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Tracking the Origins and Testing the Fairness of the Instruments of Fairness: Amici Curiae in International Litigation

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TRACKING THE ORIGINS AND TESTING THE FAIRNESS OF THE INSTRUMENT OF FAIRNESS: AMICI CURIAE IN INTERNATIONAL LITIGATION

By Luigi Crema[*]

Abstract

The trail of breadcrumbs through the paper

The widespread possibility to submit amicus curiae briefs in international courts and tribunals is a recent phenomenon. The first purpose of this paper is to verify the alleged Roman origins of amicus curiae, and to trace the emergence of its use in international law. The second and primary purpose of the paper is to assess the fairness of the new procedures, by considering the rules and the case law of several jurisdictions, and evaluating them according to procedural criteria. A set of questions that has been considered deals with the idea of public participation: clarity of the procedures, equality of the treatment of all the interested entities; conditions and reasons for accepting or refusing the proposed amici; emergence in the final decision of the amici submissions, etc. The other set of questions deals with the rights and interests of the parties to the dispute, including the interest in efficient proceedings.

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Summary

Introduction

In the 2010 and 2011 proceedings of the advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) received a joint brief from the Stitching Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature.[1] The rules regulating the procedure of the ITLOS and of the Chamber are clear in prohibiting the submission of briefs by private entities during advisory proceedings. Their observations were not attached to the official record; nevertheless, during the hearings the amici made an oral statement for the press in a special room of the Tribunal of Hamburg, the brief was published on the ITLOS website, and placed at the disposition of the Judges and of anyone interested.[2]

This is one of several signs of the keen interest and active efforts of non-state actors to participate in international litigation through the submission of a brief, and of a certain degree of benevolence towards them coming from international courts and tribunals. In the last decades, since the *US — Standards for Reformulated and Conventional Gasoline* dispute at the World Trade Organization (WTO),[3] the issue came out in many jurisdictions. States have reacted in different ways, with approval or disapproval, with formal amendments of existent procedures, as in the case of the

[1] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, 1 February 2011, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea*.

[2] Articles 84 and 133 of the ITLOS Rules permit only States and international organizations to participate as amici curiae in contentious cases before the Tribunal and the Seabed Disputes Chamber, see PHILIPPE GAUTIER, *NGOs and law of the sea disputes*, in TULLIO TREVES ET AL. (eds), *Civil society, international courts and compliance bodies*, T.M.C. Asser, The Hague, 2005, pp. 233-242. All relevant material on the opinion is published on the ITLOS website at http://www.itlos.org/index.php?id=109, last access 26 February 2012. A comment on this event has been drafted by the President of the Seabed Disputes Chamber himself, TULLIO TREVES, *Non-Governmental Organizations before the International Tribunal for the Law of the Sea: The Advisory Opinion of 1 February 2011*, manuscript to be published in the *Studies for the 90th Birthday of Boutros Boutros Ghali*.

[3] *United States - Standards for Reformulated and Conventional Gasoline, Report of the Panel, 29 January 1996*, WT/DS2/R, as mentioned by PADIDEH ALA'I, *Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience*, 24 Fordham Int'l L. J. 62 2000, at 68.

Arbitration Rules of the International Center for Settlement of Investment Disputes (ICSID), or with a resistance to these changes, as in the case of the WTO. It seems a recent wave, but, looking at the past, requests of this sort were not completely new for international law: already by the second post-war period a couple of attempts by non-governmental organizations (NGOs) were made (and then denied) before the ICJ. However, it was around the turn of the millennium that the pressure coming from non-governmental organizations to participate raised again, and this time was granted.[4]

The shape assumed by these instruments is many-sided. According to the jurisdiction, certain subjects rather than others are allowed to submit a brief, on certain requests rather than others, following certain steps rather than others. There is not an official definition in international law for describing this way of participating in a proceeding – there are many jurisdictions in international law, and not a unique code of procedure.[5] The rules of procedure and the decisions of international courts and tribunals refer to "non-disputing parties", "third interested parties", or "amici curiae". This paper looks at the different phenomena at the same time, as expression of a unique

[4] See below sect. 1.3.

[5] International practice gave several similar definitions of *amici curiae*. For example: "[A] non party to the dispute, as 'a friend', offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission", *Aguas Argentina S.A. and Others v. Argentina, Petition for Transparency and Participation as Amicus Curiae*, ICSID Case No. ARB/03/19, *19 May 2005*, para. 8; "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 fora 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. The traditional role of an amicus curiae in an adversary proceeding is 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. In short, a request to act as amicus curiae is an offer of assistance – an offer that the decision maker is free to accept or reject. An amicus curiae is a volunteer, a friend of the court, not a party", *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, *Order in Response to a Petition for Participation as* Amicus Curiae, *17 March 2006*, para. 13. The IACtHRs Rules of the Court (2009) at Art. 2.3 says: "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." See also DINAH SHELTON, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, in *AJIL*, 1994, p. 611: "Amici, with permission, suggest to a court matters of fact and law within their knowledge"; LANCE BARTHOLOMEUSZ, *The* Amicus Curiae *before International Courts and Tribunals*, in *Non-State Actors and International Law*, 5, 2005, pp. 209-286, at 211; PHILIPPE SANDS, RUTH MACKENZIE, *International Courts and Tribunals*, Amicus Curiae, in *MP-EPIL*, online version, last update 2008, para. 1.

movement.[6] Therefore, giving a broad definition, the expressions *amicus curiae* and *non-disputing party* will be used to refer in general to *any entity* (included states, international organizations and private entities) interested in a trial *but not party to it*, that submits an *unsolicited* written brief or makes an oral statement on a point of *law*, *fact*, or *value* before an international court or tribunal.

In looking at this movement, the introduction of amicus curiae in international adjudication raises three major strands of problems. The first regards the subjectivity of non-state actors in international law and litigation: in an international law model conceived around the State the possibility for private entities to participate in international legal disputes raises several conceptual problems. This issue has received a great deal of attention from the literature dedicated to assessing the role of Non-Governmental Organizations (NGOs) in international law,[7] and this paper will not treat it at length.

The second and the third strands regard the appropriateness of these procedures. The rules regulating the procedures, and the decisions in which judges and arbitrators allowed the participation of amici in the absence of an explicit provision, justify the participation of amici curiae by referring to "the proper administration of justice" and to the power of the adjudicatory bodies to adjust their procedures to that purpose.[8] The

[6] Scholarship has mainly focused on each specific jurisdiction at the time. However, there are some exceptions: see, for example, the article written by LANCE BARTHOLOMEUSZ, *The* Amicus... above at fn 5.

[7] Among many, SHELTON, *The Participation...*, above at fn 5; MARCELLA DISTEFANO, *NGOs and the WTO Dispute Settlement Mechanism*, in TULLIO TREVES ET AL., *Civil Society, International Courts and Compliance Bodies*, T.M.C. Asser Press, The Hague, 2005, 261-270; LUISA VIERUCCI, *NGOs before International Courts and Tribunals*, in PIERRE-MARIE DUPUY, LUISA VIERUCCI (eds), *NGOs in International Law*, Elgar, Northampton MT, 2008, 155-180; ERIC DE BRABANDERE, *NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 Chi. J. Int'l L. 85 2011.

[8] Art. 36.2 of the ECHRs: "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". The Statement of the Free Trade Commission of NAFTA (ref. below at fn. 121) recommended to follow the procedure issued by the Commission in the "interests of fairness and the orderly conduct of arbitrations". Art. 15.1 of the UNCITRAL rules of arbitration: "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". This rule was used in the *Methanex* and in the *UPS* arbitrations under NAFTA Chapter 11 to admit amici participation. Art. 12 of the DSU of the WTO and at Art. 16.1 of the Working Procedures for Appellate Review of the WTO: "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

appropriateness of the new procedures can be put at test: as concerns the rules, testing the fairness of the procedures; as concerns international justice, reflecting on the policy issues arising in theory and in practice from the introduction of such a device into a system of adjudication in which it was not allowed. These two questions are strictly related. This paper starts from the first one, and aims at evaluating the fairness of the procedures. The test will be conducted looking at the rules of procedure and at the judicial practice of several courts and tribunals, in light of *i*) the idea of public participation, and *ii*) the rights and interests of the parties to the dispute (see the whole sect. 2). The other question, on amici curiae and the role and nature of international justice, will lie on the background and will not be addressed organically. However, certain issues arising from the judicial practice considered in the next pages give on this question new openings that will be briefly sketched in the *Final comments* to the *Conclusions* (see sect. 2.6).

Before addressing these points, in a sort of a long parentheses, a few paragraphs are dedicated to the alleged Roman origins of amicus curiae to investigate whether this attribution is grounded on solid bases or not.

1. Where did the amicus curiae originate?

1.1 Where it did not originate

a) An excursus on Roman law

Several papers and books recurrently refer to a Roman origin of amicus curiae.[9] *Roman law* is an expression that encompasses a very broad swath of time, embracing several centuries, and there are no official codes with a systematic restatement of Roman procedure.[10] Nonetheless, distinguished scholars of Roman law make clear that neither

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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"; cf. *EC – Asbestos* commented below at sect. 2.3.

[9] See *inter alia* CHARLES MOYER, *The Role of Amicus Curiae in the Inter-American Court of Human Rights*, in *La Corte-Interamericana de Derechos Humanos. Estudios y documentos*, 1986, p. 107; SHELTON, *The Participation...* above at fn. 5, p. 616; ALA'I, *Judicial...* above at fn 3, at 84; ERIC TEYNIER, *Procedure*, in IBRAHIM FADLALLAH I., CHARLES LEBEN, ERIC TEYNIER, *Investissements internationaux et arbitrage*, in *Trans'l Disp. Management*, 3-2, 2006, p. 1; PAUL M. COLLINS, *Friends of the Supreme Court*, OUP, Oxford etc., 2008, p. 38 ff.

[10] In general Roman law was very pragmatic, rather than systematic, as contemporary law tends to be. We do have some *editti* with extensive rules on procedure, but the same word *process*, from *procedere*, does

the expression *amicus curiae*, nor the possibility for a third person to come unrequested into a trial, was part of Roman private proceedings.[11]

Nevertheless, many doctrinal works on amici curiae refer to a direct Roman origin.[12] This is due probably to a chain of erroneous citations originating from the entry *Amicus Curiae* in the Rawlse's edition of the *Bouvier Law Dictionary*.[13] That volume tracks the origins of amicus curiae to English law, but also draws a bold parallel with the institution of the *consilium*.[14] However, none of the sources quoted by that law dictionary describes a third person intervening unrequested in a trial. Instead they describe the dynamic of advice – *consilium* – given by somebody involved, under invitation of the judge, in the decision-making phase.[15] In the *consilium* the judge appointed an officer of the Roman court to advise him on points on which he was in

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not come from classic Roman law, but from Canon law, cf. ARNALDO BISCARDI, *Lezioni sul processo romano antico e classico*, Giappichelli, Torino, 1968, p. 1.

[11] There is no mention of the expression *amici curiae* in GUIDO PADELLETTI, *Storia del diritto romano*, Firenze, 1878; GIOVANNI PUGLIESE, *Il processo civile romano*, Milano, 1966, 1 vol. (cf. especially at 259-278); BISCARDI, *Lezioni...* above at fn. 10; MAX KASER, KARL HAKL, *Das römische Zivilprozessrecht*, Munchen, 1997; CESARE SANFILIPPO, *Istituzioni di diritto romano*, 10th ed., Soveria Mannelli, 2002; LEANNE BABLITZ, *Actors and audience in the Roman Courtrooom*, Routledge, Florence-NY, 2007. This is not to say that the Roman public was absent from litigation: one of the places for the administration of justice was the *Forum*, were the case was discussed under the open sky, in front of the mob, involving also persons with relevant public roles, such as the *Tribuni*, ERIC KONDRATIEFF, *The Urban Praetor's Tribunal in the Roman Republic*, in FRANCESCO DE ANGELIS, *Spaces of Justice in the Roman World*, Brill, Leiden-Boston, 2010, p. 109, but the public, the "mob", was kept well distinct from the parties: *vanae voces populi non sunt audiendae* ("vain cries of the populace are not to be listened"), Cod. Ius., IX, 47, 12. In certain ages there was a custom to give the first seats in the room to distinguished persons "against the great public, which in later times, with the publicity of the procedure, presses near and interposes itself through the attestations of approval or approval", LEOPOLD WENGER, *Institutes of the Roman Law of Civil Procedure*, New York, 1955, p. 33, fn. 6.

[12] Few examples are listed above at fn. 9.

[13] *Amicus curiae*, in *Bouvier's Law Dictionary* (Rawle's 3rd ed.) 1914, p. 188. This is the last edition published by Rawle; in the new Bouvier's dictionaries, edited by other authors, the reference to the Roman origins disappears. However the chain of wrong quotations made by other articles starts from the quotation of that volume.

[14] «[The custom of *Amicus Curiae*] cannot be traced to its origin, but is immemorial in the English law. It is recognized in the Year Books, and it was enacted in 4 Hen. IV (1403), that any stranger as *"amicus curiae"* might move the court, etc. Under the Roman system the *Judex*, "especially if there was but one, called some lawyer to assist him with their counsel" *"sibi advocavit ut in consilio adessent;"* Cic. Quint. 2 Gell. xiv. 2 ; Suet. Lib. 33. There was in that day also the *"amicus consiliari"*, who was ready to make suggestions to the advocate, and this *"amicus"* was called a "*ministrator;"* Cic. de Orat. II. 75. This custom became incorporated in the English system, and it was recognized throughout the earlier as well as the later periods of the common law. At first suggestions could come only from the barristers or counsellors, although by the statute of Hen. IV. a "bystander" had the privilege. The custom included *instructing*, *warning*, *informing*, and *moving* the court. The information so communicated may extend to any matter of which the court takes judicial cognizance; 8 Coke 15», *Amicus curiae*, in *Bouvier's Law Dictionary* (Rawle's 3rd ed.) 1914, p. 188.

[15] The distinction between *consilia* and amici curiae is also well explained by FRANK M. COVEY, Amicus Curiae*: friend to the Court*, in *De Paul Law Review*, 1959-60, 9, pp. 33-34.

doubt.[16] Thus, in 1963, Krislov does not quote any direct source, but referring in a footnote to the *Bouvier Law Dictionary* mentions a Roman origin of this device, although in very hypothetical terms: «Inasmuch as the device was apparently known in Roman law...».[17] This dubious statement probably biased an influential paper on amicus briefs written by Angell in 1967,[18] which, without supporting his affirmation with any Roman source, strongly asserted the Roman origins of the device, and, through it, contemporary scholars that made reference to it.

In more recent times, Chandra Mohan is clear in saying that amicus curiae was not an expression used in classical Roman law; however, he too tracks the origin of the amicus to Rome, drawing a parallel with the *consilium Principi*.[19] He sustains that, just as the *Prince* relied on the advice of a large circle of *amici* (friends), judges and lawyers were advised by friends of the court in their decisions.[20] This construction too is unconvincing. *Amici*, friends, were an important part of Roman public life. Indeed, they were a distinct social category: they were not just *friends* in the contemporary, purely affective, meaning of the term, but they had a public (and legally recognized) role.[21] During some periods they were involved in certain legal activities, such as counseling the *prince*,[22] or representing him;[23] the amici of the *pater familias* (father of a family)

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[16] CECCHINI A., *I "consiliarii" nella storia delle procedure*, Atti Regio Istituto Veneto, 58, II, 1909; WENGER, *Institutes*... above at fn. 11, p. 32, and also pp. 58, 202-3. The same can be said for the *adsessores*, which were appointed, not voluntary, counselors, *ivi*, 32, fn. 6.

[17] SAMUEL KRISLOV, *The* Amicus Curiae *Brief: From Friendship to Advocacy*, in *Yale Law Journal*, 1693, p. 694.

[18] ERNEST ANGELL, *The Amicus Curiae. American Development of English Institutions*, in *International and Comparative Law Quarterly*, 16, 1967, pp. 1017-1044. Angell in his article does not support his affirmation with any Roman source, but in another paragraph of his article dedicated to commenting on medieval English cases (at p. 1018, fn. 4) there is a reference to an article of Krislov published on 1963. Probably Angell's idea of a Roman origin of this device comes from that article.

