Part II
Commonalities and divergences: the procedural laws of *amicus curiae* participation

Chapter § 5 Admission of *amicus curiae* to the proceedings

> *[A]lso because I believe that the Court would be unwilling to open the floodgates to what might be a vast amount of proffered assistance, in my opinion a negative answer must be given to your first question, whatever justification for describing the volunteer as an amicus curiae may exist.*[1]

> *The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.*[2]

This Chapter addresses the admission of *amici curiae*. The first question an international court or tribunal considers upon receiving a request for leave to appear as *amicus curiae* – as in the above-quoted cases – is whether it is competent to grant the request.[3] Accordingly, this Chapter first examines the legal basis for the admission of *amici curiae* before the international courts and tribunals reviewed (A.). It then analyzes the various requirements in the admission processes starting with those attached to the person of *amicus curiae* (B.), followed by a comparison of request for leave procedures (C.).

A. Legal bases for amicus curiae *participation*

Much of the debate on *amicus curiae* has been reduced to the issue of competence to accept *amicus curiae* submissions. This is unsurprising. The admission of an entity unrelated to the case before an international court or tribunal is anathema to the bilateral notion of international dispute

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1 *South West Africa*, Letter No. 21 (Letter by the Registrar to Professor Reisman), Advisory Opinion, 6 November 1970, Part IV: Correspondence, ICJ Rep. 1970, p. 639.

2 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 108.

3 While the ICJ found that it lacked the power to accept an *amicus* brief, the WTO Appellate Body found that panels had the authority to do so. Neither the ICJ Statute and Rules nor the DSU or Panels' Working Procedures explicitly allowed for *amicus curiae* submissions.

settlement. Accordingly, both in investment arbitration and in WTO adjudication submissions by non-state entities were initially either ignored or rejected.[4]

As indicated in Article 38(1) ICJ Statute, there are three legal sources from which an international court or tribunal could draw authority to allow *amicus curiae* participation: treaty law, customary international law, or a general principle of law.

Amicus curiae participation by way of contractual legitimization describes the situation where the international court or tribunal draws permission to accept *amicus curiae* from its governing rules. This comprises permission in a *compromis* or an *ad hoc* agreement between the disputing parties. The latter is contingent on a permission by the instrument governing the proceedings to deviate from the standard set of procedural rules provided.[5] The permission may be express or implied. Where authority to accept *amicus curiae* has been conferred neither expressly nor impliedly, might an international court or tribunal seek to rely on its inherent powers.[6] Inherent powers are used to supplement the often-rudimentary procedural rules where necessary to ensure the proper functioning of a court.[7]

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4 For example, in *Aguas del Tunari v. Bolivia*, a case concerning the privatization of water services in Cochabamba, Bolivia's third largest city, which had drawn significant public attention and an *amicus curiae* request for leave from more than 300 entities, the arbitral tribunal found that acceptance of the submission was 'beyond the power or authority of the Tribunal' due to the consensual nature of arbitration and pointed to the parties' lack of consensus on whether to accept the submission. *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Appendix III: Letter from the Tribunal to Earthjustice, Counsel for Petitioners, ICSID Case No. ARB/02/3, pp. 125-127. The case concerned a damages claim by Aguas del Tunari, a subsidiary of the Dutch Bechtel corporation, in the amount of US$ 50 million under the Netherlands-Bolivia investment treaty for unlawful termination of a concession to Aguas del Turnari of the Cochabamba water system following the striking down by the military of a protest against an approximately 35% percent raise of water prices in the course of which one teenager was killed and over one hundred people injured.

5 See Article 101 ICJ Rules; Article 12 DSU; Article 44 ICSID Convention; Articles 1(1), 17(1) of the 2010 UNCITRAL Rules; Article 48 ITLOS Rules.

6 For an analysis of the concept of inherent powers, see C. Brown, *A common law of international adjudication,* Oxford 2007, pp. 56, 67; I. van Damme, *Treaty interpretation revisited, not revised*, ILO Distinguished Scholar Series, 30 October 2008.

7 E.g. *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, PCIJ Series A, p. 16 (The PCIJ reasoned that the absence of a fitting rule of procedure allowed

Alternatively, international courts and tribunals could draw permission from customary international law, which can constitute a source of procedural law.[8] However, it is difficult to argue that authority to accept and regulate *amicus curiae* submissions has attained the status of a rule of customary international law. So far, no international court or tribunal has sought to admit *amici curiae* on this basis. To form a rule of customary international law, pursuant to Article 38(1) (b) ICJ Statute the rule in question needs to be generally practiced in the belief that it is legally binding (*opinio iuris*). The intense debate surrounding the admissibility of *amicus curiae*, in particular the continuing strong political opposition to it in the WTO membership, as exemplified in numerous Dispute Settlement Body, General Council and Doha-Negotiation Meetings, indicates the absence of *opinio iuris* (at least for now).[9]

Equally, it is difficult to argue convincingly that the authority to admit *amici curiae* constitutes a general principle of international law.[10] General principles of international law prescribe a fundamental value or binding

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it to 'adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.'); *Northern Cameroons (Cameroon v. United Kingdom),* Judgment, 2 December 1963, Sep. Op. Judge Fitzmaurice, ICJ Rep. 1963, p. 103; *Nuclear Tests Case (Australia v. France)*, Judgment, 20 December 1974, ICJ Rep. 1974, pp. 259-260.

8 C. Brown, supra note 6, p. 53; S. Rosenne, *The law and practice of the International Court*, Vol. 3: Procedure, Leiden 2006, pp. 1027-1028; H. Thirlway, *Dilemma or chimera? Admissibility of illegally obtained evidence in international adjudication*, 78 American Journal of International Law (1984), pp. 622-623; *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (hereinafter: *US–Wool Shirts and Blouses*), Report of the Appellate Body, adopted on 23 May 1997, WT/DS33/AB/R.

9 Opposing C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 351 (The continuous assertion by panels and the Appellate Body of authority to admit *amicus* briefs have rendered '*amicus* briefs a customarily accepted procedural means.'); CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 21, FN 103; L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 Journal of World Investment and Trade (2004), pp. 333-336 ('[M]aybe there is an emergence of a customary international law rule which allows for the submissions of *amicus curiae* briefs.').

10 See C. Kessedjian, *Codification du droit commercial international et droit international privé: de la gouvernance pour les relations économiques transnationales*, 300 Receuil des cours (2002), p. 285 ('Reflechir à l'eventuelle existence d'un principe international de procedure qui permettrait a des tiers a un litige d'inter-

rule in an abstract manner. They are distilled from national laws or national court decisions and are prevalent in most of the world's legal systems. However, they are only directly binding if concretized in an international contract or as customary international law.[11] *Amicus curiae* is essentially a common law concept (see Chapter 3). Hence, it is difficult to view it as a *general* principle of law.

Accordingly, this section focuses on treaty-based authority to accept *amici curiae*.

I. International Court of Justice

Article 34(2) ICJ Statute allows the Court to

> request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

The provision does not use the term *amicus curiae*, but the first alternative functionally contains the typical features of *amicus curiae*.[12] Article 34(2) is further elaborated by Article 69(1) and (2) ICJ Rules:

> 1. The Court may, at any time prior to the closure of the oral proceedings, either *proprio motu* or at the request of one of the parties communicated as provided in Article 57 of these Rules, request a public international organization, pursuant to Article 34 of the Statute, to furnish information relevant to a case

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venir devant le tribunal.'); D. Hollis, *Private actors in public international law*: *amicus curiae and the case for the retention of state sovereignty*, 25 Boston College International and Comparative Law Review (2002), pp. 238-239. On the ascertainment of general principles, M. Nolan/F. Sourgens, *Issues of proof of general principles of law in international arbitration*, 3 World Arbitration and Mediation Review (2009), pp. 505-532; B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, pp. 257-394; s. Rosenne, supra note 8, pp. 1022-1023.

11 M. Bodgan, *General principles of law and the problem of lacunae in the law of nations*, 46 Nordisk Tidsskrift Internasjonal Ret (1977), pp. 37, 42; G. Göttsche, *Die Anwendung von Rechtsprinzipien in der Spruchpraxis der WTO-Rechtsmittelinstanz*, Berlin 2005, pp. 113-117, 123.

12 W. Jenks, *The status of international organizations in relation to the International Court of Justice*, 32 Transactions of the Grotius Society (1946), p. 38. Considering the whole provision as *amicus curiae*, P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 Max-Planck Yearbook of United Nations Law (2002), p. 167.

> before it. The Court, after consulting the chief administrative officer of the organization concerned, shall decide whether such information shall be presented to it orally or in writing, and the time-limits for its presentation.
> 2. When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate and also to authorize the parties to comment, either orally or in writing, on the information thus furnished.

Article 34(2) has to date not played any significant role in ICJ proceedings. The ICJ has consistently rejected requests for *amicus curiae* submissions by governmental and non-governmental entities by reference to the wording of Article 34(2), including requests from individuals and tribal representatives (see Chapter 3).

Pursuant to Article 50 ICJ Statute, the court may, 'at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.' The provision specifies the Court's general investigative power in Article 48 ICJ Statute.[13] The ICJ enjoys discretion in the selection of the entity or person carrying out an enquiry under the provision. It may appoint an expert or commission of inquiry *ex officio*, as long as the parties have referred to the facts investigated.[14] The provision is intentionally inclusive.[15] Article 50 ICJ Statute expects that the Court 'entrust' a relevant body. The ordinary meaning of this term does not seem to allow for the acceptance of unsolicited information, although this does not seem to be an insurmountable restriction. The provision could be interpreted to grant the Court permission to formally request *amicus curiae* submissions (after having received a request). This is confirmed by a contextual interpretation. The rules on standing are not an obstacle. Article 34(1) ICJ Statute

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13 A. Riddell/B. Plant, *Evidence before the International Court of Justice*, London 2009, pp. 57-58. The PCIJ Statute contained an identical norm. The proposal by the PCIJ Drafting Committee and the Advisory Committee of Jurists reveal that the norm was intended to enable the court to obtain information and views distinct from those of the parties.

14 M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, p. 239.

15 C. Tams, *Article 50*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed, Oxford 2012, para. 15, p. 1294.

addresses only standing before the ICJ. It does not, as the French version of the text might suggest, exclude any form of participation by non-state actors in ICJ proceedings.[16]

However, further contextual analysis renders a different result.[17] Article 50 concerns the evidentiary process. It distinguishes between enquiries – directed at the investigation and evaluation of specific questions of fact – and experts who shall explain complex technical and scientific questions to the legal specialists on the bench.[18] This differentiation indicates that the provision is unsuitable to accommodate the heterogeneous *amici curiae*, which typically share a specific view on the case and exceed neutral assistance in the evidentiary process. The object and purpose of Article 50 is to furnish the ICJ with a set of investigative powers in the event that the parties' submissions are insufficient to establish the factual record. For the same reason, reliance on Article 62(1) ICJ Rules is equally of no avail.[19]

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16 The French version of Article 34(1) reads: 'Seuls les Etats ont qualité pour se présenter devant la Cour.' It has been suggested that this term refers to the general ability to appear before the ICJ in any manner. The provision's historical background does not support such an understanding. The main purpose of the norm was to exclude the possibility for individuals to bring states before the PCIJ. See S. Rosenne, *Reflections on the position of the individual in inter-state litigation*, in: P. Sanders (Ed.) *International arbitration – liber amicorum for Martin Domke*, The Hague 1967, pp. 240, 244.

17 See, however, D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), p. 627; L. Bartholomeusz*, The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), p. 214; D. Shelton, *The International Court of Justice and non-governmental organisations*, 9 International Community Law Review (2007), pp. 150-151.

18 C. Tams, supra note 15, para. 4; *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (hereinafter: *Pulp Mills Case*), Judgment, 20 April 2010, Declaration of Judge Yusuf, ICJ Rep. 2010, p. 217, para. 5 ('The rationale behind these provisions on enquiry and the seeking of an expert opinion in the Statute and the Rules of Court is to allow the Court to obtain the necessary assistance and support in acquiring such full knowledge of the facts.').

19 Article 62(1) ICJ Rules: 'The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of an aspect of the matters in issue, or may itself seek other information for this purpose.' It is disputed if the provision allows the court to seek evidence *proprio motu* as it elaborates the court's interaction with the parties relating to party-submitted evidence under Article 49 ICJ Statute. See M. Benzing, supra note 14, p. 146; S. Rosenne, supra note 8, p. 1324; R. Mosk, *The role of facts in international dispute resolution*, 304 Receuil des Cours (2003), p. 96;

Ultimately, because of the clear textual constraints, the ICJ would have to change its rules on procedure and likely even Article 34(2) ICJ Statute in order to be able to invite non-governmental organizations to participate in contentious proceedings, an unlikely prospect given the arduous amendment procedure.[20]

Article 66(2) ICJ Statute addresses *amicus curiae* participation in advisory proceedings.[21] Its personal scope is less narrow due to the different phrasing of the predecessor norms in the PCIJ Statute:[22]

> The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Article 66(2) is further elaborated by Article 66(3) and (4) ICJ Statute, as well as Articles 105 and 106 ICJ Rules, which were introduced with the 1978 revision of the Rules:

> *Article 66*
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> 3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.
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> 4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular

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A. Riddell/B. Plant, supra note 13, pp. 62, 336-337. But see P. Palchetti, supra note 12, p. 169.

20 See Articles 69, 70 ICJ Statute. M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 The Law and Practice of International Courts and Tribunals (2006), p. 403; R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 International and Comparative Law Quarterly (2001), p. 123.

21 For the legislative history of Article 66, which was adopted with minimal changes from the PCIJ Statute, see A. Paulus, *Article 66*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed, Oxford 2012, pp. 1640-1645, paras. 3-10.

22 Articles 26 and 66 PCIJ Statute, respectively, see P.M. Dupuy, *Article 34*, in: A. Zimmermann/C. Tomuschat/ K. Oellers-Frahm/ C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed, Oxford 2012, p. 589, para. 3.

case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 105

1. Written statements submitted to the Court shall be communicated by the Registrar to any States and organizations which have submitted such statements.
2. The Court, or the President if the Court is not sitting, shall:
(a) determine the form in which, and the extent to which, comments permitted under Article 66, paragraph 4, of the Statute shall be received, and fix the time-limit for the submission of any such comments in writing;
(b) decide whether oral proceedings shall take place at which statements and comments may be submitted to the Court under the provisions of Article 66 of the Statute, and fix the date for the opening of such oral proceedings.

Article 106

The Court, or the President if the Court is not sitting, may decide that the written statements and annexed documents shall be made accessible to the public on or after the opening of the oral proceedings. If the request for advisory opinion relates to a legal question actually pending between two or more States, the views of those States shall first be ascertained.

The ICJ did not rely on any particular legal basis in its decision to accept an *amicus curiae* brief from the International League for the Rights of Man in *International Status of South West Africa*. Since, the ICJ has rejected all requests by NGOs and individuals on the basis of the limited scope of Article 66(2) ICJ Statute (see Chapter 3). The most elaborate rejection was sent to *Professor W. Michael Reisman* in *South West Africa*. *Reisman* sought permission from the ICJ to make submissions as *amicus curiae* on 'critical legal issues' relevant to the advisory proceedings. He argued that there was no explicit prohibition in the Statute or the Rules 'to accepting a document from an interested group or individual.' In his reply, the Registrar underlined the limited scope of participants pursuant to Article 66(2) ICJ Statute and by reference to the principle *'expressio unius est exclusio alterium*' found that there was no legal possibility to grant leave.[23]

In 2004, the ICJ issued Practice Direction XII to address the growing number of submissions from non-governmental organizations it re-

23 *South West Africa*, Advisory Opinion, 21 June 1971, Letter No. 18 (Professor Reisman to the Registrar), Part IV: Correspondence, ICJ Rep. 1971, pp. 636-637.

ceived.[24] A codification of the ICJ's practice in the *Nuclear Weapons* advisory proceedings it stipulates:

> 1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion on its own initiative, such statement and/or document is not to be considered as part of the case file.
> 2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
> 3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.

The Direction does not contain any assertion of authority to accept *amicus curiae* briefs. But given that it only addresses *international* non-governmental organizations, a term defined by the United Nations Economic and Social Council as 'any organization, which is not established by inter-governmental agreement', it can be argued to fall within the scope of Article 66(2) ICJ Statute.[25] Essentially, Practice Direction XII contains two messages: first, submissions from international NGOs do not form part of the formal record of the case as such. Second, such submissions are to be considered like any piece of information publicly available, with the added difficulty that they are only accessible at the Peace Palace.[26] Unless the parties take the time and effort to track down submissions at the Peace Palace and include them in their own submissions, they will be ignored. It is little surprising that these submissions have not been mentioned in any

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24 Practice Directions were introduced in 2001. They shall complement the ICJ Rules. With regard to the legal nature of Practice Directions, see S. Rosenne, *International Court of Justice*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 76.

25 UN ECOSOC Resolution 288 (X) 27 February 1950. See also Resolution 1296 (XLV) of 25 June 1968, which encompasses also 'organizations which accept members designated by government authorities, provided that such membership does not interfere with the free expression of views of the organizations.'

26 Cf. Article 56(4) ICJ Rules. The concept of 'publication readily available' was introduced in the ICJ with the 1972 Revision of the Rules. For further analysis, see A. Riddell/B. Plant, supra note 13, pp. 181-182. Due to growing concerns over the extensive reference to publications readily available by the parties, the ICJ has issued Practice Directions IXbis and IXter.

of the recent advisory proceedings. Instead, there is an increasing reliance on reports from NGOs submitted as documentary evidence by the parties in contentious and advisory proceedings.[27] Practice Direction XII solidifies the legal *status quo*. Moreover, it can be seen as an assurance to parties that the Court will not rely on an inherent power to admit *amici curiae* against their express wishes.[28]

The ICJ has exceptionally accepted information from entities not encompassed by the wording of Article 66(2) ICJ Statute in two types of cases.

The first constellation concerns cases where the advisory jurisdiction of the ICJ functions as a review instance to administrative tribunals of intergovernmental organizations in employment disputes.[29] In *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, a case concerning the validity of judgments rendered by the ILO Administrative Tribunal, the ICJ accepted sealed written statements by the staff members involved in proceedings against the UNESCO before the Administrative Tribunal through the UNESCO. Due to the restrictive wording of Article 66(2) ICJ Statute, the Court refused the petitioners' request to appear before the court or to at least send their submissions direct-

27 NGOs stand a better chance of having their views brought before the Court if submitted through a state. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Counter Memorial of the Kingdom of Belgium, 28 September 2001, pp. 80, 103-105, FN 250. See also D. Zagorac, *International courts and compliance bodies: the experience of Amnesty International*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 15.

28 Cf. M. Benzing, supra note 14, p. 249.

29 In its first decision under the new Statute, the ICJ acknowledged that Article 66(2) ICJ Statute caused 'inherent inequality between the staff member, on the one hand, and the Secretary-General and the member States, on the other.' It reasoned that '[g]eneral principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal. But that condition is fulfilled by the submission of written statements. ... The Court is … only concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court respecting the questions on which its opinion is requested and that the Court shall have adequate information to enable it to administer justice in giving its opinion.' *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, ICJ Rep. 1973, pp. 166, 178, 180-182, paras. 32, 35-39.

ly to it.[30] But the Court agreed to the proposal from the two original parties that the UNESCO would attach to its own submission those of the former staff members. The ICJ justified its direct circumvention of Article 66(2) ICJ Statute with the atypical nature of the case – it was essentially a private employment dispute – and the need to establish a minimal degree of procedural equality between the staff members and the international organization.[31] In 1995, a separate appeals mechanism was established within the UN Administrative Tribunal, but the appellate procedure remains applicable to other international organisations.[32] In 2012, in an employment dispute concerning the International Fund for Agricultural Develop-

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30 *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints made against the U.N.E.S.C.O.,* Advisory Opinion, 23 November 1956, Letters No. 9, No. 12, No. 23, No. 25 and Annex to No. 25 and No. 35, Part IV: Correspondence, ICJ Rep. 1956, pp. 236-238, 245-248, 253, 356. At the time, the General Assembly of the United Nations had already proposed to amend the procedure of the UN Administrative Tribunal in the way that the UN Secretary-General should transmit the opinion of those concerned by a contested judgment to the ICJ without previous review. This practice was later enshrined in Article 11(2) Statute of the UN Administrative Tribunal until a review mechanism within the administrative tribunal was created for cases involving UN staff members. Article 11(3) further recommended that, in the interest of procedural equality, oral proceedings should not be held. The mechanism remains relevant for employees of other international organizations.

31 *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.,* Advisory Opinion, 23 November 1956, ICJ Rep. 1956, pp. 77, 80. It seems that the Court bases the admission of the employee's statements on a loose reading of Article 65(2) ICJ Statute. It stipulates: 'Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.' In the first such case, the Court refused submissions from the individual. See *Effects of awards of compensation made by the United Nations Administrative Tribunal*, Decision, 13 July 1954 and Letter, 5 February 1954, ICJ Rep. 1954, pp. 48, 394.

32 See *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, ICJ Rep. 1973, pp. 166, 180-181, para. 36*; Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, 27 May 1987 and Letter No. 17 (The Legal Counsel of the United Nations to the Registrar), ICJ Rep. 1987, pp. 18, 20, para. 6 and pp. 253-254; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, 20 July 1982 and No. 23 (The Legal Counsel of the United Nations to the Registrar), ICJ Rep. 1982, pp. 325-326, para. 6 and p. 233.

ment, the ICJ was asked to apply a similar provision from the Statute of the ILO Administrative Tribunal. The ICJ confirmed its earlier decisions, although it questioned the adequacy of the review system in light of the rule of law.[33] The majority justified its decision by noting that the 'unequal position before the Court of the employing institution and its official, arising from provisions of the Court's Statute' had been 'substantially alleviated' by the transmission of documents from the official via the employing institution and the decision of the Court to not hold hearings in review proceedings.[34]

Second, the ICJ allows the filing of submissions from state-like entities that are directly affected by an advisory opinion.[35] In the *Wall* Opinion, the ICJ granted leave to file written submissions to the United Nations, its member states and Palestine after the General Assembly had in 2003 requested the ICJ to give an advisory opinion on the consequences of the construction of a wall by Israel in the occupied Palestinian territories.[36] The ICJ justified the granting of leave to Palestine as follows:

> [I]n light of General Assembly resolution A/RES/ES-10/14 and the report of the Secretary-General transmitted to the Court with the request, and taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement on the question within the above time-limit.[37]

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33 The majority questioned the adequacy of the review system. It considered that the principle of party equality 'must be now understood as including access on an equal basis to available appellate or similar remedies', but found that it was 'not in a position to reform this system.' See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, ICJ Rep. 2012, p. 10, paras. 45-47. *Judge Greenwood* disagreed with the majority in this regard. He considered the review system 'not acceptable today.' See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, Sep. Op. Judge Greenwood, ICJ Rep. 2012, pp. 95-96, paras. 3-4.

34 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, ICJ Rep. 2012, p. 10, para. 44.

35 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 136, 141, para. 4; *Kosovo*, Order of 17 October 2008, ICJ Rep. 2008, p. 410, para. 4.

36 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 136, 141, para. 4.

37 *Wall*, Order of 19 December 2003, ICJ Rep. 2003, p. 429, para. 2.

The ICJ did not explicitly rely on Article 66(2) in its Order.[38] The importance it attached to Palestine's participation is illustrated by the fact that the Palestinian speakers were also admitted to the hearings.[39] This decision marked a change from *Applicability of the Obligation to Arbitrate under section 21 of the Headquarters Agreement of 26 June* 1947, where the Court did not invite Palestine to participate despite the direct effect the advisory opinion had on its position. The underlying dispute between the UN and the USA concerned the closing of the Palestine Liberation Organisation's UN representation by the USA. Instead, the UN Legal Counsel informed the ICJ of the Palestinian position.[40] The ICJ confirmed its new approach in 2007 in *Kosovo* by granting leave to the Provisional Institutions of Self-Government of Kosovo in the advisory proceedings on the accordance with international law of the unilateral declaration of independence by the provisional institutions. This time, the ICJ even relied on the wording of Article 66(2) in its granting of leave.[41] The authors of the unilateral declaration filed written statements together with 35 UN member states and two intergovernmental organizations. In addition, they were also invited to participate in the oral proceedings.[42]

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38 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 141-142, para. 5.

39 *Wall,* Public Sitting held on Monday 23 February 2004, Verbatim Record, CR 2004/1, p. 17.

40 *Applicability of the obligation to arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, Order of 9 March 1988, ICJ Rep. 1988, paras 3-4. See also C. Chinkin, *Third parties in international law*, Oxford 1993, p. 232, FN 34; B. Stern, *L'affaire de l'OLP devant la jurisdiction international et interne*, 34 Annuaire français de droit international (1988), pp. 165-194.

41 *Kosovo*, Order of 17 October 2008, ICJ Rep. 2008, p. 410, para. 4 ('[T]aking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question'.).

42 See *Kosovo*, Public sitting held on Monday 1 December 2009, Verbatim Record, CR 2009/24, p. 30. During the General Assembly debates preceding the request, several states found that the General Assembly should ask that the Provisional Institutions be permitted to participate to ensure fairness in the proceedings. This was ultimately not done. See Y. Ronen, *Participation of non-state actors in ICJ proceedings*, 11 The Law and Practice of International Courts and Tribunals (2012), p. 92, FN 64; UN Doc. A/63/461 of 2 October 2008, Annex to UN Doc. A/63/461, para. 9; UN Doc. A/63/PV.22, pp. 2, 10-14.

The ICJ appears to have justified the admissions on the basis of the special circumstances (i.e. the special role and relevance of the two state-like entities concerning the issue before it), as well as its interest in obtaining the fullest information on the events underlying the advisory questions. It is unlikely that the decisions precipitate a broadening of the interpretation of the term 'international organization' in light of the particularities of the circumstances.[43] Further, the admissions follow an approach adopted already by the PCIJ in *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.[44] The case concerned the legality of legislation passed by the Socialist Nationalist Party majority in the Danzig Senate, which permitted prosecutors and judges to prosecute individuals for certain crimes not stipulated by law. The legislation had been used against opposition party members that complained to the High Commissioner of the League of Nations in charge of Danzig, then an autonomous area under the international protectorate of the League of Nations. In the advisory proceedings, the PCIJ permitted the Free City of Danzig to participate in the proceedings on the basis of an authorizing resolution from the Council of the League of Nations.[45] In addition, the opposition party members were informed that the PCIJ would receive an explanatory note to supplement their initial statement to the High Commissioner.[46] The Free City and the opposition party members made submissions in accordance with the invitations.

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43 See also G. Hernandez, *Non-state actors from the perspective of the International Court of Justice*, in: J. d'Aspremont (Ed.), *Participants in the international legal system, multiple perspectives on non-state actors in international law*, London and New York 2011, p. 151; A. Paulus, supra note 21, pp. 1646-1647, para. 14; H. Thirlway, T*he International Court of Justice 1989-2009: at the heart of the dispute settlement system?*, 57 Netherlands International Law Review (2010), p. 388.

44 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 4 October 1935, PCIJ Series A/B, No. 65.

45 *Resolution of 17 May 1922*, Official Journal of the League of Nations, Vol. 3, p. 545, item 667, PCIJ Series D, No. 6, cited by Y. Ronen, supra note 42, p. 90, FN 56.

46 The authorization was communicated to the Free City by Poland. *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 4 December 1935, PCIJ Series A/B, No. 65, p. 65.

II. International Tribunal for the Law of the Sea

Participation by non-parties before the ITLOS is regulated in the ITLOS Rules.[47] With respect to contentious proceedings, Article 84 ITLOS Rules provides as follows:

> 1. The Tribunal may, at any time prior to the closure of the oral proceedings, at the request of a party or *proprio motu*, request an appropriate intergovernmental organization to furnish information relevant to a case before it. The Tribunal, after consulting the chief administrative officer of the organization concerned, shall decide whether such information shall be presented to it orally or in writing and fix the time-limits for its presentation.
> 2. When such an intergovernmental organization sees fit to furnish, on its own initiative, information relevant to a case before the Tribunal, it shall do so in the form of a memorial to be filed in the Registry before the closure of the written proceedings. The Tribunal may require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also authorize the parties to comment, either orally or in writing, on the information thus furnished.
> 3. Whenever the construction of the constituent instrument of such an intergovernmental organization or of an international convention adopted there under is in question in a case before the Tribunal, the Registrar shall, on the instructions of the Tribunal, or of the President if the Tribunal is not sitting, so notify the intergovernmental organization concerned and shall communicate to it copies of all the written proceedings. The Tribunal, or the President if the Tribunal is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the intergovernmental organization concerned, fix a time-limit within which the organization may submit to the Tribunal its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings.
> 4. In the foregoing paragraphs, "intergovernmental organization" means an intergovernmental organization other than any organization which is a party or intervenes in the case concerned.

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47 Article 4(1) (a) (iii) *Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea* establishes that the UN Secretary-General 'shall [s]ubject to the applicable rules and regulations and the obligations of the United Nations under the relevant agreements, furnish to the International Tribunal information requested by it as relevant to a case before it.' This special cooperation provision leaves no room for discretion or interpretation to the Secretary-General, and is therefore not considered an *amicus curiae* provision, although the UN Secretary-General essentially acts as a friend to the ITLOS when transmitting the documents.

The norm reflects Article 34 ICJ Statute with three important differences: the wording of Article 84(2) ITLOS Rules does not oblige the tribunal to accept submissions made by the intergovernmental organizations on their own initiative; the personal scope of the provision is explicitly narrower by only addressing intergovernmental organizations (thereby incorporating Article 69(4) ICJ Rules); and the rule may be changed by the tribunal through Article 16 ITLOS Statute or be modified for a specific case by joint proposal of the parties based on Article 48 ITLOS Rules.[48]

In late 2013, the ITLOS received its first request for an *amicus curiae* admission in contentious proceedings (see Chapter 3). Although the ITLOS did not give reasons for the rejection of the brief from Greenpeace International (GPI), Article 84(2) and (4) ITLOS Rules essentially mandated the result. In addition, while the Netherlands informed the tribunal that it had no objections to the brief, Russia did, excluding the option of an *ad hoc* amendment to the Rules. The situation was complicated by two factors: first, GPI was not only directly affected in the case, but it worked closely with the Dutch Government on the case (see Section B). Second, the tribunal had to be particularly careful to preserving Russia's procedural rights, equality of arms, and its own appearance of impartiality, because Russia refused to participate in the proceedings.[49]

With respect to advisory proceedings, Article 133(2)-(3) ITLOS Rules determines:[50]

> 2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish in-

48 D. Anderson, *Article 84*, in: P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2006, p. 235.

49 *Arctic Sunrise Case* (Provisional Measures), Note verbale of the Embassy of the Russian Federation in Berlin of 22 October 2013 and Order of 22 November 2013, ITLOS Case No. 22, paras. 9-10, 13.

50 The UNCLOS provides for several forms of advisory proceedings. See R. Wolfrum, *Advisory opinions: are they a suitable alternative for the settlement of international disputes*, in: R. Wolfrum et al. (Eds.), *International dispute settlement: room for innovations?,* Heidelberg 2012, pp. 48-55. *Judge Wolfrum* lists three different forms of advisory proceedings. The ITLOS may give advisory opinions pursuant to Article 138(1) ITLOS Rules. Legitimacy for this provision is argued to stem from Article 21 ITLOS Statute which determines that the jurisdiction of ITLOS extends 'to all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.' The Seabed Disputes Chamber is competent to give advisory opinions pursuant to Articles 159(10) and 191 UNCLOS. See also

> formation on the question. The Registrar shall give notice of the request to such organizations.
> 3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber, or its President if the Chamber is not sitting, may fix a further time-limit within which such States Parties and organizations may present written statements on the statements made.
> 4. The Chamber, or its President if the Chamber is not sitting, shall decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings. States Parties and the organizations referred to in paragraph 2 shall be invited to make oral statements at the proceedings.

Neither Article 84 nor Article 133 ITLOS Rules find an express legal basis in the UNCLOS or the ITLOS Statute. Power to address these matters has been seen to stem from the tribunal's inherent powers and its duty of cooperation with other international organizations under general international law.[51] The latter would justify the exclusion of the admission of submissions from NGOs.

In *Responsibilities*, the Chamber received *inter alia* a joint submission by two environmental NGOs requesting leave to participate as *amici curiae* in the written and oral proceedings.[52] The President of the Chamber decided not to include the submission in the case file for falling outside the personal scope of Article 133.[53] The Chamber also refused the request for participation in the oral proceedings. However, the Chamber adopted a procedure comparable to the ICJ's Practice Direction XII. The submission

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P. Gautier, *NGOs and law of the sea disputes*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 236.

51 M. Benzing, supra note 14, p. 211. It is questionable whether the duty to cooperate reaches into the conduct of proceedings, and does not rather implicate diplomatic cooperation.

52 *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, p. 10, para. 13.

53 Critical, P. Gautier, *Article 133*, in: P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a Commentary*, Leiden 2006, p. 385 ('In this day and age, the important role of some non-governmental organizations deserves to be recognized by the Tribunal. … On matters of protection of the marine environment and preservation of marine resources, to name just a few areas, non-governmental organizations could also be of great assistance to the work of the Seabed Disputes Chamber in dealing with a particular request for an advisory opinion.').

was posted on the ITLOS's website under a separate heading to clarify that it was not part of the case file. By the posting it became a publication readily available in the meaning of Article 71(5) ITLOS Rules and could be relied on by the parties.[54] Further, the Chamber transmitted the document to all who had made written submissions under Article 133, thereby increasing the likelihood of it being read and considered. The Chamber did not give reasons for its approach.

