state refers to Canada or Mexico since they are not a party to the dispute.

States normally design the power to competent tribunals to settle investor-state disputes through the arrangement contained in the investment agreements, but this does not imply that the tribunals are granted the full interpretive power to determine the true intents of the states.[19] Recent practice has shown that in case of ambiguity or lacunae in investment treaties, tribunals have always come to different conclusions.[20] Also as pointed out by Professor Anthea Roberts, in the determination of the meanings of contentious provisions, tribunals normally rely on academic opinions[21], with little consideration of the statements and practices of non-disputing states. In addition, due to the lack of a formal system of stare decisis within the investment treaty regime, many scholars raised the concern that treaty provisions are not interpreted coherently, logically

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[15] Geoffrey Gertz and Taylor St John, "State Interpretation of Investment Treaties: Feasible Strategies for Developing Countries", (2015) accessed 16 November 2018, from http://www.geg.ox.ac.uk/sites/geg/files/GEG%20Gertz%20and%20St%20John%20June2015_A.pdf, p.2.

[16] *Ibid*.

[17] *SIAC IA Rules* entered into force 1 January 2017.

[18] *North America Free Trade Agreement,* adopted October 1992, entered into force 1 July. 2003.

[19] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", American Journal of International Law, Vol. 104, No. 12, p.190 (2010); Geoffrey Gertz and Taylor St John, *supra note* 15, p.2.

[20] Margie-Lys Jaime, "Relying upon Parties' Interpretation in Treaty-based Investor State Settlement: Filling the Gaps in International Investment Agreement", Georgetown Journal of International Law, Vol. 46, No. 1, p.278 (2014).

[21] Anthea Roberts, *supra note* 19, p.179.

and consistently, the "credibility of the entire investor-state dispute settlement system is undermined when irreconcilable decisions are issued."[22]

When arbitrators use the discretion to adopt expansive interpretations of states' obligations, the states may perceive that the treaty provisions are interpreted in the ways they did not intend or foresee.[23] The interpretations may in fact ignore the norm that states are the creators and masters of the treaties, after treaties are in force, they remain the power to shape their mutual understandings on contentious provisions.[24] Hence, when the interests of a non-disputing state will be potentially impacted by a tribunal's incorrect interpretation, the state is justified to intervene through submitting its opinions on the ambiguous provisions, and such intervention could ensure the tribunal is using proper procedures and taking due account of the voice given by the state.

Non-disputing state submission on treaty interpretation can be regarded as an important way of ensuring the cohesive jurisprudence and continued integrity of the arbitral system.[25] For instance, in *Canadian Cattlemen for Fair Trade v. United State* ("Cattlemen"),[26] the tribunal affirmed that state's statements and acts in arbitral proceedings, including unilateral submissions made by non-disputing states or by respondent states, can establish subsequent agreement under Article 31(3)[27] of the Vienna Convention on the Law of Treaties.[28] State's voices through non-disputing state submissions in international investment arbitration, especially those voices that were

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[22] Meg Kinnear, *supra note* 12, p.8.

[23] Geoffrey Gertz and Taylor St John, *supra note* 15, p.4.

[24] *Ibid*, p.2.

[25] Meg Kinnear, *supra note* 12, p.8.

[26] Cattlemen, "UNCITRAL" (28 January 2008), accessed 16 November 2018, from https://www.italaw.com/cases/documents/192.

[27] *Vienna Convention on the law of Treaties* ("Vienna Convention"), concluded 23 May1969, entered into force 27 January 1980, art. 31(3)

There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

[28] Cattlemen, "UNCITRAL" (28 January 2008), accessed 16 November 2018, from http://www.italaw.com/cases/188, para.181-189

cited in arbitral awards, are being cited as support in other arbitral decisions. As one scholar suggested:

> [W]hat is known about states' positions on the interpretation and application of their treaties is often limited to what can be gleaned from quoted or paraphrased excerpts from their oral and written contributions when those are referenced in awards. The fact that awards are increasingly public but states' submissions are not weakening states' role in shaping the law, and leaves inaccessible a potentially important source of practice that would have to be taken into account by tribunals.[29]

Due to the growing demand of publication of arbitral records, more and more perspectives on treaty interpretation made by non-disputing states will be made available for public access, which could assist subsequent tribunals some useful information to determine their cases. Up to present, a growing number of states have relied on this mechanism to ensure the tribunal would properly take into account their voices while deciding the meanings to treaty provisions in dispute. For instance, pursuant to Article 10.20.2 of the U.S. – Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"),[30] any non-disputing states can make oral and written submissions to the tribunal regarding the interpretation of the CAFTA-DR. In *Commerce Group Corp. and San Sebastian Gold Mine, Inc. v. Republic of El Salvador*[31]("Commerce"), the Republic of Costa Rica, as a non-disputing state to the CAFTA-DR, filed a submission[32] to give its interpretation on Article 10.18. After reviewing the submission, the tribunal cited the relevant arguments as additional support for its finding.[33] In *CME Czech Republic B.V. vs. The Czech Republic ("CME"),*[34] the Netherlands, as the contracting state to the Netherlands-Czech Republic Bilateral Investment Treaty and the non-disputing state to

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[29] Lise Johnson and Merim Razbaeva, *supra note* 13, p.8.