[19] SRI CHANDRA MOHAN, *The Amicus Curiae: Friends no More?*, in *Singapore J Int Law*, 2010, pp. 352-374; Chandra Mohan makes clear that the expression *amicus curiae* is not present in Roman Law; however he still sustains that *amicus curiae* finds its origin in the uses of having advice with family and friends for the imperator, in particular pp. 360-364, particularly relying on a work of JOHN CROOK, *Consilium Principis*, Cambridge, 1955. On the *consilium* see FRANCESCO AMARELLI, *Consilia Principium*, Jovene, Napoli, 1983; this work includes also an interesting part dedicated to the counseling of the *prince* from the time of Alexander the Great, p. 42 ff.

[20] CHANDRA MOHAN, *The Amicus*... above at fn. 19, pp. 360-364.

[21] Though called *friends*, this category involved more than friendship, cf. the work of BERNARDO ALBANESE, *L'«amicitia» nel diritto privato romano*, in *Jus*, 14, 1963, pp. 130-143; see also CROOK, *Consilium*... above at fn. 19, pp. 22-27, stressing the importance of political friendship in many aspects of the Roman political life: *patronatus*, *hospitium*, *etc.*

[22] CROOK, *Consilium*... above at fn. 19, pp. 21-31; AMARELLI, *Consilia*... above at fn. 19.

[23] ABEL HENDY, JONES GREENIDGE, *Roman Public Life*, London, 1901, pp. 357-358.

were involved in his decisions on the conduct of a son.[24] Each of these usages involves *amici* and a deliberative activity; however, apart from sharing with the modern amicus curiae the term *amici*, there are no other commonalities, given the fact that no one of these activities resembles the contemporary use of the amicus curiae.[25] As explained above, mere counseling and advising are not similar to the essence of the contemporary amicus curiae, the former being solicited, while the second is unsolicited; and the first usually being confidential, while the second is generally public: amici curiae today do not come in during the deliberation phase, but instead attach written briefs or make oral statements during the proceedings.

b) An excursus on the early legal practice in continental Europe

Considering the other grandfather of contemporary law, that is the legal practice in continental Europe from the XIIth Century to the XVth, the expression *amicus curiae* is likewise absent, and there is no similarity between contemporary amici curiae and practices of judicial consultation of that time, like the *consilium sapientis iudiciale*.[26] In a *consilium* a professional lawyer would prepare an opinion at the request of a city statute, the parties, or the judge, and the judge (voluntarily or obliged by law) would use it as a basis for his decision.[27] The judge of the *comune*, the counsels, or the *podestà* (a sort of mayor with greater powers) routinely requested this kind of preliminary draft from legal professionals.[28] In some cases they adjudicated on the basis of the *consilium*,

[24] See PADELLETTI, *Storia*... above at fn. 11, which comprehensively maintains at p. 27: "Un principio fondamentale del diritto pubblico e privato di Roma si fu la necessità di chiunque dovesse prendere una qualunque decisione, di ricorrere al parere delle persone più prossime, più interessate e più intelligenti. Il padre, il marito, il giusdicente erano sempre dal costume legati ad un *consilium* di parenti, di amici, di periti del giure, che senza avere voce deliberativa esercitava però molta influenza sopra la loro risoluzione. Lo stesso carattere ebbe fino dai tempi più antichi il consiglio regio o senato".

[25] A precise description of the importance of, and the role played by, the friends, *amici*, trained in law, in several kind of consultations, especially those involving the *Principes*, is given by AMARELLI, *Consilia*... above at fn. 19, especially at 16-19, and 137-159.

[26] GUIDO ROSSI, *Consilium sapientis judiciale*, Vol. I, *Secoli XII-XIII*, Milano, Giuffrè, 1958; MARIO ASCHERI. *I consilia dei giuristi medievali*, Siena, 1982; MARIO ASCHERI, INGRID BAUMGÄRTNER, JULIUS KIRSHNER, *Legal Consulting in the Civil Law Tradition*, The Robbins Collection, Berkeley, 1999, in particular the chapters of MARIO ASCHERI, *Le fonti e la flessibilità del diritto commune. Il paradosso del* consilium sapientis, pp. 11-53 (see pp. 15-17 with a short summary of the kinds of *consilia*, and p. 41 ff. on the mandatory/non mandatory character of the *consilia* for the judges), and JULIUS KIRSHNER, Consilia *as Authority in Late Medieval Italy: The Case of Florence*, pp. 107-140.

[27] ROSSI, *Consilium*... above at fn. 26, pp. 1, 137, 148.

[28] ANTONIO PADOA SCHIOPPA, *Storia del diritto in Europa*, Il Mulino, Bologna, 2007, pp. 142-144. See also GUILELMUS DURANTIS, *Speculum iudiciale*, lib. II, part. II, *De requisitione consilii*, vers. *Quoniam*, n. 3 (Basel, 1579), p. 763; "Apart from exceptions of Venice and parts of Piedmont, the procedure for

but in others they simply adopted it in its entirety, without any change.[29] Here again, the *consilia* were not unsolicited,[30] and they were not coming from *interested* third entities (sometimes they were actual friends of the judge).[31] They were an expression of the professionalization of legal practice,[32] and the advisors involved were more similar to legal counselors, to the contemporary *referendaires* of the Luxembourg Court of the European Union, or to the clerks of the judges, participating with the judge in the deliberation and in the drafting of a the decision with their legal expertise.

Thus, *amicus curiae* is an expression not present in classical Roman times, nor in the renewal of legal studies started in continental Europe in the XI[th] Century; also, the research did not show the presence of a similar institution in the law of those ages, nor a close resemblance with the *consilium*.

1.2 First references

There are apparently no complete studies tracking the origins of the amicus curiae. Early mentions of it appear in English legal decisions of the XIV[th] Century,[33] and there are other references to it in subsequent centuries.[34] In those references amici were people in the room who could inform the Court. They included lawyers who could intervene when a judge was doubtful or mistaken on a matter of law ("shepardizing" for him, so to speak); persons who could appeal to the court on behalf of an infant, though they were not relatives;[35] and lawyers present in the court to assist the judge in criminal

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requesting *consilia sapientis* was authorized by statute everywhere in north and central Italy, even in the smallest communities", quoted in KIRSHNER, Consilia... above at fn. 25, p. 107, fn. 1.

[29] ROSSI, *Consilium*... above at fn. 26, pp. 1-111.

[30] *Ivi*, pp. 81 ff., and 137.

[31] "Consilium est deliberationis auxilium, quod postulator a viris prudentibus vel amicis in communibus negotiis vel privatis ... [et] ... dicitura a consiliario, ex eo quod consilium est effectum consiliarii", BONCOMPAGNUS**,** *Rhetorica novissima***,** A. GAUDENZI (ed.), in *Bibliotheca Juridica Medii Aevi*, vol. II, Bononiae, 1892, p. 294, col. 1.

[32] ROSSI, *Consilium*... above at fn. 26, p. 159 ff.

[33] Y. B. Hil. 26 Ed. III, 65 (1353).

[34] 1468, Y. B. 7 Ed. IV, 16 (1486): "Any man [amicus curiae & amicus iuris, says the decision elsewhere] can inform the court in the case so that court will not render judgment on an insufficient record". Entry *Error*, para. 49, in ROBERT BROOKE, *La Graunde Abridgment*, 1576, Fo. 273. *The Prince's Case*, 8 Coke 1, 29°, 77 Eng. Rep. 481, 516, 1606. *The Proctector v. Geering* , 145 Eng. Rep., 394 (1656); *Horton & Ruesby*, Comb. 33, 90 Eng. Rep. 326 (K. B. 1686). *Falmouth v. Strode*, 11 Mod. 137, 88 Eng. Rep. 949 (Q. B. 1707); *Beard v. Travers*, 1 Versey Sen. 313, 27 Eng. Rep. 1052 (Ch. 1707).

[35] JOHN BOUVIER, *A Law dictionary*, 6[th] ed., Vol. I, G.W. Childs, Philadelphia, 1856, entry *Amicus curiae*.

cases where the accused was undefended.[36] In a case in 1686 a member of the English Parliament appeared as *amicus* to explain the intent of a law.[37] Many different kinds of intervention came under the label *amicus curiae* over the centuries: the intervention of a lawyer, the defense of a weak party, the presentation of a law from the authority that enacted it, etc.

The constant presence of such a device at common law is not questioned. Already in 1353 the Year Book deemed it a consolidated practice,[38] and in his paper on amicus curiae Covey concluded that:

> In the early Common Law the practice of allowing any person present in court to step forward as *amicus curiae* and inform or advise the court is as old as the reported cases themselves.[39]

In conclusion, the presence of the *amicus brief* as a flexible device for those not party to a trial to intervene on a matter of law or fact was solidified in English Common Law first, and in the former British colonies later.[40] The sudden arrival of Portia before the bench, "And here, I take it, is the doctor come", was more likely to happen in the Shakespearian England than in front of the Venetian court (which in fact conducted trials very privately).[41]

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[36] EDMUND RUFFIN BECKWITH, RUDOLPH SOBERNHEIM, *Amicus Curiae/Minister of Justice*, 17 Fordham L. Rev. 17 1948 38.

[37] *Horton* and *Huersby* (King's Bench 1686), in ROGER COMBERBACH, *The report of several cases argued and adjudged in the Court of King's bench at Westminster: from the first year of King James the Second, to the tenth year of King William the Third [1685-1698]*, 1734, p. 33. See also in the same volume other two references at 13 and 169-170.

[38] Y. B. Hil. 26 Ed. III, 65 (1353).

[39] COVEY, Amicus... above at fn. 15, p. 33. See also HERMAN COHEN, *A History of the English Bar and Attornatus to 1450*, Sweet & Maxwell Ltd., London, 1929, at 218-219.

[40] See KRISLOV, *The Amicus*... above at fn. 17, pp. 694-697, and ANGELL, *The Amicus*... above at fn. 18. Today the debate over the use of amici briefs in a trial is still very much alive in the US, while in England it has been reformed, and the name has been changed: with the Civil Procedure Rules of 2000 the expression *Advocate to the Court* replaced *amicus curiae.*

[41] In Venice the jealous prerogatives of the Government did not admit the interference of professional jurists through their *consilia*, see KIRSHNER, Consilia... above at fn. 25, p. 107, fn. 1, and ROSSI, *Consilium*... above at fn. 26, p. 2.

1.3 From Common Law to International Law through Anglo-Saxons Lawyers

The introduction of *amicus curiae* in international courts came through English and American lawyers. This happened through three separate moments. The first moment is more than 50 years ago: the International Court of Justice admitted, at least in theory, the participation of amici.[42] In the proceedings for the advisory opinion on *South-West Africa*, 1950, an American lawyer, Robert Delson, requested on behalf of the NGO International League for the Rights of Man to participate as an amicus.[43] Although the ICJ Statute and Rules do not envisage the possibility for private parties to intervene both in the contentious and advisory jurisdictions,[44] the registrar answered:

> «Your letter March 7 re advisory opinion South-West Africa stop Am instructed to let you know that International Court justice is prepared to receive from you before April 10 1950 a written statement of the information likely to assist Court in its examination of legal questions put to it in Assembly request concerning South-West Africa stop This information confined to legal questions must not include any statement of facts which Court has not been asked to appreciate stop Court does not contemplate resorting further to League for Rights of Man in present case».[45]

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[42] EDUARDO VALENCIA OSPINA, *Non-Governmental Organizations and the International Court of Justice*, in TULLIO TREVES ET AL., *Civil Society, International Courts and Compliance Bodies*, T.M.C. Asser Press, The Hague, pp. 227-232.

[43] A detailed account is available in ROGER S. CLARK, *The International League for Human Rights and South West Africa 1947-1957: The Human Rights NGO as Catalyst in the International Legal Process*, in *Human Rights Quarterly*, 1981, 3, p. 116-124.

[44] About advisory jurisdiction, the Statute of the Court is ambiguous. Art. 66.2 of the Statute provides that, when a request for an advisory opinion is received, all States entitled to appear and "any international organization considered... likely to be able to furnish information on the question" shall be notified that "the Court will be prepared to receive... written statements" relating to the question. It is not, however, clear if international organization refers only to *public* international organizations, or can also encompass NGOs. Two arguments support the exclusion of private entities. The first is the clear statement contained in the rules on the participation of third parties in the contentious jurisdiction: article 34.2 of the Statute provides that the Court, "...subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative". Article 69.4 of Rules of Court defines the term "public international organization" as "an international organization of States". An interpretation of the dispositions in an analogical way will lead to the conclusion that NGOs' statements are not admitted; an interpretation according to the principle of effectiveness will lead to the opposite conclusion: the fact that art. 34.2 specifies the term *public* means that when there is not such a reference it does not apply. However, between the two possibilities, the first is corroborated by the practice of the ICJ, which has not admitted NGOs briefs in advisory proceedings.

[45] *International Status of South West Africa*, 1950, ICJ Pleadings, p. 327.

However, because of procedural obstructionism, the NGO could deposit its brief only after the expiration of the terms.[46] After this first open door to private amici briefs, the door was closed; in the advisory opinions, until the nineteen-seventies, the ICJ explicitly refused to accept them,[47] while in certain subsequent cases the Court received material relevant to the case, without publishing it, but leaving it available to members of the Court.[48]

The second moment was during the nineteen-eighties, and regards the Strasbourg Court, and in a limited way, the Inter-American Court. The reform of the Strasbourg Court Rules in 1983, in which the participation of third concerned parties was introduced, was preceded by several cases in which the British Government and other British private entities asked permission to participate in trials.[49] At the time the private applicant could not participate to the trial, and the European Commission on Human Rights pleaded before the bench. However the Rule 37.2 introduced in 1983 was

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[46] CLARK, *The International...* above at fn. 43, p. 117-119. The letters of the Deputy Registrar are reported at p. 118, fn. 72 and 73.

[47] The same lawyer, Delson, had also asked for permission on behalf of the League to present material in the contentious proceedings involving *Haya de la Torre* (see Delson's letter in *Asylum Case*, 1950, ICJ Pleadings, Part II, p. 227). The Registrar's negative response in this instance relied upon the differences in the wording of Article 66 of the Statute, pertaining to advisory proceedings, from that of Article 34 on contentious proceedings: "Court finds Article 34 of Statute not applicable since International League of Rights of Man cannot be characterized as public international organization as envisaged by Statute", *ivi*, p. 228. The request made by the International League in the proceedings of the 1970-71 advisory proceedings on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, was summarily refused, *Pleadings* (1970), Part 2, pp. 636-640, 644, 672, 678, 679; see also ARTHUR W. ROVINE, ANTHONY D'AMATO, *Written Statement of the International League for the Rights of Man Filed with The International Court of Justice in the Namibia Question*, in *New York University Journal of International Law and Politics*, 1971), 4, p. 335.

[48] See for further explanations *below* sect. 2.5.

