Part III
The added value of the international *amicus curiae*

Chapter § 7 Does content matter? Substantive effectiveness of *amicus curiae* submissions

While the admission of *amicus curiae* submissions has received much scholarly attention, few have examined the extent to which submissions have been considered by international courts and tribunals in their decision-making. However, this is an essential issue, because it shows whether international courts and tribunals take seriously the content of submissions – and, ultimately, *amici curiae* as such.

Views in academia as to whether and how international courts and tribunals consider *amicus curiae* submissions differ. According to *Mistelis*:

> It appears that Tribunals have effectively treated [*amici*] as a category of experts, whereby they have been allowed to express opinion in technical and legal matters and to provide results of research with the aim of assisting the Tribunal in forming a view. Two significant differences between experts and [*amici*] nonetheless remain: [*amici*] are not remunerated for their services; and they bear no contractual relationship to the arbitration parties and thus bear no liability for their representations.[1]

On the other hand, the *JIEL Editors* argue:

> There is no inherent difference in nature between academic writings and other relevant documents (such as decisions of the ICJ) on the one hand, and *amicus curiae* briefs submitted by persons and organizations which are not the parties to the dispute on the other.[2]

In addition, reliance on *amicus curiae* submissions may influence international courts and tribunals' approach to evidence. *Stern* argues that this may be the case in the WTO:

> [T]here are serious problems with respect to the *law of evidence*. Thus, in their briefs the NGOs do not have to prove their assertions. If the facts they report or the provisions to which they refer are prejudicial to one of the par-

1 L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration*, London 2005, p. 198.

2 *Note by Editors*, 3 Journal of International Economic Law (2000), p. 706.

> ties, it will be for that party to rebut them: there can be no doubt that this represents a distortion of the rules concerning the burden of proof.[3]

Further, there might be an overlap between the instrument and established categories of evidence, particularly between information-based *amici curiae* and expert-witnesses. Such an overlap may be problematic where an international court or tribunal considers *amicus curiae* submissions as evidence without subjecting them to the same standards and treatment as the established categories of evidence. *Amici curiae* are not bound by special agreements or professional duties. Accordingly, they cannot be held liable for misleading or wrong information.

This Chapter seeks to provide clarity on whether and how submissions are considered by international courts and tribunals in the outcome of a dispute. In particular, have *amici curiae* influenced the substantive outcome of a case? What are the issues considered? How do courts and tribunals assess submissions and verify their accuracy? How does the consideration of *amicus curiae* briefs relate to a court's general approach to evidence?[4] Has it distorted the (modified) adversarial process that the international courts and tribunals reviewed adhere to?[5]

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3 B. Stern, *The intervention of private entities and states as "friends of the court" in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.) *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1453.

4 The term evidence is understood to include all information submitted to an international court or tribunal by the parties to a case or from other sources with an aim of establishing or disproving alleged facts. See R. Wolfrum, *International courts and tribunals: evidence,* in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 2; B. Cheng, *General principles of law as applied by international courts and tribunals*, Cambridge 1953, p. 307 (Every allegation of fact forwarded by a party must be proven, unless judicial notice is taken, their veracity is presumed or it has been admitted by the opposing party.).

5 The adversarial process places the process in the hands of the parties: they initiate the case, define the subject matter of the dispute and provide the court with the necessary facts. The court's role is to decide the dispute on the basis of the information provided. E. Valencia-Ospina, *Evidence before the International Court of Justice*, 1 International Law Forum (1999), p. 202. But see M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 119, 130, 268 (‚In zwischenstaatlichen Streitigkeiten gilt weder der Untersuchungsgrundsatz noch ein streng kontradiktorisches Verfahren. Am ehesten entspricht die Situation dem aus dem deutschen. Zivilprozessrecht bekannten (modifizierten) Verhandlungsgrundsatz.'); E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), p. 518; *Western Sahara Case*, Advisory Opinion, 16 October 1975, Sep. Op. *de Castro*, ICJ Rep.

The impact of *amicus curiae* participation on decisions and decision-making is difficult to measure, not only because deliberations are secret. Not all international courts and tribunals comment in their decisions on the sources relied upon. This Chapter is based on information drawn from judgments and awards, public statements by judges and court staff and, where apposite, *amicus curiae* submissions.

A. An obligation to consider?

Most international courts and tribunals clarify upon granting leave, in procedural orders, or in other rules on *amicus curiae* participation, that there is no guarantee, let alone a right of consideration. To the contrary, there seems to be agreement that the fate of a submission once filed is subject to the full discretion of the international court or tribunal. Indeed, a *right* to have a submission considered would have to emanate from the international court or tribunals' applicable laws. The existing laws barely comment on *amicus curiae*, let alone a right of reply or participation. Further, as a non-party, whose rights cannot be pronounced upon by a court or tribunal, an *amicus curiae* cannot request to be heard based on fair trial considerations.[6] The Appellate Body clarified this in *US– Shrimp*:

> [U]nder the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.[7]

1975, p. 138 ('In litigation, the parties are masters of the evidence: the court has a passive role. In the words of the traditional axiom of procedure, the court says to the party: *da mihi factum, dabo tibi jus*. The parties put forward facts and submit the evidence that they consider favourable to their claims, and the court takes them into consideration when making its decision (*secundum allegata et probata*). That is perfectly logical, because the purpose of the judgment is to decide as between the parties…').

6 This may be dissatisfying in cases where *amicus curiae* participation is used by entities affected by a judicial decision to obtain access to an international court or tribunal.

7 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101. See also *EC–Sardines*, Report of the Appellate Body,

The FTC Statement and several investment tribunals' procedural orders concerning *amicus curiae* are drafted similarly.[8] *Judge Higgins* notes that in the ICJ's *Nuclear Weapons* advisory proceedings the judges were informed of the *amicus curiae* briefs received on a weekly basis and that it was within their discretion to consult them.[9]

These practices are convincing. An *amicus curiae* submission should only be considered if a tribunal finds it relevant in its decision-making. For instance, a brief that was admitted because of its relevancy may become irrelevant because the matter discussed becomes moot during the proceedings. If an international court or tribunal would be obliged to consider every *amicus curiae* submission, a failure to do so might at worst affect the validity of the decision rendered and at best reduce the efficiency of proceedings.[10]

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adopted on 23 October 2002, WT/DS231/AB/R, para. 166 ('In particular, WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief.'). See also *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 41 (Panels have 'no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations' as opposed to party and third party submissions.).

8 *Glamis v. USA*, Award, 8 June 2009, para. 286 (The tribunal emphasized the FTC Statement's Section 9 that '[t]he granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration.'). See also *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, Sec. 3.6.8 ('The granting of leave to file an *amicus curiae* submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file an *amicus curiae* submission does not entitle the applicant that filed the submission to make further submissions in the arbitration. *Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their submissions must be limited to allegations, without introducing new evidence.').

9 R. Higgins, *Remedies and the International Court of Justice: an introduction*, in: M. Evans (Ed.), *Remedies in international law*, Oxford 1998, p. 1.

10 In *US–Shrimp*, Malaysia pointed to a drastic consequence of a right to consideration: 'It must be left to the complete discretion of panel members whether or not to read them. A panel's decision not to read the briefs cannot constitute a procedural mistake and cannot influence the outcome of a panel report.' See *US–Shrimp*, Re-

In exceptional cases, an obligation to consider an *amicus curiae* brief could arise from an international court or tribunal's duty to fully investigate a case and objectively assess it.[11] Still, such an obligation is owed towards the parties, not an *amicus curiae*. Nonetheless, according to *Bartholomeusz*, a consideration of admitted submissions is only logic and fair:[12]

> Ordinarily one would think that a grant of leave to a person to make a submission entails a legitimate expectation that the court would then at least consider in good faith whatever is submitted.[13]

Indeed, why would a court admit an *amicus curiae* if it did not intend to consider it? Do courts tend to consider *amicus curiae* submissions for which leave was granted?

B. International Court of Justice

The ICJ does not have a formalized approach regarding the consideration of *amicus curiae* submissions in contentious proceedings. It has not defined the status of information submitted by an intergovernmental organi-

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port of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 46.

11 E.g. WTO panels' duty under Article 11 DSU. See J. Koepp, *Die Intervention im WTO-Streitbeilegungsverfahren, Eine rechtsvergleichende Untersuchung im internationalen Verfahrensrecht*, Hamburger Studien zum Europäischen und Internationalen Recht, Band 32, Berlin 2001, p. 194.

12 L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), p. 240 ('It is difficult to imagine that a busy Court would permit *amicus* participation while contemplating that it was under no duty to even consider the resulting submissions.'). Also in favour, A. Reinisch/C. Irgel, *The participation of non-governmental organizations (NGOs) in the WTO dispute settlement system*, 1 Non-State Actors and International Law (2001), p. 147; C. Tams/C.-S. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 239; C. Ford, *What are friends for? In NAFTA Chapter 11 disputes, accepting amici would help lift the curtain of secrecy surrounding investor-state arbitrations*, 11 Southwestern Journal of Law and Trade in the Americas (2005), p. 253.

13 L. Bartholomeusz, supra note 12, p. 276. See also T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), pp. 409-410 ('[A]s a minimum requirement, [tribunals] should summarize the arguments made in the submission and *respond* to them in its reason for award.' [References omitted]).

zation pursuant to Article 34(2) ICJ Statute, possibly because of the few existing cases.[14] The Court considered in *Aerial Incident of 3 July 1988* the factual information submitted by the ICAO on the proceedings initiated before the ICAO Council following the shooting down of Iran Air flight IR655 and on the decisions adopted by the ICAO Council in response.[15] The ICJ excluded from the case file and chose not consider a note from the Director of the Legal Bureau containing his opinion on some of the legal aspects of the case, which had been enclosed with the documents the Court had requested. In his reply, the Deputy-Registrar informed the Director of the Legal Bureau that he was not including in the case file the letter 'in so far as it relates to matters which fall for the Court itself to consider.'[16] In the *Corfu Channel* case, the Court stated that because Yugoslavia was not a party to the proceedings the documents it had submitted 'could only be admitted as evidence subject to reserves' and that it would forgo to assess their probative value.[17] However, the parties agreed to the use of some of the documents in the examination of one witness, which effectively accorded them the treatment reserved for ordinary evidence.[18] Finally, the ICJ has treated as ordinary party evidence documents entitled '*amicus curiae',* which had been transmitted by one of the parties in contentious proceedings.[19]

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14 C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 141 (Opining that the United Nations Environment Programme should have participated in Gabčíkovo-Nagymaros.).

15 *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, ICJ Pleadings, Vol II, p. 618.

16 *Aerial Incident of 3rd July 1988 (Islamic Republic of Iran v. United States of America)*, Letter No. 3 (The Agent of the Islamic Republic of Iran to the Registrar of the International Court of Justice), Part IV: Correspondence, p. 639.

17 *Corfu Channel Case*, Part III: Pleadings, ICJ Reports 1949, pp. 89, 90, 224, 233. See also S. Rosenne, *The law and practice of the International Court 1920-2005*, 4th Ed., Leiden 2006, p. 1333; S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht 1993, pp. 170-171.

18 *Corfu Channel Case*, Part III: Pleadings, ICJ Rep. 1949, pp. 224, 233. See also S. Rosenne, supra note 17, Law and Practice, p. 1333.

19 In *Democratic Republic of the Congo v. Belgium*, the ICJ did not discuss specifically a 750-page memorandum on universal jurisdiction prepared by Amnesty International and submitted (and cited) by Belgium with its counter-memorial, which was titled '*amicus curiae submission'*. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Counter Memorial of the King-

Pursuant to Practice Direction XII, the ICJ considers unsolicited *amicus curiae* submissions from NGOs 'information readily available'. This categorization entails that *amicus curiae* submissions are regarded as being *en pars* with any information one can find in the public sphere. Due to their placement in the Court's library with no possibility of online access as of writing, it is not surprising that the briefs have not been mentioned or adopted expressly by any party to date. Practice Direction XII does not state unequivocally that judges may consult the submissions *proprio motu*. Given the clear sentiment articulated in the Practice Direction, this option seems to concern only a few judges at best.[20] *Judge Weeramantry* in *Nuclear Weapons* in his Dissenting Opinion used the *amicus curiae* submissions to illustrate the public interest in the proceedings:

> Though these organizations and individuals have not made formal submissions to the Court, they evidence a groundswell of global public opinion which is not without legal relevance.[21]

The ICJ's *de facto* rejection of *amicus curiae* participation correlates with its hesitant use of its wide investigative powers granted under its Statute and Rules.[22] Its treatment of the Yugoslav submission and documents in the *Corfu Channel case* indicates that the Court would not treat *amicus cu-*

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dom of Belgium, 28 September 2001, pp. 80, 103 (FN250), 104, 105. Amnesty International attributed to the memorandum 'functions of an *amicus curiae* brief.' See D. Zagorac, *International courts and compliance bodies: the experience of Amnesty International*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 11, 15. Reports by NGOs are increasingly relied on by the parties as documentary evidence before the Court. See A. Riddell/B. Plant, *Evidence before the International Court of Justice*, London 2009, pp. 247-248. Some of the judges referred to the memorandum.

20 It is unknown if the submissions from non-state entities are still notified to the judges.

21 *Nuclear Weapons*, Advisory Opinion, 8 July 1996, Diss. Op. Judge Weeramantry, ICJ Rep. 1996, p. 216. *Judge Weeramantry* also took note of the 35 written statements and 24 oral submissions made by states. Under the subsection 'World Public Opinion,' he referred to NGOs dedicated to the eradication of nuclear weapons and the large number of signatures received in the proceedings. *Id.,* pp. 533-534.

