Author: El Hosseny F.F.
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3. What is a *'friend of the court'*? – A cross-jurisdictional perspective outside the realm of investor-state arbitration

When civil society acts as *amicus curiae,* it is in such cases concerned by, or self-interested in, the dispute without having its rights affected, and thus it solely aims to intervene in on-going proceedings – that it has not initiated – in order to assist the tribunal in reaching a final decision. The *amicus curiae* procedure is largely inspired by US law. Because an *amicus* may be in principle 'any person', a potential *amicus* will generally be required to seek permission to make a submission as a 'volunteer', an 'assistant of the court' and will be required to provide certain information in support of its petition, for example as to its identity, expertise, interest in the dispute, as well as funding. [967] It will be then for the court or tribunal to decide whether a particular submission should be received. These elements will be discussed below through the

[964] L. Alvarado, *supra* note 770, at 609. Helton mentions several positive developments that ensued following the IACtHR's landmark decision in *Awas Tingni* v. *Republic Nicaragua*. See T. Helton, 'Introduction to the IACtHR Report on Indigenous and Tribal Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', (2010) 35 American Indian Law Review 257, at 262.

[965] *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para 77.

[966] It is worthy to recall once more that in this case the ACHPR actually thanked the civil society groups who submitted the complaint against Nigeria. See *SERAC and Center for Economic and Social Rights v. Nigeria*, *supra* note 931, para 44.

[967] P. Sands and R. Mackenzie, *supra* note 55, at para 2.

prism of US court practice (**Section 4.1**), WTO Panels and Appellate Body (**Section 4.2**), and international human rights jurisdictions (**Section 4.3**). Given that the *amicus* procedure has been previously discussed in an investor-state arbitration context, the aim of this section is to identify the features of such procedures from a comparative approach in order to better understand its potential and limitations.

3.1 The *amicus curiae* procedure – A *common law* inspiration

The *amicus curiae* procedure is a common law notion as previously mentioned.[968] It exists in the English judicial system where the procedure is generally associated to, and referred as, 'third party intervention'.[969] It exists as well in the Canadian legal system.[970]

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[968] Yet, the UK approach to the *amicus curiae* is slightly different than the American or Canadian one. In its glossary, the UK Ministry of Justice defines it 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' – thereby emphasizing the non-adversarial aspect of the procedure. From a UK standpoint, an *amicus curiae* – as opposed to a third party intervenor – typically refers to the appointment of an 'official figure, usually the Attorney-General, Official Solicitor or Counsel from a list maintained by the Treasury Solicitor and has regularly been used in the Family Division'. See C. Harlow, *infra* note 1083, at 7; UK Ministry of Justice, 'HM Courts & Tribunals Service Glossary of terms – Latin', available at: http://www.justice.gov.uk/courts/glossary-of-terms (last accessed 06 October 2014).

[969] There are no explicit procedural rules governing *amicus curiae* interventions under the Civil Procedure Rules ('CPR') (governing the High Court). However, CPR Rule 54.7 on the 'Court's Power to hear any person' provides that: '(1) Any person may apply for permission – (a) to file evidence; or (b) make representations at the hearing of the judicial review. (2) An application under paragraph (1) should be made promptly.' See CPR, *infra* 1072. In its Practice Directions, the House of Lords does however state in Article 37 that: 'A person who is not a party to an appeal may petition the House for permission to intervene... Petitions for permission to intervene orally or in writing or both must be lodged with the Judicial Office at least six weeks before the date of hearing of the appeal'. It is noteworthy that the main 'informal' requirement assessed by English courts is whether the proposed intervention would provide the court with some information, expertise or perspective not already provided by the parties. See Practice Directions and Standing Orders applicable to civil appeals, approved 8 October 2007, available at: http://www.publications.parliament.uk/pa/ld199697/ldinfo/ld08judg/bluebook/bluebk-1.htm (last accessed 06 October 2014). The UK Supreme Court has a similar provision, Article 15 states that: '(1) Any person and in particular— (a) any official body or non-governmental organization seeking to make submissions in the public interest or (b) any person with an interest in proceedings by way of judicial review, may make written submissions to the Court in support of an application for permission to appeal and request that the Court takes them into account'. See Rules of the Supreme Court of the UK, entered into force 01 October 2009, available at: http://supremecourt.uk/docs/uksc_rules_2009.pdf (last accessed 06 October 2014). See also E. Metcalfe, *infra* note 1074, 14-15, and C. Harlow, *infra* note 1083, at 7.

[970] It is noteworthy that the Rules of the Supreme Court of Canada allow *amicus curiae* submissions. Article 92 states that: 'The Court or a judge may appoint an *amicus curiae* in an appeal'. See Rules of the Supreme Court of Canada (SOR/2002-156), last amended 01 January 2014, available at: http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/index.html (last accessed 01 March 2014).

It has been most extensively developed under US law, and it is for such reason that it is worthy to take a closer look at the practice from a US law perspective.[971]

The Supreme Court adopted its first rule on *amicus curiae* in 1937.[972] Historically, the procedure was instrumental in public interest litigation, which most notably included civil and minority rights as well as environmental law cases.[973] It has allowed American civil society and advocacy groups such as the National Association for the Advancement of Colored People (the 'NAACP') to engage in judicial advocacy.[974] It has now become inherent to US litigation in general, and public interest cases in particular.[975]

Under US law, an *amicus* is a *bystander*, who of his own knowledge makes a suggestion on a point of law or of fact for the information of the court.[976] Inherently, an *amicus* cannot offer direct and rebuttal evidence, present oral arguments (unless otherwise authorized), and does not have the right to take an appeal – in stark contrast to intervenors or disputing parties.[977]

This is well-reflected in *Newark Branch, NAACP v. Town of Harrison*, a case regarding alleged employment discrimination by the Harrison municipality against African American citizens. Whilst commenting on an *amicus* brief submitted by seven Harrison residents, the Court of Appeal stated that an *amicus curiae* is not a disputing party in the following terms:

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[971] For instance, the first *amicus curiae* submission by a civil society group to be accepted at the US Supreme Court was in Ah How v. United States, 193 U.S. 65 (1904), where the Chinese Charitable and Benevolent Association of New York made an *amicus curiae* submission of favour of the appellant who was contesting the decision of his deportation; whereas, the UK House of Lords had only done so in the case of Regina v. Khan [1996] 3 WLR 162 when it accepted a submission by Liberty, a UK-based NGO. See also E. Metcalfe, *infra* note 1074, at 5, 46. See also S. Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy', (1963) 72:04 The Yale Law Journal 694, at 707.
[972] The Supreme Court rules constitute the first formalistic regulation of the practice. However, Krislov traces back the first formal use of the *amicus* procedure to a 1821 case - Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). See R. Garcia, 'A Democratic Theory of Amicus Curiae', (2008) 35 Florida State University Law Review 315, at 321, and S. Krislov, *supra* note 971, at 694, 700.
[973] S. Krislov, *supra* note 971, at 694, 700, and more generally P. Appel, *infra* note 1095.
[974] For instance, the NAACP acted as *amicus* in the landmark case of Westminster School District of Orange County v. Mendez, which revolved around the segregation of Mexican-American schoolchildren. Westminster Sch. Dist. of Orange County v. Mendez, 161 F.2d 774, 775 (9th Cir. 1947). See also R. Garcia, *supra* note 972, at 341.
[975] For instance, empirical research shows that *amicus briefs* were filed in 83% of US Supreme Court cases between 1986 to 1997. It is suggested that this figure has not substantially changed in recent years. See R. Garcia, *supra* note 972, at 315.
[976] T. Ishikawa, *supra* note 108, at 377 citing B. Abbott, *Dictionary of Terms and Phrases used in American or English Jurisprudence* (1879).
[977] G. Hazard et al., *Pleading and Procedure: State and Federal Cases and Materials* (1999), at 770.

> Amicus curiae is a latin phrase for "friend of the court" as distinguished from an advocate before the court. It serves only for the benefit of the court, assisting the court in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision. *An amicus curiae is not a party to the litigation* and therefore does not necessarily represent the views or interests of either party. Since an amicus does not represent the parties but participates only for the benefit of the court, *it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus*.[978]

The preceding passage is instrumental as it succinctly flags both the opportunities and limitations of *amici curiae*. Relevant in particular to public interest cases, courts typically consider the *amicus* as *an assistant* that plays a much more limited role than litigating parties; it provides specific information to the court solely through written submissions, and cannot control procedural developments.[979] It cannot act as a litigant and is therefore not entitled to counter arguments raised by any of the litigating parties. More fundamentally, as outlined by the Court of Appeal, 'the fact, extent, and manner of participation by the *amicus*' is solely grounded on the court's discretion; as such, it does not benefit from any substantive right enabling it to file briefs outside the court's permission.[980] It has been argued nonetheless that *amicus* petitioners should benefit from the same rights granted to parties under the US Constitution, in particular the right 'to petition the Government'; however, no federal court has confirmed such position to date.[981] This understanding is echoed in the relevant procedural rules – discussed below.

Rule 29 of the Federal Rules of Appellate Procedure[982] and Rule 37 of the Rules of the Supreme Court regulate the *amicus* procedure. State and federal courts do not have

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978 Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991), at para 808. See also G. Castanias, and R. Klonoff, *infra* note 985, at 154.

979 D. Shelton, 'The International Court of Justice and Nongovernmental Organizations', (2007) 09 International Community Law Review 139, at 150.

980 R. Garcia, *supra* note 972, at 348.

981 It is argued that the right to file a lawsuit in the US is constitutionally protected under the First Amendment, which states that: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances'*. (our emphasis). Having said that, it is also recognized that the text of the First Amendment aims to protect aggrieved citizens, i.e. petitioners who seek a 'redress of grievances'. A narrow interpretation of this rule would therefore exclude *amici curiae* who by definition may only in ongoing petitions (or in other words – litigation). See First Amendment to the US Constitution, ratified 15 December 1791, available at: http://www.law.cornell.edu/constitution/first_amendment (last accessed 06 October 2014). For further analysis, see also R. Garcia, *supra* note 972, at 336.

982 Rule 29 states that: '… Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. (b) The motion must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. (c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate

specific *amicus* procedural rules but generally refer instead to the Rules of Appellate Procedure.[983] Rule 37 of the Rules of the Supreme Court provides that:

> 1. An amicus curiae brief that brings to the attention of the Court relevant matter 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…*[984]

Essentially, it is argued that most courts are fairly liberal in permitting the filing of *amicus* briefs, in particular when these do not simply duplicate the briefs of the parties but instead provide the court useful arguments or information.[985] However, the potential burden it might cause to the proceedings is also a factor taken into account by courts – as discussed below.

US judges are in general fairly receptive to *amicus* briefs and liberally apply Rule 29 of the Federal Rules of Appellate Procedure and Rule 37 of the Supreme Court Rules.[986] Yet, as is the case in other jurisdictions of interest, discussions over *amicus*' interest, independence vis-à-vis disputing parties, and the additional burden it may potentially cause are also relevant to the US litigation context – as is reflected in Rule 37(1) of the Rules of the Supreme Court.

For instance, in *National Organization for Women Inc. v. Scheidler*, a case involving abortion rights and access to abortion clinics, Priests for Life, Life Legal Defense Foundation, and the Southern Christian Leadership Conference were denied a permission to file *amicus curiae* briefs in support of the appellants. The Court of Appeal explained its decision namely by noting that '*amicus curiae briefs can be a real burden on the court system*' as well as on the disputing parties, and that they '*are more often than*

whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following: (1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1… (4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file; (5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; (6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review… (f) Except by the court's permission, an amicus curiae may not file a reply brief. (g) An amicus curiae may participate in oral argument only with the court's permission. See Federal Rules of Appellate Procedure, available at: http://www.law.cornell.edu/rules/frap/rule_29 (last accessed 06 October 2014).

[983] R. Garcia, *supra* note 972, at 323.

[984] See Rules of The Supreme Court of The United States, adopted April 19, 2013, available at: http://www.law.cornell.edu/rules/supct (last accessed 06 October 2014) (our emphasis).

[985] See also G. Castanias, and R. Klonoff, *Federal Appellate Practice and Procedure* (2008), at 250.

[986] G. Castanias, and R. Klonoff, *supra* note 985, at 251; See also A. Asteriti, and C. Tams, *infra* note 402, at 802.

not sponsored or encouraged by one or more of the parties'.[987] In the same vein, the Court stated that it shall not accept *amicus curiae* briefs that 'merely duplicate' the arguments of a disputing party.[988]

The following case law-developed criteria are aimed at curbing the often excessive and equally unhelpful flow of *amicus curiae* briefs, particularly from interest groups.[989] These would be solely accepted if (i) a party is not adequately represented or is not represented at all; or (ii) the petitioner has a 'direct' interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata*, materially affect that interest; or (iii) the petitioner has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.[990] In a similar vein, seemingly detracting judges refused to afford *amicus* arguments a weight equivalent to that of the disputing parties.[991]

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[987] National Organization for Women, Inc., on behalf of itself and others, et al., v. Joseph M. Scheidler, et al., 223 F.3d 615 (7th Cir. 2000), at para 3-6 (our emphasis). See also, G. Castanias, and R. Klonoff, *supra* note 985, at 250. Other landmark abortion cases include the Supreme Court case of Webster v Reproductive Health Services (1989) 492 US 490, where the constitutionality of a Missouri statute regulating the performance of abortions. The case attracted numerous *amicus* submissions including by the American Psychological Association which argued against the statute.