[49] PAUL MAHONEY, *Developments in the Procedure of the European Court of Human Rights: the Revised Rules of Court*, in *Yearbook of European Law*, 3, 1983, 127-167, at 141-154; FRANÇOISE HAMPSON, *Interventions par des tiers at le Rôle des organisations non gouvernementales devant la cour européenne des droits de l'homme*, in EMMANUEL DECAUX, CRISTOPHE PETTITI (dir.), *La tierce intervention devant la Cour européenne des droits de l'homme et en droit comparé*, Nemesis-Bruylant, Bruxelles, 2009, 123-140, 136-137; ANNA DOLIDZE, *Anglo-Saxonizing Rights: Transnational Public Interest Litigation in Europe*, in *ASIL Proceedings*, 2011, p. 50; *Articolo 36*, SERGIO BARTOLE, PASQUALE DE SENA, VLADIMIRO ZAGREBELSKY, *Commentario Breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, CEDAM, 2012, p. 685. The cases were *Wintwerpen v. Netherlands*, in which the UK asked to be heard on a point of construction according to the then art. 38.1 of the Rules of the Court, Series B, No. 31, 64-65; the case of *Young James & Webster v. UK*, in which the three complainant workers were not admitted before the Court, while a representative of a British union, the Trade Union Congress was admitted to present its point of view on the case, *13 August 1981*, Series A, No. 44, para. 8. There are also other precedents: the *Tyrer v. UK* case, in which the family of the nineteen years old applicant was admitted to the case, while an association, the NCCL was not, *25 April 1978*, Series A, No. 26, para. 21.

clear in allowing any person concerned *other than the applicant* to petition the President for the opportunity to clarify points to the Court.[50] Participation then depended on the President's authorization.[51] In the same years the newly-established Inter-American Court, accepted amicus briefs coming from private entities based in the U.S. in its first advisory opinions, even if the Convention and the rules did not explicitly provide for this possibility,[52] and the Iran-USA Claims Tribunal began accepting amici briefs under Art. 15 of the UNCITRAL Arbitration Rules of 1976.[53]

The third, and last moment, is recent. A wave of amici curiae admittance in the procedures of international courts and tribunals resulted from the activism of certain North-American NGOs, with supportive voices also coming from the US Government.[54] This can be seen at the WTO,[55] at the North American Free Trade Agreement (NAFTA), in two cases involving Canada and the USA,[56] and at the ICSID.[57]

In conclusion, this historical inquiry does not locate the positive origin of the amicus curiae as a form of intervention. No source was found to link the amicus to Roman law. Further research into this question could yield fruitful results; in any case, as far as concerns the use of amicus curiae before international courts and tribunals –

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[50] "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 such leave to any person concerned other than the applicant". See MAHONEY, *Developments*... above at fn. 49, pp. 141-154, and MOYER, *The Role*... above at fn. 9, p. 107 ff. The amici participation was then recognized also in the text of the Convention in 1998, when Protocol 11 entered into force.

[51] MAHONEY, *Developments*... above at fn. 49, pp. 145-6.

[52] MOYER, *The Role*... above at fn. 9, p. 103 ff., and at 113; THOMAS BUERGENTHAL, *The Advisory Practice of the Inter-American Court of Human Rights*, in *Am. J. Int'l L.*, 79, 1985, p. 1 ff.

[53] *Iran v. USA*, Case A/15, Award No. 63-A/15-FT, *20 August 1986*, reproduced in Iran-USA Cl. Tr. Rep., 2, p. 43. The Tribunal considered a brief submitted in 1983 by some US banks through the interpretation of Art. 15 of the UNCITRAL Arbitration Rules of 1976 (the same Art. used then in the *UPS* and *Methanex* decisions, see *below* sect. 2.4). The *Decision on Petitions from Third Persons to Intervene as "Amici Curiae"*, *Methanex Corp. v. USA, 15 January 2001*, referred to this precedent at para. 32.

[54] See the speech of former US President Clinton, proposing 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 deliberation". *Remarks by the President at the Commemoration of the 50th Anniversary of the World Trade Organization, 18 May 1998*.

[55] See ALA'I, *Judicial*... above at fn. 3, pp. 67-84.

[56] See the analysis of the petition to participate as amici curiae in the *Methanex* case between a Canadian company and the US State in PATRICK DUMBERRY, *The Admissibility of* Amicus Curiae *briefs by NGOs in Investors-States Arbitration: The Precedent Set by the* Methenex *Case in the Context of NAFTA Chapter 11 Proceedings*, 1 Non-St. Actors & Int'l L. 2002, 201-214, especially 205-213.

[57] On the first cases see EDUARDO SAVARESE, Amicus Curiae *Participation in Investor-State Arbitral Proceeding*, 17 Italian Y.B. Int'l L. 99 2007.

the focus of this paper – it is clear that they were introduced by American and British lawyers.

2. Analysis of the procedures

Even if the introduction of these rules in international law is of recent vintage, they now involve several jurisdictions. The decisions that admitted them and legal literature have so far highlighted several reasons at the base of the introduction of amici curiae in international proceedings: they enhance transparency;[58] they allow civil society to participate in distant international disputes;[59] they give *locus standi* to otherwise excluded stakeholders;[60] they give legitimacy to international courts[61] and democratize international law,[62] *etc.* In short, by opening international courts to the recipients of their decisions, and bringing civil society and those institutions closer, they have been depicted as an instrument to promote the fairness of the global society. The legal concepts used in the treaties and by judges and arbitrators to justify the introduction of amici curiae, in fact, are "the proper administration of justice" and the power of the adjudicatory bodies to adjust their procedures to that purpose.[63] This second part of the paper will not reflect on all these potentialities and functions of the amici. Rather, it will be dedicated to assess the *appropriateness* of the procedures, the fairness of these "instruments of fairness":

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[58] *Methanex Corp. v. USA, Decision on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001*, para. 49; *Aguas Argentina S.A. and Others v. Argentina, Petition for Transparency and Participation as Amicus Curiae*, ICSID Case No. ARB/03/19, *19 May 2005*, para. 22; STEVE CHARNOVITZ, *Transparency and Participation in the World Trade Organization*, 56 Rutgers L. Rev. 927 2004.

[59] CAROL HARLOW, *Global Administrative Law: The Quest for Principles and Values*, 17 Eur. J. Int'l L. 187 2006 at 203-4; FRANCESCO FRANCIONI, *Access to Justice, Denial of Justce and International Investment Law*, 20 Eur. J. Int'l L. 729 at 738-743.

[60] See *supra* at fn 53.

[61] JEAN D'ASPREMONT, ERIC DE BRABANDERE, *The Complementary Faces of Legitimacy in International Law : The Legitimacy of Origin and the Legitimacy of Exercise*, 34 Fordham Int'l L.J. 190 2010-2011, in particular at 234-7. *Methanex Corporation, v. USA* (Amended Petition of Communities or A Better Environment, The Bluewater Network of Earth Island Institute, and the Center for International Environmental Law to Appear Jointly as Amici Curiae), *13 October 2000*, Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, para. 2: "Moreover, as representatives of serious public environmental and human health concerns, Petitioners' participation is important as a safeguard of democratic processes and will help to ensure the legitimacy of the Tribunal's decision".

[62] BARNALI CHOUDHURY, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic deficit*, 41 Vand. J. Transnat'l L. 775 2008 814-818; ARMIN VON BOGDANDY, INGO VENZKE, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 German L.J. 1341 2011 1366-1368.

[63] See fn. 8 for references.

In particular, this section will investigate *i*) whether the instrument guarantees equal access to the judge to all interested entities (both by procedural clarity and by equality of treatment); *ii*) whether the acceptance or refusal of proposed amici has to be justified or not *iii*) whether the final decision gives account on amici submissions, or there is a publicly accessible place to verify them. These principles are expressions of the same ideal of public participation that underlies the amicus curiae: if these principles are frustrated, even if the purpose of allowing the submission of amici is noble, there is no a real participation. Finally, looking at the parties and their rights, it will be considered *iv*) whether the positions of the parties are took into consideration (if the parties are involved in the submission, and can comment on the briefs, or judges and arbitrators manage alone them, and whether in the dispute between private parties and states the participation of other states as amici does not impair the position of the private parties), and *v*) whether the procedure is efficient: the right of participation cannot transform international litigation into a unregulated political forum, the discussion of which can turn in an excessive burden for the parties and for the states.

To get this overview, several international procedures for admittance of amicus briefs will be scrutinized.[64] Naturally, every international jurisdiction has its own rules and procedures, so the analysis will be carried out separately for each of them. However, at the end there will be a common overview over them to try to give a general opinion on the amici procedures and to open a reflection on the appropriateness of the new procedures to achieving their proposed purposes.

The elements that will be considered are several:

As concerns the clearness of the possibility to submit a brief,

- Whether there is an explicit procedure provided for in the basic texts, or if it can be derived only from judicial decisions.
- Whether notice of the proceedings is public.

[64] Amici curiae are also admitted in many international administrative tribunals, cf. Art. 23.2 of the Rules of the Administrative Tribunal of the United Nations, Rule 23.2 of the Administrative Tribunal of the World Bank, Disposition XV IMF; Art XVIII African Development Bank; Disposition 21.2 of the Asian Bank for Development; Art. 52 of the OAS, see DAVID RUZIE, *L'intervention devant les juridictions administratives internationales*, in EMMANUEL DECAUX, CRISTOPHE PETTITI (dir.), *La tierce intervention devant la Cour européenne des droits de l'homme et en droit comparé*, Nemesis-Bruylant, Bruxelles, 2009, 67-74, at 73.

As concerns the requesting subjects:

- Who, or which kind of entity is allowed to request the participation (private individuals, private entities, international organizations, member or third states, representatives of the authors of a legal document, *etc. etc.*).

- Whether there is a specific procedure for the participation of member states as amici, separate from private amici.

- Whether the amici should not have any relationship with the parties/there is a duty to disclose any contact between the parties to a proceedings and the amici, and, in the case of NGOs, whether there is a duty to disclosure their ownership.

- Whether an interest of the applicants in the dispute is required.

As concerns the submission and the form of the brief:

- Whether there is a preliminary request to submit, and whether there is a specific form for the petition.

- What time limits apply to the application or the submission of a paper.

- What the brief should contain.

- What form the brief should take.

As concerns the content of the brief and of the dispute:

- For what purposes they can be admitted (to give witness being involved, provide legal advice, demonstrate scientifically facts, etc.).

- Whether they will only be permitted in cases involving a certain subject matter (matters that are considered “public”).

As concerns the proceedings:

- Whether the parties can set a proceeding without amici participation;

- Whether the parties have a power of intervention/veto during the phase of submission;

- Who has the discretion to decide whether an amicus is admitted or not, and whether this decision is public and needs a specific form.

- Whether the briefs are public, only circulate privately, or are only published online.

- Whether the parties can read them and reply to them before the court/tribunal;

- Whether the amicus has access to the case files or the right/possibility to appear, and whether the brief becomes a part of the case file.

The idea of this list of criteria is not to draw a conclusion on any one of them in particular, but rather to bear them in mind as aids in analyzing the institution as a whole.

2.1 European Court of Human Rights

The first international Court that envisaged a procedure for the submission of amici curiae is the European Court of Human Rights.[65] The expression *amici curiae* is not present in the relevant texts. However, Art. 36 of the CEDU, under the label: "*intervention of third parties*", includes a procedure that resembles amici curiae.[66] It says:

> 1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
>
> 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.
>
> 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.[67]

This provision is completed by Art. 44 of the Rules of the Court.[68] According to these provisions, four kinds of subject are allowed to intervene: the member state(s) whose national(s) is(are) applicant(s), the other member states, persons concerned, and the Council of Europe Commissioner for Human Rights. The first and third paragraphs

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[65] See above at fn. 48.

[66] On this procedure and its practice see several chapters in TULLIO TREVES ET AL., *Civil Society, International Courts and Compliance Bodies*, T.M.C. Asser Press, The Hague, 2005, namely: DEAN ZAGORAC, *International Courts and Compliance Bodies: The Experience of Amnesty International*, pp. 11-40; CATHARINA HARBY, *The Experience of the AIRE Centre in Litigating before the European Court of Human Rights*, pp. 41-55; MARCO FRIGESSI DI RATTALMA, *NGOs before the European Court of Human Rights: Beyond* Amicus Curiae *Participation?*, pp. 57-66; NINA VAJIC, *Some Concluding Remarks on NGOs and the European Court of Human Rights*, pp. 93-104. See also EMMANUEL DECAUX, CRISTOPHE PETTITI (dir.), *La tierce intervention devant la Cour européenne des droits de l'homme et en droit comparé*, Nemesis-Bruylant, Bruxelles, 2009, and the entry *Articolo 36*, in SERGIO BARTOLE, PASQUALE DE SENA, VLADIMIRO ZAGREBELSKY, *Commentario Breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, CEDAM, 2012, pp. 683-687.

[67] Art. 36 of the European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, Council of Europe Treaty Series, No. 5.

[68] Rules as amended on 1 February 2012.

contemplate for contracting parties whose nationals are applicants and the Council of Europe Commissioner for Human Rights. The Court has no discretionary power over these submissions a specific right to submit written comments, and a right to intervene in the hearings.

Paragraph 2, on the contrary, gives the Court the discretionary power to accept written comments or participation from other member states and other persons. In practice, other member states have been so far treated like the states whose nationals are applicants: the Court, even while acting under 36.2, always accepts their briefs and always allows them to intervene in hearings, as though by right. Therefore, in practice, all the member states have the right to submit briefs and intervene.

The reference to "persons" in the second paragraph is very broad, and appears to exclude third states, NGOs and international organizations (IOs); however, in practice, NGOs, IOs and their organs (like the United Nations High Commissioner for Refugees) have so far been included under the term *person* used in Art. 36.2 of the CEDU and Rule 44.3 of the Rules of the Court, and this practice has never been challenged by member states, which have thus acquiesced to it.

While the procedure envisaged for the participation as amicus of a member states whose nationals is an applicant and of the Council of Europe Commissioner for Human Rights is sufficiently clear (Rules 44.1 and 44.2), the sections dedicated to the submissions of other entities (Rules 44.3, 44.5, and 44.6) are more ambiguous. Rule 44.3 establishes a two-step procedure, with an early request to participate, and, in case of a positive answer, the actual submission of the brief; it does not specify the length or the content of the request, it just says that it should be "duly reasoned", and written in one of the two official languages of the Court (English or French).[69] The request should be sent to the President of the Court within 12 weeks after communication of the

[69] Rule 44.3.*b*: " Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official".

application has been given to the respondent Contracting Party or a decision is taking to the effect that a Grand Chamber will deal with it.[70]

If participation is permitted, the President sets a new time limit, and the briefs should be written in one of the official languages of the Court.[71] While member states are almost always allowed to appear before the Court to present oral statements, this possibility is rarely extended to other persons or entities. There is not any indication of the length or the points that an amicus can touch upon, but these questions are likely addressed by the President in the answer to the request.[72] From an analysis of the practice (the communication from the Chambers to, and the briefs submitted by, the amici) the briefs cannot put forward arguments in favor or against allegations, but only contribute facts and legal analysis that will be helpful to the Court and that are expressions of the special expertise or interest of the proponent. The briefs are usually no longer than 20 pages, but the Court often limits them to fewer pages, depending on the issues at stake. Also in practice, publicity is provided by naming the amici accepted under Art. 36.2 (but not those rejected), in the first paragraphs of the final decisions, along with the names of the parties and the description of the procedural phases of the proceedings.

Notwithstanding the fact that there is constant participation of amici curiae in the ECtHRs, there are some lingering shadows in the procedure that should be dispersed. First, the term *a quo* for the application process in cases referred to the

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[70] Rule 44: "3.*b*. Requests for leave ... must be ... submitted ... 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.

[71] Rule 44.5, and 44.6: "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".

[72] Rule 44.3 and 44.5.

Grand Chamber "shall run from the notification to the parties of the decision of the Chamber [...] to relinquish jurisdiction in favour of the Grand Chamber or of the decision of the panel of the Grand Chamber [...] to accept a request [...] for referral...". Although the decisions on the relinquishment of jurisdiction or the referral of a case to the Grand Chamber is posted on the Court's website, the term for submission begins with an act – the *notification to the parties* – that is not public, but involves intercourse only between the Court and the parties (and may be posted later). The date of the relinquishment/referral may coincide with the day of the notification, but this is not necessary, thus it is not clear to *any interested* person when the twelve-week term starts. The choice of a clear and public start date for the submission term would be preferable.

Second, Art. 36.2 and Rule 44.3 give the management of the whole procedure for the participation of private entities to the President, without reserving a role to the Parties or to the Chamber; but to this power does not correspond any duty to publish the identities of those who requested participation, or any duty to publish the names of the briefs accepted or refused. In the significant managerial power given to the President of the Chamber, the procedure envisaged in Art. 36.2, even if it is under the heading *intervention of third parties*, more closely resembles the discretionary handling of evidence. The President is at the center of the procedure, free from any involvement by the parties. In a positive sense (compare, for example, with the WTO in section 2.3) this independence gives the President the opportunity to admit controversial briefs or briefs intervening in high-stakes disputes. In addition, the parties are prevented from interfering with the relationship between the participant and the Court: they do not have the right to oppose admission, but can only make their observations once the Courts has communicated the briefs to them. The downside, and probably it is more than just a downside, is that the President has no duty to report in public who submitted an amicus, and the reasons why a given submission was accepted or dropped. The lack of a duty to disclose all the applicants and to justify the decision is untenable given the importance that third participants can play in deciding a case in Strasbourg.

