

ADVISORY OPINION ON RESPONSIBILITY AND LIABILITY FOR INTERNATIONAL SEABED MINING (ITLOS CASE NO. 17) AND THE FUTURE OF NGO PARTICIPATION IN THE INTERNATIONAL LEGAL PROCESS

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I. INTRODUCTION

On February 1, 2011, the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS) issued an advisory opinion in Case No. 17, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Case No. 17).¹ The commentators have highlighted a number of important aspects in this opinion. First, from a substantive viewpoint, the Advisory

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1. Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Feb. 1, 2011, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf (last visited Feb. 23, 2013) [hereinafter *Responsibilities and Obligations*].

Opinion was hailed as historic because it set the highest standards of due diligence, a legal obligation to apply precaution, best environmental practices, and Environmental Impact Assessment by the sponsoring States in relation to the activities of the sponsored organizations in the Area.² Second, for the first time, the advisory jurisdiction of ITLOS was invoked.³ Third, Advisory Opinion in Case No. 17 was unanimous, an unprecedented occasion in the line of the Tribunal's earlier decisions marked by separate and dissenting views by judges.⁴

This article highlights another aspect of the case, hitherto unrecognized. Case No. 17 was the first instance in which non-governmental organizations (NGOs) took part in the Tribunal's proceedings in the capacity of *amici curiae*. First, the Tribunal requested the *amicus curiae* brief of the International Union for the Conservation of Nature (IUCN).⁵ Under the United Nation's definition, IUCN is considered an NGO.⁶ Second, on August 17, 2010, the ITLOS Registry received a request by Stichting Greenpeace Council (Greenpeace) and the World Wide Fund for Nature (WWF) to permit them to participate in the Advisory proceedings as *amici curiae*.⁷ The President of the Court informed the organizations with individual letters on August 27 that their statement would not be included in the case file, for it was not submitted in accordance with the procedural rules.⁸ However, it would be transmitted to the states, intergovernmental organizations, and the Seabed Authority.⁹ On September 10, 2010, the Chamber decided not to grant the request for participation to the two organizations and informed them of this decision on the same day.¹⁰ The Advisory Opinion was issued on February 1, 2011.¹¹

2. David Freestone, *Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area*, Mar. 9, 2011, available at <http://www.asil.org/pdfs/insights/insight110309.pdf> (last visited Feb. 23, 2013) [hereinafter *Advisory Opinion of Seabed*].

3. *Responsibilities and Obligations*, *supra* note 1.

4. *Advisory Opinion of the Seabed*, *supra* note 2.

5. *Responsibilities and Obligations*, *supra* note 1.

6. International Union for Conservation of Nature (IUCN), *About IUCN*, available at <http://www.iucn.org/about/> (last visited Feb. 13, 2013).

7. *Responsibilities and Obligations*, *supra* note 1.

8. *Id.*

9. *Id.* at 14.

10. *Id.*

11. *Id.*

NGO participation in ITLOS Case No. 17 is an example of a larger trend in which entities not party to litigation take part in the proceedings before international tribunals as *amici curiae*. More often than not, litigation within the international tribunals involves a number of *amicus curiae* interventions by NGOs.¹²

Scholars have analyzed the international law-making activity by NGOs from a number of perspectives. Although international law-making has traditionally been reserved to States, some commentators point out that NGOs play an increasingly active role in the development of international law.¹³ Although a number of scholars applaud this development as a possibility to democratize international law-making and welcome NGO involvement in the international environmental law-making, others criticize NGOs and their role.¹⁴

I analyze ITLOS's action with respect to the NGO *amicus curiae* petition on two levels. On an immediate level, the Tribunal's actions represent a cautious welcome to NGO participation in the Tribunal's proceedings. Tribunal's actions toward the *amici* petition point to its favorable disposition. This, in turn, widens the possibility of NGO participation and influence in the law-making process within the Tribunal. In this regard, I discern the Tribunal's positive approach in two specific actions: First, in its decision in Case No. 17, ITLOS clarified that it was open to considering *amicus* briefs by organizations other than those whose members were exclusively States.¹⁵ By requesting *amicus curiae* views from a number of organizations, including the International Union for Conservation of Nature and Natural Resources (IUCN), ITLOS expressed its welcome to *amicus curiae* briefs by NGOs—at least as the term is understood by the United Nations. The Tribunal established a precedent by which NGOs that contain States and State agencies and their representatives as members that can be invited as *amici curiae* to submit their views.

Second, the Tribunal was neither required nor authorized to undertake the steps they did in relation to the submission by Greenpeace and WWF. However, the Tribunal used its discretion favorably towards the NGO petition and allowed it to attain the maximum effect, for even though the

12. *Responsibilities and Obligations*, *supra* note 1.

13. Arnold Pronto, *Some Thoughts on the Making of International Law*, 19 EUR. J. INT'L L. 601, 603 (2008).

14. Rana Lehr-Lehnardt, *NGO Legitimacy: Reassessing Democracy, Accountability and Transparency*, Apr. 16, 2005, available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1020&context=lps_clacp (last visited Feb. 13, 2013).

15. *Advisory Opinion of the Seabed*, *supra* note 2.

Tribunal officially declined to admit the *amici curiae* submission, in fact, the Tribunal fostered the dissemination of NGO arguments.¹⁶

From a more general perspective, the case has important implications for NGO participation as *amici* in the international legal process. Alongside the International Court of Justice (ICJ), up until this case, the ITLOS has remained as one of the last bastions untouched by NGO attempts to participate as *amici* and to put forth their views. Many other international tribunals have already been accustomed to handling NGO petitions for intervention as *amici*.¹⁷ Moreover, international tribunals often draw on research and expertise provided in NGO *amicus* briefs.¹⁸ By its most recent actions in Case No. 17, the Tribunal went down the path that many other international courts have traveled earlier.

This paper proceeds as follows: Part II stresses that NGO participation as *amici curiae* in international dispute resolution is one form of NGOs activity in international lawmaking. It maps the theoretical discussions regarding the role of NGOs in international law-making, and specifically, in international environmental lawmaking. Part III sketches out the domestic legal origins of the procedural institution of *amicus curiae* intervention. Part IV highlights how *amicus curiae* participation procedure was adopted by international tribunals. It shows the active role that NGOs play as *amici curiae* before five major international tribunals. Part V presents the jurisdiction of ITLOS and outlines the contours of the legal framework regulating non-state actor access to the Tribunal. Part VI provides the factual background to the advisory opinion in Case No. 17 and *amicus curiae* petitions in the case. Part VII analyzes the Tribunal's approach and explores the implications of the Tribunal's approach from the perspective of NGO participation as *amici* within ITLOS. Finally, Part VIII highlights the importance of the Tribunal's approach to NGOs in Case No. 17 from a general perspective of NGO participation in the international legal process.

II. NGOS IN INTERNATIONAL LAW-MAKING

International public interest organizations and their domestic counterparts often contribute to the shaping of international law through legal means; they may take part in proceedings in different capacities: Initiating a case, acting as a court-appointed expert, appearing as a witness,

16. *Id.*

17. Emanuele Rebasti, *A Legal Status for NGOs in Contemporary International Law?*, available at <http://www.esil-sedi.eu/sites/default/files/VierucciRebasti.PDF>. (last visited Feb. 23, 2013).

18. *Id.*

and submitting *amicus curiae* briefs.¹⁹ NGO participation as *amici curiae* before international tribunals²⁰ is one form of NGOs participation in international law-making. Through *amici* briefs, NGOs express their advocacy and put forth arguments with which international tribunals engage in a number of ways.²¹

Non-state actors' activity in international lawmaking has posed a challenge for scholars who need to reassess their views on the making of international law.²² A number of commentators have responded to the challenge, conceptualizing the involvement and initiatives of NGOs in creating specific international law instruments.

New Haven School of International Process provides one of the most convincing explanations of NGO participation in international law-making.²³ The New Haven School arose out of dissatisfaction with conventional explanations of the emergence of international law and aimed at offering new ways to conceptualize the process of making international law.²⁴ The New Haven School was launched as a response to Cold War realism, which, according to one of the proponents of the School, "underestimates the role of rules, and of the legal processes in general, and

19. Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 612 (1994).

20. See, e.g., Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); see also David Davenport, *The Proliferation of International Courts and Tribunals: What Does It Mean?*, 9 NAT'L LEGAL CENTER PUB. INT. 5 (2005); see also Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U.J. INT'L L. & POL. 679, 680 (1999); Cesare PR Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U.J. INT'L L. & POL. 709, 709 (1999); Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT'L L. 453, 454 (2002).

21. See Anna Dolidze, *Making International Property Law: Amici Curiae in International Judicial Decision-Making*, 43 SYRACUSE J. INT'L L. & COM. (forthcoming 2013).

22. ANTHONY C. AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 8–9 (1995).

23. See generally MYRES MCDUGAL, INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION 136–57 (1953); see also Myres McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); see also Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitute Process: How International Law is Made*, 6 YALE STUDIES IN WORLD PUB. ORDER 249 (1980); W. Michael Reisman, *The Democratization of International Law Law-making Processes and the Differentiation of Their Application*, in DEVELOPMENT OF INTERNATIONAL LAW IN TREATY MAKING 16, 26 (Rüdiger Wolfrum & Volker Röben eds., 2005).

24. See Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitute Process: How International Law is Made*, 6 YALE STUDIES IN WORLD PUB. ORDER 249, 249 (1980).

over-emphasize[s] the importance of naked power.”²⁵ However, the school also does not understand international law as static, created, and implemented through states.²⁶

A number of commentators have built on the New Haven School and have explained NGOs transnational law-making activity as their participation in the international legal process.²⁷ As one commentator points out, “[p]rivate parties, non-governmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on the ground experiences and perceived ‘self-interests,’ ‘codifying’ norms that at ones reflect and condition group practices.”²⁸ Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereof become “law.”²⁹ Building on the New Haven School’s insights, Harold Koh has looked at the role of NGOs as “norm entrepreneurs” in facilitating the process of internalization of international law domestically by States.³⁰

Scholars working on the international legal process tradition have emphasized their normative approach to the trend of increased NGO participation in international lawmaking.³¹ For instance, Janet Levit remarked, “in an era of globalization, the international lawmaking universe is disaggregating into multiple—sometimes overlapping lawmaking communities, and neither the President, political elites, nor any of the other protagonists that star in the neo-conservative account are at the center of many of these communities.”³² Some may recoil at this reality; I, on the other hand, celebrate this moment as one of possibility and promise, as an opportunity “to invite new worlds.”³³ Other commentators as well regard participation of NGOs at various levels of international governance as

25. MYRES MCDUGAL, *INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION* 136–57 (1953).

26. Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 *YALE J. INT’L L.* 393, 394 (2007).

27. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997).

28. Levit, *supra* note 26, at 395.

29. *Id.*

30. *Id.*

31. Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, 1 *GLOBAL GOVERNANCE* 3, 10 (1995).

32. U.N. Dev. Programme (UNDP), *Human Development Report* (1999) [hereinafter UNDP 1999].

33. See also David Kennedy, *The International Human Rights Movement: Part of the Problem?* 12 *HARV. HUM. RTS. J.* 101 (2002) (summarizing main criticisms advanced against the global human rights movement, primarily driven by human rights NGOs).

“mechanisms for democracy.”³⁴ For instance, a 1999 United Nations (U.N.) Human Development Report stated that “[o]ne big development in opening opportunities for people to participate in global governance has been the growing strength and influence of NGOs—in both the North and the South.”³⁵

However, NGOs’ intensified international law-making activity has been subject to critique as well.³⁶ Uneasiness about the new role that NGOs play in international law-making processes is well expressed in the opinion of the President of the ICJ in the case of *The Legality of the Threat or Use of Nuclear Weapons*.³⁷ He expressed his discontent about the fact that the International Association of Lawyers against Nuclear Arms (IALANA) and other groups brought strong pressure on the UN General Assembly and the World Health Organization in order to convince them to bring a request for an advisory opinion to the International Court of Justice.³⁸ He expressed his hope that “[G]overnments and inter-governmental institutions [would] still retain sufficient independence of decision[s] to resist the powerful pressure groups which besiege them today with the support of mass communication media.”³⁹

For instance, Makau Mutua criticizes the “façade of neutrality” maintained by international non-governmental organizations while they actually engage in political projects.⁴⁰ Obiora Okafor emphasizes the crises of legitimacy that human rights NGOs active in Nigeria face.⁴¹ In addition, the actions of individual NGOs have often come under fire for lack of objectivity and bias.⁴²

34. Boutros-Ghali, *supra* note 31, at 10.

35. UNDP, *supra* note 32, at 35.

36. See Kennedy, *supra* note 33.

37. *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 67 (July 8) (dissenting opinion of Judge Guillaume); see also *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 216 (July 8) (as Judge Weeramantry indicated in his dissenting opinion, the Court had received more than 3,000,000 signatures from NGOs and individuals in relation to this case).

38. *Id.*

39. *Id.*

40. MAKAU W. MUTUA, *Human Rights International NGOs: A Critical Evaluation*, in *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 151 (Claude W. Welch Jr. ed. 2001).

41. JOEL M. NGUGI & OBIORA CHINEDU OKAFOR, *LEGITIMIZING HUMAN RIGHTS NGOS: LESSONS FROM NIGERIA* (2007).

42. See, e.g., Robert Neiman, *Latin America Scholars Urge Human Rights Watch to Speak up on Honduras Coupe*, THE HUFFINGTON POST, Aug. 21, 2009, available at http://www.huffingtonpost.com/robert-naiman/latin-america-scholars-ur_b_265282.html, (last visited Dec. 12, 2010) (arguing that Human Rights Watch’s “reporting on Latin America is often heavily

Moreover, scholars have expressed specific calls for NGO participation in the process of international environmental lawmaking.⁴³ Barbara Gemmill and Abimbola Bamidele-Izu have indicated, for instance, the need to create structures for NGO participation in advocacy for environmental justice.⁴⁴ They state that the creation of opportunities for NGO participation as *amicus curiae* should be welcome: “[T]he submission of ‘friends of the court’ opinions would be well-suited to the skills and interests of NGOs.”⁴⁵

Writing about *amicus curiae* submissions by NGOs in the WTO and drawing on Jurgen Habermas’ work, Robin Eckersley argues that NGO participation as *amicus curie* has the potential of creating transnational space for dialogue on environmental matters or a transnational “green public sphere.”⁴⁶ “Cosmopolitan public spheres are conceptualized as specialized, intermediary structures, with multiple strategic and communicative functions, that mediate between supra-national governance structures and regional and domestic civil societies.”⁴⁷ According to Eckersley, transnational public spheres can partly remedy concerns for the lack of external accountability of international courts.⁴⁸

However, writing about the legitimacy deficit of international environmental law, Daniel Bodansky cautions against confusion between NGO involvement and public participation.⁴⁹ As Bodansky emphasizes:

influenced by the agendas of official Washington”); Robert Bernstein, *Rights Watchdog, Lost in the Mideast*, NEW YORK TIMES, Oct. 19, 2009, available at <http://www.nytimes.com/2009/10/20/opinion/20bernstein.html>, (last visited Jan. 11, 2011) (founder of the Human Rights Watch criticized the organization for allegedly biased reporting on human rights abuses in the Israeli-Arab Conflict); Scott Macleod, *Sneak Attack on Human Rights Watch*, L.A. TIMES, Oct. 30, 2009, available at <http://articles.latimes.com/2009/oct/30/opinion/oe-macloed30>, (last visited Dec. 12, 2010) (arguing that the attacks on Human Rights Watch for its Middle East policies are unfounded).

43. On public participation in international environmental lawmaking, see Neil A.F. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENVTL. L. REV., 683 (1993); see also Kal Raustiala, *The “Participatory Resolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997).

44. Barbara Gemmill and Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 20 (Daniel C. Esty & Maria H. Ivanova, eds. 2002).

45. *Id.* at 19.

46. Robyn Eckersley, *A Green Public Sphere in the WTO? The Amicus Curiae Interventions in the Transatlantic Biotech Dispute*, 13 EUR. JOURNAL INT’L RELATIONS 329 (2007).

47. *Id.*

48. *Id.*

49. Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 596 (1999).

What is meant more precisely is participation by non-governmental groups, such as Greenpeace, the Sierra Club, and the Global Climate Change Coalition, which often have opposing positions and may or may not reflect ‘the public interest’—if such a thing exists at all. Indeed, even if international meetings were opened up and NGOs given unrestricted access, few members of the public would, as a practical matter, be able to participate.⁵⁰

This article highlights that with ITLOS’ actions in Case No. 17, the opportunities for NGO participation in international environmental law-making have expanded. ITLOS’ cautious welcome to *amicus* participation by NGOs in this case might be a stepping stone towards NGOs more active involvement in the Tribunal’s work. Moreover, although this analysis could be in line with scholarship that aspires for more NGO involvement in international lawmaking, due to the constraints of space, this article is intentionally limited to the analytical side of the issue and remains agnostic to its normative aspects.

III. DOMESTIC LEGAL ORIGINS OF *AMICUS CURIAE* PROCEDURE

Although currently *amici curiae* participation is a commonly accepted international procedural instrument, its origins are purely local. *Amicus curiae* petitions evolved as part of common law procedure. *Amici* have served a number of objectives, including remedying certain deficiencies of adversarial procedure and preventing judicial error.⁵¹ Moreover, although *amici* have been traditionally recognized as participants in the judicial proceedings in common law countries, a number of civil law countries have recently adopted the procedure as well.⁵² The section below outlines the historical origins, objectives, and evolution of *amicus curie* procedure.

Principles of Transnational Civil Law, a codification of internationally accepted “best practices” of civil procedure by the influential American Law Institute and International Institute for the Unification of Private Law (UNIDROIT), put forth the following description of the *amicus curiae* procedure:

Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon

50. *Id.* at 619.

51. PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, UNIDROIT & THE AMERICAN LAW INSTITUTE 32 (2006).

52. *Id.*

consultation with the parties. The court may invite such a submission. The parties must have an opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.⁵³

The commentary to the Principles indicates that, in general, civil law nations do not possess a practice of allowing *amicus curiae* submissions, though some countries from civil law tradition, such as France, have developed the practice in its case law.⁵⁴

Amicus curiae intervention practice has been an integral part of English law and practice. Bouvier's Law dictionary⁵⁵ notes that the practice is "immemorial" in England and can be traced back to the Roman institution of "*amicus consiliari*," who assisted the advocate.⁵⁶ Some sources reveal that the practice of *amicus curiae* or "friend of the court" existed in England since at least Edward I.⁵⁷

Amici did not have an entitlement to intervene.⁵⁸ However, the discretion was wide, for *amicus* interventions took place for different purposes, including relieving problems created by an adversarial system.⁵⁹ Moreover, *amicus* interveners were allowed to expand their role from neutral informers of the Court on matters which the Court would have otherwise overlooked to advocates of parties whose interests might have been prejudiced by the impending judgment.⁶⁰ Samuel Krislov cites a number of early English cases that refer to the participation of *amici curiae*.⁶¹

Indeed, *amicus curiae* submissions are customary in a number of countries that share the fundamental principles of common law, including the United States, Canada, the United Kingdom, and Australia.⁶² As Professor Michael Reisman wrote in 1970:

53. *Id.* at 32.

54. *Id.* at 33.

55. BOUVIER'S DICTIONARY (3d ed. 1914).

56. *Id.*

57. SIR FREDERICK POLLOCK, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, vol. 2, 248 (Liberty Fund Inc. 1898).

58. *Id.*

59. Samuel Krislov, *Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 696 (1963).

60. *Id.* at 697.

61. *Id.* at 695.

62. Roger S. Clark, *The International League for Human Rights and South West Africa*, 3 HUM. RTS. Q. 101, 112-13 (1981).