[30] *U.S. – Dominican Republic-Central American Free Trade Agreement*, signed 5 August 2004, entered into force 1 April 2006.

[31] *Commerce Group Corp. and San Sebastian Gold Mine, Inc. v. Republic of El Salvador* ("Commerce"), ICSID Case No. ARB/09/17, (Del. 2009)

[32] "Commerce, Non-Disputing Party Submission of the Republic of Costa Rica" (20 October 2010), accessed 16 November 2018, from http://www.italaw.com/sites/default/files/case-documents/ita0204_0.pdf.

[33] "Commerce, Award" (14 March 2011), accessed 16 November 2018, from http://www.italaw.com/sites/default/files/case-documents/ita0202.pdf.

[34] "*CME Czech Republic B.V. v. The Czech Republic*" ("CME"), UNCITRAL (Del. 1976)

the dispute, submitted a submission ("agreed minutes") to clarify certain issues on the interpretation and application of the treaty. In order to decide the relevant issues of the dispute, the tribunal adopted the interpretations listed in the "agreed minutes" to support its holding.[35]

The Agreement on Investment concluded between China and ASEAN, as a product of compromise among eleven states, inevitably contains vague and ambiguous provisions, which leaves the tribunals a substantial discretion to decide issue of treaty interpretation. As studied earlier, non-disputing state submission on treaty interpretation plays an essential role in helping pending tribunals or assisting subsequent tribunals to make determination on ambiguous treaty provisions, thus allowing non-disputing states to make submission on ambiguous provisions of the Agreement on Investment could alleviate the risk associated with tribunals' board discretionary power of interpreting treaty provisions.

3. Interpretative Right of Non-Disputing States: Current Practices and Laws under Investment Treaty and Arbitration Rules

Pursuant to the current practice, tribunals are entitled to allow non-disputing state's submission on treaty interpretation through the following two means: treaty provisions granting non-disputing states the right to make submissions on treaty interpretation as well as arbitration rules allowing tribunals to consider submissions made by non-disputing states. This section will highlight the current practices and laws concerning the interpretative right of non-disputing states pursuant to the North American Free Trade Agreement ("NAFTA"),[36] the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"),[37] as well as

[35] "CME, UNICITRAL, Final Award," (14 March. 2003), accessed 16 November 2018, from http://www.italaw.com/sites/default/files/case-documents/ita0180.pdf.

[36] *North America Free Trade Agreement*, ("NAFTA") (adopted October 1992, entered into force 1 July 2003.

[37] *ICSID Rules of Procedure for Arbitration Proceedings*, signed 18 March 1965, entered into force 14 October 1966.

the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ("UNCITRAL Transparency Rules").[38]

3.1 Founder of the Interpretative Right of Non-Disputing States in Investment Arbitration: the NAFTA

With respect to the first way acknowledging the practice of non-disputing state submission on treaty interpretation, it can trace back to the time when the NAFTA entered into force in 1994. Article 1127 of the NAFTA requires a respondent State to deliver to other state parties: "(a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and (b) copies of all pleadings filed in the arbitration."[39] After receiving the written notice made by the respondent state, Article 1128 further allows the non-disputing states to make submissions to the tribunal on a question of interpretation of the NAFTA. Subsequently, such practice has been adopted by many modern investment agreements. For instance, the CAFTA-DR followed the practice that a respondent state shall promptly transmit the following information and documents to all non-disputing contracting states,[40] including:

> (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal.[41]

Upon receiving the relevant documents, any non-disputing states may decide whether or not to make oral or written submission on CAFTA-DR interpretation.[42] Also the practice was been incorporated into the Canada Model FIPA.[43]

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[38] *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, entered into force 1 April 2014.

[39] *NAFTA*, art. 1127.

[40] *CAFTA-DR*, art. 10.20(2).

[41] *Ibid*, art. 10.21(1).

[42] *Ibid*, art. 10.20(2).

[43] *Model Foreign Investment Promotion and Protection Agreement,* art. 33-35.

