Leiden Journal of International Law (2017), 30, pp. 647–660
 doi:10.1017/S0922156517000231

INTERNATIONAL LAW AND PRACTICE

How Does the *Amicus Curiae* Submission Affect a Tribunal Decision?

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Abstract
In the *South China Sea Arbitration* initiated by the Philippines against China, the Chinese (Taiwan) Society of International Law (CSIL) submitted an *amicus curiae* brief to the Annex VII arbitral tribunal established in accordance with United Nations Convention on the Law of the Sea (UNCLOS). This article first analyzes the definition and legal nature of *amicus curiae* status, then introduces cases involving *amicus curiae* in the International Court of Justice (ICJ) and UNCLOS dispute settlement mechanisms. By analyzing relevant statutes and rules of procedure, this article assesses the acceptance of *amicus curiae* submissions by international courts or tribunals, in different dispute settlement mechanisms. Finally, the article describes the significance of the *amicus curiae* brief submitted by CSIL to the arbitral tribunal, concluding that the *South China Sea* Arbitral Tribunal did take the *amicus curiae* submission into account, but exercised caution in its consideration.

Keywords
Amicus Curiae submissions; Annex VII Arbitral Tribunal; International Court of Justice; International Tribunal for the Law of the Sea

1. INTRODUCTION

On 22 January 2013, the Philippines instituted arbitral proceedings against China over disputes related to the South China Sea, in accordance with Articles 286, 287, and Article 1 of Annex VII of UNCLOS.[1] China's attitude toward the proceedings has been one of non-acceptance, non-participation, and non-compliance regarding the arbitral claim filed by the Philippines.[2] In Procedural Order No. 3 issued by the tribunal, the tribunal invited the parties to comment on, 'the appropriate procedure

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1 The Notification and Statement of Claims, issued by the Department of Foreign Affairs of the Republic of the Philippines in Manila to the Embassy of the People's Republic of China in Manila, Serial No. 13-0211, 22 January 2013.

2 *In the Matter of An Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS (The Philippines v. China)*, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19 (2015), para. 37 (hereinafter '*The Sino-Philippines South China Sea Arbitration*').

with regard to any *amicus curiae* submission that the Tribunal may receive',[3] to which the Philippines responded.[4] On 6 February 2015, the Chinese Ambassador to the Netherlands wrote to the members of the tribunal in a personal capacity, stating that China expressed 'firm opposition' to some of the procedures raised in the tribunal's correspondence, including *amicus curiae* submissions.[5]

On 23 March 2016, the CSIL submitted an *amicus curiae* brief regarding the legal status of Taiping Island (also known as Itu Aba) to the tribunal. CSIL's submission sought to prove that Taiping Island is an 'island', rather than a 'rock', according to Article 121 of UNCLOS.[6] CSIL also expressed its willingness to help arrange a site visit to Taiping Island for the members of the tribunal, in order to prove the authenticity of its submissions.[7] This article will discuss the definition of *amicus curiae* and the legal status of *amicus curiae* submissions. Case studies will be used to assess the attitude of international judicial bodies toward *amicus curiae* submissions. The article will conclude by suggesting that in the *South China Sea Arbitration* award the tribunal did take the *amicus curiae* submission by the CSIL into account but in so doing, exercised caution.

2. Definition and legal nature of *amicus curiae*

Amicus curiae originated in Roman law, which has always been an integral part of the common law system.[8] Even in some civil law states, where *amicus curiae* have not been explicitly recognized, stakeholders possess a similar right to intervention.[9] The development of international law is inseparable from the impact of domestic law.[10] In its treatment of *amicus curiae*, international law has been influenced by the domestic legal systems of particular states, such as the United States.[11] Since the 1990s, more and more international courts and tribunals have encountered *amicus curiae* submissions.[12] In international law, however, no single definition exists for *amicus curiae*.[13] Many international judicial bodies accept *amicus curiae* submission in practice, such as the European Court of Human Rights (ECtHR), the

3 Ibid., para. 60.
4 Ibid., para. 63. In the Award on Jurisdiction and Admissibility issued by the arbitral tribunal, it is said that the Philippines wrote to the arbitral tribunal which, 'commented on appropriate procedures for evaluating any *amicus curiae* submission'.
5 Ibid., para. 64.
6 *In the Matter of An Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS (The Philippines v. China), Amicus Curiae* Submission by the Chinese (Taiwan) Society of International Law on the Issue of the Feature of Taiping Island (Itu Aba) Pursuant to Article 121(1) and (3) of the 1982 UNCLOS, PCA Case No. 2013-19 (2016), para. 17 (hereinafter '*Amicus Curiae* Submissions by the CSIL').
7 Ibid., para. 17.
8 D.B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty', (2002) 25 *Boston College International and Comparative Law Review* 235, at 239.
9 D. Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings', (1994) 88 *American Journal of International Law* 611, at 616.
10 Z. Haifeng and G. Lizhong, '*Amicus Curiae* in International Judicial Procedures', (2007) 3 *Journal of Comparative Law* 68, at 69.
11 Ibid.
12 L. Bartholomeusz, 'The *Amicus Curiae* before International Courts and Tribunals', (2005) 5 *Non-State Actors and International Law* 209, at 211.
13 L. Crema, 'Testing Amici Curiae in International Law: Rules and Practice', (2012) 22 *Italian Yearbook of International Law* 91, at 93.