In common law countries, the *amicus curiae* brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.⁶³

In the United States, the procedural institution of *amicus curiae* has a long, rich history. For instance, Rule 29 of the Federal Rules of Appellate Procedure establishes the process with which entities can file *amicus* briefs in the U.S. appellate courts.⁶⁴ Rule 37 of the Supreme Court Rules indicates the ways for filing *amicus* briefs before the U.S. Supreme Court.⁶⁵ Scholars have extensively written on the *amicus curiae* institution within the U.S.⁶⁶

The Canadian Supreme Court has allowed *amicus curiae* interventions since the first rules of procedure were adopted in 1878.⁶⁷ Further, *amicus curiae* interventions also have a long history in Australia,⁶⁸ whose position has been described by the following decision of the Australian Supreme Court:

Brennan CJ in *Levy v. Victoria*:

The footing on which *amicus curiae* is heard is that that person is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted [A]n *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay

63. *Id.*

64. FED. R. APP. P. 29.

65. SUP. CT. R. 37.

66. See, e.g., Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35 (1983).

67. Amanda Jane Burgess, *Intervenor Before the Supreme Court of Canada, 1997–1999: A Content Analysis* (2000), COLLECTIONSCANADA.COM, available at <http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp03/MQ62193.pdf> (last visited Feb. 14, 2013); CAN. SUP. CT. R. 18.

68. Jason Pierce, *The Road Less Traveled: Non-Party Intervention and Public Litigation Model in the High Court*, (2003), 28 ALT. L. J. 69; see also, Ronnit Redman, *Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner*, 27 U.N.S.W.L.J. 849 (2004); for a discussion of the *amicus curiae* in Australia, see George Williams, *The Amicus Curiae and Intervener in the High Court*, 28 FED. L. REV. 1 (2000); see also Susan Kenny, *Intervenor and Amici Curiae in the High Court*, 20 ADEL. L. REV. 159, 159 (1998).

consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.⁶⁹

IV. NGOS AS *AMICI CURIAE* BEFORE INTERNATIONAL TRIBUNALS

The chronological overview of the legalization of NGO *amicus curiae* submissions by five important international tribunals shows that international tribunals have been moving recently to formalization of *amicus curiae* procedure for NGOs. All of these tribunals have legally formulated a procedure for accepting *amicus curiae* submissions by NGOs. Each of them has chosen an individual approach to *amicus curiae* petitions. The International Court of Justice, for instance, authorizes NGOs to submit *amicus curiae* briefs and provides a specific procedure for addressing them, while not making such submissions part of the official case file.⁷⁰ The Inter-American Court of Human Rights, on the other hand, accepts all *amicus* briefs indiscriminately without specifying if and based on what criteria they may be rejected.⁷¹ Nevertheless, it is indisputable that over the last 30 years, all of the major international courts, whether transnational or interstate,⁷² have chosen to regulate *amicus* participation for NGOs.

The first international court to legalize the procedure formally for *amicus* submission by non-state actors was the European Court of Human Rights (ECHR), which was established in 1959.⁷³ The Court was based on the European Convention for the Protection of Human Rights and Fundamental Freedoms after eight State parties delivered their instruments recognizing the compulsory jurisdiction of the Court.⁷⁴ The Court's initial structure allowed neither for the right of individuals to address the Court nor for the right of third parties to request the Court to hear their views.⁷⁵ However, the European Convention recognized the procedure in 1998, when in addition to other reforms in the Convention structure, the newly adopted Article 36(2) granted the States, individuals, and organizations that

69. *Levy v. Victoria*, (1997) 189 CLR 579, 604–05, (Austl.).

70. Robert O. Keohane, *Legalized Dispute Resolution: Interstate and Transnational*, available at <http://www.princeton.edu/~slaughtr/Articles/IOdispute.pdf> (last visited Apr. 5, 2013).

71. *See id.*

72. *See id.*

73. European Court of Human Rights, *The European Court of Human Rights Some Facts and Figures*, available at http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf. (last visited Feb. 23, 2013).

74. Paul Mahoney, *Developments in the Procedure of the European Court of Human Rights: The Revised Rules of the Court*, 3 Y.B. EUR. L. 127, 127 (1983).

75. STEVEN GREER, *THE EUROPEAN CONVENTIONS ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 37–38 (Cambridge University Press 2006).

are not party to the proceedings to intervene.⁷⁶ Article 36(2) notes: “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.”⁷⁷

However, the procedure existed prior to the Convention amendments of 1998 and operated on the basis of a similar provision that was incorporated in the Rules of Procedure in 1982.⁷⁸ On November 24, 1982, the judges of the Court held a plenary session in which they adopted the revisions to the procedural rules⁷⁹ after a series of attempts by British civil society organizations and the United Kingdom to participate in the proceedings as *amici*.⁸⁰ The new Rule 37 in Chapter III established the possibility of third-party intervention.⁸¹ Clause 2 stated the following:

The President may, in the interest of proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such a leave to any person concerned other than the applicant.⁸²

Thus, the ECHR’s approach to NGO *amicus* briefs has been more expansive relative to the International Court of Justice’s as *amici*. Under the ECHR, NGOs have a right to submit unsolicited requests to the Court, though the requests may be rejected by the Court “in the interests of proper administration of justice.”⁸³

76. European Convention on Human Rights, art. 36(2), Dec. 10, 1948, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf (entered into force on Oct. 1, 1994) (last visited Aug. 3, 2013).

77. *Id.*

78. European Court of Human Rights, *Rules of Court*, Sept. 1, 2012, available at http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf. (last visited Feb. 23, 2013).

79. *Id.*

80. See Anna Dolidze, *Anglo-Saxonizing Rights: The European Court of Human Rights and British Civil Society*, 104 ASIL PROC. 47, 47–50 (2012).

81. *Rules of Court*, *supra* note 83.

82. *Id.*

83. European Convention on Human Rights, art. 36(2), Dec. 10, 1948, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf (entered into force on Oct. 1, 1994) (last visited Aug. 3, 2013).

Currently, NGOs are very active in participating as *amici* in litigation in the European Court of Human Rights.⁸⁴ For instance, on March 18, 2011, the European Court of Human Rights handed down the judgment in *Lautsi v. Italy* concerning the display of religious symbols in classrooms in Italy.⁸⁵ This case is noteworthy for a record number of *amicus curiae* interveners.⁸⁶ The Court's final judgment mentions *amicus* submissions from the governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, the Republic of San Marino, and the principalities of Monaco and Romania.⁸⁷ Submissions from NGOs included the Greek Helsinki Monitor, *Associazione nazionale del libero Pensiero*, the European Center for Law and Justice, *Eurojuris*, International Commission of Jurists and Human Rights Watch, *Zentralkomitee der deutschen katholiken*, *Semaines sociales de France*, *Associazioni cristiane lavoratori italiani*, and thirty-three members of the European Parliament.⁸⁸

Moreover, the Court sometimes rejects NGO submissions. For instance, the U.S. based organization Rights International was denied the possibility of submitting an *amicus* intervention in the case of *Ahmed Sadik v. Greece*.⁸⁹ In the case of *McGinley and Egan v. UK*, the President of the Court granted the right to submit *amicus* briefs to two non-governmental organizations, Liberty and Campaign for Freedom of Information, while it declined this possibility without further justification for another organization, the New Zealand Nuclear Test Veterans' Association.⁹⁰

The International Court of Justice, the principal judicial organ of the United Nations, is an adherent of a more restrictive model of accepting NGO *amicus* interventions.⁹¹ Article 34 of the Statute of the ICJ allows "public international organizations" to submit their views about a case before the Court *proprio motu* as well as to authorize the Court to inform the named organization if the construction of the constituent instrument of the organization or international convention has been invoked in the case.⁹²

84. See Anna Dolidze, *Making International Property Law: Amici Curiae in International Judicial Decision-Making*, 43 SYR. J. INT. L. & COM. (forthcoming).

85. Appl. No. 30814/06, *Lautsi and Others v. Italy*, 2011, ECHR 8, available at http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf. (last visited Feb. 23, 2013).

86. *Id.*

87. *Id.*

88. *Id.* at 47-56.

89. Appl. No. 46/1995/552/638, *Ahmet Sadik v. Greece*, 1996, ECHR 4.

90. Appl. No. 10/1997/794/995-996, *McGinley and Egan v. the UK*, 1998, ECHR 5.

91. *Id.*

92. Competence of the Court, Statute ICJ, art. 34.

NGOs have petitioned the Court to accept their briefs as *amici curiae* in contentious proceedings.⁹³ However, the Court has never formally accepted an *amicus* brief from an NGO in such proceedings.⁹⁴

Nonetheless, the Court has been more welcoming of *amicus* submissions by NGOs in its advisory proceedings than in the contentious ones. Article 66 of the International Court of Justice's Statute refers to two types of entities that can voice its opinion as *amici curiae* in advisory proceedings: "States" and "international organizations."⁹⁵ The practice under the Article has been varied, for the Court has requested an *amicus curiae* brief from Palestine (neither a State nor an International organization at the time). It has also consented to receiving an *amicus curiae* brief from the International League for the Rights of Man in 1950 in the *International Status of South-West Africa* case.⁹⁶ Furthermore, in 2004, the Court adopted Practice Direction XII, an addition to earlier Practice Directions, for which it regulated *amicus curiae* submissions by international NGOs.⁹⁷ Practice Direction IX states, "[w]here an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file."⁹⁸

Such statements and/or documents 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 manner as publications in the public domain. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.⁹⁹

93. See Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-ST. ACTORS & INT'L L. 216, 231 (2005).

94. *Id.* at 224.

95. *Id.* at 218.

96. *Id.*

97. Dinah Shelton, *The International Court of Justice and Nongovernmental Organizations*, 9 INT'L COMMUNITY L. REV. 139, 139 (2007).

98. *Practice Directions*, ICJ-CIJ.ORG, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Feb. 23, 2013).

99. International Court of Justice (ICJ), *Practice Directions*, Jan. 20, 2009, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Feb. 14, 2013).

