

Astrid Wiik

# *Amicus Curiae* before International Courts and Tribunals



**Nomos**



## Successful Dispute Resolution

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Astrid Wiik

*Amicus Curiae* before  
International Courts and Tribunals



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*To my family*



## Preface

At first sight, one might expect that all legal systems are firmly based on fundamental concepts, implemented by settled institutions. However, in actuality, these preconditions are usually not met as the law is part of the societal, economic and political reality of a broader environment, reflective of the status of and changes in human society in both history and modern times. This situation is especially true for public international law. Here, one fundamental issue concerns the status of actors in the international legal order: are only states and international organizations subjects of modern public international law? Or do we accept that other actors, like non-governmental organizations, multinational enterprises and individuals, enter the scene to vindicate their rights (and individual protections) at the international level? Much has been written about this subject and there is still much scholarship needed to assess the great changes in, and affecting, the international legal order at the beginning of the 21<sup>st</sup> century.

The uncertainties of the current situation are also reflected in the practices of international courts and tribunals. The proliferation of these courts and tribunals over the last decades – not only with regard to the number of institutions but also in relation to the ever-growing corpus of case-law and practice – has been accompanied by a procedural phenomenon called “amicus curiae”. Although the concept as such is largely unsettled, it is often understood as a procedural vehicle for non-parties, often for non-state actors without legal standing, to influence the decision-making processes of international courts and tribunals by submitting written and – occasionally – even oral statements to those courts. The admissibility of these statements is being disputed, but there is a growing tendency of permitting these interventions, at least in investment arbitration and before human rights bodies. Much attention has been paid to this development which, at a procedural level, reflects the unsettled status of actors in modern public international law. At the same time, the expansion of the amicus curiae corresponds to the pursuit of more transparency in international dispute settlement and reflects the search for more legitimacy in international dispute resolution processes as a whole.

The PhD thesis of Astrid Wiik contributes to this ongoing debate in a remarkable way: She bases her analysis on a broad empirical research by

analysing the case law and the practice of several international courts (the ICJ, the ITLOS, the ECtHR) and dispute settlement bodies such as the WTO Appellate Body and investment arbitration. Her research question does not only ask about the different variations of the *amicus curiae*; Astrid Wiik also wants to know to what extent *amici curiae* really influence international dispute settlement processes and whether the expectation that their involvement in dispute resolution would improve the outcomes in a positive way is really justified. It does not come as a surprise that she comes up with a much more nuanced result than other studies in this field. Indeed, this PhD is the first on the *amicus curiae* phenomenon which is based on a comprehensive review of the practice of international courts and tribunals.

This PhD was written in the framework of the International Max Planck Research School on Successful Dispute Resolution. This Doctoral School was originally organized by the Institute for Comparative Law, and Business Law of the University of Heidelberg and the Max Planck Institute Heidelberg for Comparative Public Law and International Law. In the meantime, the Max Planck Institute Luxembourg for European, International and Regulatory Procedural Law joined the School, as did the Law Faculty of the University of Luxembourg. When she worked on her PhD, Astrid Wiik was strongly involved in the debates of the students and their supervisors; the School offered her the opportunity to spend some time at the Permanent Court of Arbitration in The Hague where she obtained many insights into the “real” world of international dispute settlement. Her study profited considerably from an academic environment which permitted her to engage in comparative research at different research centres in Europe (including Heidelberg, Cambridge and The Hague).

After several years of steady work, this PhD project has been successfully completed. This is a great moment, not only for the candidate, but also for the supervisor who has accompanied the author throughout the process. In the case of Astrid Wiik, it was my pleasure to see her research expanding and to share the upcoming results with Rüdiger Wolfrum as a co-supervisor. And I’m also glad to see that Astrid Wiik has started an academic career at Heidelberg University.

Luxembourg, 8 February 2018

*Burkhard Hess*

## Acknowledgments

This book is the outcome of a (long) journey that started at Heidelberg University in 2009, with a keen interest in the role and functioning of international courts and tribunals in the 21<sup>st</sup> century in view of the changing landscape of actors in the international arena. The concept of *amicus curiae* was repeatedly mentioned in literature as a tool to improve international dispute settlement. However, case law from inter-state courts and the WTO Appellate Body indicated a strong suspicion of this instrument. The lack of a definition of the instrument before any of the international courts and tribunals reviewed when I first embarked on this topic did not contribute to its reputation. Accordingly, the study was based on two aims: first, to grasp the reality of *amicus curiae* before international courts and tribunals. Second, to contrast this reality – including the effectiveness of the instrument – with the expectations attributed to it. The dissertation was written between 2009 and 2014. For the publication, new developments until November 2016 were included. During the years of writing the dissertation and preparing the book, *amicus curiae* practice has continued to expand and solidify, and definitions of the concept before some courts and an increasing number of codifications were achieved. It is the hope that this book will make a humble contribution to the ongoing debates and codification efforts surrounding *amicus curiae*.

This endeavor would not have been possible without the continuous support of my supervisor Professor Burkhard Hess, to whom I am most indebted for his patient guidance and precious advice throughout the writing of the Ph.D. and until its publication. I am also deeply grateful to Professor Rüdiger Wolfrum for his highly valuable feedback on the Ph.D. (and general matters of academia). Without their directive encouragement and advice, I would not have embraced the excitement and uncertainties of an academic career. I would also like to thank Dr. Karin Oellers-Frahm for first pointing me to the topic and for sparking my interest in international dispute settlement.

Thanks to Professor Hess and Professor Wolfrum, I was accepted into the Graduate Academy on Successful Dispute Resolution and the International Max Planck Research School for Successful Dispute Resolution in International Law. Like the Institute for Comparative Law, Conflict of

## *Acknowledgments*

Laws and International Business Law at Heidelberg University and the Max Planck Institute for Comparative Public Law and International Law, it provided an inspiring work environment in Heidelberg. I also had the pleasure to spend some time as a visiting fellow at the Lauterpacht Centre for International Law in Cambridge in the springs of 2010 and 2011, and I would like to thank its then Director Professor James Crawford and the staff and visitors at the Centre for their warm welcome. I am further indebted to my friends and former colleagues at the Permanent Court of Arbitration. The many discussions on and off topic with professors, friends and colleagues, as well as the overall vibrant research communities in Heidelberg, Cambridge, and The Hague formed a constant source of motivation and new insights into the field of international dispute settlement.

At all the mentioned places, friends and colleagues provided comments, encouragement and the requisite amount of humor and patience to make the experience worthwhile. I am particularly grateful to Natasa Mavronicola, Evgeniya Goriatcheva, Magdalena Słok-Wodkowska, Constanze von Roeder, Jara Mínguez, Naya Pessoa, Katharina Domke-Schmidt, Elisa Novic, Sonja Firl, Clemens Zick, Lisa Staben, Yanying Li, Andreas Laupp, Martin Doe, Margret Solveigardottir and Judith Ulshöfer for reading and commenting on chapters and outlines of the dissertation, for helping with IT and formatting matters, and for tea, cookies and encouragement.

I am also grateful for the generous financial support provided by the Landesstiftung Baden-Württemberg, the IMPRS-SDR and the German Academic Exchange Service DAAD, and to Nomos and Hart Publishing and the editors of the series for offering me the opportunity to publish the dissertation.

Words are insufficient to thank my extended family for the immense support and cheerleading that I have received from over the years. My parents' intellectual curiosity in this world, their humanist values and their love are key guideposts in my life, for which I am very grateful. My siblings have always been great companions, and I would like to thank them for their support and particularly Ivar for his help during the final stretch of the dissertation. I would also like to thank my Mexican family, Nora and Jorge Zertuche, and my Heidelberg family, Volker and Charlotte Soergel, for their interest in my work, their help and many happy hours and inspiring conversations. I would like to dedicate this book to them all.

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ACHR	American Convention on Human Rights
BIT	Bilateral Investment Treaty
CAFTA	Dominican Republic-Central America Free Trade Agreement
CEJIL	Center for Justice and International Law
CIEL	Centre for International Environmental Law
DSU	Dispute Settlement Understanding
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECtHR Rules	Rules of the European Court of Human Rights
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FTC	Free Trade Commission (NAFTA)
FTC Note	FTC Note of Interpretation of Certain Chapter 11 Provisions
FTC Statement	FTC Statement on non-disputing party participation
GPI	Stichting Greenpeace International
IACtHR	Inter-American Court of Human Rights
IACtHR Rules	Rules of the Inter-American Court of Human Rights
IACtHR Statute	Statute of the Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rules	Rules of Procedure of the International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea

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ITLOS Rules	Rules of the International Tribunal for the Law of the Sea
ITLOS Statute	Statute of the International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUSCT	Iran-United States Claims Tribunal
MIT	Multilateral investment treaty
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OAS	Organization of American States
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
SPS Agreement	The WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	WTO Agreement on Technical Barriers to Trade
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## Chapter § 1 Introduction

*Amici curiae* skyrocketed to international fame in the late 1990 after the WTO Appellate Body decided in *US–Shrimp* that panels possessed an unwritten authority to accept submissions from non-governmental organisations lobbying for the inclusion of environmental standards in trade disputes.<sup>1</sup> The admission by investment arbitration tribunals of equally unsolicited *amicus curiae* submissions by non-state actors a few years later firmly entrenched the issue on the agenda of trade and investment law practitioners.<sup>2</sup> In the heat of the debate, few realized that *amicus curiae* participation was quite common before many other international courts and tribunals. The ECtHR, the IACtHR and most international and hybrid criminal tribunals had a thriving *amicus curiae* practice, and even the ICJ and the IUSCT had had (admittedly few and sporadic) encounters with the concept.

What is *amicus curiae*? Latin for ‘friend of the court’ the term indicates that *amicus curiae* is an instrument for the benefit of the court, that it assists it in some manner – with the term ‘friend’ indicating that it is not obliged to do so. An often-quoted entry in Black’s Law Dictionary defines *amicus curiae* as ‘[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.’<sup>3</sup> This view is not unchallenged. Some require *amicus curiae* to act as an uninterested and neutral assistant.<sup>4</sup> Others see *amici* as lobbyists of their own, a public

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1 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter: *US–Shrimp*), Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 83.

2 *Methanex Corporation v. United States of America* (hereinafter: *Methanex v. USA*), Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001; *United Parcel Service of America Inc. v. Canada* (hereinafter: *UPS v. Canada*), Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001.

3 B. Garner, *Black’s law dictionary*, 7<sup>th</sup> Ed., St. Paul 1999, p. 83.

4 G. Umbricht, *An “amicus curiae brief” on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 778 (*Amicus curiae* is ‘a private person or entity who has no direct legal interest at stake in the dispute at hand [and]

or the parties' interests.<sup>5</sup> The plethora of views held in academia (and in national legal systems) is reflected in the practice of international courts and tribunals. With the exception of the IACtHR, international courts and

- 
- may submit an unsolicited report to the court in which such person or entity may articulate its own view on legal questions and inform the court about factual circumstances in order to facilitate the court's ability to decide the case.'. [References omitted].); *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78, Decision on *amicus curiae* request by the Kigali Bar Association, 22 February 2008, Rec. No. ICTR-02-78-0091/1, para. 7 ('[J]urisprudence indicates that the role of an *amicus curiae* is not to represent the interests of a particular party, but rather to assist the court by providing an objective view in relation to the issues under consideration.');
- P. De Cesari, *NGOs and the activities of the ad hoc criminal tribunals for former Yugoslavia and Rwanda*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 119 ('If the authorization does not indicate exactly the amount of information required, the NGO must try not to broaden the scope of its opinion ... Leave is normally granted for technical and limited support and not recommendations or suggestions. The aim of *amicus curiae* participation is to assist the judicial process and not to attempt to put pressure on it.')
- 5 P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 317; C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 *Aussenwirtschaft* (2005), p. 348 ('[T]oday's *amici* try to highlight factual or legal aspects associated with their specific concerns or interests.');
- M. Frigessi di Rattalma, *NGOs before the European Court of Human Rights: beyond amicus curiae participation*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 57 ('[A]n *amicus curiae* is a person or organization with an interest in or view on the subject matter of a case who, without being a party, petitions the ECHR for permission to file a brief suggesting matters of fact and of law in order to propose a decision consistent with its views. The interest of an *amicus* tends to be of a general nature, such as the desire to promote public interests.');
- Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 821 ('Broadly defined, *amici curiae* are natural or legal persons who, without being parties to the case, submit their views to the court on matters of fact and law, in the pursuit of a public interest related to the subject matter of the case.').

tribunals largely have abstained from defining the concept and its functions.<sup>6</sup> Overall, the term *amicus curiae* is vague and unclear.<sup>7</sup>

Despite these uncertainties, many NGOs support the notion of *amicus curiae* participation in international dispute settlement. The concept is lauded as an opportunity to introduce public values into trade and investment-focused legal regimes whose dispute settlement processes are said to operate so effectively as to stymie national measures issued by democratically elected governments and parliaments in the public interest.<sup>8</sup> Many scholars and NGOs argue that some form of participation for affected individuals and communities is indispensable to ensure the continued legitimacy of international adjudication. They welcome *amicus curiae* as an agent of change from a state-focused to a peoples-focused dispute settlement system where the selective espousal of national interests by states can be mitigated by this form of direct participation.<sup>9</sup>

However, not all view the instrument positively. Many states and international practitioners on and before the benches worry that its involve-

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6 Exception: *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic* (hereinafter: *Suez/Vivendi v. Argentina*), Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para.13. See also *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Decision on ADAD's (The organisation of ICTR defence counsel) motion for reconsideration of request for leave to appear as *amicus curiae*, 1 July 2008, para. 10, where the ICTR emphasizes that *amicus curiae* participation is at the discretion of the Chamber and that it serves to assist the Chamber 'in its consideration of the questions at issue, and in the proper determination of the case before it.' But see *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998, where the ICTR found that an *amicus* may have 'strong interests in or views on the subject matter before the court.'

7 C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 *Archiv des Völkerrechts* (2007), p. 220 ('Der Begriff *amicus curiae* ist schillernd und wird vielfach verwendet.');

J. Bellhouse/A. Lavers, *The modern amicus curiae: a role in arbitration?*, 23 *Civil Justice Quarterly* (2004), p. 187.

8 R. Higgins, *International law in a changing international system*, 58 *Cambridge Law Journal* (1999), p. 85.

9 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 2 ('Given that decisions rendered by international courts and tribunals increasingly affect a myriad of public interest issues, there is a need to ensure that those dispute resolution bodies do not view the cases before them in an artificially myopic manner, but that they adequately consider the context and social implications of, and the interests affected by, the cases before them.' [References omitted]).

ment places an unjustifiable burden on the parties. They fear that the admission of *amici curiae* ruptures the delicate compromise represented in international treaties on what international courts and tribunals decide on and in which manner.<sup>10</sup> Others fear a blurring of the primary function of dispute settlement: the rendering of a workable and acceptable solution of the parties' dispute. The issues *amici curiae* seek to table are often viewed as potentially further antagonizing the parties and impeding 'the complex process of interest-accommodation that third party dispute settlement inevitably entails.'<sup>11</sup> Concerns are not limited to procedural matters: it is argued that the WTO and investment treaties have been drafted technically to keep politics out of the proceedings and to ensure a smooth functioning of the global trade system. Allowing *amici* to participate in adjudicative proceedings, many fear, might repoliticize disputes and, in the worst case, limit trade and foreign direct investments.<sup>12</sup>

In short, the issue of *amicus curiae* raises not only intricate procedural questions, but it engages the fundamental purpose of international dispute settlement in today's globalizing world.<sup>13</sup> The issue's relevance is augmented in light of the ever-increasing importance of international dispute settlement, which is reflected in the growth in number of international courts and tribunals and the cases brought before them.

Hence, it is not surprising that in the last fifteen years the instrument has become the subject of extensive academic interest. Research has focused largely on analyses of *amicus curiae* before individual adjudicating bodies, especially the WTO dispute settlement system and investor-state arbitration. To date, there is no comprehensive study of *amicus curiae* before international courts and tribunals examining its role and accommoda-

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10 For many, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion Judge Buergerthal, ICJ Rep. 2003, p. 279, para. 22.

11 A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii.

12 WTO General Council, *Minutes of Meeting* of 22 November 2000, WT/GC/M/60, Statement by Brazil, para. 46.

13 T. Treves, *Introduction*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 1-2 ('[I]ncreased weakness of the dogma that the state is the only actor in international relations'). See also R. Mackenzie/C. Romano/Y. Shany/P. Sands, *Manual on international courts and tribunals*, 2<sup>nd</sup> Ed. Oxford 2010, p. xv.

tion in international proceedings, its effectiveness and its effect on international dispute settlement.<sup>14</sup> This contribution seeks to close this gap.

The aim of this study is twofold: first, to obtain a deeper understanding of *amicus curiae* before international courts and tribunals: its characteristics, its functions and how it is dealt with. The second aim is to examine if the concept, as currently used and regulated, is of added value to international dispute settlement.

### A. Structure

The main decision concerning the structure of this study was whether to examine *amicus curiae* before each international court and tribunal<sup>15</sup> separately or to approach the different issues topically. The latter approach was chosen to allow for direct comparisons and keep the focus on the instrument and not on the particularities of a certain international court or tribunal, although they determine much of the role and development of *amicus curiae* in each court.

This book is structured in three parts. The first part, Chapters 2-4, sketch the international *amicus curiae*. Chapter 2 presents the above-indicated presumed functions and drawbacks of *amicus curiae* participation in order to provide a backdrop against which to assess the instrument throughout this book. Chapter 3 examines the national law origins and the development of the instrument before international courts and tribunals to show the variety of concepts held of *amicus curiae* in national legal systems and to highlight the different settings and conditions under which

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14 Several studies of *amicus curiae* served as starting points for this study. Two articles were of particular value: an article by *Lance Bartholomeusz* published in 2005, which constitutes the most comprehensive study of the concept so far, and a book chapter authored by *Christine Chinkin* and *Ruth Mackenzie*. See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 *Non-State Actors and International Law* (2005), pp. 209-286; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'* in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, pp. 295-311.

15 This is usually done, see L. Bartholomeusz, *supra* note 14; D. Hollis, *Private actors in public international law: amicus curiae and the case for the retention of state sovereignty*, 25 *Boston College International and Comparative Law Review* (2002), pp. 235-255; A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005.

*amici curiae* were first admitted. Chapter 4 distils the current characteristics and functions of *amicus curiae* before international courts and tribunals and delineates it from other forms of non-party involvement in international dispute settlement.

The second part of this book examines the laws and practices of *amicus curiae* participation before international courts and tribunals. It forms the empirical and analytical foundation of the study. Chapter 5 explores the legal bases for *amicus curiae* participation and its admission to the proceedings. Chapter 6 examines the instrument in the proceedings, including the modalities of participation, the formal and substantive requirements attached to submissions and their content.

The third part of this book, Chapters 7-8, drawing from the examination in the second part, addresses the second aim of the study: the added value of *amicus curiae* participation. Chapter 7 explores the substantive effectiveness of the concept. It evaluates how and to what extent international courts and tribunals have relied on submissions in their decision-making. Chapter 8 analyses the effect of *amicus curiae* on international dispute settlement as such. In particular, it considers whether the concept has fulfilled the positive and/or negative expectations surrounding it.

## B. Methodology

This study pursues an analytical approach. Normative considerations only play a role when analysing the sufficiency of current regulations. The focal point of this study is the law *de lege lata*.

The research is based on the laws and cases of the included international courts and tribunals, academic literature and select *amicus curiae* submissions. Unless indicated otherwise, the statutes, procedural rules and other international treaties referred to are those applicable as of 15 November 2016.<sup>16</sup> The corpus of case law of each court was researched

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16 United Nations, Statute of the International Court of Justice, entered into force 18 April 1946 (hereinafter: *ICJ Statute*); International Court of Justice, Rules of Court, entered into force 1 July 1978 (last amendment entered into force 14 April 2005) (hereinafter: *ICJ Rules*); International Court of Justice, Practice Directions, first adopted October 2001, and last amended on 21 March 2013 (hereinafter: *ICJ Practice Directions*), all at: <http://www.icj-cij.org/en/practice-directions> (last visited: 28.9.2017); United Nations Convention on the Law of the Sea of 10 December 1982, entered into force 16 November 1994 (hereinafter: *UNCLOS*) at: <http://www>

with a view to identifying cases with *amicus curiae* participation. This

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.un.org/Depts/los/convention\_agreements/convention\_overview\_convention.htm (last visited: 28.9.2017); Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea, entered into force 16 November 1994 (hereinafter: *ITLOS Statute*), at: [https://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/statute\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf) (last visited: 28.9.2017); Rules of the International Tribunal for the Law of the Sea (ITLOS/8), adopted on 28 October 1997 (last amendment 17 March 2009) (hereinafter: *ITLOS Rules*), at: [https://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf) (last visited: 28.9.2017); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, and as entered into force with the latest amendment on 1 June 2010 (hereinafter: *ECHR*), at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited: 28.9.2017); European Court of Human Rights, Rules of Court, adopted 18 September 1959 (last amendment entered into force 14 November 2016) (hereinafter: *ECtHR Rules*), at: [http://www.echr.coe.int/Documents/Library\\_2015\\_RoC\\_ENG.PDF](http://www.echr.coe.int/Documents/Library_2015_RoC_ENG.PDF) (last visited: 28.9.2017); Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the Organisation of American States by Resolution No. 448, entered into force on 1 January 1980 (hereinafter: *IACtHR Statute*), at: <http://www.corteidh.or.cr/index.php/en/about-us/estatuto> (last visited: 28.9.2017); Inter-American Court of Human Rights, Rules of Procedure, as approved by the Court at its LXXXV Regular Period of Sessions, from 16-28 November 2009 (hereinafter: *IACtHR Rules*), at: [http://www.corteidh.or.cr/sitios/registro/nov\\_2009\\_ing.pdf](http://www.corteidh.or.cr/sitios/registro/nov_2009_ing.pdf) (last visited: 28.9.2017); African (Banjul) Charter on Human and Peoples' Rights, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 (hereinafter: *African Charter*), at: <http://en.african-court.org/images/Basic%20Documents/charteang.pdf> (last visited: 28.9.2017); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, at: <http://en.african-court.org/images/Basic%20Documents/africancourt-humanrights.pdf> (last visited: 28.9.2017); African Court on Human and Peoples' Rights, Rules of Court, as entered into force on 2 June 2010 (hereinafter: *ACtHPR Rules*), at: [http://en.african-court.org/images/Basic%20Documents/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_\\_English\\_7\\_sept\\_1\\_.pdf](http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf) (last visited: 28.9.2017); Practice Directions, as adopted at the Fifth Extraordinary Session of the Court, held from 1-5 October 2012 (hereinafter: *ACtHPR Practice Directions*), at: <http://en.african-court.org/images/Basic%20Documents/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf> (last visited: 28.9.2017); World Trade Organization, Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement (hereinafter: *WTO DSU*), at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (last visited 28.9.2017); WTO Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6, as entered into force on 15 September 2010, at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm) (last visited 28.9.2017); International Centre for the Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of

was necessary given the lack of a full set of current data before all of the courts examined.<sup>17</sup> A list of all cases with *amicus curiae* practice that were included in this study is annexed to this book (Annex I). Judgments and decisions rendered before or on 15 November 2016 were considered. The laws and practices of each court were compared based on the methods of comparative law.<sup>18</sup> Although traditionally defined as an area of law that compares foreign national laws, these methods are applicable to the comparison of the practices and laws of international courts and tribunals on the assumption that each court perceives the others courts' laws and practices as alien.<sup>19</sup>

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Other States, as amended and effective 10 April 2006 (hereinafter: *ICSID Convention*), at: <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> (last visited 28.9.2017); ICSID Arbitration Rules, entered into force on 1 January 1968 (last amendment entered into force 1 January 2003), at: <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx> (last visited: 28.9.2017); United Nations Commission on International Trade Law Arbitration Rules, with new article 1, paragraph 4, as adopted in 2013 (hereinafter: *2013 UNCITRAL Arbitration Rules*), at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> (last visited: 28.9.2017); UNCITRAL Arbitration Rules, as revised in 2010 (hereinafter: *2010 UNCITRAL Arbitration Rules*), at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited: 28.9.2017); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as entered into force on 1 April 2014, (hereinafter: *UNCITRAL Rules on Transparency*), at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) (last visited: 28.9.2017).

17 For a set of data on NGOs appearing as *amicus curiae* before the ECtHR, see L. Van den Eynde, *An empirical look at the amicus curiae practice of human rights NGOs before the European Court of Human Rights*, 31 *Netherlands Quarterly of Human Rights* (2013), pp. 271-313.

18 See K. Zweigert/H. Kötz, *Introduction to comparative law*, 3<sup>rd</sup> Ed. Oxford 1998, pp. 43-47. With respect to the difficulties related to comparative law studies in arbitration, see R. Schütze, *Schiedsgerichtsbarkeit und Rechtsvergleichung*, 110 *Zeitschrift für vergleichende Rechtswissenschaft* (2011), pp. 89-90.

19 B. Burghardt, *Die Rechtsvergleichung in der völkerstrafrechtlichen Rechtsprechung*, in: S. Beck/C. Burchard/B. Fateh-Moghadam (Eds.), *Strafrechtsvergleichung als Problem und Lösung*, Baden-Baden 2011, pp. 236-237; K. Zweigert/H. Kötz, *supra* note 18, p. 8. Critical, A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 *Max Planck Yearbook of United Nations Law* (2001), p. 21 ('[Procedural q]uestions can in practice only be pursued on a tribunal-by-tribunal basis.').

The empirical approach faced several difficulties. Although an attempt at comprehensiveness was made, the breadth of the study and wealth of case law will have led to inadvertent, hopefully minor, omissions of relevant cases or aspects, especially as not all courts provide a central searchable database. Moreover, judgments tend to refer only sporadically, if at all, to *amicus curiae* participation and official case records are rarely accessible. Many aspects of *amicus curiae* participation are addressed only in the courts' correspondence, which is usually not publicly accessible.

A crucial initial challenge was the decision which international courts and tribunals to include in the study. Not all international courts and tribunals use the term *amicus curiae*. Moreover, definitions of the concept are numerous and diverging. The term *amicus curiae* is explicitly mentioned in the governing laws of the ICTY, the ICTR, in the ICC and the SCSL Rules of Procedure and Evidence, the IACtHR Rules of Procedure, and in numerous cases before the ECtHR, the IACtHR, the ICC, the ICTY, the ICTR, the SCSL, the STL, WTO panels, the WTO Appellate Body and investor-state arbitration tribunals. Some international courts and tribunals choose not to use the term to avoid connotations associated with any national legal concept. In 2011, the UNCITRAL Working Group II discussed whether the term should be used in its new rules on transparency. The Report of the 55<sup>th</sup> Session summarizes the discussions that led to the use of the term 'third party':

It was said that that notion was well known in certain legal systems, where it was used in the context of court procedure. *Amicus curiae* participation in arbitral proceedings was said to be a more recent evolution. In order to provide rules that would be understood in the same manner in all legal systems, it was recommended to avoid any reference to the term "*amicus curiae*" and to use instead words such as "third party submission", "third party participation", or other terms with similar import. That proposal received support.<sup>20</sup>

This study relies on a functional approach to the term. Relying on shared characteristics of the concept before the international courts and tribunals reviewed, as will be detailed in Chapter 4, this study considers as *amicus curiae* all forms of participation where a non-party to the proceedings that has an interest in the proceedings or its outcome submits to the court for

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20 Report of the UNCITRAL Working Group II (Arbitration and Conciliation on the Work of its fifty-fifth session), 55<sup>th</sup> Session, UN Doc. A/CN.9/736 (2011), para. 71 [Emphasis added].

its consideration information without a right to have the information accepted or considered.

C. *Scope of the study*

The definition of *amicus curiae* has led to the exclusion from this study of the following forms of non-party participation in international courts and tribunals: intervention, participation as of right by non-disputing member states to the treaty in dispute,<sup>21</sup> victim participation in the IACtHR pursuant to Article 25 IACtHR Rules, participation of the expert witness on the inter-American public order of human rights under Article 35 IACtHR Rules, participation by the national state of the applicant pursuant to Article 36(1) ECHR and participation by the Council of Europe Commissioner of Human Rights pursuant to Article 36(3) ECHR.<sup>22</sup> Often, the differences between these forms of participation and *amicus curiae* are only marginal and formal (see Chapter 4).

Participation by international organizations before the ICJ is more complex. Article 34(3) ICJ Statute in connection with Article 69(3) ICJ Rules empowers the ICJ to invite a public international organization whose constituent instrument or any other instrument adopted under it is in question to submit observations in writing. Article 43(2) and (3) ICJ Rules in connection with Article 69(2) ICJ Rules clarifies that in this case the public international organizations may submit observations *proprio motu* under the procedure established by Article 69(2) ICJ Statute. This form of participation was excluded from the study, because the ICJ is obliged to consider the submissions made, and functionally and historically, it relates to intervention pursuant to Article 63 ICJ Statute. However, Article 34(2) ICJ

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21 See Article 5 UNCITRAL Rules on Transparency, Article 1128 NAFTA. See also the possibility of participation by the ‘competent tax authorities’ pursuant to Article 26(5)(b)(i) Energy Charter Treaty.

22 The provision was introduced upon request by the Council of Europe Commissioner for Human Rights. See Explanatory Note to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, ETS No. 194, Agreement of Madrid, 12 May 2009, paras. 86-87.

Statute was included in the study, because applicants for leave to participate as *amicus curiae* have invoked the provision as a legal basis.<sup>23</sup>

The book takes a pragmatic approach with respect to the selection of the international courts and tribunals to include in the study. In 2011, *De Brabandere* counted 22 international courts and 60 quasi-judicial, implementation control and other dispute settlement bodies.<sup>24</sup> It is obvious that this contribution cannot cover them all. Definitions of what constitutes an international court or tribunal vary.<sup>25</sup> This study considers as international courts all institutions established by international law, which are composed of independent judges and issue legally binding decisions based on law in proceedings involving as a party at least one state or intergovernmental organization.<sup>26</sup> The requirements of permanency of judges and predetermined procedural rules were dropped to include investor-state arbitration tribunals. Further, the WTO Appellate Body and panels have been included, although their reports become legally binding only upon adoption by negative consensus in the Dispute Settlement Body.<sup>27</sup> Essentially,

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- 23 M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 209-210. An obligation to submit requested information may be agreed to in a relationship agreement between the UN and the organization pursuant to Articles 57 and 63 UN Charter. Benzing refers to Article IX(1) Agreement between the UN and the ILO and Article IX(1) Agreement between the UN and the FAO.
- 24 E. De Brabandere, *Non-state actors in international dispute settlement: pragmatism in international law*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, pp. 342-359.
- 25 C. Brown, *A common law of international adjudication*, Oxford 2007, pp. 10-11, with more references.
- 26 The definition proposed by Romano has gained some popularity. According to him, an international court is a permanent institution, which is composed of independent judges, adjudicates disputes between at least two entities at least one of which is a state or intergovernmental organization, operates on predetermined procedural rules, and issues legally binding decisions. C. Romano, *The international judiciary in context: a synoptic chart*, 2004, at: [http://www.pict-pcti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf) (last visited: 28.9.2017). See also the similar definition by I. Brownlie, *Principles of public international law*, 6<sup>th</sup> Ed., Cambridge 2003, p. 676. See also C. P. Romano/K. J. Alter/Y. Shany, *Mapping international adjudicative bodies, the issues, and players*, in: C. P. Romano/K. J. Alter/Y. Shany (Eds.), *The Oxford handbook of international adjudication*, Oxford 2014, p. 5.
- 27 Cf. Articles 2(4), 16(4), 17(14) DSU. See for many, D. McRae, *What is the future of WTO dispute settlement?*, 7 *Journal of International Economic Law* (2004), p. 4.

this study includes judicial and quasi-judicial institutions that are usually considered international courts or ‘quasi-courts’ and that have *amicus curiae* practice.

A few words are necessary on investor-state arbitration.<sup>28</sup> The scope of this study does not permit a consideration of all of the approximately 3300 bilateral and multilateral investment treaty regimes.<sup>29</sup> Also because of the difficulties in obtaining information on the traditionally confidential investor-state arbitrations, the examination of investment disputes has been limited to cases with *amicus curiae* participation that were accessible through the websites of the ICSID, the PCA, the NAFTA and private investment arbitration databases such as *italaw.com*. Most of the cases considered were conducted under the institutional procedural rules of the ICSID or the UNCITRAL, which govern the majority of investor-state arbitrations.<sup>30</sup>

The definition excludes all *non-international* courts. *Amicus curiae* practice before national courts, though abundant, is addressed only to the extent it is necessary for the analysis of the concept before international courts and tribunals. The definition further excludes all international *non-courts*, such as monitoring and implementation control bodies.<sup>31</sup> Because

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28 Investment treaties bestow a national from a state party to the treaty with the right to initiate binding arbitration against another state party (the ‘host state’) for an injury suffered by the national in relation to an investment due to a measure that is inconsistent with substantive obligations guaranteed in the treaty and for which the host state is liable. E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 *Berkeley Journal of International Law* (2011), p. 202.

29 UNCTAD, *IIA issues note, recent developments in investor-state dispute settlement*, No. 1, 2015, p. 2, at: [http://unctad.org/en/PublicationsLibrary/webdi-aepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdi-aepcb2015d1_en.pdf) (last visited: 28.9.2017); UNCTAD, Investment Policy Hub, at: <http://investmentpolicyhub.unctad.org/IIA> (last visited: 28.9.2017).

30 For the argument that investment arbitration is a system of international law, see S. Schill, *The multilateralization of international investment law*, Cambridge 2009.

31 E.g. UN Human Rights Council, Committee on the Elimination of Racial Discrimination, Committee Against Torture, Inter-American Commission on Human Rights, Inter-African Commission on Human and Peoples’ Rights, and implementation monitoring bodies established by environmental agreements. See G. Rubagotti, *The role of NGOs before the United Nations Human Rights Committee*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 67-92; L. Boisson de Chazournes, *The World Bank Inspection Panel: about public participation and dispute*

of their functional comparability to national labour courts, international administrative tribunals are also excluded.

Based on this approach, the following courts and tribunals were included in this study: the International Court of Justice, the International Tribunal for the Law of the Sea including its specialized Seabed Disputes Chamber, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, the panels and Appellate Body of the World Trade Organization and investor-state arbitration tribunals including the Iran-United States Claims Tribunal. The scope of analysis covers both contentious and advisory proceedings.<sup>32</sup>

This selection does not claim to be comprehensive.<sup>33</sup> Notable is the exclusion of the Courts of the European Union and international and hybrid criminal courts and tribunals.

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*settlement*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 187-203.

32 The advisory practice of the ECtHR is not considered. Article 47 ECHR endows the ECtHR with advisory jurisdiction for certain questions of interpretation of the ECHR and its Protocols. Rule 82 ECHR Rules subjects proceedings to Articles 47-49 ECHR, Chapter IX ECHR Rules and those provisions of the Rules the court considers 'appropriate'. Pursuant to Rule 84(2), contracting parties may submit written comments on the request. In its three advisory proceedings, the court has received written submissions from its member states. In two cases, it also received submissions from the Parliamentary Assembly. The ECtHR acknowledged the submissions, but it did not provide any legal justification for their admission. As an organ composed of representatives of national parliaments of the contracting states, the court may have considered it equivalent to member states' submissions. See *Decision on the Competence of the Court to give an advisory opinion; Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, para. 3; *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)* of 22 January 2010.

33 Inter-state arbitration is only referred to incidentally. So far, arbitral tribunals in two publicly known cases have received *amicus curiae* submissions: In the *Arctic Sunrise Arbitration*, the tribunal received (and rejected) a submission from Stichting Greenpeace Council. See *Arctic Sunrise Arbitration (the Kingdom of the Netherlands v. the Russian Federation)*, Procedural Order No. 3 (Greenpeace International's Request to File an *Amicus Curiae* Submission) of 8 October 2014. In the *South China Sea Arbitration*, the Chinese (Taiwan) Society of International Law submitted an *amicus curiae* brief. The tribunal did not officially admit the brief. However, the brief is referenced in the portion of the award detailing non-

The exclusion of international and internationalized criminal courts and tribunals results from the realization that the scope of the study was too broad. Further, their purpose – the assertion of individual criminal liability – entails notable differences in their procedures, which, combined with the richness of their *amicus curiae* practice, warrants a separate study.<sup>34</sup>

The Courts of the European Union<sup>35</sup> are excluded from the scope of this study for another reason. The basic mandate of the ECJ is to ensure the uniform interpretation and application of primary and secondary EU law. With regard to the ECJ's own approach to its role, *Stein* argues that 'the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology.'<sup>36</sup> This unique position somewhere between a national and an international court renders difficult a comparison of the procedural practices of the ECJ with other international courts.<sup>37</sup> In addition, the ECJ provides for other forms of non-party participation, limiting the need and likelihood of

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participating China's position. See *South China Sea Arbitration (Republic of the Philippines and the People's Republic of China)*, Award, 12 July 2016, PCA Case No. 2013-19 para. 449, FN 487. The parties held diverging views on the participation of *amicus curiae*. While the Philippines saw it within the power of the tribunal to admit *amicus* briefs, China, in a letter to the tribunal, expressed its 'firm opposition' to *amicus curiae* submissions (and state intervention). *Id.*, paras. 41, 42, 89.

For the EFTA Court, see J. Almqvist, *The accessibility of European Integration Courts from an NGO perspective*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 276. For individuals in the Mercosur system, see M. Haines-Ferrari, *Mercosur: individual access and the dispute settlement mechanism*, in: J. Cameron/ K. Campbell (Eds.), *Dispute resolution in the World Trade Organization*, London 1998, pp. 270-284. For *amicus curiae* before African human rights bodies, see F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 *Journal of African Law* (2014), pp. 22-44.

34 See S. Williams/H. Woolaver, *The role of amicus curiae before international criminal tribunals*, 6 *International Criminal Law Review* (2006), pp. 151-189.

35 Article 19(1) TEU determines that the Court of Justice of the European Union includes the European Court of Justice (hereinafter: ECJ), the General Court and specialized courts.

36 E. Stein, *Lawyers, judges and the making of a transnational constitution*, 75 *American Journal of International Law* (1981), p. 1. See also H. Rengeling/A. Middeke/M. Gellermann et al., *Handbuch des Rechtsschutzes in der Europäischen Union*, 3<sup>rd</sup> Ed., Munich 2014, p. 37, para. 2.

37 See T. Oppermann/C. Classen/M. Nettesheim, *Europarecht*, 5<sup>th</sup> Ed., Munich 2011, p. 67, para. 152; H. Rengeling/A. Middeke/M. Gellermann, *supra* note 36, p. 46, para. 17.

an introduction of *amicus curiae* participation.<sup>38</sup> Pursuant to Article 23 ECJ Statute, the parties to the national dispute that is referred, the European Commission (EC) and the EU member states have a right to submit written statements to the ECJ in cases where the validity or interpretation of an act is in dispute. Article 40 ECJ Statute permits intervention by member states in contentious proceedings. Further, the institute of the Advocate General serves to represent the public interest.<sup>39</sup> Despite the significant differences in terms of functions and rights, these forms of participation have prompted comparison with *amicus curiae*, because they can highlight aspects relevant for the interpretation of the provisions in dispute.<sup>40</sup>

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- 38 The concept is not unknown in European law. Article 15(3) *Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 TEU* grants the European Commission and the competition authorities of the member states a right to make written submissions as *amicus curiae* in national proceedings relating to the application of Articles 81 and 82. The modalities of participation were elaborated in Case C-429/07, *Belastingdienst/P/kantoor P v. X BV* [2009] and in the Opinion of Advocate General Mengozzi of 5 March 2009. The EC has relied on Article 15(3) to make submissions in seventeen cases so far, see [http://ec.europa.eu/competition/court/antitrust\\_amicus\\_curiae.html](http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html) (last visited: 28.9.2017). See also E. Barbier de La Serre/M. Lavedan, *Une leçon de la Cour sur l'ampleur de l'amitié: la Commission amicus curiae et les juridictions nationales*, 21 *Révue Lamy de la Concurrence: droit, économie, régulation*, pp. 68-71; R. Urlings, *De Commissie als amicus curiae en het fiscale karakter van een mededingingsboete*, *Nederlands tijdschrift voor Europees recht* (2009), pp. 288-293; P. Van Nuffel, *Ode an die Freu(n)de – the European Commission as amicus curiae before European and national courts*, in: I. Govaere/D. Hanf (Eds.), *Scrutinizing internal and external dimensions of European Law – liber amicorum Paul Demaret*, Vol. I, Brussels 2013, pp. 267-278. Arguing for an extension of third party participation to *amicus curiae* before the ECJ, E. Bergamini, *L'intervento amicus curiae: recenti evoluzioni di uno strumento di common law fra Unione europea e Corte europea dei diritti dell'uomo*, 42 *Diritto comunitario e degli scambi internazionali* (2003), pp. 181, 186, 188.
- 39 The Advocate General represents the public and community interest in the form of 'reasoned submissions' written from the perspective of European law. See Article 252 TEU (ex Art. 222 EC). See also T. Oppermann/C. Classen/M. Nettesheim, supra note 37, p. 66, para. 143.
- 40 Case C-137/08, *VB Pénzügyi Lízing Zrt. V. Ferenc Schneider* [2010], closing argument of Advocate General Trstenjak of 6 July 2010, para. 80 (The arguments of member states submitted in proceedings before the ECJ are 'comparable to the submissions of an *amicus curiae* in so far as they are intended exclusively to support the Court of Justice in reaching a decision.' [References omitted]). See also

A final word concerning terminology seems appropriate due to the variety of terms used to describe *amicus curiae* participation. This contribution uses the terms *amicus curiae*, *amicus*, *amici curiae* and *amici*. The term ‘international *amicus curiae*’ is used to address *amici curiae* before international courts collectively. The use of the term ‘*amicus* intervention’ is avoided. It confuses intervention and *amicus*. The term ‘third party’ will not be used as some international courts use it for different forms of non-party involvement.<sup>41</sup> The terms ‘international courts and tribunals’, ‘courts and tribunals’, ‘international adjudication’ and ‘international dispute settlement’ are used interchangeably.<sup>42</sup>

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C. Chinkin, *Third parties in international law*, Oxford 1993, pp. 218-220; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 *American Journal of International Law* (1994), pp. 629-630; J. Almqvist, *supra* note 33, p. 278. See L. Brown/F. Jacobs, *The Court of Justice of the European Communities* 3<sup>rd</sup> Ed., London 1989, p. 55. This assessment overinflates *amicus curiae*. Unlike the Advocates General, *amici curiae* do not possess rights of participation in the proceedings.

41 Article 4 UNCITRAL Rules on Transparency; Articles 10, 17(4) DSU. See L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 170 (‘Parties not bound by the particular arbitration agreement and affected by the particular arbitration are referred to as third parties.’).

42 On the differentiation between court and tribunal, see Y. Shany, *The competing jurisdictions of international courts and tribunals*, Oxford 2003, pp. 12-13, FN 44.

Part I  
The ‘international’ *amicus curiae*



## Chapter § 2 Great expectations? Presumed functions and drawbacks of *amicus curiae* participation

Before embarking on an analysis of the content and legal ramifications of *amicus curiae*, it is worthwhile to consider the justifications underlying its reception in international adjudication, that is, its presumed functions and the associated drawbacks. These considerations will serve as the measuring scale for the effectiveness and added value of *amicus curiae* participation in international dispute settlement throughout this book.

This Chapter will first outline the functions attributed to *amicus curiae* before international courts and tribunals (A.) and then address the feared drawbacks (B.).

### A. Presumed functions of *amicus curiae*

Academic writers and international stakeholders attribute different functions to the international *amicus curiae*. Mainly they are that *amicus curiae* increases the information available to international courts and tribunals (I.); that *amicus curiae* is a medium through which international courts and tribunals are made aware of the public's view in a case and the public interests at stake (II.); that *amicus curiae* increases the legitimacy of international courts and tribunals, as well as contributes to overcoming a democratic deficit in international adjudication (III.); that *amicus curiae* increases the transparency of international adjudication (IV.); and that *amicus curiae* helps to secure the coherence of international law (V.).

#### I. Broader access to information

Concepts such as *iura novit curia* and – in some courts – an obligation to establish the objective facts of the case require judges to obtain a complete picture of events and the relevant laws and arguments.<sup>1</sup> Proponents of *am-*

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1 The latter obligation is not universal. See for many, S. Schill, *Crafting the international economic order: the public function of investment treaty arbitration and its*

*amicus curiae* participation argue that the assistance from *amicus curiae* can support a court in this endeavour and help it to produce decisions of higher quality.<sup>2</sup> *Amici curiae* can soothe the imperfections of the bilateral structure of dispute settlement. Especially where the parties are unwilling or unable to provide the necessary information, where a judge faces a novel legal issue or one that lies outside his area of specialisation or where the caseload makes it impossible for judges and their clerks to conduct extensive legal research, *amici curiae* can provide the requisite information.<sup>3</sup> The CIEL commented on the advantages of *amicus curiae* participation

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*significance for the role of the arbitrator*, 23 *Leiden Journal of International Law* (2010), pp. 422-423.

- 2 See L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 244, 249; O. Bennaim-Selvi, *Third parties in international investment arbitrations: a trend in motion*, 6 *Journal of World Investment and Trade* (2005), p. 786; S. Schill, *supra* note 1, p. 424 (Fact-finding *proprio motu* should be restricted to special circumstances where the interests of non-participating parties are involved, such as issues of corruption). See also P. Carozza, *Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights*, 73 *Notre Dame Law Review* (1998), p. 1225. Carozza contends that the ECtHR does not conduct proper comparative analysis of legal issues, in particular, that it selects the cases it considers arbitrarily. *Amicus curiae* could alleviate this concern.
- 3 With regard to WTO law, see R. Howse et al., *Written submission of non-party amici curiae in EC-Seals*, 11 February 2013, para. 13 ('The preliminary submissions in this brief are aimed at correcting the misleading and incomplete manner in which Canada has characterized the objectives of the measures at issue in this dispute...'); C. Beharry/M. Kuritzky, *Going green: managing the environment through international investment arbitration*, 30 *American University International Law Review* (2015), pp. 415-416 ('While interested third parties could always petition the parties to the dispute with their expertise or knowledge, allowing an independent party to provide expertise in a separate process is valuable because it prevents disputing parties from acting as gatekeepers of specialized knowledge.');
- G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 *Journal of International Economic Law* (2001), p. 783; D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 447. In the case of corruption or bribery, the parties may try to keep certain information from the court or tribunal. See also *AES v. Hungary* where, according to Levine, 'neither Hungary nor the investor would have an interest in emphasizing the fact that the contracts between them may violate the European Commission's restrictions on state aid. The

for the furtherance of the law in respect of cases concerning the Aliens Claims Tort Act before the US Federal Courts:

[A] *amicus curiae* briefs are useful when trying to set new legal precedents enforcing innovative legal concepts, such as environmental rights. Persons or organizations who submit *amicus curiae* briefs can advocate for more novel principles and interpretations of law than the lawyers who directly represent a client in the case are likely to be free to do, given that they must zealously advocate for their client and, as such, will probably feel obliged to argue that the case involves violations of established legal principles with precedent judges can rely on in making their decisions.<sup>4</sup>

In short, *amici curiae* can extend an international court or tribunal's access to relevant information. The term information in this respect is used loosely and collectively to cover both the (legal) arguments a court must apply and consider in the interpretation of the applicable laws, as well as the facts of the case and the relevant context. The idea is that 'the greater the amount of information and views considered, the greater the chances for a good outcome.'<sup>5</sup>

It is particularly important that the decisions of international courts and tribunals are free from error given the significant impact of decisions and their general finality.<sup>6</sup> In *Methanex v. USA*, an *amicus curiae* petitioner, who sought to argue that the interpretation of NAFTA's Chapter 11 should

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claimant would certainly not wish to emphasize that a contract may be based on an illegality, as this may impact their ability to claim damages. As for Hungary, the state may consider it detrimental to emphasize this issue as its primary defence, since its acknowledgment of engaging in state aid may give rise to further actions by the Commission within the EU sphere.' E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 217 [References omitted]. For the award, see *AES Summit Generation Limited and AES-Tisza Erőmű Kft. (UK) v. Republic of Hungary* (hereinafter: *AES v. Hungary*), Award, 23 September 2010, ICSID Case No. ARB/07/22.

- 4 J. Cassel, *Enforcing environmental human rights: selected strategies of U.S. NGOs*, 6 Northwestern Journal of International Human Rights (2007), p. 122 [references omitted].
- 5 G. Umbricht, *supra* note 3, p. 774; M. Schachter, *The utility of pro bono representation of U.S.-based amicus curiae in non-U.S. and multi-national courts as a means of advancing the public interest*, 28 Fordham International Law Journal (2004), p. 111 ('[T]he facilitation of an informed, deliberative, and fair-minded court ruling is among the most laudable purposes of an *amicus* submission.')
- 6 There is a limited review of panel decisions by the WTO Appellate Body under Article 17 of the DSU, and Articles 51 and 52 of the ICSID Convention allow revision

include legal principles relating to sustainable development, submitted that he would contribute to the avoidance of error by providing a 'fresh and relevant perspective' on some of the issues before the tribunal.<sup>7</sup>

Has this function lost some of its relevance lately? Given the ready (online) availability of legal materials, judges are no longer confined to the legal literature available in the court library. In addition, many judges now have clerks to assist them with legal research.<sup>8</sup> Moreover, with the help of new media they can more easily than ever carry out basic fact-checks (to the extent that this is in accordance with the applicable rules). Still, it appears premature to argue that this change obviates information-based *amicus curiae*. While it remains to be examined what has been the impact of the new technologies on information-based *amici curiae*, there seems to be room left for it. Admittedly, the pure transmission of information today is less relevant than a decade ago, but this function may be useful with respect to facts and specialized legal information. Above all, *amici curiae* can assist judges in navigating the vast amount of material available on an issue.<sup>9</sup> In this respect, *amici curiae* have shifted from mere (descriptive) providers to pre-screensers of information. This shift is not unproblematic. There is a risk of incomplete and distortive submissions. Nevertheless, these *amici curiae* can reopen the marketplace of ideas before the court. They can highlight or elaborate arguments or facts that the parties have not exhaustively discussed. This may be particularly relevant before courts that form part of specialized subsystems of international law with a clear

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and annulment of awards, if a narrow set of requirements are met. Regarding the effects of erroneous judicial decisions, see M. Reisman, *Nullity and revision: the review and enforcement of international judgments and awards*, New Haven 1971; J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 *International and Comparative Law Quarterly* (2002), p. 353 ('The risk of a panel 'getting it wrong', because the parties did not present certain information, has consequences that may affect millions of people').

7 *Methanex v. USA*, Decision of the Tribunal on petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 6.

8 But see with regard to the ACtHPR F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 *Journal of African Law* (2014), p. 37 ('*Amicus* briefs also enable the court to access legal opinion and practical information that a resource and time-constrained court would not otherwise obtain. Without the support of experts and NGOs, the role of the court will be marginal at best.').

9 J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 115.

policy mandate in favour of a certain interest.<sup>10</sup> In this regard, *amici* can infuse the deliberations with new views, fortify solid competition and exchange of legal ideas, as well as give guidance on new laws or legal issues outside the judges' core fields of expertise.<sup>11</sup>

## II. Representation of 'the' public interest

A second function often presumed is that *amicus curiae* participation allows the representation of public or community interests by civil society. *Amicus curiae* is portrayed as an instrument that complements the 'voluntarist and bilateral origins of international law' with public interest-based normative structures.<sup>12</sup> *Barker* notes the specific ability of fact-focused *amici curiae* to support 'rational decision making, especially when judges are faced with issues having broad political-social ramifications.'<sup>13</sup>

One justification for the involvement of civil society is that international courts routinely assess the conformity with international law of states' conduct and actions adopted under national law, including 'measures of general application intended to promote or achieve important public policy goals [or values]' which concern areas traditionally considered belonging to the sovereign prerogative of nation states.<sup>14</sup> Especially in investment ar-

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10 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 *European Journal of International Law* (2003), p. 502; N. Trocker, *L'"Amicus Curiae" nel giudizio davanti alla Corte Europea dei Diritti Dell'Uomo*, 35 *Revista di Diritto Civile* (1989), p. 124; S. Joseph, *Democratic deficit, participation and the WTO*, in: S. Joseph/D. Kinley/J. Waincymer (Eds.), *The World Trade Organization and human rights*, Cheltenham and Northampton 2009, p. 316.

11 L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 *Journal of World Investment and Trade* (2004), p.335.

12 M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 *The Law and Practice of International Courts and Tribunals* (2006), p. 371.

13 L. Barker, *Third parties in litigation: a systematic view of the judicial function*, 29 *The Journal of Politics* (1967), p. 54.

14 K. Kinyua, *Assessing the benefits of accepting amicus curiae briefs in investor-state arbitrations: a developing country's perspective*, Stellenbosch University Faculty of Law, Working Paper Series No. 4 (2009), quoted by E. Levine, *supra* note 3, p. 200; P. Wieland, *Why the amicus curiae institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals*:

bitration and in WTO dispute settlement, subsystems focused on trade and investment respectively, an increasing number of disputes concern the legality of state measures (including parliamentary acts) seeking to protect public commodities or rights, such as the environment, human rights, water management and public health.<sup>15</sup> The matter has become pressing also for Western countries as they increasingly risk incurring state responsibility for measures carried out in the interest and will of their constituents. In *Methanex v. USA*, one of the *amicus* petitioners argued that the tribunal's decision would have a 'critical impact ... on environmental law and other public welfare law-making in the NAFTA region.'<sup>16</sup> Exemplary recent cases include the legality of the EU's ban on the import and marketing of seal and seal products for reasons of public morale which was challenged by Canada under the WTO Agreement, proceedings brought against the Kingdom of Spain for reducing subsidies in the renewable energies sector following the world financial crisis and proceedings against El Salvador for breach of the CAFTA by the mining company Pac Rim Cayman LLC following the refusal of environmental permits required by El Salvadorian

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*Glamis Gold and the right of intervention*, 3 Trade, Law and Development (2011), p. 338.

- 15 Investment agreements in their preambles establish as objectives the furtherance of free trade and foreign investment, including effectiveness of any dispute resolution mechanism. Cf. Article 102 NAFTA. See also G. Carvajal Isonza/F. Gonzalez Rojas, *Evidentiary issues on NAFTA Chapter 11 arbitration: searching for the truth between states and investors*, in: T. Weiler (Ed.), *NAFTA investment law and arbitration*, New York 2004, p. 287. For the claim that investment treaty arbitration can be viewed as a system, see S. Schill, *The multilateralization of international investment law*, Cambridge 2009; C. Brower, *Obstacles and pathways to consideration of the public interest in investment treaty disputes*, in: K. Sauvant (Ed.), *Yearbook on international investment law & policy*, Oxford 2008-2009, p. 351. See also the growing literature seeking to accommodate the competing interests within the subsystems. For many, G. Marceau, *WTO dispute settlement and human rights*, 13 *European Journal of International Law* (2002), p. 753; J. Viñuales, *supra* note 9. Arguing against the perception of investor-state dispute settlement as a public system and for a characterization as a hybrid public private system, see J. Alvarez, *Is investor-state arbitration "public"?*, 7 *Journal of International Dispute Settlement* (2016), pp. 534–576.
- 16 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 5 (The *amicus* applicant submitted that the case was also of constitutional importance, thus, raised national public interests.).

law for the extraction and exploitation of gold out of a concern over the pollution of one of the country's most important rivers.<sup>17</sup>

Furthermore, international legal norms tend to be rather abstract having been achieved by inter-state negotiation and compromise. Courts and tribunals must concretize obligations and balance competing interests by way of treaty interpretation, at times to an extent usually reserved for the legislature.<sup>18</sup> Given this reality, international decisions have an important quasi-precedential value.<sup>19</sup>

Moreover, there is an issue of costs: the general public and local communities will ultimately bear (at least the state's share of) the costs of the proceedings and potential damages, as well as may be the recipients of new legislation or executive action.<sup>20</sup>

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17 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (hereinafter: *EC–Seal Products*), Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R; C. Patrizia/J. Profaizer/I. Timofeyev, *Investment disputes involving the renewable energy industry under the Energy Charter Treaty*, 2 October 2015, GAR, at: <http://globalarbitrationreview.com/chapter/1036076/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty> (last visited: 28.9.2017); *Pac Rim Cayman LLC v. Republic of El Salvador* (hereinafter: *Pac Rim v. El Salvador*), Notice of Arbitration, 30 September 2009, ICSID Case No. ARB/09/12.

18 C. Brower, *supra* note 15, pp. 355-356; G. Van Harten, *Investment treaty arbitration and public law*, Oxford 2007, p. 122; C. Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 *Journal of International Economic Law* (2003), p. 699; V. Lowe, *The function of litigation in international society*, 61 *International and Comparative Law Quarterly* (2012), p. 214; R. Howse, *Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence*, in: J. Weiler (Ed.), *The EU, the WTO and the NAFTA*, Oxford 2000, p. 39. On the problems associated with the applicability of public interest measures in investment treaty arbitration see A. Kulick, *Global public interest in investment treaty arbitration*, Cambridge 2012, pp. 50-52; S. Schill, *International investment law and comparative public law – an introduction*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, pp. 6-7.

19 Interpretations rendered in investment arbitrations have influenced not only the decision-making in following disputes, but they have also influenced treaty-making. S. Schill, *supra* note 1, pp. 415-418.

20 In the context of the ECtHR, *amicus curiae* participation has been justified on the ground that a judgment may have an effect on the rights and obligations of everyone within the respondent state's jurisdiction. See A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/H. Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, p. 342. Franck calculated

Also, it is argued that there is a growing number of global interests whose representation cannot (or should not) be left to individual states. In these cases, *amici curiae* shall act as a link between the court and the public by (re)presenting the broader issues affected by the case.<sup>21</sup> In *Biwater v. Tanzania*, *amicus curiae* petitioners submitted that because the arbitration substantially influenced the 'population's ability to enjoy basic human rights ... the process should be transparent and permit citizens' participation. In particular, the Arbitral Tribunal should hear from the leading civil society groups in Tanzania on these issues.'<sup>22</sup>

For these reasons, it is said that 'where the award can have deep impacts on such issues of general interest, it would be outrageous for the tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.'<sup>23</sup> The claim is that the affected public should be given a procedural tool to present its viewpoints in proceedings involving matters of public interest. Otherwise, the international court or tribunal may risk its legitimacy.<sup>24</sup> This departure from the doctrine of espousal rests on the belief that the state will (or cannot) represent the

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that the average amount of damages claimed in investment arbitration was about USD 343.4 million. See S. Franck, *Empirically evaluating claims about investment arbitration*, 86 North Carolina Law Review (2007), p. 58. G. Van Harten, *supra* note 18, p. 1 (The investment claims brought against Argentina in the aftermath of its financial crisis exceeded its financial reserves); F. Marshall/H. Mann, IISD, *Revision of the UNCITRAL Arbitration Rules: good governance and the rule of law: express rules for investor-state arbitrations required*, September 2006, p. 3, at: [http://www.iisd.org/pdf/2006/investment\\_uncitral\\_rules\\_revision.pdf](http://www.iisd.org/pdf/2006/investment_uncitral_rules_revision.pdf) (last visited: 28.9.2017); R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), p. 84.

21 L. Barker, *supra* note 13, p. 56.

22 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (hereinafter: *Biwater v. Tanzania*), Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 14.

23 A. Mourre, *Are amici curiae the proper response to the public's concerns on transparency in investment arbitration?*, 5 *The Law and Practice of International Courts and Tribunals* (2006), p. 266; M. Gruner, *Accounting for the public interest in international arbitration*, 41 *Columbia Journal of Transnational Law* (2003), p. 955; K. Hobér, *Arbitration involving states*, in: L. Newman/R. Hill (Eds.), *The leading arbitrators' guide to international arbitration*, New York 2008, Chapter 8, p. 155.

24 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 2; C. Brower, *supra* note 15, p. 347 ('[N]o legal regime can maintain legitimacy while ignoring the fundamental needs and values

public interest adequately (or as preferred by the *amicus curiae* applicant), because its primary goal is to win the case.<sup>25</sup> *Amicus curiae* briefs are ‘expected to reduce adverse effects of [the parties’ arbitration strategies] on the public good of the host State.’<sup>26</sup> The matter is of particular concern in the WTO where critics stress an additional readiness on the part of states to defend the interests of the industry sector at the expense of public interests and values.<sup>27</sup>

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- of affected populations.’); E. Triantafilou, *Is a connection to the “public interest” a meaningful prerequisite of third party participation in investment arbitration?*, 5 Berkeley Journal of International Law (2010), p. 38.
- 25 For many, G. Umbricht, *supra* note 3, p. 783 (‘The fair representation by governments of every minority forming part of their constituency is a fiction.’); O. De Schutter, *Sur l’émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l’homme*, 7 European Journal of International Law (1996), p. 407; D. McRae, *What is the future of WTO dispute settlement?*, 7 Journal of International Economic Law (2004), p. 11; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), p. 615 (Reasons why a party may not present an interest adequately include: limited relevance, difficulties in obtaining evidence, lack of resources, litigation strategy, de-politicization of a dispute.); A. Kawharu, *Participation of non-governmental organizations in investment arbitration as amici curiae*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 284 (A state may try to avoid being perceived as anti-investor); R. McCorquodale, *An inclusive international legal system*, 17 Leiden Journal of International Law (2004), pp. 477-504; A. Reinisch, *The changing international legal framework for dealing with non-state actors*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, pp. 74-78.
- 26 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 398; A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii.
- 27 R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Berlin 2007, pp. 228-232. In US and EU law, private parties can force their governments or the EC to initiate WTO dispute settlement proceedings respectively. Further, private companies can influence national decision-makers informally. See B. Jansen, *Die Rolle der Privatwirtschaft im Streitschlichtungsverfahren der WTO*, 3 Zeitschrift für europarechtliche Studien (2000), pp. 293-305; J. Dunoff, *The misguided debate over NGO participation at the WTO*, 4 Journal of International Economic Law (1998), pp. 435-436, 441-448 (‘[B]oth Kodak and Fuji had input into virtually every stage of WTO processes, including the initial consultations, the selection of panellists, the written submissions, the oral representations and the written responses to the panel’s questions. In addition to these informal roles in these formal processes, Kodak and Fuji also attempted to shape the larger political context

Related hereto is the argument that, because at least factually proceedings before international courts extend beyond the parties appearing before them, international courts and tribunals do not only offer a private service to the parties, but execute a broader, public function.<sup>28</sup> Therefore, proceedings should be inclusive.

An issue that requires analysis throughout this contribution is what is the public interest justifying a broadening of the judicial function. The term public interest appears frequently in relation to *amici curiae*, in particular in investor-state arbitration, but it is rarely defined and remains vague. How do we define the public interest? Does it refer to the national interest based on which a certain measure was issued or should it be a general and internationally accepted interest? Are they the same? Can one speak of an international public at all, especially in the investment con-

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within which the WTO dispute resolution proceedings occurred.');

S. Charnovitz, *Participation of nongovernmental organizations in the World Trade Organization*, 17 University of Pennsylvania Journal of International Economic Law (1996), p. 351, FN 99 (He quotes a 1994 speech by then US-Trade Representative Kantor, who characterized the GATT panel process as 'star chamber proceedings that are making the most important decisions that affect the lives of all our citizens – especially in the environmental area – and there is no accountability whatsoever.' See M. Kantor, *Remarks on trade and environment at the global legislators' organisation for a balanced environment* on 28 February 1994. The US Congress responded by directing him to seek greater transparency at all WTO levels); A. Schneider, *Democracy and dispute resolution: individual rights in international trade organizations*, 19 University of Pennsylvania Journal of International Economic Law (1998), pp. 587, 594; J. Morison/G. Anthony, *The place of public interest*, in: G. Anthony et al (Eds.), *Values in global administrative law*, Oxford 2011, pp. 217, 229. Critical, M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 World Trade Review (2006), p. 98.

28 R. Higgins, *supra* note 20, p. 95 ('International law is a facilitating discipline – its purpose is to assist in the achievement of an international stability that is consistent with justice and in the realisation of shared values.');

C. Brower, *supra* note 15, pp. 423-424 ('Arbitrators in investment treaty cases not only fulfil a function in settling the specific dispute at hand, but also are agents of the international community.');

S. Schill, *supra* note 1, p. 419; C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 223; G. Van Harten/M. Loughlin, *Investment treaty arbitration as a species of global administrative law*, 17 European Journal of International Law (2006), pp. 145-148. See, however, G. Aguilar Alvarez/W. Park, *The new face of investment arbitration: NAFTA Chapter 11*, 28 Yale Journal of International Law (2003), p. 394.

text?<sup>29</sup> One could argue that all cases involving state participation – thus, every ‘international court case’ – raises a public interest for they engage the state budget and concern the legality of the exercise of state authority. For the present purpose, this contribution views as pertaining to the public interest all those matters that extend beyond the mere parties to the dispute and affect an abstract local, national, or global constituency.<sup>30</sup> This admittedly broad concept allows for the inclusion of public national and international interests.

### III. Legitimacy and democratization

With the growing number of disputes before an increasing number of international courts and tribunals since the early 1990, concerns have arisen over the legitimacy and democracy of international judicial decision-making. While this issue concerns all international courts and tribunals, it is

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29 For a consideration of the international community and community values, see A. Paulus, *Die internationale Gemeinschaft im Völkerrecht*, Munich 2001; V. Lowe, *Private disputes and the public interest in international law*, in: D. French et al. (Eds.), *International law and dispute settlement: new problems and techniques – liber amicorum John G. Merrills*, Oxford 2010, p. 9 (‘[W]hat kinds of public interest are appropriate to be put before international tribunals, and who should decide that question? Who should be permitted to make representations in the public interest? Elected local councils? State agencies, such as environmental agencies established by the government of a State? International scientific bodies? Organizations with an explicit political agenda, such as Greenpeace or Amnesty International? You? Me? The Church of Scientology? And again, who decides?’); L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSD, NAFTA, bilateral treaties and customary international law*, London 2005, p. 230.

30 M. Gruner, *supra* note 23, pp. 929-932 (It is a ‘set of values and norms that serve as ends towards which a community strives.’). M. Benzing, *supra* note 12, p. 371 (‘Community interests ... are those which transcend the interests of individual states and protect public goods of the international community as a whole or a group of states.’ [References omitted]). A private interest is understood as any interest that belongs to one person or a defined group of persons. See also Chapter 4.

discussed in particular in respect of the compulsory WTO dispute settlement system and investor-state arbitration.<sup>31</sup>

The literature on this issue is vast and continues to expand ranging from highly theoretical considerations to more practical accounts.<sup>32</sup> Matters are made more complex by diverging conceptions of legitimacy, a shift from consent-based to governance-based concepts of international law and the confluence of concerns over the political legitimacy of international subsystems with that of their (quasi-)judicial organs. This contribution only addresses concerns pertaining to adjudicatory legitimacy.<sup>33</sup>

On a basic level, legitimacy is seen as the justification for the exercise of public authority.<sup>34</sup> As a binding decision based on law by a third over a

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31 Regarding the WTO, see R. Reusch, *supra* note 27, pp. 40-124. ICSID awards can be enforced as judgments of the highest court at the place of enforcement, Article 54(1) ICSID Convention.

32 S. Schill, *supra* note 1, p. 6, FN 8 (Signs of the legitimacy crisis in investment arbitration are seen in the withdrawal of several Latin American states such as Bolivia and Venezuela from investment treaties and the ICSID Convention); A. Van Duzer, *Enhancing the procedural legitimacy of investor-state arbitration through transparency and amicus curiae participation*, 52 McGill Law Journal (2007), pp. 681-723; C. Forcese, *Does the sky fall? NAFTA Chapter 11 dispute settlement and democratic accountability*, 14 Michigan State Journal of International Law (2006), p. 315; S. Joseph, *supra* note 10, pp. 316-319. T. Ishikawa, *supra* note 26, p. 399; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 137; D. Prévost, *WTO Subsidies Agreement and privatised companies: Appellate Body amicus curiae briefs*, 27 Legal Issues of Economic Integration (2000), p. 287. The criticism of closed dispute-settlement proceedings relates to a larger debate on the lack of public participation in all areas of WTO activity, see R. Housman, *Symposium: democratizing international trade decision-making*, 27 Cornell International Law Journal (1994), pp. 699-747.

33 But see also A. von Bogdandy/I. Venzke, *In whose name? An investigation of international courts' public authority and its democratic justification*, 23 European Journal of International Law (2012), pp. 7-41; With respect to the political legitimacy of subsystems, see R. Reusch, *supra* note 27; R. Howse, *supra* note 10, pp. 496-497.

34 R. Wolfrum, *Legitimacy of international law from a legal perspective: some introductory considerations*, in: R. Wolfrum/V. Röben (Eds.), *Legitimacy in international law*, Berlin 2008, p. 6; A. Voßkuhle/G. Sydow, *Die demokratische Legitimation des Richters*, 57 Juristische Zeitung (2002), pp. 673-682. For this and other, including positivist definitions of legitimacy, see R. Reusch, *supra* note 27, pp. 35-36; H. Kelsen, *Principles of international law*, New York 1952.

(disputed) fact pattern, adjudication squarely falls within this category.<sup>35</sup> The legitimacy of adjudication is generally seen to depend on two pillars: the selection of an impartial, independent and knowledgeable adjudicator and the creation of an adequate procedure that permits participation of all those affected by a decision. In international law, in addition, traditionally legitimacy stems from a state's voluntary submission to a court's jurisdiction as expressed by the principle of consent.<sup>36</sup> If duly exercised, these pillars secure a final rational decision that is accepted by those addressed and affected by it.<sup>37</sup>

Legitimacy considerations with respect to *amicus curiae* address procedural and substantive legitimacy. Procedural legitimacy (or input legitimacy) demands that judges decide on the basis of the applicable law, give the parties adequate opportunity to argue their case, respect basic considerations of due process and fair trial and give those affected by a decision the opportunity to participate.<sup>38</sup> Substantive (or output) legitimacy relates to the quality of the decision rendered by an international court or tribunal.

The argument for a procedural legitimacy deficit builds on the same structure as the argument for representation of the public interest: international courts are increasingly called upon to determine the legality with international law of domestic regulatory measures on issues of general public interest in a binding and final manner.<sup>39</sup> Related hereto is the concern that these decisions often directly or indirectly affect entities without

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35 A. Voßkuhle/G. Sydow, *supra* note 34, pp. 674-675. On why the WTO dispute settlement system falls hereunder even though the DSB adopts the reports, see R. Reusch, *supra* note 27, pp. 61, 123-124.

36 R. Reusch, *supra* note 27, pp. 202-236.

37 D. Esty, *We the people: civil society and the World Trade Organization*, in: M. Bronckers/R. Quick (Eds.), *New directions in international economic law – essays in honour of John H. Jackson*, The Hague 2000, p. 92 ('The ongoing legitimacy of the WTO depends on the public perception that its decisions are based on sound logic, not whim or special interest pressures.');

G. Van Harten, *supra* note 18, p. 159.

38 R. Reusch, *supra* note 27, pp. 202-236; R. Wolfrum, *supra* note 34, p. 6; R. Howse, *supra* note 18, p. 42 (*Howse* argues that at a minimum level it suffices to establish publicity so that those affected can understand how they are affected and on what basis the outcome was achieved.); M. Slotboom, *supra* note 27, p. 99. See also N. Luhmann, *Legitimation durch Verfahren*, 2<sup>nd</sup> Ed., Frankfurt a.M. 1989.

39 R. Wolfrum, *supra* note 34, p. 6; A. von Bogdandy/I. Venzke, *supra* note 33, p. 31; B. Choudhury, *Recapturing public power: is investment arbitration's engagement of the public interest contributing to the democratic deficit?*, 41 *Vanderbilt Journal*

standing, hence, without the ability to defend their position in court.<sup>40</sup> Both *Rosenne* and *Brownlie* have called for a formal right of individuals to be heard in cases affecting their legal rights before the ICJ.<sup>41</sup>

There is an additional layer of concerns connected to the legitimacy of the adjudicators as the following statement by *Choudry* concerning investment arbitration shows:

Public interest regulations are promulgated by elected officials to protect the welfare of the state's citizens and nationals. Thus, interference with these regulations by unelected and unappointed arbitrators is not consistent with basic principles of democracy. ... [C]orrecting the democratic deficit ... involves concepts of legitimacy, which requires the inclusion of core democratic values in the investment arbitration process. Thus, public participation in the decision-making process should be encouraged on the part of stakeholders whose interests may not be adequately represented by a member state.<sup>42</sup>

The view is that because adjudicators are so far removed from those they ultimately adjudicate upon (under novel concepts: individuals) and states increasingly transfer powers to international organizations (and thus potentially to international adjudication), international judges' democratic le-

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of Transnational Law (2008), p. 775; E. Levine, *supra* note 3, p. 205; T. Ishikawa, *supra* note 26, p. 399; J. Dunoff, *supra* note 27, pp. 733, 758 (A general contention is that WTO rules unduly restrict the regulatory capacities of states, which is particularly problematic if they affect the ability of states to enact laws that reflect the democratic will of their people); S. Joseph, *supra* note 10, p. 314; D. McRae, *supra* note 25, p. 21.

40 A. von Bogdandy/I. Venzke, *supra* note 33, p. 36.

41 S. Rosenne, *Reflections on the position of the individual in inter-state litigation*, in: P. Sanders (Ed.), *International arbitration – liber amicorum for Martin Domke*, The Hague 1967, reprinted in: S. Rosenne, *An international law miscellany*, Dordrecht 1993, p. 123; I. Brownlie, *The individual before tribunals exercising international justice*, 11 *International and Comparative Law Quarterly* (1962), p. 716 ('Even if the individual is not to be given procedural capacity a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure.' [References omitted]).

42 B. Choudhury, *supra* note 39, p. 782 and 807-808 [References omitted]. See also J. Atik, *Legitimacy, transparency and NGO participation in the NAFTA Chapter 11 process*, in: T. Weiler (Ed.), *NAFTA investment law and arbitration: past issues, current practice, future prospects*, New York 2004, pp. 136, 138; C. Tams/C. Zoellner, *supra* note 28, p. 225; D. Esty, *supra* note 37, p. 90; M. Laidhold, *Private party access to the WTO: do recent developments in international trade dispute resolution really give private organizations a voice in the WTO?*, 12 *The Transnational Lawyer* (1999), pp. 432-433.

gitimization, which is exercised through national election processes, is too remote to justify the exercise of authority without additional mechanisms of civic participation. Lack of broad public support, it is argued, may compromise the validity and the legitimacy of decisions.<sup>43</sup>

*Amicus curiae* participation is said to improve the acceptance and credibility of proceedings by guaranteeing public input and the adequate presentation of all of the interests involved.<sup>44</sup> By inviting *amici curiae* with a stake in one of the (unrepresented) issues to partake in disputes where global values clash, international courts and tribunals can increase proce-

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43 D. Esty, *supra* note 37, p. 89; R. Reusch, *supra* note 27, pp. 126-127. R. Howse, *How to begin to think about the “democratic deficit at the WTO”*, in: R. Howse (Ed.), *The WTO system: law, politics and legitimacy*, London 2007, pp. 57-75. For a definition of ‘democratic values’, namely inclusiveness, transparency and value pluralism, see S. Joseph, *supra* note 10, p. 316.

44 R. Higgins, *Remedies and the International Court of Justice: an introduction*, in: M. Evans (Ed.), *Remedies in international law*, Oxford 1998, p. 1; C. Chinkin/R. Mackenzie, *supra* note 32, p. 137; E. De Brabandere, *NGOs and the „public interest“ – the legality and rationale of amicus curiae interventions in international economic and investment disputes*, 12 *Chinese Journal of International Law* (2011), pp. 85-113; C. Tams/C. Zoellner, *supra* note 28, p. 238; T. Zwart, *Would international courts be able to fill the accountability gap at the global level?*, in: G. Anthony et al. (Eds.), *Values in global administrative law*, Oxford 2011, p. 212. In the context of the WTO, see: G. Umbricht, *supra* note 3, p. 783; D. Esty, *supra* note 37, p. 90; R. Howse, *supra* note 18, p. 40 (‘[E]ven from an internal perspective of effective ‘regime management’, there is an urgency to seek a new basis for the ‘social legitimacy’ of dispute settlement outcomes, a basis sensitive to the concern of critics or sceptics concerning the project of global economic liberalism that the whole undertaking of international trade law is tilted towards the privileging of free trade against other competing, relevant values of equal or greater legitimacy in themselves.’); N. Blackaby/C. Richard, *Amicus curiae: a panacea for legitimacy in investment arbitration?*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 269 (‘Considering that public participation is at the heart of democratic processes, it is assumed that increased civil society participation will enhance the legitimacy and acceptance of the system.’ [References omitted]. The basis of this argument is fragile. It presumes that the specific *amicus curiae* fulfils the requirements of a legitimate representative of public interests (see also Chapters 5 and 8)); A. von Bogdandy/I. Venzke, *supra* note 33, p. 29 (‘[*Amici curiae*] may bridge the gap between the legal procedures and a global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalization that contribute to discussions and mobilize the general public.’).

dural legitimacy.<sup>45</sup> Crawford and Marks see 'the vastly enhanced participation in recent years of non-governmental organizations at the international level [as] one indication of the pressures and possibilities for democracy in global decision-making.'<sup>46</sup> Similarly, then-WTO Director-General Lamy considered the admission of *amici curiae* a recognition of the importance of the views of civil society in WTO adjudication.<sup>47</sup> A group of Tanzanian and international NGOs argued as follows in their request to be admitted as *amici curiae* in *Biwater v. Tanzania*:

Finally, the petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public, which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context.<sup>48</sup>

Further, the instrument is seen as a link between international courts and the individual.<sup>49</sup> The argument is that *amicus curiae* participation will inform the wider public of ongoing proceedings that may have a significant impact on the economy of their state and important public interests and, in

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45 L. Boisson de Chazournes, supra note 11, pp. 333-336; F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, p. 29.

46 J. Crawford/S. Marks, *The global democracy deficit: an essay on international law and its limits*, in: D. Archibugi/D. Held/M. Köhler (Eds.), *Re-imagining political community*, Stanford 1998, p. 83. See also S. Joseph, supra note 10, pp. 316, 327; R. Howse, supra note 43, pp. 57-75.

47 P. Lamy, *Towards global governance? Speech of 21 October 2005*, Master of Public Affairs Inaugural Lecture at the Institut d'Etudes Politiques de Paris, at: [https://www.wto.org/english/news\\_e/sppl\\_e/sppl12\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl12_e.htm) (last visited: 28.9.2017).

48 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 24. See also D. Esty, supra note 37, p. 93 (He goes further by requesting that NGOs should be granted permission to observe the parties' presentations to panels, as well as obtain immediate access to all written submissions.)

49 Three days after the panel's decision in *US-Shrimp* that it lacked power to accept *amicus curiae* briefs, then-US President Bill Clinton endorsed *amicus* participation in the WTO dispute settlement system: 'Today, there is no mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file 'amicus briefs,' to help inform the panels in their deliberations.' Statement by H.E. Mr. William J. Clinton in Geneva on the Occasion of the 50<sup>th</sup> Anniversary of GATT/WTO, 18 May 1998, para. 108.

return, that *amici* will report the public's views back to the tribunal.<sup>50</sup> This may contribute to repealing notions of 'secret trade courts' that may force governments in the long run to seek other dispute resolution mechanisms. The admission of *amicus curiae* is presented as *sine qua non* for the continued existence of international judicial dispute settlement.

The substantive legitimacy of a decision is said to be enhanced by taking these arguments seriously and thereby rendering a more informed decision of better quality and free from error.

In short, *amicus curiae* is seen to improve adjudicatory legitimacy in the following ways: first, as an instrument to ensure procedural legitimacy by allowing those affected by a decision to become involved in the proceedings and as a tool to increase the public acceptance of international dispute settlement; second, as an instrument to increase the substantive legitimacy of a decision by providing the tribunal with all information necessary to render a fully-informed decision.

#### IV. Contribution to the coherence of international law

International law enjoys generally low levels of coherence because of its lack of a central legislature and its inter-subjective character. Often, courts

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50 E. Triantafilou, *Amicus submissions in investor state arbitration after Suez v. Argentina*, 24 *Arbitration International* (2008), p. 575 ('[A] transparent arbitral process allows citizens to monitor actively the conscientiousness of the government's representatives in protecting the rights of the public and ensuring the sound disbursement of public money.');

M. Brus, *Third party dispute settlement in an interdependent world: developing a theoretical framework*, Dordrecht 1995, pp. 229-230 ('Involvement of non-state actors is particularly suitable for the upgrading of the community interest through participation in informal decision-making. Their expertise, creativity and critical attitude is an incentive for states not to lose sight of the common interest.'). According to a study on NGO involvement in international law, NGO participation may promote legitimacy by way of monitoring the process and communicating its results to the relevant constituencies and by acting as a channel of information between decision makers and constituencies. See S. Charnovitz, *Nongovernmental organizations and international law*, 100 *American Journal of International Law* (2006), pp. 348-372. This view has found some reflection in environmental treaties. See *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/Conf.151/5/rev (1992); *Agenda 21*, UNCED, Annex II, UN Doc. A/CONF151/26/Rev (1992).

are given the role of 'agents of legal unity.'<sup>51</sup> The significant growth in number of international courts and tribunals since the early 1990 has raised concerns over an increasing fragmentation of international law in the absence of formal precedent and the lack of a coordinating judicial system.<sup>52</sup> Concerns are amplified by the fact that many courts form part of powerful subsystems of international law with potentially competing values.<sup>53</sup> The phenomenon as such has been analysed in depth elsewhere.<sup>54</sup> Of relevance for this contribution is the concern that different international

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- 51 Y. Shany, *The competing jurisdictions of international courts and tribunals*, Oxford 2003, p. 114.
- 52 Rejecting the notion of an international judicial system, Y. Shany, *supra* note 51, pp. 104-110.
- 53 See Y. Shany, *supra* note 51, pp. 87-104, 113-114 (While we can speak of a system of international law from which no subsystem can isolate itself as a 'self-contained regime' if it wishes to fulfil its constituent's legitimate expectations and avoid being perceived as 'unduly biased towards a particular political agenda', there is no such correlating system with respect to international courts.).
- 54 The WTO Appellate Body in *US–Stainless Steel* found that it was obliged to follow earlier decisions due to its obligation under Article 3(2) DSU to ensure security and predictability in the WTO dispute settlement system. See *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (hereinafter: *US–Stainless Steel*), Report of the Appellate Body, adopted on 20 May 2008, WT/DS344/AB/R, p. 67, para. 160. See also *Saipem S.p.A. v. the People's Republic of Bangladesh*, Decision, 21 March 2007, ICSID Case No. ARB/05/07, para. 67 ('[The Tribunal] believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.' [References omitted]); H. Lauterpacht, *The so-called Anglo-American and continental schools of thought in international law*, 12 *British Yearbook of International Law* (1931), p. 53. Regarding the proliferation of international courts and tribunals, see E. Lauterpacht, *Principles of procedure in international litigation*, 345 *Receuil des Cours* (2009), p. 527; J. Charney, *The impact on the international legal system of the growth of international courts and tribunals*, 31 *NYU Journal of International Law and Politics* (1999), p. 697; C. Brown, *A common law of international adjudication*, Oxford 2007, p. 16; C. Brown, *The cross-fertilization of principles relating to procedure and remedies in the jurisprudence of international courts and tribunals*, 30 *Loyola of Los Angeles International and Comparative Law Review* (2008), pp. 219-220; G. Hafner, *Risks ensuing from the fragmentation of international law*, in: *International Law Commission, Work of its Fifty-Second Session*, UN Doc. A/55/10, para. 143; International Law Commission, *Fragmentation of international*

courts or tribunals may arrive at diverging, even opposing decisions in cases with comparable or identical fact patterns.<sup>55</sup> The fear is that if this were to occur regularly, international law might lose its normative force, as well as compromise the credibility, effectiveness and legitimacy of international adjudication.<sup>56</sup> This has prompted calls for subsystems of international law to ‘evolve and be interpreted consistently with international law’ and for the courts pertaining to such subsystems to strive to ensure uniform application and interpretation of international law.<sup>57</sup> In this vein, courts are requested to give greater weight to the pertinent case law of other international courts and tribunals despite the absence of binding precedent in international law.<sup>58</sup>

By providing cross-references to and analysis of the case law and views of other international courts and tribunals, *amici curiae*, it is argued, can

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*law: difficulties arising from the diversification and expansion of international law*, UN Doc. A/CN.4/L.682, 13 April 2006; R. Jennings, *The role of the International Court of Justice*, 68 *British Yearbook of International Law* (1997), p. 60; R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 *International and Comparative Law Quarterly* (2001), p. 122. Disputing that fragmentation is problematic, see T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvart (Ed.), *Yearbook of International Investment Law and Policy* (2008-2009), pp. 508-509, 516-521.

55 On these conflicts, which Treves calls jurisprudential conflicts, see T. Treves, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 *NYU Journal of International Law and Politics* (1999), pp. 809-821. Regarding parallel jurisdiction, see H. Sauer, *Jurisdiktionskonflikte im Mehrebenensystem: Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen*, Berlin 2008; Y. Shany, *supra* note 51.

56 L. Helfer/ A. Slaughter, *Toward a theory of effective supranational adjudication*, 107 *Yale Law Journal* (1997), pp. 374-375; S. Franck, *The legitimacy crisis in investment arbitration: privatizing public international law through inconsistent decisions*, 73 *Fordham Law Review* (2005), p. 1523. According to Kelsen, the principle of non-contradiction is part of the basic norm of a legal system, H. Kelsen, *General theory of law and state*, Cambridge 1949, p. 406.

57 A. van Aaken, *Fragmentation of international law: the case of international investment protection*, 17 *Finnish Yearbook International Law* (2006), p. 91. See also Y. Shany, *One law to rule them all: should international courts be viewed as guardians of procedural order and legal uniformity?*, in: O. Fauchald/A. Nollkaemper (Eds.), *The practice of international courts and the (de-)fragmentation of international law*, Oxford 2012, p. 15.

58 Y. Shany, *supra* note 51, p. 110.

inform the deciding international court or tribunal of the legal interpretation of a norm by other international courts or tribunals, encourage inter-judicial dialogue and draw attention to potential jurisprudential conflicts.<sup>59</sup> This, of course, presupposes willingness on the part of international courts and tribunals to take into consideration the decisions of other international courts and tribunals given the absence of *stare decisis*.<sup>60</sup>

## V. Increased transparency

Most international courts and tribunals provide to the public, with varying frequency and at different times, information and documents on pending and concluded cases. In particular, investment tribunals and the WTO dispute settlement institutions are criticized for lack of transparency in their proceedings and decision-making despite efforts towards greater transparency.<sup>61</sup>

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59 Mackenzie and Chinkin consider it an option for an international court to submit *amicus* briefs on an issue of law it has decided to a court dealing with the same issue to avoid fragmentation. See C. Chinkin/ R. Mackenzie, *supra* note 32, p. 159; V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 *Vanderbilt Journal of Transnational Law* (2015), p. 1338; Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 821 (On *amici curiae*: 'Their goal, however, is to introduce public interest considerations into the decision – and indirectly, to impact the development of international law – rather than to affect the outcome of the specific case.')

60 This does not seem to be a problem. See E. Lauterpacht, *supra* note 54, pp. 527-528; J. Charney, *Is international law threatened by multiple international tribunals?*, 271 *Receuil des Cours* (1998), pp. 101-373. See also H. Lauterpacht, *The development of international law by the International Court*, London 1958, p. 14 ('The Court follows its own decisions ... , because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and ... because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.'). Less hopeful, N. Rubins, *Opening the investment arbitration process: at what cost, for what benefit?*, in: R. Hofmann/C. Tams (Eds.), *The International Convention on the Settlement of International Disputes (ICSID): taking stock after 40 years*, Baden-Baden 2007, p. 217.

61 D. McRae, *supra* note 25, p. 12 ('Lack of transparency is a critical issue for the credibility of the WTO dispute settlement system.');

C. Knahr/A. Reinisch, *Trans-*

The understanding of the term transparency varies. Here, the definition adopted by *Asteriti* and *Tams* is followed. Accordingly, transparency is the availability of information about the proceedings, whereas confidentiality describes the restriction of information about the proceedings to the parties. Correlatively, privacy describes limitation of access to the proceedings, whereas inclusiveness describes access to the proceedings to entities other than the parties.<sup>62</sup>

Investment tribunals specifically have come under pressure for ‘obsessive secrecy’ of proceedings resulting from the use of confidentiality-focused commercial arbitration rules in investment treaty arbitrations.<sup>63</sup> Critics have gone so far as to predict an end of investment arbitration due to its opacity.<sup>64</sup> Claims for increased transparency are justified on the same basis as those pertaining to the inclusion of public interest considerations.

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*parency versus confidentiality in international investment arbitration – The Biwatter Gauff compromise*, 6 *The Law and Practice of International Courts and Tribunals* (2007), p. 97. See also J. Lacarte, *Transparency, public debate and participation by NGOs in the WTO: a WTO perspective*, 7 *Journal of International Economic Law* (2004), pp. 685-686 (He proposes alternative mechanisms, such as the creation of an Advisory Economic and Social Committee composed of NGOs, which would make recommendations on WTO reform to the membership. Alternatively, he favours a stronger involvement of parliamentarians.).

62 A. Asteriti/C. Tams, *Transparency and representation of the public interest in investment treaty arbitration*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, pp. 787-816. A broader definition including opportunities for participation, awareness of and access to the dispute settlement process is proposed by L. Chin Leng, *The amicus brief issue at the WTO*, 4 *Chinese Journal of International Law* (2005), p. 86. See also N. Blackaby/C. Richard, *supra* note 44, p. 256.

63 J. Atik, *supra* note 42, p. 148; N. Blackaby/C. Richard, *supra* note 44, p. 253; T. Wälde, *supra* note 54, p. 550, FN 139. Of certain fame is a quote from a NYT article from A. De Palma, *NAFTA's powerful little secret: Obscure tribunals settle disputes, but go too far, critics say*, *The New York Times*, 11 March 2001 (‘[Their] meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations changed. And it is all in the name of protecting the rights of foreign investors under the North America Free Trade Agreement.’).

64 A. Mourre, *supra* note 23, p. 266 (‘If the worries of the public are not properly addressed, States will step back from arbitration, and there is a risk that investors will, one day, be sent back to the old and ineffective mechanism of diplomatic protection.’).

The instrument is presented as an agent of increased transparency together with other mechanisms, such as publication of judgments and awards.<sup>65</sup> In several investment arbitration cases, *amicus curiae* applicants opined that their participation would 'allay public disquiet as to the closed nature of arbitration proceedings.'<sup>66</sup> It is argued that enhanced *amicus curiae* participation may educate the public about international dispute settlement, which in turn may increase its acceptance.<sup>67</sup> Sporadically, doubts have been raised as to whether the instrument truly supports transparency. *Amici curiae* seek not merely to obtain information about the proceedings, but to participate in them. Given the amount of negative reactions this has generated in the WTO, *McRae* views *amicus curiae* as a roadblock to transparency.<sup>68</sup> In how far this is the case will be examined. Certainly, the instrument is dependent on transparency as the joint *amicus curiae* submission of the IISD and Earthjustice in *Methanex v. USA* shows. After the parties consented to open their proceedings to the public, the *amici curiae* realized that the respondent USA was defending the measures adopted against MTBE only on the basis of public health. They (unsuccessfully) petitioned the tribunal for permission to submit a post-hearing brief to argue that the measure also should be regarded as furthering environmental objectives.<sup>69</sup>

### B. Presumed drawbacks

Despite its potential advantages, the admission of *amici curiae* to international proceedings entails risks. Especially states have expressed concerns

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65 Other tools to increase transparency include public registration of a case; publication of awards, submissions, decisions and case files; opening of hearings; and publication of interpretative notes. C. Knahr/A. Reinisch, *supra* note 61, p. 97.

66 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001, para. 5. See also *UPS v. Canada*, Petition by the Canadian Union of Postal Workers and the Council of Canadians, 17 October 2001, para. 3 (ii).

67 G. Umbricht, *supra* note 3, p. 783; C. Tams/C. Zoellner, *supra* note 28, p. 237.

68 D. McRae, *supra* note 25, p. 17. Critical also C. Brower, *Structure, legitimacy and NAFTA's investment chapter*, 36 *Vanderbilt Journal of Transnational Law* (2003), pp. 72-73.

69 K. Tienhaara, *Third party participation in investment-environment disputes: recent developments*, 16 *Review of European Community Law and International Environmental Law* (2007), p. 240.

with regard to the concept. They fear *inter alia* additional practical burdens (I.); a curtailing of the parties' procedural rights (II.); a politicization of disputes (III.); additional burdens on developing countries (IV.); unmanageable quantities of submissions (V.); and a denaturing of the judicial function (VI.).

## I. Practical burdens

*Amicus curiae* participation could entail practical burdens on the disputing parties and the court.<sup>70</sup> The concerns are largely twofold: *amici curiae* can cause a considerable increase in costs resulting from the parties' need to review and possibly respond to briefs.<sup>71</sup> Further, *amici curiae* may cause a significant delay in the proceedings, as international courts and tribunals need to add additional procedures and accommodate the parties' right to comment. In extreme cases, courts may feel the need to conduct an additional round of submissions on the issues raised in an *amicus curiae* brief.

## II. Compromising the parties' rights

States have expressed concern that *amicus curiae* participation may also affect their procedural rights and their position in the proceedings.<sup>72</sup> These concerns must be taken seriously, because the violation of fundamental procedural rights by a tribunal may affect the validity of a judgment, award or decision. International courts and tribunals must apply standards that will ensure that the enforcement of a judicial decision is not at risk.<sup>73</sup>

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70 E. Levine, *supra* note 3, p. 219.

71 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Mexico, para 51.

72 See also A. Bianchi, *supra* note 26, p. xxii ('[I]n certain particular contexts, the increasing involvement of civil society groups and professional associations can be perceived by the 'users' of judicial mechanisms as an undue interference, and, potentially, a disruptive element in the complex process of interest-accommodation that third party settlement inevitably entails.').

73 M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2<sup>nd</sup> Ed., Oxford 2010, p. 1 ('Making certain the award is enforceable is one of the most central duties of the arbitral tribunal.'). A violation of equality of arms can

One concern is obvious: the presentation of submissions in favour of one party may risk tilting the delicate procedural equality of the parties. It will be shown later that virtually all international courts and tribunals permit *amicus curiae* submissions to argue for or against a party. Further, it is common practice before WTO panels, the Appellate Body, investment tribunals and the ECtHR that the parties endorse arguments made by *amici curiae* without formally adopting them as their own.<sup>74</sup> Referring to the intense public campaigning by the *amicus curiae* applicants in and outside the proceedings against the claimant in *Biwater v. Tanzania*, a water-privatization-related investment dispute, Wälde argued that the risk of material inequality is real: 'Amicus briefs can ... directly or indirectly impugn the investor or the social acceptability of the investor's conduct, without supplying evidence or being subjected to cross-examination.'<sup>75</sup> This can entail a substantial financial and time burden for the claimants, as they must defend themselves against the respondent and the *amicus curiae* in and out of the proceedings. The possible inequality created by this additional support may be occasional or, where *amici curiae* tend to support one of the sides, structural.

Moreover, international courts and tribunals have explicitly acknowledged an obligation to resolve disputes in a speedy manner.<sup>76</sup> This issue has frequently been thematized in WTO dispute settlement. Article 12(2)

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lead to annulment of an award pursuant to Article 52 ICSID Convention as a serious departure from a fundamental rule of procedure.

74 E.g. *Kress v. France* [GC], No. 39594/98, 7 June 2001, ECHR 2001-VI; *Glamis Gold Limited v. United States of America* (hereinafter: *Glamis v. USA*), Respondent's submission on Quechan application, 15 September 2005. The USA supported the admission of the Quechan's submission, which argued that the California and federal governments' measures did not violate the BIT.

75 T. Wälde, *Equality of arms in investment arbitration: procedural challenges*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements: a guide to the key issues*, New York 2010, p. 178 [Emphasis added]; A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements*, New York 2010, pp. 145-147.

76 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, Judgment, 5 February 1970, ICJ Rep. 1970, p. 31, para. 27 ('[The Court] remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.'). B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, p. 295 ('[There is a] public need that there

DSU determines that ‘panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process.’<sup>77</sup> These obligations may be compromised if *amicus curiae* submissions are made and accepted late in the proceedings or if submissions are extremely long or numerous.

### III. Politicization of disputes, de-legitimization and lobbying

Many WTO member states in reaction to the admission of *amici curiae* expressed the concern that matters not addressed in the WTO Agreements such as the environment, social or labour issues would suddenly be discussed in the realm of dispute settlement proceedings and disrupt the carefully negotiated trade system, provoke a clash of legal cultures and create additional burdens for already under-resourced developing countries.<sup>78</sup> Faced with hundreds of letters and submissions from individuals and non-governmental entities in *Nuclear Weapons* – which had been brought to the ICJ by the General Assembly after intense lobbying by NGOs – Judge *Guillaume* expressed his discontent by arguing that states and intergovernmental organizations required protection against ‘powerful pressure groups which besiege them today with the support of the mass media.’<sup>79</sup>

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should be an early settlement of all disputes ..., not to mention the consideration that time-limits once set should in principle be observed.’); A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 32.

77 See also *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 105; *United States – Tax Treatment for “Foreign Sales Corporations”* (hereinafter: *US–FSC*), Report of the Appellate Body, adopted on 20 March 2000, WT/DS108/AB/R, para. 166 (‘The procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes.’).

78 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Brazil, para. 46 (‘[T]he dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism.’); WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Costa Rica, para. 70; G. Umbricht, *supra* note 3, pp. 773, 781, 787-788 (He considers the debate partly a clash of legal cultures. But this does not explain why except for the USA and the EU all WTO members have rejected *amicus curiae*.)

79 *Legality of the Threat or Use of Nuclear Weapons* (hereinafter: *Nuclear Weapons*), Advisory Opinion, 8 July 1996, Sep. Op. Judge Guillaume, ICJ Rep. 1996, p. 287.

The matter is exacerbated by transparency measures, which may prompt disputing governments to emphasize their national (protectionist) interests and refute attempts at negotiated settlements in an effort to save face and secure constituents' votes in the next national elections.<sup>80</sup> Brühwiler argues that this concern cannot be attributed to *amicus curiae*, because it is not the *amicus* submission that politicizes the dispute settlement system. The subject matter of the dispute attracts *amici curiae*.<sup>81</sup> Nonetheless, the information contributed by an *amicus*, as well as the manner in which it is presented may put a spotlight on politically sensitive aspects of the dispute which the parties did not intend to bring before the international court or tribunal (and which may not fall under its material jurisdiction).

Related hereto is the concern that the instrument further delegitimizes rather than legitimizes international dispute settlement.<sup>82</sup> It is said that especially financially powerful *amici curiae*, including foreign governments with different policies, might derail the proceedings with a hidden agenda. It is no secret that NGOs and other entities seek to push their own agendas through *amicus curiae* participation. Cases are chosen not solely for the interests engaged, but for the impact (and other benefits) *amici curiae* calculate generating through their participation.<sup>83</sup> Many NGOs do not seek to defend a public interest or common good, but an exclusive interest held by a few. Merely by powerful appearance and the presentation of 'the' (alleged) public interest, international courts and tribunals may be captured by the interest-groups' own interests without these interests necessarily

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80 P. Nichols, *Extension of standing in World Trade Organization disputes to non-government parties*, 17 University of Pennsylvania Journal of International Economic Law (1996), p. 314 (Arguing that granting of standing, as a stronger measure, would expose international dispute settlement to protectionist pressures, especially from interest groups.).

81 C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 376.

82 Some argue that *amici curiae* should not be burdened with any additional requirements given their awareness raising function, which, in the view of some, is separate from representation. Others, in turn, demand that *amici* fulfil a set of criteria and doubt that *amici curiae* can act as legitimate representatives on the international level. See P. Spiro, *Accounting for NGOs*, 3 Chicago Journal of International Law (2002), pp. 161, 163; J. Dunoff, *supra* note 27, p. 438.

83 J. Cassel, *supra* note 4, pp. 113, 115; J. Viñuales, *supra* note 9, p. 75. Private entities dependent on public financing typically compete for public support. See S. Charnovitz, *supra* note 27, p. 363.

equalling those of the group they claim to represent.<sup>84</sup> Further, ‘certain interests [may] exert disproportionate influence.’<sup>85</sup> Commentators agree that this risk is one pertaining largely to NGOs and their frequent lack of accountability and representativeness including towards the community whose values and interests they purport to represent.<sup>86</sup> Bolton even argues that ‘the civil society idea actually suggests a “corporativist” approach to international decision-making that is dramatically troubling for democratic theory because it posits “interests” (whether NGO or businesses) as legitimate actors along with popularly elected governments.’<sup>87</sup> And Blackaby and Richard argue in relation to the admission of an US-based *amicus curiae* in *Biwater v. Tanzania*:

The representative character and the source of the legitimacy of civil society groups seeking to submit *amicus curiae* briefs appear to be a common assumption. Yet the assumption may be flawed: how is, for example, a Washington-based NGO representative of Tanzanian civil society, and how is it best placed to advocate the interests of the Tanzanian people? Surely the state-party to the arbitration, if democratically elected, has far more legitima-

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- 84 J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), p. 1363, FN 134. See also M. Schachter, *supra* note 5, pp. 116-117 (‘As an advocacy mechanism, [*amicus curiae*] is generally less expensive than lobbying efforts or the mounting of an extensive publicity campaign. *Amicus* participation is also less costly than the initiation of a separate lawsuit by the interested party.’).
- 85 A. Reinisch/C. Irgel, *The participation of non-governmental organizations (NGOs) in the WTO dispute settlement system*, 1 Non-State Actors and International Law (2001), p. 130.
- 86 C. Brower, *supra* note 68, p. 73 (‘[M]any NGOs have very specific agendas and are not accountable to their own members, much less to the general public.’ [References omitted].); R. Keohane, *Global governance and democratic accountability*, in: R. Wilkinson (Ed.), *The global governance reader*, London 2005, p. 148 (‘[NGO’s] claims to a legitimate voice over policy are based on the disadvantaged people for whom they claim to speak, and on the abstract principles that they espouse. But they are internally accountable to wealthy, relatively public-spirited people in the United States and other rich countries, who do not experience the results of their actions. Hence, there is a danger that they will engage in symbolic politics, satisfying to their internal constituencies but unresponsive to the real needs of the people whom they claim to serve.’).
- 87 J. Bolton, *Should we take global governance seriously?*, 1 Chicago Journal of International Law (2000), p. 218.

cy to represent its constituents than unaccountable (and sometimes foreign) NGOs?<sup>88</sup>

In the WTO and investment arbitration, the concern over interest capture appears to be amplified by the fact that some view NGOs as striving to inscribe intrusive labour and environmental standards into the rule-book to reduce trade liberalization and the amount of foreign direct investment in developing countries.<sup>89</sup> Indeed, NGOs have publicly argued that *amicus curiae* participation before international courts and tribunals is an effective way to create publicity for the issues on their agenda and to push for novel interpretations.<sup>90</sup> In addition, it is feared that *amici curiae* may be partial towards one of the parties having received financial or other support from them, or that they lack the necessary expertise and experience regarding the issues commented on.

#### IV. Overwhelming developing countries

Another concern, which is mainly held by developing countries, is that most *amicus curiae* participants are well-funded Western non-governmental organizations.<sup>91</sup> It is assumed that they will largely oppose arguments presented by less developed or less affluent countries creating additional burdens for them and thereby deepening the structural inequality between the parties.<sup>92</sup> *Marceau* and *Stilwell* argue in respect of WTO practice:

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88 N. Blackaby/C. Richard, *supra* note 44, p. 269 [Emphasis added and references omitted].

89 P. Ala'ri, *Judicial lobbying at the WTO – the debate over the use of amicus curiae briefs and the U.S. experience*, 24 *Fordham International Law Journal* (2000), pp. 62-94.

90 J. Cassel, *supra* note 4, p. 116 ('A further reason why CIEL has chosen to petition the IACHR is that CIEL believes that such petitions can create publicity – and therefore increased awareness – of the link between human rights and the environment.').

91 H. Pham, *Developing countries and the WTO: the need for more mediation in the DSU*, 9 *Harvard Negotiation Law Review* (2004), pp. 350-351 (For developing countries, *amicus curiae* participation is one of the three most problematic issues concerning the DSU reform.).

92 S. Joseph, *supra* note 10, p. 321; D. McRae, *supra* note 25, p. 12; B. Stern, *The emergence of non-state actors in international commercial disputes through WTO Appellate Body case-law*, in: G. Sacerdoti et al. (Eds.), *The WTO at ten: the contribution of the dispute settlement system*, Cambridge 2006, p. 382 (*Stern* worries

NGOs participating as *amici* have often represented, directly or indirectly, commercial interests. This fact concerns many WTO members, which believe that participation of *amici* will further shift the balance of WTO dispute settlement towards developed countries, their NGOs and their multinational corporations.<sup>93</sup>

## V. Unmanageable quantities of submissions

Another concern is that international courts and tribunals will be flooded by numerous submissions many of which will not be of any assistance, but instead will hinder the court or tribunal in the exercise of its judicial mandate. This was one of the reasons for the ICJ's refusal to accept *amici curiae* in *South West Africa* (see Chapter 5).

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that some states could take advantage of *amicus curiae*: 'Even among the countries of the North, the unlimited acceptance of *amicus curiae* briefs would probably favour, in particular, the larger international NGOs, most of which would appear to be of American origin, as well as the extremely well-organized and powerful US lobbies. ... [I]t seems very likely that if there were unlimited authorization to file *amicus curiae* briefs, the big winner, in terms of relative influence, would be the United States.' However, see C. Brühwiler, *supra* note 81, p. 370 ('In cases touching upon environmental or public health issues, *amici curiae* can indeed be termed as foes of developing countries – meaning their governments – as NGOs operating in these fields have defended conservatory policies they consider necessary, but which violated WTO agreements. At the domestic level, however, the same entities regularly represent interests that conflict with their government's programme: these NGOs engage for global issues and are not mere advocates of any governments.' She admits that the majority of *amicus* submissions stems from NGOs situated in developed countries.). See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Costa Rica, para. 70; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by India, para. 38 ('[T]he Appellate Body's approach would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.')

93 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 *Journal of International Economic Law* (2001), p. 180 [References omitted]. See also R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 300.

## VI. Denaturing of the judicial function

This concern pertains to the separation of powers and the role of the judiciary. Courts are seized to decide concrete disputes. The participation of *amici curiae*, especially if pushing for the consideration of a broad public interest, could inject a legislative notion into the process.<sup>94</sup> In addition to having to decide the dispute between the parties, an international court or tribunal may suddenly feel pressured to accommodate the – possibly heterogeneous – interests of the public. As a result, a court might try to balance an unquantifiable number of interests, much like a legislature, and thereby lose sight of the parties before it. This risk is amplified on the international level given the absence of an international legislature to counterbalance judicial activism. While it may be valuable for a court to be aware of the broader implications of its decisions, it is questionable if the adjudication of such implications falls under its mandate. Further, the sphere of governmental responsibilities generally entails – also when appearing as a party or as an intervener (or in another capacity) – calling attention to public interest considerations.

### C. Conclusion

The dramatic growth of international courts and tribunals and the ever-increasing number of international disputes has placed international adjudication in the spotlight. *Amicus curiae* participation and all the expectations and concerns related to it must be seen as a consequence of this expanding success.

The extent to which many of the above-outlined expectations and drawbacks materialize is largely a result of the content and regulation of *amicus curiae*. These, again, often mirror the initial reception of *amicus curiae* before each of the international courts and tribunals reviewed. The following Chapter therefore addresses *amicus curiae* participation from a historical viewpoint.

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94 Regarding *amicus curiae* participation before US courts in the 1960, *Barker* noted that: 'How groups bring issues to the court is strikingly similar to the way in which they bring issues to the legislature. ... Just as group participation injects a more popular and majoritarian characteristic into the legislative process, it does the same for the judicial process.' see L. Barker, *supra* note 13, p. 62.

## Chapter § 3 An international instrument

*In common law countries, the amicus curiae brief, has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as a means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.*<sup>1</sup>

This excerpt from a letter by *Reisman* to the ICJ Registrar in the *South West Africa* advisory proceedings constitutes the first explicit request for participation as *amicus curiae* before an international court or tribunal.

Like many other procedural concepts used before international courts and tribunals, *amicus curiae* participation is a creation of national law.<sup>2</sup> It is prevalent in most common and a few civil law systems.<sup>3</sup> It is not surprising that – as in the case above – most of the initial *amicus curiae* submissions were made by entities from countries with a rich *amicus curiae* practice.<sup>4</sup> International courts and tribunals as well as *amicus curiae* peti-

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1 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (hereinafter: *South West Africa*), No. 21 (Letter from Professor W. Michael Reisman to the Registrar), Advisory Opinion, ICJ Rep. 1971, Correspondence, pp. 636-637.

2 C. Amerasinghe, *Evidence in international litigation*, Leiden 2005, pp. 24-27. For an overview over the use of national procedural law as a source for general principles of international law by international courts and tribunals, see M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 71-86.

3 See Part 18, Section 92 Rules of the Supreme Court of Canada, SOR/2002-156; Schedule 6(7), Standard directions for appeals to the New Zealand Judicature Act 1908. For *amicus curiae* in Ireland, see Irish Supreme Court decision *Iwala v. Minister for Justice*, 1 ILRM (2004), p. 27; Z. O'Brien, *Did the courts make a new friend? Amicus curiae jurisdiction in Ireland*, 7 Trinity College Law Review (2004), pp. 5-28. For the concept in the Australian legal system, see L. Willmott/B. White/D. Cooper, *Intervenors or interferers: intervention in decisions to withhold and withdraw life-sustaining medical treatment*, 27 Sydney Law Review (2005), p. 600. For analysis of *amicus curiae* in Canadian courts, see S. Menétrey, *L'amicus curiae, vers un principe commun de droit procédural?* Paris 2010.

4 See *Winterwerp v. the Netherlands*, Judgment, 24 October 1979, ECtHR Series A No. 33; *US-Shrimp*, Reports of the Panel and the Appellate Body, adopted on 6

tioners have consulted national law in their dealing with *amicus curiae* in international dispute settlement.<sup>5</sup>

It is therefore useful to take a look at the instrument before national courts (A.) before examining the development of the international *amicus curiae* (B.).

#### A. *Amicus curiae* before national courts

This section first considers the origins of *amicus curiae* (I.) followed by the concept's use in the English legal system (II.) and in the US Federal Courts and Supreme Court (III.). The study of *amicus curiae* in these two common law systems is not only exemplary for *amicus curiae* in many other common law systems, but their approaches to the instrument have significantly influenced its development in international law and have facilitated its dissemination into several civil law systems as well as transnational and supranational instruments in the course of the growing interaction of national legal systems (IV.).

#### I. The origins of *amicus curiae*

The origins of *amicus curiae* are often attributed to Roman law.<sup>6</sup> It is said that *amici curiae* 'provided information, at the court's discretion, in areas

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November 1998, WT/DS58/AB/R; *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001.

5 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001; *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 8 ('[T]he tribunal assumes that the *amicus curiae* role the Petitioners seek to play in the present case is similar to that of a friend of the court recognised in certain legal systems and more recently in a number of international proceedings.');

*Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001 (The tribunal consulted national legislation and case law on the issue of confidentiality in its decision on petitions from several non-governmental organizations to participate as *amici curiae*.).

6 For many, P. Dumberry, *The admissibility of amicus curiae briefs by NGOs in investor-states arbitration*, 1 Non-state actors and international law (2001), pp. 201-214; E. Angell, *The amicus curiae: American development of English institu-*

of law in which the courts had no expertise or information.<sup>7</sup> However, a review of the surviving accounts of Roman law indicates that no direct equivalent existed to today's concept of *amicus curiae*.<sup>8</sup>

Roman law provided an instrument with some functional similarities to *amicus curiae*: the *consilium*, which existed already in the early Roman Republic. Among the several forms of *consilia*, which translates loosely into bodies of advisers, the *consilium* that compares most closely to today's *amicus curiae* was the *consilium magistratum*. The *consilium magistratum* was an advisory body composed of eminent jurists and priests selected by the judge.<sup>9</sup> The judge, a citizen from the upper class, did not have to be and usually was not a legal professional.<sup>10</sup> Still, he was bound by law and given the application of the principle of *iura novit curia* he was expected to know the law. The judge could at his discretion seek legal advice from the *consilium magistratum* and in particular the *adsores*, the legal members of the *consilium*, to complement the parties' submissions. The permissible scope of advice covered the whole scope of judicial

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*tions*, 16 International and Comparative Law Quarterly (1967), p. 1017; J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-state actors and international law (2001), pp. 169-200; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), pp. 629-630.

7 S. Walbolt/J. Lang, *Amicus briefs: friend or foe of Florida Courts?*, 32 Stetson Law Review (2003), p. 270, quoted by M. Schachter, *The utility of pro-bono representation of US-based amicus curiae in non-US and multi-national courts as a means of advancing the public interest*, 28 Fordham International Law Journal (2004), p. 89. See also S. Krislov, *The amicus curiae brief: from friendship to advocacy*, 72 Yale Law Journal (1963), p. 694.

8 Crema argues that the designation is the product of 'a chain of erroneous citations' from the definition of *amicus curiae* in *Bouvier's Law Dictionary* (Rawle's 3<sup>rd</sup> ed.) 1914, p. 188. See L. Crema, *Tracking the origins and testing the fairness of the instruments of fairness: amici curiae in international litigation*, Jean Monnet Working Paper 09/12, 2012, pp. 7-8. However, he limits *amicus curiae* to unrequested third party participation, a limitation that is not reflected in all legal systems relying on the concept. See also, U. Kühne, *Amicus curiae*, Heidelberg 2015, pp. 25-33.

9 M. Kaser /K. Hackel, *Das römische Zivilprozessrecht*, München 1996, pp. 44, 197, 595-596. On the limited inquisitorial powers of the early Roman judge, see P. Jörs, *Geschichte und System des römischen Privatrechts*, Berlin 1927, pp. 270-271, 277.

10 Judges only adjudicated on the facts. The *praetor* determined the cause of action during his screening of the matter. O. Tellegen-Couperus, *The so-called consilium of the praetor and the development of Roman Law*, 69 Tijdschrift voor Rechtsgeschiedenis (2001), p. 11.

activity. The advice was not binding and the judge bore responsibility for his decision.<sup>11</sup> There was no mechanism for the presentation of unsolicited advice.

Throughout the Roman Empire, the institution was formalized and in the late Empire each official was supported by at least one salaried *adsector*.<sup>12</sup> The *consilium magistratum* inspired the creation by Emperor Augustus of the famous *consilium principis*, the advisory council to the emperors.<sup>13</sup> The members of the *consilium principis* were at times referred to as *amici principis*, a possible influence for today's name of the concept.<sup>14</sup> The term *amicus* was used further in official documents as an epithet of public officials such as provincial governors and procurators to indicate their status as representatives of the emperor.<sup>15</sup>

## II. *Amicus curiae* before the English courts

The English legal system was the first modern legal system to develop an *amicus curiae* practice. The first accounts of *amicus curiae* date back to

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11 See A. Berger, *Encyclopedic dictionary of Roman law*, Vol. 43, 1968.

12 It is unclear whether the *praetor* relied on the services of a legal *consilium*. Mommsen first argued that the *praetor* did not have a formal *consilium*. See T. Mommsen, *Römisches Staatsrecht I*, 2<sup>nd</sup> Ed., Leipzig 1876, pp. 293-305. His interpretation of the sources was revised in the late 19<sup>th</sup> century and remained largely uncontested. See H. Hitzig, *Die Assessoren der römischen Magistrate und Richter*, München 1893, pp. 20-21. Tellegen-Couperus' recent interpretation of three sources by Cicero indicates that in late Roman law the *praetor* decided, *inter alia*, whether a legal problem could be brought before a judge under one of the enumerated courses of action provided by Roman law. Already prior to the separation of proceedings, a form of *consilium* advised the judge during deliberations. See See O. Tellegen-Couperus, *supra* note 10, pp. 11-18.

13 The term *consilium* had further meanings. For instance, it was used to describe the regular juries of courts with jurisdiction over civil and criminal matters. See also S. C. Mohan, *The amicus curiae: friends no more?*, Singapore Journal of Legal Studies (2010), pp. 360-364.

14 S. Menétrey, *supra* note 3, p. 23; J. Crook, *Consilium principis – imperial councils and counsellors from Augustus to Diocletian*, Cambridge 1955, pp. 21, 26-27, 29-30.

15 J. Crook, *supra* note 14, pp. 23-24; T. Mommsen, *Römisches Staatsrecht*, Vol. II, 3<sup>rd</sup> Ed., Leipzig 1887, pp. 834-835. It is not entirely clear who qualified as *amicus*. The general consensus is that it included those with the right of admission to the imperial *salutationes*.

the 14<sup>th</sup> century. It is not clear how the instrument appeared in the English legal system. Some argue it was adapted from the *consilium*. Others consider it a creation of English law.<sup>16</sup>

*Amicus curiae* today is used in all legal systems of the United Kingdom, albeit rarely.<sup>17</sup> The majority of *amicus curiae* participation in England and Wales occurs in cases before the Court of Appeal, the Crown Court and the High Court of Justice. *Amici curiae* are heard in all court divisions.<sup>18</sup> In Scotland, *amici curiae* have been mostly appointed to appear in cases before the Scottish High Court of Justiciary and the Scottish Court of Session. In Northern Ireland, *amici curiae* have been referred to in cases before the High Court of Justice in Northern Ireland and the Court of Appeal in Northern Ireland. *Amici curiae* have also appeared before the Supreme Court of the United Kingdom, the House of Lords and the Privy Council.<sup>19</sup> This section focuses on *amici curiae* in English courts.<sup>20</sup>

Initially, *amici curiae* were appointed to appear in criminal proceedings to overcome difficulties caused by the lack of right to counsel of the accused. *Amici curiae* assisted the court in ensuring that criminal proceedings were conducted free from error and in accordance with the accused's due process rights.<sup>21</sup> This function expanded to other areas of law. *Amici*

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16 S. Menétrey, *supra* note 3, p. 24, para. 22.

17 A research on the database of the English and Irish Legal Information Institute retrieved around 35 cases where *amici curiae* had been appointed in cases decided between 2008 and 2014, at: <http://www.bailii.org/> (last visited: 28.9.2017).

18 JUSTICE/Public Law Project, *A matter of public interest – reforming the law and practice on interventions in public interest cases*, 1996, p. 35.

19 E.g. *R (on the application of Sir David Barclay and another) v. Secretary of State for Justice and the Lord Chancellor and others and The Attorney General of Jersey and The States of Guernsey* [2014] UKSC 54; *R v Waya* [2012] UKSC 51; *Craig Moore v. The Scottish Daily Record and Sunday Mail Limited* [2008] CSIH 66 A631/05; Attorney General for Northern Ireland, *Third Annual Report 2012/2013*, para. 34. See also [www.bailii.org](http://www.bailii.org).

20 The function of *amicus curiae* in the other legal systems of the United Kingdom appears to be quite similar. E.g. use of *amicus curiae* to provide a comprehensive examination of the legal issues of the case if one of the parties decides to not appear. *Craig Moore v. The Scottish Daily Record and Sunday Mail Limited* [2008] CSIH 66 A631/05, para. 1. See also D. Clark, *Use of the amicus curiae brief in American judicial procedure in comparative perspective*, 80 *RabelsZ* (2016), pp. 331-335.

21 The first noted case with *amicus curiae* participation seems to be a case from 1353 (Y.B.Hil. 26 Ed. III 65 (1353)); F. Covey, *Amicus curiae: friend of the court*, 9 *De Paul Law Review* (1968-1969), p. 35.

*curiae* furnished legally untrained judges in the strictly adversarial process with relevant case law and laws not presented by the parties, intervened in court to clarify matters of law, and notified the judge of important developments such as the death of a party, collusive proceedings, or the rights of affected non-parties.<sup>22</sup>

These functions of *amicus curiae* have barely changed.<sup>23</sup> *Amici curiae* have been admitted or appointed by courts to present a public interest. In *R. v. Bow Street Metropolitan Stipendiary Magistrate Ex. p. Pinochet Ugarte*, in addition to hearing appointed *amici curiae*, the court allowed Human Rights Watch to make a written submission in relation to the human rights dimension of the extradition of former Chilean President Pinochet.<sup>24</sup> However, courts have been quick to stress that this form of *amicus curiae* is highly exceptional.<sup>25</sup>

Until an unreported Practice Note was issued to judges by the Attorney General's office in April 1975, *amicus curiae* participation was solely regulated by court practice.<sup>26</sup> In 2001, a working group was established by then Attorney General Lord Williams and then Lord Chief Justice Woolf to clarify and regulate the instrument. This was perceived necessary following a widening of the requirements for intervention to accommodate intervention in the public interest.<sup>27</sup> As a first step and in accordance with the government's effort to modernize legal language, the working group

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22 *The Proceter v. Geering* (1656) 145 Eng. Rep., p. 394; *Falmouth v. Strode* (Q.B. 1707) 88 Eng. Rep., p. 949; *Coxe v. Phillips* (1736) 95 Eng. Rep., p. 152 (K.B. 1736), all cited by S. Krislov, *supra* note 7, pp. 695-696.

23 See *Grice v. R.* (1957) 11 D.L.R. 2d, p. 702, quoted by J. Bellhouse/A. Lavers, *The modern amicus curiae: a role in arbitration?*, 23 *Civil Justice Quarterly* (2004), p. 188.

24 *R. v. Bow Street Metropolitan Stipendiary Magistrate Ex. p. Pinochet Ugarte* [1998] 3 W.L.R. 1456.

25 In *Re A (children)*, the Court of Appeals (CA) had to decide on the appeal by the parents of conjoined twins. The lower court had decided that an operation separating the twins with the inevitable death of one of the twins was lawful. The CA heard arguments concerning unlawful killing, medical law and family law by three appointed *amici curiae*. In addition, the CA allowed written submissions by the Archbishop of Westminster and Pro-Life Alliance on the sanctity of life and the Human Rights Act. See *Re A (children)* [2001] 2 W.L.R. 1071.

26 J. Bellhouse/A. Lavers, *supra* note 23, p. 188.

27 For an analysis of public interest intervention, see C. Harlow, *Public law and popular justice*, 65 *Modern Law Review* (2002), p. 7 ('Today 'respectable' campaigning groups ... are allowed to intervene almost as a matter of course in cases, typically to provide information on international law or the interpretation of human

renamed *amicus curiae* ‘advocate to the court.’<sup>28</sup> On 19 December 2001, then Attorney-General Lord Goldsmith and the Lord Chief Justice jointly issued a ‘Memorandum to Judges.’

The Memorandum lay to rest any expectations that the role of *amicus curiae* may drift towards interest-based participation.<sup>29</sup> It describes it as to present legal argument ‘when there is danger of an important and difficult point of law being decided without the court hearing relevant argument.’<sup>30</sup> It clarifies that *amicus curiae* may comment on the application of a law to the facts of a case, but that it ‘will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts.’<sup>31</sup> The Memorandum emphasizes the independence of the instrument from the parties.<sup>32</sup> Similarly, in 2008, Her Majesty’s Court Services defined *amicus curiae* as ‘[a] neutral party who does not represent any individual party in the case who will be asked by the Court to make representations from an independent viewpoint.’<sup>33</sup> Thus, *amicus curiae* remains a service instrument to ensure that a court has fully heard all of the legal arguments pertaining to a

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rights conventions or the practice of other governments and jurisprudence of other courts.’); JUSTICE/Public Law Project, supra note 18. See also the rules on intervention in the Civil Procedure Rules Part 54, Section 54.17.

28 The term *amicus curiae* continues to be used in practice. See *Twaite, Re Appeal against Conviction* [2010] EWCA 2973 (Crim); *Mohamed, R (on the application of) v. Secretary of State for Foreign & Commonwealth Affairs* (Rev 31-07-2009), [2008] EWHC 2048 (Admin).

29 Interest-based participation is limited to intervention. It has developed separately from *amicus curiae* participation and appears to have expanded in the last decade with the expansion of public interest litigation. See, however, CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, pp. 7-8 (‘Although generally described as being impartial aides to the court, *amici curiae* in the English legal system have also long advanced ‘partisan’ arguments on behalf of unrepresented parties and on behalf of the public interest.’); R. Smith, *Why third-party interventions in the judicial process benefit democracy*, The Law Gazette of 12 November 2009, at: <http://www.lawgazette.co.uk/53085.article> (last visited: 28.9.2017); C. Harlow, supra note 27.

30 Para. 3 Memorandum to Judges.

31 Para. 4 Memorandum to Judges. See *R. v. Leicester JJ, ex parte Barrow* [1991] 2 QB, pp. 260, 283, where Lord Donaldson doubted whether material submitted by an *amicus curiae* was admissible. It is not uncommon for *amici curiae* to submit illustrative material, see JUSTICE/Public Law Project, supra note 18, p. 34.

32 Para. 4 Memorandum to Judges.

33 <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/courts/glossary-of-terms> (last visited: 28.9.2017), referred to by S. Men tre, supra note 3, p. 25, FN 108.

case prior to rendering a decision. It represents only the interest of the court and appears only at its request. *Amicus curiae* is not an instrument to bring to the attention of the court the interests of unrepresented third parties.<sup>34</sup>

The Memorandum also provides guidance on the appointment process. Here, the following aspects are relevant: appointment of an advocate to the court occurs generally by the Attorney General upon request by a court.<sup>35</sup> There is no participation by unsolicited *amici curiae*. The court in its request must identify the legal issues and the nature of the assistance required.<sup>36</sup> On this basis, the Attorney General chooses the *amicus curiae* appointees. Once appointed, the advocate to the court will be instructed by the Treasury Solicitor with documentation provided by the court that has solicited its participation. Advocates to the court are remunerated from public funds.<sup>37</sup> The 2009 United Kingdom Supreme Court Rules for the first time regulate the advocate to the court. They codify the already existing practice.<sup>38</sup>

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34 J. Bellhouse/A. Lavers, *supra* note 23, p. 193.

35 C. Harlow, *supra* note 27, p. 7; JUSTICE/Public Law Project, *supra* note 18, p. 35. In cases involving children or the disabled the appointment of *amicus* will be made by the Official Solicitor or the Children & Family Court Advisory Service. Paras. 2, 11-12 Memorandum to Judges.

36 Para. 9 Memorandum to Judges.

37 Often he chooses a member from a panel of barristers maintained by his office. This has given rise to criticism for the risk of a pro-government bias by the *amicus curiae*, see JUSTICE/Public Law Project, *supra* note 18, pp. 35-37. J. Bellhouse/A. Lavers, *supra* note 23, p. 192.

38 Rule 35 Rules of the Supreme Court of the United Kingdom, 2009 No. 1603 (L. 17): '(1) The Court may request the relevant officer to appoint, or may itself appoint, an advocate to the Court to assist the Court with legal submissions. (2) In accordance with section 44 of the Act [XXX] the Court may, at the request of the parties or of its own initiative, appoint one or more independent specially qualified advisers to assist the Court as assessors on any technical manner. (3) The fees and expenses of any advocate to the court or assessor shall be costs in the appeal.' Practice Direction 8.13.1 determines that specialist advisers must be independent from the parties, and 8.13.2 addresses procedural aspects of the request for an advocate to the Court, see Supreme Court Practice Directions, at: <https://www.supremecourt.uk/procedures/practice-direction-08.html#13> (last visited: 28.9.2017).

### III. *Amicus curiae* before the United States Federal Courts and the Supreme Court

*Amicus curiae* was introduced in the US legal system through English practitioners and first admitted by courts in the 18<sup>th</sup>/19<sup>th</sup> century.<sup>39</sup> The instrument remained unregulated until 1937.<sup>40</sup> This allowed courts to adapt it to their needs.<sup>41</sup>

*Amici curiae* appear frequently in the United States federal judicial system on which this section will focus.<sup>42</sup> Studies show that *amicus curiae* participation before the US Supreme Court has consistently grown from 35% in all cases decided by opinion in the mid-1960 to 85% in the late 1990.<sup>43</sup> A database search retrieves 1212 mentions of the terms *amicus curiae* and *amici curiae* in Supreme Court cases between 2008 and 2017, 4139 in US Court of Appeals cases, and 2119 in Federal District Court

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39 The first reported case involving *amicus curiae* is said to have been *Green v. Bridgde*, 21 US (8 Wheat.) 1, 17-18 (1823), cited by M. Lowman, *The litigating amicus curiae: when does the party begin after the friends leave?*, 41 American University Law Review (1992), pp. 1254-1255, 1270. According to Epstein, there were at least four earlier cases with *amicus curiae* participation, in 1790, 1812, 1813 and 1814: *Cassie v. Spicer*, 2 US 111 (1790); *Schooner Exchange v. McFadden*, 11 US (7 Cranch) 116 (1812); *Beatty Administrator v. Burnes's Administrators*, 12 US 98 (1813); *Livingston v. Dorgenois*, 11 US 577 (1814). See L. Epstein, *A comparative analysis of the evolution, rules, and usage of amicus curiae briefs in the US Supreme Court and in state courts of last resort*, Conference Paper 1989 (on file), p. 3. For a more detailed analysis, see D. Clark, *Use of the amicus curiae brief in American judicial procedure in comparative perspective*, 80 *LabelsZ* (2016), pp. 347-349.

40 F. Covey, *supra* note 21, p. 35; D. Shelton, *supra* note 6, p. 617; *Kirppendorf v. Hyde*, 110 US 276, 283 (1884); *The Schooner Exchange v. McFaddon*, 11 US (7 Branch) 116 (1812), quoted by M. Lowman, *supra* note 39, p. 1270.

41 D. Shelton, *supra* note 6, p. 616; J. Kearney/T. Merrill, *The influence of amicus curiae briefs on the Supreme Court*, 148 *University of Pennsylvania Law Review* (2000), p. 744.

42 M. Lowman, *supra* note 39, p. 1250. *Amicus curiae* practice has also developed in state supreme courts. See L. Epstein, *supra* note 39.

43 For a more detailed analysis, see M. Schachter, *supra* note 7, p. 95; J. Kearney/T. Merrill, *supra* note 41, p. 749; P. Collins/W. Martinek, *Amicus participation in the US Court of Appeals*, paper prepared for delivery at the 81<sup>st</sup> Annual Meeting of the Southern Political Science Association, Atlanta, USA, 2010, p. 4 (on file).

cases.<sup>44</sup> *Amici curiae* have played a significant role in landmark cases.<sup>45</sup> It is therefore not surprising that *amicus curiae* before US Federal Courts and the Supreme Court has been the subject of extensive study.<sup>46</sup> This section abstains from giving a historical overview over the concept and its empirical assessment which has been done elsewhere.<sup>47</sup> Instead, it focuses on the functions and the regulation of *amicus curiae*.

*Amicus curiae* participation before the US Supreme Court is regulated by Rule 37 US Supreme Court Rules. *Amicus curiae* participation before the US Federal Courts is regulated by Rule 29 Federal Rules for Appellate Procedure (together, the Rules). The Rules focus on the formalities of participation. Neither of the Rules defines the concept, but Rule 37 points to the purpose of *amicus curiae* in paragraph 1. It stipulates:

An *amicus curiae* brief that brings to the attention of the Court relevant matters not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

*Amicus curiae* participation may be solicited or unsolicited.<sup>48</sup> The latter is the norm, but the US Supreme Court occasionally requests the US government to participate as *amicus curiae*.<sup>49</sup> There is no clear delineation of the role of *amicus curiae*. *Amicus curiae* in US practice is diverse and multi-

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44 CIEL, supra note 29, p. 8 (Its heavy use is partly credited to 'a need to compensate for the fact that numerous parties and groups are affected by the United States' federal judicial system, but are unrepresented and unable to gain standing in the courts of that system.')

45 *Brown v. Board of Education*, 347 US 483 (1954); *Roe v. Wade*, 410 US 113 (1973); *Hamdan v. Rumsfeld*, 548 US 557 (2006) 11.

46 P. Collins/W. Martinek, supra note 43.

47 For empirical analysis of the impact of *amicus curiae*, see J. Kearney/ T. Merrill, supra note 41; P. Collins, *Friends of the court: examining the influence of amicus curiae participation in US Supreme Court litigation*, 38 *Law & Society Review* (2004), pp. 807-832; P. Chen, *The information role of amici curiae briefs in Gonzalez v. Raich*, 31 *Southern Illinois University Law Journal* (2007), pp. 217, 220, 239; D. Farber, *When the court has a party, how many 'friends' show up? A note on the statistical distribution of amicus brief filings*, 24 *Constitutional Commentary* (2007), pp. 19-42; S. Walbolt/J. Lang, Jr., *Amicus briefs revisited*, 33 *Stetson Law Review* (2003), p. 171.

48 *Note on amici curiae*, 34 *Harvard Law Review* (1921), p. 774.

49 B. Ennis, *Effective amicus briefs*, 33 *Catholic University Law Review* (1984), p. 604.

faceted. Analysis of Federal Court and Supreme Court cases indicates that *amici curiae* assume two roles.

In the first role, an *amicus curiae* acts as a bystander without a direct interest in the litigation. It participates to bring to the attention of the court matters of fact or law, which are neither (fully) addressed nor represented by the parties.<sup>50</sup> These *amici curiae* have provided legal arguments, raised issues overlooked by the parties, highlighted the potential impact of a particular decision affecting the public interest or complemented the factual basis of a case.<sup>51</sup> This role of *amicus curiae* is often dubbed the ‘traditional’ *amicus curiae*, likely in reference to its similarities with the English concept.<sup>52</sup>

The second role assumed by *amicus curiae* accords for the largest share in *amicus curiae* participation before US courts.<sup>53</sup> In this role, *amicus curiae* acts as an advocate.<sup>54</sup> It participates to defend its own interest in the case, to support one of the parties and/or to give weight, publicity or credibility to a case or a certain issue. This role of *amicus curiae* is very diverse. It can be subdivided into several categories based on the interest pursued by the *amicus curiae*.

The first sub-category includes *amici curiae* that may be directly affected by a decision. Courts first permitted this category due to the absence of formal rules on third-party intervention in federal courts. Courts have emphasized that the instrument does not become a party to the proceedings and that it is not bound by the final outcome of the case.<sup>55</sup>

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50 *Campbell v. Swasey*, 12 Ind. 70, 72 (1859), cited by S. Krislov, *supra* note 7, p. 697.

51 For instance, in *Sweatt v. Painter*, a case concerning the legality of a Texan separate law school for African-Americans, a group of law professors submitted an *amicus curiae* brief which argued that the segregated legal education violated the 14<sup>th</sup> Amendment to the US Constitution. *Sweatt v. Painter*; 339 U.S. 629 (1950).

52 M. Lowman, *supra* note 39, p. 1246.

53 S. Banner, *The myth of the neutral amicus: American courts and their friends 1790-1890*, 20 Constitutional Commentary (2003), p. 122 (Out of the 252 *amicus curiae* participations between 1790-1890, 207 were motivated by a particular interest.).

54 G. Umbricht, *An “amicus curiae brief” on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), pp. 778-779; M. Lowman, *supra* note 39, p. 1245.

55 However, in the *Michigan Prisons Case*, the private *amicus curiae* the Knop-class was granted rights similar to those of a party while not being bound to the final outcome. It was *inter alia* allowed to call witnesses, submit evidence, present oral

The second sub-category is often described as the 'litigating *amicus*'. It emerged with the development of public interest litigation in the 1980 and allows *amicus curiae* to act as 'an actively litigating lobbyist and defender of particular interests within the confines of the adversarial process.'<sup>56</sup> The litigating *amicus curiae* seeks to represent an allegedly unrepresented public interest.<sup>57</sup> This form of *amicus curiae* is most prevalent in cases involving core constitutional issues, especially at the *certiorari* stage before the US Supreme Court. At this stage, the submissions are used to indicate to the Supreme Court the public interest engaged in a case.<sup>58</sup> Initially, courts limited this form of *amicus curiae* to representations from government entities.<sup>59</sup> Gradually, courts have opened it to private actors, foreign states, and international organizations.<sup>60</sup> Moreover, this form of *amicus curiae* has increasingly been commissioned by the parties.<sup>61</sup> Courts have generally accepted it despite the risks it entails for party equality. The Committee

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arguments, and seek enforcement of a consent decree. A sixth circuit court later found that the district court had undermined the Civil Rules of Procedure by effectively granting the Knop-class party status. See *Michigan Prisons Case*, 940 F.2d, p. 147. Critical of the district court, M. Lowman, *supra* note 39, pp. 1274-1276.

56 L. Epstein, *supra* note 39, pp. 1, 4.

57 M. Lowman, *supra* note 39, p. 1269 In *Belize Telecom v. Belize*, the US government submitted an *amicus curiae* brief disagreeing with monetary contempt sanctions issued by the district court against Belize. The US government stated that it had a 'substantial interest in the proper interpretation and application of the FSIA because of the foreign policy implications of US litigation involving a foreign state.' See *Belize Telecom v. Government of Belize*, US C.A., 11<sup>th</sup> Cir, Case No. 06-12158. S. Banner, *supra* note 53, p. 122 (The change was driven by the changing nature of litigation.).

58 See *Georgia v. Evans*, 316 US 159, 161 (1942) (The 'importance of the question ... is attested by the fact that thirty-four states, as friends of the Court, supported Georgia's request that the decision be reviewed on certiorari.'). S. Men trety, *supra* note 3, p. 58, FN 274.

59 Particularly, the Attorney General made extensive use of this possibility to represent the public interest. M. Lowman, *supra* note 39, pp. 1263-1264; S. Men trety, *supra* note 3, p. 51, para. 63.

60 E.g. in *Donald Roper v. Christopher Simmons*, the European Union, the member states of the Council of Europe and several other foreign governments submitted an *amicus curiae* brief which analysed pertinent international human rights norms and argued against the legality of executions of minors. See *Donald Roper v. Christopher Simmons*, 543 US 551 (2005), quoted by G. Biehler, *Procedures in international law*, Berlin 2008, p. 182.

61 M. Schachter, *supra* note 7, p. 90 ('duelling *amicus curiae*'); B. Ennis, *supra* note 49, pp. 604-608.

in charge of the 2010 amendments to the Federal Rules of Appellate Procedure even welcomed ‘coordination between the *amicus* and the party whose position the *amicus* supports ... to the extent that it helps to avoid duplicative arguments.’<sup>62</sup>

The current *amicus curiae* practice has attracted criticism.<sup>63</sup> The large amount of submissions per case is argued either to distract judges or to entice them to fully disregard the briefs.<sup>64</sup> Commentators fear that partisan *amicus curiae* briefs may create inequality between the parties, skew the adversarial process and, in the federal courts, politicize appeal processes.<sup>65</sup> Despite the criticism, courts have chosen not to limit the scope of permissible functions.<sup>66</sup>

The Rules generally subject participation as *amicus curiae* to the parties’ written consent. If consent is denied by one party, the *amicus curiae* petitioner may formally request leave to appear from the court. *Amicus curiae* briefs from the Solicitor General on behalf of the United States, any other governmental entity or agency, state, territory or the District of Columbia are exempt from this procedure.<sup>67</sup>

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62 At [https://www.law.cornell.edu/rules/frap/rule\\_29](https://www.law.cornell.edu/rules/frap/rule_29) (last visited: 28.9.2017). The Committee further found that ‘mere coordination – in the sense of sharing of drafts of briefs – need not be disclosed.’ This calls into question the view that the courts control this *amicus* through broad transparency requirements. *Id.* See also E. Gressman et al., *Supreme Court Practice*, 9<sup>th</sup> Ed., Washington 2007, p. 739.

63 M. Lowman, *supra* note 39, pp. 1246, 1256, 1292, 1295; J. Harrington, *Amici curiae in the federal courts of appeals: how friendly are they?*, 55 *Case Western Reserve Law Review* (2005), p. 687. For *amicus* to acquire clients, see S. Ward, *Friends of the court are friends of mine*, 93 *ABA Journal* (2007), pp. 24-25.

64 G. Caldeira/J. Wright, *Amici curiae before the Supreme Court: who participates, when and how much?*, 32 *Journal of Politics* (1996), p. 804. According to Schachter, every brief is read by clerks, see M. Schachter, *supra* note 7, p. 97.

65 J. Harrington, *supra* note 63, pp. 673, 684, 687, 690-691. The Federal Court Judge Posner in particular has advocated limiting *amicus curiae* to three scenarios: inadequately or unrepresented parties; risk of direct adverse effects of a decision; possession of unique information or perspectives. See *National Organisation for Women Inc. v. Scheidler*, 223 F 3d 615 (7<sup>th</sup> Cir. 2000); *Voices for Choices v. Illinois Bell Telephone Company*, 339 F 3d 542 (7<sup>th</sup> Cir. 2003).

66 A. Frey, *Amici curiae: friends of the court or nuisances?*, 33 *Litigation* (2006-2007), p. 6; J. Harrington, *supra* note 63, pp. 667-700.

67 See Rule 37(4) Rules of the Supreme Court. Arguments to justify this exception are an added value by the participation of governmental experts, a higher degree of objectivity, and an increased legitimacy to represent the public interest.

The Rules provide little guidance on the substance of briefs other than to require identification of the *amicus curiae*'s interest in the case and an explanation of the relevance of the prospected submission.<sup>68</sup> Notable formal requirements are that *amicus curiae* submissions must disclose the authorship and the financing of the brief, in particular, whether a party or a party's counsel were involved in its authorship or financing, as well as name the supported party.<sup>69</sup> This requirement is essential for the court's assessment of the role of an *amicus curiae* and forms part of an effort to deter parties from using *amicus curiae* submissions to circumvent page limits.<sup>70</sup>

#### IV. Internationalization: *amicus curiae* in civil law systems and in inter- and supranational legal instruments

*Amicus curiae* is not a civil law concept. The existence of alternative mechanisms for the consideration and protection of third party interests, in particular intervention, and the more elaborate evidentiary system for a long time seemed to obviate a need for *amicus curiae*.<sup>71</sup> For example, the

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68 A few courts have implemented rules to avoid recusal of judges because of *amicus curiae*. See Interim Local Rule 29 Federal Rules of Appellate Practice from the US Court of Appeals for the Second Circuit. See also *Ferguson v. Brick*, 279 Ark. 168 (1983) (The Arkansas Supreme Court rejected an *amicus curiae* as it would merely participate for judicial lobbying without conveying anything of 'legal significance').

69 Rule 29(c) Federal Rules of Appellate Procedure; Rule 37(6) Rules of the Supreme Court.

70 Appellate Rules Committee Notes on Rules – 2010 Amendment.

71 Comment P-13C, ALI/Unidroit Principles of Transnational Civil Procedure by the Joint American Law Institute/Unidroit Working Group on Principles and Rules of Transnational Civil Procedure ('In civil-law countries there is no well-established practice of allowing third parties without a legal interest in the merits of the dispute to participate in a proceeding, although some civil-law countries like France have developed similar institutions in their case law. Consequently, most civil-law countries do not have a practice of allowing the submission of *amicus curiae* briefs.').

legal systems of Japan, Mexico, Switzerland and Germany<sup>72</sup> do not provide for *amicus curiae*.<sup>73</sup>

Civil law systems that have admitted *amicus curiae* include Argentina, Québec, Columbia, Italy and France. For illustration purposes, this section will consider the development of the concept in the French courts.<sup>74</sup> The *Cour d'appel* was the first French court to admit *amicus curiae*. In 1988, in a dispute concerning the application of rules regulating the legal profession, the court invited the President of the Paris Bar to 'provide ... all the observations that may enlighten the court in its process of solving the dis-

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72 However, German law provides for the possibility of representation of the public interest in certain administrative proceedings and the interests of the federal republic before the highest administrative court through state-appointed public interest representatives. The mechanism is rarely used. See §§ 35-37 *Verwaltungsgerichtsordnung*. German law comprises one functional equivalent to *amicus curiae*. § 27a of the *Bundesverfassungsgerichtsgesetz* [Procedural Code of the German Constitutional Court] stipulates that the constitutional court may grant informed third parties leave to make a submission. The official explanation for the amendment, which was inserted in 1997, was to increase the information available to the court when rendering a decision. See U. Kühne, *Amicus curiae*, Heidelberg 2015, pp. 274-281; H. Hirte, *Der amicus-curiae-brief: Das amerikanische Modell und die deutschen Parallelen*, 104 *Zeitschrift für Zivilprozess* (1991), pp. 11-66; A. Asteriti/C. Tams, *Transparency and representation of the public interest in investment treaty arbitration*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, p. 806; T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvart (Ed.), *Yearbook of International Investment Law and Policy (2008-2009)*, p. 556; CIEL, *supra* note 29, pp. 22-28.

73 Mexico based its initial scepticism towards *amicus curiae* in the NAFTA on the fact that the concept was unknown in Mexican law. See *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001, para. 9. See also C. Kessedijan, *La nécessité de généraliser l'institution de l'amicus curiae dans le contentieux privé international*, in: H. Mansel et al. (Eds.), *Festschrift für Erik Jayme*, Munich 2004, Vol. I, pp. 403-404.

74 For the development of the concept in the Italian and Columbian legal systems and in several mixed legal systems, including South Africa, Pakistan, the Philippines, Israel, Nigeria, Indonesia, see CIEL, *supra* note 29, pp. 12-21; S. Kochevar, *Amici curiae in civil law jurisdictions*, 122 *Yale Law Journal* (2013), pp. 1653-1669; O. Jonas, *The participation of the amicus curiae institution in human rights litigation in Botswana and South Africa: a tale of two jurisdictions*, 58 *Journal of African Law* (2015), pp. 329-354. For *amicus curiae* in the Argentinian legal system, see V. Bazán, *Amicus curiae, transparencia del debate judicial y debido proceso*, *Anuario de Derecho Constitucional Latinoamericano* 2004, pp. 251-280.

pute.<sup>75</sup> The court clarified in the case that *amicus curiae* was neither a witness nor an expert, and that it was subject to the court's discretion. According to Menétrey, the further entrenchment of the concept before the French courts was largely due to then President of the Cour de cassation Draï who viewed *amicus curiae* as a tool to enrich the information available to the Cour in a dispute.<sup>76</sup> The Cour de cassation has since in several cases invited *amici curiae* to advise it on specific ethical, legal, or scientific aspects of a case.<sup>77</sup> *Amici curiae*, usually highly respected scientific experts or representatives of prestigious institutions, have generally participated upon invitation by the court.<sup>78</sup> This strictly informatory role and the firm control by the judiciary have been criticized as overly restrictive and as excluding the possibility of participation by civil society in matters of public debate.<sup>79</sup> With three exceptions, the instrument remains unregulated

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75 Paris Court of Appeal, 21 June 1998 and 6 July 1998, Gaz. Pal. 1988, 2, 700, Note Laurin, quoted by C. Coslin/D. Lapillonne, *France and the concept of amicus curiae: what lies ahead?*, 4 Paris International Litigation Bulletin (2012), at: [https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi\\_8vFX19bWAhWCA5oKHZTxC7YQFggmMAA&url=https%3A%2F%2Fwww.hoganlovells.com%2F~%2Fmedia%2Fhogan-lovells%2Fpdf%2Fpublication%2F6--france-and-the-concept-of-amicus-curiae\\_pdf.pdf&usg=AOvVaw3p01VsLA8910LisgnVdXzB](https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi_8vFX19bWAhWCA5oKHZTxC7YQFggmMAA&url=https%3A%2F%2Fwww.hoganlovells.com%2F~%2Fmedia%2Fhogan-lovells%2Fpdf%2Fpublication%2F6--france-and-the-concept-of-amicus-curiae_pdf.pdf&usg=AOvVaw3p01VsLA8910LisgnVdXzB) (last visited: 28.9.2017).

76 Audience solennelle de début d'année judiciaire, Adresse de Monsieur Pierre Draï, Premier Président de la République, 6 January 1989, quoted by S. Menétrey, *supra* note 3, pp. 41-42.

77 Areas where the expertise of *amici curiae* has been requested include the lawfulness of surrogacy agreements and the unintentional homicide of an unborn child during birth. See Cour de Cassation, Ass. Plén., 31 May 1991, Pourvoi No. 90-20.105; Cour de Cassation, Ass. Plén. 29 June 2001, Pourvoi No. 99-85.973; Cour de Cassation, Ch. Mixte, 23 November 2004, Pourvois No. 02-17.507, 03-13.673, 02-11.352 and 01-13.592; Paris Court of Appeal, 27 November 1992, D. 1993, p. 172. See also S. Menétrey, *supra* note 3, pp. 42-43; C. Coslin/D. Lapillonne, *France and the concept of amicus curiae: what lies ahead?*, 4 Paris International Litigation Bulletin (2012), p. 14.

78 C. Kessedjian, *De quelques pistes pour l'encadrement procédural de l'intervention des amici curiae*, 8 European Journal of Law Reform (2006), pp. 93, 101; Cour de Cassation, Ass. Plén. 29 June 2001, Pourvoi No. 99-85.973.

79 C. Kessedjian, *supra* note 73, pp. 404-405; C. Kessedjian, *supra* note 78, pp. 93, 97. Interest groups hoped for a change in light of consultations held between the Cour de cassation and public interest groups in 2004 and 2007. So far, the consultations have not been fruitful. S. Menétrey, *supra* note 3, pp. 44-45; G. Canivet, *L'organisation de la Cour de cassation favorise-t-elle l'élaboration de sa jurispru-*

in French law and forms part of the judges' broad inquisitorial powers.<sup>80</sup> *Amicus curiae* participation remains an exception in the French courts. This may be also because of the availability of alternative forms of public interest representation such as the *Ministère public* or the *Conseil de la Concurrence*.<sup>81</sup> In addition, interested parties may intervene in proceedings to protect their legal rights.

The instrument is also referred to in the 2005 *ALI/Unidroit Principles of Transnational Procedure*, a project by the American Law Institute which was subsequently joined by Unidroit. It aims to propose a set of 'universal' procedural rules.<sup>82</sup> Principle 13 enshrines *amicus curiae* participation. It provides that

[w]ritten submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission. The parties must have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.

The commentary to the provision gives a clearer idea of the role. *Amicus curiae* briefs are viewed as a 'useful means by which a non-party may supply the court with information and legal analysis that may be helpful to

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*dence?*, in: N. Molfessis (Ed.), *La Cour de cassation et l'élaboration du droit*, Paris 2004, p. 3.

- 80 The first exception, Article R. 625-3 French Code of Administrative Justice – created by Article 143 of the New Code of Civil Procedure, Decree No. 2010-164 of 22 February 2010 – permits the court to invite any person whose contributions it deems valuable to the solution of the dispute to provide it with general observations on a specific issue. Second, Article L. 621-20 French Monetary and Financial Code allows all court divisions to invite the *autorité des marchés* financiers to make written and oral submissions. The third provision implements EU Regulation No. 1/2003. This has raised questions with regard to the appropriate legal basis for *amicus curiae* participation. Article 143 Code of Civil Procedure grants the court power only to establish the facts of the case. See C. Kessedjian, *supra* note 78, pp. 93, 105.
- 81 The *Ministère public* commonly intervenes in proceedings to represent the public interest. Pursuant to Articles 462-3 and 470-5 Commercial Code, a judge may request the advice of the competition counsel or the minister for economy in matters of competition law. See S. Menétrey, *supra* note 3, pp. 46-47.
- 82 The principles were considered by some as too common law oriented. See C. Kessedjian, *Uniformity v. diversity in law in a global world – the example of commercial and procedural law*, 61 *Revue hellénique de droit international* (2008), p. 326.

achieve a just and informed disposition of the case. Such a brief might be from a disinterested source or a partisan one. Any person may be allowed to file such a brief, notwithstanding a lack of legal interest sufficient for intervention.<sup>83</sup> The commentary to the principle further excludes submissions on disputed facts, but allows *amici curiae* to present 'data, background information, remarks, legal analysis, and other considerations that may be useful for a fair and just decision of the case.'<sup>84</sup> The court may reject *amicus curiae* submissions that are of no 'material assistance'. The commentary clarifies that *amici curiae* do not obtain party status and that factual assertions in their briefs do not constitute evidence.<sup>85</sup>

## V. Comparative analysis

*Amicus curiae* has been particularly successful in common law systems. Traditionally, these systems adhere to a strict adversarial process. The lack of formal rules on intervention, as well as differing views regarding the scope of interests to include in the solution of a dispute prompted courts to tailor *amicus curiae* to their needs. This has led to the development of a diverse range of *amici curiae*. One cannot speak of *one* concept of *amicus curiae* across and at times even within national legal systems.

There is a noticeable divide between *amicus curiae* participation in US federal courts and in other national court systems. US courts have not sought to limit the possible functions. Submissions may be partisan or impartial, defend a private or public interest or seek to inform the court of a certain legal or factual issue. In most other legal systems, *amicus curiae* is more limited. The English and the French courts prescribe independence and neutrality for *amici curiae* in cases involving fundamental ethical questions.

The inclusion of *amicus curiae* in transnational legal instruments has familiarized many civil law states with the concept facilitating its further dissemination.<sup>86</sup> The introduction of *amicus curiae* is often accelerated through national actors, including public interest organizations seeking

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83 P-13A.

84 P-13D.

85 P-13B.

86 S. Kochevar, *supra* note 74, p. 1669 ('[A]n evolving global procedural norm').

cost-effective ways to circumvent strict rules on standing and to promote their agenda.<sup>87</sup>

*B. Emergence and rise of amicus curiae before international courts and tribunals*

This section examines the initial admission and the development of *amicus curiae* before international courts and tribunals.

I. International Court of Justice

Already the procedural rules of the PCIJ permitted it to accept *amicus curiae* submissions, including from the International Labour Organization (ILO), an international organization with a mixed private and governmental structure.<sup>88</sup> The PCIJ regularly invited the participation of international governmental and non-governmental organizations, including international trade and economic unions.<sup>89</sup>

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87 C. Harlow, *supra* note 27, p. 12. Providing further reasons, S. Kochevar, *supra* note 74, pp. 1663-1668.

88 Article 26(1) PCIJ Statute: ‘In labour cases, the International Labour Office shall be at liberty to furnish the Court with all relevant information and for this purpose the Director of that Office shall receive copies of all the written proceedings.’ Though it was agreed on 25 February 1922 that the provision referred only to contentious cases, already the PCIJ’s second annual report noted its application by analogy to advisory proceedings. See PCIJ, *Second Annual Report*, Series E – No. 2, p. 174, at: [http://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_E/English/E\\_02\\_en.pdf](http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_E/English/E_02_en.pdf) (last visited: 28.9.2017). Article 26(2) PCIJ Statute allowed the PCIJ to instruct up to four technical assessors to assist it in a case. The same was determined in Article 27 PCIJ Statute for cases relating to transit and communications. Further, Article 50 PCIJ Statute allowed the PCIJ to ‘at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.’ In advisory proceedings, Rule 73 PCIJ Rules instructed the Registrar to invite all members of the League of Nations or states admitted before the PCIJ as well as international governmental and non-governmental organizations considered as likely to be able to furnish information on the question to submit written statements on the question before the PCIJ.

89 G. Hernandez, *Non-state actors from the perspective of the International Court of Justice*, in: J. d’Aspremont (Ed.), *Participants in the international legal system*:

Although it is the first court to have received an express request for leave to appear as *amicus curiae*, the ICJ has been less welcoming. To date, it has not accepted any unsolicited *amicus curiae* submission in contentious proceedings and there is only one recorded instance of admission of an unsolicited request for participation as *amicus curiae* in advisory proceedings.

As regards contentious proceedings, Article 34(2) ICJ Statute stipulates that the Court may receive or request 'information relevant to a case before it' from public international organizations. Article 34(2) was modelled from Article 26 PCIJ Statute and created to mitigate the drafters' decision not to grant *locus standi* to intergovernmental organizations before the ICJ. As such, it reflects the role states envisaged for intergovernmental organizations before the Court at the time of drafting.<sup>90</sup>

The ICJ has never requested any information on the basis of this provision. It has notified international organizations of cases or invited them to submit observations pursuant to Article 34(3) ICJ Statute and Article 43 ICJ Rules in a few cases.<sup>91</sup> The provisions give a right of intervention to organizations whose instruments are at issue in a case. In the two instances

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*multiple perspectives on non-state actors in international law*, London 2011, p. 148 and FN 70. See Annex I for list of cases. In its first advisory opinion, *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the PCIJ issued an invitation to several international trades unions, in response to which it received numerous submissions. See *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, Advisory Opinion, 31 July 1922, PCIJ Series B.

90 P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 Max-Planck Yearbook of United Nations Law (2002), pp. 139, 167. The norm is now viewed very critically, see P.M. Dupuy, *Article 34*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, pp. 604-605, paras. 42-43.

91 See *Appeal Relating to the Jurisdiction of the ICAO Council (India/Pakistan)*, Judgment, 18 August 1972, ICJ Rep. 1972, p. 48, para. 5 (The Registrar notified the ICAO Council that a party had argued that the Chicago Convention of 1944 was at issue in the case and later set a deadline for any comments by the ICAO. The ICAO did not make any submissions.) *Case concerning border and transborder armed actions (Nicaragua v. Honduras)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 20 December 1988, ICJ Rep. 1988, pp. 69-72, paras. 6-7 (The Court notified the OAS and set a deadline for comments on the invocation of the Pact of Bogotá as a basis for its jurisdiction. The OAS Secretary-General replied to the ICJ's invitation that he required permission by the OAS

where the ICJ has received unsolicited submissions relying on Article 34(2) ICJ Statute, it has rejected them. The first request was made in 1950 in the *Asylum case* between Colombia and Peru by the International League for the Rights of Man, a US-based non-governmental human rights organization with consultative status B before the UN ECOSOC.

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Permanent Council to make any submissions which, in turn, would necessitate transmission of the parties' submissions to all member states and, ultimately, no submission was made.); *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Order of 22 February 1996 (Removal from List), ICJ Rep. 1996, p. 9 (The ICJ received a reply to its invitation to the International Council of Aviation on preliminary objections raised by the USA, which were contested by Iran on whether the ICJ proceedings constituted an appeal pursuant to the Chicago Convention); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. the United Kingdom and Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, p. 8, para. 14 and p. 119, para. 15 (Notification of ICAO); *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, p. 8, para. 12; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 27 February 2007, ICJ Rep. 2007, pp. 43-44 (Notification of the United Nations itself pursuant to Article 34(3)). For further recent examples, see P.-M. Dupuy, *supra* note 90, pp. 594-595, para. 16. He views the increasing number of notifications as a cautious opening to a broader reading of Article 34(3). *Id.*, p. 595, para. 17. In none of the recent instances, the notification or invitation was taken up by the invited intergovernmental organisation. Critical of the lack of participation, C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 162. See also G. Fischer, *Les rapports entre l'Organisation Internationale du Travail et la Cour Permanente de Justice Internationale*, Geneva 1946; *Aerial Incident of 27 July 1955 (Israel/Bulgaria)*, ICJ Rep. 1959, p. 127 (The ICAO Council agreed that its Secretariat could inform the Court, if requested by it, on the safety of civil airplanes inadvertently crossing international borders. The Court did not request such information.); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, para. 7 (Invitation to furnish observations on jurisdiction. The OAS Secretary General declined the invitation); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, para. 6; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, para. 6.

The Registrar denied the request in the case, because the organization did not qualify as a public international organization pursuant to Article 34(2).<sup>92</sup> The ILO made the second submission in the case *South West Africa*. The ILO Director-General informed the Registrar that the ILO was willing to submit any information the Court wished to request, but he did not attach any specific information. The Registrar transmitted the letter to the Court, but it seems that the Court never accepted the invitation.<sup>93</sup>

States' involvement in proceedings to which they are not party is generally limited to intervention pursuant to Articles 62 and 63 ICJ Statute. In its first contentious case, the *Corfu Channel* case between the United Kingdom and Albania, the ICJ exceptionally received informal submissions by a third state. In the case, the United Kingdom impugned Yugoslavia to have laid mines in the Corfu Channel causing the destruction of English warships.<sup>94</sup> To refute the allegation, the Yugoslav Government submitted several series of documents.<sup>95</sup> In a communiqué, the Yugoslav government denied the allegations and attacked the credibility of a witness

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92 The Court did not mention the request in its judgment, but it included the exchange in its correspondence. See *Asylum case (Colombia v. Peru)*, Letters Nos. 63, 66, ICJ Rep. 1950, Part IV: Correspondence, pp. 227-228. Article 71 UN Charter allows the ECOSOC 'to make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.' ECOSOC first established criteria for the granting of consultative status in Resolution 1926 (XLIV) in 1968. Due to the increase in NGO participation, the Resolution was revised several times. The last revision took place in 1996. See ECOSOC RES 1996/31 *Consultative relationship between the United Nations and non-governmental organizations*, 49<sup>th</sup> Plenary Meeting, 25 July 1996. For an overview of the organizations with consultative status, see ECOSOC *List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2014*, E/2014/INF/5.

93 *South West Africa (Ethiopia v. South Africa and Liberia v. South Africa)*, Judgment (Second Phase) of 18 July 1996, Letters No. 56 (Le Directeur Général du Bureau International du Travail au Greffier) and No. 57 (Le Greffier au Directeur Général du Bureau du International du Travail), Part IV: Correspondence, pp. 543-544.

94 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (hereinafter: *Corfu Channel case*), Statement by Sir Hartley Shawcross (UK), CR 1949/1, Minutes of the Sittings Held from November 9<sup>th</sup> to April 9<sup>th</sup>, 1949, Vol. III: Pleadings, p. 258; S. Rosenne, *The law and practice of the International Court 1920-2005*, 4<sup>th</sup> Ed., Leiden 2006, p. 1333.

95 The ICJ accepted four series of documents in total. Three were submitted via the respondent, the Albanian government, and the Court accepted one set of documents with a communiqué directly from the Yugoslav government. *Corfu Channel case*, No. 236 (L'Agent Albanais au Greffier), No. 237 (British Agent to the Reg-

that had been called by the United Kingdom. The ICJ merely stated that it did not refuse to receive the documents, because it was ‘anxious for full light to be thrown on the facts alleged.’<sup>96</sup> It did not forward any legal justification for the admission of these submissions. In addition, the Court accepted two informal statements by the Greek Government.<sup>97</sup> The ICJ’s receptiveness in the *Corfu Channel case* has not been repeated in later instances, but the Court has in a few exceptional instances accepted legal submissions by states informally.<sup>98</sup>

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istrar), No. 252 (The British Agent to the Registrar), No. 235 (Le Greffier a l’Agent Albanais), No. 262 (Note du Greffier Adjoint), No. 301 (Le Chargé d’affaires a.i. de Yougoslavie a la Haye au Président), Part IV: Correspondence, ICJ Rep. 1949, pp. 224, 232-233, 238-239, 253-254. The Yugoslav representatives also submitted a statement criticizing alleged inaccuracies of the expert opinion and representatives of the Yugoslav government took part in a meeting with the Deputy-Registrar regarding the parties’ access to evidence.

96 *Corfu Channel case*, Judgment (Merits), 9 April 1949, ICJ Rep. 1949, pp. 4, 17. Further, the Albanian Government depended on the submissions to deny its own responsibility.

97 One statement was submitted by the United Kingdom. The other statement was sent to the ICJ to respond to a statement made by the counsel for Albania during the hearings. See *Corfu Channel case*, No. 145 (The Deputy-Registrar to the English Agent), No. 148 (The English Agent to the Registrar), No. 339 (The Greek Minister at The Hague to the Registrar), Part IV: Correspondence, ICJ Rep. 1949, pp. 184-185, 269.

98 *Fisheries case (United Kingdom v. Norway)*, Judgment, 18 December 1951, Pleadings, CR 1951/1, ICJ Rep. 1951, pp. 606-607, 680 (Belgium, the Netherlands and France presented notes on customary international law formation which were read by the United Kingdom at the oral proceedings). In *Military and Paramilitary Activities in and against Nicaragua*, the USA, in its counter-memorial, submitted statements by three Central American governments concerning the situation in the region. The Court further accepted a publication by the US State Department, which dealt with the US policy towards Nicaragua. The document was never formally submitted as evidence by any party and Nicaragua objected to its use. The ICJ, citing the special circumstances of the case, admitted the document. While not a common incidence, in both instances, the information was submitted by a party as part of its argument and does as such not constitute an *amicus curiae* submission. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (hereinafter: *Nicaragua case*), Judgment (Merits), 27 June 1986, ICJ Rep. 1986, pp. 44, 120-121, paras. 73, 233-234. See also S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht 1993, p. 174, para. 8.9; S. Rosenne, *The law and practice of the International Court of Justice 1920-2005*, Leiden 2006, p. 1335; C. Waldock, *The Anglo-Norwegian Fisheries Case*, 28 British Yearbook of International Law (1951), pp.

The ICJ maintains its reserved attitude towards unsolicited submissions by non-parties in contentious proceedings. No known *amicus curiae* requests were found, which indicates that NGOs consider requesting leave a futile attempt. The ICJ accepts non-party submissions solely within the ambit of its governing instruments. It rejects all other requests with a 'standard reference' to Article 34(1).<sup>99</sup> The ICJ has a practice of seeking information from experts on an informal basis, and parties sometimes attach reports from NGOs (see Chapter 7).

The ICJ has been more open to the reception of information by unsolicited sources in advisory proceedings. Pursuant to Article 66(2) ICJ Statute, states and international organizations considered likely to be able to furnish information on the question may submit written statements 'relating to the question' to the Court or be heard in the case of oral proceedings. This possibility is used in virtually every advisory proceeding both by states and inter-governmental organizations.<sup>100</sup>

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127-128. An unsuccessful request was made in the case *Trial Concerning Pakistani Prisoners of War* between India and Pakistan. See *Trial of Pakistani Prisoners of War (Pakistan v. India)*, Order of 15 December 1973 (Removal from List), ICJ Rep. 1973, pp. 347-348. The Court received a written communication with two annexes by the Foreign Minister of Afghanistan. His submission intended to correct statements made by the representative of Pakistan during the hearings. The Registrar rejected the request for falling outside the scope of procedures in the ICJ Statute and Rules, specifically intervention. See Letter No. 67 (The Registrar to the Minister for Foreign Affairs of Afghanistan), *Trial of Pakistani Prisoners of War case (Pakistan v. India)*, Part IV: Correspondence, pp. 174-175.

99 See Annex I. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (hereinafter: *Gabčíkovo case*), Judgment, 25 September 1995, ICJ Rep. 1997, p. 7; A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005, p. 304. Several sources claim that the ICJ accepted an unsolicited *amicus curiae* brief from the National Heritage Institute and the International River Network as an annex to one of Hungary's submissions. The ICJ did not refer to the brief in its judgment. There is no confirmation of this in the judgment. However, legal counsel for Hungary has submitted that it received offers of assistance by NGOs (which were turned down). See P.-M. Dupuy, *supra* note 90, pp. 589, 604, paras. 4, 41, FN 118. Arguing that *amicus curiae* submissions would have been apposite in the case, D. Shelton, *supra* note 6, pp. 625-626.

