

Prospects for Amicus Curiae Under the Annex to the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses *

การค้นคว้าที่ปรึกษาของศาลภายใต้ภาคผนวกของอนุสัญญา
ว่าด้วยกฎหมายเกี่ยวกับการใช้ลำนํ้าระหว่างประเทศ
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Abstract

As global demand for water resources increase for limited supplies, disputes may arise between States which share international watercourses. In the law of international watercourses, when States are unable to settle disputes through

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“diplomatic” methods, they may resort to international courts and tribunals. A recent trend in water-related disputes submitted to international courts and tribunals has been participated by non-parties as *amicus curiae*. This procedural tool of international courts and tribunals is not customary international law, nor is it a procedural tool common to all States. The 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses came into force on August 17, 2014. The convention includes optional recourse to arbitration and an annex of procedural rules for arbitration. However, the annex to the convention provides no express provision for *amicus curiae*. This article reviews whether an arbitral tribunal constituted under the annex may accept *amicus curiae* submissions based on the rules and practice of selected international courts and tribunals. This article concludes that based on the rules and practice of selected international courts and tribunals, an arbitral tribunal following the procedures in the annex to the convention will most likely find the discretion to accept *amicus curiae* submissions under its general procedural powers, however notions of public participation may be explored that may further support the acceptance of *amicus curiae* submissions.

Keywords: Amicus Curiae, Dispute, International, Public Participation, Water

บทคัดย่อ

เนื่องจากความต้องการใช้ทรัพยากรน้ำสูงขึ้นแต่ปริมาณน้ำมีจำกัด ข้อพิพาทระหว่างรัฐที่ใช้แหล่งน้ำระหว่างประเทศร่วมกันจึงอาจเกิดขึ้นได้ ในกฎหมายลำนํ้าระหว่างประเทศ เมื่อรัฐไม่สามารถระงับข้อพิพาทผ่านวิธีการทูต รัฐเหล่านั้นอาจระงับข้อพิพาททางศาลหรืออนุญาโตตุลาการระหว่างประเทศ แนวโน้มล่าสุดของข้อพิพาทที่เกี่ยวกับน้ำซึ่งถูกเสนอต่ออนุญาโตตุลาการหรือศาลระหว่างประเทศเพื่อระงับข้อพิพาทมักจะมีที่ปรึกษาของศาล (Amicus Curiae) ที่มีใช้คู่ความเข้ามามีส่วนร่วม เครื่องมือพิจารณาคดีดังกล่าวไม่ใช่ทั้งกฎหมายจารีตประเพณีระหว่างประเทศและไม่ใช่แนวทางการพิจารณาคดีร่วมกันของทุกรัฐ อนุสัญญาว่าด้วยกฎหมายเกี่ยวกับการใช้นํ้าระหว่างประเทศที่มีใช้เพื่อการเดินเรือ ค.ศ. 1997 ซึ่งมีผลบังคับใช้เมื่อวันที่ 17 สิงหาคม 2557 ประกอบด้วยบทบัญญัติเกี่ยวกับการขอความช่วยเหลือทางเลือกต่ออนุญาโตตุลาการและภาคผนวกว่าด้วยกฎกระบวนการพิจารณาสำหรับอนุญาโตตุลาการ อย่างไรก็ตาม ภาคผนวกดังกล่าวไม่มีบทบัญญัติที่ชัดเจนเกี่ยวกับการเสนอที่ปรึกษาของศาล

บทความนี้จึงมุ่งที่จะทบทวนให้เห็นว่าคณะอนุญาโตตุลาการที่ถูกตั้งขึ้นภายใต้ภาคผนวกอาจยอมรับข้อเสนอที่ปรึกษาของศาลตามกฎหมายเกณฑ์และทางปฏิบัติเกี่ยวกับศาลหรืออนุญาโตตุลาการระหว่างประเทศที่ถูกคัดเลือกได้หรือไม่ บทความนี้ได้สรุปว่าตามกฎหมายเกณฑ์และวิธีปฏิบัติของศาลหรืออนุญาโตตุลาการระหว่างประเทศที่ถูกคัดเลือกขึ้นมานั้นจะต้องใช้ดุลพินิจในการยอมรับและพิจารณาข้อเสนอว่าด้วยที่ปรึกษาของศาลภายใต้อำนาจกระบวนการพิจารณาโดยทั่วไป อย่างไรก็ตาม แนวคิดว่าด้วยการมีส่วนร่วมของประชาชนอาจถูกนำมาวินิจฉัยสนับสนุนในอนาคตสำหรับการยอมรับและการพิจารณาข้อเสนอที่ปรึกษาของศาล

คำสำคัญ: ที่ปรึกษาของศาล, ข้อพิพาท, ระหว่างประเทศ, การมีส่วนร่วมของประชาชน, น้ำ

1. Introduction

Water is at the center of sustainability for human beings and human development.¹ The global population tripled during the 20th century, but the use of water increased by six times during the same period.² All human enterprises (food and agriculture, energy, industry, and human settlement)³ and ecosystems require the use of water directly or indirectly.⁴ By 2050, the world's population is estimated to increase to between 9.4 billion and 10.2 billion.⁵ As the global population grows, so will the demand for food and agriculture, energy, industry, and human settlement,⁶ and the demand for the use of water will also increase as well,⁷ putting increasing strain on ecosystems. The current global population withdraws an estimated 4,600 cubic kilometers of water per year, an amount already near maximum sustainable levels.⁸ However, by 2050, global water withdrawal is expected to increase by 20%-30%.⁹ The Earth's water is finite, all

¹ The World Bank, 'Water, Overview - Context.' (*The World Bank*, 2019) <<http://www.worldbank.org/en/topic/water/overview>>; The World Bank, *Water Resources Sector Strategy: Strategic Directions for World Bank Engagement* (The World Bank 2004) 7; 'Report of the United Nations Conference on Environment and Development' (United Nations 1993) UN Doc A/CONF.151/26/Rev.1 (vol. I) 3–8, 275–314.

² The World Bank, *Water Resources Sector Strategy: Strategic Directions for World Bank Engagement* (n 4) 5.

³ WWAP, *The United Nations World Water Development Report 4: Managing Water Under Uncertainty and Risk*, vol. 1 (UNESCO 2012).

⁴ WWAP, *The United Nations World Water Development Report 3: Water in a Changing World* (UNESCO 2009) 166.

⁵ WWAP, *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water* (UNESCO 2018) 10–11.

⁶ WWAP, *The United Nations World Water Development Report 4: Managing Water Under Uncertainty and Risk* (n 6) 45.

⁷ WWAP, *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water* (n 8) 10.

⁸ WWAP, *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water* (n 8) 11, 13.

⁹ WWAP, *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water* (n 8) 11.

water that exists is all that there will ever be.¹⁰ The water we use today is the same water used by ancient civilizations thousands of years ago.¹¹ There are an estimated 1,386 million cubic kilometers of water in the whole world.¹² However, only 2.5% of this water is freshwater fit for human sustainability and development.¹³ This water supply¹⁴ is unevenly distributed in various water resources around the world. The majority of the Earth's freshwater is held in glaciers (68.7%) or is groundwater and permafrost (30.9%).¹⁵ Less than 0.4% is surface water such as lakes, rivers, wetlands, and reservoirs, from which most humans have relied upon for much of human history.¹⁶ These water resources are sustained or diminished by a complex global interaction between processes in the atmosphere, land surface, and subsurface known as the hydrologic cycle.¹⁷ When there is a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common

¹⁰ Stephen C McCaffrey, *The Law of International Watercourses* (2nd edn, Oxford University Press 2007) 4.

¹¹ McCaffrey (n 13) 4.

¹² USGS, 'Where Is Earth's Water?' (*USGS Water-Science School*, 2 December 2016) <<https://water.usgs.gov/edu/earthwherewater.html>>.

¹³ Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford University Press 2013) 1; WWAP, *The United Nations World Water Development Report 2: Water, A Shared Responsibility* (UNESCO 2006) 121.

¹⁴ Water supply may be defined as "quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability." - UN-Water, 'What Is Water Security? Infographic.' (*UN-Water*, 8 May 2013) <<http://www.unwater.org/publications/water-security-infographic/>>.

¹⁵ WWAP, *The United Nations World Water Development Report 2: Water, A Shared Responsibility* (n 16) 121.

¹⁶ USGS (n 15); WWAP, *The United Nations World Water Development Report 2: Water, A Shared Responsibility* (n 16) 121.