3.2 Investment Arbitration Rules Establishing the Practice of Non-Disputing State's Submission on Treaty Interpretation

With respect to the way of incorporating the mechanism of non-disputing state's submission on treaty interpretation into investor-state arbitration through arbitration rules, the ICSID Arbitration Rules can be regarded as the earliest example. In 1962, the Executive Directors of the World Bank proposed a study on the subject of establishing an arbitration institutional facility with the purpose of safeguarding economic interests of investors from developed countries investing in developing countries.[44] After putting a numerous efforts by the World Bank, the ICSID Convention came into force on 14 October 1966. One of the most outstanding achievements of the Convention was that a new organ, the ICSID, had been officially established, which provides administrative services for investor-state arbitration proceeding in accordance with the provisions under the Convention.[45] Up to date, there are 154 Contracting States and 8 Signatory States to the Convention.[46] Accompanying with the rapid expansion of ICSID Convention membership numbers, as of December 31, 2017, ICSID had registered 650 cases under the ICSID Convention and Additional Facility Rules.[47]

In order to explore the current practice regarding non-disputing state submission on treaty interpretation pursuant to the 2006 revised ICSID Arbitration Rules, a key question needs to be clarified in the first place. Pursuant to Rule 37 (2), the tribunal may, after consultation with both disputing parties, allow a person or entity ("non-disputing party") that is not a party to the dispute to file a written brief regarding factual or legal matter within the scope of the dispute.[48] In accordance with the initial proposal for the amendment of Rule 37, a non-disputing party explicitly referred to "a person or state", but the wording finally adopted by the 2006 amendment is "a person or entity". During the debate of the proposal, many commentators raised the concern the wording "a

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[44] Moshe Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes, (Martinus Nijhoff Publishers, 1993), p.18.

[45] *Ibid*, p.19.

[46] "Database of ICSID Member States", accessed 16 November 2018, from https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

[47] "The ICSID Caseload – Statistics, issue 2018-1", ICSID, accessed 16 November 2018, from https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf, pp.7-8.

[48] *ICSID Rules of Procedure for Arbitration Proceedings*, art.37

person or state" is too restrictive. As commentator suggested, it is now trusted that the wording "person or entity," as adopted in the final text, answers those concerns. It follows that the "non-disputing party can be a natural person, a juridical person, an unincorporated NGO or a State."[49] Therefore, based on the above analysis, a non-disputing state is explicitly granted the right to make a submission on legal issues involved in the dispute.

In order to be justified as a non-disputing state to submit brief on treaty interpretation in the ICSID arbitral proceedings, several criteria have been listed. In determining whether to allow such a filing, the tribunal shall consider: firstly, whether the non-disputing state submission would assist the tribunal in the determination of a legal matter related to the arbitral proceeding by providing a perspective, particular knowledge or insight that is different from that of the both parties. Moreover, non-disputing state shall have a significant interest in the proceeding and only address matter within the scope of the dispute. In *Siemens v. Argentina*,[50] one of the key issues of the dispute is to determine the interpretation of Article 53 and 54 of the ICSID Convention. Although the case was registered between a germen investor and Argentina pursuant to the Germany-Argentina BIT, the U.S. was invited to make an unsolicited submission on the interpretation of the Articles during the arbitral proceedings. The U.S. felt compelled to make such filing because the interpretation may have "repercussions for cases well beyond the present one, including a number of disputes by U.S. investors against Argentina."[51] Pursuant to the submission, the U.S. made the following specific statements in order to be justified as a non-disputing state to file such submission:

> (a) the submission will assist the Tribunal in the determination of a legal issue related to the proceeding by bringing particular knowledge that is different from that of the disputing parties; (b) the submission addresses a matter within the scope of the dispute," i.e., the interpretation of Articles 53 and 54 of the ICSID Convention; and (c) the United States has a significant interest in the proceedings,

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[49] Aurélia Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules", ICSID Review – Foreign Investment Law Journal, Vol.21, No.2, p. 435 (2006).

[50] *Letter from Lisa J. Grosh to Claudia Frutos-Peterson* (*Siemens AG v. Argentine Republic)*, Annulment Proceeding, ICSID Case No. ARB/02/8 (Del.2008).