100 Since becoming operative in 1946, the ICJ has rendered 26 advisory opinions. The Registrar has made invitations in every advisory proceeding and there has been no case without a state submission. See <http://www.icj-cij.org/en/advisory-proceedings> (last visited 28.9.2017).

The ICJ has in several cases received requests from entities not mentioned in Article 66(2) ICJ Statute. In the advisory proceedings concerning the *International Status of South West Africa*, the ICJ received a request for leave to submit an *amicus curiae* brief by the International League for the Rights of Man, the same NGO that had sought to participate in the *Asylum case*. In this case, the ICJ allowed the organization to file a submission on legal issues within the scope of the case. The organization failed to submit its observations in the form and within the time limit established by the Court.<sup>101</sup>

Subsequent requests for admission as *amicus curiae* by individuals and non-governmental organizations have been rejected routinely on the basis of the limited personal scope of Article 66(2) ICJ Statute and the nature of advisory proceedings.<sup>102</sup> These include a request by the Chief of the Zulu tribe in *International Status of South-West Africa* to present the ‘reasonable wants and wishes of the native population of the mandated Territory of South-West Africa.’<sup>103</sup> The Court also denied several requests to make written and/or oral submissions in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (South West Africa)* by the International League for the Rights of Man and its affiliate, the American Committee on Africa,<sup>104</sup> by an individual purporting to represent the Herero people, by four individuals named ‘The South West

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101 *International Status of South West Africa*, Advisory Opinion, No. 10 (Letter by R. Delson, League for the Rights of Man (hereinafter: ILRM) to the Registrar), No. 18 (Letter from the Registrar to Mr. R. Delson, ILRM), No. 61 (Mr. A. Lans, Counsel to the ILRM to the Registrar), Nos. 66-67 (Deputy-Registrar to Mr. A. Lans), Correspondence, ICJ Rep. 1950, pp. 324,327, 343-344, 346.

102 See also the rejection of a request by the International Civil Servants’ Association in *Effects of Awards of Compensation*, Advisory Opinion, No. 4 (The Federation of International Civil Servants’ Association to the Registrar), No. 5 (The Registrar to the Federation of International Civil Servants’ Association), ICJ Rep. 1954, pp. 389-390. See Annex I for further cases.

103 The President of the Court denied the application for lack of necessity and the purely legal nature of advisory opinions. See No. 51 (The Assistant Secretary-General in charge of the legal department, United Nations, to the Registrar), Annex to No. 51 (Mr. R. H. Swale to the Secretary-General of the United Nations), No. 55, *International Status of South-West Africa*, Advisory Opinion, Correspondence, ICJ Rep. 1950, pp. 320, 341.

104 The Registrar rejected the requests because the organizations were not international organizations within the meaning of Article 66(2) ICJ Statute. No. 89 (The

Africa National United Front' seeking to represent the indigenous inhabitants of South West Africa<sup>105</sup> and by *Professor W. Michael Reisman*.<sup>106</sup> The ICJ admitted a joint request from Burundi, Nigeria, Sierra Leone, the United Arab Republic and Zambia under the title of Organization of African Unity (OAU) after considering it a statement from the Government of Nigeria. The OAU was later admitted to the oral proceedings.<sup>107</sup>

In 1994, the ICJ ceased to publish its correspondence. This makes it difficult to trace unsolicited submissions unless they were accepted into the record or mentioned elsewhere. Based on the information available in the public realm, non-governmental entities and individuals have continued to seek access to advisory proceedings as *amicus curiae*. In his dissenting opinion in *Nuclear Weapons*, *Judge Weeramantry* mentions the receipt by the ICJ of a large but unquantified amount of communications, documents and signatures by different organizations and individuals in addition to 35 written and 24 oral submissions by states pursuant to Article 66(2) ICJ Statute.<sup>108</sup> Then ICJ Registrar *Valencia-Ospina* conveyed that the submissions from the NGOs and individuals were placed in the ICJ library for

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Registrar to the Chairman of the Board of Directors of the ILRM); No. 42 (The Registrar to the Executive Director of the American Committee on Africa), *South West Africa*, Advisory Opinion, Correspondence, ICJ Rep. 1971, pp. 647, 672.

105 No. 41 (The Registrar to the Reverend M. Scott); No. 93 (The Reverend M. Scott to the Registrar); No. 97 (The Registrar to Messrs. Ribuako, Mbaha, Mbaeva and Kerina), *South West Africa*, Advisory Opinion, Correspondence, ICJ Rep. 1971, pp. 647, 676-678.

106 Nos. 18, 21 (The Registrar to Professor Reisman), *South West Africa*, Advisory Opinion, Correspondence, ICJ Rep. 1971, pp. 647-648.

107 The admission may have been justified on the basis that the organization was represented by officials from Nigeria and the United Arab Republic, two states that had received the communication under Article 66(2) ICJ Statute. See No. 43 (The Registrar to the Permanent Representatives to the United Nations of Burundi, Nigeria, Sierra Leone, United Arab Republic and Zambia), *South West Africa*, Advisory Opinion, Correspondence, ICJ Rep. 1971, pp. 647-648.

108 *Nuclear Weapons*, Advisory Opinion, 8 July 1996, Diss. Op. Judge Weeramantry, ICJ Rep. 1996, pp. 533-534. According to *Shelton*, one of the rejected submissions stemmed from International Physicians for the Prevention of Nuclear War. In a letter to the organization, the ICJ Registrar acknowledged that the organization possessed relevant experience in the matters at issue but decided to not accept its information given the scope of the request by the WHO for an advisory opinion, to which the organization had close working ties. D. Shelton, *supra* note 6, p. 624, quoting a letter from the Registrar to Dr. Barry D. Levy dated 28 March 1994.

consultation by the members of the Court without being admitted into the case record.<sup>109</sup> Former ICJ President *Higgins* has stated that the decision not to make the submissions part of the case file in *Nuclear Weapons* was not a hostile act towards *amicus curiae*, but rather grounded in the ‘myriad of briefs’ received and assured that judges were updated on the submissions received.<sup>110</sup>

In 2004, the Court confirmed and formalized its approach to unsolicited submissions by NGOs in Practice Direction XII. Practice Direction XII basically codifies the approach adopted in *Nuclear Weapons*. It also confirms that unsolicited submissions from ‘international non-governmental organizations’ do not form part of the case file. This regulation has been described as the ‘hesitant, if not grudging, acknowledgment of the growing importance of the work of NGOs in the international sphere.’<sup>111</sup> It constitutes a *de minimis* acknowledgment of the existence of submissions by entities other than those mentioned in Article 66(2) ICJ Statute.<sup>112</sup>

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- 109 E. Valencia-Ospina, *Non-governmental organizations and the International Court of Justice*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 231. See also his clarification in the New York Times of 15 November 1995 concerning an *amicus curiae* submission by the Federation of American Scientists: ‘The court has received numerous documents, petitions and representations from non-governmental organizations, professional associations and other bodies.’ *Valencia-Ospina*, then Registrar of the ICJ, underlined that all documents received consistent treatment. See *Court clarification: letter to the editor*, The New York Times, 15 November 1995.
- 110 R. Higgins, *Remedies and the International Court of Justice: an introduction*, in: M. Evans (Ed.), *Remedies in international law*, Oxford 1998, p. 1.
- 111 S. Rosenne, *International Court of Justice*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 107.
- 112 *Sir Arthur Watts* considered Practice Direction XII a good compromise. See A. Watts, *The ICJ’s practice directions of 30 July 2004*, 3 *The Law and Practice of International Courts and Tribunals* (2004), pp. 392-393 (‘The Court has developed and put on a more formal footing its previous informal practice, reflecting a neat compromise between on the one hand treating non-governmental organizations in exactly the same way as governmental organizations and, on the other hand, banishing them from all participation in Advisory Opinion cases. By acknowledging their written submission as part of the public record, the Court acknowledges its own right to take them into consideration and allows others who are entitled to full participation in the proceeding to take note of them on their merits. But by declining to treat them as part of the case file, their distinctive (and lesser) formal status is preserved. ...’).

The ICJ has carved out two exceptions to its strict interpretation of Article 66(2) ICJ Statute, which will be considered in detail in Chapter 5. First, where advisory proceedings serve as the appellate mechanism of an international administrative tribunal in employment disputes, the Court accepts the affected staff member's views through the employing international organization. Second, in the advisory proceedings in *Wall* and *Kosovo*, the ICJ allowed Palestine and the authors of the declaration of independence of 17 February 2008 respectively to make submissions in the proceedings in the same manner as states participating pursuant to Article 66(2) ICJ Statute.<sup>113</sup>

As will be shown in later Chapters, the ICJ's reluctance to admit *amicus curiae* beyond Articles 34(2) and 66(2) ICJ Statute cannot be explained solely by reference to the limited scope of these provisions. It seems to correlate with a general hesitation of the ICJ to officially take into consideration views that do not stem from the parties to the dispute. As former Judge H. Lauterpacht pointed out in the 1950, the ICJ Statute is very much grounded in the exclusion of non-governmental interests and a deviation from this rationale 'would constitute a radical alteration in the structure of the Statute.'<sup>114</sup> Judges may consider such a change too drastic to initiate it without states' formal approval. The ICJ has been strongly criticized for its reluctance to accept external information, especially from NGOs and individuals (see Chapter 2). For the time being, non-state actors seek to bring attention to their views mainly through the lobbying of state parties and intergovernmental organisations.

## II. International Tribunal for the Law of the Sea

The Statute and Rules of the ITLOS have been closely modelled from those of the ICJ. Like the procedural rules of the ICJ, the ITLOS Statute does not provide for *amicus curiae* participation explicitly. However, Arti-

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113 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter: *Wall*), Order of 19 December 2003, ICJ Rep. 2003, pp. 428-429; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (hereinafter: *Kosovo*), Order of 17 October 2008, ICJ Rep. 2008, pp. 409-410.

114 H. Lauterpacht, *The revision of the Statute of the International Court of Justice*, 1 *The Law and Practice of International Courts and Tribunals* (2002), p. 108.

cle 84 ITLOS Rules reflects Article 34(2) ICJ Statute in that it allows participation by intergovernmental organizations akin to *amicus curiae*. Intergovernmental organizations have yet to make use of the provision. On 30 October 2013, the ITLOS received a request from Stichting Greenpeace Council ('Greenpeace International' or 'GPI') for admission as *amicus curiae* in the *Arctic Sunrise case* between the Netherlands and Russia concerning a request for provisional measures brought by the Netherlands pending the establishment of the Annex VII arbitral tribunal competent to hear the case. The case concerned the arrest and detention of thirty GPI activists and the GPI-operated vessel (which was flying the Dutch flag) in Russia's Exclusive Economic Zone on 19 September 2013 where it had protested against an Arctic Gazprom offshore oil platform.<sup>115</sup> Although the ITLOS ultimately rejected the request for leave, it noted the receipt of the brief in its Order of 22 November 2013 ordering the release of the crew members and the vessel upon bond.<sup>116</sup> In September 2014, GPI requested leave to appear as *amicus curiae* in the then ongoing inter-state arbitration proceedings. The tribunal denied the request by procedural order of 8 October 2014.<sup>117</sup>

In advisory proceedings, the Seabed Disputes Chamber, a specialized permanent chamber established by the UNCLOS for matters concerning the Area, may pursuant to Article 133(2) ITLOS Rules receive written and oral submissions from UNCLOS member states and intergovernmental organizations likely able to furnish information on the matter. In *Responsibilities*, its first advisory opinion, the Chamber received written submissions from twelve states and four intergovernmental organizations, one of whose membership consists also of non-governmental actors (see Chapter 5). In addition, the Seabed Disputes Chamber received an unsolicited *amicus curiae* submission from Greenpeace International and the World Wide

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115 *The Arctic Sunrise case (Kingdom of the Netherlands v. Russian Federation)* (hereinafter: *Arctic Sunrise case*), Provisional Measures, Request for Provisional Measures submitted by the Netherlands of 21 October 2013, ITLOS Case No. 22, at: [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Request\\_provisional\\_measures\\_en\\_withtranslations.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf) (last visited: 28.9.2017).

116 *Arctic Sunrise case*, Provisional Measures, Order of 22 November 2013, ITLOS Case No. 22, paras. 16, 18.

117 *The Kingdom of the Netherlands v. the Russian Federation*, Procedural Order No. 3, 8 October 2014, PCA Case No. 2014-2.

Fund for Nature (WWF).<sup>118</sup> The Chamber followed the approach of the ICJ in advisory proceedings. Instead of displaying the document at the Tribunal's seat in Hamburg, it facilitated access to the submission by publishing it on the ITLOS website.<sup>119</sup> Judge Treves has noted that the Chamber was 'well conscious of the impact of modern technology' when it decided to place the submissions on its website.<sup>120</sup> The ITLOS recently confirmed its approach in its second advisory proceedings with respect to two *amicus curiae* submissions it received from the WWF. Moreover, it admitted into the record a submission from the USA, which is not a member to the UNCLOS.<sup>121</sup> The Chamber was careful not to denote the submission an *amicus curiae* brief and stressed the USA's membership of the Straddling Fishstocks Agreement which elaborates certain UNCLOS provisions.<sup>122</sup> However, the admission is not covered by the wording of Article 133 ITLOS (see Chapter 5). Both submissions were also transmitted to the parties. Compared with the ICJ, this facilitation of access to the submissions signals a greater openness to *amicus curiae* and encourages states parties and intergovernmental organizations to take them into account in their submissions. It remains to be seen if the admission of the USA's brief remains an exception or signals a careful shift towards a more liberal acceptance of *amicus curiae* submissions.

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118 *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (hereinafter: *Responsibilities*), Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, paras. 11, 13-17.

119 At: <http://www.itlos.org/index.php?id=109&L=0%25255CoOpensinternallinkincurrentwindow#c587> (last visited: 28.9.2017).

120 T. Treves, *Non-governmental organizations before the International Tribunal for the Law of the Sea: the advisory opinion of 1 February 2011*, in: G. Bastid-Burdeau et al. (Eds.), *Le 90e anniversaire the Boutros Boutros-Ghalie: hommage du Curatorium à son Président/Académie de Droit international de la Haye*, Leiden 2012, p. 255. Further, the *amici* gave an oral statement to the press in a room reserved for them at the ITLOS in Hamburg, which – at least for the larger public – may have added an appearance of gravitas to their statement.

121 *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (hereinafter: *SRFC*), Written Statement of the United States of America, 27 November 2013, Memorial Filed on Behalf of WWF, 29 November 2013 and Further *Amicus Curiae* Brief on Behalf of WWF International, 14 March 2014, ITLOS Case No. 21.

122 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 12, 14, 24.

### III. European Court of Human Rights

Upon receiving its first request for participation as *amicus curiae* in the late 1970, the ECtHR did not foresee participation by non-parties in its procedural instruments. Participation by interested third parties was channelled through the Commission on Human Rights, then the main organ to enforce human rights in the Council of Europe member states and the only organ competent to bring cases before the court.

The first request for admission as *amicus curiae* before the ECtHR was made by the Government of the United Kingdom in the case *Winterwerp v. the Netherlands*. It sought to file a brief on the interpretation of Article 5(4) ECHR, which was relevant in several pending ECtHR cases against it. The government argued that the court could allow it to participate on the basis of its investigative powers.<sup>123</sup> The President of the Court refused the request for oral participation, but allowed the government to make a written submission.<sup>124</sup>

After the decision, the ECtHR gradually opened its doors to *amicus curiae* participation. In *Young, James and Webster v. the United Kingdom*, a case concerning the termination of employment contracts of employees of the English Railways Board for their refusal to become members in one of three specified trade unions, the court for the first time accepted the sub-

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123 Petitioners sought to rely on former Rule 38(1) ECtHR Rules which concerned the ECtHR's investigative powers. The provision determined that a chamber could hear 'any person whose evidence or statements seem likely to assist in the carrying out of its task.' The ECtHR did not use the provision to accept *amicus* briefs. Instead, it arranged for a written submission to be made through the representatives of the EComHR. See *Winterwerp v. the Netherlands*, Judgment, 24 October 1979, ECtHR Series A No. 33. The oral proceedings were interrupted for two weeks to allow the EComHR to present the statement. See also F. Matscher, *Überlegungen über die Einführung der "Interpretationsintervention" im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, in: H. Miehsler (Ed.), *Ius Humanitatis – Festschrift für Alfred Verdross zum 90. Geburtstag*, Berlin 1980, p. 539.

124 F. Matscher, *supra* note 123, p. 539. For a detailed analysis of the first cases of *amicus curiae* participation before the ECtHR and the role of British legal practitioners therein, see A. Dolidze, *Bridging comparative and international law: amicus curiae participation as a vertical legal transplant*, 26 *European Journal of International Law* (2015), p. 851.

mission of an NGO, the Trades Union Congress (TUC).<sup>125</sup> The TUC argued that it should be admitted because of an affiliation to the three unions involved in the case, the importance of the judgment, and an incomplete presentation by the United Kingdom government of all arguments relevant to the case. The written memorandum was submitted via the European Commission for Human Rights. In addition to accepting the memorandum, the ECtHR decided to hear the TUC on certain issues of fact.<sup>126</sup>

Finding a benefit to *amicus curiae*, in November 1982, the court amended its rules to provide for *amicus curiae* participation on matters specified by the president of the court.<sup>127</sup> The first request under the new Article 37(2) was made shortly after by the Council of the Rome Bar Association in *Goddi v. Italy*.<sup>128</sup> Throughout the 1980 and 1990, *amicus curiae* participation grew slowly.<sup>129</sup>

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125 *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44; P. Mahoney, *Developments in the procedure of the European Court of Human Rights: the revised rules of the court*, 3 Yearbook of European Law (1983), p. 150.

126 Even though the request was ultimately unsuccessful, *Tyrer v. the United Kingdom* is the first case in which an organization explicitly requested to participate in proceedings as *amicus curiae*. The case concerned the conformity with Article 3 ECHR of court-ordered corporal punishment of a 15-year-old student. The National Council for Civil Liberties (NCCL) requested permission to participate in the written and oral proceedings of the case. The NCCL argued that it could inform the court of issues that would otherwise not come to its attention. It had helped the applicant to prepare his case. Given that the applicant had resigned from the proceedings after unsuccessful attempts to withdraw his action, the court refused to grant leave to the NCCL. See *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, Series A No. 26.

127 On 1 January 1983, Rule 37(2) entered into force. It provided: 'The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant leave to any person concerned other than the applicant.' See D. Shelton, *supra* note 6, p. 631; P. Mahoney, *supra* note 125, p. 141.

128 *Goddi v. Italy*, Judgment of 9 April 1984, Series A No. 76.

129 Between 1983 and 1995, the court permitted the filing of 37 *amicus curiae* briefs in 26 cases and denied leave to file *amicus* briefs in nine cases. See D. Gomien/D. Harris/L. Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg 1996, p. 81 ('[B]earing in mind the importance of the case-law of the Court for the formation of a common human rights standard, it was surprising that third-party interventions

*Amicus curiae* participation before the ECtHR was fully institutionalized and approved of by the Council of Europe member states with its introduction into the European Convention by Protocol 11, which entered into force on 1 November 1998. The new Article 36(2) ECHR firmly embedded the instrument in the European human rights system. It also broadened the scope of *amicus curiae* by permitting oral submissions and abolishing the requirement that the court specify the issues *amicus curiae* was to comment on. This change in the treatment of *amicus curiae* coincided with a general broadening of the role of individuals and NGOs before the ECtHR, especially the introduction by Protocol 11 of the individual complaint procedure.<sup>130</sup>

This opening has been received well in practice. Since 1978, the ECtHR has granted leave to file *amicus curiae* submissions in 459 cases (see Annex I). In absolute figures, *amicus curiae* participation continues to steadily grow. In relative terms, it is estimated to affect less than 1% of Chamber and Grand Chamber proceedings.<sup>131</sup> Nonetheless, *amicus curiae* participation is not insignificant. It occurs frequently in Grand Chamber proceedings and especially in cases considered to be of fundamental importance for the development, clarification or modification of the court's case law.<sup>132</sup>

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were so few from 1959-1998.'). A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/H. Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, p. 349 (Lester criticizes the ECtHR for being overly cautious in the admission of *amici curiae*).

130 For general information on the reform, see M. Ölz, *Non-governmental organizations in regional human rights systems*, 28 *Columbia Human Rights Law Review* (1997), p. 349.

131 L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 *Non-State Actors and International Law* (2005), p. 235; L. Van den Eynde, *An empirical look at the amicus curiae practice before the European Court of Human Rights*, 31 *Netherlands Quarterly of Human Rights* (2013), p. 282 (She considers as a contributing factor the large amount of routine cases with settled case law, where there is no rationale for an influencing of the court's jurisprudence.).

132 N. Bürli, *Amicus curiae as a means to reinforce the legitimacy of the European Court of Human Rights*, in: S. Flogaitis et al. (Eds.), *The European Court of Human Rights and its discontents*, Cheltenham et al. 2013, p. 136, FN 5. Dolidze states that between 1994 and 2014 *amici curiae* have participated in 34,5% of all Grand Chamber cases. A. Dolidze, *Bridging comparative and international law: amicus curiae as a vertical legal transplant*, 26 *European Journal of International Law* (2016), p. 864.

#### IV. Inter-American Court of Human Rights

The structure of human rights enforcement in the American Convention on Human Rights was closely modelled on the structure of human rights enforcement in the European Convention prior to the adoption of the individual complaint procedure in the ECHR.<sup>133</sup> Under the ACHR, a complaint is first brought to the Inter-American Commission on Human Rights (IAComHR) that investigates the case and decides if it will be brought before the IACtHR.<sup>134</sup> Individuals cannot bring a case directly before the IACtHR. However, any person, group of persons or non-governmental entity legally recognized in at least one OAS member state can initiate investigations by the IAComHR.<sup>135</sup>

The IACtHR admitted *amici curiae* already in its first advisory opinion in 1982. Peru had asked the court to opine on the scope of its advisory jurisdiction under Article 64(1) ACHR. The court received written submissions by six states and several OAS organs in response to its invitation to make observations pursuant to then Article 52 IACtHR Rules, which allowed member states and OAS organs to make written submissions. In addition, the court received four written *amicus curiae* submissions by five NGOs.<sup>136</sup> The IACtHR has both invited and received *amicus curiae* sub-

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133 M. Ölç, *supra* note 130, p. 355.

134 For a discussion of the American Convention's two-step complaint procedure, see A. Del Vecchio, *Inter-American Court of Human Rights, International courts and tribunals, standing*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 15; J. Kokott, *Das inter-amerikanische System zum Schutze der Menschenrechte*, Berlin 1986; C. Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: reflections on a joint venture*, 12 *Human Rights Quarterly* (1990), pp. 440-448. For an overview of the court's advisory practice, see T. Buergenthal, *Advisory practice of the Inter-American Court of Human Rights*, 79 *American Journal of International Law* (1985), pp. 1-27. The IAComHR also receives *amicus curiae* submissions, see A. Lindblom, *supra* note 99, pp. 350-354.

135 The Commission has matured into a body considering individual human rights violations. Its initial mandate was limited to the examination and documentation of systemic and gross human rights violations. The Commission changed the scope of its activities upon entry into force of the American Convention in 1978. See C. Medina, *supra* note 134, pp. 441-442.

136 "Other Treaties" subject to the consultative jurisdiction of the court (*Article 64 American Convention on Human Rights*), Advisory Opinion No. OC-1/82, 24 September 1982, IACtHR Series A No. 1. The *amici* were: Inter-American Institute for Human Rights, International Human Rights Law Group, International

missions in almost every advisory proceeding since (see Annex I). Today, pursuant to Article 73(3) IACtHR Rules, the President of the Court may invite or authorize any interested party to present a written statement on the issues submitted for consultation.<sup>137</sup>

The IACtHR has been equally open to *amicus curiae* submissions in contentious cases. The first *amicus curiae* submissions were accepted in 1988 in *Velásquez Rodríguez v. Honduras*, the court's first contentious case. The IACtHR received multiple submissions, mostly by non-governmental human rights organizations and lawyers. It explicitly listed them as *amicus curiae* submissions in its judgment.<sup>138</sup> The IACtHR has yet to discuss the legal basis upon which it admitted and admits *amici curiae* in its proceedings. In 2009, the IACtHR defined and codified its extensive *amicus curiae* practice in its rules of procedure due to the type of submissions received.<sup>139</sup> Still, the IACtHR did not formulate a legal basis for *amicus curiae* participation (see Chapter 5).

The IACtHR accounts for the largest number of *amicus curiae* participation in relative terms. Out of 317 concluded contentious cases, *amicus curiae* briefs were submitted in 122 (see Annex I), with a notable increase of submissions over the last decade particularly in cases engaging fundamental ethical questions.<sup>140</sup> The IACtHR has received *amicus curiae* submissions in 20 of its 22 advisory opinions. As Annex I shows, the number

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League for Human Rights and Lawyers Committee for International Human Rights and Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law.

137 In advisory proceedings under Article 64(2) ACHR, the IACtHR must prior to issuing invitations consult the agent of the state that submitted the request.

138 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), IACtHR Series C No. 4, p. 8, para. 19. Submissions were made by Amnesty International, the Asociación Centroamericana de Detenidos-Desaparecidos, twelve jurists, Association of the Bar of the City of New York, the Lawyers' Committee for Human Rights and the Minnesota Lawyers' International Human Rights Committee.

139 F. Rivera Juaristi, *The "amicus curiae" in the Inter-American Court of Human Rights (1982 – 2013)*, in: Y. Haeck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, pp. 112-113 quoting the IACtHR, Statement of Reasons to Modify the Rules of Procedure, p. 3, available at: [http://www.corteidh.or.cr/sitios/reglamento/ene\\_2009\\_motivos\\_ing.pdf](http://www.corteidh.or.cr/sitios/reglamento/ene_2009_motivos_ing.pdf) (last visited: 28.9.2017).

140 F. Rivera Juaristi, *supra* note 139, p. 107 (19% of all briefs in contentious proceedings were filed in the cases *Artavia Murrillo* concerning in-vitro fertilization and in *Atala Riffo and daughters* concerning same-sex marriage.)

of submissions per case ranges between one and well over fifty. The number of submissions in a case appears to depend on the novelty and perceived importance of the matter decided. Generally, the number of submissions per case is higher in advisory opinions, which is unsurprising given their wide reach. The IACtHR rarely solicits *amicus curiae* submissions.<sup>141</sup>

## V. African Court on Human and Peoples' Rights

Neither the ACtHPR Protocol nor its Rules explicitly allow for the admission of *amici curiae*. However, *amicus curiae* participation is regulated in sections 42-47 ACtHPR Practice Directions of 2012. Regarding advisory proceedings, Article 54 replicates Article 66 ICJ Statute and Article 70(2) ACtHPR Rules further allows the court to authorize any interested entity to make a written submission on any of the issues raised in the request.

Having decided its first case in 2009, the ACtHPR so far has admitted *amici curiae* to participate in two of its 26 finalized cases and in one advisory proceeding.<sup>142</sup> These admissions show that the ACtHPR is generally willing to receive *amici curiae*. In addition to the court, the AComHPR sometimes accepts *amicus curiae* submissions.<sup>143</sup>

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141 E.g. *Juridical Condition and Human Rights of the Child*, Advisory Opinion No. OC-17/02 of 28 August 2002, IACtHR Series A No. 17, p. 21 (The court solicited assistance as observer from the UN special rapporteur for the rights of migrants).

142 *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order of 15 March 2013, ACtHPR No. 004/2011, p. 3, para. 4. See also *Request for advisory opinion 001/2013 by the Socio-Economic Rights and Accountability Project* (pending); *Lohé Issa Konaté v. Burkina Faso*, Application No. 4/2013, Judgment of 5 December 2014.

143 Until 2017, *amicus curiae* submissions were received in six out of its 218 decided cases. They are: *Kenneth Good/Republic of Botswana*, No. 313/05, decided on 26 May 2010; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya*, No. 276/03, decided on 25 November 2009; *Gabriel Shumba v. Zimbabwe*, No. 288/04, decided on 2 May 2012; *Samuel T. Muzerengwa and 110 Others v. Zimbabwe*, No. 306/05, decided on 3 March 2011; *Interights (on behalf of Pan African Movement and Citizens for peace in Eritrea) v. Ethiopia and Interights (on behalf of Pan African Movement and Inter African Group/ Eritrea)*, Nos. 233/99 and 234/99, decided on 29 May 2003, at: <http://www.achpr.org/communications/> (last visited: 28.9.2017). See C. Odinkalu/C. Christensen, *The African Commission on Human*

## VI. WTO Appellate Body and panels

Until the late 1990, *amicus curiae* participation was a non-issue in WTO dispute settlement. The Appellate Body and panels had received – and routinely rejected – submissions by non-state actors by pointing to the strict inter-governmental nature of the dispute settlement system.<sup>144</sup> Panels' reasoning was artificial in so far as select private actors strongly influenced the initiation and conduct of proceedings to the extent that, at times, they were considered the 'real' parties to a dispute (see Chapter 2).

In 1998, the Appellate Body made headlines when it decided that panels had the authority to accept and consider unsolicited *amicus curiae* submissions without the parties' approval.<sup>145</sup> The decision in *US–Shrimp* was the first in a series of such decisions despite heavy criticism and open warnings to the dispute settlement organs by virtually the entire WTO membership. In 2000, the Appellate Body in *US–Lead and Bismuth II*

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*and Peoples' Rights: the development of its non-state communication procedures*, 20 Human Rights Quarterly (1998), pp. 235, 279. On the relationship between the court and the commission, see A. P. van der Mei, *The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?*, 18 Leiden Journal of International Law (2005), pp. 122-128. Providing reasons for the low amount of participation by *amici curiae*, which include the lenient standing requirements and lack of transparency of the *amicus curiae* mechanism, F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 Journal of African Law (2014), pp. 33-34.

144 These cases were: *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (hereinafter: *EC–Hormones*), Report of the Panel, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R; *United States – Standards for Reformulated and Conventional Gasoline* (hereinafter: *US–Gasoline*), Report of the Panel, adopted on 20 May 1996, WT/DS2/R and WT/DS4/R. See G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), pp. 157-158; S. Charnovitz, *Opening the WTO to nongovernmental interests*, 24 Fordham International Law Journal (2000), p. 182, FN 52; Factual Background Note to the General Council Special Meeting on 22 November 2000, referred to by D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 438.

145 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 107.

found that it also possessed authority to admit unsolicited *amicus curiae* briefs.<sup>146</sup>

Conflict between the member states and the Appellate Body intensified after it adopted *ad hoc* procedures to regulate *amicus curiae* submissions pursuant to Article 16(1) Working Procedures for Appellate Review (*EC–Asbestos* Additional Procedure) in *EC–Asbestos*, a case concerning the legality of an EU ban on asbestos and asbestos-based products for health reasons.<sup>147</sup> The *EC–Asbestos* Additional Procedure established a detailed procedure for *amicus curiae* participation.<sup>148</sup> It was published on the WTO website with a general invitation to non-parties to apply for leave. The *EC–Asbestos* Additional Procedure evoked strong reactions from the WTO membership, which culminated in an urgently convened General Council Meeting on 22 November 2000.<sup>149</sup> With the exception of the United States – and later the European Commission – member states condemned *amicus curiae* participation and accused the Appellate Body of acting *ultra vires*.<sup>150</sup> Ultimately, none of the 17 requests for leave submitted under the *EC–Asbestos* Additional Procedure was admitted. Particularly non-state actors surmised that the rejection of the briefs was a result

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146 *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (hereinafter: *US–Lead and Bismuth II*), Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, p. 15, para. 42.

147 *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (hereinafter: *EC–Asbestos*), Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, para. 50.

148 The division had previously consulted the parties and third parties on the desirability of the procedure. With the exception of the USA and Zimbabwe, the parties and third parties (Canada, the EU and Brazil) informed the division that such a procedure lay within the sphere of competence of the WTO Membership, but still, without prejudice to their views, made substantive suggestions for a procedure. *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, para. 50.

149 G. Umbrecht, *supra* note 54, p. 776.

150 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by USA, para. 74 ('[T]he Appellate Body had acted appropriately in adopting its additional procedure in the asbestos appeal.'). See, however, G. Zonnekeyn, *The Appellate Body's communication on amicus curiae briefs in the Asbestos case – an Echernach procession?*, 35 *Journal of World Trade* (2001), p. 562 ('The Additional Procedure undoubtedly constitutes a good initiative taken within the boundaries of the law and case law.').

of the political pressure exerted on the Appellate Body at the General Council Meeting.<sup>151</sup>

Panels and the Appellate Body since have relied neither on the *EC–Asbestos* Additional Procedure nor adopted similar procedures.<sup>152</sup> Still, the *EC–Asbestos* Additional Procedure continues to be relevant, as it constitutes the only comprehensive assessment by a division of the Appellate Body of the necessary procedures relating to *amicus curiae*.<sup>153</sup>

With one exception, panels and the Appellate Body have repeatedly confirmed their authority to admit *amicus curiae* briefs.<sup>154</sup> The decisions display a growing confidence in their authority to do so. At first, panels frequently asserted their authority to accept *amici* by reference to *US–Shrimp*. Now, panels directly decide on an *amicus curiae* request without first justifying their authority to do so.<sup>155</sup>

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151 C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 *Aussenwirtschaft* (2005), p. 368.

152 D. McRae, *What is the future of WTO dispute settlement?*, 7 *Journal of International Economic Law* (2004), p. 12 (Member states' reaction to the *EC–Asbestos* Additional Procedure 'wasted an opportunity to provide coherence in the submission of such briefs.').

153 *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, para. 56. *Amicus curiae* applicants still frame their requests in accordance with it. The future effect of the procedure was a concern for Egypt: 'While the [Appellate Body] pledged that the decision was for the purpose of the Asbestos appeal only, it introduced an additional procedure which, if allowed to apply, would certainly create pressure for future cases and might in fact set a precedent or jurisprudence.' See WTO General Council, *Minutes of Meeting* of 22 November 2000, WT/GC/M/60, Statement by Egypt, para. 20.

154 See *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* (hereinafter: *US–Softwood Lumber VI*), Report of the Panel, adopted on 22 April 2004, WT/DS277/R, p. 86, para. 7.10, FN. 75 (The panel rejected an *amicus curiae* brief citing a lack of consensus among member states on how to treat *amici curiae*. It allowed the parties and third parties to attach *amicus curiae* submissions to their own submissions.).

155 In *US–Lead and Bismuth II*, the panel received an unsolicited *amicus* brief by a US industry association. Briefly stating that 'we clearly have the discretionary authority to accept the AISI brief,' the panel rejected the brief for untimeliness. See *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/R, pp. 24–25, para. 6.3. See also *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India* (hereinafter: *EC–Bed Linen*), Report of the Panel, adopted on 12 March 2001, WT/DS141/R, p.6, FN 10.

The expected flood of *amicus curiae* submissions, another concern voiced by member states, has not materialized. Between 1995 and 2014, 201 panel and 129 Appellate Body reports were adopted.<sup>156</sup> To date, unsolicited *amicus curiae* submissions have been received in 23 panel and in 19 Appellate Body proceedings respectively (see Annex I).

Member states continue to disagree over the issue of *amicus curiae* at the political level. The regulation of *amicus curiae* was placed on the political agenda in 2001 as part of the efforts to reform the DSU under the Doha Mandate.<sup>157</sup> The reform mandate has been extended several times due to the inability of member states to agree on several matters, including *amicus curiae* participation.<sup>158</sup> Member states attach great importance to the DSU reform negotiations in light of the DSU's pivotal role in the

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156 See WTO dispute settlement statistics, at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm) (last visited 28.9.2017).

157 Doha Ministerial Declaration, 14 November 2001, para. 30. At para. 47, the Doha Declaration clarifies that these negotiations will not be part of the single undertaking – i.e. that they will not be tied to the success or failure of the other negotiations mandated by the declaration. Reform negotiations of the DSU resulted from an agreement made by member states at the 1994 Marrakesh Ministerial Conference that the governments would review the dispute settlement system within four years of the entry into force of the WTO Agreement, that is, by 1 January 1999, to decide on any necessary changes. The DSB initiated the review in late 1997 with several informal discussions.

158 Originally set to conclude by May 2003, the negotiations are now continuing without a deadline. Hong Kong Ministerial Declaration, 18 December 2005, para. 34, at: [https://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_text\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm) (last visited: 28.9.2017). On the DSU review in general, see D. Evans/C. de Tarsion Pereira, *DSU review: a view from the inside*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, pp. 251-268. The reform proposals are discussed at special sessions of the DSB within the framework of the Doha Agenda work program. See also WTO DSB, *Special Session of the Dispute Settlement Body – Report by the Chairman, Ambassador Ronald Saborio Soto*, 6 August 2015, WTO Doc. No. WT/DS/27, paras. 3.23, 3.24 ('Unsolicited *amicus curiae* briefs remain a sensitive issue. ... There is limited common ground among participants that only parties and third parties have the right to present submissions and be heard in panel proceedings. However, views are opposed on the general acceptability of unsolicited briefs. In light of this, I see no basis to develop a general solution at this point. In the absence of such general solution, participants might consider whether there is readiness to confirm the limited common ground and explore means to assist panels facing unsolicited *amicus* briefs on an *ad hoc* basis.' [Emphasis deleted]).

WTO multilateral trading system.<sup>159</sup> The issue of *amicus curiae* participation has evolved into a dispute over the need for direct representation of civil society in dispute settlement proceedings.<sup>160</sup> In May 2003, the Chairman of the negotiations circulated a draft legal text (Chairman's text) that has since served as a discussion paper. The Chairman excluded the issue of *amicus curiae* from the text due to the continued disagreement. Since then, no measurable progress has been made.<sup>161</sup> Several proposals regarding the concept remain on the table. The EU with the support of *inter alia* the USA and Canada proposes to explicitly permit and regulate *amicus curiae* participation. Its detailed proposal largely adopts the *EC-Asbestos Additional Procedure*.<sup>162</sup> Several proposals from developing countries

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159 In notes for the Cancun Ministerial Conference, the WTO conveys that only the issue of agriculture has attracted more active participation among member states under the Doha Mandate. See *Cancún Ministerial Conference Briefing Notes*, 2003, at: [https://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief02\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief02_e.htm) (last visited: 28.9.2017).

160 H.E. E. Østebø Johansen (then DSB Chairman), *WTO Dispute Settlement Body developments in 2011*, at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/speech\\_johansen\\_13mar12\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm) (last visited: 28.9.2017).

161 *Special Session of the Dispute Settlement Body, Report by the Chairman to the Trade Negotiations Committee*, 21 April 2011, TN/DS/25, pp. A-38-A.39 (Inviting the member states in favour of regulating *amicus curiae* to submit draft proposals); General Council, *Minutes of Meeting of 20 November 2011*, 21 March 2012, WT/GC/M/134, p. 89. See also M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 *World Trade Review* (2006), p. 85.

162 See WTO General Council, *Minutes of Meeting of 22 November 2000*, WTO Doc. No. WT/GC/M/60, Statement by EU, para. 96; DSB, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, Dispute Settlement Body Special Session*, 13 March 2002, WTO Doc. No. TN/DS/1, section IV.

seek to explicitly prohibit the participation of *amici curiae*.<sup>163</sup> Despite the continuing impasse, many continue to hope for a political solution.<sup>164</sup>

In the meantime, some states have adopted alternative solutions. Within the framework of their Free Trade Agreement negotiations in 2000, Jordan and the USA issued a 'Joint Statement on WTO Issues' in which they agreed to permit *amicus curiae* in their disputes before the WTO, as well as 'consider the views of members of their respective publics in order to draw upon a broad range of perspectives.'<sup>165</sup> In addition, several member states, including states that heavily oppose *amicus curiae* in WTO dispute settlement, have concluded regional trade agreements whose dispute settlement mechanisms contain rules on *amicus curiae* participation. These

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163 DSB, *Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, Negotiations on the Dispute Settlement Understanding*, 7 October 2002, WTO Doc. No. TN/DS/W/18; DSB, *Contribution by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Doha Mandated Review of the Dispute Settlement Understanding (DSU)*, 27 November 2002, TN/DS/W/25. For further analysis, see H. Pham, *Developing countries and the WTO: the need for more mediation in the DSU*, 9 Harvard Negotiation Law Review (2004), pp. 331-389.

164 G. Marceau/M. Stilwell, *supra* note 144, p. 176; L. Boisson de Chazournes/M. Mbengue, *The amici curiae and the WTO dispute settlement system: the doors are open*, 2 *The Law and Practice of International Courts and Tribunals* (2003), p. 244. On 15 July 2016, the Delegation of Canada circulated among WTO member states a document suggesting several transparency measures and the 'development and adoption of procedures to regulate the invitation, submission and consideration of [*amicus curiae*] briefs' to enhance 'the legitimacy of the dispute settlement system', see WTO, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Addendum*, WTO Doc. No. JOB/DSB/1/Add.3, 18 July 2016.

165 Sections 1 and 2(b) United States-Jordan Joint Statement on WTO Issues of 24 October 2000. For detailed analysis, see M. Nsour, *Fundamental facets of the United States-Jordan Free Trade Agreement: e-commerce, dispute resolution, and beyond*, 27 *Fordham Journal of International Law* (2004), pp. 776-777. A regulation of *amicus* submissions was inserted also in paras. 38-40 of Annex I (Rules of Procedure for Arbitration) to the *Protocol between the European Union and the Hashemite Kingdom of Jordan establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part*, which entered into force on 1 July 2011, at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2011.177.01.0001.01.ENG&toc=OJ:L:2011:177:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2011.177.01.0001.01.ENG&toc=OJ:L:2011:177:TOC) (last visited: 28.9.2017).

include the *Chile-EU-FTA*,<sup>166</sup> additional protocols signed to the *EU-ROMED* Partnership Agreements between the EU and different Mediterranean countries<sup>167</sup> and the *Economic Partnership Agreement between the EU and the CARIFORUM States*.<sup>168</sup> The change of heart of the CARIFORUM states may be in part explained by the fact that the EU has agreed to cover the full costs of dispute settlement proceedings with the exception of arbitrator and mediator fees.<sup>169</sup> This indicates that concerns over exploding procedural costs are one of the reasons for resisting *amicus curiae* in the WTO context. This should be kept in mind in the review negotiations.

## VII. Investor-state arbitration

Investment arbitration has traditionally been closed off to any form of external participation, with few exceptions.<sup>170</sup> Confidentiality and privacy are still hailed as one of the main advantages of arbitral proceedings.<sup>171</sup> With the development of *amicus curiae* practice before the WTO adjudi-

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166 Sec. 35-27 Model Rules of Procedure for Arbitration Panels, Annex XV to the Association Agreement, L 1435, 30 December 2002.

167 Protocols were concluded with Jordan in 2011, Lebanon in 2011, Tunisia in 2012, Morocco in 2012 as well as Egypt. Article 16 of the Annex to these protocols provides for *amicus curiae* participation.

168 See Article 217 *Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part*, 30 October 2008, L289/I/72: 'At the request of a Party, or upon its own initiative, the arbitration panel may obtain information from any source, including the Parties involved in the dispute, it deems appropriate for the arbitration panel proceeding. The arbitration panel shall also have the right to seek the relevant opinion of experts as it deems appropriate. Interested parties are authorized to submit *amicus curiae* briefs to the arbitration panel in accordance with the Rules of Procedure. Any information obtained in this manner must be disclosed to each of the Parties and submitted for their comments.' See also Article 12 of *Protocol 6 to the Stabilisation and Association Agreement (SAA) between the European Communities and their Member States and Bosnia and Herzegovina*, OJ L 164, 30 June 2015.

169 For further analysis, see T. Dolle, *Streitbeilegung im Rahmen von Freihandelsabkommen*, Baden-Baden 2015, Part C.

170 An exception regarding *amicus curiae* is the Iran-United States Claims Tribunal, see Chapter 5.

171 K. Hobér, *Arbitration involving states*, in: L. Newman/R. Hill (Eds.), *The leading arbitrators' guide to international arbitration*, New York 2008, Chapter 8, p. 155.

cating bodies, it came as no surprise that requests for leave to participate were sent to various investment arbitration tribunals.<sup>172</sup>

In 2001, two arbitral tribunals constituted under the NAFTA's investment chapter, Chapter 11, and the 1976 UNCITRAL Arbitration Rules accepted unsolicited submissions by several non-governmental environmental organizations. In *Methanex v. USA*, the world's largest producer and marketer of methanol claimed that the USA had violated the NAFTA investment protections by issuing a California executive order that banned the use or sale in California of the gasoline additive MTBE. A US corporation, a producer of ethanol (which can be used instead of methanol in the production of MTBE) had lobbied for the ban. The USA retorted that the Order was not aimed at supporting the US ethanol producers, but based on human health and safety in addition to environmental considerations. The tribunal acknowledged a public interest in the dispute and decided that Article 15(1) of the 1976 UNCITRAL Arbitration Rules furnished it with the power to admit *amici curiae* to elaborate on the public interest engaged.<sup>173</sup> Shortly after, the tribunal in *UPS v. Canada* received unsolicited *amicus curiae* submissions from the Canadian Union of Postal Workers and the Council of Canadians, as well as the US Chamber of Commerce. The case was brought by the US parcel delivery service United Parcel Service of America. *UPS* argued that Canada Post, a government-owned postal enterprise, was engaging in anti-competitive practices in violation of the NAFTA. Like the *Methanex* tribunal, the *UPS* tribunal found that it was 'within the scope of article 15(1) for the Tribunal to receive submissions offered by third parties with the purpose of assisting the tribunal.'<sup>174</sup>

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172 For this reason, it is unlikely that *amicus curiae* will be introduced in commercial arbitration, even if involving a state as a party. In addition to the absence of significant pressure to open proceedings, justifying abolishment of confidentiality of commercial arbitration proceedings with public interest concerns seems rather difficult. See also K. Hober, *supra* note 171, Chapter 8, p. 155.

173 Because the parties had not made their submissions, the tribunal rejected the *amicus curiae* submissions for prematurity, but it accepted them at a later stage of the proceedings. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, paras. 48-52.

174 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amicus curiae*, 17 October 2001, p. 24, para. 61.

The decisions received mixed reviews.<sup>175</sup> The admission of *amici curiae* was a bold step, signalling a paradigm change in a dispute settlement system that had largely been operating in a private environment. It is not surprising that the first admissions of *amici curiae* occurred in NAFTA disputes involving Canada and the United States. Both countries' jurisdictions are familiar with the concept of *amicus curiae* and their laws establish broad transparency obligations, fostering the availability of information on investment disputes and case-related documents. In addition, the arbitrators deciding the cases were familiar with the concept from their national legal systems.<sup>176</sup>

In 2005 and 2006, tribunals under the ICSID Arbitration Rules also allowed for *amicus curiae* participation by NGOs in arbitrations concerning Argentina's measures against several foreign water supply companies during the financial crisis.<sup>177</sup> *Amici curiae* were subsequently also admitted to proceedings under the CAFTA and the Energy Charter Treaty.<sup>178</sup>

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175 Critical of *amicus curiae*, A. Mourre, *Are amici curiae the proper response to the public's concerns on transparency in investment arbitration?*, 5 *The Law and Practice of International Courts and Tribunals* (2006), pp. 258, 262; K. Hobér, supra note 171, Chapter 8, pp. 154-155. In *Methanex v. USA*, Mexico intervened pursuant to Article 1128 NAFTA to express its disagreement with the admission of *amicus curiae*, because it was not familiar with the concept. To appease Mexico, the tribunal noted in its decision that it had 'not relied on the argument that *amicus* submissions feature in the domestic procedures of the courts in two NAFTA parties.' See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, pp. 6, 21 paras. 9, 47. See also J. Coe, *Transparency in the resolution of investor-state disputes: adoption, adaptation, and NAFTA leadership*, 54 *University of Kansas Law Review* (2006), pp. 1376-1377 (He insinuates that Mexico's opposition to *amicus curiae* stemmed from it being the respondent in several arbitrations which could have been affected by an *amicus curiae* precedent and that transparency was not a significant concern.).

176 In *Methanex v. USA*, the tribunal was composed of William Rowley, Warren Christopher, and V. V. Veeder acting as Chairman. The *UPS v. Canada* tribunal consisted of Ronald A. Cass, L. Yves Fortier, and Kenneth Keith as Chairman.

177 *Suez/Vivendi v. Argentina* Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v. Argentine Republic* (hereinafter: *Suez/InterAguas v. Argentina*), Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17.

178 *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22; *Electrabel S.A. v. Republic of Hungary* (hereinafter: *Electrabel v. Hungary*), Decision

The number of investor-state arbitrations with *amicus curiae* petitions has steadily grown with a notable increase since 2014. The increase results in large part from the approximately 25 *amicus curiae* petitions by the European Commission in arbitrations involving EU law (see Annex I). Nonetheless, *amicus curiae* participation continues to be an exception in investment arbitration in terms of absolute numbers. Based on information publicly available, there have been in total 51 cases with *amicus curiae* participation under the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules and the SCC Arbitration Rules.<sup>179</sup> This represents about 6, 7% of the known 767 treaty-based investor-state arbitrations by early 2017.<sup>180</sup>

The growing *amicus curiae* practice in international investment arbitration has been accompanied by efforts to codify the concept in investment treaties and in institutional rules. On 7 October 2003, during the pendency of *Methanex v. USA* and *UPS v. Canada*, the NAFTA Free Trade Commission, a council of cabinet-level representatives of the three NAFTA governments upon Canada's initiative issued a *Statement on non-disputing party participation* (FTC Statement). The FTC Statement establishes conditions for requests for leave to participate as *amicus curiae* and the modalities of such participation. Several other multilateral and bilateral investment treaties have also adopted provisions on *amicus curiae* participation (see Chapter 5). The large majority of these treaties were concluded with the USA or Canada (and increasingly the EU), all strong advocates for transparency in investment arbitration.

*Amicus curiae* participation is also increasingly regulated in institutional arbitration rules. In 2006, the ICSID Administrative Council adopted new Arbitration Rules.<sup>181</sup> Rule 37(2) allows tribunals to accept written

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on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19.

179 Of the UNCITRAL-administered cases six were brought under the NAFTA.

180 UNCTAD, Investment Dispute Settlement Navigator, at: <http://investmentpolicyhub.unctad.org/ids> (last visited: 28.9.2017).

181 The ICSID Arbitration Rules are adopted by the ICSID Administrative Council, see Article 6(1)(c) ICSID Convention. Already at the time of the first admission of *amicus curiae* by ICSID-administered tribunals, the Administrative Council had begun amending its Arbitration Rules to include a provision on *amicus curiae* participation, which culminated in the adoption of Rule 37(2) ICSID Arbitration Rules in 2006. It is said that the tribunals were aware of the impending modification. Thus, they knew that the member states were not opposing *amicus curiae* participation on a fundamental level.

*amicus curiae* submissions after consulting both parties.<sup>182</sup> Rule 32(2) empowers a tribunal under certain conditions to admit non-parties to the hearings. The process for consultation of the rules was initiated in 2004, that is, prior to the decisions in *Suez/Vivendi v. Argentina* and *Suez/InterAguas v. Argentina*. The idea for the inclusion of provisions on *amicus curiae* arose in the ICSID Secretariat in the wake of the decisions in *Methanex* and *UPS*.<sup>183</sup> Thus, the executive and the ‘judicial’ arm of ICSID opened up to *amicus curiae* participation at similar times.

In 2008, UNCITRAL decided to address the issue of transparency in investment-treaty arbitration including *amicus curiae* participation. Such an amendment of the UNCITRAL Arbitration Rules had been discussed and recommended by experts earlier.<sup>184</sup> In 2010, the UNCITRAL Working

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182 Rule 41 ICSID Additional Facility Rules is identical to Rule 37 ICSID Arbitration Rules.

183 ICSID Secretariat, *Possible Improvements of the Framework for Investor-State Arbitration*, Discussion Paper, 22 October 2004, at: <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (last visited: 28.9.2017); ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005 by the ICSID Secretariat, at: <https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> (last visited: 28.9.2017).

184 See the *Paulsson/Petrochilos Report*. It proposed the introduction of the following Article 15(5): ‘Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the Parties.’ See J. Paulsson/G. Petrochilos, *Revision of the UNCITRAL Rules*, 2006, p. 72, at: [http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf) (last visited: 28.9.2017). In 2007, the CIEL and the International Institute for Sustainable Development (IISD), two NGOs with *amicus curiae* experience, proposed that UNCITRAL elaborate separate rules for investor-state arbitration, including a new Article 15(4) for *amicus curiae* submissions similar to Rule 37(2) ICSID Arbitration Rules, see CIEL/IISD, *Revising the UNCITRAL Arbitration Rules to address state arbitration*, 2007, p. 4, at: [http://www.iisd.org/pdf/2007/investment\\_revising\\_uncitral\\_arbitration.pdf](http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf) (last visited: 28.9.2017). In 2005, the OECD Investment Committee announced that there was ‘merit’ in *amicus curiae*

Group II was mandated to prepare a legal standard.<sup>185</sup> The Working Group completed its efforts in February 2013. On 11 July 2013, the UNCITRAL Rules on Transparency were adopted by the UNCITRAL Commission at its 46<sup>th</sup> session.<sup>186</sup> They entered into force on 1 April 2014. They provide for *amicus curiae* participation in Article 4. In December 2014, the United Nations General Assembly further adopted the United Nations Convention on Transparency (the Mauritius Convention).<sup>187</sup> The Convention expands the scope of application of the UNCITRAL Rules on Transparency to investment treaties concluded before 1 April 2014.

These developments are significant. The regulatory efforts of arbitral institutions and of other international organisations and states show that these key stakeholders have accepted the existence of *amicus curiae* in international investment treaty arbitration and strive towards a systematic (and controlled) approach to it. Resistance to *amicus curiae* participation has been significantly less hostile than in the WTO.<sup>188</sup>

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participation if regulated properly. See OECD, *Transparency and third party participation in investor-state dispute settlement procedures*, Statement by the OECD Investment Committee, June 2005, p. 12, paras. 45-46.

- 185 Official Records of the General Assembly, Sixty-Fifth Session, Supplement No. 17, UN Doc. A/65/17, para. 190. The Working Group comprised all UNCITRAL member states, observer states, observers from the European Commission, UNCTAD, international organizations and courts, inter-governmental and commercial arbitral institutions as well as select NGOs.
- 186 *Report of the United Nations Commission on International Trade Law*, 46<sup>th</sup> Session, 8-26 July 2013, UN Doc. A/68/17, p. 22, para. 128.
- 187 *Resolution adopted by the General Assembly on 10 December 2014*, UN Doc. Res. GA/69/116. The Convention will enter into force six months after the third instrument of ratification has been deposited. 22 states have signed the Convention so far, and three states have ratified it (Switzerland, Canada and Mauritius), see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html) (last visited: 28.9.2017).
- 188 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 *International and Comparative Law Quarterly* (2010), p. 389; C. Knahr/A. Reinisch, *Transparency versus confidentiality in international investment arbitration: the Bivater Gauff compromise*, 6 *The Law and Practice of International Courts and Tribunals* (2007), p. 98.

### C. Conclusion

This Chapter has sought to clarify several commonly held misconceptions about *amicus curiae*. It has shown that, first, the instrument is not a creation of international law, but essentially a common law concept. Second, there is a plethora of concepts of *amicus curiae* in national legal systems, which has influenced its development in international dispute settlement. Third, *amicus curiae* arrived in international dispute settlement largely by external actors seeking to participate in bilateral proceedings and not out of a perceived need by international courts and tribunals. Consequently, the concept has evolved and been developed in an unsystematic fashion, both globally and with respect to each international court and tribunal reviewed. Fourth, *amicus curiae* participation is not new to international dispute settlement. It has, however, only since the late 1990 gained firm ground in international adjudication. Fifth, the amount of *amicus curiae* participation is steadily increasing before international courts and tribunals.

One can distinguish three different reactions towards *amicus curiae* in international courts and tribunals.<sup>189</sup> They align with the absolute number of *amicus curiae* submissions received by the respective international court or tribunal. The regional human rights courts have openly accepted and relied on *amicus curiae* submissions. WTO dispute settlement organs and investment arbitration tribunals have been less welcoming. They have asserted possessing the authority to admit *amici curiae*. But they are hesitant in their dealing with it on a case-by-case basis. The ICJ and the ITLOS basically exclude *amicus curiae* due to their restrictive governing rules. However, the ITLOS appears to be somewhat sympathetic towards the instrument.

What are the reasons for the different attitudes towards *amicus curiae*? Factors that appear to play a role are the parties' and the member states' opinions of the instrument; the procedural power of each international court or tribunal vis-à-vis the parties' powers over the proceedings; the respective court's governing rules; the environment within which it operates; and its understanding of its own role and the particularities of the case, including its subject-matter.

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189 Cf. H. Ascensio, *L'amicus curiae devant les juridictions internationales*, 105 *Revue générale de droit international public* (2001), pp. 901-910.



## Chapter § 4 Characteristics, status and function of *amicus curiae* before international courts

The meaning and function of *amicus curiae* has remained vague, as shown in Chapter 1. The observation from *Bellhouse* and *Lavers* with respect to *amicus curiae* in English law applies also in this context, that ‘[t]here can be few technical legal terms or definitions as unhelpful as *amicus curiae* ... [I]ts meaning is still imprecise and obscure.’<sup>1</sup>

This Chapter attempts to define the instrument from three different perspectives drawing from the analysis of the regulations and case law on *amicus curiae* in Chapters 5 and 6. The first section addresses the common basic characteristics of the instrument. Despite the difference in terminology and the varied reception of *amici curiae* by international courts and tribunals, the analysis shows that *amici curiae* share several procedural characteristics (A.). The second section proposes a functional characterization of the different types of international *amicus curiae* (B.). The third section delineates the instrument and other forms of non-disputing party participation (C.).

### *A. Characteristics of the international amicus curiae*

The following characteristics can be distilled: first, the international *amicus curiae* is a procedural instrument that is fully subject to the discretion of the international court or tribunal (I.). Accordingly, it is both a non-party and a non-party instrument (II.). Third, it seeks to provide information to the court (III.). Fourth, it represents an interest to a court or tribunal (IV.). It is not limited to NGO participation (V.).

This set of characteristics does not claim to be complete also, because *amicus curiae* participation continues to develop and modify with an ever-growing body of case law. But it outlines the most basic common features of the international *amicus curiae* and can serve as the foundation for a ba-

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1 J. Bellhouse/A. Lavers, *The modern amicus curiae: a role in arbitration?*, 23 Civil Justice Quarterly (2004), p. 187.

sic common understanding of the instrument, especially in relation to other instruments of participation before international courts and tribunals and national concepts of *amicus curiae*.

## I. A procedural instrument

All international courts and tribunals reviewed have considered *amicus curiae* to be a procedural instrument. In most cases, the classification was done by judges during a case, as the matter had not been addressed in the governing instruments at the time of the first request. Since, the concept has been defined in several legal instruments as procedural, including in Article 44 IACtHR Rules and Rule 37(2) ISCID Arbitration Rules.

The initial admission of *amici curiae* in investment arbitration, in WTO dispute settlement and in the regional human rights courts was based on the premise that *amicus curiae* is a procedural instrument. This is because courts and tribunals relied on their reserve procedural powers to justify its admission.<sup>2</sup> In *Suez/Vivendi v. Argentina*, the tribunal noted that it 'face[d] an initial question as to whether permitting an *amicus curiae* submission by a non disputing party is a "procedural question."' Defining procedural question as 'one which relates to the manner of proceeding or which deals with the way to accomplish a stated end,' the tribunal held that the 'admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tri-

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2 In *US-Lead and Bismuth II*, when deciding whether it could accept unsolicited *amicus curiae* submissions, the Appellate Body reasoned that it possessed 'broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.' *US-Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, pp. 14-15, paras. 39-42. In *Methanex v. USA*, *UPS v. Canada*, *Suez/Vivendi v. Argentina* and *Suez/InterAguas v. Argentina*, the tribunals relied on their reserve procedural powers in Article 15(1) of the 1976 UNCITRAL Rules and Article 44 ICSID Convention respectively to admit *amicus curiae* submissions. Defining the purpose of Article 15(1) as to 'grant the broadest procedural flexibility within procedural safeguards,' the *Methanex* tribunal found that it had power to accept *amicus curiae*, see *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, p. 13, para. 27; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 39.

bunal to achieve its fundamental task of arriving at a correct decision in this case.<sup>3</sup>

The consideration of *amicus curiae* as a procedural issue seems to have been pragmatic. *Amicus curiae* was introduced into the practice of most of the international courts and tribunals through petitions by non-state actors seeking to present their views to the court and the parties.<sup>4</sup> International courts and tribunals had to decide whether to accept or refuse these petitions without a clear rule. Their powers were generally confined to those necessary for the conduct of proceedings, i.e. to procedural issues. To be able to consider the admission of *amici curiae*, courts had to define the concept as procedural.<sup>5</sup> In addition, national laws categorize *amicus curiae* uniformly as a procedural instrument (see Chapter 3).

Often, international courts and tribunals have defined *amicus curiae* as a procedural issue without consideration of what a procedural issue is and without pondering the nature of *amicus curiae*. Member states' reactions, especially those in the WTO context, show that this conclusion may have been drawn too easily given that *amicus curiae* engages institutional questions, not only as it is used to address systemic concerns and induces a multilateral element into a bilateral dispute settlement process, but also because *amicus curiae* briefs have the potential to shape the substantive outcome of a case.<sup>6</sup> The views on where to draw the line between procedural

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3 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 11.

4 H. Ascensio, *L'amicus curiae devant les juridictions internationales*, 105 *Revue générale de droit international public* (2001), p. 900 ('Ce n'est pas tant que les juridictions internationales aient souhaité recevoir de nombreux avis amicaux; ce sont bien plutôt les personnes avisées qui se sont soundainement bouscoulées à leur porte.').

5 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, pp. 24-25, paras. 61-62; *Methanex v. USA*, Statement of Respondent USA in response to Canada's and Mexico's submissions concerning petitions for *amicus curiae* status, 22 November 2000, p. 2. See also D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 444.

6 See also J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 76 ('The conclusion as to the procedural nature of the question seems to me somewhat hasty.');

K. Hobér, *Arbitration involving states*, in: L. New-

and substantive issues – and where to place *amicus curiae* – differ widely.<sup>7</sup> The decisive distinction between substantive and procedural participation for tribunals and the WTO Appellate Body and panels has been between participation as a matter of right, for instance, as a party or as a non-disputing contracting party to an investment treaty versus participation subject to the discretion of the international court or tribunal seized.

All international courts and tribunals reviewed consider themselves within the parameters established by the applicable rules in full control over the modalities of *amicus curiae* participation. In so far, it is appropriate to consider the international *amicus curiae* a 'judge-driven process.'<sup>8</sup>

## II. A non-party and a non-party instrument

A consequence of the decision that *amicus curiae* is a procedural issue is that it does not become a party upon admission to the proceedings. International courts and tribunals uniformly agree that *amici curiae* do not obtain the procedural and substantive rights accorded to the parties to the proceedings. *Amici curiae* have a right neither to have their submissions considered by an international court or tribunal, nor to remuneration, nor to legal aid, nor to access case documents.<sup>9</sup>

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man/R. Hill (Eds.), *The leading arbitrators' guide to international arbitration*, New York 2008, Chapter 8, p. 155 (He doubts that Art. 15(1) allows for *amicus curiae*, because it deals with the conduct of the arbitration as between the disputing parties.). However, courts have stressed that *amicus curiae* must fit into the arbitral schedule agreed on by the parties (see Chapter 8).

7 C. Brown, *A common law of international adjudication*, Oxford 2007, p. 8 (He defines procedure as 'all elements of the adjudicatory process other than the application of primary rules of international law which determine the rights and obligations in dispute, and the application of secondary rules of international law which determine the consequences of breaches of primary rules. Thus, "procedure" includes not only the conduct of proceedings, including the power of international courts to rule on preliminary objections, the adduction of evidence, and the exercise of incidental powers, during and after the adjudication on the merits, but also the constitution of international tribunals, and questions relating to their jurisdiction.' [References omitted].)

8 L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 *Journal of World Investment and Trade* (2004), p. 334.

9 The limitations and determinations of the concept and characteristics of the international *amicus curiae* may more than anything be the consequence of the tribunal's powers. The *Methanex* tribunal acknowledged that the provision could not 'grant

There is consensus that because *amicus curiae* is not a party to the proceedings and does not enjoy party rights, it cannot be bound by the final judgment.<sup>10</sup> The tribunal in *Suez/Vivendi v. Argentina* rejected the claimants' argument that 'the practical effect [of *amicus curiae* participation] would be that Claimants would end up litigating with entities which are not party to the arbitration agreement.'<sup>11</sup> The tribunal stressed that *amicus curiae* was not a form of party participation when rejecting an assimilation of *amicus curiae* with any form of participation as of right:

An *amicus curiae* is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding. Its role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. ... In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the de-

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the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party [or Non-Disputing NAFTA Party] under Article 1128 of NAFTA.' *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, p. 13, para. 27. The tribunal then noted that it was 'equally precluded from achieving this result indirectly by exercising power over the conduct of the arbitration,' but asserted that *amicus curiae* participation engaged the exercise of its procedural powers rather than forming a third party right. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, pp. 14-15, paras. 29-31. Adopted in *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 39.

- 10 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 13; *Suez/Interaguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, p. 5, para. 9; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 61, p. 24; A. Mourre, *Are amici curiae the proper response to the public's concerns on transparency in investment arbitration?*, 5 *The Law and Practice of International Courts and Tribunals* (2006), p. 262; G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 *Journal of International Economic Law* (2001), pp. 773, 780.
- 11 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 12. See also *Infinito Gold Ltd. v. Republic of Costa Rica* (hereinafter: *Infinito Gold v. Costa Rica*), Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 19 (Claimant argued that: 'Allowing [APREFLOFAS] to participate [as *amicus curiae*] would compel the Claimant to meet two cases at once, which would be unfairly prejudicial.').

cision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.<sup>12</sup>

Equally, a former President of the IACtHR noted, that '[a]micus curiae is a brief whereby an individual or non-governmental organization submits information and views to the Court without having to be a party in the case.'<sup>13</sup> In a NAFTA arbitration under the UNCITRAL Arbitration Rules, the tribunal found that the *amicus curiae* did not have 'any rights as a party or as a non-disputing NAFTA party. It is not participating to vindicate its rights.'<sup>14</sup> The tribunal in *Biwater v. Tanzania* went so far as to explicitly reject the notion of any formalized *amicus curiae* status in the proceedings and stressed the limited scope of a grant of leave:

[T]he ICSID Rules do not, in terms, provide for an *amicus curiae* "status", in so far as this might be taken to denote a standing in the overall arbitration akin to that of a party, with the full range of procedural privileges that that may entail. Rather, the ICSID Arbitration Rules regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)). Each of these types of participation is to be addressed by a tribunal on an *ad hoc* basis, rather than by the granting of an overall "*amicus curiae* status" for all purposes. Indeed, Rule 37(2) is specifically drafted in terms of the discretion of a tribunal to accept "a" written submission, rather than all submissions from a particular entity. ... It also follows that a "non-disputing party" does not become a party to the arbitration by virtue of a tribunal's decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission.<sup>15</sup>

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12 *Id.*, para.13.

13 *Informe del Presidente de la Corte Interamericana de Derechos Humanos, Juez Cançado Trindade, a la Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente de la Organización de los Estados Americanos en el Marco del Diálogo sobre el sistema interamericano de protección de los derechos humanos*, 16 March 2000, Annex 5, pp. 103 in: IACtHR, *informe: bases para un proyecto de protocolo a la convención Americana sobre derechos humanos, para fortalecer su mecanismo de protección*, relator: A. Cançado Trindade, Mayo de 2001, Tomo II, 2<sup>nd</sup> Ed., IACtHR 2003, p. 110.

14 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, p. 24, para. 61.

15 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, pp. 13-14, para. 46. See also *Suez/InterAguas v. Argentina*, Order in response for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 46 ('A "non-disputing party" does not become a party to the arbitration by virtue of a tribunal's decision under Rule 37, but is instead offered a specific and defined opportunity to make a particular submission.');

Further, international courts, tribunals and scholars agree that *amicus curiae* is an instrument that is out of the reach of the parties.<sup>16</sup> Contrary to the US *amicus curiae*, the large majority of international courts and tribunals consider the international *amicus curiae* not a tool of the parties in the adversarial process. The IACtHR defines *amicus curiae* as a person or institution that ‘is unrelated to the case and to the proceeding.’ The Explanatory Note to Protocol No. 11 to the European Convention, which introduced Article 36(2) ECHR, simply states: ‘States and persons taking part in such proceedings are not parties to the proceedings.’<sup>17</sup> Moreover, the international courts examined here as soon as *amicus curiae* is appropriated by a party consider it part of the respective party’s submissions, thereby stripping it of any individual value. However, in practice, there are some difficulties in ensuring *amicus curiae*’s independence from the parties (see Chapter 5).

### III. Transmission of information

A further common characteristic is that *amici curiae* seek to impart information and are admitted for their likely utility in the solution of the dispute (see Chapter 5). Article 84 ITLOS Rules and Article 34(2) ICJ Statute point hereto by mentioning the likelihood of useful information as the condition for the invitation of the participation of intergovernmental organizations. Article 2(3) IACtHR Rules purports that an *amicus curiae* submits ‘reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding.’<sup>18</sup>

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*v. The Government of Canada* (hereinafter: *Vito Gallo v. Canada*), Procedural Order No. 1, 4 June 2008, PCA Case No. 55798, para. 38 (‘*Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their briefs must be limited to allegations, without introducing new evidence.’).

16 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 268.

17 Explanatory Report to Protocol No. 11, ETS No. 155, para. 91, at: <http://convention.coe.int/Treaty/en/Reports/Html/155.htm> (last visited: 28.9.2017).

18 This view of *amicus* as a neutral bystander has been the prevailing view in the IACtHR. See former Court President *Cançado Trindade*: ‘*Amicus curiae* is a brief whereby an individual or nongovernmental organization submits information and views to the Court without having to be a party in the case.’ Informe del Presidente de la Corte Interamericana de Derechos Humanos, *supra* note 13, p. 110.

The tribunal in *Suez/Vivendi v. Argentina* viewed the 'traditional role' of *amici curiae* as 'to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.'<sup>19</sup> The same view has been enshrined in Article 37(2) FTC Statement and the UNCITRAL Rules on Transparency. The WTO Appellate Body and panels have stated in many cases that *amicus curiae* submissions are considered if they are 'pertinent and useful' and of assistance in deciding the case.

#### IV. An interested participant

There is a widespread assumption or even expectation that the international *amicus curiae* – like the English *amicus curiae* – is a disinterested participant, 'a neutral bystander,' without a vested interest in the outcome of the case or a particular issue.<sup>20</sup>

This assumption is not confirmed by the law and practice concerning the international *amicus curiae*. To the contrary, while there is consensus that *amicus curiae* shall not be a tool of the parties, there is no expectation that it is neutral with respect to the outcome of the case. With the exception of the IACtHR, it is even expected that an *amicus curiae* represent an interest. In investment arbitration, proof of a 'significant interest' is a condition for admission. As an investment tribunal noted, '[a]mici are not experts; such third persons are advocates (in the non-pejorative sense) and

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19 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 13.

20 P. Mahoney, *Developments in the procedure of the European Court of Human Rights: The revised rules of the court*, 3 Yearbook of European Law (1983), p. 149 ('The underlying purpose of the third-party rules is the objective one of contributing to the elucidation of the factual and legal issues before the Court, not the subjective one of protecting individual or State interests.');

G. Hernandez, *Non-state actors from the perspective of the International Court of Justice*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London 2011, pp. 140, 146; O. Gerlich, *More than a friend? The European Commission's amicus curiae participation in investor-state arbitration*, in: G. Adinolfi et al. (Eds.), *International economic law*, Springer 2017, p. 253.

not “independent” in that they advance a particular case to a tribunal.<sup>21</sup> The *EC–Asbestos* Additional Procedure states in Section 7(c) that *amicus curiae* may support the position of one of the parties. Entities seeking to participate in the proceedings before WTO dispute settlement *fora* and the ECtHR are typically interested because they are personally and directly affected by the matter or because they wish to support a certain idea, value or public interest.

The fact that *amici curiae* pursue an interest has attracted scholarly criticism.<sup>22</sup> Critics purport that an *amicus curiae* should be an impartial and fair adviser on questions that the court may have in the course of deciding the dispute. These views seek to transform *amicus curiae* into something reminiscent of an assessor.<sup>23</sup> However, it seems unnecessary and somewhat unrealistic to expect full neutrality. As long as *amici curiae* bear the costs of their participation, most of them will participate only if it also

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21 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*”, 15 January 2001, para. 38. The latter aspect has recently become disputed, see Chapter 5.

22 S. Menétrey, *L’amicus curiae, vers un principe commun de droit procédural?*, Paris 2010, p. 7 (‘Par l’utilisation répétée des groupements d’intérêts, l’*amicus curiae* risqué de rompre avec ses fondements procéduraux classiques pour devenir un droit de participation au profit des tiers.’); P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 317 (‘Many *amici* are rather friends for themselves than the court and do not care for the truth, but merely want to sell a message.’); C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country’s foe?*, 60 *Aussenwirtschaft* (2005), p. 348. As in US practice, there is an erroneous assumption that there has been an increase in *amici curiae* defending an interest while there has been no corresponding increase in information-based *amici*. See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 *Non-State Actors and International Law* (2005), pp. 279-280 (‘[T]he traditional concept of *amici* as neutral bystanders has evolved. To this extent, ordinarily, *amici* are not expected to be completely neutral. When the ECHR appoints as *amicus* a person with a clear interest in the domestic proceedings to which an application relates, it must expect that the *amicus* will make submissions about his or her own interests.’ [References omitted]).

23 Regulated in Article 9 ICJ Rules, assessors can be appointed by the Court to support it during the deliberation of a case, without having a vote. Arguing for the introduction of special masters in cases with complex fact-patterns, see C. Payne, *Mastering the evidence: improving fact-finding by international courts*, 41 *Environmental Law* (2011), pp. 1191-1220.

serves their interests in one way or another. Furthermore, submissions are not useless even if *amici curiae* pursue a concrete interest with their brief, as long as the court is aware of it. Finally, overall, *amicus curiae* participation is too sporadic and heterogeneous to substitute clerks and legal secretaries and carry out legal research for judges (see Chapter 5).

## V. An instrument of non-state actors?

One recurring myth associated with the international *amicus curiae* is that it is a tool exclusively for non-state actors. The intensely discussed first requests for *amicus curiae* participation in the WTO adjudicating bodies and in investment arbitration have shaped the image of activist NGOs seeking to circumvent rules limiting *locus standi* to states by reverting to this form of participation. Chapter 5 and Annex I show that this impression is not in accordance with the structure of *amicus curiae* participation before international courts and tribunals. The majority of *amicus curiae* participation before international courts and tribunals originates from non-governmental organizations. However, both the existing rules regulating *amicus curiae* participation, as well as *amicus curiae* practice before most international courts and tribunals comprises a more diverse *amicus curiae* structure. While there is no need to recapitulate the findings of Chapters 3 and 5 here, it seems important to recall the limitations of the ICJ to accept (inter-)governmental *amici curiae*, as well as the frequent participation of intergovernmental organizations (and states) before the ECtHR and in investment arbitration. The fact that the concept of *amicus curiae* is mostly relied upon by non-state actors may also be due to the fact that states and intergovernmental organizations use other, including diplomatic channels to communicate their views on certain issues.

### B. Functions of the international *amicus curiae*

This section distills the functions attributed by courts to *amici curiae*.<sup>24</sup> International courts and tribunals rarely comment on the functions they as-

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24 The only other effort to systematically categorize the functions of the international *amicus curiae* was undertaken by *Bartholomeusz*. L. Bartholomeusz, *supra* note 22, pp. 278-279. He distinguishes four 'broad functions' of *amicus curiae*: provi-

sign to *amici curiae*. The functions are established through observations of how submissions are dealt with, an analysis of relevant regulations, and public comments on *amicus curiae* by members of the courts and their staff. On this basis, it is suggested to classify the international *amicus curiae* in three groups: information-based *amicus curiae* (I.), interest-based *amicus curiae* (II.) and system-based *amicus curiae* (III.).

#### I. Information-based *amicus curiae*

The term information-based *amicus curiae* is used to describe the instances where international courts and tribunals have admitted *amicus curiae* with the primary aim of obtaining information. The term information is considered to include all forms of legal and factual information, irrespective of whether it concerns the heart of a dispute or relates to its periphery. This function leans on the ‘traditional’ American and the British understanding of *amicus curiae* as an instrument whose purpose is to provide the court with legal and/or factual information to ensure that it has considered all the relevant information before rendering a decision.

All of the international courts and tribunals examined have admitted *amici curiae* for their (prospective) informative value.

The procedural rules of the ICJ and the ITLOS assign the instrument an informative function both in contentious and in advisory proceedings. The ICJ is reluctant to extend information-based *amicus curiae* beyond the possibilities foreseen in the procedural rules. Information has exceptionally been accepted where states were incriminated in proceedings to which they were not a party and the ICJ depended on the information submitted (see Chapters 3 and 5).

The human rights courts all use information-based *amicus curiae*. While the IACtHR’s definition of *amicus curiae* explicitly points to this function, the rules of the ECtHR and the ACtHPR do not attribute any specific function to *amicus curiae*. The ECtHR has indicated allowing information-based *amicus curiae*. In the 1980, it held that ‘the sole purpose of association of third parties in the Court’s proceedings is to serve the

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sion of specialist legal expertise; of factual information; of due process; and representation of the public interest. Though valuable, his categorization does not include all existing functions. It neglects in particular admission of *amici* to represent a private interest or to address systemic deficiencies.

interest of the proper administration of justice.<sup>25</sup> Further, it did not contradict the Trade Union Congress' argument for admission as *amicus* in its request in *Young, James and Webster v. the United Kingdom*, a case concerning the legality of British union membership arrangements under the ECHR, that the memorial of the United Kingdom government failed to provide the court with 'full knowledge of the historical, legal and social character of [its] decision and of the consequences which different legal interpretations would in reality create in each relevant country.'<sup>26</sup> A corrective function was assigned to *amicus curiae* in *Hokkanen v. Finland*. Upon request by the applicant, the court granted leave to the maternal grandparents of a child in a custody case to submit written observations on 'any facts which they considered had been dealt with inaccurately in the [European Commission on Human Rights'] report of 22 October 1993.'<sup>27</sup> In one early advisory opinion under Article 64(2) ACHR, *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the IACtHR invited interested stakeholders to participate as *amici curiae*, arguing that it needed to obtain the greatest understanding possible on the subject matter.<sup>28</sup> In *Case of Expelled Dominicans and Haitians v. Dominican Republic*, the IACtHR held that *amicus curiae* briefs were presented 'in order to clarify to the Court some factual or legal matters related to the case being processed by the Court'.<sup>29</sup>

WTO panels' power to accept *amicus curiae* has been attributed to their investigative powers, especially Articles 11 and 13 DSU, which permit panels to request additional information to fulfil their duty to establish the

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25 *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82 (Written comments shall be directed towards assisting the court in the discharge of its particular and circumscribed task). See also N. Vajic, *Some concluding remarks on NGOs and the European Court on Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 98.

26 Quoted by O. De Schutter, *Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme*, 7 *European Journal of International Law* (1996), p. 384.

27 *Hokkanen v. Finland*, Judgment of 23 September 1994, Series A No. 299-A, para. 5.

28 *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84 of 19 January 1984, IACtHR Series A No. 4, p. 2, para. 4.

29 *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 282, para. 15.

objective facts of the case.<sup>30</sup> Reliance on these provisions indicates that ‘a primary purpose of *amici* should be to assist panels to fulfil their obligations by providing additional sources of objective information.’<sup>31</sup> Indeed, an information-based function was implied in *US–Shrimp*. The Appellate Body decided that the ‘DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.’<sup>32</sup> Further, in *Turkey–Textiles*, a case concerning the legality under the GATT of the imposition by Turkey of quantitative restrictions on imports of different categories of textiles from India in the framework of its association process with the EU, the panel requested information from the Permanent Representative of the European Communities in Geneva on several issues concerning the association process and the administration of the textiles trade sector. The Chairman of the panel explained to the Permanent Representative that the panel sought to ensure ‘the fullest possible understanding of this case.’<sup>33</sup>

The first investment tribunals that admitted *amicus curiae* emphasized its function as an assistant to the court.<sup>34</sup> The *UPS v. Canada* tribunal, interpreting Article 15(1) of the 1976 UNCITRAL Rules, held that ‘[t]he

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30 *Canada – Measures Affecting the Export of Civilian Aircraft* (hereinafter: *Canada–Aircraft*), Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, pp. 49-50, paras. 184-185.

31 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 *Journal of International Economic Law* (2001), p. 178.

32 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 106.

33 *Turkey–Textiles*, Report of the Panel, adopted on 19 November 1999, WT/DS34/R, pp. 2, 27, paras. 1.11, 4.1.

34 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, paras. 38, 48; *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 19 (The role of an *amicus curiae* is ‘not to serve as a litigant ... but to assist the Tribunal, the traditional role of an *amicus curiae*.’); *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 23 (‘The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided.’).

powers [under the provision] are to be used to facilitate the Tribunal's process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it' and '[i]t is within the scope of article 15(1) for the tribunal to receive submissions offered by third parties *with the purpose of assisting the Tribunal* in that process'.<sup>35</sup> Further, the FTC Statement, the ICSID Arbitration Rules and the UNCITRAL Rules on Transparency all require that the admission of *amici curiae* should be guided by the extent to which 'the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.' Case law indicates that the provision of relevant information has constituted a pivotal element in tribunals' decisions whether to grant leave to an *amicus curiae* applicant.<sup>36</sup> In *Piero Foresti v. South Africa*, the tribunal held that the purpose of *amicus curiae* participation under the ICSID Additional Facility Rules was 'to give useful information and accompanying submissions to the Tribunal.'<sup>37</sup> However, the mere provision of information may not suffice. In *Apotex I v. USA*, the tribunal rejected a request because in its view an *amicus curiae* brief on the classification of venture capital as an investment contained 'no more than a legal analysis of the terms of the NAFTA, and previous arbitral decisions on the concept of "*investment*", undistinguished and un-

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35 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, p. 24, paras. 60-61 [Emphasis added].

36 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10; *Apotex Inc. v. United States of America* (hereinafter: *Apotex I v. USA*), Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, paras. 21-26. Avoidance of error and obtaining the broadest understanding of the issues appears to have been also the main reason for the admission of an *amicus curiae* submission from the EC in *Eastern Sugar B.V. (Netherlands) v. Czech Republic* (hereinafter: *Eastern Sugar v. Czech Republic*), Partial Award, 27 March 2007, SCC Case No. 088/2004, paras. 97, 119 (Reproduction of a letter dated 13 January 2006). See also *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22.

37 *Piero Foresti, Laura de Carli and Others v. the Republic of South Africa* (hereinafter: *Piero Foresti v. South Africa*), Letter by the Secretary of the Tribunal, 5 October 2009, ICSID Case No. ARB(AF)/07/1, para. 2.1.

coloured by any particular background or experience.’<sup>38</sup> This indicates that tribunals do not merely wish to receive legal analysis akin to that provided by the parties, but request legal or factual information or a consideration thereof, which they or the parties are not able to provide.<sup>39</sup>

Thus, all international courts and tribunals embrace the traditional *amicus curiae* function. The analysis of the submissions and applications in Chapters 5 and 6 shows that submissions made usually seek to argue for a certain legal interpretation and rarely comprehensively (and neutrally) inform the court of a certain legal aspect. In so far, the observation by Moyer that *amici curiae* remedy a limited staff and a small legal library is no longer fully apposite.<sup>40</sup> The information-based *amicus curiae* is tilting towards legal lobbyism and not a mere (and sporadic) research assistant. The tribunal in *UPS v. Canada* also noted this. It remarked that the ‘contribution of an *amicus* might cover such ground [to seek the assistance of independent experts on specialized factual matters], but is likely to cover quite distinct issues (especially of law) and also to approach those issues from a distinct position.’<sup>41</sup> This shift is not unproblematic where *amicus*

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38 *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para. 23 [Emphasis in original]. The tribunal stressed that ‘the requirement of a different expertise, experience or perspective from that of the Disputing Parties ought to be construed broadly, so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.’ *Id.*, para. 22.

39 E.g. *Bear Creek Mining v. Peru*, where the tribunal granted leave to the *amicus curiae* request from the NGO DHUMA and Dr. Lopez, because the NGO was a direct witness to the conflict between the local indigenous Aymara communities and the claimant which led to the revocation of the mining concession forming the heart of the damages claims of the claimant, see *Bear Creek Mining Corporation v. Republic of Peru* (hereinafter: *Bear Creek Mining v. Peru*), ICSID Case No. ARB/14/21, Procedural Order No. 5, 21 July 2016, para. 44 (‘[T]he information supplied ... is sufficient to show that DHUMA has information and experience specific to the background and development of the Santa Ana Project which may contribute a new perspective.’).

40 See C. Moyer, *The role of “amicus curiae” in the Inter-American Court of Human Rights*, in: *la corte interamericana de derechos humanos, estudios y documentos*, 1999, p. 133 (‘[T]here is no doubt that the *amicus* brief has been a valuable aid to the Court during its early years when it has been served by a very small staff and has not had access to a first-rate legal library.’).

41 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, p. 25, para. 62.

*curiae* briefs are accepted because of their informative value. The question arises how international courts and tribunal can assess the value and veracity of briefs, especially from *amici* with a concrete agenda. A submission from such an entity may be selective towards the preferred outcome, which may not be noticed by an international court if its resources are too limited to thoroughly scrutinize the submissions and carry out background checks with respect to hidden agendas of the *amicus curiae*, including connections with a party. Courts have been rather oblivious to these risks, even though they can be managed with disclosure requirements (see Chapter 7).

## II. Interest-based *amicus curiae*

The second function comprises *amici curiae* that are admitted before an international court or tribunal to defend or (re)present an interest. Such an interest may be public or private. For the purpose of this book, a public interest is an interest that extends beyond the interest of one or a set of defined entities on a local, national or global level.<sup>42</sup> A private interest is understood as any interest which belongs to one person or a defined group of persons.<sup>43</sup>

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42 M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 *Columbia Journal of Transnational Law* (2003), pp. 929-932 (It is a 'set of values and norms that serve as ends towards which a community strives.'). For a narrower definition, see M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 *The Law and Practice of International Courts and Tribunals* (2006), p. 371 ('Community interests...are those which transcend the interest of individual states and protect public goods of the international community as a whole or a group of states.').

43 Reasons why a person may wish to bring a private interest to an international court's attention include: lack of a formalized right to defend an affected interest before the court; holding of an interest similar to the interest that is adjudicated and a concern that the decision may be considered persuasive in subsequent proceeding. See also B. Hess/A. Wiik, *Affected individuals in proceedings before the ICJ, the ITLOS and the ECHR*, in: H. Hestermeyer et al. (Eds.), *Coexistence, cooperation and solidarity – liber amicorum Rüdiger Wolfrum*, Leiden 2012, pp. 1639-1660.

## 1. International Court of Justice and International Tribunal for the Law of the Sea

Neither the ICJ nor the ITLOS have allowed for interest-based *amicus curiae* participation in contentious proceedings. Their applicable laws foresee the consideration of the interests of non-parties only with regard to intervention and, under specific circumstances, with regard to international organizations (see Section C). ICJ case law shows that the ICJ has been unreceptive to interest-based non-party participation outside the rules on intervention including in situations where the rules on intervention are not applicable because the interests of individuals or private entities are directly affected by the outcome of the case (see Chapter 2).<sup>44</sup> Recent cases show that the ICJ continues to expect states to espouse the interests of their nationals.<sup>45</sup>

In advisory proceedings, the ICJ has created two specific constellations of interest-based *amicus curiae* in its advisory practice for entities not mentioned in Article 66(2) ICJ Statute: where its advisory jurisdiction serves as an appeal mechanism to an international administrative tribunal in employment disputes between an international organization and its (former) employee and for state-like entities whose position is at the heart of the advisory question. The ICJ does not seem willing to expand its practice beyond these two exceptions. In particular, it does not accept written statements defending a public or communal interest beyond the confines of the existing rules.

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44 See *Trial of Pakistani Prisoners of War case (Pakistan v. India)*, Letter No. 57 (The Minister for Foreign Affairs of Afghanistan to the President of the Court), Part IV: Correspondence, ICJ Rep. 1973, pp. 167-171; Letters No. 67 (The Registrar to the Minister for Foreign Affairs of Afghanistan), Part IV: Correspondence, ICJ Rep. 1973, pp. 167-171, 174-175 and Order of 15 December 1973 (Removal from List), ICJ Rep. 1973, pp. 347-348.

45 See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, p. 99; *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, Order of 5 April 2011 (Removal from List), ICJ Rep. 2011, p. 341. Re the facts of the case, see B. van het Kaar/G. Kaplan, *Airline dispute lands in ICJ: a commentary on the Swissair/Sabena case*, at: [http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Commentary\\_Sabena\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Commentary_Sabena_EN.pdf) (last visited: 28.9.2017).

## 2. European Court of Human Rights

The ECtHR's *amicus curiae* practice has traditionally been interest-based. The court has a broad understanding of interest-based *amicus curiae*. It grants leave to *amicus curiae* to present direct and indirect, private and public interests, as long as it finds the participation to be 'in the interest of the proper administration of justice' pursuant to Article 36(2) ECHR.<sup>46</sup>

Private-interest *amici curiae* include persons with a legal interest that will directly be affected by the court's decision, because they were the opposing party to the applicant in the domestic proceedings to which the application before the ECtHR relates ('indirect respondent')<sup>47</sup> or, because the legality of a treaty to which they are a party is at issue.<sup>48</sup> This category is particularly relevant in the ECtHR where the winning party from the national court proceedings is not a party to the proceedings before the ECtHR, even though its interests will likely be directly affected by the judgment.<sup>49</sup> For instance, in *Hannover v. Germany*, the court granted leave to the publisher of the German magazine that had printed photographs of Caroline von Hannover and her family in private moments. *Von Hannover* argued that the German judgment permitting publication of the pictures in-

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46 See A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/Herbert Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, pp. 342-343 ('Mere demonstration by a potential intervener of an interest in the outcome of the proceedings will not suffice. The President must be satisfied that the intervention is likely to assist the Court in the carrying out of its task.').

47 *Mahoney* defines the term as 'someone connected with the particular facts and whose related legal interests are liable to be directly and adversely affected by the judgment, but who is not in the position of having his viewpoint adequately put by the respondent Government.' See P. Mahoney, *supra* note 20, p. 151.

48 *S.A.R.L. du parc d'activités de Blotzheim et la S.C.I. Haselaecker v. France* (dec.), No. 48897/99, 18 March 2003, ECHR 2003-III (Case concerned the extension of the airport Basel-Mulhouse and the legality of a French-Swiss agreement. Switzerland appeared as *amicus curiae*); *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.) [GC], No. 56672/00, 10 March 2004, ECHR 2004-IV; *Danell and others v. Sweden* (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I. See also E. Bergamini, *L'intervento amicus curiae: recenti evoluzioni di uno strumento di common law fra Unione europea e Corte europea dei diritti dell'uomo*, 42 *Diritto comunitario e degli scambi internazionali* (2003), pp. 181, 183.

49 For many, *Ahrens v. Germany*, No. 45071/09, 22 March 2012.

fringed her rights to respect for her private and family life under Article 8 ECHR. The publisher made factual submissions on the relationship of the applicant's family with the media.<sup>50</sup> This subcategory further includes *amici curiae* whose (private) interest arises from their involvement in the facts of the case<sup>51</sup> or who are *de facto* affected.<sup>52</sup> In *Cha'are Shalom Ve Tsedek v. France*, the applicant argued that France had violated its rights

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- 50 *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI. Further examples, *Ahrens v. Germany*, ECtHR No. 45071/09, 22 March 2012; *Goddi v. Italy*, Judgment, 9 April 1984, ECtHR Series A No.76; *Young, James and Webster v. the United Kingdom*, Judgment, 13 August 1981, ECtHR Series A No. 44; *Feldek v. Slovakia*, No. 29032/95 12 July 2001, ECHR 2001-VIII; *Hatton and others v. United Kingdom*, No. 36022/97, 2 October 2001 and [GC], 8 July 2003, ECHR 2003-VIII (Comments by British Airways, the main user of Heathrow Airport on the importance of night flights in a case brought by locals against the airport's noise levels.); *Taskin and others v. Turkey*, No. 46117/99, 10 November 2004, ECHR 2004-X (Case concerned a request for the annulment of a mining concession by ten locals. Factual submission on the gold mine by the concession holder); *Py v. France*, No. 66289/01, 11 January 2005, ECHR 2005-I; *Vrioni and others v. Albania*, No. 2141/03, 24 March 2009; *Zhigalev v. Russia*, No. 54891/00, 6 July 2006; *Eskinazi and Chelouche v. Turkey* (dec.), No. 14600/05, 6 December 2005, ECHR 2005-XIII; *E.O. and V.P. v. Slovakia*, Nos. 56193/00 and 57581/00, 27 April 2004; *Neulinger and Shuruk v. Switzerland*, ECtHR No. 41615/07, 8 January 2009; *Peta Deutschland v. Germany*, No. 43481/09, 8 November 2012; *Schneider v. Germany*, No. 17080/07, 15 September 2011; *von Hannover v. Germany* (No. 2) [GC], Nos. 40660/08 and 60641/08, 7 February 2012, ECHR 2012.
- 51 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, Nos. 412/03 and 35677/04, 22 January 2009; *Joesebov v. the Netherlands* (dec.), No. 44719/06, 2 November 2010; *Sindicatul "Păstorul cel bun" v. Romania*, No. 2330/09, 31 January 2012; *Perna v. Italy* [GC], No. 48898/99, 6 May 2003, ECHR 2003-V.
- 52 *Ilascu and others v. Moldova and Russia* (dec.) [GC], No. 48787/99, 4 July 2001; *Suljagić v. Bosnia and Herzegovina*, No. 27912/02, 3 November 2009; *Kearns v. France*, No. 35991/04, 10 January 2008; *Dichand and others v. Austria*, No. 29271/95, 26 February 2002; *Hokkanen v. Finland*, Judgment of 23 September 1994, Series A No. 299-A; *Buckley v. the United Kingdom*, Judgment of 25 September 1996, Reports 1996-IV; *Mangouras v. Spain* [GC], No. 12050/04, 28 September 2010, ECHR 2010; *Saliyev v. Russia*, No. 35016/03, 21 October 2010; *Öcalan v. Turkey* [GC], No. 46221/99, 12 May 2005, ECHR 2005-IV; *Haas v. Switzerland*, No. 31322/07, 20 January 2011, ECHR 2011; *Peta Deutschland v. Germany*, ECtHR No. 43481/09, 8 November 2012; *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, ECHR 2003-X; *Geotech Kancev GmbH v. Germany*, No. 23646/09, 26 July 2016; *Lambert and others v. France* [GC], No. 46043/14, 5 June 2015; *Vasiliauskas v. Lithuania* [GC], No. 35343/05, 20 October 2015 (Russian government in case concerning genocide conviction of former secu-

under Article 9 ECHR for refusing to grant the approval necessary to access slaughterhouses to perform ritual slaughter pursuant to the ultra-orthodox religious requirements of the applicant's members. The court permitted the Chief Rabbi of France and the organisation ACIP, at the time the only Jewish Association with the permission requested, to appear as *amici curiae*. Both *amici* were heavily involved in the case and considered themselves potentially affected by the outcome.<sup>53</sup> It is necessary to stress already at this point that private interest-based *amicus curiae* participation is purely protective. The court does not adjudicate upon the rights or interests defended by the *amici*. It admits these *amici curiae* to alert it of rights that might conflict with the applicant's claims or may otherwise be affected by its judgment in order to avoid accidentally prejudicing them (see Chapters 6 and 7).<sup>54</sup>

The ECtHR has granted leave to governments, religious groups, trade or other professional unions, and individuals who are not directly affected in their legal position by its judgment, but who might be affected by legislative or administrative changes enacted by the respondent state to comply with the judgment.<sup>55</sup> The ECtHR also allows other state parties to the

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rity agent for operations against partisan movements in then Lithuanian Soviet Socialist Republic). This category also includes victims and the relatives of the applicant's victims, primarily in proceedings arising out of domestic criminal proceedings. See *Gäfgen v. Germany*, No. 22978/05, 30 June 2008 and [GC], No. 22978/05, 1 June 2010, ECHR 2010.

- 53 *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, 27 June 2000, ECHR 2000-VII.
- 54 *M.G. v. Germany* (dec.), No. 11103/03, 16 September 2004. But see the rejection of the request for leave from the Evkaf Administration, a religious trust claiming to own some of the properties claimed by the applicant in *Lordos and others v. Turkey*, No. 15973/90, 2 November 2010. See also *Brumărescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I.
- 55 *Herrmann v. Germany*, No. 9300/07, 20 January 2011 and [GC], 26 June 2012; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V; *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, ECHR 2011 (European Association of Jehovah's Christian Witnesses on the position of the organisation on the use of arms and their situation in Armenia); *Heinisch v. Germany*, No. 28274/08, 21 July 2011, ECHR 2011 (ver.di, a German trade union, on the organisation of institutional care for the elderly in Germany and working conditions of employees in this sector); *Goudswaard-Van der Lans v. the Netherlands* (dec.), No. 75255/01, 22 September 2005, ECHR 2005-XI; *SAS v. France* [GC], No. 43835/11, 1 July 2014 (Belgium defending the full-face veil ban given that itself had issued a similar ban).

ECHR to argue for a certain interpretation of the ECHR, which may, at some point, become relevant as persuasive case law.<sup>56</sup>

The ECtHR also has developed a strong public interest-based *amicus curiae* practice. It has invited and received submissions from governments and civil society representatives – often representing clashing values – in cases involving ethically and socially controversial issues (see Chapter 5, Section B).

The public interest *amici curiae* often lobby for changes in the court's case law. Briefs address earlier decisions, point to gaps, negative and positive effects of the jurisprudence and highlight the impact a certain interpretation of the ECHR will have. If well executed, such 'feedback' submissions allow for some form of direct communication and dialogue between the court and (parts of) the public and enable it to see if decisions have had the intended effect – or correct them if not. A review of accepted submissions indicates that the court tends to admit only *amici curiae* with some expertise on the relevant issues.<sup>57</sup> This requirement points to a

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56 In the late 1980, in *Glaserapp v. Germany*, Judgment, 28 August 1986, ECtHR Series A No. 104 and in *Kosiek v. Germany*, Judgment, 28 August 1986, ECtHR Series A No. 105, the ECtHR rejected a request by *amici curiae* that sought to impede the creation of a certain precedent, because it was not aimed at solving the case before it. See also O. De Schutter, *supra* note 26, p. 391. *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A No. 262; *AB Kurt Kellermann v. Sweden*, No. 41579/98, 26 October 2004; *Association SOS Attentats and De Boëry v. France* [GC], No. 76642/01, 4 October 2006, ECHR 2006-XIV; *Scordino v. Italy (No. 1)* [GC], No. 36813/97, 29 March 2006, ECHR 2006-V; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008; *TV Vest AS and Rogaland Pensjonistparti v. Norway*, No. 21132/05, 11 December 2008; *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008; *A. v. the Netherlands*, No. 4900/06, 20 July 2010 (Several states argued for a more deportation-friendly interpretation); *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011 (The Netherlands and the United Kingdom arguing in defence of the EU's Dublin system for asylum matters); *S.H. and others v. Austria* [GC], No. 57813/00, 3 November 2011, ECHR 2011; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *Schatschaschwili v. Germany* [GC], No. 9154/10, 15 December 2015.

57 The court has received submissions from organizations focusing on a particular public interest or the defence of the human rights of a particular group. They include the European Roma Rights Centre in cases involving the violation of human rights of Roma people and the mental health NGO MIND in cases concerning

strong nexus between information-based and public interest-based *amicus curiae*.<sup>58</sup>

### 3. Inter-American Court of Human Rights

Only in 2008, in *Kimel v. Argentina* and *Castañeda Gutman v. Mexico*, the IACtHR for the first time explicitly elaborated on its concept of *amicus curiae* upon a challenge by Argentina to a submission from the Civil Rights Association. It first rejected the concept of a private interest-based *amicus curiae* by determining that *amici curiae* were 'not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court,' a requirement now included in the definition of Article 2(3) IACtHR Rules.<sup>59</sup> While this embraces an information-based function of

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- mentally disabled people. *Chapman and others v. the United Kingdom* [GC], Nos. 27238/95, 24882/94, 24876/94, 25289/94, 18 January 2001, ECHR 2001-I; *Jane Smith v. the United Kingdom* [GC], No. 25154/94, 18 January 2001; *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 1<sup>st</sup> section, 26 February 2004; *Tănase and others v. Romania* (striking out), No. 62954/00, 26 May 2009; *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93; *Munjaz v. the United Kingdom*, No. 2913/06, 17 July 2012; *X. v. France*, Judgment of 31 March 1992, Series A No. 234-C; *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, 24 April 2003; *Shelley v. the United Kingdom* (dec.), No. 23800/06, 4 January 2008; *M.W. v. the United Kingdom* (dec.), No. 11313/02, 23 June 2009; *Carson and others v. the United Kingdom* [GC], No. 42184/05, 16 March 2010, ECHR 2010; *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, ECHR 2010; *Axel Springer AG v. Germany* [GC], No. 39954/08, 7 February 2012; *I.G. and others v. Slovakia*, No. 15966/04, 13 November 2012; *Kedzior v. Poland*, No. 45026/07, 16 October 2012; *Kiyutin v. Russia*, No. 2700/10, 10 March 2011.
- 58 *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010; *MGN Limited v. the United Kingdom*, No. 39401/04, 18 January 2011; *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011.
- 59 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, para. 16 [Emphasis added]. The exclusion of particular interests may be because the court possesses several distinct mechanisms for the recognition of certain non-party interests. These mechanisms include the screening and preparation of cases by the Inter-American Commission on Human Rights, which can invite affected parties, victims and interest groups to join its legal team before the IACtHR. See, for example, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), IACtHR Series C No. 4. See also T. Buergenthal, *International human rights in a nutshell*, 4<sup>th</sup> Ed., St. Paul 1999, p. 254. Further, the

*amicus curiae*, the court also acknowledged a secondary, public interest-based function of *amicus curiae* by stating that:

On the other hand, the Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, *amici curiae* briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court.<sup>60</sup>

The court's openness to public interest-based *amici curiae* is illustrated also by its public call for *amicus curiae* submissions from different entities and the public society in general through its website.<sup>61</sup> The IACtHR's reluctance to assign a private interest-based function to *amici curiae* has led it to hear on an *ad hoc* basis people directly affected by its judgment, but not as *amicus curiae*.<sup>62</sup> Still, it receives in contentious and advisory proceedings submissions from institutions, which are active advocates on the issues in dispute. On occasion, these groups may be indirectly or directly

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IACtHR Statute provides a special mechanism for the participation of victims, their next of kin or accredited representatives in Article 25(1) IACtHR Rules. The 'alleged victim or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings.' Article 25(2) determines that in the event of several alleged victims, they shall designate a 'common intervener' to represent them in the case. See M. Pinto, *NGOs and the Inter-American Court of Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 52; A. del Vecchio, *International courts and tribunals, standing*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 17. One exceptional case of interest-based *amicus curiae* occurred in *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 144, pp. 7, 10, 38-39, 43, 95-96, paras. 42-44, 62, 196-197.

60 *Caso Kimel v. Argentina*, Judgment of 2 May 2008, IACtHR Series C No. 177, para. 16, pp. 4-5; *Caso Castañeda Gutman v. Estados Unidos Mexicanos*, Judgment of 6 August 2008, IACtHR Series C No. 184, para. 14, p. 5.

61 *Artículo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20, pp. 28-32.

62 *Atalo Riffo y niñas v. Chile*, Judgment of 4 February 2012, IACtHR Series C. No. 239. The court decided to hear the testimony of three minors in a case concerning their mother's loss of custody and their removal from the family home due to her sexual orientation. The children's father request for his and his daughters' direct participation as interveners was denied and he was not allowed to present substantive arguments or evidence as *amicus curiae*.

affected by the court's judgment.<sup>63</sup> But this is not the reason for their admission.

#### 4. WTO Appellate Body and panels

The WTO adjudicating bodies have not expressly assigned a public-interest function to *amicus curiae*. They have on several occasions received submissions from NGOs purporting to represent a public interest or from business and industry groups defending a commercial interest. The panels and the Appellate Body have developed as the decisive admission criterion that submissions should be useful for the decision-making in the case, which can be understood to allow for interest-based briefs. Panels' and the Appellate Body's admission practice indicates a preference for briefs supporting specific commercial over general (and potentially more diffuse)

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63 See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*, Advisory Opinion No. OC-5/85 of 13 November 1985, IACtHR Series A No. 5, pp. 6-9; *Enforceability of the right to reply or correction (Articles 14(1), 1(1) and (2) American Convention on Human Rights)*, Advisory Opinion OC-7/85 of 29 August 1986, IACtHR Series A No. 7, p. 9; *Caso de las Hermanas Serrano Cruz v. El Salvador*, Judgment of 23 November 2004 (Preliminary objections), IACtHR Series C, No. 118, paras. 32-35 (Forced disappearances case, submission by Asociación Abuelas de Plaza de Mayo); *Case Yatama v. Nicaragua* (Preliminary objections, Merits, Reparations and Costs), Judgment, 23 June 2005, IACtHR Series C No. 127, paras. 17, 34, 38, 42, 120; *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 209; *Garibaldi v. Brazil*, Judgment of 23 September 2009 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 203; *Fernández Ortega et al. v. Mexico*, Judgment of 30 August 2010 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 215; *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79, paras. 38, 41-42, pp. 7-8; *Duque v. Colombia*, Judgment of 26 February 2016 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 310; *Flor Freire v. Colombia*, Judgment of 31 August 2016 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 315. For an analysis of this case, see P. Macklem/E. Morgan, *Indigenous rights in the Inter-American system: the amicus brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua*, 22 Human Rights Quarterly (2000), p. 570.

public interests.<sup>64</sup> The panel in *Australia–Salmon* admitted an *amicus curiae* submission from ‘concerned fishermen and processors from South Australia.’<sup>65</sup> In *EC–Asbestos*, the Appellate Body received applications for *amicus curiae* submissions from a large number of asbestos industry organizations and asbestos producers.<sup>66</sup> And in *Australia–Apples*, the panel accepted an unsolicited letter from Apple and Pear Australia Ltd, an Australian industry organization representing the interests of commercial apple and pear growers in Australia.<sup>67</sup>

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64 *European Communities – Export Subsidies on Sugar* (hereinafter: *EC–Sugar*), Report of the Appellate Body, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R; *EC–Bed Linen*, Report of the Panel, adopted on 12 March 2001, WT/DS141/R. In *US–Section 110 (5) Copyright Act*, the panel received a copy of a letter to the US Trade Representative by a law firm representing the American Society of Composers, Authors and Publishers (‘ASCAP’) which was affected by the dispute. The panel accepted the brief but decided not to rely on it for its findings because it ‘essentially duplicated information already submitted by the parties’. See *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R.

65 *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW.

66 As noted, all applications for grant of leave to file an *amicus* brief were ultimately rejected for formal deficiencies. *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, FN 30-33. Similarly, in *US–Lead and Bismuth II*, the Appellate Body received a written submission from the industry association American Iron and Steel Institute and the Specialty Steel Industry of North America representing the interests of steel manufacturers. *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 42.

67 *Australia–Measures Affecting the Importation of Apples from New Zealand* (hereinafter: *Australia–Apples*), Report of the Panel, adopted on 17 December 2010, WT/DS367/R. See also *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter: *US–Clove Cigarettes*), Report of the Appellate Body, adopted on 24 April 2012, WT/DS406/AB/R, p. 4, para. 10 (Rejection of two *amicus curiae* briefs one of which stemmed from a group of anti-tobacco lobbying organizations).

## 5. Investor-state arbitration

Rules governing *amicus curiae* participation determine that tribunals should consider in their decision whether to grant leave to *amici curiae* if the applicant has a significant interest in the subject-matter of the arbitration. In *Apotex I*, the tribunal reasoned that this required that 'the rights or principles [the *amicus*] may represent or defend might be directly or indirectly affected by the specific ... issue on which it intends to make submissions, or indeed by the outcome of the overall proceedings.'<sup>68</sup> Case law shows that investment tribunals often admit *amici curiae* to present on a public interest. In *Biwater v. Tanzania*, the tribunal, having examined the *amicus curiae* petitioners' profiles, found that 'given the particular qualifications of the Petitioners, ... it is envisaged that the Petitioners will address broad policy issues concerning sustainable development, environment, human rights, and governmental policy.'<sup>69</sup> The emphasis on public interest *amici curiae* is not surprising, as the rationale for the admission of *amici curiae* in the first place was to respond to the public interest that arose from the subject matter of the dispute (see Chapter 3). This requirement has been maintained since, and *amici curiae* purporting to be connected to those who will bear the consequences of a decision are usually admitted (see Chapter 5). This concerns in particular cases involving public commodities, such as access to water, the protection of the environment, human, or indigenous rights. The public interests these *amicus curiae* represent predominantly relate to local and national public interests. These are increasingly internationalized as displayed in the increasing number of joint submissions from national and international NGOs combining international legal arguments with contextual background information on the affected local area or the national debates held on the issue in

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68 *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para. 28.

69 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para 64.

dispute.<sup>70</sup> Some tribunals have also considered as a relevant interest that the award will affect how similar cases are dealt with.<sup>71</sup>

Tribunals further have granted leave to *amici curiae* with a more direct interest in the outcome of the arbitration. In *Glamis v. USA*, the tribunal admitted an *amicus curiae* brief from the National Mining Association, a national not-for-profit organization that represented the interests of the mining industry in the US. The brief addressed the possible negative effects for mining investors of regulatory uncertainty in US mining laws and the ‘*de facto* bans on the open-pit mining of valuable mineral resources through reclamation requirements inconsistent with accepted and economically feasible best practices.’<sup>72</sup> Further, the Quechan Indian Nation outlined its (affected) rights connected to the land where the mines were built, and emphasized its vulnerability to the substantive outcome of the case.<sup>73</sup> The Tribunal decided to accept all of the *amicus curiae* submissions, including some more general public interest-based *amicus curiae* briefs, noting the ‘public and remedial purposes of non-disputing [party] submissions.’<sup>74</sup> A directly interested *amicus curiae* was admitted by the tribunal

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70 E.g. *Pac Rim v. El Salvador*, Submission of *amicus curiae* brief by CIEL et al., 20 May 2011, at: [http://www.ciel.org/Publications/PAC\\_RIM\\_Amicus\\_20May11\\_En\\_g.pdf](http://www.ciel.org/Publications/PAC_RIM_Amicus_20May11_En_g.pdf); *Biwater v. Tanzania*, *Amicus curiae* submission of Lawyers Environmental Action Team, Legal and Human Rights Centre, Tanzanian Gender Networking Programme, CIEL, IISD, 16 March 2007, ICSID Case No. ARB/05/22, at: [http://www.ciel.org/Publications/Biwater\\_Amicus\\_26March.pdf](http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf) (both last visited: 28.9.2017); *Bear Creek Mining v. Peru*, *Amicus curiae* request for leave dated 9 June 2016 from the Peruvian NGO Derechos Humanos y Medio Ambiente and Dr. Carlos Lopez PhD, Senior Legal Adviser to the International Commission of Jurists, Geneva, ICSID Case No. ARB/14/21.

71 *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 18 (‘[B]ecause of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.’). Opposing such a notion, Claimant in *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 19.

72 *Glamis v. USA*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, 13 October 2006, p. 3.

73 *Glamis v. USA*, Application for Leave by the Quechan Indian Nation, 19 August 2005.

74 *Glamis v. USA*, Award, 8 June 2009, para. 286.

in *Infinito Gold v. Costa Rica*. The tribunal granted leave to the environmental NGO APREFLOFAS. The NGO had been the plaintiff in the domestic proceedings before an administrative appeals court that revoked *Infinito Gold's* exploitation concession and gave rise to the arbitration. In its order granting leave, the tribunal highlighted that because 'claimant now impugns the judgment that APREFLOFAS obtained is contrary to international law ... APREFLOFAS can thus be deemed to have an interest in ensuring that this Tribunal has all the information necessary to its decision-making.'<sup>75</sup>

The European Commission has carved out a special form of interest representation. It has actively sought to participate in investor-state arbitrations involving EU law – so far in approximately 25 cases (see Annex I).<sup>76</sup> In doing so, it not merely seeks to impart information as an expert on EU law, but acts as a watchdog over the adherence to and implementation of EU law, as first exemplified in *Micula v. Romania*.<sup>77</sup> In *Electrabel v. Hungary*, the tribunal acknowledged that the European Commission had

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75 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 36.

76 Since 2012, more than 25 investor-state arbitrations have been initiated under the Energy Charter Treaty by EU nationals against several EU member states, in particular against Spain and the Czech Republic, over claims for indirect expropriation and violation of the guarantee of fair and equitable treatment after the countries issued measures that reduced financial incentives to invest in the renewable energies sector. Spain in 2004 had established a special subsidies regime to boost its electric energy sector by Royal Decree No. 436/2004. Due to the financial crisis, several measures were revoked, and in 2014, the advantageous tariff and remuneration system was replaced. See also O. Gerlich, *supra* note 20, p. 264.

77 *Micula v. Romania* concerned the legality of a repeal of tax incentive measures for certain Swedish investments in Romania. The repeal was in part to comply with EU state aid rules in order to fulfil the requirements of the EU's Common Position on Romania's compliance with the EU accession criteria. The EC participated in the arbitration as *amicus curiae*. It argued in its brief that the Sweden-Romania BIT should be interpreted in accordance with EU law. Otherwise, the award would not be enforceable in the EU. The tribunal (unfortunately) left open the issue of interaction of EU law and the BIT when it found for the investors and ordered Romania to pay EUR 82 million in damages for violation of the fair and equitable treatment standard. In January 2014, the EC informed Romania that any implementation of the award would amount to new state aid and would have to be notified to it. Romania informed the EC that the award had been partially complied with by offsetting some of the damages against the investors' tax debts. On 26 May 2014, the EU notified Romania that it had issued a suspension injunction, which obliged it to not enforce the award. In October 2014, it launched a formal

‘much more than “a significant interest” in these arbitration proceedings’ lamenting that the EC ‘could not play a more active role as a non-disputing party in [the] arbitration.’<sup>78</sup>

While these cases signal a shift towards *amici curiae* pursuing more particular (public) interests, *amici curiae* presenting a purely commercial interest are rejected (see Chapter 5). Further, *amici curiae* rarely are assigned a pure interest-based function. Their submissions are coupled with an information-based function. The claimant’s argument in the course of the request for leave proceedings in *Biwater v. Tanzania* is exemplary:

The [*amicus curiae*] petitioners should only be accorded *amicus* status if the issues they raise and the interests they represent will contribute information and insight in relation to the determinations that are necessary for the Arbitral Tribunal to make in order to resolve this dispute.<sup>79</sup>

This ensures that *amicus curiae* participation remains incidental to pending proceedings.

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investigation under Article 108(2) TFEU. See *Ioan Micula, Viorel Micula and others v. Romania* (hereinafter: *Micula v. Romania*), Award, 11 December 2013, ICSID Case No. ARB/05/20, para. 36; EC, *State aid SA.38517(2014/C) (ex 2014/NN) – Romania, Implementation of Arbitral Award Micula v. Romania of 11 December 2011*, 1 October 2014, C(2014) 6848 final. See also C. Tietje/C. Wackernagel, *Outlawing compliance? – The enforcement of intra-EU investment awards and EU state aid law*, Policy Papers on Transnational Economic Law No. 14 (June 2014). The EC has also intervened as *amicus curiae* in district and appellate court proceedings initiated by Romania to halt the enforcement of the award. See *Micula et al. v. the Government of Romania*, No. 1:2015mc00107, Document 66 (S.D.N.Y. 2015); *Ioan Micula, European Food S.A., S.C. Starmill S.R.L., Multipack S.R.L. v. the Government of Romania*, Brief for *Amicus Curiae* [by] the Commission of the European Union in Support of Defendant-Appellant, 4 February 2016 (2nd Cir. 2016). See also H. Wehland, *The enforcement of intra-EU BIT awards: Micula v. Romania and beyond*, 17 *Journal of World Investment and Trade* (2016), pp. 942-963.

78 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/09, para. 4.92.

79 *Biwater v. Tanzania*, and Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 31. See also *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366 (‘In this case, given the particular qualifications of the Petitioners, and the basis for their intervention as articulated in the Petition, it was envisaged that the Petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy.’).

## 6. Comparative analysis

It is noticeable that interest-based *amici curiae* play a more significant role in courts with no or very limited rules on intervention.<sup>80</sup> The ECHR for instance only establishes a right of intervention for the national state of the applicant, see Article 36(1) ECHR.<sup>81</sup> Private-interest *amici curiae* are used by the court as a means to ensure some form of due process. The IACtHR has a strong public interest-based *amicus curiae* practice in contentious and in advisory proceedings, but it rejects the idea of private interest-based *amici curiae*. Article 25 IACtHR Rules establishes a special participation mechanism for alleged victims or their specially appointed representatives. In investment arbitration, there is a strong focus on public interest-based *amici curiae*. This is likely a result of the reliance on public interest considerations to justify the general admission of *amicus curiae*. The WTO takes a different position. It favours *amici curiae* that defend concrete trade and business interests. This approach accords with the historical focus of the WTO on trade liberalization and facilitation.

There is no clear case law on the preferred public interest with the exception of investment tribunals (see Chapter 5). No international court or tribunal has elaborated any requirements concerning the nature of the public interest to be represented.

## III. Systemic *amicus curiae*

The systemic *amicus curiae* describes instances where *amici curiae* are admitted to the proceedings to remedy certain (perceived) deficiencies of an international court or tribunal relating to its structure or set-up.

*Amicus curiae* participation to alleviate systemic concerns is rare in international dispute settlement. One example is the ICJ's admission of written submissions by officials employed by an international organization in review proceedings to overcome the lack of standing of individuals and grant some form of due process and access to justice (see Chapter 5). Fur-

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80 See G. Umbricht, *supra* note 10, p. 784 ('The gap between individuals who are allowed to participate in procedures and individuals who are affected by the relevant decision is wider at an international level than it is at a national level.')

81 E.g. *M.G. v. Germany* (dec.), ECtHR No. 11103/03, 16 September 2004; *A. v the United Kingdom*, No. 35373/97, 17 December 2002, ECHR 2002-X.

ther, investment tribunals have cited transparency and legitimacy concerns as a reason for the admission of *amicus curiae* submissions.<sup>82</sup> In *Methanex v. USA*, the tribunal noted that

the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.<sup>83</sup>

Similarly, in *Suez/InterAguas v. Argentina* and in *Suez/Vivendi v. Argentina*, the ICSID-administered arbitral tribunals found that

[t]he acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. ... Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.<sup>84</sup>

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82 See *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 70; *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50 ('[T]he Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself.'). *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (hereinafter: *Philip Morris v. Uruguay*), Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 28 ('[The tribunal] considers that in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large.'). Legal scholars surmise that the assertion of authority to admit *amicus curiae* may have been motivated by a wish to alleviate criticism about the lack of transparency in WTO dispute settlement (see Chapter 2). However, neither panels nor the Appellate Body have relied on this consideration alone to justify the admission of *amicus curiae*.

83 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 49.

84 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 22. See also *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Par-

The UNCITRAL Rules on Transparency in their Article 4(a) make '[t]he public interest in transparency' a factor in tribunals' exercise of discretion. This concern was voiced by many of the *amicus curiae* petitioners. In its request for leave in *Methanex v. USA*, the IISD, for instance, argued that the tribunal would be perceived as intransparent and private if it chose not to accept the organization's *amicus curiae* brief.<sup>85</sup> However, the alleviation of systemic deficiencies is generally only considered a supplemental benefit.<sup>86</sup>

#### IV. Analysis

The functions of the international *amicus curiae* were not defined prior to the first use of the concept before international courts or tribunals. Thus, international courts and tribunals had to carve out the concept's functions. Only investment tribunals and the IACtHR have openly discussed the functions of *amicus curiae* in their proceedings. Despite extensively justifying its admission, WTO Appellate Body and panels have not commented on the functions of *amicus curiae* in their case law.

Despite overlaps and similarities, the instrument does not have a general joint function before international courts and tribunals (1.). Further, its functions are constantly evolving (2.). This raises the question of limits to the functions courts can assign to *amici curiae* (3.).

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icipation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 21.

85 *Methanex v. USA*, Petition to the Arbitral Tribunal Submitted by the International Institute for Sustainable Development, 25 August 2000, p. 3, paras. 3.7-3.8.

86 In *Biwater v. Tanzania*, the tribunal seems to have placed greater emphasis on this factor than other tribunals. The tribunal dismissed the claimant's argument that the public interest was not engaged in light of the investor's termination of the investment. The tribunal held that even if a public interest was not at stake, 'the observation of the tribunal in the *Methanex* case still applies with force, namely, that "the acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor state arbitration".' [Emphasis and reference omitted]. See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 54.

### 1. The myth of ‘the’ international *amicus curiae*

All international courts and tribunals use *amicus curiae* as an information provider. However, there are notable differences as to how courts use information-based *amicus curiae*. Information-based *amicus curiae* participation ranges from the pure transmission of non-redacted documents to the presentation of *amici curiae*'s experiences, views and legal arguments. Investment tribunals, for instance, expect an *amicus curiae* to give its own interpretation of events or to argue a legal issue from its own perspective. Before the ECtHR, there is a large practice of submissions on the human rights situations in certain countries that aims to complete the court's fact record. These *amici curiae* are used for their information value, not their personal opinions.

Further, most international courts and tribunals allow *amicus curiae* participation in the public interest, even though only few of them pronounce this function as clearly as investment tribunals and the IACtHR. Even fewer international courts and tribunals grant leave to *amici curiae* to present a private interest. Private interest-based *amicus curiae* participation occurs mainly before the ECtHR. WTO panels and, in one case, an investment tribunal have also received *amicus curiae* submissions from business interest groups.

Several academics argue that the instrument should be defined clearly to create a single ‘international *amicus curiae*.’<sup>87</sup> A common, singular concept of *amicus curiae* in international dispute settlement has its advantages in respect of clarity of the instrument. However, the creation of a single international *amicus curiae* fails to take into account the significant differences between international courts and tribunals. Their institutional needs, their functions and their constituencies are very diverse. Further, the advantage of the current *amicus curiae* practice is its flexibility. International courts and tribunals are free to consider what kind of participation would be beneficial to their proceedings and tasks, and they can shape the instrument accordingly. The instrument would lose many of its advantages if it would be standardised, regardless of the practical difficulties in achieving such an endeavour in the fragmented landscape of international dispute settlement.

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87 Cf. S. Menétrey, *supra* note 22, pp. 2-4.

## 2. An evolving concept

*Amicus curiae* has changed significantly in the last fifteen years, both in terms of regulation and the functions assigned to it. For instance, the ECtHR has expanded *amicus curiae* from an instrument to call attention to private interests to one that introduces public interests.<sup>88</sup> This has allowed in particular civil society groups and member states to present statements in cases engaging competing values. Investment arbitration tribunals and the WTO adjudicating institutions have developed the instrument in the opposite direction. Having admitted at first only NGOs seeking to present non-trade and non-investment related general public interests, they increasingly have admitted entities (re)presenting interests that are more particular.

## 3. Are there limits to the functions *amici curiae* may assume?

International courts and tribunals most often admit *amici curiae* through their inherent procedural powers. Accordingly, *amici* cannot fulfil functions that international courts and tribunals cannot transfer. This has become relevant in particular with respect to interest-based *amicus curiae* participation. The instrument cannot be used to introduce a new party through the backdoor or to extend the scope of the dispute. This also entails that the use of *amicus curiae* to obtain standing is moot (see Chapter 8). The *UPS v. Canada* tribunal stressed that it would overextend the instrument if an *amicus curiae* could participate to 'vindicate its rights.'<sup>89</sup> It can merely alert an international court or tribunal of a possibly conflicting right or interest, not have it adjudicated.

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88 This was possible by the dropping of the requirement that an *amicus curiae* show a 'sufficiently proximate connection' between its submission and the case. See *Glaserapp v. Germany*, Judgment, 28 August 1986, ECtHR Series A No. 104 and *Kosiek v. Germany*, Judgment, 28 August 1986, ECtHR Series A No. 105, where the court did not grant leave to *amici curiae* seeking to submit information about practices in states other than the defendant state for lack of a 'sufficiently proximate connection'. The court found that the *amici curiae* could bring their own claim to the EComHR, if they considered themselves affected or harmed by a state measure.

89 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 61.

The variety of functions implies the question if it is adequate to subject all *amici curiae* to the same rules and standards. Should different sets of rules apply depending on the function of *amicus curiae*, such as a requirement for public interest-based *amicus curiae* that it can legitimately represent a specific interest or the requirement that information-based *amicus curiae* must be impartial and independent? A differentiated regulatory framework could increase the utility and quality of *amicus curiae* briefs, but it would also raise the administrative burdens of international courts and tribunals.

### C. Amicus curiae and other forms of non-party participation

This section explores how *amicus curiae* relates to other forms of non-party participation, especially intervention and participation by non-disputing member states to a treaty.<sup>90</sup>

Differentiating *amicus curiae* from intervention and other forms of non-party participation is challenging because of the functional overlaps between the two instruments and because neither concept is viewed uniform-

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90 There may be some functional overlaps between *amicus curiae* and evidentiary instruments, as noted by the tribunal in *Methanex v. USA*. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, para. 13. However, as Chapter 7 shows, there are obvious differences between witnesses, experts and expert-witnesses, on the one hand, and *amicus curiae*, on the other hand. The actual functions of *amicus curiae* including information-based *amicus curiae* differ significantly from the established categories of evidence. An *amicus curiae* is expected to voice its own views and provide argument, including (and often especially) on legal issues. This is not the case for experts and witnesses. They shall complete the fact record. Moreover, an *amicus curiae* is not limited to questions posed to it by the court or tribunal. Also, it can seek to participate without having been solicited, and it is usually not bound by any special duties or rules (see Chapters 5 and 6). Finally, even though a few regulations and courts, including Rule 37(2) ICSID Arbitration Rules, address *amicus curiae* under the heading of evidence, all international courts and tribunals reviewed treat it as separate from the established categories of evidence, as a concept *sui generis*. See Chapter 7 and L. Bartholomeusz, *supra* note 22, p. 273 (‘[A]mici can perform a function similar to that of an expert. In appointing *amici*, international jurisdictions rarely, if ever, rely on their power to appoint third parties as experts ...’ [References omitted]); J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 *International and Comparative Law Quarterly* (2002), pp. 325-364.

ly in international dispute settlement.<sup>91</sup> Zimmermann defines intervention before international courts and tribunals as 'the participation of third states in ... proceedings while not being either the applicant or the respondent due to a legal interest in the underlying legal issues.'<sup>92</sup> Before several international courts and tribunals, *amici curiae* participate to highlight specific interests. Interveners, like *amici*, approach the court in the hope that their submissions will be considered in the final decision. Intervention, non-party participation by member states and *amicus curiae* participation are all forms of third party participation in that they pierce the traditionally bilateral dispute settlement process.<sup>93</sup> This functional overlap has led to concerns that *amicus curiae* could undermine the prerequisites for intervention.

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91 Institut de Droit International, Rapporteur R. Bernhardt, *Judicial and arbitral settlement of disputes involving more than two states*, Session 11 (Berlin), 68 Institute of International Law Annuaire (1999), p. 113 (He does not take into consideration interest-based *amicus curiae*: 'The only valid purpose of intervention is to protect a specific and own legal interest while *amicus curiae* participation assumes another perspective in that it exclusively aims to inform the Court on matters of law or fact in order to facilitate the Court's fulfillment of its tasks.'). In his Dissenting Opinion in *Continental Shelf, Judge Ago* equated the concepts. He held that the object of intervention was to provide the Court with information on the extent of the intervener's claims and the legal foundations on which it based them 'with the sole purpose, however, of demonstrating that those claims deserve to be taken seriously, and certainly not of obtaining a definitive recognition of them by the Court'. See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 21 March 1984, Diss. Opinion of Judge Ago, ICJ Rep. 1984, pp. 123-124, para. 14; P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 Max-Planck Yearbook of United Nations Law (2002), p. 149, FN 24.

92 A. Zimmermann, *International courts and tribunals, intervention in proceedings*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 1. Traditionally, there are two types of intervention before international courts: intervention as of right, where the interpretation of a treaty to which a third state is a member is at issue, and discretionary intervention, where the legal interest of a third party may be affected by the outcome of the case.

93 See A. Zimmermann, *supra* note 92, para. 3; S. Rosenne, *International Court of Justice*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, paras. 92-94.

## I. International Court of Justice and International Tribunal for the Law of the Sea

The ICJ Statute provides for discretionary intervention and intervention as of right. Article 62 ICJ Statute allows a state to request permission to intervene if it considers having ‘an interest of a legal nature which may be affected by the decision in the case.’ Article 63 allows intervention by states ‘[w]henever the construction of a convention to which States other than those concerned in the case are parties is in question.’<sup>94</sup> The latter form of intervention has been considered to be functionally akin to *amicus curiae* participation because of its purpose to promote and facilitate the uniform interpretation of multilateral conventions.<sup>95</sup> Indeed, there is a similarity in the sense that Article 63 establishes an incidental consultative process which extends the ICJ’s basis for decision-making in the interpretation of a convention.<sup>96</sup> Still, the comparison falls short: first, Article 63(2) expands the judgment’s binding effect on the intervening state with regard to the interpretation of the convention. Second, Article 63, by its wording, grants a *right* to intervene.<sup>97</sup> The ICJ denies this right only where

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94 For a detailed analysis of intervention before the ICJ, see S. Rosenne, *The law and practice of the International Court of Justice*, 4<sup>th</sup> Ed., Leiden 2006, Chapter 26; C. Chinkin, *Article 63*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed. Oxford 2012, para. 24. The intervening state does not need to show a particular legal interest. An abstract interest is presumed by membership to the convention. See S. Oda, *Intervention in the International Court of Justice*, in: R. Bernhardt et al (Eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit und Menschenrechte, Festschrift für Hermann Mosler*, Berlin et al. 1983, p. 644. The prevailing view is that the convention must be of some relevance to the case. See K. Günther, *Zulässigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH*, 34 German Yearbook of International Law (1991), p. 286; *Haya de la Torre (Colombia v. Peru)*, Judgment, 13 June 1951, ICJ Rep. 1951, p. 76 (‘[E]very intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings.’).

95 K. Günther, *supra* note 94, p. 285; S. Oda, *supra* note 94, p. 635, citing the Advisory Committee of Jurists of The Hague in 1920; C. Chinkin, *supra* note 94, p. 1575, para. 4.

96 K. Günther, *supra* note 94, pp. 287-288; P. Palchetti, *supra* note 91, pp. 141-142.

97 T. Elias, *The limits of the right to intervention in a case before the International Court of Justice*, in: R. Bernhardt et al. (Eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit und Menschenrechte, Festschrift für Hermann Mosler*,

it finds that an intervention is not 'genuine.'<sup>98</sup> *Amicus curiae* participation in contentious proceedings remains limited to the narrow confines of Article 34(2) ICJ Statute, which differs in personal scope and content from intervention in so far as only intergovernmental organizations may participate and they must submit information relevant to the case before the Court. Article 34(3) ICJ Statute together with Article 69(3) ICJ Rules, however, establishes a provision similar to Article 63 ICJ Statute for intergovernmental organizations whose constituent instruments or an instrument adopted thereunder is in question before the Court.

The ICJ understands intervention under Article 62 ICJ Statute as purely protective.<sup>99</sup> The term 'interest of a legal nature' is not further specified, but the ordinary meaning of the term denotes less than a legal right, but more than a purely economic or political interest.<sup>100</sup> The ICJ has held that the interest must be the *own* interest of the applicant, but it needs neither

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Berlin et al. 1983, p. 166. The ICJ did not follow this view. It denied El Salvador's application for permission to intervene under Article 63 in the *Nicaragua case*. See *Nicaragua Case*, Declaration of Intervention, Order of 4 October 1984, ICJ Rep. 1984, p. 215.

98 See the analysis by K. Günther, *supra* note 94, p. 287.

99 Applicants must state the purpose of the intervention to facilitate the Court's decision on the existence of a genuine interest (Article 81(2)(b) ICJ Rules). See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, Diss. Op. Judge Jennings, ICJ Rep. 1984, p. 152, para. 14 ('As to the "precise object of the intervention", this is presumably to enable the Court to assure itself how far the object is indeed the safeguarding of legal rights which may be affected by the decision, and how far other purposes might be involved.'). Intervening states may not seek a decision on their interests. The Court considers as a valid objective information on the nature of the potentially affected legal interests. Critical, P. Palchetti, *supra* note 91, p. 147. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 130, para. 90; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Application to Intervene, Order of 21 October 1999, ICJ Rep. 1999, p. 1034, para. 14; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 23 October 2001, ICJ Rep. 2001, p. 606, paras. 87-88. See also the heavily criticized rejection of Italy's application in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, pp. 9-28, paras. 13-45; C. Chinkin, *supra* note 94, *Article 62*, para. 55.

100 K. Günther, *supra* note 94, p. 266. This was the intention of the drafters of the PCIJ Statute, see Advisory Committee of Jurists, Procès-verbaux des séances du

to be direct, nor substantial, nor specific to the state seeking to intervene.<sup>101</sup> Already the PCIJ Statute's *travaux préparatoires* indicate that the provision did not intend to allow states to intervene to make submissions on abstract questions of law in the interest of a 'harmonious development' of international law – a typical motivation for participation as *amicus curiae*. The ICJ has confirmed this in its practice.<sup>102</sup> In a dispute between Libya and Malta, the Court decided with respect to Italy's application for permission to intervene that intervention was not permissible if its main purpose was to assist the Court, therewith drawing a clear line to *amicus curiae*.<sup>103</sup> However, the ICJ expanded the understanding of interest of a legal nature in a judgment on the application for permission to intervene by

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Comité, PCIJ 1920, pp. 745-746. Some scholars equate interest of a legal nature with a legal right. See T. Elias, *supra* note 97, pp. 160-161.

- 101 C. Chinkin, *supra* note 94, *Article 63*, para. 42; *Land Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, para. 61 and p. 124, para. 76. On public interest intervention, see C. Chinkin, *Article 62*, *supra* note 94, p. 1558, para. 66 (Chinkin argues that the PCIJ indirectly suggested the 'concept of a public interest intervention' in the case *Railway Traffic Between Lithuania and Poland*, because it asserted third party interests in freedom of transit and communications. However, no state found it necessary to intervene. She contends that nevertheless the ICJ is unlikely to permit such intervention in light of its restrictive decision in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, Judgment 14 April 1981, ICJ Rep. 1981, p. 9, paras. 12-13). See also M. Benzing, *supra* note 42, pp. 384-385.
- 102 See E. Jiménez de Aréchaga, *Intervention under Article 62 of the Statute of the International Court of Justice*, in: R. Bernhardt et al. (Eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit und Menschenrechte, Festschrift für Hermann Mosler*, Berlin et al. 1983, pp. 456-458; S. Oda, *supra* note 94, p. 635; K. Günther, *supra* note 94, p. 267.
- 103 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, pp. 25-26, paras. 40-42. In the first successful intervention pursuant to Article 62, in *Land, Island and Maritime Frontier Dispute between El Salvador and Honduras*, Nicaragua was granted permission to intervene only in respect of an inseparable condominium in the Gulf of Fonseca between the three states because of its 'community interest'. The ICJ considered the other two grounds upon which Nicaragua sought to intervene too remote. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 137, para. 105. S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht 1993, p. 148; K. Günther, *supra* note 94, p. 264. The Court's rejection of Malta's application to intervene in the *Continental Shelf* case between Libya and Tunisia displays the ICJ's reluctance

the Philippines in the case *Sovereignty over Pulau Ligitan and Pulau Sipadan*, approximating intervention and *amicus curiae* participation. The Court stressed the need for ownership of a specific interest of a legal nature.<sup>104</sup> However, it deviated from its earlier jurisprudence by finding that the interest did not need to be affected by the subject matter of the case. It sufficed if the Court's reasoning could affect the applicant's legal interests.<sup>105</sup> The ICJ's decision marks a significant deviation from its earlier held position. Now, an intervener can seek to submit its views on specific issues of interpretation of laws or fact to prevent a decision that might

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to broaden the scope of 'legal interest'. The Court found that an interest in the applicable general principles and rules of international law, and, in particular, an interest in the 'potential implications of reasons which the Court may give in its decision' did not constitute an interest of a legal nature. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, Judgment 14 April 1981, ICJ Rep. 1981, p. 12, para. 19.

104 Insofar, the ICJ solidified its position established earlier with regard to Malta's application for permission to intervene when it stressed: 'The wish of a State to forestall interpretations by the Court that might be inconsistent with responses it might wish to make, in another claim, to instruments that are not themselves sources of the title it claims, is simply too remote for purposes of Article 62.' See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 23 October 2001, ICJ Rep. 2001, pp. 603-604, para. 83.

105 Ultimately, the application of the Philippines was unsuccessful for other reasons, see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, 23 October 2001, ICJ Rep. 2001, p. 607, paras. 93-94. The decision constitutes a startling deviation from the position already held by the PCIJ that intervention under Article 62 depends on an 'independent submission of a specific claim' by the applicant 'which may be affected by the operative part of the Court's judgment.' *Case of the SS Wimbledon*, Question of Intervention by Poland, Judgment, 28 June 1923, PCIJ Series A No. 1, p. 12, see E. Jiménez de Aréchaga, *supra* note 102, p. 461. The decision is in line with *Judge Oda's* push towards a broader scope of intervention. *Judge Oda* has consistently argued that Article 62 should be read in the light of Article 63. A state should be allowed to intervene under Article 62 to make submissions on the interpretation of principles and rules of international law, which the Court may address in its reasoning, as long as the state can show the existence of an interest of a legal nature. See S. Oda, *supra* note 94, pp. 646-648. Critical, *Palchetti* who argues for a return to a narrow scope of intervention and for the creation of (inclusive) separate rules on *amicus curiae* participation. Intervention re the reasoning should, in his view, depend upon the impact the reasoning of the Court will have on the state. See P. Palchetti, *supra* note 91, pp. 156-157, 162.

negatively affect its legal interests in future cases.<sup>106</sup> This has moved intervention closer to *amicus curiae* participation. Still, the Court continues to emphasize that intervention is not a mechanism for it to obtain additional information on the case from non-parties.<sup>107</sup>

A further convergence of the concepts results from the effects a decision has on the intervener: the ICJ has developed two forms of intervention under Article 62 ICJ Statute based on the requirement of a jurisdictional link between the intervener and the parties: the non-party intervener and the party intervener.<sup>108</sup> Similar to *amicus curiae* in other *fora*, the non-party intervener under Article 62 informs the ICJ of its legal interests that may be affected with the aim of protecting those interests, but without obtaining a ruling on them due to lack of a jurisdictional band.<sup>109</sup> The main difference between *amicus curiae* and non-party intervention boils down to the fact that the non-party intervener has a right to have its submission

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106 As a caveat, the ICJ added that in such a situation, the state seeking to intervene ‘necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have.’ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, 23 October 2001, ICJ Rep. 2001, para. 59.

107 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 130, paras. 89-90; C. Chinkin, *supra* note 94, p. 1533, para. 9.

108 Regarding the dispute on the necessity of a jurisdictional link, see K. Günther, *supra* note 94, p. 274; T. Elias, *supra* note 97, pp. 163-166, 168 (He rejects the concept of non-party intervention as a ‘ludicrous enigma’); E. Jiménez de Aréchaga, *supra* note 102, pp. 454, 462-465; S. Oda, *supra* note 94, pp. 641-644; E. Lauterpacht, *Principles of procedure in international litigation*, 345 *Receuil des Cours* (2009), pp. 462-464. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 135, para. 99; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, 23 October 2001, ICJ Rep. 2001, p. 589, para. 36.

109 R. Bernhardt, *supra* note 91, pp. 86-87. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, Judgment (Merits), 11 September 1992, ICJ Rep. p. 610, para. 423 (‘[T]he right to be heard, which the intervener does acquire, does not carry with it the obligation of being bound by the decision.’). Critical, Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 814 (‘If third parties are given the opportunity to influence the progression and possibly the outcome of a case, even against the opposition of the parties, it would seem unfair that they benefit from intervention without bearing some corresponding commitment.’ [With further references].).

considered whereas an *amicus curiae* does not. *Bernhardt* even argues that the broad approach to intervention renders obsolete *amicus curiae* participation before the ICJ.<sup>110</sup> What is clear is that any admission of *amicus curiae* by the ICJ would require it to elaborate on how it relates to this broad concept of intervention. The existing rules on *amicus curiae* and intervention indicate that the main difference boils down to the personal scope of participants and the purely protective purpose of intervention before the ICJ.

Intervention before the ITLOS follows the two-pronged approach to intervention established by the ICJ Statute. Article 31 ITLOS Statute addresses intervention to protect an interest of a legal nature, whereas intervention pursuant to Article 32 ITLOS Statute regulates intervention when the interpretation or application of the UNCLOS or another international agreement is in question. The ITLOS Statute determines explicitly that in both cases the intervener is bound by the judgment to the extent of his intervention.<sup>111</sup> This is a clear difference to *amicus curiae* participation and might indicate that the drafters of the Statute intended intervention before the ITLOS to be resorted to for the protection of rights rather than the development of international law.

## II. WTO Appellate Body and panels

Article 10(2) DSU grants '[a]ny Member having a substantial interest in a matter before a panel and having notified its interest to the DSB ... an op-

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110 R. Bernhardt, *supra* note 91, pp. 113-114.

111 Article 31 ITLOS Statute: '1. Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene. ...

3. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.'

Article 32 ITLOS Statute: '1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith.

2. Whenever pursuant to article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all parties to the agreement.

3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.'

portunity to be heard by the panel and to make written submissions to the panel.’ Article 17(4) DSU determines that ‘[t]hird parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard, by the Appellate Body.’ Member states frequently intervene in panel and Appellate Body proceedings. Like *amicus curiae*, third parties are not bound by the panel or Appellate Body reports.<sup>112</sup> The substantial interest need neither be legal nor belong to the third party in the form of a subjective right.<sup>113</sup> A general interest in the interpretation of the WTO Agreement and its related agreements suffices. In so far, there is a parallel to *amicus curiae* participation. Third parties – like *amici curiae* – may possess a direct interest in the outcome of the case.<sup>114</sup>

Third parties generally make written and oral submissions. They receive privileged access to some of the party submissions.<sup>115</sup> They have a right to reply to the parties’ comments on their submissions. The Appellate Body has clarified that the role of third parties is not tantamount to that of parties. Third parties are not in a position to determine procedural

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112 *Japan – Taxes on Alcoholic Beverages* (hereinafter: *Japan–Alcoholic Beverages II*), Report of the Appellate Body, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

113 E.g. *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (hereinafter: *EC–Bananas III*), Report of the Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R. See also J. Koepf, *Die Intervention im WTO-Streitbeilegungsverfahren. Eine rechtsvergleichende Untersuchung im internationalen Verfahrensrecht*, Hamburger Studien zum Europäischen und Internationalen Recht, Band 32, Berlin 2001, pp. 68–74.

114 *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products* (hereinafter: *EC–IT Products*), Report of the Panel, adopted on 22 September 2010, WT/DS375/R, WT/DS376/R, WT/DS377/R, para. 7.78. The equivalent provisions in the Working Procedures for Appellate Review neither have such a limitation. See Rule 24 Working Procedures for Appellate Review of 16 August 2010, WT/AB/WP/6.

115 *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (hereinafter: *Canada–Wheat Exports and Grain Imports*), Report of the Panel, adopted on 27 September 2004, WT/DS276/R, pp. 111–113, para. 6.6; *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (hereinafter: *Australia–Automotive Leather II*), Recourse to Article 21.5 (US), Report of the Panel, adopted on 11 February 2000, WT/DS126/RW, para. 3.9. The extent of third parties’ access to documentation under Article 10(3) DSU has been controversial.

issues.<sup>116</sup> They cannot expand the panel's mandate. Accordingly, panels and the Appellate Body ignore submissions on issues outside the scope of the dispute.<sup>117</sup>

Panels and the Appellate Body have limited discretion with respect to third parties. Applicants that submit the Article 10(2) DSU notification in a timely fashion are automatically admitted as a third party. There is no assessment of the substantive requirements.<sup>118</sup> *Koepp* argues that the liberal approach to third party intervention and the large amount of interventions result from the complex network of multilateral rights and obligations established by the WTO Agreement. WTO obligations are owed to all members of the trading system. Violations of obligations therefore concern all members and can rarely be severed into the bilateral structure of judicial dispute settlement. Third party participation is institutionally encouraged and third parties are intensely involved in proceedings, as panels often request additional information from them.<sup>119</sup>

Member states have claimed that *amici curiae* could undermine their rights as third parties, because they do not have to prove a substantial interest in the case while taking the liberty to comment on issues affecting all member states. The Appellate Body faced a true test in *EC–Sardines* when it received an *amicus* submission from Morocco (see Chapter 5).<sup>120</sup>

This concern is unfounded. Despite many similarities, the categorical differentiation between *amicus curiae* and third-party participation is

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116 *Canada/USA – Continued Suspension of Obligations in the EC–Hormones Dispute* (hereinafter: *Canada/US–Continued Suspension*), Reports of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, Annex IV, para. 9.

117 *United States – Sections 301-310 of the Trade Act 1974* (hereinafter: *US–Section 301 Trade Act*), Report of the Panel, adopted on 27 January 2000, WT/DS152/R, p. 302, para. 7.13 ('The mandate we have been given in this dispute is limited to the specific EC claims set out ... above. ... It is not our task to examine any aspects of Sections 301-310 outside the EC claims.').

118 See Section 6(1) Panel Working Procedures. J. Koepp, *supra* note 113, p. 78.

119 J. Koepp, *supra* note 113, pp. 84, 227.

120 Also, it was argued that *amicus* participation grants more and additional rights to non-members than to WTO member states as the latter must comply with Article 10(2) DSU. The admission of Morocco as *amicus curiae* dispelled this argument. See *Canada in European Communities – Trade Description of Sardines* (hereinafter: *EC–Sardines*), Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, p. 36, para. 155; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7.

strictly maintained in practice by the Appellate Body.<sup>121</sup> In *EC–Sardines*, the Appellate Body emphasized that the existence of a right of intervention did not justify ‘treating the WTO Members differently from non-WTO Members in the exercise of [its] authority to receive *amicus curiae* briefs. ... Just because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an *amicus curiae* is prohibited.’<sup>122</sup> The Appellate Body reasoned that the admission of *amicus curiae* submissions by non-WTO entities *a fortiori* entitled it to receive *amicus curiae* submissions from member states, and that such participation was less than participation as a third party, i.e. a member state did not have a right to have its *amicus curiae* submission accepted or considered.<sup>123</sup> Moreover, *amicus curiae* has no right of participation and it is treated like any other member of the public in terms of access to hearings, documents and the case record (see Chapter 6). In particular, the Appellate Body’s expansive interpretation of Article 10(3) DSU’s obligation that third parties be provided with party submissions has not at all been applied to *amici curiae*. This is despite the Appellate Body’s acknowledgment regarding third parties that full access to case-related submissions more likely will ‘guarantee that the third parties can participate at a session of the first meeting with the panel in a full

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- 121 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101 (‘Only Members may become parties to a dispute of which a panel may be seized, and only Members “having a substantial interest in a matter before a panel” may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel.’ [References omitted]); *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, paras. 39–40 (‘[W]e are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal,’ while ‘[w]e wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute.’).
- 122 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 165.
- 123 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 164.

and meaningful fashion that would not be possible if the third parties were denied written submissions made to the panel before that meeting [and that] panels themselves will thereby benefit more from the contributions made by third parties.<sup>124</sup>

### III. Investor-state arbitration

Institutional rules and investment treaties are virtually silent on the topic of intervention as of right, but an increased number of multilateral investment treaties and a few bilateral investment treaties have established the possibility for states parties to an investment treaty to make submissions on issues of interpretation of the investment treaty in arbitrations where they are not appearing as party. Prominent examples include Article 1128 NAFTA, Article 10.20.2 CAFTA and Article 5 UNCITRAL Rules on Transparency.<sup>125</sup> The procedures are used regularly.<sup>126</sup> The amount of submissions is not limited and it is common for parties to file several submis-

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124 *US–FSC*, Recourse to Article 21.5 (EC), Report of the Appellate Body, adopted on 29 January 2002, WT/DS108/AB/RW, p. 76, para. 249.

125 See Article 1128 NAFTA: 'On a written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.'

Article 10.20.2. CAFTA: 'A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.'

Article 5 UNCITRAL Rules on Transparency: '(1) The arbitral tribunal shall, subject to paragraph 4, allow, or ... may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

(2) The arbitral tribunal .... may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. ...'

126 E.g. in *UPS v. Canada*, First Submission under Art. 1128 NAFTA of the Government of Mexico, 11 June 2001 and First Submission of the United States of America, 11 June 2001; *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 25; *Ethyl Corporation v. the Government of Canada* (hereinafter: *Ethyl Corp. v. Canada*), Award on Jurisdiction, 24 June 1998 para. 36; *Pac Rim v. El Salvador*, Non-Disputing Party Submission of the Republic of Costa Rica, 13 May 2011, ICSID Case No. ARB/09/12; *Commerce Group Corp. and San Sebastián Gold Mines, Inc. v. El Salvador* (hereinafter: *Commerce Group v. El Salvador*), Non-Disputing Party Submission of the Republic of Costa Rica, 20 October 2010, ICSID Case No. ARB/09/17. See also G. Kaufmann-Kohler, *Non-disputing state submissions in investment arbitration: resurgence of diplomatic protection?*, in: L. Boisson de Chazournes et al. (Eds.), *Diplomatic and judicial means of dispute settlement*, Leiden 2013, p. 311.

sions in a case.<sup>127</sup> Permission to intervene is granted if the formal requirements are fulfilled.<sup>128</sup> Though formally limited to issues of NAFTA interpretation, some of the Article 1128 interveners have also addressed factual aspects of the pending case, which, notably, were not rejected by the respective tribunals.<sup>129</sup>

NAFTA investment tribunals have denied that there is any overlap between Article 1128 and *amicus curiae* participation based on the formal argument that third-party participation is a right, whereas *amicus curiae* participation is a privilege subject to the discretion of the tribunal.<sup>130</sup> However, there is a functional and substantive overlap between the two

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127 E.g. in *Pope and Talbot, Inc. v. the Government of Canada*, the USA made eight 1128 submissions, at: <http://www.state.gov/s/l/c3747.htm> (last visited: 28.9.2017).

128 M. Hunter/A. Barbuk, *Procedural aspects of non-disputing party interventions in Chapter 11 arbitrations*, 3 *Asper Review of International Business and Trade Law* (2003), p. 157. See also Mexico's arguments in *Methanex v. USA* on the effect of Article 1128 submissions: 'Mexico agrees with the US that where there is agreement on a matter of treaty interpretation between the disputing NAFTA Party and the non-disputing NAFTA Parties through their Article 1128 submissions, this "constitutes a practice ... establish[ing] the agreement of the parties regarding [the NAFTA's] interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention," and that such agreement is "authoritative". The Treaty has been negotiated and administered by the NAFTA Parties and their shared views, as all of the sovereign States party to the Agreement, should be considered authoritative on a point of interpretation.' [References omitted]. See *Methanex v. USA*, Article 1128 NAFTA submission, 30 April 2001, p. 1, para. 1.

129 See T. Weiler, *The Ethyl arbitration: first of its kind and a harbinger of things to come*, 11 *American Review of International Arbitration* (2001), p. 201 (Weiler urges tribunals to ignore such submissions 'to preserve the integrity of arbitrators by ensuring that the parties to them remain the primary actors, rather than other NAFTA parties who may have their own trade and investment policy agendas.'). See also M. Hunter/A. Barbuk, *supra* note 128, pp. 163-164.

130 The *Methanex* tribunal stated that it had no power pursuant to Article 15(1) of the 1976 UNCTRAL Arbitration Rules to grant the petitioners 'the substantive rights of NAFTA Parties under Article 1128 of NAFTA.' *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 27. The *Methanex* tribunal reasoned that participation under Article 1128 NAFTA was not affected by *amicus curiae* participation. See *Methanex v. USA*, *id.* para. 38. See also the arguments by the respondent USA: 'The NAFTA [in Article 1128] provides only the State Parties with a right to make submissions to tribunals on questions of the interpretation of NAFTA. No provision of the NAFTA, however, limits a tribunal's ability to accept, as a matter of discretion, submissions by other non-parties.' [Emphasis omitted]. See

concepts. Even though they are not limited to commenting on matters of investment treaty interpretation like non-disputing parties, *amici curiae* often seek to do so in their attempts to harmonize investment treaties and other international law obligations.<sup>131</sup> In addition, tribunals tend to align procedures such as the timing of submissions for practical reasons (see Chapter 6). In cases that do not provide for interpretative intervention, parties to the underlying investment treaty have participated as *amicus curiae*.<sup>132</sup> The most distinct difference between the mechanisms in investment arbitration is that *amicus curiae* has no right of participation. Unlike the non-disputing contracting states whose justified interest in the case is presumed, prospective *amici* must apply for permission to participate and show possessing a special interest in the case as well as a unique expertise that will help the tribunal to decide the case. A sparsely discussed obfuscation of the concepts, at least in practice, risks arising from the EC's participation as *amicus curiae* in cases with an EU law dimension. Based on Article 13(b) of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012, the European Commission requests to participate 'where appropriate' in investor-state arbitrations based on investment treaties concluded between a member state and a third country. While not possessing a formal right of participation, tribunals might find it difficult to resist the EC's request to participate given that the EC does not hesitate to take measures against the enforcement of investment awards it considers incompatible with EU law (see Section

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*Methanex v. USA*, Statement of Respondent USA in response to Canada's and Mexico's submissions concerning petitions for *amicus curiae* status, 22 November 2000, p. 2. See also D. Steger, *supra* note 5, p. 444.

131 *Kaufmann-Kohler* calls for a limitation of *amicus curiae* briefs to legal matters in order to avoid a breach of Article 27 ICSID Convention in ICSID-administered cases where states parties use the instrument to comment on the investment treaty. Article 27 prohibits diplomatic protection by the national state of investors that have initiated arbitration. See G. Kaufmann-Kohler, *supra* note 126, pp. 318-319.

132 *Achmea B.V. v. the Slovak Republic*, (formerly *Eureko B.V. v. the Slovak Republic*) (hereinafter: *Eureko v. Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13; *Aguas del Tunari, S.A. v. the Republic of Bolivia* (hereinafter: *Aguas del Tunari v. Bolivia*), Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, p. 10, para. 47.

B).<sup>133</sup> Another notable difference is that, unlike most *amici curiae*, third parties receive privileged access to information (see Chapter 6).

#### IV. Comparative analysis

The interaction between *amicus curiae* and intervention depends on the concrete regulation of the two mechanisms in the applicable procedural regimes. International courts and tribunals formally differentiate between intervention and *amicus curiae*. As a basic rule, everyone can act as *amicus curiae*, but to appear as an intervener one must have the right to do so under the applicable procedural laws. International courts and tribunals that allow *amicus curiae* participation to defend an individualized interest typically do not provide for intervention as of right.

While intervention and *amicus curiae* functionally overlap, one significant difference remains; an intervener possesses a right to participate and a right to be heard in the proceedings. His interest in the case is legally protected.<sup>134</sup> *Amicus curiae* participation is subject to the discretion of the court. For this reason, the conditions permitting intervention are generally narrow. Intervention is usually restricted to a certain set of entities (usually the parties to the statute) and the intervener must prove a legitimate (legal)

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133 V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 *Vanderbilt Journal of Transnational Law* (2015), p. 1339 (Arguing that while the EU has no extra rights in investment arbitration, ‘still it is not a mere third party’. She also acknowledges that the EC so far has not ‘at least to the outside world’ received special treatment compared to other *amici curiae*.)

134 Often, it is stated that interveners become bound by the judgment to the extent of their intervention. This is not the case in all international courts. See A. Zimmermann, *supra* note 92, paras. 1, 4. Zimmermann further posits that intervention is an acknowledgment of the *de-facto* effect of judgments on third party interests and the limited protection offered by the principle of *res inter alios acta* enshrined in Article 59 ICJ Statute. Because of the lack of compulsory jurisdiction, the ICJ has at times protected the interests of third parties unwilling to intervene by limiting the scope of the dispute brought before it, if the rights of the third party formed the subject matter of the dispute. E.g. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Judgment, 15 June 1954, ICJ Rep. 1954, p. 19; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, p. 25-26, paras. 40-42; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, p. 28, para. 46.

interest or right which again must be closely related to the case.<sup>135</sup> The requirements for *amicus curiae* participation differ, but tend to be less strict and grant the tribunal a greater degree of discretion in the handling of petitions and briefs, also with regard to the purpose of participation (see Chapters 5 and 6). The requirements for intervention seem to have been neither lessened where *amicus curiae* participation is possible, nor have *amici* received preferential treatment. Where *amicus* participation is not permitted, particularly in the ICJ, intervention has been extended to cover participation similar to that of *amicus curiae*.<sup>136</sup> This reinforces the usefulness of opening to *amicus curiae* participation to avoid blurring the concepts.

#### D. Conclusion

Before all international courts and tribunals reviewed, *amicus curiae* is a procedural instrument subject to full judicial discretion. It provides information to the court and may not be used by the parties as a litigation tool. These few common characteristics show that the international *amicus curiae* differs fundamentally from national concepts of the instrument. It is neither a court-appointed, neutral or impartial legal adviser (as in English law), nor a litigation tool of the parties (as in US law).

Apart from the common procedural characteristics, *amicus curiae* is a flexible and varied concept. International courts and tribunals assign different functions to *amicus curiae*. This book proposes to break them into three basic categories: information-based *amicus curiae*, interest-based *amicus curiae*, and systemic *amicus curiae*. All international courts and tribunals rely on information-based *amicus curiae* and most assign also an interest-based function to *amicus curiae*, but only investment tribunals and the ICJ have admitted *amici* to alleviate systemic concerns. Within the categories, significant differences between the functions exist. This flexibility

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135 Cf. Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 808.

136 Id., p. 809 ('An exceptional right to intervene due to an interest in the development of the law not linked directly to a case is allowed at the ... ICJ, ... ITLOS, ... CCJ, and ... PCA. These courts not only allow intervention but actively solicit it, whenever at issue is the construction of a treaty to which states or organizations other than those concerned in the case are parties. The exclusivity of intervention in treaty interpretation but not in questions of general international law can hardly be justified on normative grounds.' [References omitted]).

is the instrument's true advantage. It allows courts and tribunals to adapt the instrument to their specific needs. *Amicus curiae* should not be streamlined and generalized to establish a common concept of *amicus curiae*. Any broad generalizations risk oversimplification and ignorance of subtle, but decisive differences mandated by reality.

While there is a functional overlap with intervention and other forms of non-disputing party participation, international courts and tribunals that allow for several forms of participation strictly distinguish between them. An *amicus curiae* does not acquire any formal status with its admission. It is not given any general or special procedural powers or duties. In short, 'the third person acquires no rights at all.'<sup>137</sup> The fear that *amicus curiae* as a 'soft' third party would undermine formal non-party participation mechanisms has not materialized within an international court or tribunal's procedural regime. However, those international courts and tribunals whose procedural framework does not allow for other forms of third-party participation tend to assign to *amici curiae* a wider set of functions, including functions that are reserved for intervention in other international courts and tribunals, such as the assertion of particular (legal) interests or rights, or submissions on the interpretation of a convention or treaty to which the *amicus curiae* is a party.

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137 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, para. 30.



Part II  
Commonalities and divergences:  
the procedural laws of *amicus curiae* participation



## Chapter § 5 Admission of *amicus curiae* to the proceedings

*[A]lso because I believe that the Court would be unwilling to open the flood-gates to what might be a vast amount of proffered assistance, in my opinion a negative answer must be given to your first question, whatever justification for describing the volunteer as an amicus curiae may exist.<sup>1</sup>*

*The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.<sup>2</sup>*

This Chapter addresses the admission of *amici curiae*. The first question an international court or tribunal considers upon receiving a request for leave to appear as *amicus curiae* – as in the above-quoted cases – is whether it is competent to grant the request.<sup>3</sup> Accordingly, this Chapter first examines the legal basis for the admission of *amici curiae* before the international courts and tribunals reviewed (A.). It then analyzes the various requirements in the admission processes starting with those attached to the person of *amicus curiae* (B.), followed by a comparison of request for leave procedures (C.).

### A. Legal bases for *amicus curiae* participation

Much of the debate on *amicus curiae* has been reduced to the issue of competence to accept *amicus curiae* submissions. This is unsurprising. The admission of an entity unrelated to the case before an international court or tribunal is anathema to the bilateral notion of international dispute

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1 *South West Africa*, Letter No. 21 (Letter by the Registrar to Professor Reisman), Advisory Opinion, 6 November 1970, Part IV: Correspondence, ICJ Rep. 1970, p. 639.

2 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 108.

3 While the ICJ found that it lacked the power to accept an *amicus* brief, the WTO Appellate Body found that panels had the authority to do so. Neither the ICJ Statute and Rules nor the DSU or Panels' Working Procedures explicitly allowed for *amicus curiae* submissions.

settlement. Accordingly, both in investment arbitration and in WTO adjudication submissions by non-state entities were initially either ignored or rejected.<sup>4</sup>

As indicated in Article 38(1) ICJ Statute, there are three legal sources from which an international court or tribunal could draw authority to allow *amicus curiae* participation: treaty law, customary international law, or a general principle of law.

*Amicus curiae* participation by way of contractual legitimization describes the situation where the international court or tribunal draws permission to accept *amicus curiae* from its governing rules. This comprises permission in a *compromis* or an *ad hoc* agreement between the disputing parties. The latter is contingent on a permission by the instrument governing the proceedings to deviate from the standard set of procedural rules provided.<sup>5</sup> The permission may be express or implied. Where authority to accept *amicus curiae* has been conferred neither expressly nor impliedly, might an international court or tribunal seek to rely on its inherent powers.<sup>6</sup> Inherent powers are used to supplement the often-rudimentary procedural rules where necessary to ensure the proper functioning of a court.<sup>7</sup>

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4 For example, in *Aguas del Tunari v. Bolivia*, a case concerning the privatization of water services in Cochabamba, Bolivia's third largest city, which had drawn significant public attention and an *amicus curiae* request for leave from more than 300 entities, the arbitral tribunal found that acceptance of the submission was 'beyond the power or authority of the Tribunal' due to the consensual nature of arbitration and pointed to the parties' lack of consensus on whether to accept the submission. *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Appendix III: Letter from the Tribunal to Earthjustice, Counsel for Petitioners, ICSID Case No. ARB/02/3, pp. 125-127. The case concerned a damages claim by Aguas del Tunari, a subsidiary of the Dutch Bechtel corporation, in the amount of US\$ 50 million under the Netherlands-Bolivia investment treaty for unlawful termination of a concession to Aguas del Tunari of the Cochabamba water system following the striking down by the military of a protest against an approximately 35% percent raise of water prices in the course of which one teenager was killed and over one hundred people injured.

5 See Article 101 ICJ Rules; Article 12 DSU; Article 44 ICSID Convention; Articles 1(1), 17(1) of the 2010 UNCITRAL Rules; Article 48 ITLOS Rules.

6 For an analysis of the concept of inherent powers, see C. Brown, *A common law of international adjudication*, Oxford 2007, pp. 56, 67; I. van Damme, *Treaty interpretation revisited, not revised*, ILO Distinguished Scholar Series, 30 October 2008.

7 E.g. *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, PCIJ Series A, p. 16 (The PCIJ reasoned that the absence of a fitting rule of procedure allowed

Alternatively, international courts and tribunals could draw permission from customary international law, which can constitute a source of procedural law.<sup>8</sup> However, it is difficult to argue that authority to accept and regulate *amicus curiae* submissions has attained the status of a rule of customary international law. So far, no international court or tribunal has sought to admit *amici curiae* on this basis. To form a rule of customary international law, pursuant to Article 38(1) (b) ICJ Statute the rule in question needs to be generally practiced in the belief that it is legally binding (*opinio iuris*). The intense debate surrounding the admissibility of *amicus curiae*, in particular the continuing strong political opposition to it in the WTO membership, as exemplified in numerous Dispute Settlement Body, General Council and Doha-Negotiation Meetings, indicates the absence of *opinio iuris* (at least for now).<sup>9</sup>

Equally, it is difficult to argue convincingly that the authority to admit *amici curiae* constitutes a general principle of international law.<sup>10</sup> General principles of international law prescribe a fundamental value or binding

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it to 'adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.');

*Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, 2 December 1963, Sep. Op. Judge Fitzmaurice, ICJ Rep. 1963, p. 103; *Nuclear Tests Case (Australia v. France)*, Judgment, 20 December 1974, ICJ Rep. 1974, pp. 259-260.

- 8 C. Brown, *supra* note 6, p. 53; S. Rosenne, *The law and practice of the International Court*, Vol. 3: Procedure, Leiden 2006, pp. 1027-1028; H. Thirlway, *Dilemma or chimera? Admissibility of illegally obtained evidence in international adjudication*, 78 *American Journal of International Law* (1984), pp. 622-623; *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (hereinafter: *US–Wool Shirts and Blouses*), Report of the Appellate Body, adopted on 23 May 1997, WT/DS33/AB/R.
- 9 Opposing C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 *Aussenwirtschaft* (2005), p. 351 (The continuous assertion by panels and the Appellate Body of authority to admit *amicus* briefs have rendered '*amicus* briefs a customarily accepted procedural means.');
- CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 21, FN 103; L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 *Journal of World Investment and Trade* (2004), pp. 333-336 ('[M]aybe there is an emergence of a customary international law rule which allows for the submissions of *amicus curiae* briefs.');
- 10 See C. Kessedjian, *Codification du droit commercial international et droit international privé: de la gouvernance pour les relations économiques transnationales*, 300 *Receuil des cours* (2002), p. 285 ('Reflechir à l'éventuelle existence d'un principe international de procedure qui permettrait a des tiers a un litige d'inter-

rule in an abstract manner. They are distilled from national laws or national court decisions and are prevalent in most of the world's legal systems. However, they are only directly binding if concretized in an international contract or as customary international law.<sup>11</sup> *Amicus curiae* is essentially a common law concept (see Chapter 3). Hence, it is difficult to view it as a *general* principle of law.

Accordingly, this section focuses on treaty-based authority to accept *amici curiae*.

## I. International Court of Justice

Article 34(2) ICJ Statute allows the Court to

request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

The provision does not use the term *amicus curiae*, but the first alternative functionally contains the typical features of *amicus curiae*.<sup>12</sup> Article 34(2) is further elaborated by Article 69(1) and (2) ICJ Rules:

1. The Court may, at any time prior to the closure of the oral proceedings, either *proprio motu* or at the request of one of the parties communicated as provided in Article 57 of these Rules, request a public international organization, pursuant to Article 34 of the Statute, to furnish information relevant to a case

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venir devant le tribunal.');

D. Hollis, *Private actors in public international law: amicus curiae and the case for the retention of state sovereignty*, 25 Boston College International and Comparative Law Review (2002), pp. 238-239. On the ascertainment of general principles, M. Nolan/F. Sourgens, *Issues of proof of general principles of law in international arbitration*, 3 World Arbitration and Mediation Review (2009), pp. 505-532; B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, pp. 257-394; s. Rosenne, *supra* note 8, pp. 1022-1023.