In conclusion, it seems that the Rules of the Court do not provide any further clarification of important procedural issues surrounding the use of amici curiae. In

particular, the use of a non-public act to start the clock ticking on the allotted time to request leave of the President of the Grand Chamber for cases referred to it, and the lack of a duty to report in public all the petitions to participate as amici and the reasons behind their acceptance or refusal. The introduction of different rules on these questions could be helpful in resolving these issues.[73]

2.2 The Inter-American Court of Human Rights

Although there are examples of amici curiae submission appearing in practice even before, especially under the advisory jurisdiction,[74] the Inter-American Court officially introduced the possibility to submit amici curiae in 2001.[75] Today the submission of amicus briefs is regulated at Arts 2, 28, and 44 of its Rules of Procedure of 2009.[76] Art. 2.3 defines an amicus curiae as "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". Art. 28 dictates the formalities for the submission of a brief, while Art. 44 regulates it in detail.

First Art. 44 reiterates that any person or institution can submit a brief. While it is clear that both NGOs and IOs and their organs fall under the term "institution", it is not clear that other entities, like states, can file briefs, as they can under the ECtHR. Already under Art. 45.1 of the Court's rules precedent to the amendments of 2009,

[73] Art. 44 disposes also a special status to contracting parties willing to intervene without being a party to the proceedings (Art. 36.1 ECnHRs and Art. 44.1.b of the Rules) and to the Council of Europe Commissioner for Human Rights (Art. 36.3 ECnHRs and 44.2 of the Rules): "1.*b* If a Contracting Party wishes to exercise its right under Article 36 § 1 of the Convention to submit written comments or to take part in a hearing, it shall so advise the Registrar in writing not later than twelve weeks after the transmission or notification referred to in the preceding sub-paragraph. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.
2. If the Council of Europe Commissioner for Human Rights wishes to exercise the right under Article 36 § 3 of the Convention to submit written observations or take part in a hearing, he or she shall so advise the Registrar in writing not later than twelve weeks after transmission of the application to the respondent Contracting Party or notification to it of the decision to hold an oral hearing. Another time-limit may be fixed by the President of the Chamber for exceptional reasons. Should the Commissioner for Human Rights be unable to take part in the proceedings before the Court himself, he or she shall indicate the name of the person or persons from his or her Office whom he or she has appointed to represent him. He or she may be assisted by an advocate".
[74] MOYER, *The Role*... above at fn. 9, p. 103 ff.; BUERGENTHAL, *The Advisory*... above at fn. 52, p. 1 ff.
[75] JO M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge etc., 2003, p. 74 ff.
[76] *Rules of Procedure of the Inter-American Court of Human Rights*, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009.

which authorized the Court to hear any person whose opinion it deemed relevant, the Inter-American Court accepted an amicus coming from an organ of the respondent state,[77] a brief presented by a law firm on behalf of the petitioners (hence, beside the claims of the Commission),[78] briefs coming from organs of international organizations,[79] and briefs coming from entities not based in the OAS countries.[80]

A previous request for authorization is not required: the submission of the brief is the request. The brief can be sent in electronic format,[81] and it must be written in the working language of the case and bear the names and signatures of its authors.[82] There is no limit on its length. Unlike at the ECtHR, here the beginning of the term to submit a brief is very clear and publicly available: it may be submitted at any time during the proceedings for up to 15 days following the public hearing.[83] This procedure is much clearer than the European one: the publicity of the rules and of the term for the time limit makes them more accessible and transparent.

Here, as above, the Court has no duty to publish the identities of the applicants, and of those who were refused, and this is a weak point: however, unlike in the European Court, here the President of the Court does not decide on the amici alone, but rather together with a panel: the Permanent Commission. Moreover, the Rules contain a guideline for the Permanent Commission for deciding whether a brief should be

[77] *Baena Ricardo et al. v. Panama* (Merits), *2 February 2001*, Series C, No. 72, para. 37.
[78] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits), *31 August 2001*, Series C, No. 79, para. 52.
[79] The United Nations High Commissioner for Refugees, UNHCR, often files a brief. For a short comment on the regulation precedent to the 2009 reform see HÉCTOR FAÚNDEZ LEDESMA, *The Inter-American System for The Protection of Human Rights*, 3rd ed., 2007, Inter-American Institute of Human Rights, San José, pp. 676-677.
[80] For example, the Legal Clinic for Social Justice and the Master's Program in "Human Rights, Democracy, and International Justice" of the Universidad de Valencia (Spain), filed a brief in the case *Vélez Restrepo and Family v. Colombia* (Preliminary objection, merits, reparations and costs), *3 September 2012*, Serie C, No. 248.
[81] Art. 44.2.
[82] Art. 44.1.
[83] The complete dispositions say, Art. 44.3: "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".

accepted or not: they establish a very high threshold for refusing an amicus, saying that in order to be rejected an amicus should be "*patently* inadmissible".[84]

As concerns the moment of submission, the amici can be filed also after the hearing (*up to 15 days following the public hearing*), so they can reflect knowledge of the parties' arguments, and avoid repetition to make precise further points and emphasize mistakes. Compared to the European procedure, the Inter-American procedure is more focused on the *curia*, on the role of amici helping the *court*. In the European Court the amici are short briefs sent to the Court at the beginning of a proceeding, so that the parties have the chance to take a position regarding them. Here, on the contrary, the amici are in the position to have the last word, a sought-after place in a proceeding. Thus, there is the possibility that the parties don't have the opportunity to deal with all of them before the Court.

The procedure places no restrictions on the length and number of amicus briefs. In practice, they are often very long or too many in number. This creates a risk that amici be time consuming for the Court, and that the Court become more involved with the arguments of private entities than with the positions of the state(s). This can be seen both in contentious cases, with briefs longer than 70 pages,[85] and under the advisory jurisdiction: for example, in the advisory opinion on *Article 55 of the American Convention on Human Rights*[86] the opinion treats the arguments of the institutional subjects (requesting state, member states – those that actually have the power to comply with the duties enshrined in the Convention – and Inter-American Commission on Human Rights) for 11 pages, and the arguments of persons and NGOs for 30 pages.[87]

[84] Art. 28.4: "The Presidency may, in consultation with the Permanent Commission, reject any communication that he or she considers patently inadmissible, and shall order that it be returned to the relevant party without further action". Emphasis added.
[85] See for example the 42 pages *amicus* brief submitted by the Human Right Foundation in the *Case of López Mendoza v. Venezuela (*Merits, Reparations, and Costs), *1 September 2011*, Series C, No. 233, at http://thehrf.org/documents/Amicus_CuriaeLL_English.pdf, or the 80 pages presented by the National Congress of American Indians in the case of the *Mayagna (Sumo) Community* cit. above at fn. 78.
[86] *Article 55 of the American Convention on Human Rights*, Advisory Opinion, OC-20, *29 September 2009*, Series A, No. 20.
[87] The whole list of the interveners is reported at para. 7.

2.3 The World Trade Organization

The Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) does not have any rule expressly dedicated to amici curiae. However, several panels and the Appellate Body (AB) have accepted them, justifying their acceptance by reference to different rules: the panels referred first to Art. 13 of the DSU (power to seek information), but also to Art. 12 (power to tailor the procedure on the specificity of a dispute).[88] The AB justified its acceptance under Art. 17 and Art. 16.1 of the Working Procedures for Appellate Review, that give the AB power to modify their procedure as required by the exigencies of an ordered dispute.[89] Given the absence of clear rules on amicus curiae submission, it is necessary to look into the decisions to find out how they have been managed.[90]

By March 31st 2012, 434 disputes had been brought to the Dispute Settlement Body of the WTO.[91] Almost a third of them are still at the consultation stage;[92] in 26 of them the panel did not yet issue its report;[93] and 80 others are settled by mutual agreement or terminated because of withdrawal.[94] Since the *Shrimp Turtles* panel report, more than 200 Panel and AB reports have been issued, and in 28 cases the

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[88] On the dialectic between the two articles and their role in admitting amicus curiae see YANG GUOHUA, BRYAN MERCURIO, LI YONJIE, *WTO Dispute Settlement Understanding. A Detailed Interpretation*, Kluwer Law International, 2005, p. 173 ff.

[89] "In the interest 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 purpose of that appeal only provided that it is not inconsistent with the DSU, the other covered agreements and these Rules". Cf. *EC – Asbestos*, *Document inviting briefs*, DS 135/9.

[90] Legal literature on amici curiae at the WTO is extensive, see *inter multa alia* PETROS C. MAVROIDIS, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, 2001; ROBERT HOWSE, *Membership and Its Privileges: The WTO, Civil Society, and the* Amicus *Brief Controversy*, in *European Law Journal*, 9, 2003, pp. 496-510; JOSH ROBBINS, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead / Asbestos Doctrine*, 44 Harv. Int'l L.J. 317 (2003); JARED B. CAWLEY, *Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organizations*, 23 Penn St. Int'l L. Rev 47 (2004); JOSEPH KELLER, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestion for Further Development*, 33 Int'l J. Legal Info. 449 (2005); CHIN LENG LIM, *The* Amicus *Brief Issue at the WTO*, 4 Chinese J. Int'l L. 85 (2005); FEDERICO ORTINO, *The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes*, in KARL M. MEESSEN (ed.), *Economic Law as an Economic Good*, Sellier, Munich, 2009, pp. 301-316.

[91] All the data in this page can be found and checked at http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm.

[92] 140 disputes since 1995.

[93] 18 cases with a Panel established, but not yet composed, and 8 with a Panel already composed.

[94] However, in two disputes subsequent to the first panel report allowing for amicus curiae, *US – Shrimps*, panel and AB reports, WT/DS58/R, the panel issued also a report (DS72 and DS323).

question of amici curiae was openly discussed.[95] Although, according to legal literature, the first case to consider an amicus brief was the *US-Gasoline* dispute in 1996, where certain NGOs sought to bring an amicus that was dismissed,[96] this section will treat only those reports in which the question of amicus briefs was openly discussed, therefore after the *Shrimps Turtle* report of 1998.

There are two turning points regarding amici curiae in the WTO: the first is, as just mentioned, the *Shrimps Turtle* report of the panel of 1998, in which for the first time at the WTO amici curiae were admitted.[97] The second is the communication made by the AB in the *Asbestos* dispute, in 2000 (although of the 17 requests of amicus filed at the *Asbestos* appellate proceedings, none was admitted),[98] in which the AB too officially introduced the possibility of submitting an amicus brief (before the *Asbestos* report the AB had only accepted amicus briefs insofar they were annexed to the file of a party).[99] The rules of procedure for the proceedings of the panel and the AB are different; however, in dealing with them, panel reports often quote AB decisions; for this reason the decisions of panels and the AB will be considered together, and only when a difference emerges will there be a separate comment on the two jurisdictions.

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[95] *US – Shrimps*, panel and AB reports, WT/DS58/R and WT/DS58/AB/R; *Thailand — H-Beams* WT/DS122/AB/R; *EC — Asbestos*, panel and AB reports, WT/DS135/R and WT/DS135/AB/R; *US — Lead and Bismuth II*, panel and AB reports, WT/DS138/R and WT/DS138/AB/R; *EC — Bed Linen*, WT/DS141/R; *US — Countervailing Measures on Certain EC Products*, WT/DS212/AB/R; *EC – Sardines*, WT/DS231/AB/R; *US — Steel Safeguards*, 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;*US — Softwood Lumber IV*, panel and AB reports, WT/DS257/R and WT/DS257/AB/R; *EC — Export Subsidies on Sugar*, panel and AB reports, WT/DS265/R-WT/DS266/R-WT/DS283/R and WT/DS265/AB/R-WT/DS266/AB/R-WT/DS283/AB/R; *US — Softwood Lumber VI*,WT/DS277/R; *EC — Approval and Marketing of Biotech Products*, WT/DS291/R; *EC — Chicken Cuts*, WT/DS269/AB/R-WT/DS286/AB/R; *US — Zeroing (EC)*, WT/DS294/R; *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R; *Brazil — Retreaded Tyres*, WT/DS332/R and WT/DS332/AB/R; *China — Auto Parts*, WT/DS339/AB/R-WT/DS340/AB/R-WT/DS342/AB/R; *Australia — Apples*,WT/DS367/R; *Thailand — Cigarettes (Philippines)*, WT/DS371/R; *US — Anti-Dumping and Countervailing Duties (China)*,WT/DS379/AB/R; *US — COOL*, WT/DS384/R; *US — Clove Cigarettes*, WT/DS406/R (28 cases. In the appeal of the *Asbestos* case the discussion on the admissibility of amici brief took place outside the final report.)

[96] CAWLEY, *Friend...* above at fn. 90, p. 61, commenting *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, *29 January 1996*.

[97] *US – Shrimp Turtles*, WT/DS58/R, *15 May 1998*, section III.B. See the comments HOWSE, *Membership...* above at fn. 89, pp. 497-499.

[98] Six of these 17 applications were received after the deadline specified in the additional procedure and, for this reason, leave to file a written brief was denied to these six applicants. The other 11 applications were considered by the Appellate Body but finally denied for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure. On this, see the harsh critics of HOWSE, *Membership...* above at fn. 90, pp. 504-505.

[99] *US – Shrimps Turtles*, WT/DS58/AB/R, *12 October 1998*, paras 88-91.

There are no restrictions concerning which entities may submit a brief: the vast majority of the cases involve submissions either from environmental or human rights NGOs (in about five proceedings),[100] or from producer associations (in about nine proceedings).[101] There are also cases in which a brief was filed by university professors,[102] by a single individual,[103] and by a WTO member (Morocco). This last choice was contested by Brazil, which argued that members with an enhanced status at the dispute (Colombia in the case at stake – an *observer*) cannot intervene with a brief as Morocco did. The AB dismissed this argument, stressing that if private entities can submit a brief, a state can a fortiori.[104]

The most common way to submit a brief is to send it directly and simultaneously to the parties and the panelists or the AB, avoiding a preliminary request. Looking at the practice, two different time limits for their submission emerge, both without any preliminary request for authorization. Some panels gave a strict time limit, saying that a brief must be submitted before the first substantive meeting of the Panel.[105] The majority of the reports specified that the parties must have at least one meeting in order

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[100] *US – Shrimps Turtles*, WT/DS58/R, *15 May 1998*, Annex I; *US — Softwood Lumber IV*,WT/DS257/AB/R, *19 January 2004*, para. 9; *US — Softwood Lumber VI*, WT/DS277/R, *22 March 2004*, fn. 75; *EC — Approval and Marketing of Biotech Products*, WT/DS293/R, *29 September 2006*, paras 7.10-7.11; *Brazil — Retreaded Tyres*, WT/DS332/AB/R, *3 December 2007*, fn. 32.

[101] *US — Lead and Bismuth II*, WT/DS138/R, *23 December 1999*, para. 6.3; *EC — Bed Linen*, WT/DS141/R, *30 October 2000*, FN 10; *Thailand — H-Beams*, WT/DS122/AB/R, *12 March 2001*, para. 62; *US — Countervailing Measures on Certain EC Products*, WT/DS212/AB/R, *9 December 2002*, para. 9 and fn. 17; *EC — Export Subsidies on Sugar*, WT/DS283/R, *15 October 2004*, para. 2.20; *EC — Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, *28 April 2005*, para. 9; *EC — Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, *12 September 2005*, para. 12; *US — Zeroing (EC)*, WT/DS294/R, *31 October 2005*, para. 1.7; *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R, *6 March 2006*, para. 8.

[102] *EC —Biotech*, WT/DS293/R, *29 September 2006*, para. 7.10.

[103] *EC – Sardines*, WT/ DS231/AB/R, *26 September 2002*, para. 160: "We find that we have the authority to accept the brief filed by a private individual, and to consider it. We also find that the brief submitted by a private individual does not assist us in this appeal".

[104] Cf. the brief filed by Morocco in *EC – Sardines*, WT/ DS231/AB/R, 26 September 2002, paras 163-165; para. 164: "As we have already determined that we have the authority to receive an amicus curiae brief from a private individual or an organization, a fortiori we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU. We find no such prohibition".