On 27 March 2013, the Sub-Regional Fisheries Commission requested an advisory opinion on the obligations and liability of flag states and international agencies issuing fishing licenses for illegal, unreported and unregulated fishing activities in the Exclusive Economic Zones of third party states to the UNCLOS, as well as the rights and obligations of coastal states in relation to sustainable management of shared stocks and stocks of common interest.[55] In November 2013, the ITLOS received written statements from the USA and the WWF. The USA is not a state party to UNCLOS and therefore not covered by the wording of Article 133(3) ITLOS Rules. The Chamber first placed the statement under a separate section on its website – as typically done with *amicus* submissions. However, on 1 April 2014, it decided to consider the submission part of the case file, albeit under a separate section.[56] Even though the Chamber was careful not to label the submission an *amicus curiae* submission, it is one. The Chamber did not explain or justify its decision to admit the brief. The USA is a party to the 1995 Straddling Fish Stocks Agreement, which the Chamber emphasized. In March 2014, during a second round of submissions called for by the President of the Chamber, the WWF submitted another *amicus curiae* brief. As in *Responsibilities*, the Chamber posted the submissions under separate headings on the case-related ITLOS website and it also transmitted the submissions to the parties.[57]

Is this procedure in accordance with Article 133 ITLOS Rules? This could be disputed if Article 133 ITLOS Rules regulated submissions by

54 *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 14. Article 71(5) ITLOS Rules was applied in the Chamber proceedings pursuant to Article 40 ITLOS Statute and Articles 130(1) and 115 ITLOS Rules.

55 *SRFC*, Request of 27 March 2013, at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Letter_from_ISBA_14_10_2010_E.doc.pdf (last visited: 21.9.2017).

56 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 12, 15, 24.

57 *Id.*, paras. 15, 23.

non-parties exhaustively. The fact that the Seabed Disputes Chamber – unlike the ITLOS – grants access to states parties, the International Seabed Authority, state enterprises and natural and juridical persons in contentious proceedings indicates that the provision's narrow scope was intended.[58] This is buttressed by the fact that Article 133 is purposely narrower than its model provision Article 66(2) ICJ Statute. However, as part of the ITLOS Rules it is open to modification by the tribunal with the consent of the parties.[59] In fact, the ITLOS plenary and the Committee on Rules and Judicial Plenary during a review of the ITLOS Rules and judicial procedures in the early 2000 contemplated the desirability of developing guidelines on *amicus curiae* participation in light of the practice of other international courts and tribunals. While the idea was not rejected, it was considered premature.[60] Despite the recent experiences, the idea has not been revived yet.[61]

III. European Court of Human Rights

With the introduction of Article 36(2) ECHR in 1998, the ECtHR's *amicus curiae* practice was sanctioned by the member states of the Council of Europe. The provision stipulates:

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58 See also Article 291(2) in connection with Article 187 UNCLOS and Article 37 ITLOS Statute. See S. Talmon, *Der Internationale Seegerichtshof in Hamburg als Mittel der friedlichen Beilegung seerechtlicher Streitigkeiten*, JuS 2001, p. 555.

59 See, for the ICJ, H. Thirlway, *Article 30*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed, Oxford 2012, p. 522, paras. 17-19.

60 ITLOS, *Annual Report of the International Tribunal for the Law of the Sea for 2004*, SPLOS/122, 30 March 2005, p. 9, para. 41, available at: https://www.itlos.org/fileadmin/itlos/documents/annual_reports/ar_2004_e.pdf (last visited: 21.9.2017).

61 For the same reasons as before the ICJ, *amicus curiae* participation on the basis of the rules on evidence, specifically Articles 77(1) and 82(1) ITLOS Rules appears not possible. Further, application of these provisions in advisory proceedings through Article 130(1) ITLOS Rules and Article 40(2) ITLOS Statute appears problematic, because it is not clear if courts may engage in fact-finding in advisory proceedings. Apart from frictions with Article 133 ITLOS Rules, in advisory proceedings, the adjudicatory body is not necessarily given all the necessary facts as participation is voluntary and participants do not carry a burden of proof.

> The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Rule 44 ECtHR Rules further elaborates *amicus curiae* participation in paragraphs 3-6 as follows:[62]

> 3. (a) Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.
> (b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.
> 4. (a) In cases to be considered by the Grand Chamber, the periods of time prescribed in the preceding paragraphs shall run from the notification to the parties of the decision of the Chamber under Rule 72 § 1 to relinquish jurisdiction in favour of the Grand Chamber or of the decision of the panel of the Grand Chamber under Rule 73 § 2 to accept a request by a party for referral of the case to the Grand Chamber.
> (b) The time-limits laid down in this Rule may exceptionally be extended by the President of the Chamber if sufficient cause is shown.
> 5. Any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.
> 6. Written comments submitted under this Rule shall be drafted in one of the official languages as provided in Rule 34 § 4. They shall be forwarded by the Registrar to the parties to the case, who shall be entitled, subject to any conditions, including time-limits, set by the President of the Chamber, to file written observations in reply or, where appropriate, to reply at the hearing.

62 Prior to the amendment of the rules, Rule 61(3) 1998 ECtHR Rules regulated *amicus curiae* as follows: 'Any invitation or grant of leave referred to in paragraph 3 of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file.'

IV. Inter-American Court of Human Rights

The IACtHR has yet to discuss the legal basis for its acceptance of *amicus curiae* submissions both in contentious and in advisory proceedings, even though early requests for leave to submit *amicus curiae* briefs contended that *amicus curiae* participation could be anchored in the rules on evidence.[63] The IACtHR indicated in *Loayza Tamayo v. Peru* that it possesses an inherent authority to accept and regulate *amicus curiae* when it dismissed Peru's contestation of the admissibility of *amicus curiae* briefs from an individual and a NGO. The President held that the briefs would be added to the case file without further explanation.[64]

The 2009 codification of *amicus curiae* in the IACtHR Rules presupposes authority to admit *amici curiae*. It is argued that the authority to ad-

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63 See *Submission from the Urban Morgan Institute for Human Rights and the International League for Human Rights and the Lawyers Committee for International Human Rights in "Other Treaties" subject to the consultative jurisdiction of the court (Article 64 of the American Convention on Human Rights)*, Advisory Opinion, 24 September 1982, OC-1/82, IACtHR Series A No. 1, para. 5 and Series B, pp. 123, 128, 144, 151. Former Article 34(1) IACtHR Rules: 'The Court may, at the request of a party or the delegates of the Commission, or *proprio motu*, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function.' The provision applied directly only to contentious proceedings, but was argued to be applicable in advisory proceedings via Article 53 of the former Rules. In 2001, Article 34(1) became Article 45 IACtHR Rules: 'The Court may, at any stage of the proceedings, obtain on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.' See D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 American University International Law Review (1994), p. 349; T. Buergenthal, *International human rights in a nutshell*, 4th Ed., St. Paul 1999, p. 15; C. Moyer, *The role of "amicus curiae" in the Inter-American Court of Human Rights*, in: La corte interamericana de derechos humanos, *estudios y documentos*, 1999, p. 120; M. Ölz, *Non-governmental organizations in regional human rights systems,* 28 Columbia Human Rights Law Review (1997), p. 359; S. Davidson, *The Inter-American Court of Human Rights*, Dartmouth 1992, p. 59.

64 *Loayza v. Peru (Merits)*, Judgment, 17 September 1997, IACtHR Series C No. 33, p. 8, para. 22. The court confirmed its approach in *Case Yatama v. Nicaragua (Preliminary exceptions, Merits, Reparations and Costs),* Judgment, 23 June 2005, IACtHR Series C No. 127, p. 39, para. 120; *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections; Merits, Reparations and Costs), IACtHR Series C No. 144, p. 10, paras. 62.

mit *amicus curiae* is implied in the IACtHR's power to devise its own rules of procedure granted in Article 60 ACHR and Article 25(1) IACtHR Rules.[65] Article 2(3) defines *amicus curiae* as follows:

> For the purposes of these Rules: …
> 3. the expression '*amicus curiae*' refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing;

Article 44 IACtHR Rules, which is located at the end of the section on the course of the written proceedings, establishes a series of formal requirements for written *amicus curiae* submissions in contentious proceedings.[66] It provides:

> 1. Any person or institution seeking to act as *amicus curiae* may submit a brief to the Tribunal, together with its annexes, by any of the means established in Article 28(1) of these Rules of Procedure, in the working language of the case and bearing the names and signatures of its authors.
> 2. If the *amicus curiae* brief is submitted by electronic means and is not signed, or if the brief is submitted without its annexes, the original and supporting documentation must be received by the Tribunal within 7 days of its transmission. If the brief is submitted out of time or is submitted without the required documentation, it shall be archived without further processing.
> 3. *Amicus curiae* briefs may be submitted at any time during contentious proceedings for up to 15 days following the public hearing. If the Court does not hold a public hearing, *amicus* briefs must be submitted within 15 days following the Order setting deadlines for the submission of final arguments. Following consultation with the President, the *amicus curiae* brief and its annexes shall be immediately transmitted to the parties, for their information.
> 4. *Amicus curiae* briefs may be submitted during proceedings for monitoring compliance of judgments and those regarding provisional measures.

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65 F. Rivera Juaristi, *The amicus curiae in the Inter-American Court of Human Rights (1982-2013)*, in: Y. Haeck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, pp. 109-110. *Rivera Juaristi* further argues that the lack of regulation in the American Convention and the IACtHR Statute is due to some OAS member states' regulatory traditions. They delegate procedural issues to the implied powers of the court, see *Id*.

66 The inquisitorial powers of the IACtHR towards the parties and in respect of the reception of external information were also extended in the course of the reform of the rules.

There is no corresponding rule for participation in the oral proceedings, although such participation is foreseen in the definition. The court devises its rules without need for express approval by the member states. It is transferred by accession to the court's jurisdiction.[67] However, member states together with other stakeholders were invited to participate in a consultation process for the revision of the rules and there was no known opposition to the rules on *amicus curiae*.[68]

Equally, the IACtHR did not justify the admission of *amicus curiae* in advisory proceedings. This is surprising in so far as the Statute was silent on this issue and the former IACtHR Rules permitted the President of the Court to invite briefs only from states parties and OAS organs. The current IACtHR Rules also do not mention the term *amicus curiae* in the section on advisory proceedings, but the IACtHR in its advisory opinions differentiates between *amicus curiae* submissions – with which it describes the same range of persons as in contentious proceedings – and submissions from the entities notified of a request for an advisory opinion pursuant to Article 73(1) IACtHR Rules. Arguably, authority to accept *amicus curiae* in advisory proceedings can be implied from Article 73(3) IACtHR Rules. The provision determines:

> The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent.

The IACtHR has not cited Article 73(3) to justify the admission of *amici*.[69] This does not necessarily imply that it finds the provision irrelevant, as it routinely acknowledges the receipt of *amicus* briefs in its opinions without indicating the legal basis to do so. Further, it has not defined the

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67 Article 25(1) IACtHR Statute.

68 The IACtHR invited entities involved in the inter-American system to submit their views on several topics, including *amicus curiae*. See *Síntesis del informe annual de la corte interamericana de derechos humanos correspondiente al ejercicio de 2008, que se presenta a la commission de asuntos jurídicos y politicos de la organización de los estados americanos*, 19 March 2009, pp. 7-8. Replies were received by several member states, the IAComHR, Latin American governmental and non-governmental organizations and legal expert groups.

69 See the public invitation for *amicus* submissions in *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, para. 6.

term 'any interested party.'[70] The word 'party' insinuates a limitation to parties to the Convention, especially as Article 73(1) determines that notification of a request for advisory opinion shall be transmitted only to the member states and certain OAS organs. The term is broader than earlier versions of the norm that limited submissions to 'any State which might be concerned,' leaving room for the interpretation that the provision was intentionally broadened to include *amicus curiae* submissions.[71] Further, the court seems to apply Article 44 by way of Article 74 IACtHR Rules.[72]

V. African Court on Human and Peoples' Rights

Neither the ACtHPR's protocol, nor its rules allow expressly for *amicus curiae* participation in contentious proceedings.[73] As the ICJ, the ACtHPR procedural regime contains broad investigative rules.[74] However, the court

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70 Article 2(14) defines 'States Parties' as: 'the States that have ratified or have adhered to the Convention.'

71 According to *Chinkin*, the former was open enough to include non-member states of the OAS and therefore 'provides a form of *amicus* brief in advisory opinions.' See C. Chinkin, supra note 40, p. 242.

72 Article 74 IACtHR Rules foresees analogous application of the provisions concerning contentious proceedings in advisory proceedings 'to the extent that [the IACtHR] deems them to be compatible.'

73 The Protocol on the merger of the ACtHPR and the still inoperative African Court of Justice signed on 1 July 2008 at the African Summit to create the African Court of Justice and Human Rights has been ratified by fewer than the necessary fifteen member states for its entry into force. Article 49(3) Protocol on the Statute of the new court allows the admission of *amicus curiae* submissions under the heading intervention. It stipulates: 'In the interest of the effective administration of justice, the Court may invite any Member State that is not a party to a case, any organ of the Union or any person concerned other than the Claimant, to present written observations or take part in hearings.' Article 49(1) and (2) Protocol on the Statute of the ACtHPR establish intervention as of right. At: http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (last visited: 21.9.2017).

74 Arguing that the ACtHPR could admit *amicus curiae* under its powers to receive evidence in Rule 26(2) Rules of Procedure, A. Mohamed, *Individual and NGO participation in human rights litigation before the African Court of Human and Peoples' Rights: lessons from the European and Inter-American Courts of Human Rights*, 43 Journal of African Law (1999), pp. 201, 204, 212. In addition, under Rule 45(1), '[t]he Court may, *inter alia*, decide to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems

does not rely on them to justify the admission of *amicus curiae*. In an interview conducted in 2012, the former President of the Court and the Registrar stated that they could admit *amicus curiae* on the basis of implied powers.[75] The ACtHPR's 2012 Practice Directions issued under Rule 19 ACtHPR Rules in sections 42-47 address *amicus curiae* under the heading '*Request to act as Amicus Curiae*'. They stipulate:

> 42. An individual or organization that wishes to act as *amicus curiae* shall submit a request to the Court, specifying the contribution they would like to make with regard to the matter.
> 43. The Court will examine the request and determine within a reasonable time from the date of receipt of the request, whether or not to accept the request to act as *amicus curiae*.
> 44. If the Court grants the request to act as *amicus curiae*, the person or organization making the request shall be notified by the Registrar and invited to make submissions, together with any annexes, at any point during the proceedings. The Application, together with any subsequent pleadings relating to the matter for which the request for *amicus curiae* has been made, shall be put at the disposal of the person or organization.
> 45. The Court on its own motion may invite an individual or organization to act as *amicus curiae* in a particular matter pending before it.
> 46. The *amicus curiae* brief and its annexes submitted to the Court on a matter shall be immediately transmitted to all the parties, for their information.
> 47. The decision on whether or not to grant a request for *amicus curiae* is at the discretion of the Court. [76]

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likely to assist it in carrying out its task.' And, unter Rule 45(2), '[t]he Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.'

75 F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 Journal of African Law (2014), p. 36 and FN 77.

76 These rules accord with the ACtHPR's broad rules on standing. Article 5(1) and (3) ACtHPR Protocol allows NGOs with observer status before the AComHPR and individuals from states that upon ratification have made a Declaration accepting the jurisdiction of the court, to bring cases directly before the court, see Article 34(6) ACtHPR Protocol. To date, only seven of the 26 member states have made such a declaration, leaving it to the AComHPR, state parties or African intergovernmental organizations to institute proceedings. These states are: Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Cote d'Ivoire. On access to the court under the old system, A. Mohamed, supra note 74, pp. 201-213; A. van der Mei, *The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?*, 18 Leiden Journal of International Law (2005), pp. 113, 120.

For advisory proceedings, Article 54 allows submissions in the same scope as Article 66 ICJ Statute. In addition, Article 70(2) ACtHPR Rules extends the provision. It allows the court to authorize any interested entity to make a written submission on any of the issues raised in the request.

VI. WTO Appellate Body and panels

Amicus curiae is not regulated explicitly in the WTO's Dispute Settlement Understanding ('DSU') or any of the working procedures. The Appellate Body and panels have held possessing implied authority to accept *amicus curiae* based on different powers granted to them.

1. Panels

Panels' power to accept *amicus curiae* briefs was implied from their investigative powers in Articles 11-13 DSU. Pursuant to Article 13(1) DSU, '[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.' Paragraph 2 states, in relevant part, that '[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.' Article 13 concretizes Article 11 DSU which establishes the role and duty of panels. Deviating from a strict adversarial understanding of justice, Article 11 determines that panels shall establish the objective truth with regard to the facts.[77]

The case of reference remains the Appellate Body's decision in *US–Shrimp*. Briefly, the facts of the case are as follows: on 8 October 1996, India, Malaysia, Pakistan and Thailand jointly initiated proceedings against the United States on the account of a US import prohibition issued

77 Article 11 DSU: '[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.' See also D. Steger, *Amicus curiae: participant or friend? - The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 427.

under the US Endangered Species Act of 1973 for shrimp and shrimp products which had been harvested without approved turtle excluder devices. During the panel proceedings, several NGOs with a focus on environmental issues submitted two unsolicited *amicus curiae* requests. The panel rejected the briefs. It found that it lacked the authority under the DSU to directly accept information from sources other than the parties and third parties intervening pursuant to Article 10(2) DSU. The panel rejected the USA's argument that Article 13 DSU could be interpreted to allow unsolicited submissions, because the wording of the provision required that 'the initiative to seek information rests with the Panel.'[78] The panel's hesitation may have been influenced by the fact that panels' procedural powers under the DSU are limited and the respondents and third parties objected to the admission.[79] Still, the panel allowed the parties to annex the briefs or parts thereof to their own submissions, because it was 'usual practice for parties to put forward whatever documents they considered relevant to support their case.'[80] The USA annexed a section of one of the briefs to its second submission to the panel. Further, it appealed the rejection of the unsolicited briefs.

The Appellate Body overturned the panel decision. It also regarded Articles 11-13 DSU as the critical provisions.[81] The Appellate Body first defined the issue a procedural matter as opposed to an issue of access to the WTO dispute settlement process, which would have been outside its com-

78 *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 7.8.

79 It could be argued that because panels may not draw up their own working procedures they lack inherent powers. This argument is misguided as such powers are essential to ensure the functioning of the panel.

80 *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 7.8. The Appellate Body confirmed the Panel's authority to permit the adoption of briefs by parties. See *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, pp. 38-39, 109, 119. See also A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 Journal of International Economic Law (1999), p. 485.

81 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 European Journal of International Law (2003), p. 498 (The Appellate Body relied on Article 13 DSU only to reason that it did not prohibit the admission of *amicus curiae*, but it actually drew its power from Articles 12 and 13 DSU.).

petences.[82] It then considered the scope of panels' procedural powers, specifically Article 13 DSU.[83] It set the tone for its conclusion by emphasizing '[t]he comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any relevant source.'[84] Engaging in a systematic interpretation of Article 13 DSU, the Appellate Body referred to Article 12 DSU's permission to deviate from Panel Working Procedures to determine that 'the DSU accords to a panel ... ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.'[85] The Appellate Body then rather bluntly dismissed the wording of Article 13 by arguing that 'we do not believe that the word 'seek' must be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief.'[86] Finally, the Appellate Body stated without further elaboration that the use of the term 'seek' could not be understood as a prohibition to accept unrequested information.[87]

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82 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, pp. 35-36, para. 101.

83 First, the Appellate Body confirmed by reference to previous decisions that the authority vested in panels by Article 13 was discretionary. See *EC–Hormones,* Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 147; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (hereinafter: *Argentina–Textiles and Apparel*), Report of the Appellate Body, adopted on 22 April 1998, WT/DS56/AB/R, paras. 84-86.

84 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 37, para. 104.

85 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 38, para. 106.

86 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 38, para. 107. See however, C. L. Lim, *The amicus brief issue at the WTO*, 4 Chinese Journal of International Law (2005), p. 93.

87 Maybe to dispel the concerns expressed by the Joint Appellees of an overburdening of panels and a partiality of the information shared by *amici curiae* (cf. *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 13, para. 32), the Appellate Body assured that '[t]he amplitude of the authority vested in panels to shape the process of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.' See *US–Shrimp*,

The Appellate Body's decision received significant criticism legally and politically.[88] The debate often has been reduced to whether *amici curiae* are party-like participants in the proceedings rather than a procedural concept and it has, at times, become formalistic.[89] For instance, the Appellate Body was criticized for not raising panels' non-compliance with the formal requirements of Article 13 DSU when accepting unsolicited briefs.[90] At times, the Appellate Body's reasoning has been misunderstood.[91] It has been argued that Article 3(2) DSU's prohibition that the adjudicating bod-

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Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 38, para. 108 [emphasis in original].

88 For many, J. Robbins, *False friends: amicus curiae and procedural discretion in WTO appeals under the Hot-Rolled Lead/Asbestos doctrine*, 44 Harvard International Law Journal (2003), p. 324; P. Mavroidis*, Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 317-329; M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 World Trade Review (2006), p. 92 (The limitations of Article 13 DSU express a prohibition to accept *amicus curiae* submissions on the basis of *expressio unius*. But this becomes relevant only if the wording of the provision does not cover the alleged authority.).

89 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by India, paras. 29, 32 ('Accepting unsolicited *amicus curiae* briefs is a substantive issue that could not be dealt with under Rule 16(1), it was therefore totally unjustified by the Appellate Body to proceed on this basis.'). See also WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Egypt on behalf of the Informal Group of Developing Countries, para. 12; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Canada, para. 73 ('The issues surrounding *amicus* participation had important systemic and institutional implications for the WTO, and could not be characterized as exclusively procedural.').

90 P. Mavroidis, supra note 88, p. 320; C. Brühwiler, supra note 9, p. 350.

91 Especially the argument that *amicus curiae* participation granted more and additional rights to non-members of the WTO than to member states who could only appear as third parties if they could show a substantial interest in the matter, see Malaysia in *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 13, para. 32; Canada in *EC–Sardines*, Appellate Body Report, adopted on 23 October 2002, WT/DS231/AB/R, p. 36, para. 155; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7. The admission of an *amicus curiae* brief from the Kingdom of Morocco in *EC–Sardines* dispelled this asymmetry argument. It was then argued that the admission of states as *amicus curiae* was a circumvention of the DSU rules on third party participation. See C. Brühwiler, supra note 9, pp. 367,

ies alter the rights and duties of member states was violated, because the DSU grants a right to make submissions only to parties and third parties in Articles 10 and 12 DSU respectively.[92] But this was never questioned by the Appellate Body. Further, Article 13 DSU is testament that Articles 10 and 12 DSU were not meant to describe exhaustively all the ways in which panels may gather case-related information. Others argued that the DSU was designed as a purely intergovernmental system to regulate disputes concerning the multilateral trading system (Article II(1) WTO Agreement).[93] This argument also fails given that the requests for leave to appear as *amicus curiae* never questioned the inter-governmental character of the WTO dispute settlement system.

The Appellate Body's decision in *US–Shrimp* is a continuation of a jurisprudence that interprets Article 13 DSU broadly. In *US/Canada–Continued Suspension*, the Appellate Body, drawing from earlier decisions, delineated panels' authority to seek information as follows: 'Panels are understood to have "significant investigative authority" under Article 13 of the DSU … and broad discretion in exercising this authority.'[94] *US-Shrimp* differed from previous decisions in that the Appellate Body allowed for the direct admission of views that had not been pre-approved by the parties.

Still, were the critics right? Did the Appellate Body go beyond the wording of the DSU? The answer depends on the interpretation of the authority granted to panels by the covered agreements.

It is unusual that the Appellate Body chose not to interpret Article 13 DSU in accordance with the standards of interpretation stipulated in Articles 31-33 VCLT, which are 'widely recognized as reflecting customary international law.'[95] Pursuant to Article 31 VCLT, a court first establishes and considers the ordinary meaning of the relevant term. Only then it con-

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373; N. Covelli, *Member intervention in World Trade Organization dispute settlement proceedings after "EC-Sardines": the rules, jurisprudence, and controversy*, 37 Journal of World Trade (2003), pp. 673-690.

92 G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), pp. 773, 779.

93 M. Slotboom, supra note 88, pp. 93-94.

94 *Canada/US–Continued Suspension*, Reports of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, para. 439.

95 *La Grand Case (Germany v. USA*), Judgment, 27 June 2001, ICJ Rep. 2001, p. 501, para. 99; *Golder Case*, Judgment, 1975, ECtHR 1975, Series A No. 18, para. 29; *Japan–Alcoholic Beverages II*, Report of the Appellate Body, adopted on 1

siders the term in context taking into account the object and purpose of the treaty. The Appellate Body's conclusion that the term 'to seek' includes the acceptance of unsolicited information has rightly been considered as 'acrobatic' and not covered by the ordinary meaning of the term.[96] However, this is not necessarily problematic, as long as Article 13 DSU was not meant to be exhaustive. The Appellate Body indicated this in its final (unreasoned) statement in its report.[97]

Further, it is surprising that the Appellate Body did not expressly hold – albeit some of this could be implied from *US–Shrimp* – that the *existence* of the investigative powers under Article 13 DSU implied the receipt of an *amicus curiae* brief by way of *de maiore ad minus*. One could argue that the receipt of information is no more intrusive to the adversarial process than the active seeking of information. Also, as the Appellate Body noted, a denial of authority to accept briefs would lead to the paradox result that panels could seek any information but could not receive it if it was brought to them.

2. Appellate Body

Neither the DSU nor the Appellate Body Working Procedures provide for *amicus curiae* participation in the appellate review process. Nevertheless, upon receiving two unsolicited *amicus curiae* briefs from American industry associations, the Appellate Body decided in *US–Lead and Bismuth II*

November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para. 104; *Iron Rhine Railway*, PCA Award, 24 May 2005, para. 45; *Camuzzi International SA v. Argentina*, Decision on Jurisdiction, 11 May 2005, ICSID Case No. ARB/03/2, para. 133. See also I. Sinclair, *The Vienna Convention on the Law of Treaties,* 2nd Ed, Manchester 1984, p. 153; P. Mavroidis, supra note 88, p. 328 ('The Appellate Body contributes to the *amicus curiae* mess by inventing interpretations of Article 13 DSU which are unsustainable under the VCLT.').

96 P. Mavroidis, supra note 88, p. 319; M. Slotboom, supra note 88, pp. 92-93. In its third party submission, the European Commission indicated that the acceptance of unrequested information by NGOs might be outside the wording of Article 13 DSU. It proposed that NGOs could publish their views which panels would be free to request in an *amicus curiae* brief pursuant to Article 13 DSU if they were interested in the information, see *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 18, para. 46.

97 R. Howse, supra note 81, pp. 496-498.

that it was competent to accept unsolicited written *amicus curiae* briefs.[98] The Appellate Body noted that its governing instruments were silent on the matter.[99] It then considered its power to establish new Working Procedures in accordance with the DSU and the covered agreements under Article 17(9) DSU and, in a footnote, its power conferred by Rule 16(1) Working Procedures to fill procedural gaps during pending proceedings.[100] It deduced from these provisions an implied 'broad authority to adopt proce-

98 Already in *US–Shrimp,* the Appellate Body had held that it could accept *amicus curiae* briefs annexed to party submissions. The Appellate Body held that the attaching of a brief to a party submission 'renders that material at least *prima facie* an integral part of that participant's submission.' *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, pp. 29, 31, paras. 83, 89, 91. See B. Stern, *The intervention of private entities and states as "friends of the court" in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.) *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1435; A. Appleton, *Amicus curiae submissions in the Carbon Steel Case: another rabbit from the Appellate Body's hat?*, 3 Journal of International Economic Law (2000), p. 693. For a summary of the factual background of the case, see D. Prévost, *WTO Subsidies Agreement and privatised companies; Appellate Body amicus curiae briefs*, 27 Legal Issues of Economic Integration (2000), pp. 281-283.

99 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, p. 14, para. 39 ('[N]othing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants or third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit the acceptance or consideration of such briefs.'). See also Article 17(7) DSU which determines that '[t]he Appellate Body shall be provided with appropriate administrative and legal support as it requires' is not applicable. It concerns the staffing of the Appellate Body. *Mavroidis* argues that the Appellate Body fully relied on Rule 16(1) Working Procedures to admit *amicus curiae* in *EC–Asbestos*. This is not stated explicitly in the report. The Appellate Body only refers to Rule 16(1) for authority to draw up working procedures. The general authority to accept *amicus* briefs was assumed on the basis of *US–Lead and Bismuth II*. See P. Mavroidis, supra note 88, p. 320.

100 Rule 16(1) Working Procedures: 'In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.'

dural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.' The Appellate Body reasoned that this general procedural authority included the authority to accept *amicus curiae* submissions. In a statement that has been considered by some tautological, the Appellate Body found that 'we are of the opinion, that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.'[101] The Appellate Body then reemphasized that only parties and third parties to a dispute had a legal right to participate in proceedings in the WTO dispute settlement system citing its decision in *US–Shrimp* as well as Articles 17(4) DSU and Rule 24 Working Procedures, which regulate third party participation.

Again, the Appellate Body received strong backlash for its decision. Many criticized it for not engaging in interpretation of its constituent instruments in accordance with the VCLT and Article 3(2) DSU.[102] Article 3(2) DSU limits the gap-filling powers of the Appellate Body. It provides that:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights of obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings cannot add to or diminish the rights and obligations provided in the covered agreements.

Indeed, the Appellate Body barely discussed any provisions of the DSU or the covered agreements which might contravene its authority to admit briefs, leaving unanswered the main question – whether or not the DSU and covered agreements *allow* for *amicus curiae* participation.

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101 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, pp. 13-14, paras. 36-39. The reference to Rules 21 and 24 may be viewed as a rebuttal of an argument from the appellant and third parties who deducted from them a prohibition to admit *amicus* briefs.

102 A. Appleton, supra note 98, p. 695 ('The Appellate Body is drawing support for its theory of broad gap-filling powers by citing a gap-filling rule that it created when it formulated, albeit with consultations, the Working Procedures.').

The Appellate Body did not anchor its interpretation in any particular provision.[103] It used Article 17(9) DSU and Rule 16(1) Appellate Body Working Procedures merely as indicators for possessing an inherent general procedural power. The criticism that these provisions were not directly applicable is thus somewhat misdirected.[104] However, the question arises in how far the Appellate Body was obliged to rely on Article 16(1), which squarely addressed the scenario it faced regarding *amici curiae*.[105] Pursuant to the provision, the Appellate Body may find a short-term solution for one case. For permanent procedures, Article 17(9) DSU allows the Appellate Body to draw up Working Procedures in consultation with the Chairman of the DSB and the Director-General.

There are several additional legal issues the Appellate Body should have considered, some of which were already brought to its attention during the proceedings. First, the Appellate Body failed to elaborate whether the silence of the DSU was qualified, that is, whether the fact that there was no provision regarding *amicus curiae* was intentional and equalled a prohibition to admit *amici curiae*. Second, there is a contextual argument pertaining to the Appellate Body's limited jurisdiction.[106] Article 17(6) DSU determines that '[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' The DSU does not give the Appellate Body investigative powers comparable

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103 For this reason, the issue is considered an exercise of inherent powers. *Hollis* regards the Appellate Body's contentions as an assertion of implied authority. See D. Hollis, *Private actors* in *public international law*: *amicus curiae* and the case for the retention of *state sovereignty*, 25 Boston College International and Comparative Law Review (2002), p. 241.

104 *Mavroidis* argued that neither Article 17(9) nor Rule 16(1) were applicable. Article 17(9) was ill-suited, because the Working Procedure could not be drawn up by a division of the Appellate Body hearing an appeal in a specific case, and Rule 16(1) was ill-suited, because the issue of *amicus curiae* required a permanent solution. See P. Mavroidis, supra note 88, p. 321. Further, Article 17(9) foresees that the Appellate Body elaborate Working Procedures for Appellate Review in consultation with the DSB Chairman and the Director-General, which was not done in the case.

105 Critical, A. Appleton, supra note 98, pp. 693, 695, 697 ('By avoiding the application of Rule 16(1) and its conditions, the Appellate Body avoids accepting limits to its procedural authority. … Any failure to follow its own Working Procedures can undermine Member confidence in the Appellate Body.').

106 This has led some to argue that *amicus curiae* would be admissible only before panels. See G. Umbricht, supra note 92, pp. 773, 781, 787-788.

to those enshrined in Article 13 DSU.[107] It is undisputed that the Appellate Body cannot rely on Article 13 DSU due to the limitations of its mandate. So how does the admission of *amicus curiae* align with Article 17(6) DSU, especially taking into account the legal reasoning in *US–Shrimp*? Further, there might be frictions with Article 17(4) DSU and Article 18(1) Appellate Working Procedures, which mention only parties and third parties in relation to written submissions before the Appellate Body. Are these provisions exhaustive? The answer to these questions lies largely in the concept held of *amicus curiae* and its regulation. Article 17(6) DSU certainly excludes fact-focused *amicus curiae* submissions, but the provision's text does not demand refusal of briefs elaborating the law or a panel's application of the facts, in short, the issues falling within the Appellate Body's jurisdiction.[108] With respect to Article 17(4) DSU it must again be emphasized that the Appellate Body never viewed *amicus curiae* as a participant to the proceedings *en pars* with the parties or third parties, but as an instrument in its discretion without any participatory rights.[109] *Amicus curiae* is qualitatively different from the forms of participation described in Article 17(4) DSU. Therefore, it cannot conflict with them, but constitutes an alternative form of participation.

As already mentioned, the WTO constituency reacted almost uniformly negatively to the assertion of power to admit of *amici curiae*. It is safe to say that the admission of *amicus curiae* seems to have been more than the parties had bargained for, giving rise to concerns over the continued consent of member states to the compulsory dispute settlement mechanism (see Chapter 8). So far, no political long-term solution has been reached on the issue. Proposals for an explicit regulation of *amicus curiae* participation have been on the political agenda since the creation of the WTO,

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107 Often reference is made to Article V(2) WTO Agreement which refers to the General Council's mandate 'to make arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.' See D. Hollis, supra note 103, p. 252. This argument overlooks that *amicus curiae* participation is not limited to NGOs and that Article V concerns the relationship between NGOs and the WTO as a negotiation forum, not the relationship between these entities and the WTO DSB. The latter does not have a negotiation mandate, see Article 2 DSU.

108 This was alleged by the EU, Brazil and Mexico in *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, paras. 36-37.