11 M. Bodgan, *General principles of law and the problem of lacunae in the law of nations*, 46 Nordisk Tidsskrift Internasjonal Ret (1977), pp. 37, 42; G. Götsche, *Die Anwendung von Rechtsprinzipien in der Spruchpraxis der WTO-Rechtsmittelinstanz*, Berlin 2005, pp. 113-117, 123.

12 W. Jenks, *The status of international organizations in relation to the International Court of Justice*, 32 Transactions of the Grotius Society (1946), p. 38. Considering the whole provision as *amicus curiae*, P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 Max-Planck Yearbook of United Nations Law (2002), p. 167.

before it. The Court, after consulting the chief administrative officer of the organization concerned, shall decide whether such information shall be presented to it orally or in writing, and the time-limits for its presentation.

2. When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate and also to authorize the parties to comment, either orally or in writing, on the information thus furnished.

Article 34(2) has to date not played any significant role in ICJ proceedings. The ICJ has consistently rejected requests for *amicus curiae* submissions by governmental and non-governmental entities by reference to the wording of Article 34(2), including requests from individuals and tribal representatives (see Chapter 3).

Pursuant to Article 50 ICJ Statute, the court may, ‘at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.’ The provision specifies the Court’s general investigative power in Article 48 ICJ Statute.<sup>13</sup> The ICJ enjoys discretion in the selection of the entity or person carrying out an enquiry under the provision. It may appoint an expert or commission of inquiry *ex officio*, as long as the parties have referred to the facts investigated.<sup>14</sup> The provision is intentionally inclusive.<sup>15</sup> Article 50 ICJ Statute expects that the Court ‘entrust’ a relevant body. The ordinary meaning of this term does not seem to allow for the acceptance of unsolicited information, although this does not seem to be an insurmountable restriction. The provision could be interpreted to grant the Court permission to formally request *amicus curiae* submissions (after having received a request). This is confirmed by a contextual interpretation. The rules on standing are not an obstacle. Article 34(1) ICJ Statute

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13 A. Riddell/B. Plant, *Evidence before the International Court of Justice*, London 2009, pp. 57-58. The PCIJ Statute contained an identical norm. The proposal by the PCIJ Drafting Committee and the Advisory Committee of Jurists reveal that the norm was intended to enable the court to obtain information and views distinct from those of the parties.

14 M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, p. 239.

15 C. Tams, *Article 50*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, para. 15, p. 1294.

addresses only standing before the ICJ. It does not, as the French version of the text might suggest, exclude any form of participation by non-state actors in ICJ proceedings.<sup>16</sup>

However, further contextual analysis renders a different result.<sup>17</sup> Article 50 concerns the evidentiary process. It distinguishes between enquiries – directed at the investigation and evaluation of specific questions of fact – and experts who shall explain complex technical and scientific questions to the legal specialists on the bench.<sup>18</sup> This differentiation indicates that the provision is unsuitable to accommodate the heterogeneous *amici curiae*, which typically share a specific view on the case and exceed neutral assistance in the evidentiary process. The object and purpose of Article 50 is to furnish the ICJ with a set of investigative powers in the event that the parties' submissions are insufficient to establish the factual record. For the same reason, reliance on Article 62(1) ICJ Rules is equally of no avail.<sup>19</sup>

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16 The French version of Article 34(1) reads: 'Seuls les Etats ont qualité pour se présenter devant la Cour.' It has been suggested that this term refers to the general ability to appear before the ICJ in any manner. The provision's historical background does not support such an understanding. The main purpose of the norm was to exclude the possibility for individuals to bring states before the PCIJ. See S. Rosenne, *Reflections on the position of the individual in inter-state litigation*, in: P. Sanders (Ed.) *International arbitration – liber amicorum for Martin Domke*, The Hague 1967, pp. 240, 244.

17 See, however, D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 *American Journal of International Law* (1994), p. 627; L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 *Non-State Actors and International Law* (2005), p. 214; D. Shelton, *The International Court of Justice and non-governmental organisations*, 9 *International Community Law Review* (2007), pp. 150-151.

18 C. Tams, *supra* note 15, para. 4; *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (hereinafter: *Pulp Mills Case*), Judgment, 20 April 2010, Declaration of Judge Yusuf, ICJ Rep. 2010, p. 217, para. 5 ('The rationale behind these provisions on enquiry and the seeking of an expert opinion in the Statute and the Rules of Court is to allow the Court to obtain the necessary assistance and support in acquiring such full knowledge of the facts.')

19 Article 62(1) ICJ Rules: 'The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of an aspect of the matters in issue, or may itself seek other information for this purpose.' It is disputed if the provision allows the court to seek evidence *proprio motu* as it elaborates the court's interaction with the parties relating to party-submitted evidence under Article 49 ICJ Statute. See M. Benzinger, *supra* note 14, p. 146; S. Rosenne, *supra* note 8, p. 1324; R. Mosk, *The role of facts in international dispute resolution*, 304 *Receuil des Cours* (2003), p. 96;

Ultimately, because of the clear textual constraints, the ICJ would have to change its rules on procedure and likely even Article 34(2) ICJ Statute in order to be able to invite non-governmental organizations to participate in contentious proceedings, an unlikely prospect given the arduous amendment procedure.<sup>20</sup>

Article 66(2) ICJ Statute addresses *amicus curiae* participation in advisory proceedings.<sup>21</sup> Its personal scope is less narrow due to the different phrasing of the predecessor norms in the PCIJ Statute:<sup>22</sup>

The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Article 66(2) is further elaborated by Article 66(3) and (4) ICJ Statute, as well as Articles 105 and 106 ICJ Rules, which were introduced with the 1978 revision of the Rules:

*Article 66*

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular

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A. Riddell/B. Plant, *supra* note 13, pp. 62, 336-337. But see P. Palchetti, *supra* note 12, p. 169.

20 See Articles 69, 70 ICJ Statute. M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 *The Law and Practice of International Courts and Tribunals* (2006), p. 403; R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 *International and Comparative Law Quarterly* (2001), p. 123.

21 For the legislative history of Article 66, which was adopted with minimal changes from the PCIJ Statute, see A. Paulus, *Article 66*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, pp. 1640-1645, paras. 3-10.

22 Articles 26 and 66 PCIJ Statute, respectively, see P.M. Dupuy, *Article 34*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, p. 589, para. 3.

case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

*Article 105*

1. Written statements submitted to the Court shall be communicated by the Registrar to any States and organizations which have submitted such statements.

2. The Court, or the President if the Court is not sitting, shall:

(a) determine the form in which, and the extent to which, comments permitted under Article 66, paragraph 4, of the Statute shall be received, and fix the time-limit for the submission of any such comments in writing;

(b) decide whether oral proceedings shall take place at which statements and comments may be submitted to the Court under the provisions of Article 66 of the Statute, and fix the date for the opening of such oral proceedings.

*Article 106*

The Court, or the President if the Court is not sitting, may decide that the written statements and annexed documents shall be made accessible to the public on or after the opening of the oral proceedings. If the request for advisory opinion relates to a legal question actually pending between two or more States, the views of those States shall first be ascertained.

The ICJ did not rely on any particular legal basis in its decision to accept an *amicus curiae* brief from the International League for the Rights of Man in *International Status of South West Africa*. Since, the ICJ has rejected all requests by NGOs and individuals on the basis of the limited scope of Article 66(2) ICJ Statute (see Chapter 3). The most elaborate rejection was sent to *Professor W. Michael Reisman* in *South West Africa*. *Reisman* sought permission from the ICJ to make submissions as *amicus curiae* on ‘critical legal issues’ relevant to the advisory proceedings. He argued that there was no explicit prohibition in the Statute or the Rules ‘to accepting a document from an interested group or individual.’ In his reply, the Registrar underlined the limited scope of participants pursuant to Article 66(2) ICJ Statute and by reference to the principle ‘*expressio unius est exclusio alterium*’ found that there was no legal possibility to grant leave.<sup>23</sup>

In 2004, the ICJ issued Practice Direction XII to address the growing number of submissions from non-governmental organizations it re-

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23 *South West Africa*, Advisory Opinion, 21 June 1971, Letter No. 18 (Professor Reisman to the Registrar), Part IV: Correspondence, ICJ Rep. 1971, pp. 636-637.

ceived.<sup>24</sup> A codification of the ICJ's practice in the *Nuclear Weapons* advisory proceedings it stipulates:

1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion on its own initiative, such statement and/or document is not to be considered as part of the case file.
2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.

The Direction does not contain any assertion of authority to accept *amicus curiae* briefs. But given that it only addresses *international* non-governmental organizations, a term defined by the United Nations Economic and Social Council as 'any organization, which is not established by inter-governmental agreement', it can be argued to fall within the scope of Article 66(2) ICJ Statute.<sup>25</sup> Essentially, Practice Direction XII contains two messages: first, submissions from international NGOs do not form part of the formal record of the case as such. Second, such submissions are to be considered like any piece of information publicly available, with the added difficulty that they are only accessible at the Peace Palace.<sup>26</sup> Unless the parties take the time and effort to track down submissions at the Peace Palace and include them in their own submissions, they will be ignored. It is little surprising that these submissions have not been mentioned in any

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24 Practice Directions were introduced in 2001. They shall complement the ICJ Rules. With regard to the legal nature of Practice Directions, see S. Rosenne, *International Court of Justice*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 76.

25 UN ECOSOC Resolution 288 (X) 27 February 1950. See also Resolution 1296 (XLV) of 25 June 1968, which encompasses also 'organizations which accept members designated by government authorities, provided that such membership does not interfere with the free expression of views of the organizations.'

26 Cf. Article 56(4) ICJ Rules. The concept of 'publication readily available' was introduced in the ICJ with the 1972 Revision of the Rules. For further analysis, see A. Riddell/B. Plant, *supra* note 13, pp. 181-182. Due to growing concerns over the extensive reference to publications readily available by the parties, the ICJ has issued Practice Directions IXbis and IXter.

of the recent advisory proceedings. Instead, there is an increasing reliance on reports from NGOs submitted as documentary evidence by the parties in contentious and advisory proceedings.<sup>27</sup> Practice Direction XII solidifies the legal *status quo*. Moreover, it can be seen as an assurance to parties that the Court will not rely on an inherent power to admit *amici curiae* against their express wishes.<sup>28</sup>

The ICJ has exceptionally accepted information from entities not encompassed by the wording of Article 66(2) ICJ Statute in two types of cases.

The first constellation concerns cases where the advisory jurisdiction of the ICJ functions as a review instance to administrative tribunals of inter-governmental organizations in employment disputes.<sup>29</sup> In *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, a case concerning the validity of judgments rendered by the ILO Administrative Tribunal, the ICJ accepted sealed written statements by the staff members involved in proceedings against the UNESCO before the Administrative Tribunal through the UNESCO. Due to the restrictive wording of Article 66(2) ICJ Statute, the Court refused the petitioners' request to appear before the court or to at least send their submissions direct-

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27 NGOs stand a better chance of having their views brought before the Court if submitted through a state. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Counter Memorial of the Kingdom of Belgium, 28 September 2001, pp. 80, 103-105, FN 250. See also D. Zagorac, *International courts and compliance bodies: the experience of Amnesty International*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 15.

28 Cf. M. Benzing, *supra* note 14, p. 249.

29 In its first decision under the new Statute, the ICJ acknowledged that Article 66(2) ICJ Statute caused 'inherent inequality between the staff member, on the one hand, and the Secretary-General and the member States, on the other.' It reasoned that '[g]eneral principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal. But that condition is fulfilled by the submission of written statements. ... The Court is ... only concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court respecting the questions on which its opinion is requested and that the Court shall have adequate information to enable it to administer justice in giving its opinion.' *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, ICJ Rep. 1973, pp. 166, 178, 180-182, paras. 32, 35-39.

ly to it.<sup>30</sup> But the Court agreed to the proposal from the two original parties that the UNESCO would attach to its own submission those of the former staff members. The ICJ justified its direct circumvention of Article 66(2) ICJ Statute with the atypical nature of the case – it was essentially a private employment dispute – and the need to establish a minimal degree of procedural equality between the staff members and the international organization.<sup>31</sup> In 1995, a separate appeals mechanism was established within the UN Administrative Tribunal, but the appellate procedure remains applicable to other international organisations.<sup>32</sup> In 2012, in an employment dispute concerning the International Fund for Agricultural Develop-

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- 30 *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints made against the U.N.E.S.C.O.*, Advisory Opinion, 23 November 1956, Letters No. 9, No. 12, No. 23, No. 25 and Annex to No. 25 and No. 35, Part IV: Correspondence, ICJ Rep. 1956, pp. 236-238, 245-248, 253, 356. At the time, the General Assembly of the United Nations had already proposed to amend the procedure of the UN Administrative Tribunal in the way that the UN Secretary-General should transmit the opinion of those concerned by a contested judgment to the ICJ without previous review. This practice was later enshrined in Article 11(2) Statute of the UN Administrative Tribunal until a review mechanism within the administrative tribunal was created for cases involving UN staff members. Article 11(3) further recommended that, in the interest of procedural equality, oral proceedings should not be held. The mechanism remains relevant for employees of other international organizations.
- 31 *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion, 23 November 1956, ICJ Rep. 1956, pp. 77, 80. It seems that the Court bases the admission of the employee's statements on a loose reading of Article 65(2) ICJ Statute. It stipulates: 'Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.' In the first such case, the Court refused submissions from the individual. See *Effects of awards of compensation made by the United Nations Administrative Tribunal*, Decision, 13 July 1954 and Letter, 5 February 1954, ICJ Rep. 1954, pp. 48, 394.
- 32 See *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, ICJ Rep. 1973, pp. 166, 180-181, para. 36; *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, 27 May 1987 and Letter No. 17 (The Legal Counsel of the United Nations to the Registrar), ICJ Rep. 1987, pp. 18, 20, para. 6 and pp. 253-254; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, 20 July 1982 and No. 23 (The Legal Counsel of the United Nations to the Registrar), ICJ Rep. 1982, pp. 325-326, para. 6 and p. 233.

ment, the ICJ was asked to apply a similar provision from the Statute of the ILO Administrative Tribunal. The ICJ confirmed its earlier decisions, although it questioned the adequacy of the review system in light of the rule of law.<sup>33</sup> The majority justified its decision by noting that the ‘unequal position before the Court of the employing institution and its official, arising from provisions of the Court’s Statute’ had been ‘substantially alleviated’ by the transmission of documents from the official via the employing institution and the decision of the Court to not hold hearings in review proceedings.<sup>34</sup>

Second, the ICJ allows the filing of submissions from state-like entities that are directly affected by an advisory opinion.<sup>35</sup> In the *Wall* Opinion, the ICJ granted leave to file written submissions to the United Nations, its member states and Palestine after the General Assembly had in 2003 requested the ICJ to give an advisory opinion on the consequences of the construction of a wall by Israel in the occupied Palestinian territories.<sup>36</sup> The ICJ justified the granting of leave to Palestine as follows:

[I]n light of General Assembly resolution A/RES/ES-10/14 and the report of the Secretary-General transmitted to the Court with the request, and taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement on the question within the above time-limit.<sup>37</sup>

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33 The majority questioned the adequacy of the review system. It considered that the principle of party equality ‘must be now understood as including access on an equal basis to available appellate or similar remedies’, but found that it was ‘not in a position to reform this system.’ See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, ICJ Rep. 2012, p. 10, paras. 45-47. Judge Greenwood disagreed with the majority in this regard. He considered the review system ‘not acceptable today.’ See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, Sep. Op. Judge Greenwood, ICJ Rep. 2012, pp. 95-96, paras. 3-4.

34 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, ICJ Rep. 2012, p. 10, para. 44.

35 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 136, 141, para. 4; *Kosovo*, Order of 17 October 2008, ICJ Rep. 2008, p. 410, para. 4.

36 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 136, 141, para. 4.

37 *Wall*, Order of 19 December 2003, ICJ Rep. 2003, p. 429, para. 2.

The ICJ did not explicitly rely on Article 66(2) in its Order.<sup>38</sup> The importance it attached to Palestine's participation is illustrated by the fact that the Palestinian speakers were also admitted to the hearings.<sup>39</sup> This decision marked a change from *Applicability of the Obligation to Arbitrate under section 21 of the Headquarters Agreement of 26 June 1947*, where the Court did not invite Palestine to participate despite the direct effect the advisory opinion had on its position. The underlying dispute between the UN and the USA concerned the closing of the Palestine Liberation Organisation's UN representation by the USA. Instead, the UN Legal Counsel informed the ICJ of the Palestinian position.<sup>40</sup> The ICJ confirmed its new approach in 2007 in *Kosovo* by granting leave to the Provisional Institutions of Self-Government of Kosovo in the advisory proceedings on the accordance with international law of the unilateral declaration of independence by the provisional institutions. This time, the ICJ even relied on the wording of Article 66(2) in its granting of leave.<sup>41</sup> The authors of the unilateral declaration filed written statements together with 35 UN member states and two intergovernmental organizations. In addition, they were also invited to participate in the oral proceedings.<sup>42</sup>

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38 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 141-142, para. 5.

39 *Wall*, Public Sitting held on Monday 23 February 2004, Verbatim Record, CR 2004/1, p. 17.

40 *Applicability of the obligation to arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, Order of 9 March 1988, ICJ Rep. 1988, paras 3-4. See also C. Chinkin, *Third parties in international law*, Oxford 1993, p. 232, FN 34; B. Stern, *L'affaire de l'OLP devant la juridiction internationale et interne*, 34 *Annuaire français de droit international* (1988), pp. 165-194.

41 *Kosovo*, Order of 17 October 2008, ICJ Rep. 2008, p. 410, para. 4 ('[T]aking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question').

42 See *Kosovo*, Public sitting held on Monday 1 December 2009, Verbatim Record, CR 2009/24, p. 30. During the General Assembly debates preceding the request, several states found that the General Assembly should ask that the Provisional Institutions be permitted to participate to ensure fairness in the proceedings. This was ultimately not done. See Y. Ronen, *Participation of non-state actors in ICJ proceedings*, 11 *The Law and Practice of International Courts and Tribunals* (2012), p. 92, FN 64; UN Doc. A/63/461 of 2 October 2008, Annex to UN Doc. A/63/461, para. 9; UN Doc. A/63/PV.22, pp. 2, 10-14.

The ICJ appears to have justified the admissions on the basis of the special circumstances (i.e. the special role and relevance of the two state-like entities concerning the issue before it), as well as its interest in obtaining the fullest information on the events underlying the advisory questions. It is unlikely that the decisions precipitate a broadening of the interpretation of the term ‘international organization’ in light of the particularities of the circumstances.<sup>43</sup> Further, the admissions follow an approach adopted already by the PCIJ in *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.<sup>44</sup> The case concerned the legality of legislation passed by the Socialist Nationalist Party majority in the Danzig Senate, which permitted prosecutors and judges to prosecute individuals for certain crimes not stipulated by law. The legislation had been used against opposition party members that complained to the High Commissioner of the League of Nations in charge of Danzig, then an autonomous area under the international protectorate of the League of Nations. In the advisory proceedings, the PCIJ permitted the Free City of Danzig to participate in the proceedings on the basis of an authorizing resolution from the Council of the League of Nations.<sup>45</sup> In addition, the opposition party members were informed that the PCIJ would receive an explanatory note to supplement their initial statement to the High Commissioner.<sup>46</sup> The Free City and the opposition party members made submissions in accordance with the invitations.

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43 See also G. Hernandez, *Non-state actors from the perspective of the International Court of Justice*, in: J. d’Aspremont (Ed.), *Participants in the international legal system, multiple perspectives on non-state actors in international law*, London and New York 2011, p. 151; A. Paulus, *supra* note 21, pp. 1646-1647, para. 14; H. Thirlway, *The International Court of Justice 1989-2009: at the heart of the dispute settlement system?*, 57 *Netherlands International Law Review* (2010), p. 388.

44 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 4 October 1935, PCIJ Series A/B, No. 65.

45 *Resolution of 17 May 1922*, Official Journal of the League of Nations, Vol. 3, p. 545, item 667, PCIJ Series D, No. 6, cited by Y. Ronen, *supra* note 42, p. 90, FN 56.

46 The authorization was communicated to the Free City by Poland. *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 4 December 1935, PCIJ Series A/B, No. 65, p. 65.

## II. International Tribunal for the Law of the Sea

Participation by non-parties before the ITLOS is regulated in the ITLOS Rules.<sup>47</sup> With respect to contentious proceedings, Article 84 ITLOS Rules provides as follows:

1. The Tribunal may, at any time prior to the closure of the oral proceedings, at the request of a party or *proprio motu*, request an appropriate intergovernmental organization to furnish information relevant to a case before it. The Tribunal, after consulting the chief administrative officer of the organization concerned, shall decide whether such information shall be presented to it orally or in writing and fix the time-limits for its presentation.
2. When such an intergovernmental organization sees fit to furnish, on its own initiative, information relevant to a case before the Tribunal, it shall do so in the form of a memorial to be filed in the Registry before the closure of the written proceedings. The Tribunal may require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also authorize the parties to comment, either orally or in writing, on the information thus furnished.
3. Whenever the construction of the constituent instrument of such an intergovernmental organization or of an international convention adopted there under is in question in a case before the Tribunal, the Registrar shall, on the instructions of the Tribunal, or of the President if the Tribunal is not sitting, so notify the intergovernmental organization concerned and shall communicate to it copies of all the written proceedings. The Tribunal, or the President if the Tribunal is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the intergovernmental organization concerned, fix a time-limit within which the organization may submit to the Tribunal its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings.
4. In the foregoing paragraphs, “intergovernmental organization” means an intergovernmental organization other than any organization which is a party or intervenes in the case concerned.

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47 Article 4(1) (a) (iii) *Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea* establishes that the UN Secretary-General ‘shall [s]ubject to the applicable rules and regulations and the obligations of the United Nations under the relevant agreements, furnish to the International Tribunal information requested by it as relevant to a case before it.’ This special cooperation provision leaves no room for discretion or interpretation to the Secretary-General, and is therefore not considered an *amicus curiae* provision, although the UN Secretary-General essentially acts as a friend to the ITLOS when transmitting the documents.

The norm reflects Article 34 ICJ Statute with three important differences: the wording of Article 84(2) ITLOS Rules does not oblige the tribunal to accept submissions made by the intergovernmental organizations on their own initiative; the personal scope of the provision is explicitly narrower by only addressing intergovernmental organizations (thereby incorporating Article 69(4) ICJ Rules); and the rule may be changed by the tribunal through Article 16 ITLOS Statute or be modified for a specific case by joint proposal of the parties based on Article 48 ITLOS Rules.<sup>48</sup>

In late 2013, the ITLOS received its first request for an *amicus curiae* admission in contentious proceedings (see Chapter 3). Although the ITLOS did not give reasons for the rejection of the brief from Greenpeace International (GPI), Article 84(2) and (4) ITLOS Rules essentially mandated the result. In addition, while the Netherlands informed the tribunal that it had no objections to the brief, Russia did, excluding the option of an *ad hoc* amendment to the Rules. The situation was complicated by two factors: first, GPI was not only directly affected in the case, but it worked closely with the Dutch Government on the case (see Section B). Second, the tribunal had to be particularly careful to preserving Russia's procedural rights, equality of arms, and its own appearance of impartiality, because Russia refused to participate in the proceedings.<sup>49</sup>

With respect to advisory proceedings, Article 133(2)-(3) ITLOS Rules determines:<sup>50</sup>

2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish in-

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48 D. Anderson, *Article 84*, in: P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2006, p. 235.

49 *Arctic Sunrise Case* (Provisional Measures), Note verbale of the Embassy of the Russian Federation in Berlin of 22 October 2013 and Order of 22 November 2013, ITLOS Case No. 22, paras. 9-10, 13.

50 The UNCLOS provides for several forms of advisory proceedings. See R. Wolfrum, *Advisory opinions: are they a suitable alternative for the settlement of international disputes*, in: R. Wolfrum et al. (Eds.), *International dispute settlement: room for innovations?*, Heidelberg 2012, pp. 48-55. Judge Wolfrum lists three different forms of advisory proceedings. The ITLOS may give advisory opinions pursuant to Article 138(1) ITLOS Rules. Legitimacy for this provision is argued to stem from Article 21 ITLOS Statute which determines that the jurisdiction of ITLOS extends 'to all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.' The Seabed Disputes Chamber is competent to give advisory opinions pursuant to Articles 159(10) and 191 UNCLOS. See also

formation on the question. The Registrar shall give notice of the request to such organizations.

3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber, or its President if the Chamber is not sitting, may fix a further time-limit within which such States Parties and organizations may present written statements on the statements made.

4. The Chamber, or its President if the Chamber is not sitting, shall decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings. States Parties and the organizations referred to in paragraph 2 shall be invited to make oral statements at the proceedings.

Neither Article 84 nor Article 133 ITLOS Rules find an express legal basis in the UNCLOS or the ITLOS Statute. Power to address these matters has been seen to stem from the tribunal's inherent powers and its duty of cooperation with other international organizations under general international law.<sup>51</sup> The latter would justify the exclusion of the admission of submissions from NGOs.

In *Responsibilities*, the Chamber received *inter alia* a joint submission by two environmental NGOs requesting leave to participate as *amici curiae* in the written and oral proceedings.<sup>52</sup> The President of the Chamber decided not to include the submission in the case file for falling outside the personal scope of Article 133.<sup>53</sup> The Chamber also refused the request for participation in the oral proceedings. However, the Chamber adopted a procedure comparable to the ICJ's Practice Direction XII. The submission

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P. Gautier, *NGOs and law of the sea disputes*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 236.

51 M. Benzing, *supra* note 14, p. 211. It is questionable whether the duty to cooperate reaches into the conduct of proceedings, and does not rather implicate diplomatic cooperation.

52 *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, p. 10, para. 13.

53 Critical, P. Gautier, *Article 133*, in: P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a Commentary*, Leiden 2006, p. 385 ('In this day and age, the important role of some non-governmental organizations deserves to be recognized by the Tribunal. ... On matters of protection of the marine environment and preservation of marine resources, to name just a few areas, non-governmental organizations could also be of great assistance to the work of the Seabed Disputes Chamber in dealing with a particular request for an advisory opinion.').

was posted on the ITLOS's website under a separate heading to clarify that it was not part of the case file. By the posting it became a publication readily available in the meaning of Article 71(5) ITLOS Rules and could be relied on by the parties.<sup>54</sup> Further, the Chamber transmitted the document to all who had made written submissions under Article 133, thereby increasing the likelihood of it being read and considered. The Chamber did not give reasons for its approach.

On 27 March 2013, the Sub-Regional Fisheries Commission requested an advisory opinion on the obligations and liability of flag states and international agencies issuing fishing licenses for illegal, unreported and unregulated fishing activities in the Exclusive Economic Zones of third party states to the UNCLOS, as well as the rights and obligations of coastal states in relation to sustainable management of shared stocks and stocks of common interest.<sup>55</sup> In November 2013, the ITLOS received written statements from the USA and the WWF. The USA is not a state party to UNCLOS and therefore not covered by the wording of Article 133(3) ITLOS Rules. The Chamber first placed the statement under a separate section on its website – as typically done with *amicus* submissions. However, on 1 April 2014, it decided to consider the submission part of the case file, albeit under a separate section.<sup>56</sup> Even though the Chamber was careful not to label the submission an *amicus curiae* submission, it is one. The Chamber did not explain or justify its decision to admit the brief. The USA is a party to the 1995 Straddling Fish Stocks Agreement, which the Chamber emphasized. In March 2014, during a second round of submissions called for by the President of the Chamber, the WWF submitted another *amicus curiae* brief. As in *Responsibilities*, the Chamber posted the submissions under separate headings on the case-related ITLOS website and it also transmitted the submissions to the parties.<sup>57</sup>

Is this procedure in accordance with Article 133 ITLOS Rules? This could be disputed if Article 133 ITLOS Rules regulated submissions by

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54 *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 14. Article 71(5) ITLOS Rules was applied in the Chamber proceedings pursuant to Article 40 ITLOS Statute and Articles 130(1) and 115 ITLOS Rules.

55 *SRFC*, Request of 27 March 2013, at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/Letter\\_from\\_ISBA\\_14\\_10\\_2010\\_E.doc.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Letter_from_ISBA_14_10_2010_E.doc.pdf) (last visited: 21.9.2017).

56 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 12, 15, 24.

57 *Id.*, paras. 15, 23.

non-parties exhaustively. The fact that the Seabed Disputes Chamber – unlike the ITLOS – grants access to states parties, the International Seabed Authority, state enterprises and natural and juridical persons in contentious proceedings indicates that the provision's narrow scope was intended.<sup>58</sup> This is buttressed by the fact that Article 133 is purposely narrower than its model provision Article 66(2) ICJ Statute. However, as part of the ITLOS Rules it is open to modification by the tribunal with the consent of the parties.<sup>59</sup> In fact, the ITLOS plenary and the Committee on Rules and Judicial Plenary during a review of the ITLOS Rules and judicial procedures in the early 2000 contemplated the desirability of developing guidelines on *amicus curiae* participation in light of the practice of other international courts and tribunals. While the idea was not rejected, it was considered premature.<sup>60</sup> Despite the recent experiences, the idea has not been revived yet.<sup>61</sup>

### III. European Court of Human Rights

With the introduction of Article 36(2) ECHR in 1998, the ECtHR's *amicus curiae* practice was sanctioned by the member states of the Council of Europe. The provision stipulates:

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58 See also Article 291(2) in connection with Article 187 UNCLOS and Article 37 ITLOS Statute. See S. Talmon, *Der Internationale Seegerichtshof in Hamburg als Mittel der friedlichen Beilegung seerechtlicher Streitigkeiten*, JuS 2001, p. 555.

59 See, for the ICJ, H. Thirlway, *Article 30*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, p. 522, paras. 17-19.

60 ITLOS, *Annual Report of the International Tribunal for the Law of the Sea for 2004*, SPLOS/122, 30 March 2005, p. 9, para. 41, available at: [https://www.itlos.org/fileadmin/itlos/documents/annual\\_reports/ar\\_2004\\_e.pdf](https://www.itlos.org/fileadmin/itlos/documents/annual_reports/ar_2004_e.pdf) (last visited: 21.9.2017).

61 For the same reasons as before the ICJ, *amicus curiae* participation on the basis of the rules on evidence, specifically Articles 77(1) and 82(1) ITLOS Rules appears not possible. Further, application of these provisions in advisory proceedings through Article 130(1) ITLOS Rules and Article 40(2) ITLOS Statute appears problematic, because it is not clear if courts may engage in fact-finding in advisory proceedings. Apart from frictions with Article 133 ITLOS Rules, in advisory proceedings, the adjudicatory body is not necessarily given all the necessary facts as participation is voluntary and participants do not carry a burden of proof.

The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Rule 44 ECtHR Rules further elaborates *amicus curiae* participation in paragraphs 3-6 as follows:<sup>62</sup>

3. (a) Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.

(b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.

4. (a) In cases to be considered by the Grand Chamber, the periods of time prescribed in the preceding paragraphs shall run from the notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.

(b) The time-limits laid down in this Rule may exceptionally be extended by the President of the Chamber if sufficient cause is shown.

5. Any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.

6. Written comments submitted under this Rule shall be drafted in one of the official languages as provided in Rule 34 § 4. They shall be forwarded by the Registrar to the parties to the case, who shall be entitled, subject to any conditions, including time-limits, set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.

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62 Prior to the amendment of the rules, Rule 61(3) 1998 ECtHR Rules regulated *amicus curiae* as follows: ‘Any invitation or grant of leave referred to in paragraph 3 of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file.’

#### IV. Inter-American Court of Human Rights

The IACtHR has yet to discuss the legal basis for its acceptance of *amicus curiae* submissions both in contentious and in advisory proceedings, even though early requests for leave to submit *amicus curiae* briefs contended that *amicus curiae* participation could be anchored in the rules on evidence.<sup>63</sup> The IACtHR indicated in *Loayza Tamayo v. Peru* that it possesses an inherent authority to accept and regulate *amicus curiae* when it dismissed Peru's contestation of the admissibility of *amicus curiae* briefs from an individual and a NGO. The President held that the briefs would be added to the case file without further explanation.<sup>64</sup>

The 2009 codification of *amicus curiae* in the IACtHR Rules presupposes authority to admit *amici curiae*. It is argued that the authority to ad-

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63 See *Submission from the Urban Morgan Institute for Human Rights and the International League for Human Rights and the Lawyers Committee for International Human Rights in "Other Treaties" subject to the consultative jurisdiction of the court (Article 64 of the American Convention on Human Rights)*, Advisory Opinion, 24 September 1982, OC-1/82, IACtHR Series A No. 1, para. 5 and Series B, pp. 123, 128, 144, 151. Former Article 34(1) IACtHR Rules: 'The Court may, at the request of a party or the delegates of the Commission, or *proprio motu*, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function.' The provision applied directly only to contentious proceedings, but was argued to be applicable in advisory proceedings via Article 53 of the former Rules. In 2001, Article 34(1) became Article 45 IACtHR Rules: 'The Court may, at any stage of the proceedings, obtain on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.' See D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 *American University International Law Review* (1994), p. 349; T. Buergenthal, *International human rights in a nutshell*, 4th Ed., St. Paul 1999, p. 15; C. Moyer, *The role of "amicus curiae" in the Inter-American Court of Human Rights*, in: *La corte interamericana de derechos humanos, estudios y documentos*, 1999, p. 120; M. Ölç, *Non-governmental organizations in regional human rights systems*, 28 *Columbia Human Rights Law Review* (1997), p. 359; S. Davidson, *The Inter-American Court of Human Rights*, Dartmouth 1992, p. 59.

64 *Loayza v. Peru (Merits)*, Judgment, 17 September 1997, IACtHR Series C No. 33, p. 8, para. 22. The court confirmed its approach in *Case Yatama v. Nicaragua (Preliminary exceptions, Merits, Reparations and Costs)*, Judgment, 23 June 2005, IACtHR Series C No. 127, p. 39, para. 120; *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections; Merits, Reparations and Costs), IACtHR Series C No. 144, p. 10, paras. 62.

mit *amicus curiae* is implied in the IACtHR's power to devise its own rules of procedure granted in Article 60 ACHR and Article 25(1) IACtHR Rules.<sup>65</sup> Article 2(3) defines *amicus curiae* as follows:

For the purposes of these Rules: ...

3. the expression '*amicus curiae*' refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing;

Article 44 IACtHR Rules, which is located at the end of the section on the course of the written proceedings, establishes a series of formal requirements for written *amicus curiae* submissions in contentious proceedings.<sup>66</sup> It provides:

1. Any person or institution seeking to act as *amicus curiae* may submit a brief to the Tribunal, together with its annexes, by any of the means established in Article 28(1) of these Rules of Procedure, in the working language of the case and bearing the names and signatures of its authors.

2. If the *amicus curiae* brief is submitted by electronic means and is not signed, or if the brief is submitted without its annexes, the original and supporting documentation must be received by the Tribunal within 7 days of its transmission. If the brief is submitted out of time or is submitted without the required documentation, it shall be archived without further processing.

3. *Amicus curiae* briefs may be submitted at any time during contentious proceedings for up to 15 days following the public hearing. If the Court does not hold a public hearing, *amicus* briefs must be submitted within 15 days following the Order setting deadlines for the submission of final arguments. Following consultation with the President, the *amicus curiae* brief and its annexes shall be immediately transmitted to the parties, for their information.

4. *Amicus curiae* briefs may be submitted during proceedings for monitoring compliance of judgments and those regarding provisional measures.

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65 F. Rivera Juaristi, *The amicus curiae in the Inter-American Court of Human Rights (1982-2013)*, in: Y. Haeck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, pp. 109-110. *Rivera Juaristi* further argues that the lack of regulation in the American Convention and the IACtHR Statute is due to some OAS member states' regulatory traditions. They delegate procedural issues to the implied powers of the court, see *Id.*

66 The inquisitorial powers of the IACtHR towards the parties and in respect of the reception of external information were also extended in the course of the reform of the rules.

There is no corresponding rule for participation in the oral proceedings, although such participation is foreseen in the definition. The court devises its rules without need for express approval by the member states. It is transferred by accession to the court's jurisdiction.<sup>67</sup> However, member states together with other stakeholders were invited to participate in a consultation process for the revision of the rules and there was no known opposition to the rules on *amicus curiae*.<sup>68</sup>

Equally, the IACtHR did not justify the admission of *amicus curiae* in advisory proceedings. This is surprising in so far as the Statute was silent on this issue and the former IACtHR Rules permitted the President of the Court to invite briefs only from states parties and OAS organs. The current IACtHR Rules also do not mention the term *amicus curiae* in the section on advisory proceedings, but the IACtHR in its advisory opinions differentiates between *amicus curiae* submissions – with which it describes the same range of persons as in contentious proceedings – and submissions from the entities notified of a request for an advisory opinion pursuant to Article 73(1) IACtHR Rules. Arguably, authority to accept *amicus curiae* in advisory proceedings can be implied from Article 73(3) IACtHR Rules. The provision determines:

The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent.

The IACtHR has not cited Article 73(3) to justify the admission of *amici*.<sup>69</sup> This does not necessarily imply that it finds the provision irrelevant, as it routinely acknowledges the receipt of *amicus* briefs in its opinions without indicating the legal basis to do so. Further, it has not defined the

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67 Article 25(1) IACtHR Statute.

68 The IACtHR invited entities involved in the inter-American system to submit their views on several topics, including *amicus curiae*. See *Síntesis del informe anual de la corte interamericana de derechos humanos correspondiente al ejercicio de 2008, que se presenta a la comisión de asuntos jurídicos y políticos de la organización de los estados americanos*, 19 March 2009, pp. 7-8. Replies were received by several member states, the IAComHR, Latin American governmental and non-governmental organizations and legal expert groups.

69 See the public invitation for *amicus* submissions in *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, para. 6.

term ‘any interested party.’<sup>70</sup> The word ‘party’ insinuates a limitation to parties to the Convention, especially as Article 73(1) determines that notification of a request for advisory opinion shall be transmitted only to the member states and certain OAS organs. The term is broader than earlier versions of the norm that limited submissions to ‘any State which might be concerned,’ leaving room for the interpretation that the provision was intentionally broadened to include *amicus curiae* submissions.<sup>71</sup> Further, the court seems to apply Article 44 by way of Article 74 IACtHR Rules.<sup>72</sup>

## V. African Court on Human and Peoples’ Rights

Neither the ACtHPR’s protocol, nor its rules allow expressly for *amicus curiae* participation in contentious proceedings.<sup>73</sup> As the ICJ, the ACtHPR procedural regime contains broad investigative rules.<sup>74</sup> However, the court

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70 Article 2(14) defines ‘States Parties’ as: ‘the States that have ratified or have adhered to the Convention.’

71 According to *Chinkin*, the former was open enough to include non-member states of the OAS and therefore ‘provides a form of *amicus* brief in advisory opinions.’ See C. Chinkin, *supra* note 40, p. 242.

72 Article 74 IACtHR Rules foresees analogous application of the provisions concerning contentious proceedings in advisory proceedings ‘to the extent that [the IACtHR] deems them to be compatible.’

73 The Protocol on the merger of the ACtHPR and the still inoperative African Court of Justice signed on 1 July 2008 at the African Summit to create the African Court of Justice and Human Rights has been ratified by fewer than the necessary fifteen member states for its entry into force. Article 49(3) Protocol on the Statute of the new court allows the admission of *amicus curiae* submissions under the heading intervention. It stipulates: ‘In the interest of the effective administration of justice, the Court may invite any Member State that is not a party to a case, any organ of the Union or any person concerned other than the Claimant, to present written observations or take part in hearings.’ Article 49(1) and (2) Protocol on the Statute of the ACtHPR establish intervention as of right. At: <http://www.peaceau.org/upload/s/protocol-statute-african-court-justice-and-human-rights-en.pdf> (last visited: 21.9.2017).

74 Arguing that the ACtHPR could admit *amicus curiae* under its powers to receive evidence in Rule 26(2) Rules of Procedure, A. Mohamed, *Individual and NGO participation in human rights litigation before the African Court of Human and Peoples’ Rights: lessons from the European and Inter-American Courts of Human Rights*, 43 *Journal of African Law* (1999), pp. 201, 204, 212. In addition, under Rule 45(1), ‘[t]he Court may, *inter alia*, decide to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems

does not rely on them to justify the admission of *amicus curiae*. In an interview conducted in 2012, the former President of the Court and the Registrar stated that they could admit *amicus curiae* on the basis of implied powers.<sup>75</sup> The ACTHPR's 2012 Practice Directions issued under Rule 19 ACTHPR Rules in sections 42-47 address *amicus curiae* under the heading 'Request to act as Amicus Curiae'. They stipulate:

42. An individual or organization that wishes to act as *amicus curiae* shall submit a request to the Court, specifying the contribution they would like to make with regard to the matter.

43. The Court will examine the request and determine within a reasonable time from the date of receipt of the request, whether or not to accept the request to act as *amicus curiae*.

44. If the Court grants the request to act as *amicus curiae*, the person or organization making the request shall be notified by the Registrar and invited to make submissions, together with any annexes, at any point during the proceedings. The Application, together with any subsequent pleadings relating to the matter for which the request for *amicus curiae* has been made, shall be put at the disposal of the person or organization.

45. The Court on its own motion may invite an individual or organization to act as *amicus curiae* in a particular matter pending before it.

46. The *amicus curiae* brief and its annexes submitted to the Court on a matter shall be immediately transmitted to all the parties, for their information.

47. The decision on whether or not to grant a request for *amicus curiae* is at the discretion of the Court.<sup>76</sup>

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likely to assist it in carrying out its task.' And, under Rule 45(2), '[t]he Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.'

75 F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 *Journal of African Law* (2014), p. 36 and FN 77.

76 These rules accord with the ACTHPR's broad rules on standing. Article 5(1) and (3) ACTHPR Protocol allows NGOs with observer status before the AComHPR and individuals from states that upon ratification have made a Declaration accepting the jurisdiction of the court, to bring cases directly before the court, see Article 34(6) ACTHPR Protocol. To date, only seven of the 26 member states have made such a declaration, leaving it to the AComHPR, state parties or African intergovernmental organizations to institute proceedings. These states are: Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Cote d'Ivoire. On access to the court under the old system, A. Mohamed, *supra* note 74, pp. 201-213; A. van der Mei, *The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?*, 18 *Leiden Journal of International Law* (2005), pp. 113, 120.

For advisory proceedings, Article 54 allows submissions in the same scope as Article 66 ICJ Statute. In addition, Article 70(2) ACTHPR Rules extends the provision. It allows the court to authorize any interested entity to make a written submission on any of the issues raised in the request.

## VI. WTO Appellate Body and panels

*Amicus curiae* is not regulated explicitly in the WTO's Dispute Settlement Understanding ('DSU') or any of the working procedures. The Appellate Body and panels have held possessing implied authority to accept *amicus curiae* based on different powers granted to them.

### 1. Panels

Panels' power to accept *amicus curiae* briefs was implied from their investigative powers in Articles 11-13 DSU. Pursuant to Article 13(1) DSU, '[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.' Paragraph 2 states, in relevant part, that '[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.' Article 13 concretizes Article 11 DSU which establishes the role and duty of panels. Deviating from a strict adversarial understanding of justice, Article 11 determines that panels shall establish the objective truth with regard to the facts.<sup>77</sup>

The case of reference remains the Appellate Body's decision in *US-Shrimp*. Briefly, the facts of the case are as follows: on 8 October 1996, India, Malaysia, Pakistan and Thailand jointly initiated proceedings against the United States on the account of a US import prohibition issued

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<sup>77</sup> Article 11 DSU: '[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.' See also D. Steger, *Amicus curiae: participant or friend? - The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination - studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 427.

under the US Endangered Species Act of 1973 for shrimp and shrimp products which had been harvested without approved turtle excluder devices. During the panel proceedings, several NGOs with a focus on environmental issues submitted two unsolicited *amicus curiae* requests. The panel rejected the briefs. It found that it lacked the authority under the DSU to directly accept information from sources other than the parties and third parties intervening pursuant to Article 10(2) DSU. The panel rejected the USA's argument that Article 13 DSU could be interpreted to allow unsolicited submissions, because the wording of the provision required that 'the initiative to seek information rests with the Panel.'<sup>78</sup> The panel's hesitation may have been influenced by the fact that panels' procedural powers under the DSU are limited and the respondents and third parties objected to the admission.<sup>79</sup> Still, the panel allowed the parties to annex the briefs or parts thereof to their own submissions, because it was 'usual practice for parties to put forward whatever documents they considered relevant to support their case.'<sup>80</sup> The USA annexed a section of one of the briefs to its second submission to the panel. Further, it appealed the rejection of the unsolicited briefs.

The Appellate Body overturned the panel decision. It also regarded Articles 11-13 DSU as the critical provisions.<sup>81</sup> The Appellate Body first defined the issue a procedural matter as opposed to an issue of access to the WTO dispute settlement process, which would have been outside its com-

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78 *US-Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 7.8.

79 It could be argued that because panels may not draw up their own working procedures they lack inherent powers. This argument is misguided as such powers are essential to ensure the functioning of the panel.

80 *US-Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 7.8. The Appellate Body confirmed the Panel's authority to permit the adoption of briefs by parties. See *US-Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, pp. 38-39, 109, 119. See also A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 *Journal of International Economic Law* (1999), p. 485.

81 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 *European Journal of International Law* (2003), p. 498 (The Appellate Body relied on Article 13 DSU only to reason that it did not prohibit the admission of *amicus curiae*, but it actually drew its power from Articles 12 and 13 DSU.).

petences.<sup>82</sup> It then considered the scope of panels' procedural powers, specifically Article 13 DSU.<sup>83</sup> It set the tone for its conclusion by emphasizing '[t]he comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any relevant source.'<sup>84</sup> Engaging in a systematic interpretation of Article 13 DSU, the Appellate Body referred to Article 12 DSU's permission to deviate from Panel Working Procedures to determine that 'the DSU accords to a panel ... ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.'<sup>85</sup> The Appellate Body then rather bluntly dismissed the wording of Article 13 by arguing that 'we do not believe that the word 'seek' must be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief.'<sup>86</sup> Finally, the Appellate Body stated without further elaboration that the use of the term 'seek' could not be understood as a prohibition to accept unrequested information.<sup>87</sup>

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82 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, pp. 35-36, para. 101.

83 First, the Appellate Body confirmed by reference to previous decisions that the authority vested in panels by Article 13 was discretionary. See *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 147; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (hereinafter: *Argentina–Textiles and Apparel*), Report of the Appellate Body, adopted on 22 April 1998, WT/DS56/AB/R, paras. 84-86.

84 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 37, para. 104.

85 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 38, para. 106.

86 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 38, para. 107. See however, C. L. Lim, *The amicus brief issue at the WTO*, 4 Chinese Journal of International Law (2005), p. 93.

87 Maybe to dispel the concerns expressed by the Joint Appellees of an overburdening of panels and a partiality of the information shared by *amici curiae* (cf. *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 13, para. 32), the Appellate Body assured that '[t]he amplitude of the authority vested in panels to shape the process of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged.*' See *US–Shrimp*,

The Appellate Body's decision received significant criticism legally and politically.<sup>88</sup> The debate often has been reduced to whether *amici curiae* are party-like participants in the proceedings rather than a procedural concept and it has, at times, become formalistic.<sup>89</sup> For instance, the Appellate Body was criticized for not raising panels' non-compliance with the formal requirements of Article 13 DSU when accepting unsolicited briefs.<sup>90</sup> At times, the Appellate Body's reasoning has been misunderstood.<sup>91</sup> It has been argued that Article 3(2) DSU's prohibition that the adjudicating bod-

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- Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 38, para. 108 [emphasis in original].
- 88 For many, J. Robbins, *False friends: amicus curiae and procedural discretion in WTO appeals under the Hot-Rolled Lead/Asbestos doctrine*, 44 *Harvard International Law Journal* (2003), p. 324; P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 317-329; M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 *World Trade Review* (2006), p. 92 (The limitations of Article 13 DSU express a prohibition to accept *amicus curiae* submissions on the basis of *expressio unius*. But this becomes relevant only if the wording of the provision does not cover the alleged authority.).
- 89 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by India, paras. 29, 32 ('Accepting unsolicited *amicus curiae* briefs is a substantive issue that could not be dealt with under Rule 16(1), it was therefore totally unjustified by the Appellate Body to proceed on this basis.'). See also WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Egypt on behalf of the Informal Group of Developing Countries, para. 12; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Canada, para. 73 ('The issues surrounding *amicus* participation had important systemic and institutional implications for the WTO, and could not be characterized as exclusively procedural.').
- 90 P. Mavroidis, *supra* note 88, p. 320; C. Brühwiler, *supra* note 9, p. 350.
- 91 Especially the argument that *amicus curiae* participation granted more and additional rights to non-members of the WTO than to member states who could only appear as third parties if they could show a substantial interest in the matter, see Malaysia in *US-Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 13, para. 32; Canada in *EC-Sardines*, Appellate Body Report, adopted on 23 October 2002, WT/DS231/AB/R, p. 36, para. 155; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7. The admission of an *amicus curiae* brief from the Kingdom of Morocco in *EC-Sardines* dispelled this asymmetry argument. It was then argued that the admission of states as *amicus curiae* was a circumvention of the DSU rules on third party participation. See C. Brühwiler, *supra* note 9, pp. 367,

ies alter the rights and duties of member states was violated, because the DSU grants a right to make submissions only to parties and third parties in Articles 10 and 12 DSU respectively.<sup>92</sup> But this was never questioned by the Appellate Body. Further, Article 13 DSU is testament that Articles 10 and 12 DSU were not meant to describe exhaustively all the ways in which panels may gather case-related information. Others argued that the DSU was designed as a purely intergovernmental system to regulate disputes concerning the multilateral trading system (Article II(1) WTO Agreement).<sup>93</sup> This argument also fails given that the requests for leave to appear as *amicus curiae* never questioned the inter-governmental character of the WTO dispute settlement system.

The Appellate Body's decision in *US–Shrimp* is a continuation of a jurisprudence that interprets Article 13 DSU broadly. In *US/Canada–Continued Suspension*, the Appellate Body, drawing from earlier decisions, delineated panels' authority to seek information as follows: 'Panels are understood to have "significant investigative authority" under Article 13 of the DSU ... and broad discretion in exercising this authority.'<sup>94</sup> *US–Shrimp* differed from previous decisions in that the Appellate Body allowed for the direct admission of views that had not been pre-approved by the parties.

Still, were the critics right? Did the Appellate Body go beyond the wording of the DSU? The answer depends on the interpretation of the authority granted to panels by the covered agreements.

It is unusual that the Appellate Body chose not to interpret Article 13 DSU in accordance with the standards of interpretation stipulated in Articles 31-33 VCLT, which are 'widely recognized as reflecting customary international law.'<sup>95</sup> Pursuant to Article 31 VCLT, a court first establishes and considers the ordinary meaning of the relevant term. Only then it con-

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373; N. Covelli, *Member intervention in World Trade Organization dispute settlement proceedings after "EC-Sardines": the rules, jurisprudence, and controversy*, 37 *Journal of World Trade* (2003), pp. 673-690.

92 G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 *Journal of International Economic Law* (2001), pp. 773, 779.

93 M. Slotboom, *supra* note 88, pp. 93-94.

94 *Canada/US–Continued Suspension*, Reports of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, para. 439.

95 *La Grand Case (Germany v. USA)*, Judgment, 27 June 2001, ICJ Rep. 2001, p. 501, para. 99; *Golder Case*, Judgment, 1975, ECtHR 1975, Series A No. 18, para. 29; *Japan–Alcoholic Beverages II*, Report of the Appellate Body, adopted on 1

siders the term in context taking into account the object and purpose of the treaty. The Appellate Body's conclusion that the term 'to seek' includes the acceptance of unsolicited information has rightly been considered as 'acrobatic' and not covered by the ordinary meaning of the term.<sup>96</sup> However, this is not necessarily problematic, as long as Article 13 DSU was not meant to be exhaustive. The Appellate Body indicated this in its final (unreasoned) statement in its report.<sup>97</sup>

Further, it is surprising that the Appellate Body did not expressly hold – albeit some of this could be implied from *US–Shrimp* – that the *existence* of the investigative powers under Article 13 DSU implied the receipt of an *amicus curiae* brief by way of *de maiore ad minus*. One could argue that the receipt of information is no more intrusive to the adversarial process than the active seeking of information. Also, as the Appellate Body noted, a denial of authority to accept briefs would lead to the paradox result that panels could seek any information but could not receive it if it was brought to them.

## 2. Appellate Body

Neither the DSU nor the Appellate Body Working Procedures provide for *amicus curiae* participation in the appellate review process. Nevertheless, upon receiving two unsolicited *amicus curiae* briefs from American industry associations, the Appellate Body decided in *US–Lead and Bismuth II*

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November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para. 104; *Iron Rhine Railway*, PCA Award, 24 May 2005, para. 45; *Camuzzi International SA v. Argentina*, Decision on Jurisdiction, 11 May 2005, ICSID Case No. ARB/03/2, para. 133. See also I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> Ed, Manchester 1984, p. 153; P. Mavroidis, *supra* note 88, p. 328 ('The Appellate Body contributes to the *amicus curiae* mess by inventing interpretations of Article 13 DSU which are unsustainable under the VCLT.')

96 P. Mavroidis, *supra* note 88, p. 319; M. Slotboom, *supra* note 88, pp. 92-93. In its third party submission, the European Commission indicated that the acceptance of unrequested information by NGOs might be outside the wording of Article 13 DSU. It proposed that NGOs could publish their views which panels would be free to request in an *amicus curiae* brief pursuant to Article 13 DSU if they were interested in the information, see *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 18, para. 46.

97 R. Howse, *supra* note 81, pp. 496-498.

that it was competent to accept unsolicited written *amicus curiae* briefs.<sup>98</sup> The Appellate Body noted that its governing instruments were silent on the matter.<sup>99</sup> It then considered its power to establish new Working Procedures in accordance with the DSU and the covered agreements under Article 17(9) DSU and, in a footnote, its power conferred by Rule 16(1) Working Procedures to fill procedural gaps during pending proceedings.<sup>100</sup> It deduced from these provisions an implied ‘broad authority to adopt proce-

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98 Already in *US–Shrimp*, the Appellate Body had held that it could accept *amicus curiae* briefs annexed to party submissions. The Appellate Body held that the attaching of a brief to a party submission ‘renders that material at least *prima facie* an integral part of that participant’s submission.’ *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, pp. 29, 31, paras. 83, 89, 91. See B. Stern, *The intervention of private entities and states as “friends of the court” in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.) *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1435; A. Appleton, *Amicus curiae submissions in the Carbon Steel Case: another rabbit from the Appellate Body’s hat?*, 3 *Journal of International Economic Law* (2000), p. 693. For a summary of the factual background of the case, see D. Prévost, *WTO Subsidies Agreement and privatised companies; Appellate Body amicus curiae briefs*, 27 *Legal Issues of Economic Integration* (2000), pp. 281–283.

99 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, p. 14, para. 39 (‘[N]othing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants or third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit the acceptance or consideration of such briefs.’). See also Article 17(7) DSU which determines that ‘[t]he Appellate Body shall be provided with appropriate administrative and legal support as it requires’ is not applicable. It concerns the staffing of the Appellate Body. *Mavroidis* argues that the Appellate Body fully relied on Rule 16(1) Working Procedures to admit *amicus curiae* in *EC–Asbestos*. This is not stated explicitly in the report. The Appellate Body only refers to Rule 16(1) for authority to draw up working procedures. The general authority to accept *amicus* briefs was assumed on the basis of *US–Lead and Bismuth II*. See P. Mavroidis, *supra* note 88, p. 320.

100 Rule 16(1) Working Procedures: ‘In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.’

dural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.’ The Appellate Body reasoned that this general procedural authority included the authority to accept *amicus curiae* submissions. In a statement that has been considered by some tautological, the Appellate Body found that ‘we are of the opinion, that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.’<sup>101</sup> The Appellate Body then reemphasized that only parties and third parties to a dispute had a legal right to participate in proceedings in the WTO dispute settlement system citing its decision in *US–Shrimp* as well as Articles 17(4) DSU and Rule 24 Working Procedures, which regulate third party participation.

Again, the Appellate Body received strong backlash for its decision. Many criticized it for not engaging in interpretation of its constituent instruments in accordance with the VCLT and Article 3(2) DSU.<sup>102</sup> Article 3(2) DSU limits the gap-filling powers of the Appellate Body. It provides that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings cannot add to or diminish the rights and obligations provided in the covered agreements.

Indeed, the Appellate Body barely discussed any provisions of the DSU or the covered agreements which might contravene its authority to admit briefs, leaving unanswered the main question – whether or not the DSU and covered agreements *allow* for *amicus curiae* participation.

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101 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, pp. 13-14, paras. 36-39. The reference to Rules 21 and 24 may be viewed as a rebuttal of an argument from the appellant and third parties who deducted from them a prohibition to admit *amicus* briefs.

102 A. Appleton, *supra* note 98, p. 695 (‘The Appellate Body is drawing support for its theory of broad gap-filling powers by citing a gap-filling rule that it created when it formulated, albeit with consultations, the Working Procedures.’).

The Appellate Body did not anchor its interpretation in any particular provision.<sup>103</sup> It used Article 17(9) DSU and Rule 16(1) Appellate Body Working Procedures merely as indicators for possessing an inherent general procedural power. The criticism that these provisions were not directly applicable is thus somewhat misdirected.<sup>104</sup> However, the question arises in how far the Appellate Body was obliged to rely on Article 16(1), which squarely addressed the scenario it faced regarding *amici curiae*.<sup>105</sup> Pursuant to the provision, the Appellate Body may find a short-term solution for one case. For permanent procedures, Article 17(9) DSU allows the Appellate Body to draw up Working Procedures in consultation with the Chairman of the DSB and the Director-General.

There are several additional legal issues the Appellate Body should have considered, some of which were already brought to its attention during the proceedings. First, the Appellate Body failed to elaborate whether the silence of the DSU was qualified, that is, whether the fact that there was no provision regarding *amicus curiae* was intentional and equalled a prohibition to admit *amici curiae*. Second, there is a contextual argument pertaining to the Appellate Body's limited jurisdiction.<sup>106</sup> Article 17(6) DSU determines that '[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' The DSU does not give the Appellate Body investigative powers comparable

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103 For this reason, the issue is considered an exercise of inherent powers. *Hollis* regards the Appellate Body's contentions as an assertion of implied authority. See D. Hollis, *Private actors in public international law: amicus curiae* and the case for the retention of *state sovereignty*, 25 Boston College International and Comparative Law Review (2002), p. 241.

104 *Mavroidis* argued that neither Article 17(9) nor Rule 16(1) were applicable. Article 17(9) was ill-suited, because the Working Procedure could not be drawn up by a division of the Appellate Body hearing an appeal in a specific case, and Rule 16(1) was ill-suited, because the issue of *amicus curiae* required a permanent solution. See P. Mavroidis, *supra* note 88, p. 321. Further, Article 17(9) foresees that the Appellate Body elaborate Working Procedures for Appellate Review in consultation with the DSB Chairman and the Director-General, which was not done in the case.

105 Critical, A. Appleton, *supra* note 98, pp. 693, 695, 697 ('By avoiding the application of Rule 16(1) and its conditions, the Appellate Body avoids accepting limits to its procedural authority. ... Any failure to follow its own Working Procedures can undermine Member confidence in the Appellate Body.').

106 This has led some to argue that *amicus curiae* would be admissible only before panels. See G. Umbricht, *supra* note 92, pp. 773, 781, 787-788.

to those enshrined in Article 13 DSU.<sup>107</sup> It is undisputed that the Appellate Body cannot rely on Article 13 DSU due to the limitations of its mandate. So how does the admission of *amicus curiae* align with Article 17(6) DSU, especially taking into account the legal reasoning in *US–Shrimp*? Further, there might be frictions with Article 17(4) DSU and Article 18(1) Appellate Working Procedures, which mention only parties and third parties in relation to written submissions before the Appellate Body. Are these provisions exhaustive? The answer to these questions lies largely in the concept held of *amicus curiae* and its regulation. Article 17(6) DSU certainly excludes fact-focused *amicus curiae* submissions, but the provision's text does not demand refusal of briefs elaborating the law or a panel's application of the facts, in short, the issues falling within the Appellate Body's jurisdiction.<sup>108</sup> With respect to Article 17(4) DSU it must again be emphasized that the Appellate Body never viewed *amicus curiae* as a participant to the proceedings *en pars* with the parties or third parties, but as an instrument in its discretion without any participatory rights.<sup>109</sup> *Amicus curiae* is qualitatively different from the forms of participation described in Article 17(4) DSU. Therefore, it cannot conflict with them, but constitutes an alternative form of participation.

As already mentioned, the WTO constituency reacted almost uniformly negatively to the assertion of power to admit of *amici curiae*. It is safe to say that the admission of *amicus curiae* seems to have been more than the parties had bargained for, giving rise to concerns over the continued consent of member states to the compulsory dispute settlement mechanism (see Chapter 8). So far, no political long-term solution has been reached on the issue. Proposals for an explicit regulation of *amicus curiae* participation have been on the political agenda since the creation of the WTO,

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107 Often reference is made to Article V(2) WTO Agreement which refers to the General Council's mandate 'to make arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.' See D. Hollis, *supra* note 103, p. 252. This argument overlooks that *amicus curiae* participation is not limited to NGOs and that Article V concerns the relationship between NGOs and the WTO as a negotiation forum, not the relationship between these entities and the WTO DSB. The latter does not have a negotiation mandate, see Article 2 DSU.

108 This was alleged by the EU, Brazil and Mexico in *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, paras. 36-37.

109 G. Umbricht, *supra* note 92, p. 788.

but they have failed. It is argued that the impasse has catapulted the topic out of the Appellate Body's sphere of competence and that the Appellate Body and panels lack competence to admit submissions pending a solution.<sup>110</sup> Gao points out that the issue of *amicus curiae* was only raised during the Uruguay Round in an Informal Group on Institutional Issues of which there is no written record.<sup>111</sup> However, in order to be relevant, *travaux préparatoires* must be contained in an official record.<sup>112</sup> In addition, several member states have different recollections of the reasons for the DSU's silence on *amicus curiae*.<sup>113</sup> In the meantime, both panels and the Appellate Body continue to admit *amicus curiae* based on the considerations in the cases above.

A few states have concluded Free Trade Agreements whose trade disputes settlement mechanisms explicitly permit *amicus curiae* participation in their dispute settlement proceedings, which were modelled from the WTO system (see Chapter 3).<sup>114</sup>

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110 See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Switzerland, para. 64 ('[T]he issue should be solved through negotiations and failing to do so would blur the division between the legislative and the judicial functions.');

Malaysia in *US-Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 23, paras. 65-66; J. Jackson, *The WTO "constitution" and proposed reforms: seven "mantras" revisited*, 4 *Journal of International Economic Law* (2001), pp. 67-78.

WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Hong Kong, China, para. 23.

111 H. Gao, *Amicus curiae in WTO dispute settlement: theory and practice*, 1 *China Rights Forum* (2006), pp. 55-56.

112 A. Aust, *Modern treaty law and practice*, Cambridge 2000, pp. 197-198.

113 The USA has maintained that the admissibility of *amicus curiae* was so obvious that explicit regulation was considered unnecessary. Other states have recollected that there was no political support for *amici curiae*. See H. Gao, *supra* note 111, pp. 55-56.

114 E.g. *Free Trade Agreement between the European Union and Montenegro*, 15 April 2011, WT/REG236/1, para. 158; *Free Trade Agreement between the European Union and Serbia*, 18 April 2011, WT/REG285/1, para. 78; *Free Trade Agreement between the European Union and the Republic of Korea*, 31 August 2012, WT/REG296/1/Rev. 1, para. 178; *Free Trade Agreement between the Republic of Korea and New Zealand*, Annex 19-A, Rules 34 – 37, 20 December 2015.

## VII. Investor-state arbitration

In investment arbitration, the regulation of *amicus curiae* participation may occur in different instruments: the investment treaty which contains the host state's standing offer to arbitrate, the procedural rules governing the arbitration, *ad hoc* agreements by the parties or a procedural order issued by the tribunal.

### 1. Clauses in investment treaties

An increasing number of multi- and bilateral investment treaties contain rules on *amicus curiae* participation.<sup>115</sup> Three shall be replicated here due to their practical relevance.

One of the first regulations of *amicus curiae* in investment arbitration was the NAFTA FTC Statement of 7 October 2003 (see Chapter 2). It is legally non-binding.<sup>116</sup> Instead of clearly deciding for or against *amicus curiae* participation in NAFTA Chapter 11-arbitrations, the FTC Statement confirms the *Methanex* and *UPS* decisions by asserting:

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115 E.g. Article 28(3) 2012 *US Model BIT* and Article 39 *Canadian Foreign Investment and Promotion and Protection Agreement* permit *amicus curiae* participation irrespective of the parties' will. Numerous BITs concluded on the basis of these model BITs have adopted these provisions, see Article 10.19.3 USA-Chile FTA, Article 10.19.3 USA-Morocco FTA, Article 10.20.3 US-Peru Trade Promotion Agreement, Article 10.20.3 USA-Colombia FTA, Article 10.19.3 USA-Oman FTA. *Amicus curiae* participation is also foreseen in Annex 29-A of the agreed text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). It is disputed if Sec. 8 of Annex T to the EFTA provides for *amicus curiae* participation or establishes a special right to make submissions for non-disputing member states. See T. Dolle, *Streitbeilegung im Rahmen von Freihandelsabkommen*, Baden-Baden 2015. The latter view is preferable given that the provision grants a non-participating member state a *right* to make submissions.

116 Not only was this unexpected, because Article 1131(2) NAFTA grants the FTC power to issue binding regulation, which it had used to regulate the issue of confidentiality shortly before, but it left the matter to the discretion of the tribunals, thereby risking continued disputes over the authority to admit *amicus curiae*. The investor in *Merrill v. Canada* emphasized this in a comment on a request for admission as *amicus curiae*. See *Merrill and Ring Forestry LP v. Canada* (hereinafter: *Merrill v. Canada*), Response by the Investor to the Petition of the Communication, Energy and Paperworks Union et al., 16 July 2008, p. 5, para. 16.

No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submission from a person or entity that is not a disputing party (a “non-disputing party”).

In addition, the FTC Statement recommends a detailed request for leave procedure (see Annex II). The document is of high political significance. It signalled that the NAFTA states parties agreed on the issue. This was far from obvious given Mexico’s initial opposition to the instrument. Despite its non-binding character, virtually all NAFTA-tribunals since have drawn from the FTC Statement authority to accept *amicus curiae* briefs.<sup>117</sup>

The United States-Dominican Republic-Central America Free Trade Agreement (CAFTA) of 5 August 2004 has taken another approach. Article 10.20.3 explicitly permits *amicus curiae* participation in investment disputes under Chapter 10 of the CAFTA. It reads:

The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) contains a detailed regulation of *amicus curiae* participation in Annex 29-A. It stipulates:

43. Non-governmental persons established in a Party may submit *amicus curiae* briefs to the arbitration panel in accordance with the following paragraphs.

44. Unless the Parties agree otherwise within five days of the date of the establishment of the arbitration panel, the arbitration panel may receive unsolicited written submissions, provided that they are made within 10 days of the date of the establishment of the arbitration panel, and in no case longer than 15 typed pages, including any annexes, and that they are directly relevant to the issue under consideration by the arbitration panel.

45. The submission shall contain a description of the person making the submission, whether natural or legal, including the nature of that person’s activities and the source of the person’s financing, and specify the nature of the interest that that person has in the arbitration proceeding. It shall be drafted in the languages chosen by the Parties in accordance with paragraphs 48 and 49.

46. The arbitration panel shall list in its ruling all the submissions it has received that conform to the above rules. The arbitration panel shall not be obliged to address in its ruling the arguments made in such submissions. The

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117 Upon request by the parties, the tribunal in *Methanex* adopted the FTC Statement. See *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 27.

arbitration panel shall submit to the Parties for their comments any submission it obtains.<sup>118</sup>

## 2. Clauses in institutional procedural rules

Several of the most frequently used institutional arbitration rules now expressly regulate *amicus curiae*. In 2006, the ICSID Administrative Council issued new Arbitration Rules and Additional Facility Rules.<sup>119</sup> Rule 37(2) ICSID Arbitration Rules determines:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

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

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

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118 CETA is currently in the ratification process in the EU Council and in the parliaments of EU member states, see <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/> (last visited: 21.9.2017).

119 The ICSID Secretariat circulated a Discussion Paper for comments in October 2004. The Paper argued that tribunals should be informed of an authority to accept and consider submissions from third parties. See ICSID Secretariat, *Possible Improvements for Investor-State Arbitration*, 22 October 2004, p. 9. The ICSID received comments from member states, practitioners and several commercial and non-commercial NGOs, not all of which supported the idea of *amicus curiae*. Having considered the comments, in May 2005, the ICSID Secretariat circulated a second Discussion Paper entitled ‘*Suggested Changes to the ICSID Rules and Regulations*’. The paper *inter alia* contained the proposed draft Rule 37(2) with an explanatory note on the background and rationale of the provision. See ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005, p. 4. Unlike the now enacted Rule 37(2), the draft provision foresaw consultation with the parties only ‘as far as possible’. A requirement that the submission must be within the scope of the dispute was added to the *chapeau* of the provision elevating it to a mandatory requirement. See A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements – a guide to the key issues*, Oxford 2010, p. 148.

(c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Prior to the issuance of this rule, tribunals relied on Article 44 ICSID Convention, which authorizes them to decide procedural questions not covered by the ICSID Arbitration Rules.<sup>120</sup>

Article 41(3) ICSID Additional Facility Rules, which was crafted for disputes involving parties that have not acceded to the ICSID Convention, is identical. The rules are silent on access to pleadings and other case-related submissions, matters which applicants often request. Participation in the oral proceedings is subject to a separate rule. Article 32(2) ICSID Arbitration Rules and Article 39(2) ICSID Additional Facility Rules provide:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

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120 Article 44 ICSID Convention: ‘Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.’ See *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 16. The issuance of the draft of Rule 37(2) in May 2005 coincided with the issuing by the tribunal in *Suez/Vivendi v. Argentina* of a decision on the request for leave from five NGOs. Although likely aware of the draft, the tribunal did not draw from the criteria of the draft Rule (which was not applicable directly in the pending arbitration), but it established its own set of criteria for the admission which were applied in subsequent proceedings. They are: (i) appropriateness of the subject matter of the case; (ii) the suitability of the petitioner to act as *amicus curiae* in the case; and (iii) the procedure by which the submission was made and considered. These criteria have been applied in later proceedings, including under the new Rule 37(2) (see Section C below). *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, paras. 17-29.

The recently adopted UNCITRAL Rules on Transparency provide in Article 4:

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person’s position on issues; and

(d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 8 further sets up a repository of published information which shall render publicly available information and a significant number of specific case-related documents and submissions listed in Articles 2 and 3, unless exceptions elaborated in Article 7 related to confidential or protected information or the integrity of the arbitral process apply. Article 6 mandates the general publicity of hearings. The UNCITRAL Rules on Transparency constitute a notable enhancement of multi- and bilateral efforts to increase the transparency of investor-state dispute settlement such as the ICSID Rules and the FTC Statement by approaching the matter comprehensively. Existing standards are adopted and carefully expanded.<sup>121</sup> The rules on *amicus curiae* participation are more detailed especially in respect of the so far underthematized disclosure requirements. Document disclosure is considered holistically and not only in respect of publication of the final award, the approach taken under the traditional assumption that the proceedings were to be fully confidential.

The Rules on Transparency are explicitly open for use in arbitrations under any other rules, and prevail over them (but not the applicable investment treaty) in case of conflict.<sup>122</sup> As regards UNCITRAL arbitrations, they apply only to treaty-based investment arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to investment treaties concluded after 1 April 2014 or by special agreement as per Article 1(2).<sup>123</sup> In 2013, the UNCITRAL Arbitration Rules were revised to incorporate in Article

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121 Certain areas could further be improved. *Fry and Repousis* point, for instance, to a lack of clarity on who takes the final decision on what issues are exempt from publication. J. Fry/O. Repousis, *Towards a new world for investor-state arbitration through transparency*, 48 NYU Journal of International Law and Politics (2016), p. 830.

122 Article 1 (7), (8) and (9) UNCITRAL Rules on Transparency. Mandatory rules of the law applicable to the arbitration also supersede the Rules on Transparency, see Article 1(8).

123 UNCITRAL maintains a non-exhaustive list of investment treaties to which the UNCITRAL Rules on Transparency apply, at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Rules\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html) (last visited: 21.9.2017). The parties can also derogate from the rules by agreement.

1(4) the UNCITRAL Rules on Transparency in their entirety (including its narrow scope of application).<sup>124</sup>

An attempt at accelerating the application of the Rules has been made through the Mauritius Convention (see Chapter 3), which is a special agreement in the meaning of Article 1(2) UNCITRAL Rules on Transparency.<sup>125</sup> The scope of application of the Mauritius Convention is purposely broad and includes arbitrations between investors and a state or a regional economic integration organization under *all* bilateral and multilateral investment treaties concluded prior to 1 April 2014.<sup>126</sup> There are two ways in which the UNCITRAL Rules of Transparency are made applicable through the Convention: first, by way of so-called ‘bilateral or multilateral application’ under Article 2(1) in all investor-state arbitrations irrespective of the applicable institutional rules, unless the host *and* the home state have issued a reservation pursuant to Article 3(1)(a) that the Mauritius Convention shall not apply to the investment treaty in question, or the host state has issued a reservation pursuant to Article 3(1)(b) that the Rules shall not apply to arbitrations under a set of arbitration rules (that are not the UNCITRAL Arbitration Rules). The second manner of application through the Mauritius Convention is addressed in Article 2(2). It covers cases where the host, but not the investor’s home state, is a party to the Convention and the investor agrees to their application (as long as the host state has not issued a reservation excluding such unilateral appli-

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124 The provision reads: ‘For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), subject to article 1 of the Rules on Transparency’.

125 See the preamble of the Mauritius Convention: ‘Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency under those already concluded investments.’ With respect to other options discussed to promote the rules, as well as the Convention’s drafting history, see J. Fry/O. Repousis, *supra* note 121, p. 837.

126 The term ‘investment treaty’ is broadly defined in Article 1(2) and denotes ‘any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.’

cation) (so-called ‘unilateral offer of application’)<sup>127</sup>. Notably, Article 2(5) Mauritius Convention excludes the possibility for claimants to rely on most favoured nation standards in investment treaties to skirt the UNCITRAL Rules on Transparency. It remains to be seen when the Mauritius Convention receives the third ratification necessary for it to enter into force.<sup>128</sup>

Outside the scope of application of the UNCITRAL Rules on Transparency, arbitrations conducted under the UNCITRAL Arbitration Rules will continue to rely on their general procedural powers enshrined in Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules to admit *amici curiae* (absent any regulation in the applicable investment treaty). The provision stipulates:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnece-

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127 Based on Article 5 Mauritius Convention, the Convention applies only to investor-state arbitrations commenced after the date of entry into force of the Convention.

128 See Article 9(1). *Schill* warns that ‘what is at stake, in case the Mauritius Convention finds insufficient support, is no less than a further jolt to an already trembling investment law system.’ S. Schill, *The Mauritius Convention on Transparency: a model for investment law reform?*, EJIL:Talk!, 8 April 2015, at: <http://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investor-law-reform/> (last visited: 21.9.2017). In 2015, the European Commission suggested to the European Council that the EU sign the Mauritius Convention. See *Proposal for a Council Decision on the signing, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration*, see COM/2015/021 final – 2015/0013(NLE), Doc. No. 52015PC0021. However, so far this has not occurred. Several EU member states have signed, but not yet ratified the Convention, including Belgium, Finland, France, Germany, Italy and the Netherlands, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html) (last visited: 21.9.2017). For a thorough analysis of the Convention, see G. Kaufmann-Kohler/M. Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?*, CIDS Research Paper, 3 June 2016, at: [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf) (last visited: 21.9.2017).

essary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.<sup>129</sup>

Article 28(3) of the 2010 and 2013 UNCITRAL Arbitration Rules rigorously subjects the admission of non-parties to the hearings to party consent.

In 1981, the IUSCT adopted a special regulation of *amicus curiae* participation in Note 5 Interpretative Notes to Article 15(1) of the 1976 UNCITRAL Arbitration Rules.<sup>130</sup> It provides that the arbitral tribunal

may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting oral and written statements.

The Note has been applied in very few cases.<sup>131</sup> Note 5 to Article 25 of the 1976 UNCITRAL Arbitration Rules determines, in relevant part, that subject to the agreement of the parties the tribunal may permit the representatives of the parties in other arbitral proceedings, which present comparable legal issues, to attend the hearing.<sup>132</sup>

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129 Due to static referral clauses in many investment treaties, the predecessor to Article 17(1) often continues to apply. Article 15(1) of the 1976 UNCITRAL Arbitration Rules reads: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.'

130 Interpretative notes were incorporated into the IUSCT's procedural rules to inform the parties on how the tribunal intended to interpret its procedural laws, at: <http://www.iusct.org/tribunal-rules.pdf> (last visited: 21.9.2017). See M. Pellonpää/D. Caron, *The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal*, Helsinki 1994, p. 17. Only Iran, the USA and the IUSCT may modify the rules of procedure, see Article III(2).

131 M. Pellonpää/D. Caron, *supra* note 130, p. 530. *The United States of America and the Islamic Republic of Iran*, Case No. A/16; *Bank Mellat and the USA* (Cases No. 582 and 591), Award No. 108-A-16/582/591-FT, 25 January 1984, reprinted in 5 IUSCTR (1984-I), pp. 57, 59.

132 M. Pellonpää/D. Caron, *supra* note 130, p. 513.

### 3. Implied powers

In cases where none of the applicable rules regulate the participation of *amici curiae*, tribunals will decide on their admissibility based on their implied procedural powers as enshrined in the just-mentioned Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules. Due to the provision's continued relevance for tribunals operating under the UNCITRAL Arbitration Rules in decisions on the admission of *amicus curiae* briefs, in the following the pertinent aspects of the tribunals' reasoning in *Methanex v. USA* and *UPS v. Canada* are summarized.<sup>133</sup>

In their interpretation of the powers granted by Article 15(1) of the 1976 UNCITRAL Arbitration Rules (now Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules), the tribunals essentially addressed two questions: first, was the issue of *amicus curiae* procedural? Second, was the admission of *amicus curiae* in conformity with the applicable rules?

With regard to the first question, the tribunals' considerations focused on whether *amicus curiae* participation was tantamount to adding a party to the proceedings. The tribunals agreed that this would be beyond their powers under Article 15(1).<sup>134</sup> The *Methanex v. USA* tribunal reasoned that the

receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third

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133 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, para. 24; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, para. 36.

134 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, p. 24, para. 61; *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, paras. 27, 29. See also A. Mourre, *Are amici the proper response to the public's concerns on transparency in investment arbitration?*, 5 *The Law and Practice of International Courts and Tribunals* (2006), pp. 263-264.

person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged.<sup>135</sup>

With regard to the second question, three issues were considered: first, whether *amicus curiae* participation was reconcilable with existing provisions on participation, especially Article 1128 NAFTA;<sup>136</sup> second, whether *amici curiae* could participate in hearings; and third, whether the confidentiality of proceedings precluded *amicus curiae* participation. The tribunals found that *amicus curiae* and participation under Article 1128 NAFTA pursued different objectives. The tribunals emphasized that participation under Article 1128 NAFTA was a right, whereas *amicus curiae* participation was a matter of judicial discretion (see Chapter 4). With regard to the second aspect, the tribunals admitted that they lacked authority to admit *amici curiae* to the oral proceedings without the parties' consent pursuant to Article 25(4) of the 1976 UNCITRAL Arbitration Rules (Article 28(3) of the 2010 and 2013 UNCITRAL Arbitration Rules). But they held that this did not affect their authority to admit written submissions. Regarding the compatibility of their authority to admit *amicus curiae* with rules on confidentiality, the tribunals found that this could be addressed on a case-by-case basis. It did not affect their general authority to accept *amicus curiae* briefs. The tribunals concluded that they could accept *amici curiae* under the appropriate procedures.<sup>137</sup>

The *UPS v. Canada* tribunal rightly refuted the argument by the Council of Canadians and the Canadian Union of Postal Workers that their participation (as parties) was mandated by international human rights norms guaranteeing a fair trial, above all Article 14 ICCPR and Article 6 ECHR. First, it is doubtful that the provisions are applicable. They do not form

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135 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as “*amici curiae*”, 15 January 2001, para. 30. It then confirmed its view by reference to the modalities of *amicus curiae* participation in the IUSCT, the WTO and the ICJ. Adopting the *Methanex* reasoning, *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, para. 61.

136 Because Article 1120 Nr. 1 a) NAFTA allows NAFTA parties to submit their dispute to ICSID arbitration, this norm may also be of relevance in proceedings conducted under the ICSID framework.

137 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as “*amici curiae*”, 15 January 2001, paras. 35-37; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, paras. 62, 66-69.

part of the law applicable in the arbitration. Also, arbitration is an exception to the right to a public trial. Moreover, the provisions seek to ‘confer rights upon persons whose rights and obligations in a suit at law are being determined by a court or tribunal and concern[] the standing as a party to proceedings rather than the possibility to [participate] as *amicus curiae*.’<sup>138</sup> The *UPS* tribunal found that the petitioners’ rights and obligations were not engaged at all. While this is legally true, the tribunal did not discuss if the indirect effects of the award on the *amicus* applicants – the Unions represented 46 000 Canadian postal workers – warranted their inclusion in the proceedings.<sup>139</sup>

Having found that they possessed the power to accept *amicus curiae* briefs under the blanket procedural clause of Article 15(1) of the 1976 UNICTRAL Arbitration Rules, the tribunals examined the requests before them. The *Methanex* tribunal focused interpretation on the term ‘appropriate’ in Article 15(1). It found that appropriateness was determined by three factors: first, whether *amicus curiae* would assist it by providing necessary assistance and materials to decide the dispute; second, whether there was a public interest in the arbitration; and third, the burden that would be placed on the parties in terms of costs and presentation of the case.<sup>140</sup>

#### 4. *Ad hoc* agreements

Finally, *ad hoc* party agreements have also played a role in investment arbitration. In *Glamis v. USA*, the NAFTA Chapter 11 tribunal held that it

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138 C. Reiner/C. Schreuer, *Human rights and international investment arbitration*, in: P.M. Dupuy/F. Francioni/ E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, p. 91.

139 *UPS v. Canada*, Petition to the Arbitral Tribunal, Submissions of The Canadian Union of Postal Workers and of The Council of Canadians, 8 November 2000, para. 4.

140 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as “*amici curiae*”, 15 January 2001, paras. 48-51. The tribunal decided it was too early to determine if *amicus curiae* participation would be appropriate, but that it would reconsider an application at a later stage. The applicants both in *Methanex v. USA* and in *UPS v. Canada* were admitted upon their second application at the merits stage of the proceedings. *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as “*amici curiae*”, 15 January 2001, para. 53.

did not need to decide if it had authority to accept *amicus curiae* under its applicable laws. This was because all of the NAFTA parties consented to it and the parties in the case had not objected to *amicus curiae* briefs.<sup>141</sup> In *Eureko v. Slovak Republic*, the parties consented to inviting the European Commission and the Netherlands to comment on one of the procedural objections raised by the respondent state.<sup>142</sup> Freedom to deviate from procedural rules operates both ways. It also permits parties to exclude the application of certain provisions or agree that a tribunal does not possess a certain authority. For instance, in *Biwater v. Tanzania*, the parties agreed that there was no further need for *amicus curiae* participation.<sup>143</sup> In several recent arbitrations, at the outset of the proceedings, the tribunals have together with the parties elaborated a detailed set of rules regulating *amicus curiae* participation, especially in cases under the UNCITRAL Arbitration Rules.<sup>144</sup>

### VIII. Comparative analysis

Existing regulations vary significantly in personal scope and in density. The following analysis addresses two issues further: the codification trend (1.) and common regulatory approaches (2.).

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141 *Glamis v. USA*, Award, 8 June 2009, p. 127, para. 273.

142 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 30-32.

143 The tribunal adopted the parties' agreement in a procedural order. See *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 83, 364 and Procedural Order No. 6, 25 April 2007, p. 2.

144 E.g. *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011; *Mesa Power Group LLC v. Government of Canada* (hereinafter: *Mesa v. Canada*), PCA Case No. 2012-17, Notification to non-disputing parties and potential *amicus curiae*, 28 May 2014; *Eli Lilly and Company v. Government of Canada* (hereinafter: *Eli Lilly v. Canada*), Case No. UNCT/14/2, Procedural Order No. 1, 26 May 2014, para. 18. In the latter case, the parties notably argued that the FTC Statement was only to be 'taken into consideration', thus, giving the UNCITRAL arbitration tribunal power to deviate from it. Procedural Order No. 1 further regulates the parties' right to comment.

### 1. Codification and informal doctrine precedent?

There is a trend towards express codification of *amicus curiae* participation across all international courts and tribunals. The ICJ Statute, the ECHR, the UNCITRAL Rules on Transparency, the ICSID Arbitration Rules, the ITLOS Rules, the CETA and the CAFTA address *amicus curiae* directly. In these cases, the member states have explicitly authorized the concept. The IACtHR, the ACtHPR, the WTO Appellate Body, WTO panels and investment tribunals applying the NAFTA and/or the UNCITRAL Arbitration Rules have subsumed *amicus curiae* under their rules of procedure or practice directions, thereby relying on an implied or inherent procedural power to do so absent any direct permission or prohibition to accept *amicus curiae*. There is also a tendency for individualized *ad hoc* regulation of the modalities of *amicus curiae* participation in investment arbitration.

The reasons for this trend vary. Partly, it can be accredited to overall increased efforts for greater transparency (IACtHR, ICJ, investment treaty arbitration). It may also be motivated by efforts to control the development of the concept or to systematize it (investment treaty arbitration).

This trend signals that member states approve of, or at least accept, the involvement of *amici curiae* in their proceedings. In this regard, the continued dispute in the WTO appears problematic, though most states' positions on the instrument in other courts indicates that they do not reject the instrument categorically. Their hesitations to it are contextual to the WTO system.

The regulation of the concept has advantages. It contributes to the transparency of proceedings both for the parties to the dispute who are informed of potentially having to engage with additional submissions, and for those interested in participating as *amicus curiae* as they will more clearly know the requirements for participation.

Parties to UNCITRAL arbitrations as well as WTO member states no longer challenge the authority of panels and arbitral tribunals to admit *amicus curiae* submissions on a case-by-case basis. Does this indicate that those now concluding arbitration agreements or submitting their disputes to arbitration or WTO adjudication, while not necessarily agreeing with *amicus curiae* practice, accept it? Does the consistent admission legalize even an initial overstepping of the powers granted? The answer to these questions depends on the legal framework of each international court and tribunal. There is an argument to be made that the fact that member states

cannot agree on how to deal with *amicus curiae* in the WTO precludes the Appellate Body and panels from creating a permanent solution. The DSU and the WTO Agreement foresee that political decisions are to be taken by the WTO's political arm, not its judicial bodies. Article IX(2) WTO Agreement (binding interpretation of any WTO provision), Article X(8) (amendment of the DSU) or a decision by the DSB all are political tools given to member states to collectively decide issues also against the stated views of panels and the Appellate Body. The situation is different before the IACtHR. Member states have not questioned the court's competence to accept *amicus* submissions on a general level. Similarly, in investor-state arbitration, states parties have generally supported the instrument. However, it must be emphasized that the mere toleration or acceptance of *amicus curiae* does not suffice to conclude that there exists a rule of customary international law permitting *amicus curiae* in international dispute settlement (see above).

## 2. Common regulatory approaches

The regulations and the practice of international courts and tribunals approach *amicus curiae* in different ways. Significant regulatory differences also exist within investment arbitration where some rules such as the CAFTA are very abstract, whereas others like the FTC Statement, the CETA and the UNCITRAL Rules on Transparency are very detailed. There is no obvious pattern regarding the form of regulation chosen. In particular, the attitude towards *amicus curiae* does not seem to play a role. Moreover, in investment arbitration, the rules tend to be interpreted similarly, because tribunals often fill regulatory gaps by reference to more detailed regulations.<sup>145</sup>

Though the regulations vary in length, breadth and density, they share some similarities. Almost all address written *amicus curiae* participation. Moreover, all regulations consider *amicus curiae* a matter of procedural law (with the consequence that it falls within their powers to control the conduct of the proceedings). Further, all rules address procedural aspects

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145 For instance, in the CAFTA context tribunals have felt it necessary to concretize procedures on an *ad hoc* basis. See *TCW Group, Inc., Dominican Energy Holdings, LP v. Dominican Republic* (hereinafter: *TCW v. Dominican Republic*), Procedural Order No. 3, 16 December 2008.

of the participation albeit with varying density. Only few rules consider the substance of submissions. The FTC Statement establishes a very detailed request for leave procedure and controls the substance of *amicus curiae* submissions, whereas the IACtHR Rules and the ECHR are largely silent on the substance of submissions and set only a few pointers with regard to procedure. Only the IACtHR defines the concept. Remarkably, in all international courts and tribunals reviewed, regulations are absent on how potential *amici curiae* are informed of the existence of proceedings and on access to case documents (see Chapter 6). The overall focus on procedure across adjudicatory bodies is indicative of their efforts to minimize disruptions in the proceedings and to assuage the parties. One key regulatory question is who may act as *amicus curiae*. This will be considered in the following section.

### B. Conditions concerning the person of *amicus curiae*

The debate on *amicus curiae* tends to narrow the instrument to participation of NGOs in international adjudication. However, the spectrum of those acting as *amicus curiae* is much wider and varies between international courts and tribunals. This section examines the requirements attached to the international *amicus curiae*.<sup>146</sup>

In addition to analysing the type of users of the instrument, this section focuses on the extent to which independence and impartiality, on the one hand, and expertise and experience, on the other hand, influence the admission decision.

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146 The contribution will not consider formal aspects of *amicus curiae* participation arising out of the membership structure of an organization. These issues depend on the internal laws of the respective organization and are only rarely problematic. An exception is the case *Border and Transborder Armed Actions*. The ICJ invited the OAS to submit observations under Article 34(2) ICJ Statute. The OAS Secretary-General informed the Registrar that he had no authority to submit observations on behalf of the OAS without approval of the OAS Permanent Council which, in turn, would require each OAS member to receive the pleadings of the case. *Case concerning border and transborder armed actions (Nicaragua v. Honduras)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 20 December 1988, ICJ Rep. 1988, pp. 69-72, paras. 6-7. See also R. Mackenzie/C. Chinkin, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 142.

## I. International Court of Justice

The ICJ has not directly defined the term *public international organization* in Article 34(2) ICJ Statute. Since the 2005 amendment of the Rules, Article 69(4) ICJ Rules clarifies that the term ‘public international organization’ denotes solely intergovernmental organizations.<sup>147</sup> By its wording Article 69(4) only applies to Article 69(3) ICJ Rules, which implements Article 34(3) ICJ Statute. There is no indication that the ICJ understands the term public international organization differently in Article 34(2). To the contrary, the definition confirms the Court’s rejection of non-governmental submissions. The definition obviates proposals to read the term to mean ‘international public interest organizations’ to include international organizations with consultative status before the ECOSOC or any international NGO.<sup>148</sup> The provision’s *travaux préparatoires* indicate that the narrow understanding was an intentional deviation from Article 26 PCIJ Statute. It allowed for submissions by the ILO, an organization composed of governmental and non-governmental entities.<sup>149</sup>

Article 66(2) ICJ Statute is drafted more broadly. It encompasses states and international organizations. The ICJ has not defined the term international organization. Article 105 ICJ Rules, which elaborates Article 66(2), only refers to ‘organizations’, omitting the adjective ‘international.’ The vague wording of Article 105 indicates a potential flexibility on behalf of the ICJ. However, the 1978 revisions of Articles 108 and 109 ICJ Rules replicate the narrower wording of Article 34(2) ICJ Statute by using the term ‘public international organization.’ Practice Direction XII shows that the ICJ has synchronized the different terms used in Article 34(2) and Article 66(2) ICJ Statute in practice.

Despite its broader terminology, the ICJ’s practice under Article 66(2) ICJ Statute displays a hesitation to receive submissions from organizations that are not (inter-)governmental. The ICJ regularly invites submissions

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147 See Y. Ronen, *supra* note 42, p. 83, FN. 27.

148 But see D. Shelton, *supra* note 17, p. 625.

149 During the drafting of the Statute, representatives questioned the scope of the term. The Chairman of the Committee, *Fitzmaurice*, stated that ‘the term included only those organizations having States as their members, and this excluded scientific societies and other such international groups’. See Jurist 30, G/22, 14 UNCIO Docs., p. 137, cited by D. Shelton, *supra* note 17, p. 621. This issue was not discussed further in the Committee and the proposal was adopted. This rule has not been altered since 1946.

from intergovernmental organizations.<sup>150</sup> For instance, in the *Wall* advisory proceedings, the ICJ accepted written submissions from the European Union, the League of Arab States and the Organization of the Islamic Conference, thereby clarifying that it considers regional organizations an international organization within the scope of Article 66(2) ICJ Statute.<sup>151</sup> Otherwise, the ICJ has applied the provision narrowly, with the earlier-mentioned exceptions in the case of quasi-state entities or staff members in employment disputes (see Section A above). A well-known singular exception is the granting of leave to the International League for the Rights of Man to file a written statement in the *International Status of South-West Africa* advisory proceedings (see Chapter 3).

Despite the consistent rejection of *amicus curiae* submissions by entities that do not fall under the scope of Article 66(2) ICJ Statute or the ICJ's narrow exceptions, as well as the less than friendly treatment by Practice Direction XII, non-governmental entities and individuals continue to file submissions in high profile advisory proceedings. In *Nuclear Weapons*, the ICJ received 'numerous documents, petitions and representations from non-governmental organizations, professional associations and other bodies.'<sup>152</sup>

The ICJ does not appear to apply a specific set of criteria to the choice of intergovernmental organizations apt to participate in its contentious or advisory proceedings.<sup>153</sup> The ICJ's main criterion both in contentious and advisory proceedings seems to be an organization's potential ability to provide useful information. Unlike the PCIJ, the ICJ does not maintain a list of organizations qualified to make submissions to it.

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150 See, with examples, R. Mackenzie/C. Chinkin, *supra* note 146, p. 143.

151 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 9. Based on the record, the EU was not invited to make a submission. It is unclear how the EU came to furnish its information to the ICJ. A. Riddell/B. Plant, *supra* note 13, p. 366.

152 See *Court Clarification: Letter to the Editor [from the ICJ Registrar]*, The New York Times, 15 November 1995.

153 However, see the ICJ's circumvention of the requirement that states have *locus standi* pursuant to Article 66(2) ICJ Statute by operation of Articles 63(1) and 68 ICJ Statute in the cases *Interpretation of peace treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 30 March 1950, ICJ Rep. 1950, pp. 65, 69 and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, pp. 17-18.

## II. International Tribunal for the Law of the Sea

Article 84 ITLOS Rules limits *amicus curiae* participation before the ITLOS in contentious proceedings to intergovernmental organizations. The term is not defined in the Rules. In particular, it is not identical to the definition in Article 1(d) ITLOS Rules which refers to Article 1 Annex IX to the UNCLOS and encompasses only intergovernmental organizations with competences over UNCLOS-related issues.<sup>154</sup> The term itself leaves little room for interpretation.<sup>155</sup> In its ordinary meaning, it includes all intergovernmental organizations as commonly understood in international law. So far, the ITLOS has neither received nor requested information from intergovernmental organizations in contentious proceedings.

Article 133 ITLOS Rules is equally limitative with regard to advisory proceedings before the Seabed Disputes Chamber. This is surprising considering the substantial rights of non-governmental entities under the UNCLOS, in particular in respect of matters concerning the Area. Pursuant to Article 1(2) No. 2 in conjunction with Article 305 UNCLOS, non-state actors may become members to the UNCLOS. And pursuant to Articles 291(2) and 187 UNCLOS and Articles 20(2) and 37 ITLOS Statute, natural and legal persons and enterprises engaged in operations in the Area may appear as parties before the Seabed Disputes Chamber.<sup>156</sup>

Despite the narrow phrasing, the Seabed Disputes Chamber appears to interpret the term intergovernmental organization less strict than the ICJ. In *Responsibilities*, the Chamber notified all UNCLOS member states, the Authority and intergovernmental organizations with observer status in the

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154 Article 1 Annex IX to UNCLOS: ‘For the purposes of article 305 and of this Annex, “international organization” means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.’

155 P. Gautier, *supra* note 50, p. 239 (‘It is, however, difficult to see how the term “intergovernmental organization” could cover an NGO. The term “NGO” is literally defined by what it is not, i.e. a “governmental organization” or an “intergovernmental organization”.’).

156 It is disputed whether non-state actors may also appear as parties before the ITLOS, see R. Wolfrum, *The legislative history of arts. 20 and 21 of the Statute of the International Tribunal for the Law of the Sea*, 63 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1999), p. 346; A. Boyle, *Dispute settlement and the Law of the Sea Convention: problems of fragmentation and jurisdiction*, 46 *International and Comparative Law Quarterly* (1997), pp. 53-54.

Assembly of the Authority to make written and oral submissions.<sup>157</sup> The Chamber received written statements by twelve states, the Authority and two international organizations, the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources (IUCN). The IUCN is composed of private and public organizations. In its opinion, the Chamber did not discuss the mixed membership. The IUCN was again invited to make submissions in *Request from the Sub-Regional Fisheries Commission (SRFC)*.<sup>158</sup> Thus, at least in Chamber proceedings, organizations are allowed to participate that are predominantly, but not necessarily exclusively composed of states. This accords with the intention of the drafters of the model provision in the PCIJ Statute to exclude only so-called ‘unofficial organisations.’<sup>159</sup>

As in the ICJ, unsolicited requests for admission as *amicus curiae* from non-governmental organisations have been rejected given the clear restrictive personal scope of the provision. But the Chamber has in both advisory proceedings where it received such submissions from environmental NGOs – the WWF and Greenpeace International – posted them on its website for consultation by states parties, intergovernmental organizations and tribunal members.<sup>160</sup> This approach is reminiscent of the codification in ICJ Practice Direction XII.

The recent admission of a written submission from the USA in *SRFC* signals an expansion of the current practice.<sup>161</sup> As noted, the USA is not a UNCLOS member state and therefore not encompassed by Article 133 ITLOS Rules. The ITLOS did not justify the admission and first treated it like the submissions from the WWF by transmitting it to the parties and publishing in on its website. But it later on decided to include it in the case

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157 *Responsibilities*, Advisory Opinion, 1 February 2010, ITLOS Case No. 17, pp. 6-9, paras. 4, 7.

158 *SRFC*, Annex to Order 2013/2 of 24 May 2013, and Advisory Opinion of 2 April 2015, ITLOS Case No. 21, para. 17.

159 A. Paulus, *supra* note 21, pp. 1641-1642, paras. 4-5.

160 *Responsibilities*, Advisory Opinion, 1 February 2010, ITLOS Case No. 17, para. 13, p. 10 (unsolicited joint *amicus curiae* submission from the WWF and Greenpeace International.); *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, pp. 9-11, paras. 13, 23 (two submissions from the WWF).

161 *SRFC*, ITLOS Case No. 21, Written Statement of the United States of America, 27 November 2013, at: [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/written\\_statements\\_round\\_1/C21\\_statement\\_USA\\_orig\\_Eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round_1/C21_statement_USA_orig_Eng.pdf) (last visited: 21.9.2017).

record. The tribunal merely pointed to the USA's membership to the Straddling Fishstocks Agreement, which serves to facilitate the implementation of some of the UNCLOS regulations on the conservation and management of straddling and high migratory fish stocks.<sup>162</sup> The tribunal treats the submissions of the USA and the WWF decidedly differently – only the latter was denoted an *amicus curiae* submission and it received a much cooler welcome. The reasons for this are unclear. Both submissions fell outside Article 133's scope, but it may well be that the state parties were less opposed to the admission of the USA's brief. The closed-off approach to NGOs has been criticized, because

in some cases it might make sense for the Seabed Disputes Chamber to have the authority to request information from entities other than States Parties to the Convention, bearing in mind that requests for advisory opinions to the Chamber necessarily deal with matters governed by the legal regime of the common heritage of mankind. There is therefore a need to secure the principle of universality of the Convention.<sup>163</sup>

The ITLOS and the Seabed Disputes Chamber have not expressly stated what requirements an intergovernmental organization needs to fulfil to be considered an 'appropriate' intergovernmental organization under Article 133(2) ITLOS Rules. The invitations issued indicate that they operate on a basis of inclusiveness and invite all organizations with an intergovernmental structure that may in some way make a useful submission. In *SRFC*, the tribunal invited 48 intergovernmental organizations, including the United Nations, the UNDP, the FAO, regional fisheries commissions, development Banks, scientific commissions and the IUCN.<sup>164</sup>

In the provisional measures proceedings of the *Arctic Sunrise Case*, the question of the permissible relationship between *amicus curiae* and the claimant the Netherlands was at issue. The case concerned the arrest, capture and persecution for hooliganism in a Russian District Court of thirty Greenpeace International (GPI) activists and the GPI-operated vessel *Arctic Sunrise* which was flying under Dutch flag. GPI was directly affected

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162 *Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks*, adopted on 4 August 1995, entered into force 11 December 2001, UNTS Vol. 2167, p. 3.

163 P. Gautier, *supra* note 53, pp. 385-386.

164 *SRFC*, Annex to Order 2013/2 of 24 May 2013, ITLOS Case No. 21.

by the case and had an overwhelming interest that the Netherlands win the case. This interest appears to have motivated the use of *amicus curiae*. A GPI employee, Mr. Kees Kodde, publicly stated that GPI had ‘hired a well-known expert on ITLOS issues who will write [the *amicus curiae* brief] so that it complements the Dutch arguments.’<sup>165</sup> In the proceedings, the Netherlands called as a witness GPI’s legal counsel. He was questioned by the agent of the Netherlands and answered questions from the judges concerning the factual circumstances of the arrest.<sup>166</sup> The request for the provisional measures contained in Annex 2 a statement of facts which had been prepared by GPI. GPI also paid for the proceedings.<sup>167</sup> If admitted, this would have been the first apparent case of a US-style litigating *amicus curiae*. This is a worrying development in terms of procedural equality of the parties as it raises the judges’ duty to ensure that the parties are given equal time to present their cases. This may not have been a ma-

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165 T. Moore, *Greenpeace case gathers knots at ITLOS*, 22 October 2013, at: <http://www.cdr-news.co.uk/categories/arbitration-and-adr/featured/greenpeace-case-gathers-knots-at-itlos> (last visited: 21.9.2017). Kodde further allegedly said that GPI considered asking other governments to intervene in the dispute, but decided against it as the ‘Dutch government feared the intervention of other countries might cause a delay in the proceedings.’ The *amicus curiae* petition was prepared by Greenpeace International with the assistance of renowned international lawyers, including Prof. Philippe Sands, QC. See *The Arctic Sunrise Case, Amicus Curiae* Submission by Stichting Greenpeace Council (Greenpeace International), 30 October 2013, ITLOS Case No. 22, at: <http://www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf> (last visited: 21.9.2017).

166 See *Arctic Sunrise Case*, Verbatim records of Public Sitting, ITLOS/PV.13/C22/1/Rev. 1/6 November 2013 a.m., ITLOS Case No. 22, 15:29-17:36.

167 T. Moore, *supra* note 165. GPI compensated the Dutch government for depositing the USD 3,6 million bond that was ordered to be paid in exchange for the prompt release of the crew members and the vessel, see A. Dolidze, *The Arctic Sunrise and NGOs in international judicial proceedings*, 18 ASIL Insight (2014), at: <https://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings> (last visited: 21.9.2017). Dolidze quotes the following statement from GPI’s General Counsel J. Teulings of 29 November 2013: ‘Greenpeace International will cover the costs associated with the issuing of the bank guarantee and will make sure that Dutch taxpayers are not affected by the Tribunal’s order. Similarly, Greenpeace will compensate the Dutch government if the arbitral tribunal orders the Netherlands at a later date to pay reparations to Russia,’ at: <http://www.greenpeace.org/canada/en/recent/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action/> (last visited: 21.9.2017).

for issue given that the interactions were apparent and could be addressed adequately, but it may be less obvious in other instances. Overall, this attempt may have weakened rather than strengthened the willingness of some international courts and tribunals to welcome *amici curiae* in their proceedings.

### III. European Court of Human Rights

Article 36(2) ECHR and Rule 44(3)(a) ECtHR Rules consider apt to act as *amicus curiae* two kinds of participants: first, any High Contracting party which is not a party to the proceedings and, second, ‘any person concerned who is not the applicant.’

The first alternative includes all Council of Europe member states that are neither party to the proceedings nor privileged by Article 36(1) ECHR, because they are not the national state of the applicant. States participate frequently as *amicus curiae* (see Annex I). Submissions have also been accepted from local governments.<sup>168</sup> The ECtHR interprets the term ‘not a party’ broadly. It excludes *amicus curiae* if there is an overlap in person between *amicus curiae* and a party. For instance, a request for leave by a member of the Georgian parliament was denied in *Shamayev and others v. Georgia and Russia*.<sup>169</sup>

As regards the second alternative, the court understands the term ‘person’ to encompass natural and legal persons, including intergovernmental organizations such as the European Commission, the UNCHR and the OSCE.<sup>170</sup> The ECtHR has accepted submissions from a vast range of entities, predominantly non-governmental local and international human-rights interest groups. But submissions have been received also by private individuals, professionals,<sup>171</sup> trade unions,<sup>172</sup> neighbourhood representatives and academic institutions (see Annex I). In short, there seems to be no limit as to who may appear as *amicus*. Until 2000, the large majority of

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168 E.g. *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A No. 262.

169 *Shamayev and others v. Georgia and Russia*, No. 36378/02, 12 April 2005, ECHR 2005-III.

170 *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, ECHR 2008; *R.R. v. Poland*, No. 27617/04, 26 May 2011, ECHR 2011.

171 *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93.

172 *Brumărescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I.

submissions stemmed from European and particularly British human rights NGOs.<sup>173</sup> Although *amicus curiae* applicants still mainly originate from within Council of Europe member states, the ECtHR does not seem to consider the origin of a submission relevant.<sup>174</sup>

The ECtHR interprets the requirement that the person be ‘concerned’ broadly. It applies it to interest groups, stakeholders, individuals and entities that are directly or indirectly affected by or connected to the dispute or interested in the interpretation of a specific issue.<sup>175</sup> The ECtHR often grants leave to appear as *amicus curiae* to entities that will be legally or factually affected by the decision. This includes individuals and entities that are party to an agreement whose legality is contested before the ECtHR, that are in the same legal position as the applicant or that represent the interests of the applicant. A review of the pertinent case law points to a link between the lessening of the proximate connection test applied in early cases of *amicus curiae* participation and an expanding participation by *amicus curiae* to defend certain public interests.<sup>176</sup> Where the ECtHR de-

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173 According to *Chinkin and Mackenzie*, submissions from international as opposed to national NGOs were increasingly received in the 1980s. See C. Chinkin/R. Mackenzie, *supra* note 146, p. 146. See also *Sousa Goucha v. Portugal*, No. 70434/12, 22 March 2016 (submission from USA-based NGO Alliance Defending Freedom).

174 E.g. in *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010, the *amicus curiae* was from the USA (Harvard Law School Project on Disability).

175 *M.G. v. Germany* (dec.), No. 11103/03, 16 September 2004 (The case concerned an expulsion order by German authorities to Romania. The Romania-born applicant argued that he was no longer a Romanian citizen. Romania supported the applicant’s view and stressed its lack of legal obligations towards the applicant. It further guaranteed safe return and assistance in the resettlement process in light of Article 3 allegations.); *Lordos and others v. Turkey*, No. 15973/90, 2 November 2010 (Rejection of the request for leave from the Evkaf Administration, a religious trust claiming to own some of the properties claimed by the applicant); *Brumărescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I. See also A. Lindblom, *Non-governmental organizations in international law*, Cambridge 2005, p. 344; *Gäfgen v. Germany*, No. 22978/05, 30 June 2008 and [GC], 1 June 2010, ECHR 2010.

176 *Mahoney’s* observation on early case-law is no longer accurate that ‘the mere fact the aspirant holds views, however strong and well-informed, regarding the performance by a Contracting State of its obligations under the Convention will ... probably not suffice.’ See P. Mahoney, *Developments in the procedure of the European Court of Human Rights: the revised rules of the court*, 3 Yearbook of European Law (1983), p. 153.

cides on ethically and socially controversial issues, such as abortion, right to assisted suicide, legality of the death penalty, display of religious symbols in public schools or adoption by homosexual couples, it tends to ensure that the different public interests engaged are elaborated on by representative civil society groups.<sup>177</sup> A review of the submissions accepted indicates that the ECtHR admits as *amicus curiae* only those with documented legal or factual expertise on the engaged public interest.

*Amici curiae* may openly support one of the parties. In *Emesa Sugar B.V. v. the Netherlands*, the applicant company complained that it had been violated in its right to a fair trial because it had not been allowed to respond to the opinion of the ECJ's Advocate General on a request for a preliminary ruling arising from domestic proceedings to which it was a party before The Hague Regional Court. The European Commission, having received permission to participate as *amicus curiae*, supported the Dutch government's argument that the application was inadmissible as it was directed exclusively against an ECJ order, that is, an act of an institution of the European Union, and that there was no *ratione materiae*.<sup>178</sup> The ECtHR has also granted leave to trade and other professional unions in cases

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177 *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002, ECHR 2002-III (Abortion); *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161; *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No. 246-A; *Vo v. France* [GC], No. 53924/00, 8 July 2004, ECHR 2004-VIII (Legal status of a child *in utero*); *D. v. Ireland* (dec.), No. 26499/02, 6 28 June 2006 (abortion in case of a lethal fetal abnormality); *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX (Treatment of homosexuals regarding succession to tenancies under Austrian Law. The ECtHR noted that Liberty, ILGA-Europe and Stonewall 'highlighted the general importance of the issue.');

*E.B. v France* [GC], No. 43546/02, 22 January 2008 (Adoption in same-sex relationships); *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, ECHR 2012 (Second-parent adoption by homosexual couples); *Haas v. Switzerland*, No. 31322/07, 20 January 2011, ECHR 2011; *Koch v. Germany*, No. 497/09, 19 July 2012 (Right to die); *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *P. and S. v. Poland*, No. 57375/08, 30 October 2012; *R.R. v. Poland*, No. 27617/04, 26 May 2011, ECHR 2011; *Taddeucci McCall v. Italy*, No. 51362/09, 30 June 2016; *Annen v. Germany*, No. 3690/10, Judgment of 26 November 2015.

178 *EMESA SUGAR B.V. v. the Netherlands* (dec.), No. 62023/00 of 13 January 2005. The ECtHR followed the argument and rejected the application for lack of *ratione materiae*. See also *S.A.R.L. du parc d'activites de Blotzheim et la S.C.I. Haselaecker v. France* (dec.), No. 48897/99, 18 March 2003, ECHR 2003-III (The Swiss government was granted leave pursuant to Article 36(2) ECHR in a

involving an applicant whose affected rights fall into one of their areas of operation.<sup>179</sup>

Also, requests for leave to participate by persons affiliated with or related to the parties are regularly granted. The requirement that the person is not the applicant is interpreted to exclude only persons identical to the applicant. In *Koua Poirrez v. France*, the adoptive father of an adult applicant was permitted to submit an *amicus curiae* brief. The applicant, an Ivory Coast national, complained against the French authorities' refusal to award him a disability allowance.<sup>180</sup> In *Association of Jehova's Witnesses v. France* concerning the authorities' refusal to recognize the applicant association as a religious association, the ECtHR granted leave to make a submission to the European Association of Jehova's Christian Witnesses.<sup>181</sup> Despite the clear wording of Article 36(2) ECHR, the ECtHR does

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case where the applicant challenged the legality of a French-Swiss agreement relating to the extension of the airport Basel-Mulhouse.); *Danell and others v. Sweden* (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I; *Zhigalev v. Russia*, No. 54891/00, 6 July 2006; *Hatton and others v. the United Kingdom*, No. 36022/97, 2 October 2001 and [GC], No. 36022/97, 8 July 2003, ECHR 2003-VIII; *Py v. France*, No. 66289/01, 11 January 2005, ECHR 2005-I; *Goudswaard-Van der Lans v. the Netherlands* (dec.), No. 75255/01, 22 September 2005, ECHR 2005-XI; *Herrmann v. Germany* [GC], No. 9300/07, 26 June 2012; *Haas v. Switzerland*, No. 31322/07, 20 January 2011, ECHR 2011; *Koch v. Germany*, No. 497/09, 19 July 2012; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V.

179 *Heinisch v. Germany*, No. 28274/08, 21 July 2011, ECHR 2011; *Beer and Regan v. Germany* [GC], No. 28934/95, 18 February 1999; *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999, ECHR 1999-I; *Pedersen and Baadsgaard v. Denmark*, No. 49017/99, 19 June 2003 and [GC], No. 49017/99, 17 December 2004, ECHR 2004-XI; *Petri Sallinen and others v. Finland*, No. 50882/99, 27 September 2005; *Hutten-Czapska v. Poland*, No. 35014/97, 22 February 2005.

180 *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, ECHR 2003-X. See also *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, 24 April 2003; *E.O. and V.P. v. Slovakia*, Nos. 56193/00 and 57581/00, 27 April 2004; *Eskinazi and Chelouche v. Turkey* (dec.), No. 14600/05, 6 December 2005, ECHR 2005-XIII; *Neulinger and Shuruk v. Switzerland*, No. 41615/07, 8 January 2009 and [GC], No. 41615/07, 6 July 2010, ECHR 2010; *Kearns v. France*, No. 35991/04, 10 January 2008. The interests of the parent and the applicant are not necessarily identical.

181 *Association of Jehova's Witnesses v. France* (dec.), No. 8916/05, 17 June 2008. See also *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, ECHR 2011;

not require a prospective *amicus curiae* to disclose any affiliation or relation with the parties (or the ECtHR) or any granting of support, financial or otherwise, in general or with regard to a specific brief. The ECtHR has accepted *amicus curiae* submissions from national groups from the respondent state which were (partly) publicly funded, as well as from state-administered human rights observers.<sup>182</sup>

Impartiality does not play a significant role. *Amici curiae* may directly and openly support one of the parties. In *Malone v. the United Kingdom*, the ECtHR allowed the Post Office Engineering Union to make a submission. The Union was involved in the phone tapping whose legality was at issue in the case.<sup>183</sup> In *Behrami and Behrami v. France* concerning France's responsibility for alleged negligence by KFOR troops in the French sector of Kosovo which had led to the explosion of unmarked and undefused clusterbombs killing and seriously injuring the applicant's two sons, and in *Saramati v. France and Norway*, a case concerning the legality of the events of the applicant's arrest and conviction for attempted murder by the KFOR mission in Kosovo, the ECtHR solicited a submission from the United Nations. The United Nations provided information on UNMIK's mandate and its relation to the KFOR missions. The United Na-

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*Wilson, National Union of Journalists and others v. the United Kingdom*, Nos. 30668/96, 30671/96, 30678/96, 2 July 2002, ECHR 2002-V (Leave granted to Trade Union Congress to which the National Union of Journalists belongs).

182 *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I; *Tinnelly and Sons Ltd and others and McElduff and others v. the United Kingdom*, Judgment of 10 July 1998, Reports 1998-IV; *Hugh Jordan v. the United Kingdom*, No. 24746/94, 4 May 2001, ECHR 2001; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, 2001-III; *O'Keeffe v. Ireland*, No. 35810/09, (dec.) 26 June 2012 and [GC] 28 January 2014, ECHR 2014; *Shelley v. the United Kingdom* (dec.), No. 23800/06, 4 January 2008 (Submission by the National AIDS trust which receives funding by the Department for Health); *Tysiac v. Poland* (dec.), No. 5410/03, 7 February 2006; *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010.

183 *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82. See also *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44; *Feldek v. Slovakia*, No. 29032/95 12 July 2001, ECHR 2001-VIII; *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI; *Metropolitan Church of Bessarabia and others v. Moldova*, No. 45701/99, 13 December 2001, ECHR 2001-XII; *Dichand and others v. Austria*, No. 29271/95, 26 February 2002; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, Nos. 412/03 and 35677/04, 22 January 2009.

tions argued that the acts were attributable to KFOR, which was unsurprising given its interest to protect UNMIK from potential liability.<sup>184</sup>

Furthermore, the ECHR has not established any formal requirements concerning the qualifications, the expertise or the experience of *amicus curiae*, though such requirements could be read into Article 36(2)'s condition that a submission be 'in the interest of the proper administration of justice'. The court values informed and experienced *amici curiae*. It has a unique practice of admitting the same entities, in particular specialized human rights organizations such as Interights, Liberty, Article 19, Amnesty International and the Helsinki Foundation for Human Rights to make submissions on country-specific issues or to provide legal analysis.<sup>185</sup> The ECtHR frequently receives submissions from the European Roma Rights Centre in cases involving the Roma. This form of 'institutional' *amici* is particular to the ECtHR. In their applications to the court, *amicus* petitioners tend to comment on their knowledge and experience. The ECtHR also routinely grants leave to persons with expert knowledge of a country or particular situation. In *Hutten-Czapska v. Poland*, the ECtHR granted leave to the Polish Association of Tenants to report on the general situation concerning the implementation of a law imposing restrictions on landlords regarding rent increases and termination of leases in Poland.<sup>186</sup> Still,

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184 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007.

185 The court has explicitly noted the expertise of *amicus curiae* in a few cases. *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115 (The court stated that JUSTICE possessed 'unrivalled experience' in conducting cases before the Court of Appeal Criminal Division. This led it to assume that the NGO could provide it with a 'useful, broader view of the matters currently under review.'). *Chapman v. the United Kingdom* [GC], No. 27238/95, 18 January 2001, ECHR 2001-I; *Beard v. the United Kingdom* [GC], No. 24882/94, 18 January 2001; *Coster v. the United Kingdom* [GC], No. 24876/94, 18 January 2001; *Lee v. the United Kingdom* [GC], No. 25289/94, 18 January 2001; *Jane Smith v. the United Kingdom* [GC], No. 25154/94, 18 January 2001; *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX; *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 1<sup>st</sup> section, 26 February 2004; *Tănase and others v. Romania* (striking out), No. 62954/00, 26 May 2009. See also *X. v. France*, Judgment of 31 March 1992, Series A No. 234-C (submission from the French association of haemophiliacs in a case concerning the infection by a haemophilic with HIV through an infected blood transfusion).

186 *Hutten-Czapska v. Poland*, No. 35014/97, 22 February 2005. See also *Jelicic v. Bosnia and Herzegovina* (dec.), No. 41183/02, 15 November 2005, ECHR 2005-

the ECtHR has not (publicly) specified any criteria for the level of expertise or experience required.

The lack of more specific criteria is lamentable, as the court relies extensively on *amicus* submissions in its decisions (see Chapter 7). A strict set of criteria may not be appropriate given the ECtHR's use of *amicus curiae* to give personally affected individuals an opportunity to make submissions in the proceedings. Nonetheless, the court's indiscriminate approach to the instrument also in cases where it relies on fact submissions might lead to inadvertent adoptions of partial information. The court should establish mechanisms to ensure the independence of *amici curiae* from the parties in all cases.

#### IV. Inter-American Court of Human Rights

According to Article 2(3) IACtHR Rules, *amicus curiae* is a 'person or institution that is unrelated to the case and to the proceeding.'<sup>187</sup> Neither the Rules nor the court have further defined these terms. The court's practice indicates that the term 'person' is limited to natural persons and the term 'institution' to a private or public entity with a public values mandate. The requirement that *amicus curiae* should be unrelated to the case and the proceedings is decidedly narrower than the practice before the ECtHR and points to an emphasis on neutrality and independence.

The IACtHR has admitted almost exclusively non-state actors as *amicus curiae* in contentious and in advisory proceedings. *Amicus curiae* submissions in contentious proceedings are made in particular by international and local non-governmental organizations, academics, academic institu-

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XII and 31 October 2006, ECHR 2006-XII; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009; *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009; *Suljagić v. Bosnia and Herzegovina*, No. 27912/02, 3 November 2009; *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011.

187 Former Article 41 of the January 2009 Rules of Procedure referred to 'one who wishes to act as *amicus curiae*'. The new Article 44 of the November 2009 Rules of Procedure uses the same term as the definition. The term institution was only added to the rules in November 2009. It is not clear what the purpose of this amendment was. See also F. Rivera Juaristi, *supra* note 65, p. 112.

tions and law clinics specialized in human rights.<sup>188</sup> The IACtHR has received *amicus curiae* submissions also from individuals, law firms, lawyer associations, journalist associations, and other special interest, victim and professional groups, as well as private business ventures in cases where their interests were at issue (see Annex I).<sup>189</sup> Recently, a submission was received by a state.<sup>190</sup> Cases often attract *amici curiae* specialized in the particular issue in dispute. In *Herrera Ulloa v. Costa Rica*, a case concerning defamation proceedings, the IACtHR received submissions from several publishing houses and media corporations.<sup>191</sup>

Non-governmental organizations and individuals participating as *amicus curiae* regularly originate from the respondent state or from state parties to the American Convention.<sup>192</sup> Public invitations issued by the

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188 E.g. “Other Treaties” subject to the consultative jurisdiction of the court (Article 64 ACHR), Advisory Opinion No. OC-1/82, 24 September 1982, IACtHR Series A No. 1, p. 1. *Kent and Trinidad* note the adoption in the IACtHR of the US practice to submit briefs ‘on behalf of a large number of signatories.’ A. Kent/ J. Trinidad, *International law scholars as amici curiae: an emerging dialogue (of the deaf)?*, 29 *Leiden Journal of International Law* (2016), p. 1096.

189 *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 ACHR)*, Advisory Opinion No. OC-14/94, 9 December 1994, IACtHR Series A No. 14, p. 13 (first *amicus curiae* brief by an individual); *Wong Ho Wing v. Peru* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 30 June 2015, IACtHR Series C No. 297, para. 11 (brief by an individual); *Caso Granier y Otros (Radio Caracas Televisión) v. Venezuela* (Preliminary Objections, Merits, Reparations and Costs), Judgment, 22 June 2015, IACtHR Series C No. 293, para. 9 (media focused entities). According to *Rivera Juaristi*, between 1988 and 2013, 58% of all *amicus curiae* briefs submitted in contentious proceedings were submitted by human rights NGOs, 24,5% by academic institutions, 14% by individuals, 3% by domestic governments and 0,5% by corporations. See F. Rivera Juaristi, *supra* note 65, p. 107. This accords with the data collected in Annex I.

190 The submission was made by Guatemala. It is not certain why Guatemala chose to participate as *amicus curiae*. It is likely that the reason for participation rests on the fact that Guatemala is also home to a large Garífuna community whose rights were at issue in the case. See *Garífuna Community of “Triunfo de la Cruz” and its members v. Honduras* (Merits, Reparations and Costs), Judgment, 8 October 2015, IACtHR Series C No. 305.

191 *Herrera Ulloa v. Costa Rica* (Preliminary objections, Merits, Reparations and Costs), Judgment, 2 July 2004, IACtHR Series C No. 107, p. 56.

192 See also D. Padilla, *The Inter-American Commission on Humans Rights of the Organization of American States: a case study*, 9 *American University Journal of International Law & Policy* (1993), pp. 111-112.

IACtHR for *amicus curiae* submissions in several recent advisory proceedings indicate that the court prefers briefs from local civil society groups, academics and academic institutions.<sup>193</sup> This is in line with the IACtHR's strong public interest based *amicus curiae* function. However, the IACtHR has over the years received an increasing amount of *amicus curiae* submissions from NGOs located in states not party to the American Convention, above all Spain and the USA.<sup>194</sup>

*Amici curiae* must be 'unrelated to the case.' This requirement was first mentioned explicitly in the 2009 IACtHR Rules. It is unclear if the IACtHR newly created this requirement or if it formed part of the court's general handling of *amici curiae*. The term could cover both independence and impartiality. However, the IACtHR does not require complete independence. With the exception of one case, the court regularly admits *amicus* briefs from entities connected to a party or the facts of the case.<sup>195</sup> In *Cesti Hurtado v. Peru*, a forced disappearances case, the IACtHR accepted

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193 The court has posted on its website general invitations to make *amicus curiae* submissions to 'interested representatives of civil society and academic institutions from the region.' E.g. *Artículo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20, para. 6.

194 *Artículo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20, p. 3, para. 6; *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 209 (submission by a Spanish human rights NGO); *Ríos et al. v. Venezuela*, Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 194 (submission by the Netherlands Institute for Human Rights-SIM); *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197 (submission by the Centre for Human Rights and Law Faculty of the University of Essex); *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 205; *The "Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 211; *Rosendo-Cantú and other v. Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 216.

195 In *Familia Pacheco Tineo v. Bolivia*, the court interpreted the requirement 'unrelated to the case' narrowly. It excluded a submission from an individual after this had been requested by the respondent, because she was engaged with an organization that was involved in the case. The court held that the condition required that an *amicus* be completely uninvolved in the process and the dispute ('totalmente ajena al litigio y al proceso'). See *Pacheco Tineo v. Bolivia*, Judgment of

a written submission from the President of the Human Rights Commission of the Lima Bar Association. The organization was involved substantially in the case as it had tried to locate and help the victim.<sup>196</sup> In *Acevedo Jaramillo y otros v. Peru*, the court admitted a submission by the Lima municipality. The IACoMHR objected to the submission by pointing to the municipality's identity with the respondent under international law and its involvement in the case. The municipality's failure to comply with national judgments ordering the reinstatement of unlawfully laid-off employees constituted the basis of the proceedings before the IACtHR. The respondent had even accredited a representative of the municipality to participate in the proceedings. The IACtHR did not further comment on the issue. It merely stated that it would admit the submission to the extent that it contained useful information while taking into account the Commission's objections.<sup>197</sup> In a few other cases, the IACtHR has received submissions from public agencies or officers, such as public human rights protection offices, which are maintained and financed through the respondent state, like the 'defensor del pueblo'.<sup>198</sup> In *Personas Dominicanas y Haitianas Expulsadas v. República Dominicana*, the court rejected a request by the respondent state to exclude two *amicus curiae* submissions from human rights institutes and law clinics on the account that their contents had been directed, coordinated and reviewed by the CEJIL. The CEJIL was the co-representative of the victims during the proceedings before the IACoMHR and the IACtHR. The court again did not properly address the complaint. It merely repeated the text of Article 2(3), namely, that an *amicus curiae* may not be a disputing party to the proceedings and that submission had to be made with the aim of illustrating to the court fact or legal questions related to the proceedings.<sup>199</sup> In short, the court reads the requirement rather loosely in terms of independence (concerning state entities) and prior in-

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25 November 2013 (Preliminary exceptions, Merits, Reparations and Costs), IACtHR Series C No. 272, para. 10.

196 *Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56.

197 *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 144.

198 E.g. *Barrios Altos et al. v. Peru*, Judgment of 3 September 2001 (Interpretation of the Judgment on the Merits), IACtHR Series C No. 83.

199 It further stressed that under no circumstance the *amicus curiae* submission could be considered evidence and that *amici curiae* had no right to have their submission considered. See *Personas Dominicanas y Haitianas Expulsadas v. Republica*

volvement in the case. It excludes only the formal parties, that is, the IA-ComHR and the respondent state government (whilst disregarding that all parts of the state under international law are considered to form one entity).<sup>200</sup> This shows that the court values the usefulness of a brief over formal independence.<sup>201</sup>

Further, *amici curiae* do not need to be neutral. This accords with the endorsement by the IACtHR of *amicus curiae* as an effective tool to hear the views of the public.<sup>202</sup> Even though the large majority of submissions are made by academic institutions and civil society representatives that typically have ‘only’ a general (public) interest in the case, in a few cases prior to 2009, the IACtHR admitted *amici curiae* with a direct interest in or an affiliation to the case and/or a clearly preferred outcome.<sup>203</sup> In *Ríos y otros v. Venezuela*, a case concerning the alleged threatening and interference with the activities of 20 journalists and communications employees of the TV station RCTV, the IACtHR considered the submissions of several unions and radio-syndicates.<sup>204</sup> In *Yatama v. Nicaragua*, the court admitted four *amici curiae* because they had ‘an interest in the subject matter of the application and provide useful information.’<sup>205</sup>

There is no disclosure requirement or procedure in the rules or in practice. Still, many *amici curiae* in their submissions include a detailed description of their nature, expertise, experience and activities, as well as an

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*Dominicana*, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 282, paras. 3, 15.

200 The IACtHR confirmed this in *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282, para. 15 (‘In other words, the person should not be a procedural party to the litigation’).

201 *Rivera Juaristi* suggests the creation of exceptions to the requirement ‘unrelated’ in cases where state organs or entities have useful information for the court. Any concerns regarding impartiality could be considered as ‘a matter of credibility of a brief’. See F. Rivera Juaristi, *supra* note 65, pp. 116-117.

202 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177.

203 Critical, M. Pinto, *NGOs and the Inter-American Court of Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 56.

204 *Ríos et al. v. Venezuela*, Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 194, para. 19.

205 *Yatama v. Nicaragua*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 23 June 2005, IACtHR Series C No. 127, para. 120.

assurance of independence from the parties.<sup>206</sup> This is useful to bolster the credibility of a brief.

The IACtHR appears to test neither the expertise and/or experience of *amicus curiae* nor its qualifications or ability to represent civil society – or at the least it has not made the criteria publicly known.<sup>207</sup> The large number of participating academic institutions specialized in human rights indicates that the IACtHR values legal expertise. Similarly, the court often mentions having received submissions from organizations specialized in the matters at issue in the case and from international NGOs with a substantial record of participation before it.<sup>208</sup>

## V. African Court on Human and Peoples' Rights

Section 42 Practice Directions permits *amicus curiae* submissions by '[a]n individual or organisation' in contentious cases. The provision is similar in personal scope to Article 2(3) IACtHR Rules, without establishing any limiting requirements. The use of the term 'organization' requires further clarification. It could denote only civil society organization or cover all types of legal persons, including those with a commercial focus. It can also be interpreted to allow intergovernmental organizations, but not states, to appear as *amicus curiae*. It remains to be seen how the court will interpret this term. In its first case, the court granted leave to make a submission as *amicus curiae* to the Pan African Lawyers' Union, an umbrella organization of African Lawyers and Law Societies, showing that the

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206 See *amicus curiae* submission from the *Assembly of First Nations*, p. 48 in the case *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79.

207 Cf. *Artículo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20; *Veliz Franco y otros v. Guatemala*, Judgment of 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 277, paras. 15, 64 (The respondent state sought the exclusion of *amicus curiae* briefs. It alleged that they lacked knowledge of the case and failed to present any new elements of use to the court in its decision-making. The IACtHR rejected the submissions on formal grounds and did not comment on these arguments.).

208 For instance, the International Human Rights Law Group, CEJIL, Lawyers Committee for International Human Rights and Human Rights Watch/Americas Watch. See Annex I. See also M. Ólz, *supra* note 63, p. 360; M. Pinto, *supra* note 203, p. 53.

court includes interest-based groups. In *Lohé Issa Konaté v. Burkina Faso*, the ACtHPR admitted as *amicus curiae* a group of African and international human rights groups, many with a focus on media and journalists' rights.<sup>209</sup>

## VI. WTO Appellate Body and panels

Neither panels nor the Appellate Body have formulated specific criteria petitioners must comply with or disclosures they must make to be admitted as *amicus curiae*.<sup>210</sup> Article 13 DSU requires that information be from an individual or body that the panel considers 'appropriate'. Panels or the Appellate Body have not concretized these elements in regard of *amicus curiae*, even though panels' authority to admit *amicus curiae* is drawn from the provision.<sup>211</sup> Panels and the Appellate Body have only cited the usefulness of *amicus* submissions when deciding on the admission. The term is too imprecise to deduct concrete conditions for the person of *amicus curiae*. For want of better guidelines, *amicus curiae* applicants in their requests often adhere to (the no longer applicable) Section 2 *EC-Asbestos* Additional Procedure, which denotes as competent to request leave '[a]ny person, whether natural or legal, other than a party or third party to this dispute.'

The WTO Appellate Body does not limit the scope of entities able to act as *amicus curiae*. The issue was strongly debated when Morocco requested leave to file an *amicus curiae* submission in *EC-Sardines*.<sup>212</sup> The

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209 See *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, p. 7, para. 20.

210 See *US-Tuna II*, where the nature of the *amici curiae* does not appear to have played a role. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter: *US-Tuna II (Mexico)*), Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R.

211 See G. Marceau/ M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 *Journal of International Economic Law* (2001), p. 178. They argue that panels and the Appellate Body should draw guidance for criteria from the objectives of the WTO which are referred to in the Preamble to the WTO Agreement. *Id.*, p. 179.

212 The respondent Peru and other third parties objected to the admission arguing that it would accord Morocco a more privileged status than Colombia, which was attending the oral proceedings as a passive observer after having been denied third party status. *EC-Sardines*, Appellate Body Report, adopted on 23 October

Appellate Body denied that the rules on third party participation could preclude states from participating as *amicus curiae*,<sup>213</sup> essentially, because it found that third party and *amicus curiae* participation were two different things. To stress this point, it stated:

We wish to emphasize, however, that, in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis.<sup>214</sup>

The decision was a logical and necessary progression from the Appellate Body's earlier *amicus curiae* decisions where it had emphasized that *amicus curiae* participation fundamentally differed from party and third party participation. Based on this reasoning, the WTO adjudicating bodies can also receive *amicus curiae* submissions from non-WTO member states.

State submissions are an absolute exception. The majority of *amicus curiae* submissions stem from non-governmental entities in the broadest sense, in particular, industry associations and trade unions. This may be unexpected given the large degree of publicity attracted by submissions from NGOs.<sup>215</sup> In twelve cases, *amicus curiae* submissions were made by interest groups in the areas of environmental protection, health and safety, human or animal rights. The organizations were largely operating internationally. In fifteen cases, submissions were made by industry groups, in six cases by individuals, including three briefs from legal experts. In one case, a submission was made by a member state, and one submission was

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2002, WT/DS231/AB/R, para. 19, p. 6. See also C. Brühwiler, *supra* note 9, p. 373.

213 *EC–Sardines*, Report of the Appellate Body, adopted on 25 July 2003, WT/DS231/AB/R, pp. 12, 35, 39, paras. 111, 115, 154, 163. See also C. Brühwiler, *supra* note 9, p. 367.

214 *EC–Sardines*, Report of the Appellate Body, adopted on 25 July 2003, WT/DS231/AB/R, pp. 40–41, para. 167.

215 The publicity value attached to *amicus curiae* submissions in the WTO was highly evident in *EC–Seal Products* concerning the legality of an import and marketing ban by the EU on seal and seal products. The animal rights organization PETA chose to submit its brief through US actress Pamela Anderson. An *amicus curiae* brief was also submitted by British actor Jude Law. See *EC–Seal Products*, Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R, p. 14, FN 16.

received from a commercial company operating in the energy sector (see Annex I). Submissions from academic institutions are rare.

The large number of applications by professional groups and business associations in the WTO may be due to the chilling effect of the Appellate Body's strict attitude towards non-governmental entities, although in cases decided in 2013 their number has increased again. In all cases where information was solicited, panels have requested information exclusively from intergovernmental organizations.

The Appellate Body in the *EC–Asbestos* Additional Procedure required that *amici curiae* in their applications 'contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant' (No. 3 (c)), as well as 'a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or third party to this dispute in the preparation of its application for leave or its written brief' (No. 3 (g)). These requirements pertain to the independence, expertise and experience of *amicus curiae*. It is unclear what value the Appellate Body attached to any of them, because all of the 17 diverse *amicus curiae* petitioners that applied under the *EC–Asbestos* Additional Procedure were rejected for failure to comply with it by a generic form letter. These requirements have not been mentioned since by panels or the Appellate Body. However, of the few submissions that have been accepted most stemmed from business entities, industry associations or trade unions with a link to the matter in dispute (see Chapters 6 and 7). This indicates that experience in the field at issue is an important criterion. Representativity to speak for a certain matter, on the other hand, does not appear to be generally relevant, at least if an *amicus curiae* purports to represent a public interest.

Panels and the Appellate Body do not require *amici curiae* to be impartial. Typically, *amici* openly support one of the parties.<sup>216</sup> In *Australia–Apples*, a case concerning the legality of Australia's import ban on Apples

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216 Cf. L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 244 (CIEL's brief to the panel in *US–Shrimp* had two parts: legal arguments supporting the panel's authority to accept *amicus* submissions, and second, it pre-

from New Zealand, the panel accepted an *amicus curiae* submission supporting the ban by Apple and Pear Australia Limited, an industry body representing the interests of commercial apple and pear growers in Australia. The Australian apple industry was closely involved in the import risk analysis process upholding the ban.<sup>217</sup>

## VII. Investor-state arbitration

### 1. Legal standards

Investment arbitration regulations do not follow a uniform approach on who may act as *amicus curiae*. Some investment treaties establish conditions with respect to the person of *amicus curiae*. The NAFTA's FTC Statement determines that prospective *amici curiae* must be either 'a person of a Party' or have a 'significant presence in the territory of a party.' Like many other investment treaties, it mandates detailed disclosure requirements.<sup>218</sup> Pursuant to Section B, para. 2 (c) – (f), the application for leave to file a submission shall

(c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

(d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;

(e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;

(f) specify the nature of the interest that the applicant has in the arbitration;

The nationality/locality requirement recently has become popular among lawmakers. It has been included in investment treaties concluded by the

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sented technical, scientific and legal information in support of the USA's position.).

217 *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R.

218 See, for instance, Article 836 and Annex 836.1 to the *Canada-Peru Free Trade Agreement*.

EU and in Section 43 of Annex 29-A to the CETA.<sup>219</sup> The requirement ensures a degree of representativeness in the sense that only those potentially affected by a decision are permitted to participate. The CETA further limits participation to ‘non-governmental persons established in a Party’, and establishes disclosure requirements in Section 45, including the ‘nature of the [*amicus*] activities’, its financial sources and its interest in the proceedings.

In arbitrations governed by the ICSID regime, Rule 37(2) ICSID Arbitration Rules contemplates submissions by ‘a person or entity that is not a party to the dispute.’<sup>220</sup> In addition, tribunals have read the standards established by tribunals prior to the issuance of Rule 37(2) into the provision (or the identical Article 41(3) ICSID Additional Facility Rules).<sup>221</sup> The tribunal in *Suez/Vivendi v. Argentina* had established as a personal requirement the ‘suitability of the petitioner to act as *amicus curiae*.’ Petitioners were to ‘establish to the tribunal’s satisfaction that they [had] the expertise, experience, and independence to be of assistance in this case.’<sup>222</sup> They also had to elaborate on the following matters: their identity and background, the nature of their membership (if it [was] an organization) and the nature of their relationships, if any, to the parties in the dispute; the nature of their interest in the case; whether they had received financial or other material support from any of the parties or from any person con-

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219 The protocols to BITs concluded by the EU with states under the Mediterranean Economic Partnership Program establish a corresponding requirement. Prospective *amici* must originate from any of the contracting parties. Given that this includes all of the EU member states, the circle of potential participants is still very broad. See T. Dolle, *supra* note 115.

220 The first draft referred to ‘states and persons’. It was later rejected as too restrictive in order to allow also persons without legal capacity to participate as *amicus curiae*. The term non-disputing parties was drawn from the FTC Statement. See T. Ruthemeyer, *Der amicus curiae brief im internationalen Investitionsrecht*, Baden-Baden 2014, p. 173; A. Antonietti, *The 2006 amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review (2006), p. 435.

221 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, pp. 7-11, paras. 17-27; *Piero Foresti v. South Africa*, Application by the Centre for Applied Legal Studies, the CIEL, INTERIGHTS and the Legal Resources Centre, 17 July 2009, ICSID Case No. ARB(AF)/07/01.

222 *Suez/Vivendi v. Argentina*, Order in response to a petition for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 29.

nected with the parties in this case; and the reason why the tribunal should accept the submission.<sup>223</sup>

In UNCITRAL arbitrations, the standard differs depending on the application of the UNCITRAL Rules on Transparency. Article 4 stipulates unprecedented disclosure obligations concerning the *amicus curiae* petitioner. *Amici* must notify any affiliation or relationship they may have with the parties and any financial or other assistance they have received in the preparation of the brief. Especially the latter requirement is significantly more elaborate than those of other regimes. The applicant must disclose all ‘significant funding’, which is funding exceeding 20 percent of its annual operations in the preceding two years. Also, it must not only disclose names, but ‘[p]rovide information on any government, person, or organization that has provided any such financial or other assistance.’ Further, an *amicus* applicant must describe the nature of his interest in the arbitration. If the UNCITRAL Rules on Transparency do not apply, it falls to the tribunals within their procedural powers to develop the necessary rules.<sup>224</sup> This has not been an issue as of yet because most UNCITRAL arbitrations were brought under the NAFTA where the FTC Statement applies.

In proceedings before the IUSCT, Note 5 Interpretative Notes to Article 15(1) UNCITRAL of the Iran-US Claims Tribunal limits *amicus curiae* to Contracting States and ‘persons who are not party to the case.’<sup>225</sup> The lat-

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223 *Suez/Vivendi v. Argentina*, Order in response to a petition for participation as *amici curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 29.

224 E.g. *TCW Group, Inc., Dominican Energy Holdings, LP v. Dominican Republic* (hereinafter: *TCW v. Dominican Republic*). In Procedural Order No. 2, the tribunal established a detailed request for leave procedure. Section 3.6.2 (c) – (e) of the Order required *amicus curiae* applicants to describe *inter alia* their membership and legal status, their general objectives, the nature of their activities and any parent organization (including any organization that directly or indirectly controls the applicant); disclose whether or not the applicant had any affiliation, direct or indirect, with any disputing party; and identify any government, person or organization that had provided any financial or other assistance in preparing the submission. *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008.

225 The note stipulates that: ‘The arbitral tribunal may, having satisfied itself that the statement of *one of the two Governments* – or, under special circumstances, *any other person* – *who is not an arbitrating party in a particular case* is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting oral and written statements’ [Emphasis added]. It is not clear if there is a two-step admission system. So far, submissions appear to have been made by legal persons, in particular banks.

ter have usually been business organizations from one of the contracting states USA or Iran.<sup>226</sup>

## 2. Application

The similarity of the rules translates into a largely homogenous practice. However, there are discernible differences with respect to independence.

Tribunals generally do not restrict who can appear as *amicus curiae* except where investment treaties contain locality requirements.<sup>227</sup> Under the ICSID Arbitration Rules, a ‘person or entity’ can be a private or legal person, including a state or an intergovernmental organization. Tribunals under the NAFTA, under the Netherlands-Bolivia BIT and in arbitrations governed by the UNCITRAL Arbitration Rules also have admitted legal persons, including states.<sup>228</sup> Currently, the large majority of submissions made stem from NGOs active in environmental or human rights law and the European Commission. Investment tribunals have also received briefs from trade unions, indigenous groups, private companies, industry interest groups, academics and legal practitioners (see Annex I).

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226 See *United States of America and The Islamic Republic of Iran*, Case No. A/16; *Bank Mellat and the USA*, Cases No. 582 and 591, Award, 25 January 1984, No. 108-A-16/582/591-FT.

227 In *Eli Lilly v. Canada*, the tribunal in the arbitration under the NAFTA and the UNCITRAL Arbitration Rules 1976 for the first time rejected requests for leave by several academics because they were located outside of NAFTA states. *Eli Lilly v. Canada*, Procedural Order No. 4, 23 February 2016, Case No. UNCT/14/2, p. 3.

228 E.g. *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22 (European Commission); *Eureka v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13 (European Commission and the Netherlands). In *Aguas del Tunari v. Bolivia*, the tribunal solicited information from the Netherlands concerning various provisions of the applicable BIT. The Netherlands, though not party to the proceedings, was a signatory to the BIT containing the arbitration clause. Similarly, in *World Wide Minerals v. Republic of Kazakhstan* under the Canada-USSR BIT, Canada appeared as *amicus curiae* to support the view that Kazakhstan had succeeded to the BIT, at: <http://www.jonesday.com/world-wide-minerals-achieves-right-to-arbitrate-its-expropriation-and-international-law-claims-against-republic-of-kazakhstan/> (last visited: 21.9.2017). See also Annex I. States tend to participate as *amici curiae* when there is no right of participation (such as Article 1128 NAFTA) for the other states party to the underlying investment treaty (see Chapter 4).

The independence of *amici curiae* has become topical. Recent regulatory efforts evince a propensity to insert expansive disclosure requirements in standard and *ad hoc* procedural rules. No uniform standard has emerged yet. For example, the tribunal in *Pac Rim v. El Salvador* required in its *ad hoc* procedure that applicants ‘[disclose] any direct or indirect financial or other material support from any disputing party or any person connected with the subject-matter of the proceeding,’ a requirement that is broader than the NAFTA and suitability test disclosure requirements.<sup>229</sup> In *Renco Group v. Peru*, in addition to other requirements, the procedural rules mandated petitioners to ‘identify any prior writings related to this arbitration, any of the Parties, or entities related to the Parties, the La Oroya Metallurgical Complex, the Treaty, or any material dealings prior to this proceeding with the Parties or its counsel.’<sup>230</sup>

The tribunals that first admitted *amici curiae* were rather sceptical of the motives of *amicus curiae* petitioners.<sup>231</sup> In *Methanex v. USA*, the parties, for instance, agreed to modify the applicable FTC Statement. *Amicus* applicants had to identify any entity that had helped to prepare the submission.<sup>232</sup> The *UPS v. Canada* tribunal, to assuage the investor’s concerns regarding the independence of *amici curiae*, demanded that petitioners disclose ‘other relevant information, including the relationship (if any) ... to the disputing parties or the other NAFTA parties.’<sup>233</sup> It is startling that the tribunal subsequently admitted an *amicus curiae* submission from the Chamber of Commerce, as it had received US\$ 100,000, equalling 12 per-

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229 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12. See also *Pac Rim v. El Salvador*, CIEL et al., Application for Permission to Proceed as *Amici Curiae*, 2 March 2011, ICSID Case No. ARB/09/12. The petition included neither a declaration of independence nor a statement of disclosure of finances. The tribunal nevertheless admitted the *amici curiae*. See *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12.

230 *The Renco Group, Inc. v. Republic of Peru*, Procedural Order No. 1, 22 August 2013, UNCT/13/1, para. 14 (vii).

231 The *Methanex* tribunal noted that *amici curiae* were motivated by their own interests and as such not ‘independent’. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, paras. 38.

232 *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 27.

233 *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae*, 1 August 2003, paras. 4, 7.

cent of its annual budget, from UPS which further was one of its members prior to the submission.<sup>234</sup> This was not a singular incident. In *Glamis v. USA*, the tribunal received four *amicus curiae* petitions.<sup>235</sup> Each petition addressed the disclosure requirements of the FTC Statement, at least to some extent. The Quechan Indian Nation, a tribe that had been involved in the national proceedings given that the claimant's intended open-pit mining would adversely impact its ancestral lands, disclosed that it had received 'federal grants to support some of its governmental programming.'<sup>236</sup> The National Mining Association, an industry association, disclosed that the claimant was among its members, but it did not reveal its sources of income or who prepared the submission. The tribunal, finding that the public interest raised in the case required a liberal grant of access to the proceedings, still admitted all petitioners.<sup>237</sup> In *Bear Creek Mining v. Peru*, the tribunal expressly valued the particular information held by the *amicus curiae* petitioner – an NGO that had actively been involved with the local communities whose rights allegedly were violated by the claimant – higher than the disclosure requirements pursuant to Annex 836.1 of the Canada-Peru FTA that only partially had been met.<sup>238</sup>

In two recent cases, tribunals adopted a stricter approach. In *Philip Morris v. Uruguay*, the tribunal denied request for leave to the Inter-American Association of Intellectual Property for lack of independence from

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234 *UPS v. Canada*, *Amicus curiae* brief of the Chamber of Commerce, 10 October 2005. See also T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 *International and Comparative Law Quarterly* (2010), FN 166.

235 *Glamis v. USA*, Application of non-disputing parties for leave to file a written submission by Sierra Club, Earthworks, Earthjustice and the Western Mining Action Project, 16 October 2006; Application for Leave by the Quechan Indian Nation, 19 August 2005; Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, 13 October 2006; and Application by Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005.

236 *Glamis v. USA*, Application for Leave to File a Non-Party Submission, Submission of the Quechan Indian Nation, 19 August 2005, p. 2 ('To its best knowledge, the Tribe does not have an affiliation, either direct or indirect, with any disputing party; except that, it may, from time to time, receive federal grants to support some of its governmental programming.').

237 *Glamis v. USA*, Award, 8 June 2009, para. 286. The *amicus curiae* submissions from the two environmental NGOs contained no such information, but they openly argued in support of the respondent's position.

238 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 44.

the claimants, after the respondent notified the tribunal that claimants' lawyers served on the petitioners' board of management and other committees.<sup>239</sup> Similarly, in *Eli Lilly v. Canada*, two *amicus curiae* petitions were rejected because the claimant's Canadian subsidiary was a member in the two associations IMC and Biotecanada and, in addition to paying membership fees and publicly acknowledging to having relied on their services for lobbying purposes in respect of one of the disputed issues, several senior employees served on the associations' board of directors. Noting the interlinkages, the respondent in the case stressed: 'the role of *amici* in international arbitration proceedings ... is to assist the Tribunal, not to support a disputing party.'<sup>240</sup>

In *Apotex II v. USA*, the *amicus curiae* applicant had submitted a notice of intent regarding another case on behalf of an organization identified as the claimant's joint venture partner.<sup>241</sup> The tribunal did not condone Mr. Appleton's lack of disclosure of his affiliations and true interest in participating. It held that 'from the outset Mr. Appleton should have disclosed his involvement in the pending NAFTA cases, even if this information is publicly available,' but stated that because of the claimant's assurance that it was unrelated to Mr. Appleton, the omission had not been relevant.<sup>242</sup> While these clarifications must be welcomed, the lack of consequence of what can only have been an intentionally flawed disclosure sends an unfortunate signal to future petitioners.

Other tribunals have found that the mere assertion to not have received support from a party and general remarks about the financing were insufficient to determine petitioners' suitability, and that petitioners must com-

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239 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, para. 55.

240 *Eli Lilly v. Canada*, Letter by Canada on *amicus curiae* applications, 19 February 2016, Case No. UNCT/14/2, p. 6.

241 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 18-21. The claimants stated in their response that they had communicated with Mr. Appleton neither on the present arbitration, nor the *amicus* application, nor that they had provided any support to Mr. Appleton, nor had mandated him earlier.

242 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 45-46.

ment on their financial relationship with either party.<sup>243</sup> This approach is convincing, as sufficiency of mere allegations would place the onus on the parties to verify the allegations, which may lead to an escalation of costs and increase the risk of admission of unsuitable *amici curiae*.<sup>244</sup>

A novel aspect regarding independence was raised recently in *Philip Morris v. Uruguay*. The claimant argued, based on *Apotex II*, that the *amicus* petitioners – the World Health Organization (WHO) and the WHO’s Framework Convention on Tobacco Control Secretariat (WHO FCTC), as well as the Pan American Health Organization (PAHO) were not independent, because the respondent was an active member of the organizations and they further had provided different forms of support to their member states in conformity with their mandates.<sup>245</sup> The tribunal did not address these concerns in its orders. This approach is convincing. Otherwise, inter-governmental organizations *per se* would be excluded from participation. Further, their functional independence and organizational structure at least calls for a case-by-case assessment of their independence instead of a blanket exclusion. However, when assessing evidence such briefs can – and have proven to be – quite persuasive (see Chapter 7). Tribunals must be careful to not appear overly friendly towards intergovernmental organizations or states participating as *amici curiae* lest they risk being accused of interest capture.<sup>246</sup> With regard to *amicus curiae* participation by the European Commission, there is an additional dimension in respect of independence. Article 13(b) of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing

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243 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, pp. 12-13, paras. 32, 34: ‘In order for the Tribunal to evaluate the independence of the *Fundacion*, it would be necessary to have additional information on its membership. To judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationship, with the Claimants or the Respondent.’ The Tribunal rejected all of the four *amicus curiae* petitioners, but allowed them submit a new application for leave with the required information. See *Id.*, p. 13, para. 34.

244 E. Triantafilou, *Amicus submissions in investor-state arbitration after Suez v. Argentina*, 24 *Arbitration International* (2008), pp. 581-582.

245 *Philip Morris v. Uruguay*, Procedural Order No. 4, 24 March 2015, para. 12 and Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 11.

246 J. Fry/O. Repousis, *supra* note 121, p. 827 (Concerned that EU *amicus* participation ‘brings into question the potential effects and power of such intervention and the influence they can have over arbitral tribunals’ rulings.’).

transitional arrangements for bilateral investment agreements between Member States and third countries obliges member states to immediately inform the European Commission of any arbitration proceedings initiated under a BIT. Moreover, the member state and the EC ‘shall fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, the participation in the procedure by the Commission.’<sup>247</sup>

Expertise and experience of *amicus curiae* are considered to be highly important in all investment arbitrations. The FTC Statement recommends that a tribunal’s decision whether to admit a petitioner consider whether *amicus curiae* would offer a ‘perspective, particular knowledge or insight that is different from that of the disputing parties.’ Accordingly, petitioners have highlighted their expertise and experience, including as *amicus curiae* domestically and before international tribunals. An ICSID-administered tribunal rejected an application, because the *amicus curiae* applicants had not submitted *curricula vitae* and it felt unable to assess if the applicants possessed sufficient expertise and experience.<sup>248</sup> It stressed that it was not sufficient for a petitioner ‘to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns. It must show the Tribunal in *specific* terms how its background, experience, expertise, or special perspectives will assist the Tribunal in the particular case.’<sup>249</sup> In *Biwater v. Tanzania*, the tribunal remarked on the petitioners ‘specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania,’ and stated that their approach to the issues materially differed from that of the parties.<sup>250</sup> Further, international and local NGOs increasingly seek to participate

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247 See also C. González-Bueno/L. Lozano, *More than a friend of the court: the evolving role of the European Commission in investor-state arbitration*, Kluwer Arbitration Blog, 26 January 2015, at: <http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/> (last visited: 21.9.2017).

248 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, pp. 11-12, para. 30.

249 *Id.*, p. 13, para. 33.

250 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, paras. 46, 50 and Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 50, 359. The petitioners framed their request both under Article 37(2) and the suitability test, especially with respect to previous experience and their membership structure. Unfortunately, the tribunal shied away from generally commenting on the continued ap-

jointly. This is sensible. It allows the combination of international law expertise with expertise on the local facts and context of a case. An additional advantage to such joint undertakings was visible in *Piero Foresti v. South Africa*, an arbitration under the ICSID Additional Facility Rules. The tribunal accepted the petitioners' argument that in joint petitions petitioners' expertise and experience should be assessed collectively.<sup>251</sup>

In *Apotex I v. USA*, proceedings governed by the NAFTA and the UNCITRAL Rules, the tribunal rejected a request by the Study Center for Sustainable Finance, an institution linked to a for-profit management consulting firm for not providing 'a different perspective and a particular insight on the issues in dispute, on the basis of either substantive knowledge or relevant expertise or experience, that go beyond or differ in some respect from, that of the Disputing Parties themselves.'<sup>252</sup> The tribunal stressed that the condition should be interpreted broadly 'so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.'<sup>253</sup> The tribunal noted that the applicant had not pointed to any knowledge, experience or expertise with respect to any of the substantive or procedural issues of the case that were not already available to the tribunal.<sup>254</sup> For similar reasons, the tri-

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plicability of the suitability test under Rule 37(2). It merely noted that it had considered the requirements and that, based on the information provided, it might benefit from petitioners' participation. See also *Philip Morris v. Uruguay*, Procedural Order No. 4, 24 March 2015, para. 28 and Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 30.

251 *Piero Foresti v. South Africa*, Letter of admission, 5 October 2009, ICSID Case No. ARB(AF)/07/01.

252 *Apotex I v. USA*, Procedural Order No. 2, 11 October 2011, para. 21. Notably, the tribunal relied on the parameters established by the tribunal in *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 23. The decision was fully confirmed in 2013 when another tribunal received the identical submission. Although the dispute was conducted under the NAFTA and ICSID Additional Facility Rules, the tribunal relied largely only on the FTC Statement for its findings. The tribunal found also that Article 41(3) ICSID Additional Facility Rules and the FTC Statement were compatible. See *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, (hereinafter: *Apotex II v. USA*), Procedural Order on the Participation of the Applicant, BNM, as a non-disputing Party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, para. 27.

253 *Id.*, para. 22.

254 *Id.*, paras. 23, 27-28.

bunal in *Apotex II v. USA* rejected the application from Mr. Appleton, an international lawyer with substantial professional experience in NAFTA matters. The tribunal found that Mr. Appleton's offer to share his 'particular experience' on NAFTA interpretation was unlikely to surpass the combined expertise of the tribunal and the parties' counsel.<sup>255</sup> Thus, for many tribunals mere expertise is not sufficient to be granted leave to file a submission. *Amicus curiae* petitioners must be able to link their expertise to the legal or fact issues in dispute.<sup>256</sup>

Tribunals in practice have not given importance to impartiality, as the submissions by the EC, the Quechan, the WHO or many of the NGOs prove – and as indicated in the requirement that *amicus curiae* applicants state their interests in the arbitration. This changed recently in the joined cases *von Pezold v. Zimbabwe*, brought under the Germany/Switzerland-Zimbabwe BITs and the ICSID Arbitration Rules. The tribunal rejected a joint request for admission by the Germany-based international human rights NGO European Center for Constitutional and Human Rights (ECCHR) and four indigenous Zimbabwean communities.<sup>257</sup> The claimant questioned *inter alia* the petitioners' independence, because the indigenous communities had disclosed receiving assistance in the form of facilitation of communications with the ECCHR and in holding meetings to discuss the *amicus* application from a Zimbabwean organization that was run by a local Zimbabwean politician who was involved in Zimbabwe's resettlement policies. The tribunal held that Rule 37(2)(a) ICSID Arbitration Rules implied a duty of independence of *amici* towards the parties. Otherwise, they could not share information *different* from that of the parties, and that already '[t]he apparent lack of independence or neutrality of the Petitioners [was] a sufficient ground to deny the ... Application.'<sup>258</sup> While the decision is to be welcomed with respect to independence, the

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255 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 30-34.

256 T. Ruthemeyer, *supra* note 220, p. 248.

257 *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited and Others v. Zimbabwe (joined)* (hereinafter: *von Pezold v. Zimbabwe*), Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25.

258 *Id.*, paras. 49, 54-57. The tribunal further held that the petitioners had failed to satisfy any of the other criteria of Rule 37(2) ICSID Arbitration Rules. This will be discussed in greater detail below.

statements regarding neutrality raise concerns.<sup>259</sup> Not only is it unclear how petitioners shall possess and defend an interest in the arbitration whilst remaining neutral, but the statement is so broad that it has the potential to exclude any form of *amicus curiae* participation.<sup>260</sup>

Overall, case law shows that the application of the relatively similar criteria differs significantly. While all tribunals consider important the expertise and experience of *amicus curiae* and do not require it to be impartial, application of the requirement of independence differs widely, subjecting prospective *amici curiae* to an unfortunate uncertainty.

### VIII. Comparative analysis

The ICJ and the ITLOS stand out with their limitation of *amicus curiae* to intergovernmental organizations. This limitation (or rather *amicus curiae* participation as such) appears to be a historical remnant. The IACtHR and the ACtHPR have limited the instrument in the opposite direction. Submissions stem almost exclusively from individuals, NGOs and academic institutions. The other international courts and tribunals admit a broad range of *amici curiae*, including commercial and non-commercial, governmental and non-governmental, national and international, legal and natural persons. Interestingly, no case was found where an international court or tribunal explicitly solicited information from a source other than a state or an intergovernmental organization. The latter, in turn, have been hesitant to request leave to participate as *amicus curiae*.<sup>261</sup> An exception is the European Commission. It has requested leave to defend its legal interests – the adherence to EU law – in numerous investment cases. The notable scarcity of submissions from intergovernmental organizations and states may be due to the availability in most procedural rules of more effective avenues for participation or their ability to resort to political means to as-

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259 See also T. Ruthemeyer, *supra* note 220, pp. 252-256. He argues that the decision was due to the fact that the *amici* essentially sought to assert their own property interests and not to defend a public interest.

260 C. Beharry/M. Kuritzky, *Going green: managing the environment through international investment arbitration*, 30 *American University Intl. Law Review* (2015), p. 415. Their suggestion that *amicus curiae* can provide expert analysis of environmental risk assessments conflicts with the impartiality requirement and also risks circumventing rules on expert participation.

261 R. Mackenzie/C. Chinkin, *supra* note 146, p. 139.

sert their interests (effectively). Intergovernmental organizations may be hesitant to appear as *amicus curiae* because of their member states' differing interests and to avoid any appearance of bias towards a member state. Where the interests are clear, intergovernmental organizations have been willing to appear as *amicus curiae*, as the EC's submissions to investment tribunals prove.<sup>262</sup>

Most international courts and tribunals require *amici curiae* to possess special expertise and experience. Only investment tribunals have made this an express condition, but also the other international courts and tribunals reviewed value this element. These requirements are important, in particular, where the tribunal hopes to extract information from the *amicus curiae*.

An issue that touches upon the credibility of *amicus curiae* submissions is the accountability and representativity of *amicus curiae*. Accountability in this context means responsibility to a constituency. Representativity entails that an *amicus curiae* in some way legitimately can show to speak for those whose interests it claims to voice. The issue has barely received attention in the practice of international courts and tribunals. With the exception of the FTC Statement's nationality/locality requirement and the increasing number of international NGOs that team up with local NGOs to prepare submissions before investment tribunals, it is virtually absent. The matter has been increasingly discussed at the political level and in academia.<sup>263</sup> This issue is further examined in Chapter 8.

International courts and tribunals overwhelmingly accept submissions that are or seem partial. Is this warranted? Impartiality is understood to mean that *amici curiae* may not take the side of one of the parties with the intention of supporting the party, whereas independence describes financial or any other material or non-material reliance on one of the parties. The two concepts are related but distinct. Impartiality at most may be an indicator for lack of independence, but there is a significant difference be-

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262 See Annex I.

263 The OECD's Working Group on Transparency expressed that third parties should prove a substantive and legitimate interest in the issue they wish to comment upon and urged courts to oblige non-governmental *amici curiae* to demonstrate that their organization is accountable, professional and transparent, as well as independent from the parties to the dispute. See OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, Statement by the OECD Investment Committee, June 2005, p. 12.

tween *amici curiae* that support the views or arguments of a party and *amicus curiae* that are identical to a party or act as its mouthpiece.

Independence seems to be more of a concern than impartiality in international adjudication.<sup>264</sup> Most of the rules on *amicus curiae* participation require that the *amicus curiae* be ‘unrelated to the case’ or ‘different from one of the parties’. No court or tribunal has accepted the American litigating *amicus curiae*.<sup>265</sup> However, across the benches this requirement is not always strictly applied. This is surprising. If one party, without the knowledge of the international court or tribunal or the opposing party finances or uses *amicus curiae* to advance its case to the tribunal, it could affect due process and the procedural equality between the parties. The wide-reaching decision in *von Pezold v. Zimbabwe* seems to have been guided by this view. Furthermore, the risk remains that a party uses the instrument to circumvent rules on evidence that limit its ability to present information, such as regulations on the presentation of witnesses or experts.

With regard to impartiality, the above findings indicate that most tribunals expect that an *amicus curiae* participates to pursue or defend a direct or an indirect interest in the case. Investor state dispute settlement tribunals and the ECtHR interpret the requirement that *amici curiae* are ‘concerned’ to mean that they must somehow be affected by the case.<sup>266</sup> Accordingly, *amici curiae* may openly support the position of one of the

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264 But see T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvart (Ed.), *Yearbook of International Investment Law and Policy (2008-2009)*, p. 557 (‘If *amici* are truly independent of one party and there is no coordinated strategy, they risk being “unguided missiles”: Although intending to be supportive, they may reveal facts the litigating party would prefer not to be raised or make legal arguments that contradict the advocacy strategy of the party.’ [Emphasis added]).

265 The adoption of a submission does not fall hereunder. As emphasized by the Appellate Body in *US–Shrimp*, an adopted *amicus curiae* submission becomes part of the party submission. See Section A above.

266 For example, *Sadak and others v. Turkey (No.1)*, Nos. 29900/96, 29901/96, 29902/96, 29903/96, 17 July 2001, ECHR 2001-VIII; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V; *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No. 246-A; *Informationsverein Lentia and others v. Austria*, Judgment of 24 November 1993, Series A No. 276; *Chahal v. the United Kingdom*, Judgment of 15 November 1996, Reports 1996-V. An exception is *Capuano v. Italy*, Judgment of 25 June 1987, Series A No. 119, where the Registrar informed the Rome Lawyers’ Association that its written comments

parties. The IACtHR requires that *amici curiae* be unrelated to the case, but it regularly accepts *amici curiae* that were involved in the case and/or are interested in its outcome, indicating that it interprets the requirement along the lines of identity between *amicus curiae* and a party. The ICJ Statute and the ITLOS Rules are silent on this issue, but the invitations to Palestine in the *Wall* proceedings and to the authors of the declaration of independence in *Kosovo* show that the ICJ is willing, at least in exceptional cases, to hear the views of entities with a vested interest in the outcome. In academia, the matter is disputed. According to *Umbricht*, *amici curiae* may not have a direct legal interest at stake in the dispute,<sup>267</sup> while *Mavroidis* and *Ishikawa* define (and defend) *amici* as lobbyists of their own interests.<sup>268</sup> *Boisson de Chazournes* argues that a distinction should be made between *amici* acting in the public interest and industry groups representing their own interests and that only the former should be admitted.<sup>269</sup>

Should *amici curiae* be impartial?<sup>270</sup> It seems sensible to condition this on the function assigned to the respective *amicus curiae* by the interna-

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were restricted to the issue of the power of Italian judges over actions of the parties' representatives in civil proceedings, and that the Association should not take sides in its submission as this would be contrary to the spirit of the rules. Cited by A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/Herbert Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, pp. 348-349.

267 G. Umbricht, *supra* note 92, p. 778.

268 P. Mavroidis, *supra* note 88; T. Ishikawa, *supra* note 234, p. 268. See also the Statement from a GPI employee: '[ITLOS] is a route that might offer possibilities in the future. ... Greenpeace has gone to ITLOS before because of an issue around seabed mining in the past and the courts can really help to further cases of environmental issues and transparency.' At: <http://www.cdr-news.co.uk/categorie/s/arbitration-and-adr/featured/greenpeace-case-gathers-knots-at-itlos> (last visited: 21.9.2017).

