

# NGOs and the "Public Interest": The Legality and Rationale of Amicus curiae Interventions in International Economic and Investment Disputes

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## Abstract

*Recent decades have seen a significant increase in the number of legal dispute settlement mechanisms, which has opened the door for NGO participation as "friends of the court." Confronted with unsolicited submissions by NGOs, the WTO dispute settlement organs and international investment tribunals have accepted the legality of such submissions. However, despite various decisions on the principled legality of amicus curiae submissions by NGOs, the effective acceptance or consideration of such submissions in particular cases remains limited. This Article aims to systematize the involvement of NGOs in international economic and investment disputes. This Article extracts the general principles for NGO participation in such disputes, both from the perspective of the legality of third-party interventions and from the perspective of the rationale, utility, and usefulness of such interventions in the dispute settlement processes, elements often linked to "public interest" or "public character" of a dispute.*

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## I. INTRODUCTION

Although international law is a legal system that is principally and essentially engaged with the relation of states with other states, the involvement of non-state actors as participants either formally or informally in international law has increased substantially over the past years. Whether or not this participation needs to be equated with or, on the contrary is a consequence of the international legal subjectivity of non-state actors, is subject to debate in international legal scholarship.<sup>1</sup> However, despite the theoretical discussions on the status of non-state actors in international law, the *informal* participation of non-state actors in international law and international relations is a reality that cannot be ignored.

This Article will focus on the role played by non-governmental organizations (NGOs) in legal dispute settlement mechanisms in international economic and investment law. Recent decades have seen a significant increase in the number of legal dispute settlement mechanisms charged with settling disputes based on international law. An often overlooked aspect of this evolution is that the proliferation of dispute settlement mechanisms has equally witnessed the increased involvement of non-state actors as non-disputing parties in dispute settlement procedures. NGOs especially have benefited from the proliferation of legal dispute settlement mechanisms to gain access to these forums, often as "friends of the court" (*amici curiae*). The advantage of participation as *amici curiae* is that the intervening party is not actually a party to the dispute but is nevertheless allowed to submit a written statement during the proceedings and, less commonly, is allowed to be heard by the court or tribunal.<sup>2</sup> Such participation has been visible, in particular, in international economic disputes and in international investment arbitration, although this tendency has also been observed in other courts, such as the International Court of Justice (ICJ).

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<sup>1</sup> For more on non-state actors as participants in international law, see generally Jean d'Aspremont, ed, *Participants in the International Legal System: Theoretical Perspectives* (Routledge 2011). For more on the role of non-state actors in international relations, see Bob Reinalda, ed, *The Ashgate Research Companion to Non-State Actors* (Ashgate 2011).

<sup>2</sup> For a discussion of the concept of "amicus curiae," see generally Philippe J. Sands and Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, in Rudiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford 2011).

Confronted with unsolicited submissions by NGOs, WTO dispute settlement organs and international investment tribunals have been forced to develop case law on the access of NGOs to these international proceedings, both in terms of the legality of such submissions and in terms of the appropriateness of a submission in a particular case. Despite various decisions on the principled legality of amicus curiae submissions by NGOs and other non-disputing parties, there has not yet been substantial effective acceptance or consideration of such submissions in particular cases.

This Article aims to systematize the involvement of NGOs in international economic and investment disputes by extracting the general principles for NGO participation in such disputes, both from the perspective of the legality of third-party interventions and from the perspective of the rationale, utility, and usefulness of such interventions in the dispute settlement processes. These elements are often linked to the "public interest" or "public character" of a dispute. The aim is thus not to describe generally the conditions under which NGOs may participate in international proceedings. Rather, this Article adopts a transversal perspective focusing on both international economic and investment law, to disentangle the issues underlying this development, which are demonstrably similar, if not identical, in both international economic law and international investment law—fundamentally different types of law that share many common features.

The first section will briefly depict the position of non-governmental organizations in international dispute settlement and in international law generally. The second section will address the role of NGOs before the ICJ. The third section will tackle the case law and rules with respect to NGO participation within legal dispute settlement in international economic and investment law. The third section will first address the *legality* of this participation before turning to the *rationale and appropriateness* of the role played by NGOs as "friends of the court" in economic and investment dispute settlement proceedings. The section then concludes with an assessment of the effect of NGO submissions on international proceedings in international economic and investment law.

## II. NGOs IN INTERNATIONAL DISPUTE SETTLEMENT

The notion of the "non-state actor" has become a core concept in international law, but, as rightly pointed out by several authors before,<sup>3</sup> it is not a

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<sup>3</sup> See, for example, Philip Alston, *The "Not-a-cat" Syndrome: Can the Human Rights Regime Accommodate Non-State Actors?*, in Philip Alston, ed., *Non-State Actors and Human Rights* 3 (Oxford 2005) (describing these terms as "negative [and] euphemistic").

very useful description because it is a negative one. As a consequence, an exact definition is still not entirely agreed upon, and the inclusion of international organizations and sub-state entities,<sup>4</sup> or criminal organizations and religious communities<sup>5</sup> in this category is not fully accepted. Nonetheless, despite suggesting only what it is not, the notion of non-state actors indicates where in the traditional international legal order these organizations are to be situated. In a legal system based and centered on states as the primary subjects, it seems appropriate to describe the other actors with respect to those primary actors. They are indeed characterized by the fact that they "are not states, and can never aspire to be such."<sup>6</sup> From a theoretical perspective, the binary division of actors into states and non-states or subjects and objects can be seen as too traditional an approach to international law,<sup>7</sup> but scholars seem to agree that most non-state actors, with the exception of international organizations, are not subjects of international law.<sup>8</sup> Other scholars, however, have vigorously opposed such a traditional perspective on the concept of subjectivity.<sup>9</sup>

Despite criticisms about the notions of non-state actors and subjectivity, and the growing importance of non-state actors in international relations, their

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<sup>4</sup> As pointed out by Virginia Leary, in the 1998 ASIL Annual Meeting, a Panel was called "The Accountability of International Organisations to Non-State Actors," somehow implying that international organizations are not to be considered non-state actors. See Virginia Leary, *Wrap-Up: Non-State Actors and Their Influence on International Law*, 92 Am Soc Intl L Proc 380, 386 (1998).

<sup>5</sup> See, for example, United Nations Office on Drugs and Crime Report to the UN General Assembly's Third Committee, Human Trafficking, Smuggling of Migrants, Corruption, Drug-Related Violence Highlighted as Debate Begins on Crime Prevention, International Drug Control, UN Doc GA/SHC/3848, 4 (Oct 4, 2006) (discussing, in a media release, the statements of Jean-Paul Laborde, Chief of the Terrorism Prevention Branch of UNDOC, on "[t]he threat posed by transnational and non-State actors involved in drugs and crime").

<sup>6</sup> Alston, "Not-a-cat" Syndrome at 19 (cited in note 3).

<sup>7</sup> Id (describing the expanding roles and new realities of non-state actors).

<sup>8</sup> See August Reinisch, The changing international legal framework for dealing with non-state actors, in Philip Alston, ed, *Non-State Actors and Human Rights* 70-71 (Oxford 2005); Ian Brownlie, *Principles of Public International Law* 65 (Oxford 2003) (noting that corporations today have no recognized legal personality).

<sup>9</sup> Rosalyn Higgins has, for example, argued that the notions of "subjects" and "objects" have no "credible reality" and no "functional purpose." See Rosalyn Higgins, *Problems and Process: International Law and How we Use It* 49 (Clarendon 1994). Other authors have advocated that "participation" in the international legal system should be the relevant criterion, instead of relying solely on the existing categories of subjects and objects, and thus have suggested a conceptualization of the international legal system as inclusive rather than exclusive of non-state actors. See, for example, Robert McCorquodale, *An Inclusive International Legal System*, 17 Leiden J Intl L 477, 497 (2004) ("[I]n reality non-state actors have a direct, influential, and independent participation in the international legal system. This participation is currently ignored by the adherents to the traditional doctrine.").

