Chapter § 6 *Amici curiae* in the proceedings

Having admitted an *amicus curiae* to the proceedings, international courts and tribunals must decide on the mode of its participation in the proceedings. They must decide when in the proceedings *amicus curiae* should participate, in what manner, and whether it will be allowed to submit evidence or access case documents. In short, they must decide on its status in the proceedings.

As in the admission process, international courts and tribunals have discretion over the participation of *amicus curiae*, often similar in scope to that of the ECtHR in Article 44(5) ECtHR Rules. The provision determines that '[a]ny invitation or grant of leave … shall be subject to any conditions … set by the President of the Chamber.' However, this discretion is not unlimited. International courts and tribunals are under an obligation to carry out their proceedings efficiently and with respect for the rights of the parties and third parties. For some investment tribunals, these obligations have been codified with respect to *amicus curiae*. For instance, Rule 37(2) ICSID Arbitration Rules stipulates that the tribunal shall 'ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party.' The tribunal in *Suez/Vivendi v. Argentina* summarized the diverging interests at stake in the creation of an adequate regulatory framework for the participation of *amicus curiae* by noting that the goal of such regulation was to

> enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties. … [T]he Tribunal will endeavour to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings.[1]

This Chapter examines how the efforts of international courts and tribunals to strike a balance between these interests have shaped *amicus curiae* participation. First, it will consider the modalities of *amicus curiae* participation (A.) and whether participation is officially recorded (B.), fol-

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1 *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 15. See also, *Suez/InterAguas v. Argentina*, Order in Response to a petition for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 28.

lowed by an examination of the formal aspects of *amicus curiae* participation (C.) and the substance of briefs (D.). The Chapter concludes by considering whether *amici curiae* may submit evidence (E.) and access case documents (F.).

A. Oral and written participation

Amici curiae participate in proceedings before international courts and tribunals predominantly through written submissions. Only select international courts and tribunal have granted *amici curiae* permission to participate actively in hearings.

I. International Court of Justice

Article 69(2) ICJ Rules clarifies that the ICJ may request information from a public international organization pursuant to Article 34(2) ICJ Statute both in writing and orally. Where information is submitted *proprio motu* by a public international organization, Article 69(3) ICJ Rules determines that the submission may be made in written form, but that the ICJ shall retain the right to require such information to be supplemented orally or in writing. To date, where *amici* have submitted information to the ICJ, they have done so exclusively in written form. For advisory proceedings, Article 66(2) ICJ Statute determines that international organizations and states participate in writing and, if hearings are held, orally. In its *Wall* and *Kosovo* advisory opinions, the ICJ granted leave to present written and oral statements to the affected state-like entities. Interestingly, the time allocated to the affected entities in both cases was four times longer than the time allocated to the other participants, indicating that the ICJ distinguished based on how affected an entity was.[2] In labour dispute cases between an international organization and its (former) staff member, the ICJ, in view

2 *Wall*, Public sitting held on Monday 23 February 2004, verbatim record, CR 2004/1, p. 17; *Kosovo*, Public sitting held on Monday 1 December 2009, verbatim record, CR 2009/24, p. 30. Serbia was also granted three hours of speaking time, that is, four times longer than the other speakers. Cited by Y. Ronen, *Participation of non-state actors in ICJ proceedings*, 11 The Law and Practice of International Courts and Tribunals (2012), pp. 92-93.

of its limited rules on standing, abolished hearings altogether to ensure equal representation of the concerned staff member and its employer organization. Though the Court may do so as hearings are not mandatory in advisory proceedings pursuant to Article 66(2) ICJ Statute and Article 105(2)(b) ICJ Rules, this result is overall unsatisfying considering that the ICJ's decisions in these cases – unlike in typical advisory proceedings – directly modify the rights of the parties (see Chapter 5). Practice Direction XII states that submissions from non-governmental entities are not considered part of the record. They can therefore not be considered formal written submissions.

II. International Tribunal for the Law of the Sea

Article 84(1) ITLOS Rules leaves it to the ITLOS to decide after consultation with the chief administrating officer of the organization concerned whether solicited information shall be presented orally or in writing. Article 84(2) determines that unsolicited information may be submitted only in writing. Only if the ITLOS then wishes to receive additional information, can it authorize the organization to present such information orally. Participation under Article 84(3) is primarily by written submission, but the submission may be discussed orally at the hearing. As regards advisory proceedings, Article 133(3) and (4) ITLOS Rules stipulates that submissions to the Seabed Disputes Chamber by states and appropriate intergovernmental organizations may be written and oral, if oral proceedings are held. The wording of the provisions indicates that prior written submission is not a condition for the presentation of oral statements at the hearings. Further, pursuant to Article 133(3) the Chamber may hold a second round of written statements for states and intergovernmental organizations to comment on the initial written statements. The Seabed Disputes Chamber received numerous written submissions by states and intergovernmental organizations in *Responsibilities*. In addition to several governmental oral submissions, the Intergovernmental Oceanographic Commission of UNESCO and the IUCN were granted leave to present oral statements.[3] The Chamber also reproduced on its website a joint written sub-

3 See verbatim records ITLOS/PV.10/1 14 September 2010 p.m.; ITLOS/PV.10/2 15 September 2010 a.m.; ITLOS/PV.10/3 16 September 2010 a.m.; ITLOS/PV.10/4, 1 6 September 2010 p.m.; ITLOS/PV.11/1, 1 February 2011.

mission by Greenpeace and the WWF, but denied their request for oral submissions. The Chamber had no other option given the clear limitation of Article 133(4) ITLOS Rules to intergovernmental organizations. Notably, in *SRFC*, WWF submitted two *amicus curiae* briefs, both of which were replicated on the ITLOS website of the case.[4]

III. European Court of Human Rights

Article 36(2) ECHR contemplates written and oral submissions as alternative forms of participation. The provision is modified by Rule 44(3)(a) ECtHR Rules which designates written comments the norm and limits oral participation to 'exceptional cases.'[5] The limitation was introduced only in the late 1990. Oral admission was granted where the *amicus curiae* possessed special knowledge due to its involvement in the case or longstanding involvement in the matters at issue.[6] While written *amicus curiae* participation has always been the norm in the ECtHR, the number of oral submissions has noticeably decreased over time, possibly due to the overall increase in the court's caseload and efforts to conduct proceedings in the most efficient manner.[7] There was a significant rise in the admission of *amici curiae* to make oral presentations in 2011 and 2012 in cases before

4 The briefs can be accessed at https://www.itlos.org/cases/list-of-cases/case-no-21/ (last visited: 21.9.2017).

5 Rules concerning *amicus curiae* prior to Article 61(3) former ECtHR Rules did not mention the possibility of oral submissions. Still, oral submissions were occasionally allowed by the court.

6 *Mahoney* assumed that this would only occur with regard to factual aspects. Practice shows that this is not the case. See P. Mahoney, *Developments in the procedure of the European Court of Human Rights: the revised rules of the court*, 3 Yearbook of European Law (1983), p. 146.

7 The first admission of *amicus curiae* allowed oral submissions. See *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44. Between 2003 and 2010, seven *amici curiae* were granted leave to present oral submissions. See *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX; *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, 30 June 2005, ECHR 2005-VI; *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008; *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECHR 2009; *Perna v. Italy* [GC], No. 48898/99, 6 May 2003, ECHR 2003-V; *Muñoz Díaz v. Spain*, No. 49151/07, 8 December 2009, ECHR 2009.

the Grand Chamber.[8] But it seems to result from the nature of the cases rather than a policy shift in the court. The cases attracted widespread attention from the public and governments as they involved novel legal issues and touched upon politically highly sensitive matters. The main criterion guiding the ECtHR's exercise of discretion appears to be the expectation of an added value from the oral submission.[9] It is not always clear on what basis the court chooses to admit a certain *amicus curiae* to the oral proceedings over another that also made written submissions, but it seems that leave to make oral submissions is predominantly granted to states parties and intergovernmental organizations.[10] In *Hirsi Jamaa and others v. Italy*, a case concerning the legality under the ECHR of the interception on sea of boat refugees and their immediate return to Libya, the ECtHR granted leave to present an oral statement to the UNHCR. The UNHCR shared information *inter alia* on push-back operations and some of the affected applicants, the legal and factual situation of asylum seekers in Libya and the illegality of collective expulsion of aliens under international and European Union law. The ECtHR did not invite any of the several organizations that had carried out fact-finding missions on the situation of refugees in Libya.[11] In other cases, *amici curiae* that were granted leave to make oral in addition to written submissions include the parents of a child

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8 Five cases were registered: *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011; *NADA v. Switzerland* [GC], No. 10593/08, 12 September 2012, ECHR 2012; *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, ECHR 2012; *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012 (only UNHCR); *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011.

9 The ECtHR rejected requests for permission to present oral submissions for lack of necessity in *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, Series A No. 240; *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A No. 246-A.

10 An exception is *Gas and Dubois v. France*, No. 25951/07, 15 March 2012, ECHR 2012. The International Federation for Human Rights, International Commission of Jurists, ILGA-Europe, British Association for Adoption and Fostering and Network for European LGBTIQ* Families Association were given leave to make joint written and oral submissions on the prohibition of second parent adoption.

11 *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012. In *Lautsi and others v. Italy*, a highly publicly discussed case concerning the legality of religious symbols in state schools, the ECtHR granted leave to present a joint oral submission to some of the states that had filed a written *amicus curiae* submission. The ECtHR did not reveal on which basis the states were selected to present oral submissions. See *Lautsi and others v. Italy* [GC], No. 30814/06, 18

murdered by the applicants,[12] homosexual and human rights interest groups commenting on discrimination based on sexual orientation in a case concerning rights of homosexuals,[13] the caretakers and Romanian legal representatives of Romanian orphans in a case concerning adoption by Italian families,[14] the European Commission in a case concerning seizure of an aircraft under Regulation (EEC) 990/93,[15] the British government in a case concerning the protection against *refoulement* of persons involved in terrorist activities,[16] the Belgian government in a case concerning the legality of the French full-face veil ban,[17] an international human rights organization in a case concerning states' obligations to protect citizens from domestic violence,[18] the European Commission and Cyprus (that initially had been the co-respondent) in a case engaging the relationship between EU law and the ECHR,[19] family members of a patient in a vegetative state in a case concerning withdrawal of nutrition and hydration

March 2011, ECHR 2011. Leave to appear collectively in oral proceedings was given to the governments of Armenia, Bulgaria, Cyprus, Russia, Greece, Lithuania, Malta and San Marino. They criticized the chamber judgment and openly supported Italy's practice of display of religious symbols. Romania was not granted leave to present oral argument.

12 *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999; *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, ECHR 1999-IX.

13 *Karner v. Austria*, No. 40016/98, 24 July 2003, ECHR 2003-IX.

14 *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V.

15 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, 30 June 2005, ECHR 2005-VI. Council Regulation 990/93 implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). Bosphorus Airways lost three of its four-year lease of the aircraft due to the seizure. It argued that the seizure had violated its rights under Article 1 Protocol 1 to the ECHR.

16 *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008. The applicant had been prosecuted in Italy for participation in international terrorism. His deportation to Tunisia was ordered, where he had been sentenced *in absentia* to 20 years of imprisonment for membership in a terrorist organization and incitement to terrorism. The ECtHR had earlier held that the efforts to protect communities from terrorism could not outweigh the absolute nature of Article 3 ECHR. The United Kingdom in its oral *amicus* submission unsuccessfully argued that the court should overtun *Chahal v. the United Kingdom*, Judgment of 15 November 1996, Reports 1996-V.

17 *SAS v. France* [GC], No. 43835/11, 1 July 2014, para. 8.

18 See *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECHR 2009.

19 *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016.

against which other members of the family had brought the application[20] and the Armenian government in a freedom of expression case related to criminalization of the denial of the Armenian genocide.[21]

The ECtHR does not limit the modalities of written participation. Submissions may be made jointly by several persons or individually. The ECtHR has a strong practice of 'repeat' *amici curiae*, entities that regularly appear as *amici curiae* in its proceedings (see Annex I).

IV. Inter-American Court of Human Rights

The definition of *amicus curiae* in the IACtHR Rules mentions written and oral participation as equal alternatives. The IACtHR Rules only regulate written submissions from *amici curiae* in contentious proceedings. The provisions concerning oral hearings do not mention *amicus curiae* participation explicitly, but Rule 58(a) IACtHR Rules allows the court *inter alia* to hear 'in any other capacity, any person whose statement, testimony, or opinion it deems to be relevant,' a term that does not conflict with the definition in Article 2(3).[22] This lack of regulation may be because oral *amicus curiae* participation is rare before the IACtHR and the recent codification of *amicus curiae* was intended to solidify the existing *amicus curiae* practice.[23] The IACtHR has taken a more liberal approach

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20 *Lambert and others v. France* [GC], no. 46043/14, 5 June 2015, para. 8.

21 *Perinçek v. Switzerland* [GC], No. 27510/08, 15 October 2015.

22 Alternative basis could be an implied power read into Article 52(2) IACtHR Rules, which refers to 'all other persons that the Court decides to hear.'

23 Prior to the codification, the IACtHR denied at least one request by *amici curiae* to participate in oral proceedings and there is no known case of oral participation since adoption of the new rules. In *Claude Reyes et al. v. Chile*, a case concerning the right to access to information, the *Asociación por los derechos civiles* requested leave to present written and oral arguments. It argued that it had originally brought the case before the IAComHR. Upon instruction by the President of the Court, the Secretary of the IACtHR accepted the written submission as *amicus curiae*, but denied the request to present oral submission on the account of a limitation of direct participation in hearings to persons accredited by the disputing parties. See *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006 (Merits, Reparations and Costs), IACtHR Series C No. 151, p. 5, para. 25. In 2012, the IACtHR Secretary heard three minors in a case affecting their custody arrangements. The girls' father had filed a petition as *amicus curiae* on his and his daughters' behalf. The court did not admit the girls as *amici*, but decided to hear their

in advisory proceedings. Although written submissions are the norm, the IACtHR has allowed *amici curiae* to make oral submissions in at least nine advisory proceedings.[24] The first admission was made in *Ciertas Atribuciones*, a case challenging some of the practices of the IAComHR.[25] The IACtHR invited three of the eleven NGOs that had submitted *amicus curiae* briefs to participate in the hearing: the CEJIL, American Watch and the International Human Rights Law Group. *Shelton* surmises that their admission to the oral proceedings resulted from the importance of the issue.[26] It is not clear what criteria the court used to decide which *amicus*

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submission given that they were affected by the decision. See *Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs), IACtHR Series C No. 239.

24 *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84 of 19 January 1984, IACtHR Series A No. 4, pp. 3-4, para. 6; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*, Advisory Opinion No. OC-5/85 of 13 November 1985, IACtHR Series A No. 5, p. 3, para. 7; *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50, 51 of the American Convention on Human Rights)*, Advisory Opinion No. OC-13/93 of 16 July 1993, IACtHR Series A No. 13*; International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion No. OC-14/94 of 9 December 1994, IACtHR Series A No. 14, p. 4, paras. 10-11*; Reports of the Inter-American Commission on Human Rights (Article 51 American Convention on Human Rights)*, Advisory Opinion No. OC-15/97 of 14 November 1997, IACtHR Series A No. 15, pp. 6-7, para. 21; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99 of 1 October 1999, IACtHR Series A No. 16; *Juridical Condition and Human Rights of the Child*, Advisory Opinion No. OC-17/02 of 28 August 2002, IACtHR Series A No. 17; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03 of 17 September 2003, IACtHR Series A No. 18, pp. 9-10, para. 36; *Article 55 of the American Convention on Human Rights,* Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, p. 4, para. 8. According to *Lindblom*, this is a growing trend. The examination of the case law did not confirm this view. Instead, it appears that *amici curiae* have been admitted to the court frequently. See A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005, p. 361.

25 *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50, 51 of the American Convention on Human Rights)*, Advisory Opinion No. OC-13/93 of 16 July 1993, IACtHR Series A No. 13.

26 D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 American University International Law Review (1994), p. 350.

curiae to invite to participate in the oral proceedings. One factor might have been consent from the institution that brought the advisory proceedings as early cases mention such consent.[27] Another factor may have been the quality or relevance of the written submission or the representativeness of the *amicus curiae*. In one case, the court decided to hold a separate hearing session for the *amici curiae*, predominantly non-governmental organisations active in the area of human rights and journalism. The *amici* were not invited to the ordinary hearing.[28] Recently, the IACtHR seems to have changed its restrictive approach in advisory proceedings. In two cases, the IACtHR decided that all those who had submitted written briefs were eligible to take part in the oral proceedings subject only to accreditation. In both cases, almost all entities accepted the invitation. In addition, in both cases, the IACtHR admitted as *amici curiae* to the oral proceedings institutions that had not submitted written briefs.[29] The IACtHR has not explained this change, but it coincides with the court's general efforts to increase the transparency of its practice with respect to *amicus curiae*. Submissions can be made jointly by several persons or individually.

V. African Court on Human and Peoples' Rights

The Practice Directions in Section 44 determine that any *amicus curiae* admitted to the proceedings shall be 'invited to make submissions ... at any point during the proceedings.' In *Lohé Issa Konaté v. Burkina Faso*,

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27 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13, 29 ACHR)*, Advisory Opinion No. OC-5/85, 13 November 1985, IACtHR Series A No. 5, pp. 3-4, paras. 6-7; *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No OC-4/84, 19 January 1984. The case was conducted under Article 64(2) IACtHR Statute where the government bringing the opinion generally has stronger influence on the proceedings. In addition, the *amici curiae* were invited by the court in consultation with the Costa Rican government.

28 C*ompulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13, 29 ACHR), Advisory Opinion No. OC-5/85 of 13 November 1985, IACtHR Series No. 5, p. 3, para. 7.

29 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03 of 17 September 2003, IACtHR Series A No. 18, pp. 9-10, para. 36; *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, p. 4, para. 8.

amici curiae made both written and oral submissions.[30] The court did not specifically justify admission to the oral proceedings.

VI. WTO Appellate Body and panels

Before the Appellate Body and WTO panels, the issue of *amicus curiae* has exclusively been considered with regard to written submissions. It appears that *amici curiae* have never sought admission to hearings. Article 13 DSU does not explicitly confine solicitation of information and technical advice to a written procedure, but this flows from the limitative rules on access to hearings in panel proceedings.[31] In short, oral submissions by *amici curiae* are a non-issue. This could change if panels and the Appellate Body were to uplift the confidentiality of hearing. The DSU does not limit the circle of entities allowed to appear before panels and the Appellate Body. Section 2 Panel Working Procedures foresees privacy of panel meetings and envisages participation by the disputing parties and third parties upon invitation by the panel, but this provision is not mandatory. It can be altered by the panel in consultation with the parties in a case pursuant to Article 12(1) DSU.[32] Further, the Appellate Body Working Proce-

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30 *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, pp. 8-9, paras. 25, 27.

31 Section 2 Panel Working Procedures, Appendix 3 to the DSU: 'The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.'

32 Since 2005 and as of September 2011, panels have, with the consent of the parties, on more than 10 occasions opened their meetings to the public via closed circuit television and webcast. See *Canada/US–Continued Suspension*, Reports of the Panels, adopted on 14 November 2008, WT/DS320/ R, WT/DS321/R, paras. 7.38-7.51; *European Communities and Certain Member States–Measures Affecting Trade in Large Civil Aircrafts* (hereinafter: *EC and Certain Member States–Large Civil Aircraft*), Report of the Panel, adopted on 1 June 2011, WT/DS316/R, para. 1.13; *United States – Measures Affecting Trade in Large Civil Aircraft* (hereinafter: *US–Large Civil Aircraft (2nd complaint)*), Report of the Panel, adopted on 23 March 2012, WT/DS353/R, para. 1.15; *EC–Bananas III*, Recourse to Article 21.5 (US), Report of the Panel, adopted on 22 December 2008, WT/DS27/R, para. 1.11; *United States – Continued Existence and Application of Zeroing Methodology* (hereinafter: *US–Continued Zeroing)*, Report of the Panel, adopted on 19 February 2009, WT/DS350/R, para. 1.9; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* (hereinafter: *US–Zeroing (EC)*), Recourse to Article 21.5–EC*,* Report of the Panel, adopted on 11 June

dures do not appear to prohibit oral presentations by *amici curiae*.[33] However, given the delicacy of the issue in WTO dispute settlement, it current-

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2009, WT/DS294/R; *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R, paras. 1-18-1.19, 1.51; *United States – Measures Relating to Zeroing and Sunset Reviews* (hereinafter: *US–Zeroing (Japan)*), Recourse to Article 21.5 (Japan), Report of the Panel, adopted on 31 August 2009, WT/DS322/R, para. 1.6; *EC–IT Products*, Reports of the Panesl, adopted on 21 September 2010, WT/DS375/R, WT/DS376/R, WT/DS377/R, para. 1.11, WT/DS377/R; *Brazil – Measures Affecting Imports of Retreaded Tyres* (hereinafter: *Brazil–Retreaded Tyres*), Report of the Panel, adopted on 17 December 2007, WT/DS332/R, para. 1.9 (Unsuccessful request by CIEL to webcast first substantive meeting due to parties' dissent). See also L. Ehring, *Public access to dispute settlement hearings in the World Trade Organization*, 11 Journal of International Economic Law (2008), pp. 1-14. Panels regard the parties' request for open hearings as a waiver of the confidentiality obligation of Article 18(2) DSU with respect to the information shared by the parties at the hearing. The confidentiality rights of third parties who disagree with opening the hearings are protected by the disconnection of the transmission of the hearing broadcast for the duration of their statements.

The Appellate Body in more than 10 cases since 2008 has waived the confidentiality of hearings prescribed by Article 17(10) DSU upon request from the parties on the condition 'that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process.' *EC and Certain Member States–Large Civil Aircraft,* Report of the Appellate Body, adopted on 1 June 2011, WT/DS316/AB/R, p. 14, para. 22 and Annex IV; *Canada/US–Continued Suspension*, Reports of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, para. 32, Annex IV; *EC–Bananas III*, Recourse to Article 21.5 (Ecuador), Report of the Appellate Body, adopted on 11 December 2008, WT/DS27/AB/R; *EC– Bananas III,* Recourse to Article 21.5 (US), Report of the Appellate Body adopted on 22 December 2008, WT/DS27/AB/R, para. 28, Annex IV; *US–Continued Zeroing*, Report of the Appellate Body, adopted on 19 February 2009, WT/DS350/AB/R, para. 9, Annex III; *US–Zeroing (EC)*, Recourse to Article 21.5 (EC)*,* Report of the Appellate Body, adopted on 11 June 2009, WT/DS294/AB/R, para. 14, Annex III; *US–Zeroing (Japan)*, Recourse to Article 21.5 (Japan), Report of the Appellate Body, adopted on 31 August 2009, WT/DS322/AB/R, para. 18, Annex II; *Australia–Apples*, Report of the Appellate Body, adopted on 17 December 2010, WT/DS367/AB/R, para. 9, Annex III. Rule 27 Working Procedures for Appellate Review contemplates as participants in hearings 'all parties to the dispute, participants, third parties and third participants.' The Appellate Body has granted requests by WTO states parties to attend appeal hearings as passive observers if the requesting state appeared as third participant in the panel proceedings and the parties do not object to the participation. *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R.

ly seems unlikely that the parties or the adjudicating bodies would be willing to agree to oral presentations by *amici curiae*. The WTO panels and Appellate Body permit both the submission of individual and joint *amicus curiae* briefs, as well as the adoption of full or parts of *amicus curiae* submissions by one of the parties to a case.

VII. Investor-state arbitration

Amici curiae in investment arbitration are also limited to written participation, although *amicus curiae* petitioners routinely request leave to make oral submissions and obtain access to case documents.[34] Existing regulations on *amicus curiae* address largely written submissions.[35] The ICSID and the UNCITRAL Arbitration Rules establish a clear presumption in

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33 Section 27 Appellate Body Working Procedures regulates hearings. With respect to oral presentations, Section 27(3)(c) mentions that third parties may present oral submissions after having notified their intention to do so and if this accords with 'the requirements of due process.'

34 For many, *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, paras. 5, 7; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amicus curiae*, 17 October 2001, para. 1; *Suez/Vivendi v. Argentina*, Order in Response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007, para. 1; *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25, para. 14; *Piero Foresti v. South Africa*, Letter from Secretariat to the Applicants, 5 October, 2009, ICSID Case No. ARB(AF)/07/01, para. 4; *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.1.5. In NAFTA-administered arbitrations, access to document requests are rare given the practice of publication of case materials by the parties. Recent *amicus curiae* petitions have only requested leave to file written submissions, an acknowledgment of the unlikelihood of being granted leave to file oral submissions. See *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 3.22; *Glamis v. USA*, Quechan Indian Nation Application for leave to file a non-party submission, 19 August 2005.

35 See FTC Statement; Rule 37(2) ICSID Arbitration Rules; Article 4(1) UNCITRAL Rules on Transparency; *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008; *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, Application by CIEL et al., 2 March 2011 and Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12; *UPS v. Canada*, Direction of the tribunal on the participation of *amici curiae*, 1 August 2003, para. 3; *Merrill v. Canada*, Letter, 31 July 2008.

favour of privacy of hearings and subject the decision over attendees and participants in hearings to parties' consent.[36] Given that such consent has regularly been denied, *amici curiae* have not been admitted to oral hearings in UNCITRAL arbitrations.[37] The UNCITRAL Rules on Transparency in Article 6 establish a general publicity of hearings, but Article 4 codifies the current *amicus* practice by regulating *amicus curiae* participation purely as written participation.[38] The ICSID Arbitration Rules are less limitative. In the 2006 reform of the ICSID Arbitration Rules, the consensuality requirement in Rule 32(2) was transformed to a veto right of each party against the tribunal's decision to admit additional participants to the hearing.[39] This rule change has not had any practical effect given that usually the party against whose case the *amicus curiae* seeks to argue explic-

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36 Article 28(3) of the 2010 and 2013 UNCITRAL Arbitration Rules maintains the strict presumption in favour of privacy of hearings found in Article 25(4) of the 1979 UNCITRAL Arbitration Rules. Thereafter, hearings are to be held *in camera* 'unless the parties agree otherwise.'

37 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, paras. 23, 41-42; *UPS v. Canada*, Decision of the tribunal on petition for intervention and participation as *amici curiae*, 17 October 2001, para. 67; *Chevron/Texaco v. Ecuador,* Procedural Order No. 8, 18 April 2011, PCA CASE N° 2009-23, para. 5; *Eli Lilly v. Canada*, Procedural Order No. 5, 29 April 2016, Case No. UNCT/14/2, para. 12 (*'Amici* are to be treated like any other members of the public and will not be given access to the hearing room.').

38 This does not exclude oral submissions by *amici curiae* in general. Article 1(5) explicitly condones further measures: 'These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example, by accepting submissions from third persons.' CETA in Articles 43 – 46 of Annex 29-A also foresees only written *amicus curiae* participation.

39 New Rule 32(2): 'Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. ...' According to *Viñuales*, 'one could argue that revised Article 32(2) is more restrictive than before, for it explicitly reserves "the protection of proprietary or privileged information" which, in all likelihood, under the former rule would have fallen within the tribunal's jurisdiction.' See J. Viñuales*, Amicus intervention in investor-state arbitration*, 61 Dispute Resolution Journal (2006-2007), p. 76.

itly objects to its participation.[40] As in the WTO, there is a trend in investor-state arbitrations to open hearings to the general public.[41] This shows that the parties' objections to oral *amicus curiae* participation are not grounded necessarily in concerns over confidentiality, but may stem from concerns over a disruption of the proceedings, undue increased substantive burden or exploding costs. In *Biwater v. Tanzania*, the tribunal reserved the right to engage in written communication with the *amici curiae*.[42] This approach seems sensible because it allows tribunals to clarify *amici curiae's* submissions, if necessary, while minimizing additional costs and delay incurred by oral participation.

VIII. Comparative Analysis

Amicus curiae participation in international dispute settlement equals written participation. Oral *amicus curiae* submissions are rare before the international courts and tribunals reviewed. Before all international courts and tribunals, the parties have been allowed to annex *amicus curiae* submissions as their own. This practice accords with the parties' rights across all international courts and tribunals to submit whatever evidence they consider relevant to their case. With the exception of the WTO, this happens rarely. In that case, the submission becomes part of the party submission.

Is the current focus on written submissions justified? Oral submissions may be useful where the information shared by the *amicus* is highly relevant, (technically) complex or the judges on the bench disagree on the issue commented on and a questioning of the *amicus curiae* promises to be

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40 E.g. *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 46-48.