269 L. Boisson de Chazournes, *supra* note 9, pp. 334-335. See also the critique of this view by A. Appleton, *Transparency, amicus curiae briefs and third party rights, discussion session*, 5 *Journal of World Investment and Trade* (2004), p. 343. *Stern* further notices the risk of a tension between non-state actors participating in the public interest and well-funded industry representatives. See B. Stern, *supra* note 98, p. 1454.

270 L. Bartholomeusz, *supra* note 17, p. 280 ('While *amici* may sometimes appear as advocates it seems that they must still conduct themselves in a manner consistent with the trust reposed in them as "friends of the court". In the course of deciding

tional court or tribunal. An *amicus curiae* that is admitted to defend an interest in virtually all cases will have to opt for a certain outcome of the case. In the typical adversarial processes before international courts, this is unproblematic, because the parties can challenge the brief.<sup>271</sup> Partiality is more problematic where an international court solicits or receives information from an *amicus curiae* that it expects to be neutral, for instance, in cases where ‘academics may try to leverage their credibility as teachers and scholars’ purporting to be neutral when in fact they are lobbying for a certain outcome.<sup>272</sup> In these constellations, support for a party or outcome may taint the reliability and credibility of the *amicus* and, in extreme cases, the court might appear biased. In all cases, measures may be necessary to ensure party equality (see Chapter 8).

Another question is whether an *amicus curiae* may pursue its own interest and if there are limits to the interests that *amici curiae* may defend. Especially in the WTO context it is argued that *amici curiae* should not be allowed to represent commercial and industrial interests. The expectation that an *amicus curiae* is a bystander to the proceedings who impartially advises the court on a matter of law or fact is somewhat unrealistic in international dispute settlement given the expense and effort of submitting a brief.<sup>273</sup> There is no doubt that many *amici curiae* participate to advance their own agenda.<sup>274</sup> But cutting out all types of *amicus* with a commercial or other ‘un-noble’ interest might keep tribunals from valuable information, for instance, from industry associations with special insight into the

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in the *Milosevic* proceedings that one *amicus* was no friend of theirs, the ICTY indicated that an *amicus* had to “act fairly in the performance of his duties [and] discharge his duties ... with the required impartiality”. [Reference omitted].

271 M. Schachter, *The utility of pro bono representation of US-based amicus curiae in non-US and multi-national courts as a means of advancing the public interest*, 28 *Fordham International Law Journal* (2004), p. 119.

272 A. Kent/J. Trinidad, *supra* note 188, p. 1088.

273 C. Brühwiler, *supra* note 9, p. 348; T. Ishikawa, *supra* note 234, p. 268; *Jaffee v. Redmond*, 518 US 1, 35-36, Diss. Op. US Supreme Court Justice Scalia: ‘[T]here is no self-interested organization out there devoted to pursuit of the truth in the federal courts[, t]he expectation is ... that th[e] Court will have that interest prominently – indeed, primarily – in mind.’

274 See Interights and ILGA-Europe on strategic human rights litigation, at: <http://www.interights.org/our-work/index.html> and <https://www.ilga-europe.org/what-we-do/our-advocacy-work/strategic-litigation> (last visited: 21.9.2017).

impact of a decision.<sup>275</sup> The case law of the IACtHR and the ECtHR illustrate the benefits of these *amici curiae*.

International courts and tribunals can effectively manage the interests of *amici curiae* through disclosure requirements. Transparency with respect to the membership, activities and financing of *amici* as well as the specific drafters of a brief are indispensable for the evaluation of information submitted. Otherwise, the court risks to be manipulated to the detriment of one party, and it might even violate its duty to render an informed and reasoned decision in case of erroneous assessment of the information provided by an *amicus curiae*. If an international court or tribunal is made aware of dependency or partiality, it can seek to remedy any potential inequalities through procedural means such as sufficient time to react to submissions, adaptation of deadlines, etc. Disclosure requirements are instrumental for the assessment of the content of an *amicus curiae* submission. In this respect, disclosure requirements are also an opportunity for prospective *amici curiae* to enhance their credibility and for the tribunal to get a clearer view of the *amici's* true interests in participating.<sup>276</sup> Many prospective *amici curiae* voluntarily provide the court with information on their entity in general, their expertise and their experience to enhance their credibility.

### C. Request for leave procedures

A request for leave procedure requires those interested in participating as *amicus curiae* without having been solicited by the respective international court or tribunal to apply for permission to do so.<sup>277</sup> Unsolicited submissions are much more frequent than solicited submissions (see Annex I).

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275 A. Appleton, *supra* note 269, pp. 343-344 (The 'industry should have a voice' as it has 'different voices and they all can help society on certain issues.').

276 M. Schachter, *supra* note 271, p. 131 ('[D]isclosures by *amici* enhance their credibility before the court, both by openly identifying interests and potential biases and by negating any biases that a court might erroneously or presumptively infer.').

277 Request for leave procedures do not apply where international courts or tribunals solicit the participation of a specific *amicus curiae*. In that case, the court has already concluded its screening of the solicitee prior to establishing the contact.

A request for leave procedure can be highly advantageous. If duly exercised, it filters desirable from undesirable briefs and ensures that a court is not swamped. This is particularly relevant where courts receive a large number of *amicus curiae* submissions.<sup>278</sup> A transparent request for leave procedure augurs preventative and educational effects. It may motivate petitioners with useful contributions to apply whilst discouraging submissions that would not be helpful. A request for leave procedure can be very cost-efficient if only useful *amicus curiae* are admitted.<sup>279</sup> It also permits courts to influence the content of a brief. They can tailor its substance and form. Accordingly, a request for leave procedure can effectively manage *amicus curiae*'s as well as parties' expectations and foreshadow the potential relevancy of a submission.

Given these advantages, it is not surprising that most international courts and tribunals have created request for leave procedures for *amicus curiae* participation.<sup>280</sup> A few courts have abstained from such a procedure, but essentially all courts reviewed have installed at least some (unwritten) admission criteria, usually in respect of timing. This includes the

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278 This was also one of the reasons for the rejection of *amicus curiae* participation in *South West Africa*. The Registrar stated that an admission might 'open the floodgates to what might be a vast amount of proffered assistance.' See *South West Africa*, Advisory Opinion, 21 June 1971, Letter No. 21 (The Registrar to Professor Reisman), Part IV: Correspondence, ICJ Rep. 1971, pp. 638-639.

279 In *EC-Seal Products*, the panel received, among other briefs, whose informative value stands to debate. The most eclectic brief was a two-page long brief from the actress Pamela Anderson on behalf of animal activist group PETA expressing the hope that the panel would uphold the EC's ban on imports of seal products, which Canada had challenged. See *EC-Seal Products*, Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R, p. 14, FN 16; *Pamela Anderson/People for the Ethical Treatment of Animals (PETA)*, Written Submission of Nonparty *Amici Curiae*, 12 February 2013, at: [http://www.media-peta.com/peta/pdf/Pamela\\_Anderson\\_WTO.pdf](http://www.media-peta.com/peta/pdf/Pamela_Anderson_WTO.pdf) (last visited: 21.9.2017). For further benefits of such a procedure, see R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 304.

280 Some courts with the publication of a request for leave procedure have issued public invitations to potential *amici*, see *Apotex II v. USA*, Invitation to *Amici Curiae*, ICSID News Release, 31 January 2013; *Pac Rim v. El Salvador*, ICSID New Release, 2 February 2011, ICSID Case No. ARB/09/12; *EC-Asbestos*, Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, AB-2000-11, WT/DS135/9.

ICJ and the ITLOS whose procedural regimes do not mention a request for leave procedure for participation in contentious or in advisory proceedings, possibly due to the restrictive scope of participation offered by their procedural regimes. Only Article 66(3) ICJ Statute in cases where a state has not been notified of the possibility to make a submission stipulates that a state ‘may express a desire to submit a written statement or to be heard; and the Court will decide.’<sup>281</sup> Based on its wording, Article 36(2) ECHR only contemplates solicited *amicus curiae* participation before the ECtHR.<sup>282</sup> In practice, the court only exceptionally invites *amici curiae*.<sup>283</sup> Virtually all *amicus curiae* submissions to the ECtHR are unsolicited and the court has since the first admission of *amicus curiae* applied a request for leave procedure which is now enshrined in its rules. In so far, the ECtHR Rules are broader than Article 36(2) ECHR. A request for leave procedure is not required by the ECtHR if a case is referred to the Grand Chamber and the *amicus curiae* was already admitted to the chamber proceedings.<sup>284</sup> The IACtHR until recently appears to have barely restricted admissions to enable the greatest participation by civil society in an effort to strengthen human rights (and human rights dialogue) in the Americas.<sup>285</sup> However, this approach likely entailed significant administrative burdens and required the court to assess and consider submissions of limi-

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281 See Article 34(2) and (3) ICJ Statute and Article 69 (3) ICJ Rules; Articles 84(2) and 133 (2) and (3) ITLOS Rules.

282 Article 36(2) ECHR: ‘2. The President of the Court may, in the interest of the proper administration of justice, *invite* any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.’ [Emphasis added].

283 The data analysis showed only five such cases: *Kyprianou v. Cyprus*, No. 73797/01, 27 January 2004; *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007; *Kearns v. France*, No. 35991/04, 10 January 2008; *Suljagić v. Bosnia and Herzegovina*, No. 27912/02, 3 November 2009.

284 *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Gäfgen v. Germany* [GC], No. 22978/05, 1 June 2010, ECHR 2010. An *amicus curiae* petitioner can also apply directly to the Grand Chamber without having participated in the Chamber proceedings. See *Kononov v. Latvia* [GC], No. 36376/04, 17 May 2010, ECHR 2010.

285 See Article 44 IACtHR November 2009 Rules; *Kimel v. Argentina*, Judgment (Merits, Reparations and Costs), 2 May 2008, IACtHR Series C No. 177, pp. 4-5, para. 16; *Castañeda Gutman v. Mexico*, Judgment (Preliminary exceptions Merits, Reparations and Costs), 6 August 2008, IACtHR Series C No. 184, p. 5, para. 14.

ted value. The court has increasingly put in place (and enforced) formal admission criteria. The WTO panels and the Appellate Body have abstained from establishing a request for leave procedure following the backlash from member states to the *EC–Asbestos* Additional Procedure. The latter remains an important guidepost for *amicus curiae* applicants (see Section B).

Even in international courts and tribunals that have not published a request for leave procedure, prospective *amici curiae* usually attach to their submissions a formal request for leave. This approach facilitates international courts and tribunals' assessment of briefs, and voluntary disclosures bolster the credibility of substantive submissions by *amici curiae*.

This section considers the existing requests for leave procedures and admission criteria established by international courts and tribunals that do not provide for a formalised request for leave procedure. The first part examines the formal requirements (I.), followed by the substantive requirements (II.). The third part discusses international courts and tribunals' exercise of discretion in the admission of *amici curiae* (III.).

## I. Formal requirements

While it is common to establish formal requirements for an *amicus curiae* submission, it is less common to establish them for the application process. Formal requirements concern in particular the timing (1.) and length (2.) of a request for leave. In addition, as shown in the previous section, investment arbitration regulations and tribunals increasingly establish formal disclosure requirements for *amicus curiae* petitioners.

### 1. Timing

Timing is one of the most important procedural aspects of *amicus curiae* participation in practice.<sup>286</sup> The international court or tribunal must balance competing interests, especially the interest in a speedy and efficient

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286 *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.81 ('The panel ... considers timing of the *amicus curiae* submission plays an important role in the acceptance or rejection of *amicus curiae* briefs.').

discharge of the case with that of obtaining as complete an understanding of the case as possible and giving *amici curiae* sufficient time to prepare useful contributions. To satisfy the latter concern, an international court or tribunal may set filing deadlines after the publication of party submissions. Due to regular overlaps regarding timing of requests for leave and the filing of briefs (which often coincide), these aspects are considered jointly.

The ICJ and ITLOS may request submissions from intergovernmental organizations ‘at any time prior to the closure of the oral proceedings.’<sup>287</sup> Unrequested briefs by intergovernmental organizations must be submitted before closure of the written proceedings.<sup>288</sup> Pursuant to Articles 84 and 133(3) ITLOS Rules, the ITLOS or its Chambers respectively fix time limits for submissions by order. This regulation accords with Article 49 ITLOS Rules’ encouragement that the ITLOS and its Chambers conduct proceedings ‘without unnecessary delay or expense.’<sup>289</sup> Timing does not seem to have been an issue so far. In *Responsibilities*, the President of the Chamber decided to accept into the case file a statement from the United Nations Environment Programme that had been received more than twenty days after the expiration of the deadline.<sup>290</sup> These time limits are more lenient than those established for intervention.<sup>291</sup>

According to Rule 44 ECtHR Rules, requests for leave at the earliest may be decided after notice of an application has been given to the respondent Contracting Party under Rule 51(1) or Rule 54(2)(b) ECtHR Rules. Further, they must be submitted at the latest twelve weeks after notice of the application has been given. The President of the Chamber may extend the time limit for exceptional reasons.<sup>292</sup> The same timeframe applies in

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287 Article 84 ITLOS Rules; Article 69 (1) ICJ Rules.

288 Article 84(2) ITLOS Rules.

289 See also Article 49 ITLOS Rules: ‘Time-limits for the completion of steps in the proceedings may be fixed by assigning a specified period but shall always indicate definite dates. Such time-limits shall be as short as the character of the case permits.’ See also P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2006, p. 144.

290 *Responsibilities*, Advisory Opinion, 1 February 2010, ITLOS Case No. 17, para. 16.

291 See Article 99(1) ITLOS Rules; Article 67(1) ICJ Rules; Article 81(1) ICJ Rules. With regard to requests for appointment of experts under Article 289 UNCLOS, see Article 15(1) ITLOS Rules.

292 Rule 44(3) (a), (b) ECtHR Rules. The President may not receive requests prior to notice of appeal.

all Grand Chamber proceedings. There, the twelve-week period begins with the notification of the parties of the referral to the Grand Chamber.<sup>293</sup> These regulations are problematic in so far as the notification is not public and may not always coincide with the date of posting of the notification on the ECtHR's website.<sup>294</sup> Any delay in posting reduces the time for potential *amici curiae* to prepare their submission. This system is stricter than the regulation in former Rule 61(3) in force until November 2003, likely due to the increase in *amicus curiae* requests.<sup>295</sup> The change has had a significant impact. Many requests are now made prior to the decision on admissibility in an attempt to influence the decision. According to *Judge Vajic*, the reform has increased the usefulness of submissions. The hearing on admissibility now deals with both the admissibility and the merits of the case.<sup>296</sup> Early participation has the additional benefit that no exchange of written observations is required after the hearing on issues discussed at the hearing.<sup>297</sup>

While the ECtHR Rules establish a deadline for requests for leave, Rule 44(5) subjects time limits for submissions to the discretion of the President of the Chamber. The President has not established a fixed schedule for submissions. Submissions are accepted at all stages of the proceedings

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293 Rule 44(4) (a) ECtHR Rules. See also Articles 30 and 43 ECHR. See N. Vajic, *Some concluding remarks on NGOs and the European Court on Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 99.

294 L. Crema, *Tracking the origins and testing the fairness of the instruments of fairness: amici curiae in international litigation*, Jean Monnet Working Paper 09/12, 2012, p. 21.

295 Former Rule 61(3) determined that requests for leave had to be submitted 'within a reasonable time after the fixing of the written procedure.' The ECtHR has rejected requests for untimeliness, without giving any further details of the circumstances. See *Öcalan v. Turkey* [GC], No. 46221/99, 12 May 2005, ECHR 2005-IV; *Phillips v. the United Kingdom*, No. 41087/98, 5 July 2001, ECHR 2001-VII and (dec.), 30 November 2000; *Goddi v. Italy*, Judgment of 9 April 1984, Series A No.76 (The request was submitted one working day before the hearings). The court has shown some flexibility in the admission of requests for leave. In *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161, the request was received and accepted 11 days before the opening of the oral proceedings.

296 N. Vajic, supra note 293, p. 98.

297 *Id.*, referring to *Hatton and others v. the United Kingdom*, No. 36022/97, 2 October 2001; *Brumărescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I.

before chambers and the Grand Chamber, including, in several cases, after the closure of the hearings.<sup>298</sup> The ECtHR routinely grants extensions of time limits and allows *amici curiae* to supplement submissions.<sup>299</sup> As the Rules prescribe that the parties must be given an opportunity to comment on submissions, the ECtHR's scheduling practice must ensure that sufficient time is allocated for comments.

The IACtHR Rules do not establish a formal request for leave procedure. Article 44(3) IACtHR Rules allows the filing of *amicus curiae* submissions until 15 days after the closure of public hearings or, in cases without hearings, 15 days after the issuance of the order setting deadlines for the submissions of final arguments. The IACtHR can deem the provision applicable in advisory opinion proceedings (see Section A). Having been more lenient earlier, the court now strictly enforces this deadline and rejects briefs submitted late. Briefs received only a few days late are not admitted, even if the IACtHR received the submission in a non-working language of the case on time.<sup>300</sup> The court practice is conflicting as to the basis on which late briefs or late translations of briefs in the language of

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298 *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93 (*amicus curiae* brief by MIND received after the oral proceedings); *Capuano v. Italy*, Judgment of 25 June 1987, Series A No. 119 (submission received 2 weeks before hearing); *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I (the brief was supplemented 6 weeks after the opening of the oral proceedings); *Hatton and others v. the United Kingdom*, No. 36022/97, 2 October 2001 (Leave granted for after the hearing on admissibility and merits).

299 *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82; *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93; *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, ECHR 2000-I; *Pham Hoang v. France*, Judgment of 25 September 1992, Series A No. 243; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I.

300 *Vélez Restrepo and Family v. Colombia*, Judgment of 3 September 2012 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 248, paras. 67-68; *Fontev ecchia and d'Amico v. Argentina*, Judgment of 29 November 2011, IACtHR Series C No. 238; *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219; *Veliz Franco y Otros v. Guatemala*, Judgment of 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 277, para. 64; *Brewer Cariás v. Venezuela*, Judgment of 26 May 2014 (Preliminary Objections), IACtHR Series C No. 278, para. 10. It is not clear whether the court made an exception in *Kaliña*

the proceedings are rejected. Article 44(2) of the IACtHR Rules provides that briefs submitted out of time shall be archived without further processing, but the provision contextually refers only to briefs submitted unsigned and electronically or without annexes. The language requirement is addressed in Article 44(1) and the time limit in Article 44(3) neither of which spell out consequences of failure to comply. With respect to late filings of translations, the IACtHR in *Artavia Murillo and others (Fecundación in vitro) v. Costa Rica* applied the 21-day deadline established in Article 28 of its Rules to briefs whose translations in the correct language were received after the expiration of the time limit.<sup>301</sup> The application of Article 28(1) is not entirely convincing, as the reference in Article 44 to Article 28(1) both in the English and Spanish language versions of the Rules only refers to the ‘means’ or ‘medios’ of submission. Further, the wording of Article 28(1) is equivalent in scope to Article 44(2) in that it does not address the late filing of hard copy briefs in the right language.<sup>302</sup>

Article 44(3) states that ‘briefs may be submitted at any time during contentious proceedings.’ Thus, the earliest date of submission is after notification of the dispute to the respondent. Article 44(4) clarifies that briefs may be submitted also in compliance monitoring and in provisional measures proceedings.<sup>303</sup> A review of cases indicates that *amicus* submissions are often made shortly before or after the hearing, thus, at a stage where

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*and Lokono Peoples v. Suriname*. It noted that an *amicus curiae* brief from *Fundación Pro Bono-Colombia* had been received in the official language of the case more than one month after the public hearing, but it did not state whether the court accepted or rejected the brief. See *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015 (Merits, Reparations and Costs), IACtHR Series C No. 309, para. 9. See also *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), Judgment of 31 August 2001, IACtHR Series C No. 79, para. 41 (The IACtHR accepted the required Spanish translation of an *amicus curiae* brief by the Assembly of First Nations nine months after the brief had been submitted in English).

301 *Artavia Murillo and others (Fecundación in vitro) v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 28 November 2012, IACtHR Series C No. 257, para. 15.

302 F. Rivera Juaristi, *supra* note 65, pp. 118-120. *Rivera Juaristi* suggests that the rules should be modified to include a regulation of this aspect.

303 This is a novel development. In 1999, in *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, the court rejected a request by a group of individuals to be heard as *amici curiae* ‘in all the oral and written instances’ on the account that that ‘until the reparations stage, the possibility of participating in the proceedings before [the] Court was restricted to the parties to the respective

the parties' arguments are largely known. Under the new rules, the IACtHR may receive submissions after the closure of the oral proceedings.<sup>304</sup> In *Kimel v. Argentina* and in *Castañeda Gutman v. Mexico*, the respondent states and the representatives of the victims each requested the IACtHR not to consider *amicus curiae* submissions that had been submitted after closure of the oral proceedings, that is, after the stage designated for the presentation and discussion of the case by the parties.<sup>305</sup> The IACtHR did not agree that the brief by the Civil Rights Association was untimely, because

*amici curiae* briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court. Hence, they may be submitted at any stage before the deliberation of the pertinent judgment.<sup>306</sup>

This approach implies that the IACtHR does not consider party comments on *amicus curiae* submissions obligatory or necessary.<sup>307</sup> Apart from risk-

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case.' *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Judgment of 5 February 2001 (Merits, Reparations and Costs), IACtHR Series C No. 73, para. 21. Rule 44(4) in its current form was inserted in the IACtHR Rules in November 2009. The first regulation of *amicus curiae* in the January 2009 IACtHR Rules of Procedure did not contain such a rule.

- 304 *Juridical Condition and Human Rights of the Child*, Advisory Opinion No. OC-17/02 of 28 August 2002, IACtHR Series A No. 17, pp. 9, 11, paras. 38, 40; *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, p. 4, para. 10 (The hearing took place on 3 July 2009 and *amici curiae* made final written submissions on 10 August 2009); *Lori Berenson Mejía v. El Salvador*, Judgment of 25 November 2004 (Merits, Reparations and Costs), IACtHR Series C No. 119; *De la Cruz Flores v. Perú*, Judgment of 18 November 2004 (Merits, Reparations and Costs), IACtHR Series C No. 115; *Yatama v. Nicaragua*, Judgment of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 127; *The "Mapiripán Massacre" v. Columbia*, Judgment of 15 September 2005 (Merits, Reparations and Costs), IACtHR Series C No. 134, p. 10, para. 46.
- 305 *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008, IACtHR Series C No. 184, p. 5, paras. 13-14. The *amicus curiae* submissions at issue were submitted approximately one and four months after closing of the respective files.
- 306 *Kimel v. Argentina*, Judgment of 1 May 2008, IACtHR Series C No. 177, p. 4, para. 16.
- 307 E.g. *Claude Reyes and others v. Chile*, Judgment of 19 September 2006, IACtHR Series C No. 151.

ing delay in deliberations, this practice is problematic in terms of due process (see Chapter 8).

WTO panels and the Appellate Body's main consideration with respect to timing is the protection of the parties' due process rights and the avoidance of disruptions in the proceedings.<sup>308</sup> Early submissions seem to be favoured even though this might negatively affect their quality, because the parties may not have disclosed information on the case yet.<sup>309</sup> Submissions received prior to the composition of the panel have been considered for admission. This indicates that panels do not have an earliest date for submissions. *Amici curiae* are generally required to submit their written briefs at the latest before the second substantive meeting with the parties or before the expiry of the deadline for the parties' rebuttal submissions approximately fourteen weeks after the composition of the panel.<sup>310</sup> Several panels have required submissions to be made even before the first sub-

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308 In *Argentina–Textiles and Apparel*, the panel considered that there were no specific rules of procedure prohibiting the practice of submitting additional evidence after the first hearing of the panel. The proper approach was to consider whether the practice conflicted with due process obligations. See *Argentina–Textiles and Apparel*, Report of the Panel, adopted on 22 April 1998, WT/DS56/R, 6.55. See also *Third Party Participation in Panels*, Statement by the Chairman of the Council, C/COM/3 of 27 June 1994; *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 2.2; *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/R, pp. 24-25, para. 6.3 ('The AISI brief was submitted after the deadline for the Parties' rebuttal submissions, and after the second substantive meeting of the Panel with the Parties. Thus, the Parties have not, as a practical matter had adequate opportunity to present their comments on the AISI brief to the Panel. In our view, the inability of the Parties to present their comments on the AISI brief raises serious due process concerns as to the extent to which the Panel could consider the brief. In accordance with Art. 12.1 of the DSU, the Panel may have been entitled to delay its proceedings in order to provide the Parties sufficient opportunity to comment on the AISI brief. However, we considered that any such delay could not be justified in the present case.')

309 *European Communities–Approval and marketing of biotech products* (hereinafter: *EC–Biotech*), Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.10. See G. Marceau/M. Stilwell, supra note 211, p. 181 (Submissions should be made before the first substantive meeting, ie within 10 weeks from the composition of the panel).

310 *European Communities – Anti-Dumping Measures on Farmed Salmon from Norway* (hereinafter: *EC–Salmon*), Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12-1-13. *EC–Asbestos*, Report of the Panel, adopted on 18 September 2000, WT/DS135/R, para. 6.4 (The submission was received 6

stantive meeting approximately ten weeks after the composition of the panel.<sup>311</sup> The request for early submissions in the WTO Appellate Body and panels is in accordance with the DSU's declared goal to solve disputes promptly and the correspondingly tight panel and appellate review schedules.<sup>312</sup> These deadlines are difficult to meet for *amici curiae* as procedural timetables are confidential.<sup>313</sup> The panel in *EC–Sugar* took a more flexible approach upon receiving almost two weeks following the second substantive meeting an *amicus curiae* brief by the German industry association of sugar producers 'Wirtschaftliche Vereinigung Zucker' (WVZ). Though the submission was ultimately rejected for other reasons, the panel found that the brief was timely because it earlier had extended the written

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months after the second substantive meeting and three months before issuing of the award.); *Mexico–Tax Measures on Soft Drinks and Other Beverages* (hereinafter: *Mexico–Taxes on Soft Drinks*), Report of the Appellate Body, adopted on 6 March 2006, WT/DS308/AB/R, para. 8, FN 21 (*Amicus* brief received 5 days before the hearing rejected as 'unnecessary' after the United States had argued untimeliness); *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R.

- 311 In *US–Softwood Lumber III*, the panel rejected three applications received after the first substantive meeting. A reason for the stricter decision might have been that an application received prior to the first substantive meeting had already been discussed. See *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* (hereinafter: *US–Softwood Lumber III*), Report of the Panel, adopted on 1 November 2002, WT/DS236/R, paras. 7.2, 12. See also *US–Softwood Lumber IV*, Report of the Panel, adopted on 17 February 2004, WT/DS257/R/Corr.1; *EC–Biotech*, Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, p. 284, para. 7.10; *EC–Seal Products*, Report of the Appellate Body, WT/DS400/AB/R, WT/DS401/AB/R, adopted on 18 June 2014, para. 1.15 (A brief received on the first day of hearings was rejected for untimeliness, because participants and third participants must be given an adequate opportunity to consider any written submission duly.).
- 312 Cf. Article 3(3) DSU. Article 12(8) and (9) DSU sets a general deadline of six and an absolute deadline of nine months for panel proceedings. For review proceedings, the time limits are 60 and 90 days respectively, see Article 17(5) DSU.
- 313 G. Marceau/M. Stilwell, *supra* note 211, p. 182. See the recent efforts made by Canada to assuage this problem, WTO, *Statement on a Mechanism For Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Additional Practices and Procedures In the Conduct of WTO Disputes; Transparency of Dispute Proceedings*, 18 July 2016, No. JOB/DSB/1/Add. 3.

phase of the proceedings upon request by the complainant.<sup>314</sup> This decision is sensible. There was no need to reject the submission in this case for untimeliness, because it did not conflict with the parties' procedural schedule and their opportunity to comment on it. Panels have applied the same time limits with respect to submissions solicited pursuant to Article 13 DSU.<sup>315</sup> *Amici curiae* have been permitted to participate in compliance monitoring proceedings pursuant to Article 21(5) DSU.<sup>316</sup> A special regime applies in the case of party-annexed *amicus curiae* submissions. In *US–Shrimp*, India protested against the USA's annexing of parts of one of the *amicus curiae* briefs during the second substantive meeting, because the introduction of new evidence was outside the scope of the meeting and the formal rebuttal session had been completed.<sup>317</sup> The panel still accepted the information, because the brief was considered to form part of the USA's submission and, therewith, the rules on timely submission of party evidence applied, which exceptionally allowed the submission of evidence up to the interim review stage.<sup>318</sup>

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314 *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, p. 132, paras. 7.81-7.82.

315 Cf. *China – Measures Affecting Imports of Automobile Parts* (hereinafter: *China–Auto Parts*), Report of the Panel, adopted on 12 January 2009, WT/DS339/R, WT/DS340/R, WT/DS342/R, para. 2.5.

316 See *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW; *US–Tuna II (Article 21.5)*, Report of the Appellate Body, adopted on 3 December 2015, WT/DS381/AB/RW, FN 68.

317 India argued that this amounted to a violation of Article 12(1) and Appendix 3(7) DSU. See *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 3.130.

318 In *Argentina–Textiles and Apparel*, the Appellate Body held that acceptance of certain evidence two days prior to the second substantive meeting did not constitute a violation of Article 11 DSU as 'the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence.' *Argentina–Textiles and Apparel*, Report of the Panel, adopted on 22 April 1998, WT/DS56/R, para. 82. See also *Canada–Aircraft*, Report of the Panel, adopted on 20 August 1999, WT/DS70/R, p. 170, paras. 9.73-9.74. However, no submission of new evidence at the interim review stage is allowed, see *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 301.

There are typically no fixed rules in investment treaties and institutional rules on the timing of a request for leave or a submission.<sup>319</sup> The FTC Statement, Rule 37(2) ICSID Arbitration Rules and Article 4 UNCITRAL Rules on Transparency determine that a submission should not disrupt the proceedings and that the parties must be given an opportunity to comment on it. In practice, tribunals emphasize that submissions should be received well before the hearing in order to ‘integrat[e] the *amicus* process into the general course of the arbitration.’<sup>320</sup> Accordingly, the appropriate timing of a request for leave depends on the particularities of each case.<sup>321</sup> Tribunals strive to accommodate the instrument within their procedural schedules to avoid overlaps with other deadlines and to not unduly burden the parties.<sup>322</sup> The difficulties of this endeavour were apparent in *Glamis v. USA*. The tribunal first shortened and later extended the deadline following changes in the procedure of the case.<sup>323</sup> Tribunals that work with detailed procedural schedules have a propensity to accommodate *amicus cu-*

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319 Section 44 of Annex 29-A to the CETA constitutes an exception. The mandatory deadlines established in the provision – absent party agreement submission must be made within 10 days of the date of the establishment of the panel – will render it exceptionally difficult for an *amicus curiae* to make meaningful contributions.

320 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, para. 21. The submission was received eight months prior to the hearing and six months before the deadline for submission of memorials. See also *Vito Gallo v. Canada*, Claimant’s submission, 29 February 2008, PCA Case No. 55798, pp. 28-29 (The claimant asked for a determination of the timing of *amicus* briefs, because ‘[a]llowing the possibility of further evidence to be adduced by *amicus curiae* at some point after the memorials have been delivered essentially represents a re-opening of the record and might require the submission of responding witness statements and/or other forms of evidence.’).

321 See Rule 26 ICSID Arbitration Rules (No fixed time schedule in ICSID arbitrations).

322 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 21.

323 The tribunal, noting that the time foreseen for *amicus curiae* applications and submissions in the procedural order risked causing delay, shortened submission deadlines from 3 March 2006 to 30 September 2005. The deadline was later extended upon request by petitioners by one month after the due date of the counter-memorial to allow for ‘meaningful contributions’. *Glamis v. USA*, Award, 8 June 2009, paras. 267-271, 275-280.

*riae* participation already at the outset of the proceedings.<sup>324</sup> Where the investment treaty contemplates submissions by member states to the treaty (non-disputing parties), tribunals have often tried to align due dates for submissions from *amici curiae* and non-disputing parties.<sup>325</sup> This approach is useful to ensure the efficiency of proceedings and to minimize disruptions.

Most requests for leave are made at the merits stage of the proceedings, often prior to or during the first round of submissions.<sup>326</sup> It is unlikely that tribunals would be willing to receive submissions after the closing of hearings if this would prolong the proceedings.<sup>327</sup> Requests have also been received during the jurisdictional phase, with mixed reactions (see Chapter 6). *Amicus curiae* submissions at the earliest can be received and processed once a tribunal is constituted. In an ICSID-administered arbitration, a premature request for leave was simply shelved and processed upon con-

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324 See *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011.

325 *Merrill and Ring v. Canada*, Award, 31 March 2010, para. 24; *Commerce Group v. El Salvador*, Minutes of the First Session of the Tribunal, 27 July 2010, para. 13.3; *Glamis v. USA*, Award, 8 June 2009, para. 280.

326 E.g. *Micula v. Romania*, Award, 11 December 2013, ICSID Case No. ARB/05/20, para. 36; *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae* re modalities of *amicus curiae* participation, 1 August 2003, para. 7 (When the exchange of documents is completed and any interrogatories are answered, the *amici* may apply to the Tribunal); *Merrill & Ring v. Canada*, Award, 31 March 2010, paras. 18, 24-25 (Submissions were received only ten days before the beginning of the merits hearing on 18 May 2009); *Eli Lilly v. Canada*, Procedural Order No. 3, 15 January 2017, Case No. UNCT/14/2, para. 4 ('[T]he Tribunal agrees with the Respondent's position that this deadline [for applications for leave] should not precede publication of the Disputing Parties' written submissions, as potential *amici* should have the opportunity to review all such submissions.'). See also R. Happ, *Rule 37*, in: R. Schütze (Ed.), *Institutionelle Schiedsgerichtsbarkeit, Kommentar*, 2<sup>nd</sup> Ed., Cologne 2011, p. 1021, para. 5.

327 This was done by the tribunal in *Ethyl Corp.* with respect to a submission by Mexico under Article 1128 NAFTA. The brief was received after the hearings, around the time the tribunal announced circulation of the award. Instead of rejecting the submission for untimeliness, the tribunal circulated it to the parties and gave them an opportunity to comment on it. *Ethyl Corp. v. Canada*, Preliminary Tribunal Award on Jurisdiction, 24 June 1998, para. 36. See M. Hunter/A. Barbuk, *Procedural aspects of non-disputing party interventions in Chapter 11 arbitrations*, 3 *Asper Review of International Business and Trade Law* (2003), pp. 154-155.

stitution of the tribunal.<sup>328</sup> However, in two recent cases, tribunals rejected applications by the European Commission for untimeliness. In one case, the request was received shortly after the first meeting of the tribunal and in the other case, it was received shortly after the claimant had filed its memorial on jurisdiction.<sup>329</sup> In cases where the petitioners have access to the case documents, it is useful for them to await and review at least the first round of the parties' submissions prior to submitting a brief.<sup>330</sup> Practical difficulties for *amicus curiae* applicants arise out of the fact that only ICSID cases underlie mandatory public notification (cf. Article 22(1) ICSID Financial and Administrative Regulations). Applicants may learn of a case very late.<sup>331</sup> For this reason, the recent public invitations of submissions by several investment tribunals (often through the ICSID web-

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328 The ICSID notified the *amicus curiae* petitioner that it would transmit the petition to the tribunal after it was constituted and forwarded it to the parties, see *Infinito Gold v. Costa Rica*, Letter by the ICSID to Asociación Preservacionista de Flora y Fauna Silvestre, 16 September 2014, ICSID Case No. ARB/14/5. Upon its constitution, the tribunal invited the parties to comment and then decided on the request, see *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5.

329 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energía Termosolar B.V. v. Kingdom of Spain*, Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 15 December 2014, ICSID Case No. ARB/13/31; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 17 December 2014, ICSID Case No. ARB/13/36.

330 *Glamis v. USA*, Award, 8 June 2009, paras. 278-279 and Procedural Order No. 6, 15 October 2005. The deadline was extended by Procedural Order No. 8 of 31 January 2006, after some of the petitioners successfully argued that it would be more useful to make submissions after the filing of the parties' memorials, to which the parties agreed. *Amicus curiae* submissions were then filed together with the non-disputing party filings under Article 1128 NAFTA around one month after the due date for the respondent's counter-memorial.

331 An exception to this applies to the European Commission. Article 13(b) Regulation (EU) No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member states and third countries. It stipulates that 'the Member State shall also immediately inform the Commission of any request for dispute settlement lodged under the auspices of the bilateral investment agreement as soon as the Member State becomes aware of such a request. The Member State and the Commission shall fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, the participation in the procedure by the Commission.'

site) must be welcomed.<sup>332</sup> Accordingly, tribunals have accepted submissions at most stages of the proceedings, albeit there is some disagreement between tribunals as to the usefulness of submissions during the jurisdictional stage (see Chapter 6). Overall, tribunals have been accommodating in terms of timing. The *Biwater v. Tanzania* tribunal, noting that full memorials had already been exchanged and the merits hearing was to begin in three weeks, instead of rejecting requests for untimeliness, established a two-tiered participation process. As a first step, *amici curiae* were to file a joint submission detailing their arguments and identify, but not attach, evidence or other pertinent documentation. After consideration of this submission, as a second step, the parties could decide whether to receive the documentation and extended arguments.<sup>333</sup> The parties later agreed to forgo the second step.<sup>334</sup> Late submissions have been accepted with the consent of the parties in several cases.<sup>335</sup> Extensions are granted if they do not risk disrupting the course of the proceedings.<sup>336</sup>

To conclude, only the ECtHR and investment tribunals have established rules regarding the timing of requests for leave. The filing date of a written *amicus* brief is usually determined in the grant of leave. International courts and tribunals establish deadlines that reflect the general course of the proceedings, as applicable rules only rarely prescribe fixed time limits. Where request for leave procedures apply or in case of solicited *amicus curiae* submissions, the time period granted to an *amicus curiae* to prepare

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332 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011; *Mesa Power Group LLC v. Government of Canada*, Notification to non-disputing parties and potential *amicus curiae*, 28 May 2014, PCA Case No. 2012-17; *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, Case No. UNCT/14/2, section (C); *Mobil Investments Canada Inc. v. Canada*, ICSID News Release, 22 December 2016, ICSID Case No. ARB/15/6, at: <https://icsid.worldbank.org/en/Pages/News.aspx?CID=208> (last visited: 21.9.2017).

333 *Biwater v. Tanzania*, Award, 24 July 2008, paras. 362-363 and Procedural Order No. 5, 2 February 2009, ICSID Case No. ARB/05/22, para. 60.

334 *Biwater v. Tanzania*, Award, 24 July 2008, paras. 363-364 and Procedural Order No. 6, 25 April 2007, ICSID Arb. No. ARB/05/22, para. 3.

335 *Merrill v. Canada*, Award, 31 March 2010, paras. 22-23. The filing was received 18 days late.

336 The *Glamis* tribunal extended the deadline for filing an application for leave by one month. See *Glamis v. USA*, Letter by the tribunal to petitioners, 10 October 2006.

a submission on average ranges between four and twelve weeks.<sup>337</sup> It has been extended where *amici curiae* were given access to party-redacted documents after the deadline had been established.<sup>338</sup> There is no noticeable difference in time limits allocated to solicited and unsolicited *amicus curiae* submissions in investment arbitration. This is startling because unsolicited *amici* typically have fully prepared their briefs when seeking leave.<sup>339</sup>

The most relevant divergence concerns the question whether courts may accept submissions after the closure of proceedings. This seems to depend on the view of the role of *amicus curiae*. The IACtHR views *amici curiae* as an additional feature for the benefit of the judges in their understanding of the law of a case. On this basis, the court justifies granting time limits beyond closure of the oral proceedings. Similarly, in advisory proceedings, where legal rights are not directly modified, inter-state courts have shown latitude with respect to late submissions. In contentious proceedings and before the other courts, due process considerations, especial-

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- 337 E.g. *Jersild v. Denmark*, Judgment of 23 September 1994, Series A No. 298; *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, ECHR 2000-I; *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 27; *Pac Rim v. El Salvador*, Procedural Order No. 8, ICSID Case No. ARB/09/12 (seven weeks); *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 3.22 (seven weeks); *Merrill v. Canada*, Award, 31 March 2010, para. 22 (six weeks); *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22 paras. 62-63; *Micula v. Romania*, Award, 11 December 2013, ICSID Case No. ARB/05/20, para. 36; *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19. The one-week deadline foreseen by the WTO Appellate Body in its Working Procedure in *EC-Asbestos* remains an exception. This time pressure may have motivated the setting of unrealistic deadlines for the filing of leave requests of mere eight days between publication of the applicable procedure and the deadline in *EC-Asbestos* where six out of 17 *amicus curiae* applicants were rejected for not meeting this deadline. See *EC-Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, p. 22, para. 55. In total, the Appellate Body received 30 *amicus curiae* applications. See also B. Stern, *supra* note 98, p. 1456 (on the difficulties of financially challenged NGOs to meet this deadline).
- 338 *Piero Foresti v. South Africa*, Letter by Secretary to Tribunal to Petitioners, 5 October 2009, ICSID Case No. ARB(AF)/07/1 (ten weeks).
- 339 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 32, 34, 27, 31, 154.

ly the parties' right to comment on *amicus curiae* submissions, preclude the admission of submissions after the closing of the proceedings.<sup>340</sup> It is prudent to accord the parties a right to comment on *amicus curiae* submissions to ensure the acceptability of the outcome as well as to give them an opportunity to challenge and rebut the *amici's* arguments in an open 'marketplace of ideas.' Most importantly, where an *amicus'* arguments could lead to a decision not expected by the parties, they must be given the opportunity to comment for reasons of due process (see Chapter 8).

## 2. Form and length

Requests for leave usually must be submitted in writing.<sup>341</sup> The FTC Statement further requires that an application be dated and signed by the person filing it and include the address and other contact details of the applicant, a requirement that has been adopted by other tribunals.<sup>342</sup> Furthermore, it may not be longer than 5 typed pages. A tribunal established a limit of 20 pages including the submission.<sup>343</sup> In Section 3 *EC-Asbestos* Additional Procedure, the WTO Appellate Body determined that the request for leave was not to exceed three typed pages. This issue has not raised difficulties in practice.

Some *amici curiae* attach to the application their brief.<sup>344</sup> Attaching of the submission is not unproblematic. On the one hand, it allows an inter-

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340 See Section B, para. 7(a) FTC Statement, Rule 37 ICSID Arbitration Rules. See also R. Happ, *Rule 37*, in: R. Schütze (Ed.), *Institutionelle Schiedsgerichtsbarkeit, Kommentar*, 2<sup>nd</sup> Ed. Cologne 2011, p. 1021, para. 5.

341 Rule 44 (3) ECtHR Rules; Section B, para. 1. FTC Statement; Rule 37(2) ICISD Arbitration Rules. *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011.

342 Section B, para. 2(a) and (b). See also *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12. The tribunal requested that the signature stem from a person authorized to sign for the entity making the application.

343 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12.

344 See *Glamis v. USA*, Quechan Indian Nation Application for Leave to File a Non-Party Submission and Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006, as well as National Mining Association Application for Leave to File a Non-Disputing Party Submissions and Submission of Non-Disputing Party National Mining Association, 13 October 2006; *Pac Rim v. El Sal-*

national court or tribunal to see the quality of the submission and to get an idea of its usefulness. On the other hand, it may reduce the effectiveness of a request for leave procedure as the court (or its registry) will consider the request for leave in addition to the submission, thereby losing the time gain that was to be achieved by a request for leave procedure. It may be more useful to require applicants to outline their later submission. This would also help them to avoid duplicative and costly work in the event that the international court or tribunal requests substantive changes to the submission.

## II. Substantive requirements concerning the application

Only the regulations and practices of the ICJ, the ECtHR, the ACtHPR, the WTO and investment arbitration tribunals establish substantive requirements for requests for leave.

### 1. International Court of Justice

The ICJ has not formulated any requirements for requests pursuant to Article 66(3) ICJ Statute. However, its rejection of an unspecified offer of assistance by the ILO in the *South-West Africa* case indicates that the information offered should be concrete and specific (see Chapter 3).

### 2. European Court on Human Rights

The ECHR provides little substantive guidance to the ECtHR regarding the substance of a request for leave. Pursuant to Article 36(2) ECHR, the admission of *amici curiae* must be ‘in the interest of the proper administration of justice’ and Rule 44(3)(b) ECtHR Rules requires requests for leave to be ‘duly reasoned.’<sup>345</sup> The ECtHR does not provide reasons for the admission of a request in its judgments, which makes it difficult to as-

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*vador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011.

345 Until the entering into force of Protocol 11 in 1998, Rule 37(2) established that the President of the Court was to specify the content of submissions.

certain the exact requirements. Case law indicates that prospective *amici curiae* need to convince the court that they will contribute to the ECtHR's discharge of its judicial function in the specific case. In particular, *amici curiae* must show that they will present information that is not already before the court and that their submission will be within the court's jurisdiction.<sup>346</sup> The ECtHR accepts briefs that enhance its understanding of the case in the broadest sense (see Chapters 4 and 6). It has rejected requests for leave for various reasons of irrelevancy, including comments on the situation of a third (and not involved) country, duplicity and failure to present new arguments or ideas, comments on issues adequately presented by the parties or other entities, comments on simple issues or on issues where there is settled case law.<sup>347</sup> In *Hutten-Czapska v. Poland*, the ECtHR denied leave to the Polish Association of Tenants. The ECtHR found that it already possessed the necessary information, because the Association had provided information during the preceding Polish constitutional

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346 See *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115; *Glaserapp v. Germany*, Judgment of 28 August 1986, Series A No. 104; *Kosiek v. Germany*, Judgment of 28 August 1986, Series A No. 105; *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A No. 216. In 2010, in *A., B., C. v. Ireland*, the court stressed that 'it [was] not its role to examine submissions which do not concern the factual matrix of the case before it.' See *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010. See also M. Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 Netherlands Quarterly of Human Rights (1996), p. 297.

347 *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93; *Leander v. Sweden*, Judgment of 26 March 1987, Series A No. 116 (Leave denied to National Council for Liberties on behalf of three British Trade Unions representing government employees, because the connection to the case was considered to be too remote. The *amicus* applicant had argued that its intention was to ensure that the court had information about the situation in the United Kingdom before making a decision which would indirectly affect all members of the three unions.); *Capuano v. Italy*, Judgment of 25 June 1987, Series A No. 119; *Caleffi v. Italy*, Judgment of 24 May 1991, Series A No. 206-B; *Vocaturro v. Italy*, Judgment of 24 May 1991, Series A No. 206-C; *Y. v. the United Kingdom*, Judgment of 29 October 1992, Series A No. 247-A; *Modinos v. Cyprus*, Judgment of 22 April 1993, Series A No. 259. The ECtHR has rejected *amicus curiae* applications in cases with clear precedent on the legal issues involved. See A. Lindblom, *supra* note 175, p. 341; J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-state actors and international law (2001), p. 183; D. Shelton, *supra* note 17, p. 630.

court proceedings.<sup>348</sup> In *Senator Lines GmbH v. 15 Contracting States*, the ECtHR denied a request for leave to the German Bar Association, because its proposed submission was similar to that of the CCBE of which it was a member.<sup>349</sup>

### 3. African Court on Human and Peoples' Rights

Section 44 Practice Direction merely determines that the prospective *amici curiae* shall, in its request, 'specify ... the contribution they would like to make with regard to the matter.' This indicates that briefs need to be within the court's jurisdiction and of relevance to the case as submitted to the court.

### 4. WTO Appellate Body and panels

Though neither WTO panels nor the Appellate Body employ a request for leave procedure for *amici curiae*, some guidance can be drawn from the *EC-Asbestos* Additional Procedure as to what elements the Appellate Body considers important when assessing a request. Sections 3(e) and (f) determine that requests should

- (1) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal [...] which the applicant intends to address in its written brief;
- (2) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal;
- (3) indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute.

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<sup>348</sup> *Hutten-Czapska v. Poland*, No. 35014/97, 22 February 2005.

<sup>349</sup> *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom* (dec.) [GC], No. 56672/00, 10 March 2004, ECHR 2004-IV, referred to by N. Vajic, *supra* note 293, p. 100.

Thus, in their application, prospective *amici curiae* should indicate how they will make a useful contribution to the solution of the concrete case which is within the scope of the dispute and not repetitive of the parties' or third parties' submissions. Accordingly, in *US–Clove Cigarettes*, the panel rejected an offer of assistance by the WHO because it found that it already had sufficient material to decide the case.<sup>350</sup> In *US–Steel Safeguards*, the Appellate Body rejected a brief for not being 'of assistance in deciding this appeal' as it was 'directed primarily to a question that was not part of any of the claims.'<sup>351</sup>

## 5. Investor-state arbitration

Given the many regulatory overlaps, this section first presents the relevant legal standards (a) to then analyze their application (b).

### a) Legal standards

The FTC Statement has codified the requirements developed by the *Methanex v. USA* and *UPS v. Canada* tribunals.<sup>352</sup> Pursuant to Section B para. 2(g) and (h), the application will 'identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission' and 'explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission.' They are:

[T]he extent to which  
(a) the submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties,

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350 *US–Clove Cigarettes*, Report of the Appellate Body, adopted on 24 April 2012, WT/DS406/AB/R, p. 4, para. 11.

351 *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (hereinafter: *US–Steel Safeguards*), Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, p. 83, para. 26.

352 Criteria for *amicus curiae* participation were developed especially in *UPS v. Canada*, Direction of the tribunal re modalities of *amicus curiae* participation, 1 August 2003.

- (b) the submission would address matters within the scope of the dispute,
- (c) the non-disputing party has a significant interest in the arbitration and
- (d) the existence of a public interest in the subject-matter of the arbitration.

There is no instruction on the relative values of the requirements.

Pursuant to Rule 37(2) ICSID Arbitration Rules, in their requests applicants should convince the tribunal that their submission would: (1) assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (2) address a matter within the scope of the dispute; and show (3) that they possess a significant interest in the proceeding.

Article 4(2)(e) UNCITRAL Rules on Transparency requires prospective *amici curiae* to elaborate on the ‘specific issues of fact or law in the arbitration’ they wish to address. This requirement serves as a basis for the tribunal’s exercise of discretion whether to accept a submission. It is concretized in Article 4(3), according to which the tribunal, in its decision, shall consider ‘among other’, not concretized factors ‘whether the third person has a significant interest in the arbitration’, and the extent to which the submission would assist the tribunal in the determination of the case by bringing a different perspective, particular knowledge or insight. Article 4(1) clarifies that the submission must be within the scope of the dispute. The requirements essentially codify the common practice.<sup>353</sup>

Thus, the only apparent difference between these rules is the requirement in the FTC Statement of a public interest in the subject-matter of the arbitration.

## b) Application

*Amicus curiae* applicants comment on the requirements thoroughly.<sup>354</sup> However, not all arbitral awards and orders elaborate on a tribunal’s analy-

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353 The UNCITRAL Arbitration Rules do not establish any conditions. Usually, they are determined either by the governing investment treaty such as the NAFTA or the tribunal establishes them *ad hoc* by procedural order. In the latter case, applicants and tribunals tend to draw from the conditions established in UNCITRAL proceedings under the NAFTA.

354 For many see *Glamis v. USA*, Application for leave to file a non-party submission and submission, 19 August 2005.

sis of an application.<sup>355</sup> Several tribunals have contemplated that the requirements should not be read too strictly ‘in matters of public interest’ to attract the broadest range of views for its consideration. Tribunals have at the same time stated that there was an assumption against *amicus curiae* involvement on the account of an expectation that all the necessary information is provided by the parties.<sup>356</sup>

aa) Special knowledge or insight

This requirement plays a central role in virtually all request for leave decisions, but so far no common standard of interpretation has developed beyond the agreement that *amicus curiae* petitioners should not be admitted if the tribunal considers itself sufficiently informed.<sup>357</sup> Duplicative submissions, including from other *amici curiae*, are not welcome.<sup>358</sup>

With respect to a petition from three local and two international non-governmental organizations, the *Biwater v. Tanzania* tribunal determined that it sufficed under Rule 37(2)(a) ICSID Arbitration Rules, if ‘a written submission by the Petitioners appears to have the *reasonable potential* to assist the Arbitral Tribunal by bringing a perspective, particular knowl-

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355 An exception is *Biwater v. Tanzania*, the first case to apply Rule 37(2). The tribunal assessed each requirement separately. The case concerned Tanzania’s alleged interference with and expropriation of a water and sewerage infrastructure in Dar es Salam, Tanzania in violation of the UK-Tanzania BIT and Tanzanian investment law. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22. See also M. Polasek, *Introductory note to three procedural orders, Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 22 ICSID Review – Foreign Investment Law Journal (2007), pp. 149-150.

356 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*”, 15 January 2001, para. 48; *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, paras. 21-26.

357 *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 28.

358 *Philip Morris v. Uruguay*, Procedural Order No. 4, 24 March 2015, ICSID Case No. ARB/10/7, para. 26.

edge or insight that is different from that of the disputing parties.<sup>359</sup> Other tribunals apply a stricter standard and require *certainty* of the special knowledge.

Mere expertise, particularly legal expertise, does not suffice to meet the threshold. The *amicus curiae* petitioner must typically show that he possesses some substantive knowledge, relevant experience, expertise or a particular perspective on the case that surpasses or supplements that of the parties *and* he must link it to the specific case.<sup>360</sup> Accordingly, the *Apotex I v. USA* tribunal rejected an application, because it found that a brief on the classification of venture capital as an investment contained ‘no more than a legal analysis of the terms of the NAFTA and previous arbitral decision on the concept of “investment”, undistinguished and uncoloured by any particular background or experience.’<sup>361</sup>

Requests for leave that have passed this test include petitions from NGOs that directly have witnessed or experienced parts of the case, such as local protests against a mining project or court proceedings seeking re-

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359 *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50, 55. See also below Chapter 8 for issues regarding petitioners’ inability to access certain documents due to a confidentiality order issued by the tribunal which made it difficult for petitioners to describe the precise scope of their intended legal submissions.

360 *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, para. 21. Tribunals have so far not adopted the argument presented by the claimant in *Bear Creek Mining v. Peru* that ‘*amicus* petitions should only be granted where the Tribunal determines that the Parties have failed to provide the Tribunal the assistance and materials it needs to resolve the dispute.’ See *Bear Creek Mining v. Peru*, Procedural Order No. 6, 21 July 2016, ICSID Case No. ARB/14/21, para. 20. This narrow view does not comport with the applicable legal standard.

361 *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, p. 8, para. 23. For the same reason, in *Chevron/Texaco v. Ecuador*, the tribunal rejected an *amicus curiae* submission during the jurisdictional phase, because the issues ‘to be decided [were] primarily legal and [had] already been extensively addressed by the parties’ submissions.’ *Chevron/Texaco v. Ecuador*, Procedural Order No. 8, 18 April 2011, PCA CASE N° 2009-23, para. 18. Similarly, *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 28.

vocation of controversial concessions granted to the claimants.<sup>362</sup> In *In-finito Gold v. Costa Rica*, the tribunal emphasized upon admitting the NGO APREFLOFAS the ‘particular insights’ the NGO possessed, having been the plaintiff in the domestic proceedings, and the relevance these insights might have for some of the jurisdictional issues of the case.<sup>363</sup> The EC’s unique perspective and expertise also justifies its continued participation in cases engaging questions of EU law (see Annex I).<sup>364</sup> This includes numerous pending arbitrations in the area of renewable energies, where the EU has both established mandatory national targets to support growth of the renewables energy sector whilst requiring that the national measures comply with EU laws on state subsidies.<sup>365</sup>

This requirement of a particular perspective or link to the case limits the potential for ‘interpretative’ *amicus curiae* participation from academics, academic institutions and NGOs that seek to reform the interpretation of standard investment treaty guarantees. In *Bear Creek Mining v. Peru*, for instance, the tribunal rejected a request for leave from the Columbia Center on Sustainable Investment. It acknowledged the NGOs experience in the area of sustainable investment, but it was not convinced that the NGO possessed arguments or knowledge related to the arbitration that was sufficiently unique from the parties’ submissions.<sup>366</sup>

Some tribunals seem to lessen this requirement if they find that the political sensitivity of the case warrants the inclusion of public views (even if their submissions may not directly be of value to the legal aspects to be

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362 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 20. The tribunal rejected the claimant’s argument that the *amici* need to present ‘apparent first-hand knowledge of the facts underlying the case.’

363 *In-finito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 31-32. The tribunal further noted that this information might be useful in its determination of the jurisdiction, especially if the claim was inadmissible based on Article XII(3)(d) of the BIT due to the national court judgment.

364 In *Eureko v. Slovak Republic*, the tribunal invited the European Commission to comment on the continued validity of BITs concluded between EU Member States. *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 31-32.

365 V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 *Vanderbilt Journal of Transnational Law* (2015), pp. 1338-1339.

366 *Bear Creek Mining v. Peru*, Procedural Order No. 6, 21 July 2016, ICSID Case No. ARB/14/21, para. 38.

decided). In *Piero Foresti v. South Africa*, the tribunal did not in any detail consider whether the requirements of Rule 41(3) ICSID Additional Facility Rules were fulfilled upon receiving two requests for leave during the jurisdictional stage. It merely noted that *amicus curiae* participation by the International Commission of Jurists and four environmental and human rights NGOs served ‘to give useful information and accompanying submissions to the tribunal.’<sup>367</sup> The *amici* had argued in their application that the arbitration gave rise to issues of concern for South African citizens, civil society groups and citizens in general, particularly regarding ‘the scope of the post-apartheid South African government’s ability, under domestic and international law, to implement legislative and policy decision designed to redress the devastating socio-economic legacy left by apartheid.’<sup>368</sup> The arbitration had been initiated by Italian nationals who claimed that their investment in a mining project had been expropriated because of state measures intended to overcome the effects of the apartheid regime, including a minimum threshold of 26% ownership for historically disadvantaged South Africans in the mining industry.<sup>369</sup>

bb) Within the scope of the dispute

Together with the first requirement, this condition ‘renders the relevance of third party submissions as a paramount criterion of their permissibility (and ultimate admissibility).’<sup>370</sup> However, what is relevant – and within the

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367 *Piero Foresti v. South Africa*. Letter from the Secretary of the Tribunal, 5 October 2009, ICSID Case No. ARB(AF)/07/01, para. 2.1. According to *Viñuales*, the decision to grant leave may have been due to the exceptionally sensitive nature of the case. J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, pp. 115-116.

368 *Piero Foresti v. South Africa*, Petition for limited participation as non-disputing parties in terms of articles 41(3), 27, 39, and 35 of the additional facility rules, 17 July 2009, ICSID Case No. ARB(AF)/07/01, para. 4.2.

369 M. Coleman/K. Williams, *South Africa’s bilateral investment treaties, black economic empowerment and mining: a fragmented meeting?*, 9 *Business Law International* (2008), pp. 56-94.

370 E. Triantafyllou, *Amicus submissions in investor state arbitration after Suez v. Argentina*, 24 *Arbitration International* (2008), p. 585. The claimant in *Biwater v. Tanzania* argued that the tribunal should interpret the requirement narrowly so as to require that the matters presented by *amicus curiae* had to bear directly on the issue considered. The tribunal disagreed. It reasoned that it sufficed if the petition-

scope of the dispute – is a matter of some disagreement and also a question of the applicable law in investment arbitration. This will be discussed in detail in Chapter 6. The condition at least requires that *amici* will not present submissions on matters which the tribunal cannot consider.<sup>371</sup> For instance, in *Pac Rim v. El Salvador*, the tribunal received an application from a coalition of research institutes and NGOs seeking to inform the tribunal of the possible impact of an award in favour of the investor on El Salvador's transition towards democracy, as well as the tribunal's jurisdiction in the case and some facts relating to the political context of the project. The tribunal accepted the submission, but it ordered the *amicus curiae* to limit its submission at this stage to jurisdictional issues 'with a view to assisting the Tribunal's determination of the jurisdictional issues raised by the Parties.'<sup>372</sup> Thus, *de minimis* petitioners must show that their submission will respect the boundaries of the tribunal's jurisdiction. In some cases, parties have argued for a narrower standard that allows submissions not to address issues beyond those that the parties have raised.<sup>373</sup> At least one tribunal has expressly rejected this argument.<sup>374</sup>

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er's arguments were relevant to the dispute. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 32-34, 50.

371 This is not undisputed. *Schliemann* argues that submissions 'should be related to the substantive legal questions to be resolved in the arbitration.' See C. Schliemann, *Requirements for amicus curiae participation in international investment arbitration, a deconstruction of the procedural wall erected in joint ICSID Cases ARB/10/25 and ARB/10/15*, 12 *The Law and Practice of International Courts and Tribunals* (2013), pp. 374-375. This does not accord with practice. Several tribunals accept submissions on matters of jurisdiction, see Chapter 6. For a differentiation between jurisdiction and applicable law, see Report of the Study Group of the International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, 13 April 2006, UN Doc. A/CN.4/L.682, para. 45.

372 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12.

373 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, paras. 21, 24

374 *Infito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 33, 35. The tribunal stated in respect of one of the arguments the petitioners sought to make that even though the parties had not yet made any allegations in that regard it could not 'rule out at this early stage and without having heard the Parties that these matters may play some role in its assessment of this dispute.'

cc) Significant interest in the arbitration

Tribunals have not limited the term interest to legal interests. Petitioners also have requested leave on the basis of public, spiritual and economic interests.<sup>375</sup>

The difficulty in practice is to show that the interest is significant. Tribunals have rejected interests that are not concrete or that are purely commercial.<sup>376</sup> The *Apotex II v. USA* tribunal further held that

the applicant needs to show that he has more than a “general” interest in the proceeding. For example, the applicant must demonstrate that *the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.*<sup>377</sup>

The tribunal noted the respondent’s disclosure that the *amicus curiae* applicant, Mr. Appleton, was representing the claimants in three pending NAFTA cases, and that he had submitted a notice of intent regarding another case on behalf of an organization identified as Apotex’s joint venture partner.<sup>378</sup> The tribunal held that an interest in obtaining an interpretation favourable to a client did not constitute a *significant* interest.<sup>379</sup> Tribunals

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375 Cf. T. Ruthemeyer, *supra* note 220, p. 49. He also argues that *amici curiae* have been admitted on the basis of academic interests. This has not been confirmed by this study. Only where academic *amici curiae* were able to show having a public interest tribunals have acknowledged their significant interest.

376 See *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para. 28. Earlier tribunals have barely commented on this aspect. This is unexpected given that the admission of *amici curiae* in the first place was justified on the basis of public interest considerations and *amicus curiae* applicants tend to extensively elaborate on their particular interest in a case.

377 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, para. 38. [Emphasis added].

378 *Id.*, paras. 18-21. The claimants stated in their response that they had communicated with Mr. Appleton neither on the present arbitration nor the *amicus* application nor that they had provided any support to Mr. Appleton or mandated him earlier.

379 *Id.*, para. 40. See also A. Kent/J. Trinidad, *supra* note 188, pp. 1093-1094 (They argue that *Appleton’s* attempt to intervene as *amicus curiae* in *Apotex* shows that investment tribunals might not be open to academics in their own field appearing as *amicus curiae*).

have held that the fact that a petitioner could pursue the interest in a domestic forum does not render it insignificant.<sup>380</sup>

Tribunals regularly deem *amicus* petitioners seeking to present on a public interest to meet the threshold of significant interest. This includes mostly NGOs with a thematic focus on the public interest at issue in the arbitration, such as human rights, environmental protection, workers' rights or access to water. Tribunals have yet to delineate what a *significant* public interest entails, specifically if any public interest is significant. The public interest dimension of the overall case was emphasized by tribunals in the first admissions of *amici curiae*. The mere fact that a case will affect a large demographic can lower the threshold for NGOs to substantiate the requirement of a significant interest.<sup>381</sup> Several *amicus* admissions indicate that petitioners must be affected by the outcome of the decision – either as a local resident who directly bears the consequences of a decision or because of an institutional mandate in the public interest (and issues) at stake.<sup>382</sup> For instance, in *Philip Morris v. Uruguay*, the tribunal noted that 'both petitioners appear to have a significant interest in the proceeding, considering that the WHO is the world authority on public health matters and the FCTC Secretariat is the designated global authority concerning the FCTC ...'.<sup>383</sup> The tribunals in *von Pezold v. Zimbabwe* applied a stricter, two-tiered test. First, there had to be a substantive overlap between the

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380 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. Arb/03/19, para. 19.

381 For many, see *Glamis v. USA*, where two environmental NGOs requested leave 'to ensure that the resolution of a dispute that implicates the public interest is informed by public participation.' Thus, they did not mention any specific implications the dispute would have on their rights. See *Glamis v. USA*, *Amicus curiae* application of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005, para. 9.

382 *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 15 (The petitioners claimed that the 'combination of natural resource and human rights issues is precisely that which the Tanzanian Petitioners focus on in their day-to-day work. [And t]he interest of the Petitioners in all of these public concerns is, without question, longstanding, genuine, and supported by their well-recognized expertise on these issues.' The petitioners asserted that their interest was affected as the arbitration had 'direct and indirect relevance to [their] mandates and activities at the local, national and international levels.').

383 *Philip Morris v. Uruguay*, Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 25.

public interest engaged and the interests generally represented by the *amicus* applicant. Second, each of the joint applicants' individually had to represent the necessary interests. On this basis, the tribunals found that the ECCHR – unlike the four indigenous communities with whom it had submitted the request – lacked a significant interest, because the NGO's operative focus and experience lay not in corporate responsibility for human rights abuses, as purported by the NGO, but in other areas including negative impacts of land use and acquisition on communities. The tribunals did not find these interests to be affected in the case. With respect to the indigenous communities, the tribunal acknowledged that the petitioners had an interest in the land over which the claimants claimed legal title.<sup>384</sup> The tribunal in *Bear Creek Mining v. Peru* reverted to a lower standard. It refuted the claimant's argument that 'significant interest' required that the engaged public interest had to be at issue and that the *amicus* petitioner had to be officially mandated to represent the interest, in this case by the indigenous Aymara community.<sup>385</sup>

Tribunals have considered the criterion of 'significant interest' also to be met if direct individual or legal interests of the *amicus curiae* are engaged.<sup>386</sup> The most relevant group of cases in this category concerns the European Commission's participation as *amicus curiae*. A case that exemplifies the EC's legal interests in participating is *Electrabel v. Hungary*. The facts of the case are as follows: Following Hungary's accession to the EU in 2004, the EC in 2008 issued a decision that Hungary had provided unlawful state aid, which included a power purchase agreement (PPA) between the country's largest and fully state-owned power plant operator and

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384 The tribunal rejected the application for lack of 'independence and/or neutrality' as detailed above. See *Von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases Nos. ARB/10/15 and ARB/10/25, paras. 61-62.

385 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, paras. 19, 40.

386 In *UPS v. Canada*, for instance, the government requested that only petitioners directly affected by the outcome should be eligible for submissions and that an interest in the development of NAFTA 'jurisprudence' was insufficient. See *UPS v. Canada*, Canada's submission on Canadian Union of Postal Workers and the Council of Canadians' petition for intervention, 28 May 2001, pp. 9-11, paras. 41, 49. See also R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Berlin 2007, p. 220 (Unternehmen, die einen Antrag auf Zulassung als *amicus curiae* stellen, sollten zumindest eine konkrete Betroffenheit durch die streitbefangene Maßnahme nachweisen.).

a state-owned wholesale electricity buyer. The claimants to the arbitration had invested substantial funds in the power plant operator in 1995 after it had entered into the PPA. In view of the PPA's imminent termination, in 2007 *Electrabel* initiated arbitration against Hungary under the Energy Charter Treaty (ECT). The EC sought request for leave to appear as *amicus curiae* in these arbitral proceedings.<sup>387</sup> The tribunal granted the request.<sup>388</sup> The EC pursued two legal arguments in its request which aligned with its legal interest. First, it argued that Hungary could not be held liable (and ordered to pay compensation) under the ECT, because its measures were mandated by EU laws on state aid.<sup>389</sup> In this respect, it sought to assert the supremacy of EU law, and incidentally, to protect its own powers. Second, the EC argued that the ECT did not apply to cases involving EU member states.<sup>390</sup> This served to defend the primacy of the EU's judicial institutions claimed by Article 344 TFEU.<sup>391</sup> While confirming its jurisdiction (and thereby rejecting the supremacy argument), the tribunal dismissed the majority of the arguments on the merits.<sup>392</sup>

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387 See E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 *Berkeley Journal of International Law* (2011), p. 213. *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ICSID Case No. ARB/07/19. Similar, *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22. For an analysis of the EC's *amicus curiae* participation in *AES v. Hungary*, see T. Ruthemeyer, *supra* note 220, pp. 37-38.

388 See also E. Levine, *supra* note 387, pp. 213-214.

389 See *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, para. 6.72. See also the analysis by T. Ruthemeyer, *supra* note 220, p. 268.

390 The argument has evolved over time. First, the EC referred to the disconnection clause in Article 26(3)(b)(ii) Energy Charter Treaty. It now argues that the inapplicability of the ECT is implied from its purpose, drafting history and context. There are difficulties with both approaches. For a legal analysis, see M. Burgstaller, *European law and investment treaties*, 26 *Journal of International Arbitration* (2009), pp. 181-216.

391 Article 344 TFEU: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

392 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, Part XI. The claimant was only awarded costs for failure by the respondent to provide fair and equitable treatment in the calculation of costs incurred by claimant with respect to compensation. *Vadi* notes that no arbitration tribunal so far has accepted the supremacy argument, see V. Vadi, *Beyond known worlds: climate change governance by arbi-*

Since this decision, the EC has sought leave to participate as *amicus curiae* in more than 25 investor-state arbitrations. The largest part of these cases are based on investment treaties in force between EU member states (so called intra-EU BITs) and the ECT.<sup>393</sup> The majority of these (pending and confidential) cases have been brought under the ECT and concern the reduction of subsidies in the renewables energy sector in Spain and the Czech Republic. Based on publicly available information, the EC has presented arguments similar to those in *Electrabel v. Hungary* with regard to the application of the ECT and the substantive claims. Concerning the latter, it has commented on possible defences of the host state arising from EU law obligations against alleged violations of the FET standard and expropriation.<sup>394</sup>

Another case in which *amici curiae* sought to defend a direct interest in the outcome of the case is *Glamis v. USA*. The facts of the case were as follows: Glamis had been authorized to utilize mining rights it owned to mine gold on federal land located near designated Native American territory in South-East California by way of open pit mining. It claimed that the USA breached its NAFTA Chapter 11 obligations by wrongfully delaying the consideration of the mining project and due to the adoption by California of legislative and administrative measures against the project.<sup>395</sup> The tribal council, the elected governing body of the Quechan Indian Nation, sought leave to participate as *amicus* on the account that the arbitration could affect the ‘integrity of the sacred area and the tribe’s

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*tral tribunals?*, 48 Vanderbilt Journal of Transnational Law (2015), p. 1340. See also *Charanne B.V. and Construction Investments S.A.R.L. v. the Kingdom of Spain* (hereinafter *Charanne v. Spain*), Final Award, 21 January 2016, Arbitration No. 062/2012.

393 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 26, 31; *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, SCC Case No. 088/2004.

394 One of the defences is the EU law obligation to revoke illegal state aid. For a more detailed account of the facts underlying these cases, see C. Patrizia/ J. Profaizer/ I. Timofeyev, *Investment disputes involving the renewable energy industry under the Energy Charter Treaty*, 2 October 2015, Global Arbitration Review, at: <http://globalarbitrationreview.com/chapter/1036076/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty> (last visited: 21.9.2017); S. Perry/ K. Karadelis, *Sun rises on Czech energy claims*, Global Arbitration Review, 19 February 2014, at: <http://globalarbitrationreview.com/article/1033183/sun-rises-on-czech-energy-claims> (last visited 21.9.2017).

395 *Glamis v. USA*, Award, 8 June 2009, Section II, paras. 27-185.

relation to it' and in order to pressure California into revoking the mining reclamation measures.<sup>396</sup> In addition, the tribunal received an application from the National Mining Association, which described itself as a 'national not-for-profit organization that represents the interest of the mining industry.'<sup>397</sup> The association argued that it possessed a 'unique perspective of the mining industry as a whole.'<sup>398</sup> It sought to address the possible negative effects for investors of regulatory uncertainty in US mining laws and the 'de facto bans on open-pit mining of valuable mineral resources through reclamation requirements.'<sup>399</sup> Without detailed assessment, the Tribunal decided to admit the *amicus* applicants, noting the 'public and remedial purposes of non-disputing submissions.'<sup>400</sup> Further cases include the above-mentioned land titles claimed by indigenous communities in *von Pezold v. Zimbabwe*, and the legal interest recognized by the tribunal in *Infinito Gold v. Costa Rica* that 'APREFLOFAS can thus be deemed to have an interest in ensuring that this Tribunal has all the information necessary to its decision-making' in regard of the claimant's allegation that

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396 The tribe stated that its goal was to ensure that the tribunal would fully take into account the 'sensitive and serious nature of indigenous sacred areas' and that it would address issues such as the value of the area's cultural and environmental resources, the authorization process for the mine, the regulatory framework for mining, as well as the legal framework for the protection of indigenous sacred places under national and international law and the possible negative impact of an award in favor of the claimant. The tribe stressed that its submissions would 'assist the tribunal in the determination of factual and legal issues by bringing the perspective, particular knowledge and insight that is unique to American tribal sovereign governments. ... The [t]ribe is uniquely positioned to comment on the impacts of the proposed mine to cultural resources, cultural landscape, or context.' It noted that it had been extensively involved in the protection of its lands at the domestic level. See *Glamis v. USA*, Quechan Indian Nation Application for Leave to File a Non-Party Submission, 19 August 2005, pp. 3-4. Its submission focused on an alleged duty of the government under international law to preserve sacred lands and it outlined its rights connected to the land where the mines were to be built and emphasized its vulnerability to the substantive outcome. See also E. Levine, *supra* note 387, p. 213.

397 *Glamis v. USA*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, 13 October 2006.

398 *Id.*

399 *Id.*

400 *Glamis v. USA*, Award, 8 June 2009, para. 286.

the domestic judgment that APREFLOFAS had obtained against it violated international law.<sup>401</sup>

dd) Public interest in the subject matter of the arbitration

By its wording, this condition is independent from the applicant. Nevertheless, in *Apotex I v. USA*, the tribunal clarified that the onus to prove it is on the applicant.<sup>402</sup> It is expressly listed only in the FTC Statement and in some investment treaties. Still, tribunals operating under other procedural regimes regularly apply the requirement in admission decisions, possibly, because it serves as a general justification for the admission of *amici curiae*.

The *Methanex* tribunal defined a public interest in the subject-matter of the arbitration to exist if the issues in the case ‘extend far beyond those raised by the usual transnational arbitration between commercial parties.’<sup>403</sup> Its definition was refined further by the *Suez/Vivendi* and *Suez/InterAguas* tribunals:

In examining the issues at stake in the present case, the tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by Governments. The international responsibility

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401 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 36. *Ruthemeyer* criticizes the notion that private interests can be introduced into the arbitration by *amici curiae*, because they do not contribute to the establishment of the facts of the case and they run afoul to the justification of *amicus curiae* participation in investor-state arbitration. In his view, only significant public interests should be admissible. See T. Ruthemeyer, *supra* note 220, pp. 271-272. This view unduly limits the ordinary meaning of the requirement.

402 *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, para. 29 (‘Whilst it may be said that investment-arbitration tribunals generally deal with matters of public importance, it remains for the applicant to identify the specific public interest which it considers to be at stake, or which may be affected by any decision, and which warrants submissions from individuals or entities or interest groups beyond those immediately involved as parties in the dispute.’).

403 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as “*amici curiae*”, 15 January 2001, para. 49. See also, *Merrill v. Canada*, Award, 31 March 2010, paras. 22-24; *Philip Morris v. Uruguay*, Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 26.

of a State, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of a larger metropolitan area, the City of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve. These factors lead the tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties.<sup>404</sup>

Thus, the tribunals required for a public interest in the subject matter to be present that a dispute concerned an essential public commodity and that the outcome of the dispute would substantially and directly affect peoples' access to it.<sup>405</sup> The limitation to an essential public service is too narrow. Further, it has the potential to lead to arbitrary results. In addition, it seems questionable to burden tribunals with the task of defining in each case whether it sufficiently touches upon a public interest or not. In fact, the tribunal itself appears to have lessened the requirement upon receiving a request for leave one year later. It decided that the public interest in the subject matter was still engaged even though the concessionaire had withdrawn from the proceedings and terminated the concession. The tribunal justified its approach with Argentina's international legal responsibility, the fact that the case concerned issues involving access to basic public services of millions of people, and that its decision could affect 'how govern-

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404 *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, paras. 19-20. The admission of *amicus curiae* was also influenced by the effort to avoid mistakes in their judgments. See *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 12.

405 E. Triantafilou, *Is a connection to the "public interest" a meaningful prerequisite of third party participation in investment arbitration?*, 5 Berkeley Journal of International Law (2010), p.41.

ments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.<sup>406</sup>

Though the wording of Rule 37(2) ICSID Arbitration Rules does not mention the condition, the tribunal in *Biwater v. Tanzania* found it applied.<sup>407</sup> Like the *Methanex* tribunal, it considered the public interest present where a decision had the potential ‘to impact on the same wider interests’ as the issues raised between the parties.<sup>408</sup> The tribunal noted that the arbitration raised ‘a number of issues of concern to the wider community in Tanzania. It was therefore not inappropriate that the arbitral process permit some participation of interested non-disputing parties.’<sup>409</sup> The tribunal dismissed without explanation the claimant’s argument that the case was different from similar earlier cases, because the claimant had ter-

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406 See also *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, paras. 9, 17-18.

407 *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/220, para. 51. It imported into Rule 37(2) ICSID Arbitration Rules some of the substantive conditions of appropriateness of the subject matter which had been developed by the tribunal in *Suez/Vivendi v. Argentina*. See *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, paras. 18-19. This requirement had formed part of a three-partite test established by the tribunal in *Suez/Vivendi v. Argentina* (see Section A). With respect to the interpretation of the second requirement, see Section B above. The third condition requires *amici curiae* to justify their participation in the case and forces them to assess carefully the points they wish to make. *Id.*, para. 17. These requirements were also adopted by the identically composed tribunal in *Suez/InterAguas v. Argentina*, Order in response to a petition for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 4. For more, see E. Savarese, *Amicus curiae participation in investor-state arbitral proceedings*, 17 Italian Yearbook of International Law (2007), pp. 106-107.

408 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 53.

409 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 57, 358. See also *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 12-15. The petitioners had pointed to issues of ‘vital concern’ raised by the arbitration for the local Tanzanian community, developing countries that had or might privatize infrastructure services and for the international community.

minated its operations in Tanzania and the decision therefore would not affect access to water of the population.<sup>410</sup>

Tribunals still routinely mention the public interest to be engaged based on the above standard. *Amici curiae* do not struggle to argue that this requirement is fulfilled, because often there is an obvious public interest in the case. A significant amount of the cases already mentioned concerned water concession treaties or the effects of mining projects on the health of the population or the environment.

The requirement has not been commented on in several recent cases, particularly in those with involvement by the European Commission. It remains to be seen if these cases constitute a group of cases where the public interest is assumed to exist due to the nature of the European Commission and its motivation for *amicus curiae* participation, or if these cases are indicative of a gradual abolishment of this requirement.<sup>411</sup>

### c) Assessment

Overall, investment tribunals apply detailed requirements with regard to the substance of requests for leave. Tribunals have aligned the different applicable procedural rules and investment treaties. The most notable development concerns the requirement that the subject matter of the dispute involve the public interest. This requirement has become less important, though the majority of admissions still occurs in cases with a tangible public interest dimension. Tribunals increasingly have admitted *amici curiae* in cases that do not overtly engage the public interest. This development is likely due to the growing acceptance of *amicus curiae* participation and it must be welcomed. The requirement has remained vague. Tribunals have stated that public interest means that a dispute has the potential to impact

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410 See also A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements*, New York 2010, pp. 148-150.

411 The joined tribunals in *von Pezold v. Zimbabwe* did not address this requirement at all in their 2012 decision on *amicus curiae* petitions. Given that the *amici* were not admitted to the case, this is not indicative of a new trend. *Von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases Nos. ARB/10/15 and ARB/10/25. It was also not mentioned in *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5.

interests wider than those of the parties, but they have not clearly delineated the specific interests covered, if the interests always must relate to a specific group of persons or an entity – as in commodity and EU law cases – or if, for instance, also a general global public interest would suffice. These definitional difficulties might also be why the ICSID Administrative Council decided not to include it in Rule 37(2) ICSID Arbitration Rules.<sup>412</sup> Further, the requirement's usefulness is questionable on a theoretical level given that investment arbitration by definition engages the public interest.<sup>413</sup> Finally, over-attachment to the requirement risks rejection of informative and useful submissions in cases where the public interest is not apparent.

Where tribunals have reasoned the admission of a request for leave, the provision of relevant information has constituted an important element in their decision to grant leave together with public interest considerations.<sup>414</sup> However, recent cases indicate a stricter application of the requirement that an *amicus curiae* possess a significant interest in the case. This requirement operates as the most effective 'floodgate', but, if applied too narrowly, risks to transform *amicus curiae* into a mechanism similar to intervention.

### III. Full discretion: decision on admissibility

International courts and tribunals have asserted full discretion over the decision to accept or reject a request for leave to participate as *amicus curiae*. The *UPS* tribunal encapsulated this in its statement that it would 'de-

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412 Cf. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50. See also E. Triantafyllou, *supra* note 405, pp. 580, 585.

413 S. Jagusch/J. Sullivan, *A comparison of ICSID and UNCITRAL arbitration: areas of divergence and concern*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 93 ('[B]y their nature, disputes before ICSID tribunals will usually involve issues of public interest.')

414 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10; *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, paras. 21-26; *Piero Foresti, v. South Africa*, Letter by the Secretary of the Tribunal, 5 October 2009, ICSID Case No. ARB(AF)/07/1, para. 2.1.

cide whether to grant leave and on what terms [and reserved] the power to determine any further aspect of the procedure relating to the participation of *amici curiae*.<sup>415</sup>

Most international courts and tribunals provide little to no information on the process of deciding on a request for leave to participate as *amicus curiae*, with the exception of investment tribunals.<sup>416</sup> The data for the ECtHR showed only one case where the ECtHR explicitly rejected a request for failing to comply with the requirements of Article 44 ECtHR Rules, but according to court members requests are rejected frequently.<sup>417</sup>

Submissions have been rejected where investment tribunals have found that the parties have ‘competently and comprehensively argued all is-

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415 *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae* re modalities of *amicus curiae* participation, 1 August 2003, paras. 8, 10. But see *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 17 (Petitioners argued that ‘Rule 37(2) establishes the right of third parties to apply for *amicus curiae* status. This right does not extend to a right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are so accepted. On the other hand, it establishes a right to make a full presentation to the tribunal in order to be able to meet the test for acceptance as an *amicus curiae*.’ Other tribunals have so far not agreed with this view.)

416 For instance, the IACtHR Rules are silent on this aspect. Article 28(4) IACtHR Rules is not applicable. The provision only addresses party submissions. See, however, L. Crema, *supra* note 294, pp. 23-24. With respect to investor-state dispute settlement, see, for example, *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19. (The tribunal stated that it had considered in its decision ‘all information contained in the petition, the views of Claimants and Respondent, the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the tribunal and the proceedings; and the degree to which the proposed *amicus curiae* brief is likely to assist the tribunal in arriving at its decision.’); *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, para. 52.

417 See for the ECtHR, N. Vajic, *supra* note 293, p. 100 (The information for the period until Oct. 2003 shows that the ECtHR has practically never refused NGO requests for third party intervention.). But see L.-A. Sicilianos, *La tierce intervention devant la Cour européenne des droits de l’homme*, in: H. Ruiz-Fabri/J.-M. Sorel (Eds.), *Les tiers à l’instance devant les juridictions internationales*, Paris 2005, p. 155 (referring to an interview with P. Mahoney).

sues'.<sup>418</sup> However, as discussed, the level of scrutiny applied in respect of the requirements varies significantly between tribunals.

Before most of the international courts and tribunals reviewed, requests for leave are rarely rejected for failure to comply with formal requirements.<sup>419</sup> In *Joesoebov v. the Netherlands*, a case concerning extradition proceedings to Azerbaijan, the ECtHR received written comments by Azerbaijan without a request for leave attached. The ECtHR decided to interpret the comments as such a request. It reasoned that this was permissible, because the comments were largely factual.<sup>420</sup> Equally, in *Grand River v. USA*, the tribunal received after the expiration of a public deadline for *amicus* submissions a letter from the National Chief of the Assembly of First Nations. While the letter called for application of the rights of indigenous people in NAFTA proceedings and expressed support for the claimant, it did not request leave. The letter was subsequently adopted by the claimant as a supporting exhibit.<sup>421</sup> In *AES v. Hungary*, the investment tribunal asked the European Commission to clarify certain aspects of its application prior to transmitting it to the parties.<sup>422</sup>

Such flexibility in the application of procedural rules is not unusual in international litigation. The ICJ has observed that it is 'not bound to attach the same degree of importance to considerations of form as they might possess in domestic law.'<sup>423</sup> International courts' procedural flexibility

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418 *Suez/Interaguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 27.

419 An exception to the general procedural lenience was the Appellate Body's rejection of all seventeen *amicus curiae* applications in *EC-Asbestos* for failure to comply with the application procedure. It has been surmised that the rejection was the response to political pressure exercised by member states on the Appellate Body after the publication of the *EC-Asbestos* Additional Procedure. See B. Stern, *supra* note 98, p. 1445. Regarding the ECtHR, only in *Goddi v. Italy*, Judgment of 9 April 1984, Series A No.76, the court explicitly rejected a request for failure to comply with formal requirements. The request was also received late.

420 *Joesoebov v. the Netherlands* (dec.), No. 44719/06, 2 November 2010.

421 *Grand River v. USA*, Award, 12 January 2011, para. 60.

422 *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 3.18.

423 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 11 July 1996, ICJ Rep. 1996, pp. 595, 612, quoted by E. Lauterpacht, *Principles of procedure in international litigation*, 345 *Receuil des Cours* (2009), p. 430 ('[R]ules of procedure must be approached in a common-sense and flexible manner.').

finds its limitation in the parties' procedural rights. Where a procedural defect in the admission of *amicus curiae* risks impairing the parties' procedural rights, courts are not lenient. Especially regarding timeliness, international courts and tribunals adopt a strict position. This may be because of the direct link between timeliness, the parties' due process rights and concerns over the efficiency of proceedings. Further exceptions to strict enforcement of formal rules apply to the IACtHR and a few investment tribunals. Their approach to matters of form showcases tribunals' attempts to regulate the flow of submissions and to tolerate the additional burdens *amicus curiae* participation might entail only if *amici curiae* conform to the rules established for their involvement.

International courts and tribunals have adopted a lenient approach with regard to the substance of requests for leave. The ECtHR seems to have discarded its initial practice of closely monitoring and tailoring the content of submissions. Today, it routinely accepts requests for leave as proposed by prospective *amici curiae*.<sup>424</sup> And in *Glamis v. USA*, the tribunal decided that it

should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed, but that, given the public and remedial purposes of the non-disputing submissions, leave to file and acceptance of submissions should be granted liberally. These matters, the tribunal determined, were best considered at a later point in the proceedings, as necessary.<sup>425</sup>

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424 E.g. *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161; *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B; *Wingrove v. the United Kingdom*, Judgment of 25 November 1996, Reports 1996-V. Unfortunately, the judgments rarely reveal how the request for leave application was modified in its content. See also *Vajic* who argues that this broad admission policy has diminished the need for a right for NGOs to intervene in ECtHR proceedings. N. Vajic, *supra* note 293, pp. 99-100.

425 *Glamis v. USA*, Award, 8 June 2009, para. 286. However, the tribunal barely considered the statements made by the petitioners, raising doubts with regard to the effectiveness of the requirements. See *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10 ('Upon review of the application and submission and consideration of the views of the Parties, the Tribunal is of the view that the submission satisfies the principles of the FTC's Statement on non-disputing party participation.'). Other investment tribunals, as seen in the preceding section, take a stricter approach.

Occasionally, investment tribunals in their decision to admit a brief order an *amicus curiae* to modify the content of a submission.<sup>426</sup> Some investment tribunals engage in a dialogue with *amicus curiae* applicants to explain the conditions for participation as *amicus*. In *Biwater v. Tanzania*, the tribunal, unsure as to the potential use of an *amicus curiae* submission, instead of rejecting the application, permitted several *amicus curiae* applicants to file a joint initial written submission, in which they were to articulate whatever arguments and provide whatever information they considered appropriate to obtain a ‘clearer view as to any areas on which the tribunal might need further assistance.’<sup>427</sup>

It appears that requests for leave from governments and international organizations are often handled less rigorously. The ECtHR re-defined Azerbaijan’s submission in *Joesoebov v. the Netherlands*. Also, investment tribunals have invited the EC to clarify its request for leave. Morocco’s request for participation in WTO Appellate Body proceedings was rejected only in part when it failed to comply with certain requirements. This may be partly because regulations of *amicus curiae* are usually tailored to non-governmental entities. International courts and tribunals may find it inappropriate to hold governmental entities to the same rigorous standards. Drawing inspiration from US Supreme Court practice, *Gruner* advocates that governmental entities should be permitted to make *amicus curiae* submissions without having to request leave on the assumption that they are representing the public interest.<sup>428</sup> It is problematic to transfer this rationale to international dispute settlement. States are not necessarily seeking to represent a public interest in a case. Moreover, the public interest at issue may not necessarily be best represented by a state, especially if it is global or transnational in nature. Finally, the participation of a state at

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426 E.g. *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12, Section (ii): ‘this written submission shall take the form of the Applicants’ existing submission but it should be edited with a view to assisting the Tribunal’s determination of the jurisdictional issues raised by the Parties (not the merits).’

427 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 60. The Tribunal consisted of Gary Born, Toby Landau and Bernard Hanotiau (Presiding Arbitrator).

428 M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 *Columbia Journal of Transnational Law* (2003), p. 956.

the national level is based on a rationale that is not replicated at the international level.

Are there any requirements for the decision on request for leave itself? The FTC Statement determines that applications for leave must be decided during the proceedings and in a manner which least interrupts them.<sup>429</sup> Section 43 ACtHPR Practice Directions determines that requests will be determined ‘within a reasonable time.’ According to the *EC–Asbestos* Additional Procedure, requests for leave must be decided ‘without delay.’ This approach has been changed in practice. In several cases, the WTO Appellate Body has held that it would decide on the acceptance and consideration of a submission only after considering the parties’ and third parties’ written and oral submissions.<sup>430</sup> This approach does not seem effective. Parties and third parties will have to consider and comment on *amicus curiae* submissions that may ultimately not even be admitted.

*Amicus curiae* applicants do not possess a right to a decision, rendering unnecessary a formal admission decision, unless it is required to protect the parties’ rights. The ECtHR decides on *amicus curiae* applications without issuing a formal decision or order.<sup>431</sup> The FTC Statement on non-disputing party participation stipulates in Sec. B para. 8 that the tribunal ‘will render a decision whether to grant leave to file a non-disputing party submission.’ Investment tribunals issue a procedural order or decision on each *amicus curiae* application. Some international courts and tribunals provide reasons for the rejection of a request, which is laudable in terms of

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429 NAFTA FTC Statement, Sec. B para. 7(a).

430 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 10; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 10 (Deferral of admissibility decision, including timeliness, until consideration of party submissions.).

431 Rule 44(5) ECtHR Rules: ‘Any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be *subject to any conditions, including time-limits, set by the President of the Chamber*. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.’ *Crema* criticizes that the court only lists *amici curiae* in its judgment that it admitted to the proceedings and not those it rejected. He calls for a ‘duty to report in public who submitted an *amicus*, and the reason why a given submission was accepted or dropped.’ See L. Crema, *supra* note 294, p. 21.

efficiency and the future development of the concept. The WTO adjudicating bodies take a formal decision on the matter, but it is not published. Neither the IACtHR, nor the ICJ in advisory proceedings seem to issue a formal decision on the admission of briefs. Even where they are issued, decisions on *amicus curiae* participation are not always made by the full court or tribunal. Article 36(2) ECHR, for example, places the decision with the President of the Court.<sup>432</sup> Unlike judgments, courts do not need to provide reasons for procedural decisions, including the decision on the admission of *amicus curiae*.<sup>433</sup>

None of the courts or tribunals examined offers a procedure for the review of the decision to grant leave. Procedural court orders and decisions are not appealable under the procedures examined.<sup>434</sup> However, no rule was found prohibiting an applicant to resubmit an application at a later stage, although the chances of a reversal of a decision are rather moderate, unless the application or the circumstances of the case have changed considerably. In *Methanex v. USA*, the tribunal rejected the first *amicus* applications as premature, but encouraged petitioners to reapply at a later stage with additional information.<sup>435</sup>

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432 In a few cases, the President consulted the chamber before deciding on a request. See *Jersild v. Denmark*, Judgment of 23 September 1994, Series A No. 298; *Goodwin v. the United Kingdom*, Judgment of 27 March 1996, Reports 1996-II; *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44.

433 See Article 56 ICJ Statute, Article 30(1) ITLOS Statute, Article 45 ECHR, Article 66 IACtHR Statute, Article 12(7) DSU, Article 48 (3) ICSID Convention, Article 79 1907 Hague Convention. See also M. Benzing, *supra* note 14, p. 125; I. Scobbie, *Legal reasoning and the judicial function in the International Court*, University of Cambridge, Ph.D. Dissertation, 1990. Arguing that this is a principle of public international procedural law, L. Delbez, *Les principes généraux du contentieux international*, Paris 1962, pp. 123-124; C. Santulli, *Droit du contentieux international*, Paris 2005, para. 800.

434 Article 31(2) IACtHR Rules determines that only non-procedural decisions of the President of the Court may be appealed. Para. 3 asserts that '[j]udgments and orders of the Court may not be contested in any way.'

435 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, pp. 12-13, paras. 32, 34 ('In order for the Tribunal to evaluate the independence of the *Fundacion*, it would be necessary to have additional information on its membership. To judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationship, with the Claimants or the Respondent.'). The Tribunal rejected all four of the *amicus curiae* petitioners,

This flexible and discretionary approach has been criticized. With respect to *amicus curiae* participation in investment arbitration, *Levine* argues that

it is necessary to develop standards that will allow for guaranteed or mandatory, rather than purely discretionary, right of participation as *amicus curiae*. These applicants must be able to satisfy criteria similar to those already addressed in the ICSID Rules, such as the presence of a significant interest in the merits of the dispute. ... [I]t will genuinely address the fact that in circumstances where a third party has a sufficient interest in the proceedings, it may be necessary from the perspective of legitimacy to formalize their status rather than leaving the possibility of participation subject to an *ad hoc* process.<sup>436</sup>

*Howse* and *Peel* argue that the refusal of a panel to accept and consider a relevant *amicus curiae* submission could constitute an appealable violation of the panel's duty to make an objective assessment of the facts under Article 13 DSU.<sup>437</sup> Others wish that for governmental *amici curiae* the international court or tribunal's discretion to reject a submission should be limited.<sup>438</sup> Demands for such a right overlook that the primary purpose of *amicus curiae* participation from the perspective of international courts and tribunals is the support of the court in rendering a decision in the case. Accordingly, the admission decision cannot be placed in the hands of an applicant.<sup>439</sup> *Levine's* proposal argues for the creation of an intervention mechanism based on justified doubts concerning the adequacy of the in-

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but allowed them submit a new application for leave with the information requested. See *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, p. 13, para. 34.

436 E. Levine, *supra* note 387, p. 222 [Emphasis added].

437 R. Howse, *Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence*, in: J. Weiler (Ed.), *The EU, the WTO and the NAFTA*, Oxford 2000, p. 50; J. Peel, *Giving the public a voice in the protection of the global environment: avenues for participation by NGOs in dispute resolution at the European Court of Justice and World Trade Organization*, 12 *Colorado Journal of International Environmental Law & Policy* (2001), p. 69.

438 L. Boisson de Chazournes/ M. Mbengue, *The amici curiae and the WTO dispute settlement system: the doors are open*, 2 *The Law and Practice of International Courts and Tribunals* (2003), p. 235.

439 See N. Vajic, *supra* note 293, p. 99 ('Personally, I agree with the view that there should be some kind of judicial control over the circumstances in which, and of the extent to which, third parties are permitted to intervene, i.e. that the ECHR should have the last word in this respect.'). Arguing against an obligation to con-

strument in cases where an entity has a concrete and affected interest in the pending case. Indeed, the instrument is not a proper substitute for a right to participate (see Chapter 8). However, in the absence of such a right, international courts and tribunals have little choice but to resort to *amicus curiae* if they wish to involve the affected person in the proceedings.

#### IV. Comparative analysis

The request for leave procedures reviewed are diverse and emphasize different aspects. For instance, the procedures established by the ECtHR focus on formal aspects, whereas the procedures developed by investment tribunals are detailed with respect to substantive requirements and capacity, but grant flexibility in respect of procedure.

The substantive requirements established with regard to requests for leave to participate as *amicus curiae* vary significantly between international courts and tribunals.<sup>440</sup> A common requirement is the potential relevance of a submission.<sup>441</sup> This is the determinative substantive factor for most international courts and tribunals. Additionally, some international courts and tribunals invite the parties to weigh in on this aspect and to adopt *amicus curiae* submissions as their own (WTO, ECtHR, investment tribunals). In these instances, the court's test of relevance is replaced by the parties' own test.<sup>442</sup> Prospective *amici curiae* must convince the court or tribunal that their submission will convey information that is not already before them, and that they will add value to their decision-making. Unfortunately, most courts barely comment (publicly) on this requirement

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sider requests for leave to participate as *amicus curiae* mainly for practical reasons, L. Bastin, *The amicus curiae in investor-state arbitration*, 1 Cambridge Journal of International and Comparative Law (2012), p. 229.

440 For a comparison of the *EC-Asbestos* Additional Procedure with other request for leave procedures, see C. Knahr, *Participation of non-state actors in the dispute settlement system of the WTO: benefit or burden?*, Frankfurt am Main 2007, pp. 150-160.

441 See C. Chinkin/R. Mackenzie, *supra* note 146, p. 155; L. Bartholomeusz, *supra* note 17, pp. 209, 213.

442 E.g. *Canada – Certain Measures Affecting the Renewable Energy Sector* (hereinafter: *Canada-Renewable Energy*), Report of the Panel, adopted on 24 May 2013, WT/DS412/R and WT/DS426/R, para. 1.13.

rendering it difficult for applicants to predict the threshold for novelty, especially if access to documents is limited.<sup>443</sup> Investment arbitration tribunals further require applicants to prove a significant interest in the arbitration and, traditionally, they must show that the subject-matter of the dispute affects a public interest. The public interest requirement is more usefully established *ex officio* as it is unrelated to the respective applicant. The ECtHR has not published any requirements regarding the substance of requests for leave. It grants leave liberally, unless the information submitted is duplicative or overtly irrelevant.

Some international courts and tribunals (investment tribunals, *EC-Asbestos* Appellate Body division) regulate the request for leave process densely, while other courts and tribunals (ICJ, ITLOS, ECtHR) provide rudimentary rules. In addition, there is a trend of formalization and codification of request for leave procedures in investment arbitration. What conclusions can be drawn from the density and form of regulation? Does it impact the number of *amicus curiae* requests in terms of quantity and quality of submissions? Does inversely the lack of regulation hinder *amicus curiae* participation? In terms of absolute figures, the existence of a request for leave procedure does not affect the participation of *amici curiae*, as a comparison between the ECtHR and IACtHR shows. The extensive regulation of the concept in investment arbitration seems to be guided by an intention to minimize disruptions to the proceedings and justify the piercing by *amicus curiae* of the strictly bilateral process. It does not seem to have deterred prospective *amici curiae*. To the contrary, clear rules and transparency in their application helps potential *amici curiae* to see if there is a chance of admission. The WTO and the ICJ show that the lack of regulation combined with a standard rejection discourages potential *amici curiae* from requesting leave.

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443 A typical evaluation was made in *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 359, 370, 392: ‘The Arbitral Tribunal has found the *Amici*’s observations useful. The submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *Amici*’s submissions are returned to in that context.’

D. Conclusion

This Chapter has shown that *amicus curiae* participation is increasingly codified and regulated across all international courts and tribunals. This development coincides with a general codification trend in international procedure. There is also an increasing formalization of the requirements for requests for leave procedures to participate as *amicus curiae*. A factor contributing to this trend may be the duty of international courts and tribunals to conduct proceedings ‘without unnecessary delay or expense’, as stipulated by Article 49 ITLOS Rules. Another important factor may be the steady rise in the overall amount of cases and cases with *amicus curiae* participation. Formal rules simplify the process of assessing applications and submission. This trend is positive. It enables *amici curiae* to submit briefs in a manner which increases their likelihood of consideration. Also, it makes more efficient the process of participation, and, finally, it is an important tool to manage *amici curiae*’s as well as the disputing parties’ expectations. Overall, the density of formal requirements before all international courts and tribunals for *amicus curiae* submissions currently is moderate and strikes a sensible balance between the parties’ and the *amicus curiae*’s interests.

This Chapter has further shown that all international courts and tribunals regulate *amicus curiae* as a procedural concept that is fully subject to their discretion. *Amicus curiae* is not an instrument reserved for non-state actors. There is an ever-expanding group of *amicus curiae* participants, which varies between international courts and tribunals. The spectrum of potential *amicus curiae* participants is explicitly limited before the ICJ, the ITLOS and the IACtHR. Before the other international courts and tribunals reviewed, the structure of *amicus curiae* participants has developed outside the courts’ sphere of influence. The largest share of *amicus curiae* submissions stems from NGOs.

The requirements applicable to the person of *amicus curiae* are quite homogenous despite significant disparities in regulatory density between investment tribunals and all other international courts and tribunals in this regard. While international courts place great value on the expertise and experience of *amicus curiae*, impartiality does not seem to be a mandatory condition. The extent to which *amicus curiae* is expected to be impartial seems to correlate with the function assigned to it. Most international courts and tribunals do not expect unsolicited *amici curiae* to be neutral. To the contrary, in investment arbitration and in the ECtHR specifically,

prospective *amici* must show possessing a special interest to participate in the proceedings. In this respect, the international *amicus curiae* differs significantly from some national concepts of *amicus curiae*. Independence generally seems to be mandatory, even though concrete conditions to ensure independence are often lacking in practice. Where they exist, they are mostly enforced loosely. Additional rules prescribing disclosure of any affiliation or assistance would be useful. Tribunals generally do not seem to verify the information submitted by *amicus curiae* applicants. This places a heavy burden on the parties and should be reconsidered.

It would be useful to condition the admission requirements on the function assigned to an *amicus curiae*. Accordingly, if its main purpose is the provision of additional information, expertise and neutrality should be indispensable requirements. For interest-based *amici curiae*, impartiality should not be a condition, but instead the focus should be on whether the *amicus curiae* can credibly claim to represent the defended interest or value. Independence of *amici curiae* is indispensable in every case to protect party equality.

Request for leave procedures function well. With the exception of timeliness requirements, tribunals show lenience in their application. Overall, the concern that the admission of *amicus curiae* briefs could trigger an uncontrollable flood of requests, as argued by the ICJ Registrar in his rejection of *Reisman's* enquiry about *amicus curiae* participation in *South West Africa*, has not materialized and it could be managed by a rigorous admission process.



## Chapter § 6 *Amici curiae* in the proceedings

Having admitted an *amicus curiae* to the proceedings, international courts and tribunals must decide on the mode of its participation in the proceedings. They must decide when in the proceedings *amicus curiae* should participate, in what manner, and whether it will be allowed to submit evidence or access case documents. In short, they must decide on its status in the proceedings.

As in the admission process, international courts and tribunals have discretion over the participation of *amicus curiae*, often similar in scope to that of the ECtHR in Article 44(5) ECtHR Rules. The provision determines that '[a]ny invitation or grant of leave ... shall be subject to any conditions ... set by the President of the Chamber.' However, this discretion is not unlimited. International courts and tribunals are under an obligation to carry out their proceedings efficiently and with respect for the rights of the parties and third parties. For some investment tribunals, these obligations have been codified with respect to *amicus curiae*. For instance, Rule 37(2) ICSID Arbitration Rules stipulates that the tribunal shall 'ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party.' The tribunal in *Suez/Vivendi v. Argentina* summarized the diverging interests at stake in the creation of an adequate regulatory framework for the participation of *amicus curiae* by noting that the goal of such regulation was to

enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties. ... [T]he Tribunal will endeavour to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings.<sup>1</sup>

This Chapter examines how the efforts of international courts and tribunals to strike a balance between these interests have shaped *amicus curiae* participation. First, it will consider the modalities of *amicus curiae* participation (A.) and whether participation is officially recorded (B.), fol-

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1 *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 15. See also, *Suez/InterAguas v. Argentina*, Order in Response to a petition for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 28.

lowed by an examination of the formal aspects of *amicus curiae* participation (C.) and the substance of briefs (D.). The Chapter concludes by considering whether *amici curiae* may submit evidence (E.) and access case documents (F.).

### A. Oral and written participation

*Amici curiae* participate in proceedings before international courts and tribunals predominantly through written submissions. Only select international courts and tribunal have granted *amici curiae* permission to participate actively in hearings.

#### I. International Court of Justice

Article 69(2) ICJ Rules clarifies that the ICJ may request information from a public international organization pursuant to Article 34(2) ICJ Statute both in writing and orally. Where information is submitted *proprio motu* by a public international organization, Article 69(3) ICJ Rules determines that the submission may be made in written form, but that the ICJ shall retain the right to require such information to be supplemented orally or in writing. To date, where *amici* have submitted information to the ICJ, they have done so exclusively in written form. For advisory proceedings, Article 66(2) ICJ Statute determines that international organizations and states participate in writing and, if hearings are held, orally. In its *Wall* and *Kosovo* advisory opinions, the ICJ granted leave to present written and oral statements to the affected state-like entities. Interestingly, the time allocated to the affected entities in both cases was four times longer than the time allocated to the other participants, indicating that the ICJ distinguished based on how affected an entity was.<sup>2</sup> In labour dispute cases between an international organization and its (former) staff member, the ICJ, in view

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<sup>2</sup> *Wall*, Public sitting held on Monday 23 February 2004, verbatim record, CR 2004/1, p. 17; *Kosovo*, Public sitting held on Monday 1 December 2009, verbatim record, CR 2009/24, p. 30. Serbia was also granted three hours of speaking time, that is, four times longer than the other speakers. Cited by Y. Ronen, *Participation of non-state actors in ICJ proceedings*, 11 *The Law and Practice of International Courts and Tribunals* (2012), pp. 92-93.

of its limited rules on standing, abolished hearings altogether to ensure equal representation of the concerned staff member and its employer organization. Though the Court may do so as hearings are not mandatory in advisory proceedings pursuant to Article 66(2) ICJ Statute and Article 105(2)(b) ICJ Rules, this result is overall unsatisfying considering that the ICJ's decisions in these cases – unlike in typical advisory proceedings – directly modify the rights of the parties (see Chapter 5). Practice Direction XII states that submissions from non-governmental entities are not considered part of the record. They can therefore not be considered formal written submissions.

## II. International Tribunal for the Law of the Sea

Article 84(1) ITLOS Rules leaves it to the ITLOS to decide after consultation with the chief administrating officer of the organization concerned whether solicited information shall be presented orally or in writing. Article 84(2) determines that unsolicited information may be submitted only in writing. Only if the ITLOS then wishes to receive additional information, can it authorize the organization to present such information orally. Participation under Article 84(3) is primarily by written submission, but the submission may be discussed orally at the hearing. As regards advisory proceedings, Article 133(3) and (4) ITLOS Rules stipulates that submissions to the Seabed Disputes Chamber by states and appropriate intergovernmental organizations may be written and oral, if oral proceedings are held. The wording of the provisions indicates that prior written submission is not a condition for the presentation of oral statements at the hearings. Further, pursuant to Article 133(3) the Chamber may hold a second round of written statements for states and intergovernmental organizations to comment on the initial written statements. The Seabed Disputes Chamber received numerous written submissions by states and intergovernmental organizations in *Responsibilities*. In addition to several governmental oral submissions, the Intergovernmental Oceanographic Commission of UNESCO and the IUCN were granted leave to present oral statements.<sup>3</sup> The Chamber also reproduced on its website a joint written sub-

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3 See verbatim records ITLOS/PV.10/1 14 September 2010 p.m.; ITLOS/PV.10/2 15 September 2010 a.m.; ITLOS/PV.10/3 16 September 2010 a.m.; ITLOS/PV.10/4, 16 September 2010 p.m.; ITLOS/PV.11/1, 1 February 2011.

mission by Greenpeace and the WWF, but denied their request for oral submissions. The Chamber had no other option given the clear limitation of Article 133(4) ITLOS Rules to intergovernmental organizations. Notably, in *SRFC*, WWF submitted two *amicus curiae* briefs, both of which were replicated on the ITLOS website of the case.<sup>4</sup>

### III. European Court of Human Rights

Article 36(2) ECHR contemplates written and oral submissions as alternative forms of participation. The provision is modified by Rule 44(3)(a) ECtHR Rules which designates written comments the norm and limits oral participation to ‘exceptional cases.’<sup>5</sup> The limitation was introduced only in the late 1990. Oral admission was granted where the *amicus curiae* possessed special knowledge due to its involvement in the case or longstanding involvement in the matters at issue.<sup>6</sup> While written *amicus curiae* participation has always been the norm in the ECtHR, the number of oral submissions has noticeably decreased over time, possibly due to the overall increase in the court’s caseload and efforts to conduct proceedings in the most efficient manner.<sup>7</sup> There was a significant rise in the admission of *amici curiae* to make oral presentations in 2011 and 2012 in cases before

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4 The briefs can be accessed at <https://www.itlos.org/cases/list-of-cases/case-no-21/> (last visited: 21.9.2017).

5 Rules concerning *amicus curiae* prior to Article 61(3) former ECtHR Rules did not mention the possibility of oral submissions. Still, oral submissions were occasionally allowed by the court.

6 *Mahoney* assumed that this would only occur with regard to factual aspects. Practice shows that this is not the case. See P. Mahoney, *Developments in the procedure of the European Court of Human Rights: the revised rules of the court*, 3 Yearbook of European Law (1983), p. 146.

7 The first admission of *amicus curiae* allowed oral submissions. See *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44. Between 2003 and 2010, seven *amici curiae* were granted leave to present oral submissions. See *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX; *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, 30 June 2005, ECHR 2005-VI; *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008; *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECHR 2009; *Perna v. Italy* [GC], No. 48898/99, 6 May 2003, ECHR 2003-V; *Muñoz Díaz v. Spain*, No. 49151/07, 8 December 2009, ECHR 2009.

the Grand Chamber.<sup>8</sup> But it seems to result from the nature of the cases rather than a policy shift in the court. The cases attracted widespread attention from the public and governments as they involved novel legal issues and touched upon politically highly sensitive matters. The main criterion guiding the ECtHR's exercise of discretion appears to be the expectation of an added value from the oral submission.<sup>9</sup> It is not always clear on what basis the court chooses to admit a certain *amicus curiae* to the oral proceedings over another that also made written submissions, but it seems that leave to make oral submissions is predominantly granted to states parties and intergovernmental organizations.<sup>10</sup> In *Hirsi Jamaa and others v. Italy*, a case concerning the legality under the ECHR of the interception on sea of boat refugees and their immediate return to Libya, the ECtHR granted leave to present an oral statement to the UNHCR. The UNHCR shared information *inter alia* on push-back operations and some of the affected applicants, the legal and factual situation of asylum seekers in Libya and the illegality of collective expulsion of aliens under international and European Union law. The ECtHR did not invite any of the several organizations that had carried out fact-finding missions on the situation of refugees in Libya.<sup>11</sup> In other cases, *amici curiae* that were granted leave to make oral in addition to written submissions include the parents of a child

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8 Five cases were registered: *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011; *NADA v. Switzerland* [GC], No. 10593/08, 12 September 2012, ECHR 2012; *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, ECHR 2012; *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012 (only UNHCR); *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011.

9 The ECtHR rejected requests for permission to present oral submissions for lack of necessity in *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, Series A No. 240; *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No. 246-A.

10 An exception is *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, ECHR 2012. The International Federation for Human Rights, International Commission of Jurists, ILGA-Europe, British Association for Adoption and Fostering and Network for European LGBTIQ\* Families Association were given leave to make joint written and oral submissions on the prohibition of second parent adoption.

11 *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012. In *Lautsi and others v. Italy*, a highly publicly discussed case concerning the legality of religious symbols in state schools, the ECtHR granted leave to present a joint oral submission to some of the states that had filed a written *amicus curiae* submission. The ECtHR did not reveal on which basis the states were selected to present oral submissions. See *Lautsi and others v. Italy* [GC], No. 30814/06, 18

murdered by the applicants,<sup>12</sup> homosexual and human rights interest groups commenting on discrimination based on sexual orientation in a case concerning rights of homosexuals,<sup>13</sup> the caretakers and Romanian legal representatives of Romanian orphans in a case concerning adoption by Italian families,<sup>14</sup> the European Commission in a case concerning seizure of an aircraft under Regulation (EEC) 990/93,<sup>15</sup> the British government in a case concerning the protection against *refoulement* of persons involved in terrorist activities,<sup>16</sup> the Belgian government in a case concerning the legality of the French full-face veil ban,<sup>17</sup> an international human rights organization in a case concerning states' obligations to protect citizens from domestic violence,<sup>18</sup> the European Commission and Cyprus (that initially had been the co-respondent) in a case engaging the relationship between EU law and the ECHR,<sup>19</sup> family members of a patient in a vegetative state in a case concerning withdrawal of nutrition and hydration

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March 2011, ECHR 2011. Leave to appear collectively in oral proceedings was given to the governments of Armenia, Bulgaria, Cyprus, Russia, Greece, Lithuania, Malta and San Marino. They criticized the chamber judgment and openly supported Italy's practice of display of religious symbols. Romania was not granted leave to present oral argument.

- 12 *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999; *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, ECHR 1999-IX.
- 13 *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX.
- 14 *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V.
- 15 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, 30 June 2005, ECHR 2005-VI. Council Regulation 990/93 implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). Bosphorus Airways lost three of its four-year lease of the aircraft due to the seizure. It argued that the seizure had violated its rights under Article 1 Protocol 1 to the ECHR.
- 16 *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008. The applicant had been prosecuted in Italy for participation in international terrorism. His deportation to Tunisia was ordered, where he had been sentenced *in absentia* to 20 years of imprisonment for membership in a terrorist organization and incitement to terrorism. The ECtHR had earlier held that the efforts to protect communities from terrorism could not outweigh the absolute nature of Article 3 ECHR. The United Kingdom in its oral *amicus* submission unsuccessfully argued that the court should overturn *Chahal v. the United Kingdom*, Judgment of 15 November 1996, Reports 1996-V.
- 17 *SAS v. France* [GC], No. 43835/11, 1 July 2014, para. 8.
- 18 See *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECHR 2009.
- 19 *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016.

against which other members of the family had brought the application<sup>20</sup> and the Armenian government in a freedom of expression case related to criminalization of the denial of the Armenian genocide.<sup>21</sup>

The ECtHR does not limit the modalities of written participation. Submissions may be made jointly by several persons or individually. The ECtHR has a strong practice of ‘repeat’ *amici curiae*, entities that regularly appear as *amici curiae* in its proceedings (see Annex I).

#### IV. Inter-American Court of Human Rights

The definition of *amicus curiae* in the IACtHR Rules mentions written and oral participation as equal alternatives. The IACtHR Rules only regulate written submissions from *amici curiae* in contentious proceedings. The provisions concerning oral hearings do not mention *amicus curiae* participation explicitly, but Rule 58(a) IACtHR Rules allows the court *inter alia* to hear ‘in any other capacity, any person whose statement, testimony, or opinion it deems to be relevant,’ a term that does not conflict with the definition in Article 2(3).<sup>22</sup> This lack of regulation may be because oral *amicus curiae* participation is rare before the IACtHR and the recent codification of *amicus curiae* was intended to solidify the existing *amicus curiae* practice.<sup>23</sup> The IACtHR has taken a more liberal approach

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20 *Lambert and others v. France* [GC], no. 46043/14, 5 June 2015, para. 8.

21 *Perinçek v. Switzerland* [GC], No. 27510/08, 15 October 2015.

22 Alternative basis could be an implied power read into Article 52(2) IACtHR Rules, which refers to ‘all other persons that the Court decides to hear.’

23 Prior to the codification, the IACtHR denied at least one request by *amici curiae* to participate in oral proceedings and there is no known case of oral participation since adoption of the new rules. In *Claude Reyes et al. v. Chile*, a case concerning the right to access to information, the *Asociación por los derechos civiles* requested leave to present written and oral arguments. It argued that it had originally brought the case before the IAComHR. Upon instruction by the President of the Court, the Secretary of the IACtHR accepted the written submission as *amicus curiae*, but denied the request to present oral submission on the account of a limitation of direct participation in hearings to persons accredited by the disputing parties. See *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006 (Merits, Reparations and Costs), IACtHR Series C No. 151, p. 5, para. 25. In 2012, the IACtHR Secretary heard three minors in a case affecting their custody arrangements. The girls’ father had filed a petition as *amicus curiae* on his and his daughters’ behalf. The court did not admit the girls as *amici*, but decided to hear their

in advisory proceedings. Although written submissions are the norm, the IACtHR has allowed *amici curiae* to make oral submissions in at least nine advisory proceedings.<sup>24</sup> The first admission was made in *Ciertas Atribuciones*, a case challenging some of the practices of the IAComHR.<sup>25</sup> The IACtHR invited three of the eleven NGOs that had submitted *amicus curiae* briefs to participate in the hearing: the CEJIL, American Watch and the International Human Rights Law Group. *Shelton* surmises that their admission to the oral proceedings resulted from the importance of the issue.<sup>26</sup> It is not clear what criteria the court used to decide which *amicus*

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submission given that they were affected by the decision. See *Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs), IACtHR Series C No. 239.

- 24 *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84 of 19 January 1984, IACtHR Series A No. 4, pp. 3-4, para. 6; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*, Advisory Opinion No. OC-5/85 of 13 November 1985, IACtHR Series A No. 5, p. 3, para. 7; *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50, 51 of the American Convention on Human Rights)*, Advisory Opinion No. OC-13/93 of 16 July 1993, IACtHR Series A No. 13; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion No. OC-14/94 of 9 December 1994, IACtHR Series A No. 14, p. 4, paras. 10-11; *Reports of the Inter-American Commission on Human Rights (Article 51 American Convention on Human Rights)*, Advisory Opinion No. OC-15/97 of 14 November 1997, IACtHR Series A No. 15, pp. 6-7, para. 21; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99 of 1 October 1999, IACtHR Series A No. 16; *Juridical Condition and Human Rights of the Child*, Advisory Opinion No. OC-17/02 of 28 August 2002, IACtHR Series A No. 17; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03 of 17 September 2003, IACtHR Series A No. 18, pp. 9-10, para. 36; *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, p. 4, para. 8. According to *Lindblom*, this is a growing trend. The examination of the case law did not confirm this view. Instead, it appears that *amici curiae* have been admitted to the court frequently. See A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005, p. 361.
- 25 *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50, 51 of the American Convention on Human Rights)*, Advisory Opinion No. OC-13/93 of 16 July 1993, IACtHR Series A No. 13.
- 26 D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 *American University International Law Review* (1994), p. 350.

*curiae* to invite to participate in the oral proceedings. One factor might have been consent from the institution that brought the advisory proceedings as early cases mention such consent.<sup>27</sup> Another factor may have been the quality or relevance of the written submission or the representativeness of the *amicus curiae*. In one case, the court decided to hold a separate hearing session for the *amici curiae*, predominantly non-governmental organisations active in the area of human rights and journalism. The *amici* were not invited to the ordinary hearing.<sup>28</sup> Recently, the IACtHR seems to have changed its restrictive approach in advisory proceedings. In two cases, the IACtHR decided that all those who had submitted written briefs were eligible to take part in the oral proceedings subject only to accreditation. In both cases, almost all entities accepted the invitation. In addition, in both cases, the IACtHR admitted as *amici curiae* to the oral proceedings institutions that had not submitted written briefs.<sup>29</sup> The IACtHR has not explained this change, but it coincides with the court's general efforts to increase the transparency of its practice with respect to *amicus curiae*. Submissions can be made jointly by several persons or individually.

## V. African Court on Human and Peoples' Rights

The Practice Directions in Section 44 determine that any *amicus curiae* admitted to the proceedings shall be 'invited to make submissions ... at any point during the proceedings.' In *Lohé Issa Konaté v. Burkina Faso*,

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27 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13, 29 ACHR), Advisory Opinion No. OC-5/85, 13 November 1985, IACtHR Series A No. 5, pp. 3-4, paras. 6-7; *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84, 19 January 1984. The case was conducted under Article 64(2) IACtHR Statute where the government bringing the opinion generally has stronger influence on the proceedings. In addition, the *amici curiae* were invited by the court in consultation with the Costa Rican government.

28 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13, 29 ACHR), Advisory Opinion No. OC-5/85 of 13 November 1985, IACtHR Series No. 5, p. 3, para. 7.

29 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03 of 17 September 2003, IACtHR Series A No. 18, pp. 9-10, para. 36; *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, p. 4, para. 8.

*amici curiae* made both written and oral submissions.<sup>30</sup> The court did not specifically justify admission to the oral proceedings.

## VI. WTO Appellate Body and panels

Before the Appellate Body and WTO panels, the issue of *amicus curiae* has exclusively been considered with regard to written submissions. It appears that *amici curiae* have never sought admission to hearings. Article 13 DSU does not explicitly confine solicitation of information and technical advice to a written procedure, but this flows from the limitative rules on access to hearings in panel proceedings.<sup>31</sup> In short, oral submissions by *amici curiae* are a non-issue. This could change if panels and the Appellate Body were to uplift the confidentiality of hearing. The DSU does not limit the circle of entities allowed to appear before panels and the Appellate Body. Section 2 Panel Working Procedures foresees privacy of panel meetings and envisages participation by the disputing parties and third parties upon invitation by the panel, but this provision is not mandatory. It can be altered by the panel in consultation with the parties in a case pursuant to Article 12(1) DSU.<sup>32</sup> Further, the Appellate Body Working Proce-

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30 *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, pp. 8-9, paras. 25, 27.

31 Section 2 Panel Working Procedures, Appendix 3 to the DSU: ‘The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.’

32 Since 2005 and as of September 2011, panels have, with the consent of the parties, on more than 10 occasions opened their meetings to the public via closed circuit television and webcast. See *Canada/US—Continued Suspension*, Reports of the Panels, adopted on 14 November 2008, WT/DS320/R, WT/DS321/R, paras. 7.38-7.51; *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircrafts* (hereinafter: *EC and Certain Member States—Large Civil Aircraft*), Report of the Panel, adopted on 1 June 2011, WT/DS316/R, para. 1.13; *United States – Measures Affecting Trade in Large Civil Aircraft* (hereinafter: *US—Large Civil Aircraft (2<sup>nd</sup> complaint)*), Report of the Panel, adopted on 23 March 2012, WT/DS353/R, para. 1.15; *EC—Bananas III*, Recourse to Article 21.5 (US), Report of the Panel, adopted on 22 December 2008, WT/DS27/R, para. 1.11; *United States – Continued Existence and Application of Zeroing Methodology* (hereinafter: *US—Continued Zeroing*), Report of the Panel, adopted on 19 February 2009, WT/DS350/R, para. 1.9; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* (hereinafter: *US—Zeroing (EC)*), Recourse to Article 21.5—EC, Report of the Panel, adopted on 11 June

dures do not appear to prohibit oral presentations by *amici curiae*.<sup>33</sup> However, given the delicacy of the issue in WTO dispute settlement, it current-

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2009, WT/DS294/R; *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R, paras. 1-18-1.19, 1.51; *United States – Measures Relating to Zeroing and Sunset Reviews* (hereinafter: *US–Zeroing (Japan)*), Recourse to Article 21.5 (Japan), Report of the Panel, adopted on 31 August 2009, WT/DS322/R, para. 1.6; *EC–IT Products*, Reports of the Panels, adopted on 21 September 2010, WT/DS375/R, WT/DS376/R, WT/DS377/R, para. 1.11, WT/DS377/R; *Brazil – Measures Affecting Imports of Retreaded Tyres* (hereinafter: *Brazil–Retreaded Tyres*), Report of the Panel, adopted on 17 December 2007, WT/DS332/R, para. 1.9 (Unsuccessful request by CIEL to webcast first substantive meeting due to parties’ dissent). See also L. Ehring, *Public access to dispute settlement hearings in the World Trade Organization*, 11 *Journal of International Economic Law* (2008), pp. 1-14. Panels regard the parties’ request for open hearings as a waiver of the confidentiality obligation of Article 18(2) DSU with respect to the information shared by the parties at the hearing. The confidentiality rights of third parties who disagree with opening the hearings are protected by the disconnection of the transmission of the hearing broadcast for the duration of their statements.

The Appellate Body in more than 10 cases since 2008 has waived the confidentiality of hearings prescribed by Article 17(10) DSU upon request from the parties on the condition ‘that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process.’ *EC and Certain Member States–Large Civil Aircraft*, Report of the Appellate Body, adopted on 1 June 2011, WT/DS316/AB/R, p. 14, para. 22 and Annex IV; *Canada/US–Continued Suspension*, Reports of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, para. 32, Annex IV; *EC–Bananas III*, Recourse to Article 21.5 (Ecuador), Report of the Appellate Body, adopted on 11 December 2008, WT/DS27/AB/R; *EC– Bananas III*, Recourse to Article 21.5 (US), Report of the Appellate Body adopted on 22 December 2008, WT/DS27/AB/R, para. 28, Annex IV; *US–Continued Zeroing*, Report of the Appellate Body, adopted on 19 February 2009, WT/DS350/AB/R, para. 9, Annex III; *US–Zeroing (EC)*, Recourse to Article 21.5 (EC), Report of the Appellate Body, adopted on 11 June 2009, WT/DS294/AB/R, para. 14, Annex III; *US–Zeroing (Japan)*, Recourse to Article 21.5 (Japan), Report of the Appellate Body, adopted on 31 August 2009, WT/DS322/AB/R, para. 18, Annex II; *Australia–Apples*, Report of the Appellate Body, adopted on 17 December 2010, WT/DS367/AB/R, para. 9, Annex III. Rule 27 Working Procedures for Appellate Review contemplates as participants in hearings ‘all parties to the dispute, participants, third parties and third participants.’ The Appellate Body has granted requests by WTO states parties to attend appeal hearings as passive observers if the requesting state appeared as third participant in the panel proceedings and the parties do not object to the participation. *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R.

ly seems unlikely that the parties or the adjudicating bodies would be willing to agree to oral presentations by *amici curiae*. The WTO panels and Appellate Body permit both the submission of individual and joint *amicus curiae* briefs, as well as the adoption of full or parts of *amicus curiae* submissions by one of the parties to a case.

## VII. Investor-state arbitration

*Amici curiae* in investment arbitration are also limited to written participation, although *amicus curiae* petitioners routinely request leave to make oral submissions and obtain access to case documents.<sup>34</sup> Existing regulations on *amicus curiae* address largely written submissions.<sup>35</sup> The ICSID and the UNCITRAL Arbitration Rules establish a clear presumption in

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33 Section 27 Appellate Body Working Procedures regulates hearings. With respect to oral presentations, Section 27(3)(c) mentions that third parties may present oral submissions after having notified their intention to do so and if this accords with ‘the requirements of due process.’

34 For many, *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, paras. 5, 7; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amicus curiae*, 17 October 2001, para. 1; *Suez/Vivendi v. Argentina*, Order in Response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007, para. 1; *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25, para. 14; *Piero Foresti v. South Africa*, Letter from Secretariat to the Applicants, 5 October, 2009, ICSID Case No. ARB(AF)/07/01, para. 4; *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.1.5. In NAFTA-administered arbitrations, access to document requests are rare given the practice of publication of case materials by the parties. Recent *amicus curiae* petitions have only requested leave to file written submissions, an acknowledgment of the unlikelihood of being granted leave to file oral submissions. See *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 3.22; *Glamis v. USA*, Quechan Indian Nation Application for leave to file a non-party submission, 19 August 2005.

35 See FTC Statement; Rule 37(2) ICSID Arbitration Rules; Article 4(1) UNCITRAL Rules on Transparency; *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008; *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, Application by CIEL et al., 2 March 2011 and Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12; *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae*, 1 August 2003, para. 3; *Merrill v. Canada*, Letter, 31 July 2008.

favour of privacy of hearings and subject the decision over attendees and participants in hearings to parties' consent.<sup>36</sup> Given that such consent has regularly been denied, *amici curiae* have not been admitted to oral hearings in UNCITRAL arbitrations.<sup>37</sup> The UNCITRAL Rules on Transparency in Article 6 establish a general publicity of hearings, but Article 4 codifies the current *amicus* practice by regulating *amicus curiae* participation purely as written participation.<sup>38</sup> The ICSID Arbitration Rules are less limitative. In the 2006 reform of the ICSID Arbitration Rules, the consensuality requirement in Rule 32(2) was transformed to a veto right of each party against the tribunal's decision to admit additional participants to the hearing.<sup>39</sup> This rule change has not had any practical effect given that usually the party against whose case the *amicus curiae* seeks to argue explic-

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36 Article 28(3) of the 2010 and 2013 UNCITRAL Arbitration Rules maintains the strict presumption in favour of privacy of hearings found in Article 25(4) of the 1979 UNCITRAL Arbitration Rules. Thereafter, hearings are to be held *in camera* 'unless the parties agree otherwise.'

37 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, paras. 23, 41-42; *UPS v. Canada*, Decision of the tribunal on petition for intervention and participation as *amici curiae*, 17 October 2001, para. 67; *Chevron/Texaco v. Ecuador*, Procedural Order No. 8, 18 April 2011, PCA CASE N° 2009-23, para. 5; *Eli Lilly v. Canada*, Procedural Order No. 5, 29 April 2016, Case No. UNCT/14/2, para. 12 ('*Amici* are to be treated like any other members of the public and will not be given access to the hearing room.').

38 This does not exclude oral submissions by *amici curiae* in general. Article 1(5) explicitly condones further measures: 'These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example, by accepting submissions from third persons.' CETA in Articles 43 – 46 of Annex 29-A also foresees only written *amicus curiae* participation.

39 New Rule 32(2): 'Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. ...' According to *Viñuales*, 'one could argue that revised Article 32(2) is more restrictive than before, for it explicitly reserves "the protection of proprietary or privileged information" which, in all likelihood, under the former rule would have fallen within the tribunal's jurisdiction.' See J. Viñuales, *Amicus intervention in investor-state arbitration*, 61 *Dispute Resolution Journal* (2006-2007), p. 76.

itly objects to its participation.<sup>40</sup> As in the WTO, there is a trend in investor-state arbitrations to open hearings to the general public.<sup>41</sup> This shows that the parties' objections to oral *amicus curiae* participation are not grounded necessarily in concerns over confidentiality, but may stem from concerns over a disruption of the proceedings, undue increased substantive burden or exploding costs. In *Biwater v. Tanzania*, the tribunal reserved the right to engage in written communication with the *amici curiae*.<sup>42</sup> This approach seems sensible because it allows tribunals to clarify *amici curiae*'s submissions, if necessary, while minimizing additional costs and delay incurred by oral participation.

### VIII. Comparative Analysis

*Amicus curiae* participation in international dispute settlement equals written participation. Oral *amicus curiae* submissions are rare before the international courts and tribunals reviewed. Before all international courts and tribunals, the parties have been allowed to annex *amicus curiae* submissions as their own. This practice accords with the parties' rights across all international courts and tribunals to submit whatever evidence they consider relevant to their case. With the exception of the WTO, this happens rarely. In that case, the submission becomes part of the party submission.

Is the current focus on written submissions justified? Oral submissions may be useful where the information shared by the *amicus* is highly relevant, (technically) complex or the judges on the bench disagree on the issue commented on and a questioning of the *amicus curiae* promises to be

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40 E.g. *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 46-48.

41 E.g. *Glamis v. USA*, Award, 8 June 2009, para. 290 and Procedural Order No. 11; *Railroad Development Corporation v. Republic of Guatemala*, Award, 29 June 2010, ICSID Case No. ARB/07/23, para. 3; *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12, Sec. (iv). See also J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 *Kansas Law Review* (2006), pp. 1360-1362.

42 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 71 ('[T]he Arbitral Tribunal reserves the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist it in better understanding the Petitioners' position, whether before or after the hearing.').

of additional value compared to a supplemental written submission. In all other cases, international courts and tribunals must carefully consider if the oral submission does not place an unjustifiable burden on the parties in terms of time and cost as they may have to address further arguments and pay for extended hearings or post-hearing submissions. Limitation to written submissions does not mean that the international court or tribunal cannot engage in a dialogue with the *amicus curiae* by way of requesting additional written submissions or asking questions for clarification by written procedure.

Determination of the form of a written submission lies in the discretion of the court or tribunal. In practice, *amicus curiae* submissions are usually accepted as requested. A case where the tribunal exercised its discretion is *Biwater v. Tanzania* (see Chapter 5). The existing regulations contemplate *amicus curiae* submissions as a one-time event, and repeat submissions have been authorized very rarely.<sup>43</sup> Accordingly, *amici curiae* are generally not given leave to file additional or supplemental submissions, though this has happened in special circumstances. Courts and tribunals very rarely request additional information. This is even the case where access to party submissions is given after the *amicus curiae* brief has been filed. The IACtHR has adopted a more lenient approach and permits amendments to submissions.

The following factors have influenced courts' decisions on the modalities of *amicus curiae* participation:

1. Confidential and/or private nature of the dispute settlement mechanism

Unless otherwise provided, *amici curiae* do not enjoy any special legal status and are therefore subject to the general rules governing publicity of hearings and confidentiality. Especially dispute resolution mechanisms in

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43 No. 9 FTC Statement: '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.' In *Bear Creek Mining v. Peru*, *amicus curiae* DHUMA was authorized during the hearing to make another written submission after the hearing. *Bear Creek Mining v. Peru*, Procedural Order No. 10, 15 September 2016, ICSID Case No. ARB/14/21, para. 2.1.3; *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 38 (The tribunal restricted submissions to jurisdictional questions, but noted that if the dispute proceeded to the merits, the *amicus* could file another application.).

the areas of trade and investment law operate under strict rules on confidentiality which may be difficult or impossible to bypass.<sup>44</sup>

## 2. Regulatory reasons

Procedural rules concerning oral proceedings may limit the circle of those able to make oral submissions. This is difficult to overcome where the rule is contained in a statute as opposed to rules of procedure, which can usually be changed by the court.

## 3. Efficiency, costs and control

The financial and time-related burden of oral *amicus curiae* participation may be considered to outweigh any possible benefits oral participation might bring. The argument that oral *amicus curiae* participation should depend on the parties' agreement is not easy to dispel, unless the additional financial burden incurred by oral *amicus curiae* participation is not borne by the parties alone.

## 4. Personal views of judges

How *amici curiae* may present its views depends also on the judges' perception of a specific *amicus curiae* and of *amicus curiae* participation in general.

### *B. Recorded participation*

In accordance with the permission to accept their submissions in Article 34(2) ICJ Statute and Article 43(3) ICJ Rules in connection with Article 69(2) ICJ Rules, the ICJ records the participation of intergovernmental or-

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44 Nos. 2, 3 WTO Panel Working Procedures, Appendix 3 to the DSU and Articles 12(1), 14, 17(10) DSU.

ganisations in contentious and advisory proceedings.<sup>45</sup> In *Nuclear Weapons*, the ICJ decided not to include in the formal record the many *amicus curiae* submissions received from private entities, a view which it later enshrined in Practice Direction XII. The same approach has been adopted by the ITLOS and the Seabed Disputes Chamber in advisory proceedings. In contentious proceedings, the ITLOS does not to include a request for participation as *amicus curiae* in the case file. Unlike in advisory proceedings, it neither posts them on its webpage.<sup>46</sup> Until the 2000, the IACtHR did not include *amicus curiae* submissions in the case records, despite listing the names of the *amici curiae* in its judgments and reprinting their submissions in Series B of its official publication.<sup>47</sup> The IACtHR changed its approach in *Barrios Altos v. Peru* upon receiving an *amicus curiae* submission from the Peruvian constitutional organ in charge of human rights supervision. Since then and without official explanation, it has accepted some *amicus curiae* submissions into the case records.<sup>48</sup> In the ECtHR, every accepted *amicus curiae* submission is formally noted and

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45 G. Schwarzenberger, *International law as applied by international courts and tribunals*, Vol. 4: *international judicial law*, London 1986, p. 638.

46 *Arctic Sunrise Case* (Provisional Measures), Order of 22 November 2013, ITLOS Case No. 22, para. 18.

47 E.g. *Yatama v. Nicaragua*, Judgment of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 127. In *Loayza Tamayo v. Peru*, it stated that *amicus curiae* submissions did not form part of the formal case file. *Loayza Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33. According to *Lindblom*, this proceeding may give the IACtHR greater freedom in the assessment of briefs, see A. Lindblom, *supra* note 24. See also C. Moyer, *The role of "amicus curiae" in the Inter-American Court of Human Rights* in: *la corte interamericana de derechos humanos, estudios y documentos*, 1999, p. 121, FN 8. Briefs the court finds not useful are not mentioned in its decisions. The IACtHR noted this in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219. But see also *López Mendoza v. Venezuela*, Judgment of 1 September 2011 (Merits, Reparations and Costs), IACtHR Series C No. 233, FN 6 ('Ademas de los *amicus curiae*, el Tribunal recibio otros escritos que no tenian ninguna utilidad para el presente case y, por ello, no son admitidos ni mencionados en la presente Sentencia.').

48 *Barrios Altos et al. v. Peru*, Judgment of 3 September 2001 (Interpretation of the Judgment on the Merits), IACtHR Series C No. 83; *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197. The first case, in which the IACtHR summarised *amicus curiae* briefs was *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR

recorded in judgments. Submissions form part of the case file. The ACtH-PR mentions requests for leave in its judgments and orders, but the Practice Directions are silent on whether submissions are added to the formal case record. WTO panels and the Appellate Body, if at all, mention *amicus curiae* submissions in passing in judgments. Only the panel in *Australia–Salmon (Article 21(5))* notified the parties of having added the letter from a ‘group of concerned fishermen’ to the case record.<sup>49</sup> Submissions are not retrievable from the website. *Amicus curiae* submissions to investment tribunals are usually filed in the case record, but they become formally relevant only upon being admitted to the proceedings. In *Eli Lilly v. Canada*, the tribunal decided that supporting documents submitted by *amici curiae* would be admitted into the record if the parties wished to rely on them and it established a 24-hour in advance notification obligation with respect to unrecorded supporting documents, which included transmission of the respective document to the other party and tribunal.<sup>50</sup>

### C. Formalization of participation

The establishment of formal requirements for written (and oral) submissions can facilitate the international court or tribunal’s task of protecting the parties’ procedural rights and the integrity of the proceedings. Standardized formal procedures contribute to the manageability of *amici curiae* in international courts and tribunals. Accordingly, many international courts and tribunals have established formal rules for *amicus curiae* participation.

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Series C No. 209. One reason for the court’s reluctance to summarize submissions may be the large number of briefs received. Prior to this change, *amicus curiae* briefs were not formally added to the case file and briefs were also not cited, see F. Rivera Juaristi, *The “amicus curiae” in the Inter-American Court of Human Rights (1982 – 2013)*, in: Y. Haeck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, p. 128.

49 *Australia–Salmon (Article 21(5))*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 7.8.

50 *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, Case No. UNCT/14/2, p. 3. The respondent had requested that all documents referenced by the *amici curiae* be added to the record for the tribunal to ‘properly assess [their] weight’ and to show that it took the submissions seriously.

## I. Form of written submissions

Based on a review of legal provisions and case law, in addition to timing which already has been addressed in Chapter 5, the most important formal requirements for written *amicus* submissions are length (1.), language (2.) and authentication (3.). Courts react differently to failure to comply with these requirements (4.).

### 1. Length

Limitations on the length of *amicus curiae* briefs can help to ensure that the amount of material submitted in addition to party (and third party) submissions remains manageable and safeguards the efficiency of the proceedings. Overly long briefs may not be read by the court, simply, because judges lack the time to do so. This appears to be a structural defect of *amicus curiae* practice before US courts. Limitations on the length of *amicus curiae* briefs also serve to alleviate concerns that they constitute additional memoranda. Still, *amici curiae* need enough space to develop their arguments to make a useful contribution. How have international courts and tribunals addressed this tension?

The ICJ, the ITLOS, the IACtHR and the ECtHR do not limit the length of written *amicus curiae* submissions. This may cause administrative problems in the ECtHR and the IACtHR which both often admit dozens of *amici* in one case.<sup>51</sup> Given the strict regulation of other formal matters, the approach seems deliberate. The length of submissions does not seem to be a matter of concern before WTO panels and the Appellate Body. Although not binding, most *amicus curiae* submissions do not exceed the 20-page length prescribed for submissions including appendices by the *EC-Asbestos* Additional Procedure.<sup>52</sup> The FTC Statement mirrors the *EC-As-*

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51 Both courts have received individual submissions exceeding 50 pages. See, for example, Amnesty International's submission in *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion No. OC-9/87 of 6 October 1987, IACtHR Series A No. 9, cited by D. Zagorac, *International courts and compliance bodies: the experience of Amnesty International*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 31.

52 No. 7(b) *EC-Asbestos* Additional Procedure.

*bestos* Additional Procedure.<sup>53</sup> NAFTA and some other investment tribunals limit the size of submissions to 20 typed pages, including appendices.<sup>54</sup> The latter do not include exhibits and legal authorities.<sup>55</sup> This approach seems to work well in practice. Rule 37(2) ICSID Arbitration Rules does not establish a page limitation. ICSID tribunals have set different page limitations, ranging from 20 typed pages for application and submission together to 50 pages double-spaced for a joint submission.<sup>56</sup> Article 4(4)(b) UNCITRAL Rules on Transparency places the length to the tribunal's discretion.

## 2. Language

The ICJ has not adopted any specific rules regarding the language of submissions. For submissions in advisory proceedings, the ICJ appears to rely on the rules for party submissions through Article 68 ICJ Statute. Accordingly, submissions must be made in the ICJ's official languages French or English, unless the parties agree that only one of these languages shall be

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53 Sec. B, para. 3(b) FTC Statement: 'The submission filed by a non-disputing party will: ... (b) be concise, and in no case longer than 20 typed pages, including any appendices.' Identical, *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008.

54 *UPS v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, para. 8. This page limit was indicated by the tribunal prior to issuance of the FTC Statement.

55 *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, Case No. UNCT/14/2, p. 3 ('An alternative interpretation would unreasonably restrict non-disputing parties from relying on public information.').

56 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID news release (The application for admission and the submission itself shall 'in no case exceed 20 pages.'). The tribunal in *Biwater v. Tanzania* ordered several *amicus curiae* applicants to file a joint initial written submission limited to a maximum of 50 pages (double-spaced). This rather generous length is likely due to the prescribed bundling of the submissions of several *amici curiae*. See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 60. See also *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 27 (maximum 30 pages, double-spaced, fontsize 12).

the language of the proceedings.<sup>57</sup> Language of submissions has rarely been problematic. In *Interpretation of the Agreement between the WHO and Egypt of 1951*, the ICJ rejected the written statement by Iraq because it was submitted in Arabic without an accompanying translation. The ICJ accepted the statement after it had been translated into one of its official languages at the expense of the submitter even though by then the deadline for submissions had expired.<sup>58</sup>

Pursuant to Article 85 ITLOS Rules, it is possible to make oral statements and submissions in another language by leave of the tribunal. So far, this issue has not become problematic. It is to be expected that the tribunal and chambers would adopt an approach similar to that of the ICJ.<sup>59</sup>

Rule 44(6) ECtHR Rules determines that '[w]ritten comments submitted under this Rule shall be drafted in one of the official languages as provided in Rule 34 § 4.'<sup>60</sup> Rule 34(4) orders the application to *amicus curiae* of paras. (a) – (c) which govern the language of party submissions. Thereafter, all communications, oral and written submissions shall be made in one of the ECtHR's official languages English and French.<sup>61</sup> The President of the Court may grant *amicus curiae* leave to file a submission in its own language. In that case, it must file a translation of the written submission into English or French within a time-limit established by the President of the Court, or bear the expenses of a translation arranged by the

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57 Article 39(1), (2) ICJ Statute. According to Article 39(3), the ICJ 'shall, at the request of any party, authorize a language other than French or English to be used by that party.' In that case, Articles 51, 70 and 71 ICJ Rules require certified translations of pleadings, documents, statements or speeches into one of the ICJ's official languages.

58 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Rep. 1980, Part IV: Correspondence, p. 327. See also *Certain Expenses of the United Nations (Article 17(2) of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Rep. 1962. The ICJ rejected a submission by the USSR and Byelorussian USSR for not complying with the language requirement, but later accepted a translated version of the earlier submission.

59 Articles 43, 64, 85 ITLOS Rules. The rules concerning translation costs address only the parties.

60 This regulation follows the earlier Rule 61(5) of the 1998 ECtHR Rules: 'Written comments submitted in accordance with this Rule shall be submitted in one of the official languages, save where leave to use another language has been granted under Rule 34 § 4.' The changes to the norm in this regard were only semantic.

61 Rule 34(4) (a) and (1) ECtHR Rules. See also *Mahoney* with regard to the old regulation in Rule 27(4) which failed to address the distribution of translation costs. P. Mahoney, *supra* note 6, p. 144.

Registrar. Oral submissions in another language can be interpreted at the expense of the *amicus curiae*. The ECtHR may also order the translation or summary translation of any documents annexed to the written submission.<sup>62</sup>

Article 44(1) IACtHR Rules provides that *amicus curiae* briefs must be in the working language of the case, which the parties agree on at the beginning of the proceedings.<sup>63</sup> This approach is stricter than the IACtHR's general approach to language issues. Article 22(4) IACtHR Rules allows the IACtHR to authorize 'any person appearing before it to use his or her own language if he or she does not have sufficient knowledge of the working languages.' This indicates that the IACtHR seeks avoiding procedural burdens and additional cost caused by *amicus curiae* submissions. The IACtHR strictly enforces its new regulation.<sup>64</sup> The language requirement has been somewhat of an issue. Some English NGOs struggle to meet submission deadlines in cases where Spanish is the procedural language.<sup>65</sup>

The language of submissions is not an issue before WTO panels and the Appellate Body. Their procedural rules do not mention language requirements. So far, all *amicus curiae* submissions before the WTO adjudicating bodies were made in English.

The language of *amicus curiae* submissions does not appear to have raised any concerns in investment arbitration either, although the language

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62 Article 34(4) (b), (c) ECtHR Rules.

63 Article 22(3) IACtHR Rules. Article 41 of the February 2009 IACtHR Rules was silent on the language of *amicus curiae* briefs.

64 Prior to this regulation, in several cases, the IACtHR accepted submissions by *amici curiae* in its official languages, even if they were not in the language of the proceedings. See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), Judgment of 31 August 2001, IACtHR Series C No. 79, pp. 8, 11, paras. 41, 61; *Caso Reverón Trujillo v. Venezuela* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 30 June 2009, IACtHR Series C No. 197, p. 4, para. 9 (The Law Faculty of the University of Essex submitted a Spanish version of the English submission several days later); *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219, p. 6, para. 8.

65 *Fontevicchia y d'Amico v. Argentina*, Judgment of 29 November 2011, IACtHR Series C No. 238, p. 2; *Vélez Restrepo and Family v. Colombia*, Judgment of 3 September 2012 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 248, paras. 67-68; *Veliz Franco y Otros v. Guatemala*, Judgment of 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 277, para 64.

of the proceedings is primarily a matter of party agreement and therefore not always predictable.<sup>66</sup> Petitioners generally make submissions in the language of the arbitration, as required by No. 2(i) FTC Statement for the request for leave which includes the actual submission. Such language requirement can also be read into Rule 37(2) ICSID Arbitration Rules which requires that ‘[t]he Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding.’<sup>67</sup> The issue is of practical relevance in multi-language arbitrations, where some tribunals require parties to make submissions in all languages, whereas others consider it sufficient if submissions are made in one of the languages.<sup>68</sup> Article 4(2) UNCITRAL Rules on Transparency favours the latter approach for *amicus curiae* briefs, which is appropriate to not overburden little-resourced *amicus curiae*.

### 3. Authentication

Article 105(2)(a) ICJ Rules establishes that the Court, or its President, determine the form in which comments permitted under Article 66(2) ICJ Statute shall be received. The ICJ requires signature of the submission for proper authentication.<sup>69</sup> The ICJ Statute and Rules do not prescribe such a requirement for written statements under Article 34(2) ICJ Statute, but presumably the Court will apply standards similar to those it has estab-

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66 See Rule 22(1) ICSID Arbitration Rules; Article 17(1) of the 1976 UNCITRAL Arbitration Rules; Article 19 of the 2010 UNCITRAL Arbitration Rules; Article 19 of the 2013 UNCITRAL Arbitration Rules.

67 The UNCITRAL Rules on Transparency adopt both of these considerations in Article 4(2) and (5).

68 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12; *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 27 (both languages).

69 The Registry noted the lack of signature of the submission from the International League for the Rights of Man. See No. 67 (The Deputy-Registrar to Mr. Asher Lans, Counsel to the International League for the Rights of Man), *International Status of South West Africa*, Advisory Opinion of 11 July 1950, Part III: Correspondence, ICJ Rep. 1950, pp. 320, 346.

lished for intervention and party submissions.<sup>70</sup> Submissions must be signed and dated and applications must *inter alia* also state the name of the agent, specify the case they relate to and enclose the supporting documentation that is to be indexed.

Neither Article 84(1) nor Article 133(3) ITLOS Rules establish such a requirement. Interveners and parties pursuant to Articles 99(2) and 54(3) ITLOS Rules respectively must sign and date submissions through a ‘duly authorized person’ and ‘state the name and address of an agent as well as specify the case to which they relate’ in contentious proceedings. The Rules further determine that an application to institute a case ‘shall contain a list of the documents in support,’ with copies of the documents attached. The requirement can be found applicable in advisory proceedings through Article 130(1) ITLOS Rules. The issue has not become problematic in either the ICJ or the ITLOS.

The ECtHR Rules do not specify the form of *amicus curiae* submissions. This is surprising given the otherwise very detailed nature of the provision.

The most detailed regulation of this aspect is contained in the IACtHR Rules. Rule 44(1) determines that briefs may be submitted to the court ‘together with its annexes, by any of the means established in Article 28(1) of these Rules, in the working language of the case and bearing the names and signatures of its authors.’<sup>71</sup> Rule 44(2) establishes that briefs may be presented by different means, including electronic mail. Electronic submission of briefs has become common. If not signed or if submitted without annexes, the hard copy original and supporting documentation must be received by the tribunal within seven days.<sup>72</sup> Otherwise, the brief ‘shall be archived without further processing.’ Briefs tend to be signed by a repre-

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70 Intervention: Article 81(2) and (3) ICJ Rules. Party pleadings: Article 52 ICJ Rules.

71 Article 28(1) IACtHR Rules: ‘All briefs addressed to the Court may be presented in person or by courier, facsimile, post, or electronic mail, and must be signed in order to ensure their authenticity. If a brief is transmitted to the Court by electronic means and has not been subscribed, or in the case that a brief is not accompanied by its annexes, the original documents or missing annexes must be received by the Tribunal within a non-renewable term of 21 days from the expiration of the deadline established for the submission of that brief.’ The earlier Article 41 of the February 2009 IACtHR Rules did not contain such a requirement.

72 E.g. *Caso Claude Reyes and others v. Chile*, Judgment of 19 September 2006, IACtHR Series C No. 151, p. 5, para. 27; *Caso Tristan Donoso v. Panama*, Judg-

sentative of one of the submitting organizations or by everyone who (co-)authored or endorsed the submission. The IACtHR seeks confirmation of the endorsement in joint submissions and takes formal note if it is withheld.<sup>73</sup>

Section B para. 3(a) FTC Statement, using the same wording as No. 7(a) *EC–Asbestos* Additional Procedure, requires that *amici curiae* must ensure that a written submission is ‘dated and signed by the person filing the submission.’ This requirement was adopted by several tribunals constituted under other investment treaties in their orders on *amicus curiae*, with some explicitly stating that signature served to verify the content of the submission.<sup>74</sup> It is also included in Article 4(4)(c) UNCITRAL Rules on Transparency, which additionally requires an *amicus curiae* to ‘set out a precise statement’ of its position on the issues, which is laudable in terms of efficiency.

All of the international courts and tribunals reviewed require the identification and authentication of the authors of *amicus curiae* briefs, elements that are important for the allocation of responsibility and the verification of the origin, authorship and content of a submission. In investment arbitration, the applicable regulations often establish additional disclosure requirements (see Chapter 5). For instance, the UNCITRAL Rules on Transparency in addition prescribe detailed disclosure requirements concerning the *amicus*’ membership and legal status, its objects and structure, its connections with the parties, the financial or other assistance it has received in preparing the submission and any general substantial assistance in the two years prior to the submission. These requirements are reminiscent of the disclosure requirements in Rule 37(6) US Supreme Court

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ment of 27 January 2009, IACtHR Series C No. 193, p. 4, para. 10. In the latter case, the court further required that the individual *amici curiae* submit a copy of his identification documents. Critical, F. Rivera Juaristi, *supra* note 48, p. 120 (He questions whether all signatories of the brief have an identification obligation or only those who wrote it.).

73 *Rosendo Radilla Pacheco v. Mexico*, Judgment of 23 November 2009, IACtHR Series C No. 209, para. 13, FN 11 (The IACtHR notes that 2 of the 14 *amici curiae* listed did not confirm their adherence to the brief.).

74 *Pac Rim v. El Salvador*, ICSID News Release, 2 February 2011, ICSID Case No. ARB/09/12; *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.3(a) and (c).

Rules.<sup>75</sup> The other international courts and tribunals should consider introducing similar requirements to identify and manage affiliations with the parties when reading a submission. Inclusion of such information in the submission itself may also be useful where a request for leave procedure exists to ensure that any change in the time between the grant of leave and the actual submission (if not simultaneous) is recorded.

#### 4. Failure to comply

There are three possible reactions by a court to a formally flawed *amicus curiae* submission: ignorance of the flaw, granting of an opportunity to heal the flaw and rejection of the submission. Consideration of the effects of procedural flaws of *amicus curiae* submissions is somewhat impaired by their sporadic recording in judgments and decisions.

The ICJ routinely accepts late submissions by states and intergovernmental organizations in advisory proceedings if they are submitted before the closure of the proceedings (see Article 74(3) ICJ Rules).<sup>76</sup>

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75 They require disclosure in the first footnote on the first page of the text of the submission whether counsel of a party authored or provided monetary contribution to the preparation of a brief, as well as identification of every person or entity other than the *amicus curiae*, its members or its counsel who did.

76 After this stage, the parties cannot comment on submissions. Cases in which the ICJ accepted late submissions include *Kosovo*, Order of 17 October 2008, ICJ Rep. 2008 (late submission by Venezuela); *Certain Expenses of the United Nations (Article 17(2) of the Charter)*, Advisory Opinion, 20 July 1962 (the ICJ accepted late written submissions until the hearing); *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, 18 August 1972 (Extension of time limits upon request by the UN Secretary-General on behalf of the concerned staff member). However, the ICJ refused to accept the late submission by the International League for the Rights of Man, which it received one month late, but before the opening of the oral proceedings, possibly, because of additional formal and substantive defects. The submission was not signed and addressed issues that the court had excluded. See *International Status of South West Africa*, Advisory Opinion, No. 10 (Letter by R. Delson, League for the Rights of Man (hereinafter: ILRM) to the Registrar), No. 18 (Letter from the Registrar to Mr. R. Delson, ILRM), No. 61 (Mr. A. Lans, Counsel to the ILRM to the Registrar), Nos. 66-67 (Deputy-Registrar to Mr. A. Lans), Correspondence, ICJ Rep. 1950, pp. 324,327, 343-344, 346. ITLOS/Seabed Disputes Chamber: *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 16 (Writ-

The ECtHR rarely mentions the rejection of briefs for formal reasons even though Rule 44(4) ECtHR Rules determines that failure to comply with a condition established by the President of the Chamber allows the President to ‘decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.’<sup>77</sup>

Article 44(2) IACtHR Rules regulates consequences of briefs that are filed electronically and without signature, or without the necessary annexes in that it allows for a correction of the error to be received within seven days before the briefs are archived without further processing (see Chapter 5).<sup>78</sup> The IACtHR Rules are silent on the consequences of other formal defects. The rejection of briefs submitted in the ‘wrong’ language indicates that the court also refuses submissions where such a formal defect is not corrected within the deadline. The IACtHR strictly enforces this rule (see Chapter 5).

WTO panels and the Appellate Body reject submissions that are received after the closing of the proceedings. Panels and the Appellate Body tend to not disclose the reason for the rejection of a brief for reasons other than untimeliness. Very often it is only stated that the brief was not useful in the determination of the case.

In investment arbitration, violation of formal requirements and late submissions are rare. Late submissions have been accepted with the parties’ consent (see Chapter 5).<sup>79</sup>

## II. Comparative analysis

For all international courts and tribunals, timing appears to be the most relevant formal concern with respect to the participation of *amicus curiae*

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ten submission by the UNEP received more than one month after expiry of the (extended) deadline).

77 In *Neulinger and Shuruk*, for example, the submission of the applicant’s father whose custody was at issue was rejected for untimeliness and other non-specified formal flaws. See *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, 6 July 2010, ECHR 2010.

78 *Caso Tristan Donoso v. Panama*, Judgment of 27 January 2009, IACtHR Series C No. 193, p. 4, para. 10 (*Amicus curiae* submission was rejected because the original submission was never filed with the court.).

79 *Merrill v. Canada*, Award, 31 March 2010, para. 23.

(see Chapter 5). The importance accorded to other requirements varies between international courts and tribunals.<sup>80</sup>

There is a high degree of homogeneity with respect to language requirements. The language of briefs is generally determined by the language of the proceedings and usually coincides with the court or tribunal's official language(s). This has not been problematic in practice, though strict language requirements may constitute a severe barrier for financially-challenged *amici curiae*. The ECtHR and the ICJ are the only courts which explicitly foresee that the registry may translate a submission at the expense of the *amicus curiae*.

In contrast, the requirements for length, authorship and verification of submissions vary between inter-state and human rights courts, on the one hand, and investment tribunals and the WTO Appellate Body, on the other. The latter seek to control the length of submissions, but no case was found where a submission was rejected for excessive length. The overall amount of submissions does not explain the different approaches. The human rights courts receive the largest amount of submissions on average per case and continue to not limit the length of submissions. Efforts to regulate this aspect are likely to stem from an emphasis on speedy proceedings in the WTO and in investment arbitration, as well as attempts to minimize additional burdens (and expenses) for the parties.<sup>81</sup> Page limits are useful for reasons of efficiency and to enhance the precision and pertinence of briefs. Rules can be formulated with a sufficient degree of flexibility to allow for longer briefs in situations where a court considers it appropriate.

Only the IACtHR Rules establish concrete consequences for the breach of certain formal requirements of briefs. All other international courts and tribunals tend to deal with formal defects on a case-by-case basis. The most often mentioned formal flaw in case law is untimeliness, which tends to lead to the exclusion of a brief (see Chapter 5). However, the easiest manner for a court to deal with deficiencies is to simply ignore the submission.

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80 International courts and tribunals attribute little to no significance to formal requirements of solicited submissions with the exception of timing. This is logical given that the soliciting court requests information from an organization it has chosen itself.

81 See Article 3(3) DSU.

D. *Substantive requirements and the content of submissions*

Substantive requirements are necessary to ensure that an *amicus curiae* brief is meaningful and complies with the courts' governing laws, particularly those concerning the issues a court may consider. This limitation ensures that the court will not act *ultra vires* and produce a valid and enforceable final decision.<sup>82</sup> An *amicus curiae* brief that fulfills these requirements can certainly help an international court or tribunal in its deliberations. Still, there is an undeniable friction with the adversarial process, which as a matter of principle requires international courts and tribunals to

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82 The principle *ne ultra petita* prohibits a court to deviate from its mandate quantitatively or qualitatively by deciding on another dispute or on matters not requested by the parties. The principle is enshrined for some international courts and tribunals in their respective instruments, but it also has attained the status of customary international law. See M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 120-121. See also Article 18 IUSCT, Article 7(1) DSU; R. Kolb, *General principles of procedural law*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, p. 894, para. 34; M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2<sup>nd</sup> Ed., Oxford 2010, p. 28; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, ICJ Rep. 1991, p. 69, para. 47 ('The Court has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.'). Critical, H. Thirlway, *Procedural law and the International Court of Justice*, in: V. Lowe/M. Fitzmaurice-Lachs/R. Jennings (Eds.), *Fifty years of the International Court of Justice: essays in honour of Robert Jennings*, Cambridge 1996, p. 402. See also *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, 18 August 1972, ICJ Rep. 1972, p. 46; E. Lauterpacht, *Principles of procedure in international litigation*, 345 *Receuil des Cours* (2009), pp. 502-503; J. Lew, *Iura novit curia and due process*, in: L. Lévy/S. Lazareff (Eds.), *Liber amicorum en l'honneur de Serge Lazareff*, Paris 2011, p. 412. See Article V(1)(c) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force on 7 June 1959, Reg. No. 4739, 330 UNTS (1959), p. 3 (hereinafter: NY Convention). The provision can be divided into two subsections: (i) the award deals with a *difference* beyond the scope of the submission to arbitration (i.e., the arbitration agreement or clause); or (ii) the award *contains decisions on matters* beyond the scope of the submission to arbitration.

‘assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute.’<sup>83</sup>

Submissions can address many different issues. For ease of analysis, the following types of information are distinguished: submissions on international law, including comparative analyses; submissions on the facts of the case, including national laws and comparative analyses of different national laws; submissions on the background and context of the case; submissions on the impact of a decision or specific implications of the case; and submissions applying the applicable law in the case to the facts.

There are two issues which require closer consideration: first, the relationship between fact submissions and the parties’ prerogative over the submission of evidence in the adversarial process. Second, the extent to which an international court or tribunal may address questions raised by an *amicus curiae* that fall within its jurisdiction, but have not been addressed by the parties (yet). This concerns in particular reference by *amici curiae* to laws and arguments other than the treaty conferring jurisdiction on the international court or tribunal. This is typical for *amicus* briefs in WTO disputes and in investment arbitration, where many *amici* seek to promote the reconciliation of trade and investment agreements with international human rights, environmental or other laws.

## I. International Court of Justice and International Tribunal for the Law of the Sea

Article 34(2) ICJ Statute and Article 84(2) ITLOS Rules envisage the submission of ‘information relevant to cases before it’ respectively. Neither the ICJ nor the ITLOS have delineated these terms in practice. Based on its ordinary meaning, the term ‘information’ indicates the communication of knowledge in an objective manner, especially if compared to the use of the term ‘its observations’ in Article 84(3) ITLOS Rules and Article 34(3) ICJ Statute in connection with Article 69(3) ICJ Rules. The latter involves an element of personal perception and judgment. *Chinkin* and *Mackenzie* argue that the term information is broad enough to encompass fact and le-

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83 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, para. 48.

gal submissions.<sup>84</sup> It has been doubted that an international organization may present legal arguments or make political statements in light of its need to equally represent all of its members.<sup>85</sup>

The only textual limitation is that the information must be relevant to the pending case, which, as a minimum, requires that any submission must be within the scope of jurisdiction. Accordingly, in *Lockerbie* the ICJ limited the scope of permissible observations by the ICAO under Article 34(3) ICJ Statute to issues concerning admissibility and jurisdiction to account for the suspension of the merits proceedings.<sup>86</sup> In *Obligation to Negotiate Access to the Pacific Ocean*, the Registrar, in its notification to the OAS during the preliminary objections procedure in which Chile contested the Court's jurisdiction, clarified that any observations 'should be limited to the construction of the provisions of the Pact of Bogotá', which Bolivia relied on as the basis for jurisdiction.<sup>87</sup> The rules do not require that the

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84 C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, pp. 139-140.

85 L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 *Non-State Actors and International Law* (2005), pp. 209, 213.

86 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya/United Kingdom) and (Libyan Arab Jamahiriya/United States of America)* (hereinafter: *Lockerbie Cases*), Decision on Request for the Indication of Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, p. 8, para. 14 and p. 119, para. 15. In *Aerial Incident of 3 July 1988*, the ICJ requested the ICAO to restrict submissions pursuant to Article 34(3) ICJ Statute to issues of jurisdiction. The ICAO, in its submission, clarified which set of rules of dispute resolution had been applied to the dispute before the ICAO Council, an aspect which was decisive for the ICJ's jurisdiction. Iran intended to refer the case as an appeal proceeding from the ICAO Council to the ICJ. The ICAO Secretary-General informed the ICJ of possible norms that could have been invoked by Iran and laid out the specific steps taken by the ICAO Council after Iran had called upon it on 3 July 1988. See *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Letter from the Secretary-General of the International Civil Aviation Organization to the Registrar of the International Court of Justice, Part IV Correspondence, pp. 618-619.

87 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, para. 7. See also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, para. 6; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond*

information is relevant to the area of operation of the submitting organization.<sup>88</sup>

The ICJ has stressed in contentious proceedings that it is not limited to the arguments presented by the parties.<sup>89</sup> In *Nicaragua*, it held that information could come to it ‘in ways and by means not contemplated by the Rules’ and that it was neither ‘solely dependent on the argument of the parties before it with respect to the law’ nor ‘in principle ... bound to confine its consideration to the material formally submitted to it by the parties.’<sup>90</sup> *Chinkin* has warned that the permission of *amicus curiae* submissions in contentious ICJ proceedings ‘could expand the ambit of the adjudication beyond that accepted by the parties, and force them to answer claims that they had not themselves raised.’<sup>91</sup> However, this does not seem to be a risk considering the ICJ’s handling of intervention pursuant to Article 62 ICJ Statute. Like *amicus curiae* participation, intervention is incidental to existing proceedings. According to the ICJ, interveners cannot present a new case or require the ICJ to assert individual rights before the Court.<sup>92</sup> *Oellers-Frahm* argues an interest pursued by an intervener must have ‘connectivity’ to the matter before the Court. It is lacking if the determination of the intervener’s interest is not necessary for the solution of the dispute.<sup>93</sup> This means that *amici curiae* should be able to point to arguments or laws not mentioned by the parties, as long as they are within the

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*200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, para. 6.

88 C. Chinkin/R. Mackenzie, *supra* note 84, pp. 139-140.

89 B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, p. 299; *Corfu Channel Case*, Judgment (Merits), 9 April 1949, Diss. Op. Judge Winiarski, ICJ Rep. 1949, pp. 51-56.

90 *Nicaragua Case*, Judgment (Merits), 27 June 1986, ICJ Rep. 1986, p. 24, paras. 29-31.