22 The investigative powers are designed to be used only where the evidence submitted by the parties is conflicting or insufficient to render a decision in the case. The general 'inquisitional power' of the ICJ is enshrined in Article 48 ICJ Statute. Among the provisions in the ICJ Statute and the Rules which elaborate this general power, Article 50 ICJ Statute is particularly relevant in relation to *amicus curiae* (see Chapter 4). The ICJ delineated the exercised of its investigative powers in

riae submission like regular evidence.[23] The Court seems to make an ex-

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Armed Activities (Congo): '[T]he Court will make such findings of fact as are necessary for it to be able to respond [to the claims of the parties]. It is not the task of the court to make findings of fact [even if it were in a position to do so] beyond these parameters.' See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, 19 December 2005, ICJ Rep. 2005, pp.168, 200, para. 57. The Court's restrictive attitude towards the use of its investigative powers has been ascribed to the prevalence of undisputed facts in the majority of cases, and its proclivity to rely on the evidence submitted by the parties. See M. Hudson, *The Permanent Court of International Justice, 1920-1942: a treatise*, New York 1943, p. 565; S. Rosenne, *The law and practice of the International Court*, Leiden 1965, p. 580. This has changed in recent years due to a rise in number of cases involving complex and disputed fact patterns. See R. Higgins, *Respecting sovereign rights and running a tight courtroom*, 50 International and Comparative Law Quarterly (2001), pp. 121, 129; M. Kazazi/B. Shifman, *Evidence before international tribunals – introduction*, 1 International Law Forum (1999), p. 194; A. Riddell/B. Plant, supra note 19, p. 70, with case examples. The ICJ has applied Article 50 ICJ Statute explicitly only in one case, the *Corfu Channel Case (Assessment of Amount of Compensation) (United Kingdom v. Albania),* Order of 19 November 1949, ICJ Rep. 1949, pp. 142-169, 237. The sparse use of these powers has been strongly criticized by academics and parts of the bench, last in the *Pulp Mills case* concerning the authorization of the construction of two pulp mills on the River Uruguay, see *Pulp Mills Case,* Judgment, 20 April 2010, Sep. Op. of Judge Trindade, ICJ Rep. 2010, p. 41, para. 151. The dispute raised complex scientific and technical questions, and the parties submitted a vast amount of documentary evidence and consulted several experts. The ICJ decided to 'make its own determination of the facts, on the basis of the evidence presented to it.' Several judges had wanted to apply Article 50 ICJ Statute stressing that the Court, in order to fulfill its function, required possessing both the relevant facts and fully grasp their meaning, see *Pulp Mills Case,* Judgment, 20 April 2010, ICJ Rep. 2010, pp. 72-73, para. 168 and Declaration Judge Yusuf, ICJ Rep. 2010, p. 219, paras. 10-12 and Joint Diss. Op. Judges Al-Khasawneh and Simma, ICJ Rep. 2010, pp. 116-117, para. 17 ('[I]n a case concerning complex scientific evidence and where, even in the submissions of the Parties, a high degree of scientific uncertainty subsists, it would have been imperative that an expert consultation, in full public view and with the participation of the Parties take place.'). While the criticism by its own members signals that the ICJ may change its attitude towards the admission of Court-appointed experts, such a change likely would be limited to cases with complex scientific or technical issues and only concern experts, not *amici curiae*. In a few cases, the ICJ has solicited expert advice without following the procedure prescribed by its Statute and Rules and without including the consultations in the case file. This was suspected in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* Judgment, 10 October 2002, ICJ Rep. 2002, p. 303; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment,

ception for state-like entities,[24] and when an *amicus curiae* brief is submitted by a party together with its regular submissions. These briefs are treated by the ICJ like ordinary party evidence in accordance with the broad powers of the parties as regards the submission of evidence.

In addition, it is unlikely that *amicus curiae* participation would conflict with or undermine the rules on evidence. The ICJ follows a very strict definition of experts and witnesses. Experts and witnesses do not deter-

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16 March 2001, ICJ Rep. 2001, p. 40. See T. Daniel, *Expert evidence before the ICJ*, Paper presented at the Third Bi-Annual Conference of ABLOS 2003, pp. 4-5. According to *Jennings*, 'the Court has not infrequently employed cartographers, hydrographers, geographers or linguists, and even specialized legal experts to assist in the understanding of the issues in a case before it; and it has not on the whole felt any need to make this public knowledge or even appraise the parties.' See R. Jennings, *International lawyers and the progressive development of international law*, in: J. Makarczyk (Ed.), *Theory of international law at the threshold of the 21st century: essays in honour of Krzystof Skubiszewski*, The Hague 1996, pp. 413, 416. See also P. Couvreur, *Le règlement juridictionnel*, in: L. Lucchini (Ed.), *Le processus de délimitation maritime: étude d'un cas fictif: Colloque international*, Monaco, 27 au 29 mars 2003, Paris 2004, p. 384. Critical of this practice, *Pulp Mills Case*, Judgment, 20 April 2010, Joint Diss. Op. Judges Al-Khasawneh and Simma, ICJ Rep. 2010, pp. 114-115, para. 14. Further, in at least one case, the ICJ considered NGO reports available in the public domain to assess a factual claim. See R. Wolfrum, supra note 4, para. 60, referring to the assessment of Uganda's claim that it acted in self-defence in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, 19 December 2005, ICJ Rep. 2005, para. 129. However, these cases remain exceptions.

23 For an analysis of the rules on evidence, see M. Lachs, *Evidence in the procedure of the International Court of Justice: role of the court*, in: E. Bello/B. Ajibola (Eds.), *Essays in honour of Judge Taslim Olawale Elias*, Dordrecht 1992, p. 265; D. Sandifer, *Evidence before international tribunals*, Charlottesville 1975, pp. 184-185 (The ICJ regards the absence of any restrictive rules beside the element of timeliness a confirmation of the fact that parties have a *right* to submit the information they see fit.).

24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep. 2007, p. 195, para. 371; A. Riddell/B. Plant, supra note 19, p. 255 (The ICJ 'seemed to attach a limited amount of probative value to an official statement by the parliamentary president of Republika Srpska which originated not from either party, but a separate political entity claiming statehood.' They credit the consideration of the document by the Court to the fact that the declaration was made by a high-ranking political figure and had been communicated by official publication and that its contents were consistent with other evidence brought before the court.).

mine the scope of their submissions. They answer the questions placed to them by the Court and the parties. In the *Nicaragua* case, the ICJ did not take into account information provided by a witness, because it considered it to have been 'a mere expression of opinion.' The ICJ found that the submission 'may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself.'[25] *Amici curiae* extremely rarely limit themselves to the submission of unprocessed information.

Thus, currently, there is no interaction between *amicus curiae* participation and the system on evidence. Even if the Court would open up to the instrument, it is extremely unlikely that it would treat it like evidence given the *Corfu Channel* precedent.

C. International Tribunal for the Law of the Sea

The ITLOS has yet to receive submissions pursuant to Article 84 ITLOS Rules by intergovernmental organizations or under its Cooperation Agreement with the UN.[26] Its procedural structure, including its investigative powers, is similar to the framework governing proceedings before the ICJ.[27] The ITLOS also has broad auxiliary investigative powers despite generally following an adversarial process.[28] The ITLOS rarely relies on its investigative powers, possibly, because the parties have taken an active role in fact-heavy cases.[29]

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25 *Nicaragua Case*, Judgment (Merits), 27 June 1986, ICJ Rep. 1986, para. 68.

26 The *amicus curiae* submission from Greenpeace International in the *Arctic Sunrise case* was not admitted. However, this was not necessary, because the claimant closely cooperated with the *amicus curiae* (see Chapter 5).

27 Unlike the ICJ, the ITLOS has the power to appoint technical or scientific experts who may be present during deliberations, see Article 42(2) ITLOS Rules. Under Article 289 UNCLOS, the ITLOS may appoint technical or scientific experts *proprio motu*.

28 The ITLOS may, pursuant to Article 82(1) of its Rules, arrange for an inquiry or expert opinion. According to Article 77 ITLOS Rules, it may seek or ask the parties to provide information necessary for the elucidation of any aspect of the case. This includes arranging for the attendance of a witness or expert. See P. Chandrasekhara Rao/P. Gautier (Eds.), *Rules of the International Tribunal for the Law of the Sea: a commentary*, Leiden 2007, p. 219.

29 The ITLOS has applied Article 77 ITLOS Rules in one case. It ordered the parties to set up a group of experts to assess the potential negative impacts of Singapore's

In *Responsibilities*, the Seabed Disputes Chamber did not explicitly rely on any of the written submissions from states and intergovernmental organizations under Article 133(3) ITLOS Rules. The Seabed Disputes Chamber treated the *amicus curiae* submission it received from Greenpeace International and WWF as a publication readily available. In doing so, like the ICJ, it decided not to accord the submission any evidentiary value, but it gave the participating states and organizations an opportunity to adopt the brief or parts thereof pursuant to Article 63(1) ITLOS Rules.[30] In their submission, the WWF and Greenpeace International had argued for an in-

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land reclamation efforts in a provisional measures order. See *Case concerning land reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore),* Provisional Measures, Order, 8 October 2003, ITLOS Case No. 12, p. 16. The ITLOS has stated in early judgments that it intends to base its consideration of the facts primarily on the evidence submitted by the parties by emphasizing that the establishment of the factual record is primarily their task. See *Saiga No. 2 Case (St. Vincent and the Grenadines v. Guinea)*, Judgment (Merits), 1 July 1999, ITLOS Rep. 1999, pp. 10, 37, para. 66; *The "Grand Prince" Case (Belize v. France)*, Judgment (Prompt Release), 20 April 2001, ITLOS Rep. 2001, pp. 17, 44, para. 92 (The tribunal considered whether there was a need to seek information on the registration of *The Grand Prince* in Belize, but it decided that it should deal with the issue on the basis of the material provided by the parties.). Critical, *The "Grand Prince" Case*, Judgment (Prompt Release), 20 April 2001, Joint Diss. Op. Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson and Jesus, ITLOS Rep. 2001, p. 66, para. 3 (Nine judges referred to Article 77 ITLOS Rules in their dissenting opinions); P. Chandrasekhara Rao/P. Gautier (Eds.), supra note 28, p. 232. The tribunal has relied on Article 76(1) ITLOS Rules in several cases, see R. Wolfrum, in: Vitzthum (Ed.), *Handbuch des Seerechts*, Munich 2006, p. 58. Nonetheless, the tribunal has engaged actively in the consideration of its cases towards the parties. See *M/V Saiga (No. 2) Case (St. Vincent and the Grenadines v. Guinea)*, Provisional Measures, Order, 11 March 1998, ITLOS Case No. 2, para. 37. The ITLOS relied on Article 77(1) ITLOS Rules to ask the parties for comments regarding the release of the vessel from detention. See also P. Chandrasekhara Rao/P. Gautier (Eds.), supra note 28, pp. 217-218 ('The Tribunal has regularly exercised the power ... to indicate points and issues which it would like the parties to address. … The practice also reflects the Tribunal's policy to remain proactive in the conduct of the proceedings.' This indicates that the lack of use of its investigative powers cannot be interpreted as an expression of a general hesitation towards the use of investigative powers.).

30 Article 63(1) ITLOS Rules: 'There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading. Parties need not annex or certify copies of documents which have been published and are readily available to the tribunal and the other party.'

tegrated interpretation of the UNCLOS, as well as strict liability of the sponsoring state based on the no-harm-rule and the polluter pays principle, and they had heavily relied on the ILC's 2006 Principles on the Allocations of Loss in Case of Transboundary Harm. The United Kingdom, in its pleading, mentioned the *amicus curiae* submission when it disputed the pertinence of some of these arguments.[31] None of the arguments were picked up by the Chamber in its opinion. In *SRFC*, the two *amicus* submissions from WWF seem to have been read by some states and organizations making submissions, as well as by the ITLOS itself. Notably, as regards Question 1 of the advisory opinion – *What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States?* – New Zealand in its submission made reference to the WWF's *amicus curiae* brief to note the 'consistent view contained in the written statements presented to the Tribunal that a flag State is under a legal duty to exercise effective control over its vessels when they are fishing in the Exclusive Economic Zone (EEZ) of another State.'[32] In addition, some of the arguments made by the *amicus curiae* with respect on this question (which also were voiced in other submissions) were arrived at in a similar manner by the ITLOS in its opinion. For instance, the ITLOS held that the obligation to prevent IUU fishing extends to also to states of nationals fishing in the EEZ of a coastal state – an issue that had not been covered by the question.[33] Further, the scope of obligations of flag states it pronounced is very similar to those proposed by WWF, and both agree in their view that these obligations constitute due diligence obligations.[34]

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31 *Responsibilities*, Advisory Opinion, ITLOS Case No. 17, Verbatim Records, Public Sitting, 16 August 2010, 23:21-25 and 37:13-16.

32 *SRFC*, Written Statement of New Zealand on the Statements made as provided under Order 2013/5, 13 March 2014, ITLOS Case No. 21, para. 3, and also paras. 4, 9.

33 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 121-124. *SRFC*, Further *Amicus Curiae* Brief on Behalf of WWF International, 13 March 2014, ITLOS Case No. 21, para. 35 ('[A]lthough WWF accepts that Question 1 relates only to flag States rather than States of nationality, WWF respectfully invites the Tribunal to elaborate as far as it feels able on the obligations of States of nationality.').

34 *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 111, 112, 125, 129, 140; *SRFC*, Further *Amicus Curiae* Brief on Behalf of WWF International, 13 March 2014, ITLOS Case No. 21, paras. 10, 35.

Worth mentioning is also that the ITLOS followed WWF's 'encouragement' to draw from Article 63(1) in its interpretation of the term 'sustainable management' in Question 4 – *What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest …?*, as well as the argument that also this obligation was one of due diligence.[35] Thus, as regards advisory opinions, some states, and possibly the ITLOS, have considered *amicus* briefs.

D. European Court of Human Rights

While the ECtHR now summarizes – thus, acknowledges – virtually all admitted *amicus curiae* submissions in its judgments (usually immediately after the parties' submissions on an issue), it only occasionally refers to them in the reasoning, making it difficult to assess the concrete value accorded to them.[36] Still, many briefs are relied upon and discussed by the court to corroborate (or disprove) the parties' allegations or to reason the court's legal findings, indicating that they were influential in shaping the court's decision.[37] Briefs are often considered, even when the court ulti-

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35 *SRFC*, Further *Amicus Curiae* Brief on Behalf of WWF International, 13 March 2014, ITLOS Case No. 21, para. 19; *SRFC*, Advisory Opinion, 2 April 2015, ITLOS Case No. 21, paras. 191, 210.

36 According to *Van den Eynde*, the participation of NGOs as *amici* does not increase the likelihood that the court will find in favour of an applicant, see L. Van den Eynde, *An empirical look at the amicus curiae practice before the European Court of Human Rights*, 31 Netherlands Quarterly of Human Rights (2013), pp. 288-293.

37 In *Greens and MT v. the United Kingdom*, the ECtHR granted leave to the Equality and Human Rights Commission (EHRC) to comment on an alleged violation of Article 3 Protocol No. 1 to the ECHR for refusal by British authorities to enrol the applicant, a prisoner, on the electoral register for domestic and EU elections. The ECHR informed the court of the case's factual background, and pointed it to its earlier case law on the issue. It noted the UK government's delay in implementing earlier ECtHR decisions and drew the court's attention to the number of affected persons by presenting the relevant statistics. The ECtHR took the submission fully into account in deciding that there had been a violation of Article 3 Protocol 1 to the European Convention. The court denied that there had been a violation of Article 13 ECHR. See *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010; *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44, paras. 27, 31 (The ECtHR mentioned some of the facts submitted by the TUC.); *Pham Hoang v. France*, Judgment of 25 September 1992, Series A No. 243, p. 15, para. 40 (The

mately decides not to follow the arguments made.[38] This includes the earlier-discussed *Soering* case and briefs on the IACtHR's case law on forced disappearances.[39] In *Varnava and others v. Turkey*, the court accepted a written submission from the NGO Redress containing arguments on the obligation to conduct an effective investigation into a forced disappearance and on the reparation and amount of moral damages to be paid to the victims' families under Article 41 ECHR. In its brief, Redress relied *inter alia* on international conventions and the practice of the IACtHR and the ECtHR.[40] The court rejected a general obligation to pay moral damages under the Convention, but found that exceptionally non-pecuniary awards could be made in cases of severe damages. As proposed by Redress, the

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court explicitly relied on the fact submissions made by the *Conseil d'Etat* and the Court of Cassation Bar.); *McCann and others v. the United Kingdom*, Judgment of 27 September 1995, Series A No. 324, p. 21, para. 157 (The court noted that the *amici curiae* and applicant submissions were identical on a specific fact submission.); *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, Series A No. 115, p. 13 (The UK government, upon receiving an *amicus* brief by JUSTICE via the court, wrote to the registrar to correct some statements it had made in its own memorial to which the *amicus curiae* had called attention.); *MGN Limited v. the United Kingdom*, No. 39401/04, 18 January 2011; *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011; *Ahrens v. Germany*, No. 45071/09, 22 March 2012; *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, para. 195; *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015, para. 88; *Morice v. France* [GC], No. 29369/10, 23 April 2015, para. 168. See also L. Bartholomeusz, supra note 12, p. 241; *J.N. v. the United Kingdom*, No. 37289/12, 19 May 2016, para. 100.

