PROTECTING THE PUBLIC INTEREST IN INTERNATIONAL DISPUTE SETTLEMENT:
THE AMICUS CURIAE PHENOMENON
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Protecting the Public Interest in International Dispute Settlement: The Amicus Curiae Phenomenon is available for download at www.ciel.org.

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Introduction

The number of international disputes between States and between investors and States has increased remarkably over the past two decades. These disputes, which are resolved in a variety of international courts and tribunals, also increasingly involve a host of issues that transcend narrow commercial interests of the parties and implicate matters of broad social concern — issues such as conflicts arising out of privatization of water resources, State compliance with conservation obligations, and the ability of countries to restrict imports of products based on perceived health and safety risks posed by those products, to name just a few. Given that decisions rendered by international courts and tribunals increasingly affect a myriad of public interest issues, there is a need to ensure that those dispute resolution bodies do not view the cases before them in an artificially myopic manner, but that they adequately consider the context and social implications of, and the interests affected by, the cases before them.
To help ensure that international courts and tribunals take into account relevant public interests, civil society has called and continues to call for greater rights of public participation in international dispute settlement procedures, asking, for example, for the ability to participate as *amici curiae* – or, literally, “friends of the court” – and present facts, arguments, and perspectives that might not have been adequately advanced by the State or investor parties. Some international fora, such as the World Trade Organization and certain investment arbitration proceedings, have over the past few years begun to respond to these calls from civil society, permitting public interest groups and others to participate in dispute settlement by submitting “amicus briefs.” These steps to open up international dispute settlement signal the tribunals’ recognition that although accepting such non-party submissions may to some extent expand the workload of the parties who might want to respond to the briefs or the courts who may want to take the briefs into consideration, the advantages of accepting *amicus* briefs – advantages which include aiding the court in producing higher quality and more thorough decisions based on the particular expertise and perspectives of *amicus* – outweigh the disadvantages (which can be minimized through, for example, court rules regulating the length and timing of submissions, and deadlines for responses).

Despite those advances, however, there remains some resistance to non-party *amicus* participation in international courts and tribunals. Notwithstanding the contributions *amicus curiae* can make toward enhancing the quality of tribunals’ decisions and ensuring public interest concerns are heard in disputes where those concerns are relevant, some argue, among other contentions, that such non-party participation should not be allowed because the *amicus*...
curiae institution is a feature of common law systems not present in civil law countries and is a burden that should not be newly imposed on those civil law countries through international tribunals.9 As this paper explains, however, those arguments are flawed for several reasons: First, as the practice’s longstanding presence in common law systems evidences, the amicus curiae system is a mechanism of allowing public participation that courts and parties have accepted and allowed, that has not proven to be overly burdensome, and that can be formalized and regulated through development of various guidelines and rules regarding the content, length, and timing of submissions. Second, though amicus curiae practice may be less common in civil law than common law countries, various civil law countries do specifically allow the practice, demonstrating there is no inherent or insurmountable inconsistency between that practice and civil law systems. Third, both common law and civil law domestic systems have long recognized that there is a need to provide means for representation of the public interest before their courts and thus have developed various mechanisms (and chosen to bear various burdens) to fill that need; and in the modern era, the well-recognized need for public interest representation is no stronger before domestic courts than it is before international tribunals.10

To illustrate these three main points, this paper first provides a general introduction to amicus curiae practice and describes the features of that practice as it has developed in various common law countries (England, the United States, Australia, and Canada) in which it has had a relatively long presence (Parts II and III). Second, the paper provides some examples of the use of amicus curiae practice in civil law systems and mixed law systems, respectively (Parts IV and V). Third, the paper examines the development of analogues to amicus curiae practice that, like amicus briefs, served as a means through which advocates for the public interest could be heard in court (Part VI). Finally, the paper concludes that countries worldwide have developed various mechanisms to ensure public interests are represented before their domestic courts, and that, therefore, any policy adopted by an


10 See, e.g., Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 Am. J. Int’l L. 611, 614 (Oct. 1994) (“The amount of litigation has steadily increased in all international courts. Human rights cases, in particular, are growing in number and being litigated in all tribunals, not only those established specifically for that purpose. In addition, new issues of widespread concern, such as environmental cases, are being presented for decision. In this litigation framework, issues of broad public interest can and do arise apart from the questions submitted to courts by the parties or by international institutions. Rarely is international litigation a matter of private concern or interest affecting only the parties.”).
international tribunal precluding all avenues of public interest representation, such as a policy of refusing to accept *amicus* briefs, represents an unjustified departure from common and historical practice.

1. **General Role of an Amicus Curiae**

History has shown that while the plain words of a law or constitutional provision may be vague, uncertain and, perhaps, seemingly impotent, those words can be interpreted and applied in ways causing them to have powerful consequences for the people they govern. Lawmakers may draft the laws, but it is often courts that are responsible for assigning them significance or divining their meaning. Public interest groups therefore often have strong interests in providing information and advocating for particular court rulings, and can further those interests in three primary ways: first, by instituting actions; second, by intervening in ongoing disputes between other parties; and third, by participating as *amici curiae*.

Of those three avenues, the *amicus curiae’s* rights of participation in the legal dispute are the most limited: While parties and interveners can actively participate in and shape the course of litigation through, for example, questioning witnesses, gathering evidence from other parties, introducing evidence, and asserting claims and defenses, *amici curiae* are generally limited to providing written and/or oral submissions to courts providing information about facts and/or law provided they relate to the issues raised by the parties.11 Given these strategic advantages parties and interveners have over *amicici curiae*, a public interest group aiming to influence the outcome of a lawsuit often only limits its role to that of *amicus curiae* out of necessity, *e.g.*, when concepts such as standing prevent them from playing a more active role in the case as a party.

Nevertheless, an *amicus curiae* has several strategic advantages over parties and interveners – advantages which are key for public interest organizations working to advance

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11 Lindy Willmott, Ben White & Donna Cooper, *Interveners or Interferers: Intervention in Decisions to Withhold and Withdraw Life-Sustaining Medical Treatment*, 27 SYDNEY L. REV. 597, 600 (2005) (explaining that in Australia, the “status of intervener brings with it the same rights and obligations as the other parties to the action, including the ability to appeal, tender evidence and participate fully with all aspects of the argument,” while “the role of *amicus* remains limited…”); but see Michael K. Lowman, Comment: *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave*, 41 AM. U.L.REV. 1243, 1246 (1992) (noting that some federal courts “have permitted the *amicus* to … introduce physical evidence, to examine witnesses, to conduct discovery, and even to enforce previous court decisions upon party-participants to the litigation”); Australian Law Reform Commission, *ALRC Report 78: Beyond the Door-Keeper: Standing to Sue for Public Remedies – 6. Intervention in Public Law Proceedings* (1995), available at http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78Ch6.html#ALRC78Ch6Introduct (last visited Mar. 8, 2008) (recommending Australian courts have discretion regarding the scope of rights of participation they grant to *amicus curiae*).
particular issues. For one, participating as an amicus curiae is generally easier as it is typically less expensive and resource intensive than being a party or intervener. Moreover, amici curiae are not barred by the principle of res judicata – in other words, they are free to advance the same theory or interpretation of a law to a court even if they had previously unsuccessfully argued it to that same court.