[105] *US - Softwood Lumber III*, WT/DS236/R, *27 September 2002*, para. 7.2: "This brief was submitted to us prior to the first substantive meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this amicus curiae brief. After this meeting, we received three additional unsolicited amicus curiae briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs". Implicitly WT/DS277/R, United States - Investigation of the International Trade Commission in Softwood Lumber from Canada - Report of the Panel, 22/03/2004, FN 75.

to make their comments on the briefs (so those sent after the first meeting, but before the last one are acceptable).[106]

In the proceedings before a panel a brief may contain both facts and points of law, while certain reports of the AB specified that, given the fact that Art. 17.6 of the DSU limits an appeal to issues of law and legal interpretations developed by the panel, on appeal the briefs may only concern legal matters [107] and deal with new information not yet provided by the parties.[108]

Almost all the reports assert that the panel and the AB have discretion in accepting amicus briefs;[109] however, since the *Shrimp Turtles* report, the parties too play a decisive role in the admission of a brief. In early disputes, amicus briefs were considered only when the parties incorporated them into their files.[110] Then, more recently, both panel and AB reports decided to consider them only where the parties agreed or did not contest their admission,[111] and other of their reports said that they would be taken into account only insomuch as the parties touched upon them.[112] This

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[106] *US - Lead and Bismuth II*, WT/DS138/R, *23 December 1999*, 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"; *EC — Export Subsidies on Sugar*, WT/DS283/R, 15 October 2004, para. 7.81.

[107] *EC – Sardines*, WT/ DS231/AB/R, 26 September 2002, para. 169: "Morocco's amicus curiae brief provides mainly factual information. ... As Article 17.6 of the DSU limits an appeal to issues of law and legal interpretations developed by the panel, the factual information provided in Morocco's amicus curiae brief is not pertinent in this appeal".

[108] *US — Softwood Lumber IV*, WT/DS257/AB/R, *19 January 2004*, para. 9: "The Appellate Body received two amicus curiae briefs during the course of these proceedings... These briefs dealt with some questions not addressed in the submissions of the participants or third participants...".

[109] This has been stressed in all the cases, see *inter alia*, *US — Lead and Bismuth II*,WT/DS138/AB/R, *10 May 2000*, paras 36-42.

[110] *US — Shrimp*, WT/DS58/R, *15 May 1998*, and *US — Shrimp*,WT/DS58/AB/R, *12 October 1998*; *EC — Asbestos*, WT/DS135/R, *18 September 2000*, para. 8.12 (that follows what stated by the AB in the *US — Shrimp* report); *Brazil — Retreaded Tyres*, WT/DS332/R, *12 June 2007*, para. 1.8.

[111] In *US — Countervailing Measures on Certain EC Products*, WT/DS212/AB/R, *9 December 2002*, to the opposition of the European Community corresponds the fact the AB does not consider the amicus submission, cf. para. 76; *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R, *6 March 2006*: to the opposition of the US (FN21) the AB did not consider the amicus, para. 8; *China — Auto Parts*, WT/DS339/AB/R-WT/DS340/AB/R-WT/DS342/AB/R, *15 December 2008*, para. 11; *EC — Export Subsidies on Sugar*, WT/DS283/R, *15 October 2004*, para. 2.20, and 7.77; *US – Shrimps Turtles*, WT/DS58/AB/R, *12 October 1998*, para. 107: "the exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute".

[112] *EC — Bed Linen*, WT/DS141/R, *30 October 2000*, FN 10;*US — Zeroing (EC)*, WT/DS294/R, *31 October 2005*, para. 1.7; *US — Softwood Lumber IV*,WT/DS257/AB/R, *19 January 2004*, para. 9: "The Appellate Body received two amicus curiae briefs during the course of these proceedings... No participant or third participant adopted the arguments made in these briefs. Ultimately, in this appeal, the Division

approach risks rendering the briefs very rare, because so far only the USA (and then, in part, the European Union) has welcomed the possibility to submit amicus briefs at the WTO; many other states have clearly contested this possibility.[113] This opposition has been exacerbated by three cases in which the content of either an amicus curiae, or the website of an NGO that submitted one, revealed that the author of the brief had access to documents and information covered by confidentiality.[114] The most extensive reasoning in the reports on amici curiae has so far been dedicated to breaches of confidentiality, while in other cases in which they were accepted the panel and the AB rapidly dismissed the briefs, finding them not useful to the case.[115]

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did not find it necessary to take the two amicus curiae briefs into account in rendering its decision", internal fn. omitted. *US — Softwood Lumber VI*, WT/DS277/R, *22 March 2004*, fn. 75; *US — COOL*, WT/DS384/R, WT/DS386/R, *18 November 2011*, para. 2.10: "The Panel gave the parties an opportunity to provide comments on the brief at the second substantive meeting, 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 in these proceedings. The parties and several third parties took the occasion to comment on the amicus curiae brief at the second substantive meeting. The Panel considered the information contained in the brief as necessary and to the extent that it was reflected in the written submissions and evidence submitted by the parties".

113 *US – Final Softwood Lumber*, WT/DS257/R, 29 August 2003, para. 5.55: "India considers that the WTO panels and the Appellate Body do not have a right to accept and consider any briefs or arguments submitted by anyone other than the parties or third parties to the dispute. WTO panels, however, under Article 13 of the DSU, could seek information or technical advice or opinion of any individual or body on certain aspects of the matter or factual issues concerning scientific or technical matter raised in a dispute. We do not consider that 'arguments' of uninvited bodies or individuals would fall into such category". *Thailand — H-Beams*, WT/DS122/AB/R, *12 March 2001*, para. 63 (Thailand); *US — Softwood Lumber IV*, WT/DS257/AB/R, *19 January 2004*, para. 42. The issue is also raised explicitly by a panel as a matter of concern: *US — Softwood Lumber VI*, WT/DS277/R, *22 March 2004*, fn. 75: "Having considered carefully the question of how to treat that communication, and any further such communications that might be received, and in light of the absence of consensus among WTO Members on the question of how to treat amicus submissions, we decided not to accept unsolicited amicus curiae submissions in the course of this dispute".

114 *EC —Biotech*, WT/DS293/R, *29 September 2006*, para. 6.196, lamenting that that the Institute for Agriculture and Trade Policy and Friends of the Earth disclosed "on their own websites, interim findings and conclusions of the Panel which were clearly designated as confidential". *Thailand — H-Beams*, WT/DS122/AB/R, *12 March 2001*, paras 62-78: Thailand contests the use of confidential information contained in the file in the brief of the CITAC association, and the fact that the same law firm, Hogan & Hartson L.L.P., cooperated with Poland and CITAC; *EC — Export Subsidies on Sugar*, WT/DS283/R, *15 October 2004*, paras 2.21-2.28, and 7.86-7.99, Brazil contests the use of confidential information sent to the panel by a German association of producers.

115 *EC — Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, *12 September 2005*, para. 12; *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R, *6 March 2006*, para. 8; *EC —Biotech*, WT/DS293/R, *29 September 2006*, para. 7.11 (US said that amici curiae were irrelevant); *EC – Sardines*, WT/ DS231/AB/R, *26 September 2002*, para. 315.*b*: "the amicus curiae briefs submitted in this appeal are admissible but their contents do not assist us in deciding this appeal". *EC — Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, *28 April 2005*, para. 9; *Brazil — Retreaded Tyres*, WT/DS332/AB/R, *3 December 2007*, para. 7.

The lack of a procedure naturally renders analysis more difficult in comparison to other jurisdictions. It is not clear when the participation of amici was refused because there is no duty to disclose such information. It is possible that a request was made in all the cases, but this is impossible to know.

The terms for submissions are not very clear. Certain panels said that a brief must be submitted before the first substantive meeting of the Panel, and others that the parties must have at least one meeting in order to make their comments. In any case, while it is clear and public when a panel is constituted, this cannot be said for the hearings, so those interested have a potential wide fork of time to submit their brief.

Maybe not surprisingly, in certain cases there was an issue of confidentiality. Given the uncertain procedures and the uncertain terms of submissions, it is more likely possible to participate as amici if you actually have a contact with a party, than for someone with a general interest in something affected generally by the dispute. Further steps are necessary to make the use of this device more effective: paradoxically, the 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. This is probably one of the reasons for the small number of cases discussing amici. The resistance posed by many states to the amici participation,[116] however, makes it unlikely that this will be resolved in the short-term.

The data shown above also allow us to understand better that every type of dispute before the WTO can benefit from the use of amici. The small number of cases in which amici were discussed is not due to the fact that only a few cases touched upon matters of public concern. Basically, all the disputes at the WTO can be classified either as touching mainly on the interests of a specific group or groups, or as affecting also public concerns (in addition to the interests of a group). The first type are more private, they affect a small circle of interested subjects; while the second are more public, affecting widespread interests. In both types of disputes there is the possibility and an interest to submit a brief, in the more "private disputes" at least by the representative of

[116] On the opposition of developing countries to amicus curiae see NIRMALYA SYAM, *Civil Society Groups and Administrative Law: Amicus Curiae in WTO*, Institute for International Law and Justice (IILJ), Global Administrative Law: South Asian Dialogue Series, 2007, and ANDREW HURRELL, *On Global Order*, Oxford University Press, New York, 2007, pp. 112-114.

a very specific interested group, even if other ways to communicate the interest (e.g. lobbying at the appropriate level) are available. As we have seen, the total number of cases involving amici is composed, more or less on a 1:2 ratio, by, respectively, cases in which briefs were submitted by common concern groups (like environmental or human rights NGOs), or by specific advocacy groups (such as producer associations). Accordingly, the difference between dispute types does not seem relevant.

2.4 International Investment Arbitrations

As at the WTO, amici curiae were introduced in international investment arbitrations between private entities and states through the adjustment of the procedure by the arbitrators during the proceedings: it happened first in the Iran-USA Claims Tribunal, and then before Chapter 11 NAFTA arbitral tribunals in two cases (*Methanex* and *UPS*, both in 2001),[117] and then before ICSID tribunals in 2005 and 2006.[118] These submissions were allowed through the interpretation of the UNCITRAL and ICSID dispositions (respectively Art. 15 of the UNCITRAL Arbitration Rules of 1976, and Art. 44 of the ICSID Convention) that attribute to the arbitrators the possibility to adjust the procedures when necessary.[119] On the contrary to the WTO, the states, then, officially

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[117] *Methanex Co. 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, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001*. For comments on the cases see ORTINO, *The Impact...* above at fn. 90, p. 301 ff. The experience of the *Iran-USA Claims Tribunal* to allow *amici curiae* participation under Art. 15 of UNCITRAL Arbitration Rules of 1976 (an Article similar to Art. 17 of the Rules as amended in 2010) was evoked as precedent in the *Methanex* case, cf. ERIC DE BRABANDERE, *Non-State Actors in International Dispute Settlement: Pragmatism in International Law*, in JEAN D'ASPREMONT (ed.), *Participants in the International Legal System*, Routledge, New York, p. 342 ff., at 352.

[118] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal. S.A. v. Argentina,* ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, *19May 2005*; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, *Order in Response to a Petition for Participation as* Amicus Curiae, *17 March 2006*. In another decision issued between these ones, *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on the Respondent's Objection to Jurisdiction, *21 October 2005*, para. 17, the request was rejected.

[119] On the topic the legal literature is extensive: ALESSANDRA ASTERITI, CHRISTIAN J. TAMS, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, in STEPHAN W. SCHILL (ed.), *International Investment Law and Comparative Public Law*, at http://ssrn.com/abstract=1618843; TOMOKO ISHIKAWA, *Third Party Participation in Investment Treaty Arbitration*, 49 Int'l and Comp. L. Quarterly 373 (2010); CHRISTINA KNAHR, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 Arbitration Int'l 327 (2007); LOUKAS A. MISTELIS, *Confidentiality and Third Party Participation in Investment Arbitration*, 21 Arbitration Int'l 205 (2005); SAVARESE, *Amicus...* above at fn. 57; KYLA TIENHAARA, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 Review of European Community and International Environmental Law 230 (2007); CATHERINE YANNACA-SMALL, *Transparency and Third Party*

endorsed amici participation, amending the ICSID Arbitration Rules in 2006[120] and issuing a specific statement of the member states in the case of NAFTA in 2003.[121]

After this, other free trade and investment agreements recognized the possibility of submitting amici curiae, like the Dominican Republic-Central America-United States Free Trade Agreement (hereafter CAFTA)[122] and other treaties.[123] Therefore, the possibility to submit an amicus brief is now enshrined at two levels: first in the procedural rules that regulate the arbitrations, and now also in the investment treaty. UNCITRAL Arbitration Rules, as amended in 2010, still do not envisage this possibility, because they are still conceived as a regulation primarily for private commercial arbitration; a working group is, however, discussing a new set of rules on transparency in arbitrations involving states, that contemplate the participation of third interested parties.[124]

a) The NAFTA and the FTC Statement

NAFTA provides at Art. 1128 the possibility for member states that are not party to a dispute to "make submissions to a Tribunal on a question of interpretation of [the] Agreement". No other article allows or prohibits the possibility for private parties to

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Participation in Investor-state Dispute Settlement Procedures, in OECD (ed.), *International Investment Law: A Changing Landscape – A Companion Volume to International Investment Perspectives*, Paris, 2005, pp. 17-24; CARL-SEBASTIAN ZOELLNER, *Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings*, in RAINER HOFMANN, CHRISTIAN J. TAMS (eds), *The International Convention for the Settlement of Investment Disputes (ICSID) – Taking Stock After 40 Years*, Baden-Baden, 2007, pp. 179-208; FRANCESCO FRANCIONI, *Access to Justice, Denial of Justice and International Investment Law*, 20 Eur. J. Int'l L. 729 at 738-743; BARNALI CHOUDHURY, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*; EUGINE LEVINE, Amici Curiae *in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. Int'l L. 200 (2011).

[120] AURÉLIA ANTONIETTI, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review: Foreign Investment Law Journal 427 (2006); ANTONIO R. PARRA, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 The International Lawyer 47 (2007).

[121] *NAFTA Free Trade Commission Statement on Non-Disputing Party Participation, 7 October 2003*, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf, and commented in KINNEAR ET AL., *Investment Disputes under NAFTA, An Annotated Guide to Chapter 11*, Kluwer Law International, Alphen aan den Rijn, 2006.

[122] CAFTA, Art. 10.20.2 and 3.

[123] For example, the Bilateral Investment Treaty between Rwanda and USA, signed in Kigali on the 19th of February 2008, at Art. 28.3 says: "The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party", or the free trade agreement between the USA and Singapore, signed in May 2003, at Art. 15.19.3.

[124] See below sect. 2.4.*d*) for details.

submit a brief, and that is why, in the *Methanex* and *UPS* cases, the Tribunals could interpret the arbitration rules to accept private amici.

With the Statement of 2003 (FTC Statement hereafter), the Free Trade Commission composed by the three NAFTA member states extended the possibility to submit a written brief to any interested party, with the recommendation to follow the procedure described in the FTC Statement in the "interests of fairness and the orderly conduct of arbitrations".[125] This statement is not a formal amendment of NAFTA and gives *recommendations* for the amicus procedure; however, the non-disputing interveners and the arbitral tribunals are very scrupulous in observing what is prescribed by the FTC Statement.[126]

The conditions are well detailed. The FTC Statement sets a two-phase procedure, first with the request for permission to submit a brief, and then with the possible submission of the brief (depending on the response of the tribunal). Only persons that have a significant presence in the territory of a Party can apply (para. B.1). The application for leave to file a brief must be written, no longer than 5 typed pages, and include a description of the applicant;[127] it must contain the nature of the interest that the applicant has in the arbitration and the specific issues of fact or law it wants to address, and explain why the Tribunal should accept the submission (para. B.2). If permission to submit the brief is granted, the submission shall be no longer than 20 typed pages, including any appendices, set out a precise statement supporting the applicant position on the issues, and only address matters within the scope of the dispute (para. B.3). The FTC Statement also lists certain criteria to guide the arbitral tribunal in the decision to accept the brief: whether it brings "a perspective, particular knowledge or insight that is different from that of the disputing parties"; whether it "address[es] matters within the scope of the dispute"; whether "the non-disputing party has a significant interest in the arbitration; and "there is a public interest in the subject-

[125] See above at fn. 120.
[126] See for example the whole proceedings of the *Glamis* dispute, and the precise analysis in the award, *Glamis Gold Ltd. v. USA*, (NAFTA Ch. 11, UNCITRAL), Award, *8 June 2009*, para. 286.
[127] Including its general objectives, the nature of its activities, and any parent organization, disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party. Identify any government, person or organization that has provided any financial or other assistance in preparing the submission.

matter of the arbitration"; and whether the submission avoids disrupting the proceedings or unduly burdens or unfairly prejudices any disputing party (paras B.6 and B.7). The arbitral tribunal then decides on the request, and sets the time-limits for the parties, and for the non-disputing member states to present their observations.

