

## COMMENT

### Amici Curiae in Civil Law Jurisdictions

Amicus briefs are an ancient legal instrument, originating in Roman law and appearing early in the common law tradition.<sup>1</sup> They are now used frequently in common law jurisdictions around the world, particularly the United States.<sup>2</sup> In recent decades, they have become well established in international adjudicatory proceedings as well.<sup>3</sup> These two developments—the use of amicus briefs in common law courts and in international proceedings—have been well documented and much discussed.<sup>4</sup> However, a more recent trend seems to have evaded thorough treatment by commentators<sup>5</sup>: amicus

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1. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694 (1963).
  2. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).
  3. See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (discussing the role of amici curiae at the International Court of Justice, the European Court of Justice, the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (IACrtHR)).
  4. See, e.g., Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-ST. ACTORS & INT'L L. 209 (2005); Kearney & Merrill, *supra* note 2; Shelton, *supra* note 3.
  5. At least one nongovernmental organization (NGO) has noted the rise of civil law amici. Lise Johnson & Niranjali Amerasinghe, *Protecting the Public Interest in International Dispute Settlement: The Amicus Curiae Phenomenon*, CENTER FOR INT'L ENVTL. L. 12-20 (2009), [http://www.ciel.org/Publications/Protecting\\_ACP\\_Deco9.pdf](http://www.ciel.org/Publications/Protecting_ACP_Deco9.pdf) (reviewing amicus practices in civil law and mixed countries and concluding that “the assertion that the practice is a feature of common law but not civil systems is increasingly less and less valid”). While the Center for International Environmental Law (CIEL) publication sought to defend the use of amicus briefs in international proceedings, this Comment takes a more critical approach. In particular, it distinguishes between countries that have formally adopted amicus practices through codes or decisions versus countries where amicus briefs are submitted without

briefs in civil law courts that historically have not accepted them.

This Comment seeks to document this development and to suggest some factors that may be responsible for it. In particular, this Comment points out that courts in civil law countries in different regions around the world now accept amicus briefs. In addition, nongovernmental organizations (NGOs) routinely submit amicus briefs to civil law jurisdictions that do not officially accept them. This Comment offers some explanations for these trends, including the global influence of NGOs, the long reach of international law, and the distinctly civil law aspects of amicus submissions.

## I. BACKGROUND AND DEFINITION

At the outset, it should be noted that the purpose and form of amicus briefs have not been stable across time or across the different jurisdictions in which they appear. In the United States, for example, amicus briefs have shifted “from a source of neutral information to a flexible tactical instrument available to litigants and third parties.”<sup>6</sup> This instability has been facilitated by the wide discretion given to most courts over when and how to accept amicus briefs. Often, the procedural rules providing for amicus briefs offer little in the way of standards for their form or use.<sup>7</sup>

Nonetheless, if amicus briefs are to be examined at any level of generality, it is necessary to establish some defining characteristics. This Comment proposes the following definition: “amicus briefs” are documents voluntarily submitted to a court (1) by an entity other than a party to a dispute or an officer of the court,<sup>8</sup> (2) such that the entity retains substantial discretion over the content of

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formal recognition. Moreover, this Comment examines some of the possible causes of civil law amicus practice, including the role played by NGOs like CIEL in pushing for and normalizing amicus practice in national and international courts. See Bartholomeusz, *supra* note 4, at 266 n.275 (noting that CIEL was one of the original four NGO amici involved in the *Methanex* decision, which formally recognized amicus briefs at the World Trade Organization (WTO) for the first time); *infra* Section IV.A.

6. Krislov, *supra* note 1, at 704.
7. See Brienne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 36 (2011) (“[T]he Supreme Court rules place virtually no limit on who can file [an amicus] brief.”); Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT’L L. 200, 221 (2011) (“At present, there is no formalized or systematic approach to dealing with the issue of amicus participation in State-investor arbitration.”).
8. Note that while all members of the bar may technically be officers of a court in some jurisdictions, I restrict “officers” to individuals holding titled, continuous positions.

the submission. This definition aims to capture the meaningful aspect of amicus submissions, namely that disinterested parties may offer input in court proceedings, while still allowing for a broad range of procedural and functional diversity. Accordingly, it contains no procedural element, nor does it specify any role for judges in soliciting or filtering amicus materials. The definition performs reasonably well at formalizing intuitive categorizations of different actors as amici curiae. For example, the definition includes third-party submissions to adjudicatory proceedings at the World Trade Organization (WTO) at both the panel and Appellate Body levels.<sup>9</sup> However, the definition excludes the activities of court officers who submit neutral information or research to courts, usually in civil law jurisdictions, such as the Advocates General of the Court of Justice of the European Union (ECJ),<sup>10</sup> *rapporteurs publics* in France,<sup>11</sup> or *Vertreter des öffentlichen Interesses* (“representatives of the public interest”) in Germany.<sup>12</sup> It also excludes responses to subpoenas duces tecum, answers to interrogatories, and expert testimony, as well as their analogues in inquisitorial courts.