[51] *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, (Del 2004)

as Argentina, though its April, 7, 2008 letter, has placed the United States' interpretation of those provisions at the center of the dispute."[52]

Unlike the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules are not connected to a single institution, which can be introduced to institutional or ad hoc arbitration if both disputing parties give mutual consent. It is not surprising that the UNCITRAL Arbitration Rules have no provision governing non-disputing submission on treaty interpretation because the Rules were drafted and primarily designed to address international commercial disputes between private parties. But due to the increasing debate regarding the importance of non-disputing state participation in investor-state arbitration, the United Nations Commission on International Trade Law has promulgated a new set of arbitration rules, the Rules on Transparency in Treaty-Based Investor-State ("UNCITRAL Transparency Rules"), aiming to address the issue of transparency and to change the landscape of transparency involved in investor-state arbitration. Pursuant to Article 5 of the Rules, the UNCITRAL officially acknowledges that investment arbitration may affect the rights and obligations of the contracting states to the treaty because they are the masters and creators of that treaty, thus the states should have a significant interest in the interpretation and construction of the treaty that they negotiated and entered into. Pursuant to Article 5 (1) of the UNCITRAL Transparency Rules:

The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non- disputing Party to the treaty.[53]

Based on the Article, it requires the tribunals to conduct a consultation with both disputing parties before allowing submissions on treaty interpretation, so the parties would have a reasonable opportunity to present their observations on the potential intervention.[54] If a non-disputing state is not aware the possibility to make a submission on controversial treaty provisions, the tribunal may invite the state to do so, but the state is not strictly bound to issue its understanding on the treaty interpretation. In the absence of a response to the invitation, the tribunal shall not draw any inference.[55] Even though the Rules lack an explicit provision concerning the publication of documents for non-

[52] *Ibid*.

[53] *UNCITRAL Transparency Rules*, art. 5.

[54] *Ibid*, art. 5(5).

[55] *Ibid*, art. 5(3).

disputing state during arbitral proceedings, pursuant to Article 2 and Article 3, the Repository shall promptly release any documents produced during the proceeding to the public domain. Thus a non-disputing state shall decide whether or not to make a submission on treaty interpretation after obtaining the documents released by the Repository. Sharing the practice established by the modern investment agreements, the tribunal should ensure that the non-disputing state submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.[56]

4. Interpretative Right of Non-Disputing States in the CAFTA: Using China and Singapore as Examples

As illustrated earlier, bearing in mind that the B&R initiative provides China and ASEAN a platform to boost foreign direct investments in the CAFTA, but the Agreement on Investment itself does not stay away from vague languages or broad standard contained therein. Giving the non-disputing states a chance to opine their understandings on disputed provisions would assist the tribunals in the determination of the meanings to the provisions. In recent years, China and ASEAN, especially Singapore, have already enhanced their awareness of using such mechanism to avoid them at risk of expansive interpretations of treaty obligations. Due to the significance of allowing non-disputing state submission on treaty interpretation in the investment law system, this section sketches out the current practice of using such mechanism to avoid legal risks involved in treaty interpretation by China and Singapore.

4.1 Acknowledging the Interpretative Right of Non-Disputing State under the B&R Initiative

China has given its acknowledgment concerning the importance of interpretative right of non-disputing state through the conclusion of investment agreements since 2012, and the earliest example is the Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments ("China-Canada FIPA").[57] Pursuant to Article 27, a non-disputing

[56] *Ibid*, art. 5(4).

[57] *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments,* signed 9 September 2012, entered into force 1 October2014.

state shall, after receiving a copy of notice of intent to submit a claim to arbitration from the respondent state, make oral and written submission on the interpretation of the FIPA to the tribunal.[58] The FIPA also specified that when the non-disputing state aims to make a submission on treaty interpretation, it shall at its own cost to receive documents, such as the evidence, pleadings, and written arguments filed in the arbitration. In addition, in order to keep the documents submitted by the disputing parties from disclosure to the public, the non-disputing state should treat the documents as if it were the respondent state.[59]

Moreover, on 1 October 2017, the Chinese leading arbitration institution, China International Economic and Trade Arbitration Commission ("CIETAC"),[60] released its new Investor-State Arbitration Rules (Trail Version) ("Trail Rules").[61] The adoption of the new Rules not only plan to fill the gap in the area of Chinese international investment arbitration but also, based on previous prominent international practices in investment arbitration worldwide, develop the international arbitration practice in China.[62] Nowadays, a growing number of Chinese investors are actively seeking opportunities to invest in countries along the B&R. Given the concern that the domestic legal system of many countries along the B&R is considered relatively weak, which would cause potential legal risks for the investors. The Trail Rules could provide a significant safeguard for Chinese investors who may be concerned about potential bias against them in oversea arbitration institutions due to the lack of understanding of Chinese laws and practice.[63]

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[58] *Ibid*, art. 27(2).

[59] *Ibid*, art. 27(1).