109 G. Umbricht, supra note 92, p. 788.

but they have failed. It is argued that the impasse has catapulted the topic out of the Appellate Body's sphere of competence and that the Appellate Body and panels lack competence to admit submissions pending a solution.[110] *Gao* points out that the issue of *amicus curiae* was only raised during the Uruguay Round in an Informal Group on Institutional Issues of which there is no written record.[111] However, in order to be relevant, *travaux preparatoires* must be contained in an official record.[112] In addition, several member states have different recollections of the reasons for the DSU's silence on *amicus curiae*.[113] In the meantime, both panels and the Appellate Body continue to admit *amicus curiae* based on the considerations in the cases above.

A few states have concluded Free Trade Agreements whose trade disputes settlement mechanisms explicitly permit *amicus curiae* participation in their dispute settlement proceedings, which were modelled from the WTO system (see Chapter 3).[114]

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110 See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Switzerland, para. 64 ('[T]he issue should be solved through negotiations and failing to do so would blur the division between the legislative and the judicial functions.'); Malaysia in *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, p. 23, paras. 65-66; J. Jackson, *The WTO "constitution" and proposed reforms: seven "mantras" revisited*, 4 Journal of International Economic Law (2001), pp. 67-78. WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Hong Kong, China, para. 23.

111 H. Gao, *Amicus curiae in WTO dispute settlement: theory and practice*, 1 China Rights Forum (2006), pp. 55-56.

112 A. Aust, *Modern treaty law and practice*, Cambridge 2000, pp. 197-198.

113 The USA has maintained that the admissibility of *amicus curiae* was so obvious that explicit regulation was considered unnecessary. Other states have recollected that there was no political support for *amici curiae*. See H. Gao, supra note 111, pp. 55-56.

114 E.g. *Free Trade Agreement between the European Union and Montenegro*, 15 April 2011, WT/REG236/1, para. 158; *Free Trade Agreement between the European Union and Serbia*, 18 April 2011, WT/REG285/1, para. 78; *Free Trade Agreement between the European Union and the Republic of Korea*, 31 August 2012, WT/REG296/1/Rev. 1, para. 178; *Free Trade Agreement between the Republic of Korea and New Zealand*, Annex 19-A, Rules 34 – 37, 20 December 2015.

VII. Investor-state arbitration

In investment arbitration, the regulation of *amicus curiae* participation may occur in different instruments: the investment treaty which contains the host state's standing offer to arbitrate, the procedural rules governing the arbitration, *ad hoc* agreements by the parties or a procedural order issued by the tribunal.

1. Clauses in investment treaties

An increasing number of multi- and bilateral investment treaties contain rules on *amicus curiae* participation.[115] Three shall be replicated here due to their practical relevance.

One of the first regulations of *amicus curiae* in investment arbitration was the NAFTA FTC Statement of 7 October 2003 (see Chapter 2). It is legally non-binding.[116] Instead of clearly deciding for or against *amicus curiae* participation in NAFTA Chapter 11-arbitrations, the FTC Statement confirms the *Methanex* and *UPS* decisions by asserting:

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115 E.g. Article 28(3) 2012 *US Model BIT* and Article 39 *Canadian Foreign Investment and Promotion and Protection Agreement* permit *amicus curiae* participation irrespective of the parties' will. Numerous BITs concluded on the basis of these model BITs have adopted these provisions, see Article 10.19.3 USA-Chile FTA, Article 10.19.3 USA-Morocco FTA, Article 10.20.3 US-Peru Trade Promotion Agreement, Article 10.20.3 USA-Colombia FTA, Article 10.19.3 USA-Oman FTA. *Amicus curiae* participation is also foreseen in Annex 29-A of the agreed text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). It is disputed if Sec. 8 of Annex T to the EFTA provides for *amicus curiae* participation or establishes a special right to make submissions for non-disputing member states. See T. Dolle, *Streitbeilegung im Rahmen von Freihandelsabkommen*, Baden-Baden 2015. The latter view is preferable given that the provision grants a non-participating member state a *right* to make submissions.

116 Not only was this unexpected, because Article 1131(2) NAFTA grants the FTC power to issue binding regulation, which it had used to regulate the issue of confidentiality shortly before, but it left the matter to the discretion of the tribunals, thereby risking continued disputes over the authority to admit *amicus curiae*. The investor in *Merrill v. Canada* emphasized this in a comment on a request for admission as *amicus curiae*. See *Merrill and Ring Forestry LP v. Canada* (hereinafter: *Merrill v. Canada)*, Response by the Investor to the Petition of the Communication, Energy and Paperworks Union et al., 16 July 2008, p. 5, para. 16.

> No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submission from a person or entity that is not a disputing party (a "non-disputing party").

In addition, the FTC Statement recommends a detailed request for leave procedure (see Annex II). The document is of high political significance. It signalled that the NAFTA states parties agreed on the issue. This was far from obvious given Mexico's initial opposition to the instrument. Despite its non-binding character, virtually all NAFTA-tribunals since have drawn from the FTC Statement authority to accept *amicus curiae* briefs.[117]

The United States-Dominican Republic-Central America Free Trade Agreement (CAFTA) of 5 August 2004 has taken another approach. Article 10.20.3 explicitly permits *amicus curiae* participation in investment disputes under Chapter 10 of the CAFTA. It reads:

> The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) contains a detailed regulation of *amicus curiae* participation in Annex 29-A. It stipulates:

> 43. Non-governmental persons established in a Party may submit *amicus curiae* briefs to the arbitration panel in accordance with the following paragraphs.
> 44. Unless the Parties agree otherwise within five days of the date of the establishment of the arbitration panel, the arbitration panel may receive unsolicited written submissions, provided that they are made within 10 days of the date of the establishment of the arbitration panel, and in no case longer than 15 typed pages, including any annexes, and that they are directly relevant to the issue under consideration by the arbitration panel.
> 45. The submission shall contain a description of the person making the submission, whether natural or legal, including the nature of that person's activities and the source of the person's financing, and specify the nature of the interest that that person has in the arbitration proceeding. It shall be drafted in the languages chosen by the Parties in accordance with paragraphs 48 and 49.
> 46. The arbitration panel shall list in its ruling all the submissions it has received that conform to the above rules. The arbitration panel shall not be obliged to address in its ruling the arguments made in such submissions. The

117 Upon request by the parties, the tribunal in *Methanex* adopted the FTC Statement. See *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 27.

> arbitration panel shall submit to the Parties for their comments any submission it obtains.[118]

2. Clauses in institutional procedural rules

Several of the most frequently used institutional arbitration rules now expressly regulate *amicus curiae*. In 2006, the ICSID Administrative Council issued new Arbitration Rules and Additional Facility Rules.[119] Rule 37(2) ICSID Arbitration Rules determines:

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> (b) the non-disputing party submission would address a matter within the scope of the dispute;

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118 CETA is currently in the ratification process in the EU Council and in the parliaments of EU member states, see http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ (last visited: 21.9.2017).

119 The ICSID Secretariat circulated a Discussion Paper for comments in October 2004. The Paper argued that tribunals should be informed of an authority to accept and consider submissions from third parties. See ICSID Secretariat, *Possible Improvements for Investor-State Arbitration*, 22 October 2004, p. 9. The ICSID received comments from member states, practitioners and several commercial and non-commercial NGOs, not all of which supported the idea of *amicus curiae*. Having considered the comments, in May 2005, the ICSID Secretariat circulated a second Discussion Paper entitled '*Suggested Changes to the ICSID Rules and Regulations*'. The paper *inter alia* contained the proposed draft Rule 37(2) with an explanatory note on the background and rationale of the provision. See ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005, p. 4. Unlike the now enacted Rule 37(2), the draft provision foresaw consultation with the parties only 'as far as possible'. A requirement that the submission must be within the scope of the dispute was added to the *chapeau* of the provision elevating it to a mandatory requirement. See A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements – a guide to the key issues*, Oxford 2010, p. 148.

> (c) the non-disputing party has a significant interest in the proceeding.
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Prior to the issuance of this rule, tribunals relied on Article 44 ICSID Convention, which authorizes them to decide procedural questions not covered by the ICSID Arbitration Rules.[120]

Article 41(3) ICSID Additional Facility Rules, which was crafted for disputes involving parties that have not acceded to the ICSID Convention, is identical. The rules are silent on access to pleadings and other case-related submissions, matters which applicants often request. Participation in the oral proceedings is subject to a separate rule. Article 32(2) ICSID Arbitration Rules and Article 39(2) ICSID Additional Facility Rules provide:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

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120 Article 44 ICSID Convention: 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.' See *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 16. The issuance of the draft of Rule 37(2) in May 2005 coincided with the issuing by the tribunal in *Suez/Vivendi v. Argentina* of a decision on the request for leave from five NGOs. Although likely aware of the draft, the tribunal did not draw from the criteria of the draft Rule (which was not applicable directly in the pending arbitration), but it established its own set of criteria for the admission which were applied in subsequent proceedings. They are: (i) appropriateness of the subject matter of the case; (ii) the suitability of the petitioner to act as *amicus curiae* in the case; and (iii) the procedure by which the submission was made and considered. These criteria have been applied in later proceedings, including under the new Rule 37(2) (see Section C below). *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, paras. 17-29.

The recently adopted UNCITRAL Rules on Transparency provide in Article 4:

> Article 4. Submission by a third person
> 1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.
> 2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:
> (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
> (b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
> (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);
> (d) Describe the nature of the interest that the third person has in the arbitration; and
> (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.
> 3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:
> (a) Whether the third person has a significant interest in the arbitral proceedings; and
> (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
> 4. The submission filed by the third person shall:
> (a) Be dated and signed by the person filing the submission on behalf of the third person;
> (b) Be concise, and in no case longer than as authorized by the arbitral tribunal;
> (c) Set out a precise statement of the third person's position on issues; and
> (d) Address only matters within the scope of the dispute.
> 5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

> 6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 8 further sets up a repository of published information which shall render publicly available information and a significant number of specific case-related documents and submissions listed in Articles 2 and 3, unless exceptions elaborated in Article 7 related to confidential or protected information or the integrity of the arbitral process apply. Article 6 mandates the general publicity of hearings. The UNCITRAL Rules on Transparency constitute a notable enhancement of multi- and bilateral efforts to increase the transparency of investor-state dispute settlement such as the ICSID Rules and the FTC Statement by approaching the matter comprehensively. Existing standards are adopted and carefully expanded.[121] The rules on *amicus curiae* participation are more detailed especially in respect of the so far underthematized disclosure requirements. Document disclosure is considered holistically and not only in respect of publication of the final award, the approach taken under the traditional assumption that the proceedings were to be fully confidential.

The Rules on Transparency are explicitly open for use in arbitrations under any other rules, and prevail over them (but not the applicable investment treaty) in case of conflict.[122] As regards UNCITRAL arbitrations, they apply only to treaty-based investment arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to investment treaties concluded after 1 April 2014 or by special agreement as per Article 1(2).[123] In 2013, the UNCITRAL Arbitration Rules were revised to incorporate in Article

121 Certain areas could further be improved. *Fry* and *Repousis* point, for instance, to a lack of clarity on who takes the final decision on what issues are exempt from publication. J. Fry/O. Repousis*, Towards a new world for investor-state arbitration through transparency*, 48 NYU Journal of International Law and Politics (2016), p. 830.

122 Article 1 (7), (8) and (9) UNCITRAL Rules on Transparency. Mandatory rules of the law applicable to the arbitration also supersede the Rules on Transparency, see Article 1(8).

123 UNCITRAL maintains a non-exhaustive list of investment treaties to which the UNCITRAL Rules on Transparency apply, at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html (last visited: 21.9.2017). The parties can also derogate from the rules by agreement.

1(4) the UNCITRAL Rules on Transparency in their entirety (including its narrow scope of application).[124]

An attempt at accelerating the application of the Rules has been made through the Mauritius Convention (see Chapter 3), which is a special agreement in the meaning of Article 1(2) UNCITRAL Rules on Transparency.[125] The scope of application of the Mauritius Convention is purposely broad and includes arbitrations between investors and a state or a regional economic integration organization under *all* bilateral and multilateral investment treaties concluded prior to 1 April 2014.[126] There are two ways in which the UNCITRAL Rules of Transparency are made applicable through the Convention: first, by way of so-called 'bilateral or multilateral application' under Article 2(1) in all investor-state arbitrations irrespective of the applicable institutional rules, unless the host *and* the home state have issued a reservation pursuant to Article 3(1)(a) that the Mauritius Convention shall not apply to the investment treaty in question, or the host state has issued a reservation pursuant to Article 3(1)(b) that the Rules shall not apply to arbitrations under a set of arbitration rules (that are not the UNCITRAL Arbitration Rules). The second manner of application through the Mauritius Convention is addressed in Article 2(2). It covers cases where the host, but not the investor's home state, is a party to the Convention and the investor agrees to their application (as long as the host state has not issued a reservation excluding such unilateral appli-

124 The provision reads: 'For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency'.

125 See the preamble of the Mauritius Convention: 'Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency under those already concluded investments.' With respect to other options discussed to promote the rules, as well as the Convention's drafting history, see J. Fry/O. Repousis, supra note 121, p. 837.

126 The term 'investment treaty' is broadly defined in Article 1(2) and denotes 'any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.'

cation) (so-called 'unilateral offer of application')[127]. Notably, Article 2(5) Mauritius Convention excludes the possibility for claimants to rely on most favoured nation standards in investment treaties to skirt the UNCITRAL Rules on Transparency. It remains to be seen when the Mauritius Convention receives the third ratification necessary for it to enter into force.[128]

Outside the scope of application of the UNCITRAL Rules on Transparency, arbitrations conducted under the UNCITRAL Arbitration Rules will continue to rely on their general procedural powers enshrined in Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules to admit *amici curiae* (absent any regulation in the applicable investment treaty). The provision stipulates:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnec-

127 Based on Article 5 Mauritius Convention, the Convention applys only to investor-state arbitrations commenced after the date of entry into force of the Convention.

128 See Article 9(1). *Schill* warns that 'what is at stake, in case the Mauritius Convention finds insufficient support, is no less than a further jolt to an already trembling investment law system.' S. Schill, *The Mauritius Convention on Transparency: a model for investment law reform?,* EJIL:Talk!, 8 April 2015, at: http://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/ (last visited: 21.9.2017). In 2015, the European Commission suggested to the European Council that the EU sign the Mauritius Convention. See *Proposal for a Council Decision on the signing, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration*, see COM/2015/021 final – 2015/0013(NLE), Doc. No. 52015PC0021. However, so far this has not occurred. Several EU member states have signed, but not yet ratified the Convention, including Belgium, Finland, France, Germany, Italy and the Netherlands, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (last visited: 21.9.2017). For a thorough analysis of the Convention, see G. Kaufmann-Kohler/M. Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?*, CIDS Research Paper, 3 June 2016, at: http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (last visited: 21.9.2017).

> essary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.[129]

Article 28(3) of the 2010 and 2013 UNCITRAL Arbitration Rules rigorously subjects the admission of non-parties to the hearings to party consent.

In 1981, the IUSCT adopted a special regulation of *amicus curiae* participation in Note 5 Interpretative Notes to Article 15(1) of the 1976 UNCITRAL Arbitration Rules.[130] It provides that the arbitral tribunal

> may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting oral and written statements.

The Note has been applied in very few cases.[131] Note 5 to Article 25 of the 1976 UNCITRAL Arbitration Rules determines, in relevant part, that subject to the agreement of the parties the tribunal may permit the representatives of the parties in other arbitral proceedings, which present comparable legal issues, to attend the hearing.[132]

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129 Due to static referral clauses in many investment treaties, the predecessor to Article 17(1) often continues to apply. Article 15(1) of the 1976 UNCITRAL Arbitration Rules reads: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.'

130 Interpretative notes were incorporated into the IUSCT's procedural rules to inform the parties on how the tribunal intended to interpret its procedural laws, at: http://www.iusct.org/tribunal-rules.pdf (last visited: 21.9.2017). See M. Pellonpää/D. Caron, *The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal*, Helsinki 1994, p. 17. Only Iran, the USA and the IUSCT may modify the rules of procedure, see Article III(2).

131 M. Pellonpää/D. Caron, supra note 130, p. 530. *The United States of America and the Islamic Republic of Iran*, Case No. A/16; *Bank Mellat and the USA* (Cases No. 582 and 591), Award No. 108-A-16/582/591-FT, 25 January 1984, reprinted in 5 IUSCTR (1984-I), pp. 57, 59.

132 M. Pellonpää/D. Caron, supra note 130, p. 513.

3. Implied powers

In cases where none of the applicable rules regulate the participation of *amici curiae*, tribunals will decide on their admissibility based on their implied procedural powers as enshrined in the just-mentioned Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules. Due to the provision's continued relevance for tribunals operating under the UNCITRAL Arbitration Rules in decisions on the admission of *amicus curiae* briefs, in the following the pertinent aspects of the tribunals' reasoning in *Methanex v. USA* and *UPS v. Canada* are summarized.[133]

In their interpretation of the powers granted by Article 15(1) of the 1976 UNCITRAL Arbitration Rules (now Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules), the tribunals essentially addressed two questions: first, was the issue of *amicus curiae* procedural? Second, was the admission of *amicus curiae* in conformity with the applicable rules?

With regard to the first question, the tribunals' considerations focused on whether *amicus curiae* participation was tantamount to adding a party to the proceedings. The tribunals agreed that this would be beyond their powers under Article 15(1).[134] The *Methanex v. USA* tribunal reasoned that the

> receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third

133 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, para. 24; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, para. 36.

134 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, p. 24, para. 61; *Methanex v USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, paras. 27, 29. See also A. Mourre, *Are amici the proper response to the public's concerns on transparency in investment arbitration?,* 5 The Law and Practice of International Courts and Tribunals (2006), pp. 263-264.

> person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged.[135]

With regard to the second question, three issues were considered: first, whether *amicus curiae* participation was reconcilable with existing provisions on participation, especially Article 1128 NAFTA;[136] second, whether *amici curiae* could participate in hearings; and third, whether the confidentiality of proceedings precluded *amicus curiae* participation. The tribunals found that *amicus curiae* and participation under Article 1128 NAFTA pursued different objectives. The tribunals emphasized that participation under Article 1128 NAFTA was a right, whereas *amicus curiae* participation was a matter of judicial discretion (see Chapter 4). With regard to the second aspect, the tribunals admitted that they lacked authority to admit *amici curiae* to the oral proceedings without the parties' consent pursuant to Article 25(4) of the 1976 UNCITRAL Arbitration Rules (Article 28(3) of the 2010 and 2013 UNCITRAL Arbitration Rules). But they held that this did not affect their authority to admit written submissions. Regarding the compatibility of their authority to admit *amicus curiae* with rules on confidentiality, the tribunals found that this could be addressed on a case-by-case basis. It did not affect their general authority to accept *amicus curiae* briefs. The tribunals concluded that they could accept *amici curiae* under the appropriate procedures.[137]

The *UPS v. Canada* tribunal rightly refuted the argument by the Council of Canadians and the Canadian Union of Postal Workers that their participation (as parties) was mandated by international human rights norms guaranteeing a fair trial, above all Article 14 ICCPR and Article 6 ECHR. First, it is doubtful that the provisions are applicable. They do not form

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135 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, para. 30. It then confirmed its view by reference to the modalities of *amicus curiae* participation in the IUSCT, the WTO and the ICJ. Adopting the *Methanex* reasoning, *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae,* 17 October 2004, para. 61.

136 Because Article 1120 Nr. 1 a) NAFTA allows NAFTA parties to submit their dispute to ICSID arbitration, this norm may also be of relevance in proceedings conducted under the ICSID framework.

137 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, paras. 35-37; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2004, paras. 62, 66-69.

part of the law applicable in the arbitration. Also, arbitration is an exception to the right to a public trial. Moreover, the provisions seek to 'confer rights upon persons whose rights and obligations in a suit at law are being determined by a court or tribunal and concern[] the standing as a party to proceedings rather than the possibility to [participate] as *amicus curiae*.'[138] The *UPS* tribunal found that the petitioners' rights and obligations were not engaged at all. While this is legally true, the tribunal did not discuss if the indirect effects of the award on the *amicus* applicants – the Unions represented 46 000 Canadian postal workers – warranted their inclusion in the proceedings.[139]

Having found that they possessed the power to accept *amicus curiae* briefs under the blanket procedural clause of Article 15(1) of the 1976 UNICTRAL Arbitration Rules, the tribunals examined the requests before them. The *Methanex* tribunal focused interpretation on the term 'appropriate' in Article 15(1). It found that appropriateness was determined by three factors: first, whether *amicus curiae* would assist it by providing necessary assistance and materials to decide the dispute; second, whether there was a public interest in the arbitration; and third, the burden that would be placed on the parties in terms of costs and presentation of the case.[140]

4. *Ad hoc* agreements

Finally, *ad hoc* party agreements have also played a role in investment arbitration. In *Glamis v. USA*, the NAFTA Chapter 11 tribunal held that it

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138 C. Reiner/C. Schreuer, *Human rights and international investment arbitration*, in: P.M. Dupuy/F. Francioni/ E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, p. 91.

139 *UPS v. Canada*, Petition to the Arbitral Tribunal, Submissions of The Canadian Union of Postal Workers and of The Council of Canadians, 8 November 2000, para. 4.

140 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, paras. 48-51. The tribunal decided it was too early to determine if *amicus curiae* participation would be appropriate, but that it would reconsider an application at a later stage. The applicants both in *Methanex v. USA* and in *UPS v. Canada* were admitted upon their second application at the merits stage of the proceedings. *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, para. 53.

did not need to decide if it had authority to accept *amicus curiae* under its applicable laws. This was because all of the NAFTA parties consented to it and the parties in the case had not objected to *amicus curiae* briefs.[141] In *Eureko v. Slovak Republic*, the parties consented to inviting the European Commission and the Netherlands to comment on one of the procedural objections raised by the respondent state.[142] Freedom to deviate from procedural rules operates both ways. It also permits parties to exclude the application of certain provisions or agree that a tribunal does not possess a certain authority. For instance, in *Biwater v. Tanzania*, the parties agreed that there was no further need for *amicus curiae* participation.[143] In several recent arbitrations, at the outset of the proceedings, the tribunals have together with the parties elaborated a detailed set of rules regulating *amicus curiae* participation, especially in cases under the UNCITRAL Arbitration Rules.[144]

VIII. Comparative analysis

Existing regulations vary significantly in personal scope and in density. The following analysis addresses two issues further: the codification trend (1.) and common regulatory approaches (2.).

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141 *Glamis v. USA*, Award, 8 June 2009, p. 127, para. 273.

142 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 30-32.

143 The tribunal adopted the parties' agreement in a procedural order. See *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 83, 364 and Procedural Order No. 6, 25 April 2007, p. 2.

144 E.g. *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011; *Mesa Power Group LLC v. Government of Canada* (hereinafter: *Mesa v. Canada*), PCA Case No. 2012-17, Notification to non-disputing parties and potential *amicus curiae*, 28 May 2014; *Eli Lilly and Company v. Government of Canada* (hereinafter: *Eli Lilly v. Canada*), Case No. UNCT/14/2, Procedural Order No. 1, 26 May 2014, para. 18. In the latter case, the parties notably argued that the FTC Statement was only to be 'taken into consideration', thus, giving the UNCITRAL arbitration tribunal power to deviate from it. Procedural Order No. 1 further regulates the parties' right to comment.

1. Codification and informal doctrine precedent?

There is a trend towards express codification of *amicus curiae* participation across all international courts and tribunals. The ICJ Statute, the ECHR, the UNCITRAL Rules on Transparency, the ICSID Arbitration Rules, the ITLOS Rules, the CETA and the CAFTA address *amicus curiae* directly. In these cases, the member states have explicitly authorized the concept. The IACtHR, the ACtHPR, the WTO Appellate Body, WTO panels and investment tribunals applying the NAFTA and/or the UNCITRAL Arbitration Rules have subsumed *amicus curiae* under their rules of procedure or practice directions, thereby relying on an implied or inherent procedural power to do so absent any direct permission or prohibition to accept *amicus curiae*. There is also a tendency for individualized *ad hoc* regulation of the modalities of *amicus curiae* participation in investment arbitration.

The reasons for this trend vary. Partly, it can be accredited to overall increased efforts for greater transparency (IACtHR, ICJ, investment treaty arbitration). It may also be motivated by efforts to control the development of the concept or to systematize it (investment treaty arbitration).

This trend signals that member states approve of, or at least accept, the involvement of *amici curiae* in their proceedings. In this regard, the continued dispute in the WTO appears problematic, though most states' positions on the instrument in other courts indicates that they do not reject the instrument categorically. Their hesitations to it are contextual to the WTO system.

The regulation of the concept has advantages. It contributes to the transparency of proceedings both for the parties to the dispute who are informed of potentially having to engage with additional submissions, and for those interested in participating as *amicus curiae* as they will more clearly know the requirements for participation.

Parties to UNCITRAL arbitrations as well as WTO member states no longer challenge the authority of panels and arbitral tribunals to admit *amicus curiae* submissions on a case-by-case basis. Does this indicate that those now concluding arbitration agreements or submitting their disputes to arbitration or WTO adjudication, while not necessarily agreeing with *amicus curiae* practice, accept it? Does the consistent admission legalize even an initial overstepping of the powers granted? The answer to these questions depends on the legal framework of each international court and tribunal. There is an argument to be made that the fact that member states

cannot agree on how to deal with *amicus curiae* in the WTO precludes the Appellate Body and panels from creating a permanent solution. The DSU and the WTO Agreement foresee that political decisions are to be taken by the WTO's political arm, not its judicial bodies. Article IX(2) WTO Agreement (binding interpretation of any WTO provision), Article X(8) (amendment of the DSU) or a decision by the DSB all are political tools given to member states to collectively decide issues also against the stated views of panels and the Appellate Body. The situation is different before the IACtHR. Member states have not questioned the court's competence to accept *amicus* submissions on a general level. Similarly, in investor-state arbitration, states parties have generally supported the instrument. However, it must be emphasized that the mere toleration or acceptance of *amicus curiae* does not suffice to conclude that there exists a rule of customary international law permitting *amicus curiae* in international dispute settlement (see above).

2. Common regulatory approaches

The regulations and the practice of international courts and tribunals approach *amicus curiae* in different ways. Significant regulatory differences also exist within investment arbitration where some rules such as the CAFTA are very abstract, whereas others like the FTC Statement, the CETA and the UNCITRAL Rules on Transparency are very detailed. There is no obvious pattern regarding the form of regulation chosen. In particular, the attitude towards *amicus curiae* does not seem to play a role. Moreover, in investment arbitration, the rules tend to be interpreted similarly, because tribunals often fill regulatory gaps by reference to more detailed regulations.[145]

Though the regulations vary in length, breadth and density, they share some similarities. Almost all address written *amicus curiae* participation. Moreover, all regulations consider *amicus curiae* a matter of procedural law (with the consequence that it falls within their powers to control the conduct of the proceedings). Further, all rules address procedural aspects

145 For instance, in the CAFTA context tribunals have felt it necessary to concretize procedures on an *ad hoc* basis. See *TCW Group, Inc., Dominican Energy Holdings, LP v. Dominican Republic* (hereinafter: *TCW v. Dominican Republic*), Procedural Order No. 3, 16 December 2008.

of the participation albeit with varying density. Only few rules consider the substance of submissions. The FTC Statement establishes a very detailed request for leave procedure and controls the substance of *amicus curiae* submissions, whereas the IACtHR Rules and the ECHR are largely silent on the substance of submissions and set only a few pointers with regard to procedure. Only the IACtHR defines the concept. Remarkably, in all international courts and tribunals reviewed, regulations are absent on how potential *amici curiae* are informed of the existence of proceedings and on access to case documents (see Chapter 6). The overall focus on procedure across adjudicatory bodies is indicative of their efforts to minimize disruptions in the proceedings and to assuage the parties. One key regulatory question is who may act as *amicus curiae.* This will be considered in the following section.

B. Conditions concerning the person of amicus curiae

The debate on *amicus curiae* tends to narrow the instrument to participation of NGOs in international adjudication. However, the spectrum of those acting as *amicus curiae* is much wider and varies between international courts and tribunals. This section examines the requirements attached to the international *amicus curiae.*[146]

In addition to analysing the type of users of the instrument, this section focuses on the extent to which independence and impartiality, on the one hand, and expertise and experience, on the other hand, influence the admission decision.

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146 The contribution will not consider formal aspects of *amicus curiae* participation arising out of the membership structure of an organization. These issues depend on the internal laws of the respective organization and are only rarely problematic. An exception is the case *Border and Transborder Armed Actions*. The ICJ invited the OAS to submit observations under Article 34(2) ICJ Statute. The OAS Secretary-General informed the Registrar that he had no authority to submit observations on behalf of the OAS without approval of the OAS Permanent Council which, in turn, would require each OAS member to receive the pleadings of the case. *Case concerning border and transborder armed actions (Nicaragua v. Honduras),* Jurisdiction of the Court and Admissibility of the Application, Judgment, 20 December 1988, ICJ Rep. 1988, pp. 69-72, paras. 6-7. See also R. Mackenzie/C. Chinkin, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 142.

I. International Court of Justice

The ICJ has not directly defined the term *public international organization* in Article 34(2) ICJ Statute. Since the 2005 amendment of the Rules, Article 69(4) ICJ Rules clarifies that the term 'public international organization' denotes solely intergovernmental organizations.[147] By its wording Article 69(4) only applies to Article 69(3) ICJ Rules, which implements Article 34(3) ICJ Statute. There is no indication that the ICJ understands the term public international organization differently in Article 34(2). To the contrary, the definition confirms the Court's rejection of non-governmental submissions. The definition obviates proposals to read the term to mean 'international public interest organizations' to include international organizations with consultative status before the ECOSOC or any international NGO.[148] The provision's *travaux préparatoires* indicate that the narrow understanding was an intentional deviation from Article 26 PCIJ Statute. It allowed for submissions by the ILO, an organization composed of governmental and non-governmental entities.[149]

Article 66(2) ICJ Statute is drafted more broadly. It encompasses states and international organizations. The ICJ has not defined the term international organization. Article 105 ICJ Rules, which elaborates Article 66(2), only refers to 'organizations', omitting the adjective 'international.' The vague wording of Article 105 indicates a potential flexibility on behalf of the ICJ. However, the 1978 revisions of Articles 108 and 109 ICJ Rules replicate the narrower wording of Article 34(2) ICJ Statute by using the term 'public international organization.' Practice Direction XII shows that the ICJ has synchronized the different terms used in Article 34(2) and Article 66(2) ICJ Statute in practice.

Despite its broader terminology, the ICJ's practice under Article 66(2) ICJ Statute displays a hesitation to receive submissions from organizations that are not (inter-)governmental. The ICJ regularly invites submissions

147 See Y. Ronen, supra note 42, p. 83, FN. 27.

148 But see D. Shelton, supra note 17, p. 625.

149 During the drafting of the Statute, representatives questioned the scope of the term. The Chairman of the Committee, *Fitzmaurice*, stated that 'the term included only those organizations having States as their members, and this excluded scientific societies and other such international groups'. See Jurist 30, G/22, 14 UNCIO Docs., p. 137, cited by D. Shelton, supra note 17, p. 621. This issue was not discussed further in the Committee and the proposal was adopted. This rule has not been altered since 1946.

from intergovernmental organizations.[150] For instance, in the *Wall* advisory proceedings, the ICJ accepted written submissions from the European Union, the League of Arab States and the Organization of the Islamic Conference, thereby clarifying that it considers regional organizations an international organization within the scope of Article 66(2) ICJ Statute.[151] Otherwise, the ICJ has applied the provision narrowly, with the earlier-mentioned exceptions in the case of quasi-state entities or staff members in employment disputes (see Section A above). A well-known singular exception is the granting of leave to the International League for the Rights of Man to file a written statement in the *International Status of South-West Africa* advisory proceedings (see Chapter 3).

Despite the consistent rejection of *amicus curiae* submissions by entities that do not fall under the scope of Article 66(2) ICJ Statute or the ICJ's narrow exceptions, as well as the less than friendly treatment by Practice Direction XII, non-governmental entities and individuals continue to file submissions in high profile advisory proceedings. In *Nuclear Weapons*, the ICJ received 'numerous documents, petitions and representations from non-governmental organizations, professional associations and other bodies.'[152]

The ICJ does not appear to apply a specific set of criteria to the choice of intergovernmental organizations apt to participate in its contentious or advisory proceedings.[153] The ICJ's main criterion both in contentious and advisory proceedings seems to be an organization's potential ability to provide useful information. Unlike the PCIJ, the ICJ does not maintain a list of organizations qualified to make submissions to it.

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150 See, with examples, R. Mackenzie/C. Chinkin, supra note 146, p. 143.

151 *Wall*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 9. Based on the record, the EU was not invited to make a submission. It is unclear how the EU came to furnish its information to the ICJ. A. Riddell/B. Plant, supra note 13, p. 366.

152 See *Court Clarification: Letter to the Editor [from the ICJ Registrar]*, The New York Times, 15 November 1995.

153 However, see the ICJ's circumvention of the requirement that states have *locus standi* pursuant to Article 66(2) ICJ Statute by operation of Articles 63(1) and 68 ICJ Statute in the cases *Interpretation of peace treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 30 March 1950, ICJ Rep. 1950, pp. 65, 69 and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, pp. 17-18.

II. International Tribunal for the Law of the Sea

Article 84 ITLOS Rules limits *amicus curiae* participation before the ITLOS in contentious proceedings to intergovernmental organizations. The term is not defined in the Rules. In particular, it is not identical to the definition in Article 1(d) ITLOS Rules which refers to Article 1 Annex IX to the UNCLOS and encompasses only intergovernmental organizations with competences over UNCLOS-related issues.[154] The term itself leaves little room for interpretation.[155] In its ordinary meaning, it includes all intergovernmental organizations as commonly understood in international law. So far, the ITLOS has neither received nor requested information from intergovernmental organizations in contentious proceedings.