38 *Al-Sadoon and Mufdhi v. the United Kingdom*, No. 61498/08, 2 March 2010, ECHR 2010; *Frasik v. Poland*, No. 22933/02, 5 January 2010, ECHR 2010; *Scordino v. Italy (No. 1)* [GC], No. 36813/97, 29 March 2006, ECHR 2006-V, para. 173 (The court began its reasoning by refuting the arguments of the *amici curiae* – the governments of Poland, the Czech Republic and Slovakia – that states should possess a wide margin of appreciation in determining the reasonable duration of judicial proceedings.).

39 *Soering v. the United Kingdom*, Judgment of 7 July 1989, Series A No. 161. See also N. Bürli, *Amicus curiae as a means to reinforce the legitimacy of the European Court of Human Rights*, in: S. Flogaitis et al. (Eds.), *The European Court of Human Rights and its discontents*, Cheltenham et al. 2013, pp. 137-138 (According to *Bürli*, the ECtHR directly quoted parts of Amnesty International's submission in its reasoning.).

40 *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009, paras. 220-221.

court considered as a factor in the assessment of the amount to be awarded the duration of the breach. The court did not order the Turkish government to conduct an effective investigation of the nine disappearances in the operative part of the judgment. This was criticized in the concurring opinion of *Judge Spielmann*, which was joined by *Judges Ziemele* and *Kalaydjieva*. They explicitly relied on Redress's argument that the effective remedy owed under Article 41 ECHR included an effective investigation and referred to the court's earlier case law on this issue that had been mentioned by Redress.[41] In *M.C. and A.C. v. Romania*, a case concerning alleged lack of effective investigation of ill-treatment due to discrimination against LGBTIQ* persons, the court referred to reports from the European section of the International Lesbian, Gay, Bisexual, Trans and Intersex Association ILGA to 'acknowledge[…] that the LGBTIQ* community in the respondent State finds itself in a precarious situation, being subject to negative attitude towards its members.'[42] The ECtHR has also significantly relied on comparative law reports in its reasonings, especially to determine whether a consensus among its member states exists on a particular issue (see Chapter 6). This includes the case *Sheffield and Horsham v. the United Kingdom* where the court explicitly named a study on legislative developments in respect of recognition of post-operative gender status of transgender persons to conclude that there was no common European approach to the issue. The applicant in the case had complained against the refusal by British authorities to change his birth certificate to reflect his reassigned gender.[43] This shows the importance ascribed to such reports.

Especially in ethically sensitive cases, the court extensively summarizes the arguments made by the different interest representatives. This has included cases on the right to life, homosexuals' rights, the full-face veil ban

41 *Id.,* Conc. Op. Judge Spielmann, joined by Judges Ziemele and Kalaydjieva, paras. 3, 6.

42 *M.C. and A.C. v. Romania,* No. 12060/12, 12 April 2016, para. 118. See also *Rasul Jafarov v. Azerbaijan*, No. 69981/14, 17 March 2016, where the court relied, among other, on the contextual submissions from the third parties Council of Europe Commissioner for Human Rights and the Helsinki Foundation for Human Rights, Human Rights House Foundation and Freedom Now to find that in recent years legislative efforts had created a difficult operational environment for NGOs in Azerbaijan, and that there was a systematic effort to silence human rights activities through criminal persecutions, *Id.,* paras. 99-113, 120, 161.

43 *Sheffield and Horsham v. the United Kingdom*, ECHR 1998-V 84, para. 57. See also N. Bürli, supra note 39, p. 140.

and assisted suicide (see Chapter 6).[44] The court uses *amici* to take note of and understand societal changes and, if necessary, to justify modifications of its case law to adapt to these changes.[45] For instance, in *SAS v. France* concerning the ban by French law of the full-face veil, the court not only summarized the arguments made by the third party interveners, but it also adopted and refuted several of the arguments and fact submissions made, thereby showing that it had thoroughly read and considered the submissions of the *amici curiae.*[46]

In some of the cases where *amici curiae* have made submissions to protect their rights, the ECtHR has been careful not to prejudice them. In *Brumarescu v. Romania*, the ECtHR was called to decide an alleged violation of Article 6(1) ECHR for denying access to justice to the applicant who was seeking to regain ownership of his parents' house. The house had been nationalized in 1950. The predecessor of the *amicus curiae* had purchased a flat in the house in 1973. The *amicus curiae* argued that the court could not return the property in the flat to the applicant without violating its property rights. In its judgment, the court followed the argument. It acknowledged the direct risk to the *amicus's* rights. In accordance with its jurisdictional limitations, the court refrained from pronouncing on the legal situation of the flat on the ground floor.[47]

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44 For many, see *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, ECHR 2003-XII; *Koch v. Germany* (dec.), No. 497/09, 31 May 2011; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *A, B and C v. Ireland* [GC], No. 25579/05, 16 December 2010, ECHR 2010; *SAS v. France* [GC], No. 43835/11 1 July 2014; *Parrillo v. Italy* [GC], No. 46470/11, 27 August 2015. However, in some cases, the court has ignored *amicus curiae* briefs, even though the arguments provided touched directly on a central aspect of the case, e.g. *Babar Ahmad and others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.

45 E.g. in *Stafford v. the United Kingdom* [GC], No. 46295/99, 28 May 2002, ECHR 2002-IV. See also N. Bürli, supra note 39, p. 138.

46 *SAS v. France* [GC], No. 43835/11, Judgment of 1 July 2014, paras. 137, 147, 148. The ECtHR rejected as 'not pertinent' the allegation made by the applicant and some of the *amici* that the ban was based on the assumption that the veil was an instrument of duress, after having studied the explanatory memorandum of Law No. 2010-1192 of 11 October 2010. It further noted and later rejected the argument that a blanket ban was disproportionate.

47 *Brumârescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I, p. 43, para. 69 (It held that the 'proceedings before it, brought by the applicant against the Romanian State, can only affect the rights and obligations of those parties. The Court also notes that the intervener was not a

The court does not consider *amici curiae* to be a formal source of evidence.[48] The instrument is regulated in the general sections on proceedings in the ECHR and the ECtHR Rules and not in the sections reserved for evidence. Still, the ECtHR has relied on facts submitted by *amici curiae* to complete the record, to establish the contextual background and to draw conclusions on facts. Further, it has drawn from legal arguments to reason an interpretation.[49] In *Al Hamdani v. Bosnia and Herzegovina*, the ECtHR noted that *amicus curiae* participation played a particular role in respect of the parties' evidence:

> The Court will take as its basis all the material placed before it or, if necessary, material obtained on its own initiative. It will do so particularly when an applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.[50]

The ECtHR has developed a system of evaluation of *amicus curiae* submissions. It attaches greater value to submissions made by persons or entities with direct knowledge of a situation or expertise in the matter. It does not appear to differentiate between submissions based on the origin or nature of *amicus curiae*. It has weighed equally information submitted by NGOs involved in the case and by an international organization with oper-

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party to any of the domestic proceedings at issue in the present case, the sole parties to those proceedings having been the applicant and the Government.').

48 In *Avotiņš v. Latvia*, the court seems to have considered some fact submissions made by the Cypriot government appearing as *amicus curiae* as evidence. The case is atypical in so far as the submissions in question concerned remedies available under Cypriot law. The government also furnished the court with the relevant national laws and case law. The court noted that the parties had not disputed the respective fact submission, particularly that the claimant could have appealed the judgment whose enforcement under the Brussels I Regulation was at issue. See *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016, paras. 68, 122.

49 E.g. *Kocherov and Sergeyeva v. Russia*, No. 16899/13, 29 March 2016, para. 98; *V.M. and others v. Belgium*, No. 60125/11, 7 July 2015, para. 148.

50 *Al Husin v. Bosnia and Herzegovina*, No. 3727/08, 7 February 2012, para. 50. See also *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016, paras. 97, 98 (The ECtHR noted that the respondent had not contested the submission from various NGOs regarding a worldwide trend to treat same-sex couples as family members and recognizing a right to live together, as well as a European trend deduced from the practice of different European organizations, including the European Parliament and the Council of Europe, to view same-sex couples as families in the immigration process. The court appears to have relied on these submissions in its decision that Italy had violated Articles 14 and 8 ECHR.).

ative experience in the country in question in the establishment of the fact record.[51] The court's evaluation of facts submitted by *amici curiae* is somewhat untechnical, as its assessment of the submissions in *Kaboulov v. Ukraine* shows:

> The court has had regard to the reports of the various international human and domestic human rights NGOs, the US State Department and the submissions made by the Helsinki Federation for Human Rights …, which joined these proceedings as a third party. According to these materials, there were numerous credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects by the Kazakh law-enforcement authorities. … The Court does not doubt the credibility and reliance of these reports. Furthermore, the respondent Government has not adduced any evidence, information from reliable sources or relevant reports capable of rebutting the assertions made in the reports above.[52]

Thus, the court currently seems to verify submissions only by considering their plausibility on the basis of a comparison of all party and non-party submissions. This is problematic. According to *Sadeghi*, the ECtHR has 'a tendency to rely heavily and uncritically on secondary sources, at times deferring to their findings wholesale when their factual determinations are of questionable reliability', and without having 'articulated any discernible guidelines for the use of secondary sources, nor can any consistent standards be deduced from the Courts' judgments.'[53] Indeed, a review of *amicus curiae*-related case law confirms that the court has not articulated the

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51 See *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B, paras. 55, 61 (Briefs were received from Amnesty International et al. and the Northern Ireland Standing Advisory Commission on Human Rights. The court extensively referred to Amnesty's submission on the standard of scrutiny to be applied by the court. The court noted where the fact submissions from the parties and the *amici* corresponded. The court quoted, but rejected a fact submission from Amnesty on the safeguards against abuse of detention power. *Judge Martens*, in a concurring opinion, noted that he voted against the brief with considerable hesitation. He almost dedicated his entire opinion to an analysis of the brief and stated that he agreed with it in large parts. *Judge Pettiti* in his Diss. Op. adopted the arguments of Amnesty International.).

52 *Kaboulov v. Ukraine*, No. 41015/04, 19 November 2009, para. 111.

53 K. Sadeghi, *The European Court of Human Rights: the problematic nature of the court's reliance on secondary sources for fact-finding*, 25 Connecticut Journal of International Law (2009), p. 128. *Sadeghi* refers to *Jabari v. Turkey*, where the court held that the applicant, an Iranian woman who faced deportation from Turkey to Iran where she had been found to have committed adultery, would face a real risk of inhumane treatment. The court relied on the UNHCR's assessment of

standards it applies to verify *amicus curiae* submissions prior to using them to test party submissions, a procedure which is important given that entities have different standards of fact-finding and may not be accountable otherwise.[54] This aspect is also relevant with respect to *amicus curiae* submissions analyzing the court's own case law. As detailed in Chapter 6, *amici curiae* tend to draw the attention of the court to one or two poignant examples instead of providing a complete overview of the court's earlier decisions on a certain issue.

The reliance on *amicus curiae* and other submissions to corroborate (or disprove) the parties' allegations, while legitimate under Article 36(2) ECHR as the establishment of the facts of the case can be considered part of the administration of justice, may undermine the parties' primary responsibility to furnish the court with the relevant facts. This concern is somewhat mitigated by the fact that the ECtHR has strong investigative powers from which it has deduced an obligation to establish the objective truth.[55] A further concern is that only a fraction of cases receive *amicus curiae* submissions. Thus, parties in cases with *amicus curiae* submissions

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the veracity of her allegations, an Amnesty International report and a US Department of State report to corroborate the applicant's claim.

54 K. Sadeghi, supra note 53, pp. 143, 150-151. *Sadeghi* contends that Amnesty International does not require its employees to conduct fact-finding based on standardized procedures. He proposes several remedies, such as less-discretionary evidentiary standards, especially regarding admissibility, and the development of informal standard operating procedures for NGOs, international organisations and agencies.

55 The ECtHR's basic adversarial set-up is complemented by strong investigative powers, which are sketched in Article 38 ECHR. The provision stipulates that '[t]he Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.' Rule A1 of the 1998 Annex to the ECtHR Rules clarifies further that the court may without the parties' consent and with complete discretion as to the means engage in a full investigation of the case *ex officio*, including a consultation of secondary sources. See also R. Schorm-Bernschütz, *Die Tatsachenfeststellung im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Münster 2004, pp. 54-55, 58; L. Loukis, *Standards of proof in proceedings under the European Convention of Human Rights*, in: J. Valu (Ed.), *Présence du droit public et des droits de l'homme, mélanges offerts à Jacques Velu*, Vol. III Brussels 1992, p. 1440; J. Kokott, *Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, Heidelberg 1993, pp. 387-389. However, the ECtHR only rarely engages in a full investigation of the facts of a case. It has re-

may be held to a different standard of evidence than parties in other cases. In addition, the ECtHR does not seem to test the veracity of *amicus curiae* submissions other than by cross-checking them with other submissions received in a case. While this approach accords with the ECtHR's approach to evidence and its heavy reliance on secondary sources, yet again it reinforces the need for tight admission control and independency checks of *amici curiae*.[56]

E. Inter-American Court of Human Rights

The IACtHR traditionally has neither reproduced, nor summarized, nor explicitly evaluated the content of *amicus curiae* submissions in its judgments, though this seems to slowly change. This may be due largely to its limited resources and the significant amount of submissions received per case. Based on statements by former court officials, *obiter dicta* in some judgments and a comparison of *amicus curiae* submissions with judgments, the court regularly relies on *amicus curiae* submissions both in contentious and in advisory proceedings. *Padilla*, a former employee of the court, conveys: 'Judges of the Inter-American Court have told me that

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served, but barely used its right to question the Commission's evaluation of evidence or conduct its own investigations. See R. Schorm-Bernschütz, supra note 55, pp. 36-39. This includes cases where the ECtHR found that the facts were not proven beyond a reasonable doubt, see *Tekin v. Turkey*, Case No. 22496/93, Judgment, 9 June 1998, para. 38.

56 The ECtHR frequently considers secondary sources, including the fact determinations by the domestic courts seized with the matter prior, especially if the facts are properly documented and undisputed between the parties. Further, it reserves the right to question and verify the parties' allegations and evidence. See J. Callewaert, *The judgments of the court: background and content*, in: R. Macdonald/F. Matscher/H. Petzold (Eds.), *The European system for the protection of human rights*, Dordrecht 1993, p. 720; *Rehbock v. Slovenia*, Judgment, 28 November 2000, Diss. Op. Judge Zupancic, No. 29462/95. The court has made clear that to this end it may rely on reports from sources other than the parties, including statements from international authorities and organizations, third states and NGOs. K. Sadeghi, supra note 53, p. 127. Based on the principle of the free assessment of evidence, the court enjoys full discretion with regard to the value it attaches to the respective evidence before it. Regarding the different standards of proof applicable in proceedings before the ECtHR and the IACtHR, see R. Schorm-Bernschütz, supra note 55, pp. 119-121.

the *amici curiae* have provided invaluable contributions to the court's deliberations and judgments.'[57]

Amicus curiae submissions to the IACtHR appear to have been particularly influential in the creation or expansion of rights.[58] The creation of a separate right to truth for family members of victims of forced disappear-

57 D. Padilla, *The Inter-American Commission on Humans Rights of the Organization of American States: a case study*, 9 American University Journal of International Law & Policy (1993), pp. 95, 111. See also G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 791; M. Ölz, *Non-governmental organizations in regional human rights systems,* 28 Columbia Human Rights Law Review (1997), p. 360; J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-state actors and international law (2001), p. 184. It is reported that the IACtHR relied on the arguments of *amici curiae* without referencing the submissions in *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion No. OC-2/82 of 24 September 1982, IACtHR Series A No. 2 and *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights*, Advisory Opinion No. OC-3/83 of 8 September 1983, IACtHR Series A No. 3, see N. De Piérola y Balta/C. Loayza Tamayo, *Los Informes de Amici Curiae Ante La Corte Interamericana de Derechos Humanos*, 12 Anuario de derecho internacional (1996), pp. 469-471.