A disputing Contracting Party shall deliver to the other Contracting Party a copy of the notice of intent to submit a claim to arbitration, and the relevant document submitted pursuant to Article 22(2) no later than 30 days after the date that such documents have been delivered to the disputing Contracting Party. The non-disputing Contracting Party shall be entitled, at its cost, to receive from the disputing Contracting Party a copy of the evidence that has been tendered to the Tribunal, copies of all pleadings filed in the arbitration, and the written argument of the disputing parties. The Contracting Party receiving such information shall treat the information as if it were a disputing Contracting Party.

[60] "Introduction", CIETAC, accessed 16 November 2018, from http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en.

[61] *Investor-State Arbitration Rules,* enteredinto force 1 October2017.

[62] "Statement concerning the CIETAC Investor-State Arbitration", CIETAC, , accessed 16 November 2018, from http://www.cietac.org/index.php?m=Article&a=show&id=14469.

[63] *Ibid*.

Pursuant to Article 44 of the Trail Rules, if a non-disputing state aims to submit a written opinion on the interpretation of an investment treaty provision relevant to a dispute, the tribunal as well as the disputing parties must be notified by the non-disputing state in written form. In addition, the tribunal, based on the suggestion of the disputing parties or any specific situations involved in the dispute, shall invite a non-disputing state to make written opinion on treaty interpretation. The opinion must be made in accordance with the form and content requirement set out by the tribunal.[64] Upon receiving the submission, both parties are entitled to make a comment on the interpretation contained in the submission.[65] Also upon the request of a disputing party or if the tribunal deems that it is necessary for a non-disputing state to give an oral explanation on the submission, an oral hearing for presenting the submission can be conducted upon the permission of the tribunal.[66] The Rules also restate that the submission shall not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.[67]

Under the Trail Rules, two groundbreaking rules have been laid down in China's investment arbitration history so far. First, the tribunal can decide to allow the non-disputing state to make a further written submission on unclear interpretation issues. The further submission must be submitted pursuant to the scope and time limit required by the tribunal.[68] Moreover, if a non-disputing state lacks key information about a pending dispute, it would be difficult for the state to come up with a proper opinion on the provision in dispute. Although non-disputing states can obtain arbitral information from private sources, such as unofficial reports, the reliability of the information may be questioned. Hence, in order to assist a non-disputing state to have a full picture of the pending dispute, the tribunal is granted the discretionary power to disclose any documents relevant to the arbitral proceedings to the non-disputing state for the preparation of the submissions.[69] This rule presents the CIETAC's determination to enable non-disputing states to have a better opportunity to make an insightful contribution to the arbitral proceedings.

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[64] *Trail Rules*, art. 44(6).

[65] *Ibid*, art. 44(7).

[66] *Ibid*, art. 44(8).

[67] *Ibid*, art. 44(11).

[68] *Ibid*, art. 44(9).

[69] *Ibid*, art. 44(10).

4.2 Maintaining Singapore's Growing Prominence as a Seat of Arbitration through Establishing the Practice of Non-Disputing State Submission

For the last decade, Singapore has retained its position in the top five most chosen cities for arbitration worldwide. In order to maintain Singapore's growing prominence as a seat of arbitration and thought leader in international arbitration, Singapore also acknowledged the important goals promoted by non-disputing state submissions regarding treaty interpretation in investment arbitration. Such acknowledgement is well reflected in the investment agreements concluded by Singapore as well as the recent released Singapore International Arbitration Centre Investment Arbitration Rules ("SIAC IA Rules").

Pursuant to the United States-Singapore Free Trade Agreement,[70] Article 15.19 explicitly allows the non-disputing state to make oral and written submission on the interpretation of the Agreement to the tribunal.[71] In addition, in order to fulfill the role ascribed to the non-disputing state, several complementary rules to Article 15.19 have been designed subsequently. Under Article 15.20, in order to provide the non-disputing state with sufficient information to prepare for the submission, the respondent state shall transmit the following documents, including the notice of intent, the notice of arbitration, pleadings, memorials, and briefs submitted to the tribunal by a disputing party, minutes or transcripts of hearings of the tribunal, etc., to the non-disputing state in a timely manner. If there is a need to protect confidential information contained in a document, a redacted version of the document should be made available for the non-disputing state.[72]

Besides the practice adopted by the investment agreement, the SIAC, on 30 December 2016, released the first edition of the SIAC IA Rules and became the first major commercial arbitration institution to release a separate set of rules tailored for investor-state arbitration. Pursuant to the new Rules, sharing the common practice established by the ICSID Arbitration Rules and the UNCITRAL Transparency Rules, a non-disputing state is entitled to make written submission on a question of treaty interpretation that is directly

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[70] *United States-Singapore Free Trade Agreement*, signed 6 May 2003, entered into force 1 January 2003.