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

Inter-American Court of Human Rights (IACtHR), the World Trade Organization (WTO), and the International Center for Settlement of Investment Disputes (ICSID). An ICSID decision in 2005 said, concerning *amicus curiae*:

> An *amicus curiae* is ... not a party to the proceeding ... The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.[14]

That decision found that an ICSID tribunal has the authority to decide whether to accept the *amicus curiae* submission.[15] In general, an *amicus curiae* can be understood as a body which is not a party to the case, but nonetheless is related to the case, such as a state, state organ, international organization, or private body, and takes the initiative to submit written briefs or make oral statements before a court or tribunal, with respect to the law or facts.[16]

It can be seen from the above definition that the *amicus curiae* body must prove its relevance to the case in order to submit an *amicus curiae* brief to the court or tribunal.[17] Compared to the interests of the *amicus curiae* body, however, how the *amicus curiae* submission will serve the interests of the court or tribunal may be considered a more important factor.[18] In general, the interests of the court or tribunal are that the *amicus curiae* submission will assist the court or tribunal in conducting a better hearing.[19] In addition, the *amicus curiae* submission should help the court or tribunal to safeguard the due process.[20] When an *amicus curiae* submission is likely to satisfy the interests of the court or tribunal, such a request is likely to be accepted.[21]

Different courts or tribunals have different rules as to what entities may be considered *amicus curiae*. In some courts, such as the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), states, international organizations, and even individuals, may participate as *amicus curiae*.[22] Other courts or tribunals, such as the ICJ and the International Tribunal for the Law of the Sea (ITLOS), only allow certain entities to submit *amicus curiae* briefs, such as inter-governmental organizations.[23] Moreover, if there are no specific provisions in the statute or rules of procedure as to whether certain entities may participate as *amicus curiae*, it is more likely to generate controversy when such entities request to submit *amicus*

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14 *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina* (Order in Response to a Petition for Participation as Amicus Curiae, 2006) ICSID Case No. ARB/03/17, para.13.

15 Ibid.

16 Crema, *supra* note 13, at 94.

17 E. Savarese, '*Amicus Curiae* Participation in Investor-State Arbitral Proceedings', (2007) 17 *Italian Yearbook of International Law* 99, at 106.

18 Bartholomeusz, *supra* note 12, at 274.

19 Ibid.

20 Shelton, *supra* note 9, at 627.

21 Bartholomeusz, *supra* note 12, at 274.

22 K.F. Gomez, 'Rethinking the Role of *Amicus Curiae* in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest', (2012) 35 *Fordham International Law Journal* 510, at 521.

23 L. Bastin, 'The *Amicus Curiae* in Investor-State Arbitration', (2012) 1 *Cambridge Journal of International and Comparative Law* 208, at 209–10.

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

curiae briefs.[24] In practice, interstate dispute settlement mechanisms are more conservative, usually precluding *amicus curiae* submissions by private entities, such as non-governmental organizations (NGOs).[25]

Courts or tribunals generally have discretion in deciding whether to permit the submission of *amicus curiae* briefs.[26] If such requests are allowed, the court or tribunal can prescribe and restrict the form and scope of the submission.[27] In general, the accepted form of *amicus curiae* participation is the submission of written briefs,[28] however, sometimes *amicus curiae* are allowed to make oral statements before the court or tribunal.[29] Whether *amicus curiae* should have access to material concerning the dispute also varies among courts and tribunals.[30] For example, in WTO proceedings the material submitted by parties is usually confidential.[31] For advisory opinion proceedings at the ICJ, however, where the ICJ allows an *amicus curiae* submission by an international organization, that organization will receive written material concerning the case.[32] This may be due to the fact that material relating to ICJ cases will be published on the court's official website. In terms of the scope of *amicus curiae* submissions, they may cover both legal and factual issues.[33] Moreover, the court or tribunal usually will allow the parties to respond to the *amicus curiae* submissions.[34]

3. Case studies concerning *amicus curiae* submissions

3.1 International Court of Justice

The ICJ is the main judicial body of the United Nations.[35] Its jurisdiction includes contentious cases, that is, disputes of a legal nature submitted by states.[36] It also has jurisdiction to provide advisory opinions when requested by organs of the United Nations or other qualified specialized agencies.[37] The following part of this article will discuss the practice of the ICJ regarding *amicus curiae*, in both contentious and advisory proceedings.