58 See also *Artavia Murillo and others (Fecundación in vitro) v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 28 November 2012, IACtHR Series C No. 257 (According to the NGO Interights, the court in finding that a full ban on the practice of in-vitro fertilization violated several rights of the ACHR cited relevant ECHR case law and practice material referred to in its brief). The court also occasionally considers novel concepts even if it chooses not to adopt them. In *González and others ("Cotton Field") v. Mexico*, a case concerning the failure of the Mexican state to offer the necessary guarantees to protect the life and physical integrity of three young women who disappeared and later were found injured and dead in Ciudad Juarez, North Mexico, the IACtHR explicitly noted some of the arguments made by *amici curiae* on the concept of femicide. The court ultimately found that it did not possess sufficient evidence to confirm that the murders of the three (and more than one hundred other) women in Ciudad Juarez constituted gender-based murders. But it stated that 'it understands that some or many of them may have been committed for reasons of gender.' See *González et al. ("Cotton Field") v. Mexico,* Judgment of 16 November 2009 (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No. 205, p. 41, para. 144. *Acosta Lopez* argues that the result may have been due also to the fact that *amici curiae*, the IAComHR and experts did not follow a uniform concept of femicide, see J. Acosta López, *The Cotton Field Case: gender perspective and feminist theories in the Inter-American Court of Human Rights Jurisprudence*, 21 Revista Colombiana de Derecho Internacional (2012), pp. 17-54.

ance is largely a product of (lobbying) efforts by *amici curiae*.[59] In *Velásquez Rodriguez v. Honduras*, the IACtHR followed the argument from Amnesty International in its *amicus curiae* brief that forced disappearances violated the prohibition against torture.[60] In *Bamaca Velásquez v. Colombia*, the International Commission of Jurists and the International Center for Transitional Justice proposed creation of a right to truth in cases of forced disappearances on the basis of several provisions of the ACHR. The IACtHR adopted the proposal and established the right.[61] The CIEL, who appeared as *amicus curiae* in several cases before the IACtHR (and other international courts), has stated that it 'has successfully argued in a petition to the IACHR that environmental rights are encompassed within the right to life and the right to health, and has enjoyed even wider success in arguing that property rights, particularly those of indigenous peoples, encompass environmental rights.'[62]

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59 In its submission in *Bámaca-Velásquez v. Guatemala*, the International Commission of Jurists argued that this right was an established principle of international humanitarian law referenced in international human rights law and also implied in Article 29(c) ACHR. At the time, only *Judge Cançado Trindade* voted in favor of such a right in his separate opinion, see *Bámaca-Velásquez v. Guatemala*, Judgment, 25 November 2000 (Merits), IACtHR Series C No. 70, p. 45. See also *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219.

60 *Velásquez Rodríguez v. Honduras,* Judgment of 29 July 1988 (Merits), IACtHR Series C No. 4.

61 *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), IACtHR Series C No. 70.

62 See J. Cassel, *Enforcing environmental human rights: selected strategies of US NGOs*, 6 Northwestern Journal of International Human Rights (2007), p. 113 [References omitted]. In several cases before the IAComHR, the CIEL has successfully argued for an inclusion of environmental rights in several human rights cases concerning indigenous people. In *San Mateo v. Peru*, the CIEL submitted an *amicus curiae* brief arguing that Peru had violated the people of San Mateo's rights to life, to property and to organize by granting mining licenses to companies. Pollution from the mining operations had caused significant health problems among the population. In August 2004, the IAComHR adopted the CIEL's request for precautionary measures to protect the above rights of the people exposed to toxic sludge in San Mateo de Huanchor. The CIEL has stated that it deliberately chooses to participate as *amicus curiae* before the court 'because the IACtHR is a forum where petitioners seeking to enforce environmental rights have a relatively high likelihood of success' given that the court 'has been open to a flexible jurisprudence on international human rights law.' See *Id.*, p. 115.

The IACtHR has on occasion considered in its judgments facts contained in *amicus curiae* submissions. In *Caso del Penal Miguel Castro Castro v. Peru*, *Judge Cançado Trindade* in his reasoned opinion relied on the joint submission from two human rights NGOs which contained new arguments on the factual events in the prison and the perpetrators. The case concerned the so-called 'Operative Transfer 1' in the Miguel Castro Castro Prison in May 1992 (see Chapter 5).[63] In his separate opinion in *La Cantuta v. Perú*, *Judge Cançado Trindade* several times referred to an *amicus curiae* brief from the NGO Institute of Legal Defense with regard to the practical effect of the court's declaration as legally invalid of national self-amnesty laws.[64] In *Mendoza et al v. Argentina*, the IACtHR relied on an *amicus curiae* brief to elaborate on the effect of life sentences on minors.[65] In another case, the court in a footnote replicated the submissions by the CEJIL and an ethics and political philosophy professor on the negative stereotyping of the Mapuche indigenous people in Chilean society and mass media.[66] The court used the footnote to corroborate expert, testimonial and documentary evidence, including UN expert reports. It did not at-

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63 *The Miguel Castro Castro Prison v. Peru*, Judgment of 2 August 2008 (Interpretation of the Judgment on Merits, Reparations and Costs), IACtHR Series C No. 181, p. 3, para. 6. See also *Mohamed v. Argentina*, Judgment of 23 November 2012 (Preliminary Objection, Merits, Reparations and Costs), IACtHR Series C No. 255, paras. 41, 51 (The IACtHR relied on *amicus* submissions twice to corroborate the fact record with respect to the applicable laws and legal system in a case concerning *inter alia* the respondent's violation of the principle of non-retroactivity enshrined in the ACHR.).

64 *La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs), IACtHR Series C No. 162, p. 4, paras. 34, 40. Similarly, in *Massacres of El Mozote and nearby places v. El Salvador*, Judgment of 25 October 2012 (Merits, Reparations and Costs), IACtHR Series C No. 252, FN 475, the court cited an *amicus curiae* brief by the Salvadoran ombudsman to show that the ombudsman believed that the Salvadoran Amnesty Law at issue violated the constitutional and international human rights law obligations of El Salvador.

65 *Mendoza et al v. Argentina*, Judgment of 14 May 2013 (Preliminary Objections, Merits and Reparations), IACtHR Series C No. 260, paras. 315, 316, FN 390, 391. In the judgment, the court also cited the *amicus curiae* brief from *Colectivo de Derechos de Infancia y Adolescencia* to point to shortcoming of a specific law concerning child offenders, see *Id.*, para. 76, FN 48.

66 *Norín Catrimán et al. (Leaders, Members and Activists of the Mapuche Indigenous People) v. Chile*, Judgment of 29 May 2014 (Merits, Reparations and Costs), IACtHR Series C No. 279, para. 93, FN 100. Similarly, a footnote reference was made to a submission by Women's Link Worldwide and the Law Clinic of the Uni-

tach any evidential value to the *amicus curiae* briefs, but cited them and the documents referenced by them at length.

In 2008, in *Kimel v. Argentina*, the IACtHR indicated that it considered legal *amicus curiae* submissions to be evidence, if appropriate:

> *[A]mici curiae* briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views *which may serve as evidence regarding the matters of law* under the consideration of the Court. … [T]he Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, *amici curiai* briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate *and enlarge the evidence available to the Court*.[67]

In its *advisory opinion concerning Article 55 of the ACHR*, the IACtHR noted that *amicus curiae* briefs in the case were valuable in the progressive development of the inter-American human rights system. The briefs submitted in the case mostly consisted of textual analysis of the American Convention.[68] In addition, the court uses the number of *amicus curiae* submissions as an indicator for the public interest in the case.[69]

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versity of Valencia to confirm the obligations of forensical doctors who were detailed in the Istanbul Protocol in *Espinoza Gonzáles v. Perú*, Judgment of 20 November 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 289, para. 260, FN 437.

67 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, paras. 14, 16 [emphasis added]. Confirmed in *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 184.

68 *Article 55 of the American Convention on Human Rights*, Advisory Opinion No. OC-20/09 of 29 September 2009, IACtHR Series A No. 20, paras. 6, 17.

69 *Brewer Carías v. Venezuela*, Judgment of 26 May 2014 (Preliminary Objections), Joint Dissenting Opinions of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, IACtHR Series C No. 278, para. 3 ('The special interest that this case has aroused in civil society should also be stressed, since 33 *amicus curiae* briefs have been received from renowned international jurists, as well as from legal and professional institutions and non-governmental organisations and associations of the Americas and Europe, concerning different issues relating to the litigation, such as the rule of law, judicial guarantees, due process of law, judicial independence, the provisional nature of the judges, and the practice of law. All these *amici curiae* coincide in indicating different violations of Mr. Brewer's rights under the Convention.').

The court does not consider *amicus curiae* briefs to constitute formal evidence. The court has declared without giving reasons that the clarifying purpose of *amici curiae* entails that 'an *amicus curiae* brief may never be assessed as an actual probative element.'[70] The court's official position might gradually shift to correspond with its current practice. In *Chinchilla Sandoval v. Guatemala*, the respondent requested that the court should not take into consideration an *amicus curiae* brief. It lengthily criticized and sought to disprove each brief, arguing among other that the briefs were not sufficiently aware of the real situation of individuals incarcerated in the Guatemalan prison system and the present case. The respondent submitted further that the *amicus* was unaware of the respondent's submissions, that it was submitting new facts and that it failed to display sufficient cognizance of the social, judicial and political reality of Guatemala.[71] The court discussed and dismissed the respondent's request. Relying on Article 2(3) of its Rules, it noted that *amici curiae* were not a procedural party to the dispute and that the purpose of submissions was to illustrate fact or legal matters related to the process, without the court being obliged to evaluate or weigh these briefs. The court deduced from this that the respondent's comments did not affect the admissibility of the briefs, but that they could be considered at the moment of the evaluation of the substantial information contained in the briefs.[72] This statement neither confirms nor disproves the earlier approach to *amicus curiae*. However, the placement of these considerations in the evidence portion of the judgment under the heading 'evaluation and admissibility of *amici curiae*' insinuates that the court is shifting towards considering briefs as evidence. Notwithstanding, the court's current stance does not preclude the submission of evidence by an *amicus curiae*. In *Acevedo Jaramillo et al. v. Peru*, the Peruvian Ombudsman appeared as *amicus curiae* and submitted several documents.

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70 *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No. 282, para. 15; *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment of 25 November 2013 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 272, para. 10.

71 *Caso Chinchilla Sandoval v. Guatemala*, Judgment of 29 February 2016 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 312, para. 37.

72 *Caso Chinchilla Sandoval v. Guatemala*, Judgment of 29 February 2016 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 312, para. 38.

These were admitted as evidence and cited by the court to demonstrate the number of judgments the Peruvian executive branch had yet to comply with.[73]

A risk of confluence of *amicus curiae* and formal sources of evidence became apparent in *Cesti Hurtado v. Peru*. The IACtHR, after having accepted an *amicus curiae* submission from the Chairman of the Human Rights Committee of the Bar Association of Lima, Mr. Rivas, on the organization's efforts to locate and help the applicant who had disappeared, upon request by the IAComHR invited Mr. Rivas to appear as a witness to complement the written submission before it.[74] The giving of a formal witness status in the proceedings indicates that the involvement as *amicus curiae* was not considered sufficient, possibly, because there was no option otherwise to hear and question Mr. Rivas and to include his statements in the formal case record. A convergence of expert evidence and *amicus curiae* occurred in *Garífuna Community of "Triunfo de la Cruz" and its members v. Honduras*. The case concerned several alleged violations by the respondent of the ACHR in connection with a tourism development project on ancestral lands of the rural indigenous Garífuna community. The court accepted an *amicus* brief from Christopher Loperena, an Assistant Professor at the University of San Francisco, who had done extensive work in support of Garífuna territorial rights in Honduras. Mr. Loperena was later heard as an expert on the Garífuna people. The court relied in its judgment on submissions he made in an affidavit in respect of the sources of livelihood and occupation of the Garífuna, as well as on his expert statements in a previous case.[75] Also, the court explained neither

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73 *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 144, FN 151, cited by F. Rivera Juaristi, *The "amicus curiae" in the Inter-American Court of Human Rights (1982 – 2013)*, in: Y. Haeck et al. (Eds.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Cambridge et al. 2015, p. 128. Similarly, in *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 154, para. 80, the court admitted into evidence documents submitted with an *amicus* brief, as the court considered that the documents were 'useful and relevant to the case'.

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

75 *Garífuna Community of "Triunfo de la Cruz" and its members v. Honduras* (Merits, Reparations and Costs), Judgment, 8 October 2015, IACtHR Series C No. 305, para. 50, FN 43.

how it relies on national law submissions from *amici curiae*, which are considered facts in international law, nor on other fact submissions, if not as evidence.

Despite the IACtHR's assurances, these exemplary cases display an overlap between *amicus curiae* and evidence in practice. The court in *Cesti Hurtado v. Peru* considered both the *amicus curiae* brief and the witness statements in the judgment without qualitatively distinguishing the two. There is no indication that the parties objected to the consideration of either submission. Interestingly, the IAComHR later stated that the *amicus curiae* submission had been only of an informative character and that it had not been decisive for the IACtHR's judgment.[76] This statement may have been motivated by an effort to stymie any potential criticism from the respondent state. The informal reliance on *amicus curiae* briefs corresponds with the IACtHR Rules' addressing of *amicus curiae* submissions in the section relating to general aspects of the written proceedings, as well as the definition of the concept. It determines that *amici curiae* shall furnish the court with *arguments*, including on the facts. It does not assign *amici* a role in the establishment of the fact record.

The IAComHR has given an insight into the value it attaches to submissions from non-governmental organizations. Its practice is worth considering here due to the IAComHR's central role in the establishment of the facts of a case and, because it elucidates the IACtHR's approach to *amicus curiae*. The IACtHR unfortunately has not explained its method of weighing and evaluating *amicus curiae* submissions. In a case concerning an armed attack on military barracks in an Argentinean town, the IAComHR replied to the respondent's questioning of the value of a report from Amnesty International:

> The Inter-American Court has recognized the authority of an international organ to freely evaluate proof, stating that "for an international tribunal, the criteria for evaluating proof are less formal than in internal legal systems". Consequently, probative elements which are different from direct proof, such as circumstantial evidence, clues, presumptions, press articles and, where relevant, reports of non-governmental organizations may be used, provided that the conclusions drawn therefrom are consistent with the facts and corroborate the testimony or events alleged by the complainants. Assigning this power of discretion of an international organ is particularly relevant "in cases involving the violation of human rights in which the State cannot allege as its defence

76 *Cesti Hurtado v. Peru*, Judgment of 29 September 1999 (Merits), IACtHR Series C No. 56, pp. 16, 171, para. 56.