[71] *Ibid*, art. 15.19.

[72] *Ibid*, art. 15.20(4).

relevant to the dispute to the Tribunal. Also the tribunal may, after having regard to the circumstances of the dispute or considering the views of both parties, invite a non-disputing state to make such submission.[73] In order to ensure that a non-disputing state has relevant information for the preparation of its submissions, the tribunal may disclose relevant documents, such as submissions, evidence, orders, decisions, awards, and other necessary documents produced during the proceedings to the non-disputing state. The tribunal also shall "take appropriate measures to safeguard the confidentiality or information related to the proceedings as set out in Rule 37."[74] If there is a need to acquire further interpretation made by the non-disputing state, the tribunal shall fix the time period for submitting such a further written submission.[75] Upon receiving the submission, both parties are entitled to respond to the interpretation.[76] If either party so requests or the tribunal so decides, the tribunal may hold a hearing for the non-disputing state to elaborate on or be examined on its submissions.[77] In the determination on the legal issue of the dispute, the tribunal may refer to or rely on the submissions made by the non-disputing state.[78]

5. Establishing an Ideal Mechanism of Non-disputing State's Submission on Treaty Interpretation in the CAFTA: Factors to be Considered

Pursuant to the Agreement on Investment between China and ASEAN, the mechanism of non-disputing state submission on treaty interpretation has not been explicitly adopted. Although some contracting states to the Agreement have acknowledged the significant goals promoted by this mechanism, such practice has not been commonly established in all contracting states due to the lack of understanding on treaty interpretation, especially through submission made by non-disputing states. Therefore, China and ASEAN both need to increase the awareness of using this mechanism to ensure the cohesive jurisprudence and continued integrity of the investor-

[73] *SIAC IA Rules*, art. 29.1.

[74] *Ibid*, art. 29.8.

[75] *Ibid*, art. 29.6.

[76] *Ibid*, art. 29.5.

[77] *Ibid*, art. 29.7.

[78] *Ibid*, art. 29.10.

state arbitral system in the CAFTA. According to the practices and laws established in different jurisdictions and adopted by different leading arbitration institutions, China and ASEAN need to take into account the following factors while reaching their consensus on the establishment of the mechanism of non-disputing state submission in the CAFTA.

5.1 Tribunal's Discretion to Accept Non-disputing State Briefs and Procedural Safeguards

Based on Article 14 of the Agreement on Investment, not all investment disputes arising out of the Agreement will be automatically governed by modern arbitration rules, such as the ICSID Arbitration Rules or the UNICITRAL Transparency Rules, acknowledging the practice of non-disputing state submission on treaty interpretation. If an investment dispute is governed by a commercial arbitration rules, due to the traditional features of confidentiality and privacy of arbitration, the tribunal may find it lacks the authority to voluntarily introduce unsolicited briefs on treaty interpretation submitted by non-disputing states. In order to conquer the concern, China and ASEAN states should explicitly establish the practice to grant the tribunals the discretion to allow or invite non-disputing state's brief on ambiguous provisions of the Agreement in the CAFTA. After receiving the brief, the tribunal can take into account the relevant opinions contained therein. If there is a need to acquire further interpretation provided by the non-disputing state, the tribunal is entitled to invite the non-disputing state to make a further submission. Also the tribunal should fix the time period for submitting the further written submission in order to preserve the efficiency of the arbitral proceedings. In the meantime, if there is a need to clarify the interpretation contained in the submission or further submission, upon the request of either party or the decision of the tribunal, the tribunal may hold a hearing for the non-disputing state to elaborate on or be examined on its submissions.

As indicated earlier, after a non-disputing state has filed a submission, arbitrators and both parties have to comment on the interpretation contained therein. Also the tribunal needs to issue a procedural order or decision in respect of the submission. As a result, the submission would entail extra costs for both parties. In order to preserve the right of non-disputing states to interpret their contentious treaty provisions and ensure tribunals are properly taking into account states' voices before deciding the meaning of the provisions, these additional costs seem to be the necessary price to pay. But this

does not simply imply that a non-disputing state should raise arguments addressing matters beyond the scope of the dispute, this will inevitably increase additional costs on both disputing parties. So a non-disputing state submission should only address contentious provisions in dispute. Once failed to meet the requirement, the tribunal is entitled to disregard the submission.