3.1.1 Contentious proceedings

In accordance with Article 34 of the Statute of the Court, only states can be parties to cases put before the Court. Article 34(2), however, provides that the Court can

[24] Bartholomeusz, *supra* note 12, at 275.
[25] Bastin, *supra* note 23, at 228.
[26] Haifeng and Lizhong, *supra* note 10, at 75.
[27] Ibid.
[28] B. Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', (2008) 41 *Vanderbilt Journal of Transnational Law* 775, at 815.
[29] Ibid.
[30] Bartholomeusz, *supra* note 12, at 277.
[31] D. Yuqiong, 'On the Transparency of the WTO Dispute Settlement Mechanism—From the Perspective of *Amicus Curiae*', (2013) 2 *Social Science Research* 71, at 75.
[32] Bartholomeusz, *supra* note 12, at 277.
[33] Ibid.
[34] Ibid., at 278.
[35] See www.icj-cij.org/court/index.php?p1=1 (accessed 16 June 2016).
[36] See www.icj-cij.org/jurisdiction/index.php?p1=5 (accessed 8 June 2016).
[37] Ibid.

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

request relevant public international organizations to provide information relevant to the case, in accordance with the Rules of the Court. If such organizations provide information to the Court on their own initiative, the Court should accept such information.[38] In the past, there has been debate over the definition of 'public international organizations' under Article 34;[39] however, according to Article 69(4) of the Rules of the Court, 'public international organizations' refers to inter-governmental organizations for purposes of Article 34.[40] Therefore, such organizations do not include NGOs.[41]

There have been few occasions on which the ICJ has invoked Article 34(2). In the 1988 *Islamic Republic of Iran* v. *United States of America* case, brought by Iran following the downing of an Iranian aircraft, the Court invited the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations, to provide relevant, factual information concerning ICAO procedures, as well as the ICAO's decision after the accident.[42] Practice evinces, however, that the Court generally does not invite public international organizations to provide relevant information.[43] In addition, there are practical difficulties involved in requesting public international organizations to provide timely information, as such organizations often compile information haphazardly.[44]

In practice, there have been cases in which NGOs have initiated *amicus curiae* submissions before the Court.[45] In the 1950 *Asylum* case, the International League of the Rights of Man requested permission to submit *amicus curiae* briefs, in accordance with Article 34 of the Statute.[46] This request was, however, denied by the Registrar,[47] due to the fact that the International League of the Rights of Man did not satisfy the requirements of being a 'public international organization'.[48] ICJ records, however, show that in the *Military and Paramilitary Activities in and against Nicaragua* case and the *Gabčíkovo-Nagymaros Project* case, NGOs again sought to submit *amicus curiae* briefs.[49] In those two cases, the *amicus curiae* briefs were delivered to the library of the Court, so that the judges had full access to them.[50] It is, however, unclear whether the judgment of the Court was ultimately affected by these *amicus curiae* submissions.[51] The practice and relevant rules of the Court show that public international organizations can participate in proceedings as *amicus curiae*, however, NGOs

38 1945 Statute of the International Court of Justice, 3 Bevans 1153 (1945), Art. 34(2).
39 Bartholomeusz, *supra* note 12, at 213.
40 1978 ICJ Rules of Court, 17 ILM 1286 (1978) (adopted 14 April 1978, entered into force on 1 July 1978), Art. 69(4).
41 E. De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of *Amicus Curiae* Intervention in International Economic and Investment Disputes', (2011) 12 *Chicago Journal of International Law* 85, at 92.
42 *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, ICJ Pleadings, Vol. II [1992], at 618.
43 Bartholomeusz, *supra* note 12, at 214.
44 Ibid.
45 Crema, *supra* note 13, at 121.
46 *Asylum case (Colombia v. Peru)*, ICJ Pleadings, Vol. II [1950], at 227.
47 Ibid., at 228.
48 Ibid.
49 Crema, *supra* note 13, at 121.
50 Ibid.
51 De Brabandere, *supra* note 41, at 94.

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cannot formally submit *amicus curiae* briefs, their submissions being considered by the Court only informally.