> the complainant's inability to provide proof which, in many cases, cannot be obtained except with the State's cooperation". Taking these principles into consideration …, the Commission based part of its considerations in the present case on the report from Amnesty International. That report, in addition to corroborating the substance of the petitioners' complaints, permitted conclusions to be drawn that were consistent with the facts, in so far as it was based on information gathered directly at the place where the events took place and immediately after their occurrence.[77]

According to this quote, *amici curiae* are given the same evidential status as circumstantial evidence or reports from NGOs, and they are not formal evidence.

Overall, there is a divergence between the IACtHR's official position to the assessment of *amicus curiae* briefs and a growing body of case law.[78] Despite its statements, the IACtHR appears to increasingly treat *amicus curiae* submissions as evidence, especially with respect to legal arguments, domestic laws and practices and public opinion. In this respect, *amici curiae* mesh with the court's already very broad investigative powers and its approach to evidence.[79] Where it treats an *amicus curiae* brief

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77 Annual Report of the Inter-American Commission on Human Rights 1997, published on 17 February 1998, Report No. 55/97*, Juan Carlos Abella v. Argentina*, paras. 407-408 [References omitted]. See also A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005, p. 353.

78 F. Rivera Juaristi, supra note 73, p. 128.

79 The ACHR and the IACtHR Statute contain virtually no procedural rules, leaving the regulation of evidence to the court's discretion. Article 25(1) IACtHR Statute instructs the IACtHR to draw up its own rules. The basic set-up of the court's proceedings is adversarial. However, like the ECtHR, the IACtHR has established broad investigative rules. Pursuant to Article 58(a) IACtHR Rules it may, at any stage of the proceedings, '[o]btain on its own motion, any evidence it considers helpful and necessary. In particular, it may hear, as an alleged victim, witness, expert witness, or in any other capacity, any person whose statement, testimony, or opinion it deems to be relevant.' Article 58(c) further allows it to 'request any entity, office, organ, or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point.' The IACtHR has emphasized that it considers its powers to carry out investigations ancillary to the IAComHR's role as the primary provider of information. Still, the court regularly uses its investigative powers and summons experts to present reports, including on legal aspects when it considers it necessary to complete the factual record and obtain further legal information. See S. Davidson, *The Inter-American Court of Human Rights*, Dartmouth 1992, p. 53. On the development of the Inter-American human rights system as a system to protect individual rights, see C. Medina, *The*

like evidence, the court should apply the same scrutinizing process as for regular evidence so as to not undermine its evidentiary rules.[80]

F. African Court on Human and Peoples' Rights

Lohé Issa Konaté v. Burkina Faso is the only case with *amicus curiae* participation to have been decided on the merits as of writing. The court summarized the *amicus curiae's* arguments in its judgment. While it did not expressly rely on the *amicus curiae* submission in its final decision, it reached the same conclusion. Like the *amicus curiae* had argued, the ACtHPR found that the criminalization of defamation was not proportionate in the context of a democratic society, as it was not necessary to protect the rights and reputation of members of the judiciary.[81] The ACtHPR has not yet commented on how it assesses or categorizes *amicus curiae* briefs.

G. WTO Appellate Body and panels

There is no norm on *amicus curiae* participation like Article 10(2) DSU. The provision determines that third party submissions 'shall be reflected in the panel report.' Accordingly, the Appellate Body in *US–Shrimp* emphasized that it was obliged 'to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding' dampening expectations that it would carefully consider the content of all *amicus curiae* submissions.[82] Indeed, its report did not consider any

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Inter-American Commission on Human Rights and the Inter-American Court on Human Rights: reflections on a joint venture, 12 Human Rights Quarterly (1990), p. 441.

80 The IACtHR Statute and Rules regulate neither the weighing and evaluation of evidence nor the allocation of the burden of proof. The IACtHR has adopted a flexible approach in practice. See D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 American University International Law Review (1994), pp. 351-352. In its judgments, the court carefully analyzes and weighs in a separate section party evidence.

81 *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014, pp. 38, 44, paras. 145, 164.

82 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101. See also *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States,* Recourse to Art. 21.5 DSU,

of the arguments presented by the *amici curiae*. Former Appellate Body member *Mitsuo Matsushita* stated during a conference discussion:

> [I]n my days there was not a case in which the Appellate Body relied on the *amicus* brief when it made decisions. The first time this issue came up was in the *Steel Bar* case in 1999. So, up until that time, I don't think that was really a very big issue.[83]

Panels and the Appellate Body frequently operate with the terms of necessity, relevancy, pertinence and usefulness as reasons for not considering *amicus curiae* submissions.[84] Unfortunately, reports rarely further explain these terms.[85] This approach, coupled with the DSU's strict confidentiality

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Report of the Appellate Body, adopted on 21 November 2001, WT/DS132/AB/RW, p. 34, para. 107; Articles 12(7), 7(2) DSU.

83 M. Matsushita, *Transparency, amicus curiae briefs and third party rights, discussion round*, 5 Journal of World Investment and Trade (2004), p. 344.

84 E.g. *US–Clove Cigarettes*, Report of the Appellate Body, adopted on 24 April 2012, WT/DS406/AB/R, p. 4, paras. 10-11; *Mexico–Taxes on Soft Drinks*, Report of the Appellate Body, adopted on 24 March 2006, WT/DS308/AB/R, para. 8; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 42; *Brazil–Retreaded Tyres*, Report of the Appellate Body, adopted on 17 December 2007, WT/DS332/AB/R, para. 7; *EC–Biotech*, Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.11; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 76; *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 78; *EC–Sugar*, Report of the Appellate Body, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, para. 9; *US–Antidumping and Countervailing Duties (China)*, WT/DS379/AB/R, 2011; *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R; *EC–Seal Products*, Report of the Appellate Body, adopted on 18 June 2014, WT/DS400/AB/R, WT/DS401/AB/R, para. 1.15. In *US–Softwood Lumber III*, the panel stated that: '[W]e decided to accept for consideration one unsolicited *amicus curiae* brief from a Canadian non-governmental organization, Interior Alliance.' No further reference was made to the submission in the report, see *US–Softwood Lumber III*, Report of the Panel, adopted on 1 November 2002, WT/DS236/R, para. 7.2; *US–Tuna II (Art. 21.5),* Report of the Appellate Body, adopted on 3 December 2015, WT/DS381/AB/RW, FN 68.

85 In *US–Copyright Act*, the USA argued that the panel should not include a letter from the American Society of Composers, Authors and Publishers, because 'the letter was of little probative value for the panel because it provided essentially no

regime, entails significant uncertainty for potential *amici curiae*.[86] Increasingly, panels tend to transfer the decision whether to consider a submission onto the parties. In several cases, panels have held that they will consider *amicus curiae* submissions only to the extent that one of the parties adopts the respective submission (or parts thereof), and only after all party submissions have been read.[87]

An analysis of the cases with *amicus curiae* submissions indicates that, so far, unadopted and unsolicited *amicus curiae* submissions have been considered in substance by a panel or the Appellate Body in four cases.

First, in *Australia–Salmon (Article 21(5))* concerning Australia's compliance with the measures prescribed following the Appellate Body's earlier finding that Australia's import prohibition of Canadian salmon among other violated Article 5(5) SPS Agreement, the panel received a letter from 'Concerned Fishermen and Processors' in South Australia.[88] The panel informed the parties that '[t]he letter addresses the treatment by Australia of, on the one hand, imports of pilchards for use as bait or fish

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factual data not already provided by either party.' The letter was not included (without providing reasons). See *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R, para. 6.5; B. Stern, supra note 3, pp. 1443-1444.

86 *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, FN 4 (The American Institute for International Steel in an *amicus* brief asserted that it 'intend[ed] its written brief to make a contribution to the resolution of this dispute that [was] *not* likely to be repetitive of what [had] been and [was] likely to be submitted by a party or third party to this dispute.').

87 In *EC–Bed Linen*, for instance, the panel noted that the parties did not provide substantive comments on the *amicus curiae* submission and proceeded to declare it unnecessary in reaching its decision, see *EC–Bed Linen*, Report of the Panel, adopted on 12 March 2001, WT/DS141/R, p. 6, FN 10. See also *US–COOL*, Report of the Panel, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R, para. 2.10 (The panel informed the parties that they should comment on an *amicus curiae* application 'both with respect to whether or not the Panel should accept and consider the brief, as well as the content of the brief in terms of its relevance for the Panel in carrying out its duties.').

88 Article 5(5) SPS Agreement: 'With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. […].'

feed and, on the other hand, imports of salmon. The Panel considered the information submitted in the letter as relevant to its procedures and has accepted this information as part of the record.'[89] While the panel stressed that the information submitted concerned directly Canada's claim under Article 5(5) SPS Agreement, in its reasoning it did not elaborate on the substance of the brief.[90] Further, the letter itself has not been made public.[91] Thus, it is only known that the brief was considered but not to what extent.

Second, in *US–Tuna II*, the panel explicitly referred to the documents submitted by the *amici curiae* as evidence and lengthily dispelled doubts concerning their veracity, which Mexico had raised.[92] The case was initiated by Mexico in 2009 on the account that the US's conditions for the use and obtaining of the US Department of Commerce's dolphin-safe labels for tuna and tuna products violated the GATT and Articles 2(1), (2) and (4) TBT Agreement.[93] A central issue of the case was whether it was permissible to deny the dolphin-safe label to tuna and tuna products that had been caught by setting on dolphins. In an unsolicited *amicus curiae* submission, the Humane Society International and the American University Washington College of Law reported on the negative impact of this method on dolphin populations, as well as consumers' support of strict dolphin-safe labels, which had led the overwhelming majority of US tuna companies to purchase only dolphin-safe tuna already prior to the enact-

89 *Australia–Salmon*, Recourse to Article 21.5, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 7.8.

90 *Id.*, para. 7.9.

91 In the report, the panel concluded that Australia was not in breach of Article 5(5) SPS Agreement. It found that although Australia was employing diverging levels of protection to different but sufficiently comparable situations, the different treatment was scientifically justified and therewith neither arbitrary nor a disguised restriction on international trade. *Lindblom* attributes the consideration to the 'considerable commercial interests at stake.' See A. Lindblom, supra note 77, p. 327.

92 *US–Tuna II (Mexico),* Report of the Panel, adopted on 13 June 2012, WT/DS381/R, para. 7.368.

93 Regarding Article 2(1), the panel rejected Mexico's claims that US dolphin-safe labelling measures discriminated against Mexican tuna products. Further, it ruled that the labelling did not violate Article 2(4), which requires 'technical regulations to be based on relevant international standards where possible'. However, the panel agreed with Mexico that the labelling measures were too restrictive.

ment of the disputed US legislation.[94] The panel made clear at the beginning of its report that it had considered also the parts of the brief that had not been attached by the US 'to the extent that it deemed it relevant to the examination of the claim before it'.[95] In particular, the panel relied on the records of a hearing in the US Senate before the Subcommittee on Oceans and Fisheries which discussed amending the legal act in question, as well as several newspaper articles detailing that tuna processing companies had adopted strict dolphin-safe measures due to intense consumer pressure seven months before the enactment of the strict dolphin-safe requirements in the challenged acts. On this basis, they found that therefore any lessening of the standard to allow for some monitored and controlled dolphin setting (as requested by the complainant) would not change tuna companies' purchasing policies.[96] Further, the panel relied on the information provided by *amicus curiae* that 90% of the world's tuna processing companies had employed a strict 'no setting on dolphins' standard.[97] The information supported the panel's finding that Mexico had failed to demonstrate that the dolphin-safe measures afforded less favourable treatment to Mexican tuna products in violation of Article 2(1) TBT Agreement.[98]

Third, in *US–COOL*, a case brought by Mexico and Canada to challenge the legality of US federal legislation mandating the labelling of the origin of certain perishable products under Articles III, IX and X GATT

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94 The brief is retrievable at: http://www.hsi.org/assets/pdfs/hsi_wcl_amicus_tuna_brief_2010.pdf (last visited: 19.9.2017).

95 The USA had fiercely argued in favor of the brief's consideration stating that the submissions contained 'relevant and useful information that could assist the Panel in understanding the issues in this dispute'. It had also relied on as well as cross-referenced several exhibits and parts of the brief that the panel considered to 'form part of the submissions of that party in these proceedings.' See *US–Tuna II (Mexico),* Report of the Panel, adopted on 13 June 2012, WT/DS381/R, paras. 7.7, 7.9. During the appeal proceedings, the Appellate Body rejected further unsolicited submissions. See *US–Tuna II (Mexico),* Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R, para. 8.

96 Overall, Mexico challenged three measures. In particular, it challenged Title 16, section 1385 Dolphin Protection Consumer Information Act which had been enacted by the US Congress in the late 1990. See *US–Tuna II (Mexico),* Report of the Panel, adopted on 13 June 2012, WT/DS381/R, paras. 7.10, 7.182, FN 288, 7.363 and FN 552.

97 *Id.,* para. 7.368 and FN 559.

98 On appeal, the Appellate Body did not rely on an *amicus* brief submitted by the same entities. See *US–Tuna II (Mexico),* Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R, para. 8.

1994, Articles 2 and 12 TBT Agreement and Article 2 Agreement on Rules of Origin, the panel, after inviting the parties to comment on an *amicus curiae* brief, held that it 'considered the information contained in the brief as necessary to the extent that it was reflected in the written submissions and evidence submitted by the parties.'[99] Neither the parties nor the panel further mentioned the submission in the report, and it could not be retrieved otherwise, making it impossible to assess the extent to which the panel relied on the brief and how it assessed it.

Fourth, in 2001 in *EC-Sardines,* the Appellate Body in its consideration of whether EC Regulation No. (EEC) 2136/89 prevented Peruvian exporters from using the trade description 'sardines' for their products in breach of Articles I, III and XI(1) GATT 1994 and Articles 2 and 12 TBT Agreement decided to consider the legal parts of an *amicus curiae* submission from Morocco.[100] The Appellate Body rejected as unsubstantiated an allegation by Morocco that the Regulation was inconsistent with the relevant international standards. But it decided to consider in greater detail Morocco's legal arguments on Article 2(1) TBT Agreement and the GATT 1994.[101] Having found that the Regulation was in violation of Article 2(4) TBT Agreement, the Appellate Body held that it did not need to consider Article 2(1) to resolve the dispute and, accordingly, did not revert to the arguments made.[102]

These cases show, first, that the WTO panels and the Appellate Body are not unwilling to consider *amicus curiae* briefs altogether; and, second, that panels apply evidentiary standards to the consideration of briefs in that they require allegations to be properly substantiated.

Are there noticeable differences between these briefs and other briefs which may have contributed to their consideration? All of the above cases concerned trade barriers and limitations of trade. In three of the four cases,

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99 *US–COOL*, Report of the Panel, adopted on 23 July 2012, WT/DS384/R, WT/DS386/R, para. 2.10.

100 The Appellate Body decided that Article 17(6) DSU prevented it from considering the large fact sections of the briefs addressing the scientific differences between the *sardina pilchardus Walbaum* ('Sardina pilchardus') and *sardinops sagax sagax* ('Sardinops sagax') on which the disputed EEC Regulation relied, as well as the economic situation of the Moroccan fishing and canning industries. *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 169.

101 *Id.*, paras. 169-170.