*formal* role either in law-making, implementation of law, or international dispute settlement has only very exceptionally been recognized.<sup>10</sup> The categorization of entities other than states as non-state actors does not thus imply that they are irrelevant in international law, but rather suggests that their participation has not yet been formalized. Indeed, the influence and informal involvement of non-state actors, such as NGOs, in various fields of international law and international relations is now beyond doubt.<sup>11</sup> As rightly noted by some authors, although NGO participation essentially and originally belongs to the realm of political science, the developments in their participation nevertheless have important legal implications.<sup>12</sup> Undoubtedly, non-state actor access to international dispute settlement has increased substantially in recent years, particularly through the proliferation of judicial institutions, which have granted standing to several non-state actors, above all, individuals and corporations.<sup>13</sup>

NGOs also have been granted direct access, as parties, to international proceedings. The European Court of Human Rights, the African Court of Human Rights, and the European Court of Justice have accepted direct NGO access.<sup>14</sup> In those cases, however, NGOs need to be *direct* victims of a violation of the law,<sup>15</sup> and thus a disputing party themselves, representing their own

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<sup>10</sup> Menno T. Kamminga, *The Evolving Status of NGO's under International Law: A Threat to the Inter-State System*, in Philip Alston, ed., *Non-State Actors and Human Rights* 109 (Oxford 2005). On the role of non-state actors in international dispute settlement, see: Eric De Brabandere, *Non-State Actors in International Dispute Settlement*, in Jean d'Aspremont, ed., *Participants in the International Legal System: Theoretical Perspectives* 342 (Routledge 2011) and Eric De Brabandere, *Non-State Actors and the Proliferation and Individualization of International Dispute Settlement*, in Bob Reinalda, ed., *The Ashgate Research Companion to Non-State Actors* 347 (Ashgate 2011).

<sup>11</sup> For information respecting NGO influence on treaty-making, see Alan Boyle and Christine Chinkin, *The Making of International Law* 62–77 (Oxford 2007).

<sup>12</sup> Kamminga, *The Evolving Status of NGOs* at 94 (cited in note 10) (noting that while complaints that NGO influence "on the international plane has been growing out of all proportion . . . [and] belong to the realm of political science," some points are "suitable for legal scrutiny").

<sup>13</sup> Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle* 31 *NYU J Intl L & Pol* 709, 710–11 (1999). Although principally noticeable in the areas of human rights and investment law, this development has been confirmed by various other international forums under which individuals can directly bring claims against states. Several "mass claims processes" have been established over the past decades, such as the Claims Resolution Tribunal for Assets Deposited in Swiss Banks, the German Forced Labour Compensation Programme, the Holocaust Victim Assets Programme, the UN Compensation Commission and the Iran-US Claims Commission. For an overview, see generally Howard M. Holtzmann and Edda Kristjansdóttir, eds., *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford 2007).

<sup>14</sup> See Luisa Vierucci, *NGOs Before International Courts and Tribunals*, in Pierre-Marie Dupuy and Luisa Vierucci, eds., *NGOs in International Law: Efficiency in Flexibility?* 156, 158–59 (Edward Elgar 2008).

<sup>15</sup> *Id.* at 157–63 (discussing various cases in which standing of NGOs was dismissed on these grounds).

interest. Other instances in which NGOs have gained access to dispute settlement mechanisms are principally in the area of international environmental law.<sup>16</sup> Article 9(2) of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) obliges member states to assure that "members of the public concerned having a sufficient interest have access to a review procedure."<sup>17</sup> Article 9(2) also notes that NGOs promoting environmental protection and meeting any requirements under national laws are deemed to have sufficient interest for the purpose of that paragraph. Although the Aarhus Convention grants wide standing to NGOs in environmental matters,<sup>18</sup> it should be stressed that this standing is essentially before domestic rather than international judicial bodies. But this standing nevertheless opened the door for NGO standing before regional courts such as the European Court of Justice.<sup>19</sup>

However, despite these interesting developments, *direct* NGO participation in international courts and tribunals generally remains relatively limited, and thus, their participation remains essentially a matter of domestic litigation.<sup>20</sup> Even those international courts that have broadened their access to non-state actors have not generally included NGOs as potential parties. For example, the access granted to non-state actors before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) is limited to companies and individuals of states' parties, although some have argued that if NGOs were to be considered international legal persons they may have standing before the ITLOS.<sup>21</sup> However, besides official participation as parties to disputes, the reality of the increased influence and role of NGOs in international law and international relations is a development that existing courts and tribunals have not been able to avoid. In particular, the ICJ has been confronted with requests for active participation by NGOs.

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<sup>16</sup> For an overview, see Malgosia Fitzmaurice, Note on the Participation of Civil Society in Environmental Matters. Case Study: The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 4 *Hum Rts & Intl Legal Discourse* 1, 47 (2010).

<sup>17</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art 9(2), ILM 517 (1998).

<sup>18</sup> Fitzmaurice at 55–56 (cited in note 16).

<sup>19</sup> See Teall Crossen and Veronique Niessen, *NGO Standing in the European Court of Justice—Does the Aarhus Regulation Open the Door?*, 16 *Rev of Eur Community & Intl Envir L* 332, 332 (2008) (arguing "that the Aarhus Regulation provides NGOs with a procedural right that brings NGOs within the standing requirements of the EC Treaty to access the ECJ").

<sup>20</sup> See Vierucci, *NGOs Before International Courts and Tribunals* at 160 (cited in note 14).

<sup>21</sup> Philippe Gautier, NGOs and Law of the Sea Disputes, in Tullio Treves, et al, eds, *Civil Society, International Courts and Compliance Bodies* 235–36 (TMC Asser 2005).

### III. NGOS AT THE INTERNATIONAL COURT OF JUSTICE

Taking into account the above considerations, it might seem odd to speak of participation of non-state actors before international courts such as the ICJ, whose statute clearly and explicitly rejects every possible type of direct participation of entities other than states in disputes brought before it.<sup>22</sup> However, the ICJ is increasingly confronted with non-state actor participation. In the two most recent advisory proceedings, for example, the ICJ accepted each time that the non-state actors that were directly concerned by the question posed to the Court could present both written and oral statements before the Court.<sup>23</sup> The Court has done so not by reference to a specific article of its statute or of the Rules of the Court, but by relatively pragmatic considerations.<sup>24</sup>

As far as NGOs are concerned, they have played a substantial, albeit informal, role in initiating certain cases before the ICJ. It is generally acknowledged, for example, that NGOs have been decisive in triggering the request for the ICJ advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>25</sup> As a result, the "Court and the judges received thousands of letters inspired by these groups, appealing both to the Members' conscience and to the public conscience."<sup>26</sup> These voluntary submissions have, however, not been formally acknowledged by the Court, due to explicit provisions in the Rules of

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<sup>22</sup> See Statute of the International Court of Justice (June 1945), Art 34 ("Only states may be parties in cases before the Court.").

<sup>23</sup> See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 19 December 2003, ICJ Reports 428, 429 (2003); ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, *Order of 17 October 2008*, ICJ Reports 409, 410, online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=3> (visited Apr 1, 2011).

<sup>24</sup> In the *Wall* advisory opinion for example, the Court justified the intervention of Palestine but stated that:

... in light of General Assembly resolution A/RES/ES-10114 and the report of the Secretary-General transmitted to the Court with the request, and taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement on the question within the above time-limit.

ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports at 429 (2003) (cited in note 23).

<sup>25</sup> Manfred Mohr, *Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons under international law—A few thoughts on its strengths and weaknesses*, 316 *Intl R Red Cross* 92, ¶¶ 2–8 (1997).

<sup>26</sup> *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 287 ¶ 2 (1996) (separate opinion of J Guillaume).

the Court regarding third-party submissions.<sup>27</sup> But this development has not gone unnoticed and has in fact been severely criticized by several ICJ Judges, among them Judge Guillaume, who noted in his separate opinion that, given the active involvement of NGOs before and during the proceedings, the Court "could have considered declining to respond to the request for an advisory opinion." Indeed, Judge Guillaume wondered whether, "in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them," but then concluded by saying, "I dare to hope that Governments and intergovernmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media."<sup>28</sup>

In *contentious cases*, the ICJ Statute allows the Court to request a "public international organization" to furnish information relevant to a case before the Court.<sup>29</sup> The Statute also permits a public international organization to provide, on its own initiative, information relevant to a case before the Court.<sup>30</sup> To avoid any ambiguity, the last paragraph of that article clarifies that a "public international organization" is an international organization of States,<sup>31</sup> thus explicitly excluding NGOs from submitting briefs or being heard by the ICJ in contentious cases. An attempt by the International League for the Rights of Man to request permission from the ICJ to submit information to the Court in the *Columbian-Peruvian Asylum Case* was rejected by the Court on the ground that the League was not a public international organization as envisaged by the Statute.<sup>32</sup>

On occasion, however, states include amicus curiae briefs of NGOs in their written submissions,<sup>33</sup> in which case these submissions officially form part of the state's submission. Technically such submissions can no longer be

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<sup>27</sup> For an extensive treatment of the drafting history and meaning of the relevant provisions of the ICJ Statute with respect to participation by "international organizations," see Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 Am J Intl L 612, 619-28 (1994).

<sup>28</sup> Separate Opinion of Judge Guillaume ¶ 2 (cited in note 26).