3.1.2 Advisory proceedings

In advisory proceedings, according to Article 66(2) of the Statute, if the Court considers that certain international organizations could provide relevant information to the Court, then the Registrar should notify these organizations on behalf of the Court. Within a time limit specified by the President, the Court will accept written statements provided by such organizations; alternatively, the Court will hold public hearings in order to receive oral statements from such organizations. The practice of the Court shows that international organizations can also ask the Court to permit their participation as *amicus curiae*, on the organization's initiative.[52] In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory proceedings, the Court accepted requests to intervene filed by inter-governmental organizations such as the League of Arab States and the Organization of the Islamic Conference.[53]

'International organizations' referred to in Article 66 certainly include inter-governmental organizations, however, whether this also includes NGOs is subject to debate.[54] The early practice of the Court allowed *amicus curiae* submissions by NGOs. In the *International Status of South West Africa* advisory proceedings, the International League of the Rights of Man was permitted to submit relevant information.[55] The Court required the International League of the Rights of Man to submit its *amicus curiae* brief within 25 days, and the submission had to be limited to legal issues.[56] The International League of the Rights of Man did not, however, conform with the order of the Court.[57] The information it provided was inconsistent with the requirements of the Court and the submission was received almost a month later than the deadline specified by the Court.[58] Therefore, the information was not included in the case file.[59]

In later practice, requests filed by NGOs to participate as *amicus curiae* have all been denied by the Court. In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* advisory proceedings, the Court rejected the request filed by the International League of the Rights of Man.[60] In the 1993 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* advisory proceedings requested by the World Health

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52 Bartholomeusz, *supra* note 12, at 220.

53 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), Written Statement of the League of Arab States (January 2004) and Written Statement of the Organization of the Islamic Conference (January 2004), available at www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=1 (accessed 16 June 2016).

54 Bartholomeusz, *supra* note 12, at 220.

55 *International Status of South West Africa* (Advisory Opinion), ICJ Pleadings [1950], at 327.

56 Ibid.

57 Ibid., at 346.

58 Ibid.

59 Ibid.

60 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion), ICJ Pleadings [1971], at 679.

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Organization (WHO), International Physicians for the Prevention of Nuclear War asked to be allowed to provide information before the Court.[61] On 28 March 1994, the Court decided, considering the facts of the case and the request from the WHO, not to ask the International Physicians for the Prevention of Nuclear War to submit written briefs or make oral statements.[62]

In the 1995 *Legality of the Threat or Use of Nuclear Weapons* advisory proceedings, however, the Court adopted a different approach,[63] with the ICJ Registrar considering correspondence sent by an NGO.[64] The Registrar stated that the Court had received the *amicus curiae* brief but that this would not be included in the case file;[65] rather, the brief had been delivered to the library, where it was accessible to the judges.[66]

Since October 2001, the Court has adopted Practice Directions for the use of disputing states.[67] The Practice Directions do not alter the Rules of the Court, but are additional.[68] Practice Direction XII addresses issues concerning submissions by NGOs in advisory proceedings. The first paragraph provides that, in advisory proceedings, if an NGO submits written statements and/or documents on its own initiative, then these statements and/or documents will not be considered part of the case file. The second paragraph provides that the status of these statements and/or documents is the same as that of published material. The third paragraph provides that written statements and/or documents submitted by the NGOs will be placed in a specific location in the ICJ. All states and inter-governmental organizations participating in the advisory proceedings under Article 66 of the Statute will be notified of the location of such statements and/or documents.

As can be seen from both actual practice and the ICJ's Practice Directions, submissions by NGOs will not be included in any case file, however, these submissions will be considered by the judges. Compared with its earlier practice, the Court has gradually adopted a more inclusive approach towards making NGO briefs available in advisory proceedings, without technically granting NGOs *amicus curiae* status.[69] In brief, within the ICJ, public international organizations can submit *amicus curiae* briefs in both contentious proceedings and advisory proceedings. Conversely, although briefs submitted by NGOs will not be included in the case file, they will be considered by the judges.

3.2 Dispute settlement mechanisms under UNCLOS

Among UNCLOS dispute settlement mechanisms, namely the ICJ, ITLOS, Annex VII arbitral tribunals, and Annex VIII arbitral tribunals, there are cases involving *amicus curiae* briefs. Such submissions have primarily taken place at ITLOS and Annex VII arbitral tribunals, and will be further explored below.

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61 Letter from the Registrar to Dr. Barry D. Levy (28 March 1994), cited in Shelton, *supra* note 9, at 624.
62 Ibid.
63 'Letter to the Editor', *International Herald Tribune*, 15 November 1995, cited in Crema, *supra* note 13, at 122.
64 Ibid.
65 Ibid.
66 Ibid.
67 See www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0, Practice Direction XII (accessed 8 June 2016).
68 Ibid.
69 Bartholomeusz, s*upra* note 12, at 223.

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3.2.1 International Tribunal for the Law of the Sea

ITLOS is one of the dispute settlement mechanisms provided by UNCLOS, which can address any dispute involving the interpretation or application of UNCLOS.[70] It has jurisdiction over contentious cases and can also provide advisory opinions if so requested.[71] Both the Seabed Disputes Chamber and ITLOS have the capacity to provide advisory opinions.[72]

3.2.1.1 Advisory proceedings. Article 133 of the Rules of the Tribunal provides for the submission of *amicus curiae* briefs in advisory proceedings in the Seabed Disputes Chamber. Article 133(2) notes that the Seabed Disputes Chamber, or the President when the Chamber is not sitting, should identify inter-governmental organizations which can provide relevant information for the case at hand. The Registrar should forward advisory opinion requests to these organizations.