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9. Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 10, 13, 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. See generally Arthur E. Appleton, *Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?*, 3 J. INT'L ECON. L. 691 (2000) (discussing the DSU provisions and Appellate Body decisions that led to WTO acceptance of amicus briefs).
  10. *Court of Justice of the European Union*, EUR. COMMISSION, [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm) (last visited Feb. 20, 2013) (“The Court is helped by eight ‘advocates-general’ whose job is to present opinions on the cases before the Court.”).
  11. Décret 2009-14 du 7 janvier 2009 relatif au rapporteur public des juridictions administratives et au déroulement de l’audience devant ces juridictions [Decree 2009-14 of January 7, 2009 on the Public Administrative Court Reporter and Hearings in Such Courts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 8, 2009, p. 479; see Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 787, 807 n.127 (Stephan Schill ed., 2010).
  12. Asteriti & Tams, *supra* note 11, at 806.

## II. THE FIRST TWO DEVELOPMENTS: AMICUS ACTIVITY IN COMMON LAW JURISDICTIONS AND INTERNATIONAL ADJUDICATORY SYSTEMS

### A. *Amicus Briefs in Common Law Jurisdictions*

Essentially every common law jurisdiction in the world, from Australia<sup>13</sup> to Kenya<sup>14</sup> to Hong Kong,<sup>15</sup> recognizes some form of amicus participation. The widespread recognition of amici across common law legal systems is not particularly remarkable, given these systems' shared historical origins.

One aspect of amicus practice in common law courts should be remarked upon, however. Amicus briefs constitute a fundamental departure from the traditionally adversarial methods of common law courts. Gorod argues that "there has been no effort to square the [U.S. Supreme] Court's reliance on amicus briefs with its purported commitment to an adversarial system of justice."<sup>16</sup> Moreover, "amicus practice presents, at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take presented by the party-centered adversarial system."<sup>17</sup> In this way, the acceptance of amicus submissions appears more similar to the fact-gathering methods of some inquisitorial civil law courts. Particularly in common law jurisdictions such as the United Kingdom<sup>18</sup> or Canada,<sup>19</sup> where courts may appoint amici curiae to gather and submit research, amicus activity constitutes a civil law moment—one in which a court can gather facts without relying on the efforts of the disputing parties before it.<sup>20</sup>

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13. *High Court Amendment Rules 2004* (Cth) r 44.04 (Austl.).

14. CONSTITUTION, art. 22(3)(e) (2010) (Kenya).

15. See Johannes Chan, *Amicus Curiae and Non-Party Intervention*, 27 H.K.L.J. 391, 395-96 (1997) (finding thirty-one appearances by amici in Hong Kong between 1942 and 1997).

16. Gorod, *supra* note 7, at 37.

17. *Id.* at 60-61.

18. See Supreme Court of United Kingdom: *The Supreme Court Rules*, 2009, S.I. 1603 (L. 17), Rule 35 (U.K.).

19. Rules of the Supreme Court of Canada, Rule 92, SOR/2002-156 (Can.).

20. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985).

*B. Amicus Briefs in International Courts*

Many international courts and adjudicatory bodies, such as the Inter-American Court of Human Rights (IACrHR)<sup>21</sup> and the European Court of Human Rights (ECtHR),<sup>22</sup> accept amicus materials. Amicus participation is also allowed in many international investment arbitrations.<sup>23</sup> For example, Chapter 11 tribunals under the North American Free Trade Agreement (NAFTA) may accept amicus briefs.<sup>24</sup> One aspect of amicus activity at the international level that deserves special mention is the role of nongovernmental organizations (NGOs). NGOs, often based in the developed world,<sup>25</sup> regularly offer input as amici in international proceedings.<sup>26</sup> More importantly, NGOs played a key role in convincing international tribunals to begin accepting amicus briefs. Professor Shelton, for instance, identifies NGOs as some of the earliest actors that asked to submit amicus materials at the ECtHR and IACrHR.<sup>27</sup> The role of NGOs was even more pronounced in the international investment arbitration context: “[t]he early cases to grant third-party intervention rights in investment disputes overwhelmingly involved NGOs and civil society groups.”<sup>28</sup>

However, the involvement of NGOs as amici in international proceedings

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21. Rules of Procedure of the Inter-American Court of Human Rights, art. 44 (2009), [http://www.corteidh.or.cr/reglamento\\_eng.cfm](http://www.corteidh.or.cr/reglamento_eng.cfm); see Shelton, *supra* note 3, at 638-40; see also Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L L. 1, 15-17 (1985) (providing an early discussion of amicus practice at the IACrHR written by a former president of the court).
22. Convention for the Protection of Human Rights and Fundamental Freedoms art. 36(2), Nov. 4 1950, 213 U.N.T.S. 221; EUR. CT. HUM. RTS. R. 44(3)(a) (2012), [http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT\\_EN\\_2012.pdf](http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf); see Shelton, *supra* note 3, at 630-32.
23. See Levine, *supra* note 7, at 208-09.
24. *Statement of the Free Trade Commission on Non-Disputing Party Participation*, NAFTA FREE TRADE COMMISSION (Oct. 7, 2003), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>.
25. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 275 (1997) (“[B]ecause many NGOs are from industrial countries, they amplify certain views . . . that may not be reflective of the views of developing countries.”).
26. See Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 353 (2006).
27. See Shelton, *supra* note 3, at 630-39; see also Charnovitz, *supra* note 25, at 353 (referring to Shelton’s study as “authoritative”).
28. Levine, *supra* note 7, at 209.