91 C. Chinkin, *Third Parties in International Law*, Oxford 1993, p. 229.

92 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Application to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, pp. 133-134, paras. 97-98; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene (Philippines), Judgment, 23 October 2001, ICJ Rep. 2001, p. 598, para. 60. See also C. Chinkin, *Article 62*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed. Oxford 2012, para. 52.

93 K. Oellers-Frahm, *Die Intervention nach Art. 62 des Statuts des Internationalen Gerichtshofs: Überlegungen anlässlich der Entscheidung des Internationalen Gerichtshofs vom 14. April 1981 über die Intervention Maltas*, 41 *Zeitschrift für*

scope of jurisdiction of the case. This understanding accords with the word ‘relevant’ in Article 34(2) ICJ Statute.

In advisory proceedings, the ICJ Statute and the ITLOS Rules require that written statements be ‘on the question’, a clear pointer to the limits imposed by the courts’ jurisdictions.<sup>94</sup> It could also be interpreted more narrowly to exclude all forms of contextual submissions. Such an interpretation would not accord with the current practice. In a few early opinions, the ICJ requested specific information from intergovernmental organizations. This practice has changed.<sup>95</sup> Today, intergovernmental organizations, which the Court assumes will make a useful submission, are invited without specification concerning the issues to comment on. The decision on what to include rests with the submitter as long as it is within the scope of the request. Newer practice even indicates that the Court no longer limits submissions in advisory proceedings to legal considerations, though its jurisdiction in advisory proceedings is limited to legal considerations. In the *Wall* proceedings, the ICJ invited the UN and its member states to make submissions ‘on all aspects raised by the question,’ choosing a broader wording than Article 66(2).<sup>96</sup> In the *Wall* and the *Kosovo* advisory proceedings, the ICJ received numerous submissions on factual aspects of

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ausländisches öffentliches Recht und Völkerrecht (1981), pp. 581-582; K. Günther, *Zulässigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH*, 34 German Yearbook of International Law (1991), pp. 271-272.

94 This was emphasized, as noted, by the ICJ in its grant of leave to the International League for the Rights of Man in *International Status of South-West Africa*. See M. Benzing, *supra* note 82, p. 245, FN 514 (In its grant of leave to the International League for the Rights of Man (ILRM), the ICJ asked the ILRM to limit its submission to legal questions because of its limited advisory mandate. The organization failed to comply with the condition. It submitted reports from individuals and averred that it had ‘extensive information and data concerning the matter.’).

95 *Reservations to the Convention on Genocide*, Order of 1 December 1950, ICJ Rep. 1951, pp. 406-407 (The ICJ invited the Organisation of American States and the ILO to furnish information on the practice of reservations to multilateral conventions); *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Rep. 1954, pp. 47, 49 and Letter No. 17, Part IV: Correspondence, ICJ Rep. 1954, p. 397 (The President of the Court regarded the ILO as likely able to submit information as it potentially had been in a similar situation to that at issue.); *International Status of South-West Africa*, Advisory Opinion, 11 July 1950 and Letter No. 18 (Telegram by the Registrar to Mr. Robert Delson), ICJ Rep. 1950, pp. 128, 130, 320, 327.

96 *Wall*, Advisory Opinion, Order of 19 December 2003, ICJ Rep. 2003, p. 429.

the questions.<sup>97</sup> This was not surprising given the atypical nature of the case.<sup>98</sup> Similarly, in *Responsibilities*, the proceedings had a practical backdrop. The request for an advisory opinion from the Seabed Disputes Chamber was prompted by the sponsorship by the Republic of Nauru of an application by Nauru Ocean Resources Inc. ('NORI') to undertake exploration for polymetallic nodules in the Area, and Nauru's wish to limit its potential liability for any serious damage to the marine environment or a failure by NORI to comply with Part XI UNCLOS. This was reflected in some of the 16 submissions received from states and intergovernmental organizations. While most submissions elaborated on the liability of a state that had chosen to contract out the harvesting of the Area to private investors, the submissions of the IUCN and Nauru commented on the contextual background of the proceedings.<sup>99</sup> The ITLOS in its opinion acknowledged the practical background of the opinion.<sup>100</sup>

## II. European Court of Human Rights

The ECHR does not delineate the content of submissions beyond stipulating that the President may accept any submission which will assist the court in the administration of justice. Case law shows that the court barely limits the content of submissions.

Until the mid-1990, the ECtHR meticulously controlled the content of submissions. In most cases, it granted leave to *amici curiae* to address on-

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97 See, for example, *Kosovo*, Advisory Opinion, Written Statement of the Government of the Republic of Serbia, 17 April 2009 and Written Contribution of the Authors of the Unilateral Declaration of Independence, 17 April 2009.

98 Submissions of fact, including national laws, also have been made in other ICJ advisory proceedings. Cf. *Difference Relating to Immunity from a Legal Process of A Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 April 1999, Statement of the Government of Malaysia, October 1998.

99 See *Responsibilities*, Advisory Opinion, ITLOS Case No. 17, Written Statement of International Union for Conservations of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group, 19 August 2010; *Id.*, Written Statement of the Republic of Nauru, 5 August 2010.

100 *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 4.

ly specified issues concerning the alleged violations of the ECHR.<sup>101</sup> The court tailored the content of briefs to address matters it estimated would benefit from additional argument.<sup>102</sup> It requested that there be a ‘sufficiently proximate connection’ between the content of the application and the issues before it, a requirement it later codified in Rule 37(2) of its 1983 Rules. Submissions were rejected if the issues addressed by the *amicus curiae* did not directly concern the question before the court, for instance, if they sought to introduce information on the issue in question, but concerning the situation in states other than the respondent state.<sup>103</sup> The ECtHR has lessened this requirement. The basic requirement today is that the ECtHR consider the submission relevant for deciding the case either, because

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101 *Malone v. the United Kingdom*, Judgment of 2 August 1984, ECtHR Series A No. 82.

102 E.g. *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, Series A No. 240 (Submission by the Executive Council of the Principality of Andorra permitted only with regard to the opinions expressed in the Commission’s report of 11 December 1990); *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103 (The ECtHR emphasized that comments were to be strictly limited to the ‘particular issues of the alleged violation of the Convention.’).

103 See *Glaserapp v. Germany*, Judgment of 28 August 1986, ECtHR Series A No. 104; *Kosiek v. Germany*, Judgment of 28 August 1986, ECtHR Series A No. 105; *Leander v. Sweden*, Judgment of 26 March 1987, ECtHR Series A No. 116 (Leave was denied to the National Council for Civil Liberties on behalf of three British Trade Unions representing government employees, which would be indirectly affected by the court’s decision. The connection with the case was considered to be too remote to serve the proper administration of the case); *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115; *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93 (A lawyer requested leave to submit written comments in regard of another case pending before the EComHR where he was representing the applicant. Leave was denied on the grounds that the participation would not contribute to the proper administration of justice. *Moyer* argues that the brief was rejected, because it was from a person who had raised the same issue before the EComHR. The President of the Court also granted leave to MIND, but underscored that the comments to be submitted should be strictly limited to certain matters which were closely connected with the *Ashingdane* case. See C. Moyer, *supra* note 47, p. 126; *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I; *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103 (The ECtHR instructed the International Press Institute to comment on the application and interpretation of Article 10(2)’s test of necessity in the most concise manner possible and only as far as it related to the alleged Convention violation.).

of the information it contains or, because it elaborates on a relevant affected public or private interest.

The broader interpretation of the term ‘concerned’ has led to a steep increase in contextual submissions. Such briefs typically elaborate on the background of a case or they show that the issue before the court forms part of a larger systemic problem.<sup>104</sup> In *A., B., and C. v. Ireland*, the ECtHR allowed NGOs supporting either the rights of the unborn child or the mother’s right to choice to comment on the compatibility of Ireland’s prohibition on abortion for reasons of health and well-being with Article 8 ECHR. One organization urged the court to develop a general principle on the minimum degree of protection to which a women seeking abortion would be entitled and maintained that this would be ‘of great importance to all contracting states.’<sup>105</sup> This category of briefs also includes *amicus curiae* submissions that outline the consequences of a certain decision for the public or a specific group of people.<sup>106</sup> In many of these cases, the subject matter is of high public interest and, accordingly, attracts a large number of submissions, including from Council of Europe member

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104 *Boumediene and others v. Bosnia and Herzegovina* (dec.), Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, 18 November 2008 (Successful efforts concerning the release and repatriation of Guantanamo Bay detainees); *Jaremovicz v. Poland*, No. 24023/03, 5 January 2010; *Baka v. Hungary* [GC], No. 20261/12, Judgment of 23 June 2016; *Balázs v. Hungary*, No. 15529/12, 20 October 2015; *Emin Huseynov v. Azerbaijan*, No. 59135/09, 7 May 2015; *F.G. v. Sweden* [GC], No. 43611/22, 23 March 2016; *Janusz Wojciechowski v. Poland*, No. 54511/11, 28 June 2016.

105 *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010.

106 *Hugh Jordan v. the United Kingdom*, No. 24746/94, 4 May 2001, ECHR 2001 (Northern Ireland Human Rights Commission on how investigations into the use of lethal force by state agents should be conducted); *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A No. 216; *K.U. v. Finland*, No. 2872/02, 2 December 2008, ECHR 2008; *Baysakov and others v. Ukraine*, No. 54131/08, 18 February 2010; *C.N. v. the United Kingdom*, No. 4239/08, 13 November 2012; *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008, ECHR 2008; *Vejdeland and others v. Sweden*, No. 1813/07, 9 February 2012; *Von Hannover v. Germany (No. 2)* [GC], Nos. 40660/08 and 60641/08, 7 February 2012, ECHR 2012; *N. v. the United Kingdom* [GC], No. 26565/05, 27 May 2008, ECHR 2008; *Jamroz v. Poland*, No. 6093/04, 15 September 2009.

states.<sup>107</sup> In *MGN Limited v. the United Kingdom*, a group of NGOs submitted a brief on the ‘chilling effect of high costs in defamation proceedings on non-governmental organizations and small media organizations with small budgets.’ They argued that a decision by the court confirming the national decision that the applicant had to bear the success fees in defamation proceedings would prevent NGOs and small publishing houses from publishing information of public interest.<sup>108</sup> They attached to their brief a comparative study on the costs of defamation proceedings across Europe which showed that those relying on a contingency fee agreement incurred substantially higher legal costs than those who did not.

Further, the ECtHR regularly accepts fact submission from *amici curiae*.<sup>109</sup> Such submissions are particularly important in *non-refoulement* cases where the court must establish whether the extradition or repatriation of

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107 E.g. *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012 (interception and push-back of boat refugees in the Mediterranean Sea); *Kuric and others v. Slovenia* [GC], No. 26828/06, 26 June 2012, ECHR 2012; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011; *Lexa v. Slovakia*, No. 54334/00, 23 September 2008; *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010.

108 *MGN Limited v. the United Kingdom*, No. 39401/04, 18 January 2011. Similarly, *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011.

109 *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Jamroz v. Poland*, No. 6093/04, 15 September 2009, para. 54; *Kavakci v. Turkey* (dec.), No. 71907/01, 5 April 2007; *Wolkenberg and others v. Poland* (dec.), No. 50003/99, 4 December 2007; *Witkowska-Tobola v. Poland* (dec.), No. 11208/02, 4 December 2007; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, ECHR 2007-I; *Shelley v. the United Kingdom* (dec.), No. 23800/06, 4 January 2008 (success of needle exchange programs in prisons in other countries to prevent HIV infections, rates of drug abuse in UK prisons and number of HIV infected drug users in UK prisons); *Mir Isfahani v. the Netherlands* (dec.), No. 31252/03, 31 January 2008 (Brief from the UNHCR regarding the high burden of proof placed on asylum seekers coming to the Netherlands, need for a meaningful appeals mechanism); *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009; *SE v. France* (dec.), No. 10085/08, 15 December 2009; *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, ECHR 2010; *Diamante and Pelliccioni v. San Marino*, No. 32250/08, 27 September 2011; *Iacov Stanciu v. Romania*, No. 35972/05, 24 July 2012; *Kuric and others v. Slovenia* [GC], No. 26828/06, 26 June 2012, ECHR 2012; *O'Donoghue and others v. the United Kingdom*, No. 34848/07, 14 December 2010, ECHR 2010; *Piechowicz v. Poland*, No. 20071/07, 17 April 2012; *Sitaropoulos and Giakoumopoulos v. Greece* [GC],

an applicant to a third state might lead to a violation of the prohibition on torture under Article 3 ECHR.<sup>110</sup> Especially with regard to third states, the ECtHR struggles to obtain information on the situation in the country. The respondent state has an interest in painting a rosy picture of the circumstances expecting the applicant, whereas the applicant seeks to show the opposite. In these cases, the ECtHR often relies on *amicus curiae* submissions to assess the parties' submissions. The information stems usually from international NGOs that possess knowledge of the relevant facts due to having carried out operations in the third state or having been involved in the case at an earlier stage. For example, in *Mamatkulov and Askarov v. Turkey*, a case concerning the extradition of two Uzbek opposition politicians accused of terrorist attacks against the Uzbek President, the ECtHR relied on facts presented by international human rights organizations concerning the general human rights situation in Uzbekistan and the likely fate of the politicians. One of the *amici curiae*, Human Rights Watch, had monitored the politicians' trial in Uzbekistan.<sup>111</sup> The court also admits other types of fact submissions from *amici curiae*. In 2004, in *Pini, Bertani, Manera and Atripaldi v. Romania*, the ECtHR granted leave to the Special Rapporteur to the European Parliament in a case concerning the intended adoption by the applicants of two Romanian orphan girls. The Rapporteur

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No. 42202/07, 15 March 2012, ECHR 2012; *Jelicic v. Bosnia and Herzegovina* (dec.), No. 41183/02, 15 November 2005, ECHR 2005-XII; *Mikheyev v. Russia*, No. 77617/01, 26 January 2006; *Czarnowski v. Poland*, No. 28586/03, 20 January 2009; *Wojtas-Kaletka v. Poland*, No. 20436/02, 16 July 2009; *Geotech Kancev GmbH v. Germany*, No. 23646/09, 26 July 2016; *Janusz Wojciechowski v. Poland*, No. 54511/11, 28 June 2016.

- 110 *Ismoilov and others v. Russia*, No. 2947/06, 24 April 2008; *Soldatenko v. Ukraine*, No. 2440/07, 23 October 2008; *Kamyshev v. Ukraine*, No. 3990/06, 20 May 2010; *MB and others v. Turkey*, No. 36009/08, 15 June 2010; *Ahorugeze v. Sweden*, No. 37075/09 27 October 2011; *Chahal v. the United Kingdom*, Judgment of 15 November 1996, Reports 1996-V (Amnesty International on the situation of presumed Sikh militants in India); *Akdivar and others v. Turkey*, Judgment of 16 September 1996, Reports 1996-VI; *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012; *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012; *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012.
- 111 *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, 4 February 2005, ECHR 2005-I. See also *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009.

had gathered extensive knowledge of the Romanian adoption practice in his consideration of Romania's application for EU membership.<sup>112</sup>

Fact submissions also include briefs on the national proceedings preceding the proceedings before the ECtHR, or briefs providing statistical or other data.<sup>113</sup> Since the mid-1990, the ECtHR increasingly has admitted surveys on the laws of the respondent state, on countries dealing with a matter similar to the matter before the court or comparative analyses of how the central legal issue of the case is dealt with in other Council of Europe member states or in third countries.<sup>114</sup> Such surveys help the court to assess the possible impact of its decision on other member states and they

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- 112 *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V. See also *Blecic v. Croatia*, No. 59532/00, 29 July 2004 (OSCE provided information on the nature and number of mass terminations of specially protected tenancies in Croatia and Bosnia-Herzegovina); *Yumak and Sadak v. Turkey* [GC], No. 10226/03, 8 July 2008, ECHR 2008; *A. and others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, ECHR 2009 (Liberty was granted leave to make fact submissions in a case concerning the United Kingdom's derogation pursuant to Article 15 ECHR of the permissible maximum time of arrest and detention. Liberty had acted as a third party before the Special Immigrations Appeals Commission (SIAC) that decided on the applicant's detention. In addition, Liberty provided information on the national authorities' practice under the anti-terrorist legislation and in particular the SIAC.).
- 113 *Tinnelly and Sons Ltd and others and McElduff and others v. the United Kingdom*, Judgment of 10 July 1998, Reports 1998-IV (The Standing Advisory Commission on Human Rights, an independent statutory body based in Northern Ireland, was granted leave to make a submission in a case concerning restrictions of the applicants' rights to bring their case to a court for reasons of national security. The Commission explained reports it had submitted to Parliament on fair employment, argued for the repeal of the legislation at issue and recommended certain safeguards to protect the applicants' rights.). See also *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010; *R.P. and others v. the United Kingdom*, No. 38245/08, 9 October 2012; *Mirosław Garlicki v. Poland*, No. 36921/07, 14 June 2011 (The court accepted a brief analyzing the main points of a relevant constitutional court judgment.); *Van Colle v. the United Kingdom*, No. 7678/09, 13 November 2012.
- 114 *Chahal v. the United Kingdom*, Judgment of 15 November 1996, ECHR 1996-V; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, ECHR 2001-III; *AB Kurt Kellermann v. Sweden*, ECtHR No. 41579/98, 26 October 2004; *D.H. and others v. the Czech Republic*, ECtHR No. 57325/00, 7 February 2006 and [GC], No. 57325/00, 13 November 2007, ECHR 2007-IV; *Matyjek v. Poland*, No. 38184/03, 24 April 2007; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, ECHR 2007-I; *Laskowska v. Poland*, No. 77765/01, 13 March 2007; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], No. 44302/02,

might inform it of possible solutions to the case.<sup>115</sup> In *Otto-Preminger-Institut v. Austria*, a case concerning Austria's blasphemy laws, the court was asked for the first time to consider the need for laws banning expression ridiculing or otherwise offending a religion or religious belief in a democratic society.<sup>116</sup> The ECtHR accepted a submission from Article 19 and Interights which was supported by declarations from constitutional law experts. The submission examined the law and practice on the freedom of expression in ten European countries and the USA.<sup>117</sup>

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30 August 2007, ECHR 2007-III; *Enea v. Italy* [GC], No. 74912/01, 17 September 2009, ECHR 2009; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009; *Guiso-Gallissay v. Italy* (just satisfaction) [GC], No. 58858/00, 22 December 2009; *Bijelić v. Montenegro and Serbia*, No. 11890/05, 28 April 2009; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], No. 38224/03, 14 September 2010; *J.M. v. the United Kingdom*, No. 37060/06, 28 September 2010; *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012; *C.N. v. the United Kingdom*, No. 4239/08, 13 November 2012; *Kasabova v. Bulgaria*, No. 22385/03, 19 April 2011 (US Supreme Court case law on 'chilling effect' on freedom of expression); *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *Mouvement Raëlien Suisse v. Switzerland* [CG], No. 16354/06, 13 July 2012, ECHR 2012; *Sitaropoulos and Giakoumopoulos v. Greece* [GC], No. 42202/07, 15 March 2012, ECHR 2012; *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999; *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, ECHR 1999-IX; *Krombach v. France*, No. 29731/96, 13 February 2001, ECHR 2001-II; *I. v. the United Kingdom* [GC], No. 25680/94, 11 July 2002 and *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, 11 July 2002, ECHR 2002-VI (Liberty submitted a report on the legal recognition of transsexuals in different European countries, USA, Canada and Australia. The report was an updated version of a report submitted to the court in *Sheffield and Horsham v. the United Kingdom*, Judgment of 30 July 1998, Reports 1998-V); *Goodwin v. the United Kingdom*, Judgment of 27 March 1996, Reports 1996-II; *Nikula v. Finland*, No. 31611/96, 21 March 2002, ECHR 2002-II; *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, para. 80; *J.N. v. the United Kingdom*, No. 37289/12, 19 May 2016; *Karáscony and others v. Hungary* [GC], No. 42461/13 and 44357/13, 17 May 2016, paras. 110-119.

115 *Informationsverein Lentia and others v. Austria*, Judgment of 24 November 1993, Series A No. 276. See also M. Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 Netherlands Quarterly of Human Rights (1996), p. 298.

116 M. Nowicki, *supra* note 115, p. 298.

117 *Otto-Preminger-Institut v. Austria*, Judgment of 20 September 1994, Series A No. 295-A.

The ECtHR now also accepts *amicus curiae* briefs on international law. Initially, it excluded legal submissions from *amicus curiae* with a direct interest in the case to avoid appearance of *amicus curiae* as a party.<sup>118</sup> Such submissions elaborate on relevant international (human rights) laws and treaties, issues within the court's core competence.<sup>119</sup> In other cases, *amici curiae* submit comparative analyses of the case law of other interna-

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118 *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, ECtHR Series A No. 44. The exclusion of legal as opposed to fact information appears to have been because the court was more interested in the fact information and it needed to limit the information to avoid an appearance of party-like participation by the Trades Union Congress (TUC). This was problematic for the TUC, which sought to legally defend the system of collective labor unions. Further, it shows that the ECtHR seeks its own benefit from a brief irrespective of the *amicus*' motivation for participation. See O. De Schutter, *Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme*, 7 *European Journal of International Law* (1996), p. 384. He quotes a letter from the TUC of 30 January 1981 in which it assured the Registrar that it would not raise 'any political debate before the court.'

119 *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A No. 216; *Saunders v. the United Kingdom*, Judgment of 17 December 1996, Reports 1996-VI; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I; *Aydin v. Turkey*, Judgment of 25 September 1997, Reports 1997-VI; *Reinprecht v. Austria*, No. 67175/01, 15 November 2005, ECHR 2005-XII; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, 2001-III (Northern Ireland Human Rights Commission provided relevant international standards concerning the right to life); *Isayeva, Yusupova and Bazayeva v. Russia*, Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005; *D.H. and others v. the Czech Republic*, No. 57325/00, 7 February 2006; *Mikheyev v. Russia*, No. 77617/01, 26 January 2006; *Mir Isfahani v. the Netherlands* (dec.), No. 31252/03, 31 January 2008; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, ECHR 2008; *Ismoilov and others v. Russia*, No. 2947/06, 24 April 2008; *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECHR 2009; *A. v. the Netherlands*, No. 4900/06, 20 July 2010; *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010; *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012; *Kiyutin v. Russia*, No. 2700/10, 10 March 2011; *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, ECHR 2012; *Đorđević v. Croatia*, No. 41526/10, 24 July 2012, ECHR 2012; *Seal v. the United Kingdom*, No. 50330/07, 7 December 2010; *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016 (EU law concerning EU citizenship and right to free movement); *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, paras. 77-79.

tional courts, in particular the IACtHR.<sup>120</sup> The court is specifically receptive to such briefs when it decides on a novel legal issue.<sup>121</sup> Many of the *amicus curiae* briefs admitted by the court reference (parts of) its own case law.<sup>122</sup> The court should be careful when reviewing international law submissions, as *amici curiae* tend to draw the attention of the court to a few poignant earlier judgments at the expense of comprehensiveness, thereby risking (inadvertently) distorting the court's perception of a particular issue.

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- 120 *Timurtas v. Turkey*, No. 23531/94, 13 June 2000, ECHR 2000-VI; *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009; *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012; *Kasabova v. Bulgaria*, No. 22385/03, 19 April 2011; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, paras. 78-79.
- 121 *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia* (dec.), No. 11721/04, 14 April 2009; *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, ECHR 2012; *K.U. v. Finland*, No. 2872/02, 2 December 2008, ECHR 2008 (The Helsinki Foundation for Human Rights urged the ECtHR to develop a common standard for the use of the internet); *Sýkora v. the Czech Republic*, No. 23419/07, 22 November 2012.
- 122 *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, 24 April 2003; *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI; *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Beric and others v. Bosnia and Herzegovina* (dec.), Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009; *Frasik v. Poland*, No. 22933/02, 5 January 2010, ECHR 2010; *J.M. v. the United Kingdom*, No. 37060/06, 28 September 2010; *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, 7 July 2011, ECHR 2011; *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, ECHR 2012; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *Piechowicz v. Poland*, No. 20071/07, 17 April 2012; *Sindicatul "Păstorul cel Bun" v. Romania* [GC], No. 2330/09, 9 July 2013, ECHR 2013; *Taxquet v. Belgium* [GC], No. 926/05, 16 November 2010, ECHR 2010; *Annagi Hajibeyli v. Azerbaijan*, No. 2204/11, 22 October 2015; *Hadzimeljlic and others v. Bosnia and Herzegovina*, Nos. 3427/13, 74569/13 and 7157/14, 3 November 2015.

The ECtHR further accepts *amicus curiae* briefs that suggest interpretations of ECHR provisions of potential relevance to the case.<sup>123</sup> Such briefs often stem from states. Decisions of the ECtHR may have an effect on the laws and the political decisions of other Council of Europe member states. A declaration of incompatibility with the ECHR of a national law or state practice constitutes *de facto* precedent with regard to similar fact patterns in other member states.<sup>124</sup> In *Lautsi and others v. Italy*, upon complaint by a mother and her minor children, the ECtHR had to decide on the compati-

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123 But see *Glaser v. Germany*, Judgment of 28 August 1986, Series A No. 104 and *Kosiek v. Germany*, Judgment of 28 August 1986, Series A No. 105, where the ECtHR rejected a request by an *amicus curiae*, who sought to impede the creation of precedent because it was not aimed at solving the case before it. See also O. De Schutter, *supra* note 118, p. 391. *Herrmann v. Germany* No. 9300/07, 20 January 2011 and [GC], No. 9300/07, 26 June 2012 (The case concerned the compatibility with the ECHR of a compulsory membership in a hunting association and an obligation to tolerate hunting on the applicant's property. The *Deutscher Jagdschutzverband*, a private association representing the interests of hunters in Germany, and the *Bundesarbeitsgemeinschaft der Jagdgenossenschaften*, the federation of all state and regional associations and state-sponsored committees of property owners with hunting rights, appeared as *amici curiae*. They emphasized the importance of the proceedings for landowners and hunters and pointed to the advantages of the system); *Sadak and others v. Turkey (No.1)*, Nos. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, ECHR 2001-VIII; *Wilson, National Union of Journalists and others v. the United Kingdom*, Nos. 30668/96, 30671/96, 30678/96, 2 July 2002, ECHR 2002-V; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V (The applicants complained that domestic safeguards against disproportionately high jury awards in libel cases were inadequate. Leave was granted to seven *amici curiae* who were all stakeholders in media, publishing and newspapers); *Beer and Regan v. Germany* [GC], No. 28934/95, 18 February 1999; *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999, ECHR 1999-I; *Sorensen and Rasmussen v. Denmark* [GC], Nos. 52562/99 and 52620/99, 11 January 2006, ECHR 2006-I; *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, ECHR 2011 (European Association of Jehovah's Christian Witnesses on the position of the organization re the use of arms and their situation in Armenia); *Heinisch v. Germany*, No. 28274/08, 21 July 2011, ECHR 2011.

124 *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A No. 262; *Lobo Machado v. Portugal*, Judgment of 20 February 1996, Reports 1996-I; *Bäck v. Finland*, No. 37598/97, 20 July 2004, ECHR 2004-VIII; *Kleyn and others v. the Netherlands* [GC], Nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, ECHR 2003-VI; *AB Kurt Kellermann v. Sweden*, No. 41579/98, 26 October 2004; *Association SOS Attentats and De Boëry v. France* [GC], No. 76642/01, 4

bility of the ECHR with the display of a crucifix in public school classrooms. Leave to file an *amicus curiae* submission was granted to 33 members of the European Parliament, a group of international, European and Italian non-governmental human rights organisations arguing in favour of civil rights, a group of Christian organisations defending the practice and ten Council of Europe member states. All of the governments supported the respondent government in that the display of the crucifix was compatible with the ECHR. They provided arguments on the nature of the crucifix and its perception across Europe, as well as the margin of appreciation to be accorded to states on this issue.<sup>125</sup> The ECtHR even has accepted briefs conducting a full application by *amici curiae* of the ECHR to the purported facts or advocating for the establishment of certain standards.<sup>126</sup>

Submissions on jurisdictional aspects are rare, but not exceptional.<sup>127</sup>

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October 2006, ECHR 2006-XIV; *Scordino v. Italy (No. 1)* [GC], No. 36813/97, 29 March 2006, ECHR 2006-V; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008; *TV Vest AS and Rogaland Pensjonistparti v. Norway*, No. 21132/05, 11 December 2008; *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011 (The Netherlands and the United Kingdom in defence of the Dublin system); *S.H. and others v. Austria* [GC], No. 57813/00, 3 November 2011, ECHR 2011.

125 *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011.

126 *Soffer v. the Czech Republic*, No. 31419/04, 8 November 2007; *Al-Khawaja and Tahery v. the United Kingdom* [GC], Nos. 26766/05 and 22228/06, 15 December 2011, ECHR 2011; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011; *Vejdeland and others v. Sweden*, No. 1813/07, 9 February 2012.

127 In *Markovic v. Italy*, the Grand Chamber received submissions from the United Kingdom government *inter alia* on the question whether the applicants fell under the respondent state's jurisdiction within the meaning of Article 1 ECHR. See *Markovic and others v. Italy* [GC], No. 1398/03, 14 December 2006, ECHR 2006-XIV. See also *Beric and others v. Bosnia and Herzegovina* (dec.), Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* [GC], No. 32772/02, 30 June 2009, ECHR 2009. The ECtHR regularly accepts submissions on the admissibility of applications. See *Micallef v. Malta* [GC], No. 17056/06, 15 October 2009, ECHR 2009; *Aksu v. Turkey*, Nos. 4149/04 and 41029/04, 27 July 2010; *Balázs v. Hungary*, No. 15529/12, 20 October 2015.

The ECtHR has accepted *amicus curiae* briefs containing factual, legal or contextual information not previously mentioned by the parties.<sup>128</sup> In *Lingens v. Austria*, the ECtHR received and significantly relied on a submission from the NGO Interights, which provided a comparative survey of European and American law. Neither party had presented similar information.<sup>129</sup>

However, there are limits on what information the court can receive. Most importantly, the court cannot expand its jurisdiction through *amicus* submissions. Pursuant to Articles 34-35 ECHR and Rules 46-47 ECtHR Rules, the court's jurisdiction is defined by the facts and the alleged Convention violations listed in the application. In *Soering v. the United Kingdom*, the ECtHR is said to have based its decision on the violation of Convention guarantees that the claimant had not invoked, but which Amnesty International had presented in its *amicus curiae* brief. Amnesty International argued that the United Kingdom would violate the prohibition of torture under Article 3 ECHR, if it acceded to the USA's extradition request. *Soering* was facing a criminal trial and the death penalty in the USA for having killed the parents of a friend at age 18. The court relied on the argument presented by Amnesty International that capital punishment as

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128 *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 1<sup>st</sup> section, 26 February 2004; *Makaratzis v. Greece* [GC], No. 50385/99, 20 December 2004, ECHR 2004-XI; *Tahsin Acar v. Turkey* (preliminary objection) [GC], No. 26307/95, 6 May 2003, ECHR 2003-VI (Amnesty International commented on the application of Article 37 ECHR); *Turek v. Slovakia*, No. 57986/00, 14 February 2006, ECHR 2006-II; *Staroszczyk v. Poland*, No. 59519/00, 22 March 2007; *Sialkowska v. Poland*, No. 8932/05, 22 March 2007; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, ECHR 2008; *Leela Foerderkreis e.V. and others v. Germany*, No. 58911/00, 6 November 2008; *Kuric and others v. Slovenia*, No. 26828/06, 13 July 2010; *A. v. the Netherlands*, No. 4900/06, 20 July 2010; *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, ECHR 2010; *Al-Skeini and others v. the United Kingdom* [GC], No. 55721/07, 7 July 2011, ECHR 2011; *Axel Springer AG v. Germany* [GC], No. 39954/08, 7 February 2012; *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012; *Hode and Abdi v. the United Kingdom*, No. 22341/09, 6 November 2012; *Kiyutin v. Russia*, No. 2700/10, 10 March 2011; *NADA v. Switzerland* [GC], No. 10593/08, 12 September 2012, ECHR 2012; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012, ECHR 2012; *Redfearn v. the United Kingdom*, No. 47335/06, 6 November 2012; *O'Keefe v. Ireland* (dec.), No. 35810/09, 26 June 2012.

129 *Lingens v. Austria*, Judgment of 8 July 1986, ECtHR Series A No. 103.

such constituted inhuman and degrading treatment and thus violated Article 3 ECHR. This had been claimed neither by the applicant nor had it been mentioned by either party. The decision has been criticized as an overstepping of judicial competence.<sup>130</sup> However, this observation is not accurate. In his application before the EComHR, the applicant had claimed that his extradition would subject him to inhumane and degrading treatment and punishment contrary to Article 3 ECHR.<sup>131</sup> Thus, the court did not expand *Soering's* claim – which would have been outside its competence. It merely based it on another legal argument in accordance with the principle of *iura novit curia*. The court remains careful to respect the confines of its jurisdiction. In *A., B., and C. v. Ireland*, it emphasized that it was ‘not in its role to examine the submissions which do not concern the factual matrix of the case before it.’<sup>132</sup>

### III. Inter-American Court of Human Rights

Article 2(3) IACtHR Rules envisages two forms of submissions: first, reasoned arguments on the facts contained in the presentation of the case, and, second, legal considerations on the subject matter of the proceedings. The wording insinuates that, as a general requirement, all submissions must be within the scope of jurisdiction. The different formulations indicate that the scope of permissible fact submissions is narrower than that of legal submissions, possibly, because the drafters wanted to exclude submissions providing facts on similar cases in other OAS member states. The wording also denominates the presentation of the case as the decisive guidepost for *amici* seeking to make fact submissions. For legal submissions, the reference to the subject matter of the proceedings could be interpreted to allow more general legal submissions. However, the IACtHR also requires legal submissions to relate to the specific case. The court has

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130 F. Sudre, *Extradition et peine de mort: arrêt Soering de la cour européenne des droits de l'homme, du 7 juillet 1989*, 94 *Revue Générale de Droit International Public* (1990), pp. 107, 114.

131 *Soering v. the United Kingdom*, Judgment of 7 July 1989, ECtHR Series A No. 161, para. 176.

132 *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010.

recently for the first time in a judgment mentioned rejecting submissions for failing to relate to the matter in dispute<sup>133</sup> or for not being useful.<sup>134</sup>

A review of case law and exemplary *amicus curiae* submissions shows that the majority of *amicus curiae* submissions focus on legal and contextual arguments. The IACtHR has received *amicus curiae* submissions on international human rights law, including analyses of its own practice.<sup>135</sup> Some briefs discuss novel legal issues and propose new legal interpretations. While the majority of submissions have focused on substantive aspects, the court has also received briefs outlining procedural issues.<sup>136</sup> Briefs often focus on one particular legal aspect at issue in a case.<sup>137</sup> In

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- 133 *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219, p. 6, FN 9.
- 134 *López Mendoza v. Venezuela*, Judgment of 1 September 2011 (Merits, Reparations and Costs), IACtHR Series C No. 233, FN 6; *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 154, para. 80. F. Rivera Juaristi, *supra* note 48, p. 120 (The court should clarify the term ‘useful/uselessness’.).
- 135 *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33 (Submission on the principle *non bis in idem*); *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79; *La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs), IACtHR Series C No. 162; *The “Las Dos Erres” Massacre v. Guatemala*, Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 211 (International law doctrine on the responsibility of superiors); *López Mendoza v. Venezuela*, Judgment of 1 September 2011 (Merits, Reparations and Costs), IACtHR Series C No. 233, para. 10.
- 136 *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 209, p. 60; *Genie Lacayo v. Nicaragua*, Judgment of 29 January 1997 (Merits, Reparations and Costs), IACtHR Series C No. 30, p. 17, para. 41; *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33; *Benavides Cevallos v. Ecuador*, Judgment of 19 June 1998 (Merits, Reparations and Costs), IACtHR Series C No. 38. See also A. Lindblom, *supra* note 24, p. 356.
- 137 *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion No. OC-9/87 of 6 October 1987, IACtHR Series A No. 9; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99 of 1 October 1999, IACtHR Series A No. 16; *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197. See also D. Zagorac, *supra* note 51, pp. 31-32.

*Radilla Pacheco v. Mexico*, a case concerning the forced disappearance of an individual after his detention by military forces, Amnesty International provided an analysis of reservations to international human rights treaties in general and by Mexico.<sup>138</sup> Mexico had raised as a preliminary objection that it had issued interpretative declarations and reservations to the ACHR and the Forced Disappearances Convention which voided the court's jurisdiction over the case.

The IACtHR has occasionally received submissions on the legal situation in other OAS member states.<sup>139</sup> It remains to be seen if such submissions will be admitted under the new definition of *amicus curiae*.

Some *amicus curiae* briefs urge the court to adopt a certain legal interpretation, with some briefs even subsuming the facts of the case under the

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138 Amnesty International, *Amicus curiae* Brief to IACtHR in *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 209.

139 In *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACtHR received submissions from several indigenous communities and advocacy groups from the Americas. The case concerned the alleged failure by Nicaragua to demarcate communal land, to protect the rights of the Mayagna Awas (Sumo) Tingni Community to property of their ancestral land and natural resources on the Atlantic coast of Nicaragua and to guarantee access to effective remedies against an imminent concession to commercially develop 62,000 hectares of tropical forest on communal lands. See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79, pp. 7-8, paras. 38, 41-42. For analysis of this case, see P. Macklem/E. Morgan, *Indigenous rights in the Inter-American System: the amicus brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua*, 22 *Human Rights Quarterly* (2000), p. 570. The case raised fundamental questions of human rights law, including whether the protection of lands occupied by indigenous people amounted to a human right protected by the ACHR. The brief from the Assembly of First Nations canvassed issues of international human rights law and their application in Canada, Canadian constitutional principles governing indigenous rights and co-management arrangements on indigenous peoples' lands. See also some excerpts from the *Amicus Curiae* Brief of the Assembly of First Nations, reprinted in 22 *Human Rights Quarterly* (2000), pp. 572-602 ('[T]he purpose of this *Amicus Curiae* Brief is to offer assistance to the IACtHR in its consideration of the case of Awas. ... Canadian constitutional principles governing indigenous title and resource rights assist in illuminating the 'ordinary meaning' of Articles 1, 2 and 21 of the ACHR and in resolving the dispute ... in a manner consistent with evolving principles of international and domestic law.'). The court did not rely on the submission in its decision, indicating that the elaboration was too remote.

ACHR and proposing a concrete solution of the case.<sup>140</sup> Such briefs could be regarded as undue intrusion on judges' obligation to decide the case.

A former IACtHR staff member expected that briefs with non-legal, political content would be considered inadmissible by the court.<sup>141</sup> The court seems to have abandoned this approach in 1999 with the admission of fact submissions in *Cesti Hurtado v. Peru*, a case concerning forced disappearance.<sup>142</sup> The IACtHR took note of an *amicus curiae* brief from the Chairman of the Human Rights Committee of the Bar Association of Lima, Mr. Rivas. The Committee had publicly condemned Mr. Hurtado's detention as arbitrary. In the submission, Mr. Rivas explained how the Bar Association of Lima had communicated with public institutions requesting compliance with a writ of *habeas corpus*, how it had sought support from private and governmental international organizations, and how he had personally tried to communicate with Mr. Hurtado.<sup>143</sup>

Since 2008, there has been a noticeable increase in fact submissions before the IACtHR. Fact submissions include facts directly related to a case, to a situation in the respondent state, the immediate context of the dispute or an analysis of relevant national laws in the respondent state.<sup>144</sup> The IACtHR Rules clarify in Article 44 that submissions may be made also on

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140 *Usón Ramírez v. Venezuela*, Judgment of 20 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 207, p. 92; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79 (The Assembly of First Nations, the Canadian national representative organization of Canada's indigenous people, advocated referring to Canadian constitutional principles governing indigenous titles and resource rights to assist in the interpretation of Articles 1, 2 and 21 ACHR.).

141 C. Moyer, *supra* note 47, p. 124.

142 Assessment of the IACtHR's use of *amicus curiae* submissions in its deliberations and court practice is made difficult due to the court's rare references to the content of submissions in its case law.

143 *Cesti Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56, pp. 16-17, para. 56.

144 *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79 (Protection of indigenous rights in different national legal systems); *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006 (Merits, Reparations and Costs), IACtHR Series C No. 151 (Access to information in fourteen different countries, including Chile. The same study was also presented by the victims' representative); *Garibaldi v. Brazil*, Judgment of 23 September 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 203 (One of the *amici*

compliance.<sup>145</sup> In *Reverón Trujillo v. Venezuela*, a case concerning the lack of investigation by Venezuela of the homicide of a rural worker, the IACtHR received *inter alia* submissions on violence against field workers without property in Venezuelan rural regions in general, as well as the reopening of investigations concerning the death of the victim.<sup>146</sup> In *Gomez Lund and others v. Brazil* concerning arbitrary detention and forced disappearance of 70 members of the communist party and of farmers by the Brazilian military between 1972 and 1975, the court received numerous submissions discussing the effects of national amnesty laws on these crimes and their legality in light of the transitional justice approach pur-

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commented on the reopening of the proceedings to investigate the death of S. Garibaldi); *Usón Ramírez v. Venezuela*, Judgment of 20 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 207; *Cabrera García and Montiel Flores v. Mexico*, Judgment of 26 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 220, p. 103; *The Miguel Castro Castro Prison v. Peru*, Judgment of 2 August 2008 (Interpretation of the Judgement on Merits, Reparations and Costs), IACtHR Series C No. 181, p. 3, paras. 6, 80; *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197; *Barreto Leiva v. Venezuela*, Judgment of 17 November 2009 (Merits, Reparations and Costs), IACtHR Series C No. 206; *Rosendo-Cantú and other v. Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 216; *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84 of 19 January 1984, IACtHR Series A No. 4; *La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs), IACtHR Series C No. 162, para. 76; *Vélez Loor v. Panama*, Judgment of 23 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 218, p. 99; *Genie Lacayo v. Nicaragua*, Judgment of 29 January 1997 (Merits, Reparations and Costs), IACtHR Series C No. 30; *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282 (On admissibility of a supervening fact regarding decision by the Constitutional Court of the Dominican Republic). With respect to the last case, see F. Rivera Juaristi, *supra* note 48, p. 114.

145 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, para. 16. Confirming, *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 184.

146 *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197.

sued by the government.<sup>147</sup> However, the IACtHR does not accept all fact submissions. In *Caso Cruz Sánchez y Otros v. Perú*, a case concerning alleged violations of the ACHR in 1997 during the so-called operation ‘Chavín de Huántar’ aimed at the termination of a 126-day hostage-taking at the residence of the Japanese Ambassador to Peru, the court refused to accept as *amicus curiae* brief (or as evidence) sections of several books and an interview by some of the former hostages, including by the prominent conservative Peruvian politician and former minister of defence *Antero Flores Aráoz Esparza*.<sup>148</sup>

The review yields a different assessment in advisory proceedings. In accordance with the nature of the procedure, the IACtHR accepts predominantly legal submissions.<sup>149</sup> Submissions made include comparative analyses of the case law of other international courts and tribunals and of specific provisions of the ACHR or general international law, such as the VCLT.<sup>150</sup> The IACtHR has also received submissions on the admissibility of an advisory opinion and other procedural issues.<sup>151</sup> The court has not

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147 *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219.

148 A later submission by the same petitioner was rejected for untimeliness, see *Cruz Sánchez et al. v. Peru*, Judgment of 17 April 2015 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 292, paras. 11-12. The IACtHR noted the inadmissibility in the judgment, which it does rarely.

149 *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, pp. 3, 46-48, paras. 6, 16-17; *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33, paras. 21-22 (on *no bis in idem*).

150 “*Other Treaties*” subject to the consultative jurisdiction of the court (*Article 64 American Convention on Human Rights*), Advisory Opinion No. OC-1/82 of 24 September 1982, IACtHR Series A No. 1, p. 1 (Comparison to ICJ and PCIJ case law); *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99 of 1 October 1999, IACtHR Series A No. 16 (On the VCLT and the law on the right to information on consular assistance); *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03 of 17 September 2003, IACtHR Series A No. 18; *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 ACHR)*, Advisory Opinion No. OC-9/87 of 6 October 1987, IACtHR Series A No. 9.

151 *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights)*, Advisory Opinion No. OC-19/05 of 28 November 2005, IACtHR Series A No. 19.

explicitly stated that it does not receive factual submission. However, they are rare given the nature of advisory opinions.

The IACtHR has admitted *amicus curiae* briefs containing new facts, fact observations and legal arguments. It has held that the principle of *iura novit curia* furnishes it with competence to consider all possible violations of the ACHR. Further, it obliges it to apply all appropriate legal standards, including those not presented in the parties' pleadings conditioned on 'the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts.'<sup>152</sup> In several cases, the court has received *amicus* submissions seeking to build the case for one of the parties. In *Caso del Penal Miguel Castro Castro v. Peru*, the court accepted a joint submission from two human rights NGOs. They divulged new facts concerning the so-called 'Operative Transfer 1' in the Miguel Castro Castro Prison in May 1992, during which the state was said to have violated several provisions of the ACHR by killing at least 42, injuring 175 inmates and subjecting 322 inmates to cruel, inhuman and degrading treatment, as well as refusing access and information on the fate of the inmates to attorneys and next of kin.<sup>153</sup>

Judge Cançado Trindade notes that even though the court's material jurisdiction is limited to issues pertaining to the ACHR, the court may address treaties that are not covered by its material jurisdiction to the extent that they are referred to in the ACHR.<sup>154</sup> This view accords with the

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152 *The Moiwana Community v. Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 124, p. 47, para. 107 [Reference omitted]. See also *De la Cruz Flores case*, Judgment of 18 November 2004 (Merits, Reparations and Costs), IACtHR Series C No. 115, para. 122; *Gómez Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), IACtHR Series C No. 110, para. 179; *Hermanos Landae-ta Mejías y otros v. Venezuela*, Judgment of 27 August 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 281, para. 128.

153 *The Miguel Castro Castro Prison v. Peru*, Judgment of 2 August 2008 (Interpretation of the Judgement on Merits, Reparations and Costs), IACtHR Series C No. 181, p. 3, para. 6. Further, The IAComHR has relied on ECtHR case law, which had been presented by an *amicus curiae* it had earlier called to testify in the admissibility proceedings concerning the standing of the petitioner as a direct victim in a case. See A. Lindblom, *supra* note 24.

154 Cf. Article 44 ACHR. See also A. Cançado Trindade, *The operation of the Inter-American Court of Human Rights*, in: Harris/S. Livingstone (Eds.), *The Inter-American system of human rights*, Oxford 1998, pp. 135-136.

IACtHR's interpretation of Article 29 ACHR, which guides the interpretation of the Convention. Article 29(b) and (d) stipulates that

[n]o provision of the Convention shall be interpreted as:

(b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said states is a party; ...

(d) excluding or limiting the effect that the American Declaration on the Rights and Duties of Man and other international acts of the same nature may have.<sup>155</sup>

The IACtHR has relied on various other international treaties in its interpretation of the rights enshrined in the ACHR.<sup>156</sup>

#### IV. African Court on Human and Peoples' Rights

There are no written guidelines on the substance of *amicus* submissions other than that the submission must be made 'with regard to the matter' in Rule 42 of the 2012 Practice Direction. The text covers fact and legal briefs within the scope of the court's material jurisdiction.<sup>157</sup> The court in *Lohé Issa Konaté v. Burkina Faso* accepted a fact submission. In their brief, the *amici* argued that national laws which criminalized the defamation of judges and state officials violated the right to freedom of expression as enshrined in the African Charter and the ICCPR. They further argued that any restriction to be lawful had to be for a legitimate objective and be proportionate. This was not the case with respect to the laws in question. They were not necessary to protect the rights of the members of

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155 See T. McCann, *The American Convention on Human Rights: toward uniform interpretation of human rights law*, 6 *Fordham International Law Journal* (1983), pp. 629-631.

156 E.g. *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 154, paras. 86-133. See, with further examples, L. Lixinski, *Treaty interpretation by the Inter-American Court of Human Rights: expansionism at the service of the unity of international law*, 21 *European Journal of International Law* (2010), pp. 585-604.

157 Arguing that the court only permits fact submissions, Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 822.

the judiciary.<sup>158</sup> The case concerned the criminal prosecution and sentencing to a fine and imprisonment for defamation, public insult and contempt of court of a journalist for publishing articles which alleged that a prosecutor had committed serious criminal offences while in office.<sup>159</sup>

## V. WTO Appellate Body and panels

The substance of submissions is regulated differently for panels and the Appellate Body.

To the extent panels consider the provision a legal basis for the admission of *amicus curiae* briefs, Article 13(1) DSU guides the content of *amicus curiae* submissions before panels (see Chapter 5). The provision stipulates, in relevant part, that panels have ‘the right to seek *information and technical advice* from any individual or body which it deems appropriate.’ The European Commission in *US–Lead and Bismuth II* and in *US–Copyright Act* contended that the wording and the purpose of Article 13 DSU limited information to ‘fact information’ and excluded legal arguments.<sup>160</sup> Moreover, in *US–Shrimp*, Malaysia called for the exclusion of an *amicus* brief, because it contained not only technical advice but ‘also legal and political arguments.’<sup>161</sup> The panel in *US–Copyright Act* disagreed. It decided that it had authority to accept all forms of non-requested information in accordance with the Appellate Body’s decision in *US–Shrimp* that Articles 12 and 13 DSU allowed a panel to ‘inform[] itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.’<sup>162</sup> The Appellate Body and panels seem to require some con-

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158 *Lohé Issa Konaté v. Burkina Faso*, Application No. 4/2013, Judgment of 5 December 2014, pp. 37-38, paras. 141-144.

159 *Lohé Issa Konaté v. Burkina Faso*, Application No. 4/2013, Judgment of 5 December 2014, pp. 37-38, para. 3-4, paras. 3-8.

160 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 36; *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R, paras. 6.3-6.8.

161 See *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 157.

162 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 106 (The authority is necessary to enable a panel to discharge its duty imposed by Article 11 DSU to ‘make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the

nectivity between the *amicus* submission and the case and that the information is not duplicative. In *US-Shrimp (RW)*, the panel decided not to accept an *amicus curiae* brief after the USA argued that it addressed a hypothetical question.<sup>163</sup>

*Amici curiae* have submitted briefs to panels containing fact, legal, technical and scientific information.<sup>164</sup> Fact submissions include a letter in *Australia–Salmon* addressing the Australia’s treatment of imports of pilchards for use as bait or fish feed compared to imports of salmon. The panel noted that the information had ‘a direct bearing on a claim that was already raised by Canada.’<sup>165</sup>

Many NGO submissions argue for an inclusion of international agreements on environmental protection or human rights in the interpretation of the WTO Agreements.<sup>166</sup> In its submission to the panel in *US–Shrimp*, the CIEL presented information it characterized as ‘critical to the Panel’s deliberations on the implications of the dispute for marine ecology and biological diversity,’ including an analysis of multilateral environmental agreements and customary international law and their applicability in WTO law and jurisprudence.<sup>167</sup> A group of scientific experts in the *EC–Biotech* case argued for a sociological approach to the SPS Agreement.<sup>168</sup>

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*applicability of and conformity with the relevant covered agreements.’* [Emphasis in original]).

- 163 *US–Shrimp*, Recourse to Article 21.5 (Malaysia), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 5.15.
- 164 *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, paras. 7.76, 7.78-7.79. (WVZ argued in essence that the EC’s intervention price did not cover the average total cost of producing A, B and C sugar in the EC). For analysis of the case, see B. Hoekman/R. Howse, *European Community–Sugar: subsidization and the World Trade Organization*, Policy Research Working Paper 4336, 2007.
- 165 *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 20 March 2000, WT/DS18/RW, para. 7.9 (The information addressed inconsistency in the sense of Article 5.5 SPS Agreement).
- 166 E.g. R. Howse/J. Langille/K. Sykes, *Written submission of non-party amici curiae of 11 February 2013 in the case EC–Seal Products*, Appellate Body Report, adopted on 18 June 2014, WT/DS400, WT/DS401, WT/DS369.
- 167 CIEL et al., *Amicus brief to the Appellate Body on United States – Import Prohibition on Certain Shrimp and Shrimp Products*, at: <http://www.ciel.org/Publications/shrimpturtlebrief.pdf> (last visited: 21.9.2017).
- 168 For analysis of the submission, see C. Foster, *Social science experts and amici curiae briefs in international courts and tribunals: the WTO Biotech Case*, 52 *Netherlands International Law Review* (2005), pp. 433-459 (One of two briefs

Panels have solicited fact submissions under this provision and they have asked for an assessment of the information solicited.<sup>169</sup> In *Turkey–Textiles*, a case concerning the legality under GATT of the imposition by Turkey of quantitative restrictions on imports of textiles from India in the framework of its association process with the EU, the panel requested information from the Permanent Representative of the European Communities in Geneva. The information solicited concerned, among other, the negotiation history of the accession agreement, the accession process and the regulation of the transfer of goods, in particular of textiles between the EC and Turkey.<sup>170</sup> The EC Representative replied briefly to each of the questions. The panel later admitted that it had hoped that the EC Representative would add his own views on some of the issues. This shows that the panel understood the term ‘information’ to include also opinions.<sup>171</sup>

Article 17(6) DSU expressly limits the permissible content of submissions to the Appellate Body. The provision determines that the Appellate Body reviews the legal issues and interpretations developed in the panel reports. It explicitly states that the Appellate Body may not engage in fact-

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provided the panel with a summary of available scientific information showcasing the uncertainties associated with genetic modification and argued that these uncertainties justified categorising the measures adopted by the EC as provisional or temporary under Article 5(7) SPS Agreement.).

169 In several cases, panels have requested information from the International Bureau of WIPO on conventions administered by it. See, for example, *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R, pp. 245–246, para. 1.7 (Factual information on the negotiating history and development of several provisions of the Paris Act of 1971 of the Berne Convention for the Protection of Literary and Artistic Works); *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff* (hereinafter: *EC–Trademarks and Geographical Indications*), Report of the Panel, adopted on 15 March 2005, WT/DS174/R, p. 9, paras. 2.16, 2.18.

170 *Turkey–Textiles*, Report of the Panel, adopted on 19 November 1999, WT/DS34/R, pp. 2, 26–27, paras. 1.11, 4.1.

171 *Id.*, para. 4.2. The case concerned the EC, which had decided not to participate in the proceedings as a third party given that India had decided to ‘direct its complaint exclusively against Turkey in spite of the fact that it was clearly indicated to India that the measures at issue were taken in the framework of the formation of the EC/Turkey customs union.’ Turkey had argued that the case should not be decided because the European Commission was an ‘essential party’ to the case. *Id.*, paras. 9.4–9.13.

finding.<sup>172</sup> Even with respect to legal briefs there has been controversy. WTO member states have argued that there is no need for legal *amicus curiae* submissions, because judges are qualified to research and apply the applicable law.<sup>173</sup> However, the DSU itself acknowledges in Article 17(7) DSU that Appellate Body members may benefit from legal support. The provision stipulates that ‘[t]he Appellate Body shall be provided with appropriate administrative and legal support as it requires.’

The Appellate Body has adhered to the limitations of Article 17(6) DSU in its *amicus* practice carefully.<sup>174</sup> The *EC–Asbestos* Additional Procedure required written briefs to ‘set out a precise statement, strictly limited to legal arguments, supporting the applicant’s legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.’<sup>175</sup> Legal submission to the Appellate Body have not only addressed the WTO Agreement and the covered agreements, but they, for instance, have discussed how to integrate environmental rules into the interpretation of

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172 In several cases, the Appellate Body refers to the term ‘information’ in relation to *amicus curiae* submissions without conveying how it interprets the term. As the term is reminiscent of panels’ investigative powers under Article 13 DSU – powers the Appellate Body does not possess – it would be advisable for the Appellate Body to refrain from using the term in this context.

173 Uruguay, for instance, stated that ‘the members of the Appellate Body [have] the capacity, knowledge and experience necessary to take the legal decisions incumbent upon them without any outside help.’ See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7. See also B. Stern, *The intervention of private entities and states as “friends of the court” in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.) *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1441 (‘It seems surprising that such briefs should have been admitted, inasmuch as Article 17.3 of the DSU stipulates that the Appellate Body must comprise “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally”, and should therefore have no need to resort to NGOs in order to determine the law applicable and its interpretation.’).

174 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, pp. 12-13, paras. 36-37; *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/R, para. 83 (‘We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various attached NGO submissions.’).

175 *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, Sec. 7 (c).

WTO rules.<sup>176</sup> Further, the Appellate Body has noted the difficulty in differentiating between fact and legal submissions. *Amicus curiae* submissions often combine fact and legal considerations. In *EC–Sardines*, the Appellate Body rejected the extensive fact submissions in Morocco’s *amicus* brief, but decided that it would still consider the legal arguments.<sup>177</sup> This mirrors the Appellate Body’s approach to parties’ and third parties’ submissions in other cases.<sup>178</sup>

WTO panels’ obligation to establish the objective truth in a case in Article 11 DSU indicates that *amici curiae* may elaborate on arguments not raised by the parties, as long as the submission addresses aspects within the respective panel’s jurisdiction. With regard to third parties, the Appellate Body held in *US–Customs User Fee* that a third party does not possess the right to make claims or present defences to those claims due to the limitations imposed by the terms of reference.<sup>179</sup> Given that *amici curiae* do not attain a formal status in the proceedings (and constitute a ‘lesser’ form of involvement than third parties), these considerations *a fortiori* claim validity for *amicus curiae* submissions. The panel in *EC–Salmon* indicated that this case law also applied to *amici curiae*, when it noted that the information submitted by *amicus curiae* had ‘a direct bearing on a claim that was already raised by Canada.’<sup>180</sup> Moreover, other panels and the Appellate Body have rejected *amicus curiae* submissions that consider issues or arguments not raised in the claims or submissions of the parties or third parties, unless the submission is adopted by a party or third par-

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176 Cf. L. Johnson/E. Tuerk, *CIEL’s experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 249, analyzing the submissions of CIEL in WTO dispute settlement.

177 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, pp. 41–42, paras. 169–171. See also Chapter 7.

178 *United States–Subsidies on Upland Cotton* (hereinafter: *US–Upland Cotton*), Recourse to Article 21.5, Report of the Appellate Body, adopted on 20 June 2008, WT/DS267/AB/R, paras. 385, 420.

179 See D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international coordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 426–427.

180 *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 7.9.

ty.<sup>181</sup> In *US–Softwood Lumber IV*, the Appellate Body rejected submissions for purporting to add an ‘indigenous dimension to the issues raised by this appeal’ and for commenting on the ‘environmental implications of the issues raised by this appeal.’<sup>182</sup> In *Mexico–Taxes on Soft Drinks*, the Appellate Body decided that consideration of a submission by the Mexican national chamber of the sugar and alcohol industries was not ‘necessary’ after the United States had alleged that the submission raised new arguments and ‘claims of error’ that were not part of Mexico’s Notice of Appeal.<sup>183</sup> In short, *amici curiae* may elaborate on specific issues not mentioned by the parties, but only if they relate to an issue that has been raised by a party (or a party forgoes to protest that another issue has been addressed). *Amici curiae* cannot point to claims that have not been developed by a party. The situation is different if a party adopts a submission. With respect to third parties, panels have decided that novel legal arguments, including arguments on jurisdiction, will be considered by them only if adopted by a party.<sup>184</sup>

This practice accords with the Appellate Body’s general approach. The Appellate Body has found a violation of Article 11 DSU and parties’ due

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181 *United States–Certain Country of Origin Labelling (COOL) Requirements* (hereinafter: *US–COOL*), Report of the Panel, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R, p. 5, para. 2.10; *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 268 (‘We note that the brief was directed primarily to a question that was not part of any of the claims.’); *United States–Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* (hereinafter: *US–Softwood Lumber IV*), Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, p. 5, para. 9 (‘These briefs dealt with some questions not addressed in the submissions of the participants or third participants.’); *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8, FN 21.

182 *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, p. 5, FN 21–22.

183 *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8, FN 21.

184 In *Canada – Certain Measures Affecting the Automotive Industry*, the panel considered Article V GATS after Canada decided to rely on it as a secondary argument. It had initially only been presented by the USA which participated as a third party. See *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Panel, adopted on 11 February 2000, WT/DS142/R, WT/DS139/R, paras. 6.901, 10.265–10.272.

process guarantees where a panel has decided on claims and alleged violations of WTO law that fell outside its jurisdiction.<sup>185</sup> The material jurisdiction is limited to disputes arising out of the agreements adopted under the WTO/GATT.<sup>186</sup> Panels have decided that ‘the matter referred to the DSB’ pursuant to Article 7 DSU – the scope of jurisdiction – consists of the specific claims stated by the parties in the documents specified in the terms of reference and the legal basis of the complaint.<sup>187</sup> In *Chile–Price Band System*, the Appellate Body held that even if the terms of reference could be

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185 A. Mitchell, *Due process in WTO disputes*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement – the first ten years*, Cambridge 2005, p. 153.

186 Pursuant to Article 6(2) DSU, the scope of jurisdiction is first defined in the request for the establishment of a panel, which shall ‘identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly’ to determine panels’ jurisdiction. See *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R, para. 2.244; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 126.

Appendix 1 to the DSU lists the relevant agreements as: (A) Agreement establishing the World Trade Organization; (B) Multilateral Trade Agreements: 1A Multilateral Agreements on Trade in Goods; 1B General Agreement on Trade in Services; 1C Agreement on Trade-Related Aspects of Intellectual Property Rights; 2 Understanding on Rules and Procedures Governing the Settlement of Disputes; (C) Plurilateral Trade Agreements: 4 Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; International Bovine Meat Agreement. The request forms the basis for the terms of reference which ‘define the scope of the dispute’.

187 *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Appellate Body, adopted on 25 November 1998, WT/DS60/AB/R, p. 25, para. 72. The terms of reference are found to have an important publicity and due process function. They warn and inform parties and potential third parties of the claims in the case. *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body, adopted on 20 March 1997, WT/DS22/AB/R, pp. 21–22; *EC and Certain Member States–Large Civil Aircraft*, Report of the Panel, adopted on 1 June 2011, WT/DS316/R, para. 7.88. In *India–Patents (US)*, the Appellate Body denied having authority to consider the US’s claim under Article 63 TRIPS, because the claim had not been included in the terms of reference, even though the US claimed that it could not have been aware of the need to raise this argument given that the respondent had not disclosed certain information at the time of the request. The Appellate Body found the earlier decision of the panel that ‘all legal claims would be considered if they were made prior to the end of [the first substantive] meeting’ to be inconsistent with the clear wording of Article 7(1) DSU. See *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products* (hereinafter: *India–Patents (US)*), Report of

interpreted to include a certain claim a panel was ‘not entitled to make a claim for [the claimant], or to develop its own legal reasoning on a provision that was not at issue.’<sup>188</sup> However, a violation of Article 11 DSU and the due process guarantees enshrined therein has been denied where the claimant was aware of the possibility that the respondent would make a certain defence and failed to object to its untimeliness despite being aware of the opportunity to respond.<sup>189</sup> Equally, in *EC–Hormones* and *US–Certain EC Products*, the Appellate Body found that a panel may develop its own legal reasoning and that it was not restricted in its considerations to the legal arguments forwarded by the parties as long as the arguments per-

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the Appellate Body, adopted on 16 January 1998, WT/DS50/AB/R, paras. 85-96. Based on this case law, it suffices if a claim has been mentioned in the terms of reference. It does not need to have been elaborated upon further, as long as the claimant has not explicitly abandoned it during the proceedings. See *EC–Bananas III*, Report of the Panel, adopted on 25 September 1997, WT/DS27/R, paras. 7.57-7.58, 158; *EC–Bananas III*, Report of the Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R, para. 143. See also *Japan – Measures Affecting the Importation of Apples* (hereinafter: *Japan–Apples*), Report of the Panel, adopted on 10 December 2003, WT/DS245/R, paras. 8.63-8.66.

- 188 *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS207/AB/R, para. 168. The case law is inconsistent in this regard. In *Japan–Agricultural Products II*, the Appellate Body ruled that the exercise by panels of their investigative powers required that the party carrying the burden of proof had established a *prima facie* case of inconsistency based on specific legal claims asserted by it so as to not inadvertently shift the burden of proof onto the other party. See *Japan–Measures Affecting Agricultural Products* (hereinafter: *Japan–Agricultural Products II*), Report of the Appellate Body, adopted on 19 March 1999, WT/DS76/AB/R, paras. 127-130. In *Canada–Aircraft*, the Appellate Body took the opposing view. It stated that Article 13 DSU did not limit panels’ right to seek information in any manner, therewith rejecting Canada’s argument that the panel lacked authority to request information because Brazil had not established a *prima facie* case. It distanced itself in surprisingly clear terms from its earlier decision when it held that the argument was ‘bereft of any textual or logical basis’ and there was ‘nothing in either the DSU or the SCM Agreement to sustain it.’ See *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, para. 185. In favour of *Canada–Aircraft*, J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 *International and Comparative Law Quarterly* (2002), p. 352; M. Benzing, *supra* note 82, pp. 180, 186-187.
- 189 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (hereinafter: *US–Gambling*), Report of the Appellate Body, adopted on 20 April 2005, WT/DS285/AB/R, p. 92, para. 276.

tained to a claim made by a party.<sup>190</sup> In accordance with the text of Article 7(2) DSU, the Appellate Body has noted that panels are not limited to the specific provisions referred to by the complainant.<sup>191</sup>

This result ultimately also applies to the Appellate Body modified by the differences mandated by its appellate function. One question is if *amici curiae* may raise legal arguments that have not been addressed in the panel report.<sup>192</sup> The DSU furnishes the Appellate Body with the power to request additional submissions. However, this power is limited to requests from the parties, not external entities.<sup>193</sup> In *US–Shrimp*, Mexico argued that the Appellate Body would act *ultra vires* if it ‘were to make use of arguments which are outside the terms of article 17.6 of the DSU and which are not clearly and explicitly attributable to a Member that is a party to the dispute.’<sup>194</sup> The scope of the issues the Appellate Body may address is set out in the Notice of Appeal.<sup>195</sup> The Appellate Body agreed with Mexico’s argument in *Mexico–Taxes on Soft Drinks* when it excluded an *amicus curiae* submission the United States had argued contained new arguments and claims of error that Mexico had not addressed in its Notice of Appeal.<sup>196</sup> For being ‘directed primarily to a question that was not part of any of the claims,’ the Appellate Body also rejected a brief in *US–Steel*

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190 *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 156; *Australia–Automotive Leather II*, Recourse to Article 21.5 (US), Report of the Panel, adopted on 11 February 2000, WT/DS126/RW, p. 12, para. 6.19 (‘That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel’s interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute.’).

191 *Argentina – Safeguard Measures on Imports of Footwear* (hereinafter: *Argentina–Footwear (EC)*), Report of the Appellate Body, adopted on 12 January 2000, WT/DS121/AB/R, para. 74.

192 G. Umbricht, *An “amicus curiae brief” on amicus curiae briefs at the WTO*, 4 *Journal of International Economic Law* (2001), pp. 787–788.

193 Article 17(4) DSU and Rule 28(1) *EC–Asbestos Working Procedures for Appellate Review*; *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 81.

194 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 87.

195 Article 20 Working Procedures for Appellate Review, WT/AB/WP/6.

196 *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8, FN 21.

*Safeguards*.<sup>197</sup> In *US–Softwood Lumber IV*, the Appellate Body made clear, however, that a brief it rejected for considering ‘questions not addressed in the submissions of the participants or third participants’ could nonetheless be adopted by the parties or third parties to the dispute.<sup>198</sup> The briefs at issue in this case considered the environmental and indigenous implications of the appeal. Case law on the raising of new arguments by the parties in appellate proceedings indicates that the Appellate Body applies a stricter standard than demanded by Article 17(6) DSU. Moreover, it allows the parties to raise new arguments as long as they do not implicate facts that were not brought before the panel.<sup>199</sup> As a review instance, the establishment of the fact record does not form part of the Appellate Body’s tasks. However, the review of the legal arguments of a decision in addition to an inventory of the applicable laws routinely implies a re-assessment of the facts established in the panel proceedings to determine whether the panel erred in its application of the law to the facts. If a panel has failed to apply the pertinent law, it is the duty of the Appellate Body to correct this error. The same must be the case with respect to legal arguments. Finally, the Appellate Body does not appear to have questioned the applicability of Article 17(6) DSU to arguments on jurisdiction.<sup>200</sup>

Panels and the Appellate Body in their proceedings apply the principle of *iura novit curia*. Accordingly, the parties do not bear the burden of proof for questions of law or legal interpretation.<sup>201</sup> A related question is to what extent panels and the Appellate Body can consider submissions on

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197 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 268.

198 *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, para. 9.

199 *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, para. 211; *US–FSC*, Report of the Appellate Body, adopted on 20 March 2000, WT/DS108/AB/R, para. 103; *EC–Sugar*, Report of the Appellate Body, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, paras. 240–242.

200 *United States – Continued Dumping and Subsidy Offset Act of 2000* (hereinafter: *US–Offset Act (Byrd Amendment)*), Report of the Appellate Body, adopted on 27 January 2003, WT/DS217/AB/R, WT/DS234/AB/R, paras. 206–208.

201 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (hereinafter: *EC–Tariff Preferences*), Report of the Appellate Body, adopted on 20 April 2004, WT/DS246/AB/R, para. 105 (‘Consistent

issues and laws outside the covered agreements. As noted above, the Appellate Body and panels have received *amicus* briefs arguing for the integration of international environmental laws and the WTO covered agreements. The DSU does not contain an applicable law clause. Article 3(2) DSU stipulates that the DSU shall be interpreted ‘in accordance with customary rules of interpretation of public international law,’ which has been read not to exclude the consideration of non-WTO law *per se*.<sup>202</sup> Article 7(2) DSU requires panels to ‘address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.’ Panels have held that the wording only refers to WTO covered agreements, and does not include non-WTO international agreements.<sup>203</sup> Panels and the Appellate Body have no jurisdiction to rule on claims of violations of non-WTO international law. Still, the Appellate Body has held consistently that the WTO law is not to be ‘read in clinical isolation from public international law.’<sup>204</sup> Thus, the relevance of non-WTO international law largely

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with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.’), followed by *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.121, FN 437; *US–Zeroing (Japan)*, Recourse to Article 21.5–Japan, Report of the Panel, adopted on 31 August 2009, WT/DS322/R, para. 7.8.

202 *Korea–Measures Affecting Government Procurement*, Report of the Panel, adopted on 1 May 2000, WT/DS163/R, para. 7.96, FN 753. See also L. Bartels, *Jurisdiction and applicable law in the WTO*, Cambridge Legal Studies Research Paper Series, Paper No. 59/2014, October 2014.

203 E.g. *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Report of the Panel, adopted on 1 June 2011, WT/DS316/R, para. 7.324 (‘Article 7.2 does not give us jurisdiction to determine the rights and obligations of the parties under non-covered agreements for the purpose of the recommendations and rules envisaged under Article 11 of the DSU. Such recommendations or rulings must relate to the parties’ rights and obligations under the WTO covered agreements...’). This is disputed in literature, see G. Marceau, *A call for coherence in international law: praises for the prohibition against ‘clinical isolation’ in WTO dispute settlement*, 33 *Journal of World Trade* (1999), p. 110; D. Palmer/P. Mavroidis, *The WTO legal system: sources of law*, 92 *American Journal of International Law* (1998), p. 399.

204 *US–Gasoline*, Report of the Appellate Body, adopted on 20 May 1996, WT/DS2/R and WT/DS4/R, p. 17; *India–Patents*, Report of the Appellate Body,

unfolds in the interpretation of the WTO covered agreements<sup>205</sup> and as evidence of other international legal obligations, within the limits established by Articles 3(2) and 19(2) DSU that panels may not add to or diminish the rights and obligations established by the covered agreements.<sup>206</sup> Of particular relevance in the coordination with other international laws are broad exception clauses in the WTO Agreement, such as Article XX GATT, which allows trade restrictions for certain reasons, including environmental concerns, and Article 31(3)(c) VCLT, which will be discussed further in the next section.<sup>207</sup> Thus, while *amici* can in theory elaborate on other international law in their briefs, the above cases show that with respect to *amicus* submissions, panels and the Appellate Body will not consider issues outside the covered agreements, unless they have been tabled by a party.

## VI. Investor-state arbitration

### 1. Legal standards

The applicable legal standards are essentially those outlined with regard to the substance of requests for leave (see Chapter 5). Since *UPS v. Canada* and *Methanex v. USA*, tribunals have held that an *amicus curiae* should ‘assist in the determination of a factual or legal issue related to the arbitration by bringing a different perspective or particular knowledge to the is-

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adopted on 16 January 1998, WT/DS50/AB/R/US, para. 46; *Japan–Alcoholic Beverages II*, Report of the Appellate Body, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12.

205 J. Pauwelyn, *The role of public international law in the WTO: how far can we go?*, 95 *American Journal of International Law* (2001), pp. 554, 561 (‘[N]othing in the DSU or any other WTO rule precludes panels from addressing and ... applying other rules of international law so as to decide the WTO claims before them.’).

206 E.g. *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 158; *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R, para. 167. See L. Bartels, *Applicable law in WTO dispute settlement proceedings*, 35 *Journal of World Trade* (2001), pp. 499-519; J. Pauwelyn, *supra* note 205, pp. 562-571.

207 Cf. J. Pauwelyn, *supra* note 205, pp. 575-576, with further examples.

sues.<sup>208</sup> This criterion has become imperative for *amicus curiae* briefs in all investment arbitrations and the pertinent rules.<sup>209</sup> The FTC Statement in Section B, para. 6, determines in subsection (a) that submissions may contain both legal argument and/or facts and must add ‘a perspective, particular knowledge or insight that is different from that of the disputing parties.’ Subsection (b) reiterates that submissions must be within the scope of the dispute, as also emphasized by Section B, para. 3, and subsection (c) clarifies that *amici curiae* may/should have an interest in the case. Repetition of the scope requirement shows its pivotal relevance in the eyes of the drafters. Rule 37(2) ICSID Arbitration Rules and Article 4(1) and (3) UNCITRAL Rules on Transparency establish the same substantive requirements.<sup>210</sup>

## 2. Particular knowledge or perspective: human rights and EU law?

Tribunals have accepted *amicus curiae* briefs submitting both legal arguments and/or facts. As shown in Chapter 5, *amici curiae* need to have a

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208 See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, paras. 48-50; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 70. This requirement had been proposed by the respondent Canada, see *UPS v. Canada*, Canada’s submission on Canadian Union of Postal Workers and the Council of Canadians Petition for Intervention, 28 May 2001, p. 10, para. 43. The *UPS* tribunal further decided that submissions must ‘relate to issues raised by the disputing parties and cannot introduce new issues in the litigation or go beyond the scope of the case as defined by the disputing parties.’

209 Claimants and respondents in several cases called for a more restrictive scope of content. Canada in *UPS v. Canada*, for instance, requested that *amici curiae* should not be allowed to make arguments on legal interpretation – to avoid giving them the powers of Article 1128 NAFTA-participants and because they lacked expertise in the interpretation of international treaty obligations – and on jurisdiction and the place of arbitration. See *UPS v. Canada*, Canada’s submission on Canadian Union of Postal Workers and the Council of Canadians Petition for Intervention, 28 May 2001, paras. 49-55. *Methanex* requested a limitation of *amicus curiae* briefs to legal issues, see *Methanex v. USA*, Claimant Methanex Corporation’s Request to Limit *Amicus Curiae* Submissions to Legal Issues Raised by the Parties, 15 April 2003.

210 Other rules, including the IUSCT Note and Article 10.20.3 CAFTA, are silent on the substance of *amicus curiae* briefs.

particular knowledge or insight that supplements or surpasses that of the parties. This section considers the type of content tribunals have found meeting this test.

Submissions by NGOs tend to focus on public policy arguments and on how they can be recognized in the investment dispute. Most submissions argue either for a public value-oriented interpretation of the abstract investment treaty guarantees (especially the Fair and Equitable Treatment standard and indirect expropriation) or they discuss defences of the challenged measures taken by the host state that fall within the ambit of their own institutional activities.<sup>211</sup> In light of parties' propensity to engage in such arguments only punctually and from their particular perspectives, *amicus curiae* submissions usually accord with the requirement that *amici curiae* present 'the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.'<sup>212</sup> For instance, the tribunal in *Biwater v. Tanzania* notified the *amici* that

it was envisaged that the Petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy. These indeed, are the areas that fell within the ambit of Rule 37 (2) (a) of the ICSID Arbitration Rules.<sup>213</sup>

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- 211 See e.g. *UPS v. Canada*, Application for *amicus curiae* status by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, paras. 26-35; *Suez/Vivendi v. Argentina*, CELS, CIEL et al., *Amicus Curiae* Submission, 4 April 2007, ICSID Case No. ARB/03/19, pp. 4-13; *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19, para. 256 (In their submission, the *amici curiae* had argued that the tribunal should interpret the underlying BITs in light of Argentina's international human rights obligations, in particular, the obligations owed to its population arising from the right to water, and that the measures adopted towards the investor were justified on the basis of necessity. The *amici* argued that the right to water 'required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law.')
- 212 *Suez/InterAgua v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 13. See also *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 13.
- 213 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366.

Public policy submissions include a brief by the CIEL and other NGOs in *Biwater v. Tanzania* arguing that the investor had not carried out the necessary due diligence assessment which led it to submit a bid too low to cover the costs of operation and management of the Dar es Salaam water and sewerage system whose service interruptions had led the Tanzanian government to terminate the contract. The *amicus curiae* argued that the tribunal should factor this into its consideration of the investor's responsibilities in the interpretation of the investment treaty. It also argued that the investor's responsibility to meet its contractual obligations towards the host state was increased, because the dispute affected the exercise of the right to water and sustainable development goals.<sup>214</sup> In *Methanex v. USA*, Bluewater and the IISD expanded on the USA's argument that the prohibition of the gasoline additive MTBE served to protect public health and the environment and as such constituted a non-discriminatory regulation, which was exempt from the duty of compensation for expropriation. It pointed to general problems in environmental protection and the right of states hosting investments to issue environmental protection and sustainable development measures.<sup>215</sup> In another submission, BluewaterNetwork, CIEL et al. opined that the respondent had acted lawfully because of its obligation under international human rights law to protect the health of its population.<sup>216</sup>

Even though they are explicitly permitted, fact submissions are rare.<sup>217</sup> Fact information is submitted mostly to elucidate the context and background of the dispute or to embellish legal arguments. This may, in part,

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214 *Biwater v. Tanzania*, IISD, CIEL et al., *Amicus Curiae Submission*, 26 March 2007, ICSID Case No. ARB/05/22, at: [http://www.ciel.org/Publications/Biwater\\_Amicus\\_26March.pdf](http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf) (last visited: 21.9.2017). The tribunal summarized the arguments extensively. See also *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 357, 370-391.

215 *Methanex v. USA*, *Amicus* submission by International Institute for Sustainable Development, 9 March 2004.

216 *Methanex v. USA*, Submission of non-disputing parties Bluewater Network, Communities for a Better Environment, Center for International Environmental Law, Earthjustice, 9 March 2004, paras. 16-18.

217 See, however, *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, paras. 14-15, where the *amicus curiae* petitioners sought to participate in order to present their fact account of the social protests against the claimant's mining project and the claimant's treatment of local communities. See also *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, para. 38. The WHO and FCTC Secretariat in their *amicus* brief

be due to the limited public access to case files, which makes it difficult for *amici curiae* to ensure that they comment on facts within the scope of the dispute, meet the requirement of ‘particular knowledge’ and do not duplicate the parties’ submissions. In *Glamis v. USA*, despite the claimant’s protest against its admissibility, the tribunal accepted from the Quechan Indian Nation a fact analysis of the dispute and the tribe’s concerns over an interference of the prospective investment project with their sacred ancestral lands. The tribe submitted with its brief a confidential memorandum detailing the location of holy tribal lands.<sup>218</sup> Further, the tribe commented on the background of the case, including the licensing of the claimant’s open pit gold mine, the environmental and cultural impacts of the mine, California’s (presumed) intent in enacting mining reclamation measures and several of the contested legal issues.<sup>219</sup> Tribunals have also accepted submissions on the respondent’s national laws.<sup>220</sup> The *amicus curiae* submission by Sierra Club and Earthworks, Earthjustice and the Western Mining Association Project in *Glamis v. USA* addressed the legitimacy under federal and state environmental laws, public lands laws and mining laws of the measures of the US Interior Department and the State of California. The *amici* argued that *Glamis* did not possess a property right under federal mining laws that could be subject to expropriation, as claimed by it.<sup>221</sup>

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defended the measures taken by the respondent as effective and evidence-based measures against tobacco consumption.

- 218 E.g. *Glamis v. USA, Amicus Curiae*, Application of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005, para 12; *Glamis v. USA*, Supplemental Submission by Quechan Indian Nation, 16 October 2006 (Also, arguments on international (and domestic) legal and policy frameworks that support indigenous cultural resource protection; legal and policy frameworks supporting corporate social responsibility and sustainability).
- 219 *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10.
- 220 In *Piero Foresti v. South Africa*, the tribunal admitted a submission that provided background information on the challenged Mineral and Petroleum Resources Development Act, as well as on the constitutional implications of the case. See *Piero Foresti v. South Africa*, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, 17 July 2009, ICSID Case No. ARB(AF)/07/01.
- 221 *Glamis v. USA*, Application by Sierra Club and Earthworks, Earthjustice and the Western Mining Association Project for leave to file a written submission, 16 October 2006.

Tribunals have further accepted contextual submissions and submissions laying out the potential impact of a decision. In *Glamis v. USA*, the submission from the National Mining Association foreshadowed potential impacts on foreign direct investment of a decision against the claimant.<sup>222</sup> The Quechan Indian Nation relied on a report from the Advisory Council on Historic Preservation that, if implemented, the mine would be so damaging to historic resources that the tribal members' ability to practice their sacred traditions would be lost.<sup>223</sup> Another example is the *amicus curiae* brief submitted in *Pac Rim v. El Salvador*.<sup>224</sup> A coalition of environmental and human rights law NGOs and research institutes applied to 'provide input over the political nationwide debate over metal mining and sustainability' in El Salvador. In their brief, the *amici curiae* instructed the tribunal on the factual background of the dispute, in particular the widespread public opposition to the mine due to environmental concerns, alleged deficiencies in the claimant's environmental impact assessment, and claimant's efforts to influence Salvadorean politics in its favour. The *amici* embedded their factual submissions in the argument that the tribunal lacked jurisdiction because the claim constituted neither a legal dispute pursuant to Article 25 ICSID Convention, nor a measure under Article 10(1) CAFTA, but that it was merely an expression of dissatisfaction with legitimate Salvadorean public policy since the mid-2000.<sup>225</sup>

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222 *Glamis v. USA*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, 13 October 2006.

223 See *Glamis v. USA*, Application to file a non-party submission and submission by the Quechan Indian Nation, 19 August 2005.

224 *Pac Rim Cayman LLC* initiated arbitration proceedings through its US subsidiary under the CAFTA and Salvadorean investment law seeking more than USD 77 million in compensation after the Salvadorean Ministry of Environment had denied it extraction permits for its gold mine 'El Dorado' out of environmental and public health grounds, in particular concerns over a possible pollution of the Lempa River, which provides water to more than half of the country's population. *Pac Rim v. El Salvador*, Notice of Arbitration, 30 April 2009, ICSID Case No. ARB/09/12.

225 *Pac Rim v. El Salvador*, Application for permission to proceed as *amici curiae*, 2 March 2011, ICSID Case No. ARB/09/12. The *amici curiae* further discussed if the claimant's claim amounted to an abuse of process, as well as the respondent's denial of benefits under Article 10(12)(2) CAFTA. The tribunal admitted the submission, but stressed that the *amici curiae* should focus on the jurisdictional aspects of the case, because it was at the jurisdictional stage. See *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12, p. 2. See also *Piero Foresti v. South Africa*, where *amici curiae* defended the nation-

A distinct category of legal submissions has developed with respect to *amicus curiae* submissions by the European Commission. There are generally two types of cases in which the EC seeks to submit briefs: most frequent are cases where the arbitration clause is contained in an investment treaty between two EU member states, so called intra-EU BITs. The other type are cases involving a potential conflict between investment law and EU law. Typically, the EC submits briefs on EU law and in particular the interaction of EU law and investment treaties.<sup>226</sup> In the first type of cases, the EC often argues that the tribunal lacks jurisdiction. The EC has raised as (or added to) the preliminary objection that in ‘intra-EU disputes’ the investment treaty is invalid or, where the Energy Charter Treaty forms the jurisdictional basis, inapplicable with regard to subject matters falling under EU competence for failing to meet the requirements of the jurisdictional clause of Article 26 ECT or due to an implicit disconnection clause.<sup>227</sup> In all types of cases, submissions have been accepted on sub-

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al legislation that was at issue as indispensable in the efforts to remedy substantive inequality. *Piero Foresti v. South Africa*, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, 17 July 2009, ICSID Case No. ARB(AF)/07/01. See also S. Karamanian, *The place of human rights in investor-state arbitration*, 17 *Lewis & Clark Law Review* (2013), p. 430.

226 See *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22; *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13; *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, SCC Case No. 088/2004; *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19. See also Annex I.

227 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, Part V-Pages 3-4, paras. 5.10, 5.13-5.14; *Charanne v. Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012, paras. 427, 433-434; *European American Investment Bank AG (Austria) v. The Slovak Republic*, Letter by the European Commission to Martin Doe, Legal Counsel, Permanent Court of Arbitration entitled ‘Request dated 6 September 2011 from the arbitral tribunal dealing with (PCA) Case NO. 2010-17’, 13 October 2011, Ref. Ares(2011)1091296-13/10/2011, PCA Case No. 2010-17. For an analysis of the arguments see L. Peterson, *Investigation: In recent briefs, European Commission casts doubt on application of Energy Charter Treaty to any intra-EU dispute*, 1A Reporter, 8 September 2014, available at: <https://www.iareporter.com/articles/investigation-in-recent-briefs-european-commission-casts-doubt-on-application-of-energy-charter-treaty-to-any-intra-eu-dispute/> (last visited 21.9.2017). The EC further argues that the ECT (and other investment treaties) are inapplicable in intra-EU arbitrations on account of the exclusive ju-

stantive and procedural issues, such as EU state aid law and its relationship with investment treaty guarantees, the effect of EU decisions on EU Member States and the enforcement of awards that do not accord with a member state's EU law obligations.<sup>228</sup>

### 3. Within the scope of the dispute

Tribunals emphasize that *amici curiae* may only address issues within the scope of the tribunal's mandate (see Chapter 5). This requirement limits the information *amici curiae* can impart or, more precisely, the information contained in a brief that the tribunal may consider without risking the validity of an award.<sup>229</sup> The scope of the dispute typically is determined in

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risdiction clause of Article 344 TFEU. Article 344 TFEU: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.' For a more general analysis of the regime conflict, see G. Bermann, *Navigating EU law and the law of international arbitration*, 28 *Arbitration International* (2012), pp. 397-445. See however, the recent opinion of *Advocate-General Wathelet* in the pending Case C-284/16, *Slovak Republic v. Achmea BV*, 19 September 2017.

228 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 176-196; *Micula et al. v. The Government of Romania*, No. 1:2015mc00107, Document 66 (S.D.N.Y. 2015); *Ioan Micula, European Food S.A., S.C. Starmill S.R.L., Multipack S.R.L. v. The Government of Romania*, Brief for *Amicus Curiae* [by] the Commission of the European Union in Support of Defendant-Appellant, 4 February 2016 (2nd Cir. 2016). See also H. Wehland, *The enforcement of intra-EU BIT awards: Micula v. Romania and beyond*, 17 *Journal of World Investment and Trade* (2016), pp. 942-963; *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, Part IV-Pages 28-29, paras. 4.94-4.99, Part V-Pages 5-6, paras. 5.16-5.19. See also J. Fry/O. Repousis, supra note 121, p. 827; C. González-Bueno/L. Lozano, *More than a friend of the court: the evolving role of the European Commission in investor-state arbitration*, *Kluwer Arbitration Blog*, 26 January 2015, at: <http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/> (last visited: 21.9. 2017); O. Gerlich, *More than a friend? The European Commission's amicus curiae participation in investor-state arbitration*, in: G. Adinolfi et al. (Eds.), *International economic law*, Springer 2017, p. 262.

229 T. Ruthemeyer, *Der amicus curiae brief im internationalen Investitionsrecht*, Baden-Baden 2014, p. 261.

the Notice of Arbitration. Thus, it depends on the specifics of the case.<sup>230</sup> In the words of the tribunal in *Methanex*:

[t]he Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact.<sup>231</sup>

No *amicus* briefs were found that sought to build the case for a party or have made submissions suggesting ‘how issues of fact or law as presented by the parties ought to be determined,’ matters the tribunal in *Biwater v. Tanzania* expressly asked the *amici* to refrain from.<sup>232</sup> The *UPS v. Canada* tribunal also clarified that the scope would be exceeded if an *amicus curiae* participated to ‘vindicate its rights.’ This is convincing. Such a request would entail that the tribunal decided on issues outside of its jurisdiction.<sup>233</sup>

One issue that tribunals have struggled with is to what extent *amici curiae* may make submissions on questions of jurisdiction, particularly if they may raise jurisdictional objections and if such jurisdictional submissions are at all able to form a unique perspective.<sup>234</sup> The *UPS v. Canada* tribunal found that it was inappropriate for *amici curiae* to make submis-

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230 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID News Release, ICSID Case No. ARB/09/12, para. 8; *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 20; *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.3; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 39 (Article 15(1) of the 1976 UNCITRAL Rules ‘was about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by including subject matter in its arbitration additional to that which the parties have agreed to confer.’).

231 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, para. 29.

232 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366.

233 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 61.

234 *Suez/Interaguas v. Argentina*, Order in response to a petition of participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 27. But see also *Chevron/Texaco v. Ecuador*, Procedural Order No. 8, 18 April 2011, PCA

sions on jurisdiction or the place of arbitration, because the parties were ‘fully able to present the competing contentions and in significant degree [had] already done so’ and because it was ‘for the respondent to take jurisdictional points.’<sup>235</sup> In *AES v. Hungary*, the tribunal informed the European Commission, which had submitted an *amicus curiae* brief, that it could not challenge the tribunal’s jurisdiction in the absence of a challenge by the respondent.<sup>236</sup> This is an important limitation in respect of all preliminary objections that a tribunal is not obliged to examine *ex officio*. Any other approach would unduly interfere with the parties’ rights over the proceedings.<sup>237</sup> In *Eureko v. Slovak Republic*, the parties agreed to invite the European Commission to comment on behalf of the European Union on ‘the effect upon the tribunal’s jurisdiction of the fact that both

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CASE N° 2009-23, paras. 10, 18, 20 and *Chevron/Texaco v. Ecuador*, Petition for participation as non-disputing parties by Fundación Pachamama and IISD, 22 October 2010, PCA CASE N° 2009-23, paras. 4.6-4.7 (‘Petitioners seek leave to participate at the jurisdiction phase of this arbitration specifically out of concern for the grave consequences that a decision accepting jurisdiction could have for the rights of litigants to access the judicial system for claims arising out of foreign investment activity, and the possibility of an affront to the independence of the Ecuadorian judiciary in the present instance.’ The tribunal denied the request noting that ‘the parties agree that they do not believe that the *amicus* submissions will be helpful to the Tribunal and neither side favours the participation of the petitioners during the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal and have already been extensively addressed by the Parties’ submissions.’ The dispute was heavily politicized, and the emphasis of legal aspects may have been motivated by an attempt to depoliticize the proceedings as much as possible.)

235 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, paras. 71. See also Canada’s Submission on CUPW and the CC’s Petition for Intervention, 28 May 2001, paras. 45-55; *UPS v. Canada*, Investor’s Response to the Petition from the CUPW and the CC, 28 May 2001, para. 19.

236 E. Triantafilou, *A more expansive role for amici curiae in investment arbitration?*, Kluwer Arbitration Blog, 11 May 2009, at: <http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration/> (last visited: 21.9.2017).

237 The tribunal in *Electrabel v. Hungary* admitted a non-raised preliminary objection by the EC as *amicus curiae*, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 4.92, 10.2. See also T. Ruthemeyer, *Der amicus curiae brief im internationalen Investitionsrecht*, Baden-Baden 2014, pp. 256, 261 (He contends that jurisdictional issues can generally be addressed by *amici curiae*.)

the Respondent and the national State of the Claimant are Member States of the EU' after Slovakia had raised the procedural objection that the arbitration agreement was invalidated upon its accession to the EU.<sup>238</sup> Other tribunals have also accepted unsolicited submissions on procedural objections that had been raised by the respondent.<sup>239</sup>

One case that encapsulates the difficulties in applying this criterion is *von Pezold v. Zimbabwe*, in which the joined tribunals rejected an application from ECCHR and the chiefs of four indigenous tribes living in South-Eastern Zimbabwe. The *amicus curiae* petitioners argued that the tribes had legal claims to the land on which the claimants were operating timber plantations and whose compulsory acquisition by the Zimbabwean government formed the basis of the claim. They contended that based on the applicable law provisions – the Germany-Zimbabwe and the Switzerland-Zimbabwe BITs respectively and the ICSID Arbitration Rules – the tribunal had to apply all relevant international human rights laws to fully resolve the case.<sup>240</sup> Further, they requested that the tribunal acknowledge the

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238 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 31. The tribunal also invited the Netherlands as the other party to the applicable BIT 'to provide observations with regard to the question whether or not the BIT is still legally valid and subsequently whether or not the tribunal has jurisdiction to adjudicate this claim.' *Id.*, para. 155.

239 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011 and Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ICSID Case No. ARB/09/12; *Glamis v. USA*, *Amicus Curiae* Application of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005, para. 12 (Submission on alleged non-compliance with dominant nationality test if the measures taken by California really were motivated by goals to preserve the environment and culture). In *Dames & Moore v. Iran*, the IUSCT accepted a document from the chairman of a company that was not party to the case, because 'the above-mentioned document may assist the Tribunal in deciding the jurisdictional issue regarding the Claimant's ownership and control of SGTC.' See *Dames & Moore and the Islamic Republic of Iran*, Decision No. DEC36-54-3, 23 April 1985, p. 15, reprinted in 8 *Iran USCTR* (1985-I), p. 115 (The document was from M.A. Saheb, Chairman and Managing Director of South Gulf Trading and Shipping Limited of Dubai). See also M. Pellonpää/D. Caron, *The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal*, Helsinki 1994, p. 44.

240 ECCHR et al., Petition for leave to make submissions as *amicus curiae*, p. 7; *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25, para. 25.

existence of rights to their ancestral lands under international law which – so the argument – corresponded with obligations for the parties. The claimants strongly objected to the participation. *Inter alia* they argued that the issues were not within the scope of the dispute or at least ‘unrelated’ to it (cf. Rule 37(2)(a)), because the parties had not raised the above arguments and because the applicable law was limited to the two BITs, public international law, and the (compatible) national laws of Zimbabwe.<sup>241</sup> The tribunal agreed with the claimants. It found that the petitioners failed to comply with Rule 37(2)(a) ICSID Arbitration Rules and that the request was outside the tribunal’s jurisdiction. It held that the dispute was limited to the measures taken by the respondent against the claimants and their investments, and that it would be outside the tribunal’s jurisdiction to adjudicate on the validity of the petitioners’ claims.<sup>242</sup> It stressed that the reference in the BITs to ‘such rules of general international law as may be applicable in the BITs’ did ‘not incorporate the universe of international law into the BITs or into disputes arising under the BITs,’ and that neither party had brought the issue of indigenous people into the proceedings.<sup>243</sup> The prospected submission differed significantly from earlier submissions in that petitioners’ sought a pronouncement on their claims, which lay outside the scope of the dispute as defined by the parties.

The arguments concerning the scope of jurisdiction accord in principle with the earlier case law. However, the tribunal went one step further. It did not only find that the material jurisdiction limited the content of an *amicus curiae* submission, but it used the term ‘related to the arbitration’ in Rule 37(2)(a) ICSID Arbitration Rules to narrow the scope of issues *amici curiae* could comment on to arguments already raised by the parties.

The tribunal in *von Pezold v. Zimbabwe* discussed two issues, which remain unsettled in case law: whether international law other than the applicable investment treaty and procedural rules, especially international human rights law treaties applicable between the parties, can be imported into the investment arbitration through *amicus* briefs and, second, to what extent *amicus* briefs may raise arguments the parties have not yet ad-

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241 *von Pezold v. Zimbabwe*, Claimants Objections, ICSID Cases No. ARB/10/15 and ARB/10/25, paras. 61-64, 65-75 quoted by *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, paras. 38-39.

242 *Id.*, para. 60.

243 *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25, para. 57.

dressed. These two aspects have also been relevant in several EU-law related investment arbitrations. The first aspect will be considered separately in the next section. As regards the second issue, the approach of the tribunal appears unduly restrictive. The purpose of *amicus curiae* participation in investment arbitration is to provide tribunals with alternative arguments. It is not clear how this approach can be reconciled with the requirement of Rule 37(2)(a) that *amicus curiae* briefs should complement and not duplicate the parties' submissions.

#### 4. Applicable law and its limits

*Von Pezold v. Zimbabwe* contributes to the ongoing debate in investment arbitration and before several other international courts and tribunals on how to include international laws in addition to the constitutive treaties and their annexes. The debate is particularly intense in investment arbitration and trade law with regard to the integration of human rights and environmental protection laws, but also EU law.<sup>244</sup> The mere fact that the parties have not mentioned human rights or other international legal obligations of the respondent state (or the investor) in the arbitration does not *per se* render any arguments thereon irrelevant. Rather, this issue depends on the law applicable to the arbitration. As a general rule, tribunals are obliged by operation of the principle of *iura novit curia* to investigate *ex officio* the content of the applicable law.

Because party agreements take precedence, the primary source for the tribunal to consider is the investment treaty under which the investor claims protection.<sup>245</sup> The matter is rather straightforward if the applicable investment treaty regulates this aspect. This can be achieved in different

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244 Exemplary, B. Simma, *Foreign investment arbitration: a place for human rights?*, 60 *International and Comparative Law Quarterly* (2011), pp. 578-579; L. Crema, *Investor rights and well-being*, in: T. Treves et al. (Eds.), *Foreign investment, international law and common concerns*, London 2013, pp. 50-70; P.-M. Dupuy et al. (Eds.), *Human rights in international law and arbitration*, Oxford 2009.

245 T. Giovannini, *International arbitration and iura novit curia*, in: B. Cremades/M. Fernández-Ballesteros (Eds.), *Liber amicorum Bernardo Cremades*, Madrid 2010, p. 500. See also *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, para. 4.112.

ways. Some recent investment treaties explicitly refer to competing rights or values such as sustainable development, human rights or the protection of the environment as treaty objectives or as defences to investment limitations; some treaties exclude from their scope certain regulatory measures intended to realize these obligations; and some treaties regulate their relationship to other agreements. For instance, Article 104 NAFTA gives way to a list of environmental and conservation agreements in case of conflict if certain conditions are met.<sup>246</sup>

Where the treaty explicitly allows curtailment of investment protection guarantees to the benefit of other (public or human) rights or where the right or value at issue is tied to the interpretation of the relevant investment treaty guarantees, consideration of the issues is a question of treaty interpretation.<sup>247</sup> Tribunals have held that the fact that the parties have not

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246 E.g. Article 12 Treaty between the United States of America and the Oriental Republic of Uruguay concerning the encouragement and reciprocal protection of investment, entered into force on 1 November 2006; Article 12 Treaty between the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, entered into force on 1 January 2012; Article 15.10 United States – Singapore Free Trade Agreement, entered into force 1 January 2004; Article 11.11 United States – Australia Free Trade Agreement, entered into force on 1 January 2005. See also Article 1 and 3 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed on 15 October 2008, referred to by C. Brown, *Bringing sustainable development issues before investment treaty tribunals*, in: M.-C. Cordonier Segger/M. Gehring et al. (Eds.), *Sustainable development in world investment law*, Alphen aan Rijn 2011, p. 177; V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 *Vanderbilt Journal of Transnational Law* (2015), p. 1343 (‘Recent Investment Treaties have expressly included environmental measures in carve-outs to ensure that bona fide regulations do not amount to indirect expropriation.’). Crema notes that also in these instances tribunals struggle to apply the terms, see L. Crema, *supra* note 244, p. 55. See also Article 1101(4) NAFTA: ‘Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.’

247 C. Reiner/C. Schreuer, *Human rights and international investment arbitration*, in: P.-M. Dupuy et al. (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, p. 84; F. Balcerzak, *Jurisdiction of tribunals in investor-state arbitration and the issue of human rights*, 29 *ICSID Review* (2014), p. 224.

raised a certain argument (under the applicable investment treaty and other applicable laws) does not bar tribunals from considering them. In *Mitchell v. Congo*, the ICSID Annulment Committee held that *iura novit curia* permitted, but did not obligate it to address provisions of the underlying BIT which might have excused the government's measures against the investor.<sup>248</sup> As noted, in this regard, the decision in *von Pezold v. Zimbabwe* seems overly restrictive.

If the investment treaty is silent, tribunals must incidentally determine the applicable substantive law and whether it influences the assessment of the investment standard or duty under consideration.<sup>249</sup> The primary source to determine the applicable law is the investment treaty. However, few investment treaties determine the applicable substantive law leaving this question to be decided by the applicable procedural rules.<sup>250</sup> For cases administered by the ICSID Convention, Article 42(1) determines that in the absence of party agreement on the applicable law, the tribunal in addition to the provisions of the investment treaty shall apply the law of the 'state party to the dispute (including its rules on the conflicts of laws) and such rules of international law as may be applicable.'<sup>251</sup> The UNCITRAL Arbitration Rules contain no such reference to international law.<sup>252</sup> The

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248 *Patrick Mitchell v. The Democratic Republic of Congo* (hereinafter: *Mitchell v. Congo*), Decision on the Application for Annulment of the Award, 27 October 2006, ICSID Case No. ARB/99/7, p. 21, para. 57 (The tribunal 'is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option – and the parties should have been given the opportunity to be heard in this respect – for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it.'). See also A. Newcombe/ L. Paradell, *Law and practice of investment treaties – standards of treatment*, Alphen aan den Rijn 2009, p. 25.

249 See the examples provided by B. Simma, *supra* note 244, p. 580.

250 A. Bjorklund, *Applicable law in international investment disputes*, in: C. Giorgetti (Ed.), *Litigating international investment disputes – a practitioners' guide*, Leiden et al. 2014, p. 269.

251 Similar terms can be found in Article 1131 NAFTA; Article 26(6) Energy Charter Treaty, entered into force 16 April 1998; Article 81(1) Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, entered into force 1 April 2005.

252 Article 35(1) of the 2010 UNCITRAL Arbitration Rules and of the 2013 UNCITRAL Arbitration Rules determines: 'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the tribunal shall apply the law which it determines appropriate.'

reach of the reference to international law is disputed.<sup>253</sup> Commentators seem to agree that the reference includes all sources of international law listed in Article 38 ICJ Statute. However, this does not answer the question of the reference's reach. The disagreement relates mainly to the question if the reference only allows for the inclusion of general international law to support the interpretation and application of investment treaty provisions in dispute, or if it is broader, as advocated by the *amici* in *von Pezold v. Zimbabwe*. There is value in the view that a broader referral is not covered by the parties' consent, in particular because the parties are free to choose to apply other international law.<sup>254</sup>

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253 There is also a dispute on the balancing of national and international law. Until *Wena v. Egypt*, there was virtual agreement that international law only played a residual complementary and corrective role and that the national law of the host state was primarily applicable. See *Klöckner v. Republic of Cameroon*, Decision on Annulment, 21 October 1983, ICSID Case No. ARB/81/2, para. 69; *Amco Asia Corp. and others v. Republic of Indonesia*, Decision on the Application for Annulment, 16 May 1986, ICSID Case No. ARB/81/1. The *Wena* tribunal decided that international law could be applied alone if an appropriate rule was found. See *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on Annulment, 5 February 2002, ICSID Case No. ARB/98/4. See, for analysis, Y. Banifatemi, *The law applicable in investment treaty arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements: a guide to the key issues*, New York 2010, pp. 201-204; E. Gaillard/Y. Banifatemi, *The meaning of "and" in Article 42(1), second sentence of the Washington Convention: the role of international law in the choice of law process*, 18 ICSID Review (2003), pp. 375-411.

254 See e.g. *Siemens AG v. The Argentine Republic*, Award, 17 January 2007, ICSID Case No. ARB/02/8, pp. 21-22, paras. 77-79; *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela*, Award, 23 September 2003, ICSID Case No. ARB/00/5, pp. 31-32, paras. 102-105 ('Whatever the extent of the role that international law plays under Article 42(1) (second sentence), this Tribunal believes that there is no reason in this case, considering especially that it is a contract and not a treaty arbitration, to go beyond the corrective and supplemental functions of international law.'). See also the rather limitative approach in *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, Award, 11 June 2012, ICSID Case No. ARB/03/23, paras. 909, 912 ('It is common ground that the Tribunal should be sensitive to international *jus cogens* norms, including basic principles of human rights. ... The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law.'). See also A. Parra, *Applicable law in investor-state arbitration*, 1 Contemporary issues in international arbitration and mediation (2007), p. 3.

Even under the narrower view, tribunals could possibly consider other international law in their interpretation of the investment treaty. Proponents have especially focused on two methods – evolutive treaty interpretation and systemic integration pursuant to Article 31(3)(c) VCLT – even though other internationally accepted methods of treaty interpretation could also yield this result.<sup>255</sup>

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255 Cf. Arts. 30-33 VCLT. Other methods include subsequent practice (Art. 31(3)(b) VCLT) and subsequent agreements (Art. 31(3)(a) VCLT). See, for instance, the suggestion by UNCTAD that states adopt common or unilateral interpretation standards importing public policy objectives into investment treaty interpretation, UNCTAD, *Interpretation of IIAs: What states can do*, 3 UNCTAD Issues Note (2011), p. 9; S. Karamanian, *supra* note 225, pp. 435-436 (Further suggesting consideration of customary international law and that (as indicated in Art. 53 VCLT and Art. 103 UN Charter) *jus cogens* norms and obligations under the UN Charter should override investment treaty obligations); T. Meshel, *Human rights in investor-state arbitration: the human right to water and beyond*, 6 Journal of International Dispute Settlement (2016), pp. 302-305.

See *Glamis v. USA*, Application to file a non-party submission and submission by the Quechan Indian Nation, 19 August 2005. They detailed international legal instruments on indigenous peoples' rights and argued that they constituted customary international law which had to be taken into account in the interpretation of the NAFTA pursuant to Article 1131(1) NAFTA or Article 31(3)(c) VCLT. Similarly, in *Suez/Vivendi v. Argentina* the *amici* argued that human rights arguments relating to the right to water could be introduced into the arbitration via Article 31(3)(c) VCLT, because 'contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law.' See *Suez/Vivendi v. Argentina*, *Amicus curiae* submission, 4 April 2007, ICSID Case No. ARB/03/19, p. 15. See also S. Schadendorf, *Investor-state arbitrations and the human rights of the host state's population: an empirical approach to the impact of amicus curiae submissions*, in: N. Weiß/J.-M. Thouvenin (Eds.), *The influence of human rights on international law*, Heidelberg 2015, p. 174.

See also, for interpretation based on Article 31(3)(c) VCLT, P. Sands, *Treaty, custom and the cross-fertilization of international law*, 1 Yale Human Rights and Development Law Journal (1998), pp. 85-105; P.-M. Dupuy, *Unification rather than fragmentation of international law? The case of international investment law and human rights law*, in: P.-M. Dupuy et al. (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, pp. 45-62; D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the principle of systemic integration in international investment law and arbitration*, Baden-Baden 2015. Others have proposed the adoption of a proportionality analysis for cases where investment treaty obligations and public values clash, see J. Krommerdijk/J. Morijn, 'Proportional' by what measure(s)? *Balancing investor interests and human rights by way of applying the proportionality principle in in-*

Evolutionary or dynamic treaty interpretation takes account of the fact that treaty terms may change their meaning over time and have to be interpreted on the basis of the current understanding of a treaty in order to arrive at a decision that solves the parties' dispute.<sup>256</sup> This form of treaty interpretation, however, implies that the parties to the treaty in question expected that the understanding of a specific term or provision could or would change over time, and accepted this.<sup>257</sup>

Pursuant to Article 31(3)(c) VCLT, when interpreting a treaty a court shall take into account 'together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.' Human rights and international environmental treaties can be subsumed under this provision, if both parties are members to the treaty in question, if it forms part of the body of customary international law or if it is an obligation *erga omnes*. Article 2(1)(g) VCLT clarifies that the term 'parties' relates to the states parties to the investment treaty and not the disputing parties.<sup>258</sup>

Again, reliance on these methods is not unproblematic if it leads to the inclusion of norms which are not at least pointed to in the governing laws. *Crema* warns that an expansion of the traditional use of Article 31(3)(c)

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*vestor-state arbitration*, in: P.M. Dupuy/F. Francioni/ E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, p. 422.

256 *US-Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, paras. 2794-2795, 2797 (On the interpretation of the term 'exhaustible natural resource': 'The words of Article XX(g) [GATT], "exhaustible natural resource", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.');

*Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, Decl. Judge Higgins, ICJ Rep. 1999, pp. 1113-1114, paras. 2-3. See also R. Bernhardt, *Evolutionary treaty interpretation, especially of the European Convention on Human Rights*, 42 German Yearbook of International Law (1999), p. 14.

257 See, for instance, the limiting interpretation of the NAFTA's minimum standard of treatment-clause by the NAFTA FTC in Section B of its 2001 Notes of Interpretation of Certain Chapter 11 provisions. The Notes were issued after several tribunals had dynamically interpreted Article 1105(1) NAFTA. At: [http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp) (last visited: 21.9.2017). See also, G. Kaufmann-Kohler, *Interpretative powers of the Free Trade Commission and the rule of law*, in: E. Gaillard et al. (Eds.) *Fifteen years of NAFTA Chapter 11 arbitration*, New York 2011, pp. 175-194.

258 B. Simma, *supra* note 244, pp. 585-586, with further examples.

VCLT to ensure that investment treaty provisions or terms are interpreted in conformity with (general) international law could render it ‘a gate, a tool, to adjudicate on other questions.’<sup>259</sup> The issue engages the principle of consent and the limits of dispute settlement. The parties have chosen to bring a particular dispute before the court under a certain set of laws. Subjecting the dispute to an unforeseeable number of other laws and considerations may limit the parties’ willingness to submit disputes to international adjudication, and, ultimately, risks a decision *ultra vires*. This was also the rationale of the tribunal in *Grand River v. USA*, where the USA – after having adopted an *amicus curiae* submission from an indigenous representative – argued that the tribunal should consider the customary duty to consult indigenous people on the basis of Article 31(3)(c) VCLT. The tribunal rejected the argument, stating that ‘the Tribunal does not understand this obligation ... to allow alteration of an interpretation established through the normal interpretative processes of the [VCLT]. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.’<sup>260</sup> In *Philip Morris v. Uruguay*, however, the tribunal took a different approach when asserting that Article 31(3)(c)

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259 L. Crema, *supra* note 244, p. 61, with further references. See also B. Simma, *supra* note 244, p. 584 (‘[The provision] can only be employed as a means of harmonization *qua* interpretation, and not for the purpose of modification, of any existing treaty.’); C. McLachlan, *The principle of systemic integration and Article 31(3)(c) of the Vienna Convention*, 54 *International and Comparative Law Quarterly* (2005), pp. 311-315.

260 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (hereinafter: *Grand River v. USA*), Award, 12 January 2011, para. 71. Most other tribunals have been similarly hesitant to rely on international human rights laws in their interpretation of investment treaty standards, e.g. *Compania de Desarrollo de Santa Elena SA v. Costa Rica*, Award on the Merits, 17 February 2000, ICSID Case No. ARB/96/1, para. 72; *Metalclad v. Mexico*, Award on the Merits, 16 December 2002, ICSID Case No. ARB (AF)/97/1. See also Chapter 7. See, however, *Mondev International Ltd v. United States of America*, Final Award, 11 October 2002, ICSID Case No ARB(AF)/99/2, paras. 116, 144, where the tribunal relied on interpretations by the ECtHR regarding the term ‘public purpose’ in the ECHR. See also *Judge Buergenthal’s* restrictive Separate Opinion in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion Judge Buergenthal, ICJ Rep. 2003, para. 22 (‘[T]he principles of customary international law and whatever other treaties the parties to a dispute before the Court may have concluded do not by virtue of Article 31, paragraph 3 (c) become subject to the Court’s jurisdiction. This is so whether or not they might be relevant in the abstract to the interpretation of a

VCLT required it to interpret the relevant BIT provisions in light of any applicable international law rules, including customary international law; in this specific case, the protection of public health as an element of a state's police powers which justified the issuance of tobacco control measures.<sup>261</sup> In the other cases where systemic integration has been requested, including by *amici curiae*, tribunals may worry being overburdened by a potential wealth of relevant rules of international law. It may be sensible for tribunals to inform *amici curiae* of their limited material jurisdiction upon granting leave to adjust expectations and avoid negative publicity from disappointed *amici*.<sup>262</sup>

So far, tribunals have predominantly decided in favour of the parties and have considered public interest arguments only to the extent that they pertained to arguments that had already been raised.<sup>263</sup> An exception have to some degree been conflicts with EU law. Tribunals have stressed that

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treaty with regard to which the Court has jurisdiction. Whether one likes it or not, that is the consequence of the fact that the Court's jurisdiction, in resolving disputes between the parties before it, is limited to those rules of customary international law and to those treaties with regard to which the parties have accepted the Court's jurisdiction.').

- 261 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 290-291.
- 262 See the highly critical article by ECCHR after its unsuccessful application in *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and No. ARB/10/25: ECCHR, *Human rights inapplicable in international investment arbitration? – A commentary on the non-admissibility of ECCHR and indigenous communities as amici curiae before the ICSID tribunal*, online publication, July 2012, at: [file:///C:/Users/fc086/Downloads/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable\\_A%20Commentary.pdf](file:///C:/Users/fc086/Downloads/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable_A%20Commentary.pdf) (last visited: 21.9.2017).
- 263 This happened even where the petitioners were admitted on the basis of the public interest element arising from the subject matter of the dispute. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, paras. 5, 49. In most cases, at least one of the parties protested the admission of *amici curiae* out of concern that the dispute would be extended. E.g. *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 53 (*Canada* argued that it would not be permissible for petitioners 'to introduce new issues and take the case away from the disputing parties.'). Noting investment tribunals' hesitation to rely on human rights arguments even when invoked as a defence by host States, T. Meshel, *Human rights in investor-state arbitration: the human right to water and beyond*, 6 *Journal of International Dispute Settlement* (2016),

the recognition of a public interest cannot lead to a decision on issues beyond those brought to it for a final and binding decision by the parties. They have found alternative ways to legitimize measures taken in the public interest, without referring to other rules of international law (see Chapter 7).

## VII. Comparative analysis

Applicable rules and international courts and tribunals rarely explicitly address the permissible and desirable content of *amicus curiae* submissions. Most rules contain some rudimentary guidance on the content of submissions, but much is left to the discretion of international courts and tribunals.

Legal submissions constitute the largest share of *amicus curiae* submissions before all international courts and tribunals. Before the WTO Appellate Body, they are the only permissible type of submissions. The contents of legal submissions vary greatly. Briefs address legal issues within or outside the core competence of an international court or tribunal. They point to the solution of a certain legal issue in other courts, analyze legal issues of the case or provide legal context to the dispute.<sup>264</sup> Some briefs urge an international court or tribunal to adopt a certain interpretation or to consider a certain applicable provision. *Amicus curiae* submissions before investment tribunals focus on the public-value implications of disputes and present additional legal arguments and contextual facts. Submissions to the WTO Appellate Body and panels range from pro-trade submissions from business organisations to submissions arguing for the inclusion of environmental, labour and human rights standards in the interpretation of the covered agreements.

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p. 283, quoting among other *Azurix Corp. v. Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12.

264 See, for instance, submission by Human Rights Watch and the Aire Centre in *Ismoilov and Others v. Russia* on international law and development in the area of extradition, the prohibition of torture and *non-refoulement*, *Ismoilov and others v. Russia*, ECtHR No. 2947/06, 24 April 2008. In *The “Las Dos Erres” Massacre v. Guatemala*, Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 211, one *amicus curiae* made submissions on the international law doctrine of responsibility of superiors.

Submissions on jurisdiction are rare, but not exceptional before the IACtHR, the ECtHR, the ICJ and in investment arbitration.<sup>265</sup> The ECtHR, the IACtHR and the ICJ have accepted submissions on jurisdiction and/or admissibility without further thematizing their legality. The WTO Appellate Body and panels and the ITLOS have not discussed whether they would accept submissions on jurisdictional aspects of a case. The legality of jurisdictional submissions has been an issue of contention in investment arbitration. They should be admitted as long as they do not interfere with the structure of the proceedings. This would be the case if *amici curiae* were to raise for the first time in the arbitration a jurisdictional objection that is for the respondent to raise.

International courts and tribunals in their practice barely have delineated the permissible content of fact submissions. The relevant rules in investment arbitration and the IACtHR explicitly stipulate that *amici curiae* may make submissions on the facts of a dispute. WTO panels, the ICJ, the ITLOS and the ECtHR have all accepted fact submissions. Fact submissions are categorically excluded only by the Appellate Body.<sup>266</sup> Analysis of fact submissions in investment tribunals, WTO panels, the IACtHR and the ECtHR show that fact information comprises mostly, but not exclusively, contextual information. This practice accords with the parties' control over the facts in adversarial processes (see Chapter 7).

International courts and tribunals agree that *amici curiae* cannot elaborate on matters outside the scope of the dispute as submitted to them. What is included in the scope of jurisdiction is a matter of interpretation of the tribunals' mandates. There is a trend in favour of a wide interpretation to the effect that a grant of material jurisdiction is found to cover all questions incidental to the main question, unless explicitly provided otherwise.<sup>267</sup> In particular, international courts and tribunals may examine is-

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265 *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 ACHR)*, Advisory Opinion No. OC-19/05 of 28 November 2005, IACtHR Series A No. 19, pp. 7-9; *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12.

266 See also No. 5 b) of the ICTY's 1997 *Information on the Submission of Amicus Curiae*: 'In general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged.'

267 B. Cheng, *supra* note 89, p. 266. See also *Case concerning certain German Interests in Polish Upper Silesia*, Judgment (Jurisdiction), 25 August 1925, PCIJ Se-

sues of their own competence under their applicable treaties. Thus, unless these treaties foresee that a specific objection must be raised by the opposing party, an *amicus curiae* is free to elaborate on it in the absence of party comments to the opposite effect.<sup>268</sup> Also, as shown, international courts and tribunals are free in their legal considerations within the boundaries set by the applicable law (*iura novit curia*). The parties' legal submissions are not binding upon them. Reference to legal rules not presented by the parties may be achieved especially by way of treaty interpretation. However, treaty interpretation pursuant to Article 31(3) (c) VCLT is limited by Article 31 VCLT's basic rule that treaty interpretation cannot lead to an overhaul of the treaty text. As the ICJ noted in *Rights of US Nationals*, this confines the interpretation of a treaty to the scope of its declared object and purpose.<sup>269</sup> Otherwise, an international court or tribunal risks exceeding member states' consent as marked by the boundaries of the treaty and venture into judicial law-making.<sup>270</sup> However, not every submission outside the scope of material jurisdiction may be a risk to the validity of a de-

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ries A No. 6; *Affaire des chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan, Autriche et Yougoslavie, Société des Chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan*, Sentences préliminaires: Genève, 12 mai 1934, nouvelle sentence: La Haye, 29 juin 1938, 3 UNRIAA, p. 1803.

- 268 It is argued that this also applies to issues of illegality in investment arbitration, E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 218. See also *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)*, Order, 4 February 1933, PCIJ Series A/B No. 52, p. 15; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgment (Preliminary Objection), 22 July 1952, Individual Opinion of President Sir A. McNair, ICJ Rep. 1952, p. 116; *Certain Norwegian Loans (France v. Norway)*, Judgment, 6 July 1957, Separate Opinion of Judge Sir H. Lauterpacht, ICJ Rep. 1957, p. 43; *Marks & Umman v. The Republic of Iran*, Award No. 53-458-3, 8 IUSCTR (1985), pp. 296-97; J.J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: the application by the Iran-U.S. Claims Tribunal*, Kluwer, 1991, pp. 149-150; M. Hudson, *The Permanent Court of International Justice 1920-1942*, New York 1943, pp. 418-419; G. Fitzmaurice, *The law and procedure of the International Court of Justice*, Vol. 2, Cambridge 1986, pp. 530, 755-758; S. Rosenne, *The law and practice of the International Court*, 2<sup>nd</sup> Ed. Leiden 1985, pp. 467-468.
- 269 *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, 27 August 1952, ICJ Rep. 1952, p. 196. See also C. Brown, *A common law of international adjudication*, Oxford 2007, p. 52.
- 270 D. French, *Treaty interpretation and incorporation of extraneous legal rules*, 55 International and Comparative Law Quarterly (2006), p. 300.

cision. Especially if the parties fail to object to the matter in question being raised or to even make submissions on it, the international court or tribunal seized can consider whether the parties' response amounts to a waiver of *ne ultra petita* and an explicit or silent expansion of the dispute as submitted by the agreement or application.

### E. Submission of evidence

The submission of evidence is a prerogative of the parties in the adversarial process. Many *amici curiae* attach to their briefs material to corroborate the arguments in their submissions.<sup>271</sup> Submissions without corroborative evidence attached may be considered to be unreliable. Further, practice shows that the parties regularly deem it necessary to rebut allegations raised in *amicus curiae* submissions. In addition, the submission of requisite material is an adequate starting point for an assessment of the allegations made in a brief. Do *amici curiae* have a right or an obligation to attach evidence to their submissions?

The wording of Article 34(2) and (3) and Article 66(2) ICJ Statute is inconclusive. It only speaks of the submission of statements and information. In the *Corfu Channel* case, Yugoslavia submitted several batches of documents to the ICJ via the Albanian Government sometime after it had denied the allegations that it had supported the mine laying in a communiqué which was transmitted to the Court and the parties.<sup>272</sup> The evidence was highly important for the Court's decision with respect to Albania's connivance. The ITLOS Rules are equally inconclusive. *Amici curiae* so far have not attached any evidence to their statements.

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271 Amnesty International representatives admit that they add weight to their *amicus* briefs by endorsing their organization's reports. See D. Zagorac, *supra* note 51, p. 38. See also for many, *Kosovo*, Advisory Opinion, *Written Contribution of the authors of the unilateral declaration of independence in accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion), 17 April 2009.

272 In total, the Yugoslav Government submitted three series of documents. See No. 252 (The British Agent to the Registrar); No. 235 (Le Greffier à l'Agent Albanais); No. 236 (L'Agent Albanais au Greffier); No. 237 (British Agent to the Registrar), *Corfu Channel Case*, Part IV: Correspondence, ICJ Rep. 1949, pp. 224, 232-233, para. 3.

In the ECtHR, few *amici curiae* adduce evidence. The submission of evidence is not required by the applicable regulations. In *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, the *amicus curiae* applicants alleged, *inter alia*, that the state authorities had arbitrarily intervened in an internal leadership dispute within the Bulgarian Orthodox Church. The Holy Synod of the Bulgarian Orthodox Church to its submissions, which contained factual argument in support of the government, attached the minutes of a meeting.<sup>273</sup> Similarly, in *S. and Marper v. the United Kingdom*, the NGO Liberty attached to its submission case law and some scientific materials it considered relevant.<sup>274</sup>

Before the IACtHR, submission of ‘annexes’ and ‘supporting documentation’ is expressly required by Article 44(1) and (2) IACtHR Rules and lack thereof may be sanctioned with the exclusion of the brief.<sup>275</sup>

Section 44 ACtHPR Practice Directions allows, but does not oblige *amici curiae* to submit annexes to corroborate their submissions.

The WTO Appellate Body and the panels require *amici curiae* to prove allegations. In *EC–Sardines*, in respect of Morocco’s unsolicited *amicus* brief, the Appellate Body rejected the argument that the measure attacked in the appeal was consistent with international standards including those contained in the Codex Alimentarius Commission, because Morocco failed to elaborate and provide evidence for its allegation.<sup>276</sup> In *Brazil–Retreaded Tyres*, the European Commission attacked the credibility of the *amicus curiae* submission that had been adopted by Brazil for not providing as an annex the documents referred to in the submission.<sup>277</sup>

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273 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, Nos. 412/03 and 35677/04, 22 January 2009.

274 *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008, ECHR 2008.

275 This was expressly confirmed by the court recently when it accepted documents submitted by an *amicus curiae* after the respondent state had requested their exclusion on the account that *amici curiae* only were allowed to make legal allegations. See *Personas Dominicanas y Haitianas expulsadas v. República Dominicana*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282, para. 16.

276 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, paras. 168-170.

277 *Brazil–Retreaded Tyres*, Report of the Appellate Body, adopted on 17 December 2007, WT/DS332/AB/R, para. 392.

Investment tribunals do not pursue a uniform approach on this issue. While some tribunals welcome or require that *amicus curiae* briefs attach documents to prove allegations,<sup>278</sup> other tribunals in their procedural orders decide that *amici curiae* may not adduce evidence. In *UPS v. Canada*, the arbitral tribunal justified the exclusion with its obligation to mitigate undue burdens on the parties and unnecessary complication of the proceedings by having to cross-examine *amici's* witnesses or present refuting evidence.<sup>279</sup> The *amicus* petitioners had earlier requested to 'be accorded standing as *Amicus* interveners, but nevertheless with the full right to present and to test any and all of the evidence which may be introduced in these proceedings'.<sup>280</sup> The tribunal in *Gallo v. Canada*, in a procedure for *amicus curiae* applications, determined that briefs were to be 'limited to allegations, without introducing new evidence'.<sup>281</sup> Citing efficiency and avoidance of unnecessary burden, the tribunals in *Biwater v. Tanzania* and in *Suez/Vivendi v. Argentina* decided that the *amici curiae* should file their submissions without annexes, and that they would request any referenced documents if necessary.<sup>282</sup> In UNCITRAL and ICSID based arbitrations, the rules on privacy of hearings exclude the possibility for *amici curiae* to

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278 Many *amicus curiae* provide references to buttress the credibility and reliability of their contentions, including by providing links to referenced sources. See, for instance, *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, section (E), Case No. UNCT/14/2.

279 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amicus curiae*, 17 October 2001, para. 69 and Direction of the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, para. 3 ('The Order is limited to written briefs. It does not extend to the adducing of evidence.').

280 *Id.*, para. 4.

281 *Vito Gallo v. Canada*, Procedural Order No. 1, 4 June 2008, PCA Case No. 55798, para. 38. See also *Id.*, Claimant's submissions 29 February 2008, p. 28. The claimant had requested that any *amicus curiae* submissions 'may not contain evidence either factual in nature or in the form of an expert opinion,' because the receipt of evidence would be 'highly prejudicial to the parties given that the evidence would not be subject to cross-examination at the hearing' and force the parties to 'respond to the *amicus curiae* "quasi-evidence" because of the risk that it may influence the Arbitral Tribunal. ... Neither party to the arbitration should be placed in the position of having to determine whether a witness should be called to respond to evidence which is not part of the record.' The issue never became live, because no *amicus curiae* submissions were received during the proceedings.

282 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12

call witness evidence without the parties' consent.<sup>283</sup> The tribunal in *TCW Group v. Dominican Republic*, an arbitration under the CAFTA and the UNCITRAL Arbitration Rules, determined in its Procedural Order No. 2 that *amici curiae* could not introduce new evidence.<sup>284</sup>

*Amicus* briefs without any evidence to prove the veracity of allegations made can place significant burdens on the parties. In *Glamis v. USA*, the tribunal accepted the fact-heavy written submission from the Quechan Indian Nation, although in its response to the tribe's application, the claimant had sought the exclusion of factual allegations from the submission. They argued that the Quechan tribe was not subject to the standards applied to party submissions.<sup>285</sup> The submission from the *amicus curiae* pointed to deficiencies in the claimant's expert cultural report and called for its exclusion, as well as included a competing expert report that replied to the claimant's cultural expert report.<sup>286</sup> The claimant went on to contradict several of the fact allegations from the Quechan Indian Nation. The

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February 2007, ICSID Case No. ARB/03/19, para. 2; *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22.

283 The *UPS* tribunal noted that *amici curiae* could not call witnesses without the parties' consent given the privacy of hearings (Article 25(4) of the 1976 UNCITRAL Rules) so that the parties would not need to cross-examine *amici curiae*. The tribunal, however, asserted that its procedural power was to be used 'not only to protect th[e] rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner,' thereby alluding to its investigative powers. See *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69.

284 *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.8.

285 *Glamis v. USA*, Response of Glamis Gold Ltd. to Application of the Quechan Indian Nation for Leave to File a Non-Party Submission, 15 September 2005, pp. 1-2 ('[T]he Quechan Tribe was an active participant in the various administrative processes that comprise the factual background of this case. ... Given its role as a fact witness to predicate issues in this proceeding, we would certainly oppose allowing the Quechan Tribe to make factual submissions to the Tribunal without being subjected to discovery and production requests and requirements that generally govern party participation. Given the potential for unfairness associated with such a result, Glamis submits that the Quechan Tribe's participation, if any, should be limited to this submission setting forth the Tribe's position ...').

286 *Glamis v. USA*, Supplemental Submission of the Quechan Indian Nation, 16 October 2006.

tribunal later did not refer to the fact submissions. The issues it discussed in the end were irrelevant for its reasoning.

Only the IACtHR Rules, some investment tribunals, the WTO Appellate Body and WTO panels require an *amicus curiae* to prove its allegations. The other international courts and tribunals consider the submission of evidence less relevant. This may in part be due to the expectation that submissions focus on public policy issues, thus, matters not requiring proof. While the calling of witnesses and experts indeed may entail additional burdens, the exclusion of all forms of evidence for *amicus curiae* submissions, especially documentary evidence, risks undermining their credibility.

#### F. Access to documents

Many international courts and tribunals require prospective *amici curiae* to make submissions that are not repetitive of what already has been or could be submitted by the parties. The potential relevancy and quality of an *amicus curiae* brief is higher if the applicant has had the opportunity to consider the arguments and facts that have already been exchanged.<sup>287</sup> For the parties, confidentiality is essential to safeguard sensitive (business or political) information. How have tribunals managed to address the competing interests of parties and *amici curiae* regarding access to documents?

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287 See the comment by *amicus curiae* petitioners in *Biwater v. Tanzania*: ‘The Petitioners consider that the above conditions are met in this case. They contend, however, that the impact of the confidentiality order contained in *Procedural Order No. 3* of the Arbitral Tribunal, limiting the release to the public of certain categories of documents that detail the facts and legal issues in dispute, prevent them from describing the precise scope of their intended legal submissions and hence the extent to which the tests set out in Rule 37(2) are fully met.’ *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, p. 7, para. 19.

## I. International Court of Justice and International Tribunal for the Law of the Sea

Generally, only the parties have access to the case file prior to the hearings, when copies of the pleading and documents annexed thereto are published online.<sup>288</sup> Several exceptions exist to this rule, but they are limited to entities with a recognized purpose under the courts' statutes or rules. States, and in the case of the ITLOS also the other entities entitled to appear before it, may request copies of written pleadings and annexes before the opening of the oral proceedings.<sup>289</sup> According to Article 67(2) ITLOS Rules, the ITLOS may exceptionally release documents early in consultation with the parties.<sup>290</sup> An exception is also made where the construction of a convention is at issue. In that a case, the ICJ Statute and the ITLOS Rules foresee that the registrar transmits to the affected organization in question a copy of all written pleadings.<sup>291</sup> The ICJ has used the provision rarely.<sup>292</sup> Privileged access to information is also given to interveners, but

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288 Article 53(2) ICJ Statute: 'The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings.' Article 67(2) ITLOS Rules: 'Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal or the President of the Tribunal is not sitting so decides after ascertaining the views of the parties.' See P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2006, p. 190.

289 Article 67(1) ITLOS Rules allows the submitter of the first memorial to protest publication. In this case, the tribunal will publish the memorial together with the counter memorial. See also Article 53(1) ICJ Rules.

290 Article 67(2) ITLOS Rules.

291 See Article 34(3) ICJ Statute; Article 84(3) ITLOS Rules.

292 The ICJ furnished the International Civil Aviation Organization with the party submissions in *Aerial Incident of 3 July 1988* and transmitted, upon request, documents including party submissions and two confidential reports from the expert commission to Yugoslavia in the *Corfu Channel case*. See *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Order of 22 February 1996 (Removal from List), ICJ Rep. 1996, p. 9; *Letter from the Secretary-General of the International Civil Aviation Organization to the Registrar of the International Court of Justice*, Observations of the International Civil Aviation Organization, p. 617, at <http://www.icj-cij.org/files/case-related/79/9699.pdf> (last visited: 21.9.2017); No. 297 (Le Greffier au Chargé d'Affaires a.i. de Yougoslavie a la Haye) and No. 140 (Le Greffier Adjoint au Chargé d'Affaires a.i. de Yougoslavie a la Haye), *Corfu Channel case*, Part IV: Correspondence,

only *after* the permission to intervene has been granted.<sup>293</sup> Article 67(3) ITLOS Rules gives the tribunal the power to adopt a different approach upon request.

The rules are more lenient in advisory proceedings. In this regard, the rules of the ITLOS and ICJ differ. The ICJ only foresees transmission of written statements to any states and organizations that have submitted such statements.<sup>294</sup> It places it in the discretion of the court to make the written statements and their annexes accessible to the public on or after the opening of oral proceedings.<sup>295</sup> The ICJ interprets the provision strictly. It has rejected requests from former staff members involved in review proceedings to obtain access to statements.<sup>296</sup> Recently, it has been more accommodating towards state-like entities. In advisory proceedings before the Seabed Disputes Chamber, according to Article 134 ITLOS Rules ‘written statements and documents annexed shall be made accessible to the public as soon as possible after they have been presented to the Chamber.’ Publication is not dependent on the views of any state in either court.<sup>297</sup>

Both the ITLOS and the ICJ inform the public on the progress of proceedings through periodic press releases, publication of case-related orders and notification of the institution of proceedings on their websites. Thus,

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ICJ Rep. 1949, pp. 182, 252. See also S. Rosenne, *The Law and Practice of the International Court 1920-2005*, 4<sup>th</sup> Ed. Leiden 2006, p. 1334.

293 Articles 85(1), 86(1) ICJ Rules.

294 Article 105(1) ICJ Rules.

295 Article 106 ICJ Rules. In cases where the advisory opinion concerns a legal question which is pending between two or more states, the provision orders prior consultations with the states affected.

296 The registrar argued that access to such documents required the consent of the body which submitted the request for the advisory opinion. Counsel had argued that he intended to seek out certain member states to express his clients’ views on the question to the member states and point them to issues they might have overlooked and would like to present at the hearing. See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, Letter No. 54 (The Registrar to Mr. Leonard B. Boudin), ICJ Rep. 1954, Part IX: Correspondence, pp. 410-411.

297 During the drafting process, the second phrase of the draft article was deleted. It determined that the chamber had to ascertain the views of the states parties where the request for an advisory opinion related to a pending legal question between two or more states parties before allowing public access to the written statement and documents. See P. Chandrasekhara Rao/P. Gautier (Eds.), *supra* note 288, p. 387.

those interested in submitting a request for participation as *amicus curiae* in some way can take note of the proceedings.<sup>298</sup>

## II. European Court of Human Rights, Inter-American Court of Human Rights and African Court on Human and Peoples' Rights

The ECtHR has not issued any specific rules on transparency for entities interested in requesting leave to make an *amicus curiae* submission. Article 40(2) ECHR determines that generally all documents deposited with the registrar shall be accessible to the public.<sup>299</sup> This encompasses all documents submitted by the parties and third parties. Public access to documents may be limited pursuant to Rule 33(1) ECtHR Rules, if documents are submitted in connection with friendly-settlement negotiations or for special public interest or protective reasons.<sup>300</sup> The ECtHR's judgments and a selection of decisions are accessible online through the court's database Hudoc, whereas case files can be consulted by appointment upon written request to the Registrar.<sup>301</sup>

The situation is similar before the IACtHR. According to Article 24(3) IACtHR Statute, decisions, judgments and opinions of the court shall be delivered in public sessions and shall be published with such 'other data or background information that the Court may deem appropriate.' The IACtHR generally publishes the case file on its webpage as the dispute progresses with a note that documents, which are not accessible on the webpage, may be requested from the court by e-mail.

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298 T. Treves, *The procedure before the International Tribunal for the Law of the Sea: the rules of the tribunal and related documents*, 11 *Leiden Journal of International Law* (1998), pp. 565, 573.

299 As deliberations are secret (Rule 22(1) ECtHR Rules), access is withheld from 'points of examination for deliberations, minutes of deliberations, summary records of deliberations, preliminary draft and draft judgments and decisions as well as correspondence,' at: <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Archives/Commission.htm> (last visited: 2.7.2016).

300 See Rule 33(2) ECtHR Rules. Rule 106(4) established a third exception for cases referred to the court by the European Commission of Human Rights regarding documents filed by the parties prior to 1 November 1998. In these cases, confidentiality was the general rule.

301 At: [http://www.echr.coe.int/Documents/Practical\\_arrangements\\_ENG.pdf](http://www.echr.coe.int/Documents/Practical_arrangements_ENG.pdf) (last visited: 21.9.2017).

Before the ACtHPR, Section 44 Practice Directions determines that the application and all other subsequent pleadings shall be ‘put at the disposal’ of an *amicus curiae* but only insofar as they relate to the matter for which the request for participation has been made. The preceding sentence of the Section makes clear that access to these documents is only granted upon admission of the *amicus curiae*.

In brief, *amici curiae* do not struggle obtaining relevant case documentation from human rights courts.

### III. WTO Appellate Body and panels

Before WTO panels and the Appellate Body, access to information by external actors is handled restrictively. Although the institution and progress of proceedings is publicly notified on the WTO website, there is a clear decision in favour of confidentiality. Recent attempts by select states towards greater transparency have not been successful, as the ‘timing and form in which information becomes available’ remains contentious.<sup>302</sup>

Article 17(10) DSU establishes a general duty of confidentiality for Appellate Body proceedings, which binds the parties, WTO Members, Appellate Body members and staff and has been interpreted expansively to include ‘any written submissions, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body.’<sup>303</sup>

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302 DSB Special Session, *Report by Chairman, Ambassador Ronald Saborio Soto*, TN/DS/27, 6 August 2015, para. 3.22. In July 2016, Canada circulated a document announcing that it and supporting states would request in individual cases that rules be drawn up which among other would foresee publication of full timetables and of all submissions until the interim report ‘as soon as practicable’ during the proceedings. *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Addendum*, Doc. No. JOB/DSB/1/Add.3, 18 July 2016.

303 *Brazil – Export Financing Programme for Aircraft* (hereinafter: *Brazil–Aircraft*), Report of the Appellate Body, adopted on 20 August 1999, WT/DS46/AB/R, para. 121. See also *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, para. 145. Article VII(1) Rules of Conduct obliges the Appellate Body and panel members, their staff, experts, arbitrators and any other WTO staff assisting on panels to ‘at all times maintain the confi-

Panel proceedings are confidential according to Section 2 Panel Working Procedures.<sup>304</sup> Further, Article 18(2) DSU establishes a general duty of confidentiality for all submissions. This accords with the parties' general reluctance to publish their often economically sensitive information.<sup>305</sup> Each party may release statements – including its full submissions – to the public detailing its position, but parties are obliged to 'treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.'<sup>306</sup>

Third parties have a right to receive the submissions made by the parties up to the first substantive meeting of the panel with the parties pursuant to Article 10(2) and (3) DSU and Section 6 Panel Working Procedures.<sup>307</sup> The confidentiality requirement is softened by disputing parties'

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dentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential.'

304 Article 17(10) DSU: 'The proceedings of the Appellate Body shall be confidential.' No. 2 Working Procedures of Panels, Appendix 3 to the DSU: 'The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.' See also Article 14(1) DSU and No. 3 Working Procedures of Panels, Appendix 3 to the DSU, which determine that the panel deliberations shall be confidential.

305 Article 18(2) DSU: 'Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another member to the panel or the Appellate Body which that member has designated as confidential.'

306 In *Argentina – Poultry Anti-Dumping Duties*, the panel decided that parties could publish their own written submission also during the proceedings, as long as this would not affect the confidentiality of information of the opposing party. See *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, Report of the Panel, adopted on 19 May 2003, WT/DS241/R, paras. 7.14-7.16.

307 See *Third Party Participation in Panels*, Statement by the Chairman of the Council, C/COM/3 of 27 June 1994, pp. 1-2; *US–FSC*, Recourse to Article 21.5 (EC), Report of the Appellate Body, adopted on 29 January 2002, WT/DS108/AB/RW, para. 245. In some cases, third parties have received broader access to case related documents due to 'enhanced third party rights.' See *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 2.6. The receipt of enhanced third party rights has been made subject to the third party showing an interest beyond the 'substantial interest' required for third party participation. See *EC–Bananas III*, Report of the Panel, adopted on 25 September 1997, WT/DS27/R/ECU, pp. 292-294, paras. 7.4-7.9.

obligation to provide upon request by a member state a ‘non-confidential summary of the information contained in [their] written submissions that could be disclosed to the public,’ though these summaries are rarely published swiftly.<sup>308</sup> In short, panels’ and the Appellate Body’s Working Procedures support transparency and transmission of documents only with regard to the other parties to a dispute.<sup>309</sup>

Accordingly, prospective *amici curiae* will have difficulties obtaining up-to-date information on a case, unless the parties are willing to share their own submissions.<sup>310</sup> Indeed, in most cases, *amicus curiae* applicants are informed of the case through one of the parties. In *US–Steel Safeguards*, for example, the *amicus curiae* applicant relied on the US appellant submission that had been posted on the website of the US Trade Representative.<sup>311</sup> This option is not very reliable given that only few states publish their submissions, let alone during pending proceedings. This restrictive approach renders it nearly impossible for *amicus* applicants to fulfil the requirement that *amici* shall not repeat information submitted by the parties. It is also surprising, because special access to ‘relevant information’ is given to expert review groups pursuant to Article 13(2) and No.

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308 In *US–Steel Safeguards*, the panel clarified that it was up to the parties to agree on a date for the production of such summaries, but the panel urged the parties to agree on a deadline so that ‘appropriate information relating to the present dispute [was] disclosed to the public.’ *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 5.3.

309 See also No. 10 Panel Working Procedures, Annex 3 to the DSU: ‘In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party’s written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.’ For Appellate Body proceedings, see the similar Article 18(2) Appellate Body Working Procedures.

310 Even then, information may be redacted, see No. 3 Panel Working Procedures, Appendix 3 to the DSU. See also L. Crema, *supra* note 244, p. 30 (‘[T]he problem of confidentiality comes precisely from the lack of a clear procedure, which incentivizes and rewards contacts with the parties, and not from the nature of *amici* in and of itself.’ [Emphasis added]).

311 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, FN 4.

5 Appendix 4 to the DSU.<sup>312</sup> Panels and the Appellate Body have decided that prospective *amici curiae* do not receive privileged access to case files and information.

The Appellate Body and panels pursue a zero tolerance policy for violations by *amici curiae* of the rules on confidentiality. In *Thailand–H-Beams*, Thailand notified the Appellate Body that the drafters of the *amicus curiae* submission by the Consuming Industries Trade Action Coalition (CITAC) appeared to have had access to its confidential filing. It pointed out that Poland and the CITAC were represented by the same law firm. Both assured that there had been no violation of the confidentiality obligation in their spheres.<sup>313</sup> Although it failed to establish the source of the breach of confidentiality, the Appellate Body found that *prima facie* there was evidence that the CITAC had had access to the confidential submission, and decided not to accept it. The *EC–Sugar* panel confirmed this approach. Brazil and Australia claimed that the German Sugar Association, Wirtschaftliche Vereinigung Zucker (WVZ), had had access to submissions they had designated as confidential. They requested the rejection of the submission and the reporting of the incident to the DSB. WVZ acknowledged that it had had access to one of Brazil’s exhibits, but refused to reveal its source. The panel was conscious that the confidentiality obligation of Article 18(2) DSU did not extend to *amici curiae*, but it established a form of factual duty of confidentiality for prospective *amici*. In a display of anger over WVZ’s unwillingness to cooperate, it held that ‘if the WVZ, though not a party to the proceedings, wanted to be considered

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312 Art. 13(2) DSU, Appendix 4, No. 5: ‘The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.’

313 Quoting Article 17(10) DSU, the Appellate Body not only emphasized the DSU’s confidentiality obligation for Appellate Body proceedings for all its members and staff, but also that parties and third parties in appeal proceedings were ‘fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants.’ *Thailand–H-Beams*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS122/AB/R, paras. 64–65, 68, 71, 74.

a “friend of the court”, it should have followed an appropriate standard of behaviour towards the Panel and the parties together with making every possible effort to respect WTO dispute settlement rules, including confidentiality rules.<sup>314</sup>

The confidentiality of the WTO dispute settlement proceedings has been viewed as a risk to the credibility of the WTO as an institution.<sup>315</sup> Well-reputed *amicus curiae* applicants have found it difficult to obtain access to submissions, which limits their ability to prepare useful briefs.<sup>316</sup> Pending a solution, *amici curiae* continue to depend on the willingness of parties and third parties to share information to the extent permitted.<sup>317</sup>

*Amici curiae* have not benefited from the increasing number of public hearings in Appellate Body and panel proceedings.<sup>318</sup> This may be due to a concern regarding the sufficiency of the confidentiality rules, where much of the information exchanged is considered business confidential information and parties are reluctant to disclose any information. Parties have been granted permission to conclude additional procedures to protect business confidential information as a modification of the panel proceedings pursuant to Article 12(1) DSU – and Article 17(10) DSU in Appellate Body proceedings – making it less likely for *amici curiae* to obtain access to case files.<sup>319</sup>

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314 The incident was reported to the DSB. *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.84. See also *Id.*, paras. 7.7.7-7.7.8, 7.82-7.83, 7.89, 7.92-7.95, 7.98-7.99.

315 P. Sutherland et al., *The future of the WTO – addressing institutional challenges in the new millennium*, Report of the Consultative Board to the Director-General S. Panitchpakdi, 2004 (the ‘Sutherland Report’), pp. 41-42, at: [http://www.ipu.org/splz-e/wto-symp05/future\\_WTO.pdf](http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf) (last visited: 21.9.2017). In favour of deleting all confidentiality rules for party submissions, J. Pauwelyn, *supra* note 205, pp. 325, 330; G. Umbricht, *supra* note 199, p. 793.

316 L. Johnson/E. Tuerk, *CIEL’s experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 256.

317 A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 *Journal of International Economic Law* (1999), p. 488.

318 Pursuant to Section 2 Panel Working Procedures, hearings are private. But the parties are free to waive the confidentiality rules. See Section A and L. Ehring, *supra* note 32, pp. 1-14.

319 *EC and Certain Member States–Large Civil Aircraft*, Report of the Appellate Body, adopted on 1 June 2011, WT/DS316/AB/R, paras. 17-19 and Annex III. The parties must show why the information requires additional protection. E.g. in *Brazil–Aircraft* and *Canada–Aircraft*, the panels adopted additional procedures to

#### IV. Investor-state arbitration

Investment arbitration has a tradition of broad confidentiality due to the commercial origin of its procedural rules.<sup>320</sup> Strict confidentiality means that even the existence of the arbitration is not made public.<sup>321</sup> In commercial arbitration, confidentiality is presumed to maintain business secrets, to protect the brand or to accelerate settlement by avoiding public tension from publicity.<sup>322</sup> There is significant pressure towards greater transparency in investor-state arbitration (see Chapter 2).<sup>323</sup> This pressure increasingly translates into legal standards. Due to the different and overlapping ap-

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protect business confidential information, whereas on appellate review, the Appellate Body declined to do so, because it found that Articles 17(10) and 18(2) DSU granted sufficient protection. See *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, paras. 145, 147; *Brazil–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS46/AB/R, paras. 123, 125. See also O. Prost, *Confidentiality issues under the DSU: fact-finding process versus confidentiality*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, pp. 196–197 (Since 2003, there have been proposals to draft a standard procedure on the protection of business confidential information.).

- 320 An unusual request was made by the Quechan Indian Nation. It asked that the tribunal treat as confidential an expert report it submitted. *Glamis v. USA*, Award, 8 June 2009, p. 129, para. 282. The report provided details on the location of sacred tribal areas. The tribunal denied the request for full confidentiality citing the importance of transparency of Chapter 11 arbitrations for NAFTA member states, as expressed in the FTC Note, see NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001. The tribunal permitted the Quechan Indian Nation to request the redaction of specific sections of the report. The Quechan Indian Nation later withdrew its request and agreed to the publication. See *Glamis v. USA*, Award, 8 June 2009, para. 282.
- 321 L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 171.
- 322 For the discussion on the ‘erosion’ of confidentiality in commercial arbitration, see A. Tweeddale, *Confidentiality in arbitration and the public interest exception*, 21 *Arbitration International* (2005), p. 61; A. Rogers/D. Miller, *Non-confidential arbitration proceedings*, 12 *Arbitration International* (1996), p. 319; P. Neill, *Confidentiality in arbitration*, 12 *Arbitration International* (1996), pp. 287, 289, 310–312.
- 323 J. Coe, *supra* note 41, pp. 1339–1385; OECD, *Transparency and third party participation in investor-state dispute settlement procedures, Statement by the OECD Investment Committee*, June 2005; T. Wälde, *Transparency, amicus curiae briefs*

plicable rules, the issue of transparency is case-specific. Rules on confidentiality may be contained in special party agreements, investment treaties, institutional arbitration rules, arbitration laws, codes of conduct and ethics, general international law and, to the extent applicable, the mandatory laws of the seat of arbitration, the place of enforcement or the laws of the respondent state.<sup>324</sup>

Investment treaties usually address neither confidentiality on a general basis, nor access to case documents specifically. Exceptions are made by newer investment treaties, especially those concluded on the basis of the US or Canadian Model BITs, and by the NAFTA.<sup>325</sup> The NAFTA only provides select rules on transparency,<sup>326</sup> but in 2001 the Free Trade Commission issued a *Note of Interpretation of Certain Chapter 11 Provisions*

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- and third party rights*, 5 *Journal of World Investment and Trade* (2004), p. 337. In *Loewen v. USA*, the tribunal stated that a general duty of confidentiality in arbitration involving a state party would be undesirable as it would restrict public access to information relating to government and public matters. See L. Mistelis, *supra* note 321, pp. 181, 197; C. Zoellner, *Third-party participation (NGO's and private persons) and transparency in ICSID proceedings*, in: R. Hoffmann/C. Tams (Eds.), *The ICSID – taking stock after 40 years*, Baden-Baden 2007, p. 201.
- 324 For analysis of national laws on confidentiality, see J. Hargrove, *Misplaced confidence? An analysis of privacy and confidentiality in contemporary international arbitration*, 3 *Dispute Resolution International* (2011), pp. 47-55. The detectable shift towards transparency largely stems from predominantly Western initiatives, especially national laws on access to information and non-state actors' intense lobbying. For further national laws, see R. Teitelbaum, *A look at the public interest in investment arbitration: is it unique? What should we do about it?*, 5 *Berkeley Journal of International Law* (2010), p. 58.
- 325 See, with further references, V. Lowe, *Private disputes and the public interest in international law*, in: D. French et al. (Eds.), *International law and dispute settlement: new problems and techniques, liber amicorum Professor John G. Merrills*, Oxford 2010, p. 10.
- 326 Articles 1127 and 1129 NAFTA regulate transmission of documents between the parties and third parties. Subject to Article 1137(4) NAFTA nothing in the NAFTA, precludes the parties from providing public access to documents exchanged during the arbitration. Under NAFTA terms, Canada and the US promise to publish any arbitration award, while the publication of an award involving Mexico will be governed by the applicable arbitration rules. NAFTA tribunals previously had decided that there was no general duty of confidentiality in investment arbitration and that the parties were free to publicly discuss their cases, unless agreed otherwise. See *Metalclad Corporation v. Mexico*, Award, 20 August 2000, ICSID Case No. ARB(AF)/97/1, reprinted in 16 *ICSID Review* (2001), p. 168; *SD Myers Inc. v. Canada*, Procedural Order No. 16, 13 May 2000, para. 8.

(FTC Note). It establishes two basic rules. First, the NAFTA does not impose a general duty of confidentiality on parties in investment disputes under Chapter 11. Second, nothing in the NAFTA precludes the parties from providing public access to documents submitted to or issued by the tribunal.<sup>327</sup> Further, the FTC Note obliges the NAFTA member states to make available to the public ‘in a timely manner’ all documents pertaining to an arbitration. Documents may be withheld if they contain confidential business information or fall under domestic confidentiality laws or such provisions in institutional rules.<sup>328</sup> The FTC Note has been declared applicable to *amici curiae* by Section 10 FTC Statement.

The applicable institutional procedural rules in investment arbitration have made significant progress towards increasing transparency. While the 2010 and the 2013 UNCITRAL Arbitration Rules contain only two provisions on confidentiality – Article 28(3) prescribes confidentiality of hearings and Article 34(5) subjects the publication of awards to the parties’ consent – the UNCITRAL Rules on Transparency establish a remarkably broad set of publication requirements for treaty-based investor-state arbitrations hitherto unknown. As a matter of principle, the Rules recognize a ‘public interest in transparency’ in investment arbitration.<sup>329</sup> Article 2 establishes mandatory publication of basic information on the proceedings upon their initiation. Article 3, which is central to *amicus curiae* participation, requires that virtually all case-related documents, especially party submissions, tribunal decisions and awards, must be published through a repository ‘as soon as possible.’<sup>330</sup> Pursuant to Article 7, publication may be withheld for specific, rather broad categories of confidential and protected information.<sup>331</sup> The Rules signal a paradigm change. Transparency is the ground rule and confidentiality must be justified. Partial or delayed

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327 L. Mistelis, *supra* note 321, p. 180.

328 See No. 2(b)(i) – (iii). No. 3 determines that also information protected under Articles 2102 and 2105 NAFTA may be withheld.

329 See Article 1(4) UNCITRAL Rules on Transparency. Article 1(5) shows that the drafters considered third person submissions a transparency measure.

330 Witness statements and expert reports may be published upon request and at the expense of the requester, see Article 2(2) and (5) UNCITRAL Rules on Transparency. Other confidential information may be published on the tribunal’s initiative, see Article 2(3) UNCITRAL Rules on Transparency.

331 The categories in Article 7(4) and (5) UNCITRAL Rules on Transparency are quite broad and include confidential business information and any information that is protected against publication by the national laws of the respondent or that

release of information is chosen over full confidentiality. Especially with respect to *amici curiae*, it will be interesting to see if release ‘as soon as possible’ occurs sufficiently soon during proceedings so as to allow *amici* to obtain the relevant case documentation before the submissions deadline.

The ICSID Arbitration Rules have not undertaken a similar push towards transparency. They have – due to their purpose as special rules for investor-state arbitration – always contained some transparency measures. Notification of disputes on the ICSID webpage is mandatory.<sup>332</sup> Rule 48(4) ICSID Arbitration Rules subjects the publication of awards to party consent, but it allows for excerpts of the award’s legal reasoning to be included in ICSID publications. Rule 32 ICSID Arbitration Rules establishes privacy of hearings, but the tribunal may allow other persons to attend or observe all or part of the hearings.<sup>333</sup> Notably, the rules address neither access to documents in pending cases, nor release of a party’s documents by a party.

In practice, parties tend to conclude separate agreements on confidentiality and/or tribunals issue procedural orders on confidentiality. The agreements usually cover all documentation produced or used in connection with the arbitration. They are often used, unless the respondent is bound by its domestic laws to release information. It remains to be seen if this will change with the new UNCITRAL Rules on Transparency.

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apply in the arbitration. However, with the exception of information relating to essential security interests of the respondent, the tribunal has the last say over confidentiality. If a tribunal denies a request for redaction or confidentiality, the party who submitted the information may withdraw it from the arbitration proceedings. In addition, Article 7(6) and (7) allows the withholding of information if necessary for the integrity of the arbitral process. It is not clear how tribunals will interpret this term. In *Biwater v. Tanzania*, the tribunal used the term ‘procedural integrity’ in a carefully drafted procedural order balancing transparency and confidentiality interests. *Knahr* and *Reinisch* argue that the term ‘appears to comprise the entire set of circumstances necessary for the efficient conduct of proceedings of which confidentiality seems to be just one, albeit a crucial aspect.’ See C. Knahr/A. Reinisch, *Transparency versus confidentiality in international investment arbitration – the Biwater Gauff compromise*, 6 *The Law and Practice of International Courts and Tribunals* (2007), p. 106.

332 See Regulation 22(1) ICSID Administrative and Financial Regulations. Pursuant to Rule 48(4) ICSID Arbitration Rules, the Centre ‘shall’ publish excerpts of tribunal’s legal reasoning. Although not of value to potential *amici* for the arbitration from which the excerpt stems, this may aid prospective *amici* in other cases.

333 See the identical Articles 39 and 53(3) ICSID Additional Facility Rules.

Given the lack of a general rule on confidentiality/transparency, tribunals have decided *amici curiae*'s requests for access to hearings and documents on a case-by-case basis.<sup>334</sup> The issue increasingly has been regulated in procedural orders at the outset of the arbitration, usually in favour of confidentiality.<sup>335</sup> In NAFTA cases, states generally promptly release their pleadings to the public after having presented them to the tribunal.<sup>336</sup>

In *Methanex v. USA*, the *amicus curiae* was denied access to case documents in accordance with the parties' confidentiality order given that it had no special standing under the NAFTA or the UNCITRAL Arbitration Rules.<sup>337</sup> The tribunal left open the question if Article 25(4) of the 1976 UNCITRAL Arbitration Rules implied a duty of confidentiality for all written submissions, as alleged by the claimant, because the parties had agreed on a confidentiality order.<sup>338</sup> Admittedly, the tribunal was in a delicate situation. The other NAFTA member states in their Article 1128 NAFTA submissions held contrary views on the issue.<sup>339</sup>

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334 C. Zoellner, *supra* note 323, p. 195 (There were suggestions to amend Rule 32 ICSID Arbitration Rules in order to subject to the discretion of the tribunal the decision to allow third parties to attend or observe parts of or the entire hearings.).

335 E.g. *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.8 ('*Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public.')

336 A. Bjorklund, *The participation of amici curiae in NAFTA Chapter Eleven Cases*, 2002, p. 13, at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/participate-e.pdf> (last visited: 21.9.2017). According to *Bjorklund*, publication tends to encompass only the statements of claim and defence. This is problematic, because the parties' arguments are often significantly modified by the time of submission of memorials. The FTC Note's main value has been in adapting NAFTA member states' assurances to make their submissions publicly available into proceedings.

337 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, p. 21, para. 46.

338 *Id.*, p. 18, paras. 41-45. The parties had earlier in the proceedings agreed on a 'Consent Order regarding Disclosure and Confidentiality', which allowed them but not the tribunal to disclose the major pleadings, orders and awards of the tribunal. See *Id.*, p. 21, para. 46.

339 Mexico heavily opposed the opening of the proceedings to the public, while Canada supported full disclosure and announced that it would bring the issues to the attention of the NAFTA member states to regulate the issue of *amicus curiae* participation as a matter of urgency. *Id.*, paras. 9-10.

Tribunals in the following cases adopted this rationale irrespective of the applicable institutional rules or investment treaty. Upon admission of an *amicus curiae*, they noted that *amicus* participation would serve the interests of transparency, but they then denied it access to the hearings (given the absence of party consent) and documents (given an already existing confidentiality order the parties did not wish to amend).<sup>340</sup> Some tribunals have acknowledged *amici curiae*'s need for 'sufficient information on the subject matter of the dispute to provide perspectives, expertise and arguments which are pertinent and thus likely to be of assistance to the tribunal. Otherwise the entire exercise serves no purpose.'<sup>341</sup> However, many tribunals seem convinced that *amici curiae* are or should be able to draw sufficient information on the respective dispute from disclosures in the public domain to comment on 'broad policy issues.'<sup>342</sup> This blank refusal of access to documents might indicate a general doubtfulness by tri-

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340 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005 and Order in Response to a Petition by five Non-governmental Organizations for Permission to make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 23; *Glamis v. USA*, Decision on application and submission by Quechan Indian, 16 September 2005. *UPS v. Canada* deviates somewhat from the other cases because the petitioners requested public disclosure of case documents. The tribunal acknowledged that 'principles of transparency may support the release of some of the documentation' but found that the matter was not capable of a 'general ruling.' The tribunal held that the issue was subject to party agreement or a confidentiality order, neither of which existed at the time. See *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, paras. 4, 68, and Request of 10 May 2001, p. 1, para. 1. In *Biwater v. Tanzania*, confidentiality had been a major issue already prior to the *amicus* application, leading to a very detailed confidentiality order seeking to balance the public's (and the host state's) interest in transparency with the claimant's interest in confidentiality in a case that raised major public debate. See *Biwater v. Tanzania*, Procedural Order No. 3, 29 September 2006 and Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 12-13, 34. For further analysis, see C. Knahr/A. Reinisch, *supra* note 331.

341 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, para. 31 and Order in Response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 24.

342 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 64-66 ('None of these types of issue ought to require – at least for the time being – disclosure of documents from the arbitration.'). The situation was rather delicate in the case given that the tribunal had previously issued a con-

bunals about the usefulness of *amicus* briefs. Indeed, the *Biwater v. Tanzania* tribunal later acknowledged that the *amicus curiae* submission in part relied on inaccurate assumptions given its lack of access to the record.<sup>343</sup>

A tribunal operating under the ICSID Additional Facility Rules has granted *amici curiae* access to ‘those papers submitted to the Tribunal by the Parties that are necessary to enable the [*amici curiae*] to focus their submissions upon the issues arising in the case and to see what positions the parties have taken on those issues.’<sup>344</sup> In *Eureko v. Slovak Republic*, a

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confidentiality order to protect the ‘procedural integrity’ after the respondent had unilaterally released information to the public, which was already rallying against the investor. The tribunal feared to negatively impact the proceedings if documents were released to the *amici*. The tribunal later publicly circulated Procedural Order No. 6 to inform the *amici* of their possible role in the proceedings and to reject the claimant’s request that the tribunal find that *amici curiae*’s submission be bound by the confidentiality order. See *Biwater v. Tanzania*, Procedural Order No. 6, 25 April 2007, para. 6 and Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 66-67. See also *Suez/Vivendi v. Argentina*, Order in Response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, paras. 24-25 (‘[O]ffer their views on general issues which *per se* do not require comprehensive information on the factual basis of the case.’); *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, paras. 3.20-3.22, 3.27. An exception is *UPS v. Canada*, where the tribunal decided, without explanation, that the parties were to make available to the petitioners ‘copies of their current and any future pleadings’ to later find that the *amici curiae* would not have access to confidential information protected under the then-agreed confidentiality order. See *UPS v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, para. 6 and Procedural Directions for *Amicus* Submissions, 4 April 2003. Further, the tribunal noted that *amici* could use publicly available documentation which had been published in a lawful manner, in this case Canada’s Statement of Defense. See *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, p. 26, para. 68.

343 *Biwater v. Tanzania*, Procedural Order No. 6, 25 April 2007, para. 6 and Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 66-67.

344 *Piero Foresti v. South Africa*, Letter by Secretary to Tribunal to Petitioners, 5 October 2009, ICSID Case No. ARB(AF)/07/1, p. 1. The tribunal based this decision on two principles: (1) Non Disputing Party (NDP) participation is intended to enable NDPs to give useful information and accompanying submissions to the tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties. (2) Where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process. *Id.*

case under the Netherlands-Slovak Republic investment treaty and the 1976 UNCITRAL Arbitration Rules, the tribunal provided the Netherlands and the European Commission with the information it considered they needed for their comments.<sup>345</sup> In *Infinito Gold v. Costa Rica*, the tribunal noted that the answer to the *amicus's* request to be granted access to 'the principal arbitration documents' depended on 'whether access is required for APREFLOFAS to effectively discharge its task, i.e., provide the Tribunal with a useful and particular insight on facts or legal questions relevant to its jurisdiction' and that for the *amicus* 'to adequately meet this objective, it is undoubtedly preferable that it knows what information has already been submitted to the Tribunal.' Considering the claimant's objection to the request, the tribunal granted access to select portions of the parties' main submissions and admonished the *amicus* to use the documents 'exclusively for the purposes of preparing its written submission'.<sup>346</sup> These decisions show how tribunals, while complying with parties' wishes for confidentiality, can ensure the usefulness of an *amicus curiae*. However, these cases remain exceptions.

Overall, grant of access to documents by tribunals is sporadic, unless the parties have opted for general publicity.<sup>347</sup> This is unfortunate, because it is essential for *amicus curiae* participation to be useful. For the time being, access to case documents has been obtained mostly through the parties.<sup>348</sup>

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345 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 31.

346 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 40, 43-44.

347 R. Teitelbaum, *supra* note 324, p. 253. See also M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 *Columbia Journal of Transnational Law* (2003), p. 960 (Where public interests are involved, parties should not be free to agree on strict confidentiality). E.g. *Eli Lilly v. Canada*, Procedural Order No. 3, 15 January 2017, Case No. UNCT/14/2, para. 4.

348 E.g. *Glamis v. USA*, Award, 8 June 2009, pp. 127-128, para. 275 (documents available from the website of the US Department of State).

## V. Comparative analysis

Access to documents remains select and limited. International courts and tribunals rarely grant potential *amicus curiae* applicants privileged access, let alone a right to review the case files. *Amici curiae* are treated like any other member of the public. They, like the interested public, depend on the parties' publication of their submissions. This *status quo* is unsatisfying in terms of the efficiency of *amicus curiae* participation and raises doubts with respect to *amici's* ability to fulfil the requirements established for its participation.<sup>349</sup>

## G. Conclusion

This Chapter has considered how international courts and tribunals have accommodated *amicus curiae* in their proceedings. International courts and tribunals have been rather curt to the instrument. Few international courts and tribunals inform *amici curiae* of procedural steps in the proceedings beyond their decision on the respective *amicus's* request for leave.<sup>350</sup> Before all international courts and tribunals, participation as *amicus curiae* basically means the filing of one written submission. Only in advisory proceedings before the ICJ and the ITLOS and lately in the IACtHR, oral submissions are more common. In all other fora, oral *amicus curiae* participation is extremely rare. This fits with the general approach to proceedings in international litigation, where the introduction of novel information during the hearing is an absolute exception. Another advantage of this practice is its cost- and time-efficiency.

There is a noticeable emphasis on the form of *amicus curiae* participation before all international courts and tribunals. This arises from an effort to minimize negative impacts of *amicus curiae* participation on the parties.

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349 C. Brower, *Structure, legitimacy and NAFTA's investment chapter*, 36 *Vanderbilt Journal of Transnational Journal* (2003), pp. 72-73.

350 E.g. *UPS v. Canada*, Procedural Directions on *Amicus* Submissions, 4 April 2003 ('Messrs Sack Goldblatt Mitchell are being provided with a copy of the other directions and orders made today.')