Thus, although the Court does not officially recognize NGO *amicus curiae* submission, the practice direction does indicate that it has decided to take the issue of accessibility of NGO submissions seriously.¹⁰⁰

Issues arose in 1998 whether or not WTO Dispute Panels should accept *amicus curiae* briefs in the *Shrimp/Turtle* case.¹⁰¹ The two briefs were submitted by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL) jointly, and by the WWF.¹⁰² The Panel's decision to accept or reject the briefs rested on the interpretation of Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Article 13 states:

- 1) Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member;
- 2) Panels may seek information from any relevant sources and may consult experts to obtain their opinion on certain aspects of the matter¹⁰³

In relation to the Panel's right to receive unsolicited briefs, the appellate body in the *Shrimp/Turtle* case held on November 6, 1998 that "authority to seek information is not properly equated with prohibition on accepting information which has been submitted without having been requested by a panel. A panel has a discretionary authority whether to accept or to reject information and advice submitted to it, whether requested by a panel or not."¹⁰⁴

In November of 2000, in relation to the case between Canada and France concerning France's ban on the import of asbestos, the Division of the Appellate Body tasked with considering the dispute issued "[t]he

100. Bartholomeusz, *supra* note 93, at 105.

101. Case No. WT/DS58/AB/R, United States-Import Prohibition of Certain Shrimp and Shrimp Products 1998, App. Body Rep., available at http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf (last visited Mar. 12, 2013) [hereinafter *Import Prohibition of Certain Shrimp*].

102. See Laurence Boisson de Chazournes & Makane Moise Mbengue, 2 *The Amici Curiae and the WTO Dispute Settlement System: The Doors are Open*, 2 *LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 205 (2003).

103. K. OELLERS-FRAHM & A. ZIMMERMAN, *DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW* 650 (2d ed. 2001).

104. *Import Prohibition of Certain Shrimp*, *supra* note 101, at 108.

Additional Procedure for Purposes of Canada's Appeal Only."¹⁰⁵ The Procedure specified the process through which entities interested in submitting *amicus curiae* briefs could request participation.¹⁰⁶ The Procedure also established relatively stringent criteria that the petitions for *amicus curiae* intervention should have met, including the requirement to provide information about the petitioner's relationship to the case and to parties.¹⁰⁷

ICC's procedural rules regarding *amicus curiae* interventions mirror the phrasing of a similar rule, Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR).¹⁰⁸

The Rules of Procedure of the International Criminal Court allow for *amicus curiae* interventions by entities other than states. Rule 103 indicates that the power of the Chamber to invite a State, organization, or a person to submit written or oral observations.¹⁰⁹ Rule 149 extends the same authority to the Appeals Chamber.¹¹⁰ NGOs have used the possibility of *amicus curiae* intervention a number of times. For instance, on May 12, 2012, the ICC Pre-Trial Chamber I agreed to hear the views of two organizations, Lawyers for Justice in Libya and the Redress Trust, in relation to *The Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi* case.¹¹¹

Moreover, the ICC continues to provide an important and expansive interpretation of the *amicus curiae* procedure. On June 8, 2012, the ICC put forth an important interpretation of Rule 103.¹¹² The Office of Public Counsel for Victims filed a motion requesting leave to reply to the *amicus*' submission, even though the entity's right to reply to *amicus*' briefs is not mentioned explicitly in the rules.¹¹³ The Chamber granted the request, finding that the Chamber also has discretion to grant participants leave to

105. Ulrich Beyerlin, *The Role of NGOs in International Environmental Litigation*, 61 ZAÖRV 357, 366 (2001).

106. *Id.*

107. Communication from the Appellate Body, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/9 (Nov. 8, 2000).

108. See Sarah Williams & Hannah Woolaver, *The Role of Amicus Curiae before International Criminal Tribunals*, 6 INT'L CRIMINAL L. REV. 151 (2006).

109. INT'L CRIM. CT. R. OF P. 103.

110. ICC R. OF P. 149.

111. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Request (June 8, 2012).

112. *Id.*

113. *Id.*

reply to such filings.¹¹⁴ The Chamber “reviewed the [r]equest, and considering the issues for which leave to submit *amicus curiae* observations has been granted, the Chamber is of the view that it is appropriate in the present circumstances to accord the OPCV the opportunity to submit a response to the *amicus curiae* observations.”¹¹⁵

The Inter-American Court of Human Rights formalized the *amicus* procedure for NGOs in 2009, although in practice it has admitted *amicus* interventions by NGOs.¹¹⁶ The Inter-American Court of Human Rights was created in 1979 as an autonomous judicial organ of the Organization of American States (OAS).¹¹⁷ Its creation came about through the entry into force of the Inter-American Convention on Human Rights on July 18, 1978.¹¹⁸ The Inter-American Convention created the Court for the purpose of applying and interpreting the Convention and formalized the relationship between the Commission and the Court.¹¹⁹ The Court’s jurisdiction extends only to the twenty-five states that have ratified the Convention, whereas the Commission has a more general competence under the OAS Charter.¹²⁰

The Court adopted its rules of procedure during its third ordinary session held from June 30, 1980 to August 9, 1980.¹²¹ The rules have been subsequently amended several times; the most recent amendments were adopted in 2009. In the amendments, the Court formalized the procedure for submitting *amicus curiae* interventions, which should be emphasized.¹²² Although recent cases at the Inter-American Court have witnessed burgeoning *amici* interventions from domestic and international non-governmental organizations.¹²³ This activity has so far remained unregulated.

114. *Id.*

115. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision (June 4, 2012).

116. *Id.*

117. *Id.*

118. American Convention on Human Rights “Pact of San Jose, Costa Rica” art. 8, Sep. 22, 1969, O.A.S.T.S. 36.

119. *Rules of Procedure of the Inter-American Court of Human Rights*, Nov. 16, 2008, available at http://www.corteidh.or.cr/reglamento/regla_ing.pdf (last visited Mar. 12, 2013).

120. *Id.*

121. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 119.

122. *Id.*

123. Open Society Foundations, *Justice Initiative and Four Other Groups Join Landmark Access to Information Case*, Mar. 30, 2006, available at <http://www.opensocietyfoundations.org/press-releases/justice-initiative-and-four-other-groups-join-landmark-access-information-case> (last visited Apr. 5, 2013) (“Consider, for example, the case of Marcel Claude Reyes and Others v. Chile (Case no. 12.108) where five civil society organizations submitted a joint *amicus* brief: Open Society Justice

Henceforth, *amicus curiae* interventions will be sent to the Court and be admissible within fifteen days following a hearing.¹²⁴ If no hearing had been appointed, *amici* brief should be submitted following the Order that set the deadlines for submission of final arguments and documentary evidence.¹²⁵ In its unconditional acceptance of *amicus* briefs, the Inter-American Court is even more welcoming to civil society's participation than its European counterpart.¹²⁶

V. NGO ACCESS IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ITLOS was founded as a dispute resolution mechanism under the United Nations Convention on the Law of the Sea (UNCLOS).¹²⁷ Although there has been extensive academic discussion on whether the Tribunal allows access to NGOs as applicants and as *amicus curiae*, prior to the Case No. 17 the issue had not been tested in practice. Moreover, when referring to *amicus curiae* interventions, the Tribunal's Statute and Rules of Procedure mention "intergovernmental organizations."¹²⁸ The commentators have been discussing whether the term includes "NGOs."¹²⁹ Furthermore, *amicus curie* can only participate in the Tribunal's proceedings if requested by the Chamber.¹³⁰ The section below outlines ITLOS' basic structure and delineates the main procedural aspects related to the applicant and *amicus curiae* access.

Initiative, Article 19, Libertad de Informacion Mexico, Instituto Presa y Sociedad, Access Info Europe.").

124. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 119

125. Inter-Am. Ct. H.R. Art. 56, available at <http://www.cidh.org/basicos/english/basic20.RulesCourt.pdf> (last visited Feb. 10, 2013); *see also* Inter-Am. Ct. H.R. Art. 61 available at <http://www.cidh.org/basicos/english/RulesIACourtNov2009.pdf> (last visited Feb. 10, 2013).

126. Anna Dolidze, *Inter-American Court of Human Rights, Reports on International Organizations*, REPORTS ON INTERNATIONAL ORGANIZATIONS (Oct. 2010), http://www.asil.org/rio/iccourt_hr_oct2010.html (last Feb. 10, 2013).

127. Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements, IUU Fishing and ITLOS in West African Cases* in INTERNATIONAL ENVIRONMENTAL LAW MAKING AND DIPLOMACY REVIEW 107, 121 (Ed Couzens & Tuula Honkonen eds. 2008).

128. INT'L TRIBUNAL LAW OF THE SEA, Rules of the Tribunal, Annex 6, art. 16.

129. Zengerling, *supra* note 127.

130. *Id.*

A. Background

ITLOS is a judicial body entrusted with the adjudication of disputes that arise out of application and interpretation of the UNCLOS.¹³¹ The UNCLOS resulted from one of the most complex and protracted diplomatic negotiations in the twentieth century, and was hailed as a success.¹³² The Tribunal was set up pursuant to Annex VI of UNCLOS.¹³³ Annex VI contains the Statute of the International Tribunal for the Law of the Sea.¹³⁴ The Tribunal had its first session in October of 1996,¹³⁵ in which its judges adopted the Rules of Procedure in accordance with Article 16 of Annex VI on October 28, 1997.¹³⁶

The Tribunal, which is composed of twenty-one members, has its seat in Hamburg, Germany.¹³⁷ The first case of ITLOS, *M/V Saiga (St. Vincent and the Grenadines v. Guinea)* was submitted to the Court on November 13, 1997.¹³⁸ ITLOS is split into four chambers:

- 1) The Chambers for Summary Procedure,
- 2) Fisheries Disputes,
- 3) Marine Environments Disputes, and
- 4) Seabed Disputes.¹³⁹

The Seabed Disputes Chamber that issued the Advisory Opinion in Case No. 17 consisted of eleven members.¹⁴⁰

The Tribunal has jurisdiction in two kinds of proceedings: Contentious and advisory.¹⁴¹ In terms of access, the Tribunal is a hybrid

131. *Id.*

132. RAH & WALLRABENSTEIN, SUSTAINABILITY NEEDS JUDICIAL SUPPORT: WHAT DOES THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) OFFER IN THIS RESPECT? (2006).

133. Statute of the International Tribunal for the Law of the Sea, Annex VI, Dec. 10, 1982, 1983 U.N.L.O.S 397.

134. *Id.*

135. Zengerling, *supra* note 127.

136. INT'L TRIBUNAL LAW OF THE SEA, Rules of the Tribunal, Annex 6, art. 16.

137. Statute of the International Tribunal for the Law of the Sea, Annex VI, Dec. 10, 1982, 1983 U.N.L.O.S 397.

138. International Tribunal for the Law of the Sea (ITLOS), *Cases*, ITLOS.ORG, available at <http://www.itlos.org/index.php?id=10&L=0%20%5Co%20Opens%20internal%20link%20in%20current%20window> (last visited Feb. 17, 2013).