has been sharply contested. Debate concerning the proper role of NGOs at the WTO and in international investment arbitrations has been particularly intense.<sup>29</sup> Supporters claim that amicus activity by NGOs helps to remedy deficits of participation and legitimacy at the international level.<sup>30</sup> With such benefits in mind, some commentators have cited amicus activity as a component of evolving global administrative law norms.<sup>31</sup> Opponents, including many developing countries, argue that amicus participation by NGOs gives these organizations too much influence and unfairly benefits developed countries.<sup>32</sup> To the extent that the common law correlates with

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29. See, e.g., Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1290-94 (2009); C.L. Lim, *The Amicus Brief Issue at the WTO*, 4 CHINESE J. INT'L L. 85 (2005); Georg C. Umbricht, *An 'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO*, 4 J. INT'L ECON. L. 773 (2001). See *infra* note 31 for developing countries' objections to the submission of amicus briefs at the WTO.
  30. See, e.g., Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1546 (2006) (identifying amicus briefs at the WTO as "a new avenue for participation").
  31. See *id.*; Richard B. Stewart & Michelle Rattón Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 582 (2011) ("The [Appellate Body's] embrace of amicus briefs reflects the adoption of [global administrative law] to boost organizational legitimacy . . .").
  32. See, e.g., Dispute Settlement Body Special Session, *Taiwan, Penghu, Kinmen & Matsu – DOHA Mandated Review of the Dispute Settlement Understanding (DSU)*, TN/DS/W/25, at 2 (Nov. 27, 2002) ("To allow unsolicited *amicus curiae* submissions . . . would create a situation where those Members with the least social resources could be put at a disadvantage."); Dispute Settlement Body Special Session, *Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania & Zimbabwe – Negotiations on the Dispute Settlement Understanding*, TN/DS/W/18, at 4 (Oct. 7, 2002) ("If . . . nongovernmental entities were allowed to influence the process and outcome of disputes, it would severely erode the Member governments' authority and ability to participate effectively in the dispute settlement process."); Dispute Settlement Body Special Session, *African Group – Negotiations on the Dispute Settlement Understanding*, TN/DS/W/15, at 5 (Sept. 25, 2002) (arguing that the "obligation to receive un-requested information . . . has implications for the intergovernmental nature of the [dispute settlement mechanism] and the rights of Members when they seek participation . . . as third parties"); General Council, *Minutes of Meeting*, ¶ 38, WT/GC/M/60, at 10 (Jan. 31, 2001) (comment of India) ("[T]he Appellate Body's approach [to amicus briefs] would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs."); Decision by the Appellate Body Concerning Amicus Curiae Briefs, *Uruguay*, WT/GC/38 3, at 3 (Dec. 4, 2000) (arguing that acceptance of amicus briefs inappropriately altered the dispute settlement mechanism and limited the rights of parties to a dispute); Stewart & Badin, *supra* note 31, at 564.

economic development,<sup>33</sup> the common law origins of amicus activity also map onto this dispute. One commentator has stated that “the introduction of amici participation into investment arbitration may be seen as representing a victory of the common law over the civil law, and of the developed world over the developing world.”<sup>34</sup>

### III. THE THIRD DEVELOPMENT: CIVIL LAW AMICUS CURIAE

Historically, amicus briefs did not appear in modern civil law jurisdictions. Today, although civil law amicus practice is by no means universal, amicus briefs appear, formally or informally, in civil law courts around the world. This broad development can be split into two trends. First, various civil law jurisdictions have formally recognized amicus activity through rules, statutes, or court decisions. Second, NGOs regularly submit amicus briefs to civil law courts, even when such courts have adopted no formal mechanisms to accept their submissions. Both trends are interregional and relatively recent.

#### *A. Formal Recognition of Amicus Briefs in Civil Law Courts*

Latin America, in particular, has seen a number of court systems alter their procedural rules to formally accept amicus briefs. In 1999, Brazil passed legislation authorizing amicus practice in the Brazilian constitutional court.<sup>35</sup> However, it appears amicus practice existed in Brazil prior to this legislation in various forms, including in the requirement that different Brazilian government agencies, such as the Brazilian securities commission, appear in cases pertaining to their area of expertise.<sup>36</sup> In 2004, the Supreme Court of

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33. This controversial correlation is known as the “legal origins thesis.” See, e.g., Vivian Grosswald Curran, *Comparative Law and the Legal Origins Thesis*: “[N]on scholae sed vitae discimus,” 57 AM. J. COMP. L. 863, 865 (2009) (“The legal origins thesis . . . contrasts countries with common and civil-law origins, correlating common-law origins with . . . greater economic well-being.”).