<sup>29</sup> International Court of Justice, Art 34(2).

<sup>30</sup> Id.

<sup>31</sup> Id at Art 34(3).

<sup>32</sup> ICJ, *Columbian-Peruvian Asylum Case*, Judgments of 20 and 27 November 1950, ICJ Reports, Vol II Oral proceedings-Documents-Correspondence, Part IV: Correspondence, 228 (1950) online at <http://www.icj-cij.org/docket/files/7/8909.pdf> (visited Apr 18, 2011).

<sup>33</sup> In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case for example, Hungary attached a number of NGO reports as annexes ("scientific report") to its submission. See *Memorial of the Republic of Hungary*, Vol 5, Annexes, Part 1 and Vol 5, Annexes, Part 2 (May 2, 1994), online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=8d&case=92&code=hs&p3=1> (visited Apr 1, 2011).



considered as amicus curiae briefs since the state that has included the briefs in its submissions, to a certain extent, can be considered to have endorsed the views expressed therein.

In *advisory proceedings*, the statute provides that the Court may invite any "international organization" that the Court considers likely to be able to furnish information on the question to submit written statements or hear oral statements relating to the question.<sup>34</sup> The use here of the term "international organization" in the rules relating to advisory proceedings—as opposed to "public international organization" in contentious cases—has prompted several commentators to point out that NGOs would on that ground be able to submit written statements to the Court.<sup>35</sup> However, whether or not the drafters of the statute intended this distinction is highly debatable.<sup>36</sup> Practice confirms that the ICJ is relatively reluctant to admit such participation. Except on one occasion, which was not followed by the actual submission of a written statement,<sup>37</sup> the Court has never officially requested any written submission by an NGO.<sup>38</sup>

In the most recent request for an advisory opinion, the ICJ limited those entities likely to provide information on the question submitted to the Court to the UN and its Member States.<sup>39</sup> In practice, as noted already with respect to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court spontaneously receives many amicus curiae briefs by various NGOs.<sup>40</sup> When NGOs submit briefs to the Court in advisory proceedings, the Court treats the briefs merely as factual information placed at the disposal of the judges without officially considering them as amicus curiae briefs. Therefore, the briefs do not form part of the record in those cases. In practice, the Court has made the

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<sup>34</sup> International Court of Justice, Art 66(2).

<sup>35</sup> See Shelton, *The Participation of Nongovernmental Organizations* at 619–28 (cited in note 27) ("[E]ven without amending the Rules, the Court could permit a[n NGO] that so requested to submit information [in a contentious case] in the form of an expert opinion.").

<sup>36</sup> See also Eduardo Valencia-Ospina, *Non-Governmental Organizations and the International Court of Justice*, in Tullio Treves, et al, eds, *Civil Society, International Courts and Compliance Bodies* 230 (TMC Asser 2005).

<sup>37</sup> ICJ, *International Status of South-West Africa* Advisory Opinion (July, 11 1950), [1950] ICJ Reports, 130 (stating that the League of the Rights of Man did not submit a writing within the specified time period).

<sup>38</sup> Valencia-Ospina, *Non-Governmental Organizations and the International Court of Justice* at 230 (cited in note 36) (discussing the Advisory Opinion of 11 July 1950 on the International Status of South-West Africa).

<sup>39</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, ICJ Reports at 410 (cited in note 23).

<sup>40</sup> Valencia-Ospina, *Non-Governmental Organizations and the International Court of Justice* at 230–32 (cited in note 36).

submissions available to the members of the Court by placing them in the library.<sup>41</sup> It is thus difficult, if not impossible, to assess the effective impact of the submissions of NGOs on the outcome of the Court's decision. This custom has since then been enshrined in the ICJ's practice directions.<sup>42</sup> The relative reluctance by the Court to accept amicus curiae briefs stands, however, in sharp contrast with the practice developed in international economic and investment law.

#### IV. NGO PARTICIPATION IN ECONOMIC AND INVESTMENT DISPUTES

NGOs have principally benefited from the openings created by the expansion of legal dispute settlement mechanisms in recent decades by gaining access to international economic and investment dispute settlement procedures via amicus curiae submissions. NGO participation in international economic and investment disputes is part of a much broader phenomenon. First, participation of NGOs in economic and investment law entails more than their sole participation as amici curiae in dispute settlement procedures. It includes, for example, consultation.<sup>43</sup> Secondly, amicus curiae briefs by NGOs and other private parties are, either formally or in practice, accepted in several other courts and tribunals such as the European Court of Human Rights,<sup>44</sup> the Inter-American Court of Human Rights,<sup>45</sup> and international criminal tribunals and courts.<sup>46</sup> Moreover, although principally used in practice to give a voice to NGOs, the practice of amicus curiae briefs has been extended to other private or public organizations and individuals.<sup>47</sup>

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<sup>41</sup> Id at 231.

<sup>42</sup> ICJ, *Practice Directions* XII, online at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (visited Apr 1, 2011).

<sup>43</sup> For an overview of NGO involvement in the WTO, see generally Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 *J Intl Econ L* 717 (2008).

<sup>44</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Art 36(2) (1953), 213 UN Treaty Ser 221 ("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.").

<sup>45</sup> See Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* 214 (Cambridge 2003).

<sup>46</sup> See Sarah Williams and Hannah Woolaver, *The Role of the Amicus Curiae Before International Criminal Tribunals*, 6 *Intl Crim L Rev* 151, 152 (2006) ("The amicus curiae brief has also found favor in proceedings before international courts and tribunals.").

<sup>47</sup> The Venice Commission of the Council of Europe for example frequently intervenes as amicus curiae before the European Court of Human Rights. See for example: European Commission for

In the area of international economic and investment law, NGO participation as amici curiae has explicitly, but compared to other mainly human rights courts and tribunals only recently, been accepted in several judicial decisions. This Section starts with an overview of the legal aspects of NGO participation in international economic and investment disputes. It then addresses the rationale and appropriateness of such submissions in WTO proceedings and investment arbitration, and concludes with an assessment of the effectiveness of such submissions in light of the described developments.

#### A. The Legality of NGO Participation as Amicus Curiae

When tribunals are first confronted with NGOs' voluntarily submitting briefs, the tribunals or courts that have to assess the legality and acceptability of such interventions are often faced with the absence of specific regulations or rules both in international law generally and in their own statutes or rules of procedure. These statutes and regulations often contain explicit rules only on the procedure of third-party intervention, which enables a third state to participate directly as a party in the proceedings provided that it has a legal interest that may be affected by the decision in the case.<sup>48</sup> That procedural mechanism is fundamentally different from the participation as amicus curiae. Nevertheless, despite the original absence of any explicit provision allowing amicus curiae interventions, the legality of this practice has been accepted in both WTO proceedings and investment arbitration.

##### 1. NGOs in the WTO Dispute Settlement System

The acceptance of NGO participation through amicus curiae submissions in the context of international trade is particularly remarkable since it gives NGOs access to international dispute settlement to represent a non-state interest, even though the essence of the dispute relates purely to international legal obligations of states. The reason why only states have, to date, access to the WTO Dispute Settlement System is that the obligations contained in the Agreement Establishing the World Trade Organization are purely inter-state

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Democracy Through Law (Venice Commission), Amicus Curiae Opinion (Proceedings before the European Court of Human Rights), On the Nature of the Proceedings Before the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, Opinion no. 337 / 2005, Doc. Nr. CDL-AD(2005)020, (15 June 2005), online at [http://www.venice.coe.int/docs/2005/CDL\(2005\)093e.asp](http://www.venice.coe.int/docs/2005/CDL(2005)093e.asp) (visited May 11, 2011)

<sup>48</sup> See, for example, International Court of Justice, Art 62(1) ("Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.").

obligations, although the activity regulated by the WTO is by its very nature commercial. Such activity is principally, if not almost exclusively, the prerogative of private actors.<sup>49</sup> The purely inter-state obligations arising out of the WTO explain the absence of direct standing of individuals or corporations in the WTO Dispute Settlement System.<sup>50</sup> However, many, if not most, WTO cases in effect directly concern disputes between corporations, and it has often been pointed out that the initiation and resolution of trade disputes under the WTO Dispute Settlement Understanding (DSU) are a direct consequence of the lobbying of corporations and other industry lobbying groups.<sup>51</sup>

The *Shrimp-Turtles* dispute was the first WTO dispute involving NGO participation in proceedings through the submission of an amicus curiae brief. The case was first brought before a WTO Special Panel. Three groups of NGOs submitted briefs to the panel in order to influence the Panel's decision.<sup>52</sup> The Panel rejected on legal grounds the unsolicited information provided by these three NGOs.<sup>53</sup> In doing so, the Panel essentially relied on an *a contrario* interpretation of Article 13.2 of the DSU,<sup>54</sup> which provides that Panels have the right to *seek* information. The Panel thus found that the submission of information by private parties cannot be made voluntarily but only by the specific and explicit request of the Panel.<sup>55</sup> The Panel did not decide that such submissions would be useless or inappropriate, but instead refused *as a matter of principle* to allow parties, other than the disputant states and third parties who are explicitly allowed to intervene under the DSU, to intervene in WTO Proceedings.