139. ITLOS, *Seabed Disputes Chamber and Ad Hoc Chambers of the Seabed Disputes Chamber*, available at <http://www.itlos.org/index.php?id=19> (last visited Feb. 23, 2013).

140. Randa Salama, *Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes*, 19 AUSTRALIAN AND N. Z. MAR. L. J. 24, 27 (2005).

mechanism. The issues related to access to the tribunal should be considered in two separate areas: 1) access in the contentious proceedings with special considerations given to the issues of access to the Seabed Disputes Chamber and 2) access to advisory proceedings.¹⁴²

B. Access as Applicants

Article 20 of Annex VI of UNCLOS stipulates provisions regarding access to the Tribunal.¹⁴³ First, the Tribunal is open to state parties of UNCLOS.¹⁴⁴ However, access is not foreclosed to them. Article 20(2) states the following: “The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.”¹⁴⁵

First, we have to inquire what is meant by a “state party” in 20(1). Article 1(2.1) defines State parties as States that have consented to be bound by the Convention and for which the UNCLOS is in force.¹⁴⁶ Moreover, the meaning of “state parties” is extended to entities other than States by virtue of Article 305, which stipulates that UNCLOS will accept signatures by entities other than states, including by self-governing associated states and international organizations.¹⁴⁷ Article 305 of Annex IX (Participation by International Organizations) establishes the following:

For the purposes of Article 305 and of this Annex, “international organization” means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including

141. *Jurisdictions*, ITLOS.ORG, <http://www.itlos.org/index.php?id=11> (last visited Feb. 15, 2013).

142. *Advisory Proceedings*, ITLOS.ORG <http://www.itlos.org/index.php?id=44&L=1%252527%252560%252528%25255B%25257B%25255E%25257> (last visited Feb. 15, 2013); see also *Contentious Proceedings*, ITLOS.ORG <http://www.itlos.org/index.php?id=43&L=1%252527%252560%252528%25255B%25257B%25255E%25257> (last visited Feb. 15, 2013).

143. Statute of the International Tribunal for the Law of the Sea, Annex VI, Dec. 10, 1982, 1983 U.N.L.O.S 397.

144. *Id.*

145. *Id.*

146. U.N. Convention on the Law of the Sea, art. 1, Dec. 10, 1982, 1833 U.N.T.S. 397.

147. U.N. Convention on the Law of the Sea, art. 305, Dec. 10, 1982, 1833 U.N.T.S. 397.

the competence to enter into treaties in respect of those matters.¹⁴⁸

Commentary to the UNCLOS has also suggested that the definition entails only those organizations to which States transfer competence.¹⁴⁹ Some commentators argue that this definition includes the European Community (EC) only.¹⁵⁰ Indeed, the EC ratified the UNCLOS in 1998.¹⁵¹ Up until now, the EC is the only international organization and non-state member of the Convention.¹⁵²

Second, Part XI referred to in Article 20 is the Part that regulates activities in the Area.¹⁵³ Article 187 of Part XI of UNCLOS provides that in the cases when disputes arise from the activities in the Area, the relevant Chamber of the Tribunal has jurisdiction over disputes between States as well as non-state parties, including State enterprises and natural or juridical persons.¹⁵⁴ The third prong, in “any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case” has been subject to much academic discussion.¹⁵⁵

There are several opinions on how to interpret the word “agreement” in this part. Thomas Mensah, for instance, argues that the “agreement” can only be a public international agreement, as also stated in Article 288(2) that would mean that the general contentious jurisdiction is not open for private entities.¹⁵⁶ Others, such as Sicco Rah and Tilo Wallrabenstein,

148. U.N. Convention on the Law of the Sea, annex. IV, art. 1, Dec. 10, 1982, 1833 U.N.T.S. 397.

149. MYRON NORDQUIST, SHABTAI ROSENNE, & SATYA NANDAN, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 193, 456 (vol. v. 1989).

150. INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 40 (Laurence Chazourmes, Cesare Romano, & Ruth Mackenzie, eds., 2002).

151. *Id.*

152. Zengerling, *supra* note 127.

153. United Nations Convention on the Law of the Sea, *Agreement Relating to the Implementation of Part IX of the Convention*, art. 20, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Aug. 3, 2013).

154. United Nations Convention on the Law of the Sea, *Agreement relating to the Implementation of Part XI of the Convention*, art. 187, Dec. 10, 1982, 1833 U.N.T.S. 397.

155. ITLOS, *Competence*, ITLOS.ORG, available at <http://www.itlos.org/index.php?id=41> (last visited Feb. 17, 2013).

156. Thomas A. Mensah, *The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes*, in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 30 (P. Chandrasekhara Rao and Rahmatullah Khan eds., 2001); BUDISLAV VUKAS, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 6 (2004).

argue that the phrasing exhibits “theoretical openness” towards NGOs.¹⁵⁷ Philippe Gautier, the Registrar of the Tribunal,¹⁵⁸ considers that even if the “agreement” in Article 20(2) does imply the public international law agreement as in Article 288(2), access to ITLOS remains open to entities that have international legal personality.¹⁵⁹ However, the question as to which entities possess the international legal personality should be determined based on the “needs of the international community.”¹⁶⁰

Moreover, even after meeting the conditions under these provisions, theoretically, a plaintiff before ITLOS needs to have legal standing according to the general rules of international public law.¹⁶¹ Thus, NGOs would have either to claim infringement on their own rights or have the option of arguing altruistically in the common interest.¹⁶² ITLOS could develop criteria for such standing.¹⁶³ In any event, so far the Tribunal’s practice has not provided definitive answers for solving these debates.

Section H of the Rules of Procedure concerns advisory proceedings¹⁶⁴ in which Article 133 of the Rules of Procedure spells out the system for advisory proceedings, which fall within the domain of the Seabed Disputes Chamber.¹⁶⁵ The request for an advisory opinion should rest on a legal question arising within the scope of the Assembly’s activities.¹⁶⁶ It should also contain a concise formulation of the question and be accompanied by the relevant documentation.¹⁶⁷

157. RAH & WALLRABENSTEIN, *supra* note 132, at 18.

158. PHILIPPE GAUTIER, THE REPARATION FOR INJURIES CASE REVISITED: THE PERSONALITY OF THE EUROPEAN UNION 331, 332, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm. (J.A. Frowein and R. Wolfrum 2000).

159. *Id.*

160. Zengerling, *supra* note 127.

161. Harold M. White, *International Law and Relations*, *available at* <http://er.jsc.nasa.gov/seh/law.html> (last visited Mar. 12, 2013).

162. *Id.*

163. ITLOS, Rules of the Tribunal, sec. H, art. 130 (Mar. 17, 2009), *available at* http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (last visited Feb. 15, 2013).

164. *Id.*

165. *Id.*

166. *Id.*

167. Donald K. Anton, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216 (last visited Feb. 23, 2013).

C. *Access as Amicus Curiae*

The possibility of *amicus* intervention is not mentioned in the ITLOS Statute. However, the Tribunal's Rules of Procedure allow *amici curiae* interventions both in contentious and advisory proceedings.¹⁶⁸ Rule 84 regulates the procedure of such interventions in contentious proceedings.¹⁶⁹ The Tribunal's procedure allows for *amici* interventions of two basic forms: 1) top down, i.e. when requested by the Tribunal and 2) unsolicited—when an intergovernmental organization seeks to furnish information relevant to the case.¹⁷⁰

The top-down occasions may have three specific origins:

- 1) When requested by the state party,
- 2) When requested by the Tribunal *proprio motu*, or
- 3) In a special instance, when the case before the Tribunal is concerned with the interpretation of the constituent instrument of an international organization or a related international convention.¹⁷¹

At any time prior to the closure of the oral proceedings, the Tribunal might request the organization “to furnish information relevant to a case before it.”¹⁷²

In advisory proceedings, the *amicus curiae* procedure is top-down only.¹⁷³ The Registrar communicates to all State parties that a request for advisory opinion was submitted.¹⁷⁴ Article 133(2) establishes, “[t]he Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request

168. Rules of the Tribunal, *supra* note 163.

169. *Amicus curiae* should not be confused with third party intervention. Article 31 of Annex VI sets out the procedure for the third party intervention. Only state parties to the Convention can request an intervention when they have “an interest of a legal nature which may be affected by the decision in any dispute.” In the request is granted, the intervening party is bound by the ensuing decision as long as the decision relates to the issues in relation to which the state intervened. Article 31, Annex VI

170. Rules of the Tribunal, *supra* note 163.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 133.

to such organizations.”¹⁷⁵ Then the Chamber or its President, if the Chamber is not sitting, will identify an intergovernmental organization that can furnish information pertinent to the legal question raised.¹⁷⁶ The organizations and States are invited to submit their opinions within fixed time limits.¹⁷⁷ If the oral proceedings are held, then the States and organizations are invited to make oral submissions.¹⁷⁸

However, scholars have debated the exact meaning of the word “intergovernmental” in Rule 133. As noted above, *amici* interventions under both Rules 84 and 133 are limited to “intergovernmental organizations.”¹⁷⁹ Because neither the Tribunal’s Statute nor Rules of Procedure define the characteristics of “intergovernmental organizations,” considerable scholarly discussion has been generated around the Rules’ use of this term. In particular, scholars have deliberated about the frequent and seemingly interchangeable uses of the phrases “intergovernmental organization” and “international organization” by the Rules of Procedure.

For instance, Rule 52 elaborates on the procedure for communication to the parties and mentions both types of organizations.¹⁸⁰ It indicates that “in the case of the International Seabed Authority or the Enterprise, any international organization and any other intergovernmental organization (*emphasis added*) the Tribunal shall direct all communications to the competent body or executive head of such organization at its headquarters location.”¹⁸¹

With regard to the possibility of *amicus* interventions by NGOs, it is important to inquire whether the “intergovernmental organization” mentioned in the Rules of Procedure provisions about *amicus* interventions are equivalent to the “International Organization” defined in UNCLOS. Could the Tribunal, hypothetically speaking, call on an internationally recognized NGO to submit its views under Rules 84 and 133? And if not, in what way are “intergovernmental organizations” different from “international organizations” for the purposes of submitting *amicus* briefs?