¹⁷ McCaffrey (n 13) 24–25; M Pidwirny, 'The Hydrologic Cycle.' (*Fundamentals of Physical Geography, 2nd Edition*, 2018) <<http://www.physicalgeography.net/fundamentals/8b.html>>.

terminus, it may be called a watercourse.¹⁸ Watercourses are one of the water resources used by States to satisfy the water requirements for the uses of those living within its national borders.¹⁹

It is often the case that the ingenuity of human beings alter the natural flow of one or several watercourses, through feats great and small to maintain a stable quantity and quality of water for when and where they should need and want it.²⁰ Ideally, every community, every State, on its own, would have all the water it needs and wants, in adequate quantity and quality, at the time desired. However, the reality is that States have imposed political borders upon watercourses in such a way that hundreds of known watercourses flow contiguously, successively or both contiguously and successively between more than one State.²¹ This trans-boundary nature has given hundreds of watercourses an international²² characteristic as those watercourses are claimed for uses by more than one State such that the uses of water from an international watercourse by any one State will implicate international substantive and procedural obligations and have consequences in the quantity and quality of water available in any other State that shares the same watercourse or watercourses. As more and more demands are placed upon a watercourse shared by two or more States, tensions between uses may arise with another State or States that share the watercourse or watercourses and mature into an

¹⁸ “‘Watercourse’ means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus” - Convention on the Law of the Non-navigational Uses of International Watercourses 1997 (I-52106) art. 2(a).

¹⁹ USGS, ‘How Much Water Is There on Earth?’ (*USGS Water Science School*, 2 December 2016) <<https://water.usgs.gov/edu/earthhowmuch.html>>; Boisson de Chazournes, *Fresh Water in International Law* (n 16) 8; McCaffrey (n 13) 24–25.

²⁰ WWAP, *The United Nations World Water Development Report 3: Water in a Changing World* (n 7) 129–130, 162.

²¹ WWAP, *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water* (n 8) 107.

²² “‘International watercourse’ means a watercourse, parts of which are situated in different States” - UNWC art. 2(b).

international dispute.²³ In the event of an international dispute, States are under an obligation to settle their disputes by peaceful means that will maintain peace and security between users and uses.²⁴ This may include the use of international courts and tribunals.²⁵

²³ The term “dispute” is often used in treaties without definition. In several scholarly works, the term is often used interchangeably with the term conflict. In other works, a dispute is also often assumed and emphasis is placed on the process of dispute prevention or settlement. The terms conflict and dispute are related, but are not the same. Commentary to the Charter of the United Nations states a dispute arises, “when a State addresses specific claims to another State, which the latter rejects.” - Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol. 1 (3rd edn, Oxford University Press 2012) 192. The Permanent Court of International Justice in the *Mavromattis Palestine Concessions* case defined a dispute as, “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.” - *Mavromattis Palestine Concessions (Greece v UK), Judgment* (Aug. 30) 1924 PCIJ Ser No. 2 (PCIJ) 11. Merrills defines a dispute as “a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter claim or denial by another.” - JG Merrills, *International Dispute Settlement* (Cambridge University Press 2005) 1. Black’s Law Dictionary defines dispute as, “A conflict or controversy, especially one that has given rise to a particular lawsuit.” - Bryan A Garner (ed), *Black’s Law Dictionary* (4th edn, West Publishing Co 1996) 240. In the non-navigational uses of international watercourses, some scholars have provided a limited definition, “Thus, for the purpose of this study the term ‘water dispute’ will be limited to those conflicts involving the use of transboundary water resources, both surface and ground waters. However, it will be treated broadly enough to cover any conflict of views or of interests that takes the form of opposing claims between the states involved, ‘justiciable’ as well as ‘non-justiciable’ disputes, which can be resolved through all available means of dispute settlement.” - Vinogradov, Wouters and Jones (n 85) 26.

²⁴ Charter of the United Nations and Statute of the International Court of Justice 1945 (1 UNTS XVI) art. 1(1), 2(3), 33(1).

²⁵ Laurence Boisson de Chazournes, ‘The Permanent Court of International Justice, The International Court of Justice and International Water Law: Versatility in Consistency’, *The Research Handbook on International Water Law* (Edward Elgar Publishing 2019) 285; Laurence Boisson de Chazournes, ‘The Settlement of Disputes through Judicial Means (Article 33(10) and the Annex on Arbitration)’ in Laurence Boisson de Chazournes and

International disputes involving international watercourses reflect the versatility of water and its uses through the variety of disputes that occur.²⁶ Allocating water between its competing uses is a balancing of values²⁷ whether sociological, ecological, cultural, or economic.²⁸ Specific values may be well represented in the forum in which the international watercourse dispute is being settled such as investment protection and trade policies, but other values may not, such as the environment and sustainability. In balancing values to reach a proper determination of a case before them, international courts and tribunals have various procedural tools available to provide perspectives, arguments, or expertise on disputes before them. A recent trend in water-related disputes submitted to international courts and tribunals has been increasing participation by non-parties to the dispute in the form of *amicus curiae*.²⁹

Amicus curiae is Latin for “friend of the court.”³⁰ It is a procedural tool of courts and tribunals.³¹ There is no one definition of the scope and content

others (eds), *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary* (Oxford University Press 2018) 568.

²⁶ Boisson de Chazournes, *Fresh Water in International Law* (n 16) 198.

²⁷ Eyal Benvenisti, ‘The Role of Third Parties in Promoting Collective Action Among Riparians’ in The International Bureau of the PCA (ed), *Resolution of International Water Disputes (PCA/Peace Palace Papers)* (Kluwer Law International 2003) 203.

²⁸ Boisson de Chazournes, *Fresh Water in International Law* (n 16) 198.

²⁹ Boisson de Chazournes, *Fresh Water in International Law* (n 16) 218–226; Makane Moïse Mbengue and Mara Tignino, ‘Transparency, Public Participation, and Amicus Curiae in Water Disputes’ in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (Oxford University Press 2005) 367–405; Attila Tanzi and Cesare Pitea, ‘Emerging Trends in the Role of Non-State Actors in International Water Disputes’ in The International Bureau of the PCA (ed), *Resolution of International Water Disputes (PCA/Peace Palace Papers)* (Kluwer Law International 2003) 286–297.

³⁰ Philippe J Sands and Ruth Mackenzie, ‘International Courts and Tribunals, Amicus Curiae’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 519.

of amicus curiae.³² However, amicus curiae may generally be characterized as a procedural tool of a court or tribunal whereby a non-party to a dispute provides perspectives, arguments, or expertise that can assist the court or tribunal in the administration of its duties.³³ Amici are not considered a party to a dispute³⁴ and participate at the discretion of the court or tribunal.³⁵ Therefore, amici are without the same substantive and procedural rights as a party³⁶ and are not bound by the judgment of the court or tribunal.³⁷ Participation as amicus curiae may take different forms from the submission of briefs to oral testimony. Generally, anyone may participate as amicus curiae, however this is subject to the court or tribunal's discretion. Upon the completion of the submission, amicus curiae participation is considered over, there is no requirement that a court or tribunal consider the submission.³⁸

In the non-navigational uses of international watercourses, the *1997 Convention on the Law of the Non-Navigational Uses of International Watercourses* ("UNWC") does not expressly address amicus curiae in the convention. Adopted by resolution A/RES/51/229 on May 21, 1997, and entering into force on August 17, 2014,³⁹ the UNWC is a framework convention of universal effect⁴⁰ that is

³¹ Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals* (Nomos Verlagsgesellschaft 2018) 123–126.

³² Wiik (n 34) 33; Sands and Mackenzie (n 33) 519.

³³ Wiik (n 34) 22–29; Sands and Mackenzie (n 33) 519–520; Lance Bartholomeusz, 'The Amicus Curiae Before International Courts and Tribunals' (2005) 5 *Non-State Actors and International Law* 209, 211.

³⁴ Gernot Biehler, *Procedures in International Law* (Springer-Verlag 2008) 181–183; Bartholomeusz (n 36) 209.

³⁵ Bartholomeusz (n 36) 44.

³⁶ Wiik (n 34) 126; Bartholomeusz (n 36) 273.

³⁷ Wiik (n 34) 546.

³⁸ Helen A Anderson, 'Frenemies of the Court: The Many Faces of Amicus Curiae' (2014) 49 *URichLRev* 361, 389–390.