[988] Ibid., para 6.

[989] A Court of Appeal judge, Judge Posner, made the following somewhat unfavourable statement on *amicus curiae* briefs: 'We court of appeals judges have heavy caseloads requiring us to read thousands of pages of briefs annually, and we wish to minimize extraneous reading. It would not be responsible for us to permit the filing of a brief and then not read it (or at least glance at it, or require our law clerks to read it), at least when permission is granted before the brief is written, and so reliance on our reading it invited'. See Ibid., para 3. In another case, Ryan v. Commodity Futures Trading Commission, Judge Posner denied a petition by the Chicago Board of Trade to file an *amicus curiae* brief, and stated that: 'after 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion'. See Ryan v. Commodity Futures Trading Commission, 125 F.3d (7th Cir. 1997), at para 1063. See also R. Garcia, *supra* note 972, at 317, 326.

[990] Ibid., para 6.

[991] This is well-reflected in Eldred et al. v. Ashcroft, concerning the constitutionality of the Sonny Bono Copyright Term Extension Act which extended existing copyright terms by an additional 20 years, where the Court of Appeal set forth the reasons why it had previously found it 'particularly inappropriate' to entertain a constitutional argument pressed by amicus but not by the parties. Indeed, the Court noted that it 'deems it "particularly inappropriate" in this case to reach the merits of the amicus's position'. See Eldred et al. v. Ashcroft, 255 F.3d (D.C. Cir. 2001), at para 849. See also, G. Castanias, and R. Klonoff, *supra* note 985, at 154. Another example of a restrictive approach would be Boumediene v. Bush where a group of former judges petitioned to file an *amicus* brief in support of greater due process for Guantanamo Bay detainees. The Appellate Court denied petitioners' leave because they identified themselves as judges – citing a previous opinion which restricts the use of the title 'judge' in the courtroom or litigation documents to designate a former judge. See Boumediene v. Bush, 476 F.3d (D.C. Cir. 2006), at para 934-935. See also R. Garcia, *supra* note 972, at 330.

3.2 WTO Panels and the Appellate Body's restrictive approach

Since its inception, civil society organizations have been active at the WTO. Their action has not been solely restricted to policy matters, but it has also covered dispute settlement amongst WTO member states. This section gives a succinct look at the WTO from an institutional perspective, the public interest issues and non-trade concerns that the WTO is increasingly addressing, followed by a more detailed analysis of some of the landmark cases involving civil society. These cases in fact served as an important precedent to investor-state tribunals.

3.2.1 Brief background to WTO dispute settlement

The end of the Second World War marked a series of international conferences aimed essentially at orchestrating the reconstruction of war-torn Europe as well as the regulation of the global monetary and financial order, particularly in light of the looming effects of the Great Depression of 1929. The 1944 Bretton Woods Conference created the IMF, the International Bank for Reconstruction and Development (commonly referred to as the World Bank). Four years later, the Havana Charter established the International Trade Organization (ITO).[992] A global economic governance framework thus emerged. However, the establishment of the ITO never materialized, and the General Agreement on Tariffs and Trade (GATT),[993] a multilateral framework rather than an international organization, became a *de facto* alternative to the ITO.[994] Nearly half a century following the signature of the Havana Charter establishing the ITO, the WTO came into existence with the signature of the Marrakech Agreement in 1994.[995] Member states resort to the

[992] Havana Charter for an International Trade Organization, signed 24 March 1948, 1948 CAN. T.S. No. 32, available at http://www.wto.org/english/docse/legal-e/havanae.pdf (last accessed 06 October 2014) (the 'Havana Charter'); M. Majlessi, *supra* note 110, at 28.
[993] General Agreement on Tariffs and Trade (GATT 1947), entry into force 01 January 1948, 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700.
[994] The ITO never came into existence due to opposition from the US Senate. See Ibid, at 29.
[995] It is now recognized that both the GATT and the WTO have effectively set forth the regulatory framework for a significant proportion of global trade and have become symbols of global interconnectedness. The WTO currently has 159 member states and 25 others with observer status. See Marrakesh Agreement Establishing the World Trade Organization, entry into force 15 April 1994, 1867 U.N.T.S. 154; 33 I.L.M. 1144 (1994), available at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 02 October 2013); J. Kagan, 'Making Free Trade Fair: How the WTO Could Incorporate Labor Rights and Why It Should', (2011) 43 Georgetown Journal of International Law 195, at 195; and WTO, 'members and Observers' (2013), available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed 06 October 2014).

WTO to settle their trade-related disputes.[996] A crucial aspect of the organization is that it comprises a binding dispute settlement mechanism that has as primary objective to enforce the organization's intricate regulatory framework.[997] Given that WTO disputes relate to inter-state obligations and rights, non-state actors, including civil society and corporations, have remained essentially absent from the process. The WTO's Dispute Settlement Understanding (DSU) does not provide for any sort of procedural rules allowing non-member state actor access.[998] Whereas other international jurisdictions, notably through the creation of arbitration institutions to settle mixed disputes such as ICSID, have opened up to non-state actors, WTO members chose to maintain the inter-state character of the dispute settlement mechanism set forth under the DSU – which can only be amended by consensus (as is the case for all WTO agreements).[999] This strictly inter-state framework might seem anomalous since disputes amongst states are ultimately the result of diverging interests amongst corporations and other non-state actors.[1000]

3.2.2 Non-trade concerns as the substantive context

Both WTO policy-making, rules, and dispute settlement have had ramifications beyond the trade and economic spheres by increasingly touching upon environmental, public health, and other public interest-related issues.[1001] This has brought the WTO both attention and pressure. It has been called upon to address such issues for the sake of balancing the global trade concerns it actively promotes.[1002] Given that the WTO is a trade-centered organization, these issues have been branded under the notion of 'non-trade concerns' when raised within the WTO context.[1003] This term was in fact initially

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[996] Those cover a wide array of international obligations and rights that are guaranteed by WTO agreements such as the GATT, General Agreement on Trade in Services (GATS), the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the agreement on Technical Barriers to Trade (TBT).
[997] The WTO has more than 60 legal texts in place, see WTO website, available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last accessed 02 April 2013).
[998] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement Establishing the WTO, 33 ILM 1197 (1994) ('DSU').
[999] R. Buckley, and P. Blyschak, 'Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes', (2007) 22 Banking and Financial Law Review 353, at 362.
[1000] E. De Brabandere, *supra* note 852, at 96.
[1001] C.E. Côté, *La participation des personnes privées dans le règlement des différends internationaux économiques : L'élargissement du droit de porter plainte à l'OMC* (2007), at 405.
[1002] J. Kagan, *supra* note 995, at 202.
[1003] The WTO Glossary defines it as: 'similar to multifunctionality. The preamble of the Agriculture Agreement specifies food security and environmental protection as examples. Also cited by members are rural development

used in the preamble of the Agreement on Agriculture and included 'food security and the need to protect the environment'.[1004] It may also include labor conditions, which were indeed set forth in the non-ratified Havana Charter but were never included in the texts of neither the GATT nor WTO agreements.[1005] Since its inception, civil society has pressured the WTO to allow it to further non-trade concerns, as well as to enhance transparency, within its fora.[1006] The WTO has been opening up to non-state actors in general, including to civil society, namely through the annual WTO Forum.[1007] In fact, the Marrakech Agreement explicitly affords the organization's General Council the right to 'make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO' – which not only include civil society organizations, but also business and industry associations.[1008]

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and employment, and poverty alleviation'. See WTO Glossary, available at: http://www.wto.org/english/thewto_e/glossary_e/non_trade_concerns_e.htm (last accessed 10 August 2013).