41 E.g. *Glamis v. USA*, Award, 8 June 2009, para. 290 and Procedural Order No. 11; *Railroad Development Corporation v. Republic of Guatemala*, Award, 29 June 2010, ICSID Case No. ARB/07/23, para. 3; *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12, Sec. (iv). See also J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), pp. 1360-1362.

42 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 71 ('[T]he Arbitral Tribunal reserves the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist it in better understanding the Petitioners' position, whether before or after the hearing.').

of additional value compared to a supplemental written submission. In all other cases, international courts and tribunals must carefully consider if the oral submission does not place an unjustifiable burden on the parties in terms of time and cost as they may have to address further arguments and pay for extended hearings or post-hearing submissions. Limitation to written submissions does not mean that the international court or tribunal cannot engage in a dialogue with the *amicus curiae* by way of requesting additional written submissions or asking questions for clarification by written procedure.

Determination of the form of a written submission lies in the discretion of the court or tribunal. In practice, *amicus curiae* submissions are usually accepted as requested. A case where the tribunal exercised its discretion is *Biwater v. Tanzania* (see Chapter 5). The existing regulations contemplate *amicus curiae* submissions as a one-time event, and repeat submissions have been authorized very rarely.[43] Accordingly, *amici curiae* are generally not given leave to file additional or supplemental submissions, though this has happened in special circumstances. Courts and tribunals very rarely request additional information. This is even the case where access to party submissions is given after the *amicus curiae* brief has been filed. The IACtHR has adopted a more lenient approach and permits amendments to submissions.

The following factors have influenced courts' decisions on the modalities of *amicus curiae* participation:

1. Confidential and/or private nature of the dispute settlement mechanism

Unless otherwise provided, *amici curiae* do not enjoy any special legal status and are therefore subject to the general rules governing publicity of hearings and confidentiality. Especially dispute resolution mechanisms in

43 No. 9 FTC Statement: 'The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.' In *Bear Creek Mining v. Peru*, *amicus curiae* DHUMA was authorized during the hearing to make another written submission after the hearing. *Bear Creek Mining v. Peru*, Procedural Order No. 10, 15 September 2016, ICSID Case No. ARB/14/21, para. 2.1.3; *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 38 (The tribunal restricted submissions to jurisdictional questions, but noted that if the dispute proceeded to the merits, the *amicus* could file another application.).

the areas of trade and investment law operate under strict rules on confidentiality which may be difficult or impossible to bypass.[44]

2. Regulatory reasons

Procedural rules concerning oral proceedings may limit the circle of those able to make oral submissions. This is difficult to overcome where the rule is contained in a statute as opposed to rules of procedure, which can usually be changed by the court.

3. Efficiency, costs and control

The financial and time-related burden of oral *amicus curiae* participation may be considered to outweigh any possible benefits oral participation might bring. The argument that oral *amicus curiae* participation should depend on the parties' agreement is not easy to dispel, unless the additional financial burden incurred by oral *amicus curiae* participation is not borne by the parties alone.

4. Personal views of judges

How *amici curiae* may present its views depends also on the judges' perception of a specific *amicus curiae* and of *amicus curiae* participation in general.

B. Recorded participation

In accordance with the permission to accept their submissions in Article 34(2) ICJ Statute and Article 43(3) ICJ Rules in connection with Article 69(2) ICJ Rules, the ICJ records the participation of intergovernmental or-

44 Nos. 2, 3 WTO Panel Working Procedures, Appendix 3 to the DSU and Articles 12(1), 14, 17(10) DSU.

ganisations in contentious and advisory proceedings.[45] In *Nuclear Weapons*, the ICJ decided not to include in the formal record the many *amicus curiae* submissions received from private entities, a view which it later enshrined in Practice Direction XII. The same approach has been adopted by the ITLOS and the Seabed Disputes Chamber in advisory proceedings. In contentious proceedings, the ITLOS does not to include a request for participation as *amicus curiae* in the case file. Unlike in advisory proceedings, it neither posts them on its webpage.[46] Until the 2000, the IACtHR did not include *amicus curiae* submissions in the case records, despite listing the names of the *amici curiae* in its judgments and reprinting their submissions in Series B of its official publication.[47] The IACtHR changed its approach in *Barrios Altos v. Peru* upon receiving an *amicus curiae* submission from the Peruvian constitutional organ in charge of human rights supervision. Since then and without official explanation, it has accepted some *amicus curiae* submissions into the case records.[48] In the ECtHR, every accepted *amicus curiae* submission is formally noted and

45 G. Schwarzenberger, *International law as applied by international courts and tribunals, Vol. 4: international judicial law*, London 1986, p. 638.

46 *Arctic Sunrise Case* (Provisional Measures), Order of 22 November 2013, ITLOS Case No. 22, para. 18.

47 E.g. *Yatama v. Nicaragua*, Judgment of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 127. In *Loayza Tamaro v. Peru*, it stated that *amicus curiae* submissions did not form part of the formal case file. *Loayza Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33. According to *Lindblom*, this proceeding may give the IACtHR greater freedom in the assessment of briefs, see A. Lindblom, supra note 24. See also C. Moyer, *The role of "amicus curiae" in the Inter-American Court of Human Rights* in: *la corte interamericana de derechos humanos, estudios y documentos*, 1999, p. 121, FN 8. Briefs the court finds not useful are not mentioned in its decisions. The IACtHR noted this in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219. But see also *López Mendoza v. Venezuela*, Judgment of 1 September 2011 (Merits, Reparations and Costs), IACtHR Series C No. 233, FN 6 ('Ademas de los *amicus curiae*, el Tribunal recibio otros escritos que no tenian ninguna utilidad para el presente case y, por ello, no son admitidos ni mencionados en la presente Sentencia.').

48 *Barrios Altos et al. v. Peru*, Judgment of 3 September 2001 (Interpretation of the Judgment on the Merits), IACtHR Series C No. 83; *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197. The first case, in which the IACtHR summarised *amicus curiae* briefs was *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR

recorded in judgments. Submissions form part of the case file. The ACtHPR mentions requests for leave in its judgments and orders, but the Practice Directions are silent on whether submissions are added to the formal case record. WTO panels and the Appellate Body, if at all, mention *amicus curiae* submissions in passing in judgments. Only the panel in *Australia–Salmon (Article 21(5))* notified the parties of having added the letter from a 'group of concerned fishermen' to the case record.[49] Submissions are not retrievable from the website. *Amicus curiae* submissions to investment tribunals are usually filed in the case record, but they become formally relevant only upon being admitted to the proceedings. In *Eli Lilly v. Canada*, the tribunal decided that supporting documents submitted by *amici curiae* would be admitted into the record if the parties wished to rely on them and it established a 24-hour in advance notification obligation with respect to unrecorded supporting documents, which included transmission of the respective document to the other party and tribunal.[50]

C. Formalization of participation

The establishment of formal requirements for written (and oral) submissions can facilitate the international court or tribunal's task of protecting the parties' procedural rights and the integrity of the proceedings. Standardized formal procedures contribute to the manageability of *amici curiae* in international courts and tribunals. Accordingly, many international courts and tribunals have established formal rules for *amicus curiae* participation.

Series C No. 209. One reason for the court's reluctance to summarize submissions may be the large number of briefs received. Prior to this change, *amicus curiae* briefs were not formally added to the case file and briefs were also not cited, see F. Rivera Juaristi, *The "amicus curiae" in the Inter-American Court of Human Rights (1982 – 2013)*, in: Y. Haeck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, p. 128.

49 *Australia–Salmon (Article 21(5))*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 7.8.

50 *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, Case No. UNCT/14/2, p. 3. The respondent had requested that all documents referenced by the *amici curiae* be added to the record for the tribunal to 'properly assess [their] weight' and to show that it took the submissions seriously.

I. Form of written submissions

Based on a review of legal provisions and case law, in addition to timing which already has been addressed in Chapter 5, the most important formal requirements for written *amicus* submissions are length (1.), language (2.) and authentification (3.). Courts react differently to failure to comply with these requirements (4.).

1. Length

Limitations on the length of *amicus curiae* briefs can help to ensure that the amount of material submitted in addition to party (and third party) submissions remains manageable and safeguards the efficiency of the proceedings. Overly long briefs may not be read by the court, simply, because judges lack the time to do so. This appears to be a structural defect of *amicus curiae* practice before US courts. Limitations on the length of *amicus curiae* briefs also serve to alleviate concerns that they constitute additional memoranda. Still, *amici curiae* need enough space to develop their arguments to make a useful contribution. How have international courts and tribunals addressed this tension?

The ICJ, the ITLOS, the IACtHR and the ECtHR do not limit the length of written *amicus curiae* submissions. This may cause administrative problems in the ECtHR and the IACtHR which both often admit dozens of *amici* in one case.[51] Given the strict regulation of other formal matters, the approach seems deliberate. The length of submissions does not seem to be a matter of concern before WTO panels and the Appellate Body. Although not binding, most *amicus curiae* submissions do not exceed the 20-page length prescribed for submissions including appendices by the *EC–Asbestos* Additional Procedure.[52] The FTC Statement mirrors the *EC–As-*

51 Both courts have received individual submissions exceeding 50 pages. See, for example, Amnesty International's submission in *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion No. OC-9/87 of 6 October 1987, IACtHR Series A No. 9, cited by D. Zagorac, *International courts and compliance bodies: the experience of Amnesty International*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 31.

52 No. 7(b) *EC–Asbestos* Additional Procedure.

bestos Additional Procedure.[53] NAFTA and some other investment tribunals limit the size of submissions to 20 typed pages, including appendices.[54] The latter do not include exhibits and legal authorities.[55] This approach seems to work well in practice. Rule 37(2) ICSID Arbitration Rules does not establish a page limitation. ICSID tribunals have set different page limitations, ranging from 20 typed pages for application and submission together to 50 pages double-spaced for a joint submission.[56] Article 4(4)(b) UNCITRAL Rules on Transparency places the length to the tribunal's discretion.

2. Language

The ICJ has not adopted any specific rules regarding the language of submissions. For submissions in advisory proceedings, the ICJ appears to rely on the rules for party submissions through Article 68 ICJ Statute. Accordingly, submissions must be made in the ICJ's official languages French or English, unless the parties agree that only one of these languages shall be

53 Sec. B, para. 3(b) FTC Statement: 'The submission filed by a non-disputing party will: … (b) be concise, and in no case longer than 20 typed pages, including any appendices.' Identical, *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008.

54 *UPS v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, para. 8. This page limit was indicated by the tribunal prior to issuance of the FTC Statement.

55 *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, Case No. UNCT/14/2, p. 3 ('An alternative interpretation would unreasonably restrict non-disputing parties from relying on public information.').

56 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID news release (The application for admission and the submission itself shall 'in no case exceed 20 pages.'). The tribunal in *Biwater v. Tanzania* ordered several *amicus curiae* applicants to file a joint initial written submission limited to a maximum of 50 pages (double-spaced). This rather generous length is likely due to the prescribed bundling of the submissions of several *amici curiae*. See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 60. See also *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 27 (maximum 30 pages, double-spaced, fontsize 12).

the language of the proceedings.[57] Language of submissions has rarely been problematic. In *Interpretation of the Agreement between the WHO and Egypt of 1951*, the ICJ rejected the written statement by Iraq because it was submitted in Arabic without an accompanying translation. The ICJ accepted the statement after it had been translated into one of its official languages at the expense of the submitter even though by then the deadline for submissions had expired.[58]

Pursuant to Article 85 ITLOS Rules, it is possible to make oral statements and submissions in another language by leave of the tribunal. So far, this issue has not become problematic. It is to be expected that the tribunal and chambers would adopt an approach similar to that of the ICJ.[59]

Rule 44(6) ECtHR Rules determines that '[w]ritten comments submitted under this Rule shall be drafted in one of the official languages as provided in Rule 34 § 4.'[60] Rule 34(4) orders the application to *amicus curiae* of paras. (a) – (c) which govern the language of party submissions. Thereafter, all communications, oral and written submissions shall be made in one of the ECtHR's official languages English and French.[61] The President of the Court may grant *amicus curiae* leave to file a submission in its own language. In that case, it must file a translation of the written submission into English or French within a time-limit established by the President of the Court, or bear the expenses of a translation arranged by the

57 Article 39(1), (2) ICJ Statute. According to Article 39(3), the ICJ 'shall, at the request of any party, authorize a language other than French or English to be used by that party.' In that case, Articles 51, 70 and 71 ICJ Rules require certified translations of pleadings, documents, statements or speeches into one of the ICJ's official languages.

58 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Rep. 1980, Part IV: Correspondence, p. 327. See also *Certain Expenses of the United Nations (Article 17(2) of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Rep. 1962. The ICJ rejected a submission by the USSR and Byelorussian USSR for not complying with the language requirement, but later accepted a translated version of the earlier submission.

59 Articles 43, 64, 85 ITLOS Rules. The rules concerning translation costs address only the parties.

60 This regulation follows the earlier Rule 61(5) of the 1998 ECtHR Rules: 'Written comments submitted in accordance with this Rule shall be submitted in one of the official languages, save where leave to use another language has been granted under Rule 34 § 4.' The changes to the norm in this regard were only semantic.

61 Rule 34(4) (a) and (1) ECtHR Rules. See also *Mahoney* with regard to the old regulation in Rule 27(4) which failed to address the distribution of translation costs. P. Mahoney, supra note 6, p. 144.

Registrar. Oral submissions in another language can be interpreted at the expense of the *amicus curiae*. The ECtHR may also order the translation or summary translation of any documents annexed to the written submission.[62]

Article 44(1) IACtHR Rules provides that *amicus curiae* briefs must be in the working language of the case, which the parties agree on at the beginning of the proceedings.[63] This approach is stricter than the IACtHR's general approach to language issues. Article 22(4) IACtHR Rules allows the IACtHR to authorize 'any person appearing before it to use his or her own language if he or she does not have sufficient knowledge of the working languages.' This indicates that the IACtHR seeks avoiding procedural burdens and additional cost caused by *amicus curiae* submissions. The IACtHR strictly enforces its new regulation.[64] The language requirement has been somewhat of an issue. Some English NGOs struggle to meet submission deadlines in cases where Spanish is the procedural language.[65]

The language of submissions is not an issue before WTO panels and the Appellate Body. Their procedural rules do not mention language requirements. So far, all *amicus curiae* submissions before the WTO adjudicating bodies were made in English.

The language of *amicus curiae* submissions does not appear to have raised any concerns in investment arbitration either, although the language

62 Article 34(4) (b), (c) ECtHR Rules.

63 Article 22(3) IACtHR Rules. Article 41 of the February 2009 IACtHR Rules was silent on the language of *amicus curiae* briefs.

64 Prior to this regulation, in several cases, the IACtHR accepted submissions by *amici curiae* in its official languages, even if they were not in the language of the proceedings. See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), Judgment of 31 August 2001, IACtHR Series C No. 79, pp. 8, 11, paras. 41, 61; *Caso Reverón Trujillo v. Venezuela* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 30 June 2009, IACtHR Series C No. 197, p. 4, para. 9 (The Law Faculty of the University of Essex submitted a Spanish version of the English submission several days later); *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219, p. 6, para. 8.

65 *Fontevecchia y d'Amico v. Argentina*, Judgment of 29 November 2011, IACtHR Series C No. 238, p. 2; *Vélez Restrepo and Family v. Colombia*, Judgment of 3 September 2012 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 248, paras. 67-68; *Veliz Franco y Otros v. Guatemala*, Judgment of 19 May 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 277, para 64.

of the proceedings is primarily a matter of party agreement and therefore not always predictable.[66] Petitioners generally make submissions in the language of the arbitration, as required by No. 2(i) FTC Statement for the request for leave which includes the actual submission. Such language requirement can also be read into Rule 37(2) ICSID Arbitration Rules which requires that '[t]he Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding.'[67] The issue is of practical relevance in multi-language arbitrations, where some tribunals require parties to make submissions in all languages, whereas others consider it sufficient if submissions are made in one of the languages.[68] Article 4(2) UNCITRAL Rules on Transparency favours the latter approach for *amicus curiae* briefs, which is appropriate to not overburden little-resourced *amici curiae*.

3. Authentification

Article 105(2)(a) ICJ Rules establishes that the Court, or its President, determine the form in which comments permitted under Article 66(2) ICJ Statute shall be received. The ICJ requires signature of the submission for proper authentification.[69] The ICJ Statute and Rules do not prescribe such a requirement for written statements under Article 34(2) ICJ Statute, but presumably the Court will apply standards similar to those it has estab-

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66 See Rule 22(1) ICSID Arbitration Rules; Article 17(1) of the 1976 UNCITRAL Arbitration Rules; Article 19 of the 2010 UNCITRAL Arbitration Rules; Article 19 of the 2013 UNCITRAL Arbitration Rules.

67 The UNCITRAL Rules on Transparency adopt both of these considerations in Article 4(2) and (5).

68 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae,* 2 February 2011, ICSID Case No. ARB/09/12; *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organisations For Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 27 (both languages).

69 The Registry noted the lack of signature of the submission from the International League for the Rights of Man. See No. 67 (The Deputy-Registrar to Mr. Asher Lans, Counsel to the International League for the Rights of Man), *International Status of South West Africa*, Advisory Opinion of 11 July 1950, Part III: Correspondence, ICJ Rep. 1950, pp. 320, 346.

lished for intervention and party submissions.[70] Submissions must be signed and dated and applications must *inter alia* also state the name of the agent, specify the case they relate to and enclose the supporting documentation that is to be indexed.

Neither Article 84(1) nor Article 133(3) ITLOS Rules establish such a requirement. Interveners and parties pursuant to Articles 99(2) and 54(3) ITLOS Rules respectively must sign and date submissions through a 'duly authorized person' and 'state the name and address of an agent as well as specify the case to which they relate' in contentious proceedings. The Rules further determine that an application to institute a case 'shall contain a list of the documents in support,' with copies of the documents attached. The requirement can be found applicable in advisory proceedings through Article 130(1) ITLOS Rules. The issue has not become problematic in either the ICJ or the ITLOS.

The ECtHR Rules do not specify the form of *amicus curiae* submissions. This is surprising given the otherwise very detailed nature of the provision.

The most detailed regulation of this aspect is contained in the IACtHR Rules. Rule 44(1) determines that briefs may be submitted to the court 'together with its annexes, by any of the means established in Article 28(1) of these Rules, in the working language of the case and bearing the names and signatures of its authors.'[71] Rule 44(2) establishes that briefs may be presented by different means, including electronic mail. Electronic submission of briefs has become common. If not signed or if submitted without annexes, the hard copy original and supporting documentation must be received by the tribunal within seven days.[72] Otherwise, the brief 'shall be archived without further processing.' Briefs tend to be signed by a repre-

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70 Intervention: Article 81(2) and (3) ICJ Rules. Party pleadings: Article 52 ICJ Rules.

71 Article 28(1) IACtHR Rules: 'All briefs addressed to the Court may be presented in person or by courier, facsimile, post, or electronic mail, and must be signed in order to ensure their authenticity. If a brief is transmitted to the Court by electronic means and has not been subscribed, or in the case that a brief is not accompanied by its annexes, the original documents or missing annexes must be received by the Tribunal within a non-renewable term of 21 days from the expiration of the deadline established for the submission of that brief.' The earlier Article 41 of the February 2009 IACtHR Rules did not contain such a requirement.

72 E.g. *Caso Claude Reyes and others v. Chile*, Judgment of 19 September 2006, IACtHR Series C No. 151, p. 5, para. 27; *Caso Tristan Donoso v. Panama*, Judg-

sentative of one of the submitting organizations or by everyone who (co-)authored or endorsed the submission. The IACtHR seeks confirmation of the endorsement in joint submissions and takes formal note if it is withheld.[73]

Section B para. 3(a) FTC Statement, using the same wording as No. 7(a) *EC–Asbestos* Additional Procedure, requires that *amici curiae* must ensure that a written submission is 'dated and signed by the person filing the submission.' This requirement was adopted by several tribunals constituted under other investment treaties in their orders on *amicus curiae*, with some explicitly stating that signature served to verify the content of the submission.[74] It is also included in Article 4(4)(c) UNCITRAL Rules on Transparency, which additionally requires an *amicus curiae* to 'set out a precise statement' of its position on the issues, which is laudable in terms of efficiency.

All of the international courts and tribunals reviewed require the identification and authentification of the authors of *amicus curiae* briefs, elements that are important for the allocation of responsibility and the verification of the origin, authorship and content of a submission. In investment arbitration, the applicable regulations often establish additional disclosure requirements (see Chapter 5). For instance, the UNCITRAL Rules on Transparency in addition prescribe detailed disclosure requirements concerning the *amicus'* membership and legal status, its objects and structure, its connections with the parties, the financial or other assistance it has received in preparing the submission and any general substantial assistance in the two years prior to the submission. These requirements are reminiscent of the disclosure requirements in Rule 37(6) US Supreme Court

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ment of 27 January 2009, IACtHR Series C No. 193, p. 4, para. 10. In the latter case, the court further required that the individual *amici curiae* submit a copy of his identification documents. Critical, F. Rivera Juaristi, supra note 48, p. 120 (He questions whether all signatories of the brief have an identification obligation or only those who wrote it.).

73 *Rosendo Radilla Pacheco v. Mexico*, Judgment of 23 November 2009, IACtHR Series C No. 209, para. 13, FN 11 (The IACtHR notes that 2 of the 14 *amici curiae* listed did not confirm their adherence to the brief.).

74 *Pac Rim v. El Salvador*, ICSID News Release, 2 February 2011, ICSID Case No. ARB/09/12; *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.3(a) and (c).

Rules.[75] The other international courts and tribunals should consider introducing similar requirements to identify and manage affiliations with the parties when reading a submission. Inclusion of such information in the submission itself may also be useful where a request for leave procedure exists to ensure that any change in the time between the grant of leave and the actual submission (if not simultaneous) is recorded.

4. Failure to comply

There are three possible reactions by a court to a formally flawed *amicus curiae* submission: ignorance of the flaw, granting of an opportunity to heal the flaw and rejection of the submission. Consideration of the effects of procedural flaws of *amicus curiae* submissions is somewhat impaired by their sporadic recording in judgments and decisions.

The ICJ routinely accepts late submissions by states and intergovernmental organizations in advisory proceedings if they are submitted before the closure of the proceedings (see Article 74(3) ICJ Rules).[76]

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75 They require disclosure in the first footnote on the first page of the text of the submission whether counsel of a party authored or provided monetary contribution to the preparation of a brief, as well as identification of every person or entity other than the *amicus curiae*, its members or its counsel who did.

76 After this stage, the parties cannot comment on submissions. Cases in which the ICJ accepted late submissions include *Kosovo*, Order of 17 October 2008, ICJ Rep. 2008 (late submission by Venezuela); *Certain Expenses of the United Nations (Article 17(2) of the Charter),* Advisory Opinion, 20 July 1962 (the ICJ accepted late written submissions until the hearing); *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, 18 August 1972 (Extension of time limits upon request by the UN Secretary-General on behalf of the concerned staff member). However, the ICJ refused to accept the late submission by the International League for the Rights of Man, which it received one month late, but before the opening of the oral proceedings, possibly, because of additional formal and substantive defects. The submission was not signed and addressed issues that the court had excluded. See *International Status of South West Africa*, Advisory Opinion, No. 10 (Letter by R. Delson, League for the Rights of Man (hereinafter: ILRM) to the Registrar), No. 18 (Letter from the Registrar to Mr. R. Delson, ILRM), No. 61 (Mr. A. Lans, Counsel to the ILRM to the Registrar), Nos. 66-67 (Deputy-Registrar to Mr. A. Lans), Correspondence, ICJ Rep. 1950, pp. 324,327, 343-344, 346. ITLOS/Seabed Disputes Chamber: *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 16 (Writ-

The ECtHR rarely mentions the rejection of briefs for formal reasons even though Rule 44(4) ECtHR Rules determines that failure to comply with a condition established by the President of the Chamber allows the President to 'decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.'[77]

Article 44(2) IACtHR Rules regulates consequences of briefs that are filed electronically and without signature, or without the necessary annexes in that it allows for a correction of the error to be received within seven days before the briefs are archived without further processing (see Chapter 5).[78] The IACtHR Rules are silent on the consequences of other formal defects. The rejection of briefs submitted in the 'wrong' language indicates that the court also refuses submissions where such a formal defect is not corrected within the deadline. The IACtHR strictly enforces this rule (see Chapter 5).

WTO panels and the Appellate Body reject submissions that are received after the closing of the proceedings. Panels and the Appellate Body tend to not disclose the reason for the rejection of a brief for reasons other than untimeliness. Very often it is only stated that the brief was not useful in the determination of the case.

In investment arbitration, violation of formal requirements and late submissions are rare. Late submissions have been accepted with the parties' consent (see Chapter 5).[79]

II. Comparative analysis

For all international courts and tribunals, timing appears to be the most relevant formal concern with respect to the participation of *amicus curiae*

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ten submission by the UNEP received more than one month after expiry of the (extended) deadline).

77 In *Neulinger and Shuruk*, for example, the submission of the applicant's father whose custody was at issue was rejected for untimeliness and other non-specified formal flaws. See *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, 6 July 2010, ECHR 2010.

78 *Caso Tristan Donoso v. Panama*, Judgment of 27 January 2009, IACtHR Series C No. 193, p. 4, para. 10 (*Amicus curiae* submission was rejected because the original submission was never filed with the court.).

79 *Merrill v. Canada*, Award, 31 March 2010, para. 23.

(see Chapter 5). The importance accorded to other requirements varies between international courts and tribunals.[80]

There is a high degree of homogeneity with respect to language requirements. The language of briefs is generally determined by the language of the proceedings and usually coincides with the court or tribunal's official language(s). This has not been problematic in practice, though strict language requirements may constitute a severe barrier for financially-challenged *amici curiae*. The ECtHR and the ICJ are the only courts which explicitly foresee that the registry may translate a submission at the expense of the *amicus curiae*.

In contrast, the requirements for length, authorship and verification of submissions vary between inter-state and human rights courts, on the one hand, and investment tribunals and the WTO Appellate Body, on the other. The latter seek to control the length of submissions, but no case was found where a submission was rejected for excessive length. The overall amount of submissions does not explain the different approaches. The human rights courts receive the largest amount of submissions on average per case and continue to not limit the length of submissions. Efforts to regulate this aspect are likely to stem from an emphasis on speedy proceedings in the WTO and in investment arbitration, as well as attempts to minimize additional burdens (and expenses) for the parties.[81] Page limits are useful for reasons of efficiency and to enhance the precision and pertinence of briefs. Rules can be formulated with a sufficient degree of flexibility to allow for longer briefs in situations where a court considers it appropriate.

Only the IACtHR Rules establish concrete consequences for the breach of certain formal requirements of briefs. All other international courts and tribunals tend to deal with formal defects on a case-by-case basis. The most often mentioned formal flaw in case law is untimeliness, which tends to lead to the exclusion of a brief (see Chapter 5). However, the easiest manner for a court to deal with deficiencies is to simply ignore the submission.

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80 International courts and tribunals attribute little to no significance to formal requirements of solicited submissions with the exception of timing. This is logical given that the soliciting court requests information from an organization it has chosen itself.

81 See Article 3(3) DSU.

D. Substantive requirements and the content of submissions

Substantive requirements are necessary to ensure that an *amicus curiae* brief is meaningful and complies with the courts' governing laws, particularly those concerning the issues a court may consider. This limitation ensures that the court will not act *ultra vires* and produce a valid and enforceable final decision.[82] An *amicus curiae* brief that fulfills these requirements can certainly help an international court or tribunal in its deliberations. Still, there is an undeniable friction with the adversarial process, which as a matter of principle requires international courts and tribunals to

82 The principle *ne ultra petita* prohibits a court to deviate from its mandate quantitatively or qualitatively by deciding on another dispute or on matters not requested by the parties. The principle is enshrined for some international courts and tribunals in their respective instruments, but it also has attained the status of customary international law. See M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 120-121. See also Article 18 IUSCT, Article 7(1) DSU; R. Kolb, *General principles of procedural law*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed, Oxford 2012, p. 894, para. 34; M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2nd Ed., Oxford 2010, p. 28; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, ICJ Rep. 1991, p. 69, para. 47 ('The Court has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.'). Critical, H. Thirlway, *Procedural law and the International Court of Justice*, in: V. Lowe/M. Fitzmaurice-Lachs/R. Jennings (Eds.), *Fifty years of the International Court of Justice: essays in honour of Robert Jennings*, Cambridge 1996, p. 402. See also *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, 18 August 1972, ICJ Rep. 1972, p. 46; E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), pp. 502-503; J. Lew, *Iura novit curia and due process*, in: L. Lévy/S. Lazareff (Eds.), *Liber amicorum en l'honneur de Serge Lazareff*, Paris 2011, p. 412. See Article V(1)(c) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force on 7 June 1959, Reg. No. 4739, 330 UNTS (1959), p. 3 (hereinafter: NY Convention). The provision can be divided into two subsections: (i) the award deals with a *difference* beyond the scope of the submission to arbitration (i.e., the arbitration agreement or clause); or (ii) the award *contains decisions on matters* beyond the scope of the submission to arbitration.

'assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute.'[83]

Submissions can address many different issues. For ease of analysis, the following types of information are distinguished: submissions on international law, including comparative analyses; submissions on the facts of the case, including national laws and comparative analyses of different national laws; submissions on the background and context of the case; submissions on the impact of a decision or specific implications of the case; and submissions applying the applicable law in the case to the facts.

There are two issues which require closer consideration: first, the relationship between fact submissions and the parties' prerogative over the submission of evidence in the adversarial process. Second, the extent to which an international court or tribunal may address questions raised by an *amicus curiae* that fall within its jurisdiction, but have not been addressed by the parties (yet). This concerns in particular reference by *amici curiae* to laws and arguments other than the treaty conferring jurisdiction on the international court or tribunal. This is typical for *amicus* briefs in WTO disputes and in investment arbitration, where many *amici* seek to promote the reconciliation of trade and investment agreements with international human rights, environmental or other laws.

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

Article 34(2) ICJ Statute and Article 84(2) ITLOS Rules envisage the submission of 'information relevant to cases before it' respectively. Neither the ICJ nor the ITLOS have delineated these terms in practice. Based on its ordinary meaning, the term 'information' indicates the communication of knowledge in an objective manner, especially if compared to the use of the term 'its observations' in Article 84(3) ITLOS Rules and Article 34(3) ICJ Statute in connection with Article 69(3) ICJ Rules. The latter involves an element of personal perception and judgment. *Chinkin* and *Mackenzie* argue that the term information is broad enough to encompass fact and le-

83 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, para. 48.

gal submissions.[84] It has been doubted that an international organization may present legal arguments or make political statements in light of its need to equally represent all of its members.[85]

The only textual limitation is that the information must be relevant to the pending case, which, as a minimum, requires that any submission must be within the scope of jurisdiction. Accordingly, in *Lockerbie* the ICJ limited the scope of permissible observations by the ICAO under Article 34(3) ICJ Statute to issues concerning admissibility and jurisdiction to account for the suspension of the merits proceedings.[86] In *Obligation to Negotiate Access to the Pacific Ocean*, the Registrar, in its notification to the OAS during the preliminary objections procedure in which Chile contested the Court's jurisdiction, clarified that any observations 'should be limited to the construction of the provisions of the Pact of Bogotá', which Bolivia relied on as the basis for jurisdiction.[87] The rules do not require that the

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84 C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, pp. 139-140.

85 L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), pp. 209, 213.

86 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya/United Kingdom) and (Libyan Arab Jamahiriya/United States of America)* (hereinafter: *Lockerbie Cases*), Decision on Request for the Indication of Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, p. 8, para. 14 and p. 119, para. 15. In *Aerial Incident of 3 July 1988*, the ICJ requested the ICAO to restrict submissions pursuant to Article 34(3) ICJ Statute to issues of jurisdiction. The ICAO, in its submission, clarified which set of rules of dispute resolution had been applied to the dispute before the ICAO Council, an aspect which was decisive for the ICJ's jurisdiction. Iran intended to refer the case as an appeal proceeding from the ICAO Council to the ICJ. The ICAO Secretary-General informed the ICJ of possible norms that could have been invoked by Iran and laid out the specific steps taken by the ICAO Council after Iran had called upon it on 3 July 1988. See *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Letter from the Secretary-General of the International Civil Aviation Organization to the Registrar of the International Court of Justice, Part IV Correspondence, pp. 618-619.

87 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, para. 7. See also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Carribean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, para. 6; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond*

information is relevant to the area of operation of the submitting organization.[88]

The ICJ has stressed in contentious proceedings that it is not limited to the arguments presented by the parties.[89] In *Nicaragua*, it held that information could come to it 'in ways and by means not contemplated by the Rules' and that it was neither 'solely dependent on the argument of the parties before it with respect to the law' nor 'in principle … bound to confine its consideration to the material formally submitted to it by the parties.'[90] *Chinkin* has warned that the permission of *amicus curiae* submissions in contentious ICJ proceedings 'could expand the ambit of the adjudication beyond that accepted by the parties, and force them to answer claims that they had not themselves raised.'[91] However, this does not seem to be a risk considering the ICJ's handling of intervention pursuant to Article 62 ICJ Statute. Like *amicus curiae* participation, intervention is incidental to existing proceedings. According to the ICJ, interveners cannot present a new case or require the ICJ to assert individual rights before the Court.[92] *Oellers-Frahm* argues an interest pursued by an intervener must have 'connectivity' to the matter before the Court. It is lacking if the determination of the intervener's interest is not necessary for the solution of the dispute.[93] This means that *amici curiae* should be able to point to arguments or laws not mentioned by the parties, as long as they are within the

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200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, 17 March 2016, para. 6.

88 C. Chinkin/R. Mackenzie, supra note 84, pp. 139-140.

89 B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, p. 299; *Corfu Channel Case*, Judgment (Merits), 9 April 1949, Diss. Op. Judge Winiarski, ICJ Rep. 1949, pp. 51-56.

90 *Nicaragua Case*, Judgment (Merits), 27 June 1986, ICJ Rep. 1986, p. 24, paras. 29-31.

91 C. Chinkin, *Third Parties in International Law*, Oxford 1993, p. 229.

92 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Application to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, pp. 133-134, paras. 97-98; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene (Phillippines), Judgment, 23 October 2001, ICJ Rep. 2001, p. 598, para. 60. See also C. Chinkin, *Article 62*, in: A. Zimmernann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed. Oxford 2012, para. 52.

93 K. Oellers-Frahm, *Die Intervention nach Art. 62 des Statuts des Internationalen Gerichtshofs: Überlegungen anlässlich der Entscheidung des Internationalen Gerichtshofs vom 14. April 1981 über die Intervention Maltas*, 41 Zeitschrift für

scope of jurisdiction of the case. This understanding accords with the word 'relevant' in Article 34(2) ICJ Statute.

In advisory proceedings, the ICJ Statute and the ITLOS Rules require that written statements be 'on the question', a clear pointer to the limits imposed by the courts' jurisdictions.[94] It could also be interpreted more narrowly to exclude all forms of contextual submissions. Such an interpretation would not accord with the current practice. In a few early opinions, the ICJ requested specific information from intergovernmental organizations. This practice has changed.[95] Today, intergovernmental organizations, which the Court assumes will make a useful submission, are invited without specification concerning the issues to comment on. The decision on what to include rests with the submitter as long as it is within the scope of the request. Newer practice even indicates that the Court no longer limits its submissions in advisory proceedings to legal considerations, though its jurisdiction in advisory proceedings is limited to legal considerations. In the *Wall* proceedings, the ICJ invited the UN and its member states to make submissions 'on all aspects raised by the question,' choosing a broader wording than Article 66(2).[96] In the *Wall* and the *Kosovo* advisory proceedings, the ICJ received numerous submissions on factual aspects of

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ausländisches öffentliches Recht und Völkerrecht (1981), pp. 581-582; K. Günther, *Zulässigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH*, 34 German Yearbook of International Law (1991), pp. 271-272.

94 This was emphasized, as noted, by the ICJ in its grant of leave to the International League for the Rights of Man in *International Status of South-West Africa*. See M. Benzing, supra note 82, p. 245, FN 514 (In its grant of leave to the International League for the Rights of Man (ILRM), the ICJ asked the ILRM to limits its submission to legal questions because of its limited advisory mandate. The organization failed to comply with the condition. It submitted reports from individuals and averred that it had 'extensive information and data concerning the matter.').

95 *Reservations to the Convention on Genocide*, Order of 1 December 1950, ICJ Rep. 1951, pp. 406-407 (The ICJ invited the Organisation of American States and the ILO to furnish information on the practice of reservations to multilateral conventions); *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Rep. 1954, pp. 47, 49 and Letter No. 17, Part IV: Correspondence, ICJ Rep. 1954, p. 397 (The President of the Court regarded the ILO as likely able to submit information as it potentially had been in a similar situation to that at issue.); *International Status of South-West Africa*, Advisory Opinion, 11 July 1950 and Letter No. 18 (Telegram by the Registrar to Mr. Robert Delson), ICJ Rep. 1950, pp. 128, 130, 320, 327.

96 *Wall*, Advisory Opinion, Order of 19 December 2003, ICJ Rep. 2003, p. 429.

the questions.[97] This was not surprising given the atypical nature of the case.[98] Similarly, in *Responsibilities*, the proceedings had a practical backdrop. The request for an advisory opinion from the Seabed Disputes Chamber was prompted by the sponsorship by the Republic of Nauru of an application by Nauru Ocean Resources Inc. ('NORI') to undertake exploration for polymetallic nodules in the Area, and Nauru's wish to limit its potential liability for any serious damage to the marine environment or a failure by NORI to comply with Part XI UNCLOS. This was reflected in some of the 16 submissions received from states and intergovernmental organizations. While most submissions elaborated on the liability of a state that had chosen to contract out the harvesting of the Area to private investors, the submissions of the IUCN and Nauru commented on the contextual background of the proceedings.[99] The ITLOS in its opinion acknowledged the practical background of the opinion.[100]

II. European Court of Human Rights

The ECHR does not delineate the content of submissions beyond stipulating that the President may accept any submission which will assist the court in the administration of justice. Case law shows that the court barely limits the content of submissions.

Until the mid-1990, the ECtHR meticulously controlled the content of submissions. In most cases, it granted leave to *amici curiae* to address on-

97 See, for example, *Kosovo*, Advisory Opinion, Written Statement of the Government of the Republic of Serbia, 17 April 2009 and Written Contribution of the Authors of the Unilateral Declaration of Independence, 17 April 2009.

98 Submissions of fact, including national laws, also have been made in other ICJ advisory proceedings. Cf. *Difference Relating to Immunity from a Legal Process of A Special Rapporteur of the Commission on Human Rights,* Advisory Opinion, 29 April 1999, Statement of the Government of Malaysia, October 1998.

99 See *Responsibilities,* Advisory Opinion, ITLOS Case No. 17, Written Statement of International Union for Conservations of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group, 19 August 2010; *Id.*, Written Statement of the Republic of Nauru, 5 August 2010.

100 *Responsibilities*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 4.

ly specified issues concerning the alleged violations of the ECHR.[101] The court tailored the content of briefs to address matters it estimated would benefit from additional argument.[102] It requested that there be a 'sufficiently proximate connection' between the content of the application and the issues before it, a requirement it later codified in Rule 37(2) of its 1983 Rules. Submissions were rejected if the issues addressed by the *amicus curiae* did not directly concern the question before the court, for instance, if they sought to introduce information on the issue in question, but concerning the situation in states other than the respondent state.[103] The ECtHR has lessened this requirement. The basic requirement today is that the ECtHR consider the submission relevant for deciding the case either, because

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101 *Malone v. the United Kingdom*, Judgment of 2 August 1984, ECtHR Series A No. 82.

102 E.g. *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, Series A No. 240 (Submission by the Executive Council of the Principality of Andorra permitted only with regard to the opinions expressed in the Commission's report of 11 December 1990); *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103 (The ECtHR emphasized that comments were to be strictly limited to the 'particular issues of the alleged violation of the Convention.').

103 See *Glasenapp v. Germany,* Judgment of 28 August 1986, ECtHR Series A No. 104; *Kosiek v. Germany*, Judgment of 28 August 1986, ECtHR Series A No. 105; *Leander v. Sweden*, Judgment of 26 March 1987, ECtHR Series A No. 116 (Leave was denied to the National Council for Civil Liberties on behalf of three British Trade Unions representing government employees, which would be indirectly affected by the court's decision. The connection with the case was considered to be too remote to serve the proper administration of the case); *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115; *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93 (A lawyer requested leave to submit written comments in regard of another case pending before the EComHR where he was representing the applicant. Leave was denied on the grounds that the participation would not contribute to the proper administration of justice. *Moyer* argues that the brief was rejected, because it was from a person who had raised the same issue before the EComHR. The President of the Court also granted leave to MIND, but underscored that the comments to be submitted should be strictly limited to certain matters which were closely connected with the *Ashingdane* case. See C. Moyer, supra note 47, p. 126; *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I; *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103 (The ECtHR instructed the International Press Institute to comment on the application and interpretation of Article 10(2)'s test of necessity in the most concise manner possible and only as far as it related to the alleged Convention violation.).

of the information it contains or, because it elaborates on a relevant affected public or private interest.

The broader interpretation of the term 'concerned' has led to a steep increase in contextual submissions. Such briefs typically elaborate on the background of a case or they show that the issue before the court forms part of a larger systemic problem.[104] In *A., B., and C. v. Ireland*, the ECtHR allowed NGOs supporting either the rights of the unborn child or the mother's right to choice to comment on the compatibility of Ireland's prohibition on abortion for reasons of health and well-being with Article 8 ECHR. One organization urged the court to develop a general principle on the minimum degree of protection to which a women seeking abortion would be entitled and maintained that this would be 'of great importance to all contracting states.'[105] This category of briefs also includes *amicus curiae* submissions that outline the consequences of a certain decision for the public or a specific group of people.[106] In many of these cases, the subject matter is of high public interest and, accordingly, attracts a large number of submissions, including from Council of Europe member

104 *Boumediene and others v. Bosnia and Herzegovina* (dec.), Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, 18 November 2008 (Successful efforts concerning the release and repatriation of Guantanamo Bay detainees); *Jaremovicz v. Poland*, No. 24023/03, 5 January 2010; *Baka v. Hungary* [GC], No. 20261/12, Judgment of 23 June 2016; *Balázs v. Hungary*, No. 15529/12, 20 October 2015; *Emin Huseynov v. Azerbaijan*, No. 59135/09, 7 May 2015; *F.G. v. Sweden* [GC], No. 43611/22, 23 March 2016; *Janusz Wojciechowski v. Poland*, No. 54511/11, 28 June 2016.

105 *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010.

106 *Hugh Jordan v. the United Kingdom*, No. 24746/94, 4 May 2001, ECHR 2001 (Northern Ireland Human Rights Commission on how investigations into the use of lethal force by state agents should be conducted); *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A No. 216; *K.U. v. Finland*, No. 2872/02, 2 December 2008, ECHR 2008; *Baysakov and others v. Ukraine*, No. 54131/08, 18 February 2010; *C.N. v. the United Kingdom*, No. 4239/08, 13 November 2012; *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008, ECHR 2008; *Vejdeland and others v. Sweden*, No. 1813/07, 9 February 2012; *Von Hannover v. Germany (No. 2)* [GC], Nos. 40660/08 and 60641/08, 7 February 2012, ECHR 2012; *N. v. the United Kingdom* [GC], No. 26565/05, 27 May 2008, ECHR 2008; *Jamrozy v. Poland*, No. 6093/04, 15 September 2009.

states.[107] In *MGN Limited v. the United Kingdom*, a group of NGOs submitted a brief on the 'chilling effect of high costs in defamation proceedings on non-governmental organizations and small media organizations with small budgets.' They argued that a decision by the court confirming the national decision that the applicant had to bear the success fees in defamation proceedings would prevent NGOs and small publishing houses from publishing information of public interest.[108] They attached to their brief a comparative study on the costs of defamation proceedings across Europe which showed that those relying on a contingency fee agreement incurred substantially higher legal costs than those who did not.

Further, the ECtHR regularly accepts fact submission from *amici curiae*.[109] Such submissions are particularly important in *non-refoulement* cases where the court must establish whether the extradition or repatriation of

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107 E.g. *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012 (interception and push-back of boat refugees in the Mediterranean Sea); *Kuric and others v. Slovenia* [GC], No. 26828/06, 26 June 2012, ECHR 2012; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011; *Lexa v. Slovakia*, No. 54334/00, 23 September 2008; *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010.

108 *MGN Limited v. the United Kingdom*, No. 39401/04, 18 January 2011. Similarly, *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011.

109 *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Jamrozy v. Poland*, No. 6093/04, 15 September 2009, para. 54; *Kavakci v. Turkey* (dec.), No. 71907/01, 5 April 2007; *Wolkenberg and others v. Poland* (dec.), No. 50003/99, 4 December 2007; *Witkowska-Tobola v. Poland* (dec.), No. 11208/02, 4 December 2007; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, ECHR 2007-I; *Shelley v. the United Kingdom* (dec.), No. 23800/06, 4 January 2008 (success of needle exchange programs in prisons in other countries to prevent HIV infections, rates of drug abuse in UK prisons and number of HIV infected drug users in UK prisons); *Mir Isfahani v. the Netherlands* (dec.), No. 31252/03, 31 January 2008 (Brief from the UNHCR regarding the high burden of proof placed on asylum seekers coming to the Netherlands, need for a meaningful appeals mechanism); *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009; *SE v. France* (dec.), No. 10085/08, 15 December 2009; *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, ECHR 2010*; Diamante and Pelliccioni v. San Marino*, No. 32250/08, 27 September 2011; *Iacov Stanciu v. Romania*, No. 35972/05, 24 July 2012; *Kuric and others v. Slovenia* [GC], No. 26828/06, 26 June 2012, ECHR 2012; *O'Donoghue and others v. the United Kingdom*, No. 34848/07, 14 December 2010, ECHR 2010; *Piechowicz v. Poland*, No. 20071/07, 17 April 2012; *Sitaropoulos and Giakoumopoulos v. Greece* [GC],

an applicant to a third state might lead to a violation of the prohibition on torture under Article 3 ECHR.[110] Especially with regard to third states, the ECtHR struggles to obtain information on the situation in the country. The respondent state has an interest in painting a rosy picture of the circumstances expecting the applicant, whereas the applicant seeks to show the opposite. In these cases, the ECtHR often relies on *amicus curiae* submissions to assess the parties' submissions. The information stems usually from international NGOs that possess knowledge of the relevant facts due to having carried out operations in the third state or having been involved in the case at an earlier stage. For example, in *Mamatkulov and Askarov v. Turkey*, a case concerning the extradition of two Uzbek opposition politicians accused of terrorist attacks against the Uzbek President, the ECtHR relied on facts presented by international human rights organizations concerning the general human rights situation in Uzbekistan and the likely fate of the politicians. One of the *amici curiae*, Human Rights Watch, had monitored the politicians' trial in Uzbekistan.[111] The court also admits other types of fact submissions from *amici curiae*. In 2004, in *Pini, Bertani, Manera and Atripaldi v. Romania*, the ECtHR granted leave to the Special Rapporteur to the European Parliament in a case concerning the intended adoption by the applicants of two Romanian orphan girls. The Rapporteur

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No. 42202/07, 15 March 2012, ECHR 2012; *Jelicic v. Bosnia and Herzegovina* (dec.), No. 41183/02, 15 November 2005, ECHR 2005-XII; *Mikheyev v. Russia*, No. 77617/01, 26 January 2006; *Czarnowski v. Poland*, No. 28586/03, 20 January 2009; *Wojtas-Kaleta v. Poland*, No. 20436/02, 16 July 2009; *Geotech Kancev GmbH v. Germany*, No. 23646/09, 26 July 2016; *Janusz Wojciechowski v. Poland*, No. 54511/11, 28 June 2016.

110 *Ismoilov and others v. Russia*, No. 2947/06, 24 April 2008; *Soldatenko v. Ukraine*, No. 2440/07, 23 October 2008; *Kamyshev v. Ukraine*, No. 3990/06, 20 May 2010; *MB and others v. Turkey*, No. 36009/08, 15 June 2010; *Ahorugeze v. Sweden*, No. 37075/09 27 October 2011; *Chahal v. the United Kingdom*, Judgment of 15 November 1996, Reports 1996-V (Amnesty International on the situation of presumed Sikh militants in India); *Akdivar and others v. Turkey*, Judgment of 16 September 1996, Reports 1996-VI; *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012; *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012; *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, 23 February 2012, ECHR 2012.

111 *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, 4 February 2005, ECHR 2005-I. See also *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009.

had gathered extensive knowledge of the Romanian adoption practice in his consideration of Romania's application for EU membership.[112]

Fact submissions also include briefs on the national proceedings preceding the proceedings before the ECtHR, or briefs providing statistical or other data.[113] Since the mid-1990, the ECtHR increasingly has admitted surveys on the laws of the respondent state, on countries dealing with a matter similar to the matter before the court or comparative analyses of how the central legal issue of the case is dealt with in other Council of Europe member states or in third countries.[114] Such surveys help the court to assess the possible impact of its decision on other member states and they

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112 *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V. See also *Blecic v. Croatia*, No. 59532/00, 29 July 2004 (OSCE provided information on the nature and number of mass terminations of specially protected tenancies in Croatia and Bosnia-Herzegovina); *Yumak and Sadak v. Turkey* [GC], No. 10226/03, 8 July 2008, ECHR 2008; *A. and others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, ECHR 2009 (Liberty was granted leave to make fact submissions in a case concerning the United Kingdom's derogation pursuant to Article 15 ECHR of the permissible maximum time of arrest and detention. Liberty had acted as a third party before the Special Immigrations Appeals Commission (SIAC) that decided on the applicant's detention. In addition, Liberty provided information on the national authorities' practice under the anti-terrorist legislation and in particular the SIAC.).

113 *Tinnelly and Sons Ltd and others and McElduff and others v. the United Kingdom*, Judgment of 10 July 1998, Reports 1998-IV (The Standing Advisory Commission on Human Rights, an independent statutory body based in Northern Ireland, was granted leave to make a submission in a case concerning restrictions of the applicants' rights to bring their case to a court for reasons of national security. The Commission explained reports it had submitted to Parliament on fair employment, argued for the repeal of the legislation at issue and recommended certain safeguards to protect the applicants' rights.). See also *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010; *R.P. and others v. the United Kingdom*, No. 38245/08, 9 October 2012; *Miroslaw Garlicki v. Poland*, No. 36921/07, 14 June 2011 (The court accepted a brief analyzing the main points of a relevant constitutional court judgment.); *Van Colle v. the United Kingdom*, No. 7678/09, 13 November 2012.

114 *Chahal v. the United Kingdom*, Judgment of 15 November 1996, ECHR 1996-V; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, ECHR 2001-III; *AB Kurt Kellermann v. Sweden*, ECtHR No. 41579/98, 26 October 2004; *D.H. and others v. the Czech Republic*, ECtHR No. 57325/00, 7 February 2006 and [GC], No. 57325/00, 13 November 2007, ECHR 2007-IV; *Matyjek v. Poland*, No. 38184/03, 24 April 2007; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, ECHR 2007-I; *Laskowska v. Poland*, No. 77765/01, 13 March 2007; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], No. 44302/02,

might inform it of possible solutions to the case.[115] In *Otto-Preminger-Institut v. Austria*, a case concerning Austria's blasphemy laws, the court was asked for the first time to consider the need for laws banning expression ridiculing or otherwise offending a religion or religious belief in a democratic society.[116] The ECtHR accepted a submission from Article 19 and Interights which was supported by declarations from constitutional law experts. The submission examined the law and practice on the freedom of expression in ten European countries and the USA.[117]

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30 August 2007, ECHR 2007-III; *Enea v. Italy* [GC], No. 74912/01, 17 September 2009, ECHR 2009; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, 22 December 2009, ECHR 2009; *Guiso-Gallisay v. Italy* (just satisfaction) [GC], No. 58858/00, 22 December 2009; *Bijelić v. Montenegro and Serbia*, No. 11890/05, 28 April 2009; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], No. 38224/03, 14 September 2010; *J.M. v. the United Kingdom*, No. 37060/06, 28 September 2010; *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012; *C.N. v. the United Kingdom*, No. 4239/08, 13 November 2012; *Kasabova v. Bulgaria*, No. 22385/03, 19 April 2011 (US Supreme Court case law on 'chilling effect' on freedom of expression); *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *Mouvement Raëlien Suisse v. Switzerland* [CG], No. 16354/06, 13 July 2012, ECHR 2012; *Sitaropoulos and Giakoumopoulos v. Greece* [GC], No. 42202/07, 15 March 2012, ECHR 2012; *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999; *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, ECHR 1999-IX; *Krombach v. France*, No. 29731/96, 13 February 2001, ECHR 2001-II; *I. v. the United Kingdom* [GC], No. 25680/94, 11 July 2002 and *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, 11 July 2002, ECHR 2002-VI (Liberty submitted a report on the legal recognition of transsexuals in different European countries, USA, Canada and Australia. The report was an updated version of a report submitted to the court in *Sheffield and Horsham v. the United Kingdom*, Judgment of 30 July 1998, Reports 1998-V); *Goodwin v. the United Kingdom*, Judgment of 27 March 1996, Reports 1996-II; *Nikula v. Finland*, No. 31611/96, 21 March 2002, ECHR 2002-II; *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, para. 80; *J.N. v. the United Kingdom*, No. 37289/12, 19 May 2016; *Karáscony and others v. Hungary* [GC], No. 42461/13 and 44357/13, 17 May 2016, paras. 110-119.

115 *Informationsverein Lentia and others v. Austria*, Judgment of 24 November 1993, Series A No. 276. See also M. Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 Netherlands Quarterly of Human Rights (1996), p. 298.

116 M. Nowicki, supra note 115, p. 298.

117 *Otto-Preminger-Institut v. Austria*, Judgment of 20 September 1994, Series A No. 295-A.

The ECtHR now also accepts *amicus curiae* briefs on international law. Initially, it excluded legal submissions from *amicus curiae* with a direct interest in the case to avoid appearance of *amicus curiae* as a party.[118] Such submissions elaborate on relevant international (human rights) laws and treaties, issues within the court's core competence.[119] In other cases, *amici curiae* submit comparative analyses of the case law of other interna-

118 *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, ECtHR Series A No. 44. The exclusion of legal as opposed to fact information appears to have been because the court was more interested in the fact information and it needed to limit the information to avoid an appearance of party-like participation by the Trades Union Congress (TUC). This was problematic for the TUC, which sought to legally defend the system of collective labor unions. Further, it shows that the ECtHR seeks its own benefit from a brief irrespective of the *amicus'* motivation for participation. See O. De Schutter, *Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme*, 7 European Journal of International Law (1996), p. 384. He quotes a letter from the TUC of 30 January 1981 in which it assured the Registrar that it would not raise 'any political debate before the court.'

119 *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A No. 216; *Saunders v. the United Kingdom*, Judgment of 17 December 1996, Reports 1996-VI; *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I; *Aydin v. Turkey*, Judgment of 25 September 1997, Reports 1997-VI; *Reinprecht v. Austria*, No. 67175/01, 15 November 2005, ECHR 2005-XII; *McKerr v. the United Kingdom*, No. 28883/95, 4 May 2001, 2001-III (Northern Ireland Human Rights Commission provided relevant international standards concerning the right to life); *Isayeva, Yusupova and Bazayeva v. Russia*, Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005; *D.H. and others v. the Czech Republic*, No. 57325/00, 7 February 2006; *Mikheyev v. Russia*, No. 77617/01, 26 January 2006; *Mir Isfahani v. the Netherlands* (dec.), No. 31252/03, 31 January 2008; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, ECHR 2008; *Ismoilov and others v. Russia*, No. 2947/06, 24 April 2008; *Opuz v. Turkey*, No. 33401/02, 9 June 2009, ECHR 2009; *A. v. the Netherlands*, No. 4900/06, 20 July 2010; *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010; *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012; *Kiyutin v. Russia*, No. 2700/10, 10 March 2011; *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, ECHR 2012; *Đordevic v. Croatia*, No. 41526/10, 24 July 2012, ECHR 2012; *Seal v. the United Kingdom*, No. 50330/07, 7 December 2010; *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016 (EU law concerning EU citizenship and right to free movement); *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, paras. 77-79.

tional courts, in particular the IACtHR.[120] The court is specifically receptive to such briefs when it decides on a novel legal issue.[121] Many of the *amicus curiae* briefs admitted by the court reference (parts of) its own case law.[122] The court should be careful when reviewing international law submissions, as *amici curiae* tend to draw the attention of the court to a few poignant earlier judgments at the expense of comprehensiveness, thereby risking (inadvertently) distorting the court's perception of a particular issue.

120 *Timurtas v. Turkey*, No. 23531/94, 13 June 2000, ECHR 2000-VI; *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009; *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012; *Kasabova v. Bulgaria*, No. 22385/03, 19 April 2011; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, paras. 78-79.

121 *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia* (dec.), No. 11721/04, 14 April 2009; *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, ECHR 2012; *K.U. v. Finland*, No. 2872/02, 2 December 2008, ECHR 2008 (The Helsinki Foundation for Human Rights urged the ECtHR to develop a common standard for the use of the internet); *Sýkora v. the Czech Republic*, No. 23419/07, 22 November 2012.