³⁹ *Convention on the Law of the Non-Navigational Uses of International Watercourses* 1997 (UN Doc A/RES/51/229).

⁴⁰ Patricia Wouters, 'Universal and Regional Approaches to Resolving International Water Disputes: What Lessons Learned from State Practice?' in *The International Bureau of*

intended to “ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations.”⁴¹ The UNWC consists of 37 articles that are a codification of substantive and procedural principles⁴² that when cooperatively implemented as a whole, serve to regulate the use of international watercourses and avoid disputes.⁴³ Those principles being equitable and reasonable utilization, prevention of significant harm, and prior notification of planned measures.⁴⁴ These principles are supported by other principles such as cooperation and information exchange.⁴⁵ If a dispute does arise regarding the interpretation and application of the UNWC’s principles, Article 33 of the UNWC reiterates the general obligation of States to settle their disputes peacefully under Article 2(3) and Article 33(1) of the Charter of the United Nations.⁴⁶ The settlement of disputes under Article 33 of the UNWC is

the PCA (ed), *Resolution of International Water Disputes (PCA/Peace Palace Papers)* (Kluwer Law International 2003) 119.

⁴¹ UNWC pmb.

⁴² UNWC art. 1-37.

⁴³ Ruth Lapidoth, ‘Dispute Settlement Under the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses’ (2000) 75 ILS 231.

⁴⁴ Dr Stephen McCaffrey, ‘The Entry into Force of the 1997 Watercourses Convention.’ (*International Water Law Project Blog*, 26 June 2014) <<https://www.internationalwaterlaw.org/blog/2014/05/25/dr-stephen-mccaffrey-the-entry-into-force-of-the-1997-watercourses-convention/>>.

⁴⁵ Muhammad Mizanur Rahaman, ‘Principles of International Water Law: Creating Effective Transboundary Water Resources Management’ (2009) 1 IJSSoc 207, 212–213.

⁴⁶ Robert Rosenstock, ‘The Law of the Non-Navigational Uses of International Watercourses’ in ILC (ed), *Yearbook of the International Law Commission 1994: Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session A/CN.4/SER.A/1994/Add.I (Part 2)*, vol. 2(2) (United Nations 1996) 134, art. 33, cmt 1 <http://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf>; Jens Evensen, ‘The Law of the Non-Navigational Uses of International Watercourses A/CN.4/367: First Report on the Law of the Non-Navigational Uses of International Watercourses, by Mr. Jens Evensen, Special Rapporteur’ in ILC (ed), *Yearbook of the International Law Commission 1983: Documents of the Thirty-fifth Session A/CN.4/SER.A/1983/Add.I (Part 1)*,

residual and applies where the parties to the dispute do not have an applicable agreement for dispute settlement otherwise.⁴⁷ The means of dispute settlement under the UNWC include optional recourse to arbitration⁴⁸ which is complemented by optional procedural rules codified in the Annex to the UNWC (“Annex”).⁴⁹ However, the Annex has no express provision regulating amicus curiae participation.

This article explores whether an arbitral tribunal constituted under the Annex has the authority to accept amicus curiae submissions under the optional arbitration procedures codified in the Annex based on the rules and practice of selected international courts and tribunal. This article will first provide a brief overview of the origins of amicus curiae. Secondly, this article draw upon the empirical work of various scholars⁵⁰ and briefly illustrate the rules and practice of selected international courts and tribunals to determine general criteria for the acceptance of submissions from amicus curiae. Thirdly, this article will analyze this criterion under the Annex to determine whether an arbitral tribunal following the procedures under the Annex may accept amicus curiae submissions; and fourthly, recommend consideration of other factors such as the principle of public participation for the acceptance of amicus curiae submissions.

This article concludes that based on the rules and practice of selected international courts and tribunals, an arbitral tribunal following the procedures

vol. 2(1) (United Nations 1983) 190, art. 31, cmt 207

<http://legal.un.org/ilc/publications/yearbooks/english/ilc_1983_v2_p1.pdf>; United Nations Convention on the Law of the Sea 1982 (1833 UNTS 397) art. 279-280; Attila Tanzi and Cristina Contartese, ‘Dispute Prevention, Dispute Settlement and Implementation Facilitation in International Water Law: The Added Value of the Establishment of an Implementation Mechanism Under the Water Convention’ in Attila Tanzi and others (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes: Its Contribution to International Water Cooperation* (Koninklijke Brill NV 2015) 324–325.

⁴⁷ Rosenstock (n 49) 134, art. 33, cmt 1.

⁴⁸ UNWC art. 33(10).

⁴⁹ UNWC ann.

⁵⁰ Wiik (n 34); Sands and Mackenzie (n 33); Bartholomeusz (n 36).

in the Annex will most likely be able to accept amicus curiae submissions under its general procedural powers. However, notions of public participation need to be explored that may further support the acceptance of amicus curiae submissions in the context of the UNWC.

2. Methodology

This research will utilize the formal sources of international law to make its conclusions: treaties, customary international law, general principles of law, judicial and arbitral decisions, and the teachings of the most highly qualified publicists.⁵¹ This approach is supported by the practice of the ICJ.⁵² In addition to the formal sources of international law, this research will utilize other binding and non-binding sources such as “resolutions and declarations of international organizations and international conferences having an impact on the progressive development of international law...”⁵³ In analyzing these sources, this research bears in mind to accommodate the structural preferences for argument of dispute settlement institutions in order to develop its conclusions. For example, although there is no established hierarchy of sources in international law, the ICJ prefers to invoke treaties first in its reasoning.⁵⁴ This research will also cross reference between different sources as well as fields of law as necessary in order to provide more harmonized conclusions. This is based on the fact that there exists no international organization constituted by States to regulate the world’s international watercourses nor is there an international court or tribunal dedicated solely to disputes involving the non-navigational uses of international watercourses.

⁵¹ Martti Koskeniemi, ‘Methodology of International Law’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of International Law*, vol. 7 (Oxford University Press 2012) 126. It should be noted that the teachings of most highly qualified publicists “do not actually qualify as sources of law but rather as means to establish the existence of sources of law.” - Rüdiger Wolfrum, ‘Sources of International Law’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of International Law*, vol. 9 (Oxford University Press 2012) 301.

⁵² Statute of the International Court of Justice 1945 (33 UNTS 993) art. 38(1).

⁵³ Wolfrum (n 54) 300.

⁵⁴ Wolfrum (n 54) 301.

3. The Origins of Amicus Curiae

The origins of amicus curiae are not clear. But several scholars consider it a tradition originating in Roman law and later further developed by some civil and numerous common law jurisdictions.⁵⁵ Other scholars point out that this relationship between Roman law and modern amicus curiae is too broadly stated and creates an assumption that amicus curiae has remained “functionally unchanged as long as the term has remained constant.”⁵⁶ According to Wiik, “[A] review of the surviving accounts of Roman law indicates that no direct equivalent existed to today’s concept of amicus curiae.”⁵⁷ Rather, Roman law provided an instrument with similar functions to amicus curiae, the consilium.⁵⁸ The closest form of consilium to modern amicus curiae is considered by Wiik to be the consilium magistratum, “an advisory body composed of eminent jurists and priests selected by the judge.”⁵⁹ The judge could at his discretion solicit advice from the consilium.⁶⁰ The scope of the advice the consilium could provide covered the whole scope of judicial activity, however the advice was not binding and the judge bore the responsibility for their decision.⁶¹ Wiik also points out that at this time, there was no mechanism for unsolicited advice.⁶²

Early English common law amicus curiae has a stronger functional relationship to developments in modern amicus curiae. Initially used in criminal

⁵⁵ Steven Kochevar, ‘Amici Curiae in Civil Law Jurisdictions’ (2013) 122 YaleLJ 1653; Filip Balcerzak, ‘Amicus Curiae Submissions in Investor-State Arbitrations’ (2012) 12 CMLRev 66; Ruben J Garcia, ‘A Democratic Theory of Amicus Advocacy’ (2008) 35 FlaStLRev 315; S Chandra Mohan, ‘The Amicus Curiae: Friends No More’ [2010] SingJLegalStud 352; Mbengue and Tignino (n 32); Laurence Boisson de Chazournes, ‘Transparency and “Amicus Curiae” Briefs’ (2004) 5 JWIT 333.

⁵⁶ Samuel Krislov, ‘The Amicus Curiae Brief: From Friendship to Advocacy’ (1963) 72 The Yale Law Journal 694.