Article 133 ITLOS Rules is equally limitative with regard to advisory proceedings before the Seabed Disputes Chamber. This is surprising considering the substantial rights of non-governmental entities under the UNCLOS, in particular in respect of matters concerning the Area. Pursuant to Article 1(2) No. 2 in conjunction with Article 305 UNCLOS, non-state actors may become members to the UNCLOS. And pursuant to Articles 291(2) and 187 UNCLOS and Articles 20(2) and 37 ITLOS Statute, natural and legal persons and enterprises engaged in operations in the Area may appear as parties before the Seabed Disputes Chamber.[156]

Despite the narrow phrasing, the Seabed Disputes Chamber appears to interpret the term intergovernmental organization less strict than the ICJ. In *Responsibilities*, the Chamber notified all UNCLOS member states, the Authority and intergovernmental organizations with observer status in the

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154 Article 1 Annex IX to UNCLOS: 'For the purposes of article 305 and of this Annex, "international organization" means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.'

155 P. Gautier, supra note 50, p. 239 ('It is, however, difficult to see how the term "intergovernmental organization" could cover an NGO. The term "NGO" is literally defined by what it is not, i.e. a "governmental organization" or an "intergovernmental organization".').

156 It is disputed whether non-state actors may also appear as parties before the ITLOS, see R. Wolfrum, *The legislative history of arts. 20 and 21 of the Statute of the International Tribunal for the Law of the Sea*, 63 Rabels Zeitschrift für ausländisches und internationales Privatrecht (1999), p. 346; A. Boyle, *Dispute settlement and the Law of the Sea Convention*: *problems of fragmentation and jurisdiction*, 46 International and Comparative Law Quarterly (1997), pp. 53-54.

Assembly of the Authority to make written and oral submissions.[157] The Chamber received written statements by twelve states, the Authority and two international organizations, the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources (IUCN). The IUCN is composed of private and public organizations. In its opinion, the Chamber did not discuss the mixed membership. The IUCN was again invited to make submissions in *Request from the Sub-Regional Fisheries Commission* (*SRFC*).[158] Thus, at least in Chamber proceedings, organizations are allowed to participate that are predominantly, but not necessarily exclusively composed of states. This accords with the intention of the drafters of the model provision in the PCIJ Statute to exclude only so-called 'unofficial organisations.'[159]

As in the ICJ, unsolicited requests for admission as *amicus curiae* from non-governmental organisations have been rejected given the clear restrictive personal scope of the provision. But the Chamber has in both advisory proceedings where it received such submissions from environmental NGOs – the WWF and Greenpeace International – posted them on its website for consultation by states parties, intergovernmental organizations and tribunal members.[160] This approach is reminiscent of the codification in ICJ Practice Direction XII.

The recent admission of a written submission from the USA in *SRFC* signals an expansion of the current practice.[161] As noted, the USA is not a UNCLOS member state and therefore not encompassed by Article 133 ITLOS Rules. The ITLOS did not justify the admission and first treated it like the submissions from the WWF by transmitting it to the parties and publishing in on its website. But it later on decided to include it in the case

157 *Responsibilities*, Advisory Opinion, 1 February 2010, ITLOS Case No. 17, pp. 6-9, paras. 4, 7.

158 *SRFC*, Annex to Order 2013/2 of 24 May 2013, and Advisory Opinion of 2 April 2015, ITLOS Case No. 21, para. 17.

159 A. Paulus, supra note 21, pp. 1641-1642, paras. 4-5.

160 *Responsibilities*, Advisory Opinion, 1 February 2010, ITLOS Case No. 17, para. 13, p. 10 (unsolicited joint *amicus curiae* submission from the WWF and Greenpeace International.); *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, pp. 9-11, paras. 13, 23 (two submissions from the WWF).

161 *SRFC*, ITLOS Case No. 21, Written Statement of the United States of America, 27 November 2013, at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round 1/C21_statement_USA_orig_Eng.pdf (last visited: 21.9.2017).

record. The tribunal merely pointed to the USA's membership to the Straddling Fishstocks Agreement, which serves to facilitate the implementation of some of the UNCLOS regulations on the conservation and management of straddling and high migratory fish stocks.[162] The tribunal treats the submissions of the USA and the WWF decidedly differently – only the latter was denoted an *amicus curiae* submission and it received a much cooler welcome. The reasons for this are unclear. Both submissions fell outside Article 133's scope, but it may well be that the state parties were less opposed to the admission of the USA's brief. The closed-off approach to NGOs has been criticized, because

> in some cases it might make sense for the Seabed Disputes Chamber to have the authority to request information from entities other than States Parties to the Convention, bearing in mind that requests for advisory opinions to the Chamber necessarily deal with matters governed by the legal regime of the common heritage of mankind. There is therefore a need to secure the principle of universality of the Convention.[163]

The ITLOS and the Seabed Disputes Chamber have not expressly stated what requirements an intergovernmental organization needs to fulfil to be considered an 'appropriate' intergovernmental organization under Article 133(2) ITLOS Rules. The invitations issued indicate that they operate on a basis of inclusiveness and invite all organizations with an intergovernmental structure that may in some way make a useful submission. In *SRFC*, the tribunal invited 48 intergovernmental organizations, including the United Nations, the UNDP, the FAO, regional fisheries commissions, development Banks, scientific commissions and the IUCN.[164]

In the provisional measures proceedings of the *Arctic Sunrise Case*, the question of the permissible relationship between *amicus curiae* and the claimant the Netherlands was at issue. The case concerned the arrest, capture and persecution for hooliganism in a Russian District Court of thirty Greenpeace International (GPI) activists and the GPI-operated vessel *Arctic Sunrise* which was flying under Dutch flag. GPI was directly affected

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162 *Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks*, adopted on 4 August 1995, entered into force 11 December 2001, UNTS Vol. 2167, p. 3.

163 P. Gautier, supra note 53, pp. 385-386.

164 *SRFC*, Annex to Order 2013/2 of 24 May 2013, ITLOS Case No. 21.

by the case and had an overwhelming interest that the Netherlands win the case. This interest appears to have motivated the use of *amicus curiae*. A GPI employee, Mr. Kees Kodde, publicly stated that GPI had 'hired a well-known expert on ITLOS issues who will write [the *amicus curiae* brief] so that it complements the Dutch arguments.'[165] In the proceedings, the Netherlands called as a witness GPI's legal counsel. He was questioned by the agent of the Netherlands and answered questions from the judges concerning the factual circumstances of the arrest.[166] The request for the provisional measures contained in Annex 2 a statement of facts which had been prepared by GPI. GPI also paid for the proceedings.[167] If admitted, this would have been the first apparent case of a US-style litigating *amicus curiae*. This is a worrying development in terms of procedural equality of the parties as it raises the judges' duty to ensure that the parties are given equal time to present their cases. This may not have been a ma-

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165 T. Moore, *Greenpeace case gathers knots at ITLOS*, 22 October 2013, at: http://www.cdr-news.co.uk/categories/arbitration-and-adr/featured/greenpeace-case-gathers-knots-at-itlos (last visited: 21.9.2017). *Kodde* further allegedly said that GPI considered asking other governments to intervene in the dispute, but decided against it as the 'Dutch government feared the intervention of other countries might cause a delay in the proceedings.' The *amicus curiae* petition was prepared by Greenpeace International with the assistance of renowned international lawyers, including Prof. Philippe Sands, QC. See *The Arctic Sunrise Case*, *Amicus Curiae* Submission by Stichting Greenpeace Council (Greenpeace International), 30 October 2013, ITLOS Case No. 22, at: http://www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf (last visited: 21.9.2017).

166 See *Arctic Sunrise Case*, Verbatim records of Public Sitting, ITLOS/PV.13/C22/1/Rev. 1/6 November 2013 a.m., ITLOS Case No. 22, 15:29-17:36.

167 T. Moore, supra note 165. GPI compensated the Dutch government for depositing the USD 3,6 million bond that was ordered to be paid in exchange for the prompt release of the crew members and the vessel, see A. Dolidze, *The Arctic Sunrise and NGOs in international judicial proceedings*, 18 ASIL Insight (2014), at: https://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings (last visited: 21.9.2017). *Dolidze* quotes the following statement from GPI's General Counsel *J. Teulings* of 29 November 2013: 'Greenpeace International will cover the costs associated with the issuing of the bank guarantee and will make sure that Dutch taxpayers are not affected by the Tribunal's order. Similarly, Greenpeace will compensate the Dutch government if the arbitral tribunal orders the Netherlands at a later date to pay reparations to Russia,' at: http://www.greenpeace.org/canada/en/recent/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action/ (last visited: 21.9.2017).

jor issue given that the interactions were apparent and could be addressed adequately, but it may be less obvious in other instances. Overall, this attempt may have weakened rather than strengthened the willingness of some international courts and tribunals to welcome *amici curiae* in their proceedings.

III. European Court of Human Rights

Article 36(2) ECHR and Rule 44(3)(a) ECtHR Rules consider apt to act as *amicus curiae* two kinds of participants: first, any High Contracting party which is not a party to the proceedings and, second, 'any person concerned who is not the applicant.'

The first alternative includes all Council of Europe member states that are neither party to the proceedings nor privileged by Article 36(1) ECHR, because they are not the national state of the applicant. States participate frequently as *amicus curiae* (see Annex I). Submissions have also been accepted from local governments.[168] The ECtHR interprets the term 'not a party' broadly. It excludes *amicus curiae* if there is an overlap in person between *amicus curiae* and a party. For instance, a request for leave by a member of the Georgian parliament was denied in *Shamayev and others v. Georgia and Russia*.[169]

As regards the second alternative, the court understands the term 'person' to encompass natural and legal persons, including intergovernmental organizations such as the European Commission, the UNCHR and the OSCE.[170] The ECtHR has accepted submissions from a vast range of entities, predominantly non-governmental local and international human-rights interest groups. But submissions have been received also by private individuals, professionals,[171] trade unions,[172] neighbourhood representatives and academic institutions (see Annex I). In short, there seems to be no limit as to who may appear as *amicus*. Until 2000, the large majority of

168 E.g. *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A No. 262.

169 *Shamayev and others v. Georgia and Russia*, No. 36378/02, 12 April 2005, ECHR 2005-III.

170 *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, ECHR 2008; *R.R. v. Poland*, No. 27617/04, 26 May 2011, ECHR 2011.

171 *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93.

172 *Brumârescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I.

submissions stemmed from European and particularly British human rights NGOs.[173] Although *amicus curiae* applicants still mainly originate from within Council of Europe member states, the ECtHR does not seem to consider the origin of a submission relevant.[174]

The ECtHR interprets the requirement that the person be 'concerned' broadly. It applies it to interest groups, stakeholders, individuals and entities that are directly or indirectly affected by or connected to the dispute or interested in the interpretation of a specific issue.[175] The ECtHR often grants leave to appear as *amicus curiae* to entities that will be legally or factually affected by the decision. This includes individuals and entities that are party to an agreement whose legality is contested before the ECtHR, that are in the same legal position as the applicant or that represent the interests of the applicant. A review of the pertinent case law points to a link between the lessening of the proximate connection test applied in early cases of *amicus curiae* participation and an expanding participation by *amicus curiae* to defend certain public interests.[176] Where the ECtHR de-

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173 According to *Chinkin* and *Mackenzie*, submissions from international as opposed to national NGOs were increasingly received in the 1980s. See C. Chinkin/R. Mackenzie, supra note 146, p. 146. See also *Sousa Goucha v. Portugal*, No. 70434/12, 22 March 2016 (submission from USA-based NGO Alliance Defending Freedom).

174 E.g. in *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010, the *amicus curiae* was from the USA (Harvard Law School Project on Disability).

175 *M.G. v. Germany* (dec.), No. 11103/03, 16 September 2004 (The case concerned an expulsion order by German authorities to Romania. The Romania-born applicant argued that he was no longer a Romanian citizen. Romania supported the applicant's view and stressed its lack of legal obligations towards the applicant. It further guaranteed safe return and assistance in the resettlement process in light of Article 3 allegations.); *Lordos and others v. Turkey*, No. 15973/90, 2 November 2010 (Rejection of the request for leave from the Evkaf Administration, a religious trust claiming to own some of the properties claimed by the applicant); *Brumârescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I. See also A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005, p. 344; *Gäfgen v. Germany*, No. 22978/05, 30 June 2008 and [GC], 1 June 2010, ECHR 2010.

176 *Mahoney's* observation on early case-law is no longer accurate that 'the mere fact the aspirant holds views, however strong and well-informed, regarding the performance by a Contracting State of its obligations under the Convention will … probably not suffice.' See P. Mahoney, *Developments in the procedure of the European Court of Human Rights: the revised rules of the court*, 3 Yearbook of European Law (1983), p. 153.

cides on ethically and socially controversial issues, such as abortion, right to assisted suicide, legality of the death penalty, display of religious symbols in public schools or adoption by homosexual couples, it tends to ensure that the different public interests engaged are elaborated on by representative civil society groups.[177] A review of the submissions accepted indicates that the ECtHR admits as *amicus curiae* only those with documented legal or factual expertise on the engaged public interest.

Amici curiae may openly support one of the parties. In *Emesa Sugar B.V. v. the Netherlands*, the applicant company complained that it had been violated in its right to a fair trial because it had not been allowed to respond to the opinion of the ECJ's Advocate General on a request for a preliminary ruling arising from domestic proceedings to which it was a party before The Hague Regional Court. The European Commission, having received permission to participate as *amicus curiae*, supported the Dutch government's argument that the application was inadmissible as it was directed exclusively against an ECJ order, that is, an act of an institution of the European Union, and that there was no *ratione materiae*.[178] The ECtHR has also granted leave to trade and other professional unions in cases

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177 *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002, ECHR 2002-III (Abortion); *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161; *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No. 246-A; *Vo v. France* [GC], No. 53924/00, 8 July 2004, ECHR 2004-VIII (Legal status of a child *in utero*); *D. v. Ireland* (dec.), No. 26499/02, 6 28 June 2006 (abortion in case of a lethal fetal abnormality); *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX (Treatment of homosexuals regarding succession to tenancies under Austrian Law. The ECtHR noted that Liberty, ILGA-Europe and Stonewall 'highlighted the general importance of the issue.'); *E.B. v France* [GC], No. 43546/02, 22 January 2008 (Adoption in same-sex relationships); *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, ECHR 2012 (Second-parent adoption by homosexual couples); *Haas v. Switzerland*, No. 31322/07, 20 January 2011, ECHR 2011; *Koch v. Germany*, No. 497/09, 19 July 2012 (Right to die); *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *P. and S. v. Poland*, No. 57375/08, 30 October 2012; *R.R. v. Poland*, No. 27617/04, 26 May 2011, ECHR 2011; *Taddeucci McCall v. Italy*, No. 51362/09, 30 June 2016; *Annen v. Germany*, No. 3690/10, Judgment of 26 November 2015.

178 *EMESA SUGAR B.V. v. the Netherlands* (dec.), No. 62023/00 of 13 January 2005. The ECtHR followed the argument and rejected the application for lack of *ratione materiae*. See also *S.A.R.L. du parc d'activites de Blotzheim et la S.C.I. Haselaecker v. France* (dec.), No. 48897/99, 18 March 2003, ECHR 2003-III (The Swiss government was granted leave pursuant to Article 36(2) ECHR in a

involving an applicant whose affected rights fall into one of their areas of operation.[179]

Also, requests for leave to participate by persons affiliated with or related to the parties are regularly granted. The requirement that the person is not the applicant is interpreted to exclude only persons identical to the applicant. In *Koua Poirrez v. France*, the adoptive father of an adult applicant was permitted to submit an *amicus curiae* brief. The applicant, an Ivory Coast national, complained against the French authorities' refusal to award him a disability allowance.[180] In *Association of Jehova's Witnesses v. France* concerning the authorities' refusal to recognize the applicant association as a religious association, the ECtHR granted leave to make a submission to the European Association of Jehova's Christian Witnesses.[181] Despite the clear wording of Article 36(2) ECHR, the ECtHR does

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case where the applicant challenged the legality of a French-Swiss agreement relating to the extension of the airport Basel-Mulhouse.); *Danell and others v. Sweden* (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I; *Zhigalev v. Russia*, No. 54891/00, 6 July 2006; *Hatton and others v. the United Kingdom*, No. 36022/97, 2 October 2001 and [GC], No. 36022/97, 8 July 2003, ECHR 2003-VIII; *Py v. France*, No. 66289/01, 11 January 2005, ECHR 2005-I; *Goudswaard-Van der Lans v. the Netherlands* (dec.), No. 75255/01, 22 September 2005, ECHR 2005-XI; *Herrmann v. Germany* [GC], No. 9300/07, 26 June 2012; *Haas v. Switzerland*, No. 31322/07, 20 January 2011, ECHR 2011; *Koch v. Germany*, No. 497/09, 19 July 2012; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V.

179 *Heinisch v. Germany*, No. 28274/08, 21 July 2011, ECHR 2011; *Beer and Regan v. Germany* [GC], No. 28934/95, 18 February 1999; *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999, ECHR 1999-I; *Pedersen and Baadsgaard v. Denmark*, No. 49017/99, 19 June 2003 and [GC], No. 49017/99, 17 December 2004, ECHR 2004-XI; *Petri Sallinen and others v. Finland*, No. 50882/99, 27 September 2005; *Hutten-Czapska v. Poland*, No. 35014/97, 22 February 2005.

180 *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, ECHR 2003-X. See also *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, 24 April 2003; *E.O. and V.P. v. Slovakia*, Nos. 56193/00 and 57581/00, 27 April 2004; *Eskinazi and Chelouche v. Turkey* (dec.), No. 14600/05, 6 December 2005, ECHR 2005-XIII; *Neulinger and Shuruk v. Switzerland*, No. 41615/07, 8 January 2009 and [GC], No. 41615/07, 6 July 2010, ECHR 2010; *Kearns v. France*, No. 35991/04, 10 January 2008. The interests of the parent and the applicant are not necessarily identical.

181 *Association of Jehova's Witnesses v. France* (dec.), No. 8916/05, 17 June 2008. See also *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, ECHR 2011;

not require a prospective *amicus curiae* to disclose any affiliation or relation with the parties (or the ECtHR) or any granting of support, financial or otherwise, in general or with regard to a specific brief. The ECtHR has accepted *amicus curiae* submissions from national groups from the respondent state which were (partly) publicly funded, as well as from state-administered human rights observers.[182]

Impartiality does not play a significant role. *Amici curiae* may directly and openly support one of the parties. In *Malone v. the United Kingdom*, the ECtHR allowed the Post Office Engineering Union to make a submission. The Union was involved in the phone tapping whose legality was at issue in the case.[183] In *Behrami and Behrami v. France* concerning France's responsibility for alleged negligence by KFOR troops in the French sector of Kosovo which had led to the explosion of unmarked and undefused clusterbombs killing and seriously injuring the applicant's two sons, and in *Saramati v. France and Norway*, a case concerning the legality of the events of the applicant's arrest and conviction for attempted murder by the KFOR mission in Kosovo, the ECtHR solicited a submission from the United Nations. The United Nations provided information on UNMIK's mandate and its relation to the KFOR missions. The United Na-

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Wilson, National Union of Journalists and others v. the United Kingdom, Nos. 30668/96, 30671/96, 30678/96, 2 July 2002, ECHR 2002-V (Leave granted to Trade Union Congress to which the National Union of Journalists belongs).

182 *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I; *Tinnelly and Sons Ltd and others and McElduff and others v. the United Kingdom*, Judgment of 10 July 1998, Reports 1998-IV; *Hugh Jordan v. the United Kingdom*, No. 24746/94, 4 May 2001, ECHR 2001; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, 2001-III; *O'Keeffe v. Ireland*, No. 35810/09, (dec.) 26 June 2012 and [GC] 28 January 2014, ECHR 2014; *Shelley v. the United Kingdom* (dec.), No. 23800/06, 4 January 2008 (Submission by the National AIDS trust which receives funding by the Department for Health); *Tysiac v. Poland* (dec.), No. 5410/03, 7 February 2006; *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010.

183 *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82. See also *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44; *Feldek v. Slovakia*, No. 29032/95 12 July 2001, ECHR 2001-VIII; *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI; *Metropolitan Church of Bessarabia and others v. Moldova*, No. 45701/99, 13 December 2001, ECHR 2001-XII; *Dichand and others v. Austria*, No. 29271/95, 26 February 2002; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, Nos. 412/03 and 35677/04, 22 January 2009.

tions argued that the acts were attributable to KFOR, which was unsurprising given its interest to protect UNMIK from potential liability.[184]

Furthermore, the ECHR has not established any formal requirements concerning the qualifications, the expertise or the experience of *amicus curiae*, though such requirements could be read into Article 36(2)'s condition that a submission be 'in the interest of the proper administration of justice'. The court values informed and experienced *amici curiae.* It has a unique practice of admitting the same entities, in particular specialized human rights organizations such as Interights, Liberty, Article 19, Amnesty International and the Helsinki Foundation for Human Rights to make submissions on country-specific issues or to provide legal analysis.[185] The ECtHR frequently receives submissions from the European Roma Rights Centre in cases involving the Roma. This form of 'institutional' *amici* is particular to the ECtHR. In their applications to the court, *amicus* petitioners tend to comment on their knowledge and experience. The ECtHR also routinely grants leave to persons with expert knowledge of a country or particular situation. In *Hutten-Czapska v. Poland*, the ECtHR granted leave to the Polish Association of Tenants to report on the general situation concerning the implementation of a law imposing restrictions on landlords regarding rent increases and termination of leases in Poland.[186] Still,

184 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007.

185 The court has explicitly noted the expertise of *amicus curiae* in a few cases. *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115 (The court stated that JUSTICE possessed 'unrivalled experience' in conducting cases before the Court of Appeal Criminal Division. This led it to assume that the NGO could provide it with a 'useful, broader view of the matters currently under review.'). *Chapman v. the United Kingdom* [GC], No. 27238/95, 18 January 2001, ECHR 2001-I; *Beard v. the United Kingdom* [GC], No. 24882/94, 18 January 2001; *Coster v. the United Kingdom* [GC], No. 24876/94, 18 January 2001; *Lee v. the United Kingdom* [GC], No. 25289/94, 18 January 2001; *Jane Smith v. the United Kingdom* [GC], No. 25154/94, 18 January 2001; *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX; *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 1st section, 26 February 2004; *Tănase and others v. Romania* (striking out), No. 62954/00, 26 May 2009. See also *X. v. France*, Judgment of 31 March 1992, Series A No. 234-C (submission from the French association of haemophiliacs in a case concerning the infection by a haemophiliac with HIV through an infected blood transfusion).

186 *Hutten-Czapska v. Poland*, No. 35014/97, 22 February 2005. See also *Jelicic v. Bosnia and Herzegovina* (dec.), No. 41183/02, 15 November 2005, ECHR 2005-

the ECtHR has not (publicly) specified any criteria for the level of expertise or experience required.

The lack of more specific criteria is lamentable, as the court relies extensively on *amicus* submissions in its decisions (see Chapter 7). A strict set of criteria may not be appropriate given the ECtHR's use of *amicus curiae* to give personally affected individuals an opportunity to make submissions in the proceedings. Nonetheless, the court's indiscriminate approach to the instrument also in cases where it relies on fact submissions might lead to inadvertent adoptions of partial information. The court should estalish mechanisms to ensure the independence of *amici curiae* from the parties in all cases.

IV. Inter-American Court of Human Rights

According to Article 2(3) IACtHR Rules, *amicus curiae* is a 'person or institution that is unrelated to the case and to the proceeding.'[187] Neither the Rules nor the court have further defined these terms. The court's practice indicates that the term 'person' is limited to natural persons and the term 'institution' to a private or public entity with a public values mandate. The requirement that *amicus curiae* should be unrelated to the case and the proceedings is decidedly narrower than the practice before the ECtHR and points to an emphasis on neutrality and independence.

The IACtHR has admitted almost exclusively non-state actors as *amicus curiae* in contentious and in advisory proceedings. *Amicus curiae* submissions in contentious proceedings are made in particular by international and local non-governmental organizations, academics, academic institu-

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XII and 31 October 2006, ECHR 2006-XII; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009; *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009; *Suljagić v. Bosnia and Herzegovina*, No. 27912/02, 3 November 2009; *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011.

187 Former Article 41 of the January 2009 Rules of Procedure referred to 'one who wishes to act as *amicus curiae*'. The new Article 44 of the November 2009 Rules of Procedure uses the same term as the definition. The term institution was only added to the rules in November 2009. It is not clear what the purpose of this amendment was. See also F. Rivera Juaristi, supra note 65, p. 112.

tions and law clinics specialized in human rights.[188] The IACtHR has received *amicus curiae* submissions also from individuals, law firms, lawyer associations, journalist associations, and other special interest, victim and professional groups, as well as private business ventures in cases where their interests were at issue (see Annex I).[189] Recently, a submission was received by a state.[190] Cases often attract *amici curiae* specialized in the particular issue in dispute. In *Herrera Ulloa v. Costa Rica*, a case concerning defamation proceedings, the IACtHR received submissions from several publishing houses and media corporations.[191]

Non-governmental organizations and individuals participating as *amicus curiae* regularly originate from the respondent state or from state parties to the American Convention.[192] Public invitations issued by the

188 E.g. *"Other Treaties" subject to the consultative jurisdiction of the court (Article 64 ACHR)*, Advisory Opinion No. OC-1/82, 24 September 1982, IACtHR Series A No. 1, p. 1. *Kent* and *Trinidad* note the adoption in the IACtHR of the US practice to submit briefs 'on behalf of a large number of signatories.' A. Kent/ J. Trinidad, *International law scholars as amici curiae: an emerging dialogue (of the deaf)?*, 29 Leiden Journal of International Law (2016), p. 1096.

189 *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 ACHR)*, Advisory Opinion No. OC-14/94, 9 December 1994, IACtHR Series A No. 14, p. 13 (first *amicus curiae* brief by an individual); *Wong Ho Wing v. Peru* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 30 June 2015, IACtHR Series C No. 297, para. 11 (brief by an individual); *Caso Granier y Otros (Radio Caracas Televisión) v. Venezuela* (Preliminary Objections, Merits, Reparations and Costs), Judgment, 22 June 2015, IACtHR Series C No. 293, para. 9 (media focused entities). According to *Rivera Juaristi*, between 1988 and 2013, 58% of all *amicus curiae* briefs submitted in contentious proceedings were submitted by human rights NGOs, 24,5% by academic institutions, 14% by individuals, 3% by domestic governments and 0,5% by corporations. See F. Rivera Juaristi, supra note 65, p. 107. This accords with the data collected in Annex I.

190 The submission was made by Guatemala. It is not certain why Guatemala chose to participate as *amicus curiae*. It is likely that the reason for participation rests on the fact that Guatemala is also home to a large Garifuna community whose rights were at issue in the case. See *Garífuna Community of "Triunfo de la Cruz" and its members v. Honduras* (Merits, Reparations and Costs), Judgment, 8 October 2015, IACtHR Series C No. 305.

191 *Herrera Ulloa v. Costa Rica* (Preliminary objections, Merits, Reparations and Costs), Judgment, 2 July 2004, IACtHR Series C No. 107, p. 56.

192 See also D. Padilla, *The Inter-American Commission on Humans Rights of the Organization of American States: a case study*, 9 American University Journal of International Law & Policy (1993), pp. 111-112.

IACtHR for *amicus curiae* submissions in several recent advisory proceedings indicate that the court prefers briefs from local civil society groups, academics and academic institutions.[193] This is in line with the IACtHR's strong public interest based *amicus curiae* function. However, the IACtHR has over the years received an increasing amount of *amicus curiae* submissions from NGOs located in states not party to the American Convention, above all Spain and the USA.[194]

Amici curiae must be 'unrelated to the case.' This requirement was first mentioned explicitly in the 2009 IACtHR Rules. It is unclear if the IACtHR newly created this requirement or if it formed part of the court's general handling of *amici curiae*. The term could cover both independence and impartiality. However, the IACtHR does not require complete independence. With the exception of one case, the court regularly admits *amicus* briefs from entities connected to a party or the facts of the case.[195] In *Cesti Hurtado v. Peru*, a forced disappearances case, the IACtHR accepted

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193 The court has posted on its website general invitations to make *amicus curiae* submissions to 'interested representatives of civil society and academic institutions from the region.' E.g. *Articulo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20, para. 6.

194 *Articulo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20, p. 3, para. 6; *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 209 (submission by a Spanish human rights NGO); *Ríos et al. v. Venezuela*, Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 194 (submission by the Netherlands Institute for Human Rights-SIM); *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197 (submission by the Centre for Human Rights and Law Faculty of the University of Essex); *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 205; *The "Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 211; *Rosendo-Cantú and other v. Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 216.

195 In *Familia Pacheco Tineo v. Bolivia*, the court interepreted the requirement 'unrelated to the case' narrowly. It excluded a submission from an individual after this had been requested by the respondent, because she was engaged with an organization that was involved in the case. The court held that the condition required that an *amicus* be completely uninvolved in the process and the dispute ('totalmente ajena al litigio y al proceso'). See *Pachecho Tineo v. Bolivia*, Judgment of

a written submission from the President of the Human Rights Commission of the Lima Bar Association. The organization was involved substantially in the case as it had tried to locate and help the victim.[196] In *Acevedo Jaramillo y otros v. Peru*, the court admitted a submission by the Lima municipality. The IAComHR objected to the submission by pointing to the municipality's identity with the respondent under international law and its involvement in the case. The municipality's failure to comply with national judgments ordering the reinstatement of unlawfully laid-off employees constituted the basis of the proceedings before the IACtHR. The respondent had even accredited a representative of the municipality to participate in the proceedings. The IACtHR did not further comment on the issue. It merely stated that it would admit the submission to the extent that it contained useful information while taking into account the Commission's objections.[197] In a few other cases, the IACtHR has received submissions from public agencies or officers, such as public human rights protection offices, which are maintained and financed through the respondent state, like the 'defensor del pueblo'.[198] In *Personas Dominicanas y Haitianas Expulsadas v. República Dominicana*, the court rejected a request by the respondent state to exclude two *amicus curiae* submissions from human rights institutes and law clinics on the account that their contents had been directed, coordinated and reviewed by the CEJIL. The CEJIL was the co-representative of the victims during the proceedings before the IAComHR and the IACtHR. The court again did not properly address the complaint. It merely repeated the text of Article 2(3), namely, that an *amicus curiae* may not be a disputing party to the proceedings and that submission had to be made with the aim of illustrating to the court fact or legal questions related to the proceedings.[199] In short, the court reads the requirement rather loosely in terms of independence (concerning state entities) and prior in-

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25 November 2013 (Preliminary exceptions, Merits, Reparations and Costs), IACtHR Series C No. 272, para. 10.

196 *Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56.

197 *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 144.

198 E.g. *Barrios Altos et al. v. Peru*, Judgment of 3 September 2001 (Interpretation of the Judgment on the Merits), IACtHR Series C No. 83.

199 It further stressed that under no circumstance the *amicus curiae* submission could be considered evidence and that *amici curiae* had no right to have their submission considered. See *Personas Dominicanas y Haitianas Expulsadas v. Republica*

volvement in the case. It excludes only the formal parties, that is, the IAComHR and the respondent state government (whilst disregarding that all parts of the state under international law are considered to form one entity).[200] This shows that the court values the usefulness of a brief over formal independence.[201]

Further, *amici curiae* do not need to be neutral. This accords with the endorsement by the IACtHR of *amicus curiae* as an effective tool to hear the views of the public.[202] Even though the large majority of submissions are made by academic institutions and civil society representatives that typically have 'only' a general (public) interest in the case, in a few cases prior to 2009, the IACtHR admitted *amici curiae* with a direct interest in or an affiliation to the case and/or a clearly preferred outcome.[203] In *Rios y otros v. Venezuela*, a case concerning the alleged threatening and interference with the activities of 20 journalists and communications employees of the TV station RCTV, the IACtHR considered the submissions of several unions and radio-syndicates.[204] In *Yatama v. Nicaragua*, the court admitted four *amici curiae because* they had 'an interest in the subject matter of the application and provide useful information.'[205]

There is no disclosure requirement or procedure in the rules or in practice. Still, many *amici curiae* in their submissions include a detailed description of their nature, expertise, experience and activities, as well as an

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Dominicana, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 282, paras. 3, 15.

200 The IACtHR confirmed this in *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282, para. 15 ('In other words, the person should not be a procedural party to the litigation'.).

201 *Rivera Juaristi* suggests the creation of exceptions to the requirement 'unrelated' in cases where state organs or entities have useful information for the court. Any concerns regarding impartiality could be considered as 'a matter of credibility of a brief'. See F. Rivera Juaristi, supra note 65, pp. 116-117.

202 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177.

203 Critical, M. Pinto, *NGOs and the Inter-American Court of Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 56.

204 *Ríos et al. v. Venezuela*, Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 194, para. 19.

205 *Yatama v. Nicaragua*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 23 June 2005, IACtHR Series C No. 127, para. 120.

assurance of independence from the parties.[206] This is useful to bolster the credibility of a brief.

The IACtHR appears to test neither the expertise and/or experience of *amicus curiae* nor its qualifications or ability to represent civil society – or at the least it has not made the criteria publicly known.[207] The large number of participating academic institutions specialized in human rights indicates that the IACtHR values legal expertise. Similarly, the court often mentions having received submissions from organizations specialized in the matters at issue in the case and from international NGOs with a substantial record of participation before it.[208]

V. African Court on Human and Peoples' Rights

Section 42 Practice Directions permits *amicus curiae* submissions by '[a]n individual or organisation' in contentious cases. The provision is similar in personal scope to Article 2(3) IACtHR Rules, without establishing any limiting requirements. The use of the term 'organization' requires further clarification. It could denote only civil society organization or cover all types of legal persons, including those with a commercial focus. It can also be interpreted to allow intergovernmental organizations, but not states, to appear as *amicus curiae*. It remains to be seen how the court will interpret this term. In its first case, the court granted leave to make a submission as *amicus curiae* to the Pan African Lawyers' Union, an umbrella organization of African Lawyers and Law Societies, showing that the

206 See *amicus curiae* submission from the *Assembly of First Nations*, p. 48 in the case *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79.

207 Cf. *Artículo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20; *Veliz Franco y otros v. Guatemala*, Judgment of 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 277, paras. 15, 64 (The respondent state sought the exclusion of *amicus curiae* briefs. It alleged that they lacked knowledge of the case and failed to present any new elements of use to the court in its decision-making. The IACtHR rejected the submissions on formal grounds and did not comment on these arguments.).