In addition, a submission should not disrupt the proceedings or unduly burden or unfairly prejudice either disputing party. Non-disputing state's submission would cause substantial impacts to arbitral proceedings, so establishing procedural safeguards by the tribunal, such as time limits, would ensure the submission does not overly burden the proceedings. For instance, the China-Canada FIPA adopted several procedural guarantees, including a requirement for timely submission, a limitation on the length of the brief, setting out a precise statement supporting the non-disputing state's position on the interpretation.[79] Also the CIETAC Rules explicitly grants the tribunal the discretion to determine the form and content of the submission.[80] Even though the tribunal is granted the discretion to invite and accept submissions made by non-disputing states, it is important to respect the principle that the disputing parties are the only masters of their own arbitral proceedings through giving them an opportunity to present their observations on the submission. If any disputing party finds out that the interpretation is beyond the scope of the dispute or fails to meet the requirement set out by the tribunal, an objection to such submission can be informed to the tribunal.

5.2 Right to Receive Sufficient Documents of a Pending Dispute

The efficiency of non-disputing state participation without access to arbitral documents is doubtful because without accessing to the key arbitral documents, the limited information released by the respondent state or other private sources may insufficient and imprecise for the non-disputing states to have a full understanding on the dispute. In order to preserve the right of non-disputing states to involve in arbitral proceeding through making submission on treaty interpretation, receiving sufficient documents concerning a pending dispute is essential for the preparation of their submissions. The above discussion offered two approaches to deal with this concern. First, in accordance with Article 44 (10) of the CIETAC Trail Version and Rule 29.8 of the

[79] *Supra note* 57, Annex C.29(2).

[80] *Supra note* 61, art. 44(6).

SIAC IA Rules, the tribunals have been explicitly granted the discretionary power to disclose any documents that would assist the non-disputing states to prepare for their briefs. Moreover, pursuant to the investment agreements acknowledging the practice of non-disputing state participation, for instance, the China-Canada FIPA and the United States – Singapore FTA, the respondent state is obliged to transmit relevant documents to the non-disputing states in a timely manner.

Since Article 14 of the Agreement failed to adopt the mechanism of non-disputing state submission on treaty interpretation, how to ensure the goals promoted by such mechanism becomes a crucial task in the CAFTA. First and foremost, China and ASEAN should adopt the practice that the relevant documents concerning a pending dispute should be released to all other non-disputing states. In practice, the respondent state is more suitable for disclosing relevant documents to non-disputing states. First, claimant investors are not the suitable parties to transit relevant documents to the non-disputing parties since they may lack the authority to contact the official organ responsible for foreign investment of a non-disputing party. For instance, an U.S. investor against Canada may voluntarily disclose the documents produced during the proceedings to its home country, Canada, under the NAFTA. On the contrary, the investor is unlikely and has no obligation to disclose those documents to Mexico as another non-disputing state. In addition, an investment treaty is concluded between or among the contracting states, states themselves have the duties to ensure that the treaty provisions are interpreted consistently by tribunals. So when a provision is vague and in dispute, the disputing state should disclose relevant documents to other contracting states.

When a non-disputing state moves beyond submission of written briefs and seeks the access to documents produced during arbitral proceedings, there could be extra burdens placed on the efficiency of the process. In order to decrease the burden placed on the respondent state, for instance, under the China-Canada FIPA, the non-disputing state shall at its own costs to receive relevant documents, such as the evidence, pleadings, and written arguments produced in the arbitration. Since non-disputing states are not experts invited to give their opinions to the dispute, non-disputing states to the Agreement on Investment are bound to pay the extra costs of receiving the documents produced during the proceedings. Moreover, if a document produced in arbitral proceedings is deemed as confidential or protected document, the respondent is entitled to transmit a redacted document to the non-disputing states without fully disclosing the

original document. More importantly, the non-disputing states to the Agreement shall treat all of the documents as if it were the respondent state in order to protect the documents from disclosing to the public, especially the information to be deemed as confidential information in the arbitration.

5.3 Establishing the Binding Joint Interpretation Mechanism in the CAFTA

Normally speaking, a bilateral investment treaty consists two contracting parties, so a tribunal may only accept one submission from the non-disputing state. As stated above, if tribunals make appropriate procedural safeguards to be applicable for submissions made by non-disputing states, the arbitral proceedings are unlikely to be burdened by the submissions. On the contrary, since the CAFTA consists eleven contracting states, a tribunal established pursuant to the Agreement on Investment may receive ten non-disputing states' submissions on treaty interpretation. Indeed, when the interpretations contained in the submissions made by non-disputing states are identical or the same, the tribunal and both disputing parties may spend extra times and costs for reviewing and opining the same understanding. In order to decrease the risk of causing undue burden or unfair prejudice to arbitral proceedings, the eleven contracting states may need to consider the necessity to adopt the joint interpretation mechanism into the investor-state arbitral proceedings.