And though its scope of involvement may be limited, an amicus curiae can perform significant roles: it can provide legal analysis, arguments and facts the parties chose not to advance or did not fully present because of tactical, political, or other considerations. Amicus submissions can address policy issues and discuss broad implications of possible court decisions; and can provide facts and information going beyond the record developed by the parties. Further, especially in circumstances where a party has limited means, resources, or expertise, an amicus curiae can be a more effective advocate than that party. An amicus curiae also can provide courts assistance by assembling or providing technical or specialized knowledge and information, a function that can be especially valuable in novel and complex cases. Through these contributions, amici curiae have proven to have powerful and even determinative impacts on the litigation and have been important tools for public interest advocacy.

II. Amicus Curiae Practice in Common Law Countries

The amicus curiae system was first introduced into common law systems in the fourteenth century. By the eighteenth century, amicus curiae participation throughout England was widespread and had emerged in the United States. It is now a practice in numerous other common law countries such as Australia and Canada. The development and

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12 See, e.g., Dinah Shelton, supra note 8, at 617; John Bellhouse, The Modern Amicus Curiae: A Role in Arbitration, CIVIL JUSTICE QUARTERLY, 23, 187-200, 190 (discussing the traditional roles of amicus curiae in English courts).
13 Id.
14 Id.
15 Dinah Shelton, supra note 8, at 619.
current features of *amicus curiae* participation in those common law countries is discussed below.

**England**

English courts have always had the ability to appoint, or to request that the Attorney-General appoint, an *amicus curiae* to participate in their proceedings by presenting law or fact. Although generally described as being impartial aids to the court, *amici curiae* in the English legal system have also long advanced “partisan” arguments on behalf of unrepresented parties and on behalf of the public interest. One commentator has summarized the “traditional function of the *amicus curiae* in the English courts” as “a practice, rather than an enshrined right, whereby arguments on points of law, or information, can be presented before the tribunal, with its permission and often by its active invitation, which would otherwise not be heard because they did not form part of the respective cases of the litigants represented.” The practice has “been used to ‘fill-in-the cracks’ which are sometimes left by a litigation system better suited to resolution of bi-partisan conflicts, as an alternative to allowing actual intervention by third parties or where such intervention is not an option.”

Further, in addition to these traditional court- or Attorney-General-solicited *amici curiae*, unsolicited non-party “interveners” are sometimes allowed to submit legal and/or factual information directly aligned with a particular party or particular position. “‘[R]espectable’ campaigning groups,” for example, are permitted “almost as a matter of course … to provide information on international law or the interpretation of human rights conventions or the practice of other governments and jurisprudence of other courts…”

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18 Bellhouse, *supra* note 10, at 189. (citing examples of cases in which an *amicus curiae* presented facts to the House of Lords).
19 *Id.*
20 *Id.* (discussing a case in which the Attorney-General appointed an *amicus curiae* to oppose the legality of a type of conditional fee arrangement novel in England so as to ensure the issue of its legality was fully presented).
21 *Id.* at 190.
22 *Id.*
23 See Louis Blom-Cooper, *Case Comment: Third Party Intervention and Judicial Dissent*, PUBLIC LAW 2002, WIN, 602-605 (discussing generally the traditional notion of the “impartial” *amicus curiae* in England and more recent examples of the *amicus curiae* as an advocate of a particular position or party).
Overall, the general trend over roughly the last ten years has been toward liberalization of rules that limit non-party access to proceedings.25

United States

Amicus curiae practice in the United States is a longstanding and widespread phenomenon, beginning as early as 1790.26 Its entrenchment and development is due, at least in part, to a need to compensate for the fact that numerous parties and groups are affected by the United States’ federal judicial system, but are unrepresented and unable to gain standing in the courts of that system. As one scholar has explained:

[Although t]he United States Supreme Court shapes the rights and duties of states, organizations and individuals throughout the country….the requirements for intervention remain as strict as those of English common law. On major constitutional questions, the Government often has no right to participate as a party. The amicus and other forms of third-party participation developed in response, through exercise of ‘the inherent power of a court of law to control its processes,’ with submissions accepted by ‘leave of court.’27

Unlike English amici curiae, who, as discussed above are generally described as being neutral or non-partisan aids to the courts, American amici curiae have a long history of being primarily partisan advocates.28 And over roughly the last century, their involvement in litigation has grown significantly. In the first two decades of the 20th century, amicus briefs were filed in roughly 10 percent of the Supreme Court’s cases;29 but by the end of the century, such briefs were filed in approximately 85 percent of cases argued before the Supreme Court.30

As the numbers of these non-party advocates have grown, the practice has become less ad hoc. The United States Supreme Court promulgated its first set of formal rules

25 Id. at 199.
27 Dinah Shelton, supra note 8, at 617 (internal footnotes omitted).
28 Stuart Banner, supra note 24, at 119 (setting forth his findings after conducting a LEXIS review of cases from 1790 to 1890 that although there “were more neutral amici than partisan amici in 1790-1820 (thirteen of twenty cases),” and in “1821-1830 the numbers of neutral and partisan amici were equal,” “[j]n every decade from 1831-1840 through 1881-1890 … there were many more partisan amici than neutral amici”); but see Jesse Weissbar, Unhelpful Friends, 63 J. MO. B. 22, 26 (2007).
30 Id. at 744.
governing *amicus* submissions in 1938. 31 Those rules, which have been amended several times, now require a would-be *amicus curiae* to obtain either the consent of both parties or leave from the Court before filing its submission unless the *amicus curiae* is a governmental entity; further, in a motion for leave, the *amicus curiae* must state what party or parties withheld consent to its participation and explain the nature of its interest in the lawsuit.32 Regarding the substance of the submissions, the Supreme Court’s rules counsel that “[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.”33 While such a “novelty” requirement may serve as an effective bar to *amicus* briefs if *amici curiae* are unaware of the substance of the parties’ positions, that requirement is not an insurmountable hurdle where, as in the United States’ court systems, crucial documents such as court transcripts, pleadings, briefs, orders and judgments are generally readily accessible by the public.34

**Australia**

Australian courts have long had “very wide” discretion to permit appearances by counsel representing non-parties such as *amici curiae* or interveners (the line between whom Australian courts have been charged with blurring).35 Formerly, as explained by the High Court of Australia in a 1930 decision, courts were to exercise that wide discretion cautiously by:

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32 Sup. Ct. R. 37(2).
33 Sup. Ct. R. 37(1); see also Reagan Wm. Simpson, *How to be a Good Friend to the Court: Strategic Use of Amicus Briefs*, 28 THE BRIEF 38, 39 (1999) (“In 1990 the U.S. Supreme Court issued a rule discouraging the gratuitous filing of *amicus* briefs after it was inundated with 80 *amicus* briefs in an abortion case. The rule advised the bar that *amicus* briefs that do not add something to the case are not favored and are simply a burden on the Court.”).
34 Similar rules govern *amicus* briefs filed in the Federal Courts of Appeal; they require, for example, any would-be *amicus curiae* (apart from governmental entities) to obtain the parties’ consent or leave of court before filing submissions, and, similar to the Supreme Court’s requirement that the brief add something new to the parties submissions, they require a motion for leave to set forth the reasons why the brief is “desirable” and relevant. Fed. R. App. P. 29. But see also Ryan v. Commodity Futures Trading Com’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (stating that *amicus* briefs should only “normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide”).
35 Australian Railways Union v Victorian Railways Commissioners, 44 CLR 319, 331 (1930).
allowing only those to be heard who wish[ed] to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.36

Yet that narrow view on which non-parties should be heard has since evolved and broadened, especially in those cases where the non-parties seek to be heard as amici curiae, rather than as interveners.37 Over the past twenty years, Australian courts have made clear that there is no per se “prescription of the circumstances in which it may or may not be proper for a court to hear [an amicus curiae]” and that they “may grant leave to a friend of the court to participate in proceedings pursuant to the court’s inherent or implied power to ensure that it is properly informed of matters which ought to take into account in reaching its decision.”38 While it remains that “[t]he hearing of an amicus curiae is entirely in [the courts’] discretion,”39 the guidelines governing how the courts will exercise that discretion reveal that the courts are now more open to such submissions. In the 1997 Australian High Court decision, Levy v. Victoria, for example, Brennan CJ stated that an amicus curiae “will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.”40 He also elaborated on what type of submission would provide “significant[ ] assist[ance]” when he stated that “[t]he footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way which the Court would not otherwise have been assisted.”41

Canada

Further evidencing the common law pattern, amicus curiae practice is and has historically been a feature of the Canadian legal system. Private amicus curiae have been allowed to participate in various actions (provincial and federal) throughout at least much of

36 Id.
37 Lindy Willmott, Ben White & Donna Cooper, supra note 9, at 600-01.
the past century. According to a 1939 decision, Re Pehlke, by Urguhart J, an “amicus curiae” may serve various roles: it may be someone who argues to the court a “point of law in favour of a defendant,” a “person[] who ha[s] no right to appear in a suit but [is] allowed to protect [its] own interest,” or even “a stranger who, being in court, calls the court’s attention to some error in the proceedings.” The general principle that non-party submissions may be permitted if a court “considers that it is in need of assistance and that the potential amicus curiae is, in the court’s view, the person most appropriate to render such assistance” appear to have governed the system until, in 1987, the Supreme Court of Canada issued a rule formalizing the practice to some extent. That rule, Rule 18, sets forth the requirements would-be amici curiae have to satisfy before their submissions will be considered, including the two threshold elements of “(1) an interest and (2) submissions which will be useful and different from those of the other parties.” The rule also provides the court with “wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention.” Canada’s rule thus establishes a sliding scale for non-parties seeking to make submissions: The greater the interest and more useful or novel the submission, the more significant the rights of participation. Applicants without a “specific personal interest in the outcome of the litigation” cannot attain full party standing, or the rights associated with it, such as the right to appeal an unfavorable decision, but may be allowed to introduce evidence to augment the record and present oral argument.

The history of amicus curiae practice in Canada, as in England, the United States, Australia, thus reveals the unsurprising pattern that as the practice becomes more common,

42 See, e.g., id.; Re Drummond Wren, 4 D.L.R. 674 (Ont. H.C.) (1945) (permitting the Canadian Jewish Congress to intervene as amicus curiae); R ex rel Rose v. Marshall, 48 M.P.R. 64 (1962) (permitting counsel for the publisher of “Playboy” to intervene in a case determining whether certain publications were obscene); Attorney General of Canada v Lavell Morgentaler; Robertson and Rosetanni v The Queen, S.C.R. 651 (1963).


47 Alliance for Marriage and Family v. A.A., 2007 S.C.C. 40 (rejecting application to intervene to “revive” litigation by challenging the lower court’s judgment that none of the parties to the litigation wished to challenge).

48 See, e.g., Reference re Workers’ Compensation Act, 1983 (Nfld.), 2 S.C.R. 335, 339 (1989) (Sopinka J.) (permitting the intervener to introduce a factum and “present oral argument to be limited to not more than fifteen minutes”).
courts begin to develop rules and guidelines making the practice less ad hoc. In each of those
countries, those rules reveal that the key factor to a court’s determination of whether it will or
will not accept an amicus brief seems to be whether the court believes the brief will be of
assistance to it; and that also possibly important to the court’s decision, albeit to a lesser
degree (with the apparent exception of Canada where the potential amicus curiae’s interest
may be determinative), is the potential amicus curiae’s interest in the dispute.

III. Amicus Curiae Practice in Civil Law Systems

Like the common law countries discussed above, various civil law countries also
accept submissions from private amici curiae. In contrast to the common law countries, and
as shown in the examples of France, Italy, Argentina and Colombia discussed below, this
development in civil law countries is relatively new, arguably having been stalled by the
prevalence of other analogous means of public interest representation such as the institution
of the Ministère Public discussed in the fourth section of this paper.

As a preliminary matter, it should be noted that as a function of the inquisitorial
system of procedure that characterizes civil law countries, courts in those countries have
historically had wide powers to control the litigation through such actions as defining the
issues in the dispute and investigating and considering facts not raised by the parties.
Pursuant to these powers, courts have the authority to solicit information from non-party
experts, and to base their decisions on facts not alleged by any party. In other words,
many of these civil law courts have traditionally had the right to solicit and rely on
information from what may be termed “amici curiae.” Thus, the issue is whether and to what
extent such courts have considered and will consider unsolicited information from private
amici curiae.

