Chapter § 3 An international instrument

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

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

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

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

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

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

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

tioners have consulted national law in their dealing with *amicus curiae* in international dispute settlement.[5]

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

A. Amicus curiae *before national courts*

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

I. The origins of *amicus curiae*

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

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

5 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001; *Suez/Vivendi v. Argentina*, Order in response to a petition for transparency and participation as *amicus curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 8 ('[T]he tribunal assumes that the *amicus curiae* role the Petitioners seek to play in the present case is similar to that of a friend of the court recognised in certain legal systems and more recently in a number of international proceedings.'); *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001 (The tribunal consulted national legislation and case law on the issue of confidentiality in its decision on petitions from several non-governmental organizations to participate as *amici curiae*.).

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

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

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

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

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

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

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

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

activity. The advice was not binding and the judge bore responsibility for his decision.[11] There was no mechanism for the presentation of unsolicited advice.

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

II. *Amicus curiae* before the English courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

renamed *amicus curiae* 'advocate to the court.'[28] On 19 December 2001, then Attorney-General Lord Goldsmith and the Lord Chief Justice jointly issued a 'Memorandum to Judges.'

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

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

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

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

30 Para. 3 Memorandum to Judges.

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

32 Para. 4 Memorandum to Judges.

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

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

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

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

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

36 Para. 9 Memorandum to Judges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in charge of the 2010 amendments to the Federal Rules of Appellate Procedure even welcomed 'coordination between the *amicus* and the party whose position the *amicus* supports … to the extent that it helps to avoid duplicative arguments.'[62]

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

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

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

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

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

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

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

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

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

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

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

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

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

70 Appellate Rules Committee Notes on Rules – 2010 Amendment.

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

legal systems of Japan, Mexico, Switzerland and Germany[72] do not provide for *amicus curiae*.[73]

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

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

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

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

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

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75 Paris Court of Appeal, 21 June 1998 and 6 July 1998, Gaz. Pal. 1988, 2, 700, Note Laurin, quoted by C. Coslin/D. Lapillonne, *France and the concept of amicus curiae: what lies ahead?*, 4 Paris International Litigation Bulletin (2012), at: https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi_8vfX19bWAhWCA5oKHZTxC7YQFggmMAA&url=https%3A%2F%2Fwww.hoganlovells.com%2F~%2Fmedia%2Fhogan-lovells%2Fpdf%2Fpublication%2F6--france-and-the-concept-of-amicus-curiae_pdf.pdf&usg=AOvVaw3p01VsLA8910LisgnVdXzB (last visited: 28.9.2017).

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

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

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

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

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

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

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

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

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

80 The first exception, Article R. 625-3 French Code of Administrative Justice – created by Article 143 of the New Code of Civil Procedure, Decree No. 2010-164 of 22 February 2010 – permits the court to invite any person whose contributions it deems valuable to the solution of the dispute to provide it with general observations on a specific issue. Second, Article L. 621-20 French Monetary and Financial Code allows all court divisions to invite the *autorité des marchés* financiers to make written and oral submissions. The third provision implements EU Regulation No. 1/2003. This has raised questions with regard to the appropriate legal basis for *amicus curiae* participation. Article 143 Code of Civil Procedure grants the court power only to establish the facts of the case. See C. Kessedjian, supra note 78, pp. 93, 105.

81 The *Ministère public* commonly intervenes in proceedings to represent the public interest. Pursuant to Articles 462-3 and 470-5 Commercial Code, a judge may request the advice of the competition counsel or the minister for economy in matters of competition law. See S. Menétrey, supra note 3, pp. 46-47.

82 The principles were considered by some as too common law oriented. See C. Kessedijan, *Uniformity v. diversity in law in a global world – the example of commercial and procedural law*, 61 Revue hellénique de droit international (2008), p. 326.