102 *Id.*, paras. 313-314.

the challenged measures had been issued for reasons of environmental and/or consumer protection.[103] Furthermore, all of the *amici curiae* possessed in-depth knowledge and experience in the matters they commented on.[104] Finally, the information drawn from the submissions consisted of contextual information and arguments relating to the interpretation of the WTO Agreement and its related Agreements. In particular, they did not concern general considerations on how to reconcile trade and non-trade related interests. The nature of the submitting entity does not seem to have played a role. The submissions stemmed from a range of entities: affected business people, non-governmental and educational entities with an extensive track record of advocacy on environmental issues and one state. This, at least *prima facie*, dispels contentions that business-interest *amici curiae* receive a more favourable treatment *per se*.

Submissions solicited by panels pursuant to Article 13 DSU receive a different treatment.[105] Solicited information is considered carefully by panels and referred to throughout the reports.[106] Information is given significant weight, seemingly without additional fact-checking. This became evident in *EC–Biotech* where the panel found it unnecessary to take into account the *amicus curiae* submission from a group of experts, while consulting with several individuals and international organizations, including the United Nations' Food and Agriculture Organization, the World Orga-

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103 This confirms an observation made by *Durling* and *Hardin* that WTO adjudicating bodies seem hesitant to receiving *amicus curiae* submissions in cases concerning trade remedies. See J. Durling/D. Hardin, *Amicus curiae participation in WTO dispute settlement: reflections on the past decade*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 226.

104 E.g. *US–Tuna II (Mexico),* Report of the Panel, adopted on 13 June 2012, WT/DS381/R. The *amicus curiae* had been involved for almost 30 years in the issues pertaining to the dispute. Also, as regards the concerned fishermen, there is no doubt as to their practical knowledge and experience.

105 *US–Lead and Bismuth II*, Appellate Body Report, adopted on 7 June 2000, WT/DS138/AB/R, para. 153.

106 This is similar to information solicited from scientific experts. See M. Cossy, *Panels' consultation with scientific experts: the right to seek information under Art. 13 DSU*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 218 ('In the *US–Shrimp* case, the panel referred only in a few instances to the reports provided by the experts; it made a general reference to them to conclude that conservation measures should be adopted. … The panel in *EC–Asbestos* referred extensively to the comments by the experts in its analysis of likeness under Art. II of GATT 1994 as well as in its findings under Art. XX of GATT 1994 and other findings.').

nisation for Animal Health and the United Nations Environment Programme on the construction of the ordinary meaning of several terms of Annex A to the SPS Agreement. *Ishikawa* notes that these consultations with scientific experts were influential in bringing non-WTO international law to the attention of the panel in this particular case.[107]

Party-appended *amicus curiae* briefs are considered like regular party-submitted evidence, as stated by the Appellate Body in *US–Shrimp*:

> We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. … [A] participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.[108]

Accordingly, panels apply the same standards to the evaluation of attached submissions and to regular party evidence.[109] This practice accords with their duty under Article 11 DSU to 'consider all the evidence presented to

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107 T. Ishikawa, supra note 13, p. 405.

108 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 89. The Appellate Body ultimately decided to ignore the *amicus curiae* submission due to the US's qualified adoption of its contents.

109 In their consideration of evidence, panels have significant discretion as long as they provide 'reasoned and adequate explanations' for their findings and base them on a sufficient evidentiary basis. See *US–Upland Cotton,* Recourse to Article 21.5, Report of the Appellate Body, adopted on 20 June 2008, WT/DS267/AB/R, para. 293, FN 618; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 338. In *Korea–Dairy*, the Appellate Body stressed that under Article 11 DSU, 'a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.' In *Korea–Dairy,* Korea argued in its appeal that the panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof. See *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (hereinafter: *Korea–Dairy*), Report of the Appellate Body, adopted on 12 January 2000, WT/DS98/AB/R, para. 137. See also *EC–Hormones*, Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 133-135 (Article 11 DSU requires panels to 'take account of the evidence put before them and forbids them to willfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record. Provided that panels' actions remain within these parameters, however, we have said that 'it is generally within the discretion of the Panel to decide which evidence it chooses to utilize

it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.'[110]

Overall, the assertion of authority to admit *amici curiae* has been more symbolic than real. Submissions are only rarely considered in substance

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in making findings.'); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, adopted on 19 January 2001, WT/DS166/AB/R, paras. 161-162. The Appellate Body has found that the consideration of solicited information is limited by the burden of proof. M. Cossy, supra note 106, p. 217; *Japan–Agricultural Products II*, Report of the Appellate Body, adopted on 19 March 1999, WT/DS76/AB/R, pp. 35-36 paras. 127-131. Panels and the Appellate Body enjoy significant discretion in the evaluation of information received. See *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 104 ('It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what was received.'); G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), pp. 159-160. They rely on the evidentiary standards developed in their case law. See O. Prost, *Confidentiality issues under the DSU: fact-finding process versus confidentiality* in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 191. On the different standards of proof developed in panel proceedings, see M. Oesch, *Standards of review in WTO panel proceedings*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge University Press, Cambridge 2005, pp. 166-167, quoting *EC–Hormones,* Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 116-118; *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body, adopted on 5 November 2001, WT/DS192/AB/R, para. 74.

110 *EC and Certain Member States–Large Civil Aircraft*, Report of the Appellate Body, adopted on 1 June 2011, WT/DS316/AB/R, p. 529, para. 1225; *Brazil–Retreaded Tyres*, Report of the Appellate Body, adopted on 17 December 2007, WT/DS332/AB/R, para. 185; *EC–Hormones,* Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 132-133; *Japan–Apples*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS245/AB/R, para. 221; *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, para. 161; *Australia–Salmon*, Recourse to Art. 21.5, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, para. 266.

(or at least it is rarely made known when they are).[111] Insofar, the observation from *Appleton* still holds true that

> the Appellate Body has found a politically expedient solution to a public relations dilemma. Far from rejecting the appended non-member briefs it accepted them. Far from analyzing their legal merit, it never mentions them. Yet, the Appellate Body does not foreclose the possibility that it might in a subsequent case make use of such briefs…[112]

A comparison with the treatment of solicited and expert information shows that the above-cited approach is not expressive of a general hesitation to outside information, but may be rather the consequence of the ongoing political discord on the issue of *amicus curiae*. The current approach is further problematic in that the adjudicating institutions essentially escape their responsibility implied in Article 11 DSU to decide on the relevance of an *amicus curiae* submission. Even where this is unproblematic from a legal perspective, it calls into question the effectiveness and usefulness of the *amicus curiae* practice before the WTO adjudicating bodies. The parties generally adopt only those (portions of) *amicus curiae* submissions that match their own arguments. Consequently, submissions rarely will raise novel ideas or arguments thereby limiting the information considered by the Appellate Body and panels in their decision-making. Finally, the partial adoption of submissions risks distorting *amici curiae's* arguments.[113]

To conclude, *amicus curiae* does not seem to have had a measurable effect on the manner of consideration of evidence or the burden of proof. With the exception of *US–Tuna II*, panels and the Appellate Body have been extremely hesitant to remark on the weight ascribed to unsolicited *amicus curiae* submissions making it impossible to determine in how far the standards applied to the evaluation of party evidence have played a role in the assessment of *amicus curiae* submissions. In the few cases where panels and the Appellate Body have relied on the concept, it has

111 *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 42.

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

113 L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 244, 253.

been to confirm evidence already presented by the parties. Solicited submissions, however, are considered regularly and in depth, which corresponds with the treatment given to panel-solicited expert reports.

H. Investor-state arbitration

Investment tribunals have been quite transparent in their consideration of *amicus curiae* submissions.[114] Still, they have not openly pronounced on the weight attached to *amicus curiae* submissions. The following review of some of the most important investment arbitration cases with *amicus curiae* involvement shows that tribunals increasingly mention the substance of *amicus curiae* submissions in their awards, but that submissions rarely seem to have influenced the outcome of a case.[115] Overall, tribunals appear to reference submissions by international organizations, including the European Commission on behalf of the European Union, rather than those by NGOs.

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114 E.g. *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010*,* PCA Case No. 2008-13; *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19; *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, para. 8.2.

115 In *UPS v. Canada*, the tribunal did not refer at all to the substance of the *amicus curiae* submissions. The Council of Canadians and the Canadian Union of Postal Workers had detailed the potential effects of the tribunal's award on Canadian postal workers and consumers, an aspect that had not been commented upon by either party and that was intended to assist the tribunal in understanding the adverse impacts of a decision against the respondent. The Chamber of Commerce, supporting the claimant, focused on Canada's national treatment obligations pursuant to Article 1102 NAFTA. Contrary to the *amici* in *Methanex*, it argued that the tribunal should interpret the term 'like circumstance' under Article 1102 NAFTA consistent with the national treatment obligations arising from Article III GATT. See *UPS v. Canada, Amicus* Submission from Council of Canadians and Canadian Union of Postal Workers, 20 October 2005. The tribunal did not refer to the possibility of consideration of the GATT at all in its final award despite lengthily discussing the interpretation of Article 1102 NAFTA. One reason for the tribunal's hesitation may have been the heated dispute between one of the *amici curiae* and counsel for the claimant. *S. Shrybman*, counsel for the *amici curiae*, in a letter to the tribunal had argued that the claimant's counsel *Mr. Appleton* had misrepresented their statement in bad faith. See *UPS v. Canada,* Letter by S. Shrybman to the Tribunal, 3 November 2005.

The tribunal in *Methanex v. USA* acknowledged that the *amicus curiae* submissions it had received 'were detailed and covered many of the important legal issues that had been developed by the Disputing Parties.'[116] The tribunal issued the award in favour of the respondent and the reasoning resembled the arguments submitted by Bluewater and the IISD (see Chapter 6). The tribunal found that non-discriminatory regulations that were enacted for a public purpose and in accordance with due process, like the ban on MTBE, did not amount to expropriation, unless the government had made a specific commitment to the investor to abstain from such environmental or public health regulations.[117] However, *Coe* doubts that the *amicus curiae* submission influenced this outcome given that the tribunal with its award on jurisdiction already had rendered the claimant's chances of winning marginal.[118] Still, the tribunal adopted an argument by the *amici curiae*, namely, that trade law approaches could not be transferred automatically to investment law.[119] The tribunal did not mention at all the human rights focused *amicus curiae* brief that had also been submitted. But it insinuated that *amici curiae* could constitute evidence in response to the claimant's argument that *amici* should be admitted only if the parties could cross-examine the factual basis of their allegations:

> [I]t would always be for the tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of th[e written] *amicus* briefs were arguably to constitute written "evidence", the Tribunal would still retain

116 *Methanex v. USA*, Final award of the tribunal on jurisdiction and merits, 3 August 2005, para. 29.

117 *Id.*, Part IV, Chapter D, para. 7.

118 The tribunal constructed Article 1101(1) NAFTA narrowly by including in Chapter 11 only alleged violations targeting the investor or the investor's product. See J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), pp. 1375-1376. The measures were aimed at the gasoline additive MTBE and not at the products used to make it. The investor was a producer of methanol, a component of MTBE. Because it was only affected by the measure, the investor failed to show a direct link and was unable to comply with Article 1101 NAFTA. See *Methanex v. USA*, Preliminary Award on Jurisdiction and Admissibility, 7 August 2002, para. 138.

119 The tribunal agreed that the term 'like circumstances' in Article 1102 NAFTA could not be interpreted in parallel to the term 'like products' in Article III GATT. Further, the respondent also referred in its submission to the argument raised by the IISD. See *Methanex v. USA*, *Amicus* submission by International Institute for Sustainable Development, 9 March 2004, paras. 35-37.

> a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight.[120]

The tribunal neither specified the conditions under which it would consider an *amicus curiae* submission evidence, nor clarified the legal basis allowing it to receive evidence from non-parties. Further, the tribunal noted that *amici curiae* could not call witnesses or experts (due to the privacy rules), but it failed to elaborate in how far the calling of witnesses and experts would materially differ from the submission of documentary evidence by *amici curiae*.

The tribunal in *Suez/Vivendi v. Argentina* summarized the arguments presented by *amicus curiae* on the human right to water dimension of the case.[121] The tribunal referred to the *amicus curiae's* arguments in its consideration of Argentina's argument that the breaches of the BIT towards the claimants were justified on the basis of necessity 'in order to safeguard the human right to water of the inhabitants of the country.'[122] The tribunal rejected the *amici's* argument that international human rights law obligations applied to the dispute via Article 42(1) ICSID Convention or Article 31(3)(c) VCLT in interpreting the standard of treatment owed to the investor. It found that none of the underlying BITs provided for a clause permitting a contracting state to derogate from its BIT obligations under certain circumstances, and, pointing to the arguments raised by Argentina and the *amicus curiae*, that the human rights obligations did not override Argentina's obligations under the BIT for reasons of necessity. The tribunal held that Argentina could have adopted less invasive measures and thereby could have honoured both its obligations towards the investor and those owed to its people.[123] In short, while the tribunal referred to the arguments of the *amicus curiae*, it did so only where its arguments coincided with those raised by Argentina.[124]

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120 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 36.

121 *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19, para. 256.

122 *Id.*, para. 252.

123 *Id.*, paras. 255, 262.

124 Critical, S. Schadendorf, *Human rights arguments in amicus curiae submissions: analysis of ICSID and NAFTA investor-state arbitrations*, 10 Transnational Dispute Management (2013), pp. 18-19 ('Instead of considering the role and potential impacts of human rights in investor-state arbitration, they simply refused to accept any prevalence or justifying effect of human rights law. Given that no hu-

In its award, the tribunal in *Biwater v. Tanzania* announced at the outset that '[t]he petitioners provided information and views relevant to the arbitral tribunal's mandate' and that '[t]heir submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *Amici*'s submissions are returned to in that context.'[125] Thus, the tribunal clarified that it used the submission not to establish the facts of the case (i.e. as a source of evidence), but to inform its views.[126] There is no doubt that the tribunal very carefully read the submission.[127] However, it did not include in its summary the joint *amicus curiae's* arguments concerning the principle of sustainable development and the right to clean water, but only those on investor responsibility.[128] In the award, the tribunal did not consider in depth any of the arguments presented by the *amici curiae*. This is surprising insofar as the tribunal in the admission process and in its award emphasized the public interest dimension of the case.

At the outset of its award, the tribunal in *Glamis v. USA* left no doubt as to its view of its mandate. It stated that it was 'aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property.' However, it held that it only 'should address those filings explicitly in its Award *to the degree that they bear on decisions that must be taken*,' and that 'it in no way views its

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man rights arguments were employed in the tribunal's reasoning, its selective response appears purely defensive and disregardful of a human rights oriented interpretation of investment rules as suggested by the *amici*.').

125 *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, paras. 370, 392.

126 *Id.*, para. 601.

127 This is evidenced in the correction of some arguments, which were made by *amici curiae* due to a lack of availability of certain party evidence. See *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, FN 208.