France

Beginning with the example of France, it is commonly stated that private amicus
curiae practice is a relative rarity in that country, and was not even introduced into the French
procedural system until the late 1980s or 1990s. That assertion, however, seems not to

49 J.A. Jolowicz, Active Role of the Court, in PUBLIC INTEREST PARTIES 206 (Cappelletti & Jolowicz, eds.)
(1975) (noting that Italian courts have had such powers since at least 1865 and that Italy based its code of
civil procedure on similar rules enacted in France)
50 Id. at 205.
51 Catherine Kessedjian, Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International
Society, 29 MELBOURNE U.L.R. 765, 780 (2005) (stating that the practice was introduced in France in the
consider what appears to be de facto amicus curiae practice, i.e., participation in litigation by a person or entity that did not have its own rights of standing. Since at least the 1930s, for example, private organizations have played what is akin to an amicus curiae role in France: in those cases in which an organization lacked standing to initiate an action because the interests it sought to advance were those of its individual members rather than the collective interests represented by the organization, the organization could nevertheless intervene in an action brought by those individual members.\textsuperscript{52}

In addition to permitting those forms of non-party participation from intervener-type amicus, French courts have also exercised their powers to consider non-party amicus submissions. Amicus curiae practice in France, however, is one that is reportedly “seldom used.”\textsuperscript{53} Two key limits likely have contributed to the infrequency of private amicus curiae participation. First, private amici curiae could, until recently, only present submissions “upon invitation of the court,” and could only use those submissions to “answer specific questions posed by the court.”\textsuperscript{54} Second, the practice was not open to anyone with an interest in the matter: “[T]o qualify as an amicus curiae, one [had] to be recognized as a personalité – that is, a prominent scientist, a high-ranked official with extensive experience in the field at stake, or a highly representative organization whose experience is uncontested.”\textsuperscript{55} A statement made by the Premier President of the Cour de Cassation in 1989 recognizing the importance of non-party contributions illustrates those limiting principles. Premier President Drai explained:

The [Cour de Cassation ], in order to enrich the debates which unroll before it and to raise them to the elevated level which should be theirs because of their technicality or specificity, should open the debates to the contributions of outsiders so long as the experts solicited by the court are beyond dispute, representative and of high moral and human value.\textsuperscript{56}
French rules regarding *amicus* practice, however, seem to be relaxing. At least one recent decision\(^57\) from the *Cour de Cassation*,\(^58\) for example, considered an unsolicited *amicus* brief from a private organization.\(^59\) By opening the doors to unsolicited submissions, French courts may likely see a rise in the number of private *amici curiae* making contributions to future cases.

**Italy**

With respect to Italy, there seems to be little information on the practice, its first appearance, and the guidelines, if any, regarding acceptance of submissions. However, there is evidence that – consistent with their broad powers to control litigation proceedings discussed above – Italian courts also accept *amicus* briefs from interested non-parties. To illustrate: one 1973 law permitted labor unions to appear as *amici curiae* in individual labor disputes;\(^60\) further, and more recently, in a case involving a blacklisted online betting operator’s challenge that Italian regulations on e-gambling infringed rights granted by the Italian Constitution and European Union law, for example, several Italian betting operators filed *amicus* briefs in support of the regulations.\(^61\)

**Argentina**

The acceptance of *amici curiae* practice in civil law systems is not limited to Europe: Argentina’s Supreme Court, for example, has recently declared it will accept *amicus* briefs from interested non-parties.

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\(^{58}\) The Cour de cassation is the highest of the non-administrative French courts. Its role is to ensure correct and uniform application of the law. See, e.g., Walter Cairns & Robert McKeon, *INTRODUCTION TO FRENCH LAW* 37-38 (London, Cavendish Publishing Ltd., 1995).

\(^{59}\) Catherine Kessedjian, *Sir Kenneth Bailey Memorial Lecture, supra* note 54 (citing Cass ch mixte, 30 novembre 2004, D 2004 inf rap, 3191 and explaining that "while the case was being reserved before judgment, the Conseil Superieur du Notariat filed sua sponte an *amicus* brief by writing to the First President of the Cour de cassation. This note was then circulated to the Procurer general, who, after securing the approval of all parties involved, decided to open a wider consultation. Briefs by the Ministry of Economic and Financial Affairs, Ministry of Justice, and the Federation Francaise des Societes d'Assurances (the French Federation of Insurance Companies) were filed and subsequently sent to the parties in order to respect the principe de la contradiction' (principle by which each party has a right to respond to arguments put against them)."

\(^{60}\) M. Cappelletti, *Public Interest Parties, in PUBLIC INTEREST PARTIES* 206 (Cappelletti & Jolowicz, eds.) (1975).

briefs from “physical or corporate person[s] knowledgeable in the issue under discussion.”

In a 2004 ruling, it broadly pronounced:

Physical or corporate persons that are not parties to the dispute may appear before the Supreme Court of Justice of the Nation as Friend-of-the-Court in a judicial proceedings corresponding to original or appeals jurisdiction where collective or general interest issues are debated.

In accordance with that approach, in 2004 the Supreme Court accepted an amicus brief from Human Rights Watch, the International Commission of Jurists, and the World Organization Against Torture in support of a 2001 habeas corpus petition filed on behalf of people held in prisons and police lockups in the province of Buenos Aires. Subsequently, the Supreme Court also allowed amicus briefs from public interest groups in one case involving a constitutional challenge to a law changing the composition of the council responsible for nominating and dismissing judges, and in another case involving a newspaper’s challenge that the provincial government improperly retaliated against it for printing negative coverage of the governor. The Supreme Court of Argentina has granted amici curiae fairly broad rights of participation. In the habeas corpus cases mentioned above, for example, in addition to allowing the amici curiae to make written submissions, the Supreme Court also allowed Human Rights Watch to participate in the December 2004 hearing on the matter. Additionally, a number of local courts have allowed amicus submissions, which indicates a gradual acceptance of this procedure.

From a legislative standpoint, Argentina does not have a legally binding instrument that permits amicus curiae proceedings. However, there is State legislation that allows an unofficial assistant to provide specific information (most often an opinion) on a particular

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62 Ruling by the Supreme Court of the Nation No 28/2004, (Regulations, Art. 1).
63 Ruling by the Supreme Court of the Nation No 28/2004, (Regulations, Art. 1).
66 Email from Victor Hugo Ricco, CEDHA Argentina, to Marcos Orellana, Director of the Trade and Sustainable Development Program, CIEL (Sep. 1, 2008) (on file with autor).
aspect of a case – this assistant is called an “Amicus Curiae.” While this is similar to the inquisitorial process of civil law courts, it appears that the initiation of this procedure comes not from the court, but from any person who can shed light on the subject under discussion. Law Nº 402, Article 22 of the law of proceedings before the High Court of Justice of the City of Buenos Aires, reads: Amicus curiae:

Anyone can arise in the process as an unofficial assistant, up to ten (10) days before the hearing. (…) His participation is limited to the expression of an informed opinion on the subject under discussion. The Judge adds the presentation of the unofficial assistant to the file and it is made available to those participating in the hearing. The unofficial assistant is not as a party and cannot take any of the procedural rights that correspond to them. The opinions or suggestions of the unofficial assistant are designed to informally illustrate points to the court and have no binding effect. His performance does not bear legal fees. All orders of the Court are not appealable for the unofficial assistant. The High Court, if appropriate, can quote the unofficial assistant to give its opinion at the hearing, prior to the allegations of the parties.70