[1004] 'Noting that commitments under the reform programme should be made in an equitable way among all members, having regard to non-trade concerns, including food security and the need to protect the environment'. See preamble of the WTO Agreement on Agriculture, entry into force 15 April 1994, Marrakech Agreement Annex 1A, available at: http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm (last accessed 10 August 2013).

[1005] Article 7(1) of the Havana Charter states that '1. The members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the *achievement and maintenance of fair labour standards* related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.' (our emphasis). See Havana Charter, *supra* note 992. The WTO does recognize nonetheless that its member-states are committed to core labour standards which include the freedom of association, the prohibition of forced and child labour, as well as discrimination. These rights are indeed recognized by the ILO Declaration of Fundamental Principles and Rights at Work. See WTO Website, 'Labour standards: consensus, coherence and controversy', available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last accessed 06 October 2014). See also J. Kagan, *supra* note 995, at 198-199. See ILO Declaration on Fundamental Principles and Rights at Work, dated June 1988, available at: http://www.refworld.org/docid/425bbdf72.html (last accessed 28 February 2014).

[1006] C.E. Côté, *supra* note 1001, at 418.

[1007] The WTO Public Forum is an annual conference held since 2001 bringing together 'civil society, academia, business, the media, governments, parliamentarians and inter-governmental organizations'. More than 8,000 participants attended the 2013 edition (compared to 450 in 2001). See P. Lamy, *supra* note 30.

[1008] See Article V(2) of the Marrakech Agreement, *supra* note 995. The WTO's General Council also adopted a set of guidelines aimed at clarifying the framework for cooperation with civil society, in which 'members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs'. See WTO General Council, 'members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs', 18 July 1996, available at: http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (last accessed 10 August 2013).

In turn, the WTO has increasingly addressed non-trade concerns. The waiver to the GATT in relation to conflict diamonds and the Kimberley Process[1009] called the 'Kimberley Waiver'; as well as the TRIPS waiver, namely aimed at allowing developing nations to have an enhanced access to HIV/AIDS drugs, bear witness to the WTO's endeavors in advancing, or at least, taking into account non-trade concerns.[1010] The Kimberley Waiver was initially granted in 2003, and then subsequently renewed in 2006 and 2012 by the WTO General Council.[1011] It consists of excepting trade measures provided under the Kimberly Process from the application of a number of GATT obligations and prohibitions including – *inter alia* – quantitative restrictions (Article XI(1)), and most-favoured nation treatment (Article I(1)). As to the TRIPS waiver, it was first implemented in 2003 and was extended for the third time in 2011.[1012] It originated during the Doha Ministerial Conference in 2001 where member States passed a declaration in which they recognized the gravity of the public health problems afflicting many states, 'especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics'.[1013] The General Council's waiver essentially creates a compulsory license system that enables the use of patents predominately for the supply of a given domestic market, subject to an obligation to pay adequate remuneration to right holders, in limited cases including 'national emergency or other circumstances of extreme urgency or in

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[1009] Kimberly Protocol Certification Scheme has 54 participants including the European Union. It aims at curbing the trade in 'conflict diamonds' by establishing a certification system essentially to attest that transacted raw diamonds were 'conflict free'. General Assembly resolution 55/56 defines 'conflict diamonds' as 'rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments'. See UN General Assembly, Resolution 55/56, 'The role of diamonds in fuelling conflict', dated 29 January 2001, available at: (last accessed 01 September 2013). See also the Kimberly Protocol Certification Scheme Core Document, entry into force 01 January 2003, available at: http://www.kimberleyprocess.com/en/kpcs-core-document (last accessed 10 August 2013).

[1010] The Ministerial Conference of the WTO is the organ in charge of lawmaking and may enact waivers to existing WTO agreements pursuant to Article IX(3) of the Marrakech Agreement. However, most measures are often taken by the General Council, comprised of member States' representatives based in Geneva, which undertakes the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement.

[1011] General Council, 'Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds', Decision of 14 December 2012, WT/L/876. See also I. Feichtner, *supra* note 597, at 616.

[1012] See General Council, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', Decision of 30 August 2003, WT/L/540, and General Council, 'Amendment of the Trips Agreement – Third Extension of the Period For The Acceptance By members Of The Protocol Amending the Trips Agreement', Decision of 05 December 2011, WT/L/829.

[1013] Ministerial Conference, 'Doha Declaration on the TRIPS Agreement and Public Health', adopted on 14 November 2001, WT/MIN(01)/DEC/2, available at: http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/3_wtmin01dec2_e.pdf (last accessed 10 August 2013).

cases of public non-commercial use'.[1014] Such measures come as a reaction to detractors of the world trade regime who criticize a trade-centred approach to WTO law that could lead to the neglect of other international human rights and values, e.g. the human right to health care or the protection of indigenous traditional knowledge, which are arguably relevant to the international rights and obligations set forth under TRIPS for instance.[1015] In the same vein, Pascal Lamy, ex-director general of the organisation, declared that WTO law is, and should be, interpreted in light of other international law norms including those pertaining to human rights and environmental protection.[1016] As will be examined directly below, the role of civil society – as *amicus curiae* – within WTO disputes has been effectively perceived as a means to potentially conciliate wider international law norms with WTO law.[1017]

3.2.3 *Amicus* authorities: *Shrimps* and *Asbestos*

The issue of civil society's involvement in WTO disputes has first arisen in the *Shrimps*[1018] case, and the criteria governing its intervention were further articulated in the *Asbestos* case. These two cases effectively constitute the most significant Appellate Body decisions on the matter, and thus merit further analysis. Numerous decisions later followed the position adopted in the *Shrimps* and *Asbestos* precedents.[1019]

[1014] This effectively constitutes a waiver to Articles 31(f) and (h) of TRIPS which state that: 'Where the law of a member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected (f) any such use shall be authorized predominantly for the supply of the domestic market of the member authorizing such use; (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization'. See section 1(b), General Council, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', *supra* note 1012. See also I. Feichtner, *supra* note 597, at 628.