175. ITLOS, Rules of the Tribunal, sec. H, art. 133(2) (Mar. 17, 2009), available at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (last visited Feb. 15, 2013).

176. *Id.*

177. *Id.*

178. *Id.* art. 133(4).

179. *Id.*

180. Rules of the Tribunal, *supra* note 163.

Lance Bartholomeusz highlights the drafting history of the procedural rules of ITLOS.¹⁸² He indicates that Article 133 of ITLOS Rules of Procedure was modeled on Article 66 of the ICJ statute and notes that the wording of the rules changed from “international” to “intergovernmental organization” only in later drafts.¹⁸³ According to Bartholomeusz, the reading precludes NGOs from participation as *amici*.¹⁸⁴ Beyerlin agrees with Bartholomeusz’s conclusion, yet does not elaborate in what sense an “intergovernmental organization” is different from an “international organization.”¹⁸⁵

Philippe Gautier adds that “intergovernmental organization” is broader than “international organization” and includes all international organizations, except when they are parties or intervening parties in the case.¹⁸⁶ According to Gautier, it is difficult to see how the term “intergovernmental organization” could cover an NGO.¹⁸⁷

D. *Amicus Curiae* in Case No. 17

Case No. 17 concerns an unprecedented instance when the International Seabed Authority faced a request by private entities to allow them exploration of the international seabed dubbed “a common heritage of mankind.”¹⁸⁸ However, one of the host States, Nauru requested the Seabed Authority to request an advisory opinion regarding the contours of State liability for damage in the Area incurred by private actors.¹⁸⁹ The Case is noteworthy for *amicus* participation in two respects: First, based on its procedural rules the Tribunal requested *amicus* briefs by a number of “intergovernmental” organizations that possess observer status at the Assembly of the International Seabed Authority.¹⁹⁰ One of the organizations that submitted a brief in response was the International Union

182. Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-STATE ACTORS & INT’L LAW 216, 231 (2005).

183. *Id.*

184. *Id.*

185. Ulrich, *supra* note 105, at 364.

186. GAUTIER *supra* note 158, at 339.

187. *Id.*

188. Wikipedia, *United Nations Convention on the Law of the Sea*, available at http://en.wikipedia.org/wiki/United_Nations_Convention_on_the_Law_of_the_Sea (last visited Feb. 23, 2013).

189. *Case No. 17*, ITLOS.ORG, available at <http://www.itlos.org/index.php?id=109> (last visited Feb. 15, 2013).

190. *Id.*

for the Conservation of Nature (IUCN).¹⁹¹ At the same time, two groups, Greenpeace and the WWF petitioned the Tribunal to accept their *amicus curiae* brief.¹⁹² This section outlines the relevant background to the Tribunal's opinion, as well as the founding history, organizational structure, and membership base of intervening and petitioning *amici*.

E. Facts of the Case

UNCLOS declares the seabed and its resources that lie beyond national jurisdiction (known as "The Area") to be "the common heritage of mankind."¹⁹³ The Doctrine of Common Heritage establishes norms preserving a large part of ocean space as a commons accessible and shared by all States.¹⁹⁴ The International Seabed Authority (ISA) supervises the exploration and exploitation of "The Area."¹⁹⁵ All prospective exploration and exploitation activities (either carried out by a State entity or a private entity) are required to be sponsored by a party to UNCLOS.¹⁹⁶ Sponsoring states must apply to the ISA for approval of a work plan for exploration and licenses for exploitation.¹⁹⁷

In 2008, ISA received two applications for approval of work plans for exploration in a reserved area.¹⁹⁸ They were lodged by Nauru Ocean Resources, Inc. (a Nauruan corporation sponsored by Nauru) and Tonga Offshore Mining Ltd. (a Tongan corporation sponsored by Tonga).¹⁹⁹ In 2009, as sponsoring countries became anxious about the possible liability caused by exploration, they requested the ISA to postpone both applications.²⁰⁰ Before proceeding, Nauru proposed that the ISA seek an

191. *Id.*

192. *Id.*

193. *United Nations Convention on the Law of the Sea*, *supra* note 188.

194. International Seabed Authority, *Regulations on prospecting and exploration for polymetallic sulphides in the Area*, Preamble, available at <http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf> (last visited Aug. 3, 2013).

195. *Id.*

196. *Id.*

197. *Id.*

198. Donald K. Anton, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216 (last visited Feb. 23, 2013).

199. *Id.*

200. *Id.*

Advisory Opinion from the Chamber on several specific questions to clarify the liability of sponsoring States.²⁰¹

The ISA Council requested an Advisory Opinion from the Chamber on three questions.²⁰² Based on Rule 82 of its Rules of Procedure, the Tribunal asked for an *amicus* opinion only of those intergovernmental organizations that serve as observers in the Assembly of the Authority.²⁰³ A study of the entities that submitted written statements as requested by the Tribunal shows that eleven states, three organizations, and the International Seabed Authority furnished such statements.²⁰⁴

F. *Amicus Brief by IUCN*

Rule 82 of the Rules of Procedure of the Assembly specifies the types of entities that may be granted observer status.²⁰⁵ This list includes states that are not members of the Authority and the U.N. along with its agencies and non-governmental organizations.²⁰⁶ Rule 82.1(e) of the Rules of Procedure of the assembly defines two types of organizations that can receive an observer status in the assembly: 1) Non-governmental organizations with which the Secretary-General has entered into arrangements in accordance with Article 169, paragraph 1, of UNCLOS, and 2) other non-governmental organizations invited by the Assembly that have demonstrated their interest in matters under consideration by the Assembly.²⁰⁷

Therefore, from the wide range of entities that serve as Observers of the Assembly, the Chamber invited only several organizations.²⁰⁸ The Interoceanmetal Joint Organization (IOM), the International Union for the Conservation of Nature (IUCN), and the United Nations Environment Programme (UNEP) submitted statements.²⁰⁹ The Tribunal invited

201. *Id.*

202. *Id.*

203. *Rules of Procedure of the Assembly of the International Seabed Authority*, available at http://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf (last visited Feb.23, 2013).

204. *Case No. 17*, *supra* note 194.

205. *Rules of Procedure of the Assembly of the International Seabed Authority*, *supra* note 203.

206. *Id.*

207. *Case No. 17*, *supra* note 189.

208. *Rules of Procedure of the Assembly of the International Seabed Authority*, *supra* note 203.

209. *About the Interoceanmetal Joint Organization*, IOM.COM, available at <http://www.iom.gov.pl/welcome.htm> (last visited Feb. 15, 2013).

organizations that are either fully constituted by states, such as the UNEP and the IOM or those that have States as members (IUCN).²¹⁰

IOM was founded in 1987 by an intergovernmental agreement.²¹¹ The current IOM sponsoring states are Bulgaria, Cuba, the Czech Republic, Poland, Russia, and Slovakia.²¹² The IOM is headquartered in Poland.²¹³ In fact, since 2001, the IOM has had an agreement with the International Seabed Authority for exploration activity in the area.²¹⁴ The UNEP is a United Nations arm regarding environmental issues around the world.²¹⁵ UNEP's mandate is based on the United Nations General Assembly Resolution 2997 (XXVII) of December 15, 1972 and subsequent amendments.²¹⁶

IUCN is the most hybrid of all the participating organizations. In its submission, the organization defined itself as "an intergovernmental organization."²¹⁷ However, in academic literature IUCN and its predecessor are referred to as NGOs.²¹⁸ Nevertheless, its membership base goes beyond governments alone. The statement notes, "IUCN is the world's oldest and largest global environmental network. It has a democratic membership union with more than 1,000 government and NGO member organizations, and almost 11,000 volunteer scientists and other experts in more than 160 countries."²¹⁹ In it, the Statute of the IUCN indicates that it is registered under the "Article 60 of the Swiss Civil Code as an international association of governmental and non-governmental

210. *Case No. 17, supra* note 189.

211. *About the Interoceanmetal Joint Organization (IOM), supra* note 214.

212. *Id.*

213. *Id.*

214. *Id.*

215. Adopted at UNCED in 1992, the Nairobi Declaration on the Role and Mandate of UNEP, adopted at the Nineteenth Session of the UNEP Governing Council, and the Malmö Ministerial Declaration of 31 May, 2000. See NATURAL ALLIES: UNEP AND CIVIL SOCIETY, U.N. ENV'T PROGRAMME (2004).

216. *Id.*

217. *Case No. 17: Responsibilities and obligations of states sponsoring person and entities with respect to activities in the international seabed area*, ITLOS.ORG, ¶ 3, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf (last visited Feb. 15, 2013) [hereinafter *Case No. 17 Responsibilities*].

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf Para 2.

218. See ANNA-KATHARINA WOBSE, *THE WORLD AFTER ALL WAS ONE: THE INTERNATIONAL ENVIRONMENTAL NETWORK OF UNESCO AND IUPN*, 20 CONTEMPORARY EUROPEAN HISTORY 331, 348 (Cambridge University Press 2011).

219. *Case No. 17 Responsibilities, supra* note 217, at ¶ 3.

members.”²²⁰ In terms of its members, IUCN classifies membership as States and integration organizations. States are Category A, although non-governmental organizations registered within states and international NGOs affiliated with more than one state can become members of Category B.²²¹ The difference between categories is reflected in the rights of entities within these Categories, including voting rights. For instance, each member State has three votes, while each NGO has one vote.²²²

G. *Amicus Curiae* Petition by WWF and Greenpeace

On August 17, 2010, the ITLOS Registry received a request by Greenpeace and WWF to permit them to participate in the Advisory proceedings as *amici curiae*.²²³ The President of the Court informed the organizations with individual letters on August 27th that their statement would not be included in the case file, as it was not submitted in accordance with Rule 133 of the Court.²²⁴ However, it would be transmitted to the States, intergovernmental organizations, and the Seabed Authority.²²⁵ The recipients were also informed that the statement would not be a part of the official case file.²²⁶

The *amicus curiae* pleading was submitted by two organizations: Stichting Greenpeace (Greenpeace International) and the World Wide Fund for Nature.²²⁷ The petitioners’ pleading was innovative relative to requests for intervention as *amici* in other international courts because it was composed of two related, yet separate documents: The Petition and Memorial.²²⁸ The Petition put forth the organizations’ request to participate as *amici* in the proceedings as well as their justifications for intervention, while the Memorial presented the petitioners’ substantive arguments.²²⁹

220. International Union for Conservation of Nature and Natural Resources, *Statutes and Regulations*, art. 1, Sept. 14, 2012, available at http://cmsdata.iucn.org/downloads/statutes_en.pdf (last visited Feb. 23, 2013).