208 For instance, the International Human Rights Law Group, CEJIL, Lawyers Committee for International Human Rights and Human Rights Watch/Americas Watch. See Annex I. See also M. Ölz, supra note 63, p. 360; M. Pinto, supra note 203, p. 53.

court includes interest-based groups. In *Lohé Issa Konaté v. Burkina Faso*, the ACtHPR admitted as *amicus curiae* a group of African and international human rights groups, many with a focus on media and journalists' rights.[209]

VI. WTO Appellate Body and panels

Neither panels nor the Appellate Body have formulated specific criteria petitioners must comply with or disclosures they must make to be admitted as *amicus curiae*.[210] Article 13 DSU requires that information be from an individual or body that the panel considers 'appropriate'. Panels or the Appellate Body have not concretized these elements in regard of *amicus curiae*, even though panels' authority to admit *amicus curiae* is drawn from the provision.[211] Panels and the Appellate Body have only cited the usefulness of *amicus* submissions when deciding on the admission. The term is too imprecise to deduct concrete conditions for the person of *amicus curiae*. For want of better guidelines, *amicus curiae* applicants in their requests often adhere to (the no longer applicable) Section 2 *EC–Asbestos* Additional Procedure, which denotes as competent to request leave '[a]ny person, whether natural or legal, other than a party or third party to this dispute.'

The WTO Appellate Body does not limit the scope of entities able to act as *amicus curiae*. The issue was strongly debated when Morocco requested leave to file an *amicus curiae* submission in *EC–Sardines*.[212] The

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209 See *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, p. 7, para. 20.

210 See *US–Tuna II*, where the nature of the *amici curiae* does not appear to have played a role. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter: *US–Tuna II (Mexico)*), Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R.

211 See G. Marceau/ M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), p. 178. They argue that panels and the Appellate Body should draw guidance for criteria from the objectives of the WTO which are referred to in the Preamble to the WTO Agreement. *Id*, p. 179.

212 The respondent Peru and other third parties objected to the admission arguing that it would accord Morocco a more privileged status than Colombia, which was attending the oral proceedings as a passive observer after having been denied third party status. *EC–Sardines*, Appellate Body Report, adopted on 23 October

Appellate Body denied that the rules on third party participation could preclude states from participating as *amicus curiae*,[213] essentially, because it found that third party and *amicus curiae* participation were two different things. To stress this point, it stated:

> We wish to emphasize, however, that, in accepting the brief field by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis.[214]

The decision was a logical and necessary progression from the Appellate Body's earlier *amicus curiae* decisions where it had emphasized that *amicus curiae* participation fundamentally differed from party and third party participation. Based on this reasoning, the WTO adjudicating bodies can also receive *amicus curiae* submissions from non-WTO member states.

State submissions are an absolute exception. The majority of *amicus curiae* submissions stem from non-governmental entities in the broadest sense, in particular, industry associations and trade unions. This may be unexpected given the large degree of publicity attracted by submissions from NGOs.[215] In twelve cases, *amicus curiae* submissions were made by interest groups in the areas of environmental protection, health and safety, human or animal rights. The organizations were largely operating internationally. In fifteen cases, submissions were made by industry groups, in six cases by individuals, including three briefs from legal experts. In one case, a submission was made by a member state, and one submission was

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2002, WT/DS231/AB/R, para. 19, p. 6. See also C. Brühwiler, supra note 9, p. 373.

213 *EC–Sardines*, Report of the Appellate Body, adopted on 25 July 2003, WT/DS231/AB/R, pp. 12, 35, 39, paras. 111, 115, 154, 163. See also C. Brühwiler, supra note 9, p. 367.

214 *EC–Sardines*, Report of the Appellate Body, adopted on 25 July 2003, WT/DS231/AB/R, pp. 40-41, para. 167.

215 The publicity value attached to *amicus curiae* submissions in the WTO was highly evident in *EC–Seal Products* concerning the legality of an import and marketing ban by the EU on seal and seal products. The animal rights organization PETA chose to submit its brief through US actress Pamela Anderson. An *amicus curiae* brief was also submitted by British actor Jude Law. See *EC–Seal Products*, Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R, p. 14, FN 16.

received from a commercial company operating in the energy sector (see Annex I). Submissions from academic institutions are rare.

The large number of applications by professional groups and business associations in the WTO may be due to the chilling effect of the Appellate Body's strict attitude towards non-governmental entities, although in cases decided in 2013 their number has increased again. In all cases where information was solicited, panels have requested information exclusively from intergovernmental organizations.

The Appellate Body in the *EC–Asbestos* Additional Procedure required that *amici curiae* in their applications 'contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant' (No. 3 (c)), as well as 'a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or third party to this dispute in the preparation of its application for leave or its written brief' (No. 3 (g)). These requirements pertain to the independence, expertise and experience of *amicus curiae*. It is unclear what value the Appellate Body attached to any of them, because all of the 17 diverse *amicus curiae* petitioners that applied under the *EC–Asbestos* Additional Procedure were rejected for failure to comply with it by a generic form letter. These requirements have not been mentioned since by panels or the Appellate Body. However, of the few submissions that have been accepted most stemmed from business entities, industry associations or trade unions with a link to the matter in dispute (see Chapters 6 and 7). This indicates that experience in the field at issue is an important criterion. Representativity to speak for a certain matter, on the other hand, does not appear to be generally relevant, at least if an *amicus curiae* purports to represent a public interest.

Panels and the Appellate Body do not require *amici curiae* to be impartial. Typically, *amici* openly support one of the parties.[216] In *Australia–Apples*, a case concerning the legality of Australia's import ban on Apples

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216 Cf. L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 244 (CIEL's brief to the panel in *US–Shrimp* had two parts: legal arguments supporting the panel's authority to accept *amicus* submissions, and second, it pre-

from New Zealand, the panel accepted an *amicus curiae* submission supporting the ban by Apple and Pear Australia Limited, an industry body representing the interests of commercial apple and pear growers in Australia. The Australian apple industry was closely involved in the import risk analysis process upholding the ban.[217]

VII. Investor-state arbitration

1. Legal standards

Investment arbitration regulations do not follow a uniform approach on who may act as *amicus curiae*. Some investment treaties establish conditions with respect to the person of *amicus curiae*. The NAFTA's FTC Statement determines that prospective *amici curiae* must be either 'a person of a Party' or have a 'significant presence in the territory of a party.' Like many other investment treaties, it mandates detailed disclosure requirements.[218] Pursuant to Section B, para. 2 (c) – (f), the application for leave to file a submission shall

> (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
> (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
> (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
> (f) specify the nature of the interest that the applicant has in the arbitration;

The nationality/locality requirement recently has become popular among lawmakers. It has been included in investment treaties concluded by the

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sented technical, scientific and legal information in support of the USA's position.).

217 *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R.

218 See, for instance, Article 836 and Annex 836.1 to the *Canada-Peru Free Trade Agreement*.

EU and in Section 43 of Annex 29-A to the CETA.[219] The requirement ensures a degree of representativeness in the sense that only those potentially affected by a decision are permitted to participate. The CETA further limits participation to 'non-governmental persons established in a Party', and establishes disclosure requirements in Section 45, including the 'nature of the [*amicus*] activities', its financial sources and its interest in the proceedings.

In arbitrations governed by the ICSID regime, Rule 37(2) ICSID Arbitration Rules contemplates submissions by 'a person or entity that is not a party to the dispute.'[220] In addition, tribunals have read the standards established by tribunals prior to the issuance of Rule 37(2) into the provision (or the identical Article 41(3) ICSID Additional Facility Rules).[221] The tribunal in *Suez/Vivendi v. Argentina* had established as a personal requirement the 'suitability of the petitioner to act as *amicus curiae*.' Petitioners were to 'establish to the tribunal's satisfaction that they [had] the expertise, experience, and independence to be of assistance in this case.'[222] They also had to elaborate on the following matters: their identity and background, the nature of their membership (if it [was] an organization) and the nature of their relationships, if any, to the parties in the dispute; the nature of their interest in the case; whether they had received financial or other material support from any of the parties or from any person con-

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219 The protocols to BITs concluded by the EU with states under the Mediterranean Economic Partnership Program establish a corresponding requirement. Prospective *amici* must originate from any of the contracting parties. Given that this includes all of the EU member states, the circle of potential participants is still very broad. See T. Dolle, supra note 115.

220 The first draft referred to 'states and persons'. It was later rejected as too restrictive in order to allow also persons without legal capacity to participate as *amicus curiae*. The term non-disputing parties was drawn from the FTC Statement. See T. Ruthemeyer, *Der amicus curiae brief im internationalen Investitionsrecht*, Baden-Baden 2014, p. 173; A. Antonietti, *The 2006 amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review (2006), p. 435.

221 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, pp. 7-11, paras. 17-27; *Piero Foresti v. South Africa*, Application by the Centre for Applied Legal Studies, the CIEL, INTERIGHTS and the Legal Resources Centre, 17 July 2009, ICSID Case No. ARB(AF)/07/01.

222 *Suez/Vivendi v. Argentina*, Order in response to a petition for participation as *amici curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 29.

nected with the parties in this case; and the reason why the tribunal should accept the submission.[223]

In UNCITRAL arbitrations, the standard differs depending on the application of the UNCITRAL Rules on Transparency. Article 4 stipulates unprecedented disclosure obligations concerning the *amicus curiae* petitioner. *Amici* must notify any affiliation or relationship they may have with the parties and any financial or other assistance they have received in the preparation of the brief. Especially the latter requirement is significantly more elaborate than those of other regimes. The applicant must disclose all 'significant funding', which is funding exceeding 20 percent of its annual operations in the preceding two years. Also, it must not only disclose names, but '[p]rovide information on any government, person, or organization that has provided any such financial or other assistance.' Further, an *amicus* applicant must describe the nature of his interest in the arbitration. If the UNCITRAL Rules on Transparency do not apply, it falls to the tribunals within their procedural powers to develop the necessary rules.[224] This has not been an issue as of yet because most UNCITRAL arbitrations were brought under the NAFTA where the FTC Statement applies.

In proceedings before the IUSCT, Note 5 Interpretative Notes to Article 15(1) UNCITRAL of the Iran-US Claims Tribunal limits *amicus curiae* to Contracting States and 'persons who are not party to the case.'[225] The lat-

223 *Suez/Vivendi v. Argentina*, Order in response to a petition for participation as *amici curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 29.

224 E.g. *TCW Group, Inc., Dominican Energy Holdings, LP v. Dominican Republic* (hereinafter: *TCW v. Dominican Republic*). In Procedural Order No. 2, the tribunal established a detailed request for leave procedure. Section 3.6.2 (c) – (e) of the Order required *amicus curiae* applicants to describe *inter alia* their membership and legal status, their general objectives, the nature of their activities and any parent organization (including any organization that directly or indirectly controls the applicant); disclose whether or not the applicant had any affiliation, direct or indirect, with any disputing party; and identify any government, person or organization that had provided any financial or other assistance in preparing the submission. *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008.

225 The note stipulates that: 'The arbitral tribunal may, having satisfied itself that the statement of *one of the two Governments* – or, under special circumstances, *any other person – who is not an arbitrating party in a particular case* is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting oral and written statements' [Emphasis added]. It is not clear if there is a two-step admission system. So far, submissions appear to have been made by legal persons, in particular banks.

ter have usually been business organizations from one of the contracting states USA or Iran.[226]

2. Application

The similarity of the rules translates into a largely homogenous practice. However, there are discernible differences with respect to independence.

Tribunals generally do not restrict who can appear as *amicus curiae* except where investment treaties contain locality requirements. [227] Under the ICSID Arbitration Rules, a 'person or entity' can be a private or legal person, including a state or an intergovernmental organization. Tribunals under the NAFTA, under the Netherlands-Bolivia BIT and in arbitrations governed by the UNCITRAL Arbitration Rules also have admitted legal persons, including states.[228] Currently, the large majority of submissions made stem from NGOs active in environmental or human rights law and the European Commission. Investment tribunals have also received briefs from trade unions, indigenous groups, private companies, industry interest groups, academics and legal practitioners (see Annex I).

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226 See *United States of America and The Islamic Republic of Iran*, Case No. A/16; *Bank Mellat and the USA*, Cases No. 582 and 591, Award, 25 January 1984, No. 108-A-16/582/591-FT.

227 In *Eli Lilly v. Canada*, the tribunal in the arbitration under the NAFTA and the UNCITRAL Arbitration Rules 1976 for the first time rejected requests for leave by several academics because they were located outside of NAFTA states. *Eli Lilly v. Canada*, Procedural Order No. 4, 23 February 2016, Case No. UNCT/14/2, p. 3.

228 E.g. *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22 (European Commission); *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13 (European Commission and the Netherlands). In *Aguas del Tunari v. Bolivia*, the tribunal solicited information from the Netherlands concerning various provisions of the applicable BIT. The Netherlands, though not party to the proceedings, was a signatory to the BIT containing the arbitration clause. Similarly, in *World Wide Minerals v. Republic of Kazakhstan* under the Canada-USSR BIT, Canada appeared as *amicus curiae* to support the view that Kazakhstan had succeeded to the BIT, at: http://www.jonesday.com/world-wide-minerals-achieves-right-to-arbitrate-its-expropriation-and-international-law-claims-against-republic-of-kazakhstan/ (last visited: 21.9.2017). See also Annex I. States tend to participate as *amici curiae* when there is no right of participation (such as Article 1128 NAFTA) for the other states party to the underlying investment treaty (see Chapter 4).

The independence of *amici curiae* has become topical. Recent regulatory efforts evince a propensity to insert expansive disclosure requirements in standard and *ad hoc* procedural rules. No uniform standard has emerged yet. For example, the tribunal in *Pac Rim v. El Salvador* required in its *ad hoc* procedure that applicants '[disclose] any direct or indirect financial or other material support from any disputing party or any person connected with the subject-matter of the proceeding,' a requirement that is broader than the NAFTA and suitability test disclosure requirements.[229] In *Renco Group v. Peru*, in addition to other requirements, the procedural rules mandated petitioners to 'identify any prior writings related to this arbitration, any of the Parties, or entities related to the Parties, the La Oroya Metallurgical Complex, the Treaty, or any material dealings prior to this proceeding with the Parties or its counsel.'[230]

The tribunals that first admitted *amici curiae* were rather sceptical of the motives of *amicus curiae* petitioners.[231] In *Methanex v. USA*, the parties, for instance, agreed to modify the applicable FTC Statement. *Amicus* applicants had to identify any entity that had helped to prepare the submission.[232] The *UPS v. Canada* tribunal, to assuage the investor's concerns regarding the independence of *amici curiae*, demanded that petitioners disclose 'other relevant information, including the relationship (if any) … to the disputing parties or the other NAFTA parties.'[233] It is startling that the tribunal subsequently admitted an *amicus curiae* submission from the Chamber of Commerce, as it had received US$ 100,000, equalling 12 per-

229 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12. See also *Pac Rim v. El Salvador*, CIEL et al., Application for Permission to Proceed as *Amici Curiae*, 2 March 2011, ICSID Case No. ARB/09/12. The petition included neither a declaration of independence nor a statement of disclosure of finances. The tribunal nevertheless admitted the *amici curiae*. See *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12.

230 *The Renco Group, Inc. v. Republic of Peru*, Procedural Order No. 1, 22 August 2013, UNCT/13/1, para. 14 (vii).

231 The *Methanex* tribunal noted that *amici curiae* were motivated by their own interests and as such not 'independent'. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae'*, 15 January 2001, paras. 38.

232 *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 27.

233 *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae*, 1 August 2003, paras. 4, 7.

cent of its annual budget, from UPS which further was one of its members prior to the submission.[234] This was not a singular incident. In *Glamis v. USA*, the tribunal received four *amicus curiae* petitions.[235] Each petition addressed the disclosure requirements of the FTC Statement, at least to some extent. The Quechan Indian Nation, a tribe that had been involved in the national proceedings given that the claimant's intended open-pit mining would adversely impact its ancestral lands, disclosed that it had received 'federal grants to support some of its governmental programming.'[236] The National Mining Association, an industry association, disclosed that the claimant was among its members, but it did not reveal its sources of income or who prepared the submission. The tribunal, finding that the public interest raised in the case required a liberal grant of access to the proceedings, still admitted all petitioners.[237] In *Bear Creek Mining v. Peru*, the tribunal expressly valued the particular information held by the *amicus curiae* petitioner – an NGO that had actively been involved with the local communities whose rights allegedly were violated by the claimant – higher than the disclosure requirements pursuant to Annex 836.1 of the Canada-Peru FTA that only partially had been met.[238]

In two recent cases, tribunals adopted a stricter approach. In *Philip Morris v. Uruguay*, the tribunal denied request for leave to the Inter-American Association of Intellectual Property for lack of independence from

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234 *UPS v. Canada*, *Amicus curiae* brief of the Chamber of Commerce, 10 October 2005. See also T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), FN 166.

235 *Glamis v. USA*, Application of non-disputing parties for leave to file a written submission by Sierra Club, Earthworks, Earthjustice and the Western Mining Action Project, 16 October 2006; Application for Leave by the Quechan Indian Nation, 19 August 2005; Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, 13 October 2006; and Application by Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005.

236 *Glamis v. USA*, Application for Leave to File a Non-Party Submission, Submission of the Quechan Indian Nation, 19 August 2005, p. 2 ('To its best knowledge, the Tribe does not have an affiliation, either direct or indirect, with any disputing party; except that, it may, from time to time, receive federal grants to support some of its governmental programming.').

237 *Glamis v. USA*, Award, 8 June 2009, para. 286. The *amicus curiae* submissions from the two environmental NGOs contained no such information, but they openly argued in support of the respondent's position.

238 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 44.

the claimants, after the respondent notified the tribunal that claimants' lawyers served on the petitioners' board of management and other committees.[239] Similarly, in *Eli Lilly v. Canada*, two *amicus curiae* petitions were rejected because the claimant's Canadian subsidiary was a member in the two associations IMC and Biotecanada and, in addition to paying membership fees and publicly acknowledging to having relied on their services for lobbying purposes in respect of one of the disputed issues, several senior employees served on the associations' board of directors. Noting the interlinkages, the respondent in the case stressed: 'the role of *amici* in international arbitration proceedings … is to assist the Tribunal, not to support a disputing party.'[240]

In *Apotex II v. USA*, the *amicus curiae* applicant had submitted a notice of intent regarding another case on behalf of an organization identified as the claimant's joint venture partner.[241] The tribunal did not condone Mr. Appleton's lack of disclosure of his affiliations and true interest in participating. It held that 'from the outset Mr. Appleton should have disclosed his involvement in the pending NAFTA cases, even if this information is publicly available,' but stated that because of the claimant's assurance that it was unrelated to Mr. Appleton, the omission had not been relevant.[242] While these clarifications must be welcomed, the lack of consequence of what can only have been an intentionally flawed disclosure sends an unfortunate signal to future petitioners.

Other tribunals have found that the mere assertion to not have received support from a party and general remarks about the financing were insufficient to determine petitioners' suitability, and that petitioners must com-

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239 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, para. 55.

240 *Eli Lilly v. Canada*, Letter by Canada on *amicus curiae* applications, 19 February 2016, Case No. UNCT/14/2, p. 6.

241 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 18-21. The claimants stated in their response that they had communicated with Mr. Appleton neither on the present arbitration, nor the *amicus* application, nor that they had provided any support to Mr. Appleton, nor had mandated him earlier.

242 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 45-46.

ment on their financial relationship with either party.[243] This approach is convincing, as sufficiency of mere allegations would place the onus on the parties to verify the allegations, which may lead to an escalation of costs and increase the risk of admission of unsuitable *amici curiae*.[244]

A novel aspect regarding independence was raised recently in *Philip Morris v. Uruguay*. The claimant argued, based on *Apotex II*, that the *amicus* petitioners – the World Health Organization (WHO) and the WHO's Framework Convention on Tobacco Control Secretariat (WHO FCTC), as well as the Pan American Health Organization (PAHO) were not independent, because the respondent was an active member of the organizations and they further had provided different forms of support to their member states in conformity with their mandates.[245] The tribunal did not address these concerns in its orders. This approach is convincing. Otherwise, intergovernmental organizations *per se* would be excluded from participation. Further, their functional independence and organizational structure at least calls for a case-by-case assessment of their independence instead of a blanket exclusion. However, when assessing evidence such briefs can – and have proven to be – quite persuasive (see Chapter 7). Tribunals must be careful to not appear overly friendly towards intergovernmental organizations or states participating as *amici curiae* lest they risk being accused of interest capture.[246] With regard to *amicus curiae* participation by the European Commission, there is an additional dimension in respect of independence. Article 13(b) of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing

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243 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, pp. 12-13, paras. 32, 34: 'In order for the Tribunal to evaluate the independence of the *Fundacion*, it would be necessary to have additional information on its membership. To judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationship, with the Claimants or the Respondent.' The Tribunal rejected all of the four *amicus curiae* petitioners, but allowed them submit a new application for leave with the required information. See *Id.*, p. 13, para. 34.

244 E. Triantafilou, *Amicus submissions in investor-state arbitration after Suez v. Argentina*, 24 Arbitration International (2008), pp. 581-582.

245 *Philip Morris v. Uruguay*, Procedural Order No. 4, 24 March 2015, para. 12 and Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 11.

246 J. Fry/O. Repousis, supra note 121, p. 827 (Concerned that EU *amicus* participation 'brings into question the potential effects and power of such intervention and the influence they can have over arbitral tribunals' rulings.').

transitional arrangements for bilateral investment agreements between Member States and third countries obliges member states to immediately inform the European Commission of any arbitration proceedings initiated under a BIT. Moreover, the member state and the EC 'shall fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, the participation in the procedure by the Commission.'[247]

Expertise and experience of *amicus curiae* are considered to be highly important in all investment arbitrations. The FTC Statement recommends that a tribunal's decision whether to admit a petitioner consider whether *amicus curiae* would offer a 'perspective, particular knowledge or insight that is different from that of the disputing parties.' Accordingly, petitioners have highlighted their expertise and experience, including as *amicus curiae* domestically and before international tribunals. An ICSID-administered tribunal rejected an application, because the *amicus curiae* applicants had not submitted *curricula vitae* and it felt unable to assess if the applicants possessed sufficient expertise and experience.[248] It stressed that it was not sufficient for a petitioner 'to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns. It must show the Tribunal in *specific* terms how its background, experience, expertise, or special perspectives will assist the Tribunal in the particular case.'[249] In *Biwater v. Tanzania*, the tribunal remarked on the petitioners 'specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania,' and stated that their approach to the issues materially differed from that of the parties.[250] Further, international and local NGOs increasingly seek to participate

247 See also C. González-Bueno/L. Lozano*, More than a friend of the court: the evolving role of the European Commission in investor-state arbitration*, Kluwer Arbitration Blog, 26 January 2015, at: http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/ (last visited: 21.9.2017).

248 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, pp. 11-12, para. 30.

249 *Id*., p. 13, para. 33.

250 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, paras. 46, 50 and Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 50, 359. The petitioners framed their request both under Article 37(2) and the suitability test, especially with respect to previous experience and their membership structure. Unfortunately, the tribunal shied away from generally commenting on the continued ap-

jointly. This is sensible. It allows the combination of international law expertise with expertise on the local facts and context of a case. An additional advantage to such joint undertakings was visible in *Piero Foresti v. South Africa*, an arbitration under the ICSID Additional Facility Rules. The tribunal accepted the petitioners' argument that in joint petitions petitioners' expertise and experience should be assessed collectively.[251]

In *Apotex I v. USA*, proceedings governed by the NAFTA and the UNCITRAL Rules, the tribunal rejected a request by the Study Center for Sustainable Finance, an institution linked to a for-profit management consulting firm for not providing 'a different perspective and a particular insight on the issues in dispute, on the basis of either substantive knowledge or relevant expertise or experience, that go beyond or differ in some respect from, that of the Disputing Parties themselves.'[252] The tribunal stressed that the condition should be interpreted broadly 'so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.'[253] The tribunal noted that the applicant had not pointed to any knowledge, experience or expertise with respect to any of the substantive or procedural issues of the case that were not already available to the tribunal.[254] For similar reasons, the tri-

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plicability of the suitability test under Rule 37(2). It merely noted that it had considered the requirements and that, based on the information provided, it might benefit from petitioners' participation. See also *Philip Morris v. Uruguay*, Procedural Order No. 4, 24 March 2015, para. 28 and Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 30.

251 *Piero Foresti v. South Africa*, Letter of admission, 5 October 2009, ICSID Case No. ARB(AF)/07/01.

252 *Apotex I v. USA*, Procedural Order No. 2, 11 October 2011, para. 21. Notably, the tribunal relied on the parameters established by the tribunal in *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 23. The decision was fully confirmed in 2013 when another tribunal received the identical submission. Although the dispute was conducted under the NAFTA and ICSID Additional Facility Rules, the tribunal relied largely only on the FTC Statement for its findings. The tribunal found also that Article 41(3) ICSID Additional Facility Rules and the FTC Statement were compatible. See *Apotex Holdings Inc. and Apotex Inc. v. United States of America,* (hereinafter: *Apotex II v. USA*)*,* Procedural Order on the Participation of the Applicant, BNM, as a non-disputing Party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, para. 27.

253 *Id*., para. 22.

254 *Id.*, paras. 23, 27-28.

bunal in *Apotex II v. USA* rejected the application from Mr. Appleton, an international lawyer with substantial professional experience in NAFTA matters. The tribunal found that Mr. Appleton's offer to share his 'particular experience' on NAFTA interpretation was unlikely to surpass the combined expertise of the tribunal and the parties' counsel.[255] Thus, for many tribunals mere expertise is not sufficient to be granted leave to file a submission. *Amicus curiae* petitioners must be able to link their expertise to the legal or fact issues in dispute.[256]

Tribunals in practice have not given importance to impartiality, as the submissions by the EC, the Quechan, the WHO or many of the NGOs prove – and as indicated in the requirement that *amicus curiae* applicants state their interests in the arbitration. This changed recently in the joined cases *von Pezold v. Zimbabwe*, brought under the Germany/Switzerland-Zimbabwe BITs and the ICSID Arbitration Rules. The tribunal rejected a joint request for admission by the Germany-based international human rights NGO European Center for Constitutional and Human Rights (ECCHR) and four indigenous Zimbabwean communities.[257] The claimant questioned *inter alia* the petitioners' independence, because the indigenous communities had disclosed receiving assistance in the form of facilitation of communications with the ECCHR and in holding meetings to discuss the *amicus* application from a Zimbabwean organization that was run by a local Zimbabwean politician who was involved in Zimbabwe's resettlement policies. The tribunal held that Rule 37(2)(a) ICSID Arbitration Rules implied a duty of independence of *amici* towards the parties. Otherwise, they could not share information *different* from that of the parties, and that already '[t]he apparent lack of independence *or neutrality* of the Petitioners [was] a sufficient ground to deny the … Application.'[258] While the decision is to be welcomed with respect to independence, the

255 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 30-34.

256 T. Ruthemeyer, supra note 220, p. 248.

257 *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited and Others v. Zimbabwe (joined)* (hereinafter: *von Pezold v. Zimbabwe*), Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25.

258 *Id.,* paras. 49, 54-57. The tribunal further held that the petitioners had failed to satisfy any of the other criteria of Rule 37(2) ICSID Arbitration Rules. This will be discussed in greater detail below.

statements regarding neutrality raise concerns.[259] Not only is it unclear how petitioners shall possess and defend an interest in the arbitration whilst remaining neutral, but the statement is so broad that it has the potential to exclude any form of *amicus curiae* participation.[260]

Overall, case law shows that the application of the relatively similar criteria differs significantly. While all tribunals consider important the expertise and experience of *amicus curiae* and do not require it to be impartial, application of the requirement of independence differs widely, subjecting prospective *amici curiae* to an unfortunate uncertainty.

VIII. Comparative analysis

The ICJ and the ITLOS stand out with their limitation of *amicus curiae* to intergovernmental organizations. This limitation (or rather *amicus curiae* participation as such) appears to be a historical remnant. The IACtHR and the ACtHPR have limited the instrument in the opposite direction. Submissions stem almost exclusively from individuals, NGOs and academic institutions. The other international courts and tribunals admit a broad range of *amici curiae*, including commercial and non-commercial, governmental and non-governmental, national and international, legal and natural persons. Interestingly, no case was found where an international court or tribunal explicitly solicited information from a source other than a state or an intergovernmental organization. The latter, in turn, have been hesitant to request leave to participate as *amicus curiae*.[261] An exception is the European Commission. It has requested leave to defend its legal interests – the adherence to EU law – in numerous investment cases. The notable scarcity of submissions from intergovernmental organizations and states may be due to the availability in most procedural rules of more effective avenues for participation or their ability to resort to political means to as-

259 See also T. Ruthemeyer, supra note 220 , pp. 252-256. He argues that the decision was due to the fact that the *amici* essentially sought to assert their own property interests and not to defend a public interest.

260 C. Beharry/M. Kuritzky, *Going green: managing the environment through international investment arbitration*, 30 American University Intl. Law Review (2015), p. 415. Their suggestion that *amicus curiae* can provide expert analysis of environmental risk assessments conflicts with the impartiality requirement and also risks circumventing rules on expert participation.

261 R. Mackenzie/C. Chinkin, supra note 146, p. 139.

sert their interests (effectively). Intergovernmental organizations may be hesitant to appear as *amicus curiae* because of their member states' differing interests and to avoid any appearance of bias towards a member state. Where the interests are clear, intergovernmental organizations have been willing to appear as *amicus curiae*, as the EC's submissions to investment tribunals prove.[262]

Most international courts and tribunals require *amici curiae* to possess special expertise and experience. Only investment tribunals have made this an express condition, but also the other international courts and tribunals reviewed value this element. These requirements are important, in particular, where the tribunal hopes to extract information from the *amicus curiae*.

An issue that touches upon the credibility of *amicus curiae* submissions is the accountability and representativity of *amicus curiae*. Accountability in this context means responsibility to a constituency. Representativity entails that an *amicus curiae* in some way legitimately can show to speak for those whose interests it claims to voice. The issue has barely received attention in the practice of international courts and tribunals. With the exception of the FTC Statement's nationality/locality requirement and the increasing number of international NGOs that team up with local NGOs to prepare submissions before investment tribunals, it is virtually absent. The matter has been increasingly discussed at the political level and in academia.[263] This issue is further examined in Chapter 8.

International courts and tribunals overwhelmingly accept submissions that are or seem partial. Is this warranted? Impartiality is understood to mean that *amici curiae* may not take the side of one of the parties with the intention of supporting the party, whereas independence describes financial or any other material or non-material reliance on one of the parties. The two concepts are related but distinct. Impartiality at most may be an indicator for lack of independence, but there is a significant difference be-

262 See Annex I.

263 The OECD's Working Group on Transparency expressed that third parties should prove a substantive and legitimate interest in the issue they wish to comment upon and urged courts to oblige non-governmental *amici curiae* to demonstrate that their organization is accountable, professional and transparent, as well as independent from the parties to the dispute. See OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, Statement by the OECD Investment Committee, June 2005, p. 12.

tween *amici curiae* that support the views or arguments of a party and *amici curiae* that are identical to a party or act as its mouthpiece.

Independence seems to be more of a concern than impartiality in international adjudication.[264] Most of the rules on *amicus curiae* participation require that the *amicus curiae* be 'unrelated to the case' or 'different from one of the parties'. No court or tribunal has accepted the American litigating *amicus curiae*.[265] However, across the benches this requirement is not always strictly applied. This is surprising. If one party, without the knowledge of the international court or tribunal or the opposing party finances or uses *amicus curiae* to advance its case to the tribunal, it could affect due process and the procedural equality between the parties. The wide-reaching decision in *von Pezold v. Zimbabwe* seems to have been guided by this view. Furthermore, the risk remains that a party uses the instrument to circumvent rules on evidence that limit its ability to present information, such as regulations on the presentation of witnesses or experts.

With regard to impartiality, the above findings indicate that most tribunals expect that an *amicus curiae* participates to pursue or defend a direct or an indirect interest in the case. Investor state dispute settlement tribunals and the ECtHR interpret the requirement that *amici curiae* are 'concerned' to mean that they must somehow be affected by the case.[266] Accordingly, *amici curiae* may openly support the position of one of the

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264 But see T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvant (Ed.), *Yearbook of International Investment Law and Policy (2008-2009)*, p. 557 ('If *amici* are truly independent of one party and there is no coordinated strategy, they risk being "unguided missiles": Although intending to be supportive, they may reveal facts the litigating party would prefer not to be raised or make legal arguments that contradict the advocacy strategy of the party.' [Emphasis added]).

265 The adoption of a submission does not fall hereunder. As emphasized by the Appellate Body in *US– Shrimp*, an adopted *amicus curiae* submission becomes part of the party submission. See Section A above.

266 For example, *Sadak and others v. Turkey (No.1)*, Nos. 29900/96, 29901/96, 29902/96, 29903/96, 17 July 2001, ECHR 2001-VIII; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V; *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No. 246-A; *Informationsverein Lentia and others v. Austria*, Judgment of 24 November 1993, Series A No. 276; *Chahal v. the United Kingdom*, Judgment of 15 November 1996, Reports 1996-V. An exception is *Capuano v. Italy*, Judgment of 25 June 1987, Series A No. 119, where the Registrar informed the Rome Lawyers' Association that its written comments

parties. The IACtHR requires that *amici curiae* be unrelated to the case, but it regularly accepts *amici curiae* that were involved in the case and/or are interested in its outcome, indicating that it interprets the requirement along the lines of identity between *amicus curiae* and a party. The ICJ Statute and the ITLOS Rules are silent on this issue, but the invitations to Palestine in the *Wall* proceedings and to the authors of the declaration of independence in *Kosovo* show that the ICJ is willing, at least in exceptional cases, to hear the views of entities with a vested interest in the outcome. In academia, the matter is disputed. According to *Umbricht*, *amici curiae* may not have a direct legal interest at stake in the dispute,[267] while *Mavroidis* and *Ishikawa* define (and defend) *amici* as lobbyists of their own interests.[268] *Boisson de Chazournes* argues that a distinction should be made between *amici* acting in the public interest and industry groups representing their own interests and that only the former should be admitted.[269]

Should *amici curiae* be impartial?[270] It seems sensible to condition this on the function assigned to the respective *amicus curiae* by the interna-

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were restricted to the issue of the power of Italian judges over actions of the parties' representatives in civil proceedings, and that the Association should not take sides in its submission as this would be contrary to the spirit of the rules. Cited by A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/Herbert Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, pp. 348-349.