International courts have established few substantive criteria for *amicus curiae* submissions. However, this has not been problematic.<sup>351</sup> The criteria are largely similar: submissions must be relevant for the case and be within the material jurisdiction of the court.<sup>352</sup> The latter has limited especially the extent to which international human rights and environmental law norms can be taken into account in investment and trade dispute settlement. The prohibition to extend the scope of the dispute is generally understood to mean a prohibition to introduce new claims (i.e. address matters beyond the tribunal's jurisdiction), but some courts apply a stricter standard and prohibit *amici curiae* to comment on any issue – including on laws applicable in the dispute – that were not already mentioned by the parties. This is a view held particularly by courts with a strong adversarial system of dispute settlement. There is an inherent tension between this requirement and the requirement that *amici curiae* shall not duplicate the issues addressed by the parties.<sup>353</sup>

Submissions cover a broad range of issues ranging from fact-focused submissions to abstract legal submissions to contextual submissions and submissions advocating a certain interpretation. While these submissions are legitimate if they accord with the tribunal's material scope of jurisdiction and its investigative powers (i.e. tribunals can only consider unsolicit-

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351 International courts and tribunals may ask for supplementary information. See, for instance, in relevant part, Article 84(2) ITLOS Rules: 'The Tribunal may require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also authorize the parties to comment, either orally or in writing, on the information thus furnished.' See also Art. 69(2) ICJ Statute.

352 The scenario portrayed by *Menétrey* is less dramatic than it may seem at first. According to her, 'une fois autorisées à soumettre un mémoire, les *amici curiae* sont libres du contenu et de l'orientation de leur propos sans que le tribunal n'ait plus aucun pouvoir de contrôle sur leurs observations. Le tribunal, qui se contente d'autoriser un *amicus curiae* à déposer un mémoire sans préciser les informations qu'il souhaiterait y trouver s'expose à recevoir des mémoires dont le contenu peut s'avérer décevant. L'absence de contrôle du tribunal risque de conduire à une emprise des parties sur le contenu du mémoire d'*amicus curiae* et prive le tribunal d'une information "individualisée".' S. Menétrey, *L'amicus curiae, vers un principe commun de droit procédural?* Paris 2010, p. 338. Admittedly, the need to engage in further clarification may lead to a delay in the proceedings.

353 See R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 307.

ed *amicus curiae* submissions to the extent they could obtain the information *proprio motu*), some of them raise concern. Submissions presenting solutions to the court on the case before it appear difficult to harmonise with the judges' obligation to render their own decision. Courts must be careful to avoid the appearance of not having reached their own decision.



### Part III

The added value of the international *amicus curiae*



## Chapter § 7 Does content matter? Substantive effectiveness of *amicus curiae* submissions

While the admission of *amicus curiae* submissions has received much scholarly attention, few have examined the extent to which submissions have been considered by international courts and tribunals in their decision-making. However, this is an essential issue, because it shows whether international courts and tribunals take seriously the content of submissions – and, ultimately, *amici curiae* as such.

Views in academia as to whether and how international courts and tribunals consider *amicus curiae* submissions differ. According to *Mistelis*:

It appears that Tribunals have effectively treated [*amici*] as a category of experts, whereby they have been allowed to express opinion in technical and legal matters and to provide results of research with the aim of assisting the Tribunal in forming a view. Two significant differences between experts and [*amici*] nonetheless remain: [*amici*] are not remunerated for their services; and they bear no contractual relationship to the arbitration parties and thus bear no liability for their representations.<sup>1</sup>

On the other hand, the *JIEL Editors* argue:

There is no inherent difference in nature between academic writings and other relevant documents (such as decisions of the ICJ) on the one hand, and *amicus curiae* briefs submitted by persons and organizations which are not the parties to the dispute on the other.<sup>2</sup>

In addition, reliance on *amicus curiae* submissions may influence international courts and tribunals' approach to evidence. *Stern* argues that this may be the case in the WTO:

[T]here are serious problems with respect to the *law of evidence*. Thus, in their briefs the NGOs do not have to prove their assertions. If the facts they report or the provisions to which they refer are prejudicial to one of the par-

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1 L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration*, London 2005, p. 198.

2 *Note by Editors*, 3 *Journal of International Economic Law* (2000), p. 706.

ties, it will be for that party to rebut them: there can be no doubt that this represents a distortion of the rules concerning the burden of proof.<sup>3</sup>

Further, there might be an overlap between the instrument and established categories of evidence, particularly between information-based *amici curiae* and expert-witnesses. Such an overlap may be problematic where an international court or tribunal considers *amicus curiae* submissions as evidence without subjecting them to the same standards and treatment as the established categories of evidence. *Amici curiae* are not bound by special agreements or professional duties. Accordingly, they cannot be held liable for misleading or wrong information.

This Chapter seeks to provide clarity on whether and how submissions are considered by international courts and tribunals in the outcome of a dispute. In particular, have *amici curiae* influenced the substantive outcome of a case? What are the issues considered? How do courts and tribunals assess submissions and verify their accuracy? How does the consideration of *amicus curiae* briefs relate to a court's general approach to evidence?<sup>4</sup> Has it distorted the (modified) adversarial process that the international courts and tribunals reviewed adhere to?<sup>5</sup>

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- 3 B. Stern, *The intervention of private entities and states as "friends of the court" in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.) *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1453.
  - 4 The term evidence is understood to include all information submitted to an international court or tribunal by the parties to a case or from other sources with an aim of establishing or disproving alleged facts. See R. Wolfrum, *International courts and tribunals: evidence*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 2; B. Cheng, *General principles of law as applied by international courts and tribunals*, Cambridge 1953, p. 307 (Every allegation of fact forwarded by a party must be proven, unless judicial notice is taken, their veracity is presumed or it has been admitted by the opposing party.).
  - 5 The adversarial process places the process in the hands of the parties: they initiate the case, define the subject matter of the dispute and provide the court with the necessary facts. The court's role is to decide the dispute on the basis of the information provided. E. Valencia-Ospina, *Evidence before the International Court of Justice*, 1 *International Law Forum* (1999), p. 202. But see M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 119, 130, 268 (,In zwischenstaatlichen Streitigkeiten gilt weder der Untersuchungsgrundsatz noch ein streng kontradiktorisches Verfahren. Am ehesten entspricht die Situation dem aus dem deutschen. Zivilprozessrecht bekannten (modifizierten) Verhandlungsgrundsatz.‘); E. Lauterpacht, *Principles of procedure in international litigation*, 345 *Receuil des Cours* (2009), p. 518; *Western Sahara Case*, Advisory Opinion, 16 October 1975, Sep. Op. *de Castro*, ICJ Rep.

The impact of *amicus curiae* participation on decisions and decision-making is difficult to measure, not only because deliberations are secret. Not all international courts and tribunals comment in their decisions on the sources relied upon. This Chapter is based on information drawn from judgments and awards, public statements by judges and court staff and, where apposite, *amicus curiae* submissions.

A. *An obligation to consider?*

Most international courts and tribunals clarify upon granting leave, in procedural orders, or in other rules on *amicus curiae* participation, that there is no guarantee, let alone a right of consideration. To the contrary, there seems to be agreement that the fate of a submission once filed is subject to the full discretion of the international court or tribunal. Indeed, a *right* to have a submission considered would have to emanate from the international court or tribunals' applicable laws. The existing laws barely comment on *amicus curiae*, let alone a right of reply or participation. Further, as a non-party, whose rights cannot be pronounced upon by a court or tribunal, an *amicus curiae* cannot request to be heard based on fair trial considerations.<sup>6</sup> The Appellate Body clarified this in *US–Shrimp*:

[U]nder the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.<sup>7</sup>

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1975, p. 138 ('In litigation, the parties are masters of the evidence: the court has a passive role. In the words of the traditional axiom of procedure, the court says to the party: *da mihi factum, dabo tibi jus*. The parties put forward facts and submit the evidence that they consider favourable to their claims, and the court takes them into consideration when making its decision (*secundum allegata et probata*). That is perfectly logical, because the purpose of the judgment is to decide as between the parties...').

6 This may be dissatisfying in cases where *amicus curiae* participation is used by entities affected by a judicial decision to obtain access to an international court or tribunal.

7 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101. See also *EC–Sardines*, Report of the Appellate Body,

The FTC Statement and several investment tribunals' procedural orders concerning *amicus curiae* are drafted similarly.<sup>8</sup> Judge Higgins notes that in the ICJ's *Nuclear Weapons* advisory proceedings the judges were informed of the *amicus curiae* briefs received on a weekly basis and that it was within their discretion to consult them.<sup>9</sup>

These practices are convincing. An *amicus curiae* submission should only be considered if a tribunal finds it relevant in its decision-making. For instance, a brief that was admitted because of its relevancy may become irrelevant because the matter discussed becomes moot during the proceedings. If an international court or tribunal would be obliged to consider every *amicus curiae* submission, a failure to do so might at worst affect the validity of the decision rendered and at best reduce the efficiency of proceedings.<sup>10</sup>

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adopted on 23 October 2002, WT/DS231/AB/R, para. 166 ('In particular, WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief.'). See also *US-Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 41 (Panels have 'no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations' as opposed to party and third party submissions.).

8 *Glamis v. USA*, Award, 8 June 2009, para. 286 (The tribunal emphasized the FTC Statement's Section 9 that '[t]he 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.'). See also *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, Sec. 3.6.8 ('The granting of leave to file an *amicus curiae* submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file an *amicus curiae* submission does not entitle the applicant that filed the submission to make further submissions in the arbitration. *Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their submissions must be limited to allegations, without introducing new evidence.').

9 R. Higgins, *Remedies and the International Court of Justice: an introduction*, in: M. Evans (Ed.), *Remedies in international law*, Oxford 1998, p. 1.

10 In *US-Shrimp*, Malaysia pointed to a drastic consequence of a right to consideration: 'It must be left to the complete discretion of panel members whether or not to read them. A panel's decision not to read the briefs cannot constitute a procedural mistake and cannot influence the outcome of a panel report.' See *US-Shrimp*, Re-

In exceptional cases, an obligation to consider an *amicus curiae* brief could arise from an international court or tribunal's duty to fully investigate a case and objectively assess it.<sup>11</sup> Still, such an obligation is owed towards the parties, not an *amicus curiae*. Nonetheless, according to *Bartholomeusz*, a consideration of admitted submissions is only logic and fair:<sup>12</sup>

Ordinarily one would think that a grant of leave to a person to make a submission entails a legitimate expectation that the court would then at least consider in good faith whatever is submitted.<sup>13</sup>

Indeed, why would a court admit an *amicus curiae* if it did not intend to consider it? Do courts tend to consider *amicus curiae* submissions for which leave was granted?

### B. International Court of Justice

The ICJ does not have a formalized approach regarding the consideration of *amicus curiae* submissions in contentious proceedings. It has not defined the status of information submitted by an intergovernmental organi-

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port of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 46.

- 11 E.g. WTO panels' duty under Article 11 DSU. See J. Koepf, *Die Intervention im WTO-Streitbeilegungsverfahren, Eine rechtsvergleichende Untersuchung im internationalen Verfahrensrecht*, Hamburger Studien zum Europäischen und Internationalen Recht, Band 32, Berlin 2001, p. 194.
- 12 L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), p. 240 ('It is difficult to imagine that a busy Court would permit *amicus* participation while contemplating that it was under no duty to even consider the resulting submissions.'). Also in favour, A. Reinisch/C. Irgel, *The participation of non-governmental organizations (NGOs) in the WTO dispute settlement system*, 1 Non-State Actors and International Law (2001), p. 147; C. Tams/C.-S. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 239; C. Ford, *What are friends for? In NAFTA Chapter 11 disputes, accepting amici would help lift the curtain of secrecy surrounding investor-state arbitrations*, 11 Southwestern Journal of Law and Trade in the Americas (2005), p. 253.
- 13 L. Bartholomeusz, *supra* note 12, p. 276. See also T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), pp. 409-410 ('[A]s a minimum requirement, [tribunals] should summarize the arguments made in the submission and *respond* to them in its reason for award.' [References omitted]).

zation pursuant to Article 34(2) ICJ Statute, possibly because of the few existing cases.<sup>14</sup> The Court considered in *Aerial Incident of 3 July 1988* the factual information submitted by the ICAO on the proceedings initiated before the ICAO Council following the shooting down of Iran Air flight IR655 and on the decisions adopted by the ICAO Council in response.<sup>15</sup> The ICJ excluded from the case file and chose not consider a note from the Director of the Legal Bureau containing his opinion on some of the legal aspects of the case, which had been enclosed with the documents the Court had requested. In his reply, the Deputy-Registrar informed the Director of the Legal Bureau that he was not including in the case file the letter ‘in so far as it relates to matters which fall for the Court itself to consider.’<sup>16</sup> In the *Corfu Channel* case, the Court stated that because Yugoslavia was not a party to the proceedings the documents it had submitted ‘could only be admitted as evidence subject to reserves’ and that it would forgo to assess their probative value.<sup>17</sup> However, the parties agreed to the use of some of the documents in the examination of one witness, which effectively accorded them the treatment reserved for ordinary evidence.<sup>18</sup> Finally, the ICJ has treated as ordinary party evidence documents entitled ‘*amicus curiae*’, which had been transmitted by one of the parties in contentious proceedings.<sup>19</sup>

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- 14 C. Chinkin/R. Mackenzie, *International organizations as ‘friends of the court’*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 141 (Opining that the United Nations Environment Programme should have participated in Gabčíkovo-Nagymaros.).
  - 15 *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, ICJ Pleadings, Vol II, p. 618.
  - 16 *Aerial Incident of 3<sup>rd</sup> July 1988 (Islamic Republic of Iran v. United States of America)*, Letter No. 3 (The Agent of the Islamic Republic of Iran to the Registrar of the International Court of Justice), Part IV: Correspondence, p. 639.
  - 17 *Corfu Channel Case*, Part III: Pleadings, ICJ Reports 1949, pp. 89, 90, 224, 233. See also S. Rosenne, *The law and practice of the International Court 1920-2005*, 4<sup>th</sup> Ed., Leiden 2006, p. 1333; S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht 1993, pp. 170-171.
  - 18 *Corfu Channel Case*, Part III: Pleadings, ICJ Rep. 1949, pp. 224, 233. See also S. Rosenne, *supra* note 17, *Law and Practice*, p. 1333.
  - 19 In *Democratic Republic of the Congo v. Belgium*, the ICJ did not discuss specifically a 750-page memorandum on universal jurisdiction prepared by Amnesty International and submitted (and cited) by Belgium with its counter-memorial, which was titled ‘*amicus curiae submission*’. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Counter Memorial of the King-

Pursuant to Practice Direction XII, the ICJ considers unsolicited *amicus curiae* submissions from NGOs ‘information readily available’. This categorization entails that *amicus curiae* submissions are regarded as being *en pars* with any information one can find in the public sphere. Due to their placement in the Court’s library with no possibility of online access as of writing, it is not surprising that the briefs have not been mentioned or adopted expressly by any party to date. Practice Direction XII does not state unequivocally that judges may consult the submissions *proprio motu*. Given the clear sentiment articulated in the Practice Direction, this option seems to concern only a few judges at best.<sup>20</sup> Judge Weeramantry in *Nuclear Weapons* in his Dissenting Opinion used the *amicus curiae* submissions to illustrate the public interest in the proceedings:

Though these organizations and individuals have not made formal submissions to the Court, they evidence a groundswell of global public opinion which is not without legal relevance.<sup>21</sup>

The ICJ’s *de facto* rejection of *amicus curiae* participation correlates with its hesitant use of its wide investigative powers granted under its Statute and Rules.<sup>22</sup> Its treatment of the Yugoslav submission and documents in the *Corfu Channel case* indicates that the Court would not treat *amicus cu-*

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dom of Belgium, 28 September 2001, pp. 80, 103 (FN250), 104, 105. Amnesty International attributed to the memorandum ‘functions of an *amicus curiae* brief.’ See D. Zagorac, *International courts and compliance bodies: the experience of Amnesty International*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 11, 15. Reports by NGOs are increasingly relied on by the parties as documentary evidence before the Court. See A. Riddell/B. Plant, *Evidence before the International Court of Justice*, London 2009, pp. 247-248. Some of the judges referred to the memorandum.

20 It is unknown if the submissions from non-state entities are still notified to the judges.

21 *Nuclear Weapons*, Advisory Opinion, 8 July 1996, Diss. Op. Judge Weeramantry, ICJ Rep. 1996, p. 216. Judge Weeramantry also took note of the 35 written statements and 24 oral submissions made by states. Under the subsection ‘World Public Opinion,’ he referred to NGOs dedicated to the eradication of nuclear weapons and the large number of signatures received in the proceedings. *Id.*, pp. 533-534.

22 The investigative powers are designed to be used only where the evidence submitted by the parties is conflicting or insufficient to render a decision in the case. The general ‘inquisitional power’ of the ICJ is enshrined in Article 48 ICJ Statute. Among the provisions in the ICJ Statute and the Rules which elaborate this general power, Article 50 ICJ Statute is particularly relevant in relation to *amicus curiae* (see Chapter 4). The ICJ delineated the exercised of its investigative powers in

*riae* submission like regular evidence.<sup>23</sup> The Court seems to make an ex-

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*Armed Activities (Congo)*: '[T]he Court will make such findings of fact as are necessary for it to be able to respond [to the claims of the parties]. It is not the task of the court to make findings of fact [even if it were in a position to do so] beyond these parameters.' See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Rep. 2005, pp. 168, 200, para. 57. The Court's restrictive attitude towards the use of its investigative powers has been ascribed to the prevalence of undisputed facts in the majority of cases, and its proclivity to rely on the evidence submitted by the parties. See M. Hudson, *The Permanent Court of International Justice, 1920-1942: a treatise*, New York 1943, p. 565; S. Rosenne, *The law and practice of the International Court*, Leiden 1965, p. 580. This has changed in recent years due to a rise in number of cases involving complex and disputed fact patterns. See R. Higgins, *Respecting sovereign rights and running a tight courtroom*, 50 *International and Comparative Law Quarterly* (2001), pp. 121, 129; M. Kazazi/B. Shifman, *Evidence before international tribunals – introduction*, 1 *International Law Forum* (1999), p. 194; A. Riddell/B. Plant, *supra* note 19, p. 70, with case examples. The ICJ has applied Article 50 ICJ Statute explicitly only in one case, the *Corfu Channel Case (Assessment of Amount of Compensation) (United Kingdom v. Albania)*, Order of 19 November 1949, ICJ Rep. 1949, pp. 142-169, 237. The sparse use of these powers has been strongly criticized by academics and parts of the bench, last in the *Pulp Mills case* concerning the authorization of the construction of two pulp mills on the River Uruguay, see *Pulp Mills Case*, Judgment, 20 April 2010, Sep. Op. of Judge Trindade, ICJ Rep. 2010, p. 41, para. 151. The dispute raised complex scientific and technical questions, and the parties submitted a vast amount of documentary evidence and consulted several experts. The ICJ decided to 'make its own determination of the facts, on the basis of the evidence presented to it.' Several judges had wanted to apply Article 50 ICJ Statute stressing that the Court, in order to fulfill its function, required possessing both the relevant facts and fully grasp their meaning, see *Pulp Mills Case*, Judgment, 20 April 2010, ICJ Rep. 2010, pp. 72-73, para. 168 and Declaration Judge Yusuf, ICJ Rep. 2010, p. 219, paras. 10-12 and Joint Diss. Op. Judges Al-Khasawneh and Simma, ICJ Rep. 2010, pp. 116-117, para. 17 ('[I]n a case concerning complex scientific evidence and where, even in the submissions of the Parties, a high degree of scientific uncertainty subsists, it would have been imperative that an expert consultation, in full public view and with the participation of the Parties take place.'). While the criticism by its own members signals that the ICJ may change its attitude towards the admission of Court-appointed experts, such a change likely would be limited to cases with complex scientific or technical issues and only concern experts, not *amici curiae*. In a few cases, the ICJ has solicited expert advice without following the procedure prescribed by its Statute and Rules and without including the consultations in the case file. This was suspected in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Rep. 2002, p. 303; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment,

ception for state-like entities,<sup>24</sup> and when an *amicus curiae* brief is submitted by a party together with its regular submissions. These briefs are treated by the ICJ like ordinary party evidence in accordance with the broad powers of the parties as regards the submission of evidence.

In addition, it is unlikely that *amicus curiae* participation would conflict with or undermine the rules on evidence. The ICJ follows a very strict definition of experts and witnesses. Experts and witnesses do not deter-

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- 16 March 2001, ICJ Rep. 2001, p. 40. See T. Daniel, *Expert evidence before the ICJ*, Paper presented at the Third Bi-Annual Conference of ABLOS 2003, pp. 4-5. According to Jennings, 'the Court has not infrequently employed cartographers, hydrographers, geographers or linguists, and even specialized legal experts to assist in the understanding of the issues in a case before it; and it has not on the whole felt any need to make this public knowledge or even appraise the parties.' See R. Jennings, *International lawyers and the progressive development of international law*, in: J. Makarczyk (Ed.), *Theory of international law at the threshold of the 21<sup>st</sup> century: essays in honour of Krzysztof Skubiszewski*, The Hague 1996, pp. 413, 416. See also P. Couvreur, *Le règlement juridictionnel*, in: L. Lucchini (Ed.), *Le processus de délimitation maritime: étude d'un cas fictif: Colloque international*, Monaco, 27 au 29 mars 2003, Paris 2004, p. 384. Critical of this practice, *Pulp Mills Case*, Judgment, 20 April 2010, Joint Diss. Op. Judges Al-Khasawneh and Simma, ICJ Rep. 2010, pp. 114-115, para. 14. Further, in at least one case, the ICJ considered NGO reports available in the public domain to assess a factual claim. See R. Wolfrum, *supra* note 4, para. 60, referring to the assessment of Uganda's claim that it acted in self-defence in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Rep. 2005, para. 129. However, these cases remain exceptions.
- 23 For an analysis of the rules on evidence, see M. Lachs, *Evidence in the procedure of the International Court of Justice: role of the court*, in: E. Bello/B. Ajibola (Eds.), *Essays in honour of Judge Taslim Olawale Elias*, Dordrecht 1992, p. 265; D. Sandifer, *Evidence before international tribunals*, Charlottesville 1975, pp. 184-185 (The ICJ regards the absence of any restrictive rules beside the element of timeliness a confirmation of the fact that parties have a *right* to submit the information they see fit.).
- 24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep. 2007, p. 195, para. 371; A. Riddell/B. Plant, *supra* note 19, p. 255 (The ICJ 'seemed to attach a limited amount of probative value to an official statement by the parliamentary president of Republika Srpska which originated not from either party, but a separate political entity claiming statehood.' They credit the consideration of the document by the Court to the fact that the declaration was made by a high-ranking political figure and had been communicated by official publication and that its contents were consistent with other evidence brought before the court.).

mine the scope of their submissions. They answer the questions placed to them by the Court and the parties. In the *Nicaragua* case, the ICJ did not take into account information provided by a witness, because it considered it to have been ‘a mere expression of opinion.’ The ICJ found that the submission ‘may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself.’<sup>25</sup> *Amici curiae* extremely rarely limit themselves to the submission of unprocessed information.

Thus, currently, there is no interaction between *amicus curiae* participation and the system on evidence. Even if the Court would open up to the instrument, it is extremely unlikely that it would treat it like evidence given the *Corfu Channel* precedent.

### C. *International Tribunal for the Law of the Sea*

The ITLOS has yet to receive submissions pursuant to Article 84 ITLOS Rules by intergovernmental organizations or under its Cooperation Agreement with the UN.<sup>26</sup> Its procedural structure, including its investigative powers, is similar to the framework governing proceedings before the ICJ.<sup>27</sup> The ITLOS also has broad auxiliary investigative powers despite generally following an adversarial process.<sup>28</sup> The ITLOS rarely relies on its investigative powers, possibly, because the parties have taken an active role in fact-heavy cases.<sup>29</sup>

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25 *Nicaragua Case*, Judgment (Merits), 27 June 1986, ICJ Rep. 1986, para. 68.

26 The *amicus curiae* submission from Greenpeace International in the *Arctic Sunrise case* was not admitted. However, this was not necessary, because the claimant closely cooperated with the *amicus curiae* (see Chapter 5).

27 Unlike the ICJ, the ITLOS has the power to appoint technical or scientific experts who may be present during deliberations, see Article 42(2) ITLOS Rules. Under Article 289 UNCLOS, the ITLOS may appoint technical or scientific experts *proprio motu*.

28 The ITLOS may, pursuant to Article 82(1) of its Rules, arrange for an inquiry or expert opinion. According to Article 77 ITLOS Rules, it may seek or ask the parties to provide information necessary for the elucidation of any aspect of the case. This includes arranging for the attendance of a witness or expert. See P. Chandrasekhara Rao/P. Gautier (Eds.), *Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2007, p. 219.

29 The ITLOS has applied Article 77 ITLOS Rules in one case. It ordered the parties to set up a group of experts to assess the potential negative impacts of Singapore’s

In *Responsibilities*, the Seabed Disputes Chamber did not explicitly rely on any of the written submissions from states and intergovernmental organizations under Article 133(3) ITLOS Rules. The Seabed Disputes Chamber treated the *amicus curiae* submission it received from Greenpeace International and WWF as a publication readily available. In doing so, like the ICJ, it decided not to accord the submission any evidentiary value, but it gave the participating states and organizations an opportunity to adopt the brief or parts thereof pursuant to Article 63(1) ITLOS Rules.<sup>30</sup> In their submission, the WWF and Greenpeace International had argued for an in-

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land reclamation efforts in a provisional measures order. See *Case concerning land reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order, 8 October 2003, ITLOS Case No. 12, p. 16. The ITLOS has stated in early judgments that it intends to base its consideration of the facts primarily on the evidence submitted by the parties by emphasizing that the establishment of the factual record is primarily their task. See *Saiga No. 2 Case (St. Vincent and the Grenadines v. Guinea)*, Judgment (Merits), 1 July 1999, ITLOS Rep. 1999, pp. 10, 37, para. 66; *The “Grand Prince” Case (Belize v. France)*, Judgment (Prompt Release), 20 April 2001, ITLOS Rep. 2001, pp. 17, 44, para. 92 (The tribunal considered whether there was a need to seek information on the registration of *The Grand Prince* in Belize, but it decided that it should deal with the issue on the basis of the material provided by the parties.). Critical, *The “Grand Prince” Case*, Judgment (Prompt Release), 20 April 2001, Joint Diss. Op. Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson and Jesus, ITLOS Rep. 2001, p. 66, para. 3 (Nine judges referred to Article 77 ITLOS Rules in their dissenting opinions); P. Chandrasekhara Rao/P. Gautier (Eds.), supra note 28, p. 232. The tribunal has relied on Article 76(1) ITLOS Rules in several cases, see R. Wolfrum, in: Vitzthum (Ed.), *Handbuch des Seerechts*, Munich 2006, p. 58. Nonetheless, the tribunal has engaged actively in the consideration of its cases towards the parties. See *M/V Saiga (No. 2) Case (St. Vincent and the Grenadines v. Guinea)*, Provisional Measures, Order, 11 March 1998, ITLOS Case No. 2, para. 37. The ITLOS relied on Article 77(1) ITLOS Rules to ask the parties for comments regarding the release of the vessel from detention. See also P. Chandrasekhara Rao/P. Gautier (Eds.), supra note 28, pp. 217-218 (‘The Tribunal has regularly exercised the power ... to indicate points and issues which it would like the parties to address. ... The practice also reflects the Tribunal’s policy to remain proactive in the conduct of the proceedings.’ This indicates that the lack of use of its investigative powers cannot be interpreted as an expression of a general hesitation towards the use of investigative powers.).

30 Article 63(1) ITLOS Rules: ‘There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading. Parties need not annex or certify copies of documents which have been published and are readily available to the tribunal and the other party.’

tegrated interpretation of the UNCLOS, as well as strict liability of the sponsoring state based on the no-harm-rule and the polluter pays principle, and they had heavily relied on the ILC's 2006 Principles on the Allocations of Loss in Case of Transboundary Harm. The United Kingdom, in its pleading, mentioned the *amicus curiae* submission when it disputed the pertinence of some of these arguments.<sup>31</sup> None of the arguments were picked up by the Chamber in its opinion. In *SRFC*, the two *amicus* submissions from WWF seem to have been read by some states and organizations making submissions, as well as by the ITLOS itself. Notably, as regards Question 1 of the advisory opinion – *What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States?* – New Zealand in its submission made reference to the WWF's *amicus curiae* brief to note the 'consistent view contained in the written statements presented to the Tribunal that a flag State is under a legal duty to exercise effective control over its vessels when they are fishing in the Exclusive Economic Zone (EEZ) of another State.'<sup>32</sup> In addition, some of the arguments made by the *amicus curiae* with respect on this question (which also were voiced in other submissions) were arrived at in a similar manner by the ITLOS in its opinion. For instance, the ITLOS held that the obligation to prevent IUU fishing extends to also to states of nationals fishing in the EEZ of a coastal state – an issue that had not been covered by the question.<sup>33</sup> Further, the scope of obligations of flag states it pronounced is very similar to those proposed by WWF, and both agree in their view that these obligations constitute due diligence obligations.<sup>34</sup>

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31 *Responsibilities*, Advisory Opinion, ITLOS Case No. 17, Verbatim Records, Public Sitting, 16 August 2010, 23:21-25 and 37:13-16.

32 *SRFC*, Written Statement of New Zealand on the Statements made as provided under Order 2013/5, 13 March 2014, ITLOS Case No. 21, para. 3, and also paras. 4, 9.

33 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 121-124. *SRFC*, Further *Amicus Curiae* Brief on Behalf of WWF International, 13 March 2014, ITLOS Case No. 21, para. 35 ('[A]lthough WWF accepts that Question 1 relates only to flag States rather than States of nationality, WWF respectfully invites the Tribunal to elaborate as far as it feels able on the obligations of States of nationality.').

34 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 111, 112, 125, 129, 140; *SRFC*, Further *Amicus Curiae* Brief on Behalf of WWF International, 13 March 2014, ITLOS Case No. 21, paras. 10, 35.

Worth mentioning is also that the ITLOS followed WWF's 'encouragement' to draw from Article 63(1) in its interpretation of the term 'sustainable management' in Question 4 – *What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest ...?*, as well as the argument that also this obligation was one of due diligence.<sup>35</sup> Thus, as regards advisory opinions, some states, and possibly the ITLOS, have considered *amicus* briefs.

#### D. European Court of Human Rights

While the ECtHR now summarizes – thus, acknowledges – virtually all admitted *amicus curiae* submissions in its judgments (usually immediately after the parties' submissions on an issue), it only occasionally refers to them in the reasoning, making it difficult to assess the concrete value accorded to them.<sup>36</sup> Still, many briefs are relied upon and discussed by the court to corroborate (or disprove) the parties' allegations or to reason the court's legal findings, indicating that they were influential in shaping the court's decision.<sup>37</sup> Briefs are often considered, even when the court ulti-

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35 *SRFC*, Further *Amicus Curiae* Brief on Behalf of WWF International, 13 March 2014, ITLOS Case No. 21, para. 19; *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 191, 210.

36 According to *Van den Eynde*, the participation of NGOs as *amici* does not increase the likelihood that the court will find in favour of an applicant, see L. Van den Eynde, *An empirical look at the amicus curiae practice before the European Court of Human Rights*, 31 *Netherlands Quarterly of Human Rights* (2013), pp. 288-293.

37 In *Greens and MT v. the United Kingdom*, the ECtHR granted leave to the Equality and Human Rights Commission (EHRC) to comment on an alleged violation of Article 3 Protocol No. 1 to the ECHR for refusal by British authorities to enrol the applicant, a prisoner, on the electoral register for domestic and EU elections. The ECHR informed the court of the case's factual background, and pointed it to its earlier case law on the issue. It noted the UK government's delay in implementing earlier ECtHR decisions and drew the court's attention to the number of affected persons by presenting the relevant statistics. The ECtHR took the submission fully into account in deciding that there had been a violation of Article 3 Protocol 1 to the European Convention. The court denied that there had been a violation of Article 13 ECHR. See *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010; *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44, paras. 27, 31 (The ECtHR mentioned some of the facts submitted by the TUC.); *Pham Hoang v. France*, Judgment of 25 September 1992, Series A No. 243, p. 15, para. 40 (The

mately decides not to follow the arguments made.<sup>38</sup> This includes the earlier-discussed *Soering* case and briefs on the IACtHR's case law on forced disappearances.<sup>39</sup> In *Varnava and others v. Turkey*, the court accepted a written submission from the NGO Redress containing arguments on the obligation to conduct an effective investigation into a forced disappearance and on the reparation and amount of moral damages to be paid to the victims' families under Article 41 ECHR. In its brief, Redress relied *inter alia* on international conventions and the practice of the IACtHR and the ECtHR.<sup>40</sup> The court rejected a general obligation to pay moral damages under the Convention, but found that exceptionally non-pecuniary awards could be made in cases of severe damages. As proposed by Redress, the

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court explicitly relied on the fact submissions made by the *Conseil d'Etat* and the Court of Cassation Bar.); *McCann and others v. the United Kingdom*, Judgment of 27 September 1995, Series A No. 324, p. 21, para. 157 (The court noted that the *amici curiae* and applicant submissions were identical on a specific fact submission.); *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115, p. 13 (The UK government, upon receiving an *amicus* brief by JUSTICE via the court, wrote to the registrar to correct some statements it had made in its own memorial to which the *amicus curiae* had called attention.); *MGN Limited v. the United Kingdom*, No. 39401/04, 18 January 2011; *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011; *Ahrens v. Germany*, No. 45071/09, 22 March 2012; *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, para. 195; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, para. 88; *Morice v. France* [GC], No. 29369/10, 23 April 2015, para. 168. See also L. Bartholomeusz, *supra* note 12, p. 241; *J.N. v. the United Kingdom*, No. 37289/12, 19 May 2016, para. 100.

38 *Al-Sadoon and Mufdhi v. the United Kingdom*, No. 61498/08, 2 March 2010, ECHR 2010; *Frasik v. Poland*, No. 22933/02, 5 January 2010, ECHR 2010; *Scordino v. Italy (No. 1)* [GC], No. 36813/97, 29 March 2006, ECHR 2006-V, para. 173 (The court began its reasoning by refuting the arguments of the *amici curiae* – the governments of Poland, the Czech Republic and Slovakia – that states should possess a wide margin of appreciation in determining the reasonable duration of judicial proceedings.).

39 *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161. See also N. Bürli, *Amicus curiae as a means to reinforce the legitimacy of the European Court of Human Rights*, in: S. Flogaitis et al. (Eds.), *The European Court of Human Rights and its discontents*, Cheltenham et al. 2013, pp. 137-138 (According to Bürli, the ECtHR directly quoted parts of Amnesty International's submission in its reasoning.).

40 *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009, paras. 220-221.

court considered as a factor in the assessment of the amount to be awarded the duration of the breach. The court did not order the Turkish government to conduct an effective investigation of the nine disappearances in the operative part of the judgment. This was criticized in the concurring opinion of *Judge Spielmann*, which was joined by *Judges Ziemele and Kalaydjieva*. They explicitly relied on Redress's argument that the effective remedy owed under Article 41 ECHR included an effective investigation and referred to the court's earlier case law on this issue that had been mentioned by Redress.<sup>41</sup> In *M.C. and A.C. v. Romania*, a case concerning alleged lack of effective investigation of ill-treatment due to discrimination against LGBTIQ\* persons, the court referred to reports from the European section of the International Lesbian, Gay, Bisexual, Trans and Intersex Association ILGA to 'acknowledge[...] that the LGBTIQ\* community in the respondent State finds itself in a precarious situation, being subject to negative attitude towards its members.'<sup>42</sup> The ECtHR has also significantly relied on comparative law reports in its reasonings, especially to determine whether a consensus among its member states exists on a particular issue (see Chapter 6). This includes the case *Sheffield and Horsham v. the United Kingdom* where the court explicitly named a study on legislative developments in respect of recognition of post-operative gender status of transgender persons to conclude that there was no common European approach to the issue. The applicant in the case had complained against the refusal by British authorities to change his birth certificate to reflect his reasigned gender.<sup>43</sup> This shows the importance ascribed to such reports.

Especially in ethically sensitive cases, the court extensively summarizes the arguments made by the different interest representatives. This has included cases on the right to life, homosexuals' rights, the full-face veil ban

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41 *Id.*, Conc. Op. Judge Spielmann, joined by Judges Ziemele and Kalaydjieva, paras. 3, 6.

42 *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, para. 118. See also *Rasul Jafarov v. Azerbaijan*, No. 69981/14, 17 March 2016, where the court relied, among other, on the contextual submissions from the third parties Council of Europe Commissioner for Human Rights and the Helsinki Foundation for Human Rights, Human Rights House Foundation and Freedom Now to find that in recent years legislative efforts had created a difficult operational environment for NGOs in Azerbaijan, and that there was a systematic effort to silence human rights activities through criminal persecutions, *Id.*, paras. 99-113, 120, 161.

43 *Sheffield and Horsham v. the United Kingdom*, ECHR 1998-V 84, para. 57. See also N. Bürli, supra note 39, p. 140.

and assisted suicide (see Chapter 6).<sup>44</sup> The court uses *amici* to take note of and understand societal changes and, if necessary, to justify modifications of its case law to adapt to these changes.<sup>45</sup> For instance, in *SAS v. France* concerning the ban by French law of the full-face veil, the court not only summarized the arguments made by the third party interveners, but it also adopted and refuted several of the arguments and fact submissions made, thereby showing that it had thoroughly read and considered the submissions of the *amici curiae*.<sup>46</sup>

In some of the cases where *amici curiae* have made submissions to protect their rights, the ECtHR has been careful not to prejudice them. In *Brumărescu v. Romania*, the ECtHR was called to decide an alleged violation of Article 6(1) ECHR for denying access to justice to the applicant who was seeking to regain ownership of his parents' house. The house had been nationalized in 1950. The predecessor of the *amicus curiae* had purchased a flat in the house in 1973. The *amicus curiae* argued that the court could not return the property in the flat to the applicant without violating its property rights. In its judgment, the court followed the argument. It acknowledged the direct risk to the *amicus's* rights. In accordance with its jurisdictional limitations, the court refrained from pronouncing on the legal situation of the flat on the ground floor.<sup>47</sup>

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44 For many, see *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, ECHR 2003-XII; *Koch v. Germany* (dec.), No. 497/09, 31 May 2011; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *A, B and C v. Ireland* [GC], No. 25579/05, 16 December 2010, ECHR 2010; *SAS v. France* [GC], No. 43835/11 1 July 2014; *Parrillo v. Italy* [GC], No. 46470/11, 27 August 2015. However, in some cases, the court has ignored *amicus curiae* briefs, even though the arguments provided touched directly on a central aspect of the case, e.g. *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.

45 E.g. in *Stafford v. the United Kingdom* [GC], No. 46295/99, 28 May 2002, ECHR 2002-IV. See also N. Bürli, *supra* note 39, p. 138.

46 *SAS v. France* [GC], No. 43835/11, Judgment of 1 July 2014, paras. 137, 147, 148. The ECtHR rejected as 'not pertinent' the allegation made by the applicant and some of the *amici* that the ban was based on the assumption that the veil was an instrument of duress, after having studied the explanatory memorandum of Law No. 2010-1192 of 11 October 2010. It further noted and later rejected the argument that a blanket ban was disproportionate.

47 *Brumărescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I, p. 43, para. 69 (It held that the 'proceedings before it, brought by the applicant against the Romanian State, can only affect the rights and obligations of those parties. The Court also notes that the intervener was not a

The court does not consider *amici curiae* to be a formal source of evidence.<sup>48</sup> The instrument is regulated in the general sections on proceedings in the ECHR and the ECtHR Rules and not in the sections reserved for evidence. Still, the ECtHR has relied on facts submitted by *amici curiae* to complete the record, to establish the contextual background and to draw conclusions on facts. Further, it has drawn from legal arguments to reason an interpretation.<sup>49</sup> In *Al Hamdani v. Bosnia and Herzegovina*, the ECtHR noted that *amicus curiae* participation played a particular role in respect of the parties' evidence:

The Court will take as its basis all the material placed before it or, if necessary, material obtained on its own initiative. It will do so particularly when an applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.<sup>50</sup>

The ECtHR has developed a system of evaluation of *amicus curiae* submissions. It attaches greater value to submissions made by persons or entities with direct knowledge of a situation or expertise in the matter. It does not appear to differentiate between submissions based on the origin or nature of *amicus curiae*. It has weighed equally information submitted by NGOs involved in the case and by an international organization with oper-

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party to any of the domestic proceedings at issue in the present case, the sole parties to those proceedings having been the applicant and the Government.').

48 In *Avotiņš v. Latvia*, the court seems to have considered some fact submissions made by the Cypriot government appearing as *amicus curiae* as evidence. The case is atypical in so far as the submissions in question concerned remedies available under Cypriot law. The government also furnished the court with the relevant national laws and case law. The court noted that the parties had not disputed the respective fact submission, particularly that the claimant could have appealed the judgment whose enforcement under the Brussels I Regulation was at issue. See *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016, paras. 68, 122.

49 E.g. *Kocherov and Sergejeva v. Russia*, No. 16899/13, 29 March 2016, para. 98; *V.M. and others v. Belgium*, No. 60125/11, 7 July 2015, para. 148.

50 *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012, para. 50. See also *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016, paras. 97, 98 (The ECtHR noted that the respondent had not contested the submission from various NGOs regarding a worldwide trend to treat same-sex couples as family members and recognizing a right to live together, as well as a European trend deduced from the practice of different European organizations, including the European Parliament and the Council of Europe, to view same-sex couples as families in the immigration process. The court appears to have relied on these submissions in its decision that Italy had violated Articles 14 and 8 ECHR.).

ative experience in the country in question in the establishment of the fact record.<sup>51</sup> The court's evaluation of facts submitted by *amici curiae* is somewhat untechnical, as its assessment of the submissions in *Kaboulov v. Ukraine* shows:

The court has had regard to the reports of the various international human and domestic human rights NGOs, the US State Department and the submissions made by the Helsinki Federation for Human Rights ..., which joined these proceedings as a third party. According to these materials, there were numerous credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects by the Kazakh law-enforcement authorities. ... The Court does not doubt the credibility and reliance of these reports. Furthermore, the respondent Government has not adduced any evidence, information from reliable sources or relevant reports capable of rebutting the assertions made in the reports above.<sup>52</sup>

Thus, the court currently seems to verify submissions only by considering their plausibility on the basis of a comparison of all party and non-party submissions. This is problematic. According to *Sadeghi*, the ECtHR has 'a tendency to rely heavily and uncritically on secondary sources, at times deferring to their findings wholesale when their factual determinations are of questionable reliability', and without having 'articulated any discernible guidelines for the use of secondary sources, nor can any consistent standards be deduced from the Courts' judgments.'<sup>53</sup> Indeed, a review of *amicus curiae*-related case law confirms that the court has not articulated the

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51 See *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B, paras. 55, 61 (Briefs were received from Amnesty International et al. and the Northern Ireland Standing Advisory Commission on Human Rights. The court extensively referred to Amnesty's submission on the standard of scrutiny to be applied by the court. The court noted where the fact submissions from the parties and the *amici* corresponded. The court quoted, but rejected a fact submission from Amnesty on the safeguards against abuse of detention power. *Judge Martens*, in a concurring opinion, noted that he voted against the brief with considerable hesitation. He almost dedicated his entire opinion to an analysis of the brief and stated that he agreed with it in large parts. *Judge Pettiti* in his Diss. Op. adopted the arguments of Amnesty International.).

52 *Kaboulov v. Ukraine*, No. 41015/04, 19 November 2009, para. 111.

53 K. Sadeghi, *The European Court of Human Rights: the problematic nature of the court's reliance on secondary sources for fact-finding*, 25 Connecticut Journal of International Law (2009), p. 128. *Sadeghi* refers to *Jabari v. Turkey*, where the court held that the applicant, an Iranian woman who faced deportation from Turkey to Iran where she had been found to have committed adultery, would face a real risk of inhumane treatment. The court relied on the UNHCR's assessment of

standards it applies to verify *amicus curiae* submissions prior to using them to test party submissions, a procedure which is important given that entities have different standards of fact-finding and may not be accountable otherwise.<sup>54</sup> This aspect is also relevant with respect to *amicus curiae* submissions analyzing the court's own case law. As detailed in Chapter 6, *amici curiae* tend to draw the attention of the court to one or two poignant examples instead of providing a complete overview of the court's earlier decisions on a certain issue.

The reliance on *amicus curiae* and other submissions to corroborate (or disprove) the parties' allegations, while legitimate under Article 36(2) ECHR as the establishment of the facts of the case can be considered part of the administration of justice, may undermine the parties' primary responsibility to furnish the court with the relevant facts. This concern is somewhat mitigated by the fact that the ECtHR has strong investigative powers from which it has deduced an obligation to establish the objective truth.<sup>55</sup> A further concern is that only a fraction of cases receive *amicus curiae* submissions. Thus, parties in cases with *amicus curiae* submissions

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the veracity of her allegations, an Amnesty International report and a US Department of State report to corroborate the applicant's claim.

54 K. Sadeghi, *supra* note 53, pp. 143, 150-151. *Sadeghi* contends that Amnesty International does not require its employees to conduct fact-finding based on standardized procedures. He proposes several remedies, such as less-discretionary evidentiary standards, especially regarding admissibility, and the development of informal standard operating procedures for NGOs, international organisations and agencies.

55 The ECtHR's basic adversarial set-up is complemented by strong investigative powers, which are sketched in Article 38 ECHR. The provision stipulates that '[t]he Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.' Rule A1 of the 1998 Annex to the ECtHR Rules clarifies further that the court may without the parties' consent and with complete discretion as to the means engage in a full investigation of the case *ex officio*, including a consultation of secondary sources. See also R. Schorm-Bernschütz, *Die Tatsachenfeststellung im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Münster 2004, pp. 54-55, 58; L. Loukis, *Standards of proof in proceedings under the European Convention of Human Rights*, in: J. Valu (Ed.), *Présence du droit public et des droits de l'homme, mélanges offerts à Jacques Velu*, Vol. III Brussels 1992, p. 1440; J. Kokott, *Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, Heidelberg 1993, pp. 387-389. However, the ECtHR only rarely engages in a full investigation of the facts of a case. It has re-

may be held to a different standard of evidence than parties in other cases. In addition, the ECtHR does not seem to test the veracity of *amicus curiae* submissions other than by cross-checking them with other submissions received in a case. While this approach accords with the ECtHR's approach to evidence and its heavy reliance on secondary sources, yet again it reinforces the need for tight admission control and independency checks of *amici curiae*.<sup>56</sup>

#### E. *Inter-American Court of Human Rights*

The IACtHR traditionally has neither reproduced, nor summarized, nor explicitly evaluated the content of *amicus curiae* submissions in its judgments, though this seems to slowly change. This may be due largely to its limited resources and the significant amount of submissions received per case. Based on statements by former court officials, *obiter dicta* in some judgments and a comparison of *amicus curiae* submissions with judgments, the court regularly relies on *amicus curiae* submissions both in contentious and in advisory proceedings. *Padilla*, a former employee of the court, conveys: 'Judges of the Inter-American Court have told me that

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served, but barely used its right to question the Commission's evaluation of evidence or conduct its own investigations. See R. Schorm-Bernschütz, *supra* note 55, pp. 36-39. This includes cases where the ECtHR found that the facts were not proven beyond a reasonable doubt, see *Tekin v. Turkey*, Case No. 22496/93, Judgment, 9 June 1998, para. 38.

56 The ECtHR frequently considers secondary sources, including the fact determinations by the domestic courts seized with the matter prior, especially if the facts are properly documented and undisputed between the parties. Further, it reserves the right to question and verify the parties' allegations and evidence. See J. Callewaert, *The judgments of the court: background and content*, in: R. Macdonald/F. Matscher/H. Petzold (Eds.), *The European system for the protection of human rights*, Dordrecht 1993, p. 720; *Rehbock v. Slovenia*, Judgment, 28 November 2000, Diss. Op. Judge Zupancic, No. 29462/95. The court has made clear that to this end it may rely on reports from sources other than the parties, including statements from international authorities and organizations, third states and NGOs. K. Sadeghi, *supra* note 53, p. 127. Based on the principle of the free assessment of evidence, the court enjoys full discretion with regard to the value it attaches to the respective evidence before it. Regarding the different standards of proof applicable in proceedings before the ECtHR and the IACtHR, see R. Schorm-Bernschütz, *supra* note 55, pp. 119-121.

the *amici curiae* have provided invaluable contributions to the court's deliberations and judgments.<sup>57</sup>

*Amicus curiae* submissions to the IACtHR appear to have been particularly influential in the creation or expansion of rights.<sup>58</sup> The creation of a separate right to truth for family members of victims of forced disappear-

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57 D. Padilla, *The Inter-American Commission on Humans Rights of the Organization of American States: a case study*, 9 American University Journal of International Law & Policy (1993), pp. 95, 111. See also G. Umbricht, *An "amicus curiae" brief on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 791; M. Ölz, *Non-governmental organizations in regional human rights systems*, 28 Columbia Human Rights Law Review (1997), p. 360; J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-state actors and international law (2001), p. 184. It is reported that the IACtHR relied on the arguments of *amici curiae* without referencing the submissions in *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion No. OC-2/82 of 24 September 1982, IACtHR Series A No. 2 and *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights*, Advisory Opinion No. OC-3/83 of 8 September 1983, IACtHR Series A No. 3, see N. De Piérola y Balta/C. Loayza Tamayo, *Los Informes de Amici Curiae Ante La Corte Interamericana de Derechos Humanos*, 12 Anuario de derecho internacional (1996), pp. 469-471.

58 See also *Artavia Murillo and others (Fecundación in vitro) v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 28 November 2012, IACtHR Series C No. 257 (According to the NGO Interights, the court in finding that a full ban on the practice of in-vitro fertilization violated several rights of the ACHR cited relevant ECHR case law and practice material referred to in its brief). The court also occasionally considers novel concepts even if it chooses not to adopt them. In *González and others ("Cotton Field") v. Mexico*, a case concerning the failure of the Mexican state to offer the necessary guarantees to protect the life and physical integrity of three young women who disappeared and later were found injured and dead in Ciudad Juarez, North Mexico, the IACtHR explicitly noted some of the arguments made by *amici curiae* on the concept of femicide. The court ultimately found that it did not possess sufficient evidence to confirm that the murders of the three (and more than one hundred other) women in Ciudad Juarez constituted gender-based murders. But it stated that 'it understands that some or many of them may have been committed for reasons of gender.' See *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009 (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No. 205, p. 41, para. 144. *Acosta Lopez* argues that the result may have been due also to the fact that *amici curiae*, the IAComHR and experts did not follow a uniform concept of femicide, see J. Acosta López, *The Cotton Field Case: gender perspective and feminist theories in the Inter-American Court of Human Rights Jurisprudence*, 21 *Revista Colombiana de Derecho Internacional* (2012), pp. 17-54.

ance is largely a product of (lobbying) efforts by *amici curiae*.<sup>59</sup> In *Velásquez Rodríguez v. Honduras*, the IACtHR followed the argument from Amnesty International in its *amicus curiae* brief that forced disappearances violated the prohibition against torture.<sup>60</sup> In *Bamaca Velásquez v. Colombia*, the International Commission of Jurists and the International Center for Transitional Justice proposed creation of a right to truth in cases of forced disappearances on the basis of several provisions of the ACHR. The IACtHR adopted the proposal and established the right.<sup>61</sup> The CIEL, who appeared as *amicus curiae* in several cases before the IACtHR (and other international courts), has stated that it ‘has successfully argued in a petition to the IACHR that environmental rights are encompassed within the right to life and the right to health, and has enjoyed even wider success in arguing that property rights, particularly those of indigenous peoples, encompass environmental rights.’<sup>62</sup>

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59 In its submission in *Bámaca-Velásquez v. Guatemala*, the International Commission of Jurists argued that this right was an established principle of international humanitarian law referenced in international human rights law and also implied in Article 29(c) ACHR. At the time, only Judge Cançado Trindade voted in favor of such a right in his separate opinion, see *Bámaca-Velásquez v. Guatemala*, Judgment, 25 November 2000 (Merits), IACtHR Series C No. 70, p. 45. See also *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219.

60 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), IACtHR Series C No. 4.

61 *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), IACtHR Series C No. 70.

62 See J. Cassel, *Enforcing environmental human rights: selected strategies of US NGOs*, 6 *Northwestern Journal of International Human Rights* (2007), p. 113 [References omitted]. In several cases before the IAComHR, the CIEL has successfully argued for an inclusion of environmental rights in several human rights cases concerning indigenous people. In *San Mateo v. Peru*, the CIEL submitted an *amicus curiae* brief arguing that Peru had violated the people of San Mateo’s rights to life, to property and to organize by granting mining licenses to companies. Pollution from the mining operations had caused significant health problems among the population. In August 2004, the IAComHR adopted the CIEL’s request for precautionary measures to protect the above rights of the people exposed to toxic sludge in San Mateo de Huanchor. The CIEL has stated that it deliberately chooses to participate as *amicus curiae* before the court ‘because the IACtHR is a forum where petitioners seeking to enforce environmental rights have a relatively high likelihood of success’ given that the court ‘has been open to a flexible jurisprudence on international human rights law.’ See *Id.*, p. 115.

The IACtHR has on occasion considered in its judgments facts contained in *amicus curiae* submissions. In *Caso del Penal Miguel Castro Castro v. Peru*, Judge Cançado Trindade in his reasoned opinion relied on the joint submission from two human rights NGOs which contained new arguments on the factual events in the prison and the perpetrators. The case concerned the so-called ‘Operative Transfer 1’ in the Miguel Castro Castro Prison in May 1992 (see Chapter 5).<sup>63</sup> In his separate opinion in *La Cantuta v. Perú*, Judge Cançado Trindade several times referred to an *amicus curiae* brief from the NGO Institute of Legal Defense with regard to the practical effect of the court’s declaration as legally invalid of national self-amnesty laws.<sup>64</sup> In *Mendoza et al v. Argentina*, the IACtHR relied on an *amicus curiae* brief to elaborate on the effect of life sentences on minors.<sup>65</sup> In another case, the court in a footnote replicated the submissions by the CEJIL and an ethics and political philosophy professor on the negative stereotyping of the Mapuche indigenous people in Chilean society and mass media.<sup>66</sup> The court used the footnote to corroborate expert, testimonial and documentary evidence, including UN expert reports. It did not at-

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63 *The Miguel Castro Castro Prison v. Peru*, Judgment of 2 August 2008 (Interpretation of the Judgment on Merits, Reparations and Costs), IACtHR Series C No. 181, p. 3, para. 6. See also *Mohamed v. Argentina*, Judgment of 23 November 2012 (Preliminary Objection, Merits, Reparations and Costs), IACtHR Series C No. 255, paras. 41, 51 (The IACtHR relied on *amicus* submissions twice to corroborate the fact record with respect to the applicable laws and legal system in a case concerning *inter alia* the respondent’s violation of the principle of non-retroactivity enshrined in the ACHR.).

64 *La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs), IACtHR Series C No. 162, p. 4, paras. 34, 40. Similarly, in *Massacres of El Mozote and nearby places v. El Salvador*, Judgment of 25 October 2012 (Merits, Reparations and Costs), IACtHR Series C No. 252, FN 475, the court cited an *amicus curiae* brief by the Salvadoran ombudsman to show that the ombudsman believed that the Salvadoran Amnesty Law at issue violated the constitutional and international human rights law obligations of El Salvador.

65 *Mendoza et al v. Argentina*, Judgment of 14 May 2013 (Preliminary Objections, Merits and Reparations), IACtHR Series C No. 260, paras. 315, 316, FN 390, 391. In the judgment, the court also cited the *amicus curiae* brief from *Colectivo de Derechos de Infancia y Adolescencia* to point to shortcoming of a specific law concerning child offenders, see *Id.*, para. 76, FN 48.

66 *Norín Catrimán et al. (Leaders, Members and Activists of the Mapuche Indigenous People) v. Chile*, Judgment of 29 May 2014 (Merits, Reparations and Costs), IACtHR Series C No. 279, para. 93, FN 100. Similarly, a footnote reference was made to a submission by Women’s Link Worldwide and the Law Clinic of the Uni-

tach any evidential value to the *amicus curiae* briefs, but cited them and the documents referenced by them at length.

In 2008, in *Kimel v. Argentina*, the IACtHR indicated that it considered legal *amicus curiae* submissions to be evidence, if appropriate:

[A]mici curiae briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court. ... [T]he Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, *amici curiae* briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court.<sup>67</sup>

In its *advisory opinion concerning Article 55 of the ACHR*, the IACtHR noted that *amicus curiae* briefs in the case were valuable in the progressive development of the inter-American human rights system. The briefs submitted in the case mostly consisted of textual analysis of the American Convention.<sup>68</sup> In addition, the court uses the number of *amicus curiae* submissions as an indicator for the public interest in the case.<sup>69</sup>

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versity of Valencia to confirm the obligations of forensic doctors who were detailed in the Istanbul Protocol in *Espinoza González v. Perú*, Judgment of 20 November 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 289, para. 260, FN 437.

67 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, paras. 14, 16 [emphasis added]. Confirmed in *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 184.

68 *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, paras. 6, 17.

69 *Brewer Carías v. Venezuela*, Judgment of 26 May 2014 (Preliminary Objections), Joint Dissenting Opinions of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, IACtHR Series C No. 278, para. 3 ('The special interest that this case has aroused in civil society should also be stressed, since 33 *amicus curiae* briefs have been received from renowned international jurists, as well as from legal and professional institutions and non-governmental organisations and associations of the Americas and Europe, concerning different issues relating to the litigation, such as the rule of law, judicial guarantees, due process of law, judicial independence, the provisional nature of the judges, and the practice of law. All these *amici curiae* coincide in indicating different violations of Mr. Brewer's rights under the Convention.').

The court does not consider *amicus curiae* briefs to constitute formal evidence. The court has declared without giving reasons that the clarifying purpose of *amici curiae* entails that ‘an *amicus curiae* brief may never be assessed as an actual probative element.’<sup>70</sup> The court’s official position might gradually shift to correspond with its current practice. In *Chinchilla Sandoval v. Guatemala*, the respondent requested that the court should not take into consideration an *amicus curiae* brief. It lengthily criticized and sought to disprove each brief, arguing among other that the briefs were not sufficiently aware of the real situation of individuals incarcerated in the Guatemalan prison system and the present case. The respondent submitted further that the *amicus* was unaware of the respondent’s submissions, that it was submitting new facts and that it failed to display sufficient cognizance of the social, judicial and political reality of Guatemala.<sup>71</sup> The court discussed and dismissed the respondent’s request. Relying on Article 2(3) of its Rules, it noted that *amici curiae* were not a procedural party to the dispute and that the purpose of submissions was to illustrate fact or legal matters related to the process, without the court being obliged to evaluate or weigh these briefs. The court deduced from this that the respondent’s comments did not affect the admissibility of the briefs, but that they could be considered at the moment of the evaluation of the substantial information contained in the briefs.<sup>72</sup> This statement neither confirms nor disproves the earlier approach to *amicus curiae*. However, the placement of these considerations in the evidence portion of the judgment under the heading ‘evaluation and admissibility of *amici curiae*’ insinuates that the court is shifting towards considering briefs as evidence. Notwithstanding, the court’s current stance does not preclude the submission of evidence by an *amicus curiae*. In *Acevedo Jaramillo et al. v. Peru*, the Peruvian Ombudsman appeared as *amicus curiae* and submitted several documents.

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70 *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282, para. 15; *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment of 25 November 2013 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 272, para. 10.

71 *Caso Chinchilla Sandoval v. Guatemala*, Judgment of 29 February 2016 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 312, para. 37.

72 *Caso Chinchilla Sandoval v. Guatemala*, Judgment of 29 February 2016 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 312, para. 38.

These were admitted as evidence and cited by the court to demonstrate the number of judgments the Peruvian executive branch had yet to comply with.<sup>73</sup>

A risk of confluence of *amicus curiae* and formal sources of evidence became apparent in *Cesti Hurtado v. Peru*. The IACtHR, after having accepted an *amicus curiae* submission from the Chairman of the Human Rights Committee of the Bar Association of Lima, Mr. Rivas, on the organization's efforts to locate and help the applicant who had disappeared, upon request by the IAComHR invited Mr. Rivas to appear as a witness to complement the written submission before it.<sup>74</sup> The giving of a formal witness status in the proceedings indicates that the involvement as *amicus curiae* was not considered sufficient, possibly, because there was no option otherwise to hear and question Mr. Rivas and to include his statements in the formal case record. A convergence of expert evidence and *amicus curiae* occurred in *Garífuna Community of "Triunfo de la Cruz" and its members v. Honduras*. The case concerned several alleged violations by the respondent of the ACHR in connection with a tourism development project on ancestral lands of the rural indigenous Garífuna community. The court accepted an *amicus* brief from Christopher Loperena, an Assistant Professor at the University of San Francisco, who had done extensive work in support of Garífuna territorial rights in Honduras. Mr. Loperena was later heard as an expert on the Garífuna people. The court relied in its judgment on submissions he made in an affidavit in respect of the sources of livelihood and occupation of the Garífuna, as well as on his expert statements in a previous case.<sup>75</sup> Also, the court explained neither

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73 *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 144, FN 151, cited by F. Rivera Juaristi, *The "amicus curiae" in the Inter-American Court of Human Rights (1982 – 2013)*, in: Y. Haecck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, p. 128. Similarly, in *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 154, para. 80, the court admitted into evidence documents submitted with an *amicus* brief, as the court considered that the documents were 'useful and relevant to the case'.

74 *Cesti Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56, pp. 16-17, para. 56.

75 *Garífuna Community of "Triunfo de la Cruz" and its members v. Honduras* (Merits, Reparations and Costs), Judgment, 8 October 2015, IACtHR Series C No. 305, para. 50, FN 43.

how it relies on national law submissions from *amici curiae*, which are considered facts in international law, nor on other fact submissions, if not as evidence.

Despite the IACtHR's assurances, these exemplary cases display an overlap between *amicus curiae* and evidence in practice. The court in *Cesti Hurtado v. Peru* considered both the *amicus curiae* brief and the witness statements in the judgment without qualitatively distinguishing the two. There is no indication that the parties objected to the consideration of either submission. Interestingly, the IAComHR later stated that the *amicus curiae* submission had been only of an informative character and that it had not been decisive for the IACtHR's judgment.<sup>76</sup> This statement may have been motivated by an effort to stymie any potential criticism from the respondent state. The informal reliance on *amicus curiae* briefs corresponds with the IACtHR Rules' addressing of *amicus curiae* submissions in the section relating to general aspects of the written proceedings, as well as the definition of the concept. It determines that *amici curiae* shall furnish the court with *arguments*, including on the facts. It does not assign *amici* a role in the establishment of the fact record.

The IAComHR has given an insight into the value it attaches to submissions from non-governmental organizations. Its practice is worth considering here due to the IAComHR's central role in the establishment of the facts of a case and, because it elucidates the IACtHR's approach to *amicus curiae*. The IACtHR unfortunately has not explained its method of weighing and evaluating *amicus curiae* submissions. In a case concerning an armed attack on military barracks in an Argentinean town, the IAComHR replied to the respondent's questioning of the value of a report from Amnesty International:

The Inter-American Court has recognized the authority of an international organ to freely evaluate proof, stating that "for an international tribunal, the criteria for evaluating proof are less formal than in internal legal systems". Consequently, probative elements which are different from direct proof, such as circumstantial evidence, clues, presumptions, press articles and, where relevant, reports of non-governmental organizations may be used, provided that the conclusions drawn therefrom are consistent with the facts and corroborate the testimony or events alleged by the complainants. Assigning this power of discretion of an international organ is particularly relevant "in cases involving the violation of human rights in which the State cannot allege as its defence

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76 *Cesti Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56, pp. 16, 171, para. 56.

the complainant's inability to provide proof which, in many cases, cannot be obtained except with the State's cooperation". Taking these principles into consideration ..., the Commission based part of its considerations in the present case on the report from Amnesty International. That report, in addition to corroborating the substance of the petitioners' complaints, permitted conclusions to be drawn that were consistent with the facts, in so far as it was based on information gathered directly at the place where the events took place and immediately after their occurrence.<sup>77</sup>

According to this quote, *amici curiae* are given the same evidential status as circumstantial evidence or reports from NGOs, and they are not formal evidence.

Overall, there is a divergence between the IACtHR's official position to the assessment of *amicus curiae* briefs and a growing body of case law.<sup>78</sup> Despite its statements, the IACtHR appears to increasingly treat *amicus curiae* submissions as evidence, especially with respect to legal arguments, domestic laws and practices and public opinion. In this respect, *amici curiae* mesh with the court's already very broad investigative powers and its approach to evidence.<sup>79</sup> Where it treats an *amicus curiae* brief

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77 Annual Report of the Inter-American Commission on Human Rights 1997, published on 17 February 1998, Report No. 55/97, *Juan Carlos Abella v. Argentina*, paras. 407-408 [References omitted]. See also A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005, p. 353.

78 F. Rivera Juaristi, *supra* note 73, p. 128.

79 The ACHR and the IACtHR Statute contain virtually no procedural rules, leaving the regulation of evidence to the court's discretion. Article 25(1) IACtHR Statute instructs the IACtHR to draw up its own rules. The basic set-up of the court's proceedings is adversarial. However, like the ECtHR, the IACtHR has established broad investigative rules. Pursuant to Article 58(a) IACtHR Rules it may, at any stage of the proceedings, '[o]btain on its own motion, any evidence it considers helpful and necessary. In particular, it may hear, as an alleged victim, witness, expert witness, or in any other capacity, any person whose statement, testimony, or opinion it deems to be relevant.' Article 58(c) further allows it to 'request any entity, office, organ, or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point.' The IACtHR has emphasized that it considers its powers to carry out investigations ancillary to the IAComHR's role as the primary provider of information. Still, the court regularly uses its investigative powers and summons experts to present reports, including on legal aspects when it considers it necessary to complete the factual record and obtain further legal information. See S. Davidson, *The Inter-American Court of Human Rights*, Dartmouth 1992, p. 53. On the development of the Inter-American human rights system as a system to protect individual rights, see C. Medina, *The*

like evidence, the court should apply the same scrutinizing process as for regular evidence so as to not undermine its evidentiary rules.<sup>80</sup>

#### F. African Court on Human and Peoples' Rights

*Lohé Issa Konaté v. Burkina Faso* is the only case with *amicus curiae* participation to have been decided on the merits as of writing. The court summarized the *amicus curiae*'s arguments in its judgment. While it did not expressly rely on the *amicus curiae* submission in its final decision, it reached the same conclusion. Like the *amicus curiae* had argued, the ACtHPR found that the criminalization of defamation was not proportionate in the context of a democratic society, as it was not necessary to protect the rights and reputation of members of the judiciary.<sup>81</sup> The ACtHPR has not yet commented on how it assesses or categorizes *amicus curiae* briefs.

#### G. WTO Appellate Body and panels

There is no norm on *amicus curiae* participation like Article 10(2) DSU. The provision determines that third party submissions 'shall be reflected in the panel report.' Accordingly, the Appellate Body in *US–Shrimp* emphasized that it was obliged 'to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding' dampening expectations that it would carefully consider the content of all *amicus curiae* submissions.<sup>82</sup> Indeed, its report did not consider any

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*Inter-American Commission on Human Rights and the Inter-American Court on Human Rights: reflections on a joint venture*, 12 Human Rights Quarterly (1990), p. 441.

80 The IACtHR Statute and Rules regulate neither the weighing and evaluation of evidence nor the allocation of the burden of proof. The IACtHR has adopted a flexible approach in practice. See D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 American University International Law Review (1994), pp. 351-352. In its judgments, the court carefully analyzes and weighs in a separate section party evidence.

81 *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, pp. 38, 44, paras. 145, 164.

82 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101. See also *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Recourse to Art. 21.5 DSU,

of the arguments presented by the *amici curiae*. Former Appellate Body member *Mitsuo Matsushita* stated during a conference discussion:

[I]n my days there was not a case in which the Appellate Body relied on the *amicus* brief when it made decisions. The first time this issue came up was in the *Steel Bar* case in 1999. So, up until that time, I don't think that was really a very big issue.<sup>83</sup>

Panels and the Appellate Body frequently operate with the terms of necessity, relevancy, pertinence and usefulness as reasons for not considering *amicus curiae* submissions.<sup>84</sup> Unfortunately, reports rarely further explain these terms.<sup>85</sup> This approach, coupled with the DSU's strict confidentiality

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Report of the Appellate Body, adopted on 21 November 2001, WT/DS132/AB/RW, p. 34, para. 107; Articles 12(7), 7(2) DSU.

- 83 M. Matsushita, *Transparency, amicus curiae briefs and third party rights, discussion round*, 5 *Journal of World Investment and Trade* (2004), p. 344.
- 84 E.g. *US–Clove Cigarettes*, Report of the Appellate Body, adopted on 24 April 2012, WT/DS406/AB/R, p. 4, paras. 10–11; *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 42; *Brazil–Retreaded Tyres*, Report of the Appellate Body, adopted on 17 December 2007, WT/DS332/AB/R, para. 7; *EC–Biotech*, Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.11; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 76; *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 78; *EC–Sugar*, Report of the Appellate Body, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, para. 9; *US–Antidumping and Countervailing Duties (China)*, WT/DS379/AB/R, 2011; *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R; *EC–Seal Products*, Report of the Appellate Body, adopted on 18 June 2014, WT/DS400/AB/R, WT/DS401/AB/R, para. 1.15. In *US–Softwood Lumber III*, the panel stated that: '[W]e decided to accept for consideration one unsolicited *amicus curiae* brief from a Canadian non-governmental organization, Interior Alliance.' No further reference was made to the submission in the report, see *US–Softwood Lumber III*, Report of the Panel, adopted on 1 November 2002, WT/DS236/R, para. 7.2; *US–Tuna II (Art. 21.5)*, Report of the Appellate Body, adopted on 3 December 2015, WT/DS381/AB/RW, FN 68.
- 85 In *US–Copyright Act*, the USA argued that the panel should not include a letter from the American Society of Composers, Authors and Publishers, because 'the letter was of little probative value for the panel because it provided essentially no

regime, entails significant uncertainty for potential *amici curiae*.<sup>86</sup> Increasingly, panels tend to transfer the decision whether to consider a submission onto the parties. In several cases, panels have held that they will consider *amicus curiae* submissions only to the extent that one of the parties adopts the respective submission (or parts thereof), and only after all party submissions have been read.<sup>87</sup>

An analysis of the cases with *amicus curiae* submissions indicates that, so far, unadopted and unsolicited *amicus curiae* submissions have been considered in substance by a panel or the Appellate Body in four cases.

First, in *Australia–Salmon (Article 21(5))* concerning Australia’s compliance with the measures prescribed following the Appellate Body’s earlier finding that Australia’s import prohibition of Canadian salmon among other violated Article 5(5) SPS Agreement, the panel received a letter from ‘Concerned Fishermen and Processors’ in South Australia.<sup>88</sup> The panel informed the parties that ‘[t]he letter addresses the treatment by Australia of, on the one hand, imports of pilchards for use as bait or fish

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factual data not already provided by either party.’ The letter was not included (without providing reasons). See *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R, para. 6.5; B. Stern, *supra* note 3, pp. 1443–1444.

86 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, FN 4 (The American Institute for International Steel in an *amicus* brief asserted that it ‘intend[ed] its written brief to make a contribution to the resolution of this dispute that [was] *not* likely to be repetitive of what [had] been and [was] likely to be submitted by a party or third party to this dispute.’).

87 In *EC–Bed Linen*, for instance, the panel noted that the parties did not provide substantive comments on the *amicus curiae* submission and proceeded to declare it unnecessary in reaching its decision, see *EC–Bed Linen*, Report of the Panel, adopted on 12 March 2001, WT/DS141/R, p. 6, FN 10. See also *US–COOL*, Report of the Panel, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R, para. 2.10 (The panel informed the parties that they should comment on an *amicus curiae* application ‘both with respect to whether or not the Panel should accept and consider the brief, as well as the content of the brief in terms of its relevance for the Panel in carrying out its duties.’).

88 Article 5(5) SPS Agreement: ‘With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. [...]’

feed and, on the other hand, imports of salmon. The Panel considered the information submitted in the letter as relevant to its procedures and has accepted this information as part of the record.<sup>89</sup> While the panel stressed that the information submitted concerned directly Canada's claim under Article 5(5) SPS Agreement, in its reasoning it did not elaborate on the substance of the brief.<sup>90</sup> Further, the letter itself has not been made public.<sup>91</sup> Thus, it is only known that the brief was considered but not to what extent.

Second, in *US–Tuna II*, the panel explicitly referred to the documents submitted by the *amici curiae* as evidence and lengthily dispelled doubts concerning their veracity, which Mexico had raised.<sup>92</sup> The case was initiated by Mexico in 2009 on the account that the US's conditions for the use and obtaining of the US Department of Commerce's dolphin-safe labels for tuna and tuna products violated the GATT and Articles 2(1), (2) and (4) TBT Agreement.<sup>93</sup> A central issue of the case was whether it was permissible to deny the dolphin-safe label to tuna and tuna products that had been caught by setting on dolphins. In an unsolicited *amicus curiae* submission, the Humane Society International and the American University Washington College of Law reported on the negative impact of this method on dolphin populations, as well as consumers' support of strict dolphin-safe labels, which had led the overwhelming majority of US tuna companies to purchase only dolphin-safe tuna already prior to the enact-

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89 *Australia–Salmon*, Recourse to Article 21.5, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 7.8.

90 *Id.*, para. 7.9.

91 In the report, the panel concluded that Australia was not in breach of Article 5(5) SPS Agreement. It found that although Australia was employing diverging levels of protection to different but sufficiently comparable situations, the different treatment was scientifically justified and therewith neither arbitrary nor a disguised restriction on international trade. *Lindblom* attributes the consideration to the 'considerable commercial interests at stake.' See A. Lindblom, *supra* note 77, p. 327.

92 *US–Tuna II (Mexico)*, Report of the Panel, adopted on 13 June 2012, WT/DS381/R, para. 7.368.

93 Regarding Article 2(1), the panel rejected Mexico's claims that US dolphin-safe labelling measures discriminated against Mexican tuna products. Further, it ruled that the labelling did not violate Article 2(4), which requires 'technical regulations to be based on relevant international standards where possible'. However, the panel agreed with Mexico that the labelling measures were too restrictive.

ment of the disputed US legislation.<sup>94</sup> The panel made clear at the beginning of its report that it had considered also the parts of the brief that had not been attached by the US ‘to the extent that it deemed it relevant to the examination of the claim before it’.<sup>95</sup> In particular, the panel relied on the records of a hearing in the US Senate before the Subcommittee on Oceans and Fisheries which discussed amending the legal act in question, as well as several newspaper articles detailing that tuna processing companies had adopted strict dolphin-safe measures due to intense consumer pressure seven months before the enactment of the strict dolphin-safe requirements in the challenged acts. On this basis, they found that therefore any lessening of the standard to allow for some monitored and controlled dolphin setting (as requested by the complainant) would not change tuna companies’ purchasing policies.<sup>96</sup> Further, the panel relied on the information provided by *amicus curiae* that 90% of the world’s tuna processing companies had employed a strict ‘no setting on dolphins’ standard.<sup>97</sup> The information supported the panel’s finding that Mexico had failed to demonstrate that the dolphin-safe measures afforded less favourable treatment to Mexican tuna products in violation of Article 2(1) TBT Agreement.<sup>98</sup>

Third, in *US–COOL*, a case brought by Mexico and Canada to challenge the legality of US federal legislation mandating the labelling of the origin of certain perishable products under Articles III, IX and X GATT

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94 The brief is retrievable at: [http://www.hsi.org/assets/pdfs/hsi\\_wcl\\_amicus\\_tuna\\_brief\\_2010.pdf](http://www.hsi.org/assets/pdfs/hsi_wcl_amicus_tuna_brief_2010.pdf) (last visited: 19.9.2017).

95 The USA had fiercely argued in favor of the brief’s consideration stating that the submissions contained ‘relevant and useful information that could assist the Panel in understanding the issues in this dispute’. It had also relied on as well as cross-referenced several exhibits and parts of the brief that the panel considered to ‘form part of the submissions of that party in these proceedings.’ See *US–Tuna II (Mexico)*, Report of the Panel, adopted on 13 June 2012, WT/DS381/R, paras. 7.7, 7.9. During the appeal proceedings, the Appellate Body rejected further unsolicited submissions. See *US–Tuna II (Mexico)*, Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R, para. 8.

96 Overall, Mexico challenged three measures. In particular, it challenged Title 16, section 1385 Dolphin Protection Consumer Information Act which had been enacted by the US Congress in the late 1990. See *US–Tuna II (Mexico)*, Report of the Panel, adopted on 13 June 2012, WT/DS381/R, paras. 7.10, 7.182, FN 288, 7.363 and FN 552.

97 *Id.*, para. 7.368 and FN 559.

98 On appeal, the Appellate Body did not rely on an *amicus* brief submitted by the same entities. See *US–Tuna II (Mexico)*, Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R, para. 8.

1994, Articles 2 and 12 TBT Agreement and Article 2 Agreement on Rules of Origin, the panel, after inviting the parties to comment on an *amicus curiae* brief, held that it ‘considered the information contained in the brief as necessary to the extent that it was reflected in the written submissions and evidence submitted by the parties.’<sup>99</sup> Neither the parties nor the panel further mentioned the submission in the report, and it could not be retrieved otherwise, making it impossible to assess the extent to which the panel relied on the brief and how it assessed it.

Fourth, in 2001 in *EC-Sardines*, the Appellate Body in its consideration of whether EC Regulation No. (EEC) 2136/89 prevented Peruvian exporters from using the trade description ‘sardines’ for their products in breach of Articles I, III and XI(1) GATT 1994 and Articles 2 and 12 TBT Agreement decided to consider the legal parts of an *amicus curiae* submission from Morocco.<sup>100</sup> The Appellate Body rejected as unsubstantiated an allegation by Morocco that the Regulation was inconsistent with the relevant international standards. But it decided to consider in greater detail Morocco’s legal arguments on Article 2(1) TBT Agreement and the GATT 1994.<sup>101</sup> Having found that the Regulation was in violation of Article 2(4) TBT Agreement, the Appellate Body held that it did not need to consider Article 2(1) to resolve the dispute and, accordingly, did not revert to the arguments made.<sup>102</sup>

These cases show, first, that the WTO panels and the Appellate Body are not unwilling to consider *amicus curiae* briefs altogether; and, second, that panels apply evidentiary standards to the consideration of briefs in that they require allegations to be properly substantiated.

Are there noticeable differences between these briefs and other briefs which may have contributed to their consideration? All of the above cases concerned trade barriers and limitations of trade. In three of the four cases,

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99 *US-COOL*, Report of the Panel, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R, para. 2.10.

100 The Appellate Body decided that Article 17(6) DSU prevented it from considering the large fact sections of the briefs addressing the scientific differences between the *sardina pilchardus Walbaum* (‘*Sardina pilchardus*’) and *sardinops sagax sagax* (‘*Sardinops sagax*’) on which the disputed EEC Regulation relied, as well as the economic situation of the Moroccan fishing and canning industries. *EC-Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 169.

101 *Id.*, paras. 169-170.

102 *Id.*, paras. 313-314.

the challenged measures had been issued for reasons of environmental and/or consumer protection.<sup>103</sup> Furthermore, all of the *amici curiae* possessed in-depth knowledge and experience in the matters they commented on.<sup>104</sup> Finally, the information drawn from the submissions consisted of contextual information and arguments relating to the interpretation of the WTO Agreement and its related Agreements. In particular, they did not concern general considerations on how to reconcile trade and non-trade related interests. The nature of the submitting entity does not seem to have played a role. The submissions stemmed from a range of entities: affected business people, non-governmental and educational entities with an extensive track record of advocacy on environmental issues and one state. This, at least *prima facie*, dispels contentions that business-interest *amici curiae* receive a more favourable treatment *per se*.

Submissions solicited by panels pursuant to Article 13 DSU receive a different treatment.<sup>105</sup> Solicited information is considered carefully by panels and referred to throughout the reports.<sup>106</sup> Information is given significant weight, seemingly without additional fact-checking. This became evident in *EC–Biotech* where the panel found it unnecessary to take into account the *amicus curiae* submission from a group of experts, while consulting with several individuals and international organizations, including the United Nations' Food and Agriculture Organization, the World Orga-

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103 This confirms an observation made by *Durling* and *Hardin* that WTO adjudicating bodies seem hesitant to receiving *amicus curiae* submissions in cases concerning trade remedies. See J. Durling/D. Hardin, *Amicus curiae participation in WTO dispute settlement: reflections on the past decade*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 226.

104 E.g. *US–Tuna II (Mexico)*, Report of the Panel, adopted on 13 June 2012, WT/DS381/R. The *amicus curiae* had been involved for almost 30 years in the issues pertaining to the dispute. Also, as regards the concerned fishermen, there is no doubt as to their practical knowledge and experience.

105 *US–Lead and Bismuth II*, Appellate Body Report, adopted on 7 June 2000, WT/DS138/AB/R, para. 153.

106 This is similar to information solicited from scientific experts. See M. Cossy, *Panels' consultation with scientific experts: the right to seek information under Art. 13 DSU*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 218 ('In the *US–Shrimp* case, the panel referred only in a few instances to the reports provided by the experts; it made a general reference to them to conclude that conservation measures should be adopted. ... The panel in *EC–Asbestos* referred extensively to the comments by the experts in its analysis of likeness under Art. II of GATT 1994 as well as in its findings under Art. XX of GATT 1994 and other findings.').

nisation for Animal Health and the United Nations Environment Programme on the construction of the ordinary meaning of several terms of Annex A to the SPS Agreement. *Ishikawa* notes that these consultations with scientific experts were influential in bringing non-WTO international law to the attention of the panel in this particular case.<sup>107</sup>

Party-appended *amicus curiae* briefs are considered like regular party-submitted evidence, as stated by the Appellate Body in *US–Shrimp*:

We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. ... [A] participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.<sup>108</sup>

Accordingly, panels apply the same standards to the evaluation of attached submissions and to regular party evidence.<sup>109</sup> This practice accords with their duty under Article 11 DSU to 'consider all the evidence presented to

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107 T. Ishikawa, *supra* note 13, p. 405.

108 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 89. The Appellate Body ultimately decided to ignore the *amicus curiae* submission due to the US's qualified adoption of its contents.

109 In their consideration of evidence, panels have significant discretion as long as they provide 'reasoned and adequate explanations' for their findings and base them on a sufficient evidentiary basis. See *US–Upland Cotton*, Recourse to Article 21.5, Report of the Appellate Body, adopted on 20 June 2008, WT/DS267/AB/R, para. 293, FN 618; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 338. In *Korea–Dairy*, the Appellate Body stressed that under Article 11 DSU, 'a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.' In *Korea–Dairy*, Korea argued in its appeal that the panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof. See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (hereinafter: *Korea–Dairy*), Report of the Appellate Body, adopted on 12 January 2000, WT/DS98/AB/R, para. 137. See also *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 133–135 (Article 11 DSU requires panels to 'take account of the evidence put before them and forbids them to willfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record. Provided that panels' actions remain within these parameters, however, we have said that 'it is generally within the discretion of the Panel to decide which evidence it chooses to utilize

it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.’<sup>110</sup>

Overall, the assertion of authority to admit *amici curiae* has been more symbolic than real. Submissions are only rarely considered in substance

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in making findings.’); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, adopted on 19 January 2001, WT/DS166/AB/R, paras. 161-162. The Appellate Body has found that the consideration of solicited information is limited by the burden of proof. M. Cossy, *supra* note 106, p. 217; *Japan–Agricultural Products II*, Report of the Appellate Body, adopted on 19 March 1999, WT/DS76/AB/R, pp. 35-36 paras. 127-131. Panels and the Appellate Body enjoy significant discretion in the evaluation of information received. See *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 104 (‘It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what was received.’); G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 *Journal of International Economic Law* (2001), pp. 159-160. They rely on the evidentiary standards developed in their case law. See O. Prost, *Confidentiality issues under the DSU: fact-finding process versus confidentiality* in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 191. On the different standards of proof developed in panel proceedings, see M. Oesch, *Standards of review in WTO panel proceedings*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge University Press, Cambridge 2005, pp. 166-167, quoting *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 116-118; *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body, adopted on 5 November 2001, WT/DS192/AB/R, para. 74.

- 110 *EC and Certain Member States–Large Civil Aircraft*, Report of the Appellate Body, adopted on 1 June 2011, WT/DS316/AB/R, p. 529, para. 1225; *Brazil–Retreaded Tyres*, Report of the Appellate Body, adopted on 17 December 2007, WT/DS332/AB/R, para. 185; *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 132-133; *Japan–Apples*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS245/AB/R, para. 221; *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, para. 161; *Australia–Salmon*, Recourse to Art. 21.5, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 266.

(or at least it is rarely made known when they are).<sup>111</sup> Insofar, the observation from *Appleton* still holds true that

the Appellate Body has found a politically expedient solution to a public relations dilemma. Far from rejecting the appended non-member briefs it accepted them. Far from analyzing their legal merit, it never mentions them. Yet, the Appellate Body does not foreclose the possibility that it might in a subsequent case make use of such briefs...<sup>112</sup>

A comparison with the treatment of solicited and expert information shows that the above-cited approach is not expressive of a general hesitation to outside information, but may be rather the consequence of the ongoing political discord on the issue of *amicus curiae*. The current approach is further problematic in that the adjudicating institutions essentially escape their responsibility implied in Article 11 DSU to decide on the relevance of an *amicus curiae* submission. Even where this is unproblematic from a legal perspective, it calls into question the effectiveness and usefulness of the *amicus curiae* practice before the WTO adjudicating bodies. The parties generally adopt only those (portions of) *amicus curiae* submissions that match their own arguments. Consequently, submissions rarely will raise novel ideas or arguments thereby limiting the information considered by the Appellate Body and panels in their decision-making. Finally, the partial adoption of submissions risks distorting *amici curiae*'s arguments.<sup>113</sup>

To conclude, *amicus curiae* does not seem to have had a measurable effect on the manner of consideration of evidence or the burden of proof. With the exception of *US–Tuna II*, panels and the Appellate Body have been extremely hesitant to remark on the weight ascribed to unsolicited *amicus curiae* submissions making it impossible to determine in how far the standards applied to the evaluation of party evidence have played a role in the assessment of *amicus curiae* submissions. In the few cases where panels and the Appellate Body have relied on the concept, it has

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111 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 42.

112 A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 *Journal of International Economic Law* (1999), p. 488.

113 L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 244, 253.

been to confirm evidence already presented by the parties. Solicited submissions, however, are considered regularly and in depth, which corresponds with the treatment given to panel-solicited expert reports.

#### H. Investor-state arbitration

Investment tribunals have been quite transparent in their consideration of *amicus curiae* submissions.<sup>114</sup> Still, they have not openly pronounced on the weight attached to *amicus curiae* submissions. The following review of some of the most important investment arbitration cases with *amicus curiae* involvement shows that tribunals increasingly mention the substance of *amicus curiae* submissions in their awards, but that submissions rarely seem to have influenced the outcome of a case.<sup>115</sup> Overall, tribunals appear to reference submissions by international organizations, including the European Commission on behalf of the European Union, rather than those by NGOs.

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114 E.g. *Eureka v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13; *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19; *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 8.2.

115 In *UPS v. Canada*, the tribunal did not refer at all to the substance of the *amicus curiae* submissions. The Council of Canadians and the Canadian Union of Postal Workers had detailed the potential effects of the tribunal's award on Canadian postal workers and consumers, an aspect that had not been commented upon by either party and that was intended to assist the tribunal in understanding the adverse impacts of a decision against the respondent. The Chamber of Commerce, supporting the claimant, focused on Canada's national treatment obligations pursuant to Article 1102 NAFTA. Contrary to the *amici* in *Methanex*, it argued that the tribunal should interpret the term 'like circumstance' under Article 1102 NAFTA consistent with the national treatment obligations arising from Article III GATT. See *UPS v. Canada*, *Amicus* Submission from Council of Canadians and Canadian Union of Postal Workers, 20 October 2005. The tribunal did not refer to the possibility of consideration of the GATT at all in its final award despite lengthily discussing the interpretation of Article 1102 NAFTA. One reason for the tribunal's hesitation may have been the heated dispute between one of the *amici curiae* and counsel for the claimant. *S. Shrybman*, counsel for the *amici curiae*, in a letter to the tribunal had argued that the claimant's counsel *Mr. Appleton* had misrepresented their statement in bad faith. See *UPS v. Canada*, Letter by *S. Shrybman* to the Tribunal, 3 November 2005.

The tribunal in *Methanex v. USA* acknowledged that the *amicus curiae* submissions it had received ‘were detailed and covered many of the important legal issues that had been developed by the Disputing Parties.’<sup>116</sup> The tribunal issued the award in favour of the respondent and the reasoning resembled the arguments submitted by Bluewater and the IISD (see Chapter 6). The tribunal found that non-discriminatory regulations that were enacted for a public purpose and in accordance with due process, like the ban on MTBE, did not amount to expropriation, unless the government had made a specific commitment to the investor to abstain from such environmental or public health regulations.<sup>117</sup> However, Coe doubts that the *amicus curiae* submission influenced this outcome given that the tribunal with its award on jurisdiction already had rendered the claimant’s chances of winning marginal.<sup>118</sup> Still, the tribunal adopted an argument by the *amici curiae*, namely, that trade law approaches could not be transferred automatically to investment law.<sup>119</sup> The tribunal did not mention at all the human rights focused *amicus curiae* brief that had also been submitted. But it insinuated that *amici curiae* could constitute evidence in response to the claimant’s argument that *amici* should be admitted only if the parties could cross-examine the factual basis of their allegations:

[I]t would always be for the tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of th[e written] *amicus* briefs were arguably to constitute written “evidence”, the Tribunal would still retain

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116 *Methanex v. USA*, Final award of the tribunal on jurisdiction and merits, 3 August 2005, para. 29.

117 *Id.*, Part IV, Chapter D, para. 7.

118 The tribunal constructed Article 1101(1) NAFTA narrowly by including in Chapter 11 only alleged violations targeting the investor or the investor’s product. See J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 *Kansas Law Review* (2006), pp. 1375-1376. The measures were aimed at the gasoline additive MTBE and not at the products used to make it. The investor was a producer of methanol, a component of MTBE. Because it was only affected by the measure, the investor failed to show a direct link and was unable to comply with Article 1101 NAFTA. See *Methanex v. USA*, Preliminary Award on Jurisdiction and Admissibility, 7 August 2002, para. 138.

119 The tribunal agreed that the term ‘like circumstances’ in Article 1102 NAFTA could not be interpreted in parallel to the term ‘like products’ in Article III GATT. Further, the respondent also referred in its submission to the argument raised by the IISD. See *Methanex v. USA*, *Amicus* submission by International Institute for Sustainable Development, 9 March 2004, paras. 35-37.

a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight.<sup>120</sup>

The tribunal neither specified the conditions under which it would consider an *amicus curiae* submission evidence, nor clarified the legal basis allowing it to receive evidence from non-parties. Further, the tribunal noted that *amici curiae* could not call witnesses or experts (due to the privacy rules), but it failed to elaborate in how far the calling of witnesses and experts would materially differ from the submission of documentary evidence by *amici curiae*.

The tribunal in *Suez/Vivendi v. Argentina* summarized the arguments presented by *amicus curiae* on the human right to water dimension of the case.<sup>121</sup> The tribunal referred to the *amicus curiae*'s arguments in its consideration of Argentina's argument that the breaches of the BIT towards the claimants were justified on the basis of necessity 'in order to safeguard the human right to water of the inhabitants of the country.'<sup>122</sup> The tribunal rejected the *amici*'s argument that international human rights law obligations applied to the dispute via Article 42(1) ICSID Convention or Article 31(3)(c) VCLT in interpreting the standard of treatment owed to the investor. It found that none of the underlying BITs provided for a clause permitting a contracting state to derogate from its BIT obligations under certain circumstances, and, pointing to the arguments raised by Argentina and the *amicus curiae*, that the human rights obligations did not override Argentina's obligations under the BIT for reasons of necessity. The tribunal held that Argentina could have adopted less invasive measures and thereby could have honoured both its obligations towards the investor and those owed to its people.<sup>123</sup> In short, while the tribunal referred to the arguments of the *amicus curiae*, it did so only where its arguments coincided with those raised by Argentina.<sup>124</sup>

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120 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 36.

121 *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19, para. 256.

122 *Id.*, para. 252.

123 *Id.*, paras. 255, 262.

124 Critical, S. Schadendorf, *Human rights arguments in amicus curiae submissions: analysis of ICSID and NAFTA investor-state arbitrations*, 10 *Transnational Dispute Management* (2013), pp. 18-19 ('Instead of considering the role and potential impacts of human rights in investor-state arbitration, they simply refused to accept any prevalence or justifying effect of human rights law. Given that no hu-

In its award, the tribunal in *Biwater v. Tanzania* announced at the outset that '[t]he petitioners provided information and views relevant to the arbitral tribunal's mandate' and that '[t]heir submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *Amici*'s submissions are returned to in that context.'<sup>125</sup> Thus, the tribunal clarified that it used the submission not to establish the facts of the case (i.e. as a source of evidence), but to inform its views.<sup>126</sup> There is no doubt that the tribunal very carefully read the submission.<sup>127</sup> However, it did not include in its summary the joint *amicus curiae*'s arguments concerning the principle of sustainable development and the right to clean water, but only those on investor responsibility.<sup>128</sup> In the award, the tribunal did not consider in depth any of the arguments presented by the *amici curiae*. This is surprising insofar as the tribunal in the admission process and in its award emphasized the public interest dimension of the case.

At the outset of its award, the tribunal in *Glamis v. USA* left no doubt as to its view of its mandate. It stated that it was 'aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property.' However, it held that it only 'should address those filings explicitly in its Award *to the degree that they bear on decisions that must be taken,*' and that 'it in no way views its

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man rights arguments were employed in the tribunal's reasoning, its selective response appears purely defensive and disregarding of a human rights oriented interpretation of investment rules as suggested by the *amici*.')

125 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 370, 392.

126 *Id.*, para. 601.

127 This is evidenced in the correction of some arguments, which were made by *amici curiae* due to a lack of availability of certain party evidence. See *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, FN 208.

128 J. Harrison, *Human rights arguments in "amicus curiae" submissions: promoting social justice?*, in: P.M. Dupuy/F. Francioni/E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, pp. 396-421 ('The *Biwater* decision where there was a total failure to engage with the human rights arguments raised by the *amici* is an early indication of a more basic underlying problem when it comes to utilising this mechanism to hear human rights concerns – the contradictory expert/advocate role, the lack of expertise among the tribunal on human rights law, the mistaken view that the *amicus* procedure can legitimise without effective participation.')

awareness of the context in which it operates as justifying (or indeed requiring) a departure from its *duty to focus on the specific case* before it.’ The tribunal did not refer at all to *amicus* briefs in its final award having dismissed the alleged expropriation (Article 1110 NAFTA) and violation of the minimum standard of treatment clause (Article 1105 NAFTA) before it reached the matters addressed in the briefs.<sup>129</sup> The absence of a reference to the human rights dimension of the case is startling in light of the tribunal’s lengthy elaborations on the respondent’s regulatory and administrative measures to protect the interest of the Quechan Indians in its consideration of the claim under Article 1105 NAFTA.<sup>130</sup>

In *Pac Rim v. El Salvador*, the tribunal dealt in detail with some of the arguments raised by the *amici curiae*. In its jurisdictional award, the tribunal adopted only the jurisdictional arguments that had also been addressed by the respondent, that is, abuse of process and denial of benefits. With respect to arguments regarding abuse of process, the tribunal noted that the *amicus curiae* invoked two grounds: the claimant’s alleged re-or-

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129 *Glamis v. USA*, Award, 8 June 2009, paras. 7-9, 534-536, 824 [emphasis added]. With respect to Article 1110 NAFTA, the tribunal found that the measures did not ‘cause a sufficient economic impact to the Imperial Project to effect an expropriation of Glamis’ investment,’ which constitutes the first element in any expropriation. With respect to Article 1105 NAFTA, it held that due to the location of Glamis’ project next to conservation areas and the Quechan Indian tribe, Glamis was entitled to compensation from the respondent neither for the revision of the mining permission nor for the other measures taken by the respondent to protect the interests of the Quechan. The tribunal in the pending case *Bear Creek Mining v. Peru* has signalled a similarly hesitant consideration of *amicus curiae* briefs. See *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 33 (‘[T]he Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the FTA as far as necessary in order to decide on the Application. No less, but also no more. This is of particular relevance in the present context, because the FTA contains detailed provisions regarding the submissions by other persons...’).

130 A. Kulick, *Global public interest in international investment law*, Cambridge 2012, pp. 284-285 (‘[W]hat the Tribunal seems to implicitly convey is that human rights arguments may exclusively ground in domestic legislation, but lack applicability ... as an international law claim. Such limitation to domestic law, however, basically means the marginalization of human rights considerations as an independent argumentative *topos*.’); S. Karamanian, *The place of human rights in investor-state arbitration*, 17 *Lewis & Clark Law Review* (2013), p. 429.

ganization from a Cayman Islands-based to a US-based company ‘to take advantage of CAFTA benefits’ and that the claimant had brought the dispute to arbitration, whereas in its view the ‘real respondents’, the affected communities, possessed ‘only limited discretionary rights.’<sup>131</sup> The tribunal only discussed the first ground, which had also been raised by the respondent, and cursorily rejected the *amicus curiae*’s argument. With respect to the *amicus*’s argument regarding denial of benefits, the tribunal briefly noted upon finding for the respondent that the *amicus curiae* had raised the same argument as the respondent in more general terms.<sup>132</sup> In a brief submitted at the merits stage, the *amicus curiae* suggested that the respondent’s actions did not amount to a wrongful act, but were justified to fulfil its international human rights and environmental law obligations towards the communities potentially affected by environmental pollution from the mining project.<sup>133</sup> Having dismissed the claim for failing to comply with requirements of the El Salvadorian Mining Law, the tribunal saw no need to address the arguments from the *amici curiae*.<sup>134</sup> Generally calling into question the relevance of *amicus* briefs in light of the current publicity rules, the tribunal further reasoned that it considered it unnecessary to address the submission because the *amici* had not been made ‘privy to the mass of factual evidence adduced’ in this phase of the arbitration.<sup>135</sup>

In *Eureko v. Slovak Republic*, the Dutch Government and the European Commission were invited to make submissions on the validity of the underlying bilateral investment treaty. The respondent had argued that by accession to the EU in May 2004 the BIT was terminated or at least became inapplicable devoiding the tribunal of jurisdiction. Both the Netherlands and the EC made submissions on the issue. The tribunal at the beginning of its reasoning in its jurisdictional award assured that it had

considered carefully the submissions made by the Parties, as well as the observations of the Government of the Netherlands and of the European Commission, all of which were helpful and for all of which the Tribunal thanks

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131 *Pac Rim v. El Salvador*, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, ICSID Case No. ARB/09/12, para. 2.43.

132 *Id.*, paras. 4.58-4.59, 4.85.

133 *Pac Rim v. El Salvador*, Submission of *Amicus Curiae* Brief on the Merits of the Dispute, 25 July 2014, ICSID Case No. ARB/09/12.

134 Re the dismissal reasoning, see *Pac Rim v. El Salvador*, Award, 14 October 2016, ICSID Case No. ARB/09/12, Part VIII.

135 *Pac Rim v. El Salvador*, Award, 14 October 2016, ICSID Case No. ARB/09/12, para. 3.30.

their respective authors. All of the points made in those submissions have been taken into account by the tribunal, even though it is not here necessary to address and decide in turn each and every one of these submissions and observations.<sup>136</sup>

... [T]he Tribunal has not found it necessary to rest any part of its decision upon the ostensible attitude of either Party to these arbitration proceedings – still less upon that of the Government of the Netherlands or of the European Commission – to the question of the status of the BIT or the existence, continuation or extent of the jurisdiction of the Tribunal.<sup>137</sup>

Accordingly, the tribunal refrained from making explicit references to the *amici curiae*'s submissions in its findings that the BIT remained valid and in its rejection of the suspension requested by the respondent to refer the case to the ECJ.<sup>138</sup> This approach differed from the approach of the tribunal in *Eastern Sugar v. Czech Republic* regarding a letter from the EC on the same questions in early 2006.<sup>139</sup> There, the tribunal in its consideration of the matter referred to the letter for some fact information, but it did not adopt the arguments made, because the letter contained ambiguities.<sup>140</sup> No explicit reference to the *amicus curiae* submission from the EC was made in *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*,<sup>141</sup> whereas in *Electrabel v. Hungary*, the tribunal in great detail considered – and rejected – a preliminary objection that had been raised

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136 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 217.

137 *Id.*, para 219. The same approach was taken by the tribunal in *European American Investment Bank AG (Austria) v. The Slovak Republic*, Award on Jurisdiction, 22 October 2012, PCA Case No. 2010-17, para. 54.

138 *Id.*, para. 293.

139 *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, SCC Case No. 088/2004, paras. 97, 119, 123. The tribunal reproduced the responding January 2006 letter from the EC in full, as well as an internal note by the EC on the issue in part.

140 Both the respondent and the claimant had partly relied on the *amicus* brief to bolster their contrary positions. *Id.*, para. 150.

141 The case concerned an alleged violation by Hungary of its obligations under the Energy Charter Treaty (ECT) due to the adoption of the 2006 Electricity Act Amendment, which provided for the re-introduction of regulated prices for electricity generators pursuant to two price decrees in December 2006 and February 2007 respectively, after fixed prices had been abolished as from January 2004 prior to Hungary's EC accession. Central to the case was the question in how far the measures had been motivated by a concern of state legislators over the EC's investigations into alleged state aid through power purchase agreements which formed the basis of the claimants' investments. The tribunal may not have relied

by the European Commission, namely, that the tribunal lacked jurisdiction due to the dispute being an intra-EU matter. However, the tribunal found that EU law formed part of the law applicable to the arbitration.<sup>142</sup> In *Charanne v. Spain*, the tribunal noted that it had extensively considered the arguments raised by the European Commission in its *amicus* brief and that it had found them very useful, but that it would discuss the EC's arguments only in so far as they informed the parties' arguments because the EC itself was not a party to the case.<sup>143</sup> The tribunal incidentally rejected the EC's arguments concerning jurisdiction – as in all comparable cases, but it also rejected the expropriation claim and the FET claim raised by the investor.<sup>144</sup>

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on the briefs explicitly, because the majority's view was that 'Hungary's decision to reintroduce administrative pricing was not motivated by pressure from the EC Commission,' although the tribunal 'acknowledge[d] the efforts made by the European Commission to explain its own position to the Tribunal and ha[d] duly considered the points developed in its *amicus curiae* brief in its deliberations.' See *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, paras 8.2, 10.3.18-10.3.19. Arbitrator *Stern* disagreed with the assessment and noted that 'it is quite evident that even before Hungary was under a legal obligation to follow the Commission's decision, it had been made abundantly clear to Hungary that the [power purchase agreements] raised considerable concerns at the European level, as being in contradiction with the European free market policies.'

- 142 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, paras. 4.11-4.13, 4.89-5.31-5.60 and particularly para. 4.115 ('As far as jurisdiction is concerned, the Tribunal notes that the Respondent has not raised any like objection to jurisdiction as that made by the European Commission. It is however the Tribunal's duty independently to check whether or not it has jurisdiction to decide the Parties' dispute, particularly when such jurisdiction is contested by the European Commission based on the interpretation and application of EU law.')
- 143 *Charanne v. Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012, para. 425 ('Antes que nada, el Tribunal Arbitral desea aclarar que le ha dado la más atenta consideración al *Amicus CE* el cual le ha resultado de gran utilidad. El Tribunal desea agradecer a la Comisión Europea por ello. Sin embargo, el Tribunal recuerda que la CE no es parte en este procedimiento y por tanto, en este laudo el Tribunal responderá únicamente a los argumentos de las Partes, a la luz por supuesto de los elementos de reflexión aportados por la CE.')
- 144 *Charanne v. Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012. See also *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, Award on Jurisdiction, 6 June 2016, ICSID Case No. ARB/13/30, paras. 71-90.

*Philip Morris v. Uruguay* is one of the first cases in which a tribunal has explicitly and extensively relied on information submitted by *amici curiae*, specifically the international organizations Pan American Health Organization (PAHO), the World Health Organization (WHO) and the WHO Framework Convention on Tobacco Control. The case concerned the legality of Uruguay's single representation regulation which required tobacco producers to offer only one brand of cigarettes, imposed an increase from 50% to 80% in size of mandatory health warnings and the use of six specific (and graphic) images on the front and back sides of cigarette packages.<sup>145</sup> The claimants argued that these measures amounted to violations of several guarantees under the applicable Switzerland-Uruguay BIT, primarily expropriation of their several brands including the associated goodwill and the Intellectual Property rights, as well as destruction of brand equity for remaining presentations and that Uruguay abused its rights to promote and protect public health. The tribunal explicitly referred to the *amicus curiae* submissions from the WHO and PAHO in rejecting the expropriation claim on the basis that the challenged measures constituted a 'valid exercise of the State's police powers', namely a good faith-based, non-discriminatory and proportionate effort to protect public health.<sup>146</sup> Equally, in its consideration of the FET-claim, the tribunal while assessing the alleged arbitrariness of the measures, heavily drew from the *amicus curiae* briefs to reason that the challenged tobacco control measures were evidence-based and that their effectiveness had been recognized by the *amici curiae*.<sup>147</sup> The extent to which the tribunal relied on the *amici curiae* is reminiscent of tribunals' treatment of the European Com-

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145 The single representation was prescribed by Ordinance 514 of 18 August 2008, issued by the Ministry of Health. The so-called 80/80 Regulation was enacted by Presidential Decree No. 287/009 of 15 June 2009, and the use of the six images was ordered by Ordinance No. 466 of 1 September 2009 of the Ministry of Health, see *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 108-132.

146 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 287, 306. The factual background of the award made numerous references to statistics and guidelines developed by the WHO, PAHO and the FCTC Secretariat. *Id.*, paras. 74, 75, 89, 137, 139, 141, 143. The tribunal incorporated police powers, which it found to constitute customary international law, as a defence to the expropriation claim by way of systemic treaty interpretation pursuant to Article 31(3)(c) VCLT.

147 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 391, 393, 407.

mission's briefs, and there are additional parallels: the *amici* in these cases all were international organizations with an official mandate, some involvement and indisputable expertise on the measures at issue.

Overall, despite increasingly being mentioned, *amicus curiae* submissions have had a rather limited impact on the outcome of investment arbitration cases. While tribunals often acknowledge a public interest in the arbitration, the arguments of *amici curiae* on the public interest engaged are not adopted. References in reasonings are made usually only to add weight to an argument already made by one of the parties or to summarize those parts of the submission that accord with currently held interpretations of investment law. Tribunals are extremely hesitant with respect to the invocation or application of laws that the parties have not raised, in particular international environmental or human rights law instruments.<sup>148</sup> However, there is no doubt that investment tribunals read *amicus curiae* submissions and find it necessary to comment on them. The value of *amicus curiae* submissions thus exceeds the mere appearance of increased legitimacy through their admission. The situation is different where international organizations, specifically the EC and public health organizations, have submitted *amicus* briefs in cases where measures falling within their competence or affecting issues within their sphere of activities are challenged.<sup>149</sup> Further, parties tend to liberally reference briefs supporting their arguments.<sup>150</sup>

In investment arbitration, the relationship between *amicus curiae* and evidence remains unsettled. A reason for the diverging approaches may be the form of submissions received. Most *amicus curiae* submissions focus on introducing general policy and legal arguments for the consideration of

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148 See also A. Kulick, *supra* note 130, pp. 258-259, 272-276.

149 According to *Gerlich*, the EC's participation mimics intervention. O. Gerlich, *More than a friend? The European Commission's amicus curiae participation in investor-state arbitration*, in: G. Adinolfi et al. (Eds.), *International economic law: contemporary issues*, Torino/Cham 2017, p. 255. However, absent a right of consideration, the participation by the European Commission continues to be subject to the full discretion of the tribunal.

150 E.g. *Eli Lilly v. Canada*, Government of Canada Post-Hearing Submission, 25 July 2016, Case No. UNCT/14/2, paras. 149, 188, 192 and Claimant's comments on NAFTA Article 1128 Submissions and Non-Disputing Party (*Amicus*) Submissions, 22 April 2016.

environmental and human rights implications of a dispute.<sup>151</sup> Facts usually are presented only to embellish and contextualize policy arguments. Thus, briefs rarely contain information that may be considered evidence in the classic sense. Further, the above-analysis shows that tribunals – with the exception of the recent cases *Philip Morris v. Uruguay* and *Bear Creek Mining v. Peru* – do not admit briefs to draw concrete fact evidence from them. If at all, tribunals focus on the contextual and legal arguments provided. Thus, the practical impact of *amicus curiae* participation on the process of evidence remains minimal.

Tribunals very rarely test the information submitted which, in turn, may be a reason for their hesitation to rely on it. If tribunals (decide to) accord evidentiary value to information contained in an *amicus curiae* brief, tribunals should consider applying the verification standards used for tribunal-appointed experts so as to ensure that the parties' procedural rights are safeguarded.

### I. Comparative analysis

The above analyses show that briefs are considered to a much greater extent by human rights courts than in inter-state courts, in investment arbitration and before WTO panels and the Appellate Body.

The ICJ generally considers *amicus curiae* briefs if a party submits them as its own evidence. Briefs do not seem to have influenced the outcome of a case. The ITLOS appears to be slightly more receptive than the ICJ in advisory proceedings. The ECtHR and the IACtHR's approaches are situated at the other end of the spectrum. Both courts extensively consider *amicus curiae* briefs in the deliberation of cases, and briefs have been highly influential. The IACtHR relies in particular on surveys and legal information, including on the respondent state. Further, both courts use *amicus* briefs to test the parties' evidence. However, there are some differences in the manner of consideration. The IACtHR tends to call *amici curiae* as experts or witnesses, if it finds fact or technical information conveyed by them to be relevant, whereas the ECtHR appears to also rely directly on facts submitted by *amici curiae*. The extent to which investment

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151 *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19, paras. 255-256, 262.

tribunals consider *amicus curiae* briefs depends on the nature of the *amicus curiae*: submissions by international organizations whose area of activity is affected by the case tend to be thoroughly considered and, in some cases, relied on to bolster the tribunal's decision. Briefs from non-governmental entities have only sporadically influenced the outcome. They appear to be ignored, unless a party adopts them or they are congruent with the arguments made by a party. This practice is somewhat similar to the practice of the WTO adjudicating bodies. The latter, however, decide on the relevance of an *amicus curiae* brief only after all party and third party submissions have been considered (see Chapter 5). This may explain the low 'success' rate of *amicus* briefs. They have been considered in substance only in four cases so far. Overall, information-based *amicus curiae* as well as submissions by stakeholders seem to be more successful than public interest *amici curiae*.<sup>152</sup>

None of the courts or tribunals reviewed here has considered *amici curiae* a formal source of evidence. The concept is treated with the flexibility characteristic in international proceedings.<sup>153</sup> It is considered party evidence and treated accordingly by all international tribunals examined, if a party adopts the brief. If it is independent from the parties, international courts and tribunals' approaches differ. The judgments of international courts that have relied on fact submissions from *amici curiae* indicate that they do not treat the submissions *en pars* with party evidence. They accord them a lesser probative value. Further, briefs are generally only used to test the evidence presented by the parties or gathered *proprio motu*. While, theoretically, there is a risk that the reliance of the court or tribunal on an

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152 *Shelton* expected that information based *amicus* submissions would be particularly significant where courts lacked the necessary expertise. This has not been the case, because courts seem to prefer to rely on expert submissions in such cases. An exception are EU-law related cases. See D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 *American Journal of International Law* (1994), p. 637.

153 Traditionally, judges have a wide discretion in the assessment of evidence and are free from technical rules. R. Wolfrum, *supra* note 4, para. 2. An 'important common feature among international courts and tribunals is that there is generally no restriction in the admissibility of evidence before various types of international tribunals and fact-finding bodies. ... Generally speaking, international tribunals have ... found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case.' M. Kazazi/B. Shifman, *supra* note 22, pp. 194-195.

*amicus curiae* submission may affect the burden of proof,<sup>154</sup> this has not materialized in practice. The reliance on fact submissions may be problematic in so far as the parties cannot test the submissions through use of the mechanisms available to test formal evidence, such as cross-examination.<sup>155</sup> However, some courts have solved the issue by transferring such *amici curiae* into witness or expert status (IACtHR) or by applying the evidentiary standards for expert and party submissions to unsolicited and solicited *amicus curiae* submissions (WTO panels and the Appellate Body).<sup>156</sup>

This concern applies only to a fraction of *amicus curiae* briefs, as the majority of briefs considered by international courts and tribunals focuses on analysis of the legal issues at stake. Briefs on legal issues that the parties have not raised, especially on how to (legally) integrate the ‘public interest dimension’ in investment arbitration and in WTO dispute settlement, are rarely considered. Legal arguments within the purview of the dispute as defined by the parties, for instance, on the interpretation of EU law, on jurisdiction or on the interpretation of a BIT, are taken into account. Legal submissions typically are considered informally. They cannot be considered to be evidence in a formal sense. They do not seek to prove or disprove a fact, but advocate a certain legal position or context.

*Ishikawa* questions if the admission of *amicus curiae* submissions should be treated equivalent to the hearing of an expert.<sup>157</sup> This question is justified where *amicus curiae* participation is subsumed under the rules of evidence and where international courts and tribunals attribute to the submission evidential value equal to party evidence. In those instances, the

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154 A. Qureshi, *Extraterritorial shrimps, NGOs and the WTO Appellate Body*, 48 *International and Comparative Law Quarterly* (1999), p. 205.

155 T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvant (Ed.), *Yearbook of International Investment Law and Policy (2008-2009)*, p. 558 (‘[P]arties may wish to have the right to cross-examine the authors of *amicus* submissions, in particular if the submissions contain factual allegations detrimental to one party. Part of the conditions set by the tribunal for admitting *amicus* briefs could be that the authors commit to making themselves available for cross-examination. That would then provide an incentive for greater credibility of *amicus* submissions.’).

156 This approach accords with that to court-appointed scientific experts, where panels are free within the limits of Article 11 DSU to weigh the evidence submitted.

157 T. Ishikawa, *supra* note 13, p. 267.

conditions and formalities applied to court-appointed evidence should at least serve as guidance to the international court or tribunal in the admission and consideration of *amicus curiae* submissions, even though there are obvious differences between *amici curiae* and witnesses and experts.<sup>158</sup> Such differences include the requirement before several international courts and tribunals that *amici curiae* show an interest in the case and provide opinionated submissions on abstract and general issues. Unlike experts, *amici curiae* need not necessarily be specialized or possess specialized knowledge. Most international courts and tribunals do not direct the content of *amicus curiae* submissions. Witnesses and experts, on the other hand, are questioned by the court and the parties and are directed on the content of their submissions and the information shared.<sup>159</sup> Usually, they may not make legal submissions, which is common for *amici curiae*.<sup>160</sup>

A few matters deserve additional analysis: why are some international courts and tribunals hesitant to consider submissions compared to others (1.)? Are there certain factors that increase the likelihood of consideration of a brief (2.)? Are there any limits to the consideration of *amicus curiae* submissions (3.)?

### I. Why the hesitation?

*Breton-Le Goff* surmises that the overall low consideration of *amicus curiae* submissions arises from a clash of ‘systemic values’ of international courts, on the one hand, and those advocated in *amicus curiae* submissions, on the other hand. She points in particular to a clash of values of ‘commercial freedom and non-discrimination in trade’ with those of ‘conservation and sustainability’ in the context of the WTO.<sup>161</sup>

This observation cannot be agreed with fully. As shown above, for example, investment tribunals claim to be sympathetic to these issues and

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158 Among other, see Article 35 ICSID Rules, Articles 27(2) and 29 of the 2010 UNCITRAL Arbitration Rules and of the 2013 UNCITRAL Arbitration Rules and Article 6 IBA Rules.

159 R. Wolfrum, *supra* note 4, para. 42.

160 *Id.*, para. 14.

161 G. Breton-Le Goff, *NGOs perspectives on non-state actors*, in: J. d’Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London/New York 2011, p. 260 and FN 49.

consider them if one of the parties raised them. Where *amici* raise issues not addressed by the parties, international courts and tribunals struggle to accommodate them within the adversarial process. This becomes problematic if the issues discussed by the *amici* are not at least implied in the applicable laws. Further, investment tribunals specifically, but also the ECtHR, WTO panels and the Appellate Body all have pointed to their judicial function to explain the irrelevancy of some submissions: their primary task is to render a decision that the parties consider acceptable and legitimate, and which the losing party therefore is willing to enforce. General discussions on the applicability of human rights or environmental standards in WTO or in investment law may be harmful in this regard. Further, such considerations are not needed if the tribunal can solve the case under its applicable laws. In fact, in most of the above-described investment cases, the final outcome accorded with the outcome the *amici curiae* had argued for. However, tribunals refrained from making general statements on the importation of international human rights or environmental laws into their treaty regimes. This approach is also evident in the different treatment of the EC's submissions on EC law issues that had a direct bearing on the validity of the BIT and the tribunal's jurisdiction. The submissions were aimed at providing additional argument on the legal issues the tribunal had to consider *ex officio* and did not require it to engage in any form of standard setting.<sup>162</sup>

This also explains why human rights courts have been more open to the consideration of *amicus curiae* briefs. The submissions made fall under their treaty regimes. Furthermore, the ECtHR has excluded submissions that make general pronouncements on certain contentious legal issues, because it found that they did not assist it in the solution of the concrete case. An additional reason for the greater willingness to consider *amicus*

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162 There is also some value in the argument by *Bastin*, that the limited role attributed to *amici curiae* by investment tribunals 'is ... defined by a willingness to give them a voice and an unwillingness to allow anything more than minimal disruption to the arbitration and minimal additional cost to the parties.' See L. Bastin, *The amicus curiae in investor-state arbitration*, 1 Cambridge Journal of International and Comparative Law (2012), p. 228. He further argues that any development of the role of *amici curiae* will be achieved most likely if they manage to 'win and deepen the familiarity and trust that states and tribunals have in and with them.' He wishes, in particular, for amendment of the UNCITRAL Arbitration Rules, access to hearings and the inclusion of rules on *amicus curiae* in more investment treaties, see *Id.*, p. 230.

*curiae* in the IACtHR and the ECtHR may be their tradition of collaborating with NGOs.<sup>163</sup>

## II. Elements of successful briefs

If and to what extent a brief is successful depends largely on an international court or tribunal's willingness to consider it. The research indicates that the following factors increase the likelihood of consideration:

*Expertise and special/direct knowledge:* submissions on matters within the *amicus curiae's* core competence have a greater likelihood of success than other submissions, especially briefs from *amici curiae* with many years of experience and first-hand knowledge of the issues commented upon.

*Non-textbook information:* international courts and tribunals appear to value information that is not readily available to them through simple legal research, but which broadens their knowledge of the case or informs them of the background or context of the dispute.

*Accommodation within the structure of the court and proceedings:* submissions which argue that the court or tribunal should change or widen its judicial function, or which request that it should adopt novel approaches to certain legal questions have a low chance of success.

There is no evidence in the submissions and judgments that courts pay greater attention to submissions from well-known lawyers compared to 'regular' submissions. The main criterion appears to be the relevance and perceived quality of a submission. Thus, as regards the latter, submissions from legal experts may have an advantage, but this has not been stated openly.

## III. Limits to the consideration of briefs

The *Biwater v. Tanzania* tribunal prior to receiving *amicus curiae* submissions underlined that the role of *amici curiae* was not to suggest 'how issues of fact or law as presented by the parties ought to be determined

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163 M. Ölz, *supra* note 57, pp. 358-359; J. Razzaque, *supra* note 57, p. 184.

(which is obviously the mandate of the Arbitral Tribunal itself).<sup>164</sup> In *India–Quantitative Restrictions*, India was concerned that a WTO panel had substituted its assessment of the case with the views it had received from the International Monetary Fund (IMF) following a solicited submission. The Appellate Body dispelled India's contention that the panel had violated its duty under Article 11 DSU. It admitted that

[t]he Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.<sup>165</sup>

And in *Australia–Apples*, the Appellate Body decided with respect to panel's instruction of experts it had contracted to determine whether restricting imports to mature, symptomless apples would achieve Australia's appropriate level of protection – an important question of the case – that the evaluation of the appropriateness of alternative measures was a legal question which could not be delegated to scientific experts.<sup>166</sup> Essentially all these decisions imply that a court should be the final adjudicator of the dispute brought before it. It cannot replace its own assessment with that of someone else.

The weighing and assessment of factual information under the applicable laws by *amici curiae* might conflict with the judges' duty to decide the case. As *H. Lauterpacht* notes, '[a] substantial part of the task of judicial tribunals consists in the examination and weighing of the relevance of facts for the purpose of determining liability and assessing damages.'<sup>167</sup>

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164 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366.

165 *India–Quantitative Restrictions*, Report of the Appellate Body, adopted on 22 September 1999, WT/DS90/AB/R, para. 149.

166 *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R, paras. 384, 399.

167 H. Lauterpacht, *The development of international law by the international court*, London 1958, p. 48. See also V. Bazán, *amicus curiae, transparencia del debate judicial y debido proceso*, in: Anuario de Derecho Constitucional Latinoamericano (2004), pp. 268-269 ('no converge un intercambio de roles, conservando el juez plena libertad para receptor o separarse, total o parcialmente, de los argumentos jurídicos que el *amicus* pudiera acercar al proceso.').

International courts and tribunals must at least evaluate the information received and consider it carefully to protect ‘the right of the parties to receive a decision emanating from the tribunal set up by them in its capacity as a tribunal.’<sup>168</sup> Only ‘a decision emanating from the arbitral tribunal as such can be considered as a valid award ... The award must be the result of the personal participation of each member of the tribunal, to the exclusion of other persons.’<sup>169</sup>

This calls into question the general permissibility of *amicus curiae* submissions that propose a concrete solution to the specific case by applying the law to the (preferred) facts (see Chapter 6).<sup>170</sup> International courts and tribunals have to be careful when formulating questions for solicited *amici curiae* and avoid that *amici curiae* offer decisions on matters within their sphere of duties.<sup>171</sup> International courts and tribunals must take care to remain in charge of the case and not (accidentally) outsource the evaluation of relevant facts and legal material to willing *amici curiae*. In this vein, it is also important to emphasize that international courts and tribunals must test the veracity as well as the completeness of *amicus curiae* submissions if they wish to rely on them. As shown, at the moment, the process of consideration of *amicus curiae* submissions is intransparent across all international courts and tribunals.

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168 G. White, *The use of experts by international tribunals*, Syracuse 1965, p. 166.

169 A. Balasko, *Causes de la nullité de la sentence arbitrale en droit international public*, Paris 1938, p. 125, translated and quoted by G. White, *supra* note 168, p. 166 [Emphasis omitted].

170 *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* (hereinafter: *Dominican Republic–Import and Sale of Cigarettes*), Report of the Panel, adopted on 19 May 2005, WT/DS302/R, p. 1, para. 1.8 and Annexes C-1 and D-1 (The panel asked the IMF whether it considered the commission of change and imports an exchange control or exchange restriction under the articles of agreement of the IMF.).

171 In *Turkey–Textiles*, the Panel invited the European Commission to make comments it considered relevant beyond answering a catalogue of questions it had prepared. The EC Representative stated that Article 13(2) DSU prevented him from ‘enter[ing] a broader discussion of the factual or legal elements that may be relevant for the resolution of this dispute since this could be confused with the pleading of a case before the Panel.’ He decided to ‘stick to the specific questions asked by the Panel and provide the requested factual information to the Panel as objectively as we can.’ *Turkey–Textiles*, Report of the Panel, adopted on 19 November 1999, WT/DS34/R, pp. 27-28, 103, paras. 4.2, 9.13.

A related risk is that the reliance on a submission might give the impression that a court or tribunal has given too much weight to an issue which is not overly relevant to the case as submitted by the parties, especially where the submission of a brief generates significant publicity.<sup>172</sup> In most instances, *amici curiae* advocate a certain legal argument be it because of their own or their constituents' benefit or because they consider it to be the only convincing argument. So far, this aspect, which is known as interest-capture, does not appear to have created difficulties in practice due to the hesitation of international courts and tribunals to consider issues that have not been raised by the parties.

### J. Conclusion

International courts and tribunals consider *amicus curiae* briefs to a different extent. Human rights courts rely significantly on submissions, whereas all the other courts examined are rather hesitant to do so. Legal submissions are more frequent and are considered more readily than fact submissions. Overall, *amici curiae* have rarely been decisive to the outcome of a case.

Although there are interactions between *amici curiae* and the formal sources of evidence, *amici curiae* are not viewed as a formal source of evidence. International courts and tribunals generally do not attach any formal evidential value to *amicus curiae* submissions. Submissions are considered largely informally. The standards applied to *amici curiae* are mostly untechnical and often unclear. There is a need to establish clearer standards for the consideration of briefs, in particular with regard to the verification of statements made.

*Amici curiae* have not changed tribunals' approaches to evidence. Rather, they confirm how a court or tribunal generally views its function and how it approaches its investigative powers. The rules on evidence are not undermined by *amicus curiae* participation. The practical effect of *amici curiae* on the evidentiary process and the adversarial process overall has been limited. With the exception of the ECtHR and the IACtHR, consideration of *amicus curiae* submissions by international courts and tribunals has been sporadic and limited. This seems in part due to the fact

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172 R. Mackenzie/C. Chinkin, *supra* note 14, p. 137.

that submissions often lobby for an extension of international courts and tribunals' functions, which makes it difficult to accommodate them in the adversarial process.

## Chapter § 8 Effects on the international dispute settlement system

There is an assumption among scholars and *amicus curiae* proponents that *amici curiae* have had an important effect on international law and on international dispute settlement specifically. The previous Chapters have shown that *amicus curiae* participation indeed has had an effect on the proceedings and decisions of international courts and tribunals. This Chapter adopts a more abstract perspective and asks what has been the impact of the admission and consideration of *amicus curiae* submissions on international dispute settlement in general. To this end, it strings together Chapters 5 to 7 and examines if the influence mirrors the positive or the negative expectations expressed by *amicus curiae* proponents, concerned parties and member states. In short, is the concept a friend or a foe of international dispute settlement?

The aspects considered mirror those raised in Chapter 2, namely, the effect of *amici curiae* on the relationship between international courts and tribunals, the parties and the member states (A.); on the judicial function, in particular, the extent to which the concept has encouraged international courts and tribunals to exercise a public function and place greater weight on public interest considerations (B.); on legitimacy and democratization of international adjudication (C.); on the coherence of international law (D.); on the transparency of international dispute settlement (E.); and on the status of non-state actors in international dispute settlement (F.). Finally, this section considers if any of the concerns of *amicus curiae* participation, especially regarding the practical burdens, has materialized (G.).<sup>1</sup>

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1 Changes in concepts of international law and international dispute settlement are rarely due to one factor. It is more accurate to assume that *amicus curiae* participation is but an element in a process of change or an expression thereof. It is hoped that readers will excuse occasional broad brush strokes in this regard. See for other developments, Y. Shany, *No longer a weak department of power? Reflections on the emergence of a new international judiciary*, 20 *European Journal of International Law* (2009), pp. 73-91.

A. *Effect on the relationship between the court, the disputing parties and the member states: amici curiae as evidence of an assertive international judiciary?*

It is no secret that especially before inter-state courts and tribunals the parties tend to wield significant influence over the conduct of the proceedings. Parties that have decided to submit to the jurisdiction of an international court or tribunal have studied its procedural regime and decision-making to predict how their case will evolve. Where the stakes are high – and they usually are in international adjudication – any loss of predictability of the outcome is unwanted.<sup>2</sup> It is therefore little surprising that courts with voluntary jurisdiction have traditionally given great deference to the parties' wishes on how to conduct the proceedings.<sup>3</sup> Of no less relevance is the legislative power wielded by member states over international courts and the applicable law. The final say over procedure and content rests with the respective constituents to a treaty. The existence of international courts, to put it drastically, depends on states' willingness to sustain them.

As shown, most international courts and tribunals' constituent instruments and procedural rules did not explicitly provide for *amicus curiae* participation upon receiving the first requests for admission. International courts and tribunals largely relied on implied powers doctrines to admit *amici curiae*. Procedural gaps are a commonality in international law which lacks the regulatory density of national legal orders. One of the main issues of contention concerning the admission of *amici curiae* appears to have been how and by whom the silence of the applicable rules should be dealt with. Shortly after the *Methanex* tribunal admitted an *amicus curiae* submission, *Stern* argued that the decision precipitated 'une

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2 See D. Bowett, *Contemporary developments in legal techniques in the settlement of disputes*, 180 *Receuil des Cours* (1983-II), p. 169.

3 This was buttressed by the fact that traditionally international dispute settlement was considered only one among many mechanisms (including non-judicial) for conflict resolution. E.g. *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order, 19 August 1929, PCIJ Series A No. 22, p. 13 (The PCIJ defined its task as 'simply an alternative to the direct and friendly settlement of ... disputes between the Parties.'). This aspect continues to claim validity in the emphasis on negotiated over adjudicated settlements in the fabric of many international courts and tribunals, e.g. Article 3(7) DSU, Article 39 ECHR. See also F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, pp. 85-87.

nouvelle marginalization du consentement des parties, que est à la base de la procedure d'arbitrage.<sup>4</sup> *Ishikawa* disagreed:

[The] acceptance of *amicus curiae* submissions ... does not conflict with the disputing parties' power to control the arbitration proceedings, eg to choose: the *lex arbitri*, place of arbitration, arbitral tribunal, language, substantive law governing the dispute and so on. To be sure, it affects the parties' control over the speed at which their case progresses.<sup>5</sup>

Has the admission of and reliance on *amicus curiae* briefs changed the distribution of power between international courts and tribunals vis-à-vis the disputing parties and/or the member states? Does it reflect an emancipation from the parties' influence over the proceedings, a change in the role of international courts and tribunals? How does this relate to the principle of consent? This issue is of high relevance, because consent to submit a dispute to binding judicial settlement constitutes an essential basis for the legitimacy of the outcome.<sup>6</sup> Any defect in this respect may not only affect a party's willingness to implement a decision, but it may prompt questions over its legitimacy.<sup>7</sup>

## I. International Court of Justice

Neither the ICJ Statute nor the ICJ in practice have submitted the decision whether to allow an inter-governmental organization to make observations in a case to the will of the parties. Such consent is presumed with the submission of a case to the jurisdiction of the Court and its rules, at least to the extent regulated in Articles 34 and 66 ICJ Statute and Article 69 ICJ Rules. Accordingly, in *Aerial Incident*, the ICJ invited the ICAO to make submissions under Article 34(3) ICJ Statute despite protests by the Iranian

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4 B. Stern, *L'entrée de la société civile dans l'arbitrage entre Etat et investisseur*, 2 *Revue de l'arbitrage* (2002), p. 339.

5 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 *International and Comparative Law Quarterly* (2010), p. 392 [References omitted].

6 E. Lauterpacht, *Principles of procedure in international litigation*, 345 *Receuil des Cours* (2009), pp. 443-444, 449-454.

7 F. Orrego-Vicuña, *Law making in a global society: does consent still matter?*, in: J. Bröhmer/G. Ress (Eds.), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005*, Cologne 2005, p. 199; J. Viñuales, *Amicus intervention in investor-state arbitration*, 61 *Dispute Resolution Journal* (2007), pp. 72, 75.

agent that an invitation would be inappropriate for legal and practical reasons.<sup>8</sup> However, the Court has not been willing to admit *amici curiae* unless expressly permitted in its Statute (i.e. not beyond the permission given by its member states). Further, it has barely exercised its discretion to invite participation by *amici curiae* under the existing rules.

The ICJ has been more receptive in advisory proceedings. This is unsurprising given their special function (see Section B). The ICJ has placed the decision whether to introduce non-solicited submissions from non-governmental entities into the record in the hands of the parties who, to make things more difficult, must visit the Peace Palace to consult them. Judges may also revert to the briefs, but they have used this possibility sparingly.<sup>9</sup>

Former ICJ President *Higgins* anchors the Court's hesitation in an 'undue deference to the litigants by virtue of their rank as sovereign States' and urges the Court to become more assertive towards the parties in order to have 'proper control over its own procedure.'<sup>10</sup> The ICJ's approach to *amici curiae* is in accordance with the lacklustre use of its investigative powers and its focus on maintaining and nourishing its attractiveness to states, an aspect that cannot be discredited given its voluntary jurisdiction.<sup>11</sup> The Court's increasing caseload seems to have initiated a decrease in the deference accorded to litigating states in the interest of procedural efficiency, but this has not affected its position on *amicus curiae*.<sup>12</sup>

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8 *Aerial Incident of 3<sup>rd</sup> July 1988 (Islamic Republic of Iran v. United States of America)*, Letter No. 3 (The Agent of the Islamic Republic of Iran to the Registrar of the International Court of Justice), Part IV: Correspondence, ICJ Rep. 1996, pp. 639-645.

9 Submissions from select non-state actors are considered in two narrow constellations out of basic considerations of justice. It seems that these exceptions have not been challenged by treaty members. See Chapter 5.

10 R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 *International and Comparative Law Quarterly* (2001), p. 124. With approval of the Court, the parties may modify the applicable rules. However, this has not been relevant in the context of external submissions.

11 S. Oda, *The International Court of Justice viewed from the bench (1976-1993)*, 244 *Receuil des Cours* (1993 VII), p. 31.

12 Regarding the drawbacks of a too-deferential court, see A. Riddell/B. Plant, *Evidence before the International Court of Justice*, London 2009, pp. 20, 24.

## II. International Tribunal for the Law of the Sea

Pursuant to Article 45 ITLOS Rules, '[i]n every case submitted to the Tribunal, the President shall ascertain the views of the parties with regard to questions of procedure.' Article 48 ITLOS Rules allows the parties to propose modifications to the Rules subject to the approval of the ITLOS or a Chamber. Like the ICJ, the ITLOS seeks to accommodate the parties' wishes in the proceedings. The concept does not seem to have affected the element of consent in ITLOS or Seabed Dispute Chamber proceedings. Article 84 ITLOS Rules does not subject the admission of submissions from intergovernmental organizations to party consent. However, in the concluded proceedings with *amicus curiae* submissions, the tribunal and the chamber mainly left it to the parties to introduce the submissions into the proceedings.

## III. European Court of Human Rights and African Court on Human and Peoples' Rights

The principle of consent is less affected in the ECtHR and the African Court where *amicus curiae* participation is enshrined in the constituent documents and thus has been approved by the member states. The ECtHR has admitted *amici curiae* against the expressed will of both parties.<sup>13</sup> Still, the court is not oblivious to consent, and it has valued it above the defense of the public interest through *amici curiae*. In *Y. v. the United Kingdom*, the court dismissed an *amicus curiae*'s protest against a friendly settlement of a case in which the UK government agreed to pay damages for corporal punishment of a pupil by school officials.<sup>14</sup>

## IV. Inter-American Court of Human Rights

The IACtHR does not appear to view the issue of *amicus curiae* as one concerning consent. Article 44(3) IACtHR Rules foresees that *amicus curiae* briefs in contentious proceedings 'shall be immediately transmitted to

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13 *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103.

14 *Y. v. the United Kingdom*, Judgment of 29 October 1992, Series A No. 247-A. See also O. De Schutter, *Sur l'émergence de la société civile en droit international: le*

the parties, for their information.<sup>7</sup> It does not establish any right to comment or veto an *amicus curiae* submission. The parties rarely object to an *amicus curiae* brief and an objection usually does not lead to its exclusion.<sup>15</sup> An exception is made in advisory proceedings under Article 64(2) ACHR, where the compatibility of a domestic law with the ACHR is at issue. In *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the court decided on its own motion to invite the views of several national stakeholders. But it chose the stakeholders in consultation with the government of Costa Rica that had brought the question before it.<sup>16</sup> The treatment of *amici curiae* correlates with the IACtHR's powerful position in proceedings.

## V. WTO Appellate Body and panels

The Appellate Body's decision in *US–Shrimp* came as a shock to the WTO membership which had, until then, intentionally excluded the involvement of non-state actors and the consideration of non-trade related issues.<sup>17</sup> The WTO was purposely created for participation by states only. On the political level, the WTO members had been successful in minimiz-

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*rôle des associations devant la Cour européenne des droits de l'homme*, 7 European Journal of International Law (1996), pp. 393-394.

- 15 The decision on admission is made by the President of the Court (see Chapter 5). See J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-State Actors and International Law (2001), p. 186. He states that on several occasions the President of the Court has consulted the IAComHR on an *amicus curiae* submission. However, this is not indicated in the court's case law.
- 16 C. Ruiz Miguel, *La fundación consultiva en el sistema interamericano de derechos humanos: crisálida de una jurisdicción supra-constitucional?*, in: H. Fix-Zamudio (Ed.), *Liber amicorum Héctor Fix-Zamudio*, Vol. II San José 1998 p. 1361.
- 17 A. Reinisch/C. Irgel, *The participation of non-governmental organizations (NGOs) in the WTO dispute settlement system*, 1 Non-State Actors and International Law (2001), p. 129. Staff members of the WTO Secretariat considered the decision 'ground-breaking insofar as it allows NGOs to access the dispute settlement process from now on by submitting their own argument before panels and the Appellate Body.' See G. Marceau/P. Pedersen, *Is the WTO open and transparent?*, 33 Journal of World Trade (1999), p. 37.

ing the formal involvement of non-state actors.<sup>18</sup> In the opinion of many states, the admission of *amici curiae* constituted a ‘first step towards formal and direct participation for NGOs in the *real* workings of the WTO.’<sup>19</sup> This rendered the issue of *amicus curiae* highly symbolic despite its limited reach and the limited number of requests for participation.

The subsuming by panels and the Appellate Body of *amici curiae* under the DSU was considered to be highly problematic.<sup>20</sup> The Appellate Body’s interpretation of Articles 11-13 DSU in *US–Shrimp* redefined panels’ investigative powers from what the member states had envisioned – a specific and limited grant of investigative powers to hire scientific experts for the elucidation of technical issues – to an avenue to admit non-governmental entities seeking to implement non-WTO issues in WTO dispute settlement against the expressed will of the parties.<sup>21</sup> Member states argued that the assertion of authority to accept *amicus curiae* briefs was not permissible, because the DSU’s silence on the concept was intentional. Accounts of the reasons why it was not included in the DSU differ (see Chapter 5). Critics’ arguments are buttressed by Article 3(2) DSU, which emphasizes the limited powers of panels and the Appellate Body by determining that ‘[r]ecommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.’

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18 Such participation was channeled through states who selected the issues to be addressed and the stakeholders to consider. See S. Charnovitz, *Opening the WTO to nongovernmental interests*, 24 *Fordham International Law Journal* (2000), pp. 179, 181 (The WTO member states made clear that they did not want NGOs to be directly involved in the work of the WTO with the adoption by the General Council on 18 July 1996 of the *Guidelines for Arrangements on Relations with Non-Governmental Organisations*, WT/L/162. In para. 6, the *Guidelines* establish that consultation and cooperation with NGOs should occur primarily through ‘appropriate processes at the national level’. Nonetheless, NGOs had been allowed by the General Council to attend the WTO Ministerial Conferences.).

19 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 *European Law Journal* (2003), p. 497.

20 An exception is *US–Softwood Lumber VI*. The panel reasoned that it was only allowed to exercise powers explicitly conferred upon it by its member states. See *US–Softwood Lumber VI*, Report of the Panel, adopted on 22 April 2004, WT/DS277/R, p. 86, FN 75.

21 In *US–Shrimp*, Malaysia raised the issue of consent and the limited transfer of power to adjudicating bodies when it argued that the brief could not be accepted in the absence of an express permission in the constituent treaties. See *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 46.

The provision sends a strong signal as to whom the drafters of DSU envisioned to act as the ultimate arbiter in the WTO system.<sup>22</sup>

The ensuing dispute within the WTO system as to who was to take the final decisions over the conduct of proceedings and the role of the dispute settlement body – the Appellate Body or the General Council – intensified when the Appellate Body tried to formalize *amicus curiae* participation by issuing the *EC–Asbestos* Additional Procedure in 2000.<sup>23</sup> It was an attempt to appease the WTO constituency by making transparent the conditions for participation after this had been criticised in the DSB.<sup>24</sup> However, it had the opposite effect. At a special meeting of the General Council to discuss whether non-parties should have any input into pending cases, with the exception of the USA and the European Union, member states harshly criticized the idea of *amicus curiae* participation in WTO dispute settlement. There was consensus that the rights and obligations under the DSU belonged to the WTO members and that any substantive change in the DSU framework, including the participation by non-state actors, an issue of ‘critical and systemic concern,’ would have to be initiated by them. In their view, the Appellate Body and panels possessed only the powers explicitly conferred upon them in the constituent treaties. *Amicus curiae* participation was considered the first step towards the erosion of sovereignty.<sup>25</sup>

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- 22 D. McRae, *What is the future of WTO dispute settlement?*, 7 *Journal of International Economic Law* (2004), pp. 13-14 (He argues that the power is theoretical because of the nearly universal rejection of *amici curiae* and the lack of action.). See also with respect to the power struggle, C. Romano, *The shift from the consensual to the compulsory paradigm in international adjudication: elements for a theory of consent*, 39 *New York University Journal of International Law and Politics* (2007), p. 855.
- 23 Cf. M. Matsushita, *Transparency, amicus curiae briefs and third party rights*, 5 *Journal of World Investment and Trade* (2004), pp. 329-332 (Former Appellate Body member predicting similar controversies until the Appellate Body has achieved a more powerful standing.).
- 24 Some member states in the DSB criticized that in *US–Lead and Bismuth II* the Appellate Body failed to establish guidelines for *amicus curiae* participation. See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 *Non-State Actors and International Law* (2005), p. 259.
- 25 L. Bartholomeusz, *supra* note 24, p. 263. See also Statement by Korea at DSB Meeting on 23 May 2016, Minutes of Meeting, 29 August 2016, WT/DSB/M/379, para. 6.13 (‘Korea wished to propose that Members launch a discussion devoted to the question of the boundaries of appellate review with the goal of finding a common understanding. Korea believed that this was the right way to address the con-

At the end of the meeting, the Chairman advised the Appellate Body to ‘exercise extreme caution in future cases until Members had considered what rules were needed.’<sup>26</sup> Member states largely agreed that no *amicus* submissions should be accepted pending a political decision on the concept. So far, no political agreement has been reached (see Chapter 3), and the issue appears to have become the *litmus* test for the direction of the organization. Member states seem worried that future proactive decision-making by the Appellate Body may lead to ‘excessive judicial independence’ and ‘threaten[] both the rule-based certainties that WTO Members had intended between themselves, and the possibility of stable rule-making in trade law.’<sup>27</sup> This also explains why the largest opposition to *amicus* participation stems from developing countries that generally are vocal supporters of an independent and strong trade court, and why the same states voluntarily have concluded rules on *amicus curiae* participation in regional trade agreements.

Despite their express discontent, the WTO member states neither used their powers to dismiss *amicus curiae* participation formally through the negative consensus procedure in the report adoption process in the DSB, nor issued a binding interpretation of the WTO Agreement pursuant to Ar-

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cerns of Members ... , while maintaining the integrity and independence of the Appellate Body. ... When the Appellate Body had adopted an additional procedure regarding *amicus curiae* briefs during the appeal in the “EC – Asbestos” (DS135) dispute, a large majority of Members had thought that the Appellate Body had crossed its limits.’).

26 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, para. 120. It is not far-fetched to see a link between the meeting and the subsequent rejection of all *amicus curiae* applications in *EC–Asbestos* on procedural grounds. See Chapter 5 and B. Stern, *The intervention of private entities and states as “friends of the court” in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.), *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1445.

27 C. Lim, *The amicus brief issue at the WTO*, 4 *Chinese Journal of International Law* (2005), pp. 85, 88, 117 (‘If ... Members’ concerns about textual fidelity and original intent were to be ignored by the Appellate Body because they are (wrongly) seen to be no more than political in nature, then the Appellate Body could end up sending the wrong signal ...’). See also WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 5 (The WTO was an agreement of a contractual nature that was qualitatively different from other international agreements in the sense that the obligations that stemmed from this contract included the strict fulfillment of the decisions of the DSB to the extent of diminishing the decision-making capacity of Members.).

ticle IX(2) through the Ministerial Conference or the General Council. Further, the admission of *amici curiae* does not appear to have impacted the enforcement of reports.

Irrespective of the backlash from its membership, the Appellate Body and panels have continued to assert their authority to admit *amicus curiae* submissions. As *Howse* notes

the Appellate Body's affirmation of its 'authority' in *Sardines*, without so much as an allusion to the criticisms by delegates, says volumes about the Appellate Body's implicit view of itself as a judicial body with fundamental independence from the Membership sitting in its DSB capacity, and in particular its *Kompetenz-Kompetenz*.<sup>28</sup>

Considering the way in which *amicus curiae* has been dealt with, it does not seem that the instrument has prompted a real change in the relationship between the dispute settlement organs and parties on the one hand, and member states, on the other hand. There is a noticeable tendency to follow the parties' views as to whether accept or reject a submission. Despite the absence of regulation of *amicus curiae* participation in the working procedures, WTO panels and the Appellate Body have since *US–Shrimp* consulted the parties and third parties prior to exercising their discretion whether to accept an *amicus curiae* submission.<sup>29</sup> In *Australia–Ap-*

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28 R. Howse, *supra* note 19, p. 507.

29 E.g. *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 107 ('The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute.');

*Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 37; *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12–1.13. Exception: *US–Softwood Lumber VI*, Report of the Panel, adopted on 22 April 2004, WT/DS277/R, FN 33. The joint appellees in *US–Shrimp* had argued that due process gave them a right to know the submissions panels intended to consider and to comment on them. See also *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 9; *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R. See also comment by the DSB Chairman that 'solutions developed through specific disputes may not reflect an agreed position of the entire Membership' citing unsolicited *amicus* briefs as an example. WTO DSB, *Special Session of the Dispute Settlement Body – Report by the Chairman, Ambassador Ronald Saborío Soto*, 4 December 2015, TN/DS/28, para. 1.9, FN 10.

ples, the panel accepted the submission from an industry organization only after both parties had stated that they had no objections to the panel accepting the information.<sup>30</sup> Moreover, panels and the Appellate Body regularly supplant the parties' exercise of discretion with their own by finding that unsolicited *amicus curiae* submissions will be accepted and considered only to the extent the parties decide to adopt them as part of their submissions.<sup>31</sup> Further, the parties and third parties essentially possess a veto right concerning oral submissions from *amici curiae* arising out of the general confidentiality of hearings (see Chapters 5 and 6). Where panels and the Appellate Body have considered *amicus curiae* submissions in their decision-making, they have done so only where the issue considered was discussed by the parties. Extraneous legal rules have never been considered based on *amicus curiae* submissions. Thus, ultimately in their dealing with *amici curiae*, panels and the Appellate Body have confirmed rather than disputed that the ultimate power over procedural issues rests with the parties, rendering the admission of *amici curiae* an act of symbolic rather than real emancipation from the parties.

## VI. Investor-state arbitration

The issue of *amicus curiae* was particularly sensitive in investment arbitration given the pivotal importance assigned to the principle of consent. It gives the parties the casting vote on every significant procedural aspect of a case: the selection of arbiters, the place of arbitration and the applicable rules. The parties can draft their own set of procedural rules or – which is usually done – rely on a set of procedural rules such as the UNCITRAL or ICSID Arbitration Rules (which may be modified by party agreement).<sup>32</sup>

Arbitral tribunals have been very aware in their dealing with *amici curiae* of the consensual nature of arbitration and the limits of their mandates,

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30 *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R.

31 E.g. *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12–1.13; *US–Zeroing (EC)*, Report of the Panel, adopted on 23 January 2007, WT/DS294/R, para. 1.7.

32 See Article 1(1) of the 2010 UNCITRAL Rules; Rules 19 and 20 ICSID Arbitration Rules; Article 19(1) of the 1985 UNCITRAL Model Law.

thus, emphasizing rather than diminishing consent.<sup>33</sup> They framed the issue of *amicus curiae* head-on as one of consent. Like many others, the tribunal in *UPS v. Canada* held:

The disputing parties have consented to arbitration only in respect of the specified matters and only with each other and with no other person. Canada, along with the other NAFTA Parties, has given that consent in advance in article 1122 and the Investor has given it in the particular case by consenting under article 1121. ... It is of the essence of arbitration that the tribunal has only the authority conferred on it by the agreement under which it is established, considered in context.<sup>34</sup>

In *Aguas del Tunari v. Bolivia*, a case concerning expropriation claims for the Government of Bolivia's termination of the investor's concession after significant public pressure for rising water rates, the tribunal rejected a request to participate as *amicus curiae* from 300 health and safety and environmental organizations. It found the request to be

beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved [the ICISD Convention and Arbitration Rules and the Netherlands-Bolivia BIT] and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal.<sup>35</sup>

The parties had opposed to any form of third party participation.<sup>36</sup> The decisions to admit *amici curiae* in *Methanex*, *UPS*, *Suez/InterAguas* and *Suez/Vivendi* deviated from *Aguas del Tunari* in that the tribunals found that the institutional rules selected by the parties explicitly granted them the power to accept *amicus curiae* submissions. Thus, the decisions did

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33 For many, see *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 220 ('It is important to bear in mind, as a paramount factor relating to jurisdiction, that the Tribunal is established by, and derives its powers (if any) from, the consent of the Parties.').

34 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 36. The tribunal sought to strike a balance between *amicus curiae* participation and the principle of consent by reserving for the parties objections to the jurisdiction and issues pertaining to the place of arbitration.

35 *Aguas del Tunari S.A. v. The Republic of Bolivia*, Letter by the tribunal, 29 January 2003, ICSID Case No. ARB/02/3, p. 1.

36 E. Triantafylou, *Amicus submissions in investor-state arbitration after Suez v. Argentina*, 24 *Arbitration International* (2008), p. 574 (Arguing that the tribunal considered the parties' consent at a higher value than the public interest argued by the petitioners.).

not devalue party consent at all.<sup>37</sup> It was always clear that the parties could exclude *amicus curiae* submissions in future cases by choice of rules not granting residual powers or by *ad hoc* agreement. In addition, in all of these cases, at most only one party, usually the claimant, objected to the admission of *amicus curiae* briefs.<sup>38</sup> The parties are consulted prior to the admission or solicitation of a specific *amicus curiae* brief.<sup>39</sup> Even though the applicable rules assign the ultimate decision over the admission of an *amicus curiae* submission to the tribunal – as in the case of Rule 37(2) ICSID Arbitration Rules and Article 10.20.3 CAFTA – tribunals so far have denied requests for leave to file an *amicus curiae* brief in all instances where both parties voiced their opposition.<sup>40</sup>

Tribunals reacted almost with relief to the adoption of provisions regulating *amicus curiae*. The tribunal in *Glamis v. USA* found that it needed not decide whether it had authority to accept substantive submissions from *amici curiae* as ‘[t]he Free Trade Commission’s Statement on non-disputing party participation indicates that the three states in NAFTA accept

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37 Cf. Article 17 (1) of the 2010 UNCITRAL Arbitration Rules. *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 7 (The tribunal conceded that it had ‘no authority to exercise [inherent] power[s] in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure in this case.’). Critical, L. Bartholomeusz, *supra* note 24, p. 282.

38 The lack of significant backlash by states may be because the first admissions of *amici curiae* occurred under the NAFTA and the UNCITRAL Arbitration Rules. Two of the three NAFTA member states provided for a rich *amicus curiae* practice. In addition, states may have been aware that most of the *amicus curiae* submissions were drafted in their favour.

39 E.g. *Merrill v. Canada*, Letter to petitioners, 31 July 2008, para. 7; *Glamis v. USA*, Award, 8 June 2009, paras. 272, 284-287; *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 151-154.

40 See *Chevron/Texaco v. Ecuador*, Procedural Order No. 8, 18 April 2011 and Letter to *Amici Curiae* from Permanent Court of Arbitration, 26 April 2011, PCA Case N° 2009-23; *Biwater v. Tanzania*, Procedural Order No. 6, 25 April 2007, ICSID Case No. ARB/05/22, paras. 3-4 and Award, 24 July 2008, para. 364; *UPS v. Canada*, Direction for the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, paras. 8, 10. In *Piero Foresti v. South Africa*, the tribunal noted that the parties’ consent was not a requirement for *amicus curiae* participation, and that Rule 37(2) ICSID Arbitration Rules only required tribunals to consult the parties. *Piero Foresti v. South Africa*, Award, 4 August 2010, ICSID Case No. ARB(AF)/07/1.

such statements. More particularly, the parties in this proceeding do not object to such statements...<sup>41</sup> Thus, the parties' and the member states' consent was considered relevant.

Further, at the initial stage of the proceedings, most tribunals consult with the parties on the procedure to be followed, which is then encapsulated in a procedural order. During these consultations, the issue of *amicus curiae* is often placed on the agenda. Tribunals have explicitly taken note of – and usually adopted – the parties' views on *amicus curiae* participation in general and the modalities of its participation in the particular case.<sup>42</sup> In this respect, tribunals delegate some of their procedural discretion to the parties. Tribunals also consult the parties on requests for leave and *amici curiae*'s procedural requests.<sup>43</sup> Tribunals apply the rules regulating the admission of *amici curiae* strictly. They consider the requirement of avoidance of additional burden in terms of both the admission and the process.<sup>44</sup> Furthermore, tribunals have taken due note of regulatory efforts both in the ICSID and in the NAFTA, thereby giving member states a

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41 *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005, para. 9.

42 For many, *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.8; *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001; *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005, para. 6 and Award, 8 June 2009, paras. 272, 284. In *UPS v. Canada*, the tribunal clarified that 'the circumstances and the detail of the making of any *amicus* submissions would be the subject of consultation with the parties,' upon receiving detailed comments by the parties concerning the permissible scope and modalities of *amicus curiae* participation. The procedure subsequently adopted included many of the criteria proposed by the parties. *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, paras. 50, 54, 68, 72, and Procedural directions for *amicus* submissions, 4 April 2003. An exception is *Biwater v. Tanzania*, where the tribunal established a specialized procedure for *amicus curiae* even though the claimant had explicitly requested its rejection for untimeliness. See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007 and Award, 14 July 2008, ICSID Case No. ARB/05/22, paras. 59, 64; *Bear Creek Mining v. Peru*, Procedural Order No. 1, 27 January 2015, ICSID Case No. ARB/14/21, para. 17.

43 *Eureka v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 33 ('After consultation with the Parties, the Tribunal provided the Notice of Arbitration and Statement of Claim to the EC.').

44 *Glamis v. USA*, Award, 8 June 2009, paras. 274, 286 and Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, paras. 11-12.

sense of control over the use and development of the concept. A subtle limitation of consent may be read into the change in the wording of Rule 32(2) ICSID Arbitration Rules, which requires parties to object rather than consent to oral participation by non-parties.<sup>45</sup> However, practically, this change has not had any effect (see Chapter 6).

Another area where parties have theoretically lost some influence is the scope of arguments considered by the tribunal. The instrument disrupts the parties' monopoly over the information presented to a tribunal. Rule 37(2) ICSID Arbitration Rules, the FTC Statement, and practice under these and the UNCITRAL Arbitration Rules, expect *amici curiae* to introduce information the parties would not present. This loss of control may impact the parties' litigation strategy and the scope of information provided by them.<sup>46</sup> Legally, this is not problematic given that the issues addressed by *amici curiae* must be within the scope of jurisdiction. Practically, this has not been an issue because tribunals have so far only considered arguments by *amici curiae* that correspond with the issues raised by the parties (see Chapter 7).

Overall, *Stern's* concerns regarding the admission of *amici curiae* have not materialized, unless one pursues an extremely wide understanding of sovereignty as Mexico did in its Article 1128 NAFTA submission in *UPS*. It stated: '[T]he absence of express language in the international treaty means that the Tribunal cannot take it upon itself to authorize actions that sovereign States party to the Treaty did not authorize.'<sup>47</sup> Such a narrow view was not even followed by the tribunal in *Aguas del Tunari*.<sup>48</sup> In addi-

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45 See *Biwater v. Tanzania*, Award, 14 July 2008, ICSID Case No. ARB/05/22, para. 369 ('It may be noted further that the Petitioners did not attend any of the oral hearings in this arbitration. BGT objected to such attendance and, by ICISD Arbitration Rule 32(2), the Arbitral Tribunal therefore had *no power* to permit it.')

46 L. Reed/J. Paulsson/N. Blackaby, *Guide to ICSID arbitration*, 2<sup>nd</sup> Ed., Alphen aan den Rijn 2011, p. 83.

47 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 56.

48 The tribunal asserted that its decision was not 'in any way prejudging the question of the extent of [its] authority to call witnesses or receive information from non-parties on its own initiative.' Indeed, it later solicited information from the Dutch Government under Rule 34 ICSID Arbitration Rules concerning public statements made by Dutch officials on different provisions of the bilateral investment treaty at issue and to which the parties had referred. See *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, paras. 17-18, 34.

tion, it does not harmonize with the express grant of abstract procedural authority in most institutional rules.

## VII. Comparative analysis

International courts and tribunals that traditionally heed sovereignty and grant states significant procedural influence and control have either not allowed for any significant *amicus curiae* participation (ICJ, ITLOS) or have subjected the consideration of *amicus curiae* briefs largely to the will of the parties (WTO, investment arbitration). International courts and tribunals with traditionally strong procedural powers have faced little to no resistance to *amicus curiae* participation and have not considered its admission a matter engaging the principle of consent (ECtHR, IACtHR). *Amicus curiae* has not fundamentally challenged the relationship between the court, the parties and the member states. International courts and tribunals accord significant value to the views of the parties on the admission and modalities of *amicus curiae* participation. Recent codifications of the instrument recognize the permanency of the instrument – and a desire to control it. In addition, *amici curiae* have not affected the parties' rights to solve a case out of court.<sup>49</sup> Overall, the instrument exemplifies the continued relevance of state consent in international adjudication rather than its diminution.<sup>50</sup>

### *B. Public interest: amicus curiae as motor and evidence of an expanding judicial function?*

The primary function of all courts is the determination of a dispute between two parties.<sup>51</sup> Adopting a simplified view under the private judicial

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49 Cf. *Danell and others v. Sweden* (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I.

50 Re the general relevance of consent, see D. Hollis, *Private actors in public international law: amicus curiae and the case for the retention of state sovereignty*, 25 *Boston College International and Comparative Law Review* (2002), pp. 250-251 ('The general consent of states creating rules of general application remains the operating principle of the international legal order.').

51 See, for instance, Article 25 ICSID Convention; Article 33 ACHR. See also C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45

function, the disputing parties submit a case to an international court or tribunal to deliver a final and binding decision on the basis of the relevant facts and the applicable law.<sup>52</sup> The case does not extend beyond the parties to the dispute and the court only considers issues that directly contribute to the solution of the dispute.<sup>53</sup>

However, the effects of judgments often reach beyond the parties to a case.<sup>54</sup> For facilitation of argument, all these instances are bundled in the following as an exercise of ‘the public function.’ Public judicial functions

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Archiv des Völkerrechts (2007), p. 222; C. Knahr, *Participation of non-state actors in the dispute settlement system of the WTO: benefit or burden?*, Frankfurt am Main 2007, p. 161 (‘[The] primary goal of any investment arbitration is to resolve the dispute between the parties to the proceeding.’); M. Lachs, *Evidence in the procedure of the International Court of Justice: role of the court*, in: E. Bello/B. Ajibola (Eds.), *Essays in honour of Judge Taslim Olawale Elias*, Dordrecht 1992, p. 266.

- 52 See C. Brown, *A common law of international adjudication*, Oxford 2007, p. 72. But see V. Lowe, *Private disputes and the public interest in international law*, in: D. French et al. (Eds.), *International law and dispute settlement: new problems and techniques – liber amicorum John G. Merrills*, Oxford 2010, p. 4 (‘[W]hile public interest in the integrity of the legal process is engaged if the matter does go to court, the decisions on what is done in respect of the breach of contract, and on whether to have recourse to that legal process in the first place, are entirely a matter for the parties themselves. The obligations which are in question are also created and defined by the parties themselves.’); W. Foster, *Fact finding and the world court*, 7 *Canadian Yearbook of International Law* (1969), p. 183 (‘The aim of international procedure must be to ascertain the substantial truth.’).
- 53 Expressions of the private judicial function are a strong adversarial concept in respect of evidence, control by the parties over the course and conduct of the proceedings and a limitation of the court to party-submitted information. See R. Wolfrum, *International courts and tribunals: evidence*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 2; C. Tams/C. Zoellner, *supra* note 51, p. 223.
- 54 R. Higgins, *Policy considerations and the international judicial process*, 17 *International and Comparative Law Quarterly* (1968), pp. 62, 68 (‘[P]olicy considerations, even though they differ from “rules”, are an integral element of that decision-making process which we call international law. ... There is today at least a minimal agreement that judges have a creating function, that adjudication is not a mere, automatic application of existing rules to particular situation. The interpretive function of judges may do much to fill alleged gaps.’); M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 141-142 (‘Ziel des internationalen Prozesses ist nicht primär die Beilegung eines Streits zwischen zwei Parteien, sondern vielmehr die Durchsetzung einer objektiven Rechtsordnung und

may be of a general nature or tied to specific values. They include social governance and the establishment of international peace,<sup>55</sup> the progressive development of a coherent body of international law,<sup>56</sup> deterrence and prevention of international crimes and human rights violations and consideration of public or community interests.<sup>57</sup> The judicial function is a fluid concept. It is influenced by factors such as the type of proceedings (advisory or contentious), the interests affected, the legal and socio-political background of the judges and the legacy of the court.

Is the admission and consideration of *amicus curiae* submissions motor or evidence of a broadening of the judicial function of international courts and tribunals from a private model of dispute settlement to a public-interest based dispute settlement system? Has the participation of *amici curiae* led to increased consideration of public interest issues?

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von Werten der internationalen Gemeinschaft, da die im völkerrechtlichen Prozess betroffene Interessen diejenigen der Parteien regelmäßig transzendieren.' [References omitted]); J. Jackson, *The varied policies of international juridical bodies – reflections on theory and practice*, 25 Michigan Journal of International Law (2004), pp. 875-878. Critical, V. Lowe, *The function of litigation in international society*, 61 International and Comparative Law Quarterly (2012), p. 221 ('The idea of an international community based upon shared global values is a myth; and an unhelpful myth at that. The purpose of international law is not to express, let alone to enforce, a homogenous set of universal values. The structure of international law allows States to be different; indeed, some of its most fundamental principles – sovereignty and self-determination, for instance – serve to secure the right of a State to be different from its neighbours.').

55 M. Benzing, *supra* note 54, p. 141.

56 H. Lauterpacht, *The development of international law by the international court*, London 1958, pp. 6-7 ('The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction.'); H. Lauterpacht, *The function of law in the international community*, Oxford 1933, pp. 319-320 ('Judicial activity is nothing else than legislation *in concreto*.'); V. Lowe, *supra* note 54, pp. 212-213 (Besides settling a dispute, the function of litigation is to 'articulat[e] legal principles applicable in the future.').

57 For a consideration of other judicial functions, see C. Brown, *supra* note 52, pp. 72-77. Brown finds that the latter function also includes the need for effective and efficient judicial decision-making. This could equally be considered a precondition for the private function. See *Id.*, p. 73.

I. International Court of Justice<sup>58</sup>

Article 38(1) ICJ Statute alludes to the private judicial function of the ICJ by stipulating that the Court is ‘to decide in accordance with international law such disputes as are submitted to it.’<sup>59</sup> Several provisions of the ICJ Statute and Rules point to a public judicial function. Specifically, the rules on intervention and Article 34(2) and (3) ICJ Statute show that the drafters of the Statute expected ICJ judgments to be of relevance beyond the parties.<sup>60</sup>

The ICJ has largely pursued a private judicial function, which is reflected in its approach to evidence and third parties.<sup>61</sup> In *Armed Activities*, it held that

the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.<sup>62</sup>

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58 Role and function of the International Court of Justice have been an issue of intense scholarly exchange. For many, see I. Scobbie, *Legal reasoning and the judicial function in the International Court*, University of Cambridge: Ph.D. Dissertation, 1990; I. Scobbie, *The theorist as a judge: Hersch Lauterpacht's concept of the international judicial function*, 8 *European Journal of International Law* (1997), pp. 264-298; L. Damrosch (Ed.), *The International Court of Justice at a crossroads*, Dobbs Ferry 1987; S. Wittich, *The judicial functions of the International Court of Justice*, in: I. Buffard et al. (Eds.), *International law between universalism and fragmentation – Festschrift in honour of Gerhard Hafner*, Leiden 2008, pp. 981-1000.

59 Article 36(2) ICJ Statute clarifies that such disputes must be ‘legal disputes.’

60 Articles 34(2) and (3), 62, 63 ICJ Statute, Article 43 ICJ Rules.

61 See also *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order, 19 August 1929, PCIJ Series A No. 22, para. 13. The ICJ has been less hesitant with regard to the interpretation of law. See D. McRae, *supra* note 22, p. 15.

62 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 26. See also, *Id.*, Diss. Op. Judge Kataka, ICJ Rep. 2005, pp. 168, 190, para. 26. This confirmed earlier statements. See *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, Preliminary Objections, 2 December 1963, ICJ Rep. 1963, pp. 33-34 (‘The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court’s judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.’); *South West Africa (Liberia v. South Africa and*

The ICJ has received numerous calls to expand its function, including from some of its own judges. In the *Pulp Mills* case, several judges expressed a concern that the Court's restrictive attitude to the use of its investigative powers might negatively affect its credibility and popularity in fact-heavy and scientific cases.<sup>63</sup> Judge Kooijmans has called for a greater involvement of NGOs as representatives of civil society on the account that it would allow the ICJ to better discharge its function as the principal judicial organ of the United Nations in a 'shrinking and increasingly inter-dependent world society.'<sup>64</sup> Indeed, the ICJ's interpretation of its function in contentious proceedings is quite narrow when considering that Article 1 UN Charter defines as an aim of the UN system the peaceful settlement of

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*Ethiopia v. South Africa*), Judgment of 21 December 1962, Joint Diss. Op. Judges Fitzmaurice and Spender, ICJ Rep. 1962, p. 466 ('We are not unmindful of, nor are we insensible to the various considerations of a non-judicial character, social, humanitarian and other, which underlie this case; but these are matters for the political rather than the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.'). Again, in the *Pulp Mills case*, the ICJ in remarkably express terms emphasized its continued adherence to a private judicial function to justify its decision not to carry out fact investigations. See *Pulp Mills case*, Judgment, 20 April 2010, ICJ Rep. 2010, para. 168 ('[I]n keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.'). Critical, *Pulp Mills case*, Judgment, 20 April 2010, Sep. Op. Judge Cançado Trindade, ICJ Rep. 2010, para. 151 ('[P]aragraph 170 of the present Judgment should have pointed out also the additional possibility opened to the Court, if it deemed it necessary, namely, that of obtaining further evidence *motu proprio*.'). See also R. Higgins, *supra* note 54, p. 61.