As can be seen from the wording of Article 133, within the Seabed Disputes Chamber, only 'inter-governmental organizations' can submit *amicus curiae* briefs. In fact, the practice of the Seabed Disputes Chamber is in line with Article 133. In the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* advisory proceedings, Greenpeace International and the World Wide Fund for Nature (WWF) submitted statements to the Registrar.[73] In the meantime, these two NGOs also indicated that they wished to participate as *amicus curiae*.[74] The Seabed Disputes Chamber considered, however, that as their statements had not been submitted in accordance with Article 133, they should not be included in the case file.[75] Nonetheless, these statements were forwarded to the contesting parties, the International Seabed Authority, and the inter-governmental organizations, which had submitted written statements.[76] In addition, these statements were published on the ITLOS official website.[77] Moreover, the two NGOs made oral statements to the media in a special room during the hearing.[78] At the *Request for An Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* advisory proceedings, ITLOS adopted the same practice. In this case, ITLOS invited the International Union for Conservation of Nature and Natural Resources, the Caribbean Regional Fisheries Mechanism, and other inter-governmental organizations, to submit *amicus curiae* briefs.[79] The statement submitted by WWF, an NGO, was not, however, included in the case file but was published on the ITLOS website.[80]

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70 See www.itlos.org/en/the-tribunal/ (accessed 16 June 2016).
71 Ibid.
72 See www.itlos.org/jurisdiction/ (accessed 7 June 2016).
73 *Responsibilities and Obligations of States with respect to Activities in the Area*, Advisory Opinion (1 February 2011) ITLOS Reports 2011, 10, at 19.
74 Ibid.
75 Ibid.
76 Ibid.
77 See Case No. 17: Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), *ITLOS*, available at www.itlos.org/en/cases/list-of-cases/case-no-17/ (accessed 3 June 2016).
78 Crema, *supra* note 13, at 92.
79 See Case No. 21: Request for An Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), *ITLOS*, available at www.itlos.org/en/cases/list-of-cases/case-no-21/#c1252 (accessed 4 June 2016).
80 Ibid.

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

3.2.1.2 Contentious proceedings. Article 84 of the Rules of the Tribunal provides the procedure for submitting *amicus curiae* briefs in contentious proceedings. According to Article 84(1), ITLOS can, upon the request of one of the disputing states or on its own initiative, seek the submission of relevant information by appropriate inter-governmental organizations, at any time before the closure of the oral hearing. Article 84(2) allows inter-governmental organizations to furnish information on their own initiative. In this situation, the inter-governmental organization should submit a memorial to the Registrar, before the closure of written proceedings. As can be seen from Article 84, the submission of *amicus curiae* briefs in contentious proceedings is also restricted to inter-governmental organizations.

In the *Arctic Sunrise* case, an NGO requested permission to submit an *amicus curiae* brief. In this case, the *Arctic Sunrise*, a Netherlands-flagged vessel being used by Greenpeace International to protest Russian oil drilling in the Arctic, was detained by Russian authorities in Russia's Exclusive Economic Zone (EEZ).[81] The Netherlands instituted arbitral proceedings against Russia, pursuant to Annex VII of UNCLOS.[82] Before the constitution of the Annex VII arbitral tribunal, the Netherlands requested ITLOS prescribe provisional measures for the immediate release of the vessel and its crew members.[83] Russia did not, however, participate in the ITLOS provisional measures proceedings.[84] On 30 October 2013, Greenpeace International requested that ITLOS permit its participation as *amicus curiae*.[85] The Registrar invited the Netherlands and Russia to comment on the request.[86] The Netherlands indicated that it did not have any objection to the request from Greenpeace International.[87] On 5 November 2013, ITLOS decided to reject Greenpeace International's request and its *amicus curiae* briefs were not included in the case file.[88] ITLOS did not explicitly explain the grounds for its decision. On 6 November 2013, a Russian communication to ITLOS argued that as Greenpeace International is a NGO, it was not appropriate for Greenpeace International to furnish information to ITLOS.[89]

3.2.2 Annex VII arbitral tribunal

Annex VII arbitral tribunal is another dispute settlement mechanism provided for by UNCLOS. In the *Arctic Sunrise* Annex VII arbitral proceedings, Greenpeace International also asked the tribunal's permission to submit *amicus curiae* briefs. On

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81 Request for the Prescription of Provisional Measures under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea, IV Statement of Facts (21 October 2013) ITLOS Reports 2013, at 6 (paras. 18, 20–21).