267 G. Umbricht, supra note 92, p. 778.

268 P. Mavroidis, supra note 88; T. Ishikawa, supra note 234, p. 268. See also the Statement from a GPI employee: '[ITLOS] is a route that might offer possibilities in the future. … Greenpeace has gone to ITLOS before because of an issue around seabed mining in the past and the courts can really help to further cases of environmental issues and transparency.' At: http://www.cdr-news.co.uk/categories/arbitration-and-adr/featured/greenpeace-case-gathers-knots-at-itlos (last visited: 21.9.2017).

269 L. Boisson de Chazournes, supra note 9, pp. 334-335. See also the critique of this view by A. Appleton, *Transparency, amicus curiae briefs and third party rights, discussion session*, 5 Journal of World Investment and Trade (2004), p. 343. *Stern* further notices the risk of a tension between non-state actors participating in the public interest and well-funded industry representatives. See B. Stern, supra note 98, p. 1454.

270 L. Bartholomeusz, supra note 17, p. 280 ('While *amici* may sometimes appear as advocates it seems that they must still conduct themselves in a manner consistent with the trust reposed in them as "friends of the court". In the course of deciding

tional court or tribunal. An *amicus curiae* that is admitted to defend an interest in virtually all cases will have to opt for a certain outcome of the case. In the typical adversarial processes before international courts, this is unproblematic, because the parties can challenge the brief.[271] Partiality is more problematic where an international court solicits or receives information from an *amicus curiae* that it expects to be neutral, for instance, in cases where 'academics may try to leverage their credibility as teachers and scholars' purporting to be neutral when in fact they are lobbying for a certain outcome.[272] In these constellations, support for a party or outcome may taint the reliability and credibility of the *amicus* and, in extreme cases, the court might appear biased. In all cases, measures may be necessary to ensure party equality (see Chapter 8).

Another question is whether an *amicus curiae* may pursue its own interest and if there are limits to the interests that *amici curiae* may defend. Especially in the WTO context it is argued that *amici curiae* should not be allowed to represent commercial and industrial interests. The expectation that an *amicus curiae* is a bystander to the proceedings who impartially advises the court on a matter of law or fact is somewhat unrealistic in international dispute settlement given the expense and effort of submitting a brief.[273] There is no doubt that many *amici curiae* participate to advance their own agenda.[274] But cutting out all types of *amicus* with a commercial or other 'un-noble' interest might keep tribunals from valuable information, for instance, from industry associations with special insight into the

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in the *Milosevic* proceedings that one *amicus* was no friend of theirs, the ICTY indicated that an *amicus* had to "act fairly in the performance of his duties [and] discharge his duties … with the required impartiality".' [Reference omitted]).

271 M. Schachter, *The utility of pro bono representation of US-based amicus curiae in non-US and multi-national courts as a means of advancing the public interest*, 28 Fordham International Law Journal (2004), p. 119.

272 A. Kent/J. Trinidad, supra note 188, p. 1088.

273 C. Brühwiler, supra note 9, p. 348; T. Ishikawa, supra note 234, p. 268; *Jaffee v. Redmond*, 518 US 1, 35-36, Diss. Op. US Supreme Court Justice Scalia: '[T]here is no self-interested organization out there devoted to pursuit of the truth in the federal courts[, t]he expectation is … that th[e] Court will have that interest prominently – indeed, primarily – in mind.'

274 See Interights and ILGA-Europe on strategic human rights ligitation, at: http://www.interights.org/our-work/index.html and https://www.ilga-europe.org/what-we-do/our-advocacy-work/strategic-litigation (last visited: 21.9.2017).

impact of a decision.[275] The case law of the IACtHR and the ECtHR illustrate the benefits of these *amici curiae*.

International courts and tribunals can effectively manage the interests of *amici curiae* through disclosure requirements. Transparency with respect to the membership, activities and financing of *amici* as well as the specific drafters of a brief are indispensable for the evaluation of information submitted. Otherwise, the court risks to be manipulated to the detriment of one party, and it might even violate its duty to render an informed and reasoned decision in case of erroneous assessment of the information provided by an *amicus curiae*. If an international court or tribunal is made aware of dependency or partiality, it can seek to remedy any potential inequalities through procedural means such as sufficient time to react to submissions, adaptation of deadlines, etc. Disclosure requirements are instrumental for the assessment of the content of an *amicus curiae* submission. In this respect, disclosure requirements are also an opportunity for prospective *amici curiae* to enhance their credibility and for the tribunal to get a clearer view of the *amici's* true interests in participating.[276] Many prospective *amici curiae* voluntarily provide the court with information on their entity in general, their expertise and their experience to enhance their credibility.

C. Request for leave procedures

A request for leave procedure requires those interested in participating as *amicus curiae* without having been solicited by the respective international court or tribunal to apply for permission to do so.[277] Unsolicited submissions are much more frequent than solicited submissions (see Annex I).

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275 A. Appleton, supra note 269, pp. 343-344 (The 'industry should have a voice' as it has 'different voices and they all can help society on certain issues.').

276 M. Schachter, supra note 271, p. 131 ('[D]isclosures by *amici* enhance their credibility before the court, both by openly identifying interests and potential biases and by negating any biases that a court might erroneously or presumptively infer.').

277 Request for leave procedures do not apply where international courts or tribunals solicit the participation of a specific *amicus curiae*. In that case, the court has already concluded its screening of the solicitee prior to establishing the contact.

A request for leave procedure can be highly advantageous. If duly exercised, it filters desirable from undesirable briefs and ensures that a court is not swamped. This is particularly relevant where courts receive a large number of *amicus curiae* submissions.[278] A transparent request for leave procedure augurs preventative and educational effects. It may motivate petitioners with useful contributions to apply whilst discouraging submissions that would not be helpful. A request for leave procedure can be very cost-efficient if only useful *amicus curiae* are admitted.[279] It also permits courts to influence the content of a brief. They can tailor its substance and form. Accordingly, a request for leave procedure can effectively manage *amicus curiae's* as well as parties' expectations and foreshadow the potential relevancy of a submission.

Given these advantages, it is not surprising that most international courts and tribunals have created request for leave procedures for *amicus curiae* participation.[280] A few courts have abstained from such a procedure, but essentially all courts reviewed have installed at least some (unwritten) admission criteria, usually in respect of timing. This includes the

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278 This was also one of the reasons for the rejection of *amicus curiae* participation in *South West Africa*. The Registrar stated that an admission might 'open the floodgates to what might be a vast amount of proffered assistance.' See *South West Africa*, Advisory Opinion, 21 June 1971, Letter No. 21 (The Registrar to Professor Reisman), Part IV: Correspondence, ICJ Rep. 1971, pp. 638-639.

279 In *EC–Seal Products*, the panel received, among other briefs, whose informative value stands to debate. The most eclectic brief was a two-page long brief from the actress Pamela Anderson on behalf of animal activist group PETA expressing the hope that the panel would uphold the EC's ban on imports of seal products, which Canada had challenged. See *EC–Seal Products*, Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R, p. 14, FN 16; *Pamela Anderson/People for the Ethical Treatment of Animals (PETA)*, Written Submission of Nonparty *Amici Curiae*, 12 February 2013, at: http://www.mediapeta.com/peta/pdf/Pamela_Anderson_WTO.pdf (last visited: 21.9.2017). For further benefits of such a procedure, see R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 304.

280 Some courts with the publication of a request for leave procedure have issued public invitations to potential *amici*, see *Apotex II v. USA*, Invitation to *Amici Curiae*, ICSID News Release, 31 January 2013; *Pac Rim v. El Salvador,* ICSID New Release, 2 February 2011, ICSID Case No. ARB/09/12; *EC–Asbestos*, Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, AB-2000-11, WT/DS135/9.

ICJ and the ITLOS whose procedural regimes do not mention a request for leave procedure for participation in contentious or in advisory proceedings, possibly due to the restrictive scope of participation offered by their procedural regimes. Only Article 66(3) ICJ Statute in cases where a state has not been notified of the possibility to make a submission stipulates that a state 'may express a desire to submit a written statement or to be heard; and the Court will decide.'[281] Based on its wording, Article 36(2) ECHR only contemplates solicited *amicus curiae* participation before the ECtHR.[282] In practice, the court only exceptionally invites *amici curiae*.[283] Virtually all *amicus curiae* submissions to the ECtHR are unsolicited and the court has since the first admission of *amicus curiae* applied a request for leave procedure which is now enshrined in its rules. In so far, the ECtHR Rules are broader than Article 36(2) ECHR. A request for leave procedure is not required by the ECtHR if a case is referred to the Grand Chamber and the *amicus curiae* was already admitted to the chamber proceedings.[284] The IACtHR until recently appears to have barely restricted admissions to enable the greatest participation by civil society in an effort to strengthen human rights (and human rights dialogue) in the Americas.[285] However, this approach likely entailed significant administrative burdens and required the court to assess and consider submissions of limi-

281 See Article 34(2) and (3) ICJ Statute and Article 69 (3) ICJ Rules; Articles 84(2) and 133 (2) and (3) ITLOS Rules.

282 Article 36(2) ECHR: '2. The President of the Court may, in the interest of the proper administration of justice, *invite* any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.' [Emphasis added].

283 The data analysis showed only five such cases: *Kyprianou v. Cyprus*, No. 73797/01, 27 January 2004; *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007; *Kearns v. France*, No. 35991/04, 10 January 2008; *Suljagić v. Bosnia and Herzegovina*, No. 27912/02, 3 November 2009.

284 *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Gäfgen v. Germany* [GC], No. 22978/05, 1 June 2010, ECHR 2010. An *amicus curiae* petitioner can also apply directly to the Grand Chamber without having participated in the Chamber proceedings. See *Kononov v. Latvia* [GC], No. 36376/04, 17 May 2010, ECHR 2010.

285 See Article 44 IACtHR November 2009 Rules; *Kimel v. Argentina*, Judgment (Merits, Reparations and Costs), 2 May 2008, IACtHR Series C No. 177, pp. 4-5, para. 16; *Castañeda Gutman v. Mexico*, Judgment (Preliminary exceptions Merits, Reparations and Costs), 6 August 2008, IACtHR Series C No. 184, p. 5, para. 14.

ted value. The court has increasingly put in place (and enforced) formal admission criteria. The WTO panels and the Appellate Body have abstained from establishing a request for leave procedure following the backlash from member states to the *EC–Asbestos* Additional Procedure. The latter remains an important guidepost for *amicus curiae* applicants (see Section B).

Even in international courts and tribunals that have not published a request for leave procedure, prospective *amici curiae* usually attach to their submissions a formal request for leave. This approach facilitates international courts and tribunals' assessment of briefs, and voluntary disclosures bolster the credibility of substantive submissions by *amici curiae*.

This section considers the existing requests for leave procedures and admission criteria established by international courts and tribunals that do not provide for a formalised request for leave procedure. The first part examines the formal requirements (I.), followed by the substantive requirements (II.). The third part discusses international courts and tribunals' exercise of discretion in the admission of *amici curiae* (III.).

I. Formal requirements

While it is common to establish formal requirements for an *amicus curiae* submission, it is less common to establish them for the application process. Formal requirements concern in particular the timing (1.) and length (2.) of a request for leave. In addition, as shown in the previous section, investment arbitration regulations and tribunals increasingly establish formal disclosure requirements for *amicus curiae* petitioners.

1. Timing

Timing is one of the most important procedural aspects of *amicus curiae* participation in practice.[286] The international court or tribunal must balance competing interests, especially the interest in a speedy and efficient

286 *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.81 ('The panel … considers timing of the *amicus curiae* submission plays an important role in the acceptance or rejection of *amicus curiae* briefs.').

discharge of the case with that of obtaining as complete an understanding of the case as possible and giving *amici curiae* sufficient time to prepare useful contributions. To satisfy the latter concern, an international court or tribunal may set filing deadlines after the publication of party submissions. Due to regular overlaps regarding timing of requests for leave and the filing of briefs (which often coincide), these aspects are considered jointly.

The ICJ and ITLOS may request submissions from intergovernmental organizations 'at any time prior to the closure of the oral proceedings.'[287] Unrequested briefs by intergovernmental organizations must be submitted before closure of the written proceedings.[288] Pursuant to Articles 84 and 133(3) ITLOS Rules, the ITLOS or its Chambers respectively fix time limits for submissions by order. This regulation accords with Article 49 ITLOS Rules' encouragement that the ITLOS and its Chambers conduct proceedings 'without unnecessary delay or expense.'[289] Timing does not seem to have been an issue so far. In *Responsibilities*, the President of the Chamber decided to accept into the case file a statement from the United Nations Environment Programme that had been received more than twenty days after the expiration of the deadline.[290] These time limits are more lenient than those established for intervention.[291]

According to Rule 44 ECtHR Rules, requests for leave at the earliest may be decided after notice of an application has been given to the respondent Contracting Party under Rule 51(1) or Rule 54(2)(b) ECtHR Rules. Further, they must be submitted at the latest twelve weeks after notice of the application has been given. The President of the Chamber may extend the time limit for exceptional reasons.[292] The same timeframe applies in

287 Article 84 ITLOS Rules; Article 69 (1) ICJ Rules.

288 Article 84(2) ITLOS Rules.

289 See also Article 49 ITLOS Rules: 'Time-limits for the completion of steps in the proceedings may be fixed by assigning a specified period but shall always indicate definite dates. Such time-limits shall be as short as the character of the case permits.' See also P. Chandrasekhara Rao/P. Gautier (Eds.), *The Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2006, p. 144.

290 *Responsibilities*, Advisory Opinion, 1 February 2010, ITLOS Case No. 17, para. 16.

291 See Article 99(1) ITLOS Rules; Article 67(1) ICJ Rules; Article 81(1) ICJ Rules. With regard to requests for appointment of experts under Article 289 UNCLOS, see Article 15(1) ITLOS Rules.

292 Rule 44(3) (a), (b) ECtHR Rules. The President may not receive requests prior to notice of appeal.

all Grand Chamber proceedings. There, the twelve-week period begins with the notification of the parties of the referral to the Grand Chamber.[293] These regulations are problematic in so far as the notification is not public and may not always coincide with the date of posting of the notification on the ECtHR's website.[294] Any delay in posting reduces the time for potential *amici curiae* to prepare their submission. This system is stricter than the regulation in former Rule 61(3) in force until November 2003, likely due to the increase in *amicus curiae* requests.[295] The change has had a significant impact. Many requests are now made prior to the decision on admissibility in an attempt to influence the decision. According to *Judge Vajic*, the reform has increased the usefulness of submissions. The hearing on admissibility now deals with both the admissibility and the merits of the case.[296] Early participation has the additional benefit that no exchange of written observations is required after the hearing on issues discussed at the hearing.[297]

While the ECtHR Rules establish a deadline for requests for leave, Rule 44(5) subjects time limits for submissions to the discretion of the President of the Chamber. The President has not established a fixed schedule for submissions. Submissions are accepted at all stages of the proceedings

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293 Rule 44(4) (a) ECtHR Rules. See also Articles 30 and 43 ECHR. See N. Vajic, *Some concluding remarks on NGOs and the European Court on Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 99.

294 L. Crema, *Tracking the origins and testing the fairness of the instruments of fairness: amici curiae in international litigation*, Jean Monnet Working Paper 09/12, 2012, p. 21.

295 Former Rule 61(3) determined that requests for leave had to be submitted 'within a reasonable time after the fixing of the written procedure.' The ECtHR has rejected requests for untimeliness, without giving any further details of the circumstances. See *Öcalan v. Turkey* [GC], No. 46221/99, 12 May 2005, ECHR 2005-IV; *Phillips v. the United Kingdom*, No. 41087/98, 5 July 2001, ECHR 2001-VII and (dec.), 30 November 2000; *Goddi v. Italy*, Judgment of 9 April 1984, Series A No.76 (The request was submitted one working day before the hearings). The court has shown some flexibility in the admission of requests for leave. In *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161, the request was received and accepted 11 days before the opening of the oral proceedings.

296 N. Vajic, supra note 293, p. 98.

297 *Id.*, referring to *Hatton and others v. the United Kingdom*, No. 36022/97, 2 October 2001; *Brumârescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I.

before chambers and the Grand Chamber, including, in several cases, after the closure of the hearings.[298] The ECtHR routinely grants extensions of time limits and allows *amici curiae* to supplement submissions.[299] As the Rules prescribe that the parties must be given an opportunity to comment on submissions, the ECtHR's scheduling practice must ensure that sufficient time is allocated for comments.

The IACtHR Rules do not establish a formal request for leave procedure. Article 44(3) IACtHR Rules allows the filing of *amicus curiae* submissions until 15 days after the closure of public hearings or, in cases without hearings, 15 days after the issuance of the order setting deadlines for the submissions of final arguments. The IACtHR can deem the provision applicable in advisory opinion proceedings (see Section A). Having been more lenient earlier, the court now strictly enforces this deadline and rejects briefs submitted late. Briefs received only a few days late are not admitted, even if the IACtHR received the submission in a non-working language of the case on time.[300] The court practice is conflicting as to the basis on which late briefs or late translations of briefs in the language of

298 *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93 (*amicus curiae* brief by MIND received after the oral proceedings); *Capuano v. Italy*, Judgment of 25 June 1987, Series A No. 119 (submission received 2 weeks before hearing); *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I (the brief was supplemented 6 weeks after the opening of the oral proceedings); *Hatton and others v. the United Kingdom*, No. 36022/97, 2 October 2001 (Leave granted for after the hearing on admissibility and merits).

299 *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82; *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93; *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, ECHR 2000-I; *Pham Hoang v. France*, Judgment of 25 September 1992, Series A No. 243; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I.

300 *Vélez Restrepo and Family v. Colombia*, Judgment of 3 September 2012 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 248, paras. 67-68; *Fontevecchia and d'Amico v. Argentina*, Judgment of 29 November 2011, IACtHR Series C No. 238; *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219; *Veliz Franco y Otros v. Guatemala*, Judgment of 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 277, para. 64; *Brewer Cariás v. Venezuela*, Judgment of 26 May 2014 (Preliminary Objections), IACtHR Series C No. 278, para. 10. It is not clear whether the court made an exception in *Kaliña*

the proceedings are rejected. Article 44(2) of the IACtHR Rules provides that briefs submitted out of time shall be archived without further processing, but the provision contextually refers only to briefs submitted unsigned and electronically or without annexes. The language requirement is addressed in Article 44(1) and the time limit in Article 44(3) neither of which spell out consequences of failure to comply. With respect to late filings of translations, the IACtHR in *Artavia Murillo and others (Fecundación in vitro) v. Costa Rica* applied the 21-day deadline established in Article 28 of its Rules to briefs whose translations in the correct language were received after the expiration of the time limit.[301] The application of Article 28(1) is not entirely convincing, as the reference in Article 44 to Article 28(1) both in the English and Spanish language versions of the Rules only refers to the 'means' or 'medios' of submission. Further, the wording of Article 28(1) is equivalent in scope to Article 44(2) in that it does not address the late filing of hard copy briefs in the right language.[302]

Article 44(3) states that 'briefs may be submitted at any time during contentious proceedings.' Thus, the earliest date of submission is after notification of the dispute to the respondent. Article 44(4) clarifies that briefs may be submitted also in compliance monitoring and in provisional measures proceedings.[303] A review of cases indicates that *amicus* submissions are often made shortly before or after the hearing, thus, at a stage where

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and Lokono Peoples v. Suriname. It noted that an *amicus curiae* brief from *Fundación Pro Bono-Colombia* had been received in the official language of the case more than one month after the public hearing, but it did not state whether the court accepted or rejected the brief. See *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015 (Merits, Reparations and Costs), IACtHR Series C No. 309, para. 9. See also *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), Judgment of 31 August 2001, IACtHR Series C No. 79, para. 41 (The IACtHR accepted the required Spanish translation of an *amicus curiae* brief by the Assembly of First Nations nine months after the brief had been submitted in English).

301 *Artavia Murillo and others (Fecundación in vitro) v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 28 November 2012, IACtHR Series C No. 257, para. 15.

302 F. Rivera Juaristi, supra note 65, pp. 118-120. *Rivera Juaristi* suggests that the rules should be modified to include a regulation of this aspect.

303 This is a novel development. In 1999, in *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, the court rejected a request by a group of individuals to be heard as *amici curiae* 'in all the oral and written instances' on the account that that 'until the reparations stage, the possibility of participating in the proceedings before [the] Court was restricted to the parties to the respective

the parties' arguments are largely known. Under the new rules, the IACtHR may receive submissions after the closure of the oral proceedings.[304] In *Kimel v. Argentina* and in *Castañeda Gutman v. Mexico*, the respondent states and the representatives of the victims each requested the IACtHR not to consider *amicus curiae* submissions that had been submitted after closure of the oral proceedings, that is, after the stage designated for the presentation and discussion of the case by the parties.[305] The IACtHR did not agree that the brief by the Civil Rights Association was untimely, because

> *amici curiai* briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court. Hence, they may be submitted at any stage before the deliberation of the pertinent judgment.[306]

This approach implies that the IACtHR does not consider party comments on *amicus curiae* submissions obligatory or necessary.[307] Apart from risk-

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case.' *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Judgment of 5 February 2001 (Merits, Reparations and Costs), IACtHR Series C No. 73, para. 21. Rule 44(4) in its current form was inserted in the IACtHR Rules in November 2009. The first regulation of *amicus curiae* in the January 2009 IACtHR Rules of Procedure did not contain such a rule.

304 *Juridical Condition and Human Rights of the Child*, Advisory Opinion No. OC-17/02 of 28 August 2002, IACtHR Series A No. 17, pp. 9, 11, paras. 38, 40; *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, p. 4, para. 10 (The hearing took place on 3 July 2009 and *amici curiae* made final written submissions on 10 August 2009); *Lori Berenson Mejía v. El Salvador,* Judgment of 25 November 2004 (Merits, Reparations and Costs), IACtHR Series C No. 119; *De la Cruz Flores v. Perú*, Judgment of 18 November 2004 (Merits, Reparations and Costs), IACtHR Series C No. 115; *Yatama v. Nicaragua*, Judgment of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 127; *The "Mapiripán Massacre" v. Columbia*, Judgment of 15 September 2005 (Merits, Reparations and Costs), IACtHR Series C No. 134, p. 10, para. 46.

305 *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008, IACtHR Series C No. 184, p. 5, paras. 13-14. The *amicus curiae* submissions at issue were submitted approximately one and four months after closing of the respective files.

306 *Kimel v. Argentina*, Judgment of 1 May 2008, IACtHR Series C No. 177, p. 4, para. 16.

307 E.g. *Claude Reyes and others v. Chile*, Judgment of 19 September 2006, IACtHR Series C No. 151.

ing delay in deliberations, this practice is problematic in terms of due process (see Chapter 8).

WTO panels and the Appellate Body's main consideration with respect to timing is the protection of the parties' due process rights and the avoidance of disruptions in the proceedings.[308] Early submissions seem to be favoured even though this might negatively affect their quality, because the parties may not have disclosed information on the case yet.[309] Submissions received prior to the composition of the panel have been considered for admission. This indicates that panels do not have an earliest date for submissions. *Amici curiae* are generally required to submit their written briefs at the latest before the second substantive meeting with the parties or before the expiry of the deadline for the parties' rebuttal submissions approximately fourteen weeks after the composition of the panel.[310] Several panels have required submissions to be made even before the first sub-

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308 In *Argentina–Textiles and Apparel*, the panel considered that there were no specific rules of procedure prohibiting the practice of submitting additional evidence after the first hearing of the panel. The proper approach was to consider whether the practice conflicted with due process obligations. See *Argentina–Textiles and Apparel*, Report of the Panel, adopted on 22 April 1998, WT/DS56/R, 6.55. See also *Third Party Participation in Panels*, Statement by the Chairman of the Council, C/COM/3 of 27 June 1994; *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 2.2; *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/R, pp. 24-25, para. 6.3 ('The AISI brief was submitted after the deadline for the Parties' rebuttal submissions, and after the second substantive meeting of the Panel with the Parties. Thus, the Parties have not, as a practical matter had adequate opportunity to present their comments on the AISI brief to the Panel. In our view, the inability of the Parties to present their comments on the AISI brief raises serious due process concerns as to the extent to which the Panel could consider the brief. In accordance with Art. 12.1 of the DSU, the Panel may have been entitled to delay its proceedings in order to provide the Parties sufficient opportunity to comment on the AISI brief. However, we considered that any such delay could not be justified in the present case.').

309 *European Communities–Approval and marketing of biotech products* (hereinafter: *EC–Biotech*), Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.10. See G. Marceau/M. Stilwell, supra note 211, p. 181 (Submissions should be made before the first substantive meeting, ie within 10 weeks from the composition of the panel).

310 *European Communities – Anti-Dumping Measures on Farmed Salmon from Norway* (hereinafter: *EC–Salmon)*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12-1-13. *EC–Asbestos*, Report of the Panel, adopted on 18 September 2000, WT/DS135/R, para. 6.4 (The submission was received 6

stantive meeting approximately ten weeks after the composition of the panel.[311] The request for early submissions in the WTO Appellate Body and panels is in accordance with the DSU's declared goal to solve disputes promptly and the correspondingly tight panel and appellate review schedules.[312] These deadlines are difficult to meet for *amici curiae* as procedural timetables are confidential.[313] The panel in *EC–Sugar* took a more flexible approach upon receiving almost two weeks following the second substantive meeting an *amicus curiae* brief by the German industry association of sugar producers 'Wirtschaftliche Vereinigung Zucker' (WVZ). Though the submission was ultimately rejected for other reasons, the panel found that the brief was timely because it earlier had extended the written

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months after the second substantive meeting and three months before issuing of the award.); *Mexico–Tax Measures on Soft Drinks and Other Beverages* (hereinafter: *Mexico–Taxes on Soft Drinks*), Report of the Appellate Body, adopted on 6 March 2006, WT/DS308/AB/R, para. 8, FN 21 (*Amicus* brief received 5 days before the hearing rejected as 'unnecessary' after the United States had argued untimeliness); *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R.

311 In *US–Softwood Lumber III*, the panel rejected three applications received after the first substantive meeting. A reason for the stricter decision might have been that an application received prior to the first substantive meeting had already been discussed. See *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Cananda* (hereinafter: *US–Softwood Lumber III*), Report of the Panel, adopted on 1 November 2002, WT/DS236/R, paras. 7.2, 12. See also *US–Softwood Lumber IV*, Report of the Panel, adopted on 17 February 2004, WT/DS257/R/Corr.1; *EC–Biotech*, Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, p. 284, para. 7.10; *EC–Seal Products*, Report of the Appellate Body, WT/DS400/AB/R, WT/DS401/AB/R, adopted on 18 June 2014, para. 1.15 (A brief received on the first day of hearings was rejected for untimeliness, because participants and third participants must be given an adequate opportunity to consider any written submission duly.).

312 Cf. Article 3(3) DSU. Article 12(8) and (9) DSU sets a general deadline of six and an absolute deadline of nine months for panel proceedings. For review proceedings, the time limits are 60 and 90 days respectively, see Article 17(5) DSU.

313 G. Marceau/M. Stilwell, supra note 211, p. 182. See the recent efforts made by Canada to assuage this problem, WTO, *Statement on a Mechanism For Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Additional Practices and Procedures In the Conduct of WTO Disputes; Transparency of Dispute Proceedings*, 18 July 2016, No. JOB/DSB/1/Add. 3.

phase of the proceedings upon request by the complainant.[314] This decision is sensible. There was no need to reject the submission in this case for untimeliness, because it did not conflict with the parties' procedural schedule and their opportunity to comment on it. Panels have applied the same time limits with respect to submissions solicited pursuant to Article 13 DSU.[315] *Amici curiae* have been permitted to participate in compliance monitoring proceedings pursuant to Article 21(5) DSU.[316] A special regime applies in the case of party-annexed *amicus curiae* submissions. In *US–Shrimp*, India protested against the USA's annexing of parts of one of the *amicus curiae* briefs during the second substantive meeting, because the introduction of new evidence was outside the scope of the meeting and the formal rebuttal session had been completed.[317] The panel still accepted the information, because the brief was considered to form part of the USA's submission and, therewith, the rules on timely submission of party evidence applied, which exceptionally allowed the submission of evidence up to the interim review stage.[318]

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314 *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, p. 132, paras. 7.81-7.82.

315 Cf. *China – Measures Affecting Imports of Automobile Parts* (hereinafter: *China–Auto Parts*), Report of the Panel, adopted on 12 January 2009, WT/DS339/R, WT/DS340/R, WT/DS342/R, para. 2.5.

316 See *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW; *US–Tuna II (Article 21.5),* Report of the Appellate Body, adopted on 3 December 2015, WT/DS381/AB/RW, FN 68.

317 India argued that this amounted to a violation of Article 12(1) and Appendix 3(7) DSU. See *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 3.130.

318 In *Argentina–Textiles and Apparel*, the Appellate Body held that acceptance of certain evidence two days prior to the second substantive meeting did not constitute a violation of Article 11 DSU as 'the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence.' *Argentina–Textiles and Apparel*, Report of the Panel, adopted on 22 April 1998, WT/DS56/R, para. 82. See also *Canada–Aircraft*, Report of the Panel, adopted on 20 August 1999, WT/DS70/R, p. 170, paras. 9.73-9.74. However, no submission of new evidence at the interim review stage is allowed, see *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 301.

There are typically no fixed rules in investment treaties and institutional rules on the timing of a request for leave or a submission.[319] The FTC Statement, Rule 37(2) ICSID Arbitration Rules and Article 4 UNCITRAL Rules on Transparency determine that a submission should not disrupt the proceedings and that the parties must be given an opportunity to comment on it. In practice, tribunals emphasize that submissions should be received well before the hearing in order to 'integrat[e] the *amicus* process into the general course of the arbitration.' [320] Accordingly, the appropriate timing of a request for leave depends on the particularities of each case.[321] Tribunals strive to accommodate the instrument within their procedural schedules to avoid overlaps with other deadlines and to not unduly burden the parties.[322] The difficulties of this endeavour were apparent in *Glamis v. USA*. The tribunal first shortened and later extended the deadline following changes in the procedure of the case.[323] Tribunals that work with detailed procedural schedules have a propensity to accommodate *amicus cu-*

319 Section 44 of Annex 29-A to the CETA constitutes an exception. The mandatory deadlines established in the provision – absent party agreement submission must be made within 10 days days of the date of the establishment of the panel – will render it exceptionally difficult for an *amicus curiae* to make meaningful contributions.

320 *Suez/Vivendi v. Argentina*, Order in response to a peititon by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, para. 21. The submission was received eight months prior to the hearing and six months before the deadline for submission of memorials. See also *Vito Gallo v. Canada*, Claimant's submission, 29 February 2008, PCA Case No. 55798, pp. 28-29 (The claimant asked for a determination of the timing of *amicus* briefs, because '[a]llowing the possibility of further evidence to be adduced by *amicus curiae* at some point after the memorials have been delivered essentially represents a re-opening of the record and might require the submission of responding witness statements and/or other forms of evidence.').

321 See Rule 26 ICSID Arbitration Rules (No fixed time schedule in ICSID arbitrations).

322 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 Feburary 2007, ICSID Case No. ARB/03/19, para. 21.

323 The tribunal, noting that the time foreseen for *amicus curiae* applications and submissions in the procedural order risked causing delay, shortened submission deadlines from 3 March 2006 to 30 September 2005. The deadline was later extended upon request by petitioners by one month after the due date of the counter-memorial to allow for 'meaningful contributions'. *Glamis v. USA*, Award, 8 June 2009, paras. 267-271, 275-280.

riae participation already at the outset of the proceedings.[324] Where the investment treaty contemplates submissions by member states to the treaty (non-disputing parties), tribunals have often tried to align due dates for submissions from *amici curiae* and non-disputing parties.[325] This approach is useful to ensure the efficiency of proceedings and to minimize disruptions.

Most requests for leave are made at the merits stage of the proceedings, often prior to or during the first round of submissions.[326] It is unlikely that tribunals would be willing to receive submissions after the closing of hearings if this would prolong the proceedings.[327] Requests have also been received during the jurisdictional phase, with mixed reactions (see Chapter 6). *Amicus curiae* submissions at the earliest can be received and processed once a tribunal is constituted. In an ICSID-administered arbitration, a premature request for leave was simply shelved and processed upon con-

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324 See *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011.

325 *Merrill and Ring v. Canada*, Award, 31 March 2010, para. 24; *Commerce Group v. El Salvador*, Minutes of the First Session of the Tribunal, 27 July 2010, para. 13.3; *Glamis v. USA*, Award, 8 June 2009, para. 280.

326 E.g. *Micula v. Romania*, Award, 11 December 2013, ICSID Case No. ARB/05/20, para. 36; *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae* re modalities of *amicus curiae* participation, 1 August 2003, para. 7 (When the exchange of documents is completed and any interrogatories are answered, the *amici* may apply to the Tribunal); *Merrill & Ring v. Canada*, Award, 31 March 2010, paras. 18, 24-25 (Submissions were received only ten days before the beginning of the merits hearing on 18 May 2009); *Eli Lilly v. Canada*, Procedural Order No. 3, 15 January 2017, Case No. UNCT/14/2, para. 4 ('[T]he Tribunal agrees with the Respondent's position that this deadline [for applications for leave] should not precede publication of the Disputing Parties' written submissions, as potential *amici* should have the opportunity to review all such submissions.'). See also R. Happ, *Rule 37*, in: R. Schütze (Ed.), *Institutionelle Schiedsgerichtsbarkeit, Kommentar*, 2nd Ed., Cologne 2011, p. 1021, para. 5.