[1015] The TRIPS agreement has been systematically associated with the promotion of strictly corporate interests, particularly the pharmaceutical industry. Indeed, it is argued that the Intellectual Property Committee, an international corporate-based organization, developed the basis for the TRIPS agreement. For a further analysis, see M. Majlessi, *infra* note 110, at 106, 120. See also I. Feichtner, *supra* note 597, at 616.

[1016] P. Lamy, '*La place et le rôle du droit de l'OMC dans l'ordre juridique international'*, 19 May 2006, available at: http://www.wto.org/french/news_f/sppl_f/sppl26_f.htm (last accessed 10 August 2013).

[1017] C.E. Côté, *supra* note 1001, at 419.

[1018] WTO, Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58, (15 May 1998) ('*Shrimps* case').

[1019] See for instance the following Appellate Body reports: *Australia — Measures Affecting Importation of Salmon*, WT/DS18/AB/R (20 October 1998), *European Communities — Trade Description of Sardine*, WT/DS231/AB/R, (23 October 2002); *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/AB/R (5 April 2001); *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/ DS257/AB/R (17 February 2004); *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS30824 /AB /R (6 *i. The Shrimps case*

The *Shrimps* case arose out of a complaint lodged by several Asian countries against the US, alleging the inconsistency of a ban on the imports of shrimps, and shrimp-related products, from those countries with WTO law. [1020] At issue were a series of US laws, regulations, and measures aimed at protecting certain sea turtles – which were recognized as endangered species – from harmful shrimp fishing practices allegedly adopted in those countries through an import ban on the shrimp produce of such fishing.[1021] The matter was in fact addressed in US courts, prior to its adjudication at the WTO, as a result of a lawsuit filed by environmental groups, including the Earth Island Institute and others, against the US government.[1022] It is worthy to mention here that a substantially similar dispute, although resulting in a different outcome, arose in the wake of the *Tuna-Dolphin* cases at the GATT – prior to the establishment of the WTO and its dispute settlement mechanism.[1023]

Three NGOs – the Center for Marine Conservation, the Center for International Environmental Law and the WWF – directly requested the Panel to allow them to intervene in the dispute as *amicus curiae*. Their objective was to address environmental issues relevant to the dispute, and to put forward an interpretation of the GATT that

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March 2006); *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007). See also C.E. Côté, *supra* note 1001, at 218.

[1020] Those were: India, Malaysia, Pakistan and Thailand.

[1021]The US justified its prohibition under its Endangered Species Act (in addition to related regulations and judicial rules). In addition, as mentioned previously, the US argued that the need for the use of turtle excluder devices (TEDs) – aimed at protecting sea turtles from harmful shrimp fishing – was consistent with the international community's recognition to protect endangered species pursuant to Agenda 21. See Ibid., at para. 7.57, and Agenda 21, *supra* note 99, para 17.46(c).

[1022] Those were: the American Society for the Prevention of Cruelty to Animals, the Humane Society of the United States, the Sierra Club, and the Georgia Fishermen's Association. See Earth Island Institute v. Warren Christopher, 913 F. Supp. 559 (CIT 1995).

[1023] At issues was the US import ban on tuna from GATT-members whose fishing standards were not aligned to the US Marine Mammal Protection Act, which is a US federal statute that sets dolphin protection standards. More specifically, an import ban would be triggered if dolphin deaths from tuna fishing exceeded deaths from U.S. tuna fishing by more than 25 per cent. It resulted in the ban of tuna imports from exporting states including Mexico, Venezuela, Panama, Ecuador, and the tiny Pacific island of Vanuatu; as well as other 'intermediary' states, i.e. which handle the banned tuna, such as Costa Rica, Italy, Japan, and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. A lengthy legal saga ensued, it is worthy to note, however, that in its first decision the GATT Panel essentially found that (i) the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations; and (ii) GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country (extraterritorially) — even to protect animal health or exhaustible natural resources. The Panel's decision was ultimately perceived as lacunary by environmental groups. See United States - Restrictions on Imports of Tuna, GATT Panel Report, 3 September 1991, unadopted, BISD 39S/155; and United States — Restrictions on Imports of Tuna, GATT Panel Report, 16 June 1994, unadopted, DS29/R.

would favour the protection of sea turtles from harmful shrimp fishing practices. Environmental groups perceived the GATT Panel's first decision in the *Tuna-Dolphin* case as unsatisfactory as a result of its failure to adequately balance environmental concerns. It is thus argued that there was a need for them to actively participate in WTO disputes in general, and the *Shrimps* case in particular, in order to 'enlighten' WTO Panels on the environmental issues at stake, in what cannot be merely perceived – so it was argued – as strict international trade law disputes between WTO member-states.[1024]

The Panel rejected the NGOs' request and based its decision on Articles 13.1 and 13.2 of the DSU, which state that:

> 13.1 - Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate...
> 13.2 - Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter…[1025]

The Panel interpreted this rule as vesting it with an authority to seek information but not to accept it via unsolicited submissions such as the ones made by the WWF and others.[1026] It made nonetheless a recommendation to the disputing parties, i.e. member states, to put forward any documents or information submitted by the *amici curiae* petitioners as part of their own submissions.

The Panel's decision was appealed, and the Appellate Body rejected the Panel's interpretation of Articles 13.1 and 13.2 of the DSU. It found that the Panel's authority to 'seek information' should not be equated with a prohibition on accepting non-solicited information. It was thus decided that Panels have a discretionary authority to accept such non-solicited information so long as it remains pertinent to the dispute; and more fundamentally, without '*unduly delaying the panel process*' pursuant to Article 12.2 of the DSU.[1027] The fact that the information was or was not requested by the Panel itself

[1024] Charnovitz indeed argues that: 'An impetus behind NGOs' desire to participate in WTO dispute resolution is that GATT panels have not performed well in adjudicating environmental disputes, particularly in the tuna dolphin controversy. The tuna panel decisions were neither thorough nor entirely logical. *The low quality of these environmental decisions* - as compared to typically high quality GATT decisions in the more common commercial disputes - *suggests a need to improve the information provided to a WTO panel*'. See S. Charnovitz, 'Participation of Non Governmental Organizations in the World Trade Organization', (1996) 17 University of Pennsylvania Journal of International Economic Law 331, at 352 (our emphasis).
[1025] DSU, *supra* note 998, Article 13.1 and 13.2.
[1026] Report of the Panel, *Shrimps* case, *supra* note 1018, para 7.8.
[1027] Article 12.2 of the DSU states that: 'Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. See WTO, Report of the Appellate

should not be relevant. Conversely, Panels are not bound to accept nor consider information submitted by non-disputing parties even in cases where it has *propio motu* requested such information.[1028] The Appellate Body confirmed the Panel's recommendation by allowing disputing parties to attach to their own submissions entire, or parts of, briefs prepared by non-disputing parties such as the WWF or the Center for International Environmental Law.[1029]

ii. The Asbestos case

Another key decision is the *Asbestos* case,[1030] a dispute between Canada and France (represented by the European Communities) that was triggered by a French ban on asbestos fibres and asbestos-based products on public health grounds in line with the exception set out under Article XX(b) of the GATT.[1031]