The Panel Report was appealed to the WTO Appellate Body, who rejected the *a contrario* interpretation given by the Panel.<sup>56</sup> The Appellate Body first confirmed that every state has the right to attach amicus curiae briefs to its own

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<sup>49</sup> Eric Canal-Forgues, *Le Règlement des Différends à l'OMC* 18 (Bruylant 2004) (French).

<sup>50</sup> Id.

<sup>51</sup> Gregory C. Schaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* 144-46 (Brookings Institute 2003). See also Aaron Catbagan, *Rights of Action for Private Non-State Actors in the WTO Dispute Settlement System*, 37 *Denver J Intl L & Policy* 279, 281-82 (2008).

<sup>52</sup> See generally WTO, *Report of the Panel, United States: Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc No WT/DS58/R (May 15, 1998) ("*Shrimp/Turtle—Report of the Panel*").

<sup>53</sup> Id ¶ 3.129.

<sup>54</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, 33 ILM 1197 (1994) (hereinafter "*DSU Annex 2*").

<sup>55</sup> *Shrimp/Turtle—Report of the Panel* ¶ 3.131 (cited in note 52).

<sup>56</sup> WTO, *Report of the Appellate Body, United States: Import Prohibition of Certain Shrimp and Shrimp Products* ¶¶ 102-10, WTO Doc No WT/DS58/AB/R (Oct 12, 1998).

submissions, and then drew a distinction, as the Panel did, between those briefs and briefs that are not part of the official submission of a state.<sup>57</sup> With regard to the first type, the panel is obliged to take into consideration the submission since it is part of the official submission of the state. As far as *voluntary* submissions by NGOs are concerned, the Appellate Body argued that there is no rule in the WTO DSU that prohibits panels from accepting information voluntarily submitted, since “authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested.”<sup>58</sup> The Appellate Body thus noted that panels have discretionary authority either to accept and then consider or to outright reject the information and advice submitted by NGOs. The principles laid out by the Appellate Body have since, with several exceptions, been confirmed by the practice of the Panels. For example, in the *Asbestos* case, the Panel took into consideration two NGO briefs that the EC had decided to incorporate into its own submissions.<sup>59</sup> In *Australia—Salmon*, the Compliance Panel explicitly invoked the Appellate Body’s decision as well as Article 13.1 of the DSU, to support the acceptance of unsolicited information as part of the record.<sup>60</sup>

With respect to the submission of *amicus curiae* briefs to the Appellate Body, the Appellate Body decided in a subsequent case that it had, relatively similarly to the panels, the authority to accept and consider *amicus curiae* briefs if it finds it “pertinent and useful to do so.”<sup>61</sup> The Appellate Body based this authority not only on the absence of any prohibition to this effect in the DSU, but also on its broad authority to adopt procedural rules, since under the DSU, it has the right to draw up its working procedures.<sup>62</sup> The Appellate Body has confirmed its jurisprudence in later cases, and has even elaborated upon rules

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<sup>57</sup> Id ¶ 89 (“We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant’s submission.”). See also id ¶ 110.

<sup>58</sup> Id ¶ 108.

<sup>59</sup> WTO, Report of the Panel, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products* ¶ 6.3, WTO Doc No WT/DS135/R (Sept 18, 2000) (hereinafter “EC Asbestos”).

<sup>60</sup> WTO, Panel Compliance Reports, *Australia: Measures Affecting Importation of Salmon* (Art 21.5) ¶ 7.8, WTO Doc No WT/DS18/RW (Feb 18, 2000).

<sup>61</sup> WTO, Report of the Appellate Body, *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ¶ 42, WTO Doc No WT/DS138/AB/R (May 10, 2000) (hereinafter “US—Lead and Bismuth II”).

<sup>62</sup> DSU Annex 2, Art 17.9 (cited in note 54). For an assessment of the Appellate Body’s interpretation of this article, see Arthur E. Appleton, *Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body’s Hat?*, 3 J Intl Econ L 691, 694–95 (2000).

containing requirements for the submission of amicus curiae briefs in the *Asbestos* case.<sup>63</sup> The WTO Appellate Body has on occasion also confirmed that individuals and NGOs have no *legal right* to make submissions to the Appellate Body, and that therefore the Appellate Body has no legal duty either to accept or to consider unsolicited amicus curiae briefs submitted by NGOs or individuals.<sup>64</sup> Contrary to several decisions in international investment law, addressed next, the Appellate Body did not initially clearly state the reasons behind its interpretation of the WTO DSU, nor did it say on what grounds such submissions would be considered not pertinent or appropriate. It merely noted that panels have relatively broad discretion to accept, reject, or consider amicus curiae briefs. Since these groundbreaking decisions, *member states* have also requested and been granted permission to submit amicus curiae briefs to the WTO Appellate Body.<sup>65</sup>

The practice set in motion by the WTO Appellate Body has triggered similar developments in other related fields of international law. In particular, international investment arbitral tribunals have accepted amicus curiae submissions by NGOs, despite the fact that the dispute settlement system is traditionally closed to participation by non-disputing parties.

## 2. NGOs in international investor-state arbitration

The participation of NGOs in international investment arbitration has developed along the same lines as NGO involvement in the WTO system. Investment arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which established the International Centre for Settlement of Investment Disputes (ICSID) initially contained no explicit reference to the submission of amicus curiae briefs. The

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<sup>63</sup> WTO, Report of the Appellate Body, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products* ¶ 52, WTO Doc No WT/DS135/AB/R (Mar 12, 2001) (hereinafter "*EC Asbestos* (Appellate Body)"). For the views and criticism of the WTO Member States, see generally WTO General Council, *Minutes of Meeting Held in the Centre William Rappard on 22 November 2000*, WTO Doc No WT/GC/M/60 (Jan 23, 2001).

<sup>64</sup> US—Lead and Bismuth II ¶ 41.

<sup>65</sup> In *EC Sardines*, for example, the Appellate Body accepted a submission by Morocco. The Appellate Body justified its decision by noting that they will not "treat Members less favourably than non-Members with regard to participation as *amicus curiae*," [emphasis in the original text] and that since they had already decided that they had the authority to receive amicus curiae briefs from NGOs, they were *a fortiori* entitled to accept briefs from a WTO Member. The Appellate Body again relied on the fact that although the DSU contained explicit rules on the participation of Members States as *third parties to the dispute*, this could not be interpreted as meaning that Members are prohibited from submitting briefs to the Court as amici curiae. WTO, Appellate Body Report, *European Communities: Trade Description of Sardines* ¶¶ 164-67, WTO Doc No WT/DS231/AB/R (Sept 26, 2002) (hereinafter "*EC Sardines*").

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules neither explicitly authorize nor explicitly prohibit an arbitral tribunal to accept an amicus curiae brief.<sup>66</sup> At the same time, the UNCITRAL Rules convey to the tribunal a large amount of discretion in terms of procedural rules and principles, limited only by contrary party agreement and the principle of equality.

Article 15.1 of the UNCITRAL Arbitration Rules states that ‘the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.’ The Iran-US Claims Tribunal, which functions under an amended and modified version of the UNCITRAL Arbitration Rules, has adopted an interpretative note to Article 15 of the Rules in which it authorized the submission of amicus curiae briefs by parties other than Iran or the US only “under special circumstances.”<sup>67</sup> Although non-party submissions in proceedings before the Iran-US Claims Tribunal have been relatively limited,<sup>68</sup> the principled acceptance by the Tribunal of the authority to receive and consider amicus curiae submissions in accordance with the UNCITRAL Arbitration Rules was used for subsequent investment arbitrations, which similarly had to decide on the acceptability of amicus curiae briefs.

In 2001, in the ground-breaking *Methanex* decision,<sup>69</sup> a NAFTA Chapter 11 Arbitral Tribunal, by referring to the case law of the Iran-US Claims Tribunal and the cases before the WTO mentioned above, concluded that it had the power to accept amicus curiae briefs. The Tribunal considered that neither the UNCITRAL Arbitration Rules nor Chapter 11 of the NAFTA Agreement

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<sup>66</sup> UN General Assembly, UNCITRAL Arbitration Rules, GA Res 31/98 (Dec 15, 1976) (adopted by UNCITRAL on Apr 28, 1976).