327 This was done by the tribunal in *Ethyl Corp.* with respect to a submission by Mexico under Article 1128 NAFTA. The brief was received after the hearings, around the time the tribunal announced circulation of the award. Instead of rejecting the submission for untimeliness, the tribunal circulated it to the parties and gave them an opportunity to comment on it. *Ethyl Corp. v. Canada*, Preliminary Tribunal Award on Jurisdiction, 24 June 1998, para. 36. See M. Hunter/A. Barbuk, *Procedural aspects of non-disputing party interventions in Chapter 11 arbitrations*, 3 Asper Review of International Business and Trade Law (2003), pp. 154-155.

stitution of the tribunal.[328] However, in two recent cases, tribunals rejected applications by the European Commission for untimeliness. In one case, the request was received shortly after the first meeting of the tribunal and in the other case, it was received shortly after the claimant had filed its memorial on jurisdiction.[329] In cases where the petitioners have access to the case documents, it is useful for them to await and review at least the first round of the parties' submissions prior to submitting a brief.[330] Practical difficulties for *amicus curiae* applicants arise out of the fact that only ICSID cases underlie mandatory public notification (cf. Article 22(1) ICSID Financial and Administrative Regulations). Applicants may learn of a case very late.[331] For this reason, the recent public invitations of submissions by several investment tribunals (often through the ICSID web-

328 The ICSID notified the *amicus curiae* petitioner that it would transmit the petition to the tribunal after it was constituted and forwarded it to the parties, see *Infinito Gold v. Costa Rica*, Letter by the ICSID to Asociación Preservactionista de Flora y Fauna Silvestre, 16 September 2014, ICSID Case No. ARB/14/5. Upon its constitution, the tribunal invited the parties to comment and then decided on the request, see *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5.

329 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energía Termosolar B.V. v. Kingdom of Spain*, Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 15 December 2014, ICSID Case No. ARB/13/31; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, Decision on the non-disputing party's application to file a written submission pursuant to ICSID Arbitration Rule 37(2), 17 December 2014, ICSID Case No. ARB/13/36.

330 *Glamis v. USA*, Award, 8 June 2009, paras. 278-279 and Procedural Order No. 6, 15 October 2005. The deadline was extended by Procedural Order No. 8 of 31 January 2006, after some of the petitioners successfully argued that it would be more useful to make submissions after the filing of the parties' memorials, to which the parties agreed. *Amicus curiae* submissions were then filed together with the non-disputing party filings under Article 1128 NAFTA around one month after the due date for the respondent's counter-memorial.

331 An exception to this applies to the European Commission. Article 13(b) Regulation (EU) No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member states and third countries. It stipulates that 'the Member State shall also immediately inform the Commission of any request for dispute settlement lodged under the auspices of the bilateral investment agreement as soon as the Member State becomes aware of such a request. The Member State and the Commission shall fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, the particiaption in the procedure by the Commission.'

site) must be welcomed.[332] Accordingly, tribunals have accepted submissions at most stages of the proceedings, albeit there is some disagreement between tribunals as to the usefulness of submissions during the jurisdictional stage (see Chapter 6). Overall, tribunals have been accommodating in terms of timing. The *Biwater v. Tanzania* tribunal, noting that full memorials had already been exchanged and the merits hearing was to begin in three weeks, instead of rejecting requests for untimeliness, established a two-tiered participation process. As a first step, *amici curiae* were to file a joint submission detailing their arguments and identify, but not attach, evidence or other pertinent documentation. After consideration of this submission, as a second step, the parties could decide whether to receive the documentation and extended arguments.[333] The parties later agreed to forgo the second step.[334] Late submissions have been accepted with the consent of the parties in several cases.[335] Extensions are granted if they do not risk disrupting the course of the proceedings.[336]

To conclude, only the ECtHR and investment tribunals have established rules regarding the timing of requests for leave. The filing date of a written *amicus* brief is usually determined in the grant of leave. International courts and tribunals establish deadlines that reflect the general course of the proceedings, as applicable rules only rarely prescribe fixed time limits. Where request for leave procedures apply or in case of solicited *amicus curiae* submissions, the time period granted to an *amicus curiae* to prepare

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332 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011; *Mesa Power Group LLC v. Government of Canada*, Notification to non-disputing parties and potential *amicus curiae*, 28 May 2014, PCA Case No. 2012-17; *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, Case No. UNCT/14/2, section (C); *Mobil Investments Canada Inc. v. Canada*, ICSID News Release, 22 December 2016, ICSID Case No. ARB/15/6, at: https://icsid.worldbank.org/en/Pages/News.aspx?CID=208 (last visited: 21.9.2017).

333 *Biwater v. Tanzania*, Award, 24 July 2008, paras. 362-363 and Procedural Order No. 5, 2 February 2009, ICSID Case No. ARB/05/22, para. 60.

334 *Biwater v. Tanzania*, Award, 24 July 2008, paras. 363-364 and Procedural Order No. 6, 25 April 2007, ICSID Arb. No. ARB/05/22, para. 3.

335 *Merrill v. Canada*, Award, 31 March 2010, paras. 22-23. The filing was received 18 days late.

336 The *Glamis* tribunal extended the deadline for filing an application for leave by one month. See *Glamis v. USA*, Letter by the tribunal to petitioners, 10 October 2006.

a submission on average ranges between four and twelve weeks.[337] It has been extended where *amici curiae* were given access to party-redacted documents after the deadline had been established.[338] There is no noticeable difference in time limits allocated to solicited and unsolicited *amicus curiae* submissions in investment arbitration. This is startling because unsolicited *amici* typically have fully prepared their briefs when seeking leave.[339]

The most relevant divergence concerns the question whether courts may accept submissions after the closure of proceedings. This seems to depend on the view of the role of *amicus curiae*. The IACtHR views *amici curiae* as an additional feature for the benefit of the judges in their understanding of the law of a case. On this basis, the court justifies granting time limits beyond closure of the oral proceedings. Similarly, in advisory proceedings, where legal rights are not directly modified, inter-state courts have shown latitude with respect to late submissions. In contentious proceedings and before the other courts, due process considerations, especial-

337 E.g. *Jersild v. Denmark*, Judgment of 23 September 1994, Series A No. 298; *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, ECHR 2000-I; *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 27; *Pac Rim v. El Salvador*, Procedural Order No. 8, ICSID Case No. ARB/09/12 (seven weeks); *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 3.22 (seven weeks); *Merrill v. Canada*, Award, 31 March 2010, para. 22 (six weeks); *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22 paras. 62-63; *Micula v. Romania*, Award, 11 December 2013, ICSID Case No. ARB/05/20, para. 36; *Electrabel v. Hungary,* Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19. The one-week deadline foreseen by the WTO Appellate Body in its Working Procedure in *EC–Asbestos* remains an exception. This time pressure may have motivated the setting of unrealistic deadlines for the filing of leave requests of mere eight days between publication of the applicable procedure and the deadline in *EC–Asbestos* where six out of 17 *amicus curiae* applicants were rejected for not meeting this deadline. See *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, p. 22, para. 55. In total, the Appellate Body received 30 *amicus curiae* applications. See also B. Stern, supra note 98, p. 1456 (on the difficulties of financially challenged NGOs to meet this deadline).

338 *Piero Foresti v. South Africa*, Letter by Secretary to Tribunal to Petitioners, 5 October 2009, ICSID Case No. ARB(AF)/07/1 (ten weeks).

339 *Eureko v. Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 32, 34, 27, 31, 154.

ly the parties' right to comment on *amicus curiae* submissions, preclude the admission of submissions after the closing of the proceedings.[340] It is prudent to accord the parties a right to comment on *amicus curiae* submissions to ensure the acceptability of the outcome as well as to give them an opportunity to challenge and rebut the *amici's* arguments in an open 'marketplace of ideas.' Most importantly, where an *amicus'* arguments could lead to a decision not expected by the parties, they must be given the opportunity to comment for reasons of due process (see Chapter 8).

2. Form and length

Requests for leave usually must be submitted in writing.[341] The FTC Statement further requires that an application be dated and signed by the person filing it and include the address and other contact details of the applicant, a requirement that has been adopted by other tribunals.[342] Furthermore, it may not be longer than 5 typed pages. A tribunal established a limit of 20 pages including the submission.[343] In Section 3 *EC–Asbestos* Additional Procedure, the WTO Appellate Body determined that the request for leave was not to exceed three typed pages. This issue has not raised difficulties in practice.

Some *amici curiae* attach to the application their brief.[344] Attaching of the submission is not unproblematic. On the one hand, it allows an inter-

340 See Section B, para. 7(a) FTC Statement, Rule 37 ICSID Arbitration Rules. See also R. Happ, *Rule 37*, in: R. Schütze (Ed.), *Institutionelle Schiedsgerichtsbarkeit, Kommentar*, 2nd Ed. Cologne 2011, p. 1021, para. 5.

341 Rule 44 (3) ECtHR Rules; Section B, para. 1. FTC Statement; Rule 37(2) ICISD Arbitration Rules. *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011.

342 Section B, para. 2(a) and (b). See also *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12. The tribunal requested that the signature stem from a person authorized to sign for the entity making the application.

343 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID Case No. ARB/09/12.

344 See *Glamis v. USA*, Quechan Indian Nation Application for Leave to File a Non-Party Submission and Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006, as well as National Mining Association Application for Leave to File a Non-Disputing Party Submissions and Submission of Non-Disputing Party National Mining Association, 13 October 2006; *Pac Rim v. El Sal-*

national court or tribunal to see the quality of the submission and to get an idea of its usefulness. On the other hand, it may reduce the effectiveness of a request for leave procedure as the court (or its registry) will consider the request for leave in addition to the submission, thereby losing the time gain that was to be achieved by a request for leave procedure. It may be more useful to require applicants to outline their later submission. This would also help them to avoid duplicative and costly work in the event that the international court or tribunal requests substantive changes to the submission.

II. Substantive requirements concerning the application

Only the regulations and practices of the ICJ, the ECtHR, the ACtHPR, the WTO and investment arbitration tribunals establish substantive requirements for requests for leave.

1. International Court of Justice

The ICJ has not formulated any requirements for requests pursuant to Article 66(3) ICJ Statute. However, its rejection of an unspecified offer of assistance by the ILO in the *South-West Africa* case indicates that the information offered should be concrete and specific (see Chapter 3).

2. European Court on Human Rights

The ECHR provides little substantive guidance to the ECtHR regarding the substance of a request for leave. Pursuant to Article 36(2) ECHR, the admission of *amici curiae* must be 'in the interest of the proper administration of justice' and Rule 44(3)(b) ECtHR Rules requires requests for leave to be 'duly reasoned.'[345] The ECtHR does not provide reasons for the admission of a request in its judgments, which makes it difficult to as-

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vador, Procedural Order Regarding *Amici Curiae*, ICSID News Release, 2 February 2011.

345 Until the entering into force of Protocol 11 in 1998, Rule 37(2) established that the President of the Court was to specify the content of submissions.

certain the exact requirements. Case law indicates that prospective *amici curiae* need to convince the court that they will contribute to the ECtHR's discharge of its judicial function in the specific case. In particular, *amici curiae* must show that they will present information that is not already before the court and that their submission will be within the court's jurisdiction.[346] The ECtHR accepts briefs that enhance its understanding of the case in the broadest sense (see Chapters 4 and 6). It has rejected requests for leave for various reasons of irrelevancy, including comments on the situation of a third (and not involved) country, duplicity and failure to present new arguments or ideas, comments on issues adequately presented by the parties or other entities, comments on simple issues or on issues where there is settled case law.[347] In *Hutten-Czapska v. Poland*, the ECtHR denied leave to the Polish Association of Tenants. The ECtHR found that it already possessed the necessary information, because the Association had provided information during the preceding Polish constitutional

346 See *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115; *Glasenapp v. Germany,* Judgment of 28 August 1986, Series A No. 104; *Kosiek v. Germany*, Judgment of 28 August 1986, Series A No. 105; *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A No. 216. In 2010, in *A., B., C. v. Ireland*, the court stressed that 'it [was] not its role to examine submissions which do not concern the factual matrix of the case before it.' See *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010. See also M. Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 Netherlands Quarterly of Human Rights (1996), p. 297.

347 *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93; *Leander v. Sweden*, Judgment of 26 March 1987, Series A No. 116 (Leave denied to National Council for Liberties on behalf of three British Trade Unions representing government employees, because the connection to the case was considered to be too remote. The *amicus* applicant had argued that its intention was to ensure that the court had information about the situation in the United Kingdom before making a decision which would indirectly affect all members of the three unions.); *Capuano v. Italy*, Judgment of 25 June 1987, Series A No. 119; *Caleffi v. Italy*, Judgment of 24 May 1991, Series A No. 206-B; *Vocaturo v. Italy*, Judgment of 24 May 1991, Series A No. 206-C; *Y. v. the United Kingdom*, Judgment of 29 October 1992, Series A No. 247-A; *Modinos v. Cyprus*, Judgment of 22 April 1993, Series A No. 259. The ECtHR has rejected *amicus curiae* applications in cases with clear precedent on the legal issues involved. See A. Lindblom, supra note 175, p. 341; J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-state actors and international law (2001), p. 183; D. Shelton, supra note 17, p. 630.

court proceedings.[348] In *Senator Lines GmbH v. 15 Contracting States*, the ECtHR denied a request for leave to the German Bar Association, because its proposed submission was similar to that of the CCBE of which it was a member.[349]

3. African Court on Human and Peoples' Rights

Section 44 Practice Direction merely determines that the prospective *amicus curiae* shall, in its request, 'specify ... the contribution they would like to make with regard to the matter.' This indicates that briefs need to be within the court's jurisdiction and of relevance to the case as submitted to the court.

4. WTO Appellate Body and panels

Though neither WTO panels nor the Appellate Body employ a request for leave procedure for *amici curiae*, some guidance can be drawn from the *EC–Asbestos* Additional Procedure as to what elements the Appellate Body considers important when assessing a request. Sections 3(e) and (f) determine that requests should

> (1) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal […] which the applicant intends to address in its written brief;
> (2) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal;
> (3) indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute.

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348 *Hutten-Czapska v. Poland*, No. 35014/97, 22 February 2005.

349 *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom* (dec.) [GC], No. 56672/00, 10 March 2004, ECHR 2004-IV, referred to by N. Vajic, supra note 293, p. 100.

Thus, in their application, prospective *amici curiae* should indicate how they will make a useful contribution to the solution of the concrete case which is within the scope of the dispute and not repetitive of the parties' or third parties' submissions. Accordingly, in *US–Clove Cigarettes*, the panel rejected an offer of assistance by the WHO because it found that it already had sufficient material to decide the case.[350] In *US–Steel Safeguards*, the Appellate Body rejected a brief for not being 'of assistance in deciding this appeal' as it was 'directed primarily to a question that was not part of any of the claims.'[351]

5. Investor-state arbitration

Given the many regulatory overlaps, this section first presents the relevant legal standards (a) to then analyze their application (b).

a) Legal standards

The FTC Statement has codified the requirements developed by the *Methanex v. USA* and *UPS v. Canada* tribunals.[352] Pursuant to Section B para. 2(g) and (h), the application will 'identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission' and 'explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission.' They are:

> [T]he extent to which
> (a) the submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties,

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350 *US–Clove Cigarettes*, Report of the Appellate Body, adopted on 24 April 2012, WT/DS406/AB/R, p. 4, para. 11.

351 *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (hereinafter: *US–Steel Safeguards*), Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, p. 83, para. 26.

352 Criteria for *amicus curiae* participation were developed especially in *UPS v. Canada*, Direction of the tribunal re modalities of *amicus curiae* participation, 1 August 2003.

(b) the submission would address matters within the scope of the dispute,
(c) the non-disputing party has a significant interest in the arbitration and
(d) the existence of a public interest in the subject-matter of the arbitration.

There is no instruction on the relative values of the requirements.

Pursuant to Rule 37(2) ICSID Arbitration Rules, in their requests applicants should convince the tribunal that their submission would: (1) assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (2) address a matter within the scope of the dispute; and show (3) that they possess a significant interest in the proceeding.

Article 4(2)(e) UNCITRAL Rules on Transparency requires prospective *amici curiae* to elaborate on the 'specific issues of fact or law in the arbitration' they wish to address. This requirement serves as a basis for the tribunal's exercise of discretion whether to accept a submission. It is concretized in Article 4(3), according to which the tribunal, in its decision, shall consider 'among other', not concretized factors 'whether the third person has a significant interest in the arbitration', and the extent to which the submission would assist the tribunal in the determination of the case by bringing a different perspective, particular knowledge or insight. Article 4(1) clarifies that the submission must be within the scope of the dispute. The requirements essentially codify the common practice.[353]

Thus, the only apparent difference between these rules is the requirement in the FTC Statement of a public interest in the subject-matter of the arbitration.

b) Application

Amicus curiae applicants comment on the requirements thoroughly.[354] However, not all arbitral awards and orders elaborate on a tribunal's analy-

353 The UNCITRAL Arbitration Rules do not establish any conditions. Usually, they are determined either by the governing investment treaty such as the NAFTA or the tribunal establishes them *ad hoc* by procedural order. In the latter case, applicants and tribunals tend to draw from the conditions established in UNCITRAL proceedings under the NAFTA.

354 For many see *Glamis v. USA*, Application for leave to file a non-party submission and submission, 19 August 2005.

sis of an application.[355] Several tribunals have contemplated that the requirements should not be read too strictly 'in matters of public interest' to attract the broadest range of views for its consideration. Tribunals have at the same time stated that there was an assumption against *amicus curiae* involvement on the account of an expectation that all the necessary information is provided by the parties.[356]

aa) Special knowledge or insight

This requirement plays a central role in virtually all request for leave decisions, but so far no common standard of interpretation has developed beyond the agreement that *amicus curiae* petitioners should not be admitted if the tribunal considers itself sufficiently informed.[357] Duplicative submissions, including from other *amici curiae*, are not welcome.[358]

With respect to a petition from three local and two international non-governmental organizations, the *Biwater v. Tanzania* tribunal determined that it sufficed under Rule 37(2)(a) ICSID Arbitration Rules, if 'a written submission by the Petitioners appears to have the *reasonable potential* to assist the Arbitral Tribunal by bringing a perspective, particular knowl-

355 An exception is *Biwater v. Tanzania*, the first case to apply Rule 37(2). The tribunal assessed each requirement separately. The case concerned Tanzania's alleged interference with and expropriation of a water and sewerage infrastructure in Dar es Salam, Tanzania in violation of the UK-Tanzania BIT and Tanzanian investment law. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22. See also M. Polasek, *Introductory note to three procedural orders, Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22*, 22 ICSID Review – Foreign Investment Law Journal (2007), pp. 149-150.

356 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 48; *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, paras. 21-26.

357 *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 28.

358 *Philip Morris v. Uruguay,* Procedural Order No. 4, 24 March 2015, ICSID Case No. ARB/10/7, para. 26.

edge or insight that is different from that of the disputing parties.'[359] Other tribunals apply a stricter standard and require *certainty* of the special knowledge.

Mere expertise, particularly legal expertise, does not suffice to meet the threshold. The *amicus curiae* petitioner must typically show that he possesses some substantive knowledge, relevant experience, expertise or a particular perspective on the case that surpasses or supplements that of the parties *and* he must link it to the specific case.[360] Accordingly, the *Apotex I v. USA* tribunal rejected an application, because it found that a brief on the classification of venture capital as an investment contained 'no more than a legal analysis of the terms of the NAFTA and previous arbitral decision on the concept of *"investment"*, undistinguished and uncoloured by any particular background or experience.'[361]

Requests for leave that have passed this test include petitions from NGOs that directly have witnessed or experienced parts of the case, such as local protests against a mining project or court proceedings seeking re-

359 *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50, 55. See also below Chapter 8 for issues regarding petitioners' inability to access certain documents due to a confidentiality order issued by the tribunal which made it difficult for petitioners to describe the precise scope of their intended legal submissions.

360 *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, para. 21. Tribunals have so far not adopted the argument presented by the claimant in *Bear Creek Mining v. Peru* that '*amicus* petitions should only be granted where the Tribunal determines that the Parties have failed to provide the Tribunal the assistance and materials it needs to resolve the dispute.' See *Bear Creek Mining v. Peru*, Procedural Order No. 6, 21 July 2016, ICSID Case No. ARB/14/21, para. 20. This narrow view does not comport with the applicable legal standard.

361 *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, p. 8, para. 23. For the same reason, in *Chevron/Texaco v. Ecuador*, the tribunal rejected an *amicus curiae* submission during the jurisdictional phase, because the issues 'to be decided [were] primarily legal and [had] already been extensively addressed by the parties' submissions.' *Chevron/Texaco v. Ecuador,* Procedural Order No. 8, 18 April 2011, PCA CASE N° 2009-23, para. 18. Similarly, *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 28.

vocation of controversial concessions granted to the claimants.[362] In *Infinito Gold v. Costa Rica*, the tribunal emphasized upon admitting the NGO APREFLOFAS the 'particular insights' the NGO possessed, having been the plaintiff in the domestic proceedings, and the relevance these insights might have for some of the jurisdictional issues of the case.[363] The EC's unique perspective and expertise also justifies its continued participation in cases engaging questions of EU law (see Annex I).[364] This includes numerous pending arbitrations in the area of renewable energies, where the EU has both established mandatory national targets to support growth of the renewables energy sector whilst requiring that the national measures comply with EU laws on state subsidies.[365]

This requirement of a particular perspective or link to the case limits the potential for 'interpretative' *amicus curiae* participation from academics, academic institutions and NGOs that seek to reform the interpretation of standard investment treaty guarantees. In *Bear Creek Mining v. Peru*, for instance, the tribunal rejected a request for leave from the Columbia Center on Sustainable Investment. It acknowledged the NGOs experience in the area of sustainable investment, but it was not convinced that the NGO possessed arguments or knowledge related to the arbitration that was sufficiently unique from the parties' submissions.[366]

Some tribunals seem to lessen this requirement if they find that the political sensitivity of the case warrants the inclusion of public views (even if their submissions may not directly be of value to the legal aspects to be

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362 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 20. The tribunal rejected the claimant's argument that the *amici* need to present 'apparent first-hand knowledge of the facts underlying the case.'

363 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 31-32. The tribunal further noted that this information might be useful in its determination of the jurisdiction, especially if the claim was inadmissible based on Article XII(3)(d) of the BIT due to the national court judgment.

364 In *Eureko v. Slovak Republic,* the tribunal invited the European Commission to comment on the continued validity of BITs concluded between EU Member States. *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010*,* PCA Case No. 2008-13, paras. 31-32.

365 V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 Vanderbilt Journal of Transnational Law (2015), pp. 1338-1339.

366 *Bear Creek Mining v. Peru*, Procedural Order No. 6, 21 July 2016, ICSID Case No. ARB/14/21, para. 38.

decided). In *Piero Foresti v. South Africa*, the tribunal did not in any detail consider whether the requirements of Rule 41(3) ICSID Additional Facility Rules were fulfilled upon receiving two requests for leave during the jurisdictional stage. It merely noted that *amicus curiae* participation by the International Commission of Jurists and four environmental and human rights NGOs served 'to give useful information and accompanying submissions to the tribunal.'[367] The *amici* had argued in their application that the arbitration gave rise to issues of concern for South African citizens, civil society groups and citizens in general, particularly regarding 'the scope of the post-apartheid South African government's ability, under domestic and international law, to implement legislative and policy decision designed to redress the devastating socio-economic legacy left by apartheid.'[368] The arbitration had been initiated by Italian nationals who claimed that their investment in a mining project had been expropriated because of state measures intended to overcome the effects of the apartheid regime, including a minimum threshold of 26% ownership for historically disadvantaged South Africans in the mining industry.[369]

bb) Within the scope of the dispute

Together with the first requirement, this condition 'renders the relevance of third party submissions as a paramount criterion of their permissibility (and ultimate admissibility).'[370] However, what is relevant – and within the

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367 *Piero Foresti v. South Africa*. Letter from the Secretary of the Tribunal, 5 October 2009, ICSID Case No. ARB(AF)/07/01, para. 2.1. According to *Viñuales*, the decision to grant leave may have been due to the exceptionally sensitive nature of the case. J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, pp. 115-116.

368 *Piero Foresti v. South Africa*, Petition for limited participation as non-disputing parties in terms of articles 41(3), 27, 39, and 35 of the additional facility rules, 17 July 2009, ICSID Case No. ARB(AF)/07/01, para. 4.2.

369 M. Coleman/K. Williams, *South Africa's bilateral investment treaties, black economic empowerment and mining: a fragmented meeting?*, 9 Business Law International (2008), pp. 56-94.

370 E. Triantafilou, *Amicus submissions in investor state arbitration after Suez v. Argentina*, 24 Arbitration International (2008), p. 585. The claimant in *Biwater v. Tanzania* argued that the tribunal should interpret the requirement narrowly so as to require that the matters presented by *amicus curiae* had to bear directly on the issue considered. The tribunal disagreed. It reasond that it sufficed if the petition-

scope of the dispute – is a matter of some disagreement and also a question of the applicable law in investment arbitration. This will be discussed in detail in Chapter 6. The condition at least requires that *amici* will not present submissions on matters which the tribunal cannot consider.[371] For instance, in *Pac Rim v. El Salvador,* the tribunal received an application from a coalition of research institutes and NGOs seeking to inform the tribunal of the possible impact of an award in favour of the investor on El Salvador's transition towards democracy, as well as the tribunal's jurisdiction in the case and some facts relating to the political context of the project. The tribunal accepted the submission, but it ordered the *amicus curiae* to limit its submission at this stage to jurisdictional issues 'with a view to assisting the Tribunal's determination of the jurisdictional issues raised by the Parties.'[372] Thus, *de minimis* petitioners must show that their submission will respect the boundaries of the tribunal's jurisdiction. In some cases, parties have argued for a narrower standard that allows submissions not to address issues beyond those that the parties have raised.[373] At least one tribunal has expressly rejected this argument.[374]

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er's arguments were relevant to the dispute. *Biwater v. Tanzania*, Procedural Order No, 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 32-34, 50.

371 This is not undisputed. *Schliemann* argues that submissions 'should be related to the substantive legal questions to be resolved in the arbitration.' See C. Schliemann, *Requirements for amicus curiae participation in international investment arbitration, a deconstruction of the procedural wall erected in joint ICSID Cases ARB/10/25 and ARB/10/15,* 12 The Law and Practice of International Courts and Tribunals (2013), pp. 374-375. This does not accord with practice. Several tribunals accept submissions on matters of jurisdiction, see Chapter 6. For a differentiation between jurisdiction and applicable law, see Report of the Study Group of the International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, 13 April 2006, UN Doc. A/CN.4/L.682, para. 45.

372 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12.

373 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, paras. 21, 24

374 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 33, 35. The tribunal stated in respect of one of the arguments the petitioners sought to make that even though the parties had not yet made any allegations in that regard it could not 'rule out at this early stage and without having heard the Parties that these matters may play some role in its assessment of this dispute.'

cc) Significant interest in the arbitration

Tribunals have not limited the term interest to legal interests. Petitioners also have requested leave on the basis of public, spiritual and economic interests.[375]

The difficultly in practice is to show that the interest is significant. Tribunals have rejected interests that are not concrete or that are purely commercial.[376] The *Apotex II v. USA* tribunal further held that

> the applicant needs to show that he has more than a "general" interest in the proceeding. For example, the applicant must demonstrate that *the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends*.[377]

The tribunal noted the respondent's disclosure that the *amicus curiae* applicant, Mr. Appleton, was representing the claimants in three pending NAFTA cases, and that he had submitted a notice of intent regarding another case on behalf of an organization identified as Apotex's joint venture partner.[378] The tribunal held that an interest in obtaining an interpretation favourable to a client did not constitute a *significant* interest.[379] Tribunals

375 Cf. T. Ruthemeyer, supra note 220, p. 49. He also argues that *amici curiae* have been admitted on the basis of academic interests. This has not been confirmed by this study. Only where academic *amici curiae* were able to show having a public interest tribunals have acknowledged their significant interest.

376 See *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para. 28. Earlier tribunals have barely commented on this aspect. This is unexpected given that the admission of *amici curiae* in the first place was justified on the basis of public interest considerations and *amicus curiae* applicants tend to extensively elaborate on their particular interest in a case.

377 *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a non-disputing party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, para. 38. [Emphasis added].

378 *Id.*, paras. 18-21. The claimants stated in their response that they had communicated with Mr. Appleton neither on the present arbitration nor the *amicus* application nor that they had provided any support to Mr. Appleton or mandated him earlier.

379 *Id.*, para. 40. See also A. Kent/J. Trinidad, supra note 188, pp. 1093-1094 (They argue that *Appleton's* attempt to intervene as *amicus curiae* in *Apotex* shows that investment tribunals might not be open to academics in their own field appearing as *amicus curiae*.).

have held that the fact that a petitioner could pursue the interest in a domestic forum does not render it insignificant.[380]

Tribunals regularly deem *amicus* petitioners seeking to present on a public interest to meet the threshold of significant interest. This includes mostly NGOs with a thematic focus on the public interest at issue in the arbitration, such as human rights, environmental protection, workers' rights or access to water. Tribunals have yet to delineate what a *significant* public interest entails, specifically if any public interest is significant. The public interest dimension of the overall case was emphasized by tribunals in the first admissions of *amici curiae*. The mere fact that a case will affect a large demographic can lower the threshold for NGOs to substantiate the requirement of a significant interest.[381] Several *amicus* admissions indicate that petitioners must be affected by the outcome of the decision – either as a local resident who directly bears the consequences of a decision or because of an institutional mandate in the public interest (and issues) at stake.[382] For instance, in *Philip Morris v. Uruguay*, the tribunal noted that 'both petitioners appear to have a significant interest in the proceeding, considering that the WHO is the world authority on public health matters and the FCTC Secretariat is the designated global authority concerning the FCTC … .'[383] The tribunals in *von Pezold v. Zimbabwe* applied a stricter, two-tiered test. First, there had to be a substantive overlap between the

380 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. Arb/03/19, para. 19.

381 For many, see *Glamis v. USA*, where two environmental NGOs requested leave 'to ensure that the resolution of a dispute that implicates the public interest is informed by public participation.' Thus, they did not mention any specific implications the dispute would have on their rights. See *Glamis v. USA*, *Amicus curiae* application of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005, para. 9.

382 *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 15 (The petitioners claimed that the 'combination of natural resource and human rights issues is precisely that which the Tanzanian Petitioners focus on in their day-to-day work. [And t]he interest of the Petitioners in all of these public concerns is, without question, longstanding, genuine, and supported by their well-recognized expertise on these issues.' The petitioners asserted that their interest was affected as the arbitration had 'direct and indirect relevance to [their] mandates and activities at the local, national and international levels.').

383 *Philip Morris v. Uruguay,* Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 25.

public interest engaged and the interests generally represented by the *amicus* applicant. Second, each of the joint applicants' individually had to represent the necessary interests. On this basis, the tribunals found that the ECCHR – unlike the four indigenous communities with whom it had submitted the request – lacked a significant interest, because the NGO's operative focus and experience lay not in corporate responsibility for human rights abuses, as purported by the NGO, but in other areas including negative impacts of land use and acquisition on communities. The tribunals did not find these interests to be affected in the case. With respect to the indigenous communities, the tribunal acknowledged that the petitioners had an interest in the land over which the claimants claimed legal title.[384] The tribunal in *Bear Creek Mining v. Peru* reverted to a lower standard. It refuted the claimant's argument that 'significant interest' required that the engaged public interest had to be at issue and that the *amicus* petitioner had to be officially mandated to represent the interest, in this case by the indigenous Aymara community.[385]

Tribunals have considered the criterion of 'significant interest' also to be met if direct individual or legal interests of the *amicus curiae* are engaged.[386] The most relevant group of cases in this category concerns the European Commission's participation as *amicus curiae*. A case that exemplifies the EC's legal interests in participating is *Electrabel v. Hungary*. The facts of the case are as follows: Following Hungary's accession to the EU in 2004, the EC in 2008 issued a decision that Hungary had provided unlawful state aid, which included a power purchase agreement (PPA) between the country's largest and fully state-owned power plant operator and

384 The tribunal rejected the application for lack of 'independence and/or neutrality' as detailed above. See *Von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases Nos. ARB/10/15 and ARB/10/25, paras. 61-62.

385 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, paras. 19, 40.

386 In *UPS v. Canada*, for instance, the government requested that only petitioners directly affected by the outcome should be eligible for submissions and that an interest in the development of NAFTA 'jurisprudence' was insufficient. See *UPS v. Canada*, Canada's submission on Canadian Union of Postal Workers and the Council of Canadians' petition for intervention, 28 May 2001, pp. 9-11, paras. 41, 49. See also R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Berlin 2007, p. 220 (Unternehmen, die einen Antrag auf Zulassung als *amicus curiae* stellen, sollten zumindest eine konkrete Betroffenheit durch die streitbefangene Maßnahme nachweisen.).

a state-owned wholesale electricity buyer. The claimants to the arbitration had invested substantial funds in the power plant operator in 1995 after it had entered into the PPA. In view of the PPA's imminent termination, in 2007 *Electrabel* initiated arbitration against Hungary under the Energy Charter Treaty (ECT). The EC sought request for leave to appear as *amicus curiae* in these arbitral proceedings.[387] The tribunal granted the request.[388] The EC pursued two legal arguments in its request which aligned with its legal interest. First, it argued that Hungary could not be held liable (and ordered to pay compensation) under the ECT, because its measures were mandated by EU laws on state aid.[389] In this respect, it sought to assert the supremacy of EU law, and incidentally, to protect its own powers. Second, the EC argued that the ECT did not apply to cases involving EU member states.[390] This served to defend the primacy of the EU's judicial institutions claimed by Article 344 TFEU.[391] While confirming its jurisdiction (and thereby rejecting the supremacy argument), the tribunal dismissed the majority of the arguments on the merits.[392]

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387 See E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 213. *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ICSID Case No. ARB/07/19. Similar, *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22. For an analysis of the EC's *amicus curiae* participation in *AES v. Hungary*, see T. Ruthemeyer, supra note 220, pp. 37-38.