122 *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, 24 April 2003; *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI; *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Beric and others v. Bosnia and Herzegovina* (dec.), Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009; *Frasik v. Poland*, No. 22933/02, 5 January 2010, ECHR 2010; *J.M. v. the United Kingdom*, No. 37060/06, 28 September 2010; *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, 7 July 2011, ECHR 2011; *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012, ECHR 2012; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *Piechowicz v. Poland*, No. 20071/07, 17 April 2012; *Sindicatul "Păstorul cel Bun" v. Romania* [GC], No. 2330/09, 9 July 2013, ECHR 2013; *Taxquet v. Belgium* [GC], No. 926/05, 16 November 2010, ECHR 2010; *Annagi Hajibeyli v. Azerbaijan*, No. 2204/11, 22 October 2015; *Hadzimeljlic and others v. Bosnia and Herzegovina*, Nos. 3427/13, 74569/13 and 7157/14, 3 November 2015.

The ECtHR further accepts *amicus curiae* briefs that suggest interpretations of ECHR provisions of potential relevance to the case.[123] Such briefs often stem from states. Decisions of the ECtHR may have an effect on the laws and the political decisions of other Council of Europe member states. A declaration of incompatibility with the ECHR of a national law or state practice constitutes *de facto* precedent with regard to similar fact patterns in other member states.[124] In *Lautsi and others v. Italy*, upon complaint by a mother and her minor children, the ECtHR had to decide on the compati-

123 But see *Glasenapp v. Germany,* Judgment of 28 August 1986, Series A No. 104 and *Kosiek v. Germany*, Judgment of 28 August 1986, Series A No. 105, where the ECtHR rejected a request by an *amicus curiae,* who sought to impede the creation of precedent because it was not aimed at solving the case before it. See also O. De Schutter, supra note 118, p. 391. *Herrmann v. Germany* No. 9300/07, 20 January 2011 and [GC], No. 9300/07, 26 June 2012 (The case concerned the compatibility with the ECHR of a compulsory membership in a hunting association and an obligation to tolerate hunting on the applicant's property. The *Deutscher Jagdschutzverband*, a private association representing the interests of hunters in Germany, and the *Bundesarbeitsgemeinschaft der Jagdgenossenschaften*, the federation of all state and regional associations and state-sponsored committees of property owners with hunting rights, appeared as *amici curiae*. They emphasized the importance of the proceedings for landowners and hunters and pointed to the advantages of the system); *Sadak and others v. Turkey (No.1)*, Nos. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, ECHR 2001-VIII; *Wilson, National Union of Journalists and others v. the United Kingdom*, Nos. 30668/96, 30671/96, 30678/96, 2 July 2002, ECHR 2002-V; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V (The applicants complained that domestic safeguards against disproportionately high jury awards in libel cases were inadequate. Leave was granted to seven *amici curiae* who were all stakeholders in media, publishing and newspapers); *Beer and Regan v. Germany* [GC], No. 28934/95, 18 February 1999; *Waite and Kennedy v. Germany* [GC], No. 26083/94, 18 February 1999, ECHR 1999-I; *Sorensen and Rasmussen v. Denmark* [GC], Nos. 52562/99 and 52620/99, 11 January 2006, ECHR 2006-I; *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, ECHR 2011 (European Association of Jehovah's Christian Witnesses on the position of the organization re the use of arms and their situation in Armenia); *Heinisch v. Germany*, No. 28274/08, 21 July 2011, ECHR 2011.

124 *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A No. 262; *Lobo Machado v. Portugal*, Judgment of 20 February 1996, Reports 1996-I; *Bäck v. Finland*, No. 37598/97, 20 July 2004, ECHR 2004-VIII; *Kleyn and others v. the Netherlands* [GC], Nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, ECHR 2003-VI; *AB Kurt Kellermann v. Sweden*, No. 41579/98, 26 October 2004; *Association SOS Attentats and De Boëry v. France* [GC], No. 76642/01, 4

bility of the ECHR with the display of a crucifix in public school classrooms. Leave to file an *amicus curiae* submission was granted to 33 members of the European Parliament, a group of international, European and Italian non-governmental human rights organisations arguing in favour of civil rights, a group of Christian organisations defending the practice and ten Council of Europe member states. All of the governments supported the respondent government in that the display of the crucifix was compatible with the ECHR. They provided arguments on the nature of the crucifix and its perception across Europe, as well as the margin of appreciation to be accorded to states on this issue.[125] The ECtHR even has accepted briefs conducting a full application by *amici curiae* of the ECHR to the purported facts or advocating for the establishment of certain standards.[126]

Submissions on jurisdictional aspects are rare, but not exceptional.[127]

October 2006, ECHR 2006-XIV; *Scordino v. Italy (No. 1)* [GC], No. 36813/97, 29 March 2006, ECHR 2006-V; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008; *TV Vest AS and Rogaland Pensjonistparti v. Norway*, No. 21132/05, 11 December 2008; *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011 (The Netherlands and the United Kingdom in defence of the Dublin system); *S.H. and others v. Austria* [GC], No. 57813/00, 3 November 2011, ECHR 2011.

125 *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011.

126 *Soffer v. the Czech Republic*, No. 31419/04, 8 November 2007; *Al-Khawaja and Tahery v. the United Kingdom* [GC], Nos. 26766/05 and 22228/06, 15 December 2011, ECHR 2011; *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011; *Vejdeland and others v. Sweden*, No. 1813/07, 9 February 2012.

127 In *Markovic v. Italy*, the Grand Chamber received submissions from the United Kingdom government *inter alia* on the question whether the applicants fell under the respondent state's jurisdiction within the meaning of Article 1 ECHR. See *Markovic and others v. Italy* [GC], No. 1398/03, 14 December 2006, ECHR 2006-XIV. See also *Beric and others v. Bosnia and Herzegovina* (dec.), Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)* [GC], No. 32772/02, 30 June 2009, ECHR 2009. The ECtHR regularly accepts submissions on the admissibility of applications. See *Micallef v. Malta* [GC], No. 17056/06, 15 October 2009, ECHR 2009; *Aksu v. Turkey*, Nos. 4149/04 and 41029/04, 27 July 2010; *Balázs v. Hungary*, No. 15529/12, 20 October 2015.

The ECtHR has accepted *amicus curiae* briefs containing factual, legal or contextual information not previously mentioned by the parties.[128] In *Lingens v. Austria*, the ECtHR received and significantly relied on a submission from the NGO Interights, which provided a comparative survey of European and American law. Neither party had presented similar information.[129]

However, there are limits on what information the court can receive. Most importantly, the court cannot expand its jurisdiction through *amicus* submissions. Pursuant to Articles 34-35 ECHR and Rules 46-47 ECtHR Rules, the court's jurisdiction is defined by the facts and the alleged Convention violations listed in the application. In *Soering v. the United Kingdom,* the ECtHR is said to have based its decision on the violation of Convention guarantees that the claimant had not invoked, but which Amnesty International had presented in its *amicus curiae* brief. Amnesty International argued that the United Kingdom would violate the prohibition of torture under Article 3 ECHR, if it acceded to the USA's extradition request. *Soering* was facing a criminal trial and the death penalty in the USA for having killed the parents of a friend at age 18. The court relied on the argument presented by Amnesty International that capital punishment as

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128 *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 1st section, 26 February 2004; *Makaratzis v. Greece* [GC], No. 50385/99, 20 December 2004, ECHR 2004-XI; *Tahsin Acar v. Turkey* (preliminary objection) [GC], No. 26307/95, 6 May 2003, ECHR 2003-VI (Amnesty International commented on the application of Article 37 ECHR); *Turek v. Slovakia*, No. 57986/00, 14 February 2006, ECHR 2006-II; *Staroszczyk v. Poland*, No. 59519/00, 22 March 2007; *Sialkowska v. Poland*, No. 8932/05, 22 March 2007; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, ECHR 2008; *Leela Foerderkreis e.V. and others v. Germany*, No. 58911/00, 6 November 2008; *Kuric and others v. Slovenia*, No. 26828/06, 13 July 2010; *A. v. the Netherlands*, No. 4900/06, 20 July 2010; *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, ECHR 2010; *Al-Skeini and others v. the United Kingdom* [GC], No. 55721/07, 7 July 2011, ECHR 2011; *Axel Springer AG v. Germany* [GC], No. 39954/08, 7 February 2012; *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012; *Hode and Abdi v. the United Kingdom*, No. 22341/09, 6 November 2012; *Kiyutin v. Russia*, No. 2700/10, 10 March 2011; *NADA v. Switzerland* [GC], No. 10593/08, 12 September 2012, ECHR 2012; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012, ECHR 2012; *Redfearn v. the United Kingdom*, No. 47335/06, 6 November 2012; *O'Keeffe v. Ireland* (dec.), No. 35810/09, 26 June 2012.

129 *Lingens v. Austria*, Judgment of 8 July 1986, ECtHR Series A No. 103.

such constituted inhuman and degrading treatment and thus violated Article 3 ECHR. This had been claimed neither by the applicant nor had it been mentioned by either party. The decision has been criticized as an overstepping of judicial competence.[130] However, this observation is not accurate. In his application before the EComHR, the applicant had claimed that his extradition would subject him to inhumane and degrading treatment and punishment contrary to Article 3 ECHR.[131] Thus, the court did not expand *Soering's* claim – which would have been outside its competence. It merely based it on another legal argument in accordance with the principle of *iura novit curia*. The court remains careful to respect the confines of its jurisdiction. In *A., B., and C. v. Ireland*, it emphasized that it was 'not in its role to examine the submissions which do not concern the factual matrix of the case before it.'[132]

III. Inter-American Court of Human Rights

Article 2(3) IACtHR Rules envisages two forms of submissions: first, reasoned arguments on the facts contained in the presentation of the case, and, second, legal considerations on the subject matter of the proceedings. The wording insinuates that, as a general requirement, all submissions must be within the scope of jurisdiction. The different formulations indicate that the scope of permissible fact submissions is narrower than that of legal submissions, possibly, because the drafters wanted to exclude submissions providing facts on similar cases in other OAS member states. The wording also denominates the presentation of the case as the decisive guidepost for *amici* seeking to make fact submissions. For legal submissions, the reference to the subject matter of the proceedings could be interpreted to allow more general legal submissions. However, the IACtHR also requires legal submissions to relate to the specific case. The court has

130 F. Sudre, *Extradition et peine de mort: ârret Soering de la cour européenne des droits de l'homme, du 7 juillet 1989*, 94 Revue Générale de Droit International Public (1990), pp. 107, 114.

131 *Soering v. the United Kingdom*, Judgment of 7 July 1989, ECtHR Series A No. 161, para. 176.

132 *A, B and C v. Ireland* [GC], No. 25579/05, Judgment of 16 December 2010, ECHR 2010.

recently for the first time in a judgment mentioned rejecting submissions for failing to relate to the matter in dispute[133] or for not being useful.[134]

A review of case law and exemplary *amicus curiae* submissions shows that the majority of *amicus curiae* submissions focus on legal and contextual arguments. The IACtHR has received *amicus curiae* submissions on international human rights law, including analyses of its own practice.[135] Some briefs discuss novel legal issues and propose new legal interpretations. While the majority of submissions have focused on substantive aspects, the court has also received briefs outlining procedural issues.[136] Briefs often focus on one particular legal aspect at issue in a case.[137] In

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133 *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219, p. 6, FN 9.

134 *López Mendoza v. Venezuela*, Judgment of 1 September 2011 (Merits, Reparations and Costs), IACtHR Series C No. 233, FN 6; *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 154, para. 80. F. Rivera Juaristi, supra note 48, p. 120 (The court should clarify the term 'useful/uselessness'.).

135 *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33 (Submission on the principle *non bis in idem*); *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79; *La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs), IACtHR Series C No. 162; *The "Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No. 211 (International law doctrine on the responsibility of superiors); *López Mendoza v. Venezuela*, Judgment of 1 September 2011 (Merits, Reparations and Costs), IACtHR Series C No. 233, para. 10.

136 *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 209, p. 60; *Genie Lacayo v. Nicaragua*, Judgment of 29 January 1997 (Merits, Reparations and Costs), IACtHR Series C No. 30, p. 17, para. 41; *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33; *Benavides Cevallos v. Ecuador*, Judgment of 19 June 1998 (Merits, Reparations and Costs), IACtHR Series C No. 38. See also A. Lindblom, supra note 24, p. 356.

137 *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion No. OC-9/87 of 6 October 1987, IACtHR Series A No. 9; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99 of 1 October 1999, IACtHR Series A No. 16; *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197. See also D. Zagorac, supra note 51, pp. 31-32.

Radilla Pacheco v. Mexico, a case concerning the forced disappearance of an individual after his detention by military forces, Amnesty International provided an analysis of reservations to international human rights treaties in general and by Mexico.[138] Mexico had raised as a preliminary objection that it had issued interpretative declarations and reservations to the ACHR and the Forced Disappearances Convention which voided the court's jurisdiction over the case.

The IACtHR has occasionally received submissions on the legal situation in other OAS member states.[139] It remains to be seen if such submissions will be admitted under the new definition of *amicus curiae*.

Some *amicus curiae* briefs urge the court to adopt a certain legal interpretation, with some briefs even subsuming the facts of the case under the

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138 Amnesty International, *Amicus curiae* Brief to IACtHR in *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 209.

139 In *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACtHR received submissions from several indigenous communities and advocacy groups from the Americas. The case concerned the alleged failure by Nicaragua to demarcate communal land, to protect the rights of the Mayagna Awas (Sumo) Tingni Community to property of their ancestral land and natural resources on the Atlantic coast of Nicaragua and to guarantee access to effective remedies against an imminent concession to commercially develop 62,000 hectares of tropical forest on communal lands. See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79, pp. 7-8, paras. 38, 41-42. For analysis of this case, see P. Macklem/E. Morgan, *Indigenous rights in the Inter-American System: the amicus brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua*, 22 Human Rights Quarterly (2000), p. 570. The case raised fundamental questions of human rights law, including whether the protection of lands occupied by indigenous people amounted to a human right protected by the ACHR. The brief from the Assembly of First Nations canvassed issues of international human rights law and their application in Canada, Canadian constitutional principles governing indigenous rights and co-management arrangements on indigenous' peoples' lands. See also some excerpts from the *Amicus Curiae* Brief of the Assembly of First Nations, reprinted in 22 Human Rights Quarterly (2000), pp. 572-602 ('[T]he purpose of this *Amicus Curiae* Brief is to offer assistance to the IACtHR in its consideration of the case of Awas. … Canadian constitutional principles governing indigenous title and resource rights assist in illuminating the 'ordinary meaning' of Articles 1, 2 and 21 of the ACHR and in resolving the dispute ... in a manner consistent with evolving principles of international and domestic law.'). The court did not rely on the submission in its decision, indicating that the elaboration was too remote.

ACHR and proposing a concrete solution of the case.[140] Such briefs could be regarded as undue intrusion on judges' obligation to decide the case.

A former IACtHR staff member expected that briefs with non-legal, political content would be considered inadmissible by the court.[141] The court seems to have abandoned this approach in 1999 with the admission of fact submissions in *Cesti Hurtado v. Peru*, a case concerning forced disappearance.[142] The IACtHR took note of an *amicus curiae* brief from the Chairman of the Human Rights Committee of the Bar Association of Lima, Mr. Rivas. The Committee had publicly condemned Mr. Hurtado's detainment as arbitrary. In the submission, Mr. Rivas explained how the Bar Association of Lima had communicated with public institutions requesting compliance with a writ of *habeas corpus*, how it had sought support from private and governmental international organizations, and how he had personally tried to communicate with Mr. Hurtado.[143]

Since 2008, there has been a noticeable increase in fact submissions before the IACtHR. Fact submissions include facts directly related to a case, to a situation in the respondent state, the immediate context of the dispute or an analysis of relevant national laws in the respondent state.[144] The IACtHR Rules clarify in Article 44 that submissions may be made also on

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140 *Usón Ramírez v. Venezuela*, Judgment of 20 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 207, p. 92; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79 (The Assembly of First Nations, the Canadian national representative organization of Canada's indigenous people, advocated referring to Canadian constitutional principles governing indigenous titles and resource rights to assist in the interpretation of Articles 1, 2 and 21 ACHR.).

141 C. Moyer, supra note 47, p. 124.

142 Assessment of the IACtHR's use of *amicus curiae* submissions in its deliberations and court practice is made difficult due to the court's rare references to the content of submissions in its case law.

143 *Cesti Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56, pp. 16-17, para. 56.

144 *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), IACtHR Series C No. 79 (Protection of indigenous rights in different national legal systems); *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006 (Merits, Reparations and Costs), IACtHR Series C No. 151 (Access to information in fourteen different countries, including Chile. The same study was also presented by the victims' representative); *Garibaldi v. Brazil*, Judgment of 23 September 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 203 (One of the *amici*

compliance.[145] In *Reverón Trujillo v. Venezuela*, a case concerning the lack of investigation by Venezuela of the homicide of a rural worker, the IACtHR received *inter alia* submissions on violence against field workers without property in Venezuelan rural regions in general, as well as the reopening of investigations concerning the death of the victim.[146] In *Gomez Lund and others v. Brazil* concerning arbitrary detention and forced disappearance of 70 members of the communist party and of farmers by the Brazilian military between 1972 and 1975, the court received numerous submissions discussing the effects of national amnesty laws on these crimes and their legality in light of the transitional justice approach pur-

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commented on the reopening of the proceedings to investigate the death of S. Garibaldi); *Usón Ramírez v. Venezuela*, Judgment of 20 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 207; *Cabrera García and Montiel Flores v. Mexico*, Judgment of 26 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 220, p. 103; *The Miguel Castro Castro Prison v. Peru*, Judgment of 2 August 2008 (Interpretation of the Judgement on Merits, Reparations and Costs), IACtHR Series C No. 181, p. 3, paras. 6, 80; *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197; *Barreto Leiva v. Venezuela*, Judgment of 17 November 2009 (Merits, Reparations and Costs), IACtHR Series C No. 206; *Rosendo-Cantú and other v. Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 216; *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84 of 19 January 1984, IACtHR Series A No. 4; *La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs), IACtHR Series C No. 162, para. 76; *Vélez Loor v. Panama*, Judgment of 23 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 218, p. 99; *Genie Lacayo v. Nicaragua*, Judgment of 29 January 1997 (Merits, Reparations and Costs), IACtHR Series C No. 30; *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282 (On admissibility of a supervening fact regarding decision by the Constitutional Court of the Dominican Republic). With respect to the last case, see F. Rivera Juaristi, supra note 48, p. 114.

145 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, para. 16. Confirming, *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 184.

146 *Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 197.

sued by the government.[147] However, the IACtHR does not accept all fact submissions. In *Caso Cruz Sánchez y Otros v. Perú*, a case concerning alleged violations of the ACHR in 1997 during the so-called operation 'Chavín de Huántar' aimed at the termination of a 126-day hostage-taking at the residence of the Japanese Ambassador to Peru, the court refused to accept as *amicus curiae* brief (or as evidence) sections of several books and an interview by some of the former hostages, including by the prominent conservative Peruvian politician and former minister of defence *Antero Flores Aráoz Esparza*.[148]

The review yields a different assessment in advisory proceedings. In accordance with the nature of the procedure, the IACtHR accepts predominantly legal submissions.[149] Submissions made include comparative analyses of the case law of other international courts and tribunals and of specific provisions of the ACHR or general international law, such as the VCLT.[150] The IACtHR has also received submissions on the admissibility of an advisory opinion and other procedural issues.[151] The court has not

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147 *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219.

148 A later submission by the same petitioner was rejected for untimeliness, see *Cruz Sánchez et al. v. Peru*, Judgment of 17 April 2015 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 292, paras. 11-12. The IACtHR noted the inadmissibility in the judgment, which it does rarely.

149 *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, pp. 3, 46-48, paras. 6, 16-17; *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), IACtHR Series C No. 33, paras. 21-22 (on *no bis in idem*).

150 *"Other Treaties" subject to the consultative jurisdiction of the court (Article 64 American Convention on Human Rights)*, Advisory Opinion No. OC-1/82 of 24 September 1982, IACtHR Series A No. 1, p. 1 (Comparison to ICJ and PCIJ case law); *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion No. OC-16/99 of 1 October 1999, IACtHR Series A No. 16 (On the VCLT and the law on the right to information on consular assistance); *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion No. OC-18/03 of 17 September 2003, IACtHR Series A No. 18; *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 ACHR)*, Advisory Opinion No. OC-9/87 of 6 October 1987, IACtHR Series A No. 9.

151 *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights)*, Advisory Opinion No. OC-19/05 of 28 November 2005, IACtHR Series A No. 19.

explicitly stated that it does not receive factual submission. However, they are rare given the nature of advisory opinions.

The IACtHR has admitted *amicus curiae* briefs containing new facts, fact observations and legal arguments. It has held that the principle of *iura novit curia* furnishes it with competence to consider all possible violations of the ACHR. Further, it obliges it to apply all appropriate legal standards, including those not presented in the parties' pleadings conditioned on 'the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts.'[152] In several cases, the court has received *amicus* submissions seeking to build the case for one of the parties. In *Caso del Penal Miguel Castro Castro v. Peru*, the court accepted a joint submission from two human rights NGOs. They divulged new facts concerning the so-called 'Operative Transfer 1' in the Miguel Castro Castro Prison in May 1992, during which the state was said to have violated several provisions of the ACHR by killing at least 42, injuring 175 inmates and subjecting 322 inmates to cruel, inhuman and degrading treatment, as well as refusing access and information on the fate of the inmates to attorneys and next of kin.[153]

Judge Cançado Trindade notes that even though the court's material jurisdiction is limited to issues pertaining to the ACHR, the court may address treaties that are not covered by its material jurisdiction to the extent that they are referred to in the ACHR.[154] This view accords with the

152 *The Moiwana Community v. Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 124, p. 47, para. 107 [Reference omitted]. See also *De la Cruz Flores case*, Judgment of 18 November 2004 (Merits, Reparations and Costs), IACtHR Series C No. 115, para. 122; *Gómez Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), IACtHR Series C No. 110, para. 179; *Hermanos Landaeta Mejías y otros v. Venezuela*, Judgment of 27 August 2014 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 281, para. 128.

153 *The Miguel Castro Castro Prison v. Peru*, Judgment of 2 August 2008 (Interpretation of the Judgement on Merits, Reparations and Costs), IACtHR Series C No. 181, p. 3, para. 6. Further, The IAComHR has relied on ECtHR case law, which had been presented by an *amicus curiae* it had earlier called to testify in the admissibility proceedings concerning the standing of the petitioner as a direct victim in a case. See A. Lindblom, supra note 24.

154 Cf. Article 44 ACHR. See also A. Cançado Trindade, *The operation of the Inter-American Court of Human Rights*, in: Harris/S. Livingstone (Eds.), *The Inter-American system of human rights*, Oxford 1998, pp. 135-136.

IACtHR's interpretation of Article 29 ACHR, which guides the interpretation of the Convention. Article 29(b) and (d) stipulates that

> [n]o provision of the Convention shall be interpreted as:
> (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said states is a party; …
> (d) excluding or limiting the effect that the American Declaration on the Rights and Duties of Man and other international acts of the same nature may have.[155]

The IACtHR has relied on various other international treaties in its interpretation of the rights enshrined in the ACHR.[156]

IV. African Court on Human and Peoples' Rights

There are no written guidelines on the substance of *amicus* submissions other than that the submission must be made 'with regard to the matter' in Rule 42 of the 2012 Practice Direction. The text covers fact and legal briefs within the scope of the court's material jurisdiction.[157] The court in *Lohé Issa Konaté v. Burkina Faso* accepted a fact submission. In their brief, the *amici* argued that national laws which criminalized the defamation of judges and state officials violated the right to freedom of expression as enshrined in the African Charter and the ICCPR. They further argued that any restriction to be lawful had to be for a legitimate objective and be proportionate. This was not the case with respect to the laws in question. They were not necessary to protect the rights of the members of

155 See T. McCann, *The American Convention on Human Rights: toward uniform interpretation of human rights law*, 6 Fordham International Law Journal (1983), pp. 629-631.

156 E.g. *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 154, paras. 86-133. See, with further examples, L. Lixinski, *Treaty interpretation by the Inter-American Court of Human Rights: expansionism at the service of the unity of international law*, 21 European Journal of International Law (2010), pp. 585-604.

157 Arguing that the court only permits fact submissions, Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 822.

the judiciary.[158] The case concerned the criminal prosecution and sentencing to a fine and imprisonment for defamation, public insult and contempt of court of a journalist for publishing articles which alleged that a prosecutor had committed serious criminal offences while in office.[159]

V. WTO Appellate Body and panels

The substance of submissions is regulated differently for panels and the Appellate Body.

To the extent panels consider the provision a legal basis for the admission of *amicus curiae* briefs, Article 13(1) DSU guides the content of *amicus curiae* submissions before panels (see Chapter 5). The provision stipulates, in relevant part, that panels have 'the right to seek *information and technical advice* from any individual or body which it deems appropriate.' The European Commission in *US–Lead and Bismuth II* and in *US–Copyright Act* contended that the wording and the purpose of Article 13 DSU limited information to 'fact information' and excluded legal arguments.[160] Moreover, in *US–Shrimp*, Malaysia called for the exclusion of an *amicus* brief, because it contained not only technical advice but 'also legal and political arguments.'[161] The panel in *US–Copyright Act* disagreed. It decided that it had authority to accept all forms of non-requested information in accordance with the Appellate Body's decision in *US–Shrimp* that Articles 12 and 13 DSU allowed a panel to 'inform[] itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.'[162] The Appellate Body and panels seem to require some con-

158 *Lohé Issa Konaté v. Burkina Faso*, Application No. 4/2013, Judgment of 5 December 2014, pp. 37-38, paras. 141-144.

159 *Lohé Issa Konaté v. Burkina Faso*, Application No. 4/2013, Judgment of 5 December 2014, pp. 37-38, pp. 3-4, paras. 3-8.

160 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 36; *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R, paras. 6.3-6.8.

161 See *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 157.

162 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 106 (The authority is necessary to enable a panel to discharge its duty imposed by Article 11 DSU to 'make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the

nectivity between the *amicus* submission and the case and that the information is not duplicative. In *US-Shrimp (RW)*, the panel decided not to accept an *amicus curiae* brief after the USA argued that it addressed a hypothetical question.[163]

Amici curiae have submitted briefs to panels containing fact, legal, technical and scientific information.[164] Fact submissions include a letter in *Australia–Salmon* addressing the Australia's treatment of imports of pilchards for use as bait or fish feed compared to imports of salmon. The panel noted that the information had 'a direct bearing on a claim that was already raised by Canada.'[165]

Many NGO submissions argue for an inclusion of international agreements on environmental protection or human rights in the interpretation of the WTO Agreements.[166] In its submission to the panel in *US–Shrimp,* the CIEL presented information it characterized as 'critical to the Panel's deliberations on the implications of the dispute for marine ecology and biological diversity,' including an analysis of multilateral environmental agreements and customary international law and their applicability in WTO law and jurisprudence.[167] A group of scientific experts in the *EC–Biotech* case argued for a sociological approach to the SPS Agreement.[168]

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applicability of and conformity with the relevant covered agreements.' [Emphasis in original]).

163 *US–Shrimp*, Recourse to Article 21.5 (Malaysia)*,* Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 5.15.

164 *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, paras. 7.76, 7.78-7.79. (WVZ argued in essence that the EC's intervention price did not cover the average total cost of producing A, B and C sugar in the EC). For analysis of the case, see B. Hoekman/R. Howse, *European Community–Sugar: subsidization and the World Trade Organization*, Policy Research Working Paper 4336, 2007.

165 *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 20 March 2000, WT/DS18/RW, para. 7.9 (The information addressed inconsistency in the sense of Article 5.5 SPS Agreement).

166 E.g. R. Howse/J. Langille/K. Sykes, *Written submission of non-party amici curiae of 11 February 2013 in the case EC–Seal Products*, Appellate Body Report, adopted on 18 June 2014, WT/DS400, WT/DS401, WT/DS369.

167 CIEL et al.*, Amicus brief to the Appellate Body on United States – Import Prohibition on Certain Shrimp and Shrimp Products*, at: http://www.ciel.org/Publications/shrimpturtlebrief.pdf (last visited: 21.9.2017).