Other national legislation also deals with this type of amicus curiae. Law Nº 24,488, relating to jurisdictional immunity of foreign States before Argentine courts, states: “In the event of a lawsuit against a foreign state, the Ministry of Foreign Affairs, International Trade and Worship may express their views on some aspect of fact or law before the court, as a friend of the court.”71 This provision is narrower than the State legislation described above, but they both point to an acceptance of unsolicited information from a non-disputing party. Therefore, even from a legislative perspective, there is amicus practice in Argentina.72

Colombia

Colombia is yet another South American civil law country where courts have recently made clear they will accept non-party submissions from private amici curiae. The International Commission of Jurists, for example, reported that in October 2001, it and other non-governmental organizations, Amnesty International and Human Rights Watch, “filed a written [amicus curiae] submission … to the Constitutional Court arguing that it strike down” Colombia’s National Security Law as inconsistent with the rule of law and human rights

69 Law Nº 402, Art. 22, High Court Rules, Argentina.
standards.\textsuperscript{73} And in what has been reported as an “an unprecedented move” in Colombia, the Constitutional Court of Colombia also invited the public interest group to present oral argument.\textsuperscript{74}

The developments in Colombia, like the developments in other civil law systems such as France, Italy, and Argentina, show that although \textit{amicus curiae} practice in civil law systems may have appeared later than, and may still not be as prevalent as it is in common law countries, the assertion that the practice is a feature of common law but not civil law systems is increasingly less and less valid.\textsuperscript{75}

\section*{IV. \textit{Amicus Curiae} Practice in Mixed Law Systems}

Various countries with mixed legal systems also accept \textit{amicus} briefs, in their traditional sense. In some mixed law systems, like South Africa, the use of \textit{amicus} proceedings appears to be the remnant of a former common law approach, integrated into and continued alongside the application of civil or religious law principles.\textsuperscript{76} Other systems show that the recognition of \textit{amicus} proceedings were a recent development, and had little influence from a former common law approach of dealing with non-disputing parties.\textsuperscript{77} Yet other mixed systems, for example India, have not retained the traditional \textit{amicus} proceeding, but have developed other methods of increasing public participation and protecting the public interest.\textsuperscript{78} However, the use of alternative methods is not limited to countries that do not have

\begin{thebibliography}{99}
\bibitem{74} Id.
\bibitem{75} See, \textit{e.g.}, JOINT AMERICAN LAW INSTITUTE, UNIDROIT WORKING GROUP ON PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE WITH COMMENTS, cmt. 13C (Rome 2004) (stating that “[i]n civil-law countries there is no well-established practice of allowing third parties without a legal interest in the merits of the dispute to although some civil-law countries like France have developed similar institutions in their case law.” Consequently, most civil-law countries do not have a practice of allowing the submission of \textit{amicus} curiae briefs); M. Cappelletti, \textit{Public Interest Parties, in PUBLIC INTEREST PARTIES n.391} (Cappelletti & Jolowicz, eds.) (1975) (“[\textit{Amicus} ] participation is increasingly possible for private individuals and organizations not only in Common Law systems (particularly in the United States, and especially at the appellate court level), but also, although to a much lesser degree, in the Civil Law and Socialist countries).
\bibitem{76} See Email from Willemien du Plessis, South Africa, to Marcos Orellana, Director of the Trade and Sustainable Development Program, CIEL (Aug. 31, 2008) (on file with author); South African Constitutional Court Website http://www.constitutionalcourt.org.za/site/theconstitution/history.htm.
\bibitem{77} See \textit{e.g.}, Doron & Jubran, \textit{Too Little Too Late? An American Amicus in Israeli Court}, 19 TEMP. INT'L & COMP. L.J. 105 (2005) (noting that Israeli courts did not accept \textit{amicus} submissions till the early 1990s).
\bibitem{78} In addition to those discussed in section four, \textit{examples} (outside of this paper) include Pakistan and the Philippines. Email from Sahar Said, Attorney, Cornelius, Lane and Mufti, Pakistan, to Niranjali Amerasinghe, CIEL Law Fellow (Aug. 26, 2008) (on file with author); Email from Antonia Vina, Ateneo School of Government, Philippines, to Marcos Orellana, Director of the Trade and Sustainable Development Program, CIEL (Sep. 7, 2008) (on file with author).
\end{thebibliography}
traditional amicus proceedings; Israel, for example recognizes amicus briefs but also has a well-developed system for involving non-disputing parties in legal proceedings. These analogous methods will be discussed in section four of this paper. The focus here will be to examine mixed systems that retained or have recognized amicus proceedings alongside the application of civil or religious law principles.

South Africa

In South Africa, a hybrid or “mixed” legal system, there are court procedures that allow persons to submit amicus curiae briefs at the discretion of the court. These are remnants of the common law influence as applied today. Pursuant to Rule 10 of the Constitutional Court of South Africa, a person may be admitted as an amicus either on the basis of written consent of all the parties or on an application to the Chief Justice. To determine the merits of admission, the court considers two main principles; whether the petitioners have an interest in the proceedings and whether the submissions advanced by the amici are relevant and raise new contentions that may be useful to the court. Once an individual or entity has been admitted, other considerations govern which submissions from the amici will be allowed in court; these include the reliability of the submissions or the evidence offered, the value of the submission weighed against its prejudicial value, the relevance of evidence to issues germane to the dispute, and the timing of introducing certain submissions. The court has final discretion on whether to admit an amicus curiae petition and the submissions contained therein, notwithstanding obtaining the consent of all parties, because Rule 9(3) provides that all rights and privileges agreed upon between the parties and the amici are subject to amendment by the Chief Justice.

79 See Doron & Jubran, supra note 80.
80 See Email from Willemien du Plessis, South Africa to Marcos Orellana, Director of the Trade and Sustainable Development Program, CIEL Aug. 31, 2008 (on file with author).
81 See Email from Willemien du Plessis, South Africa to Marcos Orellana, Director of the Trade and Sustainable Development Program, CIEL, CIEL Program Associate Aug. 31, 2008 (on file with author).
82 Constitutional Court of South Africa, Court Rules, Rule 10(1), available at http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm#p5. See also In Re Certain Amicus Curiae Applications relating to Minister of Health and Others, Case CCT 8/02 (2002).
83 Constitutional Court of South Africa, Court Rules, Rule 10(4), available at http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm#p5. See also In Re Certain Amicus Curiae Applications relating to Minister of Health and Others, Case CCT 8/02 (2002).
84 Fose v. Minister of Safety and Security, ¶ 9, 1997 (s) SA 786 (CC); 1997 (7) BCLR 851 (CC).
85 In Re Certain Amicus Curiae Applications relating to Minister of Health and Others, ¶ 6-7, Case CCT 8/02 (2002).
86 Fose v. Minister of Safety and Security, ¶ 9, 1997 (s) SA 786 (CC); 1997 (7) BCLR 851 (CC).
In 2004, the Constitutional Court admitted the *amicus curiae* brief of the Commission for Gender Equity in a case challenging the constitutional validity of section 23 of the Black Administration Act 38 of 1927 and the principle of primogeniture in the context of the customary law of succession. More recently, in 2007, the court allowed an *amicus* petition in a case concerning the constitutionality of some requirements in the procedure for criminal appeals from magistrates' courts. These cases demonstrate the practical use of the *amicus* procedure in the South African Constitutional Court.