⁵⁷ Wiik (n 34) 75.

⁵⁸ Wiik (n 34) 75.

⁵⁹ Wiik (n 34) 75.

⁶⁰ Wiik (n 34) 75.

⁶¹ Wiik (n 34) 75–76.

⁶² Wiik (n 34) 76.

proceedings, the practice of *amicus curiae* expanded to other areas of law.⁶³ Mohan provides several possible explanations for the development of *amicus curiae* at common law: 1) the inherent right of the court to require assistance; 2) the ‘bystander’ theory; 3) preserving the honor of the court; 4) oral “shepardizing”; and 5) overcoming the shortcomings of the adversarial system.⁶⁴ According to Mohan, *amicus curiae* at common law may be a construct of the common law “based on the inherent jurisdiction of a court to require assistance from members of the legal profession to whom it had given special rights to practise their profession.”⁶⁵ Under the bystander theory, *amicus curiae* was established to allow bystanders to provide assistance to the court in order to avoid judicial errors and to thus ensure justice. *Amicus curiae* could also help preserve the honor of the court by helping it avoid judicial errors or correcting past error.⁶⁶ *Amicus curiae* could also bring to attention cases not known to the judge.⁶⁷ Most commonly cited however, is that *amicus curiae* helps compensate for the shortcomings of the adversarial system.⁶⁸ Krislov explains, “Perhaps the most significant enlargement of the *amicus curiae* function was itself a partial solution to one of the most serious and enduring shortcomings of the adversary system. The problem of representation of third parties in a common law suit (and, for that matter, in equity proceedings in class suits where large numbers are involved) is one that does not permit either a quick or easy solution. On the contrary, the difficulties have persisted through the centuries, and devices designed to mitigate rather than cure have been the rule.”⁶⁹ Indeed, it is one thing to provide relevant law and facts to ensure the proper determination of a case between two parties, but what about when a party that is not part of the suit has rights and interests that may be affected by the

⁶³ Wiik (n 34) 77.

⁶⁴ Mohan (n 58) 357–360.

⁶⁵ Mohan (n 58) 357.

⁶⁶ Mohan (n 58) 359.

⁶⁷ Krislov (n 59) 695.

⁶⁸ Mohan (n 58) 360.

⁶⁹ Krislov (n 59) 696.

suit? Participation as amicus curiae is not to be confused with third-party intervention. A third-party may intervene to become a party to the dispute and does so as a matter of legal right because it has a legal interest in the dispute.⁷⁰ However, what about when this legal interest is not strong enough to constitute a legal right to intervene or the party does not have a specific legal interest in the dispute but wishes to provide relevant law or facts for the proper determination of the case. The function of amicus curiae assists in filling this gap. What is the proper determination of the case may be best summed up by one court's determination on amicus curiae participation, "The 'proper determination' of the case refers, quite simply, to the Court reaching the decision which most accords with the end of justice – i.e. that gets the law right."⁷¹

4. Amicus Curiae Practice Before International Courts and Tribunals

Modern amicus curiae is generally not expressly codified in treaties and has been mostly a "judge driven process."⁷² One of the few recent exceptions is in the investment context. The 2012 U.S. Model Bilateral Investment Treaty expressly addresses amicus curiae.⁷³ Amicus curiae is also not customary international law as it is not a procedural tool used by the national legal system of all States or common to all international courts and tribunals.⁷⁴ Amicus curiae as practiced by international courts and tribunals is not uniform.⁷⁵ International courts and

⁷⁰ Sands & Mackenzie, Max Planck Encyclopedia of Public International Law, 519 (2008).

⁷¹ Prosecutor v. Kallon, p. 3 para 5 *The Prosecutor v Morris Kallon, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions* (2003) SCSL-2003-07 (SCSL)3, para. 5.

⁷² Boisson de Chazournes, 'Transparency and "Amicus Curiae" Briefs' (n 58) 334.

⁷³ "The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." - 2012 U.S. Model Bilateral Investment Treaty art. 28(3).

⁷⁴ Wiik (n 34) 73, 86–87.

⁷⁵ Mbengue and Tignino (n 32) 383.

tribunals have different rules of procedures and determinations on the amicus curiae participation.

International courts and tribunals have so far determined that the acceptance amicus curiae submissions is a procedural matter within the court or tribunal's discretion⁷⁶ and is based on "parameters established by the applicable rules."⁷⁷ These rules are derived from applicable sources of international law such as treaties, custom, and the general principles of law⁷⁸ and are often manifested in the form of statutes of the courts, rules of procedure, and practice directions.⁷⁹

The applicable rules are sometimes express in addressing amicus curiae.⁸⁰ In most cases, the rules are not express. In instances where there are no express provisions within the applicable rules for amicus curiae, international courts and tribunals have had to look to provisions that allow for the court or tribunal to "seek or receive information relevant to the dispute," as well as its own general procedural powers to allow for the acceptance of amicus curiae submissions in specific cases.⁸¹ This section illustrates this conclusion in brief as

⁷⁶ Wiik (n 34) 123–126.

⁷⁷ Wiik (n 34) 126; Sands and Mackenzie (n 33) 519; Bartholomeusz (n 36) 273–276.

⁷⁸ Mandana Knust Rassekh Afshar, 'International Courts and Tribunals, Rules and Practice Directions (ECJ, GC, ECtHR, IACTHR, ICSID, ITLOS, WTO Panels and Appellate Body)' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 621.

⁷⁹ Jean-Marc Sorel, 'International Courts and Tribunals, Procedure' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 613.

⁸⁰ For example: International Criminal Court, Rules of Procedure and Evidence 2002 (ICC-ASP/1/3 and Corr1) r 103(1), 149; ICTR Rules of Procedure and Evidence 2015 r 74; Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 2015 (IT/32/Rev50) r 74; Rules of Procedure and Evidence for the Special Court for Sierra Leone 2002 r 74.

⁸¹ Sands and Mackenzie (n 33) 519.

more empirical analysis of this trend has already been conducted by other authors.⁸²

In contentious proceedings before the International Court of Justice (“ICJ”), *amicus curiae* participation is not expressly addressed. However, Art. 34(2) of the ICJ Statute states that the ICJ, “may request of public international organizations information relevant to the cases before it, and shall receive such information presented by such organization on their own initiative.”⁸³ The term “*amicus curiae*” is not mentioned, but a review of the practice before the ICJ reveal that *amicus curiae* submission has been accepted under such rule. In *Aerial Incident of 3 July 1998* between Iran and the United States, the court requested and received observations from the International Civil Aviation Organization, a non-party, relevant to the disputes before it.⁸⁴ In advisory proceedings before the ICJ, Article 66(2) of the ICJ Statute states that the ICJ may, “...notify any state entitled to appear before the Court or international organization considered by the Court,... as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.”⁸⁵ Again, the term “*amicus curiae*” is not used, but in proceedings of *International Status of South West Africa*, a non-party, non-governmental organization, requested permission to make submissions relevant to the dispute before the court.⁸⁶ The request was granted; however the submissions were never made.⁸⁷

⁸² Wiik (n 34); Sands and Mackenzie (n 33); Bartholomeusz (n 36).

⁸³ Statute of the International Court of Justice art. 34(2).

⁸⁴ *Aerial Incident of 3 July 1998 (Iran v US)*, *Observations of the International Civil Aviation Organization* (ICJ).

⁸⁵ Statute of the International Court of Justice art. 66(2).

⁸⁶ *International Status of South West Africa (Advisory Opinion)*, *Correspondence of 19 December 1949* (ICJ).

⁸⁷ *International Status of South West Africa (Advisory Opinion)*, *Correspondence of 19 December 1949* (n 89) 345.

In Panel proceedings of the World Trade Organization (“WTO”) Dispute Settlement Body (“DSB”), the Panel in carrying out its duties⁸⁸ has under Article 13 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (“WTO DSU”), “the right to seek information and technical advice from any individual or body which it deems appropriate...”⁸⁹ and, “...may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter...”⁹⁰ The most famous case on point is *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“US-Shrimp”).⁹¹ During the Panel proceedings, NGOs attempted to submit unsolicited amicus curiae briefs “reflecting their respective independent views with respect to the use of [turtle excluding devices] and other issues” which were objected to by the complaining parties and rejected by the Panel based on its interpretation of the applicable rules of procedure.⁹² Although the Panel initially refused to allow the submission of an unsolicited amicus curiae brief from a non-party based on a plain reading of the rule, the Appellate Body determined otherwise upon review of the Panel’s report. The Appellate Body determined that:

The comprehensive nature of the authority of a panel to “seek” information and technical advice from “any individual or body” it may consider appropriate, or from “any relevant source”, should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel’s authority includes the

⁸⁸ Marrakesh Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 1994 (1869 UNTS 401) art. 11.