168 For analysis of the submission, see C. Foster, *Social science experts and amicus curiae briefs in international courts and tribunals: the WTO Biotech Case*, 52 Netherlands International Law Review (2005), pp. 433-459 (One of two briefs

Panels have solicited fact submissions under this provision and they have asked for an assessment of the information solicited.[169] In *Turkey–Textiles*, a case concerning the legality under GATT of the imposition by Turkey of quantitative restrictions on imports of textiles from India in the framework of its association process with the EU, the panel requested information from the Permanent Representative of the European Communities in Geneva. The information solicited concerned, among other, the negotiation history of the accession agreement, the accession process and the regulation of the transfer of goods, in particular of textiles between the EC and Turkey.[170] The EC Representative replied briefly to each of the questions. The panel later admitted that it had hoped that the EC Representative would add his own views on some of the issues. This shows that the panel understood the term 'information' to include also opinions.[171]

Article 17(6) DSU expressly limits the permissible content of submissions to the Appellate Body. The provision determines that the Appellate Body reviews the legal issues and interpretations developed in the panel reports. It explicitly states that the Appellate Body may not engage in fact-

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provided the panel with a summary of available scientific information showcasing the uncertainties associated with genetic modification and argued that these uncertainties justified categorising the measures adopted by the EC as provisional or temporary under Article 5(7) SPS Agreement.).

169 In several cases, panels have requested information from the International Bureau of WIPO on conventions administered by it. See, for example, *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R, pp. 245-246, para. 1.7 (Factual information on the negotiating history and development of several provisions of the Paris Act of 1971 of the Berne Convention for the Protection of Literary and Artistic Works); *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff* (hereinafter: *EC–Trademarks and Geographical Indications*), Report of the Panel, adopted on 15 March 2005, WT/DS174/R, p. 9, paras. 2.16, 2.18.

170 *Turkey–Textiles*, Report of the Panel, adopted on 19 November 1999, WT/DS34/R, pp. 2, 26-27, paras. 1.11, 4.1.

171 *Id.*, para. 4.2. The case concerned the EC, which had decided not to participate in the proceedings as a third party given that India had decided to 'direct its complaint exclusively against Turkey in spite of the fact that it was clearly indicated to India that the measures at issue were taken in the framework of the formation of the EC/Turkey customs union.' Turkey had argued that the case should not be decided because the European Commission was an 'essential party' to the case. *Id.*, paras. 9.4-9.13.

finding.[172] Even with respect to legal briefs there has been controversy. WTO member states have argued that there is no need for legal *amicus curiae* submissions, because judges are qualified to research and apply the applicable law.[173] However, the DSU itself acknowledges in Article 17(7) DSU that Appellate Body members may benefit from legal support. The provision stipulates that '[t]he Appellate Body shall be provided with appropriate administrative and legal support as it requires.'

The Appellate Body has adhered to the limitations of Article 17(6) DSU in its *amicus* practice carefully.[174] The *EC–Asbestos* Additional Procedure required written briefs to 'set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.'[175] Legal submission to the Appellate Body have not only addressed the WTO Agreement and the covered agreements, but they, for instance, have discussed how to integrate environmental rules into the interpretation of

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172 In several cases, the Appellate Body refers to the term 'information' in relation to *amicus curiae* submissions without conveying how it interprets the term. As the term is reminiscent of panels' investigative powers under Article 13 DSU – powers the Appellate Body does not possess – it would be advisable for the Appellate Body to refrain from using the term in this context.

173 Uruguay, for instance, stated that 'the members of the Appellate Body [have] the capacity, knowledge and experience necessary to take the legal decisions incumbent upon them without any outside help.' See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7. See also B. Stern, *The intervention of private entities and states as "friends of the court" in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.) *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1441 ('It seems surprising that such briefs should have been admitted, inasmuch as Article 17.3 of the DSU stipulates that the Appellate Body must comprise "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally", and should therefore have no need to resort to NGOs in order to determine the law applicable and its interpretation.').

174 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, pp. 12-13, paras. 36-37; *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/R, para. 83 ('We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various attached NGO submissions.').

175 *EC–Asbestos*, Report of the Appellate Body, adopted on 5. April 2001, WT/DS135/AB/R, Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, Sec. 7 (c).

WTO rules.[176] Further, the Appellate Body has noted the difficulty in differentiating between fact and legal submissions. *Amicus curiae* submissions often combine fact and legal considerations. In *EC–Sardines*, the Appellate Body rejected the extensive fact submissions in Morocco's *amicus* brief, but decided that it would still consider the legal arguments.[177] This mirrors the Appellate Body's approach to parties' and third parties' submissions in other cases.[178]

WTO panels' obligation to establish the objective truth in a case in Article 11 DSU indicates that *amici curiae* may elaborate on arguments not raised by the parties, as long as the submission addresses aspects within the respective panel's jurisdiction. With regard to third parties, the Appellate Body held in *US–Customs User Fee* that a third party does not possess the right to make claims or present defences to those claims due to the limitations imposed by the terms of reference.[179] Given that *amici curiae* do not attain a formal status in the proceedings (and constitute a 'lesser' form of involvement than third parties), these considerations *a fortiori* claim validity for *amicus curiae* submissions. The panel in *EC–Salmon* indicated that this case law also applied to *amici curiae*, when it noted that the information submitted by *amicus curiae* had 'a direct bearing on a claim that was already raised by Canada.'[180] Moreover, other panels and the Appellate Body have rejected *amicus curiae* submissions that consider issues or arguments not raised in the claims or submissions of the parties or third parties, unless the submission is adopted by a party or third par-

176 Cf. L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 249, analyzing the submissions of CIEL in WTO dispute settlement.

177 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, pp. 41-42, paras. 169-171. See also Chapter 7.

178 *United States–Subsidies on Upland Cotton* (hereinafter: *US–Upland Cotton*), Recourse to Article 21.5, Report of the Appellate Body, adopted on 20 June 2008, WT/DS267/AB/R, paras. 385, 420.

179 See D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international coordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 426-427.

180 *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 7.9.

ty.[181] In *US–Softwood Lumber IV*, the Appellate Body rejected submissions for purporting to add an 'indigenous dimension to the issues raised by this appeal' and for commenting on the 'environmental implications of the issues raised by this appeal.'[182] In *Mexico–Taxes on Soft Drinks*, the Appellate Body decided that consideration of a submission by the Mexican national chamber of the sugar and alcohol industries was not 'necessary' after the United States had alleged that the submission raised new arguments and 'claims of error' that were not part of Mexico's Notice of Appeal.[183] In short, *amici curiae* may elaborate on specific issues not mentioned by the parties, but only if they relate to an issue that has been raised by a party (or a party forgoes to protest that another issue has been addressed). *Amici curiae* cannot point to claims that have not been developed by a party. The situation is different if a party adopts a submission. With respect to third parties, panels have decided that novel legal arguments, including arguments on jurisdiction, will be considered by them only if adopted by a party.[184]

This practice accords with the Appellate Body's general approach. The Appellate Body has found a violation of Article 11 DSU and parties' due

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181 *United States–Certain Country of Origin Labelling (COOL) Requirements* (hereinafter: *US–COOL*), Report of the Panel, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R, p. 5, para. 2.10; *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 268 ('We note that the brief was directed primarily to a question that was not part of any of the claims.'); *United States–Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* (hereinafter: *US–Softwood Lumber IV*), Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, p. 5, para. 9 ('These briefs dealt with some questions not addressed in the submissions of the participants or third participants.'); *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8, FN 21.

182 *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, p. 5, FN 21-22.

183 *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8, FN 21.

184 In *Canada – Certain Measures Affecting the Automotive Industry*, the panel considered Article V GATS after Canada decided to rely on it as a secondary argument. It had initially only been presented by the USA which participated as a third party. See *Canada–Certain Measures Affecting the Automotive Industry,* Report of the Panel, adopted on 11 February 2000, WT/DS142/R, WT/DS139/R, paras. 6.901, 10.265-10.272.

process guarantees where a panel has decided on claims and alleged violations of WTO law that fell outside its jurisdiction.[185] The material jurisdiction is limited to disputes arising out of the agreements adopted under the WTO/GATT.[186] Panels have decided that 'the matter referred to the DSB' pursuant to Article 7 DSU – the scope of jurisdiction – consists of the specific claims stated by the parties in the documents specified in the terms of reference *and* the legal basis of the complaint.[187] In *Chile–Price Band System*, the Appellate Body held that even if the terms of reference could be

185 A. Mitchell, *Due process in WTO disputes*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement – the first ten years*, Cambridge 2005, p. 153.

186 Pursuant to Article 6(2) DSU, the scope of jurisdiction is first defined in the request for the establishment of a panel, which shall 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' to determine panels' jurisdiction. See *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R, para. 2.244; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 126.
Appendix 1 to the DSU lists the relevant agreements as: (A) Agreement establishing the World Trade Organization; (B) Multilateral Trade Agreements: 1A Multilateral Agreements on Trade in Goods; 1B General Agreement on Trade in Services; 1C Agreement on Trade-Related Aspects of Intellectual Property Rights; 2 Understanding on Rules and Procedures Governing the Settlement of Disputes; (C) Plurilateral Trade Agreements: 4 Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; International Bovine Meat Agreement. The request forms the basis for the terms of reference which 'define the scope of the dispute'.

187 *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Appellate Body, adopted on 25 November 1998, WT/DS60/AB/R, p. 25, para. 72. The terms of reference are found to have an important publicity and due process function. They warn and inform parties and potential third parties of the claims in the case. *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body, adopted on 20 March 1997, WT/DS22/AB/R, pp. 21-22; *EC and Certain Member States–Large Civil Aircraft*, Report of the Panel, adopted on 1 June 2011, WT/DS316/R, para. 7.88. In *India–Patents (US)*, the Appellate Body denied having authority to consider the US's claim under Article 63 TRIPS, because the claim had not been included in the terms of reference, even though the US claimed that it could not have been aware of the need to raise this argument given that the respondent had not disclosed certain information at the time of the request. The Appellate Body found the earlier decision of the panel that 'all legal claims would be considered if they were made prior to the end of [the first substantive] meeting' to be inconsistent with the clear wording of Article 7(1) DSU. See *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products* (hereinafter: *India–Patents (US)*), Report of

interpreted to include a certain claim a panel was 'not entitled to make a claim for [the claimant], or to develop its own legal reasoning on a provision that was not at issue.'[188] However, a violation of Article 11 DSU and the due process guarantees enshrined therein has been denied where the claimant was aware of the possibility that the respondent would make a certain defence and failed to object to its untimeliness despite being aware of the opportunity to respond.[189] Equally, in *EC–Hormones* and *US–Certain EC Products,* the Appellate Body found that a panel may develop its own legal reasoning and that it was not restricted in its considerations to the legal arguments forwarded by the parties as long as the arguments per-

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the Appellate Body, adopted on 16 January 1998, WT/DS50/AB/R, paras. 85-96. Based on this case law, it suffices if a claim has been mentioned in the terms of reference. It does not need to have been elaborated upon further, as long as the claimant has not explicitly abandoned it during the proceedings. See *EC–Bananas III*, Report of the Panel, adopted on 25 September 1997, WT/DS27/R, paras. 7.57-7.58, 158; *EC–Bananas III*, Report of the Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R, para. 143. See also *Japan – Measures Affecting the Importantion of Apples* (hereinafter: *Japan–Apples*), Report of the Panel, adopted on 10 December 2003, WT/DS245/R, paras. 8.63-8.66.

188 *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS207/AB/R, para. 168. The case law is inconsistent in this regard. In *Japan–Agricultural Products II*, the Appellate Body ruled that the exercise by panels of their investigative powers required that the party carrying the burden of proof had established a *prima facie* case of inconsistency based on specific legal claims asserted by it so as to not inadvertendly shift the burden of proof onto the other party. See *Japan–Measures Affecting Agricultural Products* (hereinafter: *Japan–Agricultural Products II*), Report of the Appellate Body, adopted on 19 March 1999, WT/DS76/AB/R, paras. 127-130. In *Canada–Aircraft*, the Appellate Body took the opposing view. It stated that Article 13 DSU did not limit panels' right to seek information in any manner, therewith rejecting Canada's argument that the panel lacked authority to request information because Brazil had not established a *prima facie* case. It distanced itself in surprisingly clear terms from its earlier decision when it held that the argument was 'bereft of any textual or logical basis' and there was 'nothing in either the DSU or the SCM Agreement to sustain it.' See *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, para. 185. In favour of *Canada–Aircraft*, J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 International and Comparative Law Quarterly (2002), p. 352; M. Benzing, supra note 82, pp. 180, 186-187.

189 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (hereinafter: *US–Gambling*), Report of the Appellate Body, adopted on 20 April 2005, WT/DS285/AB/R, p. 92, para. 276.

tained to a claim made by a party.[190] In accordance with the text of Article 7(2) DSU, the Appellate Body has noted that panels are not limited to the specific provisions referred to by the complainant.[191]

This result ultimately also applies to the Appellate Body modified by the differences mandated by its appellate function. One question is if *amici curiae* may raise legal arguments that have not been addressed in the panel report.[192] The DSU furnishes the Appellate Body with the power to request additional submissions. However, this power is limited to requests from the parties, not external entities.[193] In *US–Shrimp*, Mexico argued that the Appellate Body would act *ultra vires* if it 'were to make use of arguments which are outside the terms of article 17.6 of the DSU and which are not clearly and explicitly attributable to a Member that is a party to the dispute.'[194] The scope of the issues the Appellate Body may address is set out in the Notice of Appeal.[195] The Appellate Body agreed with Mexico's argument in *Mexico–Taxes on Soft Drinks* when it excluded an *amicus curiae* submission the United States had argued contained new arguments and claims of error that Mexico had not addressed in its Notice of Appeal.[196] For being 'directed primarily to a question that was not part of any of the claims,' the Appellate Body also rejected a brief in *US–Steel*

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190 *EC–Hormones,* Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 156; *Australia–Automotive Leather II*, Recourse to Article 21.5 (US), Report of the Panel, adopted on 11 February 2000, WT/DS126/RW, p. 12, para. 6.19 ('That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute.').

191 *Argentina – Safeguard Measures on Imports of Footwear* (hereinafter: *Argentina–Footwear (EC)*), Report of the Appellate Body, adopted on 12 January 2000, WT/DS121/AB/R, para. 74.

192 G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), pp. 787-788.

193 Article 17(4) DSU and Rule 28(1) *EC–Asbestos* Working Procedures for Appellate Review; *US-Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 81.

194 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 87.

195 Article 20 Working Procedures for Appellate Review, WT/AB/WP/6.

196 *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8, FN 21.

Safeguards.[197] In *US–Softwood Lumber IV*, the Appellate Body made clear, however, that a brief it rejected for considering 'questions not addressed in the submissions of the participants or third participants' could nonetheless be adopted by the parties or third parties to the dispute.[198] The briefs at issue in this case considered the environmental and indigenous implications of the appeal. Case law on the raising of new arguments by the parties in appellate proceedings indicates that the Appellate Body applies a stricter standard than demanded by Article 17(6) DSU. Moreover, it allows the parties to raise new arguments as long as they do not implicate facts that were not brought before the panel.[199] As a review instance, the establishment of the fact record does not form part of the Appellate Body's tasks. However, the review of the legal arguments of a decision in addition to an inventory of the applicable laws routinely implies a reassessment of the facts established in the panel proceedings to determine whether the panel erred in its application of the law to the facts. If a panel has failed to apply the pertinent law, it is the duty of the Appellate Body to correct this error. The same must be the case with respect to legal arguments. Finally, the Appellate Body does not appear to have questioned the applicability of Article 17(6) DSU to arguments on jurisdiction.[200]

Panels and the Appellate Body in their proceedings apply the principle of *iura novit curia*. Accordingly, the parties do not bear the burden of proof for questions of law or legal interpretation.[201] A related question is to what extent panels and the Appellate Body can consider submissions on

197 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 268.

198 *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, para. 9.

199 *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, para. 211; *US–FSC*, Report of the Appellate Body, adopted on 20 March 2000, WT/DS108/AB/R, para. 103; *EC–Sugar*, Report of the Appellate Body, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, paras. 240-242.

200 *United States – Continued Dumping and Subsidy Offset Act of 2000* (hereinafter: *US–Offset Act (Byrd Amendment)*), Report of the Appellate Body, adopted on 27 January 2003, WT/DS217/AB/R, WT/DS234/AB/R, paras. 206-208.

201 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (hereinafter: *EC–Tariff Preferences*), Report of the Appellate Body, adopted on 20 April 2004, WT/DS246/AB/R, para. 105 ('Consistent

issues and laws outside the covered agreements. As noted above, the Appellate Body and panels have received *amicus* briefs arguing for the integration of international environmental laws and the WTO covered agreements. The DSU does not contain an applicable law clause. Article 3(2) DSU stipulates that the DSU shall be interpreted 'in accordance with customary rules of interpretation of public international law,' which has been read not to exclude the consideration of non-WTO law *per se*.[202] Article 7(2) DSU requires panels to 'address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.' Panels have held that the wording only refers to WTO covered agreements, and does not include non-WTO international agreements.[203] Panels and the Appellate Body have no jurisdiction to rule on claims of violations of non-WTO international law. Still, the Appellate Body has held consistently that the WTO law is not to be 'read in clinical isolation from public international law.'[204] Thus, the relevance of non-WTO international law largely

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with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.'), followed by *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.121, FN 437; *US–Zeroing (Japan)*, Recourse to Article 21.5–Japan, Report of the Panel, adopted on 31 August 2009, WT/DS322/R, para. 7.8.

202 *Korea–Measures Affecting Government Procurement*, Report of the Panel, adopted on 1 May 2000, WT/DS163/R, para. 7.96, FN 753 See also L. Bartels, *Jurisdiction and applicable law in the WTO*, Cambridge Legal Studies Research Paper Series, Paper No. 59/2014, October 2014.

203 E.g. *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Report of the Panel, adopted on 1 June 2011, WT/DS316/R, para. 7.324 ('Article 7.2 does not give us jurisdiction to determine the rights and obligations of the parties under non-covered agreements for the purpose of the recommendations and rules envisaged under Article 11 of the DSU. Such recommendations or rulings must relate to the parties' rights and obligations under the WTO covered agreements…'). This is disputed in literature, see G. Marceau, *A call for coherence in international law: praises for the prohibition against 'clinical isolation' in WTO dispute settlement*, 33 Journal of World Trade (1999), p. 110; D. Palmeter/P. Mavroidis, *The WTO legal system: sources of law*, 92 American Journal of International Law (1998), p. 399.

204 *US–Gasoline*, Report of the Appellate Body, adopted on 20 May 1996, WT/DS2/R and WT/DS4/R, p. 17; *India–Patents*, Report of the Appellate Body,

unfolds in the interpretation of the WTO covered agreements[205] and as evidence of other international legal obligations, within the limits established by Articles 3(2) and 19(2) DSU that panels may not add to or diminish the rights and obligations established by the covered agreements.[206] Of particular relevance in the coordination with other international laws are broad exception clauses in the WTO Agreement, such as Article XX GATT, which allows trade restrictions for certain reasons, including environmental concerns, and Article 31(3)(c) VCLT, which will be discussed further in the next section.[207] Thus, while *amici* can in theory elaborate on other international law in their briefs, the above cases show that with respect to *amicus* submissions, panels and the Appellate Body will not consider issues outside the covered agreements, unless they have been tabled by a party.

VI. Investor-state arbitration

1. Legal standards

The applicable legal standards are essentially those outlined with regard to the substance of requests for leave (see Chapter 5). Since *UPS v. Canada* and *Methanex v. USA*, tribunals have held that an *amicus curiae* should 'assist in the determination of a factual or legal issue related to the arbitration by bringing a different perspective or particular knowledge to the is-

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adopted on 16 January 1998, WT/DS50/AB/R/US, para. 46; *Japan–Alcoholic Beverages II*, Report of the Appellate Body, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12.

205 J. Pauwelyn, *The role of public international law in the WTO: how far can we go?*, 95 American Journal of International Law (2001), pp. 554, 561 ('[N]othing in the DSU or any other WTO rule precludes panels from addressing and … applying other rules of international law so as to decide the WTO claims before them.').

206 E.g. *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 158; *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R, para. 167. See L. Bartels, *Applicable law in WTO dispute settlement proceedings*, 35 Journal of World Trade (2001), pp. 499-519; J. Pauwelyn, supra note 205, pp. 562-571.

207 Cf. J. Pauwelyn, supra note 205, pp. 575-576, with further examples.

sues.'[208] This criterion has become imperative for *amicus curiae* briefs in all investment arbitrations and the pertinent rules.[209] The FTC Statement in Section B, para. 6, determines in subsection (a) that submissions may contain both legal argument and/or facts and must add 'a perspective, particular knowledge or insight that is different from that of the disputing parties.' Subsection (b) reiterates that submissions must be within the scope of the dispute, as also emphasized by Section B, para. 3, and subsection (c) clarifies that *amici curiae* may/should have an interest in the case. Repetition of the scope requirement shows its pivotal relevance in the eyes of the drafters. Rule 37(2) ICSID Arbitration Rules and Article 4(1) and (3) UNCITRAL Rules on Transparency establish the same substantive requirements.[210]

2. Particular knowledge or perspective: human rights and EU law?

Tribunals have accepted *amicus curiae* briefs submitting both legal arguments and/or facts. As shown in Chapter 5, *amici curiae* need to have a

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208 See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae'*, 15 January 2001, paras. 48-50; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 70. This requirement had been proposed by the respondent Canada, see *UPS v. Canada*, Canada's submission on Canadian Union of Postal Workers and the Council of Canadians Petition for Intervention, 28 May 2001, p. 10, para. 43. The *UPS* tribunal further decided that submissions must 'relate to issues raised by the disputing parties and cannot introduce new issues in the litigation or go beyond the scope of the case as defined by the disputing parties.'

209 Claimants and respondents in several cases called for a more restrictive scope of content. Canada in *UPS v. Canada*, for instance, requested that *amici curiae* should not be allowed to make arguments on legal interpretation – to avoid giving them the powers of Article 1128 NAFTA-participants and because they lacked expertise in the interpretation of international treaty obligations – and on jurisdiction and the place of arbitration. See *UPS v. Canada*, Canada's submission on Canadian Union of Postal Workers and the Council of Canadians Petition for Intervention, 28 May 2001, paras. 49-55. *Methanex* requested a limitation of *amicus curiae* briefs to legal issues, see *Methanex v. USA*, Claimant Methanex Corporation's Request to Limit *Amicus Curiae* Submissions to Legal Issues Raised by the Parties, 15 April 2003.

210 Other rules, including the IUSCT Note and Article 10.20.3 CAFTA, are silent on the substance of *amicus curiae* briefs.

particular knowledge or insight that supplements or surpasses that of the parties. This section considers the type of content tribunals have found meeting this test.

Submissions by NGOs tend to focus on public policy arguments and on how they can be recognized in the investment dispute. Most submissions argue either for a public value-oriented interpretation of the abstract investment treaty guarantees (especially the Fair and Equitable Treatment standard and indirect expropriation) or they discuss defences of the challenged measures taken by the host state that fall within the ambit of their own institutional activities.[211] In light of parties' propensity to engage in such arguments only punctually and from their particular perspectives, *amicus curiae* submissions usually accord with the requirement that *amici curiae* present 'the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.'[212] For instance, the tribunal in *Biwater v. Tanzania* notified the *amici* that

> it was envisaged that the Petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy. These indeed, are the areas that fell within the ambit of Rule 37 (2) (a) of the ICSID Arbitration Rules.[213]

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211 See e.g. *UPS v. Canada*, Application for *amicus curiae* status by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, paras. 26-35; *Suez/Vivendi v. Argentina*, CELS, CIEL et al., *Amicus Curiae* Submission, 4 April 2007, ICSID Case No. ARB/03/19, pp. 4-13; *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19, para. 256 (In their submission, the *amici curiae* had argued that the tribunal should interpret the underlying BITs in light of Argentina's international human rights obligations, in particular, the obligations owed to its population arising from the right to water, and that the measures adopted towards the investor were justified on the basis of necessity. The *amici* argued that the right to water 'required that Argentina adopt measures to ensure access to water by the population, including physical and economic access, and that its actions in confronting the crisis fully conformed to human rights law.').

212 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 13. See also *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 13.

213 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366.

Public policy submissions include a brief by the CIEL and other NGOs in *Biwater v. Tanzania* arguing that the investor had not carried out the necessary due diligence assessment which led it to submit a bid too low to cover the costs of operation and management of the Dar es Salaam water and sewerage system whose service interruptions had led the Tanzanian government to terminate the contract. The *amicus curiae* argued that the tribunal should factor this into its consideration of the investor's responsibilities in the interpretation of the investment treaty. It also argued that the investor's responsibility to meet its contractual obligations towards the host state was increased, because the dispute affected the exercise of the right to water and sustainable development goals.[214] In *Methanex v. USA*, Bluewater and the IISD expanded on the USA's argument that the prohibition of the gasoline additive MTBE served to protect public health and the environment and as such constituted a non-discriminatory regulation, which was exempt from the duty of compensation for expropriation. It pointed to general problems in environmental protection and the right of states hosting investments to issue environmental protection and sustainable development measures.[215] In another submission, BluewaterNetwork, CIEL et al. opined that the respondent had acted lawfully because of its obligation under international human rights law to protect the health of its population.[216]

Even though they are explicitly permitted, fact submissions are rare.[217] Fact information is submitted mostly to elucidate the context and background of the dispute or to embellish legal arguments. This may, in part,

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214 *Biwater v. Tanzania*, IISD, CIEL et al., *Amicus Curiae Submission*, 26 March 2007, ICSID Case No. ARB/05/22, at: http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf (last visited: 21.9.2017). The tribunal summarized the arguments extensively. See also *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 357, 370-391.

215 *Methanex v. USA*, *Amicus* submission by International Institute for Sustainable Development, 9 March 2004.

216 *Methanex v. USA*, Submission of non-disputing parties Bluewater Network, Communities for a Better Environment, Center for International Environmental Law, Earthjustice, 9 March 2004, paras. 16-18.

217 See, however, *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, paras. 14-15, where the *amicus curiae* petitioners sought to participate in order to present their fact account of the social protests against the claimant's mining project and the claimant's treatment of local communities. See also *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, para. 38. The WHO and FCTC Secretariat in their *amicus* brief

be due to the limited public access to case files, which makes it difficult for *amici curiae* to ensure that they comment on facts within the scope of the dispute, meet the requirement of 'particular knowledge' and do not duplicate the parties' submissions. In *Glamis v. USA*, despite the claimant's protest against its admissibility, the tribunal accepted from the Quechan Indian Nation a fact analysis of the dispute and the tribe's concerns over an interference of the prospective investment project with their sacred ancestral lands. The tribe submitted with its brief a confidential memorandum detailing the location of holy tribal lands.[218] Further, the tribe commented on the background of the case, including the licensing of the claimant's open pit gold mine, the environmental and cultural impacts of the mine, California's (presumed) intent in enacting mining reclamation measures and several of the contested legal issues.[219] Tribunals have also accepted submissions on the respondent's national laws.[220] The *amicus curiae* submission by Sierra Club and Earthworks, Earthjustice and the Western Mining Association Project in *Glamis v. USA* addressed the legitimacy under federal and state environmental laws, public lands laws and mining laws of the measures of the US Interior Department and the State of California. The *amici* argued that *Glamis* did not possess a property right under federal mining laws that could be subject to expropriation, as claimed by it.[221]

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defended the measures taken by the respondent as effective and evidence-based measures against tobacco consumption.

218 E.g. *Glamis v. USA*, *Amicus Curiae*, Application of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005, para 12; *Glamis v. USA*, Supplemental Submission by Quechan Indian Nation, 16 October 2006 (Also, arguments on international (and domestic) legal and policy frameworks that support indigenous cultural resource protection; legal and policy frameworks supporting corporate social responsibility and sustainability).

219 *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10.

220 In *Piero Foresti v. South Africa*, the tribunal admitted a submission that provided background information on the challenged Mineral and Petroleum Resources Development Act, as well as on the constitutional implications of the case. See *Piero Foresti v. South Africa*, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, 17 July 2009, ICSID Case No. ARB(AF)/07/01.

221 *Glamis v. USA*, Application by Sierra Club and Earthworks, Earthjustice and the Western Mining Association Project for leave to file a written submission, 16 October 2006.

Tribunals have further accepted contextual submissions and submissions laying out the potential impact of a decision. In *Glamis v. USA*, the submission from the National Mining Association foreshadowed potential impacts on foreign direct investment of a decision against the claimant.[222] The Quechan Indian Nation relied on a report from the Advisory Council on Historic Preservation that, if implemented, the mine would be so damaging to historic resources that the tribal members' ability to practice their sacred traditions would be lost.[223] Another example is the *amicus curiae* brief submitted in *Pac Rim v. El Salvador*.[224] A coalition of environmental and human rights law NGOs and research institutes applied to 'provide input over the political nationwide debate over metal mining and sustainability' in El Salvador. In their brief, the *amici curiae* instructed the tribunal on the factual background of the dispute, in particular the widespread public opposition to the mine due to environmental concerns, alleged deficiencies in the claimant's environmental impact assessment, and claimant's efforts to influence Salvadorean politics in its favour. The *amici* embedded their factual submissions in the argument that the tribunal lacked jurisdiction because the claim constituted neither a legal dispute pursuant to Article 25 ICSID Convention, nor a measure under Article 10(1) CAFTA, but that it was merely an expression of dissatisfaction with legitimate Salvadorean public policy since the mid-2000.[225]

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

223 See *Glamis v. USA*, Application to file a non-party submission and submission by the Quechan Indian Nation, 19 August 2005.