63 *Pulp Mills case*, Judgment, 20 April 2010, Decl. Judge Yusuf, ICJ Rep. 2010, paras. 1, 5, 13; *Pulp Mills case*, Judgment, 20 April 2010, Joint Diss. Op. Judges Al-Khasawneh and Simma, ICJ Rep. 2010, para. 17 ('The present dispute has been a wasted opportunity for the Court ... to avail itself of the procedures in Article 50 of its Statute and Article 67 of its Rules, and establish itself as a careful, systematic court which can be entrusted with complex, scientific evidence, upon which the law (or a breach thereof) by a party can be established. ... In a case concerning complex scientific evidence and where, even in the submissions of the Parties, a high degree of scientific uncertainty subsists, it would have been imperative that an expert consultation, in full public view and with the participation of the Parties take place.'). See also M. Benzing, *supra* note 54, pp. 399-400.

64 P. Kooijmans, *The role of non-state actors and international dispute settlement*, in: W. Heere (Ed.), *From government to governance: the growing impact of non-state actors on the international and European legal system*, The Hague 2003, p. 26.

disputes in compliance not only with international law, but also ‘with the principles of justice.’ Already in 1947, the General Assembly determined that part of the settlement of disputes was the clarification and progressive development of international law.<sup>65</sup> The ICJ’s narrow view may cause difficulty in meeting the demands of today’s international reality.<sup>66</sup> As Dupuy notes, ‘[t]he composition of the international community has changed, but the Statute of the Court remains the same.’<sup>67</sup>

The ICJ’s role in advisory proceedings is different. Article 96 UN Charter entrusts the Court with the clarification of any legal question, without attaching binding force to the Court’s opinion. Here, the ICJ exercises an essentially public function.<sup>68</sup>

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65 UN General Assembly Res. A/RES/181(II), 14 November 1947, Part A. See H. Steinberger, *The ICJ*, in: H. Mosler/R. Bernhardt (Eds.), *Judicial settlement of international disputes*, Berlin 1974, p. 210.

66 See in this regard the criticism by *Sir Robert Jennings*: ‘The effect of Article 34(1) is to insulate the Court from this great body of modern international law. ... It is a matter for serious thought and consideration whether more could be done to ensure that the principal judicial organ of the United Nations is the supreme court of the international community, bearing in mind that a court which exists in isolation, however splendid, is not really in a position to be a supreme court in relation to other courts, as it does not have any formal relations with those other courts.’ R. Jennings, *The International Court of Justice after fifty years*, 89 *American Journal of International Law* (1995), p. 504.

67 P. Dupuy, *Article 34*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice, a commentary*, 2<sup>nd</sup> Ed. Oxford 2012, p. 605, para. 43.

68 See *Nuclear Weapons*, Advisory Opinion, 8 July 1996, Sep. Op. J. Guillaume, ICJ Rep. 1996, p. 293, para. 14 (‘I should like solemnly to reaffirm that it is not the role of the judge to take the place of the legislator. ... [T]he Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States.’); K. Oellers-Frahm, *Lawmaking through advisory opinions*, 12 *German Law Journal* (2011), p. 1055 (‘In the present context, it may therefore be stated that advisory opinions of international courts or tribunals can at least be considered as formulating shared or community expectations – what it is in the interest of the Court itself as well as in the interest of the judicial function a contribution to the development and certainty of international law – and that they do in fact govern the further behavior of those they address, irrespective of their binding or non-binding effect or their legal impact on international law.’). See also with respect to the ICJ’s role in *Legality of the Threat or Use of Nuclear Weapons*, H. Thirlway, *Unacknowledged legislators: some preliminary reflections on the limits of judicial lawmaking*, in: R. Wolfrum et al. (Eds.), *International dispute settlement: room for innovations*, Heidelberg 2012, pp. 311-324; *Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, p. 237, para. 18.

*Amicus curiae* has not affected the Court's judicial function. The instrument is *de facto* non-existent in contentious proceedings. For advisory proceedings, Practice Direction XII acknowledges the existence of *amicus curiae* submissions by NGOs, but it has not led to an expansion of the ICJ's understanding of its judicial function. The Direction permits those involved in an advisory opinion to consult the *amicus curiae* briefs. However, at the same time, it clarifies that the Court does not endorse the concept, and only a few judges on rare occasions have disclosed having considered *amicus curiae* briefs (see Chapter 7).

## II. International Tribunal for the Law of the Sea

The UNCLOS assigns a broader judicial function to the ITLOS. The UNCLOS lists as a purpose the establishment of 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,' as well as seek to take into account 'the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries' in the pursuance of these goals. Especially the Seabed Disputes Chamber must take into consideration the interest of all of mankind in its decision-making as made explicit with respect to issues concerning any commercial use of the ocean floor and its resources extending beyond states' national jurisdiction.<sup>69</sup>

Still, the ITLOS Statute emphasizes that the primary function of the tribunal is the settlement of contentious disputes. This function is flanked by instruments, which allow the consideration of interests other than those conveyed by the parties, including intervention, investigative rules and the power to issue provisional measures to prevent serious harm to the marine environment.<sup>70</sup>

The ITLOS and its Seabed Disputes Chamber have not accepted any of the *amicus curiae* submissions out of the scope of Articles 84 and 133 ITLOS Rules, but the parties may adopt the submissions made. Thus, the

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<sup>69</sup> See Articles 136, 140 and 186 UNCLOS and the UNCLOS Preamble.

<sup>70</sup> C. Brown, *supra* note 52, p. 77.

concept as such has not prompted the tribunal to expand its judicial function, but it displays its willingness to consider the issues raised by *amici curiae* if appropriated by a party.

### III. European Court of Human Rights

Regional human rights courts naturally exercise a strong public interest function, which permeates their procedural rules.<sup>71</sup> Though generally following an adversarial model of dispute settlement, the IACtHR, the ECtHR and the ACTHPR are furnished with broad investigative powers to level the positions of the complainant and the respondent state and to establish the objective facts in light of the gravity of an alleged human rights violation.<sup>72</sup>

Since its early creation, the system of human rights protection in the Council of Europe member states constantly has been expanded, judicialized and formalized. *Amicus curiae* practice has grown with the ECtHR, and *amici curiae* carry out private and public auxiliary functions to assist the court. The insertion of Article 36(2) in the ECHR symbolized an endorsement of the ECtHR's broader public function by the Council of Euro-

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71 The ECtHR has stressed its function as the guardian of human rights in the Council of Europe member states. See R. Schorm-Bernschütz, *Die Tatsachenfeststellung im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Diss. Münster 2004, p. 36, referring to *Ireland v. the United Kingdom*, No. 5310/71, Judgment, 18 January 1978, Series A No. 25, para. 239; *Loizidou v. Turkey*, No. 15318/89, Judgment, 23 March 1995, Series A No. 310, paras. 70, 75, 93; *DeWilde, Ooms and Versyp v. Belgium*, Nos. 2832/66, 2835/66, 2899/66, Judgment, 18 June 1978, Series A No.12, para. 65.

72 With regard to the ECtHR, see R. Wolfrum, *The taking and assessment of evidence by the European Court of Human Rights*, in: S. Breitenmoser et al. (Eds.), *Human rights, democracy and the rule of law – liber amicorum Luzius Wildhaber*, Zürich et al. 2007, pp. 915-916, 918. According to Wolfrum, the ECtHR has used its investigating powers scarcely. *Id.*, p. 917. Re the IACtHR, see C. Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: reflections on a joint venture*, 12 Human Rights Quarterly (1990), p. 447. Rule 45(1) IACTHPR Rules of Procedure: 'The Court may, of its own accord, or at the request of a party, or the representatives of the Commission, where applicable, obtain any evidence which in its opinion may provide clarification of the facts of the case.' See also J. Kokott, *Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, Habil. Heidelberg 1993, pp. 387-389.

pe member states. The ECHR subjects the admission of *amici curiae* to the public interest by conditioning it on ‘the interest of the proper administration of justice.’ This requirement permits the ECtHR to assign an *amicus curiae* functions that support it in fulfilling its task.<sup>73</sup>

The member states have recently further strengthened the ECtHR’s public function through the creation of a right of intervention for the Commissioner for Human Rights by Protocol No. 14 in Article 36(3) ECHR. The reform was carried out with the aim of protecting the general interest more effectively. Member states expressed the expectation that ‘[t]he Commissioner’s experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties.’<sup>74</sup> Thus, the Commissioner’s role is to act as an integrator for similar situations.

#### IV. Inter-American Court of Human Rights

Pursuant to Article 28 IACtHR Statute and Article 34(3) IACtHR Rules, the IAComHR represents the public interest in all cases before the IACtHR.<sup>75</sup> The IACtHR has stressed that it possesses a public function to establish and maintain social order and to maximize the protection of individuals under the American Convention.<sup>76</sup> The court also appears to be

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73 N. Vajic, *Some concluding remarks on NGOs and the European Court on Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 98. *Dolidze* shows how the first admission of *amici curiae* coincided with the ECtHR ‘asserting its Europe wide policy-making role.’ See A. Dolidze, *Bridging comparative and international law: amicus curiae participation as a vertical legal transplant*, 26 *European Journal of International Law* (2015), p. 878.

74 Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention (CETS No. 194), Agreement of Madrid, 12 May 2009, Explanatory Report, para. 87.

75 R. Mackenzie/C. Romano/Y. Shany/P. Sands, *Manual on international courts and tribunals*, 2<sup>nd</sup> Ed. Oxford 2010, p. 379. See also *Viviana Gallardo et al v. Costa Rica*, Decision, 13 November 1981, Explanation of vote by Judge Piza Escalante, IACtHR Series A No. 101, para. 4 (The IAComHR has ‘a *sui generis* role, purely procedural, as an auxiliary of the judiciary, like that of a “Ministerio Publico” of the inter-American system for the protection of human rights.’).

76 Article 33 ACHR determines that the court is competent to discharge matters pertaining to the fulfilment of the commitments made by the states parties to the Con-

willing to assume a law-making function to the extent that it has sought, within the confines of its mandate, to ensure coherence and legal certainty in its case law.<sup>77</sup> The IACtHR has established new legal standards and interpretations. In the *Ivcher Bronstein Case*, it emphasized its public function:

[I]nternational settlement of human rights cases (entrusted to tribunals like the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice); since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter.<sup>78</sup>

Since its inception, the IACtHR has harnessed the concept for its broad judicial function. It made this explicit in *Kimel v. Argentina* upon characterizing *amicus curiae* not only as a source of additional information, but as an instrument to strengthen human rights in the Americas.<sup>79</sup> Thus, *amicus curiae* has not changed the judicial function of the IACtHR, but it has served as a tool for it to exercise its public function.

## V. WTO Appellate Body and panels

Article 3(7) DSU establishes that the ‘aim of the dispute settlement mechanism is to secure a positive solution to a dispute.’ The DSU emphasizes

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vention. Article 1 IACtHR Statute further stipulates: ‘The Inter-American Court of Human Rights is an autonomous juridical institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.’

77 D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 American University Journal of International Law and Policy (1994), pp. 343-344.

78 *Ivcher Bronstein v. Peru*, Judgment of 24 September 1999 (Competence), IACtHR Series C No. 54, para. 48.

79 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, pp. 4-5, para. 16; *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 184, p. 5, para. 14.

the private function by encouraging the parties at all times to find a negotiated mutually accepted solution to their dispute.<sup>80</sup>

Several provisions of the DSU indicate that the function of the WTO dispute settlement system is broader. Article 3(2) DSU describes the dispute settlement system as ‘a central element in providing security and predictability to the multilateral trading system,’ thereby pointing to a stabilizing and integrating function. The WTO Agreement incorporates select community interests pertaining to trade, such as an increase in global welfare through trade liberalization and the furtherance of economic growth of developing countries. Panels and the Appellate Body have an institutional commitment to the promotion of global free trade.<sup>81</sup> Further, Article 11 DSU’s objectivity requirement and Article 13 DSU’s grant of inquisitorial powers show that panels are not mere private service providers. The norms assert that panels, not the parties, are to establish the factual record.<sup>82</sup> Under Article 13 DSU, panels are not only free in the choice of the sources, individuals and bodies to consult,<sup>83</sup> but also whether to seek any advice at all,<sup>84</sup> whether to accept or reject the information requested

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80 R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Diss. Berlin 2007, p. 105; *US–Wool Shirts and Blouses*, Report of the Appellate Body, adopted on 23 May 1997, WT/DS33/AB/R, p. 19 (‘[T]he basic aim of dispute settlement in the WTO is to settle disputes.’). See also Article 3(4) DSU.

81 See Chapter 2. See also J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 91. On the Appellate Body as a review instance, see R. Alford, *Reflections on US–Zeroing: a study in judicial overreaching by the WTO Appellate Body (2006-07)*, 45 *Columbia Journal of Transnational Law* (2006), p. 201, FN 19; S. Croley/J. Jackson, *WTO dispute procedures, standards of review, and deference to national governments*, 90 *American Journal of International Law* (1996), pp. 195-196.

82 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, paras. 104, 106. See also P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 325.

83 *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, p. 56, para. 135 (‘[I]t is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings.’).

84 See *Argentina–Textiles and Apparel*, Report of the Appellate Body, adopted on 22 April 1998, WT/DS56/AB/R, para. 84 and *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, paras. 299-303, where the

and how to evaluate and assess said information.<sup>85</sup> Panels have acknowledged their public function. However, they have stressed that their role is '[f]irst and foremost ... designed to settle disputes.'<sup>86</sup> Indeed, the DSU establishes significant limits on panels' public function to ensure the operability of the private function, such as the scope of jurisdiction, the burden of proof and due process considerations.

Panels and the Appellate Body have embraced a broad judicial function. The Appellate Body has found that Article 3(2) DSU entrusts it and panels with the clarification of the rights and obligations of member states and the creation of a coherent and predictable body of jurisprudence.<sup>87</sup> The Appellate Body has interpreted the investigative authority bestowed upon panels broadly, while emphasizing that the primary function of the WTO Dispute Settlement System is to settle the disputes brought to it.<sup>88</sup>

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Appellate Body held that the duty to make an objective assessment of the case was not violated if the panel, in exercise of its discretion under Article 13(2) DSU, decided not to seek information from an external source.

- 85 Re the case law on panel's role as the trier of facts, see D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 428, FN. 20.
- 86 *EC–Bananas III*, Report of the Panel, adopted on 25 September 1997, WT/DS27/R/ECU, p. 301, para. 7.32.
- 87 *US–Stainless Steel*, Report of the Appellate Body, adopted on 20 May 2008, WT/DS344/AB/R, p. 67, para. 161 ('Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.').
- 88 E.g. *Korea–Dairy*, Report of the Appellate Body, adopted on 12 January 2000, WT/DS98/AB/R, para. 137. See also Chapter 7. However, see *US–Wool Shirts and Blouses*, Report of the Appellate Body, adopted on 23 May 1997, WT/DS33/AB/R, p. 19 ('Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.').

Former Appellate Body members have indicated that the proactive review of facts and laws may have been due to the ‘weakness of the political structure within the WTO.’<sup>89</sup>

Many member states considered the admission of *amicus curiae* briefs to amount to judicial activism, even an assumption of a legislative role.<sup>90</sup> However, the Appellate Body justified the admission with its already existing powers (see Chapter 5). It made no reference to a public interest or any other broader role, but presented the admission as a purely technical issue.

With respect to public interest issues in particular, *amicus curiae* briefs seem barely to have had any impact given panels’ and the Appellate Body’s reluctance to consider them. The cases where *amici curiae* have been taken into account concern contextual or legal arguments directly relevant to the case as framed by the parties and not matters of general public policy. This indicates that panels and the Appellate Body seek for information to find a solution to the dispute, not to render a general (legislative) decision on the relations between trade and other issues. Panels and the Appellate Body have refused to review briefs addressing arguments not raised by the parties (see Chapter 7). The parties and third parties can always adopt an *amicus*’ arguments with the consequence that the Appellate Body or panel is obliged to consider them. Thus, with respect to the

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89 D. Ehlermann, *Six years on the bench of the World Trade Court*, 36 *Journal of World Trade* (2002), pp. 632-636. See also T. Zwart, *Would international courts be able to fill the accountability gap at the global level?*, in: G. Anthony et al. (Eds.), *Values in global administrative law*, Oxford 2011, p. 201 (‘[T]he decision-making for all matters other than dispute settlement is by consensus which makes it slow and cumbersome. Consequently, there is a stark contrast between the fast and effective operation of the judicial dispute settlement bodies and the inefficiency and weakness of the political structure. ...The Appellate Body has been acting as the constitutional engine of the WTO by shaping and filling in its constitution, by forcing constitutional relations at the central level.’).

90 The European Commission at the General Council meeting argued that the Appellate Body had assumed a legislative function due to the WTO legislature’s failure to address the issue. See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by European Commission, para. 96. See also A. Appleton, *Amicus curiae submissions in the Carbon Steel Case: another rabbit from the Appellate Body’s hat?*, 3 *Journal of International Economic Law* (2000), p. 699.

substantive consideration of briefs, the *amicus curiae* practice evinces a strong private judicial function rather than an evolving public function.<sup>91</sup>

## VI. Investor-state arbitration

Investment arbitration tribunals embody the private function of dispute settlement. They are established by consent of the parties solely for the solution of their dispute.<sup>92</sup> Traditionally, private arbitrators are charged to focus on the interests of the disputing parties, and not to integrate any societal interests or views in their decisions. Accordingly, intervention, publicity and transparency are atypical features of investor-state arbitration, as is reflected in the majority of investment treaties and institutional rules.<sup>93</sup> They do not inform tribunals on how to reconcile investors' rights with environmental, health or other public interests.<sup>94</sup>

In recent years, there has been a shift in the characterization of the basic structure of investment arbitration. Instead of being considered a sub-area of commercial arbitration, it is increasingly seen as part of a global administrative law.<sup>95</sup> This has entailed calls for a change of the function of in-

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91 J. Durling/D. Hardin, *Amicus curiae participation in WTO dispute settlement: reflections on the past decade*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 225.

92 For instance, Article 25 ICSID Convention states that the jurisdiction of the Centre covers 'any legal dispute arising directly out of an investment'. See also Article 1(1) of the 2010 UNCITRAL Arbitration Rules and of the 2013 UNCITRAL Arbitration Rules.

93 See M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 *Columbia Journal of Transnational Law* (2003), p. 952.

94 V. Lowe, *supra* note 54, p. 9.

95 G. Van Harten/M. Loughlin, *Investment treaty arbitration as a species of global administrative law*, 17 *European Journal of International Law* (2006), p. 121; A. Cohen Smutny, *Investment treaty arbitration and commercial arbitration: are they different ball games? The actual conduct*, in: A. van den Berg (Ed.), *50 years New York Convention*, Alphen aan den Rijn 2009, p. 168 ('[I]nvestment treaty arbitrations are not private disputes. They are disputes about matters of public policy, about legislation, about the conduct of public servants, about national courts, and about the manner in which laws are implemented and regulators regulate. A final award against a state stands as a bill to the taxpayers of a country – and potentially a significant bill at that.').

vestment tribunals, specifically a broadening of their mandate to include considerations beyond the solution of the concrete dispute (see Chapter 2).

The criticism has had an effect on some of the newer investment treaties in force. The current US Model BIT recognizes the public interest explicitly.<sup>96</sup> In addition, several relatively recent legislative efforts indicate a broadening of the judicial function of tribunals. These include the introduction of third party participation and transparency rules in investment treaties and institutional rules (see Chapters 3 and 5).<sup>97</sup>

Arbitral tribunals appear to have cautiously expanded their mandates. One of the most poignant functions assumed by tribunals is the coherence of arbitral decisions, an aspect that traditionally is anathema given the pervasive confidentiality rules.<sup>98</sup>

The admission of *amici curiae* by investment tribunals was motivated by public interest considerations. The *Methanex* tribunal justified its decision to grant leave to file a brief to an *amicus curiae* with the public interest raised by the subject matter:

[T]here is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.<sup>99</sup>

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96 E.g. Articles 12 and 13 of the 2012 U.S. Model Bilateral Investment Treaty, at: <http://www.state.gov/documents/organization/188371.pdf> (last visited: 9.9.2017).

97 The ICSID Convention and its arbitration rules, which were designed specifically for investment arbitration, have always somewhat reflected the public interest element in investment treaty arbitration. C. Tams/C. Zoellner, *supra* note 51, pp. 224-225. See also public interest elements in other treaties, such as Article 1128 NAFTA, Article 10.20.2 CAFTA and Article 5 UNCITRAL Rules on Transparency.

98 The tribunal in *Saipem SpA v. Bangladesh* went so far as to consider it ‘a duty to adopt solutions established in a consistent series of cases [and] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards the certainty of the rule of law.’ See *Saipem SpA v. the Peoples’ Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ICSID Case No. ARB/05/07, para. 67.

99 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, para. 49. See also *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17

Despite the continued acknowledgment of the public interest in the subject-matter in connection with the admissions of *amici curiae*, tribunals remain cognizant of the strong private function of investment arbitration and the fact that they are bound by the rules agreed upon by the parties.<sup>100</sup> This awareness is reflected in strict timing requirements, restricted access to documents and a limited consideration of ‘public-interest’-driven briefs. Instead of these submissions, tribunals have considered with greater frequency submissions from *amici curiae* that focus on certain legal aspects raised by the parties or which provide contextual information. In essence, tribunals have consistently held that any public mandate they may have is confined by the terms of their private function. The tribunal in *Eureko v. Slovak Republic*, for instance, rejected any notion of a law-making function in its partial award:

In particular, the Tribunal wishes to emphasise that its decisions are here limited both by the requirements of this particular case and by the scope of the arguments presented by the Parties. This award is thus necessarily confined to the specific circumstances of the present case; and the Tribunal does not here

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March 2006, ICSID Case No. ARB/03/17, paras. 18-19; *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 358.

100 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 6. In *Biwater v. Tanzania*, the investor stressed the possibilities of the instrument under the private function. It pleaded with the tribunal to allow *amicus curiae* submissions only ‘if the issues they raise and the interests they represent will contribute information and insight in relation to the determinations that are necessary for the arbitral tribunal to make in order to resolve this dispute.’ See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 3. Further, the claimant submitted that it was irrelevant that the CIEL and the IISD had expertise in general international law, including on the connection between international investment agreements and national development policy, because political issues of this nature could not bear on the factual and legal issues in the dispute. The tribunal disagreed. It stated: ‘[E]ven if Claimant ultimately proves that such wider interests, as a matter of fact, are untouched by its claims, the observations of the tribunal in the *Methanex* case still applies with force, namely that ‘the acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor state arbitration.’ *Id.*, para. 54. However, in its award, the tribunal then stressed that it was ‘mandated to resolve claims as between [Biwater Gauff Tanzania] and the Republic, but also recognized that this arbitration raises a number of issues of concern to the wider community in Tanzania.’ See *Biwater v. Tanzania*, Award, ICSID Case No. ARB/05/22, para. 358.

intend to decide any general principles for other cases, however ostensibly analogous to this case they might be.<sup>101</sup>

Similarly, the tribunal in *UPS v. Canada* emphasized its private function. It rejected the petitioners' argument that the arbitration was different from private contract based arbitration as 'unhelpful', because its powers could not

be used to turn ... the subject of the arbitration into a different dispute. ... Rather, the powers are to be used to facilitate the Tribunal's process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it in accordance with the consent of the disputing parties.<sup>102</sup>

Nonetheless, the adoption of rules on *amicus curiae* signals that the *rule makers* accept a broadened mandate, especially as the rules leave room for the submission of information that not merely serves to avoid error in the final award. The rules intend to broaden the perspective of the tribunals by requiring petitioners to introduce information to the tribunal that the parties do not submit and by limiting the concept to those having an interest in the outcome of the arbitration. In addition, the concept has broadened the circle of those permitted to present information to the tribunal.<sup>103</sup>

However, so far, *amicus curiae* has not been very effective as a vehicle for public interest considerations. Portions of *amicus curiae* briefs containing policy considerations and advocating legislative change are generally ignored (see Chapter 7). Public interest considerations are rarely summarized, let alone relied upon in the decision, unless introduced by a party. This may be also because of the difficulties arising in respect of the applicable law. Unless the public interest considerations form part of the applicable law or can be considered in the interpretation of the treaty, tribunals prefer to not consider them at all to avoid challenges to the validity of an

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101 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 218. The reason for the tribunal's clear message may have been motivated by the fact that the case generated a high amount of public attention, as the European Commission and stakeholders in several European countries highly anticipated the decision to deduce the future validity of intra-EU BITs.

102 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 60. The respondent in the case acknowledged a general public interest in Chapter-11 disputes. *Id.*, para. 52.

103 See also C. Brower, *Obstacles and pathways to consideration of the public interest in investment treaty disputes*, in: K. Sauvart (Ed.), *Yearbook on International Investment Law & Policy*, Oxford 2008-2009, pp. 360-364.

award.<sup>104</sup> Further, what constitutes a noteworthy public interest has remained rather vague. Tribunals have identified cases concerning essential commodities as raising a public interest, but they have so far not explained convincingly why these cases, more than other investor-state arbitrations that also affect national legislation and budgets, should receive external input. Finally, as *Brower* notes, the cases addressing public interests generally are a fraction of the total cases submitted to investment arbitration and they cannot establish a general framework for the consideration of public interest issues.<sup>105</sup>

## VII. Comparative Analysis

Overall, the concept does not seem to have notably expanded the public judicial function of any of the international courts and tribunals considered.<sup>106</sup> *Amicus curiae* participation is virtually absent from the ITLOS and the ICJ and basically ineffective in the WTO dispute settlement system, all of which adhere to a strong private function of dispute settlement. It occurs regularly in the human rights courts including for the representation of public interests in cases engaging conflicting values. By their nature and jurisdiction, these courts exercise a public judicial (or pro-human rights) function and the presence of public interests is apparent to all parties. A certain paradigm shift towards a public judicial function constituted the admission of *amici curiae* out of public interest considerations in investment arbitration. Even though they may not have contributed to an expansion of the judicial function, in several courts, *amici curiae* have drawn attention to public interests involved (even where these were not legally recognized by the respective court or tribunal).

The opening towards *amicus curiae* in the WTO and in investment arbitration goes hand in hand with an increased recognition of public interests in substantive international law, in the applicable legal instruments and in

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104 *Id.*, p. 368. See FN 161 of his article for a list of BITs recognizing public interests.

105 *Id.*, p. 360 ('[T]he half-dozen decisions on *amicus* submissions may be too few in number and too narrow in scope to illuminate the public interest for the vast run of investment treaty disputes.').

106 For an opposing view based on the introduction of the concept itself, see Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford handbook of international adjudication*, Oxford 2014, p. 822.

case law. However, investment tribunals, WTO panels and the Appellate Body have not given effect to public interests introduced by *amici curiae* in their decision-making. In addition to concerns over the applicable law, their reluctance may be due also to systemic concerns. Both systems were founded to protect and foster trade and investment respectively. The expressed goal was essentially to take politics out of the equation and focus on a stringent application of the respective international agreements reached between member states.<sup>107</sup> The clash of these agreements with non-trade or investment-related values was not factored into the system which was accordingly ill-equipped to address it. The increasing amount of legitimacy debates certainly paved the ground for *amicus curiae* participation in these *fora*. The mere fact of admission of *amicus curiae* briefs and the granting of an opportunity to directly voice their views to the arbitrators and parties already constitutes a success for *amicus curiae* proponents.

Given its limited effectiveness, is *amicus curiae* the appropriate engine for the introduction of public interest considerations in the judicial process (if we assume that this cannot be left to the disputing parties) (1.)? Have the fears over a denaturation of the judicial function materialized (2.)?

### 1. The right agent?

An alternative to *amicus curiae* could be the instrument of a public interest representative. The ECJ relies on advocates general to represent the public interest and the IACtHR and the ECtHR allow human rights commissioners to participate in their proceedings.<sup>108</sup>

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107 T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvant (Ed.), *Yearbook on International Investment Law & Policy*, Oxford 2008-2009, p. 513.

108 Another possibility could be to exclude certain matters from adjudication, through political question doctrine or arbitrability exceptions. See V. Lowe, *supra* note 54, pp. 220-222. However, this would remove important issues from the sphere of arbitration, with the potential of abuse. In addition, not all constituent instruments allow courts to refuse adjudication on political grounds. *Wälde* proposes the creation of an appointed impartial defender of the public interest in investment arbitration. See T. Wälde, *supra* note 107, p. 558.

It is doubtful that *amicus curiae*, as developed by international courts and tribunals, is *en pars* with these other institutionalized forms of participation.<sup>109</sup> *Amicus curiae*'s role as a public interest defender is poorly developed. Rather than to authoritatively represent them, the international *amicus curiae* usually informs international courts and tribunals of possible public interest issues raised in a dispute – or the fact that the public takes an interest in the case at all (IACtHR).<sup>110</sup> International courts and tribunals – with the exception of a few investment tribunals – do not require a special link between the *amicus curiae* and the public interest represented.

The main concern, however, relates to its sporadic nature. Also, where tribunals are open to the concept, they cannot control which, if any, *amicus curiae* seeks to participate. *Amici curiae*, especially NGOs, focus on cases that support their own agenda ('strategic litigation'). Thus, there is no guarantee that a case with an affected public interest will attract *amicus curiae* submissions, let alone by the most legitimate or expert representatives of this interest. It appears more appropriate to consider establishment of a permanent representative of the public interest, as has happened in the ECtHR and the IACtHR.

## 2. Denaturation of judicial proceedings?

Fears over a denaturation because of overzealous *amici curiae* and tribunals have not materialized. The concern is basically that by opening the proceedings to public-interest based *amici curiae*, courts will lose sight of their original function and end up acting as a quasi-legislative organ seeking to accommodate the general public interest while losing sight of their

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109 R. Teitelbaum, *A look at the public interest in investment arbitration: is it unique? What should we do about it?*, 5 Berkeley Journal of International Law (2010), p. 58; Z. Eastman, *NAFTA's Chapter 11: for whose benefit?*, 16 Journal of International Arbitration (1999), pp. 114-117; T. Wälde, *Transparency, amicus curiae briefs and third party rights*, 5 Journal of World Investment and Trade (2004), p. 338.

110 A. Kawharu, *Participation of non-governmental organizations in investment arbitration as amici curiae*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 285.

primary task, the solution of the dispute before them.<sup>111</sup> This is feared to ultimately affect courts' authority and legitimacy.<sup>112</sup> The issue is even more delicate at the international level because of the absence of a central legislative organ able to reverse any unwanted judicial activism.<sup>113</sup> As seen, some of its users consider *amicus curiae* a tool to modify international law.

However, international courts and tribunals have not lost sight of their primary function in their dealing with *amici curiae*. International courts, as Mendelson puts it, are not general public enquiries.<sup>114</sup> Although courts may take far-reaching decisions which may *de facto* affect non-parties, their main function is to adjudicate, not to legislate. In so far, the assessment of the tribunal in *Larsen v. Hawaii* still holds true: '[T]he function of international arbitral tribunals in contentious proceedings is to determine disputes between the parties, not to make abstract rulings.'<sup>115</sup> International courts and tribunals cannot remedy the legislative deficiencies of international law. They (rightly) lack mechanisms to ensure popular consent, es-

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111 Arguing that courts are ill-suited to adequately protect the public interest, V. Lowe, *supra* note 54, pp. 14-16.

112 C. Harlow, *Public law and popular justice*, 65 *Modern Law Review* (2002), p. 2 ('If we allow the campaigning style of politics to invade the legal process, we may end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy.').

113 H. Lauterpacht, *The absence of an international legislature and the compulsory jurisdiction of international tribunals*, 11 *British Yearbook of International Law* (1930), p. 143 ('Undoubtedly, the absence of international legislation puts a heavy strain upon judicial settlement as an obligatory institution, but to cut the Gordian knot by rejecting, on this account, obligatory arbitration altogether is too simple a solution. To do so is to exhibit an attitude of resignation. An effective international legalization will for a long time continue to be an ideal.'). A. von Bogdandy, *Verfassungsrechtliche Dimensionen der Welthandelsorganisation*, *Kritische Justiz* (2001), p. 271.

114 In the latter, it is desirable and justified to obtain the broadest range of views on the issues under discussion from experts as well as from any potential stakeholders. See M. Mendelson, *Debate on transparency, amicus curiae briefs and third party participation*, 5 *Journal of World Investment and Trade* (2004), p. 347.

115 C. Tams/C. Zoellner, *supra* note 51, FN 22; *Lance Paul Larsen v. Hawaii*, 5 February 2001, PCA Case No. 1999-01, reprinted in 119 *ILR*, p. 587.

pecially to carry out an inclusive political consultation and deliberation process.<sup>116</sup> Their focus must remain the solution of the case before them.

The issue is different with regard to advisory proceedings, where the primary goal of the proceedings is the clarification of a question of international law.<sup>117</sup> This has consequences for participation. At least in theory, those enjoying *locus standi* do not participate to protect their own rights and obligations. Their contributions, like *amicus curiae* participation, intend to assist the respective international court or tribunal in the consideration of the legal question submitted to it.<sup>118</sup> Given that the aim is to find out what the law is, the rules on participation should be as inclusive as possible to furnish the court with the widest range of relevant information. This is reflected in the broad rules on participation in the procedural regimes of the ICJ and the ITLOS in advisory proceedings.<sup>119</sup>

### C. *Amicus curiae* as a tool to increase the legitimacy of international adjudication?

*Amici curiae* are seen to mitigate legitimacy concerns in respect of the substantive legitimacy of a decision, its procedural legitimacy and the overall acceptance of international dispute settlement. This is because it

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116 R. Kay, *Judicial policy making and the peculiar function of the law*, 40 Connecticut Law Review (2008), pp. 1281, 1283.

117 K. Oellers-Frahm, *supra* note 68, p. 1046; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 145; A. Riddell/B. Plant, *supra* note 12, p. 359. In its first advisory opinion, the IACtHR defined the purpose of advisory opinions as 'to assist the American States in fulfilling the international human rights obligations and to assist the different organs of the Inter-American system to carry out functions assigned to them in this field.' See "*Other Treaties*" *subject to the consultative jurisdiction of the court (Article 64 American Convention on Human Rights)*, Advisory Opinion No. OC-1/82 of 24 September 1982, IACtHR Series A No. 1, para. 40; R. Wolfrum, *Advisory opinions: are they a suitable alternative for the settlement of international disputes?*, in: R. Wolfrum et al. (Eds.), *International dispute settlement: room for innovations?*, Heidelberg 2013, pp. 39, 40.

118 S. Rosenne, *The law and practice of the International Court*, Vol. III: Procedure, 2<sup>nd</sup> Ed., Leiden 2006, p. 1676, para. III.409.

119 H. Thirlway, *Advisory opinions*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 1.

allows those (factually) affected by a decision to become involved in the proceedings. Further, it provides the adjudicating body with all the information necessary to render a correct decision that will be accepted by the parties and those affected by it.

This section analyzes if these expectations have been met. Specifically, it examines if the concept is an effective tool of participation for those directly or indirectly affected by a judicial decision (I.) and if it has led to improved decisions (II.). In this context, this section will also discuss the requirements *amici curiae* need to comply with to fulfil either of these functions (III.).

### I. Procedural legitimacy

Procedural (or input) legitimacy is one of the cornerstones of international adjudicative legitimacy.<sup>120</sup> It ensures that those who are affected by a decision will be willing to accept the outcome, even if it is not in their favour.<sup>121</sup>

Several international courts and tribunals, including investment arbitration tribunals, the ECtHR and the IACtHR, have stated that the instrument increases procedural legitimacy. The *Biwater v. Tanzania* tribunal, for instance, stated that the admission of *amicus curiae* is a tool ‘in securing wider confidence in the arbitral process itself.’<sup>122</sup> The ECtHR regularly uses the concept to allow persons potentially affected by a case, including the opposing party in civil proceedings, to voice their views. Also before the WTO Appellate Body and panels, the majority of those seeking to par-

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120 R. Howse, *Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence*, in: J. Weiler (Ed.), *The EU, the WTO and the NAFTA*, Oxford 2000, p. 43. One might suggest that the farther removed the decision-maker is from responsibility to a particular electorate, the more legitimacy depends on procedural fairness itself. Referring to M. Cappelletti, *Giudici legislatori?*, Milan 1984, p. 43 (‘The legitimacy or credential of the judiciary, unlike that of the other strictly political organs, does not derive from the fact that it represents an electorate, to which it is directly or indirectly responsible. Rather, democratic legitimacy accrues to the judiciary through the fundamental right to respect for the guarantees of “natural justice”.’).

121 L. Helfer/A. Slaughter, *Toward a theory of effective supranational adjudication*, 107 *Yale Law Journal* (1997), p. 284; R. Howse, *supra* note 120, pp. 35-69.

122 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50.

ticipate as *amicus curiae* are entities representing persons who may be affected by the outcome, particularly business interest groups. In the ECtHR, the WTO adjudicating bodies, the IACtHR and in investor-state arbitration, *amici curiae* seeking to represent the wider views of the public have been granted leave to file a submission (see Chapters 4 and 5 and Section B). In the IACtHR and the ECtHR, *amici curiae* have provided the courts with direct evidence of societal changes in numerous cases involving ethically complex questions, such as abortion or LGBTIQ\* rights (see Chapters 6 and 7).<sup>123</sup> Such participation, in turn, may improve international courts' procedural (and institutional) legitimacy, specifically if *amici curiae* initiate and engage in discourse with the general public about the court and its jurisprudence. This is subject to the *amici curiae* themselves being legitimate representatives of the interests tabled (see below).

Further, the main drivers for an inclusion of the public in international adjudication are NGOs with an interest in the issues affected by the dispute. Often these NGOs stem from the local area where the dispute plays out. In these instances, the instrument is used by the stakeholders on whose participation and involvement legitimacy rests. As will be shown below, representativity concerns have in so far not materialized.

Still, there are significant drawbacks to the reliance on *amicus curiae* as a tool for enhanced procedural legitimacy. First, as *Weigand* notes in his case study on the efficiency of the Quechan Indian Nation's participation as *amicus curiae* in *Glamis*, the instrument is an ill-suited substitute for a right to intervene. This is particularly troubling where, as in *Glamis v. USA*, the affected interest is unlikely to be represented adequately by any of the parties.<sup>124</sup> The limited protective capacity of *amicus curiae* rests in its nature as an instrument of the court. *Amici curiae* do not have a right to participate.

Further, *amicus curiae* participation has been largely sporadic. Especially before investment tribunals, the WTO Appellate Body and WTO

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123 See also N. Bürli, *Amicus curiae as a means to reinforce the legitimacy of the European Court of Human Rights*, in: S. Flogaitis et al. (Eds.), *The European Court of Human Rights and its discontents*, Cheltenham et al. 2013, p. 143.

124 P. Wieland, *Why the amicus curiae institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals: Glamis Gold and the right of intervention*, 3 Trade Law and Development (2011), p. 336 (He argues that indigenous people should have a right to intervene because of their distinct cultural identity and the right to self-determination.).

panels, the cases with *amicus curiae* participation range in the low double digits. Admittedly, not all cases engage the public interest equally and give rise to legitimacy concerns. Still, the exceptional character of the instrument makes it unsuitable for the addressing of fundamental systemic concerns.<sup>125</sup> The solution to this problem lies hardly in a pro-*amicus curiae* publicity campaign. The use of *amicus curiae* as a link between courts and an affected community shall not be diminished, especially where judges must balance competing interests. In these instances, the submissions from *amici curiae* can, possibly more than the parties' submissions, convey a more direct and real picture of the facts and underlying concerns. However, judges cannot possibly hear the concerns of every potentially affected person and entity, lest they lose sight of their primary task to the detriment of the parties and, as detailed in the previous section, run risk of adopting a legislative role for which they are neither equipped nor legitimized. The difficulty hence lies in finding the right balance between those to involve and those not to involve.<sup>126</sup> This matter has not become problematic in most courts, likely because of the low number *amici curiae* seeking to defend their own rights.<sup>127</sup> But it may have to be addressed when this changes. The best solution in this regard may ultimately be the creation of a representative of the public interest alongside possibilities for *amicus curiae* participation or even intervention as of right for those specifically and directly affected. Such a representative has been introduced recently in the ECtHR.

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125 C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 *Aussenwirtschaft* (2005), p. 370.

126 This is left open by R. Reusch, *supra* note 80, pp. 223-236.

127 However, it is a concern in the ECtHR with regard to the opposing party in the underlying proceedings. The German Constitutional court (BVerfG), in a decision of 14 October 2004, held that the lack of a formal participation mechanism for the winning party in domestic proceedings may lead to restrictions in the national implementation of an ECtHR judgment. The BVerfG noted that a mechanism for participation could ease the problem. Further, there is a concern that the affected person may not know that the losing party has filed an ECtHR application as no formal notification mechanism exists. In Germany, the representative of Germany before the ECtHR notifies the affected parties and informs them of the possibility of participation pursuant to Article 36(2) ECHR. It is argued that the ECtHR should process such notifications. See J. Meyer-Ladewig, *Kommentar zur europäischen Menschenrechtskonvention*, 2<sup>nd</sup> Ed, Baden-Baden 2006, Artikel 36. See also, N. Bürli, *supra* note 123, pp. 145-146. Bürli critically notes that the court admits the winning party as *amicus curiae* in only a fraction of cases.

Finally, there is an issue of intransparency concerning the rules on *amicus curiae* participation and their application. As shown in Chapters 4 and 5, many rules are highly abstract, and the decision on admission in many courts is intransparent. With the exception of investment tribunals, rejected *amicus curiae* applicants rarely are given reasons for the rejection. This practice might lead to new legitimacy concerns.

## II. Substantive legitimacy

Substantive (or output) legitimacy relates to the quality of the decisions rendered by international courts and tribunals. It has been argued that *amici curiae* can improve outcome legitimacy by sharing information with the court on issues in which they are particularly experienced or knowledgeable.

Chapter 6 shows that international courts and tribunals receive a large number of sophisticated and well-researched *amicus curiae* submissions. Submissions tend to be meticulously prepared and it is not uncommon for *amici curiae* to hire legal experts to draft their submissions.<sup>128</sup> Further, expertise and experience are considered indispensable by most international courts and tribunals when deciding on whether to grant leave to file a submission to an *amicus curiae*. However, there is a problem in terms of verification, quality assessment and consideration.

First, there is no evidence that any international court or tribunal currently engages in an in-depth control of the quality and veracity of *amicus curiae* submissions. *Amici curiae* are not cross-examined. Courts seem to expect the parties to point to inaccuracies in *amicus curiae* submissions. It has been proposed that instead of *amici curiae*, courts should appoint ex-

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128 For example, in the *Arctic Sunrise Case*, the submission from Greenpeace was prepared by Professor Philippe Sands QC, Simon Olleson and Kate Harrison. See *Arctic Sunrise Case*, Provisional Measures, ITLOS Case No. 22, *Amicus Curiae* Submission by Stichting Greenpeace Council (Greenpeace International), 30 October 2013, at: <http://www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf> (last visited: 19.9.2017); *US-Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, FN 4 (The *amicus curiae* submission by AIIS was prepared by Wilmer Cutler Pickering Hale Dorr LLP.).

perts ‘whose reputation actually stands or falls on their impartiality’ if they require further information but are not sure that the (relevant) information provided by an *amicus curiae* is impartial.<sup>129</sup> Apart from concerns over additional costs incurred by this proposal, it might suffice to start with requiring *amici curiae* to prove allegations of facts and adhere to scientific guidelines when presenting arguments. There is no justification for placing this burden on the parties’ shoulders alone, especially where the parties’ possibilities to check submissions are limited.

Second, only the IACtHR and the ECtHR seem to draw from the content of submissions regularly in their decision-making. Neither investment tribunals nor the WTO adjudicative bodies appear to have reviewed the proposals made by *amici curiae* in their submissions, unless the arguments presented were identical to those raised by the parties. WTO panels and the Appellate Body have acknowledged, albeit unrelated to the issue of *amicus curiae* participation, that the WTO Agreement and its Annexes affect the interests of non-state actors and that therefore these have to be taken into account in the interpretation of the rights and obligations of WTO law.<sup>130</sup> The submissions considered stemmed predominantly from affected industry representatives (see Chapter 7). This begs the question if *amicus curiae* at all affects substantive legitimacy. Governments appearing as a party or third party already regularly incorporate the submissions of industry groups in their pleadings, as opposed to those of consumer or environmental organizations, though the latter may change in countries where governments increasingly give weight to non-trade related issues, especially environmental concerns.<sup>131</sup>

Thus, while the instrument has the potential to inform of the various interests possibly affected by their decision, with the exception of the regional human rights courts, international courts and tribunals barely seem

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129 E. Triantafilou, *supra* note 36, p. 576.

130 *US–Section 301 Trade Act*, Report of the Panel, adopted on 27 January 2000, WT/DS152/R, p. 320, para. 7.73 (‘However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix.’); R. Howse, *supra* note 19, p. 500 (‘Indirect access to dispute settlement proceedings through *amicus* submissions recognizes these realities, without thereby changing the nature of the system as one that directly grants rights only among states parties to the treaties.’).

131 See D. Prévost, *WTO Subsidies Agreement and privatised companies: Appellate Body amicus curiae briefs*, 27 *Legal Issues of Economic Integration* (2000), pp. 287, 288.

to have taken into account *amicus curiae* submissions in their substantive decisions. Consequently, the legitimizing effect of the instrument currently is aspirational rather than real. At worst, it may give an appearance of greater legitimacy to the public that may reverse once the public realizes the ineffectiveness of the instrument. There is a risk that lack of substantial consideration of *amicus curiae* briefs may actually deepen legitimacy concerns regarding the WTO dispute settlement system and investment arbitration.<sup>132</sup>

### III. Conditions: representativity and accountability

Not every function of *amicus curiae* requires the same set of conditions from the viewpoint of legitimacy. *Dunoff* convinces when he states that ‘to the extent that NGO arguments are meritorious, it should not matter whether they are representative or electorally accountable.’<sup>133</sup> This, however, is only valid from the perspective of output legitimacy. Certain requirements are necessary to ensure that a submission is useful. These are especially expertise and quality – requirements that are essential in practice.<sup>134</sup> Further, transparency regarding the provenance of an *amicus curiae* and the drafting process of the brief are essential to ensure its independence from the parties.

Where *amici curiae* are admitted to compensate for a procedural legitimacy deficit (assuming that this is possible), their ideas are not the most relevant factor, but their participation as representatives of an affected

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132 D. McRae, *supra* note 22, p. 12 (‘However, the fact that such a brief has never had any perceptible influence on the result of a case has led to scepticism about their value and heightened cynicism about WTO transparency.’); C. Schliemann, *Requirements for amicus curiae participation in international investment arbitration, a deconstruction of the procedural wall erected in joint ICSID Cases ARB/10/25 and ARB/10/15*, 12 *The Law and Practice of International Courts and Tribunals* (2013), pp. 365-390.

133 J. Dunoff, *The misguided debate over NGO participation at the WTO*, 4 *Journal of International Economic Law* (1998), p. 439. See also S. Charnovitz, *supra* note 18, pp. 209-210.

134 E. Bluemel, *Overcoming NGO accountability concerns in international governance*, 31 *Brooklyn Journal of International Law* (2005), p. 189 (‘[E]ffectiveness, expertise and experience are crucial determinants for outcome-based accountability controls.’).

group of people or the public as such. As *Marceau* and *Stilwell* note in respect of *amici curiae* in the WTO:

[R]epresentation and accountability of NGOs may help to confirm their character and the interests they represent. Organizations expressing views of the major sections of the population may help to confirm the legitimacy of the decisions rendered by the dispute settlement system. In many cases, the value of *amicus* briefs will be to provide information on the broader implications of a decision on development, health, the environment, or other facts of general welfare.<sup>135</sup>

Likely for this reason, representativeness, transparency and accountability have virtually not been an issue before the regional human rights courts. These courts do not view the instrument as an agent of democratic legitimacy. It is only where it shall improve systemic procedural legitimacy concerns that it should be required to possess qualities non-state actors typically do not, and possibly cannot, possess. What are the requirements *amici curiae* need to fulfil to transmit procedural legitimacy?<sup>136</sup>

*Reinisch* and *Irgel* propose to create an accreditation system whereby only those non-state actors are permitted to apply for leave as *amicus curiae* that have shown to possess transparent structures and widespread support.<sup>137</sup> A proposal from the OECD Investment Committee goes further by requiring ‘a threshold showing of substantive and legitimate interest by the third parties and also have them demonstrate that they are accountable, professional and transparent themselves by disclosing the origin of the funds with which they operate.’<sup>138</sup> The FTC Statement and other investment arbitration rules already stipulate that *amicus curiae* must stem from a member state. This requirement ensures that only potentially affected *amici curiae* – as constituents of one of the states who will have to imple-

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135 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 *Journal of International Economic Law* (2001), p. 180.

136 *Tams* and *Zoellner* promote the idea that at some point civil society as a whole will have developed measures to regulate who will be able to speak for civil society. C. Tams/C. Zoellner, *supra* note 51, p. 240.

137 A. Reinisch/C. Irgel, *supra* note 17, p. 132. They acknowledge the difficulty with their approach: ‘It is clear that the determination with which NGOs would be entitled to appear before the WTO raises complex questions of evaluation, fairness and equity.’

138 OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, *Statement by the OECD Investment Committee*, June 2005, p. 12, para. 45.

ment the interpretation reached by the tribunal – are given a voice in the proceedings. However, this territoriality requirement does not account for *amici curiae* that may be incidentally affected even though they do not reside within the covered territories. In addition, it excludes *amici curiae* with special expertise. Tienhaara argues that *amici curiae* themselves need to be democratically legitimized to increase the legitimacy of international proceedings.<sup>139</sup> Bluemel argues that the accountability threshold to be fulfilled should depend on the governance function assigned to the specific *amicus curiae*. Accordingly, only when it seeks to represent a particular populace, an *amicus curiae* should be required to possess democratic accountability.<sup>140</sup>

It is important to keep in mind that the instrument is not exclusively used by NGOs. In many instances, especially in the ECtHR, states and intergovernmental organizations make *amicus* submissions. Intergovernmental organizations can validly claim to speak on global issues that fall within their mandate. Equally, states are undisputedly legitimized to speak on behalf of their nationals. In all other cases, the issue is more complex. NGOs are hardly able to satisfy standards of democratic representativity similar to those of states and intergovernmental organizations. Nonetheless, they should comply with some requirement of representativity or connectivity to the interest.<sup>141</sup> This is essential for the credibility of the submission. Representativity can be achieved by requiring prospective *amici curiae* to show that they in fact can speak for the public they claim to speak for, for instance, due to the structure of their membership or their operations in the area where affected people reside.

In some cases, this has been done successfully.<sup>142</sup> In *Aguas del Tunari*, one of the *amicus curiae* applicants submitted that it had conducted a consultation process through which more than 60,000 people had been able to

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139 K. Tienhaara, *Third party participation in investment-environment disputes: recent developments*, 16 *Review of European Commercial and Environmental Law* (2007), pp. 230-242.

140 E. Bluemel, *supra* note 134, pp. 141-145.

141 J. Viñuales, *supra* note 81, p. 118.

142 See E. Triantafyllou, *Is a connection to the “public interest” a meaningful prerequisite of third party participation in investment arbitration?*, 5 *Berkeley Journal of International Law and Policy* (2010), pp. 43-44.

comment on the water concession contract to the government.<sup>143</sup> In *UPS*, one of the *amici curiae* represented most of the affected Canadian postal workers in the case.<sup>144</sup> A convincing functional approach to representativity was advocated for by the respondent in *Bear Creek Mining v. Peru*. It argued in response to the claimant that it was irrelevant if the Ayamara communities had officially authorized the *amicus curiae* to speak on their behalf. It reasoned that it sufficed that the *amicus curiae* ‘interact[ed] daily with the Aymara communities in ways that make DHUMA uniquely qualified to understand – and allow it to explain to the Tribunal – the communities’ rejection of the Santa Ana project. That experience, and not some delegation of power, gives DHUMA the *bona fides* to be a voice for the Aymara communities in this proceeding.’<sup>145</sup> Moreover, in several IACtHR cases, the government’s human rights representative appeared as *amicus curiae* to comment on national human rights cases. In some ECtHR cases concerning the rights of homosexuals, the largest European association for LBGTIQ\* rights participated as *amicus curiae* and in several abortion cases, the church was permitted to convey its views through the instrument (see Annex I). Some form of self-regulated representativity can also be seen in the efforts of international NGOs to make joint submissions with NGOs from the respondent state, as in *Biwater v. Tanzania* (see Chapter 5).

The discussion on representativity and accountability should not lose sight of the fact that the judge remains the ultimate arbiter of the information presented. He determines which weight to attach to a submission. He can factor the degree to which an *amicus curiae* can claim to speak for a certain constituency into the evaluation of a submission. The judge is ultimately responsible and accountable for the decision rendered. Further-

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143 *Aguas del Tunari v. Bolivia*, Petition of La Coordinadora para la Defensa del Agua y Vida et al to the arbitral tribunal, 29 August 2002, ICSID Case No. ARB/02/03, para. 5.

144 *UPS v. Canada*, Application for *amicus curiae* status by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, paras. 1-10, 12-14.

145 *Bear Creek Mining v. Peru*, Respondent’s Comments to the Third Party Submission from the Asociación de Derechos Humanos y Medio Ambiente – Puno, ICSID Case No. ARB/14/21, p. 2. The tribunal did not expressly adopt the view, but it stressed that the specific experience of the *amicus curiae* on the ground sufficed to meet the admission criteria. See *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 44.

more, requirements in this respect should not be so limitative as to render it impossible for potential *amici curiae* to satisfy them.

As regards interest capture, it seems that such fears have not materialized in international dispute settlement, even though in some cases extreme pressure is exerted on judges. In the *Lautsi* case, for example, more than ten states used the *amicus curiae* procedure to protest the ECtHR's first instance judgment.<sup>146</sup> Still, *amicus curiae* offers the opportunity to lessen the influence of lobbying, especially by industry and business interest groups, on the disputing parties in dispute settlement proceedings.<sup>147</sup> *Amicus curiae* can reopen and level the playing field of different interests.

#### D. Increased coherence? Impact on international law

As shown in Chapter 2, *amicus curiae* has been presented as a tool to reduce the risk of a fragmentation of international law. Have the expectations been met?

A comparison of *amicus curiae* submissions and final judgments indicates that regional human rights courts have relied on the analysis of other international courts and tribunal's case law and of novel legal issues provided by *amici curiae*. In *Kurt v. Turkey*, an ECtHR case concerning forced disappearances, Amnesty International submitted a brief that explained and analyzed the IACtHR's case law on the issue, including the constitutive elements of the crime of forced disappearance and the notion that forced disappearances pertained to the right of life rather than the prohibition of torture. The ECtHR adopted several of the arguments of the brief.<sup>148</sup> In *Varnava and others v. Turkey*, the court accepted a written submission from the NGO Redress containing arguments on the obligation to conduct an effective investigation into a forced disappearance and on the

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146 *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011. See also P. Ala'i, *Judicial lobbying at the WTO – the debate over the use of amicus curiae briefs and the US experience*, 24 *Fordham International Law Journal* (2000), pp. 71-72; R. Kay, *supra* note 116, p. 1279 ('The presence of the particular litigants and their particular circumstances may distort the policy maker's perception of the relevant costs and benefits over the whole universe of affected cases.').

147 See J. Dunoff, *supra* note 133, p. 439.

148 *Kurt v. Turkey*, Judgment of 25 May 1998, Reports 1998-III. See also *Timurtas v. Turkey*, No. 23531/94, 13 June 2000, ECHR 2000-VI.

reparation and amount of moral damages to be paid to the victims' families under Article 41 ECHR. In its brief, Redress relied *inter alia* on international conventions and the practice of the IACtHR and the ECtHR.<sup>149</sup> The ECtHR has also accepted *amicus curiae* submissions pointing out inconsistencies in its case law.<sup>150</sup>

The IACtHR has also received submissions by non-governmental organizations on the case law of the ECtHR. This includes a brief from Interights on the legality of corporal punishment in *Caesar v. Trinidad and Tobago*. The IACtHR relied on the brief extensively in its finding that there was a norm of customary international law arising from criminal law provisions prohibiting corporal punishment.<sup>151</sup>

Before the WTO adjudicating bodies, investment tribunals and interstate courts, there is less evidence of such a reliance on *amicus curiae* briefs, although many of the briefs advocate specific legal interpretations (see Chapter 6).

The consideration of the practices of other courts and tribunals as such does not pose particular legal concerns. It may be achieved through ordinary treaty interpretation.<sup>152</sup> Article 38(1)(d) ICJ Statute considers judicial decisions as a subsidiary means for the determination of rules of law.

A final observation concerns the remarkable degree to which international courts and tribunals have borrowed from each other in considering their competence to admit unsolicited *amicus curiae* briefs. The WTO Appellate Body and investment tribunals, including tribunals operating under different investment treaties and institutional rules, have significantly drawn from each other with respect to the issue of *amicus curiae*. This is surprising in light of the conflict that surrounded the issue at the WTO, but unsurprising given the proximity of subject matters and the similar structures of panel and arbitration proceedings. Requirements for participation

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149 *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009, paras. 220-221.

150 *Sergey Zolotukhin v. Russia* [GC], No. 14939/03, 10 February 2009, ECHR 2009, p. 121.

151 *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005 (Merits, Reparations and Costs), IACtHR Series C No. 123, FN 27.

152 See C. Brown, *supra* note 52, pp. 41-44.

are often borrowed from national laws or other international courts and tribunals.<sup>153</sup>

Overall, the instrument plays a rather marginal role in the efforts to increase the coherence of international law. International courts and tribunals do not seem to need an additional mechanism. There is already quite a high degree of cross-referencing between international courts and tribunals, as well as an effort to ensure coherence within the own case law despite lack of *stare decisis*.<sup>154</sup> Further, coherence is achieved through publicity, debates among scholars and practitioners ‘and the competitive collegiality of the global investment arbitration community with repeat players, and intensive cross-fertilization through frequent professional for-

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153 For instance, the *Methanex* and *UPS* tribunals borrowed from the *EC–Asbestos* Additional Procedure, while the *Aguas* and *Biwater* tribunals drew from *Methanex*. The FTC Statement has become the general test for all investment tribunals operating under the NAFTA. See, for example, *Merrill v. Canada*, Letter to the interested petitioner, 31 July 2008 and Award, 31 March 2010, para. 22; *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005; *Apotex I v. USA*, Procedural Order No. 2, 11 October 2011, paras. 14-19; *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, BNM, as a non-disputing Party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 15-19. Where *amicus curiae* participation is not regulated in an investment treaty, tribunals operating under the UNCITRAL Arbitration Rules have borrowed from the standards established by the NAFTA and in ICSID-administered arbitrations. This may have been fuelled by the fact that *amicus curiae* petitions heavily relied on them. Further, the new UNCITRAL Rules on Transparency establish largely the same requirements as the existing rules. See *Chevron/Texaco v. Ecuador*, Procedural Order No. 8, 18 April 2011, and Letter to *Amici Curiae* from Permanent Court of Arbitration, 26 April 2011, PCA Case N° 2009-23.

154 S. Schill, *The multilateralization of international investment law*, Cambridge 2009; A. Reinisch, *The changing international legal framework for dealing with non-state actors*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, pp. 72-73. This is especially the case in the WTO where the Appellate Body strives to ensure systemic coherence. See R. Howse, *supra* note 120, pp. 51-53. Equally, investment tribunals consider previous awards as creating a legitimate expectation for the outcome. Any deviation from such case law in their view must be justified. See T. Wälde, *supra* note 107, p. 516 (‘[S]ettled jurisprudence ... defines with increasing specificity what the law is. The consequence is that settled case law informs new treaty practice and functions as authority in new cases.’).

mal and informal communication.<sup>155</sup> In addition, courts themselves have fostered inter-institutional dialogue and have kept each other abreast of new judgments and developments.<sup>156</sup>

*E. Transparency: demise of confidentiality and access to the proceedings and case documents?*

Transparency has become a key policy goal in many areas of international law. As such, it is not new to judicial proceedings. As in national courts, before most international courts and tribunals, access to the proceedings is considered an essential element of adjudicative legitimacy. It reinforces the democratic accountability of judges.<sup>157</sup> Privacy of hearings is an exception pursued as a principle only by investment tribunals and the WTO dispute settlement organs.<sup>158</sup> For *amici curiae*, the issue of transparency boils down to access to case documents (see Chapter 6).<sup>159</sup> Nevertheless, transparency is relevant in one further regard: Although most transparency initiatives are achieved without the participation of *amici curiae* – in particular, publication of awards and publicity of hearings – they play an important role in engaging the interest of the public in international judicial proceedings. While attendance of public proceedings has been disappointingly low, the publicity generated by *amicus curiae* participation has the potential to inform (or, it is feared, misinform) the general public of the proceedings. Has the involvement of *amici curiae* promoted transparency?

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155 T. Wälde, *supra* note 107, p. 523. See also F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, p. 69.

156 R. Higgins, *International courts and tribunals – the challenges ahead*, 7 *The Law and Practice of International Courts and Tribunals* (2008), p. 262.

157 R. Reusch, *supra* note 80, p. 213.

158 Critical of change, T. Wälde, *supra* note 107, p. 553 ('[T]ransparency encourages public posturing, which inevitably leads to a freezing of positions; that makes settlement, before, during and after litigation so much more difficult.').

159 This section does not consider post-award transparency given it is only incidentally relevant to *amici curiae* seeking to participate in ongoing proceedings. See N. Rubins, *Opening the investment arbitration process: at what cost, for what benefit, taking stock*, in: R. Hofmann/C. Tams (Eds.), *The International Convention on the Settlement of International Disputes (ICSID): taking stock after 40 years*, Baden-Baden 2007, p. 221.

The issue has been controversial only in WTO dispute settlement and in investment arbitration. Arbitral tribunals, WTO panels and the Appellate Body have referred to transparency as a justification for the admission of *amici curiae* in efforts to respond to public demands for increased procedural transparency. The first tribunals deciding the issue were NAFTA tribunals. Intriguingly, the *Methanex v. USA* tribunal based the admission of *amicus curiae* briefs also on transparency considerations:

[T]he ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's *willingness to receive amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.<sup>160</sup>

Indeed, the efforts seem to have been largely fuelled by an interest to increase the perceived transparency of proceedings, as the tribunal found subsequently that in terms of access to documents *amici curiae* were to be treated like any other member of the public.

While transparency efforts in investment arbitration proceedings have significantly increased over the last ten years,<sup>161</sup> the direct contributions of *amici curiae* to transparency are limited. As shown, in a few cases, *amici curiae* have been granted increased access to documents. However, decisions rejecting a general duty of confidentiality of arbitration proceedings

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160 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 49 [Emphasis added].

161 For an overview of the development of transparency in international economic law, see C. Zoellner, *Third-party participation (NGOs and private persons) and transparency in ICSID proceedings*, in: R. Hoffmann/C. Tams (Eds.), *The ICSID – taking stock after 40 years*, Baden-Baden 2007, pp. 183-186, 195; N. Bergman, *Transparency of the proceedings and third party participation*, in C. Giorgetti (Ed.), *Litigating international investment disputes: a practitioner's guide*, Leiden 2014, pp. 379-384. See also the EU Commission's paper on increasing transparency in investor-State arbitration, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, COM(2010) 343, 10. This policy paper is difficult to reconcile with the secrecy surrounding the EC's recent participation as *amicus curiae* in a number of investment arbitrations under the Energy Charter Treaty. For a critical assessment of the expected impact on transparency of the UNCITRAL Transparency Rules and the Mauritius Convention, see J. Fry/O. Repousis, *Towards a new world for investor-state arbitration through transparency*, 48 NYU Journal of Intl. Law and Politics (2016), p. 799.

have been rendered irrespective of *amicus curiae* participation. There is no direct correlation between the instrument and the increasing number of public hearings.<sup>162</sup> Rather, transparency and *amicus curiae* seem to develop in parallel, as the regulatory efforts in this area, notably the UNCITRAL Transparency Rules and the Mauritius Convention suggest.<sup>163</sup> Their expansion seems to be largely the consequence of some countries' efforts, especially the USA and Canada, and a greater willingness by some arbitrators and counsel to open the proceedings to the public.<sup>164</sup> In this regard, *amici curiae* have contributed to transparency efforts indirectly by forcing parties, arbitrators and states to address the issue.

It is unhelpful that the issue of *amicus curiae* is conflated with that of transparency. Tribunals seem to find that the admission of *amici curiae* satisfies demands for increased transparency. This approach is dangerous. It risks undermining the quality of *amicus curiae* submissions and might indicate an expectation by the tribunal that the main benefit in a submission lies in the signal its admission sends to the general public and non-participating stakeholders.<sup>165</sup> However, as seen, mere admission to the proceedings is not sufficient for most *amici curiae*. They seek to influence the outcome of the proceedings, and not only to educate the public about the proceedings, which can be achieved more directly by publication of documents or through public hearings. Mere admission without visible

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162 See Chapter 6. Whether one can already speak of a general acceptance of publicity or semi-publicity in investment arbitration is doubtful, as most arbitrations remain inaccessible to the public. In favour, L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 179.

163 See *Methanex v. USA*, Submission by Respondent USA and Decision of the tribunal on petitions from third persons to intervene as “*amici curiae*”, 15 January 2001, p. 9, para. 17. See also G. Van Harten/M. Loughlin, *supra* note 95, p. 121.

164 With respect to the leading – and often solitary role – of North American states in pushing for greater transparency in investment arbitration, see J. Fry/O. Repousis, *Towards a new world for investor-state arbitration through transparency*, 48 *NYU Journal of Intl. Law and Politics* (2016), p. 798.

165 *McRae* argues that the issue of *amicus curiae* has hindered transparency efforts. D. McRae, *supra* note 22, pp. 12, 17 (*Amicus* briefs ‘have made discussion of transparency within the WTO more difficult... [G]iven the fact that *amicus* briefs appear to have had no impact on the decisions of panels or the Appellate Body, there seems justification for suspending the *amicus* briefs process in order that more complete transparency can be worked out.’ [Emphasis added]).

consideration of submissions does little to improve general transparency.<sup>166</sup>

Concerns over the negative effects of increased pre-award publicity are difficult to measure. The feared negative side effects include compromise of business secrets and re-politicization of disputes as arbitration proceedings become a ‘court of public opinion’ where the parties make exaggerated claims to obtain ‘nuisance value’ compensation and refuse amicable settlement due to public pressure.<sup>167</sup> It is undeniable that many of the cases that have attracted *amici curiae* are politically extremely sensitive. But excluding information on these disputes does not seem to be the appropriate way forward, especially as these risks can at least partly be managed through the redaction of submissions.

The relationship between *amicus curiae* and transparency is not as straightforward as it may seem.<sup>168</sup> Transparency plays a vital role for *amici curiae* at different procedural stages, but *amici curiae* as such are not an instrument of transparency. First, they depend on some transparency to obtain knowledge of the existence of a dispute and its basic facts. Second, for *amicus curiae* participation to be useful and to satisfy request for leave procedures, *amici curiae* depend on access to relevant case documentation.<sup>169</sup> In arbitration and WTO proceedings, these are often difficult to obtain without transparency measures. In so far, transparency is a prereq-

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166 See on this issue in the WTO, D. McRae, *supra* note 22, p. 17.

167 C. Tams/C. Zoellner, *supra* note 51, p. 221; N. Rubins, *supra* note 159, p. 221 (According to *Rubins*, ‘[t]he increased risk of procedural abuse through the imposition and publicity of frivolous or exaggerated claims is an important cost. The respondent stands to benefit from the intervention of non-party actors, who tend to support the host-State position in their *amicus* submissions, but it is not always clear that such filings are wholly welcome, as they may be seen to distract from the more central aspects of the respondent government’s defense.’).

168 A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii. He refers to WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statements by Canada, Turkey and Argentina, paras. 71-72, 80 and 93, respectively. Arguing that transparency also includes participation in adjudicative processes, M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 *World Trade Review* (2006), p. 433; P. Clark/P. Morrison, *Key procedural issues: transparency*, 32 *International Lawyer* (1998), p. 857.

169 S. Jagusch/J. Sullivan, *A comparison of ICSID and UNCITRAL arbitration: areas of divergence and concern*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 97; T. Ishikawa, *supra* note 5, p. 401; N. Blackaby/C. Richard, *Amicus curiae: a*

quisite for the effective use of the instrument. These considerations have led some investment tribunals to grant *amici curiae* privileged access to case-related confidential submissions. In so far, *amicus curiae* has contributed to increased transparency.

*F. Impact on locus standi: amicus curiae as a precursor to international legal standing?*

The growth in importance of non-governmental actors in all aspects of international law and policy cannot be denied or minimized.<sup>170</sup> It has been accompanied by calls for a more formalized position in international affairs, including in international dispute settlement. The lack of standing before the ICJ especially has been a matter of constant criticism.<sup>171</sup>

*Amicus curiae* is sometimes viewed as the best alternative to *locus standi* for entities that do not have standing before the international court or tribunal to which the request is addressed. CIEL, a frequent *amicus curiae* participant before the WTO, investment tribunals, the IACtHR and the ECtHR argues:

[A] public interest group aiming to influence the outcome of a lawsuit often only limits its role to that of *amicus curiae* out of necessity, e.g., when

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*panacea for legitimacy in investment arbitration?*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 267.

170 See R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), pp. 78-95; P. Alston, *The 'not-a-cat' syndrome: can the international human rights regime accommodate non-state actors?*, in: P. Alston (Ed.), *Non-state actors and human rights*, Oxford 2005, pp. 3-36; C. Cutler, *Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, pp. 19-36.

171 The issue was already disputed during the negotiation of the PCIJ Statute. See J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, pp. 57-60; I. Brownlie, *The individual before tribunals exercising international justice*, 11 International and Comparative Law Quarterly (1962), p. 718. In favour of standing by private parties before the WTO dispute settlement organs, G. Schleyer, *Power to the people: allowing private parties to raise claims before the WTO dispute resolution system*, 65 Fordham Law Review (1997), pp. 2275-2312; B. Jillmann, *The access of individuals to international trade dispute settlement*, 13 Journal of International Arbitration (1996), pp. 143-169.

concepts such as standing prevent them from playing a more active role in the case as a party.<sup>172</sup>

Acceptance of and increase in *amicus curiae* submissions have been interpreted as a sign of a growing relevance of non-state actors, as a step towards legal personality or even subjectivity. This has raised the symbolic burden on the concept and clouded both its potential and its limits. This section will not engage in the general debate on legal personality of non-state actors.<sup>173</sup> Instead, it will examine if the instrument of *amicus curiae*, in any way, has formalized participation by non-state actors before international courts and tribunals.

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172 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 5. See Stephen Porter's (CIEL) comment during the *Debate on transparency, amicus curiae briefs and third party participation*, reprinted in 5 *Journal of World Investment and Trade* (2004), pp. 344-345 (*Amicus curiae* participation as a step towards achieving full *locus standi* and intervention rights.); L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 *Journal of World Investment and Trade* (2004), pp. 341-342 ('[I]f we were to give them a better role in dispute settlement proceedings we would have fewer *amicus curiae* submissions made by non-governmental organizations and other non-State actors.'). See also the characterization of NGOs by G. Breton-Le Goff, *NGOs' perspectives on non-state actors*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, p. 249 ('Law, for NGOs, is not only an instrument to coerce the action of states; it is also a tool to change the future of our international society to become a society of individuals rather than a society of states.'); F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 *Journal of African Law* (2014), p. 37 ('*Amicus curiae* procedures can be used to circumvent the problem in relation to access to the [ACTHPR], particularly in relation to cases that are referred to the court by the African Commission.').

173 This section is limited to a consideration of the issue of standing. It does not address the issue of legal personality of non-state actors and the surrounding debates. For an overview, see A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009. For a consideration of the legal status of individuals in international law, see A. Orakhelashvili, *The position of the individual in international law*, 31 *California Western International Law Journal* (2001), pp. 241-276. For a general considerations of the terminology and status of non-state actors in international law, see P. Alston, *supra* note 170, pp. 3-36; A. Reinisch, *supra* note 1544; A. Cançado Trindade, *The emancipation of the individual from his own state: the historical recovery of the human person as subject of the law of nations*, in: S. Breitenmoser et al. (Eds.), *Human rights, democracy and the rule of law – liber amicorum Luzius Wildhaber*, Zürich et al. 2007, p. 164.

To consider whether *amicus curiae* has moved individuals and other non-state actors closer to obtaining party status, it is worthwhile to briefly consider what defines party status to see if *amici curiae* have possibly received a *de facto* party treatment by international courts and tribunals. *Locus standi* describes the right to bring a case before an international court or tribunal. It is essentially synonymous with being a party to a proceeding.<sup>174</sup> Attached to *locus standi* is the right of a party to present its case fully to the adjudicating body through the presentation of arguments and evidence and to receive a reasoned decision on the dispute.

International courts and tribunals have granted *amici curiae* neither typical party rights nor standing. Most international courts and tribunals have conceptualized *amicus curiae* as a procedural concept *sui generis*, located somewhere between an intervener and an expert-witness. In *US–Shrimp*, for example, the Appellate Body drew a clear distinction between party status and *amicus curiae*.<sup>175</sup> Equally, in *UPS v. Canada*, where the petitioners had sought access primarily as parties and only secondary as *amicus curiae*, the tribunal found that none of the international law provisions referred to by the petitioners was applicable and that the petitioners could not enjoy party standing before it in the absence of a party agreement to this effect.<sup>176</sup> The IACtHR has also stated it does not consider *amici curiae* possessing any legal rights or status reserved for the parties. In a case where an individual was directly affected by the court’s judgment, the court decided to hear it out of considerations of due process, but strictly separated this exceptional measure from *amicus curiae* participation (see Chapter 6). While non-state actors may submit cases to the IACoMHR, Article 61 ACHR clarifies that ‘[o]nly states parties and the Commission shall have the right to submit a case to the Court.’ Article 34(2) ICJ Statute was created by the drafters of the ICJ Statute to remedy the lack of standing of intergovernmental organizations before the Court (see Chapter 3).

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174 A. del Vecchio, *International courts and tribunals, standing*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 1.

175 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101.

176 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 40 and Petition to the arbitral tribunal of the Canadian Union of Postal Workers and the Council of Canadians, 10 May 2001, p. 1, para. 1.

The reality is that access as parties (or interveners) by individuals to an international court or tribunal remains a strictly regulated exception. While *amicus curiae* participation is evidence of a tentative opening and pluralization of international dispute settlement, it cannot be seen as a motor towards a more powerful legal position of non-state actors. The instrument remains very much a matter of tribunals' discretion. Where *amici curiae* have been accepted and considered – in regional human rights courts and in investment arbitration – individuals can already appear as a party (ECtHR, investment arbitration) or as a representative in their own right (IACtHR). Notably, the creation of victims' rights of participation before the IACtHR, including limited standing in contentious cases, developed separately from *amicus curiae* participation.<sup>177</sup>

That the effort to obtain party status through *amicus curiae* participation actually may be harmful to a request for participation as *amicus curiae* is reflected in a note on how to prepare *amicus curiae* requests and submissions to investment tribunals by Advocates for International Development, a NGO focused on providing legal and other support to human rights organizations. The note discourages NGOs from seeking party status to avoid rejection of their *amicus curiae* application.<sup>178</sup>

Overall, the instrument consolidates the limited status held by non-state actors in certain institutions. As *De Brabandere* notes, '[t]he involvement of non-state actors in international dispute resolution seems to be provoked more by a sense of pragmatism than by an ambition to formally bestow upon these actors a certain legal status.'<sup>179</sup>

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177 A. Cançado Trindade, *The right of access to justice in the inter-American system of human rights protection*, 17 Italian Yearbook of International Law (2007), pp. 7-24. On the lack of standing of victims before the IACtHR, see D. Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: a case study*, 9 American University Journal of International Law & Policy (1993), pp. 108-109.

178 Advocates for International Development, *A "how to" guide to amicus curiae & international investment arbitrations*, 2012, p. 11 (on file with the author).

179 E. De Brabandere, *Non-state actors in international dispute settlement: pragmatism in international law*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, p. 354. See also A. Mantakou, *General principles of law and international arbitration*, 58 *Revue Hellenique de Droit International* (2005), p. 426; P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 *Max Planck Yearbook of United Nations Law* (2002), p. 167.

In inter-state courts and tribunals, non-state actors continue to exert their greatest influence through lobbying of the parties. It is well known that in *Japan–Film* both Kodak and Fuji masterminded the proceedings and the governments largely represented the wishes of the two companies.<sup>180</sup> In the IACtHR system, non-state actors already play a strong role. They may file petitions with the IAComHR or act as representative of victims, regardless of whether they themselves have been victim to the alleged act. The IAComHR may appoint non-state actors as part of its team of counsel in the proceedings before the IACtHR. Thus, there seems to be no pressing need to grant non-state actors standing before the court.<sup>181</sup> This form of lobbying has its setbacks, in particular in its selectiveness and lack of transparency.

There is a key advantage to the limited participation as *amicus curiae*. *Amici curiae* are not bound by the outcome of the dispute through *res judicata*. As a result, they may lobby for an application of the same theory or interpretation of law before the same court over and over again.<sup>182</sup>

#### G. *And the drawbacks?*

Some of the assumed drawbacks of *amicus curiae* participation have already been addressed. *Amici curiae* have caused neither a denaturing of the judicial function nor have they notably politicized disputes (see Sections A and B). Further, most international courts and tribunals have not received unmanageable quantities of submissions (see Chapter 3 and Annex I), and there are effective request for leave procedures in place in most international courts and tribunals to filter submissions (see Chapter 5). There is no evidence of an overwhelming of developing countries by *amicus curiae* submissions in proceedings before the WTO adjudicative bod-

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180 P. van den Bossche/W. Zdouc, *The law and policy of the World Trade Organization: text, cases and materials*, Cambridge 2013, p. 202.

181 Any person or group of persons or any non-governmental entity legally recognized in a member state may lodge a petition, regardless of whether or not the petitioner is the victim, see D. Shelton, *supra* note 77, p. 342.

182 CIEL, *supra* note 172, p. 6. The European Roma Rights Centre has in many cases before the ECtHR submitted the same brief calling for an interpretation of the ECHR in light of the plight of the Roma, see A. Dolidze, *Making international property law: the role of amici curiae in international judicial decision-making*, 40 *Syracuse Journal of International and Comparative Law* (2012), p. 141.

ies, as a study by *Brühwiler* shows.<sup>183</sup> Her considerations are transferable to investment arbitration where submissions also have most often been made in cases involving developed countries or in defence of the respondent state (see Annex I).

This leaves for consideration if the instrument has compromised the parties' rights (I.), and if it has led to the feared practical burdens (II.).

### I. Parties' rights

International courts and tribunals, as well as member states through statutes and rules have sought to regulate *amicus curiae* participation in an effort to protect the parties' rights while maximizing its potential benefits.<sup>184</sup> This was noted by the *UPS* tribunal:

The requirement of equality and the parties' right to present their cases do limit the power of the Tribunal to conduct the arbitration in such manner as it considers appropriate. That power is to be used not only to protect those rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner. The power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process.<sup>185</sup>

The tribunal in *Philip Morris v. Uruguay* decided in this respect that, '[t]he need to safeguard the integrity of the arbitral process requires in fact that no procedural rights or privileges of any kind be granted to the non-disputing parties.'<sup>186</sup> As noted, the blank denial of access to case related

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183 C. Brühwiler, *supra* note 125.

184 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 28 ('If the Tribunal decides to grant leave to a particular non-disputing party to submit an *amicus curiae* brief, the Tribunal at that time will determine the appropriate procedure governing the brief's submission. The goal of such procedure will be to enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties. In this latter context, the Tribunal will endeavour to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings.')

185 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69.

186 *Philip Morris v. Uruguay*, Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 22.

documents has repercussions for the usefulness and quality of *amicus curiae* submissions.

In the following, focus is held on the parties' procedural rights, specifically due process, procedural fairness and equality of arms.

### 1. Due process

Procedural fairness and due process apply in international proceedings as a general principle of law (see Article 38(1)(c) ICJ Statute).<sup>187</sup> Although the concept escapes precise definition, the main elements of due process were described as follows by the Appellate Body in *Thailand–Cigarettes (Philippines)*:

Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defenses, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules.<sup>188</sup>

Due process entails that each party may present its case fully.<sup>189</sup> This presupposes awareness of the issues considered determinative by the interna-

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187 M. Benzing, *supra* note 54, p. 117 (Due process is a 'necessary component of any legal system seeking legitimacy and effectiveness.'). For an overview of the domestic law origins and development of due process, see A. Mitchell, *Due process in WTO disputes*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement: the first ten years*, Cambridge 2005, pp. 144-148. Several human rights treaties establish due process protections, which may be applied by other courts as far as they consider other rules of international law in their decision-making. These include the ICCPR, the ECHR and the ACHR. See R. Schorm-Bernschütz, *supra* note 71, p. 52.

188 *Thailand – Customs and fiscal measures on cigarettes from the Philippines* (hereinafter: *Thailand–Cigarettes (Philippines)*), Report of the Appellate Body, adopted on 15 July 2011, WT/DS371/AB/R, para. 147. See also *Claim of the Salvador Commercial Company* ("El Triunfo Company"), Award, 8 May 1902, reprinted in XV UNRIAA, pp. 467-479 (The tribunal decided that the 'due process of judicial proceedings' involves 'notice, full opportunity to be heard, consideration and solemn judgment.');

B. Cheng, *General principles of law as applied by international courts and tribunals*, Cambridge 1953, pp. 291, 293.

189 This procedure accords with due process requirements established by the New York Convention on recognition and enforcement of arbitral awards. The Convention foresees refusal of enforcement in the case of objective inability of a party to present its case (Article V(1)(b) New York Convention). Both parties must

tional court or tribunal. The principle of *audi alteram partem* demands that whenever a tribunal receives new evidence, changes the legal basis of a claim or receives an amendment of the original submission, the parties must have an opportunity to comment thereon.<sup>190</sup> The right to comment must be balanced with the competing interest in an effective and prompt settlement of the dispute. Insufficient opportunity to comment on determinative rules and interpretations may risk the validity of an award or judgment.<sup>191</sup> To diffuse such concerns, *Lew* advocates that the tribunal should ‘provide the parties with the opportunity to comment on any matter that may materially affect the tribunal’s decision.’<sup>192</sup> In particular, investment arbitration tribunals and the WTO Appellate Body have been very conscious of their due process obligations. The Appellate Body has determined that the exercise of discretion by panels to address procedural issues not explicitly regulated must be in accordance with due process, thereby subjecting *amicus curiae* participation to a full due process re-

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be given the opportunity to present their cases from their respective viewpoints, submit all evidence relevant in their view to an impartial tribunal and receive a just decision. This presupposes, among other, proper notice of the initiation of proceedings, full access to all communications and written submissions without undue delay and a right to comment within reasonable time. The New York Convention is a guiding point for all non-ICSID awards. Ratified by 157 states as of 19 July 2017, it reflects the generally acknowledged fundamental rights of the parties. See also M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2<sup>nd</sup> Ed., Oxford 2010, pp. 15-17, 40, 187-188.

190 B. Cheng, *supra* note 188, p. 293.

191 T. Giovannini, *International arbitration and iura novit curia*, in: B. Cremades/M. Fernández-Ballesteros (Eds.), *Liber amicorum Bernardo Cremades*, Madrid 2010, pp. 506-507 (In 2003, the Swiss Supreme Court annulled an international arbitral award, because the tribunal had applied a contractual provision that neither of the parties had found determinative and that had not been discussed by them. Accordingly, they could not have anticipated its application.).

192 J. Lew, *Iura novit curia and due process*, in: L. Lévy/S. Lazareff (Eds.), *Liber amicorum en l’honneur de Serge Lazareff*, Paris 2011, pp. 413-414, 416; *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports (1994), p. 95, para. 91; *Iurii Bogdanove, Agurdino-Invest Ltd. and Agurdino-Chima JSC v. Republic of Moldova*, SCC, Arbitral Award, 22 September 2005, para. 2.2.1, FN 63. See also E. Lauterpacht, *supra* note 6, pp. 521-522. In *Australia-Salmon*, the Appellate Body admonished panels that despite efforts to increase flexibility, proceedings had to conform to the requirements of due process, in particular adequate opportunity to comment on the evidence by the parties. See *Australia-Salmon*, Recourse to Article 21(5), Report of the Panel, adopted on 18 February 2000, WT/DS18/RW.

view.<sup>193</sup> And Rule 37(2) ICSID Arbitration Rules, No. 7 FTC Statement and Article 4 UNCITRAL Rules on Transparency instruct tribunals to ‘ensure at all times during the proceedings that *amicus curiae* submissions will not disrupt the proceedings or *unduly* burden or prejudice either party.’<sup>194</sup> This clarifies that in case of doubt party rights trump *amicus curiae* participation. How have these requirements been interpreted in practice? How have other courts and tribunals balanced due process and *amicus curiae*?

International courts and tribunals rely largely on four measures to ensure due process in relation to *amicus curiae* participation: notification; opportunity to comment; timing; and exclusion of submissions and applications.

International courts and tribunals notify the parties, third parties and other participants such as victim representatives (IACtHR) of requests for leave to submit a brief as *amicus curiae*. Most international courts and tribunals also transmit the *amicus curiae* submissions to the parties.<sup>195</sup> The ECtHR Rules, the IACtHR Rules, the ACTHPR, the ICJ Statute with respect to advisory proceedings and the FTC Statement mention the require-

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193 The Appellate Body has anchored a general due process obligation for panels in Article 11 DSU. See *Canada/US—Continued Suspension*, Report of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, para. 433; *Thailand—H-Beams*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS122/AB/R, para. 88; *EC—Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, FN 138; *EC—Tariff Preferences*, Report of the Appellate Body, adopted on 20 April 2004, WT/DS246/AB/R, para. 7.8. Critical, A. Mitchell, *supra* note 187, p. 160 (‘The concept is necessarily broad but unnecessarily vague in current WTO jurisprudence.’). The panel in *EC—Sugar* was adamant that ‘it does not consider that *amicus curiae* briefs can be taken into account in a manner that would circumvent the parties’ rights and obligations under the DSU, the Agreement on Agriculture and the WTO Agreement generally.’ See *EC—Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.80.

194 [Emphasis added.]. See also *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69 (‘The power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process.’).

195 E.g. *EC—Bed Linen*, Report of the Panel, adopted on 12 March 2001, WT/DS141/R, p. 6, FN 10; *US—Shrimp*, Recourse to Article 21(5), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 3.7. See also G. Marceau/M. Stilwell, *supra* note 135, p. 161.

ment in their procedural rules, but it has also been acknowledged by the other international courts and tribunals reviewed in practice.<sup>196</sup> The notification and transmission of requests and submissions is necessary to enable the parties to react to the participation on a fully informed basis.

Most international courts and tribunals accord the parties a right to comment on *amicus curiae* submissions. The ICJ and the ITLOS Rules establish a limited opportunity to comment on *amicus curiae* submissions. Where intergovernmental organizations submit information on their own initiative, Articles 69(2) ICJ Rules and Article 84(2) ITLOS Rules foresee that the Court and the tribunal *may* authorize the parties to comment. Rule 44(6) ECtHR Rules grants parties the right ‘subject to any conditions, including time-limits set by the President of the Chamber’ to make written or, if necessary, oral observations in reply.<sup>197</sup> ECtHR judgments rarely summarize or mention party comments.<sup>198</sup> This makes it difficult to determine if the right is used often. A right to comment on unsolicited *amicus*

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196 Rule 44(6) ECtHR Rules; Article 44(3) IACtHR Rules; Section 46 ACtHPR Practice Directions (The *amicus curiae* brief and its annexes submitted to the Court on a matter shall be immediately transmitted to all the parties, for their information.); Section B, para. 4 FTC Statement. The ITLOS and ICJ Rules only foresee transmission of submissions in advisory proceedings explicitly, see Article 133 ITLOS Rules, Article 105 ICJ Rules, but transmission of submissions made pursuant to Article 34(2) ICJ Statute and Article 84 ITLOS Rules is encompassed where the courts use their discretion to authorize party comments on these submissions. The IACtHR transmits submissions also to other *amici curiae* and other participants, such as victim representatives. See *The girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 130, p. 12, para. 54. Under Article 13(2) DSU, panels are obliged to inform a member state’s authorities when seeking information from an individual or body within its jurisdiction.

197 Rule 61(3) of the 1998 ECtHR Rules foresaw only written observations in response to a submission.

198 Summaries are made usually only of substantive comments. For many, see *Blečić v. Croatia*, No. 59532/00, 29 July 2004; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V (The court took note of the government’s repudiation of the third parties’ comments.); *Perinçek v. Switzerland* [GC], No. 27510/08, 15 October 2015; *Sabure Malik v. the United Kingdom*, No. 32968/11, 30 June 2016 (striking out). The first case seems to have been *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B, where the United Kingdom was granted permission to file comments on certain aspects of the *amici*’s observations. See also *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103 (The court admitted an *amicus curiae* brief even though the parties had

*curiae* briefs has been granted in all cases by WTO panels and the Appellate Body.<sup>199</sup> The requirement accords with the DSU's broad rules on par-

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forgone filings and therefore had no opportunity to comment on the submission). Cases mentioning party comments: *Saunders v. the United Kingdom*, Judgment of 17 December 1996, Reports 1996-VI; *Nikula v. Finland*, No. 31611/96, 21 March 2002, ECHR 2002-II; *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI; *Akdivar and others v. Turkey*, Judgment of 16 September 1996, Reports 1996-VI; *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V; *Brumărescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I (applicant submitted three replies); *Adali v. Turkey*, No. 38187/97, 31 March 2005; *Association SOS Attentats and De Boëry v. France* [GC], No. 76642/01, 4 October 2006, ECHR 2006-XIV; *McCann and others v. the United Kingdom*, Judgment of 27 September 1995, Series A No. 324. In some cases, the parties have commented on the permissible scope of a submission or objected to the participation of certain *amici*. An exception is *Lobo Machado v. Portugal*, Judgment of 20 February 1996, Reports 1996-I, where counsel for the applicant commented on the scope of Belgium's *amicus curiae* submission after permission had been given to Belgium to make submissions. In *Mikheyev v. Russia*, No. 77617/01, 26 January 2006, the Russian Government objected to the participation of the Russian applicant NGOs and requested that the Court reject the NGO's conclusions. See also *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44; *Armani Da Silva v. the United Kingdom* [GC], No. 5878/08, Judgment of 30 March 2016.

- 199 E.g. *EC-Asbestos*, Report of the Panel, adopted on 18 September 2000, WT/DS135/R, paras. 6.2-6.3; *US-Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 37; *EC-Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, paras. 7.77, 7.80; *US-Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 19; *China-Auto Parts*, Report of the Appellate Body, adopted on 12 January 2009, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, para. 11; *US-Softwood Lumber III*, Report of the Panel, adopted on 1 November 2002, WT/DS236/R, para. 7.2; *US-Shrimp*, Recourse to Article 21(5) (Malaysia), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 3.7; *EC-Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R; Section 9 *EC-Asbestos* Additional Procedure. In earlier cases, in response to joint appellees' argument that '[d]ue process requires that a party know what submissions a panel intends to consider and that all parties be given an opportunity to respond to all submissions,' the Appellate Body reasoned that 'the exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute.' *US-Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, paras. 33, 107. See also *EC-Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.77, FN. 418; *EC-Seal Products*, Report of the Appellate Body, adopted on 18

ties' rights to comment.<sup>200</sup> In *US–Lead and Bismuth II*, the panel held that the inability of the parties to comment on a brief received after the deadline for the parties' rebuttal submissions raised 'serious due process concerns as to the extent to which the Panel could consider the brief.'<sup>201</sup> Further, although Article 13 DSU does not establish a consultation requirement prior to seeking expert advice<sup>202</sup> and consultation in procedural matters is mandatory pursuant to Article 12 DSU only where a panel wishes to deviate from the Panel Working Procedures or to establish the procedural timetable, panels and the Appellate Body commonly seek the parties' views on how to approach a request for participation as *amicus curiae* (see Chapter 5). Investment tribunals have since the first *amicus curiae* petitions acknowledged a right of the parties to comment on submissions.<sup>203</sup> Rule 37(2) ICSID Arbitration Rules, Section B, paras. 5 and 8 FTC Statement and Article 4 UNCITRAL Rules on Transparency oblige tribunals to consult the parties on the admission *and* submissions of *amici curiae*.<sup>204</sup> In *Methanex v. USA*, the tribunal clarified that the right to comment was not

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June 2014, WT/DS400/AB/R, WT/DS401/AB/R, para. 1.15 (Parties must be given an adequate opportunity fully to consider any written submission filed with the Appellate Body.).

200 With respect to the second ruling procedure under Article 15 DSU specifically, see G. Marceau/M. Stilwell, *supra* note 135, p. 184.

201 *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/AB/R, para. 6.3.

202 Where panels request information pursuant to Article 13(2) DSU, the parties are invited only to comment on the reply received and not on the panel's decision on whether to request information. See *China–Auto Parts*, Report of the Panel, adopted on 12 January 2009, WT/DS339/R, WT/DS340/R, WT/DS342/R, paras. 2.5-2.6; *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R; *EC–Trademarks and Geographical Indications*, Report of the Panel, adopted on 15 March 2005, WT/DS174/R, para. 2.16; *Dominican Republic–Import and Sale of Cigarettes*, Report of the Panel, adopted on 19 May 2005, WT/DS302/R, p.1, para. 1.8.

203 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69 ('The Parties would also *be entitled* to have the opportunity to respond to any such submissions.' [Emphasis added]).

204 The condition is also enshrined in the general procedural clauses, see Article 17(1) of the 2010 UNCITRAL Rules. See also *UPS v. Canada*, Direction of the Tribunal on the Participation of *amici curiae*, 1 August 2003, paras. 6-7, 9; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 15.

tantamount to a right to cross-examine an *amicus curiae*, because it was not a witness.<sup>205</sup> In *Philip Morris v. Uruguay*, the tribunal barred the parties from submitting documents or other evidence together with their comments on the *amicus* briefs.<sup>206</sup> The limitation seems useful to ensure that parties do not use their right to comment to circumvent the procedures agreed for party submissions. The parties (and participating NAFTA states) use their right to comment in almost every case.

The IACtHR is the only court not to mention a right to comment. Moreover, Article 44(3) IACtHR Rules determines that *amicus curiae* briefs in contentious proceedings ‘shall be immediately transmitted to the parties, for their information.’ This wording signals agreement with the court practice, albeit several judgments mention that the parties were given an opportunity to comment and used it.<sup>207</sup> Because *amicus* submissions may be submitted even after closure of the proceedings, there is a risk that the parties will not have an opportunity to respond properly to the *amici*’s arguments.

Must international courts and tribunals seek the parties’ comments on *all amicus curiae* submissions? This may entail significant delays in the proceedings, especially if tribunals receive dozens of (lengthy) submissions. Moreover, the requirement is futile if a court or tribunal does not intend to consider a submission. In *US–Tuna II (Mexico)*, the panel specified that due process required it to seek the parties’ views on the *amicus curiae* brief from Humane Society International and American University’s Washington College of Law only to the extent it considered the information in the brief and the evidence attached to it relevant for its final assessment of the case.<sup>208</sup> This is in accordance with its general views on its due

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205 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001, para. 14.

206 *Philip Morris v. Uruguay*, Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 30.

207 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177; *Fernández Ortega et al. v. Mexico*, Judgment of 30 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 215; *Rosendo-Cantú and other v. Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 216.

208 *US–Tuna II (Mexico)*, Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R, para. 7.9, FN 559 (‘[I]nsofar as the Panel deemed this infor-

process duties under Article 11 DSU.<sup>209</sup> Due process includes that each party understands what are the claims being made and that they are furnished with sufficient time and possibilities to react and respond to relevant submissions and evidence.<sup>210</sup> In *Thailand–Cigarettes (Philippines)*, the Appellate Body specified the scope of the right to respond in panel proceedings. Noting competing interests, such as the prompt settlement of disputes enshrined in Articles 3(3) and 12(2) DSU, it found that

due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties.<sup>211</sup>

These considerations are relevant for all international courts and tribunals that must balance the same competing interests. ICISD tribunals and the Annulment Committee have held that the parties should not have to bear surprising decisions if a tribunal relies on a legal reasoning that they could not have expected and on which they therefore did not comment.<sup>212</sup>

International courts and tribunals do not seem to limit the scope of permissible party comments. Comments have addressed a court's general or specific authority to accept *amicus curiae* submissions, the relevancy of a

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mation to be relevant for the purposes of its assessment, it invited Mexico to comment on it in order to take full account of Mexico's right of response and defense in respect of due process considerations.')

209 G. Marceau/M. Stilwell, *supra* note 135, p. 184.

210 In *Australia–Salmon*, the Appellate Body instructed panels that while Article 12(2) DSU provided that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process," a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted.' It found that the opportunity to respond also included claims made against a party and decided that the requirement was satisfied by granting a party the requested additional time to respond. See *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, paras. 272, 278.

211 *Thailand–Cigarettes (Philippines)*, Report of the Appellate Body, adopted on 15 July 2011, WT/DS371/AB/R, para. 155.

212 See J. Lew, *supra* note 192, p. 410; C. Alberti, *Iura novit curia in international commercial arbitration*, in: S. Kröll/L. Mistelis/P. Perales Viscasillas/V. Rogers (Eds.), *International arbitration and international commercial law: liber amicorum Eric Bergsten*, Alphen aan den Rijn 2011, p. 24.

brief or of specific substantive arguments and procedural aspects of *amicus* participation.<sup>213</sup>

The right to comment is only valuable to the extent to which courts and tribunals take note of it. Especially investment tribunals, WTO panels and the Appellate Body summarize the parties' comments and note the parties' positions.<sup>214</sup> In the WTO, the right to comment on submissions that have been adopted by a party has caused concern. Parties have pointed out that due to the simultaneous submission of the parties' second written submissions the permission to append an *amicus curiae* brief to the second submission deprives the other party of its right to comment.<sup>215</sup> However, this can be remedied by allowing parties to comment on the submission during the second hearing.

One issue that has not been addressed sufficiently by international courts and tribunals was raised by the joint appellees in *US–Shrimp*, namely, that the parties may 'feel obliged to respond to all unsolicited submissions – just in case one of the unsolicited submissions catches the at-

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213 E.g. *Brazil–Retreaded Tyres*, Report of the Panel, adopted on 17 December 2007, WT/DS332/R, p. 5; *US–Shrimp*, Recourse to Article 21(5) (Malaysia), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 3.7 ('The Panel informed the Parties that they may comment in their submissions on the admissibility and relevance of these submissions.');

*US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, paras. 5.55-5.56; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 76; *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R (exceptional two-stage process for comments). See however, *US–Softwood Lumber III*, Report of the Panel, adopted on 1 November 2002, WT/DS236/R, para. 7.2 (Three late *amicus curiae* submissions were not transmitted to the parties for comment due to untimeliness.).

214 See *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, paras. 10; *EC–Biotech*, Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.10, FN 224; *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12-1.13; *US–Zeroing (EC)*, Report of the Panel, adopted on 23 January 2007, WT/DS294/R, para. 1.7; *US–Softwood Lumber VI*, Report of the Panel, adopted on 22 April 2004, WT/DS277/R; *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R.

215 *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 3.130.

tention of a panel member.<sup>216</sup> Indeed, the parties generally respond to the arguments raised in *amicus* briefs.<sup>217</sup> This may cause a real problem for parties with limited resources. In the worst case, it may deepen a factual inequality between the parties. Parties have addressed this dilemma differently.<sup>218</sup> A selective request for leave procedure and a clear determination by international courts and tribunals of the expected content of submissions at the admission stage could alleviate such concerns. Overall, only with regard to the IACtHR a change in practice seems necessary. All other courts consider a right to comment pivotal.

## 2. Procedural fairness and equality between the parties

Formally, the participation of an *amicus curiae* does not affect the status of either party. However, materially it may threaten the equality of the parties, as acknowledged by Rule 37(2) ICSID Arbitration Rules. Virtually all international courts and tribunals allow partial *amicus curiae* submissions. In this respect, *Wälde* worried that

there is little discipline and sanction available for preventing the *amicus* brief to be used to throw dirt against the Claimant. In addition, there has to be concern over NGO activist campaigning against the other side's party, staff, experts, witnesses, counsel, tribunal members, and hosting institution.<sup>219</sup>

Further, it is common practice before WTO panels, the Appellate Body, investment tribunals, the ECtHR and the IACtHR that the parties endorse

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216 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 33.

217 For instance, in *US–Softwood Lumber IV*, Canada picked up – but did not adopt – an argument raised by *amicus* in its response to questions. The USA had adopted the *amicus* submission. *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R.

218 Regarding the WTO, see A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 Journal of International Economic Law (1999), p. 488, FN. 43 (He observes that in *US–Shrimp*, the appellees took different approaches. Malaysia chose to respond to the arguments made by non-members in Exhibits 1-3 of its appellee's submission. The Joint Appellees chose not to respond until the Appellate Body handed down its Preliminary Ruling accepting the non-member submissions and offering the Joint Appellees and third parties a second opportunity to respond. See also *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 85.

219 T. Wälde, *supra* note 107, p. 553 [Emphasis added].

arguments made by *amici curiae* without formally adopting the submission as their own.<sup>220</sup> The possible inequality created by this additional support may be occasional or, where *amici curiae* tend to support one of the sides, structural. For instance, in investment arbitration *amici curiae* overwhelmingly support the views of the host states.<sup>221</sup> How do courts tackle this issue, if at all?

Juridical equality between the parties in their capacity as litigants is one of the ‘cardinal characteristics of a judicial process.’<sup>222</sup> *Benzing* delineates the concept as encompassing a right by each party to equal treatment in the proceedings with regard to the presentation of arguments and an equal opportunity to fully present its own case and to review and respond to the

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220 *Kress v. France* [GC], No. 39594/98, 7 June 2001, ECHR 2001-VI; *Annen v. Germany*, No. 3690/10, Judgment of 26 November 2015; *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005. The USA supported the admission of the submission by the Quechan Indian Nation, which argued that the California and the government’s measures did not violate the BIT. *Glamis v. USA*, United States Submission Regarding Quechan Indian Nation Application, 15 September 2005.

221 E.g. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 31; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001; *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*Amici Curiae*’, 15 January 2001; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, paras. 6-7, 11-12. See also C. Tams/C. Zoellner, *supra* note 51, p. 221; *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 24 (‘This burden would be disproportionately heavy for Claimant. The Applicant has expressed anti-mining and/or anti-ISDS views and has aligned with or echoed the views of Respondent.’).

222 B. Cheng, *supra* note 188, p. 290; M. Reisman, *Nullity and revision*, New Haven 1971, pp. 586-589; L. Gross, *Participation of individuals in advisory proceedings before the International Court of Justice: question of equality between the parties*, 52 *American Journal of International Law* (1958), p. 23; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, 23 October 1956, Sep. Op. Judge Winiarski, ICJ Rep. 1956, p. 106 (‘The Court also respects two fundamental principles of procedure from which, as a judicial body, it cannot depart: *audiatur et altera pars* and the equality of the parties before a Court.’); T. Wälde, *Procedural challenges in investment arbitration under the shadow of the dual role of the state: asymmetries and tribunals’ duty to ensure, pro-actively, the equality of arms*, 26 *Arbitration International* (2010), p. 10; *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Pt. II, Ch. H, pp. 25, 54. M. Benzing, *supra* note 54, p. 117.

other party's legal and factual arguments.<sup>223</sup> The obligation goes further in that courts must employ all available measures to establish procedural equality between the parties.<sup>224</sup>

An *amicus curiae* may draw the attention to a set of facts or legal arguments that a party has overlooked or barely elaborated on and which are detrimental to the case of the other party. This party may then be forced to change its litigation strategy to respond to arguments that had not been raised before. For instance, in *EC–Sugar*, the complainants felt it necessary to challenge in detail the fact submissions made by the *amicus curiae*, the German association of sugar producers WVZ. WVZ argued that C sugar, which is sugar not receiving the fixed intervention price, did not benefit from export subsidies. The complainants submitted that calculations by WVZ were based on inaccurate or misinterpreted data and that sugar producers received more than the allowed intervention price.<sup>225</sup> While this does not happen frequently, the *Soering* case shows that one *amicus curiae* can turn a case around (see Chapter 7). As regards investor-state arbitration, Rule 37(2) ICSID Arbitration Rules does not furnish tribunals with concrete tools to mitigate the risks to party equality. It vaguely obliges tribunals 'to ensure that the non-disputing party submission does

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223 M. Benzing, *supra* note 54, pp. 117–118. For his differentiation between legal and factual equality of the parties, see *Id.*, p. 118, citing Article 43(2) ICJ Statute, *Island of Palmas case (The Netherlands v. USA)*, 4 April 1928, II UNRIIAA (1949), p. 842; A. Mawdsley, *Evidence before the International Court of Justice*, in: R. Macdonald (Ed.), *Essays in honour of Wang Tieya*, Dordrecht 1994, p. 539; T. Wälde, *supra* note 222, p. 11; *The Prosecutor v. Dusko Tadic*, ICTY Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, p. 22, para. 52.

224 T. Wälde, *supra* note 222, pp. 13, 39–40. For instance, in human rights litigation the rules and the court support the structurally less powerful complainant to secure procedural equality. See R. Kolb, *General principles of procedural law*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2<sup>nd</sup> Ed, Oxford 2012, p. 877, FN. 9.

225 The WVZ had sought to refute Australia, Brazil and Thailand's argument that the EC had exceeded its WTO export subsidy commitments *inter alia* through cross-subsidization of exports of C sugar due to guaranteed high annual support prices for a given quantity of sugar (A and B sugar). See *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, paras. 7.76, 7.78–7.79. (WVZ argued in essence that the EC's intervention price did not cover the average total cost of producing A, B and C sugar in the EC). For an analysis of the case, see B. Hoekman/R. Howse, *European Community–Sugar: subsidization and the World Trade Organization*, Policy Research Working Paper 4336, 2007.

not disrupt the proceeding or unduly burden or unfairly prejudice either party.’ Under the UNCITRAL Arbitration Rules, tribunals owe according to its *travaux préparatoires* ‘not so much formal equality as equality in the sense of justice and fairness.’<sup>226</sup> The review of cases shows that tribunals focus on formal equality and mostly ignore potential material burdens arising from *amicus curiae* involvement.<sup>227</sup> In *Bear Creek Mining v. Peru*, the tribunal rejected the claimant’s contention that it faced an undue burden on formal grounds. These included the length of the submission (17 pages), the timing of the submission (more than one month prior to the parties’ scheduled deadline for comments) and procedural fairness and clarity given that, from the outset of the proceedings, the possibility of *amicus curiae* participation had been accounted for in the procedural calendar.<sup>228</sup> The tribunal did not elaborate how the fact that the submissions from the *amicus* were supportive of the respondent by attributing responsibility to the claimant would affect the claimants’ case. This has also been the practice in the case of *amicus curiae* participation by the European Commission. The Commission tends to openly side with the party whose arguments give effect to the EU law at issue – and it even has taken steps in the post-award phase that hinder enforcement of awards not giving effect to its arguments. Particularly also because EU law obliges EU member states to cooperate with the European Commission when it participates as *amicus curiae*, the additional burden on the claimant is tangible and should not be ignored by tribunals.

*Harrison* rightly notes that ‘whether one thinks that the burden or bias towards one of the parties is unacceptable or not ... largely depends on per-

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226 M. Pellonpää/D. Caron, *The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal*, Helsinki 1994, p. 22. Article 17(1) of the 2010 UNCITRAL Arbitration Rules (and of the 2013 UNCITRAL Arbitration Rules) determines that a tribunal may only exercise its procedural discretion on the condition that the parties are treated with equality and that each party is given a reasonable opportunity to present its case.

227 For instance, the *Methanex v. USA* tribunal indicated that it found the potential material burden of *amicus curiae* participation not excessive. It did not discuss how it would handle a possible scenario of inequality.

228 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 58.

spective.<sup>229</sup> The main risks in this regard are secretly party-sponsored *amicus curiae* briefs. If an *amicus curiae* is independent of the parties, neither party is directly prepared for the information submitted by it. The party to whose disadvantage the information is submitted would equally have to accept it if it originated from the bench or the opposing party. Where the information risks turning a case around, the tribunal can reinstate party equality by giving the party an adequate opportunity to comment on the information, or, in extreme cases, disregard it. However, the situation is different where a party secretly sponsors an *amicus curiae* submission. In that case, the opposing party has less opportunity to make its case compared with the other party. This risk can be remedied with strict disclosure requirements.

## II. Practical burdens

Two aspects are considered in more detail: whether *amicus curiae* has caused significant delay in proceedings (1.) and whether it has led to additional costs for the parties (2.).

### 1. Right to a speedy trial and undue delay?

The participation of an *amicus curiae* can cause a delay in the proceedings as international courts and tribunals must accommodate additional procedures, including parties' rights to comment. International courts and tribunals have explicitly acknowledged an obligation to resolve disputes in a speedy manner.<sup>230</sup> This issue has frequently been thematised in WTO dispute settlement. Article 12(2) DSU determines that 'panel procedures should provide sufficient flexibility so as to ensure high-quality panel re-

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229 J. Harrison, *Human rights arguments in "amicus curiae" submissions: promoting social justice?*, in P.M. Dupuy/F. Francioni/E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, pp. 396-421.

230 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, Judgment, 5 February 1970, ICJ Rep. 1970, p. 30, para. 27; B. Cheng, *supra* note 188, p. 295 (There is a public need for speedy settlement of disputes.); A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 32.

ports while not unduly delaying the panel process.<sup>231</sup> In *EC–Sardines*, the Appellate Body held that because ‘the procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes’ it could reject an *amicus curiae* brief if its acceptance would interfere with these aspirations.<sup>232</sup> In practice, the main case is that a WTO member seeks to submit an *amicus curiae* brief late in the proceedings.<sup>233</sup>

It is difficult to measure to what extent disputes have been delayed by *amicus curiae* participation. Delays are most apparent in investment arbitration where additional deadlines are set to accommodate *amicus curiae* participation and parties are given additional time to comment on *amicus* submissions. Tribunals can minimize delays by timing *amicus curiae* applications and submissions into natural breaks in the proceedings or by aligning *amicus curiae* with the schedule for submissions, such as setting the same deadline as for comments on Article 1128 NAFTA submissions. The IACtHR relies on a fixed deadline for submissions. Similarly, WTO panels and the Appellate Body have minimized delays by excluding submissions that would require adjustment of the schedule of submissions. Thus, the effect on the parties’ right to a speedy trial due to *amicus curiae* submissions appears to be manageable and limited.

## 2. Exploding costs?

No study has been conducted in any of the reviewed international courts or tribunals measuring the additional costs incurred by *amicus curiae* participation. That *amici curiae* raise the costs of proceedings is most evident in investment arbitration. *Amicus curiae* briefs tend to demand at least two

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231 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 105.

232 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 167.

233 E.g. *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/R, para. 6.3 (The panel rejected a submission by the American Iron and Steel Institute (AISI) for untimeliness. The panel held that it had the power to delay the proceedings pursuant to Article 12(1) DSU to accommodate AISI’s submission in the proceedings, but found that the delay would not be justified). Confirming, *European Communities – Selected Customs Matters*, Report of the Panel, adopted on 11 December 2006, WT/DS315/R, FN 209.

additional rounds of party comments – one prior to the grant of leave and one once the submission has been received. Moreover, tribunals issue additional procedural orders determining the procedure to be applied, and tribunal members and secretaries face additional administrative and reading work.

Parties have rarely raised the issue of allocation of additional costs incurred by *amici curiae*. Further, none of the regulations on *amicus curiae* addresses it.<sup>234</sup> Currently, *amici curiae* tend to bear the costs of their participation save the additional procedural and administrative costs incurred by their participation, which are borne by the parties who also cover their own additional legal and other costs. Where applicable, the parties cover the additional court fees. Only before the ICTY, *amici curiae* may receive reimbursement of their costs if the participation was by invitation.<sup>235</sup> In all other international courts and tribunals, *amici curiae* do not have rights of remuneration, legal aid or damages. In *Koua Poirrez v. France*, the father of the applicant, after having participated as *amicus curiae*, claimed pecuniary damages for the allegedly excessive length of the proceedings. The ECtHR denied the claim on the basis that Article 41 ECHR foresaw pecuniary damages only for parties, and that *amicus curiae* participation conferred a status lesser than that of a party.<sup>236</sup> For the same reason the ECtHR has denied requests for legal aid, as well as reimbursement of costs

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234 Exceptionally, *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as ‘*amici curiae*’, 15 January 2001, para. 14 (‘Granting to the petitioners *amici* status would substantially increase the costs of proceedings.’); *Commerce Group v. El Salvador*, Minutes of the First Session of the Tribunal, 27 July 2010, ICSID Case No. ARB/09/17, para. 20 (‘The parties were in principle willing to arrange for webcasting of hearings but subjected their decision to a review of the costs involved.’). In *UPS v. Canada*, the investor complained of the procedural delay and the additional costs incurred due to three Article 1128 NAFTA submissions by the USA and Mexico respectively to each of which the disputing parties replied. See *UPS v. Canada*, Investor’s reply to the 1128 Submissions of the United States and Mexico, 21 May 2002; M. Hunter/A. Barbuk, *Procedural aspects of non-disputing party interventions in Chapter 11 arbitrations*, 3 *Asper Review of International Business and Trade Law* (2003), p. 154.

235 ICTY Information on the Submission of *Amicus Curiae* Briefs, March 1997, para. 5f.

236 *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, ECHR 2003-X, para. 69.

for an *amicus curiae* submission.<sup>237</sup> This is to be welcomed. The purpose of legal aid is to ensure access to justice independently of the financial situation of the person asserting or defending a right. It is tied to party status. Moreover, if *amici curiae* were allowed to obtain damages, potential parties could prefer to participate as *amici curiae* to assert their rights without running the risk of an adverse judgment.<sup>238</sup>

However, it may be worthwhile for all international courts and tribunals to contemplate remuneration (at cost) of solicited and unsolicited *amicus curiae* briefs whose submission was found to be useful in order to ensure that submissions are of a high quality. The provisions on remuneration of court-appointed experts and witnesses could serve as a model.<sup>239</sup> It is surprising that not all international courts and tribunals order the reimbursement of the costs incurred in the preparation of solicited *amicus curiae* submissions given that they constitute a service to the international court or tribunal and the reimbursement of expert costs.

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237 *Goddi v. Italy*, Judgment of 9 April 1984, ECtHR Series A No.76. The *amicus curiae* application was rejected for untimeliness and lack of complying with formal requirements. See also D. Harris/M. O'Boyle/C. Warbrick, *Law of the European Convention on Human Rights*, 2<sup>nd</sup> Ed., Oxford 2009, p. 669.

238 For lack of party status, *amici curiae* cannot be the addressees of claims in the proceedings. See *Musci v. Italy* [GC], No. 64699/01, 19 March 2006, ECHR 2006-V; *Cocchiarella v. Italy* [GC], No. 64886/01, 29 March 2006, ECHR 2006-V; *Giuseppe Mostacciolo (No. 1) v. Italy* [GC], No. 64705/01, 29 March 2006. In his dissenting opinion, Judge Azevedo criticized that the acceptance of information outside the rules on intervention would allow a state to submit information while 'escap[ing] the possibility of a decision adverse to itself.' The rights of an accused state not party to the proceedings were, in his view, sufficiently safeguarded by the ICJ's limited jurisdiction *inter partes* (cf. Article 59 ICJ Statute). *Corfu Channel case*, Judgment (Merits), Diss. Op. Judge Azevedo, 9 April 1949, ICJ Rep. 1949, p. 89. Regarding the limited protection offered by Article 59 ICJ Statute against 'persuasive precedent', see S. Rosenne, *supra* note 118, pp. 1580-1598, 1605-1606.

239 In the WTO, for instance, costs and expenses incurred by the participation of experts are paid out of the WTO budget. Experts are remunerated on a day-fee basis and receive reimbursement for travel costs and expenses. M. Cossy, *Panels' consultation with scientific experts: the right to seek information under Art. 13 DSU*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, pp. 215, 217 (Cossy states that the daily rate amounted to around 600 Swiss francs per day in 2005). In the ECtHR, expert fees and costs are borne by the Council of Europe budget. R. Schorm-Bernschütz, *supra* note 71, p. 105. See also Article 83 ITLOS Rules.

Further, international courts and tribunals can ensure that the additional costs are kept to a minimum, for instance, by limiting the length of submissions, specifying the issues to be commented upon, rejecting duplicative submissions or ordering *amici curiae* to submit joint briefs. At least in investment arbitration, the issue of additional costs factors into a tribunal's admission decision. Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules requires that tribunals conduct proceedings without incurring unnecessary expenses.<sup>240</sup> Among the most overt cost-management strategies applied are the exclusion of *amici curiae* from oral proceedings, the limitation to one written submission – possibly even a joint submission by all *amici curiae* – and the general denial of a possibility of reply by *amici curiae* to the parties' comments.

Could an international court or tribunal order an *amicus curiae* to cover the courts' and/or the parties' costs of its participation? Most of the rules only foresee allocation of costs between the court and the parties.<sup>241</sup> In several cases against Italy concerning the derisory amount awarded in damages in cases of excessive length of proceedings, the applicants requested that the ECtHR order each of the three third-party interveners to reimburse the costs of the responding memorials. The ECtHR rejected the request by stating that 'the present case is directed only against Italy and it is only in respect of that country that [the court] has found a violation of the Convention. Accordingly, any request for an order against another country for the reimbursement of costs and expenses must be rejected.'<sup>242</sup> In an investment arbitration concerning a South African mining dispute,

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240 See also, for many, *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001.

241 E.g. Rule 28 ICSID Arbitration Rules; Articles 40 and 42 of the 2010 and 2013 UNCITRAL Arbitration Rules; Article 64 ICJ Statute; Article 97 ICJ Rules; Article 34 ITLOS Statute. Rule A5(6) ECtHR Rules exceptionally foresees that costs of witnesses, experts or other persons summoned at the request of a third party can be awarded against the third party or the Council of Europe. See also Sec. 4, Practice Direction on just satisfaction claims.

242 *Cocchiarella v. Italy* [GC], No. 64886/01, 29 March 2006, ECHR 2006-V, para. 146. See also *Riccardi Pizzati v. Italy* [GC], No. 62361/00, 29 March 2006, paras. 145, 147; *Giuseppe Mostacciolo (No. 1) v. Italy* [GC], No. 64705/01, 29 March 2006; *Apicella v. Italy* [GC], No. 64890/01, 29 March 2006; *Ernestina Zullo v. Italy* [GC], No. 64897/01, 29 March 2006; *Giuseppe Mostacciolo (No. 2) v. Italy* [GC], No. 65102/01, 29 March 2006. The costs were moderate, amounting

the parties requested that the prospective *amicus curiae* should cover the costs of their participation. In another case, one party requested a retainer fee for any costs incurred.<sup>243</sup> It seems that tribunals did not adopt these suggestions. In *Philip Morris v. Uruguay*, the tribunal reserved the right to order any *amicus curiae* to pay or reimburse upon request either party for ‘properly documented costs it has incurred by reason of the Submission’ but later it did not issue such a cost order.<sup>244</sup> While there is no legal impediment to conditioning the participation of *amicus curiae* on the payment of a fee, especially where they have a direct benefit from participating in the form of increased publicity and credibility,<sup>245</sup> another question is if this outcome is desirable. Requiring *amicus curiae* to pay for participation could have a chilling effect on *amicus*’s willingness to participate. With respect to investment arbitration, *Rubins* contemplates that it may be appropriate to let states bear the financial burden of *amicus curiae* participation, because of the competitive benefits they receive in FDI placement through the conclusion of investment treaties, because the benefits of *amicus curiae* participation outweigh its costs and because the existence of the investment arbitration system depends to some degree on public support which may be secured through *amicus curiae* participation.<sup>246</sup> In the WTO, Jordan proposed the creation of a fund to assist developing countries or least developed countries with the response to *amicus curiae* briefs.<sup>247</sup> In this scenario, the additional costs are borne on a voluntary basis by WTO members. None of these proposals seem feasible at the moment. It is more

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to EUR 1,904.06 plus a 2% contribution to a lawyers’ insurance fund and 20% value-added tax per submission.

243 See L. Peterson, *Claimant in garbage disposal dispute with Canada seeks closed-door hearings and wants amicus curiae to pay \$25,000 fee*, 12 November 2008. The case in question was *Vito Gallo v. Canada*, PCA Case No. 55798. The request was not included in Procedural Order No. 1, which regulated *amicus curiae*. In *Infinito Gold v. Costa Rica*, the tribunal reserved the allocation of costs incurred by *amicus curiae* participation for a later decision, see *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 49 e.

244 *Philip Morris v. Uruguay*, Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 31.

245 In favour, N. Rubins, *supra* note 159, p. 222.

246 *Id.*, p. 222.

247 Dispute Settlement Body, *Special Session, Jordan’s further contribution towards the improvement and clarification of the Dispute Settlement Understanding*, 21 March 2003, TN/DS/W/53, p. 2.

likely that tribunals will exclude *amicus curiae* briefs that prove to be too costly for a party.

#### H. Conclusion

The overall impact of *amicus curiae* participation on the system of international dispute settlement remains largely theoretical. *Amicus curiae* participation has affected the relationship between courts and the parties mostly in a symbolic manner. By admitting *amici curiae* against the expressed will of the parties, some international courts and tribunals have shown that they do not consider themselves merely as facilitators of diplomatic dispute settlement. The admission of *amici curiae* may insofar be considered a step towards a greater judicialization of international courts and tribunals. However, it has not broadened the public function of international courts and tribunals. Its handling in each court and tribunal rather is a reflection of how the court or tribunal views its own function. Despite their limited success especially in investment arbitration, the WTO and in inter-state courts, the instrument can be used to draw attention to public interests involved (even if they are not legally recognized by the court or tribunal).

*Amici curiae* have also had a minor impact on the legitimacy of international adjudication. If at all, the instrument can be seen to add to the quality of judgments. As most courts do not consider *amicus curiae* submissions substantively, the legitimacy potential of *amicus curiae* participation remains largely unsourced. Exceptions are the ECtHR and the IACtHR. Both courts have relied on *amici curiae* to support their legal interpretation. In this limited form, *amicus curiae* has contributed to the coherence of international law.

The instrument's effect on transparency is ambivalent. It is much more a beneficiary of increased transparency than its motor. This seems to be changing in investment arbitration, where recent decisions show a tendency to grant *amici* access to certain documentation. At the same time, the instrument has reinforced the lack of standing of non-governmental entities before many international courts and tribunals.

The relationship between *amicus curiae* and parties' rights is ultimately a question of balancing of interests with the parties' procedural guarantees setting the outer limit for the embedding of *amicus curiae* in the proceedings. International courts and tribunals protect the parties' rights largely

through notification of *amicus curiae* submissions and a right to comment. In practice, the main balancing appears to occur with respect to the obligation to conduct proceedings efficiently. The feared negative impacts of *amicus curiae* participation have not materialized.

## Chapter § 9 Conclusion

Heralded as a solution to salient problems of international dispute settlement by some, others consider *amicus curiae* a risk to the foundations of international adjudication. This study has sought to contribute to the debate with an analysis of the *amicus curiae* practice before the ICJ, the ITLOS, the ECtHR, the IACtHR, the ACtHPR, the WTO adjudicating bodies and in investor-state arbitration. Two basic questions have guided this endeavour: what is *amicus curiae* before international courts and tribunals (A.); and is there an added value to its participation (B.)?

### A. What is it?

One of the main challenges of the instrument before international courts and tribunals is the many different assumptions and conceptions held of it. No attempts have been made to define the concept at the international level based on how it is used across all international courts and tribunals. Instead, definitions are drawn commonly from national legal systems, which pursue vastly different concepts of *amicus curiae* or are infused by wants and wishes, thereby adding to the misconceptions.

An analysis of regulations and case law of the international courts and tribunals reviewed has shown that the international *amicus curiae* can be described by four basic characteristics: (1) it is a procedural instrument subject to the full discretion of courts; (2) it is not a party and not an instrument of the parties; (3) it transmits to the court information in the broadest sense; and (4) it pursues some form of interest with its participation. In addition, one may add (though a few exceptions exist to this rule) that *amicus curiae* participation means written participation.

Analysis of the pertinent rules and case law revealed that the functions of the instrument have rarely been defined, leaving it to courts to carve out the roles they wish to assign to *amici curiae* in their proceedings. This book proposes a tripartite systematization of the current functions attributed to *amici curiae* by international courts and tribunals: an information-based function, an interest-based function and a systemic function. Information-based *amicus curiae* focuses on the provision of information to the

court, whereas the main purpose of the participation of interest-based *amicus curiae* is to inform the court of a private or public interest that is affected by a case before it. Systemic *amicus curiae* bundles all instances of *amicus curiae* participation where the instrument is used to alleviate systemic deficiencies of international dispute settlement. There is some overlap between these functions and international courts and tribunals often admit *amici curiae* to fulfil several roles.

While all international courts and tribunals with *amicus curiae* practice allow information-based *amicus curiae* – albeit with different emphasis on the information to be conveyed – there are differences in the use of the other functions. Public-interest based *amicus curiae* participation is allowed by all international courts and tribunals. It is the focal point for the admission of *amici curiae* in investment arbitration. Only the ECtHR allows a rich private interest based *amicus curiae* function. Finally, only the ICJ, investment tribunals, the WTO Appellate Body and panels have admitted *amici curiae* to address systemic concerns.

Overall, the concept is highly fluid and flexible. This is a consequence and an advantage of the broad regulatory discretion of international courts and tribunals in this regard. The absence of prescriptive definitions and rules allows international courts and tribunals to tailor *amicus curiae* participation to their needs. However, the adoption of a certain function of *amicus curiae* by an international court or tribunal depends not only on its needs. An analysis of the use and regulation of the instrument reveals that the following factors also play a role: the court's authority under its constitutive instruments, its relationship with the parties and the member states, external pressures and judges' views of their function.

The downside to the flexibility of the instrument is evident: the exact meaning and scope of *amicus curiae* risks to be obscure and, therefore, unpredictable. This is not only problematic for prospective *amici curiae*, but it may also render it difficult for tribunals and parties to see any value in *amicus curiae* participation, lest prospective *amici curiae* make a convincing argument for their involvement. Accordingly, the functions of the instrument have been heavily influenced by the nature and interests of *amicus* applicants.

In brief, apart from the above-listed criteria, the international *amicus curiae* is a chameleon. The term is loosely used by international courts and tribunals to describe a varied procedural creation. It is hoped that the proposed systematization of the concept will help practitioners and scholars

to obtain a clearer view of the possibilities offered by *amicus curiae* participation.

*B. Added value of amicus curiae participation in international dispute settlement*

The rise of *amicus curiae* in international adjudication is a consequence of the expansion, growing attractiveness and increased influence exercised by international courts and tribunals. However, *amicus curiae* participation should be pursued only if it adds value to a concrete dispute. It is not necessary, and may even be illegitimate, where it seeks to duplicate existing concepts or mechanisms enshrined in procedural laws or special party agreements.<sup>1</sup> Is there a niche the instrument has or can justifiably fill among existing instruments? Are there uses of the concept that should be excluded, either because they are ineffective or due to their adverse implications for other instruments, principles or structures?

This contribution has shown that, ultimately, the relevance of the instrument depends on international courts and tribunals' perception of its usefulness. This again is related to judges' understanding of their judicial function and the ability of *amici curiae* to support the exercise of the judicial function.<sup>2</sup> Based on a review of the influence of *amicus curiae* briefs on the substantive outcome of cases and taking into account the process of participation, it seems that the biggest advantage of the international *amicus curiae* is that it helps to fill information gaps, provides legal analysis, points to relevant laws and interpretations, conveys impact analysis and contextual information and may highlight the various interests involved. *Amici curiae* can infuse the deliberation and decision-making process with new and fresh ideas and thereby contribute to a solid competition of legal ideas. The regional human rights courts, in particular, show the possibili-

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1 J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), p. 1363 ('If *amici* are to have a role, it must be because they add something of significance, without denaturing the process. Nor is their inclusion seamless and self-executing; expert and somewhat time-consuming tribunal management of would-be friends is essential, lest there occur significant duplication in submissions or an artificial broadening or redirecting of the dispute.')

2 L. Barker, *Third parties in litigation: a systematic view of the judicial function*, 29 The Journal of Politics (1962), p. 62.

ties offered by the instrument. There, *amici curiae* regularly provide data on national and international laws, impact assessments and highlight the general background of a case or the systemic nature of a problem. These *amici curiae* can help the court to avoid error and ensure that it decides its case on a fully informed basis. In addition, where no mechanism exists for the defence or notification of affected interests – which usually are protected by intervention – *amici curiae* can be used to call to the attention of the court to the interest involved.

However, the instrument cannot fulfil all of the expectations held. In particular, *amicus curiae* participation is too sporadic to alleviate systemic concerns. As currently administered, it is ill-suited to address concerns pertaining to adjudicative legitimacy or to effectively represent the public interest. Public interest-based *amicus curiae* participation has not induced a substantial change in the content of decisions or the process of international judicial decision-making. Especially in investment arbitration and in WTO dispute settlement, the adjudicative bodies only consider the public interest arguments raised by *amici curiae* to the extent that they correspond with those tabled by the parties. This is not because of a lack of sympathy towards these interests. Rather, courts with a strong adversarial tradition specifically are hesitant to expand the consideration of issues beyond the matters raised by the parties, even in cases where this would be within the scope of their material jurisdiction. Still, public interest based *amicus curiae* participation is not fully futile. It can raise a court's awareness for the implications of a dispute from a perspective that is not likely to have been presented to the court otherwise, such as the impact of a decision on the people or alternative ideas and interpretations of the applicable legal instruments. In essence, it serves to show international courts and tribunals that they do not decide in a legal vacuum. Nevertheless, it cannot change the current modus of decision-making, unless the parties are willing to. Further, the instrument cannot effectively substitute intervention to protect and defend a right potentially affected by the outcome of the dispute given that an *amicus curiae* has no right to present its views. Due to its partial nature, courts would also be ill-advised to treat it as an expert-witness – which they have carefully avoided so far.

International courts and tribunals have largely neatly fitted *amicus curiae* into their general operations. The instrument has not revolutionized the current order of international dispute settlement. Neither has it changed the nature of proceedings, nor overturned the adversarial process, nor has

it led to a greater standing of non-state actors before international courts and tribunals.

This contribution has shown that the regulation of the concept is essential for its success. Areas that require additional regulation and clarification include the process of admission, specifically the independence of *amici curiae*, the permissible and preferred substance of submissions and access to relevant documents and information concerning a dispute.<sup>3</sup> Further, courts can improve the application of the already existing requirements. In many instances, requests are granted without proper assessment of the application. International courts and tribunals should at least carefully examine by way of extensive disclosure requirements whether an *amicus curiae* is independent from the parties. Apart from this general condition, this contribution proposes that courts apply a differentiated set of requirements to *amici curiae*, depending on the function they wish to assign to it. In particular, where an *amicus* shall represent certain interests, courts should require it to show in some way that it can rightly claim to represent those interests. Finally, courts must carefully assess the reliability and credibility of submissions. *Amicus curiae* participation may not significantly delay proceedings or heavily increase costs and it must not lead to a violation of party equality.<sup>4</sup> *Amicus curiae* participation is counter-productive where it risks derailing the proceedings. The main goal of the proceedings remains the rendering of an enforceable decision.

If regulated properly to ensure that courts discharge disputes efficiently while respecting the parties' rights, *amici curiae* can function as a valuable asset in the changing environment international courts and tribunals face.

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3 N. Rubins, *Opening the investment arbitration process: at what cost, for what benefit, taking stock*, in: R. Hofmann/C. Tams (Eds.), *The International Convention on the Settlement of International Disputes (ICSID): taking stock after 40 years*, Baden-Baden 2007, p. 216.

4 See F. Matscher, *Überlegungen über die Einführung der „Interpretationsintervention“ im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, in: H. Miehsler (Ed.), *Ius Humanitatis - Festschrift für Alfred Verdross zum 90. Geburtstag*, Berlin 1980, p. 541.



## Annex I: Cases with *amicus curiae* involvement

### Methodology

This annex provides an overview over all of the decisions of international courts and tribunals with *amicus curiae* involvement that were included in this dissertation. The term involvement was chosen to clarify that the annex does not include only cases where *amici curiae* were admitted to the proceedings by the court, but also cases where requests for participation were denied.<sup>1</sup>

The list was last updated on 15 November 2016.

For each court, a separate database is provided, with four identical columns.

The first column depicts the year in which the judgment (or opinion, final order or decision) in the respective case was issued. Cases pending as of 15 November 2016 are marked as ‘Pend.’.

The second column depicts the case name and the final decision rendered for easy reference. Direct reference to the relevant decisions pertaining to *amicus curiae* were included where remotely accessible.<sup>2</sup>

The third column lists those who participated or sought to participate as *amicus curiae*. Where considered necessary, the following abbreviations are added behind the name to clarify the nature of the *amicus curiae*:

NGO	Non-governmental organization, i.e. <i>any</i> form of organization of a non-governmental character irrespective of the purpose of the organization
IO	Intergovernmental organization
Ind.	Individual

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- 1 Cases where an investment arbitration tribunal chose to regulate *amicus curiae* participation in anticipation of possible requests, but then did not receive any such requests were not included but are mentioned throughout the dissertation where pertinent.
  - 2 Citations follow the respective court’s citation guidelines (which, in some cases, varied over the years). For purposes of overall coherence, deviations were made from the official citation mode with respect to the IACtHR.

*Annex I: Cases with amicus curiae involvement*

The fourth column details if and how the *amicus curiae* submission was accepted. In the event of a joint submission, only the first-listed submitter is linked with an abbreviation. The following abbreviations are used:

A	Request for participation granted or brief admitted by the court or tribunal
A (NC)	WTO-specific: submission was admitted but it was held that it was of no use and hence not considered
A (NF)	Request for participation granted by the court or tribunal, but submission was not filed
An	Submission annexed by either or both parties
I	Participation invited by the court or tribunal
R	Request for participation rejected by the court or tribunal
R (An)	The court or tribunal subjected the admission of an <i>amicus curiae</i> brief to the parties' annexing of the <i>amicus curiae</i> brief and no party annexed the brief
U	Unknown

## International Court of Justice

## Contentious cases

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
1949	<i>Corfu Channel Case (United Kingdom v. Government of Albania)</i> , Judgment (Merits) of 9 April 1949, ICJ Rep. 1949, p. 4	Yugoslav government Greek government	A A
1950	<i>Asylum Case (Colombia v. Peru)</i> , Judgment of 20 November 1950, ICJ Rep. 1950, p. 266	International League for the Rights of Man [NGO]	R
1951	<i>Fisheries Case (United Kingdom v. Norway)</i> , Judgment of 18 December 1951, ICJ Rep. 1951, p. 116	Belgium, the Netherlands and France	An
1959	<i>Aerial Incident of 27 July 1955 (Israel v. Bulgaria)</i> , Judgment (Provisional measures) of 26 May 1959, ICJ Rep. 1959, p. 127	Council of the International Civil Aviation Organization – Art. 69 (3) ICJ Rules	I
1966	<i>South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)</i> , Judgment (Second Phase) of 18 July 1966, ICJ Rep. 1966, p. 6	International Labour Organization [IO mixed]	R
1973	<i>Trial of Pakistani Prisoners of War (Pakistan v. India)</i> , <i>Order of 15 December 1973 (Removal from list)</i> , ICJ Rep. 1973, p. 347	Afghan Minister for Foreign Affairs	R
1986	<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)</i> , Judgment (Merits) of 27 June 1986, ICJ Rep. 1986, p. 14	Three Latin American countries	A
1988	<i>Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)</i> , Order of 22 February 1996 (Removal from list), p. 9	International Civil Aviation Organization [IO] – Art. 69(3) ICJ Rules	I

Annex I: Cases with amicus curiae involvement

1998	<p><i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)</i>, Judgment (Preliminary Objections), ICJ Rep. 1988, p. 3</p> <p><i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)</i>, Judgment (Preliminary Objections) of 27 February 1998, ICJ Rep. 1998, p. 115</p>	International Civil Aviation Organization [IO] – Art. 69(3) ICJ Rules	I
2002	<p><i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i>, Judgment of 14 February 2002, ICJ Rep. 2002, p. 3</p>	Amnesty International	An

## Advisory proceedings

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/State]	A/R/I/ An
1950	<i>International Status of South West Africa</i> , Advisory Opinion of 11 July 1950, ICJ Rep. 1950, p. 128	International League for the Rights of Man [NGO]	A
1954	<i>Effects of awards of compensation made by the UN Administrative Tribunal</i> , Advisory Opinion of 13 July 1954, ICJ Rep. 1954, p. 47	International Civil Servants' Association	R
1956	<i>Judgments of the Administrative Tribunal of the ILO Upon Complaints made against the UNESCO</i> , Advisory Opinion of 23. October 1956, ICJ Rep. 1956, p. 77	Employee [Ind]	An
1971	<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)</i> , Advisory Opinion of 21 June 1971, ICJ Rep. 1971, p. 16	International League for Human Rights (formerly International League for the Rights of Man (ILRM)) The American Committee on Africa (ILRM-affiliate) [NGO] Prof. W. Michael Reisman Organization of African Unity [IO] Representative of the Herero people The South West Africa National United Front, consisting of four individuals	R R R A R R
1973	<i>Application for review of Judgment No. 158 of the United Nations Administrative Tribunal</i> , Advisory Opinion of 12 July 1973, ICJ Rep. 1973, p. 166	Employee [Ind]	An
1982	<i>Application for review of Judgment No. 273 of the United Nations Administrative Tribunal</i> , Advisory Opinion of 20 July 1982, Correspondence, ICJ Rep. 1982, p. 233	Employee [Ind]	An

Annex I: Cases with amicus curiae involvement

1987	<i>Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal</i> , Advisory Opinion of 27 May 1987, ICJ Rep. 1987, p. 18	Employee [Ind]	An
1988	<i>Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947</i> , Advisory Opinion of 26 April 1988, ICJ Rep. 1988, p. 12	Mission to the UN of the Palestinian Liberation Organization	R
1996	<i>Legality of the Use by a State of Nuclear Weapons in Armed Conflict</i> , Advisory Opinion of 8 July 1996, ICJ Rep. 1996, p. 66 <i>Legality of the Threat or Use of Nuclear Weapons</i> , Advisory Opinion of 8 July 1996, ICJ Rep. 1996, p. 226	Unidentified number of NGOs and individuals	R
2004	<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> , Advisory Opinion of 9 July 2004, ICJ Rep. 2004, p. 136	League of Arab States Organization of the Islamic Conference Palestine	A A I
2010	<i>Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo</i> , Advisory Opinion of 22 July 2010, ICJ Rep. 2010, p. 403	Provisional Institutions of Self-Government of the Kosovo	I
2012	<i>Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development</i> , Advisory Opinion of 1 February 2012, ICJ Rep. 2012, p. 10	Member of staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa	An

**International Tribunal for the Law of the Sea**

*Contentious cases*

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
2013	<i>The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)</i> , Provisional Measures, Order of 22 November 2013, ITLOS Case No. 22	Stichting Greenpeace Council	R

*Advisory proceedings*

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
2011	<i>Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the area</i> , Seabed Disputes Chamber, Advisory Opinion of 1 February 2011, ITLOS Case No. 17	World Wide Fund for Nature and Stichting Greenpeace Council	R
2015	<i>Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)</i> , Seabed Disputes Chamber, Advisory Opinion of 2 April 2015, ITLOS Case No. 21	World Wide Fund for Nature International United States of America	R A

Annex I: Cases with *amicus curiae* involvement

Inter-State Arbitration

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
2015	<i>Arctic Sunrise Arbitration (The Kingdom of the Netherlands v. The Russian Federation)</i> , Procedural Order No. 3 (Greenpeace International's Request to File an <i>Amicus Curiae</i> Submission) of 8 October 2014	Stichting Greenpeace Council	R
2016	<i>South China Sea Arbitration (Republic of the Philippines and the People's Republic of China)</i> , Award, 12 July 2016, PCA Case No. 2013-19	Chinese (Taiwan) Society of International Law	U

## European Court of Human Rights

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
1978	<i>Tyrrer v. the United Kingdom</i> , Judgment of 25 April 1978, Series A No. 26	National Council for Civil Liberties [NGO]	R
1979	<i>Winterwerp v. the Netherlands</i> , Judgment of 24 October 1979, Series A No. 33	Government of the United Kingdom	An
1981	<i>Young, James and Webster v. the United Kingdom</i> , Judgment of 13 August 1981, Series A No. 44	Trades Union Congress [NGO]	A
1981	<i>Dudgeon v. the United Kingdom</i> , Judgment of 22 October 1981, Series A No. 45	Dr. Damacker, Assistant Professor at the University of Frankfurt	A
1984	<i>Goddì v. Italy</i> , Judgment of 9 April 1984, Series A No. 76	Council of the Rome Bar Association (Consiglio dell'Ordine degli Avvocati e Procuratori di Roma)	R
1984	<i>Malone v. the United Kingdom</i> , Judgment of 2 August 1984, Series A No. 82	Post Office Engineering Union [NGO]	A
1985	<i>Ashingdane v. the United Kingdom</i> , Judgment of 28 May 1985, Series A No. 93	National Association for Mental Health (MIND) Mr. Kynaston (a lawyer with a similar case before the Commission)	A R
1986	<i>Glaserapp v. Germany</i> , Judgment of 28 August 1986, Series A No. 104 <i>Kosiek v. Germany</i> , Judgment of 28 August 1986, Series A No. 105	UK Prison Officers' Association [NGO]	R
1986	<i>Lingens v. Austria</i> , Judgment of 8 July 1986, Series A No. 103	International Press Institute through Interights	A

Annex I: Cases with amicus curiae involvement

1987	<i>Leander v. Sweden</i> , Judgment of 26 March 1987, Series A No. 116	National Council for Liberties on behalf of three British Trade Unions representing government employees (the Civil Service Union, the Civil and Public Servants Association and the First Division Association)	R
1987	<i>Capuano v. Italy</i> , Judgment of 25 June 1987, Series A No. 119	The Rome Lawyers' Association The Federation of Italian Lawyers' Unions The Italian Association of Young Barristers	A R R
1987	<i>Monnell and Morris v. the United Kingdom</i> , Judgment of 2 March 1987, Series A No. 115	JUSTICE (British Section of the International Commission of Jurists)	A
1988	<i>Brogan and others v. the United Kingdom</i> , Judgment of 29 November 1988, Series A No. 145-B	The Standing Advisory Commission on Human Rights, Belfast	A
1989	<i>Soering v. the United Kingdom</i> , Judgment of 7 July 1989, Series A No. 161	Amnesty International	A
1991	<i>Caleffi v. Italy</i> , Judgment of 24 May 1991, Series A No. 206-B <i>Vocaturro v. Italy</i> , Judgment of 24 May 1991, Series A No. 206-C	5 Italian trade unions: Confederazione Generale Italiana del Lavoro, Confederazione Italiana Sindacati Lavoratori, Unione Italiana Lavoratori, Associazione sindacale aziende petrolifere, Consorzio industriale zona Ariccia, castelli Romani e aree limitrofe	R
1991	<i>Observer and Guardian v. the United Kingdom</i> , Judgment of 26 November 1991, Series A No. 216	Article 19 (International Centre against Censorship)	A
1991	<i>The Sunday Times v. the United Kingdom (No. 2)</i> , Judgment of 26 November 1991, Series A No. 217	Article 19 (the International Centre against Censorship)	A
1991	<i>Open Door and Dublin Well Woman v. Ireland</i> , Judgment of 29 October 1992, Series A No. 246-A	Article 19 The Society for the Protection of Unborn Children	A A
1992	<i>Pham Hoang v. France</i> , Judgment of 25 September 1992, Series A No. 243	Ordre des avocats au Conseil d'Etat et la Cour de cassation	A

Annex I: Cases with amicus curiae involvement

1992	<i>X. v. France</i> , Judgment of 31 March 1992, Series A No. 234-C	Association française des haemophiles/ French Association of Haemophiliacs	A
1992	<i>Drozdz and Janousek v. France and Spain</i> , Judgment of 26 June 1992, Series A No. 240	Lawyer on behalf of Conseil executive de la Principauté d'Andorre/ Executive Council of the Principality of Andorra [State]	A
1992	<i>Y. v. the United Kingdom</i> , Judgment of 29 October 1992, Series A No. 247-A	Epoch Worldwide, a federation of non-governmental organizations	R
1993	<i>Modinos v. Cyprus</i> , Judgment of 22 April 1993, Series A No. 259	International Lesbian and Gay Association (ILGA) [NGO]	R
1993	<i>Ruiz-Mateos v. Spain</i> , Judgment of 23 June 1993, Series A No. 262	Government of Germany Government of Portugal	A A
1993	<i>Branigan and McBride v. the United Kingdom</i> , Judgment of 25 May 1993, Series A No. 258-B	The Northern Ireland Standing Advisory Commission on Human Rights [State] Amnesty International, Liberty, Interights, and the Committee on the Administration of Justice [NGOs]	A A
1993	<i>Informationsverein Lentia and others v. Austria</i> , Judgment of 24 November 1993, Series A No. 276	Article 19 and Interights	A
1994	<i>Otto-Preminger-Institut v. Austria</i> , Judgment of 20 September 1994, Series A No. 295-A	Article 19 and Interights	A
1994	<i>Jersild v. Denmark</i> , Judgment of 23 September 1994, Series A No. 298	Human Rights Watch	A
1994	<i>Hokkanen v. Finland</i> , Judgment of 23 September 1994, Series A No. 299-A	Mr. and Mrs. Nick (maternal grandparents of the applicant)	A
1995	<i>Prager and Oberschlick v. Austria</i> , Judgment of 26 April 1995, Series A No. 313	Article 19 and Interights	A

Annex I: Cases with amicus curiae involvement

1995	<i>McCann and others v. the United Kingdom</i> , Judgment of 27 September 1995, Series A No. 324	Amnesty International British-Irish Rights Watch, the Committee on the Administration of Justice, Inquest and Liberty	A A
1995	<i>Scollo v. Italy</i> , Judgment of 28 September 1995	Associazione Sindacale Piccoli Proprietari Immobiliari	R
1996	<i>Lobo Machado v. Portugal</i> , Judgment of 20 February 1996, Reports 1996-I	Belgian Government	A
1996	<i>Goodwin v. the United Kingdom</i> , Judgment of 27 March 1996, Reports 1996-II	Article 19 and Interights	A
1996	<i>Saunders v. the United Kingdom</i> , Judgment of 17 December 1996, Reports 1996-VI	Liberty Mr. I.J. Lyons, Mr. A.K. Parnes, and Mr. G.M. Ronson (three of the applicant's co-accused)	A R
1996	<i>Akdivar and others v. Turkey</i> , Judgment of 16 September 1996, Reports 1996-VI	Amnesty International	A
1996	<i>John Murray v. the United Kingdom</i> , Judgment of 8 February 1996, Reports 1996-I	Amnesty International Justice Liberty, the Committee on the Administration of Justice, and the British-Irish Rights Watch The Northern Ireland Standing Advisory Commission on Human Rights	A A A A
1996	<i>Wingrove v. the United Kingdom</i> , Judgment of 25 November 1996, Reports 1996-V	Rights International [NGO] Article 19 and Interights	A A
1996	<i>Chahal v. the United Kingdom</i> , Judgment of 15 November 1996, Reports 1996-V	Amnesty International Justice Liberty, the Centre for Advice on Individual Rights in Europe (the AIRE Centre), and the Joint Council for the Welfare of Immigrants	A A A

Annex I: Cases with amicus curiae involvement

1996	<i>Buckley v. the United Kingdom</i> , Judgment of 25 September 1996, Reports 1996-IV	Mr. A.J. Buck, Neighbourhood Watch Co-ordinator, Cambridgeshire	A
1996	<i>Cantoni v. France</i> , Judgment of 15 November 1996, Reports 1996-V	Conseil national de l'Ordre des pharmaciens	R
1996	<i>Ahmet Sadik v. Greece</i> , Judgment of 15 November 1996 (preliminary objection), Reports 1996-V	Rights International [NGO]	R
1996	<i>Johansen v. Norway</i> , Judgment of 7 August 1996, Reports 1996-III	Mouvement international ATD Quart Monde	R
1997	<i>Laskey and others v. the United Kingdom</i> , Judgment of 19 February 1997, Reports 1997-I	Rights International	A
1997	<i>X, Y and Z v. the United Kingdom</i> , Judgment of 22 April 1997, Reports 1997-II	Rights International	A
1997	<i>Aydin v. Turkey</i> , Judgment of 25 September 1997, Reports 1997-VI	Amnesty International	A
1997	<i>Gregory v. the United Kingdom</i> , Judgment of 25 February 1997, Reports 1997-I	Rights International	A
1997	<i>Halford v. the United Kingdom</i> , Judgment of 25 June 1997, Reports 1997-III	Liberty	A
1997	<i>De Haes and Gijssels v. Belgium</i> , Judgment of 24 February 1997, Reports 1997-I	Rights International	R
1997	<i>Mantovanelli v. France</i> , Judgment of 18 March 1997, Reports 1997-II	Rights International	R
1997	<i>Van Mechelen and others v. the Netherlands</i> , Judgment of 23 April 1997, Reports 1997-III	Rights International	R

Annex I: Cases with amicus curiae involvement

1997	<i>Pentidis and others v. Greece</i> , Judgment of 9 June 1997, Reports 1997-III	The Rutherford Institute	R
1998	<i>Incal v. Turkey</i> , Judgment of 9 June 1998, Reports 1998-IV	Article 19 Interights	A A
1998	<i>Tinnelly and Sons Ltd and others and McElduff and others v. the United Kingdom</i> , Judgment of 10 July 1998, Reports 1998-IV	The Standing Advisory Commission on Human Rights [State]	A
1998	<i>Sheffield and Horsham v. the United Kingdom</i> , Judgment of 30 July 1998, Reports 1998-V	Liberty	A
1998	<i>McGinley and Egan v. the United Kingdom</i> , Judgment of 9 June 1998, Reports 1998-III	The Campaign for Freedom of Information and Liberty New Zealand Nuclear Test Veterans' Association	A R
1998	<i>Kurt v. Turkey</i> , Judgment of 25 May 1998, Reports 1998-III	Amnesty International	A
1998	<i>Ahmed and others v. the United Kingdom</i> , Judgment of 2 September 1998, Reports 1998-VI	Liberty	A
1998	<i>Assenov and others v. Bulgaria</i> , Judgment of 28 October 1998, Reports 1998-VIII	European Roma Rights Center Amnesty International	A A
1998	<i>Teixeira de Castro v. Portugal</i> , Judgment of 9 June 1998, Reports 1998-IV	Justice	A
1998	<i>Bowman v. the United Kingdom</i> , Judgment of 19 February 1998, Reports 1998-1	The Rutherford Institute	R
1999	<i>T. v. the United Kingdom</i> [GC], No. 24724/94, 16 December 1999	Mr. R. Bulger and Mrs. D. Fergus (the parents of the child that had been murdered by V. and the applicant) Justice	A A

Annex I: Cases with amicus curiae involvement

1999	<i>Y. v. the United Kingdom</i> [GC], No. 24888/94, 16 December 1999, ECHR 1999-IX	Mr. R. Bulger and Mrs. D. Fergus (the parents of the child that had been murdered by T. and the applicant) Justice	A A
1999	<i>Beer and Regan v. Germany</i> [GC], No. 28934/95, 18 February 1999	Committee of Staff Representatives of the Coordinated Organisations	A
1999	<i>Waite and Kennedy v. Germany</i> [GC], No. 26083/94, 18 February 1999, ECHR 1999-I	Committee of Staff Representatives of the Coordinated Organisations	A
2000	<i>Asprogerakas-Grivas v. Greece</i> No. 58683/00	Undisclosed NGO	R
2000	<i>Timurtas v. Turkey</i> , No. 23531/94, 13 June 2000, ECHR 2000-VI	The Center for Justice and International Law (CEJIL)	A
2000	<i>Khan v. the United Kingdom</i> , No. 35394/97, 12 May 2000, ECHR 2000-V	Justice Liberty	A A
2000	<i>Ch'aire Shalom Ye Tsedek v. France</i> [GC], No. 27417/95, 27 June 2000, ECHR 2000-VII	Mr. J. Sitruk, Chief Rabbi of France ACIP (then the only Jewish Consistorial Association which had received the approval in question)	A A
2000	<i>Ignaccolo-Zenide v. Romania</i> , No. 31679/96, 25 January 2000, ECHR 2000-I	AIRE Centre Reunite associations	A A
2001	<i>Phillips v. the United Kingdom</i> , No. 41087/98, 5 July 2001, ECHR 2001-VII and (dec.), 30 November 2000	Undisclosed amicus curiae	R
2001	<i>Feldak v. Slovakia</i> , No. 29032/95 12 July 2001, ECHR 2001-VIII	Minister Mr. Dusan Slobodnik, national plaintiff	A
2001	<i>Hatton and others v. the United Kingdom</i> , No. 36022/97, 2 October 2001	British Airways Friends of the Earth	A A
2001	<i>Krombach v. France</i> , No. 29731/96, 13 February 2001, ECHR 2001-II	Mr. A. Bamberski (father of the victim)	A

Annex I: Cases with amicus curiae involvement

2001	<i>Chapman v. the United Kingdom</i> [GC], No. 27238/95, 18 January 2001, ECHR 2001-I <i>Beard v. the United Kingdom</i> [GC], No. 24882/94, 18 January 2001 <i>Coster v. the United Kingdom</i> [GC], No. 24876/94, 18 January 2001 <i>Lee v. the United Kingdom</i> [GC], No. 25289/94, 18 January 2001	European Roma Rights Centre	A
2001	<i>Jane Smith v. the United Kingdom</i> [GC], No. 25154/94, 18 January 2001	European Roma Rights Centre	A
2001	<i>Z and others v. the United Kingdom</i> [GC], No. 29392/95, 10 May 2001, ECHR 2001-V	Professor G. Van Bueren, Director of the Programme on International Rights of the Child, University of London	A
2001	<i>Hugh Jordan v. the United Kingdom</i> , No. 24746/94, 4 May 2001, ECHR 2001	Northern Ireland Human Rights Commission	A
2001	<i>Sadak and others v. Turkey (No.1)</i> , Nos. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, ECHR 2001-VIII	Inter-Parliamentary Union (IPU)	A
2001	<i>Pellegrini v. Italy</i> , No. 30882/96, 20 July 2001, ECHR 2001-VII	AIRE Centre	A
2001	<i>Brumărescu v. Romania (Article 41)</i> (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I	Mr. Mircea Dan Mirescu	A
2001	<i>T.P. and K.M. v. the United Kingdom</i> [GC], No. 28945/95, 10 May 2001, ECHR 2001-V	Professor Geraldine Van Bueren, Director of the Programme on International Rights of the Child	A
2001	<i>McKerr v. the United Kingdom</i> , No. 28883/95, 4 May 2001, 2001-III	The Northern Ireland Human Rights Commission	A
2001	<i>Shanaghan v. the United Kingdom</i> , No. 37715/97, 4 May 2001	The Northern Ireland Human Rights Commission	A

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2001	<i>Kelly and others v. the United Kingdom</i> , No. 30054/96, 4 May 2001	The Northern Ireland Human Rights Commission	A
2001	<i>Metropolitan Church of Bessarabia and others v. Moldova</i> , No. 45701/99, 13 December 2001, ECHR 2001-XII	Metropolitan Church of Moldova	A
2001	<i>Ilascu and others v. Moldova and Russia</i> (dec.) [GC], No. 48787/99, 4 July 2001	Government of Romania	A
2001	<i>Fretté v. France</i> (dec.), No. 36515/97, 12 June 2001	ILGA-Europe	A
2001	<i>Kress v. France</i> [GC], No. 39594/98, 7 June 2001, ECHR 2001-VI	Court of Cassation and Conseil d'Etat Bar	A
2002	<i>A. v the United Kingdom</i> , No. 35373/97, 17 December 2002, ECHR 2002-X	Austrian Government Belgian Government Dutch Government French Government Finnish Government Irish Government Italian Government Norwegian Government	A A A A A A A A
2002	<i>I. v. the United Kingdom</i> [GC], No. 25680/94, 11 July 2002 <i>Christine Goodwin v. the United Kingdom</i> [GC], No. 28957/95, 11 July 2002, ECHR 2002-VI	Liberty	A
2002	<i>Sadak and others v. Turkey</i> (No. 2), Nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002, ECHR 2002-IV	Interights (The International Centre for the Legal Protection of Human Rights)	A
2002	<i>Pretty v. the United Kingdom</i> , No. 2346/02, 29 April 2002, ECHR 2002-III	The Voluntary Euthanasia Society The Catholic Bishops' Conference of England and Wales	A A

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2002	<i>Nikula v. Finland</i> , No. 31611/96, 21 March 2002, ECHR 2002-II	Interights (The International Centre for the Legal Protection of Human Rights)	A
2002	<i>Stafford v. the United Kingdom</i> [GC], No. 46295/99, 28 May 2002, ECHR 2002-IV	Justice	A
2002	<i>Kingsley v. the United Kingdom</i> [GC], No. 35605/97, 28 May 2002, ECHR 2002-IV	Liberty	A
2002	<i>T.A. v. Turkey</i> (striking out), No. 26307/95, 9 April 2002	Aire Centre	R
2002	<i>Dichand and others v. Austria</i> , No. 29271/95, 26 February 2002	Mr. Michael Graff, a lawyer representing a media group, which was in strong competition with the media group to which the applicants belonged and who, as a politician, initiated legislation favoring his client's businesses.	A
2002	<i>Wilson, National Union of Journalists and others v. the United Kingdom</i> , Nos. 30668/96, 30671/96, 30678/96, 2 July 2002, ECHR 2002-V	Trades Union Congress and Liberty	A
2002	<i>Togcu v. Turkey</i> (striking out), No. 27601/95, 9 April 2002	Aire Centre	A
2002	<i>A. v. the United Kingdom</i> (dec.), No. 35373/97, 5 March 2002	Dutch Government Irish Government Italian Government	A A A
2003	<i>Comitato promotore del referendum maggioritario (del 18/4/1999) and Comitato promotore del referendum antiproporzionale (del 21/5/2005) v. Italy</i> (dec. ad.), No. 56507/00, 8 July 2003	Undisclosed <i>amicus curiae</i>	R
2003	<i>Hutton and others v. the United Kingdom</i> [GC], No. 36022/97, 8 July 2003, ECHR 2003-VIII	Friends of the Earth British Airways	A A
2003	<i>Koua Poirrez v. France</i> , No. 40892/98, 30 September 2003, ECHR 2003-X	Applicant's adoptive father	A

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2003	<i>Karner v. Austria</i> , No. 40016/98, 24 July 2003, ECHR 2003-IX	Liberty, ILGA-Europe (The European Region of the International Lesbian and Gay Association), and Stonewall	A
2003	<i>Kleyn and others v. the Netherlands</i> [GC], Nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, ECHR 2003-VI	Italian Government French Government	A A
2003	<i>Perna v. Italy</i> [GC], No. 48898/99, 6 May 2003, ECHR 2003-V	Mr. G Caselli	A
2003	<i>Tahsin Acar v. Turkey</i> (preliminary objection) [GC], No. 26307/95, 6 May 2003, ECHR 2003-VI	Amnesty International.	A
2003	<i>Pedersen and Baadsgaard v. Denmark</i> , No. 49017/99, 19 June 2003	Danish Union of Journalists	A
2003	<i>Mamatkulov and Abdurasulovic v. Turkey</i> , Nos. 46827/99 and 46951/99, 6 February 2003	International Commission of Jurists	A
2003	<i>M.C. v. Bulgaria</i> , No. 39272/98, 4 December 2003, ECHR 2003-XII	Interights	A
2003	<i>Sylvester v. Austria</i> , Nos. 36812/97 and 40104/98, 24 April 2003	Mrs Monika Sylvester, the second applicant's mother Mrs. Jan Rewers McMillan, attorney at law The National Center for Missing and Exploited Children and the International Center for Missing and Exploited Children	A A A
2003	<i>S.A.R.L. du parc d'activités de Blotzheim et la S.C.I. Haselack-er v. France</i> (dec.), No. 48897/99, 18 March 2003, ECHR 2003-III	Swiss Government	A
2004	<i>Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom</i> (dec.) [GC], No. 56672/00, 10 March 2004, ECHR 2004-IV	European Commission Council of the Bars and Law Societies of the EU (CCBE) European Company Lawyers Association	A A A

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		La Fédération internationale des ligues des droits de l'homme (FIDH) International Commission of Jurists German Bar Association		A A R
2004	<i>Kyprianou v. Cyprus</i> , No. 73797/01, 27 January 2004	Undisclosed (mentioned in 2004 reports)		A
2004	<i>Von Hannover v. Germany</i> , No. 59320/00, 24 June 2004, ECHR 2004-VI	Verband deutscher Zeitschriftenverleger Hubert Burda Media GmbH & Co KG		A A
2004	<i>Pini and others v. Romania</i> , Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V	The Poiana Soarelui Educational Centre in Brasov, represented by Mr. N. Mindrila, Baroness Nicholson of Winterbourne, a British national and rapporteur for the European parliament Mr. I. Tiriac, founding member of the Poiana Soarelui Educational Centre Mr. V. Arhire, a lawyer practising in Bucharest, representative of the minors Florentina Goroh and Mariana Estoica Complexe éducatif Poiana Soarelui de Brasov, filial de la Fondation pour l'accueil des enfants, Bucarest		A A A
2004	<i>Taskin and others v. Turkey</i> , No. 46117/99, 10 November 2004, ECHR 2004-X	The Normandy Madencilik A.S. company		A
2004	<i>Vo v. France</i> [GC], No. 53924/00, 8 July 2004, ECHR 2004-VI-II	Center for Reproductive Rights The Family Planning Association		A A
2004	<i>Blecic v. Croatia</i> , No. 59532/00, 29 July 2004	OSCE		A
2004	<i>Pedersen and Baadsgaard v. Denmark</i> [GC], No. 49017/99, 17 December 2004, ECHR 2004-XI	Danish Union of Journalists		A
2004	<i>Nachova and others v. Bulgaria</i> , Nos. 43577/98 and 43579/98, 1 <sup>st</sup> section, 26 February 2004	European Roma Rights Centre		A

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2004	<i>E.O. and I.P. v. Slovakia</i> , Nos. 56193/00 and 57581/00, 27 April 2004	Ms. Z.M., mother of the child whose education was at stake in the case	A
2004	<i>Bäck v. Finland</i> , No. 37598/97, 20 July 2004, ECHR 2004-VIII	Government of Norway Government of the Netherlands Government of Sweden Government of the United Kingdom	A A A A
2004	<i>AB Kurt Kallermann v. Sweden</i> , No. 41579/98, 26 October 2004	Government of Finland	A
2004	<i>Makaratzis v. Greece</i> [GC], No. 50385/99, 20 December 2004, ECHR 2004-XI	Institut de formation en droits de l'homme du barreau de Paris	A
2004	<i>M.G. v. Germany</i> (dec.), No. 11103/03, 16 September 2004	Romanian government	A
2005	<i>Öcalan v. Turkey</i> [GC], No. 46221/99, 12 May 2005, ECHR 2005-IV	The Mothers of Martyrs Association Istanbul Analarte Dayamisma Dernegi Izmir Branch of the Association of Families (101) of Martyrs The Turkish Law Institute	A A R R
2005	<i>Eskinazi and Chelouche v. Turkey</i> (dec.), No. 14600/05, 6 December 2005, ECHR 2005-XIII	Mr Jacques Gabriel Chelouche, father of the second applicant	A
2005	<i>Koons v. Italy</i> (dec.), No. 68183/01, 7 June 2005 <i>Koons v. Italy</i> , No. 68183/01, 30 September 2008	National Center for Missing and Exploited Children, USA	A
2005	<i>Hutten-Czapka v. Poland</i> , No. 35014/97, 22 February 2005	The Polish Association of Tenants	A
2005	<i>Py v. France</i> , No. 66289/01, 11 January 2005, ECHR 2005-I	Mr Pichon and Ms Gillot, residents of New Caledonia	A
2005	<i>Mamatkulov and Askarov v. Turkey</i> [GC], Nos. 46827/99 and 46951/99, 4 February 2005, ECHR 2005-I	Human Rights Watch (HRW) The International Commission of Jurists The AIRE Centre	A A A

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2005	<i>Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland</i> [GC], No. 45036/98, 30 June 2005, ECHR 2005-VI	Italian Government United Kingdom Government The European Commission The Institut de formation en droits de l'homme du barreau de Paris	A A A
2005	<i>Isayeva, Yusupova and Bazayeva v. Russia</i> , Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005	Rights International Centre for International Human Rights Law, Inc., USA Memorial	A A A
2005	<i>Kyprianou v. Cyprus</i> [GC], No. 73797/01, 15 December 2005, ECHR 2005-XIII	Government of the United Kingdom Government of Ireland Government of Malta	A A A
2005	<i>Nachova and others v. Bulgaria</i> [GC], Nos. 43577/98 and 43579/98, 6 July 2005, ECHR 2005-VII	European Roma Rights Centre Interights Open Society Justice Initiative	A A A
2005	<i>Hirst v. the United Kingdom (No. 2)</i> [GC], No. 74025/01, 6 October 2005, ECHR 2005-IX	The AIRE Centre Government of Latvia Prison Reform Trust	A A A
2005	<i>Petri Sallinen and others v. Finland</i> , No. 50882/99, 27 September 2005	The Finnish Bar Association	A
2005	<i>Reinprecht v. Austria</i> , No. 67175/01, 15 November 2005, ECHR 2005-XII	Polish Helsinki Foundation for Human Rights	A
2005	<i>Shamayev and others v. Georgia and Russia</i> , No. 36378/02, 12 April 2005, ECHR 2005-III	Ms. N. Devdariani, Ombudsperson of the Georgian Republic Ms. E. Tevdoradze, a member of the Georgian parliament	A A
2005	<i>Independent News and Media and Independent Newspapers Ireland Limited v. Ireland</i> , No. 55120/00, 16 June 2005, ECHR 2005-V	National Newspapers of Ireland Associated Newspapers (Ireland) Limited The Irish Times Limited Thomas Crosbie Holdings Limited and Examiner Publications (Cork) Limited	A A A A