34. Bjorklund, *supra* note 29, at 1293.

35. Decreto No. 9.868, de 10 de novembro de 1999, Art. 7, § 2, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.11.1999 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/Leis/L9868.htm](http://www.planalto.gov.br/ccivil_03/Leis/L9868.htm); see Daniela Brasil Medeiros, *Amicus Curiae: Um Panorama do Terceiro Colaborador*, REVISTA DE ESMARN, 9-13 (2008), [http://www.esmarn.tjrj.jus.br/revistas/index.php/revista\\_da\\_esmarn/article/view/64/56](http://www.esmarn.tjrj.jus.br/revistas/index.php/revista_da_esmarn/article/view/64/56).

36. Decreto No. 6.616, de 7 de dezembro de 1976, Art. 31, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.12.1976 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/Leis/L6385.htm](http://www.planalto.gov.br/ccivil_03/Leis/L6385.htm); see also Medeiros, *supra* note 35, at 6-8 (describing pre-1999 amicus practice in Brazil).

Argentina<sup>37</sup> and the Constitutional Court of Peru<sup>38</sup> explicitly allowed the use of amicus briefs. In Argentina, as in Brazil, this move may not have represented profound change so much as formal recognition of past, although still fairly recent, informal practice.<sup>39</sup> Finally, Mexico amended its civil procedure code to authorize *amici curiae* in 2011.<sup>40</sup>

Across the Atlantic, the national courts of every member state of the European Union must recognize a form of amicus participation: under European Council regulations, the antitrust authorities of the member states as well as the European Commission may submit written observations to national courts on proceedings related to antitrust.<sup>41</sup> The antitrust authorities or the Commission may also provide oral observations with court permission.<sup>42</sup> In addition, the national courts may request amicus submissions from competition authorities or the Commission in antitrust proceedings.<sup>43</sup> The Netherlands, for example, has implemented these Council regulations through legislation because its civil procedure law did not previously allow *amicus curiae*.<sup>44</sup>

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37. Acordada No. 28/2004-CSJ, July 20, 2004, [CXII-30.455] B.O. 6 (Arg.), <http://www.boletinoficial.gov.ar/Inicio/Index.castle?s=01&idAviso=7265037&idRubro=438&f=20040720>.
  38. Resolución Administrativa No. 095-2004-P/TC, Sept. 14, 2004, Art. 13-A (Peru), [http://www.tc.gob.pe/Reglamento\\_Normativo.html](http://www.tc.gob.pe/Reglamento_Normativo.html); see also DEFENSORÍA DEL PUEBLO, *EL AMICUS CURIAE: ¿QUÉ ES Y PARA QUÉ SIRVE?* 45-46 (2009) (describing amicus practice in Peru).
  39. See Víctor Bazán, *La reglamentación de la figura del amicus curiae por la Corte Suprema de Justicia argentina*, 3 REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL Jan.-Jun.2004, at 3, 3-4 (2005).
  40. Código Federal de Procedimientos Civiles [CFPC] [Federal Civil Procedure Code], art. 598, as amended Aug. 30, 2011, Diario Oficial de la Federación [DO], 24 de febrero de 1943 (Mex.). Note that formal recognition in Mexico occurred following public debate: the authors of a 2003 judicial reform document commissioned by the *Suprema Corte de Justicia* called for the acceptance of amicus submissions in constitutional proceedings. See Víctor Bazán, *En Torno al Amicus Curiae*, REVISTA OFICIAL DEL PODER JUDICIAL, no. 5, at 301, 310-12 (2009).
  41. Council Regulation 01/2003, art. 15, 2003 O.J. (L 1) 12-13; see *Commission Observations to National Courts* (*Amicus curiae observations, Article 15(3)*), EUR. COMMISSION, [http://ec.europa.eu/competition/court/antitrust\\_amicus\\_curiae.html](http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html) (last updated Feb. 19, 2013) (providing some of the amicus briefs the European Commission has submitted under this regulation).
  42. Council Regulation 01/2003, *supra* note 41.
  43. *Id.*
  44. GEORGE CUMMING & MIRJAM FREUDENTHAL, *CIVIL PROCEDURE IN EU COMPETITION CASES BEFORE THE ENGLISH AND DUTCH COURTS* 172 (2010).

European Council regulations aside, some countries in Europe have formally recognized amicus briefs more broadly. In France, amicus briefs have gradually spread through the nation's different court systems.<sup>45</sup> A lower court requested and received an amicus brief in 1988,<sup>46</sup> and, in 1989, the top judge of the *Cour de cassation*, France's highest civil and criminal court, announced that the *Cour* would recognize amicus curiae.<sup>47</sup> In 1991, the *Cour* accepted its first amicus brief.<sup>48</sup> In 2010, the rules of the *Conseil d'Etat*, France's highest administrative court, were amended to formally allow amicus submissions.<sup>49</sup> Heading eastward, courts in Poland have accepted amicus briefs since the late 1990s. The *Trybunał Konstytucyjny* (Poland's highest court) formally recognized amicus briefs in 1997, and lower courts now accept them as well.<sup>50</sup>