224 *Pac Rim Cayman LLC* initiated arbitration proceedings through its US subsidiary under the CAFTA and Salvadorean investment law seeking more than USD 77 million in compensation after the Salvadorean Ministry of Environment had denied it extraction permits for its gold mine 'El Dorado' out of environmental and public health grounds, in particular concerns over a possible pollution of the Lempa River, which provides water to more than half of the country's population. *Pac Rim v. El Salvador*, Notice of Arbitration, 30 April 2009, ICSID Case No. ARB/09/12.

225 *Pac Rim v. El Salvador*, Application for permission to proceed as *amici curiae*, 2 March 2011, ICSID Case No. ARB/09/12. The *amici curiae* further discussed if the claimant's claim amounted to an abuse of process, as well as the respondent's denial of benefits under Article 10(12)(2) CAFTA. The tribunal admitted the submission, but stressed that the *amici curiae* should focus on the jurisdictional aspects of the case, because it was at the jurisdictional stage. See *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12, p. 2. See also *Piero Foresti v. South Africa*, where *amici curiae* defended the nation-

A distinct category of legal submissions has developed with respect to *amicus curiae* submissions by the European Commission. There are generally two types of cases in which the EC seeks to submit briefs: most frequent are cases where the arbitration clause is contained in an investment treaty between two EU member states, so called intra-EU BITs. The other type are cases involving a potential conflict between investment law and EU law. Typically, the EC submits briefs on EU law and in particular the interaction of EU law and investment treaties.[226] In the first type of cases, the EC often argues that the tribunal lacks jurisdiction. The EC has raised as (or added to) the preliminary objection that in 'intra-EU disputes' the investment treaty is invalid or, where the Energy Charter Treaty forms the jurisdictional basis, inapplicable with regard to subject matters falling under EU competence for failing to meet the requirements of the jurisdictional clause of Article 26 ECT or due to an implicit disconnection clause.[227] In all types of cases, submissions have been accepted on sub-

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al legislation that was at issue as indispensable in the efforts to remedy substantive inequality. *Piero Foresti v. South Africa*, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules, 17 July 2009, ICSID Case No. ARB(AF)/07/01. See also S. Karamanian, *The place of human rights in investor-state arbitration*, 17 Lewis & Clark Law Review (2013), p. 430.

226 See *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22*; Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010*,* PCA Case No. 2008-13*; Eastern Sugar v. Czech Republic,* Partial Award, 27 March 2007, SCC Case No. 088/2004; *Electrabel v. Hungary,* Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19. See also Annex I.

227 *Electrabel v. Hungary,* Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, Part V-Pages 3-4, paras. 5.10, 5.13-5.14; *Charanne v. Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012, paras. 427, 433-434; *European American Investment Bank AG (Austria) v. The Slovak Republic*, Letter by the European Commission to Martin Doe, Legal Counsel, Permanent Court of Arbitration entitled 'Request dated 6 September 2011 from the arbitral tribunal dealing with (PCA) Case NO. 2010-17', 13 October 2011, Ref. Ares(2011)1091296-13/10/2011, PCA Case No. 2010-17. For an analysis of the arguments see L. Peterson, *Investigation: In recent briefs, European Commission casts doubt on application of Energy Charter Treaty to any intra-EU dispute*, IA Reporter, 8 September 2014, available at: https://www.iareporter.com/articles/investigation-in-recent-briefs-european-commission-casts-doubt-on-application-of-energy-charter-treaty-to-any-intra-eu-dispute/ (last visited 21.9.2017). The EC further argues that the ECT (and other investment treaties) are inapplicable in intra-EU arbitrations on account of the exclusive ju-

stantive and procedural issues, such as EU state aid law and its relationship with investment treaty guarantees, the effect of EU decisions on EU Member States and the enforcement of awards that do not accord with a member state's EU law obligations.[228]

3. Within the scope of the dispute

Tribunals emphasize that *amici curiae* may only address issues within the scope of the tribunal's mandate (see Chapter 5). This requirement limits the information *amici curiae* can impart or, more precisely, the information contained in a brief that the tribunal may consider without risking the validity of an award.[229] The scope of the dispute typically is determined in

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risdiction clause of Article 344 TFEU. Article 344 TFEU: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.' For a more general analysis of the regime conflict, see G. Bermann, *Navigating EU law and the law of international arbitration,* 28 Arbitration International (2012), pp. 397-445. See however, the recent opinion of *Advocate-General Wathelet* in the pending Case C-284/16, *Slovak Republic v. Achmea BV*, 19 September 2017.

228 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 176-196; *Micula et al. v. The Government of Romania*, No. 1:2015mc00107, Document 66 (S.D.N.Y. 2015); *Ioan Micula, European Food S.A., S.C. Starmill S.R.L., Multipack S.R.L. v. The Government of Romania*, Brief for *Amicus Curiae* [by] the Commission of the European Union in Support of Defendant-Appellant, 4 February 2016 (2nd Cir. 2016). See also H. Wehland, *The enforcement of intra-EU BIT awards: Micula v. Romania and beyond*, 17 Journal of World Investment and Trade (2016), pp. 942-963; *Electrabel v. Hungary,* Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, Part IV-Pages 28-29, paras. 4.94-4.99, Part V-Pages 5-6, paras. 5.16-5.19. See also J. Fry/O. Repousis, supra note 121, p. 827; C. González-Bueno/L. Lozano, *More than a friend of the court: the evolving role of the European Commission in investor-state arbitration*, Kluwer Arbitration Blog, 26 January 2015, at: http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/ (last visited: 21.9. 2017); O. Gerlich*, More than a friend? The European Commission's amicus curiae participation in investor-state arbitration*, in: G. Adinolfi et al. (Eds.), *International economic law*, Springer 2017, p. 262.

229 T. Ruthemeyer, *Der amicus curiae brief im internationalen Investitionsrecht*, Baden-Baden 2014, p. 261.

the Notice of Arbitration. Thus, it depends on the specifics of the case.[230] In the words of the tribunal in *Methanex*:

> [t]he Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact.[231]

No *amicus* briefs were found that sought to build the case for a party or have made submissions suggesting 'how issues of fact or law as presented by the parties ought to be determined,' matters the tribunal in *Biwater v. Tanzania* expressly asked the *amici* to refrain from.[232] The *UPS v. Canada* tribunal also clarified that the scope would be exceeded if an *amicus curiae* participated to 'vindicate its rights.' This is convincing. Such a request would entail that the tribunal decided on issues outside of its jurisdiction.[233]

One issue that tribunals have struggled with is to what extent *amici curiae* may make submissions on questions of jurisdiction, particularly if they may raise jurisdictional objections and if such jurisdictional submissions are at all able to form a unique perspective.[234] The *UPS v. Canada* tribunal found that it was inappropriate for *amici curiae* to make submis-

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230 *Pac Rim v. El Salvador*, Procedural Order Regarding *Amici Curiae*, 2 February 2011, ICSID News Release, ICSID Case No. ARB/09/12, para. 8; *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 20; *TCW v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.3; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 39 (Article 15(1) of the 1976 UNCITRAL Rules 'was about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by including subject matter in its arbitration additional to that which the parties have agreed to confer.').

231 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 29.

232 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366.

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

234 *Suez/Interaguas v. Argentina*, Order in response to a petition of participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 27. But see also *Chevron/Texaco v. Ecuador,* Procedural Order No. 8, 18 April 2011, PCA

sions on jurisdiction or the place of arbitration, because the parties were 'fully able to present the competing contentions and in significant degree [had] already done so' and because it was 'for the respondent to take jurisdictional points.'[235] In *AES v. Hungary*, the tribunal informed the European Commission, which had submitted an *amicus curiae* brief, that it could not challenge the tribunal's jurisdiction in the absence of a challenge by the respondent.[236] This is an important limitation in respect of all preliminary objections that a tribunal is not obliged to examine *ex officio*. Any other approach would unduly interfere with the parties' rights over the proceedings.[237] In *Eureko v. Slovak Republic*, the parties agreed to invite the European Commission to comment on behalf of the European Union on 'the effect upon the tribunal's jurisdiction of the fact that both

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CASE N° 2009-23, paras. 10, 18, 20 and *Chevron/Texaco v. Ecuador*, Petition for participation as non-disputing parties by Fundación Pachamama and IISD, 22 October 2010, PCA CASE N° 2009-23, paras. 4.6-4.7 ('Petitioners seek leave to participate at the jurisdiction phase of this arbitration specifically out of concern for the grave consequences that a decision accepting jurisdiction could have for the rights of litigants to access the judicial system for claims arising out of foreign investment activity, and the possibility of an affront to the independence of the Ecuadorian judiciary in the present instance.' The tribunal denied the request noting that 'the parties agree that they do not believe that the *amicus* submissions will be helpful to the Tribunal and neither side favours the participation of the petitioners during the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal and have already been extensively addressed by the Parties' submissions.' The dispute was heavily politicized, and the emphasis of legal aspects may have been motivated by an attempt to depoliticize the proceedings as much as possible.).

235 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, paras. 71. See also Canada's Submission on CUPW and the CC's Petition for Intervention, 28 May 2001, paras. 45-55; *UPS v. Canada*, Investor's Response to the Petition from the CUPW and the CC, 28 May 2001, para. 19.

236 E. Triantafilou, *A more expansive role for amici curiae in investment arbitration?*, Kluwer Arbitration Blog, 11 May 2009, at: http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration/ (last visited: 21.9.2017).

237 The tribunal in *Electrabel v. Hungary* admitted a non-raised preliminary objection by the EC as *amicus curiae*, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 4.92, 10.2. See also T. Ruthemeyer, *Der amicus curiae brief im internationalen Investitionsrecht*, Baden-Baden 2014, pp. 256, 261 (He contends that jurisdictional issues can generally be addressed by *amici curiae.*).

the Respondent and the national State of the Claimant are Member States of the EU' after Slovakia had raised the procedural objection that the arbitration agreement was invalidated upon its accession to the EU.[238] Other tribunals have also accepted unsolicited submissions on procedural objections that had been raised by the respondent.[239]

One case that encapsulates the difficulties in applying this criterion is *von Pezold v. Zimbabwe*, in which the joined tribunals rejected an application from ECCHR and the chiefs of four indigenous tribes living in South-Eastern Zimbabwe. The *amicus curiae* petitioners argued that the tribes had legal claims to the land on which the claimants were operating timber plantations and whose compulsory acquisition by the Zimbabwean government formed the basis of the claim. They contended that based on the applicable law provisions – the Germany-Zimbabwe and the Switzerland-Zimbabwe BITs respectively and the ICSID Arbitration Rules – the tribunal had to apply all relevant international human rights laws to fully resolve the case.[240] Further, they requested that the tribunal acknowledge the

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238 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 31. The tribunal also invited the Netherlands as the other party to the applicable BIT 'to provide observations with regard to the question whether or not the BIT is still legally valid and subsequently whether or not the tribunal has jurisdiction to adjudicate this claim.' *Id.*, para. 155.

239 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011 and Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ICSID Case No. ARB/09/12; *Glamis v. USA*, *Amicus Curiae* Application of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005, para. 12 (Submission on alleged non-compliance with dominant nationality test if the measures taken by California really were motivated by goals to preserve the environment and culture). In *Dames & Moore v. Iran*, the IUSCT accepted a document from the chairman of a company that was not party to the case, because 'the above-mentioned document may assist the Tribunal in deciding the jurisdictional issue regarding the Claimant's ownership and control of SGTC.' See *Dames & Moore and the Islamic Republic of Iran*, Decision No. DEC36-54-3, 23 April 1985, p. 15, reprinted in 8 Iran USCTR (1985-I), p. 115 (The document was from M.A. Saheb, Chairman and Managing Director of South Gulf Trading and Shipping Limited of Dubai). See also M. Pellonpää/D. Caron, *The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal*, Helsinki 1994, p. 44.

240 ECCHR et al., Petition for leave to make submissions as *amicus curiae*, p. 7; *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25, para. 25.

existence of rights to their ancestral lands under international law which – so the argument – corresponded with obligations for the parties. The claimants strongly objected to the participation. *Inter alia* they argued that the issues were not within the scope of the dispute or at least 'unrelated' to it (cf. Rule 37(2)(a)), because the parties had not raised the above arguments and because the applicable law was limited to the two BITs, public international law, and the (compatible) national laws of Zimbabwe.[241] The tribunal agreed with the claimants. It found that the petitioners failed to comply with Rule 37(2)(a) ICSID Arbitration Rules and that the request was outside the tribunal's jurisdiction. It held that the dispute was limited to the measures taken by the respondent against the claimants and their investments, and that it would be outside the tribunal's jurisdiction to adjudicate on the validity of the petitioners' claims.[242] It stressed that the reference in the BITs to 'such rules of general international law as may be applicable in the BITs' did 'not incorporate the universe of international law into the BITs or into disputes arising under the BITs,' and that neither party had brought the issue of indigenous people into the proceedings.[243] The prospected submission differed significantly from earlier submissions in that petitioners' sought a pronouncement on their claims, which lay outside the scope of the dispute as defined by the parties.

The arguments concerning the scope of jurisdiction accord in principle with the earlier case law. However, the tribunal went one step further. It did not only find that the material jurisdiction limited the content of an *amicus curiae* submission, but it used the term 'related to the arbitration' in Rule 37(2)(a) ICSID Arbitration Rules to narrow the scope of issues *amici curiae* could comment on to arguments already raised by the parties.

The tribunal in *von Pezold v. Zimbabwe* discussed two issues, which remain unsettled in case law: whether international law other than the applicable investment treaty and procedural rules, especially international human rights law treaties applicable between the parties, can be imported into the investment arbitration through *amicus* briefs and, second, to what extent *amicus* briefs may raise arguments the parties have not yet ad-

241 *von Pezold v. Zimbabwe,* Claimants Objections, ICSID Cases No. ARB/10/15 and ARB/10/25, paras. 61-64, 65-75 quoted by *von Pezold v. Zimbabwe,* Procedural Order No. 2, 26 June 2012, paras. 38-39.

242 *Id*., para. 60.

243 *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and ARB/10/25, para. 57.

dressed. These two aspects have also been relevant in several EU-law related investment arbitrations. The first aspect will be considered separately in the next section. As regards the second issue, the approach of the tribunal appears unduly restrictive. The purpose of *amicus curiae* participation in investment arbitration is to provide tribunals with alternative arguments. It is not clear how this approach can be reconciled with the requirement of Rule 37(2)(a) that *amicus curiae* briefs should complement and not duplicate the parties' submissions.

4. Applicable law and its limits

Von Pezold v. Zimbabwe contributes to the ongoing debate in investment arbitration and before several other international courts and tribunals on how to include international laws in addition to the constitutive treaties and their annexes. The debate is particularly intense in investment arbitration and trade law with regard to the integration of human rights and environmental protection laws, but also EU law.[244] The mere fact that the parties have not mentioned human rights or other international legal obligations of the respondent state (or the investor) in the arbitration does not *per se* render any arguments thereon irrelevant. Rather, this issue depends on the law applicable to the arbitration. As a general rule, tribunals are obliged by operation of the principle of *iura novit curia* to investigate *ex officio* the content of the applicable law.

Because party agreements take precedence, the primary source for the tribunal to consider is the investment treaty under which the investor claims protection.[245] The matter is rather straightforward if the applicable investment treaty regulates this aspect. This can be achieved in different

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244 Exemplary, B. Simma, *Foreign investment arbitration: a place for human rights?*, 60 International and Comparative Law Quarterly (2011), pp. 578-579; L. Crema, *Investor rights and well-being*, in: T. Treves et al. (Eds.), *Foreign investment, international law and common concerns*, London 2013, pp. 50-70; P.-M. Dupuy et al. (Eds.), *Human rights in international law and arbitration*, Oxford 2009.

245 T. Giovannini, *International arbitration and iura novit curia*, in: B. Cremades/M. Fernández-Ballesteros (Eds.), *Liber amicorum Bernardo Cremades*, Madrid 2010, p. 500. See also *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, para. 4.112.

ways. Some recent investment treaties explicitly refer to competing rights or values such as sustainable development, human rights or the protection of the environment as treaty objectives or as defences to investment limitations; some treaties exclude from their scope certain regulatory measures intended to realize these obligations; and some treaties regulate their relationship to other agreements. For instance, Article 104 NAFTA gives way to a list of environmental and conservation agreements in case of conflict if certain conditions are met.[246]

Where the treaty explicitly allows curtailment of investment protection guarantees to the benefit of other (public or human) rights or where the right or value at issue is tied to the interpretation of the relevant investment treaty guarantees, consideration of the issues is a question of treaty interpretation.[247] Tribunals have held that the fact that the parties have not

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246 E.g. Article 12 Treaty between the United States of America and the Oriental Republic of Uruguay concerning the encouragement and reciprocal protection of investment, entered into force on 1 November 2006; Article 12 Treaty between the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, entered into force on 1 January 2012; Article 15.10 United States – Singapore Free Trade Agreement, entered into force 1 January 2004; Article 11.11 United States – Australia Free Trade Agreement, entered into force on 1 January 2005. See also Article 1 and 3 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed on 15 October 2008, referred to by C. Brown, *Bringing sustainable development issues before investment treaty tribunals*, in: M.-C. Cordonier Segger/M. Gehring et al. (Eds.), *Sustainable development in world investment law*, Alphen aan Rijn 2011, p. 177; V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 Vanderbilt Journal of Transnational Law (2015), p. 1343 ('Recent Investment Treaties have expressly included environmental measures in carve-outs to ensure that bona fide regulations do not amount to indirect expropriation.'). *Crema* notes that also in these instances tribunals struggle to apply the terms, see L. Crema, supra note 244, p. 55. See also Article 1101(4) NAFTA: 'Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.'

247 C. Reiner/C. Schreuer, *Human rights and international investment arbitration*, in: P.-M. Dupuy et al. (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, p. 84; F. Balcerzak, *Jurisdiction of tribunals in investor-state arbitration and the issue of human rights*, 29 ICSID Review (2014), p. 224.

raised a certain argument (under the applicable investment treaty and other applicable laws) does not bar tribunals from considering them. In *Mitchell v. Congo*, the ICSID Annulment Committee held that *iura novit curia* permitted, but did not obliged it to address provisions of the underlying BIT which might have excused the government's measures against the investor.[248] As noted, in this regard, the decision in *von Pezold v. Zimbabwe* seems overly restrictive.

If the investment treaty is silent, tribunals must incidentally determine the applicable substantive law and whether it influences the assessment of the investment standard or duty under consideration.[249] The primary source to determine the applicable law is the investment treaty. However, few investment treaties determine the applicable substantive law leaving this question to be decided by the applicable procedural rules.[250] For cases administered by the ICSID Convention, Article 42(1) determines that in the absence of party agreement on the applicable law, the tribunal in addition to the provisions of the investment treaty shall apply the law of the 'state party to the dispute (including its rules on the conflicts of laws) and such rules of international law as may be applicable.'[251] The UNCITRAL Arbitration Rules contain no such reference to international law.[252] The

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248 *Patrick Mitchell v. The Democratic Republic of Congo* (hereinafter: *Mitchell v. Congo*), Decision on the Application for Annulment of the Award, 27 October 2006, ICSID Case No. ARB/99/7, p. 21, para. 57 (The tribunal 'is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option – and the parties should have been given the opportunity to be heard in this respect – for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it.'). See also A. Newcombe/ L. Paradell, *Law and practice of investment treaties – standards of treatment*, Alphen aan den Rijn 2009, p. 25.

249 See the examples provided by B. Simma, supra note 244, p. 580.

250 A. Bjorklund, *Applicable law in international investment disputes,* in: C. Giorgetti (Ed.), *Litigating international investment disputes – a practitioners' guide*, Leiden et al. 2014, p. 269.

251 Similar terms can be found in Article 1131 NAFTA; Article 26(6) Energy Charter Treaty, entered into force 16 April 1998; Article 81(1) Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, entered into force 1 April 2005.

252 Article 35(1) of the 2010 UNCITRAL Arbitration Rules and of the 2013 UNCITRAL Arbitration Rules determines: 'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the tribunal shall apply the law which it determines appropriate.'

reach of the reference to international law is disputed.[253] Commentators seem to agree that the reference includes all sources of international law listed in Article 38 ICJ Statute. However, this does not answer the question of the reference's reach. The disagreement relates mainly to the question if the reference only allows for the inclusion of general international law to support the interpretation and application of investment treaty provisions in dispute, or if it is broader, as advocated by the *amici* in *von Pezold v. Zimbabwe*. There is value in the view that a broader referral is not covered by the parties' consent, in particular because the parties are free to choose to apply other international law.[254]

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253 There is also a dispute on the balancing of national and international law. Until *Wena v. Egypt*, there was virtual agreement that international law only played a residual complementary and corrective role and that the national law of the host state was primarily applicable. See *Klöckner v. Republic of Cameroon*, Decision on Annulment, 21 October 1983, ICSID Case No. ARB/81/2, para. 69; *Amco Asia Corp. and others v. Republic of Indonesia*, Decision on the Application for Annulment, 16 May 1986, ICSID Case No. ARB/81/1. The *Wena* tribunal decided that international law could be applied alone if an appropriate rule was found. See *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on Annulment, 5 February 2002, ICSID Case No. ARB/98/4. See, for analysis, Y. Banifatemi, *The law applicable in investment treaty arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements: a guide to the key issues*, New York 2010, pp. 201-204; E. Gaillard/Y. Banifatemi, *The meaning of "and" in Article 42(1), second sentence of the Washington Convention: the role of international law in the choice of law process*, 18 ICSID Review (2003), pp. 375-411.

254 See e.g. *Siemens AG v. The Argentine Republic,* Award, 17 January 2007, ICSID Case No. ARB/02/8, pp. 21-22, paras. 77-79; *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela,* Award, 23 September 2003, ICSID Case No. ARB/00/5, pp. 31-32, paras. 102-105 ('Whatever the extent of the role that international law plays under Article 42(1) (second sentence), this Tribunal believes that there is no reason in this case, considering especially that it is a contract and not a treaty arbitration, to go beyond the corrective and supplemental functions of international law.'). See also the rather limitative approach in *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic,* Award, 11 June 2012, ICSID Case No. ARB/03/23, paras. 909, 912 ('It is common ground that the Tribunal should be sensitive to international *jus cogens* norms, including basic principles of human rights. … The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law.'). See also A. Parra, *Applicable law in investor-state arbitration*, 1 Contemporary issues in international arbitration and mediation (2007), p. 3.

Even under the narrower view, tribunals could possibly consider other international law in their interpretation of the investment treaty. Proponents have especially focused on two methods – evolutive treaty interpretation and systemic integration pursuant to Article 31(3)(c) VCLT – even though other internationally accepted methods of treaty interpretation could also yield this result.[255]

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255 Cf. Arts. 30-33 VCLT. Other methods include subsequent practice (Art. 31(3)(b) VCLT) and subsequent agreements (Art. 31(3)(a) VCLT). See, for instance, the suggestion by UNCTAD that states adopt common or unilateral interpretation standards importing public policy objectives into investment treaty interpretation, UNCTAD, *Interpretation of IIAs: What states can do*, 3 UNCTAD Issues Note (2011), p. 9; S. Karamanian, supra note 225, pp. 435-436 (Further suggesting consideration of customary international law and that (as indicated in Art. 53 VCLT and Art. 103 UN Charter) *jus cogens* norms and obligations under the UN Charter should override investment treaty obligations); T. Meshel, *Human rights in investor-state arbitration: the human right to water and beyond*, 6 Journal of International Dispute Settlement (2016), pp. 302-305.
See *Glamis v. USA*, Application to file a non-party submission and submission by the Quechan Indian Nation, 19 August 2005. They detailed international legal instruments on indigenous peoples' rights and argued that they constituted customary international law which had to be taken into account in the interpretation of the NAFTA pursuant to Article 1131(1) NAFTA or Article 31(3)(c) VCLT. Similarly, in *Suez/Vivendi v. Argentina* the *amici* argued that human rights arguments relating to the right to water could be introduced into the arbitration via Article 31(3)(c) VCLT, because 'contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law.' See *Suez/Vivendi v. Argentina*, *Amicus curiae* submission, 4 April 2007, ICSID Case No. ARB/03/19, p. 15. See also S. Schadendorf, *Investor-state arbitrations and the human rights of the host state's population: an empirical approach to the impact of amicus curiae submissions*, in: N. Weiß/J.-M. Thouvenin (Eds.), *The influence of human rights on international law*, Heidelberg 2015, p. 174.
See also, for interpretation based on Article 31(3)(c) VCLT, P. Sands, *Treaty, custom and the cross-fertilization of international law*, 1 Yale Human Rights and Development Law Journal (1998), pp. 85-105; P.-M. Dupuy, *Unification rather than fragmentation of international law? The case of international investment law and human rights law,* in: P.-M. Dupuy et al. (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, pp. 45-62; D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the principle of systemic integration in international investment law and arbitration*, Baden-Baden 2015. Others have proposed the adoption of a proportionality analysis for cases where investment treaty obligations and public values clash, see J. Krommerdijk/J. Morijn, *'Proportional' by what measure(s)? Balancing investor interests and human rights by way of applying the proportionality principle in in-*

Evolutive or dynamic treaty interpretation takes account of the fact that treaty terms may change their meaning over time and have to be interpreted on the basis of the current understanding of a treaty in order to arrive at a decision that solves the parties' dispute.[256] This form of treaty interpretation, however, implies that the parties to the treaty in question expected that the understanding of a specific term or provision could or would change over time, and accepted this.[257]

Pursuant to Article 31(3)(c) VCLT, when interpreting a treaty a court shall take into account 'together with the context: … (c) any relevant rules of international law applicable in the relations between the parties.' Human rights and international environmental treaties can be subsumed under this provision, if both parties are members to the treaty in question, if it forms part of the body of customary international law or if it is an obligation *erga omnes*. Article 2(1)(g) VCLT clarifies that the term 'parties' relates to the states parties to the investment treaty and not the disputing parties.[258]

Again, reliance on these methods is not unproblematic if it leads to the inclusion of norms which are not at least pointed to in the governing laws. *Crema* warns that an expansion of the traditional use of Article 31(3)(c)

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vestor-state arbitration, in: P.M. Dupuy/F. Francioni/ E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, p. 422.

256 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, paras. 2794-2795, 2797 (On the interpretation of the term 'exhaustible natural resource': 'The words of Article XX(g) [GATT], "exhaustible natural resource", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.'); *Kasiliki/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, Decl. Judge Higgins, ICJ Rep. 1999, pp. 1113-1114, paras. 2-3. See also R. Bernhardt, *Evolutive treaty interpretation, especially of the European Convention on Human Rights*, 42 German Yearbook of International Law (1999), p. 14.

257 See, for instance, the limiting interpretation of the NAFTA's minimum standard of treatment-clause by the NAFTA FTC in Section B of its 2001 Notes of Interpretation of Certain Chapter 11 provisions. The Notes were issued after several tribunals had dynamically interpreted Article 1105(1) NAFTA. At: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last visited: 21.9.2017). See also, G. Kaufmann-Kohler, *Interpretative powers of the Free Trade Commission and the rule of law*, in: E. Gaillard et al. (Eds.) *Fifteen years of NAFTA Chapter 11 arbitration*, New York 2011, pp. 175-194.

258 B. Simma, supra note 244, pp. 585-586, with further examples.

VCLT to ensure that investment treaty provisions or terms are interpreted in conformity with (general) international law could render it 'a gate, a tool, to adjudicate on other questions.'[259] The issue engages the principle of consent and the limits of dispute settlement. The parties have chosen to bring a particular dispute before the court under a certain set of laws. Subjecting the dispute to an unforeseeable number of other laws and considerations may limit the parties' willingness to submit disputes to international adjudication, and, ultimately, risks a decision *ultra vires*. This was also the rationale of the tribunal in *Grand River v. USA*, where the USA – after having adopted an *amicus curiae* submission from an indigenous representative – argued that the tribunal should consider the customary duty to consult indigenous people on the basis of Article 31(3)(c) VCLT. The tribunal rejected the argument, stating that 'the Tribunal does not understand this obligation ... to allow alteration of an interpretation established through the normal interpretative processes of the [VCLT]. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.'[260] In *Philip Morris v. Uruguay*, however, the tribunal took a different approach when asserting that Article 31(3)(c)

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259 L. Crema, supra note 244, p. 61, with further references. See also B. Simma, supra note 244, p. 584 ('[The provision] can only be employed as a means of harmonization *qua* interpretation, and not for the purpose of modification, of any existing treaty.'); C. McLachlan, *The principle of systemic integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly (2005), pp. 311-315.