<sup>67</sup> Iran-United States Claims Tribunal, Tribunal Rules of Procedure, Notes to Article 15 ¶ 5 (May 3, 1983), online at <http://www.iusct.org/tribunal-rules.pdf> (visited Apr 1, 2011).

<sup>68</sup> Jack J. Coe, The Tribunal’s Transparency Features: Some Observations, in Christopher R. Drahozal and Christopher S. Gibson, *The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State and International Arbitration* 132 (Oxford 2007).

<sup>69</sup> In the Matter of an International Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Between Methanex Corporation and the United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’ ¶ 32 (Jan 15 2001), online at <http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf> (visited Apr 1, 2011) (“Methanex”) (“[T]he receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving states and non-state parties.”).

contained any explicit provision concerning amicus curiae briefs.<sup>70</sup> The Tribunal noted that, as mentioned above, Article 15 of the UNCITRAL Arbitration Rules gives the Tribunal a lot of discretion in terms of procedural rules.<sup>71</sup> The *Methanex* Tribunal also rightly pointed out that accepting amicus curiae briefs from a party other than a disputing party is not the equivalent of adding that entity as a party to the arbitration.<sup>72</sup>

It is important to point out that the Tribunal in *Methanex* invoked the need for greater transparency. It also called for the involvement in the case of issues relating to the "public interest" in support of the authority for the tribunals to receive NGO submissions.<sup>73</sup> The Tribunal in that case also clearly distinguished between the general capacity of a Tribunal to accept amicus curiae briefs by NGOs, which is founded on the legal arguments mentioned above, and the appropriateness of the effective acceptance of such briefs in a *particular* case, which this Article will address in the next section.<sup>74</sup>

Since *Methanex*, the NAFTA Free Trade Commission has issued a statement confirming that no provision in NAFTA limits the discretionary authority of arbitral tribunals to accept submissions of non-disputing parties.<sup>75</sup> The Statement also recommended that Chapter 11 Tribunals adopt the outlined procedure that inter alia establishes certain requirements that will be discussed in the next section.

The principled decision in *Methanex* was followed by the acceptance of amicus curiae briefs in several subsequent NAFTA Chapter 11 arbitrations, including *UPS*<sup>76</sup> and *Glamis*.<sup>77</sup> It is interesting to note that the Tribunal in *Glamis*

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<sup>70</sup> Id ¶ 47. See generally Patrick Dumberry, The Admissibility of Amicus Curiae Briefs by NGOs in Investor-States Arbitration: The Precedent Set by the Methanex Case in the Context of NAFTA Chapter 11 Proceedings, 1 Non-State Actors and Intl L 201 (2001).

<sup>71</sup> *Methanex* ¶¶ 29–32.

<sup>72</sup> Id ¶ 30.

<sup>73</sup> See Section IV.B.1.

<sup>74</sup> See Section III.B.

<sup>75</sup> Statement of the Free Trade Commission on Non-Disputing Party Participation ¶ A.1, online at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> (visited Apr 1, 2011).

<sup>76</sup> See generally An Arbitration under Chapter 11 of the North American Free Trade Agreement between United Parcel Service of America Inc. (UPS) v Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct 17, 2001), online at [http://naftaclaims.com/disputes\\_canada\\_ups.htm](http://naftaclaims.com/disputes_canada_ups.htm) (visited Apr 1, 2011) ("UPS").

<sup>77</sup> See generally An Arbitration Under Chapter 11 of the North American Free Trade Agreement (NAFTA), in Accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and Administered by the International Centre for Settlement of Investment Disputes (ICSID), *Glamis Gold, Ltd v The United States of America*, Decision on



explicitly grounded the authority to receive and consider this and other briefs in the aforementioned "Statement of the Free Trade Commission on non-disputing party participation,"<sup>78</sup> without assessing the conformity of such submission with the UNCITRAL Arbitration rules.<sup>79</sup>

Although an early Tribunal decision had refused such submissions based on a rather restrictive interpretation of the consensual nature of investment arbitration,<sup>80</sup> several ICSID Tribunals in subsequent cases have confirmed the authority to receive amicus curiae briefs. In *Suez/Vivendi*, an ICSID Tribunal for the first time accepted the authority to receive amicus curiae briefs.<sup>81</sup> The authority of the panel to receive and consider amicus curiae briefs was founded on Article 44 of the ICSID Convention, which grants the arbitral tribunal the power to decide procedural questions that are not regulated by the rules of the ICSID convention,<sup>82</sup> and explicitly referred to the *Methanex* Tribunal's interpretation of Article 15 of the UNCITRAL Rules. The *Suez/Vivendi* Tribunal again emphasized that participation as amicus curiae is not the equivalent of participation as a party to the arbitration, and reiterated that the function of an amicus curiae is to provide assistance to a court or tribunal by offering expertise and arguments that the parties might not provide.<sup>83</sup>

The decision of the Tribunal in *Suez/Vivendi* has been followed by a formal acceptance of the authority for investment tribunals to receive amicus curiae briefs in both the ICSID rules and several Bilateral Investment Treaties. As a result of this case, the ICSID Rules of Arbitration were amended in 2006 to now include explicitly, under certain conditions, the capacity for a tribunal to allow a non-disputing party with a significant interest in the case to file a written submission.<sup>84</sup> The amended rules have had an immediate impact on NGO participation in investment arbitration. In *Biwater Gauff*, for example, the parties

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Application and Submission by Quechan Indian Nation (Sept 16, 2005), online at [http://www.naftaclaims.com/disputes\\_us\\_glamis.htm](http://www.naftaclaims.com/disputes_us_glamis.htm) (visited Apr 1, 2011) ("Glamis").

<sup>78</sup> Id ¶ 10.

<sup>79</sup> Id ¶ 8.

<sup>80</sup> *Agua del Tunari, SA, v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Appendix III Text of Jan 29, 2003 Letter from the Tribunal to Earthjustice, Counsel for Petitioners 574-76 (Oct 21, 2005).

<sup>81</sup> See generally *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Participation as Amicus Curiae (May 19, 2005) (hereinafter "*Suez/Vivendi*").

<sup>82</sup> Id ¶ 16.

<sup>83</sup> Id ¶ 13.

<sup>84</sup> ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ch 9, Rule 37(2), online at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) (visited Apr 1, 2011).

accepted the application of this new rule to the dispute even though the dispute had been initiated before the new ICSID rules entered into force.<sup>85</sup> Suggestions to amend the UNCITRAL arbitration rules when applied in the same manner to international investment arbitration have not yet been adopted.<sup>86</sup>

These developments have prompted certain states to also include the possibility for NGOs to submit amicus curiae briefs, and the limitations thereto, in their bilateral investment treaties.<sup>87</sup> In the United States–Uruguay Bilateral Investment Treaty, for example, the parties have agreed that the arbitral tribunal has the authority to accept and consider amicus curiae submissions from “a person or entity that is not a disputing party.”<sup>88</sup>

## B. The Rationale and Appropriateness of NGO Participation

Certain international investment tribunals operating both under NAFTA Chapter 11 and the ICSID Convention have, from the start, distinguished between establishing the legality of NGO participation as amici curiae and the *appropriateness* of submissions in a particular case, linked to the particular non-state or non-corporate interest of that case. As already briefly noted, they have also advanced the “public character” of the dispute as part of their reasoning on the legality of NGO submissions in those cases. The participation of NGOs in international dispute settlement has been noticeable principally in cases involving matters of public interest, namely in cases relating to the environment and water in their connection with trade and foreign investment. In that sense, NGO participation is not necessarily to the benefit of the tribunal or court, but rather to the benefit of a greater “public interest,” since the participation increases the legitimacy, transparency and openness of international investment arbitration and international economic dispute settlement.<sup>89</sup> The Revised ICSID

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<sup>85</sup> *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 5 ¶ 16 (Feb 2, 2007).

<sup>86</sup> See Jan Paulsson and Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, online at [http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf) (visited Apr 1, 2011). See also Center for International Environmental Law and International Institute for Sustainable Development, *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations* (Dec 2007), online at [http://www.iisd.org/pdf/2007/investment\\_revising\\_uncitral\\_arbitration.pdf](http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf) (visited Apr 1, 2011).

<sup>87</sup> For an overview, see Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 Rev of Eur Community & Intl Envir L 230, 232–33 (2007).

<sup>88</sup> Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Art 28(3) (Nov 4, 2005), online at <http://tcc.export.gov/static/Uruguay-11.4.05.pdf> (visited Apr 1, 2011).