221. *Id.* art. 4.

222. *Id.* art. 34.

223. *Case No. 17 Responsibilities*, *supra* note 217, at ¶ 13.

224. *Responsibilities and Obligations*, *supra* note 1.

225. *Id.*

226. *Id.*

227. See World Wide Fund for Nature, *Petition of Stichting Greenpeace Council and the World Wide Fund for Nature to be granted amicus curiae status*, Aug. 13, 2010, available at <http://www.greenpeace.org/international/Global/international/publications/oceans/2011/ITLOS%20Petition%20-%20final.pdf>. (last visited Feb. 23, 2013) [hereinafter *Petition of Stichting*].

228. *Id.*

229. *Id.*

In particular, in the petition, the organizations requested that 1) the petition and the memorial be considered as part of the pleadings in Case No. 17 and 2) the intervening organizations be permitted to make oral submissions during the hearings.²³⁰

The Petition touches upon three specific issues:

- 1) The authority of ITLOS to accept NGO *amicus curiae* submissions;
- 2) The desirability of admitting *amici* submissions; and
- 3) The interests of the intervening organizations in relation to the case.²³¹

In the section addressing the Tribunal's authority, the petitioners' main claim rested on the argument that the Tribunal's statute and rules of procedure neither authorize nor bar *amici* participation.²³² The petitioners write, "[i]n summary, although there is no express legal basis for *amicus curiae* participation in ITLOS proceedings in general . . . neither is there a bar to it"²³³ The argument in the petition regarding desirability of accepting *amici* submissions rests on a number of claims.

First, in what can be called a "lacuna" argument, the petitioners indicate that the proceedings before the international tribunals raise many issues that cannot be adequately expressed via the views of just governments and intergovernmental organizations.²³⁴ Second, the petitions put forth the "diffusion argument," asserting that *amici* participation is becoming more accepted in international dispute resolution, marshaling evidence from the practice of other international courts including the European Court of Human Rights and the WTO.²³⁵ Third, the petitioners highlight specific features of the deep seabed regime that warrant representation by entities other than governments.²³⁶ Lastly, the petitions respond to an anticipated concern of the ITLOS judges in the so-called "floodgates" argument by arguing that the acceptance of *amicus* briefs will

230. *Id.* at 2

231. *Id.*

232. *See Petition of Stitching, supra* note 227.

233. *Id.* at 5.

234. *Id.*

235. *Id.* at 7.

236. *Id.* at 11–12.

not result in an overwhelming submission of *amici* petitions.²³⁷ The petitioners put forth research from ICJ and the ECHR in this regard.²³⁸

In a separate section, the petitioners outline their “interest” for participating in the case as *amici*.²³⁹ Both organizations are “foremost environmental organizations globally, and both have campaigned for protection of the marine environment for decades.”²⁴⁰ They petitioned the Court to highlight that the Law of the Sea Convention as well as the customary international law impose serious obligations on States sponsoring activities in the Seabed.²⁴¹

The combined purpose of these obligations is to ensure that the risk of activities in the Area is properly internalized to discourage ill-advised projects and ensure that the risk of these activities is not simply transferred to third parties and the environment.²⁴² Lastly, the petitioners described their organizations, objectives, and involvement with the International Seabed Authority.²⁴³

WWF is a trailblazer in *amicus curiae* procedures and was one of the organizations in relation to which the WTO had to confront the issue of admitting *amicus curiae* submissions. The issue of whether WTO Dispute Panels should accept *amicus curiae* briefs arose in the *Shrimp/Turtle* case.²⁴⁴ One of the two organizations that filed an unsolicited *amicus* submission in that case was the WWF.²⁴⁵ The two briefs were submitted jointly by the CMC and the Center for International Environmental Law (CIEL), and by the WWF.²⁴⁶ Interestingly, the ITLOS petition refers to the precedent within the WTO instance, yet does not highlight the fact that WWF was there as well as the first petitioner.²⁴⁷

Greenpeace International describes itself as “an independent global campaigning organisation that acts to change attitudes and behaviour, to

237. See *Petition of Stitching*, *supra* note 227.

238. *Id.* at 14–15.

239. *Id.*

240. *Id.* at 15.

241. *Id.*

242. See *Petition of Stitching*, *supra* note 227.

243. *Id.* at 16–17.

244. *United States—Imp. Prohibition of Certain Shrimp and Shrimp Products*, App. Body Rep. at 108.

245. Henry S. Gao, *Amicus Curiae in WTO Dispute Settlement: Theory and Practice*, Nov. 1, 2006, available at http://hrichina.org/sites/default/files/oldsite/PDFs/CRF.1.2006/CRF-2006-1_Amicus.pdf (last visited Feb. 23, 2013).

246. *Id.*

247. *Id.*

protect and conserve the environment and to promote peace”²⁴⁸ It is present in forty countries across the globe and does not accept funds from governments or corporations.²⁴⁹ Greenpeace is an experienced *amicus curiae* submitter both internationally and before domestic courts. For instance, in 2004, Greenpeace submitted an *amicus curiae* brief before the WTO together with fourteen other non-governmental organizations in the so-called Biotech dispute.²⁵⁰

Nevertheless, Greenpeace has much more experience in *amicus curiae* participation domestically. Greenpeace USA has also been active filing *amicus* briefs in the courts at home.²⁵¹ The two organizations have a history of collaboration on the submission of *amicus* briefs. They submitted a joint brief along with other organizations in the case of *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (EC–Asbestos).²⁵²

VI. THE TRIBUNAL’S APPROACH

In Case No. 17 the Tribunal expressed its cautious, yet favorable approach to NGO participation through two distinct means. First, by admitting an *amicus* brief by IUCN under Rule 133, the Tribunal conceded that “intergovernmental organizations” as understood under its Rules could include NGOs within the UN definition of this term.²⁵³ Second, although the Tribunal dismissed the brief by WWF and Greenpeace, indicating that it

248. Greenpeace International, *About Greenpeace*, available at <http://www.greenpeace.org/international/en/about/> (last visited Feb. 16, 2013).

249. *Id.*

250. Greenpeace International, *Request for Permission to Submit Information to the Panel By the Following Non-Parties (Amicus Curiae Submission)*, available at <http://www.greenpeace.org/international/Global/international/planet-2/report/2004/6/amicus-curiae-submitted-to-the.pdf> (last visited Feb. 23, 2013).

251. *State of Florida v. David Davis*, Case No. 75,128, Brief of Amicus Curiae, (Fla. 1989).

252. Case No. WT/DS135/AB/R, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* 2001, App. Body Rep., available at http://ban.org/library/wto%20asbestos%20AB%20report%20-%20135abr_e.pdf (last visited Aug. 3, 2013); see Mary Footer & Saman Zia-Zarifi, *European Communities- Measures Affecting Asbestos and Asbestos Containing Products: The World Trade Organizations on Trial for Its Handling of Occupational Health and Safety Issues*, 3 MELBOURNE J. INT’L L.120 (2002); see also Foundation for International Environmental Law and Development, *NGOs welcome WTO Green Light to French Ban on Asbestos but remain skeptical about the WTO Dispute Settlement Process*, Mar. 2001, available at www.field.org.uk (last visited Feb. 16, 2013).

253. International Tribunal for the Law of the Sea, *Written Statement of International Union for Conservation of Nature & Natural Resources*, Aug. 19, 2010, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf (last visited Feb. 23, 2013).

was contrary to the Tribunal's Rules of Procedure, the Tribunal undertook a number of steps, which point to a favorable treatment of the *amicus* submission by these two public interest organizations.²⁵⁴

A. *ITLOS' Approach to IUCN*

The practice of Case No. 17 refined the meaning of "the intergovernmental organization" under Rule 133.²⁵⁵ By admitting an *amicus* brief by IUCN, the Tribunal approximated the meaning of "intergovernmental organization" to an NGO, at least as it is understood by the U.N.²⁵⁶

The character of organizations invited to submit their views is clarified in the meaning of "intergovernmental organizations" under Article 133 of the Rules of Procedure: "Intergovernmental organizations" is a broader category than "international organizations" under Article 305 of UNCLOS.²⁵⁷ The latter is characterized by two conditions: 1) It is constituted by States; and 2) its member States have transferred competence to it over matters governed by this Convention, including the competence to enter into treaties in respect to those matters.²⁵⁸

On the other hand, "intergovernmental organizations" are those organizations that contain States as members.²⁵⁹ As Case No. 17 shows, the defining character is not the type of instrument that founded the organization.²⁶⁰ The IOM was established by an intergovernmental agreement and the UNEP was established by a U.N. General Assembly Declaration, while the IUCN was founded as an Association under the Swiss Civil Code.²⁶¹ However, all of the organizations are

254. *Id.*

255. Preamble to the United Nations Convention on the Law, *Annex IX. Participation by International Organizations*, art. 1, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Feb. 23, 2013).

256. *Id.*

257. Union of International Associations, *Conventional Categories*, available at <http://www.uia.be/2-conventional-categories> (last visited Feb. 23, 2013)

258. *Case No. 17, supra* note 189.

259. International Review of the Red Cross, *Participation of States in the International Conference of the Red Cross and Red Crescent and assemblies of other international organizations*, available at <http://www.icrc.org/eng/assets/files/other/irrc-876-casalin-lamb.pdf> (last visited Feb. 23, 2013).

260. *Case No. 17, supra* note 189.

261. Swiss Civil Code, art. 60, Jan. 1, 2013, available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf> (last visited Feb. 23, 2013).