⁸⁹ WTO DSU art. 13(1).

⁹⁰ WTO DSU art. 13(2).

⁹¹ *Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products* [1998] WTO WT/DS58/AB/R.

⁹² *Panel Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products* [1998] WTO WT/DS58/R 68–69, 279–280; *Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products* (n 94) 28(n 66).

authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.⁹³

This determination allowed for Panels to accept amicus curiae briefs, whether or not solicited, at their discretion. In *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*⁹⁴ before the Appellate Body of the WTO DSB, which has separate rules of procedure from the Panel, the Appellate Body has looked to Article 17(9) of the WTO DSU, “Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information,”⁹⁵ and Rule 16(1) of the Working Procedures for Appellate Review, “In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered

⁹³ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (n 94) 37.

⁹⁴ Appellate Body Report, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* [1998] WTO WT/DS138/AB/R para. 36-42.

⁹⁵ WTO DSU 17(9).

agreements and these Rules”⁹⁶ to determine that the Appellate Body may accept curiae submissions on a case by case basis.⁹⁷

In proceedings following the International Centre for Settlement of Investment Dispute (“ICSID”) 2006 arbitral rules, ICSID 2006 arbitration rule 37(2) states that the tribunal “may allow a person or entity that is not a party to the dispute... to file a written submission with the tribunal regarding a matter within the scope of the dispute...”⁹⁸ This rule has been interpreted to include submissions by amici curiae.⁹⁹ Several requests by non-parties for amicus curiae status to make submissions have been made in proceedings under the ICSID arbitration rules since 37(2) was adopted.¹⁰⁰ Before the adoption of the amended ICSID arbitration rules on April 11, 2006, clarifying submissions by amicus curiae,¹⁰¹ only three decisions of ICSID tribunals had involved requests by non-disputing parties for amicus curiae participation.¹⁰² All three decisions involved water-related disputes. After the adoption of the amended ICSID arbitration rules, the first decision rendered on amicus curiae participation was

⁹⁶ WTO Appellate Body, Working Procedures for Appellate Review 2010 (WT/AB/WP/6) 16(1).

⁹⁷ *Appellate Body Report, United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (n 97); *Appellate Body Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* [2001] WTO WT/DS135/AB/R.

⁹⁸ ICSID Convention, Regulations and Rules, Rules of Procedure for Arbitration Proceedings 2006 ch IV, r 37(2).

⁹⁹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, Procedural Order No 5* [2007] ICSID Case No. ARB/05/22.

¹⁰⁰ ICSID, ‘Decisions on Non-Disputing Party Participation.’ (*International Centre for Settlement of Investment Disputes*, 2019) <<https://icsid.worldbank.org/en/Pages/process/Decisions-on-Non-Disputing-Party-Participation.aspx>>.

¹⁰¹ ICSID Convention, Regulations and Rules 2006 5.

¹⁰² ICSID (n 103).

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,¹⁰³ another dispute involving water.

Finally, there are optional rules available from other notable dispute settlement bodies that take into consideration the possibility of amicus curiae participation through provisions or statements referring to submissions by non-parties at the discretion of the international court or tribunal. This includes the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment and the 2013 UNCITRAL Arbitration Rules.¹⁰⁴

These rules may also be supported by past the decisions of international courts and tribunals.¹⁰⁵ For example, the ICSID tribunal constituted under the North American Free Trade Agreement (“NAFTA”) and following the 1976 UNICTRAL Arbitration Rules in *Methanex Corp. v. United States*, determined in its proceedings that there were no provisions in the applicable rules expressly allowing for nor prohibiting the acceptance of amicus curiae submissions.¹⁰⁶ In deciding that it had the discretion to accept amicus curiae submissions, the

¹⁰³ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, Award* [2008] ICSID Case No. ARB/05/22.

¹⁰⁴ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 [UN Doc A/RES/69/116]; UNCITRAL Arbitration Rules 2013 [UN Doc A/RES/68/109] art. 1(4); UNCITRAL Rules on Transparency in Treaty-based Arbitration 2013 [UN Doc A/RES/68/109]; PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment 2001, 214.

¹⁰⁵ Although precedent is generally not binding on international arbitration and adjudication, “international jurisprudence is relevant for the development of international law through its consistency and detailed reasoning. It serves as a source for the determination of rules of law and this constitutes a subsidiary sources of international law.” - Karin Oellers-Frahm, ‘International Courts and Tribunals, Judges and Arbitrators’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 576, 584. See also Statute of the International Court of Justice art. 38(1)(d).

¹⁰⁶ *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’* (https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf).

tribunal looked to its general procedural powers under Article 15(1) of the UNCITRAL Arbitration Rules to provide it the procedural flexibility to properly administer the dispute, “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate,...”¹⁰⁷ In reaching its decision, the tribunal, among other methods of reasoning, cross-referenced the practice of other international tribunals and courts, including the ICJ, WTO, and Iran-US Claims Tribunal, regarding its discretion on procedural matters.¹⁰⁸ Since the proceeding and one other,¹⁰⁹ the NAFTA Free Trade Commission issued a statement guiding tribunals constituted under NAFTA dealing with amicus curiae submissions, “No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party.”¹¹⁰

Amicus curiae participation is generally not codified in treaties nor is it customary international law. The basis for amicus curiae participation has been “judge driven” and is based on the rules and practice of selected international courts and tribunals. In the absence of express provisions that address amicus curiae participation, the applicable rules that allow for an international court or tribunal to seek or receive information relevant to the dispute and general procedural rules that grant the court or tribunal flexibility in the administration of its duties may be a basis to exercise discretion in accepting amicus curiae submissions. These rules are derived from the sources of international law and may often be found in the statutes of the court, rules of procedure, and practice directions. These rules are also supported by the past practice of international courts and tribunal.

¹⁰⁷ *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’* (n 109) 12–13.

¹⁰⁸ *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’* (n 109).

¹⁰⁹ *United Parcel Service of America Inc v Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae* [2001] ICSID Case No. UNCT/02/1.

¹¹⁰ NAFTA FTC, ‘Statement of the Free Trade Commission on Non-Disputing Party Participation’ para A(1) <<https://www.state.gov/documents/organization/38791.pdf>>.

5. Amicus Curiae and the Annex to the UNWC

During the process of development and codification of the UNWC, the issue of dispute settlement was one of the “most controversial subjects.”¹¹¹ The draft articles of the UNWC were adopted by the Drafting Committee in 1994 and submitted to the United Nations General Assembly.¹¹² Dispute settlement came under draft Article 33.¹¹³ Subsequent deliberations during the revision of the draft articles showed split support for draft Article 33 as a narrow majority adopted it. Of the States in the United Nations Working Group voting for the adoption of draft Article 33, only 33 voted for, 5 against, and 22 abstaining.¹¹⁴ Nonetheless, on May 21, 1997, the UNWC was adopted by general assembly resolution.¹¹⁵ Article 33 of the UNWC in its final form was a compromise. “It did away with any forms of compulsory arbitration or adjudication, but confirmed the compulsory fact-finding procedure,” and added a “unilaterally triggered conciliation procedure.”¹¹⁶ It did, however, include optional recourse to judicial or arbitral settlement to be accepted by the States “when accepting, ratifying, or acceding to the UNWC or ‘any other time thereafter.’”¹¹⁷ In the event of optional recourse to arbitration, the UNWC is complemented by an annex of optional rules for the conduct of the arbitration that is the subject of this article.¹¹⁸ Based on the rules and practice of international courts and tribunals, this article looks at the Annex for rules allowing an arbitral tribunal to seek and receive information as well as general procedural rules that grant the

¹¹¹ Boisson de Chazournes, ‘The Settlement of Disputes through Judicial Means (art. 33(10) and the Annex on Arbitration)’ (n 28) 568–569.

¹¹² Rosenstock (n 49) 89, para 220.

¹¹³ Rosenstock (n 49) 133–135.

¹¹⁴ Lapidoth (n 46) 235.

¹¹⁵ Convention on the Law of the Non-Navigational Uses of International Watercourses.