**Nigeria**

In Nigeria, there is evidence that non-governmental organizations have received permission to file *amicus curiae* briefs in the context of international crimes, or related claims, being heard before national courts. The Justice Initiative submitted an *amicus* brief in November 2004 to the Federal High Court in Abuja “in support of ongoing litigation [*David Anyaele and Emmanuel Egbuna v. Charles Taylor and others*] against former Liberian president, Charles Taylor.” A related claim arose in Nigerian Federal Court, brought by two Nigerian victims of torture, challenging the asylum granted by the Nigerian government to the former President. Amnesty International was permitted to file an *amicus* brief addressing *inter alia* whether Nigeria was required to surrender the President to Sierra Leone, where he had been indicted for crimes against humanity. This demonstrates that there is some practice of accepting *amicus* briefs in court, at the very least, on a federal level.

**Indonesia**

In Indonesia, non-governmental organizations, as well as commercial, legal, and journalistic organizations have submitted *amicus curiae* briefs to the Supreme Court of Indonesia. Although it is unclear how much weight the Court gives an *amicus* brief, over the past seven years, the International Trademark Association has submitted eight *amicus* briefs to the Supreme Court of Indonesia. Moreover, in 2007, multiple organizations collaborated to submit an *amicus* brief on behalf of *TIME* Magazine. This was a result of *TIME* seeking a review by the Supreme Court of its ruling in a defamation case brought by the former

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87 See generally Bhe and Others v. Magistrate Khayelitsha and Others, 2005 (1) SA 580 (CC).
88 See generally Shinga, 2007 (4) SA 611 (CC).
90 http://asiapacific.amnesty.org/library/Index/ENGAFR440302004?open&of=ENG-SLE.
91 http://asiapacific.amnesty.org/library/Index/ENGAFR440302004?open&of=ENG-SLE.

\textbf{Israel}

Israel, which has a mixture of common law, German civil law and religious law,\footnote{Ruth Levush, A Guide to the Israeli Legal System, (2001), available at http://www.llrx.com/features/israel.htm.} did not have a precedent for accepting \textit{amicus} briefs until the 1990s.\footnote{Doron & Jubran, supra note 80, at 112.} In the case of \textit{State of Israel v. Kuzli},\footnote{Id. at 112 (citing \textit{State of Israel v. Kuzli} Cr.C. (Hi) 349/84, State of Israel v. Kuzli (unpublished)).} the Supreme Court of Israel permitted the Public Advocate's Office to submit an \textit{amicus} brief regarding the professional failure of the lawyers representing Kuzli in the first proceeding.\footnote{Id. at 112.} At the time, there was no recognized \textit{amicus} procedure, and the Attorney General objected to their participation. However the court found that it had “inherent jurisdiction” to accept \textit{amicus} briefs.\footnote{Id. at 113.} It further elaborated the factors that would determine the admissibility of such a submission:

- the potential contribution of the proposed position of the amicus to the legal proceedings, the nature and the identity of the party requesting to join, the expertise, experience, and representation of the amicus, the type of case and the entailed procedures, the identity of the parties involved, the stage at which the request to join was entered, the essence of the issue in dispute, and the position of the formal parties.\footnote{Id. at 113-14.}

Doron and Jubran comment that at the time of the decision, Chief Justice Barak was interested in the “improvement” of the Israeli legal system, and that being familiar with United States law, the traditional \textit{amicus curiae} proceeding was not an alien concept to

\textit{Id.} at 112.
The transition was by no means simple because there were a number of alternatives to traditional *amicus* proceedings at the time, such as having designated groups or organizations (as *amicus curiae*) with the right to intervene in proceedings that were relevant to them. Thus, moving to the more traditional concept of *amicus* proceeding, that allows *any person or group* with expertise to submit a brief, was a momentous step in Israeli jurisprudence.

The examples of South Africa, Nigeria and Israel demonstrate a retention or growing acceptance (as the case may be) of *amicus curiae* proceedings. They show that the proceedings can take place alongside other systemic principles, and that countries can be flexible in their approach as to how they will be integrated. Therefore, the assertion that *amicus* proceedings are so grounded in the western common law system that they cannot be accepted or integrated into other legal systems is becoming less valid.

V. Development of Amicus Curiae Analogues and Public Interest Protection

Analysis of current practices and trends regarding *amicus curiae* participation helps inform the debate regarding acceptability of non-party submissions by international tribunals and arbitration panels; and it lends support to advocates for greater *amicus curiae* participation by revealing there is a growing consensus that such participation is appropriate and useful in both common law and, as is discussed further below, civil law systems. Of equal relevance, however, is an examination of what, if any, alternative or analogous mechanisms civil law countries used prior to their sanctioning of private *amicus curiae* practice (and continue to use) in order to provide adequate representation and protection of the public interest. That analysis reveals that in contrast to representing a markedly new path or new approach, enhanced *amicus curiae* participation in many civil law countries is merely an extension of those countries’ traditions of institutionalizing means through which to ensure the public advocates have a voice in court.

While these analogues may vary from region to region, the advancement of public interest though the office of the Ministère Public and the expansion of standing rights in certain jurisdictions, is a particularly good illustration of a developed concept of increased public participation.

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101 Id. at 115.
102 Id. at 121.
Protection and Advancement of the Public Interest through the Ministère Public in Civil Law Systems

The key mechanism through which many civil law countries such as France, Belgium, and Italy have long attempted to provide adequate representation of the public interest is through the “institution of a special office of public attorneys, now called Ministères Publics or Parquet,” whose “main task is to commence, or, more frequently to intervene in civil cases – sometimes with the powers of a full-fledged party (partie principale), sometimes with the powers somewhat similar to those of an amicus curiae (partie jointe).” The Ministère Public – an institution essentially absent from common law countries – has its origins in 13th – 14th century France. Originally attorneys, beginning in the 16th century, Ministères Publics became integrated with the judiciary as permanent public officers attached to the courts, with a status “mid-way between that of the judges and that of the parties.”