45. See generally Christelle Coslin & Delphine Lapillonne, *France and the Concept of Amicus Curiae: What Lies Ahead?*, LEXOLOGY (Oct. 15, 2012), <http://www.lexology.com/library/detail.aspx?g=5863bcb7-8662-43ba-b66a-812bfc23b409> (describing amicus practices in French courts).
46. *Id.* The Paris Court of Appeals requested that the president of the Paris Bar submit an amicus brief.
47. See David W. Duncan, *A Little Tour in France: Surrogate Motherhood and Amici Curiae in the French Legal System*, 21 W. ST. U. L. REV. 447, 450 (1994).
48. *Id.*; see Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 31, 1991, Bull. civ., No. 4 (Fr.), <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007026778&fastReqId=688761281&fastPos=1>.
49. CODE ADMINISTRATIF [C. ADM.] art. R625-2 (Fr.), <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000021865144&cidTexte=LEGITEXT000006070933&dateTexte=20130121&oldAction=rechCodeArticle>; CODE ADMINISTRATIF [C. ADM.] art. R625-3 (Fr.), <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000021865142&cidTexte=LEGITEXT000006070933&dateTexte=20130121&oldAction=rechCodeArticle>; see *Réforme de la justice administrative*, LE CONSEIL D'ETAT ET LA JURIDICTION ADMINISTRATIVE, <http://www.conseil-etat.fr/fr/communiqués-de-presse/reforme-de-la-justice-administrative-kky.html> (last visited Jan. 22, 2013).
50. See Maciej Bernatt, *Opinia przyjaciela sądu (amicus curiae) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich*, in 2 SPRAWNY SĄD ZBIÓR DOBRYCH PRAKTYK 184 (Łukasz Bojarski ed., 2008); Adam Bodnar, Barbara Grabowska & Paweł Osik, "Opinie przyjaciela sądu" (amicus curiae) w postępowaniu przed Trybunałem Konstytucyjnym w praktyce Helskiej Fundacji Praw Człowieka, in KSIĘGA XXV-LECIA TRYBUNAŁU KONSTYTUCYJNEGO: EWOLUCJA FUNKCJI I ZADAŃ TRYBUNAŁU KONSTYTUCYJNEGO—ZAŁOŻENIA A ICH PRAKTYCZNA REALIZACJA (Krzysztof Budziło ed., 2010) (providing a case study of amicus curiae briefs before the Trybunał Konstytucyjny by the Helsinki Foundation for Human Rights (HFHR), a Polish nongovernmental organization). *But see* HELEN KELLER & ALEC STONE SWEET, A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 594 n.220 (2008) (stating that official recognition of the HFHR as an amicus did not occur until 2006).

Outside Europe, Israeli courts<sup>51</sup> have also embraced amicus submissions. In 1996, the Israeli Supreme Court, apparently with the particular influence of Chief Justice Aharon Barak, accepted an amicus brief for the first time.<sup>52</sup>

Formal recognition of civil law amici curiae has taken different forms and comes from different sources, sometimes even within the same country. In some cases, such as in Mexico or the French *Conseil d'Etat*, legislative action has formally amended procedural codes. In other jurisdictions, such as Argentina or France, courts have moved to accept amicus briefs on their own. The variety of processes of adoption reflects the previously discussed flexibility of the amicus form. The fact of formal recognition, however, is itself a strong point of similarity between these countries' experiences with amicus briefs; many countries receive amicus submissions without formal recognition procedures.

### *B. Informal Submission of Amicus Briefs to Civil Law Courts*

Many NGOs now submit amicus briefs to civil law courts even when the receiving court does not formally recognize amici curiae.<sup>53</sup> This practice is significantly more widespread than official acknowledgement of amicus briefs in codes or court rules. NGOs informally submit briefs to courts in virtually every region in the world, from Southeast Asia<sup>54</sup> to Russia<sup>55</sup> to Central Africa.<sup>56</sup>

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51. Strictly speaking, Israel may not be a civil law country. However, "[t]he process of development and eventual acceptance of the Israeli amicus was entirely different from that of the American and common law." Israel Doron & Manal Totry-Jubran, *Too Little, Too Late? An American Amicus in an Israeli Court*, 19 TEMP. INT'L & COMP. L.J. 105, 111 (2005).
  52. *Id.* at 111-15. Interestingly, the authors identify American influences as contributing to the initial acceptance of amicus briefs in Israel.
  53. For example, the International Trademark Association lists its amicus briefs on its website, including a number that it has submitted to civil law jurisdictions that do not appear to formally recognize amici curiae. *Amicus Briefs*, INT'L TRADEMARK ASS'N, <http://www.inta.org/Advocacy/Pages/Amicus.aspx> (last visited Dec. 20, 2012). For an example suggesting the variety of organizations informally submitting amicus briefs, see Brief for Aliansi Jurnalis Independen [Alliance of Independent Journalists] et al. as Amici Curiae in Support of Petition for Review, *H.M. Suharto v. Time Inc. Asia*, Mahkamah Agung Republik Indonesia (2009), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=92361EA9-238A-4D7D-Bo4B-3150AAF85546> (listing twenty-six organizations as amici).
  54. *E.g.*, Brief for the International Trademark Ass'n as Amicus Curiae Supporting Appellant, *Prefel S.A. v. Jae Ik Choi* (filed July 23, 2002) (S. Kor.), <http://www.inta.org/Advocacy/Documents/INTAPrefelChoi.pdf>; Brief for ARTICLE 19 as Amicus Curiae Supporting Respondent, *Public Prosecutor, Office of the Attorney Gen. v. Pruksakasemsuk* (filed Apr. 24, 2012) (Thai.), <http://www.article19.org/data/files/medialibrary/3075/12-04-30-LM-thailand.pdf>