128 J. Harrison, *Human rights arguments in "amicus curiae" submissions: promoting social justice?*, in: P.M. Dupuy/F. Francioni/E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, pp. 396-421 ('The *Biwater* decision where there was a total failure to engage with the human rights arguments raised by the *amici* is an early indication of a more basic underlying problem when it comes to utilising this mechanism to hear human rights concerns – the contradictory expert/advocate role, the lack of expertise among the tribunal on human rights law, the mistaken view that the *amicus* procedure can legitimise without effective participation.').

awareness of the context in which it operates as justifying (or indeed requiring) a departure from its *duty to focus on the specific case* before it.' The tribunal did not refer at all to *amicus* briefs in its final award having dismissed the alleged expropriation (Article 1110 NAFTA) and violation of the minimum standard of treatment clause (Article 1105 NAFTA) before it reached the matters addressed in the briefs.[129] The absence of a reference to the human rights dimension of the case is startling in light of the tribunal's lengthy elaborations on the respondent's regulatory and administrative measures to protect the interest of the Quechan Indians in its consideration of the claim under Article 1105 NAFTA.[130]

In *Pac Rim v. El Salvador*, the tribunal dealt in detail with some of the arguments raised by the *amici curiae*. In its jurisdictional award, the tribunal adopted only the jurisdictional arguments that had also been addressed by the respondent, that is, abuse of process and denial of benefits. With respect to arguments regarding abuse of process, the tribunal noted that the *amicus curiae* invoked two grounds: the claimant's alleged re-or-

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129 *Glamis v. USA*, Award, 8 June 2009, paras. 7-9, 534-536, 824 [emphasis added]. With respect to Article 1110 NAFTA, the tribunal found that the measures did not 'cause a sufficient economic impact to the Imperial Project to effect an expropriation of Glamis' investment,' which constitutes the first element in any expropriation. With respect to Article 1105 NAFTA, it held that due to the location of Glamis' project next to conservation areas and the Quechan Indian tribe, Glamis was entitled to compensation from the respondent neither for the revision of the mining permission nor for the other measures taken by the respondent to protect the interests of the Quechan. The tribunal in the pending case *Bear Creek Mining v. Peru* has signalled a similarly hesitant consideration of *amicus curiae* briefs. See *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 33 ('[T]he Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the FTA as far as necessary in order to decide on the Application. No less, but also no more. This is of particular relevance in the present context, because the FTA contains detailed provisions regarding the submissions by other persons…').

130 A. Kulick, *Global public interest in international investment law*, Cambridge 2012, pp. 284-285 ('[W]hat the Tribunal seems to implicitly convey is that human rights arguments may exclusively ground in domestic legislation, but lack applicability … as an international law claim. Such limitation to domestic law, however, basically means the marginalization of human rights considerations as an independent argumentative *topos*.'); S. Karamanian, *The place of human rights in investor-state arbitration*, 17 Lewis & Clark Law Review (2013), p. 429.

ganization from a Cayman Islands-based to a US-based company 'to take advantage of CAFTA benefits' and that the claimant had brought the dispute to arbitration, whereas in its view the 'real respondents', the affected communities, possessed 'only limited discretionary rights.'[131] The tribunal only discussed the first ground, which had also been raised by the respondent, and cursorily rejected the *amicus curiae's* argument. With respect to the *amicus's* argument regarding denial of benefits, the tribunal briefly noted upon finding for the respondent that the *amicus curiae* had raised the same argument as the respondent in more general terms.[132] In a brief submitted at the merits stage, the *amicus curiae* suggested that the respondent's actions did not amount to a wrongful act, but were justified to fulfil its international human rights and environmental law obligations towards the communities potentially affected by environmental pollution from the mining project.[133] Having dismissed the claim for failing to comply with requirements of the El Salvadorian Mining Law, the tribunal saw no need to address the arguments from the *amici curiae*.[134] Generally calling into question the relevance of *amicus* briefs in light of the current publicity rules, the tribunal further reasoned that it considered it unnecessary to address the submission because the *amici* had not been made 'privy to the mass of factual evidence adduced' in this phase of the arbitration.[135]

In *Eureko v. Slovak Republic*, the Dutch Government and the European Commission were invited to make submissions on the validity of the underlying bilateral investment treaty. The respondent had argued that by accession to the EU in May 2004 the BIT was terminated or at least became inapplicable devoiding the tribunal of jurisdiction. Both the Netherlands and the EC made submissions on the issue. The tribunal at the beginning of its reasoning in its jurisdictional award assured that it had

> considered carefully the submissions made by the Parties, as well as the observations of the Government of the Netherlands and of the European Commission, all of which were helpful and for all of which the Tribunal thanks

131 *Pac Rim v. El Salvador*, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ICSID Case No. ARB/09/12, para. 2.43.

132 *Id.*, paras. 4.58-4.59, 4.85.

133 *Pac Rim v. El Salvador*, Submission of *Amicus Curiae* Brief on the Merits of the Dispute, 25 July 2014, ICSID Case No. ARB/09/12.

134 Re the dismissal reasoning, see *Pac Rim v. El Salvador*, Award, 14 October 2016, ICSID Case No. ARB/09/12, Part VIII.

135 *Pac Rim v. El Salvador*, Award, 14 October 2016, ICSID Case No. ARB/09/12, para. 3.30.

> their respective authors. All of the points made in those submissions have been taken into account by the tribunal, even though it is not here necessary to address and decide in turn each and every one of these submissions and observations.[136]
>
> … [T]he Tribunal has not found it necessary to rest any part of its decision upon the ostensible attitude of either Party to these arbitration proceedings – still less upon that of the Government of the Netherlands or of the European Commission – to the question of the status of the BIT or the existence, continuation or extent of the jurisdiction of the Tribunal.[137]

Accordingly, the tribunal refrained from making explicit references to the *amici curiae's* submissions in its findings that the BIT remained valid and in its rejection of the suspension requested by the respondent to refer the case to the ECJ.[138] This approach differed from the approach of the tribunal in *Eastern Sugar v. Czech Republic* regarding a letter from the EC on the same questions in early 2006.[139] There, the tribunal in its consideration of the matter referred to the letter for some fact information, but it did not adopt the arguments made, because the letter contained ambiguities.[140] No explicit reference to the *amicus curiae* submission from the EC was made in *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*,[141] whereas in *Electrabel v. Hungary*, the tribunal in great detail considered – and rejected – a preliminary objection that had been raised

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136 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 217.

137 *Id.*, para 219. The same approach was taken by the tribunal in *European American Investment Bank AG (Austria) v. The Slovak Republic*, Award on Jurisdiction, 22 October 2012, PCA Case No. 2010-17, para. 54.

138 *Id.,* para. 293.

139 *Eastern Sugar v. Czech Republic,* Partial Award, 27 March 2007, SCC Case No. 088/2004, paras. 97, 119, 123. The tribunal reproduced the responding January 2006 letter from the EC in full, as well as an internal note by the EC on the issue in part.

140 Both the respondent and the claimant had partly relied on the *amicus* brief to bolster their contrary positions. *Id.*, para. 150.

141 The case concerned an alleged violation by Hungary of its obligations under the Energy Charter Treaty (ECT) due to the adoption of the 2006 Electricity Act Amendment, which provided for the re-introduction of regulated prices for electricity generators pursuant to two price decrees in December 2006 and February 2007 respectively, after fixed prices had been abolished as from January 2004 prior to Hungary's EC accession. Central to the case was the question in how far the measures had been motivated by a concern of state legislators over the EC's investigations into alleged state aid through power purchase agreements which formed the basis of the claimants' investments. The tribunal may not have relied

by the European Commission, namely, that the tribunal lacked jurisdiction due to the dispute being an intra-EU matter. However, the tribunal found that EU law formed part of the law applicable to the arbitration.[142] In *Charanne v. Spain*, the tribunal noted that it had extensively considered the arguments raised by the European Commission in its *amicus* brief and that it had found them very useful, but that it would discuss the EC's arguments only in so far as they informed the parties' arguments because the EC itself was not a party to the case.[143] The tribunal incidentally rejected the EC's arguments concerning jurisdiction – as in all comparable cases, but it also rejected the expropriation claim and the FET claim raised by the investor.[144]

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on the briefs explicitly, because the majority's view was that 'Hungary's decision to reintroduce administrative pricing was not motivated by pressure from the EC Commission,' although the tribunal 'acknowledge[d] the efforts made by the European Commission to explain its own position to the Tribunal and ha[d] duly considered the points developed in its *amicus curiae* brief in its deliberations.' See *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22, paras 8.2, 10.3.18-10.3.19. Arbitrator *Stern* disagreed with the assessment and noted that 'it is quite evident that even before Hungary was under a legal obligation to follow the Commission's decision, it had been made abundantly clear to Hungary that the [power purchase agreements] raised considerable concerns at the European level, as being in contradiction with the European free market policies.'

142 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, paras. 4.11-4.13, 4.89-5.31-5.60 and particularly para. 4.115 ('As far as jurisdiction is concerned, the Tribunal notes that the Respondent has not raised any like objection to jurisdiction as that made by the European Commission. It is however the Tribunal's duty independently to check whether or not it has jurisdiction to decide the Parties' dispute, particularly when such jurisdiction is contested by the European Commission based on the interpretation and application of EU law.').

143 *Charanne v. Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012, para. 425 ('Antes que nada, el Tribunal Arbitral desea aclarar que le ha dado la más atenta consideración al *Amicus CE* el cual le ha resultado de gran utilidad. El Tribunal desea agradecer a la Comisión Europea por ello. Sin embargo, el Tribunal recuerda que la CE no es parte en este procedimiento y por tanto, en este laudo el Tribunal responderá únicamente a los argumentos de las Partes, a la luz por supuesto de los elementos de reflexión aportados por la CE.').

144 *Charanne v. Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012. See also *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, Award on Jurisdiction, 6 June 2016, ICSID Case No. ARB/13/30, paras. 71-90.

Philip Morris v. Uruguay is one of the first cases in which a tribunal has explicitly and extensively relied on information submitted by *amici curiae*, specifically the international organizations Pan American Health Organization (PAHO), the World Health Organization (WHO) and the WHO Framework Convention on Tobacco Control. The case concerned the legality of Uruguay's single representation regulation which required tobacco producers to offer only one brand of cigarettes, imposed an increase from 50% to 80% in size of mandatory health warnings and the use of six specific (and graphic) images on the front and back sides of cigarette packages.[145] The claimants argued that these measures amounted to violations of several guarantees under the applicable Switzerland-Uruguay BIT, primarily expropriation of their several brands including the associated goodwill and the Intellectual Property rights, as well as destruction of brand equity for remaining presentations and that Uruguay abused its rights to promote and protect public health. The tribunal explicitly referred to the *amicus curiae* submissions from the WHO and PAHO in rejecting the expropriation claim on the basis that the challenged measures constituted a 'valid exercise of the State's police powers', namely a good faith-based, non-discriminatory and proportionate effort to protect public health.[146] Equally, in its consideration of the FET-claim, the tribunal while assessing the alleged arbitrariness of the measures, heavily drew from the *amicus curiae* briefs to reason that the challenged tobacco control measures were evidence-based and that their effectiveness had been recognized by the *amici curiae*.[147] The extent to which the tribunal relied on the *amici curiae* is reminiscent of tribunals' treatment of the European Com-

145 The single representation was prescribed by Ordinance 514 of 18 August 2008, issued by the Ministry of Health. The so-called 80/80 Regulation was enacted by Presidential Decree No. 287/009 of 15 June 2009, and the use of the six images was ordered by Ordinance No. 466 of 1 September 2009 of the Ministry of Health, see *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 108-132.

146 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 287, 306. The factual background of the award made numerous references to statistics and guidelines developed by the WHO, PAHO and the FCTC Secretariat. *Id.*, paras. 74, 75, 89, 137, 139, 141, 143. The tribunal incorporated police powers, which it found to constitute customary international law, as a defence to the expropriation claim by way of systemic treaty interpretation pursuant to Article 31(3)(c) VCLT.

147 *Philip Morris v. Uruguay*, Award, 8 July 2016, ICSID Case No. ARB/10/7, paras. 391, 393, 407.

mission's briefs, and there are additional parallels: the *amici* in these cases all were international organizations with an official mandate, some involvement and indisputable expertise on the measures at issue.

Overall, despite increasingly being mentioned, *amicus curiae* submissions have had a rather limited impact on the outcome of investment arbitration cases. While tribunals often acknowledge a public interest in the arbitration, the arguments of *amici curiae* on the public interest engaged are not adopted. References in reasonings are made usually only to add weight to an argument already made by one of the parties or to summarize those parts of the submission that accord with currently held interpretations of investment law. Tribunals are extremely hesitant with respect to the invocation or application of laws that the parties have not raised, in particular international environmental or human rights law instruments.[148] However, there is no doubt that investment tribunals read *amicus curiae* submissions and find it necessary to comment on them. The value of *amicus curiae* submissions thus exceeds the mere appearance of increased legitimacy through their admission. The situation is different where international organizations, specifically the EC and public health organizations, have submitted *amicus* briefs in cases where measures falling within their competence or affecting issues within their sphere of activities are challenged.[149] Further, parties tend to liberally reference briefs supporting their arguments.[150]

In investment arbitration, the relationship between *amicus curiae* and evidence remains unsettled. A reason for the diverging approaches may be the form of submissions received. Most *amicus curiae* submissions focus on introducing general policy and legal arguments for the consideration of

148 See also A. Kulick, supra note 130, pp. 258-259, 272-276.

149 According to *Gerlich*, the EC's participation mimics intervention. O. Gerlich, *More than a friend? The European Commission's amicus curiae participation in investor-state arbitration*, in: G. Adinolfi et al. (Eds.), *International economic law: contemporary issues*, Torino/Cham 2017, p. 255. However, absent a right of consideration, the participation by the European Commission continues to be subject to the full discretion of the tribunal.

150 E.g. *Eli Lilly v. Canada*, Government of Canada Post-Hearing Submission, 25 July 2016, Case No. UNCT/14/2, paras. 149, 188, 192 and Claimant's comments on NAFTA Article 1128 Submissions and Non-Disputing Party (*Amicus*) Submissions, 22 April 2016.

environmental and human rights implications of a dispute.[151] Facts usually are presented only to embellish and contextualize policy arguments. Thus, briefs rarely contain information that may be considered evidence in the classic sense. Further, the above-analysis shows that tribunals – with the exception of the recent cases *Philip Morris v. Uruguay* and *Bear Creek Mining v. Peru* – do not admit briefs to draw concrete fact evidence from them. If at all, tribunals focus on the contextual and legal arguments provided. Thus, the practical impact of *amicus curiae* participation on the process of evidence remains minimal.

Tribunals very rarely test the information submitted which, in turn, may be a reason for their hesitation to rely on it. If tribunals (decide to) accord evidentiary value to information contained in an *amicus curiae* brief, tribunals should consider applying the verification standards used for tribunal-appointed experts so as to ensure that the parties' procedural rights are safeguarded.

I. Comparative analysis

The above analyses show that briefs are considered to a much greater extent by human rights courts than in inter-state courts, in investment arbitration and before WTO panels and the Appellate Body.