The joint interpretation mechanism has been widely incorporated into investment agreements in many regions. The earliest and most well-known example of joint interpretation is the NAFTA. Pursuant to the NAFTA, a designed organ, the Free Trade Commission ('FTC')[81], has been created and granted the power to issue binding interpretation on behalf of the three Member States to the NAFTA. On 31 July 2001, the FTC issued a binding joint interpretation, the Notes of Interpretation of Certain Chapter 11 Provisions,[82] aiming to clarify the minimum standard of treatment provision during the proceeding of the *Pope*.[83] Also the ASEAN Comprehensive Investment Agreements ('ACIA')[84] provides the contracting states the authority to shape their mutual

[81] "NAFTA Free Trade Commission" Government of Canada, accessed 4 February 2019, from https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/celeb2.aspx?lang=eng. The FTC is the central institution of the NAFTA and consists of ministerial-level representatives from the three member countries.

[82] "Notes of Interpretation of Certain Chapter 11 Provisions",accessed 16 November 2018, from http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng.

[83] *Pope & Talbot Inc. v. Government of Canada* , UNCITRAL (NAFTA), (Del. 1976)

[84] *ASEAN Comprehensive Investment Agreement*, signed 26 February 2009, entered into force 29 March 2012.

understandings on ACIA interpretation through issuing binding joint interpretation in arbitral proceedings.[85]

In order to promote the role ascribed to the joint interpretation mechanism in the CAFTA, one key factor needs to be confirmed by China and ASEAN is to establish a permanent organ to be responsible for issuing joint interpretation. Based on the practice of the NAFTA, the FTC has been set up to enable the officials from the contracting states to regularly meet and discuss issues of mutual concern. On the contrary, the ACIA failed to appoint an organ, so the contracting states are bound to plan meetings, sending visiting delegations when there is a need to confirm mutual understanding on ambiguous provisions, which could be more time-consuming without the assistance of a permanent organ.[86] Thus, in order to establish the joint interpretation mechanism in the CAFTA, a key step that China and ASEAN need to put forward is to appoint an organ to be equipped with the power to issue binding joint declaration on treaty interpretation. One or two senior officials of each contracting state will be appointed as the members to the organ. The tribunal, on its own account or at the request of any disputing party, shall request the organ to issue a joint interpretation on the provision in dispute. Upon receiving the invitation, the officials of the organ need to conduct a meeting and reach a joint declaration on behalf of the eleven States to the Agreement within the time limit set out in the tribunal's invitation. If the organ cannot reach the mutual understanding on the provision in dispute, the tribunal shall decide the meaning of the provision on its own account.

6. Conclusion

The Agreement on Investment, as a product of compromise between China and ASEAN, inevitably contains vague and ambiguous provisions, so how to interpret

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[85] *Ibid*, art. 40.

The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Member States fail to issue such a decision within 60 days, any interpretation submitted by a Member State shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.

[86] Xinglong Yang, "Implementation of the Joint Interpretation Mechanism under the ASEAN Comprehensive Investment Agreement: Obstacles and Pragmatic Steps for the ASEAN", Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp.130-131 (2018).

provisions of the Agreement coherently, logically and consistently becomes a crucial task for China and ASEAN. As studied above, the mechanism of non-disputing state submission on treaty interpretation could provide tribunals an extra layer of perspective to decide treaty interpretation. Since China and ASEAN failed to explicitly incorporate the mechanism into the contexts of the Agreement on Investment, as a result, whether a tribunal is granted the discretionary power to adduce additional perspective on treaty interpretation made by non-disputing states into its proceedings will be determined in accordance with the applicable arbitration rules. Since not all disputes will be governed by the modern investment arbitration rules, tribunals may ignore the practice of giving non-disputing states a chance to opine their understandings on vague provisions. Hence, this Article proposed China and ASEAN to establish the mechanism of non-disputing state submission on treaty interpretation in the CAFTA. In order to preserve the non-disputing states' right to interpret vague provisions of the Agreement on Investment, China and ASEAN firstly need to explicitly grant the tribunals the discretionary power, either on its own account or at the request of the non-disputing states, to accept unsolicited non-disputing states' submissions. In order to fulfill the role ascribed to non-disputing states, the respondent state is obliged to transmit relevant documents concerning the dispute to all non-disputing states in a timely manner. Indeed, for avoiding extra burden placed on the disputing parties, the costs entailed during the proceedings should be borne by the non-disputing states. Moreover, since the Agreement on Investment consists eleven states, it may place undue burden on arbitral proceedings if all non-disputing states submit identical or same interpretation, so the Article proposed to adopt the joint interpretation mechanism in the CAFTA.