Often these NGOs are nonprofit organizations dedicated to specific substantive areas, such as human rights protection.<sup>57</sup> However, because of the diversity and number of NGOs submitting briefs, informal amicus activity covers a broad range of subjects and ideological positions.<sup>58</sup>

It is difficult to comprehensively measure the scale and success of informal NGO amicus operations in civil law courts. However, the variety of prominent NGOs involved suggests that the practice is perceived to be worthwhile.<sup>59</sup> Indeed, some NGOs even comment on the past success of their amicus submissions in later briefs submitted in the same country.<sup>60</sup>

#### IV. POSSIBLE EXPLANATIONS FOR THE RISE OF CIVIL LAW AMICI CURIAE

The interregional breadth and relative speed of the rise of civil law amici curiae imply that it can be usefully analyzed, to some extent, as a single, global phenomenon. While it is possible that the global shift should be seen as a series

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55. *E.g.*, Brief for International Trademark Ass'n in Support of Claimants, Case No. A40-73286/10-143-625, Arbitrazh Court of Moscow (filed Dec. 20, 2011) (Russ.), <http://www.inta.org/Advocacy/Documents/INTARichemontRospatent.pdf>.
56. *E.g.*, Brief for ARTICLE 19 as Amicus Curiae, In the Case of Uwimana Nkusi and Mukakibibi, Case No. RP 0082/10/HC/KIG (filed Oct. 24, 2011) (Rwanda), <http://www.article19.org/data/files/medialibrary/2805/Amicus-Nkusi-and-Mukakibibi-English-submitted.pdf>.
57. *See, e.g.*, Brief for Amnesty International as Amicus Curiae Supporting Claimants, Case No. 2007HunKa12 (filed Nov. 8, 2010) (Kor.), <http://www.amnesty.org/en/library/asset/ASA25/003/2010/ko/6824a776-8831-4516-948f-cod9b4819a53/asa250032010en.pdf>.
58. *Compare Amicus Curiae Brief to the Czech Constitutional Court*, MENTAL DISABILITY ADVOC. CENTER, <http://www.mdac.info/en/amicus-curiae-brief-czech-constitutional-court> (last visited Jan. 20, 2013) (providing the text of an amicus brief submitted by a mental-disability NGO headquartered in Hungary), *with Amicus Brief for the Sweden Supreme Court Case of Pastor Ake Green*, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=cbo5j01> (last visited Jan. 20, 2013) (discussing an amicus submission by conservative and religious groups in support of an anti-gay pastor).
59. *See, e.g., supra* notes 53-58 (describing informal amicus participation by Amnesty International and ARTICLE 19, among others).
60. Brief for the International Trademark Ass'n as Amicus Curiae Supporting Neither Party, UNILEVER N.V. against Resolution No. 537 of August 25, 2010 and Resolution No. 241 of October 24, 2010, issued by the Industrial Property Directorate, Honorable Exchequer Court, First Chamber of Paraguay (filed Dec. 19, 2011), <http://www.inta.org/Advocacy/Documents/INTAUnilever537.pdf> ("We are pleased to note that the Supreme Court did render a final decision in that case consistent with [the International Trademark Association]'s position [presented in a 2003 amicus brief].").

of separate regional or national changes, the relatively rapid pace of widespread change suggests otherwise. This leads to an important question: Why did amicus briefs start appearing throughout the (civil law) world? Brief sketches of three possible answers are given below.

#### A. Pushy NGOs

First, the rise of civil law amici could be seen as another version of the NGO-driven process that led to amicus briefs in international legal systems. NGOs have pushed for amicus briefs in civil law courts in various ways. Most starkly, NGOs have exerted pressure on civil law courts through the informal submission of amicus briefs to countries that do not recognize them. While an authoritative breakdown of the source of informal amicus briefs would be difficult to produce, NGOs appear to account for the overwhelming majority of informal submissions. NGOs have also acted to normalize informal civil law amicus practice through publications on the topic or by eliding the distinction between court systems that officially accept amicus briefs and those that do not.<sup>61</sup> The special roles NGOs have played in the official recognition of amicus briefs in some countries also support an NGO-centered view. In Poland, for example, the Helsinki Foundation for Human Rights (HFHR) has been instrumental in the development of amicus practice in the *Trybunał Konstytucyjny*, Poland's constitutional court.<sup>62</sup> The HFHR frequently submits amicus briefs to the court, which appears to value its input.<sup>63</sup> In Israel, although the Supreme Court initially recognized amicus briefs on its own, the legislature has since given statutory amicus curiae status to several NGOs.<sup>64</sup>

The role of NGOs in the acceptance of amicus practices by civil law courts is potentially troubling. Many of the criticisms of NGO amicus activity at the international level also apply to NGOs participating as amici at the national

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61. A CIEL publication argued against objections to amicus briefs in international courts by pointing out that amicus briefs exist in civil law countries. In the process, the publication conflated countries that recognize amici through formal procedures with those where NGOs have simply submitted briefs to courts. See Johnson & Amerasinghe, *supra* note 5, at 1, 12-21. For a website eliding the distinction, see *Amicus Briefs*, *supra* note 53, where, for instance, a brief formally submitted to the U.S. Court of Appeals for the Second Circuit is listed immediately below a brief informally submitted to the Arbitrazh Court of Moscow.