The ICJ generally considers *amicus curiae* briefs if a party submits them as its own evidence. Briefs do not seem to have influenced the outcome of a case. The ITLOS appears to be slightly more receptive than the ICJ in advisory proceedings. The ECtHR and the IACtHR's approaches are situated at the other end of the spectrum. Both courts extensively consider *amicus curiae* briefs in the deliberation of cases, and briefs have been highly influential. The IACtHR relies in particular on surveys and legal information, including on the respondent state. Further, both courts use *amicus* briefs to test the parties' evidence. However, there are some differences in the manner of consideration. The IACtHR tends to call *amici curiae* as experts or witnesses, if it finds fact or technical information conveyed by them to be relevant, whereas the ECtHR appears to also rely directly on facts submitted by *amici curiae*. The extent to which investment

151 *Suez/Vivendi v. Argentina*, Decision on Liability, 30 July 2010, ICSID Case No. ARB/03/19, paras. 255-256, 262.

tribunals consider *amicus curiae* briefs depends on the nature of the *amicus curiae*: submissions by international organizations whose area of activity is affected by the case tend to be thoroughly considered and, in some cases, relied on to bolster the tribunal's decision. Briefs from non-governmental entities have only sporadically influenced the outcome. They appear to be ignored, unless a party adopts them or they are congruent with the arguments made by a party. This practice is somewhat similar to the practice of the WTO adjudicating bodies. The latter, however, decide on the relevance of an *amicus curiae* brief only after all party and third party submissions have been considered (see Chapter 5). This may explain the low 'success' rate of *amicus* briefs. They have been considered in substance only in four cases so far. Overall, information-based *amicus curiae* as well as submissions by stakeholders seem to be more successful than public interest *amici curiae*.[152]

None of the courts or tribunals reviewed here has considered *amici curiae* a formal source of evidence. The concept is treated with the flexibility characteristic in international proceedings.[153] It is considered party evidence and treated accordingly by all international tribunals examined, if a party adopts the brief. If it is independent from the parties, international courts and tribunals' approaches differ. The judgments of international courts that have relied on fact submissions from *amici curiae* indicate that they do not treat the submissions *en pars* with party evidence. They accord them a lesser probative value. Further, briefs are generally only used to test the evidence presented by the parties or gathered *proprio motu*. While, theoretically, there is a risk that the reliance of the court or tribunal on an

152 *Shelton* expected that information based *amicus* submissions would be particularly significant where courts lacked the necessary expertise. This has not been the case, because courts seem to prefer to rely on expert submissions in such cases. An exception are EU-law related cases. See D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), p. 637.

153 Traditionally, judges have a wide discretion in the assessment of evidence and are free from technical rules. R. Wolfrum, supra note 4, para. 2. An 'important common feature among international courts and tribunals is that there is generally no restriction in the admissibility of evidence before various types of international tribunals and fact-finding bodies. … Generally speaking, international tribunals have … found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case.' M. Kazazi/B. Shifman, supra note 22, pp. 194-195.

amicus curiae submission may affect the burden of proof,[154] this has not materialized in practice. The reliance on fact submissions may be problematic in so far as the parties cannot test the submissions through use of the mechanisms available to test formal evidence, such as cross-examination.[155] However, some courts have solved the issue by transferring such *amici curiae* into witness or expert status (IACtHR) or by applying the evidentiary standards for expert and party submissions to unsolicited and solicited *amicus curiae* submissions (WTO panels and the Appellate Body).[156]

This concern applies only to a fraction of *amicus curiae* briefs, as the majority of briefs considered by international courts and tribunals focuses on analysis of the legal issues at stake. Briefs on legal issues that the parties have not raised, especially on how to (legally) integrate the 'public interest dimension' in investment arbitration and in WTO dispute settlement, are rarely considered. Legal arguments within the purview of the dispute as defined by the parties, for instance, on the interpretation of EU law, on jurisdiction or on the interpretation of a BIT, are taken into account. Legal submissions typically are considered informally. They cannot be considered to be evidence in a formal sense. They do not seek to prove or disprove a fact, but advocate a certain legal position or context.

Ishikawa questions if the admission of *amicus curiae* submissions should be treated equivalent to the hearing of an expert.[157] This question is justified where *amicus curiae* participation is subsumed under the rules of evidence and where international courts and tribunals attribute to the submission evidential value equal to party evidence. In those instances, the

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154 A. Qureshi, *Extraterritorial shrimps, NGOs and the WTO Appellate Body*, 48 International and Comparative Law Quarterly (1999), p. 205.

155 T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvant (Ed.), *Yearbook of International Investment Law and Policy (2008-2009)*, p. 558 ('[P]arties may wish to have the right to cross-examine the authors of *amicus* submissions, in particular if the submissions contain factual allegations detrimental to one party. Part of the conditions set by the tribunal for admitting *amicus* briefs could be that the authors commit to making themselves available for cross-examination. That would then provide an incentive for greater credibility of *amicus* submissions.').

156 This approach accords with that to court-appointed scientific experts, where panels are free within the limits of Article 11 DSU to weigh the evidence submitted.

157 T. Ishikawa, supra note 13, p. 267.

conditions and formalities applied to court-appointed evidence should at least serve as guidance to the international court or tribunal in the admission and consideration of *amicus curiae* submissions, even though there are obvious differences between *amici curiae* and witnesses and experts.[158] Such differences include the requirement before several international courts and tribunals that *amici curiae* show an interest in the case and provide opinionated submissions on abstract and general issues. Unlike experts, *amici curiae* need not necessarily be specialized or possess specialized knowledge. Most international courts and tribunals do not direct the content of *amicus curiae* submissions. Witnesses and experts, on the other hand, are questioned by the court and the parties and are directed on the content of their submissions and the information shared.[159] Usually, they may not make legal submissions. which is common for *amici curiae*.[160]

A few matters deserve additional analysis: why are some international courts and tribunals hesitant to consider submissions compared to others (1.)? Are there certain factors that increase the likelihood of consideration of a brief (2.)? Are there any limits to the consideration of *amicus curiae* submissions (3.)?

I. Why the hesitation?

Breton-Le Goff surmises that the overall low consideration of *amicus curiae* submissions arises from a clash of 'systemic values' of international courts, on the one hand, and those advocated in *amicus curiae* submissions, on the other hand. She points in particular to a clash of values of 'commercial freedom and non-discrimination in trade' with those of 'conservation and sustainability' in the context of the WTO.[161]

This observation cannot be agreed with fully. As shown above, for example, investment tribunals claim to be sympathetic to these issues and

158 Among other, see Article 35 ICSID Rules, Articles 27(2) and 29 of the 2010 UNCITRAL Arbitration Rules and of the 2013 UNCITRAL Arbitration Rules and Article 6 IBA Rules.

159 R. Wolfrum, supra note 4, para. 42.

160 *Id.*, para. 14.

161 G. Breton-Le Goff, *NGOs perspectives on non-state actors*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London/New York 2011, p. 260 and FN 49.

consider them if one of the parties raised them. Where *amici* raise issues not addressed by the parties, international courts and tribunals struggle to accommodate them within the adversarial process. This becomes problematic if the issues discussed by the *amici* are not at least implied in the applicable laws. Further, investment tribunals specifically, but also the ECtHR, WTO panels and the Appellate Body all have pointed to their judicial function to explain the irrelevancy of some submissions: their primary task is to render a decision that the parties consider acceptable and legitimate, and which the losing party therefore is willing to enforce. General discussions on the applicability of human rights or environmental standards in WTO or in investment law may be harmful in this regard. Further, such considerations are not needed if the tribunal can solve the case under its applicable laws. In fact, in most of the above-described investment cases, the final outcome accorded with the outcome the *amici curiae* had argued for. However, tribunals refrained from making general statements on the importation of international human rights or environmental laws into their treaty regimes. This approach is also evident in the different treatment of the EC's submissions on EC law issues that had a direct bearing on the validity of the BIT and the tribunal's jurisdiction. The submissions were aimed at providing additional argument on the legal issues the tribunal had to consider *ex officio* and did not require it to engage in any form of standard setting.[162]

This also explains why human rights courts have been more open to the consideration of *amicus curiae* briefs. The submissions made fall under their treaty regimes. Furthermore, the ECtHR has excluded submissions that make general pronouncements on certain contentious legal issues, because it found that they did not assist it in the solution of the concrete case. An additional reason for the greater willingness to consider *amicus*

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162 There is also some value in the argument by *Bastin*, that the limited role attributed to *amici curiae* by investment tribunals 'is … defined by a willingness to give them a voice and an unwillingness to allow anything more than minimal disruption to the arbitration and minimal additional cost to the parties.' See L. Bastin, *The amicus curiae in investor-state arbitration*, 1 Cambridge Journal of International and Comparative Law (2012), p. 228. He further argues that any development of the role of *amici curiae* will be achieved most likely if they manage to 'win and deepen the familiarity and trust that states and tribunals have in and with them.' He wishes, in particular, for amendment of the UNCITRAL Arbitration Rules, access to hearings and the inclusion of rules on *amicus curiae* in more investment treaties, see *Id.*, p. 230.

curiae in the IACtHR and the ECtHR may be their tradition of collaborating with NGOs.[163]

II. Elements of successful briefs

If and to what extent a brief is successful depends largely on an international court or tribunal's willingness to consider it. The research indicates that the following factors increase the likelihood of consideration:

Expertise and special/direct knowledge: submissions on matters within the *amicus curiae's* core competence have a greater likelihood of success than other submissions, especially briefs from *amici curiae* with many years of experience and first-hand knowledge of the issues commented upon.

Non-textbook information: international courts and tribunals appear to value information that is not readily available to them through simple legal research, but which broadens their knowledge of the case or informs them of the background or context of the dispute.

Accommodation within the structure of the court and proceedings: submissions which argue that the court or tribunal should change or widen its judicial function, or which request that it should adopt novel approaches to certain legal questions have a low chance of success.

There is no evidence in the submissions and judgments that courts pay greater attention to submissions from well-known lawyers compared to 'regular' submissions. The main criterion appears to be the relevance and perceived quality of a submission. Thus, as regards the latter, submissions from legal experts may have an advantage, but this has not been stated openly.

III. Limits to the consideration of briefs

The *Biwater v. Tanzania* tribunal prior to receiving *amicus curiae* submissions underlined that the role of *amici curiae* was not to suggest 'how issues of fact or law as presented by the parties ought to be determined

163 M. Ölz, supra note 57, pp. 358-359; J. Razzaque, supra note 57, p. 184.

(which is obviously the mandate of the Arbitral Tribunal itself).'[164] In *India–Quantitative Restrictions*, India was concerned that a WTO panel had substituted its assessment of the case with the views it had received from the International Monetary Fund (IMF) following a solicited submission. The Appellate Body dispelled India's contention that the panel had violated its duty under Article 11 DSU. It admitted that

> [t]he Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.[165]

And in *Australia–Apples*, the Appellate Body decided with respect to panel's instruction of experts it had contracted to determine whether restricting imports to mature, symptomless apples would achieve Australia's appropriate level of protection – an important question of the case – that the evaluation of the appropriateness of alternative measures was a legal question which could not be delegated to scientific experts.[166] Essentially all these decisions imply that a court should be the final adjudicator of the dispute brought before it. It cannot replace its own assessment with that of someone else.

The weighing and assessment of factual information under the applicable laws by *amici curiae* might conflict with the judges' duty to decide the case. As *H. Lauterpacht* notes, '[a] substantial part of the task of judicial tribunals consists in the examination and weighing of the relevance of facts for the purpose of determining liability and assessing damages.'[167]

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

165 *India–Quantitative Restrictions,* Report of the Appellate Body, adopted on 22 September 1999, WT/DS90/AB/R, para. 149.

166 *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R, paras. 384, 399.

167 H. Lauterpacht, *The development of international law by the international court*, London 1958, p. 48. See also V. Bazán, *amicus curiae, transparencia del debate judicial y debido proceso*, in: Anuario de Derecho Constitucional Latinoamericano (2004), pp. 268-269 ('no converge un intercambio de roles, conservando el juez plena libertad para receptor o separarse, total o parcialmente, de los argumentos juridicos que el *amicus* pudiera acercar al proceso.').

International courts and tribunals must at least evaluate the information received and consider it carefully to protect 'the right of the parties to receive a decision emanating from the tribunal set up by them in its capacity as a tribunal.'[168] Only 'a decision emanating from the arbitral tribunal as such can be considered as a valid award ... The award must be the result of the personal participation of each member of the tribunal, to the exclusion of other persons.'[169]

This calls into question the general permissibility of *amicus curiae* submissions that propose a concrete solution to the specific case by applying the law to the (preferred) facts (see Chapter 6).[170] International courts and tribunals have to be careful when formulating questions for solicited *amici curiae* and avoid that *amici curiae* offer decisions on matters within their sphere of duties.[171] International courts and tribunals must take care to remain in charge of the case and not (accidentally) outsource the evaluation of relevant facts and legal material to willing *amici curiae*. In this vein, it is also important to emphasize that international courts and tribunals must test the veracity as well as the completeness of *amicus curiae* submissions if they wish to rely on them. As shown, at the moment, the process of consideration of *amicus curiae* submissions is intransparent across all international courts and tribunals.

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168 G. White, *The use of experts by international tribunals*, Syracuse 1965, p. 166.

169 A. Balasko, *Causes de la nullité de la sentence arbitrale en droit international public*, Paris 1938, p. 125, translated and quoted by G. White, supra note 168, p. 166 [Emphasis omitted].

170 *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* (hereinafter: *Dominican Republic–Import and Sale of Cigarettes*), Report of the Panel, adopted on 19 May 2005, WT/DS302/R, p. 1, para. 1.8 and Annexes C-1 and D-1 (The panel asked the IMF whether it considered the commission of change and imports an exchange control or exchange restriction under the articles of agreement of the IMF.).

171 In *Turkey–Textiles*, the Panel invited the European Commission to make comments it considered relevant beyond answering a catalogue of questions it had prepared. The EC Representative stated that Article 13(2) DSU prevented him from 'enter[ing] a broader discussion of the factual or legal elements that may be relevant for the resolution of this dispute since this could be confused with the pleading of a case before the Panel.' He decided to 'stick to the specific questions asked by the Panel and provide the requested factual information to the Panel as objectively as we can.' *Turkey–Textiles*, Report of the Panel, adopted on 19 November 1999, WT/DS34/R, pp. 27-28, 103, paras. 4.2, 9.13.

A related risk is that the reliance on a submission might give the impression that a court or tribunal has given too much weight to an issue which is not overly relevant to the case as submitted by the parties, especially where the submission of a brief generates significant publicity.[172] In most instances, *amici curiae* advocate a certain legal argument be it because of their own or their constituents' benefit or because they consider it to be the only convincing argument. So far, this aspect, which is known as interest-capture, does not appear to have created difficulties in practice due to the hesitation of international courts and tribunals to consider issues that have not been raised by the parties.

J. Conclusion

International courts and tribunals consider *amicus curiae* briefs to a different extent. Human rights courts rely significantly on submissions, whereas all the other courts examined are rather hesitant to do so. Legal submissions are more frequent and are considered more readily than fact submissions. Overall, *amici curiae* have rarely been decisive to the outcome of a case.

Although there are interactions between *amici curiae* and the formal sources of evidence, *amici curiae* are not viewed as a formal source of evidence. International courts and tribunals generally do not attach any formal evidential value to *amicus curiae* submissions. Submissions are considered largely informally. The standards applied to *amici curiae* are mostly untechnical and often unclear. There is a need to establish clearer standards for the consideration of briefs, in particular with regard to the verification of statements made.

Amici curiae have not changed tribunals' approaches to evidence. Rather, they confirm how a court or tribunal generally views its function and how it approaches its investigative powers. The rules on evidence are not undermined by *amicus curiae* participation. The practical effect of *amici curiae* on the evidentiary process and the adversarial process overall has been limited. With the exception of the ECtHR and the IACtHR, consideration of *amicus curiae* submissions by international courts and tribunals has been sporadic and limited. This seems in part due to the fact

172 R. Mackenzie/C. Chinkin, supra note 14, p. 137.

that submissions often lobby for an extension of international courts and tribunals' functions, which makes it difficult to accommodate them in the adversarial process.