82 Press Release 201: Request for Provisional Measures Submitted Today to the Tribunal in the *Arctic Sunrise* Case, *ITLOS*, 21 October 2013, available at www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_201_E.pdf (accessed 22 June 2015).

83 Ibid.

84 *The Arctic Sunrise Case (Kingdom of The Netherlands v. Russian Federation)*, Order on the Request for the Prescription of Provisional Measures (22 November 2013) ITLOS Reports 2013, 230, para. 9.

85 Ibid., para. 15.

86 Ibid., para. 16.

87 Ibid., para. 17.

88 Ibid., para. 18.

89 Ibid., para. 19.

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

16 September 2014, Greenpeace International sent an email to the Permanent Court of Arbitration (PCA), requesting permission to submit *amicus curiae* briefs addressing legal issues relating to international human rights law which might arise during the proceedings.[90] Attached to the email were *amicus curiae* submissions it had filed.[91] On 19 September 2014, the PCA transferred Greenpeace International's letter and *amicus curiae* submissions to the contesting parties for their comments.[92] In the meantime, the PCA forwarded the letter to the members of the tribunal, but did not forward the *amicus curiae* submissions.[93] On 3 October 2014, the Netherlands indicated that it did not object to the submission of *amicus curiae* briefs by Greenpeace International, whereas Russia made no comment.[94] On 8 October 2014, the tribunal decided the grounds for Greenpeace International's request were insufficient, and therefore it was denied.[95] The tribunal did not, however, explain why the grounds for Greenpeace International's request were insufficient.

The rules of procedure of the *Arctic Sunrise* Annex VII arbitral tribunal did not provide for the submission of *amicus curiae* briefs and the tribunal did not explain its reasons for rejecting Greenpeace International's request. Article 10(1) of the Rules of Procedure provides, nonetheless, that as long as parties are treated equally and given suitable opportunities to make statements to the tribunal at every stage of proceedings, the tribunal can conduct proceedings as it considers fit.

In the *South China Sea Arbitration*, the tribunal's rules of procedure similarly contained no provision concerning the submission of *amicus curiae* briefs. Article 10 of the Rules of Procedure of the *South China Sea Arbitration* is the same as Article 10 of the *Arctic Sunrise* arbitral tribunal. Nonetheless, the tribunal in the *South China Sea Arbitration* invited the parties to comment on the submission of *amicus curiae* briefs, the appointment of an expert hydrographer, and the possibility of site visits.[96] Although there is no explicit provision in the procedural rules on accepting *amicus curiae* submissions, Article 10 of the Rules of Procedure does imply that the tribunal has discretion to do so. This implied power also exists in the WTO and the North American Free Trade Agreement (NAFTA) dispute settlement mechanisms.[97] For example, in the *United Parcel Services of America, Inc.* v. *Canada* case, the tribunal considered that, as the NAFTA Rules incorporate the rules of the United Nations Commission on International Trade Law (UNCITRAL), the tribunal could use the UNCITRAL Rules.[98] Article 15(1) of the UNCITRAL Rules implicitly empowers the

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90 *In the Matter of the Arctic Sunrise Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS between the Netherlands and Russia*, Procedural Order No. 3 (Greenpeace International's Request to File an *Amicus Curiae* Submission 8 October 2014), PCA Case No. 2014-02 (2014).

91 Ibid.

92 Ibid.

93 Ibid

94 Ibid.

95 Ibid.

96 *The Sino-Philippines South China Sea Arbitration*, *supra* note 2, para. 60.

97 Hollis, *supra* note 8, at 241.

98 *An Arbitration under Chapter 11 of the NAFTA between United Parcel Services of America Inc. and Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), para. 65.

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

tribunal to accept *amicus curiae* submissions.[99] This is because Article 15(1) of the UNCITRAL Rules allows the tribunal to conduct the proceedings as it considers appropriate, so long as the tribunal treats the parties equally and gives the parties ample opportunities to be heard at every stage of the proceedings.[100] The NAFTA tribunal considered it was appropriate to accept *amicus curiae* briefs.[101] Based on the above comparison, it seems reasonable to suggest that Article 10 of the Rules of Procedure of the *Arctic Sunrise* arbitration and the *South China Sea Arbitration* is comparable to Article 15 of the UNCITRAL Rules. On this basis, the tribunal in the *South China Sea Arbitration* could also choose to accept *amicus curiae* briefs, so long as the tribunal considered the submission appropriate, treated the parties equally, and gave the parties ample opportunity to be heard.