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

V. Comparative analysis

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

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

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

83 P-13A.
84 P-13D.
85 P-13B.
86 S. Kochevar, supra note 74, p. 1669 ('[A]n evolving global procedural norm').

cost-effective ways to circumvent strict rules on standing and to promote their agenda.[87]

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

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

I. International Court of Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

106 Nos. 18, 21 (The Registrar to Professor Reisman), *South West Africa*, Advisory Opinion, Correspondence, ICJ Rep. 1971, pp. 637-639.

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

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

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

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

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109 E. Valencia-Ospina, *Non-governmental organizations and the International Court of Justice*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 231. See also his clarification in the New York Times of 15 November 1995 concerning an *amicus curiae* submission by the Federation of American Scientists: 'The court has received numerous documents, petitions and representations from non-governmental organizations, professional associations and other bodies.' *Valencia-Ospina*, then Registrar of the ICJ, underlined that all documents received consistent treatment. See *Court clarification: letter to the editor*, The New York Times, 15 November 1995.

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

111 S. Rosenne, *International Court of Justice*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 107.

112 *Sir Arthur Watts* considered Practice Direction XII a good compromise. See A. Watts, *The ICJ's practice directions of 30 July 2004*, 3 The Law and Practice of International Courts and Tribunals (2004), pp. 392-393 ('The Court has developed and put on a more formal footing its previous informal practice, reflecting a neat compromise between on the one hand treating non-governmental organizations in exactly the same way as governmental organizations and, on the other hand, banishing them from all participation in Advisory Opinion cases. By acknowledging their written submission as part of the public record, the Court acknowledges its own right to take them into consideration and allows others who are entitled to full participation in the proceeding to take note of them on their merits. But by declining to treat them as part of the case file, their distinctive (and lesser) formal status is preserved. …').

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

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

II. International Tribunal for the Law of the Sea

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. European Court of Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Inter-American Court of Human Rights

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

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

133 M. Ölz, supra note 130, p. 355.

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

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

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

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

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

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

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

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

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

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

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

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

V. African Court on Human and Peoples' Rights

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

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

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

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

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

VI. WTO Appellate Body and panels

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

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

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

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

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

found that it also possessed authority to admit unsolicited *amicus curiae* briefs.[146]

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

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

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

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

149 G. Umbricht, supra note 54, p. 776.

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

of the political pressure exerted on the Appellate Body at the General Council Meeting.[151]

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

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

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

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

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

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

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

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

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

156 See WTO dispute settlement statistics, at: http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (last visited 28.9.2017).

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

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

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

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

160 H.E. E. Østebø Johansen (then DSB Chairman), *WTO Dispute Settlement Body developments in 2011*, at: http://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm (last visited: 28.9.2017).

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

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

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

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

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

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

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

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

VII. Investor-state arbitration

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

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

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

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

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

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

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

cating bodies, it came as no surprise that requests for leave to participate were sent to various investment arbitration tribunals.[172]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

185 Official Records of the General Assembly, Sixty-Fifth Session, Supplement No. 17, UN Doc. A/65/17, para. 190. The Working Group comprised all UNCITRAL member states, observer states, observers from the European Commission, UNCTAD, international organizations and courts, inter-governmental and commercial arbitral institutions as well as select NGOs.

186 *Report of the United Nations Commission on International Trade Law*, 46th Session, 8-26 July 2013, UN Doc. A/68/17, p. 22, para. 128.

187 *Resolution adopted by the General Assembly on 10 December 2014*, UN Doc. Res. GA/69/116. The Convention will enter into force six months after the third instrument of ratification has been deposited. 22 states have signed the Convention so far, and three states have ratified it (Switzerland, Canada and Mauritius), see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (last visited: 28.9.2017).

188 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 389; C. Knahr/A. Reinisch, *Transparency versus confidentiality in international investment arbitration: the Biwater Gauff compromise*, 6 The Law and Practice of International Courts and Tribunals (2007), p. 98.

C. Conclusion

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

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

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

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