¹¹⁶ Attila Tanzi and Maurizio Arcari, *The United Nations Convention on the Law of International Watercourses. A Framework for Sharing* (Kluwer Law International 2001) 282–283.

¹¹⁷ Tanzi and Arcari (n 119) 283.

¹¹⁸ UNWC ann.

tribunal flexibility in the administration of its duties as observed in the rules and practice before selected international courts and tribunals. Four articles of the Annex stand out from a plain reading of the text,¹¹⁹ Article 5, 6, 8, and 12, and may serve as the basis for an arbitral tribunal to accept amicus curiae submissions. This section determines that the most likely basis for the acceptance of amicus curiae under the Annex to the UNWC will arise under the arbitral tribunal's general procedural powers.

Article 5, 6, 8(1) and 12 states respectively:

The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention and international law.¹²⁰

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.¹²¹

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.¹²²

Decisions both on procedure and substance of the arbitral tribunal shall be taken by a majority vote of its members.¹²³

On a plain reading of the text, Article 8(1) is most similar to a provision that allows a court or tribunal to seek and receive information in the administration of its duties, at least in regards to evidence. Article 8 is specific as it obligates the disputing parties to facilitate the work of the arbitral tribunal by enabling it, when necessary, to call witnesses or experts and receive their

¹¹⁹ Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331) 31(1).

¹²⁰ UNWC ann, art. 5.

¹²¹ UNWC ann, art. 6.

¹²² UNWC art. 8(1).

¹²³ UNWC ann, art. 12.

evidence. How such evidence is to be accepted is not clear, but is amicus curiae a procedural tool available? The equitable and reasonable utilization of international watercourses requires “taking into account all relevant factors and circumstances.”¹²⁴ Individuals appointed as arbitrators and judges in international legal disputes “are often among the world’s leading in international law,” however the entire spectrum of relevant factors is inexhaustible and it is likely expert decisions makers in international law do not possess expertise on various relevant factors such as scientific and technical matters.¹²⁵ This is acknowledged in the dissenting opinion of Judges Al-Khasawneh and Simma in *Pulp Mills on the River Uruguay*:

As we will explain in the following dissent, the Court has evaluated the scientific evidence brought before it by the Parties in ways that we consider flawed methodologically: the Court has not followed the path it ought to have pursued with regard to disputed scientific facts; it has omitted to resort to the possibilities provided by its Statute and thus simply has not done what would have been necessary in order to arrive at a basis for the application of the law to the facts as scientifically certain as is possible in a judicial proceeding. Therefore, faced with the results of a deficient method of scientific fact-finding, we are not in a position to agree... The exceptionally fact-intensive case before us is unlike most cases submitted to the Court and raises serious questions as to the role that scientific evidence can play in an international judicial institution. The traditional methods of evaluating evidence are deficient in assessing the relevance of such complex, technical and scientific facts... The adjudication of disputes in which the assessment of scientific questions by experts is indispensable, as is the case here, requires an interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the

¹²⁴ UNWC art. 6(1).

¹²⁵ Cicely O Parseghian and Benjamin K Guthrie, ‘The Role of Scientific and Technical Experts’ in Stephen C McCaffrey, Christina Leb and T Denoon Riley (eds), *Research Handbook on International Water Law* (Edward Elgar Publishing 2019) 301–302.

Court... The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties.¹²⁶

It would seem at first glance that an arbitral tribunal would be able to accept amicus curiae submissions under Article 8(1) of the Annex. However, Wiik's analysis of Article 50 of the ICJ Statute¹²⁷ leads to the conclusion that Article 8(1) of the Annex would not likely be a basis for the acceptance of amicus curiae submissions as its function would not be in line with that of amicus curiae. In her analysis, Wiik identifies Article 50 of the ICJ Statute as concerning the evidentiary process and involving "investigation and evaluation of specific questions of fact" and the explanation of "technical and scientific questions to the legal specialist on the bench" by experts to establish the factual record.¹²⁸ This function would not be compatible with those of amicus curiae, as amicus curiae tend to have a specific view on the dispute and exceed the neutral assistance of the evidentiary process.¹²⁹ This is supported by the decision in *Methanex* in which the tribunal distinguish amici from that of an expert, "Amici are not experts; such third persons are advocates (in the non-pejorative sense) and not 'independent' in that they advance a particular case to a tribunal."¹³⁰

Without a provision that allows the arbitral tribunal to seek or receive information in the administration of its duties beyond that of the evidentiary process, an arbitral tribunal following the rules of the Annex would have to turn to its general procedural powers to determine whether it can accept amicus curiae submissions. Absent agreement between the disputing parties otherwise, Article 6 of the Annex gives the arbitral tribunal wide discretion to decide whether or not amicus curiae submissions may be accepted so long as

¹²⁶ *Pulp Mills on the River Uruguay (Arg v. Uru)* (Apr. 20) 2010 ICJ 14 (ICJ) 109–111.

¹²⁷ Statute of the International Court of Justice art. 50.

¹²⁸ Wiik (n 34) 182.

¹²⁹ Wiik (n 34) 182.

¹³⁰ *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae'* (n 109) para. 38.

amicus curiae participation is determined procedural.¹³¹ The article expresses a general practice that once a court or tribunal is established, it is delegated the power to draft its own procedural rules.¹³² Concerning what is procedural, on point is a water-related dispute before ICSID. In *Agues Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, the tribunal addressed the procedural role of an amicus curiae as assisting the work of the tribunal, “At a basic level of interpretation, a procedural question is one which relates to the manner of proceeding or which deals with the way to accomplish a stated end. The admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tribunal to achieve its fundamental task of arriving at a correct decision in this case.”¹³³ Article 12 of the Annex reinforces the arbitral tribunal’s power to determine its own rules of procedures by giving the arbitral tribunal sole authority over the determination the rules of procedure.¹³⁴ This is a power not enjoyed by all arbitral tribunal and courts. For example, amicus curiae participation in proceedings before the Appellate Body of the WTO DSB is facilitated by Rule 16(1) of the Working Procedures, which states:

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules.¹³⁵

¹³¹ UNWC ann, art. 6.

¹³² Sorel (n 82) 613.

¹³³ *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic, Order in Response to a Petition for Participation as Amicus Curiae* [2006] ICSID Case No. ARB/03/17.

¹³⁴ UNWC ann, art. 12.

¹³⁵ WTO Appellate Body, Working Procedures for Appellate Review 16(1).

Rule 16(1) is only a solution on a case by case basis in Appellate Body proceedings. Any permanent changes to the rules that would allow for amicus curiae submissions would have to be done so in consultation with the Chairman of the DSB and the Director-General.¹³⁶ Under the 2006 ICSID arbitration rules, the arbitral tribunal has to consult with the disputing parties before allowing a non-disputing party to make a submission.¹³⁷

Lastly, Article 5 of the Annex reminds the arbitral tribunal that the rules of procedure are derived from the UNWC and applicable international law and that a decision on accepting amicus curiae submissions cannot be inconsistent with the UNWC and applicable international law.¹³⁸ Although the applicable rules may allow an arbitral tribunal the discretion to accept amicus curiae submissions, it is not an open door through which any non-party may participate in a dispute. The arbitral tribunal still must weigh the appropriateness of the acceptance of amicus curiae submissions on a case by case basis and have varying factors to determine if allowing for amicus curiae submissions is desirable. These factors may be guided by provisions and statements derived from the applicable international law that range from who may request for leave to submit as amicus curiae, the relevancy of the perspectives, arguments, or expertise to the proceedings, and the interests of the disputing parties. For example, amicus curiae status in contentious cases before the ICJ has been limited to public international organizations which are defined as an “international organization of States.”¹³⁹ In ICSID proceedings, when determining whether to allow a written submission, the ICSID arbitral tribunal must consider, among other things, whether, “the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from

¹³⁶ WTO DSU 17(9).

¹³⁷ ICSID Convention, Regulations and Rules, Rules of Procedure for Arbitration Proceedings ch IV, r 37(2).

¹³⁸ Rassekh Afshar (n 81) 621.