The early role of the Ministère Public was to intervene “as a ‘partie jointe’ in cases involving the protection of minors, widow[s], absentees, and incompetents, and generally in cases concerning the validity of marriages, legitimacy, and adoptions” and were to act as guardians against judicial abuse and ensure that “courts correctly and uniformly appl[ied] the laws.” Over time, however, the role and rights of the Ministère public have expanded: As early as 1881 in Belgium, and in 1913 in France, in addition to his legislatively granted rights to initiate the types of cases mentioned above – cases involving protection of the weak and family – the Ministère Public has had the right to bring to court, or intervene in “any civil case in which, in his evaluation, an important element of ordre public is directly at stake.” Similarly, in the 1940s Italy granted its Ministère Public the power to intervene in “all civil cases in which he recognizes a public interest.” Ministères Publics thus have long enjoyed broad authority to initiate or intervene in litigation involving public interest issues, and have exercised that authority in public interest areas by, for example, increasing their involvement in “matters of civil rights, labor, social assistance, antitrust and unfair competition, consumer

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105 Id. at 19.
106 Id. at 27.
107 Id. at 29.
108 Id. at 29.
109 Id at 44.
110 Id. at 44-45 (citing Italian Code of Civil Procedure, Art. 40).
protection and securities regulation, environmental protection and urban development regulations."

Such broad authority directly contrasts with the limited rights of the Attorney General in common law countries, such as the United States where the federal Attorney General has a very limited role in civil litigation and must often rely on *amicus curiae* practice if it wants to be heard in a case on an issue of public importance. It is thus not surprising that *amicus curiae* practice has gained such prominence in common law countries as a means of ensuring representation of the public interest, but has not acquired similar prominence in civil law countries where the *Ministère Public* has long been the mechanism for public interest protection and advocacy. Nevertheless, modern critics argue that despite its expansive powers, the institution of the *Ministère Public* has not been an adequate advocate for, or protector of, the public interest and that, whether due to its position within the government, or lack of ability to deal with increasingly complex and specialized issues, the *Ministère Public* has refrained from taking an adequately active role in emerging public interest issues. These modern critiques of civil law countries’ Ministères publics’ ability to fill the role of public interest advocate (especially in a world where the public interest issues such as environmental protection, consumer protection, civil liberties, and elimination of discrimination are becoming increasingly prevalent and complex) have inspired new mechanisms for public interest advocacy including, as is discussed below, enhanced rights of standing and intervention, and enhanced *amicus* participation.

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111 *Id.* at 32-33.

112 *Public Interest Parties and the Active Role of the Judge in Civil Litigation, supra* note 107, at 19; *see also* Access to Justice, Vol. II 803-806 (describing the limited role of attorneys general in common law countries of the United States, England and Australia) (Cappelletti & Weisner, eds.) (Milan 1979).

113 *Id.* at 39-43 (describing limits on the Ministere public’s role) & 50-51 (explaining that the Ministere public has not taken an active role in public interest litigation); *see also* Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study, in II Access to Justice. Promising Institutions* 774-75, 783-87 (Cappelletti & Weisner ed., 1979) (arguing that "virtually insurmountable organizational, educational, and psychological barriers stand in the way of [the Ministere public] becoming the effective champion of newly emerged collective interests"); Harold Koch, *Non-Class Group Litigation under EU and German Law*, 11 Duke J. Comp. & Intl L. 355, 358 ("[I]n the European tradition - although this may be slightly over-simplified - we entrust the public interest to public institutions rather than to private law enforcers. By doing so, we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation."); Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 372-373 (2003) 380 & n.216 ("Traditional civil law political ideology generally looks to the government for protection of the public interest. There is a growing sense, however, that because government has limited knowledge and resources it will be neither willing nor able to ensure adequate representations of some group interests in court.” Gidi also argues, however, that in Brazil the Ministere public has continued to be effective and has “played the primary role in protection of group rights.” He explains that one likely reason for the Ministere public’s effectiveness in this role is its constitutional separation from the executive and legislative branches of government).
Expanded Rights of Standing and Intervention on Behalf of the Public Interest: France, Italy, Colombia, Israel, and the Philippines

Over roughly the past century, numerous civil law countries have taken steps to grant citizens and, in particular, public interest groups, increased rights of standing and intervention, expanding through court decision, legislation and/or constitutional reform the public’s and/or public interest groups’ right of access to courts.114

In France, for example, since the beginning of the twentieth century, private citizens have been able to seek in French administrative courts judicial review of administrative actions that harm “common interests. In other words, [to have standing] it is not necessary for an applicant’s claim to be his own…. It is then of little consequence that this applicant is in fact defending a collective interest, provided that he is subject to injury personally from the action of which he is seeking annulment.”115 French rules governing standing to challenge administrative actions have provided private individuals with “ample possibilities” for seeking judicial review on their own behalf and on behalf of collective or public interests.116

Similarly, and likewise beginning in the twentieth century, the French courts and legislature have granted a “range of” associations the right to “to sue on behalf of the collective interests which they promote.”117 A 1913 decision by the country’s highest non-administrative court, the Cour de Cassation, made clear that trade unions, employers’ associations and other professional associations have standing in court to protect “the

114 Harold Koch, Non-Class Group Litigation under EU and German Law, 11 DUKE J. COMP. & INT’L L. 355, 359-360 (2001); see also Gerhard Walter, Mass Tort Litigation in Germany and Switzerland, 11 DUKE COMP. & INT’L L. 369, 375-376 (2001) (describing actions by public interest organizations); Dinah Shelton, supra note 8, at 617 (noting “the position of France and other civil law countries is to grant broad rights of intervention. Associations and organizations concerned with the environment or human rights participate in cases as intervenors, serving the same purpose as amici in common law countries”).

115 Conclusions in C.E. 28 May 1943, Baffleleuf, Recueil Penant 1946, p. 77 at pp. 78-79, translated in P. van Kijk, JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE: A COMPARATIVE STUDY ON THE REQUIREMENT OF AN INTEREST TO SUE IN NATIONAL AND INTERNATIONAL LAW (The Hague, T.M.C. Asser Inst., 1980). As discussed in van Kijk, supra, pages 139 – 146, however, there are some limits on an individual’s ability to bring an action in defense or support of a collective interest including, for example, the requirement that the interest must be “capable of individualization to some extent in the sense that the applicant does not have his interest in common with the legal community at large.” P. van Kijk, JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE: A COMPARATIVE STUDY ON THE REQUIREMENT OF AN INTEREST TO SUE IN NATIONAL AND INTERNATIONAL LAW 139 (The Hague, T.M.C. Asser Inst., 1980).

116 Id. at 153.

117 Bell, et al., PRINCIPLES OF FRENCH LAW 85-86 (Oxford, Oxford University Press 1998); see also van Kijk, supra note 118, at 149 (explaining that the key requirement an organization seeking to challenge an administrative action had to satisfy was whether it serviced “the collective interest protected by the organization, and not exclusively the individual interests of all or some of its members”).
collective interest of the association.”