As can be seen from the above analysis, within ITLOS only inter-governmental organizations can submit *amicus curiae* briefs; however, in practice, if an NGO submits an *amicus curiae* brief on its own initiative, these documents will be considered by the judges, notwithstanding the fact that they will not be formally accepted by the tribunal. As there are no specific provisions concerning the participation of *amicus curiae* in Annex VII arbitral tribunals, it seems that the arbitral tribunal has more discretion to decide whether to accept *amicus curiae* briefs. It is also interesting to note that in the *Arctic Sunrise* and *South China Sea* arbitrations, Russia and China, the respective respondents, decided not to participate in the proceedings. It seems these powerful states have adopted 'non-appearance' as an instrument to sustain their claims. This will inevitably create difficulties for the tribunals in seeking a fair and comprehensive understanding of the respondents' positions. In this context, *amicus curiae* submissions will be particularly helpful for the tribunals in seeking a complete understanding of the case.

4. Implications for the *South China Sea Arbitration*

The main purpose of the *amicus curiae* submission by CSIL is to prove that Taiping Island is an 'island', rather than a 'rock', according to Article 121 of UNCLOS. It is, therefore, worthwhile to examine the CSIL submission and its implications for the *South China Sea Arbitration*. According to the constitution of CSIL, it is an independent, non-profit academic society.[102] CSIL is an NGO, and within Annex VII arbitral tribunals, there are no provisions or case law demonstrating that the *amicus curiae* briefs submitted by an NGO cannot be accepted by the tribunal. The tribunal has significant discretion in this regard. It was reported that after CSIL submitted its brief, the tribunal in the *South China Sea Arbitration* requested that the parties respond,

[99] Ibid., para. 61.
[100] Ibid.
[101] Ibid., para. 73.
[102] See中華民國國際法學會會章 [Charter of the Chinese (Taiwan) Society of International Law], *CSIL*, 19 December 2004, available at csil.org.tw/home/about/學會章程/ (accessed 19 June 2016).

https://doi.org/10.1017/S0922156517000231 Published online by Cambridge University Press

and offered the Philippines three weeks to submit feedback.[103] This implied that the tribunal was taking the *amicus curiae* submissions into consideration.

As for the merits of the case, the Philippines claimed in its memorial that the natural conditions of Taiping Island could not sustain human habitation or provide economic viability; therefore, Taiping Island should be considered a mere rock.[104] As a rock, the Philippines claimed, Taiping Island cannot generate entitlements to an EEZ or continental shelf.[105] The main arguments of the Philippines were that the island has no drinking water, no natural source of nutrition that can sustain human habitation, no soil suitable for the growth of crops, no indigenous people, no human habitation except for the garrison, and even had no military occupation prior to the Second World War. The Taiwanese garrison's survival is entirely dependent on the transportation of supplies from Taiwan and there is no economic activity on the island.[106]

In order to present a more comprehensive, and possibly alternative, understanding of the island from perspectives such as science, history, culture, and law, CSIL organized an 'International Law Task Force of the South China Sea', which conducted two site visits to Taiping Island, in December 2015 and January 2016.[107] The *amicus curiae* brief submitted by CSIL aimed to furnish relevant factual information to the tribunal, in order to help the tribunal reach its decision on the legal status of Taiping Island.[108] CSIL contended that Taiping Island is an 'island', not a 'rock' and that Taiping Island could, therefore, generate entitlements to an EEZ and continental shelf.[109] To be more specific, the *amicus curiae* submission refutes the views of the Philippines, claiming that there are currently 'residents' on the island, historically the island has had human habitation, there is abundant drinking water, the soil could sustain the growth of native vegetation and crops, the existing plants on the island can sustain human life, the island is rich in animal resources, and the island is economically sustainable.[110]

It should be noted that during the oral hearing of the merits phase of the arbitration, the tribunal asked the Philippines about the legal status of Taiwan, and whether 'Taiwan' can be differentiated from the 'People's Republic of China'.[111] In response, the Philippines stated that there is only one China, which is the People's

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[103] See 香港法律团体提交"意见书"质疑南海仲裁案 [Hong Kong Legal Organization Submitted *Amicus Curiae* Brief to Question the *South China Sea Arbitration*], 中国南海研究院 [National Institute for South China Sea Studies], 17 June 2016, available at www.nanhai.org.cn/index.php/Index/Info/content/cid/21/id/3038.html#div_content (accessed 20 June 2016) (reproducing the following article under a different title: 凌德 [Ling De] and 吴志伟 [Wu Zhiwei], 香港法律团体质疑南海仲裁案 提交"法庭之友意见书 [Hong Kong Legal Organization Challenges *South China Sea Arbitration* Proposal, Submits *Amicus Curiae* Brief], 环球时报 [*Global Times*], 17 June 2016, available at china.huanqiu.com/article/2016-06/9050741.html).

[104] *Amicus Curiae* Submissions by the CSIL, *supra* note 6, para. 4.

[105] Ibid.

[106] Ibid., para. 10.

[107] Ibid., para. 16.

[108] Ibid., para. 18.

[109] Ibid.

[110] Ibid., para. 19.

[111] *In the Matter of An Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS (The Philippines v. China)*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 1, 24 November 2015, 98.