The public interest issues at stake drew significant attention to the dispute, and the Appellate Body initially received applications for leave to submit *amicus* briefs from 13 different NGOs and other non-state actors most notably including trade and business groups or associations from the asbestos industry.[1032] 17 applications were later filed following the adoption of the Additional Procedure (discussed below) submitted by a wide array of applicants including Greenpeace International, the WWF, and the European Chemical Industry Council.[1033] What is fundamental to note here is that the Appellate

Body, *United States: Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para. 107-108 (our emphasis).

[1028] Ibid., para. 108.

[1029] Ibid., para. 110.

[1030] WTO, Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (12 March 2011) ('Asbestos case').

[1031] Article XX(b) of the GATT reads as follows: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health…'. See GATT, *supra* note 993.

[1032] These were: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianio Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan). Ibid., para 53.

[1033] These were: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council

Body referred to those potential *amici* as 'persons' or 'non-governmental associations' – notwithstanding the intricate diversity of such actors, and more particularly, the manifest dominance of trade and business groups from the asbestos industry.[1034] Indeed, the proliferation of these groups increased developing states' wariness of 'NGO involvement at the WTO' – as will be discussed further below.

In the wake of overwhelming interest by third parties to submit *amicus* briefs, the Appellate Body established an 'Additional Procedure' setting out the *ratione materiae* and *ratione personae* requirements for accepting *amicus* briefs.[1035] These requirements included (a) information on the applicants' interest in the dispute, (b) a description of their relations to the parties and their funding sources, (c) the extent to which they might 'make a contribution to the resolution' of the dispute, and (d) the specific issues of law covered in the Panel report they would like to address.[1036] The Appellate Body added that:

> [it] will review and consider each application for leave to file a written brief and will, without delay, render a decision *whether to grant or deny such leave*…The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.[1037]

Furthermore, the Appellate Body has set out additional conditions that are applicable in the event leave is granted to an applicant. These regulate both the form and scope of the written *amicus curiae* brief and essentially require that briefs should be concise and not exceed 20 pages; and to:

> set out a precise statement, *strictly limited to legal arguments*, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.[1038]

(United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland). See Ibid., para 56.

[1034] Ibid., para 53-56.

[1035] Article 16.1 of the WTO - Working Procedures for Appellate Review provide that: '[i]n the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules…'.

[1036] Report of the Appellate Body, *Asbestos* case, *supra* note 1030, para. 52(3).

[1037] Ibid., at para. 52(4)(5) (our emphasis).

[1038] Report of the Appellate Body, *Asbestos* case, *supra* note 1030, para. 52(7) (our emphasis).

The Appellate Body clearly asserted its discretion in accepting or rejecting *amicus curiae* submissions, and it eventually rejected all 17 of them simply because it was of the view that accepting them brought it no benefits.[1039] However, it opened the door to disputing member states to append *amicus* briefs as an integral part of their own submissions – as also accepted by the ICJ. The Appellate Body's conclusion in the *Asbestos* case is not inconsistent with the general legal understanding of what *amicus curiae* should and should not do. Indeed, the primary function of, and rationale behind, the *amicus curiae* procedure is the assistance of the court.[1040] If a court deems that such assistance is not beneficial to it, then the whole idea of an *amicus curiae* submission becomes altogether obsolete.

It is questioned whether civil society, through the *amicus curiae* procedure, caused any impact on Panels' or the Appellate Body's interpretation of WTO law. A breakdown both from procedural and substantive standpoints is therefore merited, as it shall also provide an *état des lieux* of the WTO dispute settlement mechanism's position concerning civil society involvement.

iii. Final remarks

The Appellate Body has repeatedly asserted both its right, as well as Panels' right, to accept non-solicited *amicus curiae* submissions. This is a procedural development *in se* that was triggered by civil society actors who solicited WTO Panels to open the door for their intervention in disputes through the *amicus curiae* procedure. The WTO's official position is that *amici curiae* do not benefit from any substantive rights. The acceptance of civil society as *amicus curiae* has been made possible through a favourable interpretation of the DSU by the Appellate Body, which asserted Panels' discretionary authority in deciding on the matter by virtue of Article 13 of the DSU. Having said that, civil society's role at the WTO dispute settlement system has been nonetheless significantly limited.[1041] It is clear that non-member states in general do not benefit from

[1039] Although 6 of those applications were rejected having not been submitted in a timely manner. See Ibid., para 55. See also R. Buckley, and P. Blyschak, *supra* note 999, at 363.
[1040] A. Moore, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?', (2006) 5 The Law and Practice of International Courts and Tribunals 257, at 268.
[1041] C.E. Côté, 'Obstacles et ouvertures processuelles pour les acteurs privés défendant des intérêts non commerciaux dans l'interprétation des accords de l'OMC', (2009) 50 Les Cahiers de droit 207, at 217.

a substantive right to submit *amicus curiae* briefs under the DSU notwithstanding the public interest issues that are potentially at stake. This applies to civil society and trade or business groups for that matter. It is in this light that in the *Hot-Rolled Lead* case, the Appellate Body poignantly reiterated its position in the *Shrimps* case in the following words:

> *Individuals and organizations, which are not members of the WTO, have no legal 'right' to make submissions or to be heard by the Appellate Body*. The Appellate Body has no legal 'duty' to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not members of the WTO…[1042]

The *right* to make *amicus curiae* submissions can only be secured through a reform to the DSU by WTO members, which was due to take place at the then-stalled Doha Round of negotiations.[1043] Some states are in favour of substantiating the *amicus curiae* practice under the DSU in order to enhance transparency in public interest-related disputes.[1044] Several developing states are, however, wary of such a prospect as this might entail the proliferation of submissions from trade lobbies or pressure groups from industrialized states (who all fall under the category of non-state actors).[1045] This was manifestly reflected not only in the *Asbestos* case, but also in the *Hot-Rolled Lead* case where the American Iron and Steel Institute and the Speciality Steel Industry of North America association made *amicus curiae* submissions.[1046] As such, the DSU has not been amended to date and the *amicus curiae* practice at the WTO remains the sole product of jurisprudential development. In turn, it has benefited other international jurisdictions such as ICSID and UNCITRAL-constituted investor-state tribunals.[1047]