62. See KELLER & STONE SWEET, *supra* note 50; Bernatt, *supra* note 50, at 186-89; Bodnar et al., *supra* note 50.

63. See Bernatt, *supra* note 50, at 186-89; Bodnar et al., *supra* note 50.

64. See Doron & Totry-Jubran, *supra* note 51, at 111-15, 121.

level in civil law courts. For instance, the developing-country case against amicus briefs at the WTO rings true with respect to amicus briefs in developing civil law countries: litigants in such courts, even government litigants, may be outmatched by NGO resources, experience, and prestige.<sup>65</sup> Particularly when an amicus brief has been informally submitted, some courts may not have the capacity to interpret and apply its contents correctly.<sup>66</sup> In addition, to the extent that most NGOs are from developed countries and have developed-country agendas,<sup>67</sup> their use of amicus briefs in the civil law developing world could be seen as unfairly influencing the substantive and procedural laws of lesser-developed countries.

These are potentially serious criticisms of NGO amicus activities and should be studied further.<sup>68</sup> However, two points militate against broadly condemning civil law amicus activity on these grounds. First, the flexibility of the amicus form suggests that countries could modify the institution to prevent unfairness while preserving the basic principle that outside actors may offer input in court proceedings—perhaps by only allowing NGOs with demonstrated connections to a local group to submit amicus briefs. Second, while NGO activities may be partly responsible for civil law amicus submissions, they likely do not account for the entire trend. Other factors, discussed below, have also contributed.

### *B. The Long Arm of International Law*

The influence of international law on domestic legal systems also helps to explain the rise of civil law amici. The European Council regulations establishing amicus practices in antitrust cases offer the starkest example of international law affecting domestic legal postures toward amici.<sup>69</sup> There are, however, many broader instances. The European Convention on Human Rights and the decisions of the ECtHR have led to significant changes in the

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65. See sources cited *supra* note 32.

66. See *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) (pointing out that “amicus briefs can be a real burden on the court system”).

67. See Charnovitz, *supra* note 25.

68. Further research might involve gathering data on the number and percentage of NGO amicus submissions across different countries, how often courts agreed with their briefs, and to what extent the NGOs’ arguments represented constituents foreign to the jurisdiction.

69. See *supra* notes 41-43 and accompanying text.

national legal systems of many European nations.<sup>70</sup> In specifically documenting the impact of the ECtHR's fair-trial jurisprudence on the *Cour de cassation* and *Conseil d'Etat* in France, Professor Mitchel Lasser points out that the *Cour* acted quickly to address the ECtHR's early objections to French procedures while the *Conseil* resisted.<sup>71</sup> The subsequent appearance of amicus briefs at the *Conseil* could be seen as part of the French response to later ECtHR decisions like *Martinie v. France*, which continued to challenge the adequacy of French procedures on fair-trial grounds.<sup>72</sup>

The influence of international law on amicus practices has not been limited to Europe. Although it does not appear that the IACrtHR's jurisprudence has had as direct an impact on domestic legal systems as the ECtHR's, the use of amicus briefs at the IACrtHR may have contributed to amicus acceptance in Latin American countries.<sup>73</sup> The influence of international law has also not been limited to practice in the major international courts. Mexican lawyers, for instance, encountered amicus briefs in NAFTA tribunals (and opposed their use there) long before the country changed its civil procedure code.<sup>74</sup> In addition, as early as 2004, countries such as the United States and Canada added provisions to their model Bilateral Investment Treaties (BITs) authorizing trade tribunals to accept amicus briefs.<sup>75</sup> The United States and Canada have BITs or similar agreements with countries around the world, providing the legal cultures of such countries with a prospective point of exposure to amicus practices.<sup>76</sup> Finally, while not strictly international law, the

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70. See generally KELLER & STONE SWEET, *supra* note 50 (reviewing the impact of ECtHR jurisprudence on eighteen European states).

71. See MITCHEL DE S.-O.-L'É. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* 95-97 (2009).

72. App. No. 58675/00, 45 Eur. H.R. Rep. 433 (2007) (decided July 13, 2006).

73. See, for example, Bazán's argument based on the IACrtHR in favor of amicus briefs in Argentina. Bazán, *supra* note 39, at 20.

74. See Letter from Hugo Perezcano Díaz, Consultor Jurídico de negociaciones, Mex., to V.V. Veeder, President Arbitrator, Methanex Corp. v. United States (2004), <http://www.state.gov/documents/organization/3936.pdf> (opposing the introduction of an amicus brief in a NAFTA arbitration).

75. Canada Model Foreign Investment Protection Agreement art. 39, INVESTMENT TREATY ARB. (2004), <http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf>; United States Model Bilateral Investment Treaty art. 28(3), U.S. DEP'T OF ST. (2004), <http://www.state.gov/documents/organization/117601.pdf>.