<sup>89</sup> See Sands and Mackenzie, *International Courts and Tribunals* ¶¶ 29–31 (cited in note 2).

Rules on Arbitration, which now confirm the legality of such participation, can be seen as evidence of the need to enhance the transparency of international investment arbitration, which by definition has a high public interest.

However, the possibility of amicus curiae submissions is not unrestricted. In practice, panels, courts, and tribunals have pointed out that such submissions need to conform to certain conditions. These conditions boil down to the rationale behind such participation—first, the “public” interest character of the dispute and the role of the NGO as representative of that interest, and second, the consequent utility of the brief in assisting the tribunal in the sense that it presents arguments different from those of the disputing parties. Both conditions relate to the same requirement of the existence of a “public interest” different from the interests of states and corporations. Indeed, the requirement of the utility of the brief in assisting the tribunal by presenting arguments *different from those of the disputing parties* implies that the NGO in fact should represent a “public,” that is, a non-state, non-corporate interest.

1. NGOs as representatives of the “public interest” in international economic and investment proceedings.

Since international economic and investment dispute settlement is traditionally open only to states and corporations or individual investors, only state and investor interests are represented at such proceedings, thus effectively excluding broader public or transnational interests. The interstate character of the WTO dispute settlement mechanism has therefore traditionally been regarded as closed, lacking both transparency and legitimacy. In reference to the WTO, the “Sutherland Report” noted that the “degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution.”<sup>90</sup> The closed and secret character of international investment arbitration is principally the consequence of the fact that the rules used for such procedures are based on the procedural rules of international commercial arbitration,<sup>91</sup> although the object of international investment disputes clearly differs from that of traditional commercial arbitration.

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<sup>90</sup> *The Future of the WTO: Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi* ¶ 261 (2004), online at [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm) (visited Apr 1, 2011).

<sup>91</sup> See Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration, Substantive Principles* 46 (Oxford 2008) (“[S]uch arbitrations resemble closely international commercial arbitrations.”); Charles H. Brower II, *Structure, Legitimacy, and NAFTA’s Investment Chapter*, 36 *Vand J Transnatl L* 37, 65 (2003).

NGO participation is often perceived as a method to remedy these problems.<sup>92</sup> The "broader" interests represented by NGOs can either be general and related to human rights or environmental issues, or relatively specific or sectoral, such as the representation of the rights of a particular social group affected by the tribunal's or court's decision and otherwise having no access to the proceedings. The rationale of NGO participation as amici curiae therefore also, relatively paradoxically, acts as inherent limitation to this participation. It should also be noted that when states have included amicus curiae briefs in their proceedings, the "public interest" function of NGOs disappears since then the interests represented by that state can, to a certain extent, be seen as coinciding with the "public interest" represented by the NGO.

Investment arbitration notwithstanding, the need to enhance the transparency of WTO proceedings and to allow access by NGOs to represent interests other than those of the states has never explicitly been invoked as a justification for accepting NGO submissions, although it might have been the unstated justification of the legality of such submissions. For example, in the groundbreaking *Shrimp/Turtle* case, the Appellate Body did not address the appropriateness of NGO submissions, nor did it analyze the rationale behind such participation—it only established the legality of NGO submissions.<sup>93</sup> In *US—Lead and Bismuth II*, the Appellate Body simply noted that it would accept unsolicited submissions if it finds it "pertinent and useful to do so."<sup>94</sup>

The presence of issues of public concern in later cases has not necessarily resulted in an effective admission of briefs. In the *Asbestos* case, the Appellate Body drafted rules (Additional Procedure) for the submission of briefs and included the requirement to "specify the nature of the interest the applicant has in this appeal."<sup>95</sup> The drafting of an Additional Procedure was clearly inspired by the fact that the case involved issues relating to the "public interest," and the Appellate Body was, for that reason, expecting a huge number of amicus curiae submissions by NGOs. The "broader" interest present in the case can easily be illustrated by the number of NGOs that have attempted to file applications; after the adoption of the Additional Procedure by the Appellate Body, some seventeen NGOs had submitted applications.<sup>96</sup> Despite the initial apparent

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<sup>92</sup> See Van den Bossche, 11 J Intl Econ L717 (cited in note 43) (discussing the arguments for and against NGO participation, as well as the various forms that such participation can and does take).

<sup>93</sup> *US—Shrimp/Turtle* ¶¶ 102–10 (cited in note 56).

<sup>94</sup> *US—Lead and Bismuth II* ¶ 42 (cited in note 61).

<sup>95</sup> *EC Asbestos* (Appellate Body) ¶ 52 (cited in note 63).

<sup>96</sup> *Id* ¶ 55.

willingness of the Appellate Body to admit amicus curiae briefs, the Appellate Body rejected all received applications and no NGO was granted leave to submit a brief.<sup>97</sup>

In the *EC Biotech* case<sup>98</sup>, a case that also had a high "public interest" character since it raised important issues relating to the environment and health,<sup>99</sup> a WTO Panel confirmed its discretionary authority to receive amicus curiae briefs generally and accepted the information submitted by the amici curiae into the record of the case.<sup>100</sup> However, when it came to the point in the case where it would actually *consider* the information submitted by NGOs, the Panel simply noted that in rendering its decision it "did not find it necessary to take the amicus curiae briefs into account."<sup>101</sup> Considering the importance of the issues at stake, this decision was seen by many as a confirmation of the closed nature of the proceedings before the WTO.<sup>102</sup>

Contrary to WTO Proceedings, many tribunals in investment arbitration have explicitly invoked the need for greater transparency in "public interest" cases to support the idea of NGO participation as amici curiae. The *Methanex* Tribunal noted that the proceedings presented an issue of public interest since it involved the provision of public services and matters relating to health, which thus "extends far beyond those [interests] raised by the usual transnational arbitration between commercial parties."<sup>103</sup> The Tribunal further noted that NAFTA Chapter 11 Arbitration could benefit from being "more open or transparent."<sup>104</sup> Similarly, the Arbitral Tribunal in *UPS* recalled the recent focus on ensuring greater transparency in international investment arbitration, which cannot be "equated to the standard run of international commercial arbitration between private parties."<sup>105</sup> In that case, the Tribunal thus accepted the representation of the labor rights of Canadian postal workers via amicus curiae submissions. In *Glamis*, NGO participation enabled indigenous peoples to

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<sup>97</sup> Id ¶¶ 56–57.

<sup>98</sup> WTO, Report of the Panel, *European Communities: Approval and Marketing of Biotech Products*, WTO Doc No WT/DS291/R (Sept 29, 2006) (hereinafter "*EC Biotech*").

<sup>99</sup> See generally Robyn Eckersley, A Green Public Sphere in the WTO?: The Amicus Curiae Interventions in Transatlantic Biotech Dispute, 13 *Eur J Intl Relations* 329 (2007).

<sup>100</sup> *EC Biotech*, WTO Doc No WT/DS291/R at ¶ 7.11 (cited in 98)

<sup>101</sup> Id.

<sup>102</sup> See Eckersley, 13 *Eur J Intl Relations* at 348–49 (cited in note 99).

<sup>103</sup> *Methanex* ¶ 49 (cited in note 69).

<sup>104</sup> Id.

<sup>105</sup> *UPS* ¶ 70 (cited in note 76).

participate in proceedings.<sup>106</sup> The *Glamis* Tribunal has indeed accepted submissions by, inter alia, the Quechan Indian Nation who could be affected by the outcome of the tribunal's decision and would have, but for the participation through amicus curiae submissions, no access to the arbitral tribunal. The Statement of the Free Trade Commission that followed the *Methanex* decision also confirmed both the rationale and the limitations of amicus curiae briefs. The Statement requires the Tribunals to assess, inter alia, whether the non-disputing party has "a significant interest in the arbitration[,] and whether there is 'a public interest in the subject-matter of the arbitration.'"<sup>107</sup> The latter will, however, often be satisfied in international investment arbitration.

As far as ICSID arbitration is concerned, the *Suez/Vivendi* Tribunal explained the appropriateness of accepting amicus curiae briefs by noting that the case not only involved matters of public interest, which are present in all ICSID cases, but that in this case, there was a "particular public interest"—the involvement of issues with respect to the water distribution and sewage systems of the city of Buenos Aires and surrounding municipalities. The Tribunal thus noted that those systems provide

basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.<sup>108</sup>

In the end, the *Suez/Vivendi* Tribunal accepted that the NGOs submit a single joint amicus curiae submission.