“intergovernmental” in the sense that States are members of these organizations. In the case of IOM, its membership consists of States only, while IUCN unites States, as well as non-governmental organizations, even though States have more rights.²⁶²

The practice of Case No. 17 also shows that membership of “intergovernmental organizations,” as opposed to “international organizations” might not be limited exclusively to states. As indicated above, IUCN’s members are States as well as state agencies, NGOs, and individuals.²⁶³

By admitting the brief by IUCN, ITLOS approximated its interpretation of an “intergovernmental organization” to the definition of an NGO at least as understood by the U.N. The term “non-governmental organization” was first mentioned on the global treaty level in Article 71 of the U.N. Charter, which reads: “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”²⁶⁴ The Charter did not, however, define “non-governmental organization.” A definition was adopted in 1950 by the UN Economic and Social Council which established that for the purpose of consultative arrangements with the Council NGO meant [A]ny international organization which is not created by intergovernmental agreement.²⁶⁵ The definition was further elaborated in 1996, providing that “[A]ny such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.”²⁶⁶ There were other conditions added as well, such as that the aims of an NGO have to be in conformity with the spirit, purposes and principles of the U.N. Charter.²⁶⁷ The

262. Economic and Social Council, *Arrangements for Consultation with Non-Governmental Organizations*, art. 1, available at <http://www.un-documents.net/1296.htm> (last visited Feb. 23, 2013).

263. Review of Consultative Agreements with Non-governmental Organizations, E/RES/288(x), art. 8, Feb. 27 1950, available at <http://www.un-documents.net/1296.htm> (last visited Feb. 23, 2013).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

definition does not, therefore, include possession of a non-profit or public interest aim as a requirement.²⁶⁸

IUCN meets this U.N. definition of an NGO. The U.N. definition excludes from recognition as an NGO those organizations that were established solely by governments.²⁶⁹ IUCN was founded as International Union for Protection of Nature (IUPN) in Fontainebleau in 1948.²⁷⁰ At the time of founding, it comprised an amalgamation of States and non-governmental organizations.²⁷¹ In 1956, IUPN was renamed into IUCN, while its objectives remained.²⁷² It is hardly doubtful that these purposes correspond to the purposes of the U.N. and its principles.

B. The Tribunal's Favorable Treatment of WWF and Greenpeace Brief

Despite the fact that ITLOS rejected NGO *amicus* submissions based on its Rules of Procedure, in fact, with its actions, the Tribunal subtly welcomed the WWF and Greenpeace brief. Although the *amicus* brief did not become part of the official case file, the actions of ITLOS in regard to the brief, including its display on its website, facilitated its dissemination to a wide audience of the *amici's* arguments. As a result, the submission is noted and discussed at other websites and scholarly blogs.²⁷³ The NGOs themselves refer to their submission as it is displayed on the Tribunal's page.²⁷⁴ In short, by displaying the submission on its website, the Tribunal granted exposure to the *amici* brief. Moreover, by furnishing the brief to the State parties and intergovernmental organizations, ITLOS supported the process of sharing NGO arguments with the parties, which allowed the parties to take into account the arguments and concerns raised in the brief. In these actions, the Tribunal allowed the NGOs to achieve the aims which would have been attained with their official participation in the case.

First, although the Rules do not expressly authorize or obligate the Tribunal to do so, the Tribunal disseminated the NGO submission to the

268. Anna Dolidze, *The European Court of Human Rights' Evolving Approach to Non-Governmental Organizations*, in *GLOBALIZATION AND GOVERNANCE?* (LAURENCE BOULLE ed. 2011).

269. *Id.*

270. W. M. ADAMS, *GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN A DEVELOPING WORLD* (3d ed. 2009).

271. *Id.*

272. *Id.*

273. Philippe Gautier, *Letter from the International Tribunal for the Law of the Sea to Mr. Daniel Simons, Greenpeace International*, Aug. 27, 2010.

274. Don Anton, *Possible NGO Amicus in ITLOS Advisory Opinion Case*, <http://donanton.org/2010/08/29/possible-ngo-amicus-in-itlos-advisory-opinion-case/> (last visited Apr. 5, 2013).

State Parties, Seabed Authority, and the organizations that had submitted their statements. The judgment notes that these entities “would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal’s website.”²⁷⁵ Indeed, while the letter from the Tribunal to the submitter informs them that their submission will not be included in the case file, it includes a promise that “State parties and intergovernmental organizations admitted to participate in the advisory proceedings will be informed of the received of the statement and will receive an electronic copy thereof.”²⁷⁶

Second, the Tribunal displayed the *amici* brief on their website,²⁷⁷ although the Rules of Procedure are also silent on this matter. Article 133 of the Rules of Procedure addresses submission of documents within advisory proceedings.²⁷⁸ It states, “[t]he written statements and documents annexed shall be made accessible to the public as soon as possible after they have been presented to the Chamber.”²⁷⁹ The question arises: Which statements and annexed documents are meant under this provision? The reading of Article 133 in its entirety answers the question. In 133(1), the Tribunal is obligated to inform all State parties about the request for the advisory procedure.²⁸⁰ The following provision allows the Tribunal “to identify the intergovernmental organizations which are likely to be able to furnish information on the question.”²⁸¹ Afterward, the State parties and intergovernmental organizations are invited to submit their “written statements and documents annexed” regarding the questions raised in the proceedings.²⁸²

Thus, according to the Rules, the Court shall make available to the public these documents submitted by States and Intergovernmental Organizations. The Tribunal indeed did so in this case.²⁸³ However, in

275. Case No. 17, *supra* note 189.

276. *Id.*

277. Case No. 17, *supra* note 189.

278. Rules of Procedure of the Assembly of the International Seabed Authority, *supra* note 208.

279. Rod Powers, *Punitive Articles of the UCMJ Article 134—General article*, available at <http://usmilitary.about.com/od/punitivearticles/a/134.htm> (last visited Feb. 16, 2013).

280. Rules of Procedure of the Assembly of the International Seabed Authority, *supra* note 208.

281. *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, *supra* note 198.

282. The European Patent Convention, art. 133(3), Nov. 29, 2000, available at <http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ar133.html> (last visited Feb. 16, 2013).

283. *Id.*

addition, the Tribunal did more than it was required to do in accordance with the Rules and displayed the submission of NGO *amici* briefs.²⁸⁴

Moreover, the tribunal's response to the submitter includes a promise that their submission will be displayed on the website.²⁸⁵ The letter specifies how the submission will be presented: "The statement will be placed on the website of the Tribunal in a separate opinion of documents relating to Case No. 17 entitled 'statement submitted by a non-governmental organization.'"²⁸⁶ The statement would also indicate that it is not part of the official case file.²⁸⁷ Indeed, the Tribunal followed up on the promise.²⁸⁸

VII. CONCLUSION

International legal process school has captured the modalities of NGO participation in international law-making. This article underscores one more, hitherto overlooked, yet increasingly popular method through which NGOs take part in making international law. Although *amicus curiae* participation procedure originated within the UK and has become a traditional procedural instrument within domestic law of common law countries, an increasing number of international tribunals allows for the *amicus* procedure and accepts and engages with *amicus curiae* briefs submitted by NGOs. Up until now, ITLOS has remained one of the few international tribunals that has not been accepting NGO *amicus* briefs. Case No. 17, however, signals a change in this policy.

ITLOS' approach to *amicus* briefs in Case No. 17 indicates that opportunities for NGO participation in international law-making are expanding. First, by admitting and considering a brief by IUCN under Rule 133, the Tribunal interpreted "intergovernmental organization" as an entity that includes States and non-State actors as founders and members. This precedent approximated "intergovernmental organization" with the term NGO as it is used within the U.N. This practice, if continued, could serve as a pathway for *amicus* briefs by other organizations whose membership is similar to the IUCN.

Second, ITLOS's approach to WWF's and Greenpeace's *amicus curiae* petition showed that the Tribunal is at least partially receptive to

284. *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, *supra* note 198.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

hearing NGO claims. Although the Tribunal declined the petition by Greenpeace and WWF, the Tribunal's actual response, including the display of the petition on its website, allowed the dissemination of NGO arguments.²⁸⁹

Interestingly, records indicate that the Tribunal judges met in 2004 to review a number of issues with regard to the Rules of Procedure, including the question of *amicus curiae* participation.²⁹⁰ During the meeting, the Members of the Tribunal discussed whether it was necessary to adopt rules regarding the *amicus curiae* proceedings.²⁹¹ In the end, they decided that it was too early to resolve this question. Thus, they determined that the issue should be resolved by considering future developments in the Court's case law.²⁹²

The decision of the 2004 meeting to discuss the possibility of admitting NGO *amicus* briefs and the judges' conclusion to wait for relevant precedents, demonstrated the readiness of the Tribunal to hear NGO arguments. Case No. 17, which concerned the issue of the seabed, recognized as "common heritage of mankind," served as an appropriate opportunity to hear views about the implications of the case beyond the interests of the immediate parties to the case. Indeed, to represent the interests that are circumvented by the adversarial procedure is one of the inherent functions of the *amicus curiae* procedural instrument, a function which, needless to say, should be performed primarily when the fate of the commons of mankind is at stake.²⁹³

On a more general level, the cautious welcome by ITLOS to NGO participation is an important development for considering the role of NGOs in international dispute-resolution. ITLOS, along with the International Court of Justice, was still one of the few international tribunals that did not allow for *amicus* submissions by non-State actors.²⁹⁴ The welcome to NGO briefs in Case No. 17, although timid, might be a sign that that international dispute-resolution is becoming more receptive than before to participation

289. *Case No. 17, supra* note 189.

290. International Tribunal for the Law of the Sea, *Statement By Mr. L. Dolliver M. Nelson, President of the International Tribunal for the Law of the Sea, on the Report of the Tribunal at the Fifteenth Meeting of the State Parties to the Convention on the Law of the Sea*, June 16, 2005, available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/nelson/msp_160605_eng.pdf (last visited Feb. 23, 2013).

291. *Id.*

292. United Nations Convention on the Law of the Sea, SPLOS/122, Mar. 30, 2005, art. 41, available at http://www.itlos.org/fileadmin/itlos/documents/annual_reports/ar_2004_e.pdf (last visited Feb. 23, 2013).

293. *Id.*

294. *Id.*

by actors other than States. Whether or not more opportunities for NGOs' participation and their active involvement in international, and in particular, international environmental law-making will lead to more legitimate or democratization, of such lawmaking is an issue that future research must answer.