¹³⁹ International Court of Justice, Rules of Court (1978) 1978 r 69(4).

that of the disputing parties...”¹⁴⁰ ICSID proceedings have also referred to the NAFTA Statement of the Free Trade Commission on non-disputing party participation¹⁴¹ for guidance on the exercise of their discretion regarding the acceptance of amicus curiae submissions. Absent applicable provisions guiding the exercise of their discretion in accepting amicus curiae submissions, courts and tribunals are well aware of the balancing of the interests of the disputing parties and the court or tribunal’s exercise of discretion in accepting amicus curiae submissions.¹⁴² In the case of the UNWC, Article 32 appears to support the acceptance of amicus curiae submissions, at least where the practice is part of the jurisdiction where judicial access is sought and there is a serious threat of suffering significant harm.¹⁴³ There may also be other international law applicable that is not directly incorporated or incorporated more specifically at the regional and sub-regional level due to the framework nature of the UNWC. This will be discussed further in the following section.

Based on the rules and the practice of selected international courts and tribunals, the acceptance of amicus curiae will most likely be found in the tribunal’s general procedural powers under the Annex to the UNWC. Article 8 appears to allow the tribunal to accept amicus curiae submissions, but it involves the evidentiary process which is generally not in line with the function

¹⁴⁰ ICSID Convention, Regulations and Rules, Rules of Procedure for Arbitration Proceedings ch IV, r 37(2)(a). See also *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5 (n 102).

¹⁴¹ *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae [2005] ICSID Case No. ARB/03/19 348–349; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission [2007] ICSID Case No. ARB/03/19. See also ICSID, ‘Non-Disputing Party Submission - ICSID Convention Arbitration.’ (*International Centre for Settlement of Investment Disputes*, 2019) <<https://icsid.worldbank.org/en/Pages/process/Non-Disputing-Party-Submission.aspx>>.

¹⁴² Wiik (n 34) 64–65.

¹⁴³ UNWC art. 32.

of amicus curiae. However, Article 5, 6, and 12 of the Annex combined may provide an arbitral tribunal the flexibility to accept amicus curiae submissions when necessary to administer its duties. However, any acceptance of amicus curiae cannot be inconsistent with the UNWC and applicable international law.

6. Public Participation and Amicus Curiae Under the Annex to the UNWC

As mentioned in the previous section, other international law may be applicable that influence an international court or tribunal's decision on the acceptance of amicus curiae. Although amicus curiae has been a “judge driven” process, the contributions of international courts and tribunals is not necessarily to create new law, but rather to “settle disputes on the basis of international law.”¹⁴⁴ This “means the law has to exist.”¹⁴⁵ There must be some basis with which to interpret that the applicable rules may allow amicus curiae participation specifically. Since the practice is generally not codified in treaties nor customary international law, there may be general principles that support the procedure of amicus curiae. “International courts... and tribunals make use of principles as an interpretive tool or a source of concrete obligations.”¹⁴⁶ This section briefly discusses one such possibility,¹⁴⁷ that being the principle of public participation, its relation to amicus curiae, and the significance to the non-navigational uses of international watercourses.

“Water disputes may... emerge when individuals and groups of individuals allege that their interests are affected.”¹⁴⁸ Affected interests involving water are frequently derived from environmental and human rights instruments.¹⁴⁹ These

¹⁴⁴ Wolfrum (n 54) 308.

¹⁴⁵ Wolfrum (n 54) 308.

¹⁴⁶ Wolfrum (n 54) 306.

¹⁴⁷ Other factors may be considered that cannot fit into this article. Such factors include but are not limited to who may participate as an amicus curiae, the form and content of submissions, other policy implications, etc. - See Bartholomeusz (n 36) 273–286.

¹⁴⁸ Boisson de Chazournes, *Fresh Water in International Law* (n 16) 218.

¹⁴⁹ Examples of instruments from which affected interests may derive include but are not limited to: United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994 (1954 UNTS

instruments are relevant international law in ensuring and promoting the optimal and sustainable non-navigational uses of international watercourses.¹⁵⁰

These instruments contribute to the complexity of disputes involving water as States may be held to account for obligations for which they have consented to that vary in purpose, scope, and approach, but did not anticipate in the dispute or forum for settling the dispute.¹⁵¹

Although the affected interests of individuals and groups are relevant in the ensuring and promoting the optimal and sustainable non-navigational uses of international watercourses, the UNWC is State centric with limited obligations to the public in participation in the settlement of disputes.¹⁵² Under the UNWC, Art. 33 is triggered when a dispute arises between two or more parties to the UNWC regarding the interpretation or application of the convention.¹⁵³ Parties

3); United Nations Framework Convention on Climate Change 1992 (1771 UNTS 107); Convention on Biological Diversity 1992 (1760 UNTS 79); Convention on Wetlands of International Importance especially Waterfowl Habitat 1971 (996 UNTS 245); International Covenant on Civil and Political Rights 1966 (999 UNTS 171).; See also Jona Razzaque, 'Public Participation in Water Governance' in JW Dellapenna and J Gupta (eds), *The Evolution of the Law and Politics of Water* (Springer 2009).

¹⁵⁰ Convention on the Law of the Non-Navigational Uses of International Watercourses art. 6.

¹⁵¹ Melvin Woodhouse, 'Is Public Participation a Rule of the Law of International Watercourses?' (2003) 43 *NatResourcesJ* 137.

¹⁵² Convention on the Law of the Non-navigational Uses of International Watercourses art. 2(c-d); Anna Spain, 'International Dispute Resolution in an Era of Globalization' in Andrew Byrnes, Mika Hayashi and Christopher Michaelson (eds), *International Law in the New Age of Globalization* (Koninklijke Brill NV 2013) 48; Nahid Islam, *The Law of Non-Navigational Uses of International Watercourses: Options for Regional Regime-Building in Asia* (Kluwer Law International 2010) 237; Tanzi and Arcari (n 119) 73.; "[T]he public is often understood as encompassing almost all actors outside the public (governmental) administration." - Jonas Ebbesson, 'Public Participation in Environmental Matters' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. 8 (Oxford University Press 2012) 577.

¹⁵³ Convention on the Law of the Non-Navigational Uses of International Watercourses art. 33(1).

to the UNWC may only be a Watercourse State or Regional Economic Integration Organization.¹⁵⁴ Even under the optional arbitral procedural rules codified in the Annex of the UNWC,¹⁵⁵ the rules appear silent with regard to the public's participation in arbitration proceedings, which motivated this article. With the exception of Art. 32 of the UNWC, which only allows the right to equal access to procedures for "when the legal system of the State where the harm originates has already recognized the right of access to administrative and judicial procedures and to compensation for environmental damages,"¹⁵⁶ the public must rely upon the parties to the UNWC to represent any interest they may have under the UNWC in dispute settlement.

Although the UNWC is State centric with regard to the participation of the public in the settlement of disputes, international law has slowly encouraged the public to engage in the relationship between States when their interests are affected.¹⁵⁷ In the context of the UNWC, the convention recalls the principles and recommendations of the 1992 Rio Declaration on Environment and Development ("1992 Rio Declaration") and Agenda 21 on sustainable

¹⁵⁴ "'Watercourse State' means a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organisation, in the territory of one or more of whose member states part of an international watercourse is situated." - Convention on the Law of the Non-Navigational Uses of International Watercourses art. 2(c); 'Regional economic integration organisation' means an organisation constituted by sovereign states of a given region, to which its member states have transferred competence in respect of matters governed by this Convention and which has been duly authorised in accordance with its internal procedures to sign, ratify, accept or accede to it." - Convention on the Law of the Non-navigational Uses of International Watercourses art. 2(d).

¹⁵⁵ Convention on the Law of the Non-Navigational Uses of International Watercourses ann.

¹⁵⁶ Roberta Greco, 'Chapter 16. Access to Procedures and the Principle of Non-Discrimination (Article 32)' in Laurence Boisson de Chazournes and others (eds), *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses* (Oxford University Press 2018) 523.

¹⁵⁷ Boisson de Chazournes, *Fresh Water in International Law* (n 16) 218; Simma and others (n 26) 184–185.;

development.¹⁵⁸ Those principles and recommendations state that a prerequisite for achieving sustainable development is public participation.¹⁵⁹ Although neither the 1992 Rio Declaration or Agenda 21 are binding agreements, the fact the instruments were endorsed by over 150 States reflects a general perception of support for public participation in order to promote the optimal and sustainable non-navigational uses of international watercourses.¹⁶⁰ This general perception is further supported by the incorporation of or reference to public participation by subsequent instruments at the international, regional, and sub-regional level. A frequently cited example is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”).¹⁶¹ The Aarhus Convention prescribes minimum

¹⁵⁸ Convention on the Law of the Non-Navigational Uses of International Watercourses pmb.