76. See *Canada's FIPA Program: Its Purpose, Objective and Content*, FOREIGN AFF. & INT'L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apic/fipa-purpose.aspx> (last updated Apr. 4, 2012); *United States Bilateral Investment*

heavy use of amicus briefs in the United States, particularly at the Supreme Court, has caught the attention of other countries and their lawyers: several countries and the European Union have submitted amicus briefs to the U.S. Supreme Court.<sup>77</sup>

Viewing civil law amicus briefs as a product of international legal influences places amicus briefs within a broader pattern of international law affecting domestic institutions.<sup>78</sup> While the influence of international law on domestic legal practices has its detractors,<sup>79</sup> some degree of influence is inevitable, and the overall pattern is less controversial than influence by NGOs. Moreover, transplanted legal practices likely would not survive in national systems in which they were totally out of place. Indeed, as the next Section discusses, amicus briefs are not out of place in civil law systems.

### *C. The Natural Fit of Amicus Briefs in Civil Law Courts*

A final possible explanation for civil law amici is that they are a natural fit within civil law systems. This claim is difficult to make because there is obviously a wide diversity of practices and traditions within the broad category of civil law systems. However, as discussed in Part I, amicus briefs are a departure from the classic, adversarial mode of inquiry of a common law court. Many of the characteristics that distinguish amicus briefs from other common law procedures align them with civil law proceedings. For instance, the work of a judge in gathering information through amicus briefs from sources other than the parties is similar to civil law inquisitorial proceedings, such as the judge's ability to reference expert witness testimony in some European legal

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*Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/afd/bit/117402.htm> (last visited Jan. 28, 2013). The Free Trade Agreement between the United States and Peru, for example, authorizes trade dispute tribunals to accept amicus briefs. See United States-Peru Trade Promotion Agreement art. 10.20(3), Apr. 12, 2006, H.R. DOC. NO. 110-60, at 225 (2007).

77. See, e.g., Brief of the European Union and Members of the International Community as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); see also, e.g., Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. June 13, 2012) (supporting the petitioner's position in a case touching on both international and domestic law).
78. See Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327 (2006).
79. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) (criticizing "unelected federal judges" for "usurping [the political branches'] lawmaking power by converting what they regard as norms of international law into American law").

systems.<sup>80</sup> Also, compared to common law systems, many civil law systems have more lenient intervention standards for third parties. The participation of an actor with no concrete interest in a dispute would be less of a departure from intervention rules for a French court than for an American one.<sup>81</sup> The historical origins of amicus briefs add an interesting twist. Although amicus briefs have been a common law phenomenon for the last several centuries, the procedure originated in Roman law.<sup>82</sup> Roman law can be seen as the (albeit distant) intellectual ancestor of modern civil law systems. Taking an extremely long view of history, civil law systems could claim that common law courts adopted the amicus procedure from them.

This view of civil law amici is probably too much of a generalization to serve as a comprehensive explanation for their appearance. Also, the basic observation could cut the other way: one might argue that civil law courts should be less likely to accept amicus briefs because they have tools like fact-gathering from nonparties<sup>83</sup> or lenient intervention rules<sup>84</sup> that fulfill the main purposes of amici. However, in the presence of other factors, the civil law qualities of amicus briefs do serve as a reason why and how civil law amici appeared so broadly so quickly. Essentially, amicus briefs are not profoundly or disruptively common law in character—unlike, say, a concentrated trial.<sup>85</sup> Thus, when NGO activities or international legal influences do lead to submissions of amicus briefs to civil law courts, these factors are more likely to catalyze a consensual process of adoption than to encounter stiff resistance.

## CONCLUSION

None of these explanations is independently sufficient to account for the rise of civil law amicus briefs. They also all overlap in various ways: the establishment of amicus briefs in international law no doubt encouraged NGOs to make amicus submissions directly to national courts, and amicus briefs would probably not be so popular among NGOs or so common in

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80. See Langbein, *supra* note 20, at 826, 836-39.

81. See Shelton, *supra* note 3, at 616.

82. See Ernest Angell, *The Amicus Curiae American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017, 1017 (1967); Krislov, *supra* note 1.

83. See Langbein, *supra* note 20, at 833-41.

84. See Shelton, *supra* note 3, at 616.

85. See Benjamin Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 841 (1971).

international law if they were utterly alien to the civil law approach. Accordingly, the best view of civil law amicus briefs, and amicus briefs overall, may be that they constitute an evolving global procedural norm. NGOs may be partly responsible for spreading and advocating for this norm, but the exchange of legal ideas through international institutions has also played a role. Such a norm should not be accepted without scrutiny: NGOs are controversial agents of legal change,<sup>86</sup> and international legal institutions may favor the current holders of geopolitical power.<sup>87</sup> Nonetheless, truly global procedural norms are uncommon (although perhaps decreasingly so), and the global reach of amicus briefs should be examined more thoroughly going forward.

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86. See *supra* note 32 and accompanying text; *supra* notes 65-67 and accompanying text.

87. See B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

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