The ICSID Rules on Arbitration were amended in 2006 and now require the Tribunal, in determining whether or not to allow the submission of a brief, to consider, inter alia, the extent to which the *amicus* "has a significant interest in the proceeding."<sup>109</sup> In *Biwater Gauff*, the Tribunal quoted the order in both the *Methanex* and the *Suez/Vivendi* cases with respect to the public interest character of these disputes.<sup>110</sup> The Tribunal equally noted, again quoting the *Methanex* decision, that even if it were admitted that there was no special or wider interest

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<sup>106</sup> See generally Megan Davis, *New Developments in International Advocacy: Amicus Curiae and the World Trade Organisation*, 28 *Indigenous L Bull* (2003), online at <http://www.austlii.edu.au/au/journals/ILB/2003/28.html> (visited Apr 1, 2011).

<sup>107</sup> Statement of the Free Trade Commission on Non-Disputing Party Participation ¶ B.6(c)–(d) (cited in note 75).

<sup>108</sup> *Suez/Vivendi* ¶ 19.

<sup>109</sup> ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) at ch 4, Rule 37(2)(c) (cited in note 84).

<sup>110</sup> *Biwater Gauff* (Procedural Order) ¶¶ 51–52.

at stake, the arbitral process could generally benefit from increased transparency.<sup>111</sup> Thus, the Tribunal accepted the submission of a single brief by five NGOs, but denied their request for access to the documents filed by the parties and their request for presence or participation at the hearing.<sup>112</sup>

## 2. Utility of the brief in assisting the tribunal.

Participation via amicus curiae briefs is only indirect and cannot be equated with participation as a party to the disputes. As a consequence, the arguments presented by the NGOs are both limited to the subject matter of the dispute and need to represent an interest different than that of the parties. In that sense, amicus curiae briefs are essentially seen as beneficial to the court or tribunal since it would provide the court or tribunal with useful information and arguments other than those presented by the parties. It has generally been accepted by various tribunals, but also under the revised ICSID Rules, that the main function of amicus curiae submissions is to assist the tribunal in its work, and so the briefs need to be related to questions under discussion in the dispute. The court or tribunal will only eventually accept those submissions that provide assistance to a court or tribunal by offering expertise and arguments different from those of the disputing parties.<sup>113</sup> In WTO proceedings, NGO submissions have often been disregarded for this reason, while investment tribunals have been more flexible and accepted that third-party submissions could in fact contain useful information. In *US-Lead and Bismuth II*, the WTO Appellate Body thus confirmed its capacity to admit amicus curiae briefs, but noted in the end that “[i]n this appeal, we have not found it necessary to take the two amicus curiae briefs filed into account in rendering our decision.”<sup>114</sup>

The WTO Appellate Body has in the *EC Sardines* case also emphasized that even formal acceptance of an amicus curiae brief by the Appellate Body does not imply that it will in effect consider it. Indeed, the Appellate Body noted that it retains a discretionary right to do so, and it would reject an amicus curiae brief if it would interfere with the fair, prompt and effective resolution of trade disputes.<sup>115</sup> As far as Morocco’s amicus curiae brief was concerned, the Appellate Body Report eventually did not take it into consideration because the factual information provided in Morocco’s brief was not generally pertinent and

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<sup>111</sup> Id ¶ 54.

<sup>112</sup> Id ¶¶ 62–72.

<sup>113</sup> See also *Suez/Vivendi* ¶ 13.

<sup>114</sup> *US—Lead and Bismuth II* ¶ 42 (cited in note 61). [Is *British Steel* and *US-Lead and Bismuth* the same case?] → it is – I changed it in the text to avoid confusion.

<sup>115</sup> *EC—Sardines* ¶¶ 164–67 (cited in note 65).

failed to assist the Appellate Body in the appeal.<sup>116</sup> Although the case related to an amicus curiae brief of a member state, there is no reason to limit the principles established by the Appellate Body to member state submissions only. In subsequent cases, the Appellate Body has also refused to take into consideration briefs that addressed arguments raised by the parties or that were not at issue in the dispute.<sup>117</sup> The Appellate Body, for instance, refused amicus curiae briefs on the sole ground that those “briefs dealt with some questions not addressed in the submissions of the participants or third participants” and that “[n]o participant or third participant adopted the arguments made in these briefs.”<sup>118</sup>

However, in the *EC Asbestos* case, one of the substantive conditions set by the Appellate Body for applications requesting leave to file a written brief was to indicate “in what way the applicant will make a contribution to the resolution of this dispute that is *not likely to be repetitive of what has been already submitted* by a party or third party to this dispute.”<sup>119</sup> To some extent, this statement runs counter to the previous requirement. Nevertheless, these two arguments can be reconciled and seem to indicate that non-disputing party submissions are only permissible to the extent that they both contain arguments that are not a mere repetition of the arguments of the disputing parties, and that do not extend the very subject-matter of the dispute. Eventually, in the *Asbestos* case, the Appellate Body denied all applicants leave to file written briefs, either because they had been submitted after the deadline, or for other undefined reasons.<sup>120</sup> Previously, the Panel in the *EC-Asbestos* case had refused to consider three submissions without explicitly stating the reasons for such a refusal.<sup>121</sup>

The revised ICSID arbitration rules, which now explicitly allow for amicus curiae submissions, limit the possibility of amicus curiae interventions to those submissions that “would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular

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<sup>116</sup> Id.

<sup>117</sup> See WTO, Report of the Appellate Body, *United States: Definitive Safeguard Measures on Imports of Certain Steel Products* ¶ 268, WTO Doc No WT/DS248/AB/R (Nov 10, 2003) (“We note that the brief was directed primarily to a question that was not part of any of the claims. We did not find the brief to be of assistance in deciding this appeal.”); WTO, Report of the Appellate Body, *United States: Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ¶ 9, WTO Doc No WT/DS257/AB/R (Jan 19, 2004) (“*US—Softwood Lumber IV*”).

<sup>118</sup> *US—Softwood Lumber IV* ¶ 9.

<sup>119</sup> *EC Asbestos* (Appellate Body) ¶ 52 (emphasis added).

<sup>120</sup> Id ¶ 56.

<sup>121</sup> See generally *EC—Asbestos*.



knowledge or insight that is different from that of the disputing parties.”<sup>122</sup> Before the revision of the ICSID Rules, the tribunal in *Suez/Vivendi* had already noted that NGOs who wished to submit amicus curiae briefs needed to satisfy the tribunal that they had the necessary expertise, experience, and independence to be of assistance in the case.<sup>123</sup> In *Biwater Gauff*, the final award of the Arbitral Tribunal, after having already granted leave to a group of NGOs to submit a single brief, noted that the interests, expertise, and perspectives given by the NGOs “have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings.”<sup>124</sup> Likewise, the Statement of the NAFTA Free Trade Commission requires the Tribunals to assess, inter alia, the extent to which the submission would “assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.”<sup>125</sup>

### C. The Utility and Effectiveness of NGO Participation in International Economic and Investment Disputes: A Matter of Principle?

Essentially, the debate on NGO participation and their representation of the “public interest” relates to the very foundation and rationale of the existing system of international investment arbitration and economic dispute settlement. These tribunals and courts are often engaged in assessing the states’ exercise of their sovereign prerogatives, which inevitably causes tensions between the commercial and closed character of the proceeding and the public and international character of such disputes.

This recent development has not been well received by all states, in particular with respect to the WTO. Criticism has initially focused on the alleged incompatibility of such a development with provisions of the WTO DSU. The WTO Appellate Body’s acceptance of the discretionary authority for both Panels and the Appellate Body to receive amicus curiae briefs has raised much criticism by WTO member states, which have principally denounced the non-conformity

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<sup>122</sup> ICSID Rules of Procedure for Arbitration Proceedings at ch 4, Rule 37(2) (cited in note 84).

<sup>123</sup> *Suez/Vivendi* ¶ 24.

<sup>124</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award of [Who?] (July 24, 2008) ¶ 359.

<sup>125</sup> Statement of the Free Trade Commission on Non-Disputing Party Participation ¶ B. 6(a) (cited in note 75).

of this development with the WTO DSU.<sup>126</sup> The main question concerning the legality of the participation of NGOs as amici curiae is whether a procedure that has clearly established rules regarding the participation of third states to a dispute does not by definition exclude any other form of intervention. The unambiguous inclusion as a condition in the DSU that third states can only participate when they have a substantial interest in the matter<sup>127</sup> can indeed be read as strictly limiting the scope of third party participation in WTO Dispute Settlement.<sup>128</sup> At least the reactions of various member states to the unacceptability of the interpretation of the DSU given by the Appellate Body confirm the disagreement amongst states. After the *Shrimp/Turtle* proceedings before the WTO Appellate Body, various, notably Asian, states objected to the decision of the Appellate Body on the particular grounds that such an interpretation of the DSU was contrary to the drafting history of the document and that this was contrary to the intent of the parties.<sup>129</sup> However, criticism since the *EC Asbestos* case has moved beyond the legality of amicus curiae submissions in WTO proceedings generally and now also targets the appropriateness of allowing submissions in a particular case.<sup>130</sup> Interestingly, in 2004, a Panel

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<sup>126</sup> See, for a discussion, Laurence Boisson de Chazournes and Makane Moïse Mbengue, *The Amici Curiae and the WTO Dispute Settlement System: The Doors Are Open*, 2 *L & Prac of Intl Cts & Trib* 205, 219–22 (2003); Asif H. Qureshi, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, 48 *Intl & Comp L Q* 199, 205–06 (1999). See generally C.L. Lim, *The Amicus Brief Issue at the WTO* 4 *Chinese J Intl L* 85 (2005).