After the awards held before the FTC Statement (*Methanex* and *UPS*), amici curiae were presented in three more cases decided after its introduction: *Glamis*, *Grand River*, and *Merrill & Ring*. The three cases, aside from the industrial interests of the producers and of the unions, could have potentially affected the public at large: the first and the third cases were about mining and timber (indigenous rights and environment), and the second about special regulations for native Americans (rights of indigenous people). In *Glamis*, a complicated cases involving a mining site (touching on the rights of the owner, rights of Native Americans, a natural park, and environmental laws)[128] several briefs were presented by different groups: the National Mining Association, the Quechan Indian Nation, the Sierra Club and Earthworks, and the Friends of the Earth. The mining association supported the claimant, Glamis, while the environmentalist groups and the Quechan Indian Nation supported the US. The Tribunal clearly stated that its duty is to adjudicate a dispute by applying NAFTA rules,[129] and that "Given the Tribunal's holdings [...] the Tribunal does not reach the particular issues addressed by these submissions".[130] The arbitral tribunal rejected the claims and did not challenge the legislation of California, but without commenting upon the amicus briefs.[131]

In the *Merrill & Ring v. Canada* case[132] the Communications, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour, presented a joint brief after the term, accepted by the tribunal after having consulted the parties. As in the previous case, the amicus brief supported

[128] More than 150 paragraphs of the final decision are dedicate to summarize the relevant facts and national legislations over the dispute, cf. *Glamis Gold Ltd. v. USA*, (NAFTA Ch. 11, UNCITRAL), Award, *8 June 2009*, paras 32-184.
[129] *Ivi*, paras 3-9.
[130] *Ivi*, para. 8.
[131] *Glamis* claimed that United States has denied the minimum standard of treatment under international law to Glamis, (Art. 1105) and has expropriated Glamis without paying fair compensation (Art. 1110).
[132] *Merrill & Ring Forestry L. P. v. Canada* (NAFTA Ch. 11 – UNCITRAL), Award, *31 March 2010*.

the state against the claims (they were rejected by the Tribunal, without comment on the brief).[133]

In *Grand River v. USA*, a case involving certain domestic regulations on tobacco, public health, and the right to be consulted of indigenous people, the Tribunal in 2009 received a letter from the National Chief of the Assembly of First Nations after the term for submission.[134] The Claimants included the letter in their file, and in that context it was read and considered by the Tribunal.[135] The amicus supported the claims, but the Tribunal rejected them.

b) ICSID Arbitration Rules (and some CAFTA arbitrations)

Compared to the FTC Statement, ICSID Arbitration Rules are more generic. Rule 37, effective 10 April 2006, says:

> 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;
>
> (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.

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[133] *Written Submission by the United Steelworkers, Communications, Energy and Paperworkers Union of Canada, and the British Columbia Federation of Labour, 26 September 2008.*

[134] The letter endorsed the UN Declaration on the Rights of Indigenous Peoples "and the customary international law principles it reflects," and called for indigenous rights to be "taken into account whenever a NAFTA arbitration involves First Nations investors or investments", *Grand River Enterprises Six Nations Ltd. et Al. v. USA*, Award (NAFTA Ch. 11 – UNCITRAL), *12 January 2011*, para. 50.

[135] *Ibidem*.

The rules, which refer not to amici, but to *non-disputing parties*, are not as detailed as the FTC Statement, but recall it, and in practice during the proceedings further details are established by the tribunals, fixing the length and setting time-limits for the amici and for the parties to the dispute to reply.

Several cases have applied these rules and defined the way they function in practice. The first case that admitted the filing of amicus briefs under the new rules is *Biwater Gauff*, in 2007. Notwithstanding that the decision was issued after the amendment of the ICSID Arbitration rules, the proceedings started before it, and accordingly the Arbitral Tribunal should not have applied the new rules: "Any arbitration proceeding shall be conducted [...] in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration".[136] However, the arbitral tribunal considered whether the three conditions envisaged by Rule 37.2.*a*), *b*), and *c*), were fulfilled, and accepted the brief.[137]

In another case, *Foresti*, four NGOs submitted a joint brief,[138] and so did the International Commission of Jurists.[139] The Tribunal, given the conditions in Rule 37 (the brief shall bring a perspective, particular knowledge or insight that is different from that of the disputing parties, and address a matter within the scope of the dispute), decided to give to the parties limited access to the case files "to enable NDPs (non-disputing parties, LC) to give useful information and accompanying submissions to the Tribunal".[140] It then specified:

> The Tribunal had ordered the Parties to provide the NDPs with certain redacted documents because it had taken the view that the NDPs must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.[141]

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[136] Art. 44 of the ICSID Convention.
[137] *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award, *2 February 2007*, para. 50. For comments see ENRIQUE FERNÁNDEZ MASIÁ, *Primeras aplicaciones de las nuevas reglas de arbitraje del CIADI sobre transparencia y partecipacion de terceros en el procedimiento arbitral*, in *Transnational Dispute Management*, 9-1, 2009.
[138] *Piero Foresti, Laura de Carli and Others v. South Africa*, ICSID Case No. ARB(AF)/07/1, Award, *4 August 2010*.
[139] *Ivi*, paras 9, 25-29.
[140] *Ivi*, para. 28.
[141] *Ivi*, para. 28.

Another issue came out in the *AES* case: a corporation incorporated in the United Kingdom filed a case against Hungary.[142] Since both are members of the European Union, the European Commission submitted an amicus brief.[143]

Lastly, other issues were addressed in the *Bernhard Von Pezold and Others* case, again on the pertinence of the brief to the dispute.[144] The Tribunal in this conjoined arbitration refused the submission because "neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings".[145] Accordingly, the Tribunal refused the submission of a brief, because the non-disputing parties' submission did not address a matter within the scope of the dispute,[146] and "the Petitioners do not have a 'significant interest in the proceeding'...[T]he ECCHR's expertise is focused on corporate responsibilities for human rights abuses... [and its] mission and experience do not, in the context of these proceedings, as presently constituted, satisfy the requirement of a 'significant interest in the proceedings'."[147] More interesting is the paragraph dedicated to assessing the presence of both the qualities, not always easily found together, required for participation as an amicus: an *interest* in the dispute, but with the freely-given spirit necessary to *friendship*, to *amicitia* – that is, an *independence* of amici from the parties:

> [T]he Arbitral Tribunals have reservations as to the independence and/or neutrality of the Petitioners, including the chiefs of the indigenous communities. ... Rule 37(2) also provides that an NDP submission must not unfairly prejudice either party. In this case, the Arbitral Tribunals are of the view that the circumstances surrounding these Petitioners are such that the

[142] *AES Summit Generation – Tisza Erömü KFT v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.
[143] *Ivi*, para. 8.2: «The Tribunal also acknowledges the efforts made by the European Commission to explain its own position to the Tribunal and has duly considered the points developed in its amicus curiae brief in its deliberations». In other cases, the Commission was invited by the arbitrators to the proceedings, see the comments of ABDREA K. BJORGLUND, *The participation of sub-national government units as* amici curiae *in international investment disputes*, in Chester Brown, Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge UK etc., p. 311 ff.
[144] *Bernhard Von Pezold and Others v. Zimbabwe* (ICSID case No. ARB/10/15), and *Borders Timbers Limited, Borders Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Zimbabwe*, ICSID Case No. ARB/10/25, *Procedural Order No. 2,26 June 2012*.
[145] *Ivi*, para. 57.
[146] *Ivi*, para. 60.
[147] *Ivi*, para. 61.

> Claimants may be unfairly prejudiced by their participation and the Application must therefore be denied.[148]

This award states very clearly that *i*) amicus briefs cannot enlarge a dispute to include issues not covered by the parties, and *ii*) that an amicus should be a friend: *interested* but *independent,* a *friend of the court* and not a *friend of one of the parties.* This is not to say that it should be *indifferent* to the dispute, or not siding with one of the possible outcomes. But that an amicus cannot be the duplicate of a party, or directly connected to it.

In all these cases the tribunals set up a part of the proceedings dedicated to presenting the amici, inviting their participation, and establishing time limits and further details not present in the ICSID Arbitration Rules, such as the briefs' length. The whole procedure more closely resembles an intervention, with the involvement of the parties, than the light submission of a brief to inform the tribunal.

The ICSID Arbitration Rules have also been applied in other cases kept confidential,[149] and in arbitrations established under CAFTA. This treaty has very broad provisions on amici (here called *amici curiae,* while *non-disputing Parties* are intended the other member states of the treaty), which say at Art. 10.20:

> 2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.
>
> 3. The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.

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[148] *Ivi*, para. 62.

[149] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, *Decision on Jurisdiction and Admissibility*, at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C65&actionVal=viewCase. In 2011 a non-disputing party applied to file a written submission in the case *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, see https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C381&actionVal=viewCase. *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C111&actionVal=viewCase; however, a comment on these cases can be read in CHRISTINA KNAHR, *The New Rules on Participation of Non/Disputing Parties in ICSID Arbitration: Blessing or Curse?*, in CHESTER BROWN, KATE MILES (eds), *Evolution in Investment Treaty Law and Arbitration*, CUP, Cabridge etc., 2011, pp. 330-333; see also the comments of VINGE CHRISTEN SÖDERLUND, *The Future of the Energy Charter Treaty in the Context of the Lisbon Treaty*, in GRAHAM COOP, *Energy Dispute Resolution: Investment Protection, Transit, and the Energy Charter Treaty*, p. 120 ff.

Sub-paragraph 2 gives non-disputing member states the right to submit a brief or to make an oral statement on the interpretation of the agreement, but not on other issues (similarly to Art. 1128 in NAFTA).[150] Sub-paragraph 3 establishes the possibility to submit an amicus brief by any person or entity. It leaves the decision on whether to accept an amicus brief only to the tribunal, without consulting the parties to the dispute, and it does not specify if the amicus must be in writing, or can consist of an oral statement. The first point is apparently in contradiction with the ICSID Arbitration Rules, which give the parties power to be consulted about amicus admissibility; the second is open to interpretation in cases in which the arbitration rules chosen for the proceedings do not specify any further rule for amici submission.

The parties raised these questions in the *Pac Rim Cayman* case, a CAFTA arbitration regulated by ICSID Arbitration Rules. Here, the Tribunal requested the observations of the Parties on the admissibility of written amicus briefs and on the admissibility of amici to present oral arguments,[151] and gave permission to submit only written observations on the current jurisdictional phase.[152] Most interestingly, the Tribunal issued an ICSID news release with the conditions for submitting an amicus brief in order to invite broad public participation.[153] The Tribunal received one brief[154] which it took into consideration in several passages of its decision.[155]

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[150] See *Railroad Development Corporation v. Guatemala*, ICSID Case No ARB/07/23, Award, *29 June 2012*, in which El Salvador, Mexico, and United States filed a submission with the interpretation of the minimum standard of aliens, para. 207 ff., and the submission made by Costa Rica and the USA in the *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, *Decision on the Respondent's Jurisdictional Objections, 1 June 2012*, paras 1.31-1.32.

[151] *Letter from El Salvador, Re: Pac Rim Cayman LLC v. Republic of EI Salvador, 18 March 2011*, ICSID Case No. ARB/09/12, in which El Salvador, the respondent state, affirmed that "it would be appropriate for the Tribunal to accept and consider the proposed *amicus curiae* submission". *Letter from the Claimant, Re: Pac Rim Cayman LLC v. Republic of EI Salvador, 18 March 2011*, ICSID Case No. ARB/09/12, in which the Claimant requested to deny the Applicants' request to make an oral presentation, non-accept part of the brief.

[152] *Pac Rim Cayman LLC v. Republic of EI Salvador*, ICSID Case No. ARB/09/12, *Procedural Order No. 8, 23 March 2011.*

[153] *ICSID News Release re Amicus Curiae, Procedural Order Regarding Amici Curiae, 2 February 2011*, reproduced in *Pac Rim Cayman LLC v. El Salvado, Decision on the Respondent's Jurisdictional Objections, 1 June 2012*, para. 1.35.

[154] *Pac Rim Cayman LLC v. El Salvador, Decision on the Respondent's Jurisdictional Objections, 1 June 2012*, para. 1.33 ff.

[155] *Pac Rim Cayman LLC v. El Salvado, Decision on the Respondent's Jurisdictional Objections, 1 June 2012*, paras. 1.38, 2.36-2.40, 2.43, 4.58, 4.85.

In other cases, non-disputing member states, and not private entities, submitted a brief and made oral statements. In *Commerce Group and San Sebastian Gold Mines v. El Salvador*, two state members of CAFTA, Costa Rica and Nicaragua, submitted amicus briefs under Art. 10.20.3 (and not under 10.20.2)[156] and Art. 37.2 of the ICSID Arbitration Rules, and three non-disputing states were admitted to make oral statements at the hearings.[157] In its decision the Tribunal discussed the two written amici, and ultimately reached conclusions in line with them.[158]

CAFTA Art 10.20.3, because it is so general, is in need of completion; it relies either on the more detailed provision on amicus submissions that is set out in the arbitration rules, or, in any case, on the procedure adopted each time by the tribunal. In all the CAFTA cases listed above, the arbitration was governed by the ICSID Arbitration Rules (rules that allow the parties to be involved in process of amici submission and to make comment on them). The tribunals always fleshed out the procedures with further details, and the parties had the opportunity to make comment on them. However, if the arbitration is not governed by the ICSID Arbitration Rules, but by rules that do not provide a procedure for amici (like the UNCITRAL Arbitration Rules), nothing prevents the tribunal from allowing oral submission, or from admitting amicus briefs or statements without consulting the parties, in a way that is similar to the European and Inter-American Courts of Human Rights. In a dispute between TCW Group, Dominican Energy Holdings and the Dominican Republic, this was the case; however, the Tribunal, in a procedural order, established a procedure for amici submission that closely resembled the FTC Statement and ICSID Arbitration Rules, that is, again, envisaging an active role for the parties.[159]

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[156] In *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, El Salvador, Guatemala, and the USA submitted a brief under Art. 10.20.2, interpreting the CAFTA.
[157] *Commerce Group and San Sebastian Gold Mines v. El Salvador*, ICSID Case No. ARB/09/17, Award, *14 March 2011*; Costa Rica and Nicaragua submitted a written brief, para. 39, while Costa Rica, Dominican Republic and USA were admitted to the hearings ex Art. 32 of the ICSID Arbitration Rules, *ivi*, para. 47.
[158] *Ivi*, paras. 80-82, and 140.
[159] *TCW Group, Inc., and Dominican Energy Holdings, L.P. v. Dominican Republic, Procedural Order No. 2, 15 August 2008*, paras 3 and 3.6.1 ff. The dispute was then terminated by the mutual agreement of the parties, *Consent Award*, *16 July 2009*.

c) The work at the UNCITRAL on transparency

The United Nations Commission on International Trade Law (UNCITRAL) started to consider the possible introduction of amicus participation in 2006,[160] in its work on transparency in treaty-based investor state arbitration.[161] In several earlier cases the UNCITRAL Arbitration Rules (of 1976) had been interpreted as allowing amici submission, through a broad interpretation of Art. 15, "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".[162] UNCITRAL then entertained the possibility of formalizing this interpretation by establishing rules on amici submission, as part of the rules on transparency, applicable to state private investment disputes; however, the rules have not yet been finalized and approved.

The debate on transparency is still ongoing, and it affects many issues beside the participation of amici curiae, like the publication of documents and awards, and access to the hearings; however, a key part of the work has already been dedicated to the participation of non-disputing states, institutions, and private parties to the arbitration between private entities and states. On several occasions the Working Group stressed the friction between the confidentiality of arbitrations and the need for transparency in procedures involving public entities like states,[163] pointing to the potentiality of the web

[160] UNCITRAL, Working Group II (Arbitration), *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules*, 20 July 2006, Doc. A/CN.9/WG.II/WP.143, para. 71: "The Working Group might wish to consider whether an express provision on third party intervention should be included in any revised version of the UNCITRAL Rules".