260 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (hereinafter: *Grand River v. USA*), Award, 12 January 2011, para. 71. Most other tribunals have been similarly hesitant to rely on international human rights laws in their interpretation of investment treaty standards, e.g. *Compania de Desarrollo de Santa Elena SA v. Costa Rica*, Award on the Merits, 17 February 2000, ICSID Case No. ARB/96/1, para. 72; *Metalclad v. Mexico*, Award on the Merits, 16 December 2002, ICSID Case No. ARB (AF)/97/1. See also Chapter 7. See, however, *Mondev International Ltd v. United States of America*, Final Award, 11 October 2002, ICSID Case No ARB(AF)/99/2, paras. 116, 144, where the tribunal relied on interpretations by the ECtHR regarding the term 'public purpose' in the ECHR. See also *Judge Buergenthal*'s restrictive Separate Opinion in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion Judge Buergenthal, ICJ Rep. 2003, para. 22 ('[T]he principles of customary international law and whatever other treaties the parties to a dispute before the Court may have concluded do not by virtue of Article 31, paragraph 3 (c) become subject to the Court's jurisdiction. This is so whether or not they might be relevant in the abstract to the interpretation of a

VCLT required it to interpret the relevant BIT provisions in light of any applicable international law rules, including customary international law; in this specific case, the protection of public health as an element of a state's police powers which justified the issuance of tobacco control measures.[261] In the other cases where systemic integration has been requested, including by *amici curiae*, tribunals may worry being overburdened by a potential wealth of relevant rules of international law. It may be sensible for tribunals to inform *amici curiae* of their limited material jurisdiction upon granting leave to adjust expectations and avoid negative publicity from disappointed *amici*.[262]

So far, tribunals have predominantly decided in favour of the parties and have considered public interest arguments only to the extent that they pertained to arguments that had already been raised.[263] An exception have to some degree been conflicts with EU law. Tribunals have stressed that

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treaty with regard to which the Court has jurisdiction. Whether one likes it or not, that is the consequence of the fact that the Court's jurisdiction, in resolving disputes between the parties before it, is limited to those rules of customary international law and to those treaties with regard to which the parties have accepted the Court's jurisdiction.').

261 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 290-291.

262 See the highly critical article by ECCHR after its unsuccessful application in *von Pezold v. Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Cases No. ARB/10/15 and No. ARB/10/25: ECCHR, *Human rights inapplicable in international investment arbitration? – A commentary on the non-admissibility of ECCHR and indigenous communities as amici curiae before the ICSID tribunal*, online publication, July 2012, at: file:///C:/Users/fc086/Downloads/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable_A%20Commentary.pdf (last visited: 21.9.2017).

263 This happened even where the petitioners were admitted on the basis of the public interest element arising from the subject matter of the dispute. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae'*, 15 January 2001, paras. 5, 49. In most cases, at least one of the parties protested the admission of *amici curiae* out of concern that the dispute would be extended. E.g. *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 53 (*Canada* argued that it would not be permissible for petitioners 'to introduce new issues and take the case away from the disputing parties.'). Noting investment tribunals' hesitation to rely on human rights arguments even when invoked as a defence by host States, T. Meshel, *Human rights in investor-state arbitration: the human right to water and beyond*, 6 Journal of International Dispute Settlement (2016),

the recognition of a public interest cannot lead to a decision on issues beyond those brought to it for a final and binding decision by the parties. They have found alternative ways to legitimize measures taken in the public interest, without referring to other rules of international law (see Chapter 7).

VII. Comparative analysis

Applicable rules and international courts and tribunals rarely explicitly address the permissible and desirable content of *amicus curiae* submissions. Most rules contain some rudimentary guidance on the content of submissions, but much is left to the discretion of international courts and tribunals.

Legal submissions constitute the largest share of *amicus curiae* submissions before all international courts and tribunals. Before the WTO Appellate Body, they are the only permissible type of submissions. The contents of legal submissions vary greatly. Briefs address legal issues within or outside the core competence of an international court or tribunal. They point to the solution of a certain legal issue in other courts, analyze legal issues of the case or provide legal context to the dispute.[264] Some briefs urge an international court or tribunal to adopt a certain interpretation or to consider a certain applicable provision. *Amicus curiae* submissions before investment tribunals focus on the public-value implications of disputes and present additional legal arguments and contextual facts. Submissions to the WTO Appellate Body and panels range from pro-trade submissions from business organisations to submissions arguing for the inclusion of environmental, labour and human rights standards in the interpretation of the covered agreements.

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p. 283, quoting among other *Azurix Corp. v. Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12.

264 See, for instance, submission by Human Rights Watch and the Aire Centre in *Ismoilov and Others v. Russia* on international law and development in the area of extradition, the prohibition of torture and *non-refoulement*, *Ismoilov and others v. Russia*, ECtHR No. 2947/06, 24 April 2008. In *The "Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 211, one *amicus curiae* made submissions on the international law doctrine of responsibility of superiors.

Submissions on jurisdiction are rare, but not exceptional before the IACtHR, the ECtHR, the ICJ and in investment arbitration.[265] The ECtHR, the IACtHR and the ICJ have accepted submissions on jurisdiction and/or admissibility without further thematizing their legality. The WTO Appellate Body and panels and the ITLOS have not discussed whether they would accept submissions on jurisdictional aspects of a case. The legality of jurisdictional submissions has been an issue of contention in investment arbitration. They should be admitted as long as they do not interfere with the structure of the proceedings. This would be the case if *amici curiae* were to raise for the first time in the arbitration a jurisdictional objection that is for the respondent to raise.

International courts and tribunals in their practice barely have delineated the permissible content of fact submissions. The relevant rules in investment arbitration and the IACtHR explicitly stipulate that *amici curiae* may make submissions on the facts of a dispute. WTO panels, the ICJ, the ITLOS and the ECtHR have all accepted fact submissions. Fact submissions are categorically excluded only by the Appellate Body.[266] Analysis of fact submissions in investment tribunals, WTO panels, the IACtHR and the ECtHR show that fact information comprises mostly, but not exclusively, contextual information. This practice accords with the parties' control over the facts in adversarial processes (see Chapter 7).

International courts and tribunals agree that *amici curiae* cannot elaborate on matters outside the scope of the dispute as submitted to them. What is included in the scope of jurisdiction is a matter of interpretation of the tribunals' mandates. There is a trend in favour of a wide interpretation to the effect that a grant of material jurisdiction is found to cover all questions incidental to the main question, unless explicitly provided otherwise.[267] In particular, international courts and tribunals may examine is-

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265 *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 ACHR)*, Advisory Opinion No. OC-19/05 of 28 November 2005, IACtHR Series A No. 19, pp. 7-9; *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12.

266 See also No. 5 b) of the ICTY's 1997 *Information on the Submission of Amicus Curiae*: 'In general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged.'

267 B. Cheng, supra note 89, p. 266. See also *Case concerning certain German Interests in Polish Upper Silesia*, Judgment (Jurisdiction), 25 August 1925, PCIJ Se-

sues of their own competence under their applicable treaties. Thus, unless these treaties foresee that a specific objection must be raised by the opposing party, an *amicus curiae* is free to elaborate on it in the absence of party comments to the opposite effect.[268] Also, as shown, international courts and tribunals are free in their legal considerations within the boundaries set by the applicable law (*iura novit curia*). The parties' legal submissions are not binding upon them. Reference to legal rules not presented by the parties may be achieved especially by way of treaty interpretation. However, treaty interpretation pursuant to Article 31(3) (c) VCLT is limited by Article 31 VCLT's basic rule that treaty interpretation cannot lead to an overhaul of the treaty text. As the ICJ noted in *Rights of US Nationals*, this confines the interpretation of a treaty to the scope of its declared object and purpose.[269] Otherwise, an international court or tribunal risks exceeding member states' consent as marked by the boundaries of the treaty and venture into judicial law-making.[270] However, not every submission outside the scope of material jurisdiction may be a risk to the validity of a de-

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ries A No. 6; *Affaire des chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan, Autriche et Yougoslavie, Société des Chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan*, Sentences préliminaires: Genève, 12 mai 1934, nouvelle sentence: La Haye, 29 juin 1938, 3 UNRIAA, p. 1803.

268 It is argued that this also applies to issues of illegality in investment arbitration, E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 218. See also *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)*, Order, 4 February 1933, PCIJ Series A/B No. 52, p. 15; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgment (Preliminary Objection), 22 July 1952, Individual Opinion of President Sir A. McNair, ICJ Rep. 1952, p. 116; *Certain Norwegian Loans (France v. Norway)*, Judgment, 6 July 1957, Separate Opinion of Judge Sir H. Lauterpacht, ICJ Rep. 1957, p. 43; *Marks & Umman v. The Republic of Iran*, Award No. 53-458-3, 8 IUSCTR (1985), pp. 296-97; J.J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: the application by the Iran-U.S. Claims Tribunal*, Kluwer, 1991, pp. 149-150; M. Hudson, *The Permanent Court of International Justice 1920-1942*, New York 1943, pp. 418-419; G. Fitzmaurice, *The law and procedure of the International Court of Justice*, Vol. 2, Cambridge 1986, pp. 530, 755-758; S. Rosenne, *The law and practice of the International Court*, 2nd Ed. Leiden 1985, pp. 467-468.

269 *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, 27 August 1952, ICJ Rep. 1952, p. 196. See also C. Brown, *A common law of international adjudication*, Oxford 2007, p. 52.

270 D. French, *Treaty interpretation and incorporation of extraneous legal rules*, 55 International and Comparative Law Quarterly (2006), p. 300.

cision. Especially if the parties fail to object to the matter in question being raised or to even make submissions on it, the international court or tribunal seized can consider whether the parties' response amounts to a waiver of *ne ultra petita* and an explicit or silent expansion of the dispute as submitted by the agreement or application.

E. Submission of evidence

The submission of evidence is a prerogative of the parties in the adversarial process. Many *amici curiae* attach to their briefs material to corroborate the arguments in their submissions.[271] Submissions without corroborative evidence attached may be considered to be unreliable. Further, practice shows that the parties regularly deem it necessary to rebut allegations raised in *amicus curiae* submissions. In addition, the submission of requisite material is an adequate starting point for an assessment of the allegations made in a brief. Do *amici curiae* have a right or an obligation to attach evidence to their submissions?

The wording of Article 34(2) and (3) and Article 66(2) ICJ Statute is inconclusive. It only speaks of the submission of statements and information. In the *Corfu Channel* case, Yugoslavia submitted several batches of documents to the ICJ via the Albanian Government sometime after it had denied the allegations that it had supported the mine laying in a communiqué which was transmitted to the Court and the parties.[272] The evidence was highly important for the Court's decision with respect to Albania's connivance. The ITLOS Rules are equally inconclusive. *Amici curiae* so far have not attached any evidence to their statements.

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271 Amnesty International representatives admit that they add weight to their *amicus* briefs by endorsing their organization's reports. See D. Zagorac, supra note 51, p. 38. See also for many, *Kosovo*, Advisory Opinion, *Written Contribution of the authors of the unilateral declaration of independence in accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion), 17 April 2009.

272 In total, the Yugoslav Government submitted three series of documents. See No. 252 (The British Agent to the Registrar); No. 235 (Le Greffier à l'Agent Albanais); No. 236 (L'Agent Albanais au Greffier); No. 237 (British Agent to the Registrar), *Corfu Channel Case*, Part IV: Correspondence, ICJ Rep. 1949, pp. 224, 232-233, para. 3.

In the ECtHR, few *amici curiae* adduce evidence. The submission of evidence is not required by the applicable regulations. In *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, the *amicus curiae* applicants alleged, *inter alia*, that the state authorities had arbitrarily intervened in an internal leadership dispute within the Bulgarian Orthodox Church. The Holy Synod of the Bulgarian Orthodox Church to its submissions, which contained factual argument in support of the government, attached the minutes of a meeting.[273] Similarly, in *S. and Marper v. the United Kingdom*, the NGO Liberty attached to its submission case law and some scientific materials it considered relevant.[274]

Before the IACtHR, submission of 'annexes' and 'supporting documentation' is expressly required by Article 44(1) and (2) IACtHR Rules and lack thereof may be sanctioned with the exclusion of the brief.[275]

Section 44 ACtHPR Practice Directions allows, but does not oblige *amici curiae* to submit annexes to corroborate their submissions.

The WTO Appellate Body and the panels require *amici curiae* to prove allegations. In *EC–Sardines*, in respect of Morocco's unsolicited *amicus* brief, the Appellate Body rejected the argument that the measure attacked in the appeal was consistent with international standards including those contained in the Codex Alimentarius Commission, because Morocco failed to elaborate and provide evidence for its allegation.[276] In *Brazil–Retreaded Tyres*, the European Commission attacked the credibility of the *amicus curiae* submission that had been adopted by Brazil for not providing as an annex the documents referred to in the submission.[277]

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273 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, Nos. 412/03 and 35677/04, 22 January 2009.

274 *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008, ECHR 2008.

275 This was expressly confirmed by the court recently when it accepted documents submitted by an *amicus curiae* after the respondent state had requested their exclusion on the account that *amici curiae* only were allowed to make legal allegations. See *Personas Dominicanas y Haitianas expulsadas v. República Dominicana*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282, para. 16.

276 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, paras. 168-170.

277 *Brazil–Retreaded Tyres*, Report of the Appellate Body, adopted on 17 December 2007, WT/DS332/AB/R, para. 392.

Investment tribunals do not pursue a uniform approach on this issue. While some tribunals welcome or require that *amicus curiae* briefs attach documents to prove allegations,[278] other tribunals in their procedural orders decide that *amici curiae* may not adduce evidence. In *UPS v. Canada*, the arbitral tribunal justified the exclusion with its obligation to mitigate undue burdens on the parties and unnecessary complication of the proceedings by having to cross-examine *amici's* witnesses or present refuting evidence.[279] The *amicus* petitioners had earlier requested to 'be accorded standing as *Amicus* interveners, but nevertheless with the full right to present and to test any and all of the evidence which may be introduced in these proceedings'.[280] The tribunal in *Gallo v. Canada*, in a procedure for *amicus curiae* applications, determined that briefs were to be 'limited to allegations, without introducing new evidence.'[281] Citing efficiency and avoidance of unnecessary burden, the tribunals in *Biwater v. Tanzania* and in *Suez/Vivendi v. Argentina* decided that the *amici curiae* should file their submissions without annexes, and that they would request any referenced documents if necessary.[282] In UNCITRAL and ICSID based arbitrations, the rules on privacy of hearings exclude the possibility for *amici curiae* to

278 Many *amici curiae* provide references to buttress the credibility and reliability of their contentions, including by providing links to referenced sources. See, for instance, *Eli Lilly v. Canada*, Procedural Order No. 6, 27 May 2016, section (E), Case No. UNCT/14/2.

279 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69 and Direction of the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, para. 3 ('The Order is limited to written briefs. It does not extend to the adducing of evidence.').

280 *Id.*, para. 4.

281 *Vito Gallo v. Canada*, Procedural Order No. 1, 4 June 2008, PCA Case No. 55798, para. 38. See also *Id.*, Claimant's submissions 29 February 2008, p. 28. The claimant had requested that any *amicus curiae* submissions 'may not contain evidence either factual in nature or in the form of an expert opinion,' because the receipt of evidence would be 'highly prejudicial to the parties given that the evidence would not be subject to cross-examination at the hearing' and force the parties to 'respond to the *amicus curiae* "quasi-evidence" because of the risk that it may influence the Arbitral Tribunal. … Neither party to the arbitration should be placed in the position of having to determine whether a witness should be called to respond to evidence which is not part of the record.' The issue never became live, because no *amicus curiae* submissions were received during the proceedings.

282 *Suez/Vivendi v. Argentina*, Order in response to a petition by five non-governmental organisations for permission to make an *amicus curiae* submission, 12

call witness evidence without the parties' consent.[283] The tribunal in *TCW Group v. Dominican Republic*, an arbitration under the CAFTA and the UNCITRAL Arbitration Rules, determined in its Procedural Order No. 2 that *amici curiae* could not introduce new evidence.[284]

Amicus briefs without any evidence to prove the veracity of allegations made can place significant burdens on the parties. In *Glamis v. USA*, the tribunal accepted the fact-heavy written submission from the Quechan Indian Nation, although in its response to the tribe's application, the claimant had sought the exclusion of factual allegations from the submission. They argued that the Quechan tribe was not subject to the standards applied to party submissions.[285] The submission from the *amicus curiae* pointed to deficiencies in the claimant's expert cultural report and called for its exclusion, as well as included a competing expert report that replied to the claimant's cultural expert report.[286] The claimant went on to contradict several of the fact allegations from the Quechan Indian Nation. The

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February 2007, ICSID Case No. ARB/03/19, para. 2; *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22.

283 The *UPS* tribunal noted that *amici curiae* could not call witnesses without the parties' consent given the privacy of hearings (Article 25(4) of the 1976 UNCITRAL Rules) so that the parties would not need to cross-examine *amici curiae*. The tribunal, however, asserted that its procedural power was to be used 'not only to protect th[e] rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner,' thereby alluding to its investigative powers. See *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69.

284 *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.8.

285 *Glamis v. USA*, Response of Glamis Gold Ltd. to Application of the Quechan Indian Nation for Leave to File a Non-Party Submission, 15 September 2005, pp. 1-2 ('[T]he Quechan Tribe was an active participant in the various administrative processes that comprise the factual background of this case. … Given its role as a fact witness to predicate issues in this proceeding, we would certainly oppose allowing the Quechan Tribe to make factual submissions to the Tribunal without being subjected to discovery and production requests and requirements that generally govern party participation. Given the potential for unfairness associated with such a result, Glamis submits that the Quechan Tribe's participation, if any, should be limited to this submission setting forth the Tribe's position ... .').

286 *Glamis v. USA*, Supplemental Submission of the Quechan Indian Nation, 16 October 2006.

tribunal later did not refer to the fact submissions. The issues it discussed in the end were irrelevant for its reasoning.

Only the IACtHR Rules, some investment tribunals, the WTO Appellate Body and WTO panels require an *amicus curiae* to prove its allegations. The other international courts and tribunals consider the submission of evidence less relevant. This may in part be due to the expectation that submissions focus on public policy issues, thus, matters not requiring proof. While the calling of witnesses and experts indeed may entail additional burdens, the exclusion of all forms of evidence for *amicus curiae* submissions, especially documentary evidence, risks undermining their credibility.

F. Access to documents

Many international courts and tribunals require prospective *amici curiae* to make submissions that are not repetitive of what already has been or could be submitted by the parties. The potential relevancy and quality of an *amicus curiae* brief is higher if the applicant has had the opportunity to consider the arguments and facts that have already been exchanged.[287] For the parties, confidentiality is essential to safeguard sensitive (business or political) information. How have tribunals managed to address the competing interests of parties and *amici curiae* regarding access to documents?

287 See the comment by *amicus curiae* petitioners in *Biwater v. Tanzania*: 'The Petitioners consider that the above conditions are met in this case. They contend, however, that the impact of the confidentiality order contained in *Procedural Order No. 3* of the Arbitral Tribunal, limiting the release to the public of certain categories of documents that detail the facts and legal issues in dispute, prevent them from describing the precise scope of their intended legal submissions and hence the extent to which the tests set out in Rule 37(2) are fully met.' *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, p. 7, para. 19.

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

Generally, only the parties have access to the case file prior to the hearings, when copies of the pleading and documents annexed thereto are published online.[288] Several exceptions exist to this rule, but they are limited to entities with a recognized purpose under the courts' statutes or rules. States, and in the case of the ITLOS also the other entities entitled to appear before it, may request copies of written pleadings and annexes before the opening of the oral proceedings.[289] According to Article 67(2) ITLOS Rules, the ITLOS may exceptionally release documents early in consultation with the parties.[290] An exception is also made where the construction of a convention is at issue. In that a case, the ICJ Statute and the ITLOS Rules foresee that the registrar transmits to the affected organization in question a copy of all written pleadings.[291] The ICJ has used the provision rarely.[292] Privileged access to information is also given to interveners, but

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288 Article 53(2) ICJ Statute: 'The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings.' Article 67(2) ITLOS Rules: 'Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal or the President of the Tribunal is not sitting so decides after ascertaining the views of the parties.' See P. Chandrasekhara Rao/P. Gautier (Eds*.), The Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2006, p. 190.

289 Article 67(1) ITLOS Rules allows the submitter of the first memorial to protest publication. In this case, the tribunal will publish the memorial together with the counter memorial. See also Article 53(1) ICJ Rules.

290 Article 67(2) ITLOS Rules.

291 See Article 34(3) ICJ Statute; Article 84(3) ITLOS Rules.

292 The ICJ furnished the International Civil Aviation Organization with the party submissions in *Aerial Incident of 3 July 1988* and transmitted, upon request, documents including party submissions and two confidential reports from the expert commission to Yugoslavia in the *Corfu Channel case*. See *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Order of 22 February 1996 (Removal from List), ICJ Rep. 1996, p. 9; *Letter from the Secretary-General of the International Civil Aviation Organization to the Registrar of the International Court of Justice*, Observations of the International Civil Aviation Organization, p. 617, at http://www.icj-cij.org/files/case-related/79/9699.pdf (last visited: 21.9.2017); No. 297 (Le Gréffier au Chargé d'Affaires a.i. de Yougoslavie a la Haye) and No. 140 (Le Greffier Adjoint au Chargé d'Affaires a.i. de Yougouslavie a la Haye), *Corfu Channel case*, Part IV: Correspondence,

only *after* the permission to intervene has been granted.[293] Article 67(3) ITLOS Rules gives the tribunal the power to adopt a different approach upon request.

The rules are more lenient in advisory proceedings. In this regard, the rules of the ITLOS and ICJ differ. The ICJ only foresees transmission of written statements to any states and organizations that have submitted such statements.[294] It places it in the discretion of the court to make the written statements and their annexes accessible to the public on or after the opening of oral proceedings.[295] The ICJ interprets the provision strictly. It has rejected requests from former staff members involved in review proceedings to obtain access to statements.[296] Recently, it has been more accommodating towards state-like entities. In advisory proceedings before the Seabed Disputes Chamber, according to Article 134 ITLOS Rules 'written statements and documents annexed shall be made accessible to the public as soon as possible after they have been presented to the Chamber.' Publication is not dependent on the views of any state in either court.[297]

Both the ITLOS and the ICJ inform the public on the progress of proceedings through periodic press releases, publication of case-related orders and notification of the institution of proceedings on their websites. Thus,

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ICJ Rep. 1949, pp. 182, 252. See also S. Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th Ed. Leiden 2006, p. 1334.

293 Articles 85(1), 86(1) ICJ Rules.

294 Article 105(1) ICJ Rules.

295 Article 106 ICJ Rules. In cases where the advisory opinion concerns a legal question which is pending between two or more states, the provision orders prior consultations with the states affected.

296 The registrar argued that access to such documents required the consent of the body which submitted the request for the advisory opinion. Counsel had argued that he intended to seek out certain member states to express his clients' views on the question to the member states and point them to issues they might have overlooked and would like to present at the hearing. See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, Letter No. 54 (The Registrar to Mr. Leonard B. Boudin), ICJ Rep. 1954, Part IX: Correspondence, pp. 410-411.

297 During the drafting process, the second phrase of the draft article was deleted. It determined that the chamber had to ascertain the views of the states parties where the request for an advisory opinion related to a pending legal question between two or more states parties before allowing public access to the written statement and documents. See P. Chandrasekhara Rao/P. Gautier (Eds.), supra note 288, p. 387.

those interested in submitting a request for participation as *amicus curiae* in some way can take note of the proceedings.[298]

II. European Court of Human Rights, Inter-American Court of Human Rights and African Court on Human and Peoples' Rights

The ECtHR has not issued any specific rules on transparency for entities interested in requesting leave to make an *amicus curiae* submission. Article 40(2) ECHR determines that generally all documents deposited with the registrar shall be accessible to the public.[299] This encompasses all documents submitted by the parties and third parties. Public access to documents may be limited pursuant to Rule 33(1) ECtHR Rules, if documents are submitted in connection with friendly-settlement negotiations or for special public interest or protective reasons.[300] The ECtHR's judgments and a selection of decisions are accessible online through the court's database Hudoc, whereas case files can be consulted by appointment upon written request to the Registrar.[301]

The situation is similar before the IACtHR. According to Article 24(3) IACtHR Statute, decisions, judgments and opinions of the court shall be delivered in public sessions and shall be published with such 'other data or background information that the Court may deem appropriate.' The IACtHR generally publishes the case file on its webpage as the dispute progresses with a note that documents, which are not accessible on the webpage, may be requested from the court by e-mail.

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298 T. Treves, *The procedure before the International Tribunal for the Law of the Sea: the rules of the tribunal and related documents*, 11 Leiden Journal of International Law (1998), pp. 565, 573.

299 As deliberations are secret (Rule 22(1) ECtHR Rules), access is withheld from 'points of examination for deliberations, minutes of deliberations, summary records of deliberations, preliminary draft and draft judgments and decisions as well as correspondence,' at: http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Archives/Commission.htm (last visited: 2.7.2016).

300 See Rule 33(2) ECtHR Rules. Rule 106(4) established a third exception for cases referred to the court by the European Commission of Human Rights regarding documents filed by the parties prior to 1 November 1998. In these cases, confidentiality was the general rule.

301 At: http://www.echr.coe.int/Documents/Practical_arrangements_ENG.pdf (last visited: 21.9.2017).

Before the ACtHPR, Section 44 Practice Directions determines that the application and all other subsequent pleadings shall be 'put at the disposal' of an *amicus curiae* but only insofar as they relate to the matter for which the request for participation has been made. The preceding sentence of the Section makes clear that access to these documents is only granted upon admission of the *amicus curiae*.

In brief, *amici curiae* do not struggle obtaining relevant case documentation from human rights courts.

III. WTO Appellate Body and panels

Before WTO panels and the Appellate Body, access to information by external actors is handled restrictively. Although the institution and progress of proceedings is publicly notified on the WTO website, there is a clear decision in favour of confidentiality. Recent attempts by select states towards greater transparency have not been successful, as the 'timing and form in which information becomes available' remains contentious.[302]

Article 17(10) DSU establishes a general duty of confidentiality for Appellate Body proceedings, which binds the parties, WTO Members, Appellate Body members and staff and has been interpreted expansively to include 'any written submissions, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body.'[303]

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302 DSB Special Session*, Report by Chairman, Ambassador Ronald Saborío Soto*, TN/DS/27, 6 August 2015, para. 3.22. In July 2016, Canada circulated a document announcing that it and supporting states would request in individual cases that rules be drawn up which among other would foresee publication of full timetables and of all submissions until the interim report 'as soon as practicable' during the proceedings. *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Addendum*, Doc. No. JOB/DSB/1/Add.3, 18 July 2016.

303 *Brazil – Export Financing Programme for Aircraft* (hereinafter: *Brazil–Aircraft*), Report of the Appellate Body, adopted on 20 August 1999, WT/DS46/AB/R, para. 121. See also *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, para. 145. Article VII(1) Rules of Conduct obliges the Appellate Body and panel members, their staff, experts, arbitrators and any other WTO staff assisting on panels to 'at all times maintain the confi-

Panel proceedings are confidential according to Section 2 Panel Working Procedures.[304] Further, Article 18(2) DSU establishes a general duty of confidentiality for all submissions. This accords with the parties' general reluctance to publish their often economically sensitive information.[305] Each party may release statements – including its full submissions – to the public detailing its position, but parties are obliged to 'treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.'[306]

Third parties have a right to receive the submissions made by the parties up to the first substantive meeting of the panel with the parties pursuant to Article 10(2) and (3) DSU and Section 6 Panel Working Procedures.[307] The confidentiality requirement is softened by disputing parties'

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dentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential.'

304 Article 17(10) DSU: 'The proceedings of the Appellate Body shall be confidential.' No. 2 Working Procedures of Panels, Appendix 3 to the DSU: 'The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.' See also Article 14(1) DSU and No. 3 Working Procedures of Panels, Appendix 3 to the DSU, which determine that the panel deliberations shall be confidential.

305 Article 18(2) DSU: 'Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another member to the panel or the Appellate Body which that member has designated as confidential.'