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2005	<i>Adali v. Turkey</i> , No. 38187/97, 31 March 2005	MGN Limited News groups Newspapers Limited and News International plc National Union of Journalists	A A A
2005	<i>Jelicic v. Bosnia and Herzegovina</i> (dec.), No. 41183/02, 15 November 2005, ECHR 2005-XII	Cypriot Government	A
2005	<i>Goudswaard-van der Lans v. the Netherlands</i> (dec.), No. 75255/01, 22 September 2005, ECHR 2005-XI	The European Commission for Democracy through Law (the Venice Commission) The International Committee for Human Rights	A A
2005	<i>Tatyana Romanenko and others v. Russia</i> (dec.), No. 11751/03, 17 November 2005	10 individuals affected by the legislation in the same manner as the applicant Open Society Justice Initiative Moscow Media Law and Policy Institute	A A
2005	<i>EMESA SUGAR N.V. v. the Netherlands</i> (dec.), No. 62023/00 of 13 January 2005	European Commission	A
2006	<i>D. v. Ireland</i> (dec.), No. 26499/02, 28 June 2006	The Centre for Reproductive Rights (USA) The Irish Family Planning Association (IRL) Pro-Life Campaign (IRL) Society for the Protection of Unborn Children (IRL)	A A A A
2006	<i>Guiseppeina and Orestina Procaccini v. Italy</i> [GC], No. 65075/01, 29 March 2006	Polish Government Czech Government Slovak Government	A A A
2006	<i>Association SOS Attentats and De Boéry v. France</i> [GC], No. 76642/01, 4 October 2006, ECHR 2006-XIV	British Government	A
2006	<i>Blečić v. Croatia</i> [GC], No. 59532/00, 8 March 2006, ECHR 2006-III	Interights OSCE	A A
2006	<i>Sejdic v. Italy</i> [GC], No. 56581/00, 1 March 2006, ECHR 2006-II	The Government of Slovakia	A

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2006	<i>Scordino v. Italy (No. 1)</i> [GC], No. 36813/97, 29 March 2006, ECHR 2006-V	Polish Government Czech Government Slovak Government	A A A
2006	<i>Riccardi Pizzati v. Italy</i> [GC], No. 62361/00, 29 March 2006	Polish Government Czech Government Slovak Government	A A A
2006	<i>Musci v. Italy</i> [GC], No. 64699/01, 19 March 2006, ECHR 2006-V	Polish Government Czech Government Slovak Government	A A A
2006	<i>Giuseppe Mostacciuolo (No. 1) v. Italy</i> [GC], No. 64705/01, 29 March 2006	Polish Government Czech Government Slovak Government	A A A
2006	<i>Cocchiarella v. Italy</i> [GC], No. 64886/01, 29 March 2006, ECHR 2006-V	Polish Government Czech Government Slovak Government	A A A
2006	<i>Apicella v. Italy</i> [GC], No. 64890/01, 29 March 2006	Polish Government Czech Government Slovak Government	A A A
2006	<i>Ernestina Zullo v. Italy</i> [GC], No. 64897/01, 29 March 2006	Polish Government Czech Government Slovak Government	A A A
2006	<i>Giuseppe Mostacciuolo (No. 2) v. Italy</i> [GC], No. 65102/01 29 March 2006	Polish Government Czech Government Slovak Government	A A A
2006	<i>Markovic and others v. Italy</i> [GC], No. 1398/03, 14 December 2006, ECHR 2006-XIV	United Kingdom Government	A

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2006	<i>D.H. and others v. the Czech Republic</i> , No. 57325/00, 7 February 2006	Interights Human Rights Watch	A A
2006	<i>Sorensen and Rasmussen v. Denmark</i> [GC], Nos. 52562/99 and 52620/99, 11 January 2006, ECHR 2006-1	Danish Confederation of Trade Unions	A
2006	<i>Üner v. the Netherlands</i> [GC], No. 46410/99, 18 October 2006, ECHR 2006-XI	German Government	A
2006	<i>Mikhayev v. Russia</i> , No. 77617/01, 26 January 2006	Redress Trust	A
2006	<i>Turek v. Slovakia</i> , No. 57986/00, 14 February 2006, ECHR 2006-II	Public Verdict Foundation, Demos Centre, the Yoshkar-Ola NGO Man and Law, the Kazan Human Rights Centre [Russian NGOs]	A A
2006	<i>Jelčić v. Bosnia and Herzegovina</i> , No. 41183/02, 31 October 2006, ECHR 2006-XII	Helsinki Foundation for Human Rights (Poland)	A
2006	<i>Danell and others v. Sweden</i> (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I	Association of Foreign-Currency Savers	A
2006	<i>Shacolas v. Cyprus</i> , No. 47119/99, 4 May 2006	Agent of the Finnish Government	A
2006	<i>Zhigalev v. Russia</i> , No. 54891/00, 6 July 2006	Federal Bank of Lebanon	A
2006	<i>Tysiac v. Poland</i> (dec.), No. 5410/03, 7 February 2006	Five partners of the Luch Farm	A A
2006	<i>Kaya v. Germany</i> (dec.), No. 31753/02, 11 May 2006	Center for Reproductive Rights, USA Polish Federation for Women and Family Planning and the Helsinki Foundation for Human Rights, Warsaw, Poland Forum for Polish Women, Gdansk, Poland Association of Catholic Families, Krakow, Poland	A A A A
2006	<i>Gebremedhin (Gaberamadhian) v. France</i> (dec.), No. 25389/05, 10 October 2006	Government of Turkey L'association nationale d'assistance aux frontières pour les étrangers	A A

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2007	<i>Husovic and others v. Itlay</i> (dec.) No. 4830/05, 30 July 2007	European Roma Rights Centre	A	A
2007	<i>Behrami and Behrami v. France and Saramati v. France, Germany and Norway</i> (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007	United Nations Government of Denmark Government of Estonia Government of Greece Government of Poland Government of Portugal Government of Germany Government of the United Kingdom	I A A A A A A A	
2007	<i>Gajic v. Germany</i> (dec.), No. 31446/02, 28 August 2007	Praxis [NGO] Serbian Government	A A	
2007	<i>Kavakci v. Turkey</i> (dec.), No. 71907/01, 5 April 2007	The Inter-Parliamentary Union, Switzerland	A	
2007	<i>Wolkenberg and others v. Poland</i> (dec.), No. 50003/99, 4 December 2007	All-Polish Association of Borderland Creditors of the State Treasury	A	
2007	<i>Witkowska-Tobola v. Poland</i> (dec.), No. 11208/02, 4 December 2007	All-Polish Association of Borderland Creditors of the State Treasury	A	
2007	<i>Soffer v. the Czech Republic</i> , No. 31419/04, 8 November 2007	Slovak Government	A	
2007	<i>Behrami and Behrami v. France and Saramati v. France, Germany and Norway</i> (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007	United Nations Government of Denmark, Government of Estonia, Government of Greece, Government of Poland, Government of Portugal and Government of the United Kingdom German Government	I A	
2007	<i>Stoll v. Switzerland</i> [GC], No. 69698/01, 10 December 2007, ECHR 2007-V	Government of France Government of the Slovak Republic	A A	
2007	<i>Gebremedhin (Gaberamadhian) v. France</i> , No. 25389/05, 26 April 2007, ECHR 2007-II	The National Association for Assisting Aliens at Borders	A	

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2007	<i>Matyjek v. Poland</i> , No. 38184/03, 24 April 2007	Helsinki Foundation for Human Rights	A
2007	<i>Tysiac v. Poland</i> , No. 5410/03, 20 March 2007, ECHR 2007-I	The Polish Federation for Women Family Planning, Polish Helsinki Foundation for Human Rights, Forum of Polish Women and Kancelaria Adwokacka/ (Association of Catholic Families of the Krakow Diocese and the Polish Federation of Associations of Catholic Families) Legal Adviser for Europe/ The Center for Reproductive Rights (USA)	A A A
2007	<i>D.H. and others v. the Czech Republic</i> [GC], No. 57325/00, 13 November 2007, ECHR 2007-IV	Fédération Internationale des Lignes des Droits de l'Homme International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association Minority Rights Group International, European Network Against Racism and European Roma Information Office Interrights and Human Rights Watch	A A A A
2007	<i>Staroszczyk v. Poland</i> , No. 59519/00, 22 March 2007	Council of Bars and Law Societies of Europe The Helsinki Foundation for Human Rights	A A
2007	<i>Sialkowska v. Poland</i> , No. 8932/05, 22 March 2007	Council of Bars and Law Societies of Europe The Helsinki Foundation for Human Rights	A A
2007	<i>Laskowska v. Poland</i> , No. 77765/01, 13 March 2007	Polish Helsinki Foundation for Human Rights, Warsaw	A
2007	<i>Filatenco v. Russia</i> , No. 73219/01, 6 December 2007	Lawyers for Constitutional Rights and Freedoms (JURIX)	A
2007	<i>Dyuldin and Kislov v. Russia</i> , No. 25968/02, 31 July 2007	Lawyers for Constitutional Rights and Freedoms (JURIX) Glasnost Defence Foundation	A A
2007	<i>J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom</i> [GC], No. 44302/02, 30 August 2007, ECHR 2007-III	Irish Government	A

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2007	<i>Beric and others v. Bosnia and Herzegovina</i> (dec.), Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007	United Kingdom Government The Office of the High Representative	A A
2008	<i>Shelley v. the United Kingdom</i> (dec.), No. 23800/06, 4 January 2008	Irish Penal Reform Trust and the Canadian HIV/AIDS Legal Network National AIDS Trust, supported by the Prison Reform Trust	A A
2008	<i>Sekasi v. the Netherlands</i> (dec.), No. 39828/03, 6 December 2008	The Dutch Refugee Council, the European Council of Refugees and Exiles, Human Rights Watch, the Dutch section of the International Commission of Jurists, Legal Aid and the Netherlands Bar Association [NGOs]	A
2008	<i>Mir Isfahani v. the Netherlands</i> (dec.), No. 31252/03, 31 January 2008	Dutch Refugee Council (Vluchtelingenwerk), the Dutch Section of the International Commission of Jurists (Nederlands Juristen Comité voor de Mensenrechten), the Foundation for Legal Aid to Asylum Seekers (Stichting Rechtsbijstand Asielzoekers) and the European Council on Refugees and Exiles UNHCR	A A
2008	<i>Boumediene and others v. Bosnia and Herzegovina</i> (dec.), Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, 18 November 2008	Interights International Commission of Jurists Center for Constitutional Rights	A A A
2008	<i>Marchiani v. France</i> (dec.), No. 30392/03, 27 May 2008	M. Giuseppe Gargani, president of the commission of legal affairs of the European Parliament in his own name	A
2008	<i>Association of Jehovah's Witnesses v. France</i> (dec.), No. 8916/05, 17 June 2008	The European Association of Jehovah's Christian Witnesses	A

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2008	<i>Yamak and Sadak v. Turkey</i> [GC], No. 10226/03, 8 July 2008, ECHR 2008	Association Minority Rights Group International	A
2008	<i>E.B. v France</i> [GC], No. 43546/02, 22 January 2008	Prof. Wintemute on behalf of Fédération internationale des Ligues des Droits de l'Homme (FIDH), European Region of the International Lesbian and Gay Association (ILGA – Europe), British Association for Adoption and Fostering (BAAF) and Association des Parents et futures parents Gays et Lesbiens (APGL)	A
2008	<i>N. v. the United Kingdom</i> [GC], No. 26565/05, 27 May 2008, ECHR 2008	Helsinki Foundation for Human Rights	A
2008	<i>Kearns v. France</i> , No. 35991/04, 10 January 2008	Mr. Byrski, father of the child Adoptive parents of the child	I I
2008	<i>Saadi v. the United Kingdom</i> [GC], No. 13229/03, 29 January 2008, ECHR 2008	The United Nations High Commissioner for Refugees (UNHCR) The AIRE Centre, The European Council on Refugees and Exiles (ECRE) and Liberty	A A
2008	<i>Saadi v. Italy</i> [GC], No. 37201/06, 28 February 2008, ECHR 2008	Government of the United Kingdom	A
2008	<i>S. and Marper v. the United Kingdom</i> [GC], Nos. 30562/04 and 30566/04, 4 December 2008, ECHR 2008	Anna Fairclough on behalf of Liberty (the National Council for Civil Liberties) Covington and Burling LLP on behalf of Privacy International	A A
2008	<i>Ismoilov and others v. Russia</i> , No. 2947/06, 24 April 2008	Human Rights Watch The AIRE Centre	A A
2008	<i>K.U. v. Finland</i> , No. 2872/02, 2 December 2008, ECHR 2008	Helsinki Foundation for Human Rights	A
2008	<i>Gäfgen v. Germany</i> , No. 22978/05, 30 June 2008	Mr. and Mrs. von Metzler, the victim's parents	A
2008	<i>Lexa v. Slovakia</i> , No. 54334/00, 23 September 2008	World Association of Former Czechoslovak Political Prisoners	A
2008	<i>Soldatenko v. Ukraine</i> , No. 2440/07, 23 October 2008	Helsinki Foundation for Human Rights, Warsaw, Poland	A

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2008	<i>Leela Foersterkreis e.V. and others v. Germany</i> , No. 58911/00, 6 November 2008	Helsinki Foundation for Human Rights, Warsaw, Poland	A
2008	<i>TV Vest AS and Rogaland Pensjonistparti v. Norway</i> , No. 21132/05, 11 December 2008	Government of Ireland Government of the United Kingdom	A A
2008	<i>Burdan v. the United Kingdom</i> [GC], No. 13378/05, 29 April 2008	Belgian Government Irish Government	A A
2008	<i>Bednarek v. Poland</i> (dec.), No. 32023/02, 30 September 2008	German Government	A
2008	<i>Buczanski v. Poland</i> (dec.), No. 1836/03, 30 September 2008	German Government	A
2009	<i>Anghelescu v. Romania</i> (dec.), No. 77234/01, 20 October 2009	Couple Stefanescu	A
2009	<i>Geraguyun Khorhurd Patgamavorakan Akumb v. Armenia</i> (dec.), No. 11721/04, 14 April 2009	Open Society Justice Initiative (OSJI)	A
2009	<i>M.W. v. the United Kingdom</i> (dec.), No. 11313/02, 23 June 2009	The European Region of the International Lesbian and Gay Association, the International Commission of Jurists, the AIRE Centre and the Fédération internationale des Ligues des Droits de l'Homme (FIDH)	A
2009	<i>Sergey Zolotukhin v. Russia</i> [GC], No. 14939/03, 10 February 2009, ECHR 2009	Human Rights Training Institute of the Paris Bar Association	A
2009	<i>A. and others v. the United Kingdom</i> [GC], No. 3455/05, 19 February 2009, ECHR 2009	Liberty Justice	A A
2009	<i>Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland</i> (No. 2) [GC], No. 32772/02, 30 June 2009, ECHR 2009	Czech Government	A
2009	<i>Enea v. Italy</i> [GC], No. 74912/01, 17 September 2009, ECHR 2009	Slovakian Government	A

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2009	<i>Yarnava and others v. Turkey</i> [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009	Redress	A
2009	<i>Micallef v. Malta</i> [GC], No. 17056/06, 15 October 2009, ECHR 2009	Government of the Czech Republic	A
2009	<i>Sejdić and Finci v. Bosnia and Herzegovina</i> [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009	Venice Commission AIRE Centre The Open Society Justice Initiative	A
2009	<i>Guiso-Gallissay v. Italy</i> (just satisfaction) [GC], No. 58858/00, 22 December 2009	Unione forense per la tutela dei diritti dell'Uomo	A
2009	<i>Eerikäinen and others v. Finland</i> , No. 3514/02, 10 February 2009	European Federation of Journalists	A
2009	<i>Opuz v. Turkey</i> , No. 33401/02, 9 June 2009, ECHR 2009	Interights	A
2009	<i>Abdolkhani and Karimnia v. Turkey</i> , No. 30471/08, 22 September 2009	UNHCR	A
2009	<i>Sifjagić v. Bosnia and Herzegovina</i> , No. 27912/02, 3 November 2009	The Association for the Protection of Foreign-Currency Savers in Bosnia and Herzegovina from the Federation of Bosnia and Herzegovina	I
2009	<i>Neulinger and Shuruk v. Switzerland</i> , No. 41615/07, 8 January 2009	Association for the Return of Foreign-Currency Savings in Bosnia and Herzegovina from the Republika Srpska Mr. Shai Shuruk, the second applicant's father	I A
2009	<i>Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria</i> , Nos. 412/03 and 35677/04, 22 January 2009	Holy Synod of the Bulgarian Orthodox Church	A

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2009	<i>Bijelić v. Montenegro and Serbia</i> , No. 11890/05, 28 April 2009	European Commission for Democracy through Law (“the Venice Commission”) Human Rights Action [NGO], Montenegro	A
2009	<i>Jamrozny v. Poland</i> , No. 6093/04, 15 September 2009	Polish Helsinki Foundation for Human Rights, Warsaw	A
2009	<i>Romanenko and others v. Russia</i> , No. 11751/03, 8 October 2009	Open Society Justice Initiative Moscow Media Law and Policy Institute	A A
2009	<i>Kaboulov v. Ukraine</i> , No. 41015/04, 19 November 2009	Helsinki Foundation for Human Rights	A
2009	<i>Muñoz Díaz v. Spain</i> , No. 49151/07, 8 December 2009, ECHR	Union Romani	A
2009	<i>Czarnowski v. Poland</i> , No. 28586/03, 20 January 2009	Helsinki Foundation for Human Rights	A
2009	<i>Yrioni and others v. Albania</i> , No. 2141/03, 24 March 2009	Mr. Glozheni, K.G.’s heir, an Albanian national and opposing party in the proceedings before the national courts	A
2009	<i>Tănase and others v. Romania</i> (striking out), No. 62954/00, 26 May 2009	European Roma Rights Centre	A
2009	<i>Wojtas-Kaletka v. Poland</i> , No. 20436/02, 16.7.2009	Helsinki Foundation for Human Rights	A
2009	<i>Al-Saadon and Mufdhi v. the United Kingdom</i> (dec.), No. 61498/08, 30 June 2009	Equality and Human Rights Commission Bar Human Rights Committee of England and Wales, British Irish Rights Watch, the European Human Rights Advocacy Centre, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, JUSTICE, Liberty and RE-DRESS	A A
2009	<i>Evangelos Tsamalis and others v. Greece</i> (dec.), No. 5469/07, 20 October 2009	Centre on Housing Rights and Eviction	A
2009	<i>MA v. France</i> (dec.), No. 4920/08, 16 June 2009	L’Association nationale d’assistance aux frontières pour les étrangers (ANAFE)	A

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2009	<i>SE v. France</i> (dec.), No. 10085/08, 15 December 2009	l'Association nationale d'assistance aux frontières pour les étrangers (ANAFE)	A
2010	<i>A, B and C v. Ireland</i> [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010	European Centre for Law and Justice and Kathy Sinnott (Member of the European Parliament), the Family Research Council (Washington D.C.) and the Society for the Protection of Unborn Children (London) Pro-Life Campaign Doctors for Choice (Ireland) and British Pregnancy Advisory Service Center for Reproductive Rights and the International Reproductive and Sexual Health Law Programme	A A A A
2010	<i>Ramzy v. the Netherlands</i> (striking out), No. 25424/05, 20 July 2010 <i>Ramzy v. the Netherlands</i> (dec.), No. 25424/05, 27 May 2008	Government of the United Kingdom Government of Italy Government of Lithuania Government of Portugal Government of Slovakia The AIRE Centre Interights and Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, the International Commission of Jurists, Open Society Justice Initiative and Redress, Liberty and Justice.	A A
2010	<i>Makuc and others v. Slovenia</i> (dec.), No. 26828/06, 31 May 2007 Now: <i>Kuric and others v. Slovenia</i> , No. 26828/06, 13 July 2010	Equal Rights Trust Open Society Justice Initiative Peace Institute – Institute for Contemporary Social and Political Studies The Legal Information Centre of Non-Governmental Organisations	A A A A
2010	<i>Neulinger and Shuruk v. Switzerland</i> [GC], No. 41615/07, 6 July 2010, ECHR 2010	Mr. Shai Shuruk, the father of the second applicant	R

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2010	<i>A. v. the Netherlands</i> , No. 4900/06, 20 July 2010	Government of Lithuania, Government of Portugal, Government of Slovakia and Government of the United Kingdom AIRE Centre Interights, also on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, the International Commission of Jurists and Redress Justice and Liberty	A A A A
2010	<i>Carson and others v. the United Kingdom</i> [GC], No. 42184/05, 16 March 2010, ECHR 2010	Age Concern Help the Aged	A A
2010	<i>Gjefgen v. Germany</i> [GC], No. 22978/05, 1 June 2010, ECHR 2010	Mr. and Mrs. von Metzler, the parents of the applicant's victim J. Redress Trust	A A
2010	<i>Sanoma Uitgevers B.V. v. the Netherlands</i> [GC], No. 38224/03, 14 September 2010	Media Legal Defence Initiative Committee to Protect Journalists Article 19 Guardian News and Media Ltd. Open Society Justice Initiative	A A A A A
2010	<i>Mangouras v. Spain</i> [GC], No. 12050/04, 28 September 2010, ECHR 2010	Mr. Hugh Mercer, QC, on behalf of the International Transport Workers' Federation, the International Chamber of Shipping, the International Shipping Federation, the Baltic and International Maritime Council, the International Association of Independent Tanker Owners, the Hong Kong Shipowners' Association, the International Association of Dry Cargo Shipowners, the International Ship Managers' Association, the Greek Shipping Cooperation Committee, the Asian Shipowners' Forum, the International Group of P & I Clubs, the International Maritime Employers' Committee Ltd and the European Community Shipowners' Association.	A
2010	<i>Frasiek v. Poland</i> , No. 22933/02, 5 January 2010, ECHR 2010	Helsinki Foundation for Human Rights	A

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2010	<i>Jaremovicz v. Poland</i> , No. 24023/03, 5 January 2010	Helsinki Foundation for Human Rights	A
2010	<i>Rantsev v. Cyprus and Russia</i> , No. 25965/04, 7 January 2010, ECHR 2010	Interights and the AIRE Centre	A
2010	<i>Al-Sadoon and Muflahi v. the United Kingdom</i> , No. 61498/08, 2 March 2010, ECHR 2010	The Equality and Human Rights Commission the Bar Human Rights Committee of England and Wales, British Irish Rights Watch, the European Human Rights Advocacy Centre, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, JUSTICE, Liberty and REDRESS	A
2010	<i>Alajos Kiss v. Hungary</i> , No. 38832/06, 20 May 2010	The Harvard Law School Project on Disability	A
2010	<i>Grzelak v. Poland</i> , No. 7710/02, 15 June 2010	Helsinki Foundation for Human Rights, Warsaw, Poland	A
2010	<i>Schalk and Kopf v. Austria</i> , No. 30141/04, 24 June 2010, ECHR 2010	United Kingdom Government International Federation for Human Rights (FIDH), International Commission of Jurists (ICJ), AIRE Centre and International Lesbian and Gay Association – Europe	A A
2010	<i>Aksu v. Turkey</i> , Nos. 4149/04 and 41029/04, 27 July 2010	Greek Helsinki Monitor	A
2010	<i>J.M. v. the United Kingdom</i> , No. 37060/06, 28 September 2010	The Equality and Human Rights Commission	A
2010	<i>Saliyev v. Russia</i> , No. 35016/03, 21 October 2010	Mr. Svistunov, former editor in chief of the newspaper in question	A
2010	<i>Baysakov and others v. Ukraine</i> , No. 54131/08, 18 February 2010	Interights The International Centre for the Legal Protection of Human Rights	A A
2010	<i>Kamyshiev v. Ukraine</i> , No. 3990/06, 20 May 2010	The Helsinki Foundation for Human Rights, Warsaw The International Federation for Human Rights	A A
2010	<i>MB and others v. Turkey</i> , No. 36009/08, 15 June 2010	The European Centre for Law and Justice	A
2010	<i>Kononov v. Latvia</i> [GC], No. 36376/04, 17 May 2010, ECHR 2010	Lithuanian Government	A

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2010	<i>Sofi v. Cyprus</i> (dec.), No. 18163/04, 14 January 2010	Turkish Government	A
2010	<i>R.B.G. and others v. Turkey</i> (dec.), No. 40270/08, 9 February 2010	European Centre for Law and Justice	A
2010	<i>Joeseobov v. the Netherlands</i> (dec.), No. 44719/06, 2 November 2010	Government of Azerbaijan (made Art. 36(1) request which was interpreted as a Art. 36(2) request)	A
2010	<i>Greens and M.T. v. the United Kingdom</i> , Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010	Equality and Human Rights Commission	A
2010	<i>Lordos and others v. Turkey</i> , No. 15973/90, 2 November 2010	Government of Cyprus Evkaf Administration	A R
2010	<i>O'Donoghue and others v. the United Kingdom</i> , No. 34848/07, 14 December 2010, ECHR 2010	Equality and Human Rights Commission Immigrant Council of Ireland – Independent Law Centre	A A
2010	<i>Seal v. the United Kingdom</i> , No. 50330/07, 7 December 2010	Equality and Human Rights Commission	A
2010	<i>Taxquet v. Belgium</i> [GC], No. 926/05, 16 November 2010, ECHR 2010	United Kingdom Government Irish Government French Government	A A A
2011	<i>Ahorugeze v. Sweden</i> , No. 37075/09, 27 October 2011	Government of the Netherlands	A
2011	<i>Al-Jedda v. the United Kingdom</i> [GC], No. 27021/08, 7 July 2011, ECHR 2011	Liberty and Justice	A
2011	<i>Al-Khawaja and Tahery v. the United Kingdom</i> [GC], Nos. 26766/05 and 22228/06, 15 December 2011, ECHR 2011	Justice	A
2011	<i>Al-Skeini and others v. the United Kingdom</i> [GC], No. 55721/07, 7 July 2011, ECHR 2011	Bar Human Rights Committee, European Human Rights Advocacy Centre, Human Rights Watch, Interights, International Federation of Human Rights, Law Society, Liberty	A
2011	<i>Aquilina and others v. Malta</i> , No. 28040/08, 14 June 2011	Undisclosed intervenor	A

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2011	<i>Bah v. the United Kingdom</i> , No. 56328/07, 27 September 2011, ECHR 2011	Equality and Human Rights Commission	A
2011	<i>Bayatyan v. Armenia</i> [GC], No. 23459/03, 7 July 2011, ECHR 2011	Amnesty International, Conscience and Peace Tax International, Friends World Committee for Consultation (Quakers), International Commission of Jurists, War Resisters' International European Association of Jehovah's Christian Witnesses	A A
2011	<i>Diamante and Pelliccioni v. San Marino</i> , No. 32250/08, 27 September 2011	Associazione pro Bimbi	A
2011	<i>Haas v. Switzerland</i> , No. 31322/07, 20 January 2011, ECHR 2011	Dignitas [NGO]	A
2011	<i>Heinisch v. Germany</i> , No. 28274/08, 21 July 2011, ECHR 2011	Verdi [NGO]	A
2011	<i>Herrmann v. Germany</i> , No. 9300/07, 20 January 2011	Bundesarbeitsgemeinschaft der Jagdgenossenschaften und Eigenjagdbesitzer, Deutscher Jagdschutzverband [NGO]	A
2011	<i>Kasabova v. Bulgaria</i> , No. 22385/03, 19 April 2011	Article 19 and Open Society Justice Initiative	A
2011	<i>Kiyutin v. Russia</i> , No. 2700/10, 10 March 2011	Interights, International Centre for the Legal Protection of Human Rights	A
2011	<i>Lautsi and others v. Italy</i> [GC], No. 30814/06, 18 March 2011, ECHR 2011	33 Members of the European Parliament Greek Helsinki Monitor, Associazione nazionale del libero Pensiero, European Centre for Law and Justice, Eurojuris, International Committee of Jurists, Interights and Human Rights Watch Zentralkomitee der deutschen Katholiken and seimaines sociales de France and Associazioni cristiane lavoratori italiani Government of Armenia, Government of Bulgaria, Government of Cyprus, Government of Greece, Russian Federation, Government of Lithuania, Government of Malta, Monaco, Government of Romania, Republic of San Marino	A A A A

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2011	<i>M.S.S. v. Belgium and Greece</i> [GC], No. 30696/09, 21 January 2011, ECHR 2011	Government of the Netherlands, UK Government, Aire Centre, Amnesty International Council of Europe Commissioner for Human Rights, Office of the United Nations High Commissioner for Refugees, Greek Helsinki Monitor	A A
2011	<i>MGN Limited v. the United Kingdom</i> , No. 39401/04, 18 January 2011	Open Society Justice Initiative, Media Legal Defence Initiative, Index on Censorship, English PEN, Global Witness, Human Rights Watch	A
2011	<i>Mirosław Gartlicki v. Poland</i> , No. 36921/07, 14 June 2011	Helsinki Foundation for Human Rights, Warsaw	A
2011	<i>Moscicki v. Poland</i> , No. 52443/07, 14 June 2011	Helsinki Foundation for Human Rights, Warsaw	A
2011	<i>Mosley v. the United Kingdom</i> , No. 48009/08, 10 May 2011	Guardian News and Media Limited, Media Lawyers' Association and Finers Stephens Innocent on behalf of the Media Legal Defence Initiative, Index on Censorship, The Media International Lawyers' Association, European Publishers' Council, The Mass Media Defence Centre, Romanian Helsinki Committee, the Bulgarian Access to Information Programme Foundation, Global Witness, Media Law Resource Centre	A
2011	<i>R.R. v. Poland</i> , No. 27617/04, 26 May 2011, ECHR 2011	UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standards of Mental Health International Federation of Gynaecology and Obstetrics, International Reproductive and Sexual Health	A A
2011	<i>S.H. and others v. Austria</i> [GC], No. 57813/00, 3 November 2011, ECHR 2011	German Government and Italian Government Hera Onlus and SOS Infertilità Onlus European Centre for Law and Justice Aktion Leben	A A A A
2011	<i>Schneider v. Germany</i> , No. 17080/07, 15 September 2011	Mr. and Mrs. H, legal parents of boy F.	A

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2011	<i>Knaggs and Khachik v. the United Kingdom</i> (dec.), Nos. 46559/06 and 22921/06, 30 August 2011	Equality and Human Rights Commission	A
2011	<i>Koch v. Germany</i> (dec.), No. 497/09, 31 May 2011	Dignitas, Aktion Lebensrecht für alle e.V.	A
2011	<i>X, Y and Z v. the United Kingdom</i> (dec.), No. 32666/10, 5 July 2011	MENCAP	A
2012	<i>Ogórek v. Poland</i> (dec.), No. 28490/03, 18 September 2012	Helsinki Foundation for Human Rights	A
2012	<i>Atmaca v. Germany</i> (dec.), No. 45293/06, 6 March 2012	Government of Turkey AIRE Centre and Human Rights Watch	A A
2012	<i>A.S.B. v. the Netherlands</i> (dec.), No. 4854/12, 10 July 2012	ILGA-Europe	A
2012	<i>Ahrens v. Germany</i> , No. 45071/09, 22 March 2012	Ms. P., Mr. M., legal parents of girl R.	A
2012	<i>Aksu v. Turkey</i> [GC], Nos. 4149/04 and 41029/04, 15 March 2012, ECHR 2012	Greek Helsinki Monitor	A
2012	<i>Al Husin v. Bosnia and Herzegovina</i> , No. 3727/08, 7 February 2012	Human Rights Watch	A
2012	<i>Axel Springer AG v. Germany</i> [GC], No. 39954/08, 7 February 2012	Media Lawyers Association, Media Legal Defense Initiative, International Press Institute, World Association of Newspapers and News Publishers	A
2012	<i>Babar Ahmad and others v. the United Kingdom</i> , Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012	American Civil Liberties Union (ACLU) New Haven Litigation Project at Yale Law School Interights Repriveve	A A A A
2012	<i>Bureš v. the Czech Republic</i> , No. 37679/08, 18 October 2012	Harvard Law School Project on Disability	A
2012	<i>C.N. v. the United Kingdom</i> , No. 4239/08, 13 November 2012	Aire Centre Equality and Human Rights Commission	A A

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2012	<i>Centro Europa 7 S.R.L. and Di Stefano v. Italy</i> [GC], No. 38433/09, 7 June 2012, ECHR 2012	Open Society Justice Initiative	A
2012	<i>D.J. v. Croatia</i> , No. 42418/10, 24 July 2012	Interights	A
2012	<i>Gas and Dubois v. France</i> , No. 25951/07, 15 March 2012, ECHR 2012	International Federation for Human Rights, International Commission of Jurists, European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), British Association for Adoption and Fostering, Network for European LGBT Families Association	A
2012	<i>Herrmann v. Germany</i> [GC], No. 9300/07, 26 June 2012	Bundesarbeitsgemeinschaft der Jagdgenossenschaften und Eigenjagdbesitzer, Deutscher Jagdschutzverband, European Centre for Law and Justice	A
2012	<i>Hirsi Jamaa and others v. Italy</i> [GC], No. 27765/09, 23 February 2012, ECHR 2012	UNHCR, Human Rights Watch, Columbia Law School Human Rights Clinic, Centre for Advice on Individual Rights in Europe (AIRE), Amnesty International, International Federation for Human Rights	A
2012	<i>Hode and Abdi v. the United Kingdom</i> , No. 22341/09, 6 November 2012	Equality and Human Rights Commission	A
2012	<i>I.G. and others v. Slovakia</i> , No. 15966/04, 13 November 2012	International Federation of Gynaecology and Obstetrics	A
2012	<i>Iacov Stanciu v. Romania</i> , No. 35972/05, 24 July 2012	Association for Defence of Human Rights in Romania, The Helsinki Committee (APADOR-CH)	A A
2012	<i>Kedzior v. Poland</i> , No. 45026/07, 16 October 2012	Mental Disability Advocacy Centre	A
2012	<i>Koch v. Germany</i> , No. 497/09, 19 July 2012	Dignitas [NGO] Aktion Lebensrecht für Alle e.V.	A A
2012	<i>Konstantin Markin v. Russia</i> [GC], No. 30078/06, 22 March 2012, ECHR 2012	Human Rights Centre of the University of Ghent	A

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2012	<i>Kuric and others v. Slovenia</i> [GC], No. 26828/06, 26 June 2012, ECHR 2012	Equal Rights Trust, Open Society Justice Initiative, Peace Institute – Institute for Contemporary Social and Political Studies, Legal Information Centre of NGOs United Nations High Commissioner for Refugees	A A
2012	<i>Mouvement Raëlien Suisse v. Switzerland</i> [CG], No. 16354/06, 13 July 2012, ECHR 2012	Article 19	A
2012	<i>Munjaz v. the United Kingdom</i> , No. 2913/06, 17 July 2012	National Association for Mental Health	A
2012	<i>NADA v. Switzerland</i> [GC], No. 10593/08, 12 September 2012, ECHR 2012	French Government United Kingdom Government Justice	A A A
2012	<i>Dortdevic v. Croatia</i> , No. 41526/10, 24 July 2012, ECHR 2012	European Disability Forum	A
2012	<i>Othman (Abu Qatada) v. the United Kingdom</i> , No. 8139/09, 17 January 2012, ECHR 2012	Amnesty International, Human Rights Watch, Justice	A
2012	<i>P. and S. v. Poland</i> , No. 57375/08, 30 October 2012	Polish Helsinki Foundation for Human Rights Rule of Law Institute Coram’s Children’s Legal Centre European Centre for Law and Justice Amnesty International, United Nations Convention on the Rights of the Child, Inter-American Commission on Human Rights and other international bodies	A A A A A
2012	<i>Peta Deutschland v. Germany</i> , No. 43481/09, 8 November 2012	Mr. S. Korn, Central Council of Jews	A
2012	<i>Piechowicz v. Poland</i> , No. 20071/07, 17 April 2012	Helsinki Foundation for Human Rights	A
2012	<i>R.P. and others v. the United Kingdom</i> , No. 38245/08, 9 October 2012	Equality and Human Rights Commission	A
2012	<i>Redfern v. the United Kingdom</i> , No. 47335/06, 6 November 2012	Equality and Human Rights Commission	A

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2012	<i>Scoppola v. Italy (No. 3)</i> [GC], No. 126/05, 22 May 2012	United Kingdom Government	A
2012	<i>Sindicatul "Păstorul cel bun" v. România</i> , No. 2330/09, 31 January 2012	Archieocese Cracovia European Centre for Law and Justice	A A
2012	<i>Sitaropoulos and Giakoumopoulos v. Greece</i> [GC], No. 42202/07, 15 March 2012, ECHR 2012	Hellenic League for Human Rights	A
2012	<i>Stanev v. Bulgaria</i> [GC], No. 36760/06, 17 January 2012, ECHR 2012	Interights	A
2012	<i>Šýkora v. Czech Republic</i> , No. 23419/07, 22 November 2012	Harvard Law School Project on Disability	A
2012	<i>Van Colle v. the United Kingdom</i> , No. 7678/09, 13 November 2012	Equality and Human Rights Commission	A
2012	<i>Vejdeland and others v. Sweden</i> , No. 1813/07, 9 February 2012	International Centre for the Legal Protection of Human Rights International Commission of Jurists	A A
2012	<i>Von Hannover v. Germany (No. 2)</i> [GC], Nos. 40660/08 and 60641/08, 7 February 2012, ECHR 2012	Association of German Magazine Publishers (Verband deutscher Zeitungsverleger) Ehrlich & Sohn GmbH & Co. KG Media Lawyers Association Media Legal Defence Initiative, International Press Institute, World Association of Newspapers and News Publishers	A A A A
2012	<i>Z. v. Poland</i> , No. 46132/08, 13 November 2012	Global Doctors for Choice	A
2012	<i>Z.H. v. Hungary</i> , No. 28973/11, 8 November 2012	Mental Disability Center	A
2012	<i>Kazali v. Cyprus and other applicants</i> (dec.), No. 49247/08, 6 March 2012	Government of Turkey	A
2012	<i>De Souza Ribeiro v. France</i> [GC], No. 22689/07, 13 December 2012, ECHR 2012	Groupe d'information et de soutien des immigrés Ligue française des Droits de l'Homme Comité inter-mouvements auprès des évacués	A A A

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2012	<i>El-Masri v. the former Yugoslav Republic of Macedonia</i> [GC], No. 39630/09, 13 December 2012, ECHR 2012	United Nations High Commissioner for Human Rights Interights Redress International Commission of Jurists Amnesty International	A A A A A
2012	<i>Yildirim v. Turkey</i> , No. 3111/10, 18 December 2012	Open Society Justice Initiative	A
2012	<i>Michaud v. France</i> , No. 12323/11, 6 December 2012	Council of Bars and Law Societies of Europe (CCBE) French-Speaking Bar Council of Brussels European Bar Human Rights Institute	A A A
2013	<i>X v. Latvia</i> [GC], No. 27853/09, 26 November 2013, ECHR 2013	Finnish Government Czech Government Reunited International Child Abduction Centre	A A A
2013	<i>Södermann v. Sweden</i> [GC], No. 5786/08, 12 November 2013, ECHR 2013	Human Rights Centre of Ghent University	A
2013	<i>Vallianatos and others v. Greece</i> [GC], Nos. 29381/09 and 32684/09, 7 November 2013, ECHR 2013	Centre for Advice on Individual Rights in Europe (Aire Centre) International Commission of Jurists Fédération Internationale des Droits de l'Homme European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe)	A A A A
2013	<i>Maktouf and Damjanović v. Bosnia and Herzegovina</i> , Nos. 2312/08 and 34179/08, 18 July 2013	Office of the High Representative	A
2013	<i>Janovic and others v. Russia</i> [GC], Nos. 55508/07 and 29520/09, 21 October 2013, ECHR 2013	Open Society Justice Initiative Amnesty International Public International Law and Policy Group Memorial The European Human Rights Advocacy Centre The Transitional Justice Network	A A A A

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2013	<i>Del Rio Prada v. Spain</i> [GC], No. 42750/09, 21 October 2013, ECHR 2013	International Commission of Jurists	A
2013	<i>Donohoe v. Ireland</i> , No. 19165/08, 12 December 2013	Irish Human Rights Commission	A
2013	<i>Sindicatul "Păstorul cel Bun" v. Romania</i> [GC], No. 2330/09, 9 July 2013, ECHR 2013	European Centre for Law and Justice Orthodox Archdiocese of Cracovia Moscow Patriarchate Becket Fund [NGO] International Center for Law and Religion Studies Government of the Republic of Moldova Government of Poland Government of Georgia Government of Greece	A A A A A A A A A
2013	<i>Yona v. Hungary</i> , No. 35943/10, 9 July 2013	European Roma Rights Centre	A
2013	<i>Eweida and others v. the United Kingdom</i> , Nos. 48420/10, 59842/10, 51671/10, 36516/10, 15 January 2013	Equality and Human Rights Commission The National Secular Society Dr. Jan Camogursky and the Alliance Defense Fund Bishop Michael Nazir-Ali The Premier Christian Media Trust The Bishops of Chester and Blackburn Associazione Guiseppi Dossetti : I Valori Observatory on Intolerance and Christians in Europe Liberty The Clapham Institute and KLM The European Centre for Law and Justice Lord Carey of Clifton Fédération International des ligues des Droits de l'Homme International Commission of Jurists ILGA-Europe	A A A A A A A A A A A A A A A

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2013	<i>Delfi AS v. Estonia</i> , No. 64569/09, 10 October 2013	Helsinki Foundation of Human Rights	A
2013	<i>Siso Musa v. Malta</i> , No. 42337/12, 23 July 2013	International Commission of Jurists	A
2013	<i>Mc Caughey and others v. the United Kingdom</i> , No. 43098/09, 16 July 2013	Committee on the Administration of Justice Equality and Human Rights Commission The Northern Ireland Human Rights Commission	A A A
2013	<i>Pauliukienė and Pauliukas v. Lithuania</i> , No. 18310/06, 5 November 2013	Open Society Justice Initiative Media Legal Defence Initiative Romanian Helsinki Committee	A A A
2013	<i>Eremia v. Moldova</i> , No. 3564/11, 28 May 2013	Equal Rights Trust	A
2013	<i>L.L. v. Ukraine</i> (dec.), No. 39678/09, 15 January 2013	Aire Centre Howard League for Penal Reform	A A
2013	<i>Mudric v. Republic of Moldova</i> , No. 74839/10, 16 July 2013	Equal Rights Trust	A
2013	<i>Nadoliska and Lopez Nadolska v. Poland</i> (dec.), No. 78296/11, 15 October 2013	Father of the second applicant and former husband of the first applicant	A
2013	<i>Zarzycki v. Poland</i> , No. 15351/03, 12 March 2013	Helsinki Foundation for Human Rights	A
2013	<i>Mikhailov v. Latvia</i> , No. 35939/10, 22 January 2013	European Disability Forum International Disability Alliance World Network of Users and Survivors of Psychiatry	A A
2013	<i>Gross v. Switzerland</i> , No. 67810/10, 14 May 2013	Alliance Defending Freedom, USA European Centre for Law and Justice Americans United for Life Dignitas	A A A A
2013	<i>Morawetz v. Czech Republic</i> (dec.), No. 11179/06, 17 September 2013	Undisclosed <i>amici curiae</i>	A

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2013	<i>POA and others v. the United Kingdom</i> (dec.), No. 59253/11, 21 May 2013	European Trades Union Confederation Trades Union Congress	A
2013	<i>D.G. v. Poland</i> , No. 45705/07, 12 February 2013	Helsinki Foundation for Human Rights European Disability Forum International Disability Alliance	A A A
2013	<i>Yomočil v. Czech Republic and Art. 38 v. Czech Republic</i> (dec.), Nos. 38817/04 and 1458/07, 5 March 2013	Association of Owners of houses, flats and other immovable property in Czech Republic Association of Defence against the Prague Real Estates Administration	A A
2014	<i>O'Keefe v. Ireland</i> , No. 35810/09, (dec.) 26 June 2012 and [GC] 28 January 2014, ECHR 2014	Irish Human Rights Commission European Centre for Law and Justice	A A
2014	<i>Jones and Others v. the United Kingdom</i> , Nos. 34356/06 and 40528/06, 14 January 2014	Redress Trust, Amnesty International and International Centre for the Legal Protection of Human Rights (Interights) Justice	A A
2014	<i>Jaloud v. the Netherlands</i> , No. 47708/08, 20 November 2014	Government of the United Kingdom	A
2014	<i>Tarakhel v. Switzerland</i> [GC], No. 29217/12, 4 November 2014	Governments of Italy, the Netherlands, Sweden, Norway and the United Kingdom Defence for Children The Centre for Advice on Individual Rights in Europe (AIRE Centre), the European Council on Refugees and Exiles (ECRE) and Amnesty International	A A A
2014	<i>Gross v. Switzerland</i> [GC], No. 67810/10, 30 September	Alliance Defending Freedom (USA) European Centre for Law and Justice Americans United for Life Dignitas	A A A A

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2014	<i>Mocanu and others v. Romania</i> [GC], Nos. 10865/09, 45886/07, 32431/08, 17 September 2014	Redress	A
2014	<i>Jeunesse v. the Netherlands</i> [GC], No. 12738/10, 3 October 2014	Defence for Children Immigrant Council of Ireland	A A
2014	<i>Ali Samatar and others v. France</i> , Nos. 17110/10 and 17301/10, 4 December 2014	Government of Greece	A
2014	<i>Hassan and others v. France</i> , Nos. 46695/10 and 54588/10, 4 December 2014	Government of Greece	A
2014	<i>Hämäläinen v. Finland</i> [GC], No. 37359/09, 16 July 2014	Amnesty International Transgender Europe	A A
2014	<i>Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania</i> [GC], No. 47848/08, 17 July 2014	Human Rights Watch Euroregional Center for Public Initiatives Bulgarian Helsinki Committee Mental Disability Advocacy Center	A A A A
2014	<i>S.A.S. v. France</i> [GC], No. 43835/11, 1 July 2014	Amnesty International Liberty Open Society Justice Initiative Article 19 Human Rights Centre of Ghent University Government of Belgium	A A A A A A
2014	<i>Hassan v. the United Kingdom</i> [GC], No. 29750/09, 16 September 2014	Professor Françoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex	A

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2014	<i>Fernández Martínez v. Spain</i> [GC], No. 56030/07, 12 June 2014	Spanish Episcopal Conference (CEE) European Centre for Law and Justice Chair for Law and Religions of the Université catholique de Louvain American Religious Freedom Program of the Ethics and Public Policy Center	A A A
2014	<i>Marguš v. Croatia</i> [GC], No. 4455/10, 27 May 2014	Academic experts associated with Middlesex University London	A
2014	<i>Venjamin Tymoshenko and others v. Ukraine</i> , No. 48408/12, 2 October 2014	European Trade Union Confederation	A
2014	<i>Sharifi and others v. Italy and Greece</i> , No. 16643, 21 October 2014	High Commissioner of the United Nations for Refugees AIRE Centre Amnesty International	A A
2014	<i>Ivinović v. Croatia</i> , No. 13006/13, 18 September 2014	PERSON project Mental Health Europe	A
2014	<i>National Union of Rail, Maritime and Transport Workers v. the United Kingdom</i> , No. 31045/10, 8 April 2014	European Trades Union Confederation Trades Union Congress Liberty	A A
2014	<i>M.E. v. Sweden</i> , No. 71398/12, 26 June 2014	Amnesty International International Federation for Human Rights International Commission of Jurists European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe)	A A
2014	<i>A.K. v. Latvia</i> , No. 33011/08, 24 June 2014	European Centre for Law and Justice	A
2014	<i>Berger-Krall and others v. Slovenia</i> , No. 14717/04, 12 June 2014	International Union of Tenants	A

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2014	<i>Baka v. Hungary</i> , No. 20261/12, 27 May 2014	Hungarian Helsinki Committee Hungarian Civil Liberties Union Eötvös Károly Institute Helsinki Foundation for Human Rights of Poland	A A
2014	<i>László Magyar v. Hungary</i> , No. 73593/10, 20 May 2014	Hungarian Helsinki Committee	A
2014	<i>Eixebarría Caballero v. Spain</i> , No. 74016/12, 7 October 2014	Open Society Justice Initiative	A
2014	<i>Axel Springer AG v. Allemagne (No. 2)</i> , No. 48311/10, 10 July 2014	Media Legal Defence Initiative	A
2014	<i>M.G. v. Bulgaria</i> , No. 59297/12, 25 March 2014	Government of Germany Government of Poland	I I
2014	<i>Saba v. Italy</i> , No. 36629/10, 1 July 2014	Parti radical non violent transnational et transparti L'association "Non c'è pace senza giustizia" Radicaux italiens	A A A
2014	<i>Korovinny v. Russia</i> , No. 31974/11, 17 February 2014	European Disability Forum European Network of Users and Survivors of Psychiatry World Network of Users and Survivors of Psychiatry International Disability Alliance	A A A A
2014	<i>Amorim Giestas and Jesus Costa Bordalo v. Portugal</i> , No. 37840/10, 3 April 2014	Media Legal Defence Initiative	A
2014	<i>Mero Canaj v. Albania</i> (dec.), No. 33705/09, 24 June 2014	National Association for the Protection of Work and Democracy in Albania	A
2014	<i>Hamdi Abdullahi Ali v. the Netherlands</i> (dec.), No. 63931/12, 27 May 2014	Government of Italy	I
2014	<i>D. and others v. Belgium</i> (dec.), No. 29176/13, 8 July 2014	European Centre for Law and Justice	A

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2014	<i>Michael v. the Netherlands</i> (dec.), No. 33229/12, 11 March 2014	Government of Italy	I
2015	<i>Neshkov and Others v. Bulgaria</i> , Nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12, 9717/13, 27 January 2015	Bulgarian Lawyers for Human Rights and Bulgarian Helsinki Committee	A
2015	<i>Uzeyir Jafarov v. Azerbaijan</i> , No. 54204/08, 29 January 2015	Article 19	A
2015	<i>Bohlen v. Germany</i> , No. 53495/09, 19 February 2015	British American Tobacco GmbH	A
2015	<i>Ernst August von Hannover v. Germany</i> , No. 53649/09, 19 February 2015	British American Tobacco GmbH	A
2015	<i>M.C. v. Poland</i> , No. 23692/09, 3 March 2015	Helsinki Foundation for Human Rights	A
2015	<i>Haldemann and others v. Switzerland</i> , No. 21830/09, 24 February 2015	Media Legal Defence Initiative	A
2015	<i>M.S. v. Croatia</i> , No. 75450/12, 19 February 2015	Centre for Disability Law and Association for Social Affirmation of People with Psychosocial Disabilities in Croatia	A
2015	<i>Cestaro v. Italy</i> , No. 6884/11, 7 April 2015	Parti radical non violent transnational et transpartie, l'association "non c'è pace senza giustizia" and Radicax italiens (former radical party of Italy)	A
2015	<i>A.T. v. Luxembourg</i> , No. 30460/13, 9 April 2015	Fair Trials International	A
2015	<i>Annagi Hajibeyli v. Azerbaijan</i> , No. 2204/11, 22 October 2015	International Commission of Jurists	A
2015	<i>Annen v. Germany</i> , No. 3690/10, 26 November 2015	Alliance Defending Freedom and Aktion Lebensrecht für Alle European Centre for Law and Justice	A A
2015	<i>Hadžimejlić and Others v. Bosnia and Herzegovina</i> , No. 3427/13, 74569/13, 7157/14, 3 November 2015	PERSON project (Partnership to Ensure Reforms of Support in other Nations)	A
2015	<i>Delfi AS v. Estonia</i> [GC], No. 64569/09, 16 June 2015	The Helsinki Foundation for Human Rights Article 19	A A

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		Access Media Legal Defence Initiative (MLDI), together with 28 associated organisations European Digital Media Association (EDiMA), the Computer and Communications Industry Association (CCIA Europe), the pan-European association of European Internet Services Providers Associations (EuroISPA)		A A A
2015	<i>Emin Huseynov v. Azerbaijan</i> , No. 59135/09, 7 May 2015	Article 19		A
2015	<i>Couderc and Hachette Filipacchi Associés v. France</i> [GC], No. 40454/07, 10 November 2015	Government of Monaco Media Legal Defence Initiative		A A
2015	<i>Khoroshenko v. Russia</i> [GC], No. 41418/04, 30 June 2015	Group of academics of the University of Surrey		A
2015	<i>Chiragov and others v. Armenia</i> [GC], No. 13216/05, 16 June 2015	Government of Azerbaijan		U
2015	<i>Balázs v. Hungary</i> , No. 15529/12, 20 October 2015	European Roma Rights Centre		A
2015	<i>Grabowska v. Poland</i> , No. 57722/12, 30 June 2015	Helsinki Foundation for Human Rights		A
2015	<i>Károly Nagy v. Hungary</i> , No. 56665/09, 1 December 2015	Alliance Defending Freedom		A
2015	<i>Lambert and others v. France</i> [GC], No. 46043/14, 5 June 2015	Rachel Lambert, François Lambert and Marie-Geneviève Lambert (wife, nephew and half-sister of the applicant) National Union of Associations of Head Injury and Brain Damage Victims' Families (UNAFIC) Association Amrésé-Bethel Human Rights Clinic of the International Institute of Human Rights		A A A A
2015	<i>Perinçek v. Switzerland</i> [GC], No. 27510/08, 15 October 2015	Armenian Government French Government Switzerland-Armenia Association		A A A

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		<p>Federation of the Turkish Associations of French-speaking Switzerland</p> <p>Coordinating Council of the Armenian Organisations in France (CCAF)</p> <p>Turkish Human Rights Association</p> <p>Truth Justice Memory Centre</p> <p>International Institute for Genocide and Human Rights Studies</p> <p>International Federation for Human Rights (FIDH)</p> <p>International League against Racism and Anti-Semitism (LICRA)</p> <p>Centre for International Protection</p> <p>Group of French and Belgian academics</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p>
2015	<i>Parrillo v. Italy</i> [GC], No. 46470/11, 27 August 2015	<p>European Center for Law and Justice (ECLJ)</p> <p>Movimento per la vita</p> <p>Scienza e vita</p> <p>Forum delle associazioni familiari</p> <p>Luca Coscioni</p> <p>Amica Cicogna Onlus</p> <p>L'altra cicogna Onlus</p> <p>Cerco bimbo</p> <p>46 Members of the Italian Parliament</p> <p>VOX – Osservatorio italiano sui Diritti</p> <p>SIFES – Society of Fertility, Sterility and Reproductive Medicine</p> <p>Cittadimanzattiva</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p>
2015	<i>Vasiliauskas v. Lithuanian</i> [GC], No. 35343/05, 20 October 2015	<p>Government of the Russian Federation</p>	<p>A</p>
2015	<i>Sher and others v. the United Kingdom</i> , No. 5201/11, 20 October 2015	<p>Privacy International</p>	<p>A</p>

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2015	<i>Schatschasehwiil v. Germany</i> [GC], No. 9154/10, 15 December 2015	Czech Government	A
2015	<i>Y.M. and Others v. Belgium</i> , No. 60125/11, 7 July 2015	Coordination et initiatives pour réfugiés et étrangers (Cire)	A
2015	<i>Morice v. France</i> [GC], No. 29369/10, 23 April 2015	Council of Bars and Law Societies of Europe Paris Bar Association National Bar Council Conférence of Chairmen of French Bars	A A A A
2015	<i>Boyrid v. Belgium</i> [GC], No. 23380/09, 28 September 2015	REDRESS Human Rights Centre of the University of Ghent	A A
2016	<i>Baka v. Hungary</i> [GC], No. 20261/12, 23 June 2016	Comité Helsinki hongrois L'Union hongroise pour les droits de l'homme International Commission of Jurists	A A A
2016	<i>Taddeucci and McColl v. Italy</i> , No. 51362/09, 20 June 2016	International Commission of Jurists, International Lesbian, Gay, Bi-sexual, Trans and Intersex Association (ILGA) Europe Network of European LGBT Families (NELFA) European Commission on Sexual Orientation Law (ECSOL)	A A
2016	<i>Al-Dulimi and Montana Management Inc. v. Switzerland</i> [GC], No. 5809/08, 21 June 2016	Government of France Government of the United Kingdom	A A
2016	<i>Armani Da Silva v. the United Kingdom</i> [GC], No. 5878/08, 30 March 2016	Equality and Human Rights Commission	A
2016	<i>Avotiņš v. Latvia</i> [GC], No. 17502/07, 23 May 2016	Government of Cyprus Government of Estonia European Commission Centre for Advice on Individual Rights in Europe (the AIRE Centre)	I A A A
2016	<i>Biao v. Denmark</i> [GC], No. 38590/10, 24 May 2016	Centre for Advice on Individual Rights in Europe (the AIRE Centre)	A

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2016	<i>Blokhin v. Russia</i> [GC], No. 47152/06, 23 March 2016	Mental Disability Advocacy Center League of Human Rights of the Czech Republic	A A
2016	<i>F.G. v. Sweden</i> [GC], No. 43611/11, 23 March 2016	European Centre for Law and Justice Alliance Defending Freedom assisted by Jubilee Campaign Advice on Individual Rights in Europe (the AIRE Centre) European Council on Refugees and Exiles (ECRE) International Commission of Jurists Office of the United Nations High Commissioner for Refugees (UNHCR)	A A A A A A
2016	<i>Geotech Kancev GmbH v. Germany</i> [GC], No. 23646/09, 2 June 2016	Supplementary Pension Scheme for the Construction Industry Corporation (Zusatzversorgungskasse des Baugewerbes AG, ZVK)	A
2016	<i>Guberrina v. Croatia</i> , No. 23682/13, 22 March 2016	Croatian Union of Associations of Persons with Disabilities (SOIH) European Disability Forum (EDF) International Disability Alliance (IDA)	A
2016	<i>Janusz Wojciechowski v. Poland</i> , No. 54511/11, 28 June 2016	Helsinki Foundation for Human Rights (Warsaw, Poland)	A
2016	<i>J.N. v. the United Kingdom</i> , No. 37289/12, 19 May 2016	Bail for Immigration Detainees (BID)	A
2016	<i>Jeronovičs v. Latvia</i> [GC], No. 44898/10, 5 July 2016	Helsinki Foundation for Human Rights (Warsaw, Poland)	A
2016	<i>Karácsony and others v. Hungary</i> [GC], Nos. 42461/13 and 44357/13, 17 May 2016	Czech Government United Kingdom Government	A A
2016	<i>Kocherov and Sergejeva v. Russia</i> , No. 16899/13, 29 March 2016	The International Disability Alliance The European Disability Forum Inclusion International Inclusion Europe	A

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2016	<i>M.C. and A.C. v. Romania</i> , No. 12060/12, 12 April 2016	Fédération internationale des ligues des droits de l'homme (FIDH) European arm of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) Advice on Individual Rights in Europe Centre (AIRE Centre) Association for the Defence of Human Rights in Romania, Helsinki Committee (APADOR-CH)	A  A  A
2016	<i>O.M. v. Hungary</i> , No. 9912/15, 5 July 2016	AIRE Centre (Advice on Individual Rights in Europe) European Council on Refugees and Exiles (ECRE) ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) International Commission of Jurists	A A A A
2016	<i>Pilav v. Bosnia and Herzegovina</i> , No. 41939/07, 9 June 2016	Minority Rights Group International Human Rights Watch Benjamin N. Cardozo School of Law	A
2016	<i>R.B. v. Hungary</i> , No. 64602/12, 12 April 2016	European Roma Rights Centre	A
2016	<i>Rasul Jafarov v. Azerbaijan</i> , No. 69981/14, 17 March 2016	Helsinki Foundation for Human Rights Human Rights House Foundation Freedom Now	A
2016	<i>Sabure Malik v. the United Kingdom</i> , No. 32968/11, 30 June 2016	Equality and Human Rights Commission	A
2016	<i>Sousa Goucha v. Portugal</i> , No. 70434/12, 22 March 2016	Alliance Defending Freedom	A

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*Contentious cases*

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
1988	<i>Velásquez Rodríguez v. Honduras</i> , Judgment of 29 July 1988 (Merits), Series C No. 4	Amnesty International Association of the Bar of the City of New York Lawyers Committee for Human Rights Minnesota Lawyers International Human Rights Committee	A A A A
1989	<i>Velásquez Rodríguez v. Honduras</i> , Judgment of 21 July 1989 (Reparations and Costs), Series C No. 7	Asociación Centroamericana de Familiares de Detenidos-Desaparecidos Jean-Denis Archambault, Alejandro Artucio, Alfredo Etchberry, Gustavo Gallón Giraldo, Diego García Sayán, Alejandro M. Garro, Robert K. Goldmann, Jorge Mera, Denis Racicot, Joaquín Ruiz Gimenez, Arturo Valencia Zea and Eugenio Raul Zaffaroni (12 jurists)	A A
1989	<i>Godínez Cruz v. Honduras</i> , Judgment of 20 January 1989 (Merits), Series C No. 5	Amnesty International Asociación Centroamericana de Familiares de Detenidos-Desaparecidos Association of the Bar of the City of New York Lawyers Committee for Human Rights Minnesota Lawyers International Human Rights Committee	A A A A A

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1989	<i>Godínez Cruz v. Honduras</i> , Judgment of 21 July 1989 (Reparations and Costs), Series C No. 8	Asociación Centroamericana de Familiares de Detenidos Desaparecidos Jean-Denis Archambault, Alejandro Artucio, Alfredo Etcheberry, Gustavo Gallon Giraldo, Diego García Sayan, Alejandro M Garro, Robert K Gologman, Jorge Mera, Denis Racicot, Joaquín Ruiz Gimenez, Arturo Valencia Zea y Eugenio Raul Zaffaroni (12 jurists)	A A
1989	<i>Fairén Garbi and Solís Corrales v. Honduras</i> , Judgment of 15 March 1989 (Merits), Series C No. 6	Amnesty International Asociación Centroamericana de Familiares de Detenidos-Desaparecidos Association of the Bar of the City of New York Lawyers Committee for Human Rights Minnesota Lawyers International Human Rights Committee	A A A A A
1993	<i>Aloeboetoe and others v. Suriname</i> , Judgment of 10 September 1993 (Reparations and Costs), Series C No. 15	International Commission of Jurists	A
1994	<i>Gangaram-Panday v. Suriname</i> , Judgment of 21 January 1994 (Merits, Reparations and Costs), Series C No. 16	International Human Rights Law Institute of DePaul University College of Law Netherlands Institute of Human Rights (SIM) International Human Rights Law Group	A A A A
1997	<i>Suárez Roxero v. Ecuador</i> , Judgment of 12 November 1997 (Merits), Series C No. 35	Rights International, the Center for International Human Rights Law, Inc. Mr. Raúl Moscoso Álvarez	A A
1997	<i>Genie Lacayo v. Nicaragua</i> , Judgment of 29 January 1997 (Merits, Reparations and Costs), Series C No. 30	The International Legal Advisors Esq. and The Foundation for the Development of International Law	A
1997	<i>Loayza-Tamayo v. Peru</i> , Judgment of 17 September 1997 (Merits), Series C No. 33	La Fundación Ecueménica para el Desarrollo y la Paz (FEDEPAZ) Mr. Nicolás de Piérola Balta	A A
1998	<i>Benavides Cevallos v. Ecuador</i> , Judgment of 19 June 1998 (Merits, Reparations and Costs), Series C No. 38	Amnesty International Rights International	A A

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1998	<i>Cesti Hurtado v. Peru</i> , Order of 21 January 1998 (Provisional Measures)	President of the Executive Commission of Human Rights of the Lima Bar Association, Mr. Heriberto M. Benítez Rivas	A
1999	<i>Constitutional Court v. Peru</i> , Judgment of 24 September 1999 (Competence), Series C No. 55	International Human Rights Law Group Mr. Curtis Francis Doebbler Mr. Alberto Borea Odría	A A A
1999	<i>Ivcher Bronstein v. Peru</i> , Judgment of 24 September 1999 (Competence), Series C No. 54	International Human Rights Law Group Mr. Curtis Francis Doebbler Mr. Alberto Borea Odría	A A A
1999	<i>Cesti Hurtado v. Peru</i> , Judgment of 29 September 1999 (Merits), Series C No. 56	Mr. Heriberto Manuel Benítez Rivas of the Human Rights Commission of the Lima Bar Association	A
1999	“ <i>Street children</i> ” ( <i>Villagrán-Morales et al.</i> ) v. <i>Guatemala</i> , Judgment of 19 November 1999 (Merits), Series C No. 63	Centro de Estudios Legales y Sociales (CELS) Centro por la Justicia y el Derecho Internacional (CEJIL)	A A
2000	<i>Bámaca-Yélasquez v. Guatemala</i> , Judgment of 25 November 2000 (Merits), Series C No. 70	Childrights International Research Institute	A
2001	<i>Ivcher Bronstein v. Peru</i> , Judgment of 6 February 2001 (Merits, Reparations and Costs), Series C No. 74	International Commission of Jurists	A
2001	<i>Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile</i> , Judgment of 5 February 2001 (Merits, Reparations and Costs), Series C No. 73	International Human Rights Law Group Mr. Curtis Francis Doebbler Mr. Alberto Borea Odría Inter-American Press Association Hermes Navarro del Valle Sergio García Valdés Jorge Reyes Zapata, Sergio García Valdés, Vicente Torres Irurozabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Cristian Heerwagen Guzmán, Joel González Castillo	A A A A A A A A A A R

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2001	<p><i>Cesti Hurtado v. Peru</i>, Judgment of 31 May 2001 (Reparations and Costs), Series C No. 78</p>	<p>Lima Bar Association Executive Human Rights Committee of the Lima Bar Association Peruvian Ombudsman Mr. Héctor Faúndez Ledesma Center for Legal and Social Studies (CELS) and the Center for Justice and International Law (CEJIL) Letter from three members of the United States Congress Human Rights Committee of the Chamber of Deputies of Mexico Guatemalan Bar Association Decision No. 33 of the Puerto Rican Bar Association Amnesty International The Washington Office on Latin America Pronouncement of the Pro-Human Rights Association (APRODEH) The University Human Rights Network (RUDEH)</p>	<p>An An An An An  An An An An An An An An An An</p>
2001	<p><i>The Mayagna (Sumo) Awas Tingni Community v. Nicaragua</i>, Judgment of 31 August 2001 (Merits, Reparations and Costs), Series C No. 79</p>	<p>Organizacion de Sindicos Indigenas del Caribe Nicaraguense (OSI-CAN) Mr. Eduardo Conrado Poveda Assembly of First Nations (AFN) of Canada International Human Rights Law Group Law firm Hutchins, Soroka and Dionne on behalf of the Mohawks Indigenous Community of Akwesasne Mr. Robert A. Williams Jr, on behalf of the organisation National Congress of American Indians (NCAI)</p>	<p>A  A A A  A</p>
2001	<p><i>Hilaire, Benjamin v. Trinidad and Tobago</i>, Judgment of 1 September 2001 (Preliminary Objections), Series C No. 80</p>	<p>United Nations Human Rights Committee and Court of Appeals for the Eastern Caribbean (through the Inter-American Commission on Human Rights) Mr. Vaughan Lowe and Mr. Carlos Vargas Pizarro</p>	<p>An  A</p>

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2001	<i>Barrios Altos et al. v. Peru</i> , Judgment of 3 September 2001 (Interpretation of the Judgment on the Merits), Series C No. 83	Mr. Walter Alban Peralta, Ombudsman for Peru	A
2001	<i>Baena Ricardo et al. v. Panama</i> , Judgment of 2 February 2001 (Merits, Reparations and Costs), Series C No. 72	Ombudsman for Panama, Mr. Italo Isaac Antinori Bolanos Labour Advice Centre of Peru, the Economic and Social Rights Centre, the Legal and Social Studies Centre, and the Colombian Law Professionals Commissions Mr. Jacinto González Rodríguez	A A A
2002	<i>Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago</i> , Judgment of 21 June 2002 (Merits, Reparations and Costs), Series C No. 94	Mr. Vaughan Lowe and Mr. Guy Goodwin-Gill	A
2002	<i>Baena Ricardo et al. v. Panama</i> , Judgment of 22 November 2002 (Compliance)	Ombudsman for Panama Mr. Miguel González	A A
2003	<i>Baena Ricardo et al. v. Panama</i> , Judgment of 28 November 2003 (Competence), Series C No. 104	Mr. Miguel González Ombudsman for Panama	A A
2003	"Five Pensioners" v. Peru, Judgment of 28 February 2003 (Merits, Reparations and Costs), Series C No. 98	Mr. Carlos Rafael Urquilla Bonilla, representative of the organization Human Rights in America Victor Abramovich, Julieta Rossi, Andrea Pochak and Jimena Garrate, from the Center for Legal and Social Studies (CELS) Mr. Christian Courtis, Professor at the Law Faculty of the Universidad de Buenos Aires	A A A
2004	<i>Serrano Cruz Sisters v. El Salvador</i> , Judgment of 23 November 2004 (Preliminary Objections), Series C No. 118	International Commission of Jurists Due Process of Law Foundation (DOPLF) and Ms. Noami Rohit-Arriaza Fundación Sur-Argentina Asociación Abuelas de Plaza de Mayo José Benjamin Cuéllar Martínez, Pedro José Cruz Rodríguez, and Roberto Burgos Viale	A A A A A

Annex I: Cases with amicus curiae involvement

2004	<i>Lori Berenson Mejía v. El Salvador</i> , Judgment of 25 November 2004 (Merits, Reparations and Costs), Series C No. 119	Archbishopric of El Salvador Mr. Gil Barragán Romero on behalf of 41 undisclosed organizations Mr. Salomon Lerner Febres	A A A
2004	<i>Plan de Sánchez Massacre v. Guatemala</i> , Judgment of 29 April 2004 (Merits), Series C No. 105	Instituto Comparado de Ciencias Penales en Guatemala, the Centro de Estudios Sobre Justicia y Participación, and the Instituto de Estudios Comparados en Ciencias Penales y Sociales	A
2004	<i>Plan de Sánchez Massacre v. Guatemala</i> , Judgment of 19 November 2004 (Reparations), Series C No. 116	Instituto Comparado de Ciencias Penales en Guatemala [Criminal Sciences Comparative Institute of Guatemala], the Centro de Estudios Sobre Justicia y Participación [Justice and Participation Study Center], and the Instituto de Estudios Comparados en Ciencias Penales y Sociales [Institute for Criminal Sciences Comparative Studies]	A
2004	<i>Ricardo Canese v. Paraguay</i> , Judgment of 3 August 2004 (Merits, Reparations and Costs), Series C No. 111	Asociación por los Derechos Cíviles [Civil Rights Association] Inter-American Press Association Asociación para la Defensa del Periodismo Independiente (PERIODISTAS) [the Independent Journalism Defense Association]	A
2004	<i>Gómez Paquiyauri Brothers v. Perú</i> , Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C No. 110	Prof. James Crawford and Simon Olleson	A
2004	<i>De la Cruz Flores v. Perú</i> , Judgment of 18 November 2004 (Merits, Reparations and Costs), Series C No. 115	Mr. Hector Faundez Ledesma Mrs. Michelangela Scalabrino Center of Investigation and Legal Assistance in International Law Internacional (IALDI)	A A A
2004	<i>Herrera Ulloa v. Costa Rica</i> , Judgment of 2 July 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 107	Committee to Protect Journalists, the Hearst Corporation, the Miami Herald Publishing Company, El Nuevo Día, La Prensa, The Reforma Group, Reuters Ltd., El Tiempo y Tribune Company La Asociación para la Defensa del Periodismo Independiente (PERIODISTAS)	A A



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Erol Agüero Chacón	A
Marvin Soto Sánchez	A
Willy Salas López	A
José Solano Soto	A
José Ruiz Pérez	A
Fernando Herrera Carranza	A
Benedicto Arauz Flores	A
José Joaquín Bonilla Madrigal	A
Bolívar Madrigal Badilla	A
Pablo Mendoza García	A
Marco Tulio Mora Padilla	A
Marcos Cedillo Cedillo	A
Juan Carlos Contreras Monge	A
Jorge Vargas Navarro	A
Juan Carlos Villalta Jiménez	A
Francisco Miralles Lewis	A
Gerardo Enrique León Redondo	A
Carlos Alberto Céspedes León	A
Carlos Manuel Hernández Quesada and Rafael Antonio Rojas Madrigal	A
Geovanny Leiva Lara	A
Cristian Portocarrero Friedman	A
Aylin Roderik Suazo Chavez	A
Andy Augustus Walters Gayle	A
Jeffry Walters Gayle	A
Iván Ruiz Chavez	A
Carlos Isaías Santander Flores	A

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2005	<i>Fernin Ramirez v. Guatemala</i> , Judgment of 20 June 2005 (Merits, Reparations and Costs), Series C No. 126	Institute of Comparative Studies in Criminal and Social Sciences of Argentina (INECIP) Mr. Eugenio Raúl Zaffaroni Irish Centre for Human Rights of the National University of Ireland (Galway)	A A A
2005	<i>The Moiwana Community v. Suriname</i> , Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 124	The Harvard Law Student Advocates for Human Rights and the Global Justice Center	A
2005	<i>The Yákye Axa Indigenous Community v. Paraguay</i> , Judgment of 17 June 2005 (Merits, Reparations and Costs), Series C No. 125	Organización Nacional Indígena de Colombia (ONIC)	A
2005	<i>César v. Trinidad and Tobago</i> , Judgment of 11 March 2005 (Merits, Reparations and Costs), Series C No. 123	The Harvard Law Student Advocates for Human Rights and Global Justice Centre Interights	A A
2005	<i>Yatama v. Nicaragua</i> , Judgment of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 127	Wisconsin Coordinating Council on Nicaragua United Nations University for Peace University of Arizona's Indigenous People Law and Policy Program Office of the Ombudsman of Nicaragua	A A A A
2005	<i>The Girls' Yean and Bosico v. Dominican Republic</i> , Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 130	Centre on Housing Rights and Evictions Asociación Civil de Centros Comunitarios de Aprendizaje Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer Minority Rights Group International Mrs. Katarina Tomasevski Secretaría Ampliada de la Red de Encuentro Dominicano Haitiano Jacques Viau, consisting of the Centro Cultural Dominicano Haitiano, the Movimiento Sociocultural de los Trabajadores Haitianos, the Ser-	A A A A A A A

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		vicio Jesuita a Refugiados y Migrantes, the Centro Dominicano de Investigaciones Legales, and the Asociación Pro-Desarrollo de la Mujer y el Medio Ambiente, Inc. Comparative International Education Society Themis Foundation and the University of Ottawa School of Law Open Society Justice Initiative Centro de Estudios Legales y Sociales, Servicio de Apoyo y Orientación a Inmigrantes y Refugiados, Clínica Jurídica para los Derechos de Inmigrantes y Refugiados (Law School of the Universidad de Buenos Aires, CELS and CAREF) and Christian Courts, Professor of the Universidad de Buenos Aires, and the Instituto Tecnológico Autónomo de México	A A A A
2005	<i>Raxcacó Reyes v. Guatemala</i> , Judgment of 15 September 2005 (Merits, Reparations and Costs), Series C No. 133	Amnesty International	A
2005	<i>The “Mapiripán Massacre” v. Colombia</i> (Merits, Reparations and Costs), Judgment of 15 September 2005, Series C No. 134	Fundación “Manuel Cepeda Vargas” Fédération Internationale des Ligues des Droits de l’Homme Centro Internacional por la Justicia Transicional	A A A
2006	<i>Herrera Ulloa v. Costa Rica</i> , Order of 22 September 2006 (Monitoring Compliance with Judgment)	Atención Damas-Vega José Ruiz-Pérez Benedicto Arauz-Flores Errol Agüero-Chacón Marco Tulio Mora-Padilla José Armando Jiménez-Carranza Carlos Alberto Céspedes-León Fernando Herrera Carranza Geovanny Leiva-Lara Manuel Hernández-Quesada Rafael Antonio Rojas-Madriral	A A A A A A A A A A A



2006	<i>Claude Reyes et al. v. Chile</i> , Judgment of 19 September 2006 (Merits, Reparations and Costs), Series C No. 151	Asociación por los Derechos Civiles Centro de Estudios Legales y Sociales and los señores Damian M Loreti y Analía Eliades (profesores de la Catedra UNESCO-Libertad de Expresión de la Facultad de Periodismo y Comunicación Social de la Universidad Nacional de La Plata) Mr. Gastón Gómez Bernaldes, Professor of la Facultad de Derecho de la Universidad Diego Portales Open Society Justice Initiative, Article 19, Instituto Prensa y Sociedad, Access Info Europe, and Libertad de Información México Impact Litigation Project of the American University Washington College of Law Center for Justice and International Law	A A  A A A A
2006	<i>Almonacid Arellano et al. v. Chile</i> , Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 154	Asociación Americana de Juristas de Valparaíso/Aconceagua	A
2006	<i>Nogueira de Carvalho et al. v. Brazil</i> , Judgment of 28 November 2006 (Preliminary Objections and Merits), Series C No. 161	Centro por la Justicia y el Derecho Internacional (CEJIL), Front line - The International Foundation for the Protection of Human Rights Defenders, Organización Mundial Contra la Tortura (OMCT), Corporación Colectiva de Abogados "José Alvear Restrepo", Movimiento Nacional de Derechos Humanos, Asociación Fomento, Centro de Derechos Humanos "Miguel Agustín Pro Juárez", Una Ventana a la Libertad, Comité de Familiares de Detenidos - Desaparecidos, Robert F. Kennedy Memorial Center for Human Rights, Centro de Derechos Económicos y Sociales (CDES), Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J." (CSMM), Casa Alianza Honduras, Centro para la Acción Legal en Derechos Humanos (CALDH), Programa Venezolano de Acción-Educación en Derechos Humanos (PROVEA), Comité Permanente de Defensa de los Derechos Humanos de Orellana, Grupo Interdisciplinario de Derechos Hu-	A

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	<p>manos de Medellín, Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH), Centro de Iniciativas Democráticas (CIDEM), Instituto de Defensa Legal (IDL), Asociación Pro Derechos Humanos (APRODEH), Coordinadora Nacional de Derechos de Perú, Movimiento Nacional de Derechos Humanos (MNDH), Fundação Interamericana de Defesa de Direitos Humanos (FIDDH), Terra de Direitos, Comisión Colombiana de Juristas (CCJ), Coordinadora de Derechos Humanos del Paraguay (CODEHUPY), Centro de Derechos Humanos y Ambiente, Abogados y Abogadas del Noroeste Argentino en Derechos Humanos y Estudios Sociales (ANDHES), Centro de Estudios Legales y Sociales (CELS), Movimiento de Mujeres Dominico-Haitianas (MUDHA), Human Rights Without Frontiers International (HRWF), University of Virginia School of Law International Human Rights Law Clinic, Human Rights Network International, Rights International - The Center for International Human Rights Law, International League for Human Rights, University of Minnesota Human Rights Center, International Human Rights Clinic of George Washington University, European Roma Rights Centre, Washington College of Law's Center for Human Rights and Humanitarian Law, University of Essex Human Rights Centre, Union Internationale des Avocats, Benjamin Cuéllar Martínez y Matilde Guadalupe Hernández Espinoza y, en su calidad de abogados litigantes, Alejandro Ponce, Carlos Ayala y Pedro Nikken</p>	<p>A</p>
<p>2006</p>	<p><i>La Cantuta v. Peru</i>, Judgment of 29 November 2006 (Merits, Reparations and Costs), Series C No. 162</p>	<p>Instituto de Defensa Legal del Perú</p>
<p>2007</p>	<p><i>Cantoral Huamani y García Santa Cruz v. Peru</i>, Judgment of 10 July 2007 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 167</p>	<p>Professor Jo-Marie Burt "Flora Tristan" Peruvian Women's Center, the Aurora Vivar Association, and the Research and Training Institute for Women and the Family</p> <p>A A</p>

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2007	<i>García Prieto et al. v. El Salvador</i> , Judgment of 20 November 2007 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 168	Ms. Sonia Rubio Padilla, Ms. Astrid María Valencia, and Mr. Francisco Antonio Chicas	A
2008	<i>Kimel v. Argentina</i> , Judgment of 2 May 2008 (Merits, Reparations and Costs), Series C No. 177	Human Rights Clinic of the Master's Degree in Fundamental Rights of Universidad Carlos III of Madrid The World Press Freedom Committee [Comité Mundial para la Libertad de Prensa] The Civil Rights Association [Asociación por los Derechos Civiles]	A A A
2008	<i>The Miguel Castro Prison v. Peru</i> , Judgment of 2 August 2008 (Interpretation of the Judgement on Merits, Reparations and Costs), Series C No. 181	Institute for Legal Defense (ILD) and the National Human Rights Coordinator of Peru	A
2008	<i>Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela</i> , Judgment of 5 August 2008 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 182	International Commission of Jurists and the Due Process of Law Foundation	A
2008	<i>Castañeda Gutman v. Mexico</i> , Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 184	Mr. Jorge Santistevan de Noriega The Mexican Lawyers' Professional Association A group of students, former students and academics of the Human Rights master's degree program of the Universidad Iberoamericana of Mexico The Parliamentary Group of the Convergence Part A group of post-graduate and licentiate students of the Law School of the Universidad Autónoma de México Socorro Apreza Salgado, Ricardo Alberto Ortega Soriano, and Jorge Humberto Meza of the Law School of the Universidad Nacional Autónoma de México Imer Flores, Juridical Research Institute of the Universidad Nacional Autónoma de México	A A A A A A A

Annex I: Cases with amicus curiae involvement

2009	<i>Herrera Ulloa v. Costa Rica</i> , Order of 9 July 2009 (Monitoring Compliance with Judgment)	Messrs. Rafael Antonio Rojas-Madrugal, Geovanny Leiva-Lara, José Armando Jiménez-Carranga, Benedicto Arauz-Flores, José Ruiz-Pérez, Fernando Herrero-Carranza, Alfonso Saborio-Corrales, Hugo Umaña-Chaverri, Antonio Sandovalendoza, Andy Waltersayle, Eliecer Acuñaaniagua and Ángel Aragón-Calderón (some of the persons supported a congressional Bill (Costa Rican Legislative Assembly file No. 17,143) “establishing the motion for appeal, introducing other amendments to the appellate system and adopting new oral procedure rules in criminal proceedings”)	A
2009	<i>Herrera Ulloa v. Costa Rica</i> , Order of 2 June 2009 (Supervision of Compliance with Judgment)	Messrs. Rafael Antonio Rojas-Madrugal, Geovanny Leiva-Lara, José Armando Jiménez-Carranga, Benedicto Arauz-Flores, José Ruiz-Pérez, Fernando Herrero-Carranza, Alfonso Saborio-Corrales, Hugo Umaña-Chaverri, Antonio Sandovalendoza, Andy Waltersayle, Eliecer Acuñaaniagua and Ángel Aragón-Calderón (some of the persons supported a congressional Bill (Costa Rican Legislative Assembly file No. 17,143) “establishing the motion for appeal, introducing other amendments to the appellate system and adopting new oral procedure rules in criminal proceedings”)	A
2009	<i>Radilla Pacheco v. Mexico</i> , Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C.No. 209	<p>Maria Valdés Leal</p> <p>Mr. Erik Nelson Ramírez, “member of the Masters’ studies in Constitutional Procedural Law of the Panamerican University,” Mexico City Campus</p> <p>Mexican Human Rights and Democracy Institute</p> <p>Mrs. Victoria Livia Unzueta Reyes</p> <p>World Association of Community Radios (AMARC-Mexico), Catholics for the Right to Decide (CDD), National Center of Social Communication (CENCOS), Human Rights Center Brother Francisco de Vitoria, O.P., Miguel Agustín Pro Juárez Human Rights Center (Prodh Center), Human Rights Center of the Tlachinollan Mountain</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p>

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		<p>(Tlachinollan), Center for Social and Cultural Studies Antonio de Montesinos (CAM), Fundar, Analysis and Research Center, Mexican Institute of Human Rights and Democracy (IMDHD), National Network of Civilian Human Rights Organizations “Todos los derechos para todas y todos” (RedTDT), and Supportive Network Decade Against Impunity. Also, but rejected, signatories: Human Rights Center Brother Bartolomé de las Casas (FrayBa) and Network for Children’s Rights in Mexico</p> <p>Spanish Association for International Human Rights Law</p> <p>Center for Justice and International Law</p> <p>Washington Office for Latin American Matters</p> <p>The Clinic of Public Interest of the Division of Legal Studies of the Center for Economic Investigation and Teaching</p> <p>Mrs. Gabriela Rodríguez Huerta and Karen Hudlet Vázquez</p> <p>Amnesty International</p> <p>Students of the Masters Program in Human Rights and Democracy of the Latin American Faculty of Social Sciences, Mexico campus</p> <p>Miguel Agustín Human Rights Center (but, rejection of co-signatories: Diego Lucero Foundation, the Guzmán Cruz Family, the Born in the Storm, and the Committee of the Mothers of Disappeared Victims of Chihuahua)</p> <p>“Some graduate students of the Law School of the Universidad Nacional Autónoma de México”</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>R</p>
<p>2009</p>	<p><i>Tristán Donoso v. Panama</i>, Judgment of 27 January 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 193</p>	<p>Mr. Javier P. Weksler</p> <p>Mr. Pedro Nikken, Mr. Carlos Ayala Corao, and Ms. Mariella Villegas Salazar</p> <p>Mr. Damián Loreti, Ms. Paola García Rey, and Ms. Andrea Pochak from the Centro de Estudios Legales y Sociales [Legal and Social Studies Center]</p>	<p>R</p> <p>A</p> <p>A</p>

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2009	<p><i>Ríos et al. v. Venezuela</i>, Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 194</p>	<p>The Netherlands Institute for Human Rights-SIM  The Institute for Democracy and Human Rights of the Pontifical University of Peru  The Legal Office of the Torcuato Di Tella University and the Association for Civil Rights  The International Radio Broadcasting Association -AIR-  The Inter-American Media Society  The Association Mondiale des Journaux  The Venezuelan Chamber of the Broadcasting Industry  The National Syndication of Media Employees (STNP)  The Bar Association of the City of New York  The World Press Freedom Committee  The “Broadcasting Association of Chile – ARCHI”  The National Union of Employees of the Radio-Television Industry Coraven-RCTV (SINATRINCORACTEL)  The Center of Studies on Law, Justice, and Society (DeJuSticia)</p>	<p>A  A  A</p>
2009	<p><i>Perozo et al. v. Venezuela</i>, Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 195</p>	<p>“Asociación Internacional de Radiodifusión-AIR” and the “Observatorio Iberoamericano de la Democracia”  “Colegio Nacional de Periodistas” of Venezuela and the National Union of Journalists of Venezuela (SNTP)  “Sociedad Interamericana de Prensa”  “Universidad Católica Andrés Bello” and the “Institute of Legal Defense-IDL”  “Asociación de Radiodifusores de Chile - ARCHI”, the “Association of the Bar of the City of New York” and the “Netherlands Institute for Human Rights- SIM”  “Cámara Venezolana de la Industria de la Radiodifusión”</p>	<p>A  A  A  A  A  A</p>

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2009	<i>Kavas Fernández v. Honduras</i> , Judgment of 3 April 2009 (Merits, Reparations and Costs), Series C No. 196	Environmental Defense Law Center	A
2009	<i>Reverón Trujillo v. Venezuela</i> , Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 197	Legal Clinic of the Law School of the Torcuato Di Tella University in Argentina Human Rights Center and the Law School of the University of Essex	A A
2009	<i>Escher et al. v. Brazil</i> , Judgment of 6 July 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 200	Human Rights Clinic of the Law School of the Fundação Getulio Vargas of Rio de Janeiro	A
2009	<i>Garibaldi v. Brazil</i> , Judgment of 23 September 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 203	Human Rights Clinic of the Legal Practice Unit of the Law School of the Getulio Vargas Foundation of Rio de Janeiro Coordinator of Social Movements of Paraná Human Rights Unit of the Law Department of the Pontificia Universidad Católica de Rio de Janeiro	A A A
2009	<i>González et al. ("Cotton Field") v. Mexico</i> , Judgment of 16 November 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 205	International Reproductive and Sexual Health Law Program of the Law School of the University of Toronto and the Center for Justice and International Law (CEJIL) TRIAL-Track Impunity Always and the World Organization Against Torture, joined by Consejo General of the Abogacia Española and the Fundación del Consejo General of the Abogacia General A group of grant holders of the Legal Research Institute of the Universidad Nacional Autónoma de México (UNAM) A human rights group of the UNAM Postgraduate Department Women's Link Worldwide The Women's Network of Ciudad Juárez A.C., with Cáritas Diocesana of Ciudad Juárez, Pastoral Obrera, Programa Compañeros, Ciudadanos por una mejor Administración Pública, Casa Amiga Centro de Crisis, and Clara Eugenia Rojas Blanco, Elizabeth Loera and Diana Itzel Gonzáles	A A A A A A

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A	The Global Justice and Human Rights Program of the Universidad de los Andes
A	The Human Rights Program and the Master's Program in Human Rights of the Universidad Iberoamericana of Mexico Human Rights Watch
A	Horvitz & Levy LLP, with Amnesty International, Thomas Antkowiak, Tamar Birkhead, Mary Boyce, Break the Circle, Arturo Carrillo, the Center for Constitutional Rights, the Center for Gender and Refugee Studies, the Center for Justice and Accountability, the Human Rights Center of the Universidad Diego Portales, Columbia Law School Human Rights Clinic, Cornell Law School International Human Rights Clinic, Bridget J. Crawford, the Domestic Violence and Civil Protection Order Clinic of the University of Cincinnati, Margaret Drew, Martin Geer, the Human Rights and Genocide Clinic, Benjamin N. Cardozo School of Law, Human Rights Advocates, Deena Hurwitz, the Immigration Clinic at the University of Maryland School of Law, the Immigration Justice Clinic, IMPACT Personal Safety, the International Human Rights Clinic at Willamette University College of Law, the International Mental Disability Law Reform Project of New York Law School, the International Women's Human Rights Clinic at Georgetown Law School, Latinojustice PRLDEF, the Legal Services Clinic at Western New England College School of Law, the Leitner Center for International Law and Justice at Fordham Law School, Bert B. Lockwood, the Allard K. Lowenstein International Human Rights Clinic, Yale Law School, Beth Lyon, Thomas M. McDonnell, the National Association of Women Lawyers, the Los Angeles Chapter of the National Lawyers Guild, the National Organization for Women, Noah Novogrodsky, Jamie O'Connell, Sarah Paolletti, Jo M. Pasqualucci, Naomi Roht-Arriaza, Darren Rosenblum, Su-

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		<p>san Deller Ross, Seton Hall University School of Law Center for Social Justice, Gwynne Skinner, Kathleen Staudt, Jeffrey Stempel, Maureen A. Sweeney, Jonathan Todres, the Urban Morgan Institute for Human Rights, the U.S. Human Rights Network, Penny M. Venetis, Deborah Weissman, Richard J. Wilson, the Women's Law Project, the Women Lawyers Association of Los Angeles, and the World Organization for Human Rights USA</p> <p>The International Commission of Jurists</p> <p>Amnesty International</p> <p>The Human Rights Centre of the School of Law of Essex University, the International Center for Transitional Justice, and Redress</p> <p>Círculo Bolivariano Yamileth López</p> <p>The Civil Rights Association</p> <p>International Human Rights Law Institute of the University DePaul, College of Law</p> <p>Messrs. José Tomás Guevara Calderón, William Bermúdez Bolívar, José Francisco Corrales Gutiérrez, Heriberto Hidalgo Segura, Manuel Antonio Coto Aguirre, Marco Vinicio Picado González, Juan José Maltés Montiel, José Ruiz Pérez, Ángel Aragón Calderón, Rafael Antonio Rojas Madrigal, Jorge Rodríguez Sánchez and J.A. Coto Aguirre.</p> <p>"Unión de Organizaciones Democráticas de América – UnoAmérica"</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p>
2009	<i>Barreto Leiva v. Venezuela</i> , Judgment of 17 November 2009 (Merits, Reparations and Costs), Series C No. 206		
2009	<i>Usón Ramírez case</i> , Judgment of 20 November 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 207		
2009	<i>The "Las Dos Erres" Massacre v. Guatemala</i> , Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 211		
2010	<i>Herrera Ulloa v. Costa Rica</i> , Order of 22 November 2010 (Suspension of Compliance with Judgment)		
2010	<i>Manuel Cepeda Vargas v. Colombia</i> , Judgment of 26 May 2010 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 213		

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2010	<i>Fernández Ortega et al. v. Mexico</i> , Judgment of 30 August 2010 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 215	<p>Three students of the Graduate Studies Department of the Law School of the Universidad Autónoma de México</p> <p>The Public Interest Clinic of the Centro de Investigación y Docencia Económicas de la Ciudad de México, and Women's Link Worldwide of Bogotá, Colombia</p> <p>The Argentine Forensic Anthropology Team (EAAF)</p> <p>The Center for Human Rights Studies of the Law School of the Universidad de San Martín de Porres</p> <p>Fundar, Centro de Análisis e Investigación A.C.</p> <p>The Miguel Agustín Pro Juárez A.C. Human Rights Center</p> <p>A law professor and students of the Strategic Litigation and Human Rights course of the Instituto Tecnológico Autónomo de México</p>	A A A A A A A
2010	<i>Rosendo-Cantú and other v. Mexico</i> , Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 216	<p>Three students of the Graduate Studies Department of the Law School of the Universidad Autónoma de México (UNAM)</p> <p>The General Council of Spanish Lawyers and the Foundation of the General Council of Spanish Lawyers</p> <p>The Faculty at the Law School, the University of the Andes</p> <p>Bar Human Rights Committee and Solicitor's International Human Rights Group</p> <p>The Washington Office on Latin America [Oficina en Washington para Asuntos Latinoamericanos]</p> <p>Lawyer's Rights Watch Canada</p> <p>Women's Link Worldwide</p> <p>The Programa de Litigio Internacional del Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer [International Litigation Program of the Committee for Latin America and the Caribbean for the Defense of the Rights of Women] (CLADEM)</p>	A A A A A A A A A

		Mr. James C. Hopkins, Associate Professor at the University of Arizona Fundar, Centro de Análisis e Investigación A.C., [Fundar, Center for Analysis and Investigation]	A A
2010	<i>Vélez Looz v. Panama</i> , Judgment of 23 November 2010 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 218	The Public Interest Clinic of the Sergio Arboleda University (Colombia)	A
2010	<i>Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil</i> , Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 219	Open Society Justice Initiative, Commonwealth Human Rights Initiative, Open Democracy Advice Centre, and South African History Initiative Grupo de Investigación de Derechos Humanos en la Amazonia Order of Attorneys of Brazil, section of Rio de Janeiro Grupo de Esenanza, Investigación y Extensión "Democracia y Justicia en Transición" de la Universidad Federal de Uberlandia José Carlos Moreira da Silva Filho, Rodrigo Lentz, Gabriela Mezzanotti, Fernanda Frizzo Bragato, Jania Maria Lopes Saldanha, Luciana Araujo de Paula, Gustavo Oliveira Vieira, Ana Carolina Seffrin, Leonadro Subtil, Castor Bartolome Ruiz and others, and el Grupo de Investigación "Derecho a la Memoria y la Verdad y Justicia de Transición" (Pontificia Universidad Católica de Rio Grande do Sul), el Núcleo de Investigación y Extensión de la Universidad Federal de Rio Grande, el Movimiento Nacional de Educación en Derechos Humanos y Acceso, Ciudadanía y Derechos Humanos, el Grupo de Investigación "delmas-Marty: Internacionalización del Derecho y Emergencia de un Derecho Mundial", el Grupo de Investigación "Fundamentación Ética de los Derechos Humanos", la Cátedra UNESCO/UNISINOS "Derechos Humanos y Violencia, Gobierno y Gobernanza", el Curso de Graduación en Derecho y el Núcleo de	A A A A

Annex I: Cases with *amicus curiae* involvement

	2010	<p><i>Cabrera García and Montiel Flores v. Mexico</i>, Judgment of 26 November 2010 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 220</p>	
		<p>Derechos Humanos, all associated with the Universidad del Valle del Río de los Simos</p> <p>Global Justice</p> <p>Equipo del Núcleo de Derechos Humanos del Departamento de Derecho de la Pontificia Universidad Católica de Río de Janeiro</p> <p>Asociación Jueces para la Democracia</p> <p>Undisclosed number of <i>amicus curiae</i> submissions rejected</p> <p>Further submissions rejected for untimeliness and irrelevance</p> <p>The Human Rights Clinic of the Human Rights Program at Harvard Law School</p> <p>The Human Rights Clinic at the University of Texas</p> <p>Mr. Gustavo Fondevila, Professor at the Centro de Investigación y Docencia Económica</p> <p>Asociación para la Prevención de la Tortura (Association for the Prevention of Torture)</p> <p>Mr. Miguel Sarre, professor at the Instituto Tecnológico Autónomo de México</p> <p>Clínica de Derechos Humanos de la Escuela Libre de Derecho (Human Rights Clinic at the Free Law School)</p> <p>Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C. (Mexican Commission for the Defense and Promotion of Human Rights A.C.)</p> <p>Centro Mexicano de Derecho Ambiental (Mexican Center for Environmental Law) (CEMDA) and Asociación Interamericana para la Defensa del Medio Ambiente (Inter-American Association for Environmental Defense) (AIDA)</p> <p>Programa de Derechos Humanos de la Universidad Iberoamericana (Human Rights Program of the Ibero-American University)</p>	<p>A</p> <p>A</p> <p>A</p> <p>R</p> <p>R</p> <p>A</p>

Annex I: Cases with amicus curiae involvement

		International Forensic Program of Physicians for Human Rights EarthRights International Environmental Defender Law Center	A A A
2011	<i>Radilla Pacheco v. Mexico</i> , Order of 19 May 2011 (Monitoring Compliance with Judgment)	Human Rights Committee of the Bar of England and Wales and Solicitor's International Human Rights Group	A
2011	<i>Gelman v. Uruguay</i> , Judgment of 24 February 2011 (Merits and Reparations), Series C No. 221	Mr. Jorge Errandonea, Mr. Carlos María Pelengo, Ms. Carolina Villadiego Burbano with the International Human Rights Clinic of the University of Quebec and the Committee of Latin America and Caribbean for Defense of Human Rights of Women	A
2011	<i>Chocrón Chocrón v. Venezuela</i> , Judgment of 1 July 2011 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 227	Association of the Bar of the City of New York, International Human Rights Committee	A
2011	<i>López Mendoza v. Venezuela</i> , Judgment of 1 September 2011 (Merits, Reparations and Costs), Series C No. 233	Asociación Venezolana de Derecho Constitucional Human Rights Foundation Mr. Jorge Castañeda Gutman Mr. Hugo María Wortman Jofre The Carter Center Undisclosed number of undisclosed <i>amicus curiae</i>	A A A A A R
2011	<i>Fleury et al. v. Haiti</i> , Judgment of 23 November 2011 (Merits and Reparations), Series C No. 236	Mr. Ariel Dulitzky for Human Rights Law Clinic of the Law School of the University of Texas	A
2011	<i>Fontvecchia and d'Amico v. Argentina</i> , Judgment of 29.11.2011 (Merits, Reparations and Costs), Series C No. 238	Committee to Protect Journalists Article 19	A R
2012	<i>Barrios Altos et al. v. Peru</i> , Judgment of 7 September 2012 (Compliance Monitoring Decision)	Mr. Eduardo Vega Luna, Ombudsman for Peru Mr. César Augusto Nakasaki Servigón, lawyer	A A



Mr. Carlos Álvarez Cozzi, Professor of Private Law at the Economic Sciences and Administration School and Associate Professor of Private International Law at the Law School of the University of the Republic of Uruguay	A
Mr. James J. Silk, Director of Allard K. Lowenstein, Legal Clinic on Human Rights, of Yale University Law School	A
Ms. María Sara Rodríguez Pinto, Doctor of Law at the Universidad Autónoma de Madrid and Professor of Civil Law	A
Ms. Natalia Gherardi, Executive Director of the Equipo Latinoamericano de Justicia y Género, and Ms. Josefina Durán, Director of that organization's Law Department	A
Ms. Laura Clérico, Ms. Liliana Ronconi, Mr. Gustavo Beade and Mr. Martín Aldao, professors and researchers at the University of Buenos Aires Law School	A
Messrs. Carlo Casini, Antonio Gioacchino Spagnolo and Joseph Meaney	A
Chancellor and some members of the Universidad Católica Santo Toribio de Mogrovejo	A
Ms. María del Pilar Vásquez Calva, Coordinator of Enlace Gubernamental de Vida and Familia A.C.	A
Ms. Suzanne B. Goldberg and Mr. Michael Kavey, lawyers at Sexuality & Gender Law Clinic of Columbia University and Ms. Adriana T. Luciano, an attorney at Paul, Weiss, Rifkind, Wharton & Garrison LLP	A
Ms. Elba Nuñez Ibáñez, Gabriela Filoni, Jeannette Llaja and Mr. Gastón Chillier	A
Mr. Brent McBurney and Mr. Bruce Abramson, attorneys at Advocates International	A



Annex I: Cases with amicus curiae involvement

		<p>The Adoptar Foundation          Laura Maria Giosa, Simón Conforti, Renzo Adrián Sujodolski,          Marisa Herrera and Lucas E. Barreiros, coordinators of the master's          programs in family, children's and adolescents' law and international          human rights law of the Law School of the Universidad de Buenos          Aires.</p>	A A
2012	<i>Kichwa Indigenous People of Sarayaku v. Ecuador</i> , Judgment of 27 June 2012 (Merits and Reparations), Series C No. 245	<p>Human Rights Law Clinic Faculty of the University of Seattle          Law Clinic of the University of San Francisco of Quito          Human Rights Centre Pontificia Universidad Católica del Ecuador          Amnesty International          Alianza Regional por la libre Expresión e Información          Mrs. Luz Ángela Patino Palacios, Mrs. Gloria Amparo Rodriguez,          and Mr. Julio Cesar Estrada Cordero          Mr. Santiago Medina Villareal and Mrs. Sophie Simon          Allard K. Lowenstein Law Clinic for International Human Rights          of Yale Law School          Forest Peoples' Programme</p>	A A A A A A A A A
2012	<i>Furlan y Familiares v. Argentina</i> , Judgment of 31 August 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 246	<p>Programa de Acción por la Igualdad y la Inclusión Social (PAIIS)          de la Facultad de Derecho de la Universidad de los Andes          Mr. Ezequiel Heffes</p>	A A
2012	<i>Yélez Restrepo and Family v. Colombia</i> , Judgment of 3 September 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 248	<p>Grupo de Acciones Públicas de la Facultad de Jurisprudencia del          Rosario          Clínica Jurídica por la Justicia Social y el Master de 'Derechos Hu-          manos, Democracia y Justicia Internacional' de la Universidad de Va-          lencia, España          Article 19</p>	A A
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Annex I: Cases with amicus curiae involvement

2012	<i>The Río Negro Massacres v. Guatemala</i> , Judgment of 4 September 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 250	The “Strategic and Structural Litigation Unit” of the Human Rights Clinic of the Pontificia Universidad Javeriana, Cali The Human Rights Program of the Universidad Veracruzana	A A
2012	<i>Nadege Dorzema et al v. Dominican Republic</i> , Judgment of 24 October 2012 (Merits, Reparations and Costs), Series C No. 251	‘Bartolomé de las Casas’ Human Rights Institute of the Universidad Carlos III de Madrid Human Rights Clinic of the Loyola Law School of Los Angeles The Equal Rights Trust The Asylum and Human Rights Clinic of the Boston University School of Law Consejo Latinoamericano de Estudios de Derecho Internacional y Comparado Centro de Estudios Legales y Sociales	A A A A A A R
2012	<i>Massacres of El Mozote and Nearby Places v. El Salvador</i> , Judgment of 25 October 2012 (Merits, Reparations and Costs), Series C No. 252	Mr. Oscar Humberto Luna, Ombudsman of El Salvador Mr. Ezequiel Heffes	A A
2012	<i>Guadál Álvarez et al. (Diario Militar) v. Guatemala</i> , Judgment of 20 November 2012 (Merits, Reparations and Costs), Series C No. 253	Pedro E. Díaz Romero Open Society Justice Initiative	A A
2012	<i>Mohamed v. Argentina</i> , Judgment of 23 November 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 255	Chair of Human Rights of the Faculty of Law of National University of Cuyo	A
2012	<i>Artavia Murillo et al. (in-vitro fertilization) v. Costa Rica</i> , Judgment of 28 November 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 257	Mónica Arango Olaya, Regional Director for Latin America and the Caribbean of the Center for Reproductive Rights, and María Alejandra Cárdenas Cerón, the Center’s Legal Adviser Marcela Leandro Ulloa of the Group in Favor of IVF A Filomena Gallo, Nicolò Paoletti and Claudia Sartori, representatives of the Association “Luca Coscioni per la libertà di ricerca scien-	A A

tífica y del Partido Radical Nonviolento Transnazionale e Transpartito”,	A
Natalia Lopez Moratalla, President of the Spanish Association of Bioethics and Medical Ethics	A
Lilian Sepúlveda, Mónica Arango, Rebecca J. Cook and Bernard M. Dickens	A
Equal Rights Trust and the Human Rights Clinic of the University of Texas Law School	A
International Human Rights Clinic of Santa Clara University Law School	A
Viviana Bohórquez Monsalve, Beatriz Galli, Alma Beltrán y Puga, Álvaro Herrero, Gastón Chillier, Lourdes Baseary and Agustina Ramón Michel	A
Ricardo Tapia, Rodolfo Vásquez and Pedro Morales	A
Alejandro Leal Esquivel, Coordinator of the Department of Genetics and Biotechnology of the School of Biology of the Universidad de Costa Rica	A
Rita Gabriela Chaves Casanova, Member of the Legislative Assembly of Costa Rica	A
Alexandra Loria Beeche	A
Claudio Grossman, Dean of the American University Washington College of Law, and Macarena Sáez Torres, Director of the Impact Litigation Project of the American University Washington College of Law	A
John O’Brien, President of Catholics for Choice and Sara Morello, Executive Vice President of the organization	A
Carlos Polo Samaniego, Director of the Latin American Office of the Population Research Institute	A

*Annex I: Cases with amicus curiae involvement*

Reynaldo Bustamante Alarcón, President of the Instituto Solidaridad y Derechos Humanos	A
Hernán Collado Martínez	A
Carmen Muñoz Quesada, Rita Maxera Herrera, Cristian Gómez, Seidy Salas and Ivania Solano	A
Enrique Pedro Haba, Professor at the Universidad de Costa Rica	A
Organización de Litigio Estratégico de Derechos Humanos	A
Susie Talbot, Lawyer of the Center for the Legal Protection of Human Rights (INTERIGHTS) and Helen Duffy, Head Counsel of INTERIGHTS	A
Andrea Acosta Gamboa	A
Andrea Parra, Natalia Acevedo Guerrero, Matías González Gil and Sebastián Rodríguez Alarcón	A
Leah Hoctor, Legal Adviser of the International Commission of Jurists	A
Margarita Salas Guzmán, President, and Larissa Arroyo Navarrete, Lawyer, of the Colectiva por el Derecho a Decidir Fabio Varela,	A
Marcelo Ernesto Ferreyra, Rosa Posa, Bruna Andrade Irineu and Mario Pecheny	A
María del Pilar Vásquez Calva, Coordinator of Enlace Gubernamental Vida y Familia A.C., Mexico	A
Latin American Network for Assisted Reproduction and Ian Cooke, Emeritus Professor of the University of Sheffield	A
Priscilla Smith, Senior Fellow of the Program for the Study of Reproductive Justice of the Information Society Project (ISP) of the University of Yale and Genevieve E. Scott, Visiting Professor of the ISP	A
Latin American Network for Assisted Reproduction and Santiago Munné, President of Reprogenetics	A

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Centro de Estudios of Derecho, Justicia y Sociedad (DEJUSTICIA)	A
José Tomás Guevara Calderón	A
Carlos Santamaría Quesada, Head of the Molecular Diagnosis Division of the Clinical Laboratory of the Hospital Nacional de Niños	A
Cesare P.R. Romano, Law Professor and Joseph W. Ford Fellow at Loyola Law School, Los Angeles, supported by numerous academic co-signatories	A
The Ombudsman's Office	A
Hernán Gullco and Martín Hevia, Professors of the Law School of the Universidad Torcuato Di Tella	A
Alejandra Huerta Zepeda, Professor of the Biomedical Research Institute (IIB) of the Universidad Nacional Autónoma de México, and José María Soberanes Díez, Professor of the Universidad Panamericana, Mexico	A
Asociación de Médicos por los Derechos Humanos	A
Latin American Federation of Obstetrics and Gynecology	A
Carlo Casini, Antonio G. Spagnolo, Marina Casini, Joseph Meaney, Nikolas T. Nikas and Rafael Santa María D'Angelo	A
Rafael Nieto Navia, Jane Adolphe, Richard Stitch and Ligia M. de Jesus	A
Hugo Martín Callienes Bedoya, Patricia Campos Olázabal, Rosa de Jesús Sánchez Barragán, Sergio Castro Guerrero and Antero Enrique Yacarini Martínez	A
Julian Domingo Zarzosa	A
Kharla Zúñiga Vallejos of the Berit Family Institute of Lima	A
Guadalupe Valdez Santos, President of the Asociación Civil Promujer y Derechos Humanos	
Piero A. Tozzi, Stefano Gemmarini, William L. Saunders and Álvaro Paül	R

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Annex I: Cases with amicus curiae involvement

		Human Rights Centre of University of Peace of the United Nations Olga Cristina Redondo Alvarado, a psychoanalyst Caio Varela, Marcelo Ferreyra, Rosa Posa, Bruna Andrade and Mario Pecheny		R R R
2012	<i>Massacre of Santo Domingo v. Colombia</i> , Judgment of 30 November 2012 (Preliminary Objections, Merits and Reparations), Series C No. 259	Coalición contra la vinculación de niños, niñas y jóvenes al conflicto armado en Colombia (Coalico)		A
2013	<i>González et al. ("Cotton Field") v. Mexico</i> , Order of 21 May 2013 (Supervision of Compliance with Judgment)	Diputada Teresa del Carmen Incháustegui Romero, President of the "Comisión Especial para Conocer y Dar Seguimiento Puntual y Exhaustivo a las Acciones que han emprendido las Autoridades Competentes en relación a los Femicidios registrados en México (CEF)" de la LXI Legislatura de la Cámara de Diputados Julia Monárrez, member of a group of academics and activists defending the interests of the families of disappeared girls and women and victims of femicide in Ciudad Juárez		A A
2013	<i>Mendoza et al. v. Argentina</i> , Judgment of 14 May 2013 (Preliminary Objections, Merits and Reparations), Series C No. 260	Group of researchers from Center for the Study of Sentence Execution Brazilian Institute of Criminal Science Asociación por los Derechos Civiles Amnesty International Colectivo de Derechos de Infancia y Adolescencia de Argentina Human Rights Institute of the University of Colombia Law School, Lawyers for Human Rights with Center for Law and Global Justice of the University of San Francisco		A A A A A A
2013	<i>Supreme Court of Justice (Quintana Coello et al.) v. Ecuador</i> , Judgment of 23 August 2013 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 266	Fundación Vida Solidaria Group of 68 undisclosed <i>amicus curiae</i> Mrs. M. Ramos and E. Carrasco, students at the Clínica Jurídica de la Universidad San Francisco, Quito		A A A

2013	<i>García Lucero et al. v. Chile</i> , Judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations), Series C No. 267	D. J. Cantor, Director of Refugee Law Initiative of School of Advanced Study, University of London Nimisha Patel, School of Psychology, University of East London Victor Rosas Vergara, abogado y Vicepresidente de la onsa Union de ex prisioneros políticos de Chile	A A A
2013	<i>Comunidades Afrodescendientes desplazados de la cuenca del río Caacaria (operación génesis) v. Colombia</i> , Judgment of 20 November 2013 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 270	“Miembros de la Etnia Negra víctimas del desplazamiento forzado del Bajo Atrato – Chocó – Colombia” Thomas Mortensen de Christian Aid RU e Irlanda International Center for Transitional Justice Jaime Arturo Fonseca Triviño of “Confesión Voluntariado Misionero Cristiano MANOS UNIDAS” “Coordinación Colombia Europa Estados Unidos”, consisting of: Compuesta por Corporación Colectivo de Abogados José Alvear Restrepo (“CCAJAR”), el Grupo Interdisciplinario para los Derechos Humanos (“GIDH”), la Corporación Jurídica Libertad (“CJL”), la Corporación Jurídica Yira Castro (“CJYC”), la Corporación Reintegrar, la Asociación para la Promoción Social Alternativa Minga, Humanidad Vigente Corporación Jurídica (“HVCI”), organizaciones integrantes de la Mesa de trabajo sobre Ejecuciones Extrajudiciales de la Coordinación Colombia Europa Estados Unidos, la Comisión Colombiana de Juristas (“CCJ”), la Consultoría para el Desplazamiento Forzado Codhes, and Mr. Carlos Rodríguez Mejía Macarena Sáez of the American University Washington College of Law Impact Litigation Project	A A A A A A
2013	<i>Pacheco Tineo Family v. Bolivia</i> , Judgment of 25 November 2013 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 272	Mr. Ezequiel Heffes and Mr. Fernando Alberto Goldar The Human Rights Law Clinic of the Faculty of Law of the University of Santa Clara, USA Mrs. Elizabeth Santalla Vargas	A A R



Eduardo Jorge Prats	A
Asdrúbal Aguiar Aranguren, as President of the Executive Committee of the Observatorio Iberoamericano de la Democracia and on behalf of himself	A
Marta Franch Sagner	A
Javier Barnes	A
Miriam Mabel Ivanega	A
Jose Luis Benavides	A
Luis Enrique Chase Plate	A
Diana Arteaga Macías	A
José Luis Meilán Gil	A
New York City Bar Association	A
Enrique Rojas Franco, President of the Asociación Iberoamericana de Derecho Público y Administrativo	A
Profesor Jesús González Pérez	
Pablo Ángel Gutiérrez Colantuono and Henry Rafael Henríquez Machado	A
Jorge Luis Suárez Mejías, Professor of the Universidad Católica Andrés Bello	A
José René Olivos Campos, President of the Asociación Mexicana de Derecho Administrativo	A
Pedro José Jorge Coviello, Professor of the Universidad Católica Argentina	A
Carlos Eduardo Herrera Maldonado	A
Humberto Prado Sifontes	A
Jorge Raúl Silveiro Salgueiro	A
Helena Kennedy and Stenford Moyo, Co-Presidents of the International Bar Association's Human Rights Institute	A
Isaac Augusto Damsky and Gregorio Alberto Flax	R

Annex I: Cases with amicus curiae involvement

2014	<p><i>Norin Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile</i>, Judgment of 29 May 2014 (Merits, Reparations and Costs), Series C No. 279</p>	<p>The lawyer Vicente Laureano Bázana Yutronic          Minority Rights Group International          Human Rights Center of the Universidad Diego Portales          Claudia Gutiérrez Olivares, Professor of Ethics and Political Philosophy of the Universidad de Chile          Osvaldo Javier Solís Mansilla, lawyer and researcher</p>	A A A A A
2014	<p><i>Case of Expelled Dominicans and Haitians v. Dominican Republic</i>, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 282</p>	<p>Clínica de Derechos Humanos de la Escuela de Derecho de la Universidad de Texas          Grupo de Acciones Públicas (GAP) – Facultad de Jurisprudencia – de la Universidad del Rosario Colombia y la Fundación Probono Colombia          Unidad de Litigio Estratégico Internacional RFK          Centro de Estudios Legales y Sociales (CELS) Argentina, Iniciativa Frontera Norte de México (IFNM) y Fundar Centro de Análisis e Investigación México          Clínica de Derechos Humanos de la Facultad de Derecho de la Universidad Santa Clara          Consejo Latinoamericano de Estudios del Derecho Internacional y Comparado, Capítulo República Dominicana (en adelante “COLADIC-RD”)          Clínica de Derecho Internacional de Derechos Humanos de la Escuela de Derecho, Universidad de Virginia          Clínica Internacional de Derechos Humanos y Facultad de Derecho de la Universidad Interamericana de Puerto Rico y El Instituto Caribeño de Derechos Humanos          Clínica de Derechos Humanos, Facultad de Derecho de la Universidad de Miami          Centro Pedro Francisco Bonó, Centro de Formación y Acción Social Agraria (CEFASA), Solidaridad Fronteriza y Red del Servicio Je-</p>	A A A A A A A A A A A A A





Annex I: Cases with amicus curiae involvement

2015	<i>Comunidad Campesina de Santa Bárbara v. Peru</i> , Judgment of 1 September 2015 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 299	and Ludovic Hennebel, Director of the International Human Rights Law Clinic of Aix-Marseille Université, France The John Marshall Law School International Human Rights Clinic	A
2015	<i>Omar Humberto Maldonado Vargas and others v. Chile</i> , Judgment of 2 September 2015 (Merits, Reparations and Costs), Series C No. 300	Centro para el Derecho Internacional de los Derechos Humanos de la Facultad de Derecho de la Universidad de Northwestern	A
2015	<i>López Lone and others v. Honduras</i> , Judgment of 5 October 2015 (Preliminary Exception, Merits, Reparations and Costs), Series C No. 302	Gilma Tatiana Rincón Covelli of Línea de Investigación de Justicia y Democracia de la Universidad del Rosario de Bogotá, Colombia Corporación Fundamental, Centro para la Justicia y los Derechos Humanos Magistrados Europeos por la Democracia y las Libertades (MEDEL), Jueces para la Democracia, Unión Progresista de Fiscales de España y Neue Richter Vereinigung (Nueva Asociación de Jueces de Alemania) Asociación por los Derechos Civiles (ADC) y la Asociación Civil por la Igualdad y la Justicia (ACIJ) Roberto Garretón Merino Red Iberoamericana de Jueces (REDIJ) Comité de Asuntos Internacionales del Gremio Nacional de Abogados de los Estados Unidos de América (National Lawyers Guild, USA)	A A A A A A A A
2015	<i>Comunidad Garífuna Triunfo de la Cruz y sus Mienbros v. Honduras</i> , Judgment of 8 October 2015 (Merits, Reparations and Costs), Series C No. 305	Keri Brondo Mark David Anderson Government of Guatemala	A A A

Annex I: Cases with *amicus curiae* involvement

2015	<i>The Kalina and Lokono Peoples v. Suriname</i> , Judgment of 25 November 2015 (Merits, Reparations and Costs), Series C No. 309	Christopher Loperena Proyecto Acompañamiento en Honduras (PROAH) Sandra Cuffie Fundación Pro Bono-Colombia	A A A A
2016	<i>Duque v. Colombia</i> , Judgment of 26 February 2016 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 310	Fundación Latina de Cultura Clínica de Derechos Humanos de la Facultad de Derecho de la Universidad de Texas e Interantona Gay and Lesbian Human Rights Commission Organización Alliance Defending Freedom Damián A. González-Salzberg Centro Leitner por la Justicia y el Derecho Internacional de la Universidad de Fordham y la Comisión Internacional de Derechos Humanos para Gays y Lesbianas Colombia Diversa y el Programa de Acción por la Igualdad y la Inclusión Social (PAIIS) de la Facultad de Derecho de la Universidad de los Andes The Heartland Alliance for Human Needs and Human Rights, Venezuela Diversa Asociación Civil, United and Strong Inc., Corporación Promoción de la Mujer/Taller de Comunicación Mujer, SASOD – Society Against Sexual Orientation Discrimination, Colectiva Mujer y Salud, Aireana Grupo por los Derechos de las Lesbianas, United Belize Advocacy Movement, Mulabi – Espacio Latinoamericano de Sexualidades y Derechos, Akahatá – Equipo de Trabajo en Sexualidades y Géneros, Colectivo Ovejas Negras, Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), Rede Nacional de Negras e Negros LGBT, Women’s Way Foundation, Jamaica Forum of Lesbians, All-Sexuals and Gays (J-Flag), Red	A A A A A A A A A A

Annex I: Cases with amicus curiae involvement

		<p>Latinamericana y del Caribe de Personas Trans (Redlactrans), Sindicato Amanda Jofré, Red Trans del Perú, Asociación Panameña de Personas Trans, Asociación Panambi y Asociación Alfíl Clínica de Derechos Humanos de la Facultad de Derecho de la Universidad de Santa Clara en California</p> <p>A</p> <p>Grupo de Acciones Públicas de la Facultad de Jurisprudencia de la Universidad del Rosario, La Fundación Probono Colombia, Red Probono Chile, Estudio Jurídico Ferrada Nheme y la Firma de Abogados Baker and McKenzie de Colombia</p> <p>A</p>	
2016	<p><i>Caso Chinchilla Sandoval v. Guatemala</i>, Judgment of 29 February 2016 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 312</p>	<p>Centro de Investigación en Política Criminal de la Universidad Externado de Colombia</p> <p>A</p> <p>Profesores y estudiantes del New York University School of Law Clinic on Policy Advocacy in Latin America</p> <p>A</p> <p>Profesores y estudiantes de la Clínica Jurídica en Discapacidad de la Pontificia Universidad Católica del Perú</p> <p>A</p> <p>Profesores y estudiantes de la clínica jurídica Programa de Acción por la Igualdad y la Inclusión Social (PAIS) de la Facultad de Derecho de la Universidad de los Andes de Colombia</p> <p>A</p> <p>Bufete “ELEMENTA Consultoría en Derechos”</p> <p>A</p> <p>Harvard Law School Project on Disability</p> <p>A</p> <p>Centro por la Justicia y el Derecho Internacional (CEJIL)</p> <p>A</p>	
2016	<p><i>Caso Flor Freire v. Ecuador</i>, Judgment of 31 August 2016 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 315</p>	<p>Fundación Ecuatoriana Equidad</p> <p>A</p>	

Annex I: Cases with amicus curiae involvement

Advisory Opinions

Year	Case	Amicus curiae [State/NGO/IO/Ind]	A/R// An
1982	"Other Treaties" subject to the consultative jurisdiction of the court (Article 64 American Convention on Human Rights), Advisory Opinion No. OC-1/82 of 24 September 1982, Series A No. 1	Inter-American Institute of Human Rights, the International Human Rights Law Group, the International League for Human Rights and the Lawyers Committee for International Human Rights The Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law	A A
1982	The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75), Advisory Opinion No. OC-2/82 of 24 September 1982, Series A No. 2	The International Human Rights Law Group and the Morgan Institute for Human Rights of the University of Cincinnati College of Law	A
1983	Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights) Advisory Opinion No. OC-3/83 of 8 September 1983, Series A No. 3	International Human Rights Law Group and Washington Office on Latin America, the Lawyers Committee for International Human Rights and the Americas Watch Committee Institute for Human Rights of the International Legal Studies Program at the University of Denver College of Law and Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law	A A
1984	Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion No. OC-4/84 of 19 January 1984, Series A No. 4	The Minister of Justice (the Costa Rican Agent) The President of the Supreme Electoral Tribunal of Costa Rica A member of the Costa Rican Legislative Assembly The Director of the Civil Registry Office of Costa Rica A member of the University of Costa Rica Law Faculty	I I I I I
1985	Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), Advisory Opinion No. OC-5/85 of 13 November 1985, Series A No. 5	The Inter-American Press Association Colegio de Periodistas de Costa Rica The World Press Freedom Committee The International Press Institute	A A A A

Annex I: Cases with amicus curiae involvement

			<p>The Newspaper Guild and the International Association of Broadcasting</p> <p>The Federación Latinoamericana de Periodistas</p> <p>The International League for Human Rights</p> <p>The American Society of Newspaper Editors, the American Newspaper Publishers' Association, and the Associated Press</p> <p>The Lawyers' Committee for International Humans Rights, the Americas Watch Committee, and the Committee to Protect Journalists</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p>
1986	<i>The word "laws" in Article 30 of the American Convention on Human Rights</i> , Advisory Opinion No. OC-6/86 of 9 May 1986, Series A No. 6		Professor Raúl Emilio Viñuesa	A
1986	<i>Enforceability of the Right to Reply or Correction (Articles 14.1, 1.1 and 2 of the American Convention on Human Rights)</i> , Advisory Opinion No. OC-7/86 of 29 August 1986, Series A No. 7		Sociedad Interamericana de Prensa, el Comité Mundial de Libertad de Prensa, la American Newspaper Publishers Association, la Fédération Internationale des Editeurs de Journaux, The Copley Press Inc., The Miami Herald, Newsweek, USA Today, The Wall Street Journal and The International Herald Tribune	A
1987	<i>Habeas Corpus in Emergency Situations (Articles 27.2, 25.1 y 7.6 American Convention on Human Rights)</i> , Advisory Opinion No. OC-8/87 of 31 January 1987, Series A No. 8		Americas Watch Committee and the International Human Rights Law Group	A
1987	<i>Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)</i> , Advisory Opinion No. OC-9/87 of 6 October 1987, Series A No. 9		Amnesty International The International Human Rights Law Group The International Commission of Jurists The Lawyers Committee for Human Rights	A A A A
1990	<i>Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights</i> , Advisory Opinion No. OC-10/90 of 14 July 1990, Series A No. 10		The International Human Rights Law Group	A

Annex I: Cases with amicus curiae involvement

1990	<i>Exceptions to the Exhaustion of Domestic Remedies (Articles 46.1, 46.2.a y 46.2.b of the American Convention on Human Rights)</i> , Advisory Opinion No. OC-11/90 of 10 August 1990, Series A No. 11	The International Human Rights Law Group	A
1993	<i>Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50, 51 of the American Convention on Human Rights)</i> , Advisory Opinion No. OC-13/93 of 16 July 1993, Series A No. 13	Federación latinoamericana de asociaciones de familiares detenidos desaparecidos Familiares, madres y abuelas de detenidos desaparecidos de Mar del Plata Centro por la justicia y el derecho internacional (CEJIL) Americas Watch International Human Rights Law Group Centro de estudios legales y sociales Centro por los derechos humanos y el derecho humanitario de American University Programa venezolano de educación y acción en derechos humanos Centro por la acción legal en derechos humanos The Washington Office on Latin America Mrs. María Elba Martínez in her capacity as a lawyer with the Fundación paz y justicia-Argentina and the legal representative of some private parties before the Commission	A A A A A A A A A A A A A
1994	<i>International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)</i> , Advisory Opinion No. OC-14/94 of 9 December 1994, Series A No. 14	CEJIL, Americas Watch, and the Comisión Andina de Juristas (Andean Commission of Jurists) Red Latinoamericana de Abogados Católicos Professor Antonio Augusto Cançado Trindade of the University of Brasilia and the Instituto Rio-Branco, Brazil and Professor Beatriz M. Ramacciotti of the Pontificia Universidad Católica del Perú	A A A



Annex I: Cases with amicus curiae involvement

		<p>Instituto Latinoamericano de Naciones Unidas para la Prevención del delito y Tratamiento del Delincuente</p> <p>Centro por la Justicia y el Derecho Internacional (CEJIL)</p> <p>La Comisión Colombiana de Juristas</p>	<p>A</p> <p>A</p> <p>A</p>
<p>2003</p>	<p><i>Juridical Condition and Rights of the Undocumented Migrants</i>, Advisory Opinion No. OC-18/03 of 17 September 2003, Series A No. 18</p>	<p>Clínicas jurídicas de Colegio de jurisprudencia de la Universidad San Francisco de Quito</p> <p>Delgado Law Firm</p> <p>Ms. Liliana Ivonne Gonzalez Morales, Gail Aguilar Castañon, Karla Micheel Salas Ramirez and Itzel Magali Perez Zagal, students of the Faculty of Law of UNAM</p> <p>Harvard Immigration and Refugee Clinic of Greater Boston Legal Services and Harvard Law School, Working Group on Human Rights in the Americas and Boston College Law Schools, and Centro de la Justicia Global/Global Justice Center</p> <p>Thomas A. Brill of the Law Office of Sayre &amp; Chavez and Javier Juárez of the Law Office of Sayre &amp; Chavez</p> <p>Beth Lyon, for Labor, Civil Rights and Immigrants' Rights Organizations in the United States</p> <p>La Academia de Derechos Humanos y Derecho Internacional Humanitario de la American University, Washington College of Law and the Programa de Derechos Humanos de la Universidad Iberoamericana de México</p> <p>Center for International Human Rights of Northwestern University, School of Law</p> <p>A CEJIL</p> <p>Centro de Estudios Legales y Sociales, the Servicio Ecuemenico de Apoyo y Orientación a Inmigrantes y Refugiados, and la Clínica Jurídica para los Derechos de Inmigrantes y Refugiados de la Facultad de Derecho de la Universidad de Buenos Aires</p>	<p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p> <p>A</p>



*Annex I: Cases with amicus curiae involvement*

A	La Asociación de Familiares de Detenidos Desaparecidos
A	La Clínica de Derechos Humanos de la Escuela de Derecho de la Universidad de Seattle de los Estados Unidos de America
A	Los intergrantes del Seminario sobre Sistema Interamericano de Derechos Humanos y Derecho Internacional Humanitario de la Facultad de Derecho de la Universidad Veracruzana de Mexico
A	Group of academics and students of the University of Notre Dame, USA
A	La Facultad de Derecho de la Pontificia Universidad Católica Argentina
A	Los miembros de la Catedra de Derechos Humanos de la Facultad de Derecho de la Universidad Nacional de Cuyo Argentina
A	La Clínica Jurídica de la Universidad San Francisco de Quito, Ecuador
A	El Centro de Derechos Humanos y Justicia "Bernard and Audre Rapoport" de la Escuela de Derecho de la Universidad de Texas en Austin, USA
A	Director e integrantes del Grupo de Justicia Global y Derechos Humanos de la Facultad de Derecho de la Unversidad de los Andes de Colombia
A	El Grupo de Estudios en Derechos Humanos y Litigio Internacional adscrito a la Facultad de Ciencias Jurídicas y Sociales de la Universidad de Caldas de Colombia
A	Mr. Alberto Bovino and Mr. Juan Pablo Chirinos
A	Mr. Carlos Rafael Urquilla, Ms. Elisa de Anda Madrazo and Mr. Guillermo Jose Garcia Sanchez
A	Mr. Luis Peraza Parga, Mr. Carlos Eduardo Garcia Granados, Ms. Ligia Galvis Ortiz and Mr. Ricardo Abello Galvis
A	Mr. Augusto M. Guevara Palacios and Mr. Marcos David Kotlik



*Annex I: Cases with amicus curiae involvement*

Department of the Law Faculty of the Universidad de Buenos Aires	A
Human Rights Center of the Universidad Nacional de Lanús	A
Legal Clinic for Migrants and Refugees of the Human Rights Center of the Law Faculty of the Universidad Diego Portales	A
Universidad Colegio Mayor de Nuestra Señora del Rosario	A
Professors of the Law Faculty of the Universidad Nacional Autónoma de México	A
Centro Estratégico de Litigio Latinoamericano, A.C. and the Human Rights Program of the Universidad Veracruzana	A
Human Rights Center of the Jurisprudence Faculty of the Universidad Católica del Ecuador	A
Democracy and Human Rights Institute of the Pontificia Universidad Católica del Perú	A
Human Rights Study Center of the Law Faculty of the Universidad de San Martín de Porres	A
Human Rights Center and Juridical Research Center of the Universidad Católica Andrés Bello	A
International Human Rights Law Clinic of the Washington College of Law, American University, on behalf of the Women's Refugee Commission, Kids in Need of Defense and the Immigrant Children's Legal Program of the U.S. Committee for Refugees and Immigrants	A
Immigration Law Clinic of the Southwestern Law School	A
Child Law Clinic of the University College Cork	A
Mr. Boris Wilson Arias López	A
Messrs. Ezequiel Heffes and Fernando Alberto Goldar	A
Ms. Beatriz Eugenia Sánchez Mojica	A
Messrs. Álvaro Francisco Amaya-Villarreal, Felipe Franco Gutiérrez and Ms. Viviana Ordóñez Salazar	A
Ms. Juliana Poveda Clavijo and Mr. Oscar Yesid Osorio Barragán	A

**African Court of Human and Peoples' Rights**

*Contentious case*

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
2013	<i>African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya</i> , Application No. 004/2011, Order of 15 March 2013	Pan African Lawyers' Union [NGO]	A
2014	<i>Lohé Issa Konaté v. Burkina Faso</i> , Application No. 004/2013, Judgment of 5 December 2014	Centre for Human Rights Comite Pour la Protection des Journalistes Media Institute of Southern Africa Pan African Human Rights Defenders Network Pan African Lawyers' Union Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa) Southern Africa Litigation Centre World Association of Newspapers and News Publishers	A

*Advisory Opinions*

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
Pend.	<i>Request for advisory opinion 001/2013 by the Socio-Economic Rights and Accountability Project</i>	Centre for Human Rights, University of Pretoria Amnesty International Human Rights Implementation Centre, Bristol University	A

World Trade Organization dispute settlement system

Panels

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
1998	<i>United States - Import Prohibition of Certain Shrimp and Shrimp Products</i> (US - Shrimp), Panel Report, adopted on 6 November 1998, WT/DS58/R	The Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL") World Wide Fund for Nature	R R
2000	<i>United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> (US - Lead and Bismuth II), Panel Report, adopted on 7 June 2000, WT/DS138/R	American Iron and Steel Institute	R
2000	<i>Australia - Measures Affecting Importation of Salmon</i> (Australia - Salmon), Panel Report, adopted on 20 March 2000, WT/DS18/RW	"Concerned Fishermen and Processors" in South Australia	A
2000	<i>United States - Section 110(5) of US Copyright Act</i> (US - Section 110(5) Copyright Act), Panel Report, adopted on 27 July 2000, WT/DS160/R	Letter from a law firm representing ASCAP to the United States Trade Representative ("USTR") that was copied to the Panel	R
2001	<i>United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia</i> (US - Shrimp (Article 21(5))), Panel Report, adopted on 21 November 2001, WT/DS58/RW	Earthjustice Legal Defense Fund on behalf of Turtle Island Restoration Network, The Humane Society of the United States, The American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, and Fiscalía del Medio Ambiente (Chile)	R

Annex I: Cases with amicus curiae involvement

		The National Wildlife Federation on behalf of the Center for Marine Conservation, Centro Eoceanos, Defenders of Wildlife, Friends of the Earth, Kenya Sea Turtle Committee, Marine Turtle Preservation Group of India, National Wildlife Federation, Natural Resources Defense Council, Operation Kachhapa, Project Swarajya, Visakha Society for Prevention of Cruelty to Animals	An
2001	<i>European Communities - Measures Affecting Asbestos and Products Containing Asbestos</i> (EC - Asbestos), Panel Report, adopted on 5 April 2001, WT/DS135/R	Collegium Ramazzini The American Federation of Labor and Congress of Industrial Organizations Ban Asbestos Network Instituto Mexicano de Fibras Industriales A.C. ONE ("Only Nature Endures")	An An R R R
2001	<i>European Communities - Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India</i> (EC - Bed Linen) Panel Report, adopted on 12 March 2001, WT/DS141/R	Foreign Trade Association by Dr. Konrad Neundörfer	R
2002	<i>United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada</i> (US - Softwood Lumber III), Panel Report, adopted on 1 November 2002, WT/DS236/R	Interior Alliance Three additional unspecified <i>amici curiae</i>	R R
2004	<i>United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada</i> (US - Softwood Lumber IV), Panel Report, adopted on 17 February 2004, WT/DS257/R	Natural Resources Defense Council 2 further undisclosed <i>amici curiae</i>	R R
2004	<i>United States - Investigation of the International Trade Commission in Softwood Lumber from Canada</i> (US - Softwood Lumber VI), Panel Report, adopted on 22 April 2004, WT/DS277/R	Northwest Ecosystem Alliance	R

Annex I: Cases with amicus curiae involvement

2005	<i>European Communities - Export Subsidies on Sugar</i> (EC - Sugar), Panel Report, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R	Wirtschaftliche Vereinigung Zucker ("WVZ")	R
2006	<i>United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)</i> (US - Zeroing), Panel Report, adopted on 9 May 2006, WT/DS294/R	Committee to Support US Trade Laws ("CSUSTL")	R
2006	<i>European Communities - Selected Customs Matters</i> (EC - Selected Customs Matters), Panel Report, adopted on 11 December 2006, WT/DS315/R	Undisclosed <i>amicus curiae</i>	R
2006	<i>European Communities - Measures Affecting the Approval and Marketing of Biotech Products</i> (EC - Biotech), Panel Report, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R	Lawrence Busch (Michigan State University), Robin Grove-White (Lancaster University), Sheila Jasanoff (Harvard University), David Winnickoff (Harvard University) and Brian Wynne (Lancaster University) Gene Watch, Foundation for International Environmental Law and Development (FIELD), Five Year Freeze, Royal Society for the Protection of Birds (RSPB)(UK), the Center for Food Safety (USA), Council of Canadians, Polaris Institute (Canada), Grupo de Reflexión, Rural Argentina, Center for Human Rights and the Environment (CEDHA) (Argentina), Gene Campaign, Forum for Biotechnology and Food Security (India), Fundación Sociedades Sustentables (Chile), Greenpeace International (The Netherlands), Californians for GE-Free Agriculture, International Forum on Globalisation Center for International Environmental Law (CIEL), Friends of the Earth – United States (FOE-US), Defenders of Wildlife, the Institute for Agriculture and Trade Policy (IATP), and the Organic Consumers Association (OCA)	A (NC)  A (NC)

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2007	<i>Brazil - Measures Affecting Imports of Retreaded Tyres</i> (Brazil - Retreaded Tyres), Panel Report, adopted on 17 December 2007, WT/DS332/R	Humane Society International Association of Combats against POPs, Association for the Protection of the Environment Cianorte, Center for Human Rights and Environment, Conectas Human Rights, Global Justice, Law for a Green Planet Institute, Center for International Environmental Law (CIEL)	An An
2008	<i>European Communities - Anti-Dumping Measure on Farmed Salmon from Norway</i> (EC - Salmon), Panel Report, adopted on 15 January 2008, WT/DS337/R	3 submissions from Dr. Martin Jaffa of Callander McDowell, a UK consulting group involved in "Strategic Planning and Marketing for the Acquaculture Industry".	An
2010	<i>Australia - Measures Affecting the Importation of Apples from New Zealand</i> (Australia - Apples), Panel Report, adopted on 17 December 2010, WT/DS367/R	Apple and Pear Australia Ltd. [NGO]	A
2011	<i>Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines</i> (Thailand - Cigarettes), Panel Report, adopted on 15 July 2011, WT/DS371/R	Undisclosed private entity	R (An)
2011	<i>European Communities - Measures Affecting Trade in Large Civil Aircraft</i> (EC and certain member States - Large Civil Aircraft), Panel Report, adopted on 1 June 2011, WT/DS316/R	Unidentified individual	R
2012	<i>United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> (US - Tuna II (Mexico)), Panel Report, adopted on 13 June 2012, WT/DS381/R	Humane Society International and the American University, Washington College of Law	A/An
2012	<i>United States - Certain Country of Origin Labelling (COOL) Requirements</i> (US - COOL), Panel Report, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R	Unspecified amicus curiae	An

Annex I: Cases with amicus curiae involvement

2013	<p><i>Canada - Certain Measures Affecting the Renewable Energy Generation Sector</i> (Canada - Renewable Energy), Panel Report, adopted on 24 May 2013, WT/DS412/R, WT/DS426/R</p>	<p>Blue Green Canada, the Canadian Auto Workers, the Communications, Energy and Paperworkers Union of Canada, the Canadian Federation of Students, the Council of Canadians, the Canadian Union of Employees, and the Ontario Public Service Employees Union International Institute for Sustainable Development, Canadian Environmental Law Association, and Ecojustice Canada R (An) Dr. Luca Rubini</p>	R (An)  R (An)
2014	<p><i>European Communities - Measures Prohibiting the Importation and Marketing of Seal Products</i> (EC - Seal Products), Panel Report, adopted on 18 June 2014, WT/DS400/R and WT/DS401/R</p>	<p>Anima, Animal Right Action Network, Animalia, Bont Voor Dieren, Change for Animals Foundation, Compassion in World Farming, Djurens Rätt, Eurogroup for Animals, Fondation Brigitte Bardot, Fondation Franz Weber, Four Paws, Global Action in the Interest of Animals, Human Society of the United States/ Humane Society International, International Fund for Animal Welfare, Lega Anti Vivisezione, Prijateljji Životinja, Respect for Animals, Royal Society for the Protection of Animals, Svoboda Zvířat, World Society for the Protection of Animals Professor Robert Howse, Joanna Langille, and Katie Sykes Pamela Anderson on behalf of People for Ethical Treatment of Animals (PETA) International Fur Trade Federation Jude Law</p>	An       R (An) R (An)  R (An) R (An)

## Appellate Body

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
1998	<i>United States - Import Prohibition of Certain Shrimp and Shrimp Products</i> (US - Shrimp), Appellate Body Report, adopted on 6 November 1998, WT/DS58/AB/R	The Earth Island Institute, the Humane Society of the United States and the Sierra Club  Center for International Environmental Law (CIEL), the Centre for Marine Conservation, the Environmental Foundation Ltd., the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Accion Ecologica, and Sobrevivencia  The Worldwide Fund for Nature and the Foundation for International Environmental Law and Development	R  An  R
2000	<i>United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> (US - Lead and Bismuth II), Appellate Body Report, adopted on 7 June 2000, WT/DS138/AB/R	American Iron and Steel Institute  The Specialty Steel Industry of North America	A (NC) A (NC)
2001	<i>Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland</i> (Thailand - H-Beams), Appellate Body Report, adopted on 5 April 2001, WT/DS122/AB/R	Consuming Industries Trade Action Coalition ("CITAC"), a coalition of United States companies and trade Associations	R
2001	<i>European Communities - Measures Affecting Asbestos and Products Containing Asbestos</i> (EC - Asbestos), Appellate Body Report, adopted on 5 April 2001, WT/DS135/AB/R	Asbestos Information Association (United States) HVL Asbestos (Swaziland) Limited (Bulembu Mine) South African Asbestos Producers Advisory Committee (South Africa) J & S Bridle Associates (United Kingdom) Associação das Indústrias de Produtos de Amianto Crisótilo (Portugal)	R R R  R R

*Annex I: Cases with amicus curiae involvement*

R	Asbestos Cement Industries Limited (Sri Lanka)
R	The Federation of Thai Industries, and Roofing and Accessories Club (Thailand)
R	Korea Asbestos Association (Korea)
R	Senac (Senegal)
R	Syndicat des Métallos (Canada)
R	Duralita de Centroamerica, S.A. de C.V. (El Salvador) Asociación Colombiana de Fibras (Colombia)
R	Japan Asbestos Association (Japan)
R	Association of Personal Injury Lawyers (United Kingdom)
R	All India A.C. Pressure Pipe Manufacturer's Association (India)
R	International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium)
R	Maharashtra Asbestos Cement Pipe Manufacturers' Association (India)
R	Roofit Industries Ltd. (India)
R	Society for Occupational and Environmental Health (United States)
R	Professor Robert Lloyd Howse (United States)
R	Occupational & Environmental Diseases Association (United Kingdom)
R	American Public Health Association (United States)
R	Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina)
R	Only Nature Endures (India)
R	R Korea Asbestos Association (Korea)
R	International Council on Metals and the Environment and American Chemistry Council (United States)

Annex I: Cases with amicus curiae involvement

		European Chemical Industry Council (Belgium) Australian Centre for Environmental Law at the Australian National University (Australia) Associate Professor Jan McDonald and Mr. Don Anton (Australia) Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and VirtualNetwork (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International(Switzerland), and Lutheran World Federation (Switzerland)	R R R R
2002	<i>European Communities - Trade Description of Sardines</i> (EC - Sardines), Appellate Body Report, adopted on 23 October 2002, WT/DS231/AB/R	Kingdom of Morocco Undisclosed private individual	A A (NC)
2003	<i>United States - Countervailing Measures Concerning Certain Products from the European Communities</i> (US - Countervailing Measures on Certain EC Products), Appellate Body Report, adopted on 8 January 2003, WT/DS212/AB/R	Andrew G. Sharkey III, American Iron and Steel Institute President & CEO	R
2003	<i>United States - Definitive Safeguard Measures on Imports of Certain Steel Products</i> (US - Steel Safeguards), Appellate Body Report, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R	American Institute for International Steel	R
2004	<i>United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada</i> (US - Softwood Lumber IV), Appellate Body Report, adopted on 17 February 2004, WT/DS257/AB/R	Indigenous Network on Economies and Trade (Canada) Defenders of Wildlife, Natural Resources Defense Council and Northwest Ecosystem Alliance (all United States)	R

Annex I: Cases with amicus curiae involvement

2005	<i>European Communities - Export Subsidies on Sugar</i> (EC - Sugar), Appellate Body Report, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R	Association of Central American Sugar Industries (Azucareros del Istmo Centroamericano (AICA)	R
2005	<i>European Communities - Customs Classification of Frozen Boneless Chicken Cuts</i> (EC - Chicken Cuts), Appellate Body Report, adopted on 27 September 2005, WT/DS269/AB/R, WT/DS286/AB/R	Association of Poultry Processors and Poultry Trade in the European Union Countries (avec)	R
2006	<i>Mexico - Tax Measures on Soft Drinks and Other Beverages</i> (Mexico - Taxes on Soft Drinks), Appellate Body Report, adopted on 24 March 2006, WT/DS308/AB/R	Cámara Nacional de las Industrias Azucarera y Alcohólica (National Chamber of the Sugar and Alcohol Industries), Mexico	R
2007	<i>Brazil - Measures Affecting Imports of Retreaded Tyres</i> (Brazil - Retreaded Tyres), Appellate Body Report, adopted on 17 December 2007, WT/DS332/AB/R	Humane Society International Associação de Combate aos Poluentes (ACPO), Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Centro de Derechos Humanos y Ambiente (CEDHA), Center for International Environmental Law (CIEL), Conectas Direitos Humanos, Friends of the Earth Europe, Forum on Environment and Development, Justiça Global, and Instituto O Direito por Um Planeta Verde	R R
2009	<i>China - Measures Affecting Imports of Automobile Parts</i> (China - Auto Parts), Appellate Body Report, adopted on 12 January 2009, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R	One submission from an unidentified <i>amicus curiae</i>	R
2011	<i>United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> (US - Anti-Dumping and Countervailing Duties), Appellate Body Report, adopted on 25 March 2011, WT/DS379/AB/R	One submission from an unidentified <i>amicus curiae</i>	R

Annex I: Cases with amicus curiae involvement

2012	<i>United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> (US - Tuna II), Appellate Body Report, adopted on 13 June 2012, WT/DS381/AB/R	The Humane Society of the United States/Humane Society International and Washington College of Law (WCL) ASTM International (formerly the American Society for Testing and Materials) Professor Robert Howse	R R R
2012	<i>United States - Measures Affecting the Production and Sale of Clove Cigarettes</i> (US - Clove Cigarettes), Appellate Body Report, adopted on 24 April 2012, WT/DS406/AB/R	The Campaign for Tobacco-Free Kids, the American Academy of Pediatrics, the American Cancer Society, the American Cancer Society Cancer Action Network, the American Lung Association, the American Medical Association, and the American Public Health Association The O'Neill Institute for National and Global Health Law at the Georgetown University Law Center	R R
2013	<i>Canada - Certain Measures Affecting the Renewable Energy Generation Sector</i> (Canada - Renewable Energy), Appellate Body Report, adopted on 24 May 2013, WT/DS412/AB/R, WT/DS426/AB/R	Mesa Power (Appleton & Associates International Lawyers, Joanna Langille and Professor Robert Howse) Professor Robert Howse, Joanna Langille, Katie Sykes Professor Luca Rubini	R R R
2014	<i>European Communities — Measures Prohibiting the Importation and Marketing of Seal Products</i> (EC – Seal Products), Appellate Body Report, adopted on 18 June 2014, WT/DS400/AB/R and WT/DS401/AB/R	Group of animal welfare organizations, including Anima, Animal Rights Action Network, Asociación Nacional para la Defensa de los Animales, Bont Voot Dieren, Compassion in World Farming, Djurens Rätt, Eurogroup for Animals, Fondation Brigitte Bardot, Fondation Franz Weber, Four Paws, GAIA, Humane Society of the United States/Humane Society International, International Fund for Animal Welfare, Lega Anti Vivisezione, Prijatelj životinja, Respect for Animals, Royal Society for the Prevention of Cruelty to Animals, Svoboda zvířat, and World Society for the Protection of Animals International Fur Federation Professor Robert Howse, Joanna Langille and Professor Katie Sykes	A (NC) R A (NC) R

Annex I: Cases with amicus curiae involvement

2015	<p><i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21(5) of the DSU by Mexico (US - Tuna II (Article 21(5))), Appellate Body Report, adopted on 3 December 2015, WT/DS381/AB/RW</i></p>	<p>Professor Robert Howse</p>	A (NC)
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## Investment treaty arbitration

Year	Case	<i>Amicus curiae</i> [State/NGO/IO/Ind]	A/R// An
2005	<i>Methanex Corporation v. United States of America</i> , UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 <i>See esp. Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae'</i> , 15 January 2001	The International Institute for Sustainable Development, Communities for a Better Environment and the Earth Island Institute (2001) The International Institute for Sustainable Development, Bluewater Network, Communities for a Better Environment and the Center for International Law (2004) The International Institute for Sustainable Development (2004) Earthjustice on behalf of Bluewater Network, Communities for a Better Environment and Center for International Environmental Law	A R A A
2006	<i>Agua del Tunari, SA v. Republic of Bolivia</i> , ICSID Case No. ARB/02/3, Order taking note of the discontinuance pursuant to ICSID Arbitration Rule 44, 28 March 2006 <i>See esp. Letter from the President of the Tribunal</i> , 29 January 2003	La Coordinadora para la Defensa del Agua y la Vida, la Federación Departamental Cochabambina de Organizaciones Regantes, Sema-pa Sur, Friends of the Earth-Netherlands, Mr. Oscar Olivera, Mr. Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado	R
2007	<i>United Parcel Service of America Inc. v. Canada</i> , UNCITRAL (NAFTA), Award on the Merits, 24 May 2007 <i>See esp. Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae</i> , 17 October 2001	Council of Canadians and Canadian Union of Postal Workers (merits) Chamber of Commerce of the United States of America Council of Canadians and Canadian Union of Postal Workers (jurisdiction) European Commission	A A R I
2007	<i>Eastern Sugar B.V. v. The Czech Republic</i> , SCC Case No. 088/2004, Partial Award, 27 March 2007	European Commission	I

Annex I: Cases with *amicus curiae* involvement

2008	<p><i>Bewater Gauff (Tanzania) Ltd. v. United Republic of Tanzania</i>, ICSID Case No. ARB/05/22, Award, 24 July 2008</p> <p>See esp. <i>Procedural Order No. 5</i>, 2 February 2007</p>	<p>The Lawyers' Environmental Action Team (LEA T), the Legal and Human Rights Centre (LHRC), the Tanzania Gender Networking Programme (TGNP), the Center for International Environmental Law (CIEL), and the International Institute for Sustainable Development (IISD)</p>	A
2009	<p><i>Glamis Gold Limited v. United States of America</i>, UNCITRAL (NAFTA), Award, 8 June 2009</p> <p>See esp. <i>Decision on application and submission by Quechuan Indian</i>, 16 September 2005</p>	<p>Quechuan Indian Nation National Mining Association Earthworks and Sierra Club Friends of the Earth</p>	A A A A
2009	<p><i>Grand River Enterprises Six Nations Ltd. et. al. v. United States of America</i>, UNCITRAL (NAFTA), Award, 12 January 2011</p> <p>See esp. <i>Letter from the Tribunal to the Parties</i>, 27 January 2009</p>	<p>Mr. Phil Fontaine, National Chief of the Assembly of First Nations</p>	An
2010	<p><i>Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic</i>, ICSID Case No. ARB/03/19 (formerly <i>Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal v. Argentine Republic</i>), Decision on Liability, 30 July 2010</p> <p>See esp. <i>Order in Response to a Petition for Participation as Amicus Curiae</i>, 19 May 2005</p> <p>See esp. <i>Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an Amicus Curiae Submission</i>, 12 February 2007</p>	<p>Asociación Civil por la Igualdad y la Justicia, Centro de Estudios Legales y Sociales, Center for International Environmental Law, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores [all NGOs]</p>	A

Annex I: Cases with amicus curiae involvement

2010	<i>Suez, Sociedad General de Aguas de Barcelona S.A., and Inter-Aguas Servicios Integrales v. Argentine Republic</i> , ICSID Case No. ARB/03/17, (formerly <i>Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., and Inter-Aguas Servicios Integrales del Aguas, S.A.</i> ), Decision on Liability, 30 July 2010 <i>See esp. Order in Response to a Petition for Participation as Amicus Curiae</i> , 17 March 2006	Fundación para el Desarrollo Sustentable, based in Rosario in the Province of Santa Fe, and three individuals	A (NF)
2010	<i>Piero Foresti and Others v. Republic of South Africa</i> , ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010 <i>See esp. Letter from ICSID regarding non-disputing parties</i> , 5 October 2009	The Centre for Applied Legal Studies, the Center for International Environment Law, the International Centre for the Legal Protection of Human Rights, and the Legal Resources Centre The International Commission of Jurists	A A
2010	<i>AES Summit Generation Limited and AES-Tisza Erőmű Kft. (UK) v. Republic of Hungary</i> , ICSID Case No. ARB/07/22, Award, 23 September 2010	European Commission	A
2010	<i>Achmea B.V. v. the Slovak Republic</i> , (formerly: <i>Eureko B.V. v. The Slovak Republic</i> ), PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010	European Commission The Netherlands	I I
2010	<i>Merrill and Ring Forestry LP v. Canada</i> , UNCITRAL (NAFTA), Award, 31 March 2010	Communications, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour	A
2012	<i>European American Investment Bank AG (Austria) v. the Slovak Republic</i> , PCA Case No. 2010-17 <i>See esp. Award on Jurisdiction</i> , 22 October 2012	European Commission The Republic of Austria The Czech Republic	I I I

Annex I: Cases with amicus curiae involvement

2013	<p><i>Ioan Micula, Viorel Micula and others v. Romania</i> (hereinafter: <i>Micula v. Romania</i>), Award, 11 December 2013, ICSID Arb. No. ARB/05/20</p> <p>See esp. <i>Decision on the Application of a Non-Disputing Party to File a Written Submission</i>, 15 May 2009</p> <p>See esp. <i>Decision on Application to Intervene as a Non-Disputing Party</i>, 3 December 2014</p>	European Commission	A
2013	<p><i>Apotex Inc. v. United States of America</i>, UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility, 14 June 2013</p> <p>See esp. <i>Procedural Order No. 2 on the participation of a non-disputing party</i>, 11 October 2011</p>	The Study Center for Sustainable Finance of the Business Neatness Magnanimity BNM srl	R
2013	<p><i>Iberdrola Energia S.A. v. Republic of Guatemala</i>, ICSID Case No. ARB/09/5</p> <p>See esp. <i>Decision of the Ad-Hoc Committee on Non-Disputing Party's Application to File a Written Submission</i>, 12 February 2014 (not public)</p>	Spain-U.S. Chamber of Commerce European Commission	R R
2014	<p><i>Apotex Holdings Inc. and Apotex Inc. v. United States of America</i>, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014</p> <p>See esp. <i>Invitation to Amici Curiae</i>, ICSID News Release, 31 January 2013</p> <p>See esp. <i>Procedural Order on the Participation of the Applicant, BNM, as a non-disputing Party</i>, 4 March 2013</p> <p>See esp. <i>Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party</i>, 4 March 2013</p>	The Study Center for Sustainable Finance of the Business Neatness Magnanimity BNM srl Mr. Barry Appleton, lawyer	R R
2014	<p><i>US Steel Global Holdings I B.V. v. the Slovak Republic</i>, PCA Case No. 2013-6 (discontinued by agreement on 13 June 2014)</p>	European Commission	A

Annex I: Cases with amicus curiae involvement

2014	<p><i>Caratube International Oil Company LLP v. Republic of Kazakhstan</i>, ICSID Case No. ARB/08/12  <i>See esp. Decision on the Non-Disputing Party's Application to File a Written Submission</i>, 12 February 2014  <i>See esp. Decision of the Annulment Application of Caratube International Oil Company LLP</i>, 21 February 2014</p>	U	U
2014	<p><i>EDF International S.A. v. Republic of Hungary</i>  <i>See esp. Award of 4 December 2014</i></p>	A	European Commission
2015	<p><i>Electrabel SA v. Republic of Hungary</i>, ICSID Case No. ARB/07/19  <i>See esp. Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission</i>, 28 April 2009  <i>See esp. Decision on Jurisdiction, Applicable Law and Liability</i>, 30 November 2012</p>	A	European Commission
2015	<p><i>Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited and Others v. Zimbabwe (joined)</i>, ICSID Cases No. ARB/10/15 and No. ARB/10/25  <i>See esp. Procedural Order No. 2</i>, 26 June 2012  <i>See esp. Award</i>, 28 July 2015</p>	R	The European Center for Constitutional and Human Rights and four indigenous communities of Zimbabwe
2016	<p><i>Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain</i>, SCC Arbitration No. 062/2012  <i>See esp. Final Award</i>, 21 January 2016</p>	R	European Commission

Annex I: Cases with amicus curiae involvement

2016	<p><i>Pac Rim Cayman LLC. v. Republic of El Salvador</i>, ICSID Case No. ARB/09/12  <i>See esp. ICSID New Release</i>, 2 February 2011  <i>See esp. Procedural Order No. 8</i>, 23 March 2011  <i>See esp. Decision on the Respondent's Jurisdictional Objections</i>, 1 June 2012  <i>See esp. Submission of amicus curiae brief by CIEL et. al on the merits</i>, 25 July 2014  <i>See esp. Award</i>, 14 October 2016</p>	<p>Eight member organizations of La Mesa Frente a la Minería Metálica de El Salvador (The El Salvador National Roundtable on Mining), Centre for International Environmental Law ("CIEL"), Mr. Aaron Marr Page of Forum Nobis PLLC and Mr. Stuart G. Gross of Gross Law</p>	A
2016	<p><i>Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay</i> (formerly: FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), ICSID Case No. ARB/10/7  <i>See esp. Procedural Order No. 3</i>, 17 February 2015  <i>See esp. Procedural Order No. 4</i>, 24 March 2015  <i>See esp. Award</i>, 8 July 2016</p>	<p>World Health Organization and World Framework Convention on Tobacco Control Secretariat  Pan American Health Organization  Avaaz Foundation  Inter-American Association of Intellectual Property/Asociación Interamericana de la Propiedad Intelectual</p>	A A R R
Pend.	<p><i>Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. the Republic of Ecuador</i>, UNCITRAL, PCA CASE N° 2009-23, First Partial Award on Track I, 17 September 2013  <i>See esp. Procedural Order No. 8</i>, 18 April 2011  <i>See esp. Letter to Amici Curiae from Permanent Court of Arbitration</i>, 26 April 2011  <i>See esp. Procedural Order No. 45</i>, 29 August 2016</p>	<p>Fundación Pachamama (Pachamama) and the International Institute for Sustainable Development (IISD)  EarthRights International</p>	R R

Annex I: Cases with amicus curiae involvement

Pend.	<p><i>Infinito Gold Ltd. v. Costa Rica</i>, ICSID Case No. ARB/14/5  <i>See esp. Petition for amicus curiae status, 15 September 2014</i>  <i>See esp. Confirmation of Receipt of Petition for Amicus Curiae Status, 16 September 2014</i>  <i>See esp. Procedural Order No. 2, 1 June 2016</i></p>	A Asociación Preservacionista de Flora y Fauna Silvestre	
Pend.	<p><i>RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain</i>, ICSID Case No. ARB/13/30  <i>See esp. Procedural Order No. 2 on non-disputing party's application to file a written submission pursuant to ICSID Rules 37(2), 5 February 2015</i>  <i>See esp. Procedural Order No. 7, 14 January 2016</i></p>	<p>European Commission (2014)          European Commission (2015)</p>	R R
Pend.	<p><i>Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain</i>, ICSID Case No. ARB/13/36  <i>See esp. Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 17 December 2014</i>  <i>See esp. Procedural Order No. 7, 21 December 2015</i>  <i>See esp. Procedural Order No. 8, 8 January 2016</i></p>	European Commission	R U

Annex I: Cases with amicus curiae involvement

Pend.	<p><i>Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain</i>, ICSID Case No. ARB/13/31</p> <p>See esp. Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 15 December 2014</p> <p>See esp. Second Decision on the Application to Intervene as a Non-Disputing Party, 5 February 2016</p> <p>See esp. Decision on the Non-Disputing Party Request for Re-consideration of the Tribunal's Decision of February 5, 2016, 26 February 2016</p>	<p>European Commission (2014)</p> <p>European Commission (2016)</p>	R R
Pend.	<p><i>REENERGY S.à.r.l. v. Spain</i>, ICSID Case No. ARB/14/18</p> <p>See esp. Procedural Order No. 2, 10 July 2015</p> <p>See esp. Procedural Order No. 5, 17 February 2016</p>	<p>European Commission</p>	U
Pend.	<p><i>Masdar Solar &amp; Wind Cooperatief U.A. v. Kingdom of Spain</i>, ICSID Case No. ARB/14/1</p> <p>See esp. Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 9 January 2015</p> <p>See esp. Tribunal admits on the record the non-disputing party's written submissions pursuant to ICSID Arbitration Rule 37(2), 25 March 2015</p>	<p>European Commission</p>	A
Pend.	<p><i>NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain</i>, ICSID Case No. ARB/14/11</p>	<p>European Commission</p>	U

Annex I: Cases with amicus curiae involvement

Pend.	<i>InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain</i> , ICSID Case No. ARB/14/12 <i>See esp. Procedural Order No. 2 concerning the non-disputing party's application, 9 February 2015</i>	European Commission	U
Pend.	<i>Bear Creek Mining Corporation v. Republic of Peru</i> , ICSID Case No. ARB/14/21 <i>See esp. Procedural Order No. 1, 27 January 2015</i> <i>See esp. Request for leave to file a brief of amicus curiae as a third non-disputing party, 9 June 2016</i> <i>See esp. Procedural Order No. 5 Regarding the Association of Human Rights and Environment of Puno, Peru ("DHUMA")</i> , and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists Application to File a Written Submission, 21 July 2016 <i>See esp. Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment ("CCSI") to File a Written Submission, 21 July 2016</i> <i>See esp. Bear Creek's Reply to the Amicus Curiae Submission of DHUMA and Dr. Lopez, 18 August 2016</i> <i>See esp. Respondent's Comments to the Third Party Submission from the Asociación de Derechos Humanos y Medio Ambiente – Puno, 18 August 2016</i>	Human Rights and Environment (DHUMA) and Dr. Carlos Lopez Hurtado	A
Pend.	<i>Eli Lilly and Company and Government of Canada</i> , Case No. UNCT/14/2 <i>See esp. Procedural Order No. 1, 26 May 2014</i> <i>See esp. Claimant's Comments on Applications for Leave to File Amicus Submissions, 19 February 2016</i> <i>See esp. Respondent's Comments on Applications for Leave to File Amicus Submissions, 19 February 2016</i>	A group of academics from the US, UK, Switzerland, South Africa and Nepal Canadian Chamber of Commerce Canadian Generic Pharmaceutical Association Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") and the Centre for Intellectual Property Policy ("CIPP")	A/R A A A

Annex I: Cases with amicus curiae involvement

	<p><i>See esp. Procedural Order No. 4, 23 February 2016</i>  <i>See esp. Claimant's Comments on NAFTA Article 1128 Submissions and Non-Disputing Party (Amicus) Submissions, 22 April 2016</i>  <i>See esp. Government of Canada Observations on Issues Raised in Amicus Submissions, 22 April 2016</i>  <i>See esp. Procedural Order No. 6, 27 May 2016</i></p>	<p>Dr. Henning Grosse-Khan, Dr. Kathleen Liddell, and Dr. Michael Waibel of the University of Cambridge                  Innovative Medicines Canada ("IMC") and BIOTECCanada ("BTC")                  Seven Intellectual Property Law Professors from Universities in the United States                  National Association of Manufacturers ("NAM")                  Pharmaceutical Research and Manufacturers of America ("PhRMA"), Mexican Association of the Research Based Pharmaceutical Industry ("AMIIF"), and Biotechnology Innovation Organization ("BIO")</p>	<p>R                  R                  A                  A                  R</p>
Pend.	<p><i>Renco Group, Inc. v. Republic of Peru, UNCT/13/1 Procedural Order No. 1, 22 August 2013</i></p>	<p>U</p>	<p>U</p>
Pend.	<p><i>Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12</i>  <i>See esp. Procedural Order No. 13, 7 August 2015</i></p>	<p>U</p>	<p>U</p>
Pend.	<p><i>BayWa r.e. renewable energy GmbH and BayWa Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16</i>  <i>See esp. Procedural Order No. 2, 23 May 2016</i></p>	<p>U</p>	<p>U</p>
Pend.	<p><i>Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23</i>  <i>See esp. Decision on the Non-Disputing Party's Application to File a Written Submission, 13 May 2016</i></p>	<p>U</p>	<p>U</p>
Pend.	<p><i>KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/25</i>  <i>See esp. Procedural Order No. 2, 15 April 2016</i></p>	<p>U</p>	<p>U</p>

Annex I: Cases with amicus curiae involvement

Pend.	<i>Cavalum SGPS, S.A. v. Kingdom of Spain</i> , ICSID Case No. ARB/15/34 <i>See esp. Procedural Order No. 2, 20 May 2016</i>	U		U
Pend.	<i>Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. The Czech Republic</i> , PCA Case No. 2014-01	European Commission		U
Pend.	<i>Natland Investment Group NV, Natland Group Limited, G.L.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. Czech Republic</i> , UNCITRAL <i>ad hoc</i>	European Commission		U
Pend.	<i>I.C.W. Europe Investments Ltd. v. Czech Republic</i>	European Commission		U
Pend.	<i>Voltaic Network GmbH v. Czech Republic</i>	European Commission		U
Pend.	<i>Photovoltaik Knopf Betriebs-GmbH v. Czech Republic</i>	European Commission		U
Pend.	<i>WA Investments-Europa Nova Limited v. Czech Republic</i>	European Commission		U
Pend.	<i>Isolux Infrastructure Netherlands B.V. v. Spain</i>	European Commission		U
Pend.	<i>World Wide Minerals v. Republic of Kazakhstan</i> , UNCITRAL Case	Government of Canada		A



## Annex II

### *Statement of the NAFTA Free Trade Commission on non-disputing party participation, 7 October 2003*

#### **A. Non-disputing party participation**

1. No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party (a “non-disputing party”).
2. Nothing in this statement by the Free Trade Commission (“the FTC”) prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.
3. Considering that written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation of the Chapter, and in the interests of fairness and the orderly conduct of arbitrations under Chapter 11, the FTC recommends that Chapter 11 Tribunals adopt the following procedures with respect to such submissions.

#### **B. Procedures**

1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the “applicant”) will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.
2. The application for leave to file a non-disputing party submission will:
  - (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
  - (b) be no longer than 5 typed pages;
  - (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
  - (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
  - (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
  - (f) specify the nature of the interest that the applicant has in the arbitration;
  - (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
  - (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and
  - (i) be made in a language of the arbitration.

*Annex II*

3. The submission filed by a non-disputing party will:
  - (a) be dated and signed by the person filing the submission;
  - (b) be concise, and in no case longer than 20 typed pages, including any appendices;
  - (c) set out a precise statement supporting the applicant's position on the issues; and
  - (d) only address matters within the scope of the dispute.
4. The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.
5. The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.
6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:
  - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
  - (b) the non-disputing party submission would address matters within the scope of the dispute;
  - (c) the non-disputing party has a significant interest in the arbitration; and
  - (d) there is a public interest in the subject-matter of the arbitration.
7. The Tribunal will ensure that:
  - (a) any non-disputing party submission avoids disrupting the proceedings; and
  - (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.
9. 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.
10. Access to documents by non-disputing parties that file applications under these procedures will be governed by the FTC's Note of July 31, 2001.

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