[161] See lastly *Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, Doc. A/CN.9/WG.II/WP.169, *6-10 February 2012*.

[162] This interpretation has still been recently proposed in the arbitrations *Chevron and Texaco v. Ecuador* (Tribunal constituted under the USA – Ecuador BIT): *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, Award, *31 August 2011* (USA-Ecuador BIT – UNCITRAL). A Canadian based organizations (*International Institute for Sustainable Development*), and an Ecuadorian (*Fundación Pachamama*), filed a joint amicus brief. On the 26 April 2011 "After considering the Petition submitted and the comments of the Parties, the Tribunal has decided not to permit the participation of the Petitioners as amici curiae at this stage of the arbitration", *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, Re: PCA Case N° 2009-23 (the amicus brief contested the jurisdiction of the arbitral tribunal, but it had already grounded its jurisdiction in an interim award of 1 December 2008).

[163] UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of Its forty-fifth session (Vienna, 11-15 September 2006)*, Doc.A/CN.9/614,para. 83; UNCITRAL, Working Group II (Arbitration and conciliation), *Fifty-fourth session, Settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration, 9 December 2010*, Doc. A/CN.9/WG.II/WP.162/Add.1; UNCITRAL, *Report of the Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011), 25 February 2011*, Doc. A./CN.9/717.

for this purpose.[164] Although the difference between a treaty-based claim and a commercial arbitration was clear to the Commission, it nonetheless decided against including specific provisions for treaty-based arbitrations in the UNCITRAL Arbitration Rules themselves. It started the drafting of a separate set of rules on transparency that could be used in addition to the Arbitration Rules in cases involving states (but the rules on transparency have not been yet approved),[165] and the amendments of the UNCITRAL Arbitration Rules, approved in 2010, do not include the submission of amici (even if they do not prohibit it).

In the latest developments of the work, many issues were illuminated.[166] The expression *non-disputing party* was preferred to *amicus curiae*,[167] and two proposals were presented,[168] reflecting two different approaches to regulation: a synthetic one, and a detailed one that "corresponds to a suggestion that guidance should be provided to third parties and the arbitral tribunal, taking account of the fact that a number of States have a little experience in that field".[169] The first possibility was then dropped, and the second proposal was polished further in 2012.[170] The work goes forward, and the

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[164] UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of Its forty-sixth session (Vienna, 5-9 February 2007)*, Doc.A/CN.9/619, para. 61.

[165] UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the work of Its forty-eighth session (New York, 4-8 February 2008)*, Doc.A/CN.9/646,para. 69.

[166] For example, regarding the question of the applicability of these rules to existing treaties, several states presented a comment saying that the application of the new rules on transparency to existing treaties depends on the parties consent. Preparation of a legal standard on transparency in treaty-based investor-State arbitration. *Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America, 2 august 2012*, Doc. A/CN.9/WG.II/WP.174,http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/552/41/PDF/V1255241.pdf?OpenElement. The question was deeply discussedin the UNCITRAL *Report of the Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011), 25 February 2011*, Doc. A./CN.9/717.

[167] UNCITRAL, *Report of the Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October 2011), 17 October 2011*, Doc. A./CN.9/736, paras 71-74.

[168] UNCITRAL, Working Group II (Arbitration and conciliation), *Fifty-fifth session, Settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration*, *9 December 2010*, Doc. A/CN.9/WG.II/WP.166.

[169] *Ivi*, para. 47; the proposals are at para 42 ff.

[170] UNCITRAL, Working Group II (Arbitration and conciliation), *Fifty-sixth session, Settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration*, *13 December 2011*, Doc. A/CN.9/WG.II/WP.169, para. 35: "Draft Article 5. *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 provide the following written information in a language of the arbitration, in a concise manner, and within such page limits as may be set by the arbitral tribunal: (a) description of the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general

Working Group remains active in proposing shared solutions that will contemplate the possibility to submit non-disputing party briefs in arbitrations between private investors and states.

d) A few remarks on amici curiae in investment arbitrations

The possibility to submit amici curiae is today envisaged at both levels, the material (the treaties), and the procedural (the arbitration rules). We have focused on two multilateral instruments, NAFTA and CAFTA, and on the arbitration rules made by ICSID and UNCITRAL. The FTC Statement and the ICSID Arbitration Rules refer to "non-disputing parties", and CAFTA to "amici curiae", while UNCITRAL developments on the participation of non-disputing parties to the proceedings are not yet part of the arbitration rules.

If we look at the three texts that envision the possibility to submit amici curiae, they are very different: the FTC Statement of 2003 is detailed, regulating basically all the aspects of the procedure; the ICSID Arbitration Rules are more generic, but still provide guidance for the most problematic aspects. CAFTA is highly generic; however, in (almost) all the CAFTA cases with participation of amici CAFTA rules where integrated by the ICSID ones; in the only case in which a CAFTA arbitration, regulated by the UNCITRAL Arbitration Rules, accepted the participation of amici, *TCW Group, Dominican Energy Holdings v. Dominican Republic*, the Arbitral Tribunal followed a procedure almost identical to that of other ICSID arbitrations (see above sect. 2.4.*b*).

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objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclosure whether or not the third person has any affiliation, direct or indirect, with any disputing party; (c) information on any government, person or organization that has provided any financial or other assistance in preparing the submission; (d) description of the nature of the interest that the third person has in the arbitration; and (e) identification of 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 things (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; (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) only address matters within the scope of the dispute. 5. The arbitral tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. 6. The arbitral tribunal shall also ensure that the disputing parties are given an opportunity to present their observations on the submission by the third person".

In practice, all the cases have so far managed amici submissions very similarly: first with the reception of a request to participate in the early phase of the proceedings; followed by an order setting time limits and further details; then submission and comments of the parties; and finally mention of the briefs in the body of the decision. In certain cases, also, like *Pac Rim Cayman v. El Salvador*, the internet has been used as a tool to reach any interested party by issuing a public press release with the conditions for a request of leave for participating.[171]

However, apart from the level of details of the rules, there are three relevant issues emerging from these texts. The first regards the role of the two parties in opening the arbitration to amici participation, and then to interfere with their submission. ICSID Arbitration Rule 37 says that a tribunal "[a]fter consulting both parties" may allow a non-disputing parties "to file a written submission". This generic expression attributes to the parties the right to interfere with the procedure, in particular deciding in advance to have an arbitration in which the participation of non-disputing parties is prohibited, or to refuse a request for leave; this Rule, however, being so generic (it just says that the Tribunal has to *consult* both parties), leaves the final decision to the Tribunal. The FTC Statement gives a more limited role to the parties: it says that "No provision of the [NAFTA] limits a Tribunal's discretion to accept written submissions from a [non-disputing party]" (para. A.1), and that "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" (para. B.5). CAFTA puts the whole decision in the hands of the arbitrators: "The tribunal shall have the authority to accept and consider amicus curiae submissions" (Art. 10.20.3). Therefore, paradoxically, in a CAFTA arbitration regulated by ICSID Arbitration Rules (that admit a procedure open to amici participation after having consulted the parties), the parties can exclude amici participation, but not in a CAFTA arbitration regulated by UNCITRAL Arbitration Rules (that does not say anything about amici participation).

The second issue regards the possibility for other states to submit a brief. CAFTA and the ICSID Arbitration Rules are silent, while the FTC Statement clearly, by saying

[171] *Pac Rim Cayman v. El salvador*, see *above* at fn. 149; see also *Apotex Inc. v. USA, NAFTA/UNCITRAL Arbitration Rules Proceeding - Invitation to Amici Curiae, ICSID News Press Release, 9 August 2011.*

that a non-disputing party "is a person of a Party, or that has a significant presence in the territory of a Party", addresses only the private parties, and excludes the third NAFTA state from participating. In practice, no state submitted an amicus brief in ICSID arbitration on bilateral treaties; in a CAFTA arbitration, on the contrary, that was the case (Costa Rica and Nicaragua in *Commerce Group and San Sebastian Gold Mines v. El Salvador*), notwithstanding the fact that CAFTA explicitly provides for only a limited interpretive power of intervention of the states (Art. 10.20.2).[172]

Finally, none of them gives the tribunals any duty report on the submissions. The list of criteria envisioned by the FTC Statement and by ICSID implicitly requires a motivated answer from the tribunals, but for disputes over CAFTA this is not clear. As already noted in the analysis of other jurisdictions, it would be preferable to give full report of the accepted and refused briefs in the first part of the case, along with the description of the proceeding.

2.5 The ICJ and the Seabed Disputes Chamber

As described above, at section 1.3, the International Court of Justice (ICJ) does not allow for the participation of private entities, and so far has generally been thrifty in admitting third parties.[173] Art. 34 provides that only states can appear before the Court (excluding, therefore, also international organizations: an anomaly already stressed by Jennings almost 20 years ago)[174] but provides the possibility for them to submit information.[175] Art. 66 is broader, and allows international organizations to present *oral*

[172] A question related to this one came out in the *Methanex* case, before a NAFTA/UNCITRAL arbitral tribunal: Mexico contested that the admittance of amici curiae would give to private entities more power to intervene than the limited power given to member states envisaged by NAFTA Art. 1128, but then did not apply to participate as amicus to the case.

[173] See CHRISTINE M. CHINKIN, *Third-Party Intervention before the International Court of Justice*, 80 Am. J. Int'l L. 495 (1986); PAOLO PALCHETTI, *Opening the International Court of Justice to Third States: Intervention and Beyond*, 6 Max Planck Yearbook of United Nations Law 139 (2002).

[174] ROBERT JENNINGS, *The International Court at Fifty*, in 89 Am. J. Int'l L. 493 (1995), at 504. For other observations see PIERRE-MARIE DUPUY, *Article 34*, in ANDREAS ZIMMERMAN, CHRISTIAN TOMUSCHAT, KARIN OELLERS-FRAHM, *The Statute of the International Court of Justice*, OUP, Oxford etc., pp. 554-556.

[175] Art. 34.2: "The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative".

and *written* statements in the advisory jurisdiction.[176] But in any case no private entity, according to the statute of the ICJ, can submit a brief.

However, although the incidents did not appear in the official record of the case, in the past the Court has received communications from NGOs in both contentious cases and in advisory proceedings. They were "dropped" in the Court's library so as to be accessible to the judges. Secondary sources refer to this happening in the *Nicaragua* and *Gabcikovo-Nagymaros* cases,[177] and in a letter to the Herald Tribune the Registrar summarized one of the communications sent to the Court by an NGO in the advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons*:

> The *amicus curiae* brief has been received by the Court but has not been admitted as part of the record in these cases. It is, however, available to members of the Court in their Library.[178]

Consolidating this usage, but only as far as the advisory jurisdiction is concerned, the possibility for NGOs to send relevant information to the Court is provided for by Practice Direction XII, which says:

> 1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case 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

[176] VALENCIA OSPINA, *Non-Governmental...* above at fn. 42, pp. 227-232.
[177] Apparently, the usage started with the Nicaragua case, SHELTON, *The Participation...* above at fn. 5, p. 619. For a secret exchange of amici briefs among judges and the parties see also what stated in the *Methanex Corp. v. USA Decision on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001*, para. 34: "[M]ore recently, it appears that that written submissions were received by the ICJ, unofficially, in [the ICJ] *Case Concerning the Gabcikovo-Nagymaros Project*, ICJ Reports, 1997".
[178] *Letter to the Editor, International Herald Tribune, 15 November 1995.*

> location where statements and/or documents submitted by international non-governmental organizations may be consulted.[179]

In short, it provides a special shelf at the Peace Palace where the relevant materials can be deposited, located beside the thousands of other volumes present in its library.

This procedure is hard to comment on because is not a procedure: in envisaging a drop-box accessible to everybody, it avoids the establishment of any direct interaction between the authors of the brief, the judges, and the parties, eliminating at the same time any public knowledge of the briefs.

The Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS) adopted a similar, but at the same time very different way to deal with amici submission. In the advisory proceedings on the *Responsibilities of States sponsoring entities with respect to activities in the International Seabed Area*, the Chamber, even if does not have a procedure dedicated to amici briefs, posted two briefs to the official website of the ITLOS, and provided a room in the same building for the amici to explain to the press their briefs.[180] Unlike with the ICJ, in this case the views expressed in the amicus briefs were made public, as the President of the Seabed Chamber stressed in a paper.[181] Still it is not clear who asked to participate, or what the reasons were for accepting or excluding them. A good way to temper this downside could be to publish a reasoned procedural order in which all the applicants are listed, and in which reasons are given for the acceptance of some of them.[182]

In any case, in the contentious jurisdiction, both before the ICJ and the ITLOS the possibility for private entities to submit and amicus brief is still precluded.

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[179] ARTHUR WATTS, *ICJ's Practice Directions of 30 July 2004*, 3 Law & Prac. Int'l Cts. & Tribunals 385 (2004)

[180] For references, see above at fn. 1.

[181] Above at fn. 1.

[182] TREVES, *Non-Governmental...* above at fn. 2: "[T]he attitude taken by the Chamber is similar to that reflected in the ICJ's Practice Direction XII... There is, however, a difference. While, under the Court's Practice Direction these submissions are to 'be placed in a designated location of the Peace Palace', the Chamber, well conscious of the impact of modern technology, decided to place them on the Tribunal's website, although on a separate section". On the participation of the public to the ITLOS GAUTIER, *NGOs...* above at fn. 2, p. 233 ff.

Table	**WTO – AB**	**WTO - Panel**	**ECtHRs**	**I-ACtHRs**	**NAFTA**	**CAFTA**	**ICSID Arb. Rules**	**Seabed Disputes Chamber**	**ICJ**
a) Is a procedure provided for?	No, but several reports accepted briefs	No procedure in the DSU or the rules of procedure. Allowed by reference to Arts 12/13 of DSU	CEDU Art. 36; Rules of Procedure Art. 44	Not in the American Convention or the Court's Statute. Yes in the Court's Rules, Arts 2, 28 and 44	Not in the Agreement, but a 2003 Statement of the members recommend a detailed procedure	CAFTA Art. 10.20.3	ICSID Arbitration Rule 37	No. Only precedent: the Adv. Op. of 1 Feb. 2012	Not in the statute. Practice Direction XII for adv. jurisd.