¹⁵⁹ ‘Report of the United Nations Conference on Environment and Development’ (n 4) ann. I, pr. 10, ann. II, ch. 23(2).; Public participation may be divided into three areas: access to information, public participation in decision making, and access to justice. Access to Information “refers to the right of members of the public to request information concerning the environment, including issues of health and natural resources, held by public bodies and authorities” - Jonas Ebbesson, ‘Access to Information on Environmental Matters’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. 1 (Oxford University Press 2012) 31.; Public participation in decision making “refers to the right and opportunity of members of the public to be part of the decision making that affects the environment, including health and natural resources.” - Ebbesson, ‘Public Participation in Environmental Matters’ (n 155) 575.; Access to justice “refers to the right of members of the public to have decisions, acts, and omissions related environmental matters legally reviewed in a fair manner.” - Jonas Ebbesson, ‘Access to Justice in Environmental Matters’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. 1 (Oxford University Press 2012).; See also Jonas Ebbesson, ‘The Notion of Public Participation in International Environmental Law’ (1997) 8 *YIntlEnvL* 51.

¹⁶⁰ ‘Report of the United Nations Conference on Environment and Development’ (n 4) 2.

¹⁶¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (2161 UNTS 447).

standards of public participation and defines who may participate.¹⁶² Parties to the Aarhus Convention are predominantly members of the European Union (“EU”), due to the fact that the EU is a party to the convention.¹⁶³ This regional membership in turn has resulted in the EU adopting directives to be implemented by its member States at the domestic level.¹⁶⁴

In 2012, the international community once again reaffirmed its commitment to sustainable development and past action plans with the outcome document “The Future We Want” at the United Nations Conference on Sustainable Development in Rio de Janeiro (“Rio 2012”)¹⁶⁵ which was endorsed by the United Nations General Assembly shortly after.¹⁶⁶ Another result of Rio 2012 was the Open Working Group on Sustainable Development Goals¹⁶⁷ whose work contributed significantly to the current 2030 Agenda for Sustainable Development.¹⁶⁸

Research on public participation in water indicates a relationship that may affect the settlement of disputes through the use of amicus curiae in the law of international watercourses.¹⁶⁹ Amicus curiae is not a foreign concept in water-related disputes. It has assisted international courts and tribunals in the administration of their duties by serving as a mechanism in which the interested public may participate in proceedings. “Almost all international dispute settlement

¹⁶² Ebbesson, ‘Public Participation in Environmental Matters’ (n 155) 579.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ ‘Report of the United Nations Conference on Sustainable Development: Rio de Janeiro, Brazil, 20-22 June 2012’ (United Nations 2012) UN Doc A/CONF.216/16.

¹⁶⁶ The Future We Want 2012 [UN Doc A/RES/66/288].

¹⁶⁷ Open Working Group of the General Assembly on Sustainable Development Goals 2013 [UN Doc A/67/L.48/rev.1].

¹⁶⁸ Transforming Our World: The 2030 Agenda for Sustainable Development 2015 [UN Doc A/RES/70/1].

¹⁶⁹ See generally Tanzi and Pitea (n 32); Ellen Hey, ‘Non-State Actors and International Water Disputes: A Search for the Nexus Between the Local and Global’ in The International Bureau of the PCA (ed), *Resolution of International Water Disputes* (PCA/Peace Palace Papers) (Kluwer Law International 2003).

bodies have dealt with water issues,”¹⁷⁰ and water-related disputes have played a significant role in the advancement of amicus curiae as a procedural tool that international courts and tribunals may avail themselves of.

Amicus curiae was informally used in the *Case Concerning the Gabčíkovo-Nagymaros Project*.¹⁷¹ During proceedings, the Hungarian government submitted concerns regarding the economic viability of the project, but more so, concerns regarding the preservation of the environment resulting from the potential effects of the project on water resources.¹⁷² An amicus brief prepared by various NGOs regarding the environmental impact of the project, particularly in regards to water resources and wetland ecology, and filed as part of the Hungarian government’s submissions.¹⁷³ The ICJ gave “most careful attention” to the submissions of the disputing parties regarding the scientific material aimed at supporting the respective arguments of each party.¹⁷⁴

In *Methanex Corp. v. United States*, Canadian investors initiated arbitration proceedings under Chapter 11 of NAFTA against the United States in regards to the State of California’s prohibition on the sale or use of the gasoline additive methyl tertiary-butyl ether (“MTBE”).¹⁷⁵ During the proceedings, NGOs requested leave to submit amicus curiae briefs regarding scientific information on the effects of MTBE on the environment, including water resources, and legal

¹⁷⁰ Boisson de Chazournes, *Fresh Water in International Law* (n 16) 199.

¹⁷¹ Cathrine Zengerling, *Greening International Jurisprudence: Environmental NGOs Before International Courts, Tribunals and Compliance Committees* (Martinus Nijhoff Publishers 2013) 175–176; Carl Bruch and others (eds), *Public Participation in the Governance of International Freshwater Resources* (United Nations University Press 2005) 52. Although some sources question whether the ICJ accepted an informal amicus curiae submission. - Wiik (n 34) 96, n 99.

¹⁷² *Gabčíkovo-Nagymaros Project (Hung/Slovk)* (Sept. 25) 1997 ICJ 7 (ICJ) 31.

¹⁷³ *Gabčíkovo-Nagymaros Project (Hung/Slovk): Reply of the Republic of Hungary* (ICJ) 45, n 246.

¹⁷⁴ *Gabčíkovo-Nagymaros Project (Hung./Slovk.)* (n 175) 42.

¹⁷⁵ *Methanex Corporation v United States of America: Final Award of the Tribunal on Jurisdiction and Merits* (<https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>).

arguments regarding the environment in the investment context.¹⁷⁶ The NGOs argued in their request for leave that the case was of public importance and the critical impact the tribunal's decision would have on the environment and public welfare. The tribunal acknowledged that there was "undoubtedly public interest"¹⁷⁷ in the arbitration and allowed leave for amicus curiae submission.

After the adoption of the amended ICSID arbitration rules, the first decision rendered on amicus curiae participation was *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.¹⁷⁸ Biwater Gauff Limited, a joint company formed by a British and German corporation, won a bid to manage and operate the water and sewerage system for Dar es Salaam and neighboring coastal regions, as well as to carry out some works related to the Dar es Salaam Water Supply and Sanitation Project.¹⁷⁹ During management and operation, a series of events occurred that ultimately led to the deportation of certain senior management and seizure of the joint company's assets. ICSID arbitral proceedings were initiated by the joint company with a claim of expropriation and various breaches. During the proceedings, a joint request for leave to make a submission as amicus curiae was made by five NGOs purportedly representing the public interest.¹⁸⁰ The tribunal acknowledged the significance of the public interest in the case as a decision would affect services to millions of people and as a result, "may raise a variety of complex public and international law questions."¹⁸¹

The increasing use of amicus curiae in water-related disputes, its absence from treaties and the increasing significance of public participation in water-

¹⁷⁶ *Methanex Corporation v. United States of America: Final Award of the Tribunal on Jurisdiction and Merits* (n 178).

¹⁷⁷ *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae'* (n 109).

¹⁷⁸ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award* (n 106).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Procedural Order No. 5* (n 102).

¹⁸¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Procedural Order No. 5* (n 102) 15–19.

related disputes justifies further inquiry. For the non-navigational uses of international watercourses, further research into how *amicus curiae* as a procedural tool operates within this context will help create a better understanding of what is *amicus curiae* and connect principles in the field with practical application.

7. Conclusion

In conclusion, as global demand for water resources increase for limited supplies, disputes may arise between States that share international watercourses. The settlement of these disputes require a balancing of values and some of these values may be well represented and others may not. *Amicus curiae* is a procedural tool that provides an avenue by which international courts and tribunals may avail themselves of these values in the form of perspectives, arguments, or expertise that may assist in the administration of their duties. The UNWC provides optional recourse to arbitration that may be utilized by the parties to the convention. Although the Annex provides no express provision for the acceptance of *amicus curiae* submissions, the rules and practice of selected international courts and tribunals has demonstrated that provisions that allow the court or tribunal to seek and receive information, as well as a court or tribunal's general procedural authority may be a basis to accept *amicus curiae* submissions. In the case of the Annex, the most likely basis for the acceptance of *amicus curiae* will likely be derived from the general procedural powers bestowed upon the arbitral tribunal. However, notions of public participation need to be explored that may further support the acceptance of *amicus curiae* submissions in the context of the UNWC.