[1042] See WTO, Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismut Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000), para. 41 ('*Hot-Rolled Lead* case') (our emphasis).
[1043] C.E. Côté, *supra* note 1001, at 223.
[1044] This is the case of the United States for instance. The US delegation at Doha claimed that 'the public has a legitimate interest in the proceedings'. See IISD, *Doha Briefing Series: Developments Since the Fourth WTO Ministerial* Conference, February 2003, online at: http://www.ictsd.org/pubs/dohabriefings/doha8-review-dispute.pdf (last accessed 15 July 2013).
[1045] R. Buckley, and P. Blyshak, *supra* note 999, at 371. Developping states are also weary of 'New Wave Protectionism', the modern corollary of 'Grandfather Protectionism'. The latter included discriminatory customs and tariff barriers with the aim of controlling the influx of foreign products into domestic markets. In fact, one of the GATT's objectives was to eliminate such barriers. New Wave Protectionism on the other hand refers to state practices involving environmental or labour measures indirectly but ultimately aim at restricting foreign products. See R. Ricupero, 'Trade and Environment: Strengthening Complementarities and Reducing Conflicts', in G. Sampson, and W. Bradnee Chambers (eds.), *Trade, Environment, and the Millennium* (2002), at 32.
[1046] Report of the Appellate Body, *Hot-Rolled Lead* case, *supra* note 1042.
[1047] Ibid., at 361.

That said, the *Shrimps* decision was perceived as a turning point in international law as it paved the way for non-state actor access in general, and civil society in particular, in an inter-state dispute settlement jurisdiction.[1048] It also dedicated environmental law questions a considerable portion of its analysis, namely by looking at the concept of sustainable development[1049] and the precautionary principle, as well as citing other international environmental law instruments such as the 1992 UNCED Rio Declaration on Environment and Development, thereby effectively taking into account other international law norms when scrutinizing member state compliance to WTO law.[1050] In particular, it did so in order to interpret the notion of 'exhaustible natural resources' cited in Article XX(b) of the GATT. This approach is consistent with Article 31(3)(c) of the Vienna Convention, which opens the door for treaty interpretation in light of 'any relevant rules of international law'.[1051] It can be generally argued that civil society organizations precisely aimed to influence Panels' or the Appellate Body's decisions towards a more favourable position on environmental protection. Yet, it remains unclear whether either has ever considered arguments contained in *amicus curiae* submissions in their decisions. This indeed echoes the WTO dispute settlement mechanism's restrictive position towards civil society involvement, which is in fact

[1048] See P. Sands, 'Turtles and Torturers: the Transformation of International Law', (2001) 33 New York Journal of International Law and Politics 527.

[1049] The Appellate Body in the *Shrimps* case noted that sustainable development was recognized as an objective *in se* by the WTO Agreement, and allowed it to adopt an evolutionary interpretation of the concept of 'exhaustible natural resources' under XX(g) of the GATT. See Report of the Appellate Body, *Shrimps* case, *supra* note 1027, at para 129.

[1050] It cited Principle 12 in support of state multilateralism when enacting environmental measures, which states that: 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus'. See Rio Declaration, *supra* note 96. See also Report of the Appellate Body, *Shrimps* case, *supra* note 1027, at para 41, 68.

[1051] Article 31 states that: '(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose…(3). There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties'. See United Nations, Vienna Convention on the Law of Treaties, entered into force 27 January 1980, United Nations, Treaty Series, vol. 1155, at 331 ('Vienna Convention'). See also D.A., Dam-De Jong, *supra* note 99, at 30.

further substantiated by the unwillingness of most member states to amend the DSU in order to formalize, and thus confirm the validity and relevance, of the *amicus* procedure.

3.3 International human rights jurisdictions' liberalism

International human rights jurisdictions accept in a liberal fashion *amicus curiae* submissions. Yet, the rules governing such access do not substantially differ from the ones discussed hitherto as will be shown below when delving into the practice of the ECtHR, IACtHR, and ACHPR.

The ECtHR has for long had a liberal approach regarding the acceptance of *amicus curiae* submissions.[1052] Having said that, prior to the entry into force of Protocol 11 in 1998, there was no explicit reference to the *amicus curiae* procedure under the Court's relevant procedural rules. Article 36(2) 'Third Party Intervention' now governs the procedure,[1053] which reads as follows:

> The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.[1054]

Rule 44(2)(a) of the ECtHR Rules of Court further provides that:

> Once notice of an application has been given to the respondent Contracting Party under Rule 51 § 1 or Rule 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, *or any person concerned who is not the applicant*, to submit written comments or, in exceptional cases, to take part in a hearing'.[1055]

[1052] Laura van den Eynde's empirical research shows that, up to 2013, NGOs have submitted *amicus* briefs in over 237 cases, i.e. 1.37 per cent of the ECtHR's proceedings. However, in 307 of the total judgements delivered by the Grand Chamber up to that date, NGOs have intervened in 65 of them, i.e. in 21 per cent of the Grand Chamber's cases. See L. van den Eynde, *supra* note 72, at 280. Indeed, *amicus* submissions were made in many seminal cases, most notably including: *Malone v. United Kingdom*, Judgment of 02 August 1984, [1984] ECtHR (8691/79); *Ashingdane v. United Kingdom*, Judgment of 28 May 1985, [1985] ECtHR (8225/78); *Lingen v. Austria*, Judgment of 08 July 1986, [1986] ECtHR (9815/82); *Monell and Morris v. United Kingdom*, Judgment of 2 March 1987, [1987] ECtHR (9562/81; 9818/82); *Soering v. United Kingdom*, Judgment of 07 July 1989, [1989] ECtHR (14038/88); *Brannigan and McBride v. United Kingdom*, Judgment of 25 May 1993, [1993] ECtHR (14553/89; 14554/89); and more recently for instance - *Opuz v. Turkey*, Judgment of 9 June 2009, [2009] ECtHR (33401/02). See also E. Metcalfe, *infra* note 1074, at 23.

[1053] The ECHR refers to the *amicus curiae* procedure as 'Third Party Intervention'. However, the term should not be confused with how third party intervention is conceptualized under the present research. See Introduction.

[1054] ECHR, *supra* note 844, Article 36.