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Republic of China.[112] The Philippines further argued that the actions of the Chinese governments before 1949, including the actions of the Republic of China, should be attributed to the current government of the People's Republic of China.[113] However, the Philippines contended, the actions of the authority in Taiwan since 1949 cannot be attributed to the government of the People's Republic of China.[114] As a result, the view of the tribunal concerning whether the actions of the authority in Taiwan could be attributed to the government of the People's Republic of China certainly affected the outcome of the arbitration.[115]

In resolving the above disputes, the tribunal employed a three-part test, in order to determine what might reasonably be termed 'islands', namely: (1) the objective capacity of a feature in its natural condition;[116] (2) to sustain either a stable community of people or economic activity;[117] and (3) is neither dependent on outside resources nor purely extractive in nature.[118] The tribunal noted that the current presence of official personnel on many of the features is dependent on outside support and not reflective of the natural capacity of the features. The tribunal further explained that the term 'human habitation' should be understood to involve the inhabitation of the feature by a stable community of people, for whom the feature constitutes a home and on which they can remain.[119] In addition, the term 'economic life of their own' is linked to the requirement of human habitation and the two will, in most instances, go hand in hand. The tribunal considered that the 'economic life' in question will ordinarily be the lives and livelihoods of the human population inhabiting a maritime feature or group of features. Additionally, the tribunal found that Article 121(3) makes clear that the economic life in question must pertain to the feature as 'of its own', meaning the feature itself as opposed to the surrounding waters.[120] Based on the above standards, the tribunal concluded that, 'the high-tide features in the Spratly Islands are therefore legally rocks for purposes of Article 121(3) and do not generate entitlements to an exclusive economic zone or continental shelf'.[121]

Based on the above discussion, it seems reasonable to suggest that the tribunal was aware of the *amicus curiae* submissions by CSIL, but considered this information with caution. First, the tribunal recognized that sources of fresh water appear to exist on Taiping Island and evidently have supported small numbers of people in the past, concluding that the freshwater sources are, therefore, still able to do so in their natural condition.[122] Second, the tribunal recognized the fact that the soil on Taiping Island could sustain cultivation but made the point that such cultivation

[112] Ibid., at 6.
[113] Ibid.
[114] Ibid.
[115] Yen-Chiang Chang, 'Taiwanese Position over the South China Sea Dispute: Before and After the Permanent Court of Arbitration Award', (2016) 9 *Journal of East Asia and International Law* 467–78.
[116] *In the Matter of An Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS (The Philippines v. China)*, Award, PCA Case No. 2013-19 (2016), para. 546.
[117] Ibid., para. 547.
[118] Ibid., para. 550.
[119] Ibid., para. 542.
[120] Ibid., para. 543.
[121] Ibid., para. 646.
[122] Ibid., para. 584.

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would be limited and that any agricultural activity on Taiping Island would not suffice, on its own, to support a sizable population.[123] Third, and most problematic for CSIL's claim, was that 'a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation'.[124] Thus, while Taiping Island, which has sources of fresh water and soil capable of permitting limited cultivation in order to support a small group of people, might be considered as sustaining a claim under Article 121(3), the claim was denied by the tribunal based on the fact that the current population is official or military in nature and its very survival significantly depends on support from outside. This interpretation might be considered as creating more problems. What if the civilian population on Taiping Island reaches a sizable level? Would the legal status of Taiping Island then change? Based on the above standards, is Okinotorishima still an island, as claimed by Japan? Can Hong Kong and Singapore sustain human habitation without outside support? Would any one perceive Hong Kong and Singapore as being mere 'rocks'?

5. Conclusions

This article advances a definition and analyzes the legal nature of *amicus curiae*. It points out that within the ICJ and ITLOS, in general, the submission of *amicus curiae* briefs is limited to inter-governmental organizations. Any *amicus curiae* briefs submitted by NGOs will not be accepted as part of the case file, but the judge will be aware of their existence. As regards Annex VII arbitral tribunals provided for in UNCLOS, the tribunals seem to have discretion to decide whether to accept *amicus curiae* briefs submitted by NGOs. In the *South China Sea Arbitration*, the information submitted by the Philippines was incomplete and contained factual errors. The *amicus curiae* submissions of the CSIL include significantly different information from that submitted by the Philippines. As the tribunal was aware of the information contained in the *amicus curiae* submissions, it could thus consider them with extra care.[125] This *amicus curiae* submission helped the tribunal develop a balanced view of how to characterize Taiping Island, rather than relying on the submissions of one party, that is, the Philippines. Such an action might also be in the best interests of all stakeholders, as well as due process.[126]

[123] Ibid., para. 596.
[124] Ibid., para. 550.
[125] Bartholomeusz, *supra* note 12, at 278.
[126] Ibid., at 279.

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