306 In *Argentina – Poultry Anti–Dumping Duties*, the panel decided that parties could publish their own written submission also during the proceedings, as long as this would not affect the confidentiality of information of the opposing party. See *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, Report of the Panel, adopted on 19 May 2003, WT/DS241/R, paras. 7.14-7.16.

307 See *Third Party Participation in Panels*, Statement by the Chairman of the Council, C/COM/3 of 27 June 1994, pp. 1-2; *US–FSC*, Recourse to Article 21.5 (EC), Report of the Appellate Body, adopted on 29 January 2002, WT/DS108/AB/RW, para. 245. In some cases, third parties have received broader access to case related documents due to 'enhanced third party rights.' See *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 2.6. The receipt of enhanced third party rights has been made subject to the third party showing an interest beyond the 'substantial interest' required for third party participation. See *EC–Bananas III*, Report of the Panel, adopted on 25 September 1997, WT/DS27/R/ECU, pp. 292-294, paras. 7.4-7.9.

obligation to provide upon request by a member state a 'non-confidential summary of the information contained in [their] written submissions that could be disclosed to the public,' though these summaries are rarely published swiftly.[308] In short, panels' and the Appellate Body's Working Procedures support transparency and transmission of documents only with regard to the other parties to a dispute.[309]

Accordingly, prospective *amici curiae* will have difficulties obtaining up-to-date information on a case, unless the parties are willing to share their own submissions.[310] Indeed, in most cases, *amicus curiae* applicants are informed of the case through one of the parties. In *US–Steel Safeguards*, for example, the *amicus curiae* applicant relied on the US appellant submission that had been posted on the website of the US Trade Representative.[311] This option is not very reliable given that only few states publish their submissions, let alone during pending proceedings. This restrictive approach renders it nearly impossible for *amicus* applicants to fulfil the requirement that *amici* shall not repeat information submitted by the parties. It is also surprising, because special access to 'relevant information' is given to expert review groups pursuant to Article 13(2) and No.

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308 In *US–Steel Safeguards,* the panel clarified that it was up to the parties to agree on a date for the production of such summaries, but the panel urged the parties to agree on a deadline so that 'appropriate information relating to the present dispute [was] disclosed to the public.' *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 5.3.

309 See also No. 10 Panel Working Procedures, Annex 3 to the DSU: 'In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.' For Appellate Body proceedings, see the similar Article 18(2) Appellate Body Working Procedures.

310 Even then, information may be redacted, see No. 3 Panel Working Procedures, Appendix 3 to the DSU. See also L. Crema, supra note 244, p. 30 ('[T]he problem of confidentiality comes precisely from the lack of a clear procedure, which incentivizes and rewards contacts with the parties, and not from the nature of *amici* in and of itself.' [Emphasis added]).

311 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, FN 4.

5 Appendix 4 to the DSU.[312] Panels and the Appellate Body have decided that prospective *amici curiae* do not receive privileged access to case files and information.

The Appellate Body and panels pursue a zero tolerance policy for violations by *amici curiae* of the rules on confidentiality. In *Thailand–H-Beams*, Thailand notified the Appellate Body that the drafters of the *amicus curiae* submission by the Consuming Industries Trade Action Coalition (CITAC) appeared to have had access to its confidential filing. It pointed out that Poland and the CITAC were represented by the same law firm. Both assured that there had been no violation of the confidentiality obligation in their spheres.[313] Although it failed to establish the source of the breach of confidentiality, the Appellate Body found that *prima facie* there was evidence that the CITAC had had access to the confidential submission, and decided not to accept it. The *EC–Sugar* panel confirmed this approach. Brazil and Australia claimed that the German Sugar Association, Wirtschaftliche Vereinigung Zucker (WVZ), had had access to submissions they had designated as confidential. They requested the rejection of the submission and the reporting of the incident to the DSB. WVZ acknowledged that it had had access to one of Brazil's exhibits, but refused to reveal its source. The panel was conscious that the confidentiality obligation of Article 18(2) DSU did not extend to *amici curiae*, but it established a form of factual duty of confidentiality for prospective *amici*. In a display of anger over WVZ's unwillingness to cooperate, it held that 'if the WVZ, though not a party to the proceedings, wanted to be considered

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312 Art. 13(2) DSU, Appendix 4, No. 5: 'The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.'

313 Quoting Article 17(10) DSU, the Appellate Body not only emphasized the DSU's confidentiality obligation for Appellate Body proceedings for all its members and staff, but also that parties and third parties in appeal proceedings were 'fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants.' *Thailand–H-Beams*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS122/AB/R, paras. 64-65, 68, 71, 74.

a "friend of the court", it should have followed an appropriate standard of behaviour towards the Panel and the parties together with making every possible effort to respect WTO dispute settlement rules, including confidentiality rules.'[314]

The confidentiality of the WTO dispute settlement proceedings has been viewed as a risk to the credibility of the WTO as an institution.[315] Well-reputed *amicus curiae* applicants have found it difficult to obtain access to submissions, which limits their ability to prepare useful briefs.[316] Pending a solution, *amici curiae* continue to depend on the willingness of parties and third parties to share information to the extent permitted.[317]

Amici curiae have not benefited from the increasing number of public hearings in Appellate Body and panel proceedings.[318] This may be due to a concern regarding the sufficiency of the confidentiality rules, where much of the information exchanged is considered business confidential information and parties are reluctant to disclose any information. Parties have been granted permission to conclude additional procedures to protect business confidential information as a modification of the panel proceedings pursuant to Article 12(1) DSU – and Article 17(10) DSU in Appellate Body proceedings – making it less likely for *amici curiae* to obtain access to case files.[319]

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314 The incident was reported to the DSB. *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.84. See also *Id*., paras. 7.7.7-7.7.8, 7.82-7.83, 7.89, 7.92-7.95, 7.98-7.99.

315 P. Sutherland et al., *The future of the WTO – addressing institutional challenges in the new millennium*, Report of the Consultative Board to the Director-General S. Panitchpakdi, 2004 (the 'Sutherland Report'), pp. 41-42, at: http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf (last visited: 21.9.2017). In favour of deleting all confidentiality rules for party submissions, J. Pauwelyn, supra note 205, pp. 325, 330; G. Umbricht, supra note 199, p. 793.

316 L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 256.

317 A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 Journal of International Economic Law (1999), p. 488.

318 Pursuant to Section 2 Panel Working Procedures, hearings are private. But the parties are free to waive the confidentiality rules. See Section A and L. Ehring, supra note 32, pp. 1-14.

319 *EC and Certain Member States–Large Civil Aircraft*, Report of the Appellate Body, adopted on 1 June 2011, WT/DS316/AB/R, paras. 17-19 and Annex III. The parties must show why the information requires additional protection. E.g. in *Brazil–Aircraft* and *Canada–Aircraft,* the panels adopted additional procedures to

IV. Investor-state arbitration

Investment arbitration has a tradition of broad confidentiality due to the commercial origin of its procedural rules.[320] Strict confidentiality means that even the existence of the arbitration is not made public.[321] In commercial arbitration, confidentiality is presumed to maintain business secrets, to protect the brand or to accelerate settlement by avoiding public tension from publicity.[322] There is significant pressure towards greater transparency in investor-state arbitration (see Chapter 2).[323] This pressure increasingly translates into legal standards. Due to the different and overlapping ap-

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protect business confidential information, whereas on appellate review, the Appellate Body declined to do so, because it found that Articles 17(10) and 18(2) DSU granted sufficient protection. See *Canada–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, paras. 145, 147; *Brazil–Aircraft*, Report of the Appellate Body, adopted on 20 August 1999, WT/DS46/AB/R, paras. 123, 125. See also O. Prost, *Confidentiality issues under the DSU: fact-finding process versus confidentiality*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, pp. 196-197 (Since 2003, there have been proposals to draft a standard procedure on the protection of business confidential information.).

320 An unusual request was made by the Quechan Indian Nation. It asked that the tribunal treat as confidential an expert report it submitted. *Glamis v. USA*, Award, 8 June 2009, p. 129, para. 282. The report provided details on the location of sacred tribal areas. The tribunal denied the request for full confidentiality citing the importance of transparency of Chapter 11 arbitrations for NAFTA member states, as expressed in the FTC Note, see NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001. The tribunal permitted the Quechan Indian Nation to request the redaction of specific sections of the report. The Quechan Indian Nation later withdrew its request and agreed to the publication. See *Glamis v. USA*, Award, 8 June 2009, para. 282.

321 L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 171.

322 For the discussion on the 'erosion' of confidentiality in commercial arbitration, see A. Tweeddale, *Confidentiality in arbitration and the public interest exception*, 21 Arbitration International (2005), p. 61; A. Rogers/D. Miller, *Non-confidential arbitration proceedings*, 12 Arbitration International (1996), p. 319; P. Neill, *Confidentiality in arbitration*, 12 Arbitration International (1996), pp. 287, 289, 310-312.

323 J. Coe, supra note 41, pp. 1339-1385; OECD, *Transparency and third party participation in investor-state dispute settlement procedures, Statement by the OECD Investment Committee,* June 2005; T. Wälde, *Transparency, amicus curiae briefs*

plicable rules, the issue of transparency is case-specific. Rules on confidentiality may be contained in special party agreements, investment treaties, institutional arbitration rules, arbitration laws, codes of conduct and ethics, general international law and, to the extent applicable, the mandatory laws of the seat of arbitration, the place of enforcement or the laws of the respondent state.[324]

Investment treaties usually address neither confidentiality on a general basis, nor access to case documents specifically. Exceptions are made by newer investment treaties, especially those concluded on the basis of the US or Canadian Model BITs, and by the NAFTA.[325] The NAFTA only provides select rules on transparency,[326] but in 2001 the Free Trade Commission issued a *Note of Interpretation of Certain Chapter 11 Provisions*

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and third party rights, 5 Journal of World Investment and Trade (2004), p. 337. In *Loewen v. USA*, the tribunal stated that a general duty of confidentiality in arbitration involving a state party would be undesirable as it would restrict public access to information relating to government and public matters. See L. Mistelis, supra note 321, pp. 181, 197; C. Zoellner, *Third-party participation (NGO's and private persons) and transparency in ICSID proceedings*, in: R. Hoffmann/C. Tams (Eds.), *The ICSID – taking stock after 40 years*, Baden-Baden 2007, p. 201.

324 For analysis of national laws on confidentiality, see J. Hargrove, *Misplaced confidence? An analysis of privacy and confidentiality in contemporary international arbitration*, 3 Dispute Resolution International (2011), pp. 47-55. The detectable shift towards transparency largely stems from predominantly Western initiatives, especially national laws on access to information and non-state actors' intense lobbying. For further national laws, see R. Teitelbaum, *A look at the public interest in investment arbitration: is it unique? What should we do about it?*, 5 Berkeley Journal of International Law (2010), p. 58.

325 See, with further references, V. Lowe, *Private disputes and the public interest in international law*, in: D. French et al. (Eds.), *International law and dispute settlement: new problems and techniques, liber amicorum Professor John G. Merrills*, Oxford 2010, p. 10.

326 Articles 1127 and 1129 NAFTA regulate transmission of documents between the parties and third parties. Subject to Article 1137(4) NAFTA nothing in the NAFTA, precludes the parties from providing public access to documents exchanged during the arbitration. Under NAFTA terms, Canada and the US promise to publish any arbitration award, while the publication of an award involving Mexico will be governed by the applicable arbitration rules. NAFTA tribunals previously had decided that there was no general duty of confidentiality in investment arbitration and that the parties were free to publicly discuss their cases, unless agreed otherwise. See *Metalclad Corporation v. Mexico*, Award, 20 August 2000, ICSID Case No. ARB(AF)/97/1, reprinted in 16 ICSID Review (2001), p. 168; *SD Myers Inc. v. Canada*, Procedural Order No. 16, 13 May 2000, para. 8.

(FTC Note). It establishes two basic rules. First, the NAFTA does not impose a general duty of confidentiality on parties in investment disputes under Chapter 11. Second, nothing in the NAFTA precludes the parties from providing public access to documents submitted to or issued by the tribunal.[327] Further, the FTC Note obliges the NAFTA member states to make available to the public 'in a timely manner' all documents pertaining to an arbitration. Documents may be withheld if they contain confidential business information or fall under domestic confidentiality laws or such provisions in institutional rules.[328] The FTC Note has been declared applicable to *amici curiae* by Section 10 FTC Statement.

The applicable institutional procedural rules in investment arbitration have made significant progress towards increasing transparency. While the 2010 and the 2013 UNCITRAL Arbitration Rules contain only two provisions on confidentiality – Article 28(3) prescribes confidentiality of hearings and Article 34(5) subjects the publication of awards to the parties' consent – the UNCITRAL Rules on Transparency establish a remarkably broad set of publication requirements for treaty-based investor-state arbitrations hitherto unknown. As a matter of principle, the Rules recognize a 'public interest in transparency' in investment arbitration.[329] Article 2 establishes mandatory publication of basic information on the proceedings upon their initiation. Article 3, which is central to *amicus curiae* participation, requires that virtually all case-related documents, especially party submissions, tribunal decisions and awards, must be published through a repository 'as soon as possible.'[330] Pursuant to Article 7, publication may be withheld for specific, rather broad categories of confidential and protected information.[331] The Rules signal a paradigm change. Transparency is the ground rule and confidentiality must be justified. Partial or delayed

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327 L. Mistelis, supra note 321, p. 180.

328 See No. 2(b)(i) – (iii). No. 3 determines that also information protected under Articles 2102 and 2105 NAFTA may be withheld.

329 See Article 1(4) UNCITRAL Rules on Transparency. Article 1(5) shows that the drafters considered third person submissions a transparency measure.

330 Witness statements and expert reports may be published upon request and at the expense of the requester, see Article 2(2) and (5) UNCITRAL Rules on Transparency. Other confidential information may be published on the tribunal's initiative, see Article 2(3) UNCITRAL Rules on Transparency.

331 The categories in Article 7(4) and (5) UNCITRAL Rules on Transparency are quite broad and include confidential business information and any information that is protected against publication by the national laws of the respondent or that

release of information is chosen over full confidentiality. Especially with respect to *amici curiae,* it will be interesting to see if release 'as soon as possible' occurs sufficiently soon during proceedings so as to allow *amici* to obtain the relevant case documentation before the submissions deadline.

The ICSID Arbitration Rules have not undertaken a similar push towards transparency. They have – due to their purpose as special rules for investor-state arbitration – always contained some transparency measures. Notification of disputes on the ICSID webpage is mandatory.[332] Rule 48(4) ICSID Arbitration Rules subjects the publication of awards to party consent, but it allows for excerpts of the award's legal reasoning to be included in ICSID publications. Rule 32 ICSID Arbitration Rules establishes privacy of hearings, but the tribunal may allow other persons to attend or observe all or part of the hearings.[333] Notably, the rules address neither access to documents in pending cases, nor release of a party's documents by a party.

In practice, parties tend to conclude separate agreements on confidentiality and/or tribunals issue procedural orders on confidentiality. The agreements usually cover all documentation produced or used in connection with the arbitration. They are often used, unless the respondent is bound by its domestic laws to release information. It remains to be seen if this will change with the new UNCITRAL Rules on Transparency.

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apply in the arbitration. However, with the exception of information relating to essential security interests of the respondent, the tribunal has the last say over confidentiality. If a tribunal denies a request for redaction or confidentiality, the party who submitted the information may withdraw it from the arbitration proceedings. In addition, Article 7(6) and (7) allows the withholding of information if necessary for the integrity of the arbitral process. It is not clear how tribunals will interpret this term. In *Biwater v. Tanzania*, the tribunal used the term 'procedural integrity' in a carefully drafted procedural order balancing transparency and confidentiality interests. *Knahr* and *Reinisch* argue that the term 'appears to comprise the entire set of circumstances necessary for the efficient conduct of proceedings of which confidentiality seems to be just one, albeit a crucial aspect.' See C. Knahr/A. Reinisch, *Transparency versus confidentiality in international investment arbitration – the Biwater Gauff compromise*, 6 The Law and Practice of International Courts and Tribunals (2007), p. 106.

332 See Regulation 22(1) ICSID Administrative and Financial Regulations. Pursuant to Rule 48(4) ICSID Arbitration Rules, the Centre 'shall' publish excerpts of tribunal's legal reasoning. Although not of value to potential *amici* for the arbitration from which the excerpt stems, this may aid prospective *amici* in other cases.

333 See the identical Articles 39 and 53(3) ICSID Additional Facility Rules.

Given the lack of a general rule on confidentiality/transparency, tribunals have decided *amici curiae's* requests for access to hearings and documents on a case-by-case basis.[334] The issue increasingly has been regulated in procedural orders at the outset of the arbitration, usually in favour of confidentiality.[335] In NAFTA cases, states generally promptly release their pleadings to the public after having presented them to the tribunal.[336]

In *Methanex v. USA*, the *amicus curiae* was denied access to case documents in accordance with the parties' confidentiality order given that it had no special standing under the NAFTA or the UNCITRAL Arbitration Rules.[337] The tribunal left open the question if Article 25(4) of the 1976 UNCITRAL Arbitration Rules implied a duty of confidentiality for all written submissions, as alleged by the claimant, because the parties had agreed on a confidentiality order.[338] Admittedly, the tribunal was in a delicate situation. The other NAFTA member states in their Article 1128 NAFTA submissions held contrary views on the issue.[339]

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334 C. Zoellner, supra note 323, p. 195 (There were suggestions to amend Rule 32 ICSID Arbitration Rules in order to subject to the discretion of the tribunal the decision to allow third parties to attend or observe parts of or the entire hearings.).

335 E.g. *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.8 ('*Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public.')

336 A. Bjorklund, *The participation of amici curiae in NAFTA Chapter Eleven Cases*, 2002, p. 13, at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/participate-e.pdf (last visited: 21.9.2017). According to *Bjorklund*, publication tends to encompass only the statements of claim and defence. This is problematic, because the parties' arguments are often significantly modified by the time of submission of memorials. The FTC Note's main value has been in adapting NAFTA member states' assurances to make their submissions publicly available into proceedings.

337 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *'Amici Curiae'*, 15 January 2001, p. 21, para. 46.

338 *Id.*, p. 18, paras. 41-45. The parties had earlier in the proceedings agreed on a 'Consent Order regarding Disclosure and Confidentiality', which allowed them but not the tribunal to disclose the major pleadings, orders and awards of the tribunal. See *Id.*, p. 21, para. 46.

339 Mexico heavily opposed the opening of the proceedings to the public, while Canada supported full disclosure and announced that it would bring the issues to the attention of the NAFTA member states to regulate the issue of *amicus curiae* participation as a matter of urgency. *Id.*, paras. 9-10.

Tribunals in the following cases adopted this rationale irrespective of the applicable institutional rules or investment treaty. Upon admission of an *amicus curiae*, they noted that *amicus* participation would serve the interests of transparency, but they then denied it access to the hearings (given the absence of party consent) and documents (given an already existing confidentiality order the parties did not wish to amend).[340] Some tribunals have acknowledged *amici curiae's* need for 'sufficient information on the subject matter of the dispute to provide perspectives, expertise and arguments which are pertinent and thus likely to be of assistance to the tribunal. Otherwise the entire exercise serves no purpose.'[341] However, many tribunals seem convinced that *amici curiae* are or should be able to draw sufficient information on the respective dispute from disclosures in the public domain to comment on 'broad policy issues.'[342] This blank refusal of access to documents might indicate a general doubtfulness by tri-

340 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005 and Order in Response to a Petition by five Non-governmental Organizations for Permission to make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 23; *Glamis v. USA*, Decision on application and submission by Quechan Indian, 16 September 2005. *UPS v. Canada* deviates somewhat from the other cases because the petitioners requested public disclosure of case documents. The tribunal acknowledged that 'principles of transparency may support the release of some of the documentation' but found that the matter was not capable of a 'general ruling.' The tribunal held that the issue was subject to party agreement or a confidentiality order, neither of which existed at the time. See *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Particpation as *Amici Curiae*, 17 October 2001, paras. 4, 68, and Request of 10 May 2001, p. 1, para. 1. In *Biwater v. Tanzania*, confidentiality had been a major issue already prior to the *amicus* application, leading to a very detailed confidentiality order seeking to balance the public's (and the host state's) interest in transparency with the claimant's interest in confidentiality in a case that raised major public debate. See *Biwater v. Tanzania*, Procedural Order No. 3, 29 September 2006 and Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 12-13, 34. For further analysis, see C. Knahr/A. Reinisch, supra note 331.

341 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, para. 31 and Order in Response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 24.

342 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, paras. 64-66 ('None of these types of issue ought to require – at least for the time being – disclosure of documents from the arbitration.'). The situation was rather delicate in the case given that the tribunal had previously issued a con-

bunals about the usefulness of *amicus* briefs. Indeed, the *Biwater v. Tanzania* tribunal later acknowledged that the *amicus curiae* submission in part relied on inaccurate assumptions given its lack of access to the record.[343]

A tribunal operating under the ICSID Additional Facility Rules has granted *amici curiae* access to 'those papers submitted to the Tribunal by the Parties that are necessary to enable the [*amici curiae*] to focus their submissions upon the issues arising in the case and to see what positions the parties have taken on those issues.'[344] In *Eureko v. Slovak Republic*, a

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fidentiality order to protect the 'procedural integrity' after the respondent had unilaterally released information to the public, which was already rallying against the investor. The tribunal feared to negatively impact the proceedings if documents were released to the *amici*. The tribunal later publicly circulated Procedural Order No. 6 to inform the *amici* of their possible role in the proceedings and to reject the claimant's request that the tribunal find that *amici curiae's* submission be bound by the confidentiality order. See *Biwater v. Tanzania*, Procedural Order No. 6, 25 April 2007, para. 6 and Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 66-67. See also *Suez/Vivendi v. Argentina*, Order in Response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission, 12 February 2007, ICSID Case No. ARB/03/19, paras. 24-25 ('[O]ffer their views on general issues which *per se* do not require comprehensive information on the factual basis of the case.'); *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, paras. 3.20-3.22, 3.27. An exception is *UPS v. Canada*, where the tribunal decided, without explanation, that the parties were to make available to the petitioners 'copies of their current and any future pleadings' to later find that the *amici curiae* would not have access to confidential information protected under the then-agreed confidentiality order. See *UPS v. Canada*, Direction of the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, para. 6 and Procedural Directions for *Amicus* Submissions, 4 April 2003. Further, the tribunal noted that *amici* could use publicly available documentation which had been published in a lawful manner, in this case Canada's Statement of Defense. See *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, p. 26, para. 68.

343 *Biwater v. Tanzania*, Procedural Order No. 6, 25 April 2007, para. 6 and Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 66-67.

344 *Piero Foresti v. South Africa*, Letter by Secretary to Tribunal to Petitioners, 5 October 2009, ICSID Case No. ARB(AF)/07/1, p. 1. The tribunal based this decision on two principles: (1) Non Disputing Party (NDP) participation is intended to enable NDPs to give useful information and accompanying submissions to the tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties. (2) Where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process. *Id*.

case under the Netherlands-Slovak Republic investment treaty and the 1976 UNCITRAL Arbitration Rules, the tribunal provided the Netherlands and the European Commission with the information it considered they needed for their comments.[345] In *Infinito Gold v. Costa Rica*, the tribunal noted that the answer to the *amicus's* request to be granted access to 'the principal arbitration documents' depended on 'whether access is required for APREFLOFAS to effectively discharge its task, i.e., provide the Tribunal with a useful and particular insight on facts or legal questions relevant to its jurisdiction' and that for the *amicus* 'to adequately meet this objective, it is undoubtedly preferable that it knows what information has already been submitted to the Tribunal.' Considering the claimant's objection to the request, the tribunal granted access to select portions of the parties' main submissions and admonished the *amicus* to use the documents 'exclusively for the purposes of preparing its written submission'.[346] These decisions show how tribunals, while complying with parties' wishes for confidentiality, can ensure the usefulness of an *amicus curiae*. However, these cases remain exceptions.

Overall, grant of access to documents by tribunals is sporadic, unless the parties have opted for general publicity.[347] This is unfortunate, because it is essential for *amicus curiae* participation to be useful. For the time being, access to case documents has been obtained mostly through the parties.[348]

345 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 31.

346 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, paras. 40, 43-44.

347 R. Teitelbaum, supra note 324, p. 253. See also M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 Columbia Journal of Transnational Law (2003), p. 960 (Where public interests are involved, parties should not be free to agree on strict confidentiality). E.g. *Eli Lilly v. Canada*, Procedural Order No. 3, 15 January 2017, Case No. UNCT/14/2, para. 4.

348 E.g. *Glamis v. USA*, Award, 8 June 2009, pp. 127-128, para. 275 (documents available from the website of the US Department of State).

V. Comparative analysis

Access to documents remains select and limited. International courts and tribunals rarely grant potential *amicus curiae* applicants privileged access, let alone a right to review the case files. *Amici curiae* are treated like any other member of the public. They, like the interested public, depend on the parties' publication of their submissions. This *status quo* is unsatisfying in terms of the efficiency of *amicus curiae* participation and raises doubts with respect to *amici's* ability to fulfil the requirements established for its participation.[349]

G. Conclusion

This Chapter has considered how international courts and tribunals have accommodated *amicus curiae* in their proceedings. International courts and tribunals have been rather curt to the instrument. Few international courts and tribunals inform *amici curiae* of procedural steps in the proceedings beyond their decision on the respective *amicus'* request for leave.[350] Before all international courts and tribunals, participation as *amicus curiae* basically means the filing of one written submission. Only in advisory proceedings before the ICJ and the ITLOS and lately in the IACtHR, oral submissions are more common. In all other fora, oral *amicus curiae* participation is extremely rare. This fits with the general approach to proceedings in international litigation, where the introduction of novel information during the hearing is an absolute exception. Another advantage of this practice is its cost- and time-efficiency.

There is a noticeable emphasis on the form of *amicus curiae* participation before all international courts and tribunals. This arises from an effort to minimize negative impacts of *amicus curiae* participation on the parties.

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349 C. Brower, *Structure, legitimacy and NAFTA's investment chapter*, 36 Vanderbilt Journal of Transnational Journal (2003), pp. 72-73.

350 E.g. *UPS v. Canada*, Procedural Directions on *Amicus* Submissions, 4 April 2003 ('Messrs Sack Goldblatt Mitchell are being provided with a copy of the other directions and orders made today.').

International courts have established few substantive criteria for *amicus curiae* submissions. However, this has not been problematic.[351] The criteria are largely similar: submissions must be relevant for the case and be within the material jurisdiction of the court.[352] The latter has limited especially the extent to which international human rights and environmental law norms can be taken into account in investment and trade dispute settlement. The prohibition to extend the scope of the dispute is generally understood to mean a prohibition to introduce new claims (i.e. address matters beyond the tribunal's jurisdiction), but some courts apply a stricter standard and prohibit *amici curiae* to comment on any issue – including on laws applicable in the dispute – that were not already mentioned by the parties. This is a view held particularly by courts with a strong adversarial system of dispute settlement. There is an inherent tension between this requirement and the requirement that *amici curiae* shall not duplicate the issues addressed by the parties.[353]

Submissions cover a broad range of issues ranging from fact-focused submissions to abstract legal submissions to contextual submissions and submissions advocating a certain interpretation. While these submissions are legitimate if they accord with the tribunal's material scope of jurisdiction and its investigative powers (i.e. tribunals can only consider unsolicit-

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351 International courts and tribunals may ask for supplementary information. See, for instance, in relevant part, Article 84(2) ITLOS Rules: 'The Tribunal may require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also authorize the parties to comment, either orally or in writing, on the information thus furnished.' See also Art. 69(2) ICJ Statute.

352 The scenario portrayed by *Menétrey* is less dramatic than it may seem at first. According to her, 'une fois autorisees à soumettre un mémoire, les *amici curiae* sont libres du contenu et de l'orientation de leur propos sans que le tribunal n'ait plus aucun pouvoir de controle sur leurs observations. Le tribunal, qui se contente d'autoriser un *amicus curiae* a déposer un mémoire sans préciser les informations qu'il souhaiterait y trouver s'expose à recevoir des mémoires don't le contenu peut s'averer decévant. L'absence de controle du tribunal risque de conduire à une emprise des parties sur le contenu du memoire d'*amicus curiae* et prive le tribunal d'une information "individualisée".' S. Menétrey, *L'amicus curiae, vers un principe commun de droit procédural?* Paris 2010, p. 338. Admittedly, the need to engage in further clarification may lead to a delay in the proceedings.

353 See R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 307.

ed *amicus curiae* submissions to the extent they could obtain the information *proprio motu*), some of them raise concern. Submissions presenting solutions to the court on the case before it appear difficult to harmonise with the judges' obligation to render their own decision. Courts must be careful to avoid the appearance of not having reached their own decision.