[1055] Other more technical conditions are also set forth: '(b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons… 5. Any invitation or grant of leave

Essentially, it is generally understood that the key conditions to the acceptance of an *amicus* submission are the following: (i) the participation by an intervener who is interested in the outcome of the proceedings; and (ii) the intervention is in the interests of the proper administration of justice.[1056]

There are numerous ECtHR cases involving *amicus curiae* submissions by civil society. However, as an over-arching rule, it is argued that 'the likelihood of an NGO participating in litigation depends, at least in part, on the case in question having a potential importance that extends beyond securing the rights of an individual applicant'.[1057]

One of such cases is *Muñoz Díaz* v. *Spain*. María Luisa Muñoz Diaz – a Rom of Spanish nationality – filed a case against Spain under Article 34 of the ECHR for violations of her right against discrimination primarily because the civil effects of her Roma marriage were not recognized by the social security authorities.[1058] The applicant exhausted local remedies when Spain's Constitutional Court had rendered an unfavorable decision.[1059] The ECtHR allowed Union Romaní – a Spanish Roma association – to file an *amicus* brief pursuant to Article 36(2) of the ECHR and Rule 44(2)(a) of the ECtHR's Rules of Court[1060] – without providing any justification for its acceptance.[1061] The association acted as an interested third party to the dispute, and as a provider of information to the ECtHR on the solemnization of marriage under the rites of the Roma community. The submission of Union Romaní's brief did not seem to stir any procedural

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referred to in paragraph 3 (a) of this Rule shall be subject to any conditions, including time-limits, set by the President of the Chamber. Where such conditions are not complied with, the President may decide not to include the comments in the case file or to limit participation in the hearing to the extent that he or she considers appropriate.' . See ECtHR Rules of Court, entered into force on 1 January 2014, available at: http://www.echr.coe.int/documents/rules_court_eng.pdf (last accessed 06 October 2014).

1056 Ibid., at 98.

1057 L. Hodson, *NGOs and the Struggle for Human Rights in Europe* (2011), at 63.

1058 The applicant was claiming, *inter alia*, her right against discrimination under Article 14 of the ECHR had been violated when the National Institute of Social Security refused to pay her a survivor's pension following her husband's death on the grounds that her marriage solemnised under the rites of the Roma community had no civil effects. *See Muñoz Díaz v. Spain*, Judgment of 8 December 2009, [2009] ECtHR (49151/07), at 3.

1059 Ibid., at 5-6.

1060 The Court merely stated that: 'The parties filed their observations. In addition, third-party comments were received from Unión Romaní which had been given leave by the President to intervene in the written procedure as amicus curiae (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court)'. Ibid., at 5.

1061 This was also the case in *Opuz v. Turkey*, where the Court merely acknowledged the fact that an *amicus* submission was made, and then delved onto the arguments raised therein: 'Third-party comments were received from Interights, which had been given leave by the President to intervene in the procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court). The Government replied to those comments (Rule 44 § 5)'. See *Opuz v. Turkey*, *supra* note 1052, at 5.

debates, and the Court rather focused on the substantive matters of the case. Union Romaní had also clearly taken the side of the claimant by submitting arguments in its favour. It most notably claimed that the Spanish government's refusal to pay the claimant's survival's pension was 'disproportionate' – an argument that was noted by the Court.[1062]

This case merely reflects the ECtHR's liberal practice in relation to the acceptance of *amicus curiae* submissions, which is no different than what is adopted by other international human rights jurisdictions, i.e. there are no cases which set out extensive *ratione materiae* and *ratione personae* criteria such as the *Asbestos* case at the WTO for instance – as will be shown further below.[1063]

There is an extensive practice for *amicus curiae* participation in contentious cases at the IACtHR, as well as in advisory proceedings where human rights organizations tend to advocate liberal interpretations of the IACHR. [1064] This procedure is covered by Article 44(1) of the Rules of Procedure of the IACtHR and it therefore opens the door to individuals or organizations to file submissions. The Article reads as follows:

> 1. Any person or institution seeking to act as amicus curiae may submit a brief to the Tribunal, together with its annexes, by any of the means established in Article 28(1) of these Rules of Procedure, in the working language of the case and bearing the names and signatures of its authors […].[1065]

The *Awas Tingni* v. *Nicaragua* case involved quite a substantial number of *amici curiae* and is therefore a suitable example. In this case, the IACtHR received *amicus* briefs submitted by various organizations such as the International Human Rights Law Group, the Assembly of First Nations of Canada – the national representative organization of Canada's indigenous peoples, the Organization of Indigenous Syndics of

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[1062] *Muñoz Díaz v. Spain* case, *supra* note 1059, at 14. Cichowski points to other examples where the ECtHR quoted *amicus* briefs in its judgments and, therefore, argues that civil society has at times shaped the Court's decisions. This includes most notably *Soering v. United Kingdom*, where the Court cited Amnesty International's brief. The Court stated that: 'This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention, which provides for the abolition of the death penalty in time of peace'. See *Soering v. United Kingdom*, Judgment of 7 July 1989, [1988] ECtHR (14038/88), at para 102. See also generally R. Cichowski, 'Civil Society and the European Court of Human Rights', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (2011).

[1063] Report of the Appellate Body, *Asbestos* case, *supra* note 1030.

[1064] J.M. Pasqualucci, *supra* note 914, at 74.

[1065] Rules of Procedure of the Inter-American Court of Human Rights, Article 44, available at: http://www.corteidh.or.cr/reglamento/regla_ing.pdf.

the Nicaraguan Caribbean, the Mohawks Indigenous Community of Akewsasne, and the National Congress of American Indians.[1066] The Court accepted the briefs without the need to raise any issues relating to their admissibility. Conversely, the IACtHR has rarely quoted from or cited *amicus* briefs; yet, there is evidence that the Court has relied on the research and analysis provided by the briefs.[1067] It is worthy to note nonetheless that the recognition of the Awas Tingni's communal rights may be regarded as a positive reception by the IACtHR of the *amici curiae*'s arguments.

As far as the ACHPR is concerned, article 99(16) of the ACHPR's Rules of Procedure states that:

> The Commission may receive *amicus curiae* briefs on communication. During the hearing of a Communication in which an *amicus curiae* brief has been filed, the Commission, where necessary shall permit the author of the brief or the representative to address the Commission. [1068]

The ACHPR's *amicus* practice is reflected in *CEMIRIDE and MRG on behalf of Endorois Welfare Council* v. *Kenya*, a Kenyan NGO called the Centre on Housing Rights and Evictions (COHRE) filed an *amicus curiae* brief that the ACHPR plainly considered as an integral part of the claimants arguments against Kenya.[1069] Again, COHRE's *amicus* submission did not seem to have stirred any legal debates nor did Kenya object to it. The ACHPR did not make explicit reference to it in its final decision either. This case reflects the ACHPR's liberal practice in relation to *amicus curiae* submissions, which is similar to the approach adopted by other international human rights jurisdictions.

[1066] J.M. Pasqualucci, , *supra* note 914, at 215; *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (series C) No. 79 (2001), para. 29-62.
[1067] Ibid., at 75.
[1068] Rules of Procedure of the African Commission on Human and Peoples' Rights, Article 99(16), available at: http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf.
[1069] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, at 31.