2.6 Conclusions

The analysis of the procedures and of the practice of courts and tribunals shows different ways of dealing with amici curiae. In the next pages, a table can help in illustrating in a synthetic way the results of this analysis.

b) How is participation structured? **Is preliminary leave required? What is the filing deadline? Must the petition take a specified form?**	Usually petitioners simultaneously send the complete brief to both panel and parties during the proceedings	Usually petitioners simultaneously send the complete brief to both panel and parties, before the first meeting/ the last meeting, of the parties (this is controversial)	Letter to President to obtain right to participate within 12 weeks after notice of the application (or relinquishment of jurisdiction/ acceptance of the panel of the Grand Chamber) has been given to the respondent (or the parties)	Submission to Court without preliminary request, within 15 days following public hearing/the order setting deadlines for the submission of final arguments	Leave must be requested, may be filed at any moment, no more than 5 typed pages. Then eventual brief Both in writing (para B.2)	No. In practice, a previous request for leave is filed at any moment, Then the brief. Both in writing	No. In practice, a previous request for leave is filed at any moment. Then the brief. Both in writing	Petition to the President of the Chamber within time limits of those allowed to participate. Then the brief	Submission of brief to Court without preliminary requests, at any moment during proceedings
c) Which kind of entity is allowed to request participation? **Are there geographical limitations?**	Persons, professors/ experts, associations and NGOs, member states. No geographic limitations	Persons, professors/ experts, associations and NGOs, member states. No geographic limitations	Party States, Council of Eur. Commissioner HRs, private persons. In practice also NGOs and organs of IOs. No geographic limitation for entities other than states: in practice extra European based NGOs file briefs (but only member states can apply)	Art. 44: any person and institution (thus, NGOs/IOs are included). Rarely states have filed amici. No geographical limitation (but only member states have applied)	Para. B.1 says that only persons having a significant presence in the territory of a Party can apply (not member states)	Any "person or entity that is not a disputing party"	Any person or entity that is not a party to the dispute (in practice, NGOs, private entities, and interested member states)	No indication	In content. jurisd., only IOs; in the adv. jurisd. beside states and IOs, only Int. NGOs, not associations, experts, local unions, professors...
d) Is there a duty to disclose contacts between parties and amici, or the ownership and the funding of associations and NGOs?	Confidentiality rules imply necessity of a clear separation between parties and amici	Confidentiality rules imply necessity of a clear separation between parties and amici	No indication	No indication	Duty to disclose the identity of the applicant, possible contacts with the parties, and funding (para. B.2)	No indication	No indication. In practice, a brief not independent from one party has been rejected	No indication	No indication

e) Under what conditions can amici be admitted?	The applicant must make an original contribution to the resolution of the dispute	The applicant must make an original contribution to the resolution of the dispute. In first cases admitted only when a party incorporated their arguments	Not specified in the rules. In practice, the briefs cannot put forward arguments in favor or against allegations, but should be helpful to the Court	Not specified	The *applicant* must have an interest in the arbitration, identify and address a specific issues of fact or law and explain why the Tribunal should accept the submission (para. B.2) The *Tribunal* will consider whether the amicus would bring "a perspective, particular knowledge or insight that is different from that of the disputing parties", but within the scope of the dispute (para. B.6)	No indication	The applicant shall bring a perspective, particular knowledge or insight that is different from that of the disputing parties, but within the scope of the dispute	Not specified	Not specified
f) Is content specified: **-facts** **-law** **-value** **-language** **-new points** **-length**	- No (DSU, Art. 17.6) - Yes - No - Usually English - Only new points (Softwood Lumbers IV, AB)	- Yes - Yes - No - Usually English - No - In practice no longer than 20 pages	- Yes - Yes - Yes -One of the two official languages - No - No (but from practice seems from 10 to 20 pp)	- Yes - Yes - Yes -Language of the procedure - No - No limits	- Yes - Yes - No - Language of the procedure - Yes - Less than 20 pp, annexes included	Not specified	- Yes - Yes - Not excluded - Language of the procedure - Yes - Usually less than 20 pages	Not specified	Documents or statements. No other specifications
g) Are briefs allowed only in certain kinds of disputes?	Not specified; every dispute in practice	Not specified; in practice every dispute	Not specified in practice every dispute	Not specified; in practice every dispute	Only if there is a public interest in the subject-matter o the arbitration" (para. B.6)	Not specified; in practice every dispute	Not specified; in practice every dispute	Not specified	Int. NGOs can apply only to the advisory jurisdiction.

h) Who has the power to admit or deny?	The Appellate Body	Formally the panel; in practice the opinion of the parties is decisive	The President. The Parties are not involved	The President with the Permanent Commission. The Parties are not involved	The Tribunal; the parties must be consulted	The Tribunal alone. In practice, even in cases not regulated by ICSID Arb. Rules, the parties are consulted	The Tribunal; the parties must be consulted	The President of the Chamber	No answer is required
i) What form does the answer take?	No specific form has been used. No duty to publish refusals	No specific form has been used. No duty to publish refusals	Letter to the applicant. No duty to publish refusals	Letter to the applicant. No duty to publish refusals	Informal. No duty to publish refusals	Informal. No duty to publish refusals	Informal. No duty to publish refusals	Communication from President	No answer is required
j) Is it sent to the parties?	Usually petitioners simultaneously send brief to AB and to parties; AB gives communication to parties	Usually petitioners simultaneously send brief to Panel and to parties; Panel gives communication to parties	Yes, after acceptance	Only if President so requires	Yes (the parties have the right to submit their observations)	No indication. So far, in arbitrations regulated by the ICSID Arb. Rules, yes	Yes	Yes	Made available to parties in dedicated room. Notification sent to states/IOs intervening

k) Rights of the interveners, publication of those admitted, oral presentation	No access to file; no oral presentation of arguments; amicus not always mentioned, and not published	No access to file; no oral presentation of arguments; amicus not always mentioned and only in early cases attached to case file	No access to file. May be invited to present arguments: usually states and IOs organs intervening as amici make oral statements. The briefs accepted are mentioned in the decision, but not published	No access to file; may be invited to present arguments; those amicus briefs accepted are mentioned, but the briefs are not published	Right to have access to the case file not specified. In certain cases, limited access to Parties' files (to know scope of dispute and perspectives of the parties). Those that submitted a brief are mentioned in the decisions. The Tribunal can allow an oral presentation after the parties are heard	Right to have access to the case file not specified. In practice those that submitted a brief are mentioned in decisions. The Tribunal can allow an oral presentation	In certain cases, limited access to the Parties' files (to know the scope of the dispute and the perspectives of the parties). In practice, those that submitted a brief are mentioned in the decisions. The Parties (Rule 32) can allow an oral presentation	No access to file, no right to appear. Brief are published on the ITLOS web-site. Interveners allowed to present arguments in separate room of Court, for the press and the public, but not before the Chamber	No right: the document/ brief sent to the Court is treated as part of legal research

Final comments

The second part of this paper has been dedicated to going through several procedural rules and practices of participation of the public in international disputes and to assessing their fairness. To this end, both the expressions *amici curiae* and *non-*

disputing parties have been used interchangeably and as synonyms to describe *any entity* interested in a trial *but not party to it* that submits an *unsolicited* written brief (or makes an oral statement) to an international court or tribunal.

One set of questions that has been considered with particular attention deals with the idea of *public participation*, and includes: the clarity of the procedures and the equality of the treatment of all the interested entities; the conditions and the reasons for accepting or refusing the proposed amici; and the emergence in the final decision of the amici submissions. The second set of questions deals with the rights and interests of the parties to the dispute, including the interest in efficient proceedings. What is emerged has some shadows.

To begin with the first set of questions, those on the publicnesss and openness of the procedures, it must be noted, first, that certain jurisdictions do not accept amici submission (ICJ and ITLOS in contentious jurisdiction) or do not have clear rules dedicated to it, like the WTO. Also, most of the procedures are characterized by a lack of definitional clarity – a critical feature for an instrument that should enhance the public's right of participation in a trial. However, certain procedures (like NAFTA's) are better defined than others, and have greater success than those that, like that of the WTO, accept amici in practice, but have no clear dispositions regulating them.

Sufficiently codified procedures also reveal some issues: many procedures, including those of the European Court on Human Rights and Inter-American Court, do not entail a duty to publish the names of the amici that requested participation, while, on the contrary, the strict requirements for amici participation in the FTC Statement and ICSID Arbitration Rules implicitly impose on arbitral tribunals the duty of giving a public verification of their fulfillment (sect. 2.4). This is a serious issue for procedures that should enhance the participation of the public in a proceeding: it is unfair to leave unknown those that have requested to participate and have been rejected, and to accept certain participants without explaining why. In procedures in which the third non-disputing parties can bring comparative perspectives, facts, witnesses from the ground, scientific evidence, and also value-judgments interpreting a text, it is extremely important to explain why the trial has been open to one applicant, and closed to

another. Without this requirement it is impossible to tell whether all international procedures so far have managed amici submission in the clearest and more transparent way (it is quite possible that they have), or if the opposite is true.

Turning to the second set of questions, the rights of the parties and the interest of having an efficient proceeding, four points can be made. The first regards the number of amici submissions: the general trend of admittance of amici into international tribunals has not, so far, overwhelmed courts and tribunals. Only before the I-ACtHRs has the participation of amici been very wide in certain cases, and in this situation the addition to the rules of a length limit for briefs would be helpful.[183] Before the other jurisdictions, like the WTO, the Strasbourg Court or the investment tribunals, this has not been the case. Therefore, the possibility of third interested entities to submit a brief, at today, considering also the strict page limit imposed by courts and tribunals, has not so far been overly burdensome on the proceedings. However, this data is generally difficult to evaluate, given the fact that the number of requests to participate is not known. One of the reasons behind the moderate number of amici submitted could be the filtering carried out by registrars, judges and arbitrators, but no public record allows us to reflect on such question.

The second point regards confidentiality. It emerged at the WTO, because of the contacts between the parties and the amici (see above at sect. 2.3), and in certain investment disputes, when the arbitrators limitedly opened the case file to the petitioners for the purpose of submitting briefs that could help[184] the tribunal in its decision (see above at sect. 2.4.a and .b). In the latter case, a rule regulating access is too complicated to implement: it depends ultimately on the wisdom of the arbitrators and the details of the specific case. At the WTO it is probably the *lack* of clear rules on amici submission, rather than the possibility for amici to participate, that encourages contacts between the parties and those interested in participating as amici. In the absence of a

[183] The Rules of the I-A Court place no restrictions on the length and number of amicus briefs, and sometimes they are very long or too many in number: see *above* the conclusions of sect. 2.2 for further observations.

[184] ICSID Arbitration Rules and FTC Statement, by requiring briefs that do not touch on other points already covered by the parties, but only on new points necessary to make an informed decision, imposes in practice that amici partial access to the file, at least to understand the essence and boundaries of a dispute.

clear procedure, those that have contacts inside a proceeding have a position of advantage. The ability, at the WTO and in investment arbitrations, for the parties to keep certain cases isolated from public participation, or to grant only partial access to the case files, is important and must be preserved as an exceptional option – one that must be properly motivated and duly explained.

The third point regards the involvement of the parties in the procedure and their abilities to make decisions about amici admittance and to make comments on them. On one extreme end of this issue are the I-ACtHRs and the ICJ, in which the parties do not play any role: at the San José Court the brief reaches the *curia* while the parties have no power either to prevent their admission, or to make any observations regarding them (see sect. 2.2). At the ICJ the complete confidentiality of the submission of amicus briefs at the Peace Palace of The Hague can help/helps the Court in collecting relevant information for advisory opinions (and sometimes also for contentious cases, see above sect. 2.5); however, it does not help foster a public understanding of the voices that contribute to a decision. These choices leave the parties no possibility to reply to whatever points may have been raised in the briefs. At the opposite end of the spectrum there is the practice developed at the WTO, in which the parties exercise close control over the participation of amici (see sect. 2.3). This choice, too, can be criticized because it allows the parties to prevent the participation of amici in disputes in which they can play an important role. Other procedures fall in the middle: in the rules of the Strasbourg Court the parties do not have any place in admitting the amici, which the Chambers manage alone; but they do receive them before the hearings, therefore having the possibility to make reply. Finally, in investment arbitrations, the exchange about the admissibility and content of amicus briefs is usually well-structured (even if with different nuances, see sect. 2.4) in a procedure guided by the arbitrators in which the parties are fully involved. Among all these models, the choice of the Strasbourg Court seems the most convincing: by linking the Court and the amici it prevents the interference of the parties even in high stakes disputes; by circulating the amici before the hearings, it gives the parties the ability to comment on them;[185] at the same time, by

[185] Also the solution envisaged by the Seabed Chamber Dispute of the ITLOS (submission to the Chamber, publication of the briefs on the internet, oral statement to the press in an ITLOS' room) seems to strike a good compromise between the need to display on the one hand the reasons of the amici and their

not establishing an ad-hoc procedure for amicus briefs in the middle of the proceeding it does not stretch the proceedings and the duties of the parties.

A crucial question (the fourth point), arises as we consider the entities that participate as amici. All the analyzed jurisdictions allow for broad participation. In practice, several kinds of amici have participated in the cases considered: those representing a specific group and interest (like the producers of steel in a case involving steel production or native groups in cases involving native rights, etc.); those representing common concerns (that can also turn out to represent specific interests), like NGOs and associations advocating for environmental protection, human rights, etc.; those that have institutional tasks (like the UNHCR in cases affecting the rights of migrants or refugees, or the European Commission for arbitrations involving members of the European Union); and those that even if participating as amici have the peculiar distinction of representing member states (whose weight in such disputes is much different than that of other amici). This last point deserves attention: member states usually have limited power under the treaties to intervene on the basis of a specific procedure. This choice prevents the dispute from becoming a forum open to political influences, and keeps it focused on the settlement of the dispute. However, in many cases, as before the ECtHRs, the CAFTA arbitral tribunals, and on rare occasions before the WTO (and in a certain way before the I-ACtHRs) states intervene under the general rules for amici participation, according to the principle: *if private parties may, a fortiori may a state*.[186] The possibility for states to submit a brief opens the proceedings up to a more political role, in which the member states can reaffirm their vision of a dispute (not only of the treaty at stake) before the judges and arbitrators with, on the one hand, the benefit of the protection of the integrity of the systems, but, on the other hand, the possible risk of compressing and sacrificing the reasons of one of the two parties to the dispute.

These issues – the difficulties arising in the context of UNCITRAL of introducing non-disputing parties in the arbitration rules, and the resistances surrounding the ICJ,

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communication with the *curia*, and on the other hand the need to not interfere with the parties' participation in the trial.

[186] *EC – Sardines*, WT/ DS231/AB/R, *26 September 2002*, para. 164: "As we have already determined that we have the authority to receive an amicus curiae brief from a private individual or an organization, a fortiori we are entitled to accept such a brief from a WTO Member". See also above at fn. 103.

ITLOS and WTO – open the door to the substantial question mentioned above in the *Introduction*: is there a precise nature and function of international law, and therefore of international adjudication? Of what cause are amici curiae a phenomenon? And what critical point is manifested in the resistance to fully accepting a regular place for them in international litigation?

Before turning to these more philosophical questions, one potential explanation for some of these issues might be found on the practical, historical plane: the resistances at the UNCITRAL, ICJ, ITLOS and WTO could be the remnant of an old conception of international dispute based on the arbitral model of free sovereigns facing each other, bilaterally, on a voluntary basis, without the interference of any other subject; the problems in the procedures could be the normal imperfections that every new regulation has before the passage of years has a polishing effect.

Cultural resistance is also a possible explanation: amici curiae could be seen as another sign of the globalization of American law described by Martin Shapiro,[187] or another tile in the mosaic of the global common law that Chester Brown began to assemble.[188] Finally, a political explanation could be given: NGOs are mainly based in western countries, and they reflect the interests and ideas of that part of the world, and accordingly non-western countries do not want to be at disadvantage in the courtroom.[189]

If these were the true objections, then all international jurisdictions would have already moved beyond them to accept the introduction of clear rules allowing the participation of private parties, including those jurisdictions that do not currently have them. After all, national sovereignty has long been recognized as a limited foundation for a truly inter-national society, and so cannot be the motive for such extended resistance. Likewise, the foreign origin of an institution is not a valid (or durable) reason to resist: even countries with established legal traditions, like France, have introduced

[187] MARTIN SHAPIRO, The Globalization of Law, in *Indiana Journal of Global Legal Studies*, 1993, Vol. 1, pp. 37-64.
[188] CHESTER BROWN, *A Common Law of International Adjudication*, Oxford University Press, 2007; a very interesting work that, however, lacks of a section dedicated to the spreading in the world of a device of common law as the amicus curiae.
[189] See the observation of HURRELL, *On Global...* cit. above at fn. 116, pp. 112-114, in commenting the opposition of developing countries to NGOs participation at the WTO.

the possibility of admitting amici curiae after seeing the positive practical implications of having this institution. Furthermore, associations exist that represent the civil societies of every country, not only western ones, and they often request to participate as amici in international disputes; for example it is normal to see purely Latin American based NGOs and associations submitting briefs at the Inter-American court of Human Rights. So the question marks written above remain unanswered.

Certain issues, like the participation of states as non-disputing parties, and the *re-politicization* of once *de-politicized* disputes through the involvement of the civil society, point to a more fundamental issue, that the elapsing of time will not resolve: how the decisions on public choices should be organized in a global society. This question entails a reflection on what is public, on how interests and values can be not only represented, but also made accountable. It also calls for reflection on the place that international courts – still vacillating between being an exceptional place for settling a dispute and being a regular participant in the public lives of states – should have in it. These are interesting and relevant questions, which have lurked in the background of the above analysis, and which will be extensively addressed with further research and thought. However, without moving on to such a discussion, and facing all the questions it entails, this paper concludes that initial steps can be taken to smooth out some of the contradictions in amici participation and to regulate it in a more efficient and transparent way.