Changing role of friends of the court in the International Courts and Tribunals

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Abstract. The paper examines the practice and procedures of a range of international courts and tribunals with regard to the submission of amicus curiae briefs by non-governmental actors. The focus is on the recent practice in the ICJ, WTO dispute settlement system and in the regional human rights bodies, as well as in international criminal tribunals, with a view to identifying whether any common rules or approaches exist. The study sets out the current rules regarding the receipt of amicus curiae briefs and considers the procedural rules apply to the submission of such briefs. The paper focuses on the ways are international court and tribunal able to use the information and arguments submitted by amicus curiae briefs.

1. Introduction

This paper deals with the potential role of the amicus curiae briefs in dispute settlement proceedings before international courts and tribunals. In particular, the focus is on the opportunities for NGOs and other non-governmental actors to make factual and legal arguments available to international courts and tribunals in the form of amicus curiae briefs, i.e., as a friend of the court. The human rights tribunals and the criminal tribunals have already adopted ‘rules of procedure’ allowing this possibility. This paper explores the implications of applying these rights in relation to other international courts and tribunals which deal with matters of public interest such as the International Court of Justice (ICJ), World Trade Organisation (WTO), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY).

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2. Role of *amicus curiae*

The amicus appears to have been originally a bystander who, without any direct interest in the litigation, intervened in his own initiative to make a suggestion to the court on matters of fact and law within his knowledge.\(^2\) An amicus brief should generally contain materials submitted to the court and are additional to that submitted by any other parties. It may support the argument of one party or indeed support the argument of one party in part and another party in part.

The *amicus curiae* (hereafter, AC) can contribute to the work on international courts and tribunals in a number of ways. For example, an amicus can bring to the attention of the tribunal, factual and legal information, which, for whatever reason, have not been adduced by the parties to a dispute. This function is of particular significance in novel and complex areas. The amicus can also serve to alert a tribunal to relevant sources of additional information and expertise which tribunal might usefully draw upon in order to fulfil its functions. An amicus can submit information as to the broader implications of decisions beyond the immediate interests of the parties to a dispute, particularly where a decision may have a significant impact on matters of public interest, thus serving to enhance public participation in international decision making.\(^3\) The advantages\(^4\) of having AC is that it is less costly and time consuming than a full case, and they can share litigation burden with other parties. They are generally not bound by the decision and can raise issues omitted by states for any number of reasons. They can raise any issues the court could raise on its own motion and is not limited by questions presented to them or to matters pleaded by the parties. The AC can participate on the basis of a general interest, which could be their desire to prevent a collusive suit, to protect unrepresented persons or the public interest, or to point out the error of the court. The AC, such as the non-governmental organisations (hereafter, NGOs) can represent global interests

\(^2\) E. Angell, “The Amicus Curiae Brief: American Development of English Institution”, *ICLQ* 16 (1967), 1017. Generally: S. Krislov, “The Amicus Curiae Brief: From Friendship to Advocacy”, *Yale Law Journal* 72 (1963), 694–721. The difference between AC and third party submission is that the former, known as the ‘friend of the court’ submits arguments independently of the parties to the dispute. The third party needs to establish a legal interest in the outcome of the case. The right of access is not dependent upon the consent of the parties. The third party will need to prove, *prima facie*, that their right or protected interest will be affected by the outcome of the case. This is not necessary with an amicus brief.

\(^3\) Supplementary AC brief on the *Shrimp-Turtle Dispute*, submitted to the Appellate Body of the WTO by WWF International, July 1998.