388 See also E. Levine, supra note 387, pp. 213-214.

389 See *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, para. 6.72. See also the analysis by T. Ruthemeyer, supra note 220, p. 268.

390 The argument has evolved over time. First, the EC referred to the disconnection clause in Article 26(3)(b)(ii) Energy Charter Treaty. It now argues that the inapplicability of the ECT is implied from its purpose, drafting history and context. There are difficulties with both approaches. For a legal analysis, see M. Burgstaller, *European law and investment treaties*, 26 Journal of International Arbitration (2009), pp. 181-216.

391 Article 344 TFEU: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

392 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, Part XI. The claimant was only awarded costs for failure by the respondent to provide fair and equitable treatment in the calculation of costs incurred by claimant with respect to compensation. *Vadi* notes that no arbitration tribunal so far has accepted the supremacy argument, see V. Vadi, *Beyond known worlds: climate change governance by arbi-*

Since this decision, the EC has sought leave to participate as *amicus curiae* in more than 25 investor-state arbitrations. The largest part of these cases are based on investment treaties in force between EU member states (so called intra-EU BITs) and the ECT.[393] The majority of these (pending and confidential) cases have been brought under the ECT and concern the reduction of subsidies in the renewables energy sector in Spain and the Czech Republic. Based on publicly available information, the EC has presented arguments similar to those in *Electrabel v. Hungary* with regard to the application of the ECT and the substantive claims. Concerning the latter, it has commented on possible defences of the host state arising from EU law obligations against alleged violations of the FET standard and expropriation.[394]

Another case in which *amici curiae* sought to defend a direct interest in the outcome of the case is *Glamis v. USA*. The facts of the case were as follows: Glamis had been authorized to utilize mining rights it owned to mine gold on federal land located near designated Native American territory in South-East California by way of open pit mining. It claimed that the USA breached its NAFTA Chapter 11 obligations by wrongfully delaying the consideration of the mining project and due to the adoption by California of legislative and administrative measures against the project.[395] The tribal council, the elected governing body of the Quechan Indian Nation, sought leave to participate as *amicus* on the account that the arbitration could affect the 'integrity of the sacred area and the tribe's

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tral tribunals?, 48 Vanderbilt Journal of Transnational Law (2015), p. 1340. See also *Charanne B.V. and Construction Investments S.A.R.L. v. the Kingdom of Spain* (hereinafter *Charanne v. Spain*), Final Award, 21 January 2016, Arbitration No. 062/2012.

393 *Eureko v. Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 26, 31; *Eastern Sugar v. Czech Republic,* Partial Award, 27 March 2007, SCC Case No. 088/2004.

394 One of the defences is the EU law obligation to revoke illegal state aid. For a more detailed account of the facts underlying these cases, see C. Patrizia/ J. Profaizer/ I. Timofeyev, *Investment disputes involving the renewable energy industry under the Energy Charter Treaty*, 2 October 2015, Global Arbitration Review, at: http://globalarbitrationreview.com/chapter/1036076/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty (last visited: 21.9.2017); S. Perry/ K. Karadelis, *Sun rises on Czech energy claims*, Global Arbitration Review, 19 February 2014, at: http://globalarbitrationreview.com/article/1033183/sun-rises-on-czech-energy-claims (last visited 21.9.2017).

395 *Glamis v. USA*, Award, 8 June 2009, Section II, paras. 27-185.

relation to it' and in order to pressure California into revoking the mining reclamation measures.[396] In addition, the tribunal received an application from the National Mining Association, which described itself as a 'national not-for-profit organization that represents the interest of the mining industry.'[397] The association argued that it possessed a 'unique perspective of the mining industry as a whole.'[398] It sought to address the possible negative effects for investors of regulatory uncertainty in US mining laws and the '*de facto* bans on open-pit mining of valuable mineral resources through reclamation requirements.'[399] Without detailed assessment, the Tribunal decided to admit the *amicus* applicants, noting the 'public and remedial purposes of non-disputing submissions.'[400] Further cases include the above-mentioned land titles claimed by indigenous communities in *von Pezold v. Zimbabwe*, and the legal interest recognized by the tribunal in *Infinito Gold v. Costa Rica* that 'APREFLOFAS can thus be deemed to have an interest in ensuring that this Tribunal has all the information necessary to its decision-making' in regard of the claimant's allegation that

396 The tribe stated that its goal was to ensure that the tribunal would fully take into account the 'sensitive and serious nature of indigenous sacred areas' and that it would address issues such as the value of the area's cultural and environmental resources, the authorization process for the mine, the regulatory framework for mining, as well as the legal framework for the protection of indigenous sacred places under national and international law and the possible negative impact of an award in favor of the claimant. The tribe stressed that its submissions would 'assist the tribunal in the determination of factual and legal issues by bringing the perspective, particular knowledge and insight that is unique to American tribal sovereign governments. … The [t]ribe is uniquely positioned to comment on the impacts of the proposed mine to cultural resources, cultural landscape, or context.' It noted that it had been extensively involved in the protection of its lands at the domestic level. See *Glamis v. USA*, Quechan Indian Nation Application for Leave to File a Non-Party Submission, 19 August 2005, pp. 3-4. Its submission focused on an alleged duty of the government under international law to preserve sacred lands and it outlined its rights connected to the land where the mines were to be built and emphasized its vulnerability to the substantive outcome. See also E. Levine, supra note 387, p. 213.

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

398 *Id*.

399 *Id*.

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

the domestic judgment that APREFLOFAS had obtained against it violated international law.[401]

dd) Public interest in the subject matter of the arbitration

By its wording, this condition is independent from the applicant. Nevertheless, in *Apotex I v. USA*, the tribunal clarified that the onus to prove it is on the applicant.[402] It is expressly listed only in the FTC Statement and in some investment treaties. Still, tribunals operating under other procedural regimes regularly apply the requirement in admission decisions, possibly, because it serves as a general justification for the admission of *amici curiae*.

The *Methanex* tribunal defined a public interest in the subject-matter of the arbitration to exist if the issues in the case 'extend far beyond those raised by the usual transnational arbitration between commercial parties.'[403] Its definition was refined further by the *Suez/Vivendi* and *Suez/InterAguas* tribunals:

> In examining the issues at stake in the present case, the tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by Governments. The international responsibility

401 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 36. *Ruthemeyer* criticizes the notion that private interests can be introduced into the arbitration by *amici curiae*, because they do not contribute to the establishment of the facts of the case and they run afoul to the justification of *amicus curiae* participation in investor-state arbitration. In his view, only significant public interests should be admissible. See T. Ruthemeyer, supra note 220, pp. 271-272. This view unduly limits the ordinary meaning of the requirement.

402 *Apotex I v. USA*, Procedural Order No. 2 on the participation of a non-disputing party, 11 October 2011, para. 29 ('Whilst it may be said that investment-arbitration tribunals generally deal with matters of public importance, it remains for the applicant to identify the specific public interest which it considers to be at stake, or which may be affected by any decision, and which warrants submissions from individuals or entities or interest groups beyond those immediately involved as parties in the dispute.').

403 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, para. 49. See also, *Merrill v. Canada*, Award, 31 March 2010, paras. 22-24; *Philip Morris v. Uruguay*, Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 26.

> of a State, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of a larger metropolitan area, the City of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve. These factors lead the tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties.[404]

Thus, the tribunals required for a public interest in the subject matter to be present that a dispute concerned an essential public commodity and that the outcome of the dispute would substantially and directly affect peoples' access to it.[405] The limitation to an essential public service is too narrow. Further, it has the potential to lead to arbitrary results. In addition, it seems questionable to burden tribunals with the task of defining in each case whether it sufficiently touches upon a public interest or not. In fact, the tribunal itself appears to have lessened the requirement upon receiving a request for leave one year later. It decided that the public interest in the subject matter was still engaged even though the concessionaire had withdrawn from the proceedings and terminated the concession. The tribunal justified its approach with Argentina's international legal responsibility, the fact that the case concerned issues involving access to basic public services of millions of people, and that its decision could affect 'how govern-

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404 *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, paras. 19-20. The admission of *amicus curiae* was also influenced by the effort to avoid mistakes in their judgments. See *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 12.

405 E. Triantafilou, *Is a connection to the "public interest" a meaningful prerequisite of third party participation in investment arbitration?,* 5 Berkeley Journal of International Law (2010), p.41.

ments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.'[406]

Though the wording of Rule 37(2) ICSID Arbitration Rules does not mention the condition, the tribunal in *Biwater v. Tanzania* found it applied.[407] Like the *Methanex* tribunal, it considered the public interest present where a decision had the potential 'to impact on the same wider interests' as the issues raised between the parties.[408] The tribunal noted that the arbitration raised 'a number of issues of concern to the wider community in Tanzania. It was therefore not inappropriate that the arbitral process permit some participation of interested non-disputing parties.'[409] The tribunal dismissed without explanation the claimant's argument that the case was different from similar earlier cases, because the claimant had ter-

406 See also *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, paras. 9, 17-18.

407 *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/220, para. 51. It imported into Rule 37(2) ICSID Arbitration Rules some of the substantive conditions of appropriateness of the subject matter which had been developed by the tribunal in *Suez/Vivendi v. Argentina*. See *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, paras. 18-19. This requirement had formed part of a three-partite test established by the tribunal in *Suez/Vivendi v. Argentina* (see Section A). With respect to the interpretation of the second requirement, see Section B above. The third condition requires *amici curiae* to justify their participation in the case and forces them to assess carefully the points they wish to make. *Id.*, para. 17. These requirements were also adopted by the identically composed tribunal in *Suez/InterAguas v. Argentina*, Order in response to a petition for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 4. For more, see E. Savarese, *Amicus curiae participation in investor-state arbitral proceedings*, 17 Italian Yearbook of International Law (2007), pp. 106-107.

408 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 53.

409 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras, 57, 358. See also *Biwater v. Tanzania*, Procedural Order, No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 12-15. The petitioners had pointed to issues of 'vital concern' raised by the arbitration for the local Tanzanian community, developing countries that had or might privatize infrastructure services and for the international community.

minated its operations in Tanzania and the decision therefore would not affect access to water of the population.[410]

Tribunals still routinely mention the public interest to be engaged based on the above standard. *Amici curiae* do not struggle to argue that this requirement is fulfilled, because often there is an obvious public interest in the case. A significant amount of the cases already mentioned concerned water concession treaties or the effects of mining projects on the health of the population or the environment.

The requirement has not been commented on in several recent cases, particularly in those with involvement by the European Commission. It remains to be seen if these cases constitute a group of cases where the public interest is assumed to exist due to the nature of the European Commission and its motivation for *amicus curiae* participation, or if these cases are indicative of a gradual abolishment of this requirement.[411]

c) Assessment

Overall, investment tribunals apply detailed requirements with regard to the substance of requests for leave. Tribunals have aligned the different applicable procedural rules and investment treaties. The most notable development concerns the requirement that the subject matter of the dispute involve the public interest. This requirement has become less important, tough the majority of admissions still occurs in cases with a tangible public interest dimension. Tribunals increasingly have admitted *amici curiae* in cases that do not overtly engage the public interest. This development is likely due to the growing acceptance of *amicus curiae* participation and it must be welcomed. The requirement has remained vague. Tribunals have stated that public interest means that a dispute has the potential to impact

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410 See also A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements*, New York 2010, pp. 148-150.

411 The joined tribunals in *von Pezold v. Zimbabwe* did not address this requirement at all in their 2012 decision on *amicus curiae* petitions. Given that the *amici* were not admitted to the case, this is not indicative of a new trend. *Von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases Nos. ARB/10/15 and ARB/10/25. It was also not mentioned in *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5.

interests wider than those of the parties, but they have not clearly delineated the specific interests covered, if the interests always must relate to a specific group of persons or an entity – as in commodity and EU law cases – or if, for instance, also a general global public interest would suffice. These definitional difficulties might also be why the ICSID Administrative Council decided not to include it in Rule 37(2) ICSID Arbitration Rules.[412] Further, the requirement's usefulness is questionable on a theoretical level given that investment arbitration by definition engages the public interest.[413] Finally, over-attachment to the requirement risks rejection of informative and useful submissions in cases where the public interest is not apparent.

Where tribunals have reasoned the admission of a request for leave, the provision of relevant information has constituted an important element in their decision to grant leave together with public interest considerations.[414] However, recent cases indicate a stricter application of the requirement that an *amicus curiae* possess a significant interest in the case. This requirement operates as the most effective 'floodgate', but, if applied too narrowly, risks to transform *amicus curiae* into a mechanism similar to intervention.

III. Full discretion: decision on admissibility

International courts and tribunals have asserted full discretion over the decision to accept or reject a request for leave to participate as *amicus curiae*. The *UPS* tribunal encapsulated this in its statement that it would 'de-

412 Cf. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50. See also E. Triantafilou, supra note 405, pp. 580, 585.

413 S. Jagusch/J. Sullivan, *A comparison of ICSID and UNCITRAL arbitration: areas of divergence and concern*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 93 ('[B]y their nature, disputes before ICSID tribunals will usually involve issues of public interest.').

414 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10; *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, paras. 21-26; *Piero Foresti, v. South Africa*, Letter by the Secretary of the Tribunal, 5 October 2009, ICSID Case No. ARB(AF)/07/1, para. 2.1.

cide whether to grant leave and on what terms [and reserved] the power to determine any further aspect of the procedure relating to the participation of *amici curiae*.'[415]

Most international courts and tribunals provide little to no information on the process of deciding on a request for leave to participate as *amicus curiae*, with the exception of investment tribunals.[416] The data for the ECtHR showed only one case where the ECtHR explicitly rejected a request for failing to comply with the requirements of Article 44 ECtHR Rules, but according to court members requests are rejected frequently.[417]

Submissions have been rejected where investment tribunals have found that the parties have 'competently and comprehensively argued all is-

415 *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae* re modalities of *amicus curiae* participation, 1 August 2003, paras. 8, 10. But see *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 17 (Petitioners argued that 'Rule 37(2) establishes the right of third parties to apply for *amicus curiae* status. This right does not extend to a right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are so accepted. On the other hand, it establishes a right to make a full presentation to the tribunal in order to be able to meet the test for acceptance as an *amicus curiae*.' Other tribunals have so far not agreed with this view.).

416 For instance, the IACtHR Rules are silent on this aspect. Article 28(4) IACtHR Rules is not applicable. The provision only addresses party submissions. See, however, L. Crema, supra note 294, pp. 23-24. With respect to investor-state dispute settlement, see, for example, *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19. (The tribunal stated that it had considered in its decision 'all information contained in the petition, the views of Claimants and Respondent, the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the tribunal and the proceedings; and the degree to which the proposed *amicus curiae* brief is likely to assist the tribunal in arriving at its decision.'); *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, para. 52.

417 See for the ECtHR, N. Vajic, supra note 293, p. 100 (The information for the period until Oct. 2003 shows that the ECtHR has practically never refused NGO requests for third party intervention.). But see L.-A. Sicilianos, *La tierce intervention devant la Cour européenne des droits de l'homme*, in: H. Ruiz-Fabri/J.-M. Sorel (Eds.), *Les tiers à l'instance devant les juridictions internationales,* Paris 2005, p. 155 (referring to an interview with P. Mahoney).

sues'.[418] However, as discussed, the level of scrutiny applied in respect of the requirements varies significantly between tribunals.

Before most of the international courts and tribunals reviewed, requests for leave are rarely rejected for failure to comply with formal requirements.[419] In *Joesoebov v. the Netherlands*, a case concerning extradition proceedings to Azerbaijan, the ECtHR received written comments by Azerbaijan without a request for leave attached. The ECtHR decided to interpret the comments as such a request. It reasoned that this was permissible, because the comments were largely factual.[420] Equally, in *Grand River v. USA,* the tribunal received after the expiration of a public deadline for *amicus* submissions a letter from the National Chief of the Assembly of First Nations. While the letter called for application of the rights of indigenous people in NAFTA proceedings and expressed support for the claimant, it did not request leave. The letter was subsequently adopted by the claimant as a supporting exhibit.[421] In *AES v. Hungary*, the investment tribunal asked the European Commission to clarify certain aspects of its application prior to transmitting it to the parties.[422]

Such flexibility in the application of procedural rules is not unusual in international litigation. The ICJ has observed that it is 'not bound to attach the same degree of importance to considerations of form as they might possess in domestic law.'[423] International courts' procedural flexibility

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418 *Suez/Interaguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 27.

419 An exception to the general procedural lenience was the Appellate Body's rejection of all seventeen *amicus curiae* applications in *EC–Asbestos* for failure to comply with the application procedure. It has been surmised that the rejection was the response to political pressure exercised by member states on the Appellate Body after the publication of the *EC–Asbestos* Additional Procedure. See B. Stern, supra note 98, p. 1445. Regarding the ECtHR, only in *Goddi v. Italy*, Judgment of 9 April 1984, Series A No.76, the court explicitly rejected a request for failure to comply with formal requirements. The request was also received late.

420 *Joesoebov v. the Netherlands* (dec.), No. 44719/06, 2 November 2010.

421 *Grand River v. USA,* Award, 12 January 2011, para. 60.

422 *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 3.18.

423 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 11 July 1996, ICJ Rep. 1996, pp. 595, 612, quoted by E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), p. 430 ('[R]ules of procedure must be approached in a common-sense and flexible manner.').

finds its limitation in the parties' procedural rights. Where a procedural defect in the admission of *amicus curiae* risks impairing the parties' procedural rights, courts are not lenient. Especially regarding timeliness, international courts and tribunals adopt a strict position. This may be because of the direct link between timeliness, the parties' due process rights and concerns over the efficiency of proceedings. Further exceptions to strict enforcement of formal rules apply to the IACtHR and a few investment tribunals. Their approach to matters of form showcases tribunals' attempts to regulate the flow of submissions and to tolerate the additional burdens *amicus curiae* participation might entail only if *amici curiae* conform to the rules established for their involvement.

International courts and tribunals have adopted a lenient approach with regard to the substance of requests for leave. The ECtHR seems to have discarded its initial practice of closely monitoring and tailoring the content of submissions. Today, it routinely accepts requests for leave as proposed by prospective *amici curiae*.[424] And in *Glamis v. USA*, the tribunal decided that it

> should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed, but that, given the public and remedial purposes of the non-disputing submissions, leave to file and acceptance of submissions should be granted liberally. These matters, the tribunal determined, were best considered at a later point in the proceedings, as necessary.[425]

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424 E.g. *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161; *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B; *Wingrove v. the United Kingdom*, Judgment of 25 November 1996, Reports 1996-V. Unfortunately, the judgments rarely reveal how the request for leave application was modified in its content. See also *Vajic* who argues that this broad admission policy has diminished the need for a right for NGOs to intervene in ECtHR proceedings. N. Vajic, supra note 293, pp. 99-100.

425 *Glamis v. USA*, Award, 8 June 2009, para. 286. However, the tribunal barely considered the statements made by the petitioners, raising doubts with regard to the effectiveness of the requirements. See *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10 ('Upon review of the application and submission and consideration of the views of the Parties, the Tribunal is of the view that the submission satisfies the principles of the FTC's Statement on non-disputing party participation.'). Other investment tribunals, as seen in the preceding section, take a stricter approach.

Occasionally, investment tribunals in their decision to admit a brief order an *amicus curiae* to modify the content of a submission.[426] Some investment tribunals engage in a dialogue with *amicus curiae* applicants to explain the conditions for participation as *amicus*. In *Biwater v. Tanzania*, the tribunal, unsure as to the potential use of an *amicus curiae* submission, instead of rejecting the application, permitted several *amicus curiae* applicants to file a joint initial written submission, in which they were to articulate whatever arguments and provide whatever information they considered appropriate to obtain a 'clearer view as to any areas on which the tribunal might need further assistance.'[427]

It appears that requests for leave from governments and international organizations are often handled less rigorously. The ECtHR re-defined Azerbaijan's submission in *Joesoebov v. the Netherlands*. Also, investment tribunals have invited the EC to clarify its request for leave. Morocco's request for participation in WTO Appellate Body proceedings was rejected only in part when it failed to comply with certain requirements. This may be partly because regulations of *amicus curiae* are usually tailored to non-governmental entities. International courts and tribunals may find it inappropriate to hold governmental entities to the same rigorous standards. Drawing inspiration from US Supreme Court practice, *Gruner* advocates that governmental entities should be permitted to make *amicus curiae* submissions without having to request leave on the assumption that they are representing the public interest.[428] It is problematic to transfer this rationale to international dispute settlement. States are not necessarily seeking to represent a public interest in a case. Moreover, the public interest at issue may not necessarily be best represented by a state, especially if it is global or transnational in nature. Finally, the participation of a state at

426 E.g. *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12, Section (ii): 'this written submission shall take the form of the Applicants' existing submission but it should be edited with a view to assisting the Tribunal's determination of the jurisdictional issues raised by the Parties (not the merits).'

427 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 60. The Tribunal consisted of Gary Born, Toby Landau and Bernard Hanotiau (Presiding Arbitrator).

428 M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 Columbia Journal of Transnational Law (2003), p. 956.

the national level is based on a rationale that is not replicated at the international level.

Are there any requirements for the decision on request for leave itself? The FTC Statement determines that applications for leave must be decided during the proceedings and in a manner which least interrupts them.[429] Section 43 ACtHPR Practice Directions determines that requests will be determined 'within a reasonable time.' According to the *EC–Asbestos* Additional Procedure, requests for leave must be decided 'without delay.' This approach has been changed in practice. In several cases, the WTO Appellate Body has held that it would decide on the acceptance and consideration of a submission only after considering the parties' and third parties' written and oral submissions.[430] This approach does not seem effective. Parties and third parties will have to consider and comment on *amicus curiae* submissions that may ultimately not even be admitted.

Amicus curiae applicants do not possess a right to a decision, rendering unnecessary a formal admission decision, unless it is required to protect the parties' rights. The ECtHR decides on *amicus curiae* applications without issuing a formal decision or order.[431] The FTC Statement on non-disputing party participation stipulates in Sec. B para. 8 that the tribunal 'will render a decision whether to grant leave to file a non-disputing party submission.' Investment tribunals issue a procedural order or decision on each *amicus curiae* application. Some international courts and tribunals provide reasons for the rejection of a request, which is laudable in terms of

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429 NAFTA FTC Statement, Sec. B para. 7(a).

430 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 10; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 10 (Deferral of admissibility decision, including timeliness, until consideration of party submissions.).

431 Rule 44(5) ECtHR Rules: 'Any invitation or grant of leave referred to in paragraph 3 (a) of this Rule shall be *subject to any conditions, including time-limits, set by the President of the Chamber*. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.' *Crema* criticizes that the court only lists *amici curiae* in its judgment that it admitted to the proceedings and not those it rejected. He calls for a 'duty to report in public who submitted an *amicus*, and the reason why a given submission was accepted or dropped.' See L. Crema, supra note 294, p. 21.

efficiency and the future development of the concept. The WTO adjudicating bodies take a formal decision on the matter, but it is not published. Neither the IACtHR, nor the ICJ in advisory proceedings seem to issue a formal decision on the admission of briefs. Even where they are issued, decisions on *amicus curiae* participation are not always made by the full court or tribunal. Article 36(2) ECHR, for example, places the decision with the President of the Court.[432] Unlike judgments, courts do not need to provide reasons for procedural decisions, including the decision on the admission of *amicus curiae*.[433]

None of the courts or tribunals examined offers a procedure for the review of the decision to grant leave. Procedural court orders and decisions are not appealable under the procedures examined.[434] However, no rule was found prohibiting an applicant to resubmit an application at a later stage, although the chances of a reversal of a decision are rather moderate, unless the application or the circumstances of the case have changed considerably. In *Methanex v. USA*, the tribunal rejected the first *amicus* applications as premature, but encouraged petitioners to reapply at a later stage with additional information.[435]

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432 In a few cases, the President consulted the chamber before deciding on a request. See *Jersild v. Denmark*, Judgment of 23 September 1994, Series A No. 298; *Goodwin v. the United Kingdom*, Judgment of 27 March 1996, Reports 1996-II; *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44.

433 See Article 56 ICJ Statute, Article 30(1) ITLOS Statute, Article 45 ECHR, Article 66 IACtHR Statute, Article 12(7) DSU, Article 48 (3) ICSID Convention, Article 79 1907 Hague Convention. See also M. Benzing, supra note 14, p. 125; I. Scobbie, *Legal reasoning and the judicial function in the International Court*, University of Cambridge, Ph.D. Dissertation, 1990. Arguing that this is a principle of public international procedural law, L. Delbez, *Les principes généraux du contentieux international*, Paris 1962, pp. 123-124; C. Santulli, *Droit du contentieux international*, Paris 2005, para. 800.

434 Article 31(2) IACtHR Rules determines that only non-procedural decisions of the President of the Court may be appealed. Para. 3 asserts that '[j]udgments and orders of the Court may not be contested in any way.'

435 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, pp. 12-13, paras. 32, 34 ('In order for the Tribunal to evaluate the independence of the *Fundacion*, it would be necessary to have additional information on its membership. To judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationship, with the Claimants or the Respondent.'). The Tribunal rejected all four of the *amicus curiae* petitioners,

This flexible and discretionary approach has been criticized. With respect to *amicus curiae* participation in investment arbitration, *Levine* argues that

> it is necessary to develop standards that will allow for guaranteed or mandatory, rather than purely discretionary, right of participation as *amicus curiae*. These applicants must be able to satisfy criteria similar to those already addressed in the ICSID Rules, such as the presence of a significant interest in the merits of the dispute. ... [I]t will genuinely address the fact that in circumstances where a third party has a sufficient interest in the proceedings, it may be necessary from the perspective of legitimacy to formalize their status rather than leaving the possibility of participation subject to an *ad hoc* process.[436]

Howse and *Peel* argue that the refusal of a panel to accept and consider a relevant *amicus curiae* submission could constitute an appealable violation of the panel's duty to make an objective assessment of the facts under Article 13 DSU.[437] Others wish that for governmental *amici curiae* the international court or tribunal's discretion to reject a submission should be limited.[438] Demands for such a right overlook that the primary purpose of *amicus curiae* participation from the perspective of international courts and tribunals is the support of the court in rendering a decision in the case. Accordingly, the admission decision cannot be placed in the hands of an applicant.[439] *Levine's* proposal argues for the creation of an intervention mechanism based on justified doubts concerning the adequacy of the in-

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but allowed them submit a new application for leave with the information requested. See *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, p. 13, para. 34.

436 E. Levine, supra note 387, p. 222 [Emphasis added].

437 R. Howse, *Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence*, in: J. Weiler (Ed.), *The EU, the WTO and the NAFTA*, Oxford 2000, p. 50; J. Peel, *Giving the public a voice in the protection of the global environment: avenues for participation by NGOs in dispute resolution at the European Court of Justice and World Trade Organization*, 12 Colorado Journal of International Environmental Law & Policy (2001), p. 69.

438 L. Boisson de Chazournes/ M. Mbengue, *The amici curiae and the WTO dispute settlement system: the doors are open*, 2 The Law and Practice of International Courts and Tribunals (2003), p. 235.

439 See N. Vajic, supra note 293, p. 99 ('Personally, I agree with the view that there should be some kind of judicial control over the circumstances in which, and of the extent to which, third parties are permitted to intervene, i.e. that the ECHR should have the last word in this respect.'). Arguing against an obligation to con-

strument in cases where an entity has a concrete and affected interest in the pending case. Indeed, the instrument is not a proper substitute for a right to participate (see Chapter 8). However, in the absence of such a right, international courts and tribunals have little choice but to resort to *amicus curiae* if they wish to involve the affected person in the proceedings.

IV. Comparative analysis

The request for leave procedures reviewed are diverse and emphasize different aspects. For instance, the procedures established by the ECtHR focus on formal aspects, whereas the procedures developed by investment tribunals are detailed with respect to substantive requirements and capacity, but grant flexibility in respect of procedure.

The substantive requirements established with regard to requests for leave to participate as *amicus curiae* vary significantly between international courts and tribunals.[440] A common requirement is the potential relevance of a submission.[441] This is the determinative substantive factor for most international courts and tribunals. Additionally, some international courts and tribunals invite the parties to weigh in on this aspect and to adopt *amicus curiae* submissions as their own (WTO, ECtHR, investment tribunals). In these instances, the court's test of relevance is replaced by the parties' own test.[442] Prospective *amici curiae* must convince the court or tribunal that their submission will convey information that is not already before them, and that they will add value to their decision-making. Unfortunately, most courts barely comment (publicly) on this requirement

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sider requests for leave to participate as *amicus curiae* mainly for practical reasons, L. Bastin, *The amicus curiae in investor-state arbitration*, 1 Cambridge Journal of International and Comparative Law (2012), p. 229.

440 For a comparison of the *EC–Asbestos* Additional Procedure with other request for leave procedures, see C. Knahr, *Participation of non-state actors in the dispute settlement system of the WTO: benefit or burden?*, Frankfurt am Main 2007, pp. 150-160.

441 See C. Chinkin/R. Mackenzie, supra note 146, p. 155; L. Bartholomeusz, supra note 17, pp. 209, 213.

442 E.g. *Canada – Certain Measures Affecting the Renewable Energy Sector* (hereinafter: *Canada–Renewable Energy*), Report of the Panel, adopted on 24 May 2013, WT/DS412/R and WT/DS426/R, para. 1.13.

rendering it difficult for applicants to predict the threshold for novelty, especially if access to documents is limited.[443] Investment arbitration tribunals further require applicants to prove a significant interest in the arbitration and, traditionally, they must show that the subject-matter of the dispute affects a public interest. The public interest requirement is more usefully established *ex officio* as it is unrelated to the respective applicant. The ECtHR has not published any requirements regarding the substance of requests for leave. It grants leave liberally, unless the information submitted is duplicative or overtly irrelevant.

Some international courts and tribunals (investment tribunals, *EC–Asbestos* Appellate Body division) regulate the request for leave process densely, while other courts and tribunals (ICJ, ITLOS, ECtHR) provide rudimentary rules. In addition, there is a trend of formalization and codification of request for leave procedures in investment arbitration. What conclusions can be drawn from the density and form of regulation? Does it impact the number of *amicus curiae* requests in terms of quantity and quality of submissions? Does inversely the lack of regulation hinder *amicus curiae* participation? In terms of absolute figures, the existence of a request for leave procedure does not affect the participation of *amici curiae*, as a comparison between the ECtHR and IACtHR shows. The extensive regulation of the concept in investment arbitration seems to be guided by an intention to minimize disruptions to the proceedings and justify the piercing by *amicus curiae* of the strictly bilateral process. It does not seem to have deterred prospective *amici curiae*. To the contrary, clear rules and transparency in their application helps potential *amici curiae* to see if there is a chance of admission. The WTO and the ICJ show that the lack of regulation combined with a standard rejection discourages potential *amici curiae* from requesting leave.

443 A typical evaluation was made in *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 359, 370, 392: 'The Arbitral Tribunal has found the *Amici*'*s* observations useful. The submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *Amici*'*s* submissions are returned to in that context.'

D. Conclusion

This Chapter has shown that *amicus curiae* participation is increasingly codified and regulated across all international courts and tribunals. This development coincides with a general codification trend in international procedure. There is also an increasing formalization of the requirements for requests for leave procedures to participate as *amicus curiae*. A factor contributing to this trend may be the duty of international courts and tribunals to conduct proceedings 'without unnecessary delay or expense', as stipulated by Article 49 ITLOS Rules. Another important factor may be the steady rise in the overall amount of cases and cases with *amicus curiae* participation. Formal rules simplify the process of assessing applications and submission. This trend is positive. It enables *amici curiae* to submit briefs in a manner which increases their likelihood of consideration. Also, it makes more efficient the process of participation, and, finally, it is an important tool to manage *amici curiae's* as well as the disputing parties' expectations. Overall, the density of formal requirements before all international courts and tribunals for *amicus curiae* submissions currently is moderate and strikes a sensible balance between the parties' and the *amicus curiae's* interests.

This Chapter has further shown that all international courts and tribunals regulate *amicus curiae* as a procedural concept that is fully subject to their discretion. *Amicus curiae* is not an instrument reserved for non-state actors. There is an ever-expanding group of *amicus curiae* participants, which varies between international courts and tribunals. The spectrum of potential *amicus curiae* participants is explicitly limited before the ICJ, the ITLOS and the IACtHR. Before the other international courts and tribunals reviewed, the structure of *amicus curiae* participants has developed outside the courts' sphere of influence. The largest share of *amicus curiae* submissions stems from NGOs.

The requirements applicable to the person of *amicus curiae* are quite homogenous despite significant disparities in regulatory density between investment tribunals and all other international courts and tribunals in this regard. While international courts place great value on the expertise and experience of *amicus curiae*, impartiality does not seem to be a mandatory condition. The extent to which *amicus curiae* is expected to be impartial seems to correlate with the function assigned to it. Most international courts and tribunals do not expect unsolicited *amici curiae* to be neutral. To the contrary, in investment arbitration and in the ECtHR specifically,

prospective *amici* must show possessing a special interest to participate in the proceedings. In this respect, the international *amicus curiae* differs significantly from some national concepts of *amicus curiae*. Independence generally seems to be mandatory, even though concrete conditions to ensure independence are often lacking in practice. Where they exist, they are mostly enforced loosely. Additional rules prescribing disclosure of any affiliation or assistance would be useful. Tribunals generally do not seem to verify the information submitted by *amicus curiae* applicants. This places a heavy burden on the parties and should be reconsidered.

It would be useful to condition the admission requirements on the function assigned to an *amicus curiae*. Accordingly, if its main purpose is the provision of additional information, expertise and neutrality should be indispensable requirements. For interest-based *amici curiae*, impartiality should not be a condition, but instead the focus should be on whether the *amicus curiae* can credibly claim to represent the defended interest or value. Independence of *amici curiae* is indispensable in every case to protect party equality.

Request for leave procedures function well. With the exception of timeliness requirements, tribunals show lenience in their application. Overall, the concern that the admission of *amicus curiae* briefs could trigger an uncontrollable flood of requests, as argued by the ICJ Registrar in his rejection of *Reisman's* enquiry about *amicus curiae* participation in *South West Africa*, has not materialized and it could be managed by a rigorous admission process.