<sup>127</sup> DSU Annex 2, Art 17.4 (cited in note 54) (“Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.”).

<sup>128</sup> Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hot-Rolled Lead / Asbestos Doctrine*, 44 *Harv Intl L J* 317, 320 (2003). But see Paolo Palchetti, *Opening the International Court of Justice to Third States: Intervention and Beyond*, in 6 *Max Planck Yearbook of United Nations Law* 139, 167 (Kluwer L Intl 2002) (claiming that even in the case of the ICJ, express provisions authorizing only intergovernmental organizations to intervene before the ICJ cannot be interpreted as prohibiting any amicus curiae intervention by NGOs).

<sup>129</sup> For the views and criticism of the WTO Member States on this, see *WTO General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000* (cited in note 63).

<sup>130</sup> See generally C.L. Lim, *Asian WTO Members and the Amicus Brief Controversy: Arguments and Strategies*, 1 *Asian J WTO & Intl Health L & Pol* 85, 85 (2006) (proposing “that what really matters is not the question of admissibility in abstract terms, but the criteria that would govern the admission of a particular brief”).

refused to receive amicus curiae submissions by invoking inter alia the absence of consensus among the WTO member states.<sup>131</sup>

Practice moreover shows that while having accepted the principled authority to accept NGO submissions as amici curiae, the WTO Appellate Body has never considered unsolicited NGO submissions to be pertinent or useful, and therefore has never considered any unsolicited NGO submissions. It has thus been pointed out that the effect of NGO participation in WTO Proceedings, in terms of the explicit consideration of the arguments put forward by NGOs, has remained relatively limited.<sup>132</sup> As with the WTO, the actual impact of amicus curiae briefs on the outcome of the proceedings in international investment arbitration is difficult to assess since Tribunals do not refer explicitly to NGO submissions. However, there are exceptions. In *Biwater Gauff*, for instance, the Tribunal extensively reproduced and summarized the submissions of the amici.<sup>133</sup> The Arbitral Tribunal noted that it had found the amici's submissions "useful," since their briefs had "informed the analysis of claims."<sup>134</sup>

It should be emphasized that NGO participation through the submission of amicus curiae briefs is merely an indirect form of participation, which perhaps does not warrant such profound apprehension. Indeed, the authority for the Panels and the Appellate Body to receive amicus curiae briefs is not to be equated with the actual taking into consideration of these briefs. As pointed out, such submissions have only rarely been taken into consideration and the effect thereof on the final decision of the judge or arbitrator is thus impossible to assess. However, if a judicial body decides not to reply to the arguments contained in the brief, these arguments have at least been read by the relevant body and to a certain extent the objective of the brief has thus been met.

In addition, one can also consider amicus curiae briefs to be very much equivalent to publicly available information, which is consistent with the treatment of amicus curiae briefs by the ICJ. In its practice, the ICJ directions say that "[s]uch statements . . . shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same

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<sup>131</sup> WTO, Panel Report, Canada - United States: Investigation of the International Trade Commission in softwood lumber from Canada ¶ 7.10 n 75, WTO Doc No WT/DS/277/R (Mar 22, 2004).

<sup>132</sup> Canal-Forgues, *Le Règlement des Différends à l'OMC* at 22-23 (cited in note 49).

<sup>133</sup> *Biwater Gauff* (Award) ¶¶ 356-91.

<sup>134</sup> *Id* ¶ 392.

manner as publications in the public domain."<sup>135</sup> Judges and arbitrators are free to, and in fact do, gather information outside the formal submissions of the parties to the disputes. This is moreover evidenced by the fact that Panels are explicitly authorized under the DSU to seek "information and technical advice from any individual or body which it deems appropriate."<sup>136</sup> The states who are party to a dispute remain the masters of the dispute in terms of delineating the facts and the legal issues of the dispute. This is consistent with the idea that amici curiae are not party to the proceedings and cannot therefore play any role in delimiting the issues to be dealt with by a court. Moreover, such practice comports with the practice of amicus curiae briefs before national courts, such as the Supreme Court of the US.<sup>137</sup>

In general, the increased acceptance in international dispute settlement of NGO participation as amici curiae can be hailed as "permitt[ing] the emergence in international law of the idea of civil society as an important participant in the resolution of investment disputes."<sup>138</sup> Surely this is a positive development from the perspective of the legitimacy and transparency of the process, in particular in those cases that are of high public interest, provided that such submissions remain within the boundary set by the very reasons for their admissibility. In cases such as *Methanex*, NGO participation has been important to "integrate environmental and social perspectives in investment disputes involving complex public policy interests."<sup>139</sup> NGO participation in such procedures has thus generally been supported in scholarship as an enhancement of the transparency in international economic dispute settlement.<sup>140</sup> However, others have pointed out that this form of participation alone cannot improve the transparency of investment arbitration, since this does not imply the right to receive pleadings or to attend hearings,<sup>141</sup> nor does such participation enhance the democratic legitimacy of investment arbitration since NGOs are—of themselves—non-democratic in the sense that they are not accountable to their members or the general public.<sup>142</sup>

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<sup>135</sup> ICJ, *Practice Directions* at XII(2) (cited in note 42).

<sup>136</sup> DSU Annex 2, Art 13 (cited in note 54).

<sup>137</sup> See Loretta Re, *The Amicus Curiae Brief: Access to the Courts for Public Interest Associations*, 14 *Melb U L Rev* 522, 528 (1983).

<sup>138</sup> Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 *Eur J Intl L* 729, 742 (2009).

<sup>139</sup> *Id* at 741.

<sup>140</sup> Laurence Boisson de Chazournes, *Transparency and Amicus Curiae Briefs*, *J World Inv & Trade* 333, 335–36 (2004).

<sup>141</sup> Brower, 36 *Vand J Transnatl L* at 72 (cited in note 91).

<sup>142</sup> *Id* at 73.

## V. CONCLUSION

The increasing role played by non-state actors in international dispute settlement is one of the most important evolutions weathered by international law in recent decades. The traditional limitation of access to international dispute settlement mechanisms to states is increasingly being challenged by the multifaceted participation of non-state actors therein. Today, the majority of the judicially settled disputes are "mixed" investment disputes involving states and non-state actors and inter-state economic disputes, two systems which have traditionally been quite closed to non-state and non-corporate participation.

The acceptance of the authority for panels and tribunals to receive amicus curiae briefs in international economic and investment law is a groundbreaking development and without a doubt paves the way to enhanced transparency in these proceedings. Although several states, particularly states in the WTO, have vigorously opposed this development on the ground that such intervention would require the consent of the states, the practice of WTO panels and the Appellate Body shows that there is an increased recognition of NGO participation through amicus curiae briefs. Courts and tribunals have often used legal technical arguments to support generally NGO participation as amici curiae by interpreting their constituent treaty or rules of procedure and have refused such submissions on grounds inherent to the concept of amicus curiae. They have, however, only occasionally clarified the policy reasons behind the interpretation given to their statute or to the arbitral rules applicable to the proceedings in these cases. These policy considerations are important since they at the same time constitute the criteria to assess the *appropriateness* or *usefulness* of allowing NGO submissions in a particular case.

Amicus curiae briefs generally need to effectively assist the tribunal or court in its work and NGO participation should in effect legitimately represent the "public interest," or at least an interest distinct from corporate or state interests. These requirements, at the heart of the rationale behind the admissibility of amicus curiae briefs, have played and will play a fundamental role in the effectiveness of NGO submissions. To date, however, the actual impact of amicus curiae briefs on the outcome of the proceedings in international investment arbitration is difficult to assess, mainly because panels and tribunals in economic and investment disputes have been relatively reluctant to consider the arguments presented in the briefs. But clearly, acceptance of these briefs is a rather recent development and so only relatively few cases have been confronted with voluntary submissions. Thus, it is beyond doubt that the participation of NGOs in international investment and economic law will grow more important in the coming years.