Two subsequent decisions of the Cour de Cassation – one issued in 1918 and the other in 1929 – similarly confirmed that “associations formed for the very purpose of more effectively defending a common interest of their members” also had standing. The French legislature then further expanded associations’ right of standing, enacting, for example, a 1972 law granting certain associations the right to initiate civil actions concerning racial discrimination, and a 1973 law expanding the “possibilities for consumer associations to sue in cases of ‘direct or indirect prejudice to the collective interest of customers.’” As a result of these decisions and legislative enactments, throughout much of the past century organizations in France have played a significant role in instituting litigation and securing judicial review of administrative actions.

Such patterns of increased rights of standing are also evident in Italy where, over the latter half of the twentieth century (in a development thus coinciding with and, as mentioned above, arguably as a response to, increased dissatisfaction with the Ministère public), the legislature passed several laws either granting expanded rights of standing to individuals or conferring rights of standing on groups and associations to protect and advance the interests represented by them: Italy’s 1967 Building Construction Law granted the right to sue to anyone seeking the right to challenge the granting of building permits by municipal authorities; a 1970 statute granted unions “broad right[s] to sue to prevent ‘anti-union conduct,’” thereby entrusting unions with the task of “‘protection of the collective interests’” of workers; a 1980 statute gave the Italian Red Cross the right to sue to protect the broad public interests and humanitarian principles represented by it, and also granted it the right to join as a civil party criminal proceedings affecting its interests; and a 1986 law conferred upon certain environmental organizations the power to both intervene (as a party, as opposed

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118 ACCESS TO JUSTICE, VOL. II 842 (Cappelletti & Weisner, eds.) (Milan 1979) (quoting Cour de Cassation, Decision of April 5, 1913 [1914] D.P.I. 65 (ch. reun.)). That decision was later confirmed by statute. Id. at 842 & n.309 (citing C. Travail, liv. III, art. 11).
119 Id. at 843.
120 ACCESS TO JUSTICE, VOL. II 843 & n.313 (Cappelletti & Weisner, eds.) (Milan 1979)
121 van Kijk, supra note 118, at 147.
122 Douglas L. Parker, Standing to Litigate ‘Abstract Social Interests’ in the United States and Italy: Reexamining ‘Injury in Fact,’ 33 COLUM. J. TRANSNAT’L L. 259, 283 (1995). While the statute permits “anyone (chiunque) to sue to challenge the grant of such a person,” in a 1970 decision the “Consiglio di Stato read this chiunque language narrowly to permit suits only by ‘those living where the illegal construction has taken place.’” Id. at 283. The Consiglio di Stato decision, however, is not so narrow that it restricts the right to sue to only adjacent landowners; anyone living in the immediate affected area can initiate the suit. Id. at 284.
123 Id. at 284-85.
124 Id. at 287-88.
to merely having *amicus curiae* status) in criminal enforcement proceedings brought by the government against private parties, and to initiate challenges to government action.125

Italian court decisions further recognized broad standing rights through decisions, such as the 1973 holding by Italy’s supreme administrative court affirming associations’ rights to sue on behalf of the public interest. In that case, the court permitted a private association formed for the purpose of preserving Italy’s artistic and environmental heritage to initiate an action challenging a local government’s resolution to permit construction of a road through a park.126

These examples from Italy and France are but part of a larger movement in many civil law countries to enhance access to courts for protection of public interests or “so-called collective, diffuse, or fragmented interests” – and represent trends that likewise “began to slowly emerge in the late 1960s and throughout the 1970s” in other civil law nations such as Germany, Switzerland, Austria and the Benelux countries.127

In contrast to these gradual shifts, other civil law countries opened their courts to private public interest actors through more rapid and dramatic measures such as constitutional reform. Colombia, for example, significantly expanded private public interest actors’ rights of standing through enactment of its 1991 Constitution, which “establishes the obligation to regulate by law ‘public interest actions to protect collective rights and interests’” such as environmental protection.128

Israel has a well-developed system of alternatives to the traditional *amicus* proceeding. One of the strongest is the expansion of standing rights of in the Supreme Court with respect to public interest. From a historical standpoint, the Israeli legal system has had a lenient attitude towards non-disputing parties wishing to join legal proceedings. Today, “any

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125 *Id.* at 288-290.
127 Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405, 411 (2001); see also Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, n.54 (2003) (citing Koch, *Class and Public Interest Actions in German Law*, 5 CIVIL JUSTICE QUARTERLY 66, 68 (1986)) (“Since the beginning of the twentieth century, the German legal system has a genuine injunctive class action in protection of business interests. The Unfair Competition Act authorized associations for the promotion of business interests and every businessperson who produced or traded goods or services of the same kind as the competitor to sue for an injunction against unfair practices.”) Similarly, in Argentina, in 1983 an administrative court recognized citizens’ broad standing rights when it held that “the right of any citizen to preserve his or her habitat amounts to a subjective right” entitling him or her to initiate an action for environmental protection. Adriana Fabra Aguilar, *Enforcing the Right to a Healthy Environment in Latin America*, 3 REV. ENV. COMTY. & INT’L ENVTL. L. 215, 219-220 (1994).
non-governmental organization or individual can appeal to the Supreme Court as a public appellant. The requirements for admission are that the case “presents a public interest and includes a constitutionally significant issue.” Additionally, Israeli legislature has two main ways of granting amicus status (in a broad sense) to public, non-governmental organizations. The first allows the organization to become a “full and formal” party. For example, the Prevention of Environmental Hazards (Civil Suits) of 1992, permits non-governmental organizations “listed in the appendix . . . to file civil suits against polluters.” The second grants amicus status to a pre-determined list of organizations that can make a request to the court. An example of this is the Equality of Opportunities in Labor Law of 1988, which states that “In actions for infringements of the provisions of this Law, the Labour Court may permit and [sic] organisation that is concerned with the rights of [women] to be heard in such manner as it may direct.

The Philippines legal system has also recognized broader rights of standing. For example, in Oposa v. Factoran, the Supreme Court of the Philippines ruled in favor of the right to sue on behalf of future generations to stop environmental damage. Mr. Oposa was counsel for forty-three Filipino children who initiated a class action suit for themselves, for others of their generation and for the succeeding generations against the Philippine Government for the misappropriation of the country's forest resources. The class action asserted that the approval by the Secretary of the Department of and Environment and Natural Resources of timber license agreements granting permission to license-holders to log in the country’s remaining forests violated their constitutional right to a balanced and healthful ecology.

Initially, the trial court dismissed the complaint on the ground that the children lacked the legal personality to sue. However, in what has become a widely-noted case on inter-generational responsibility, the Philippine Supreme Court reversed the decision and upheld the legal standing (and thereby the right) of the children to initiate the action on their behalf and on behalf of generations yet unborn. The Supreme Court noted:

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129 Doron & Jubran, supra note 80, at 122-23.
130 Id. at 123.
131 Id. at 121.
132 Id. at 122.
133 Id. at 121.
134 Id. at 122.
136 Section 16, Article II of the 1987 Philippine’s Constitution provides: “The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”
Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. Their personality to sue in behalf of succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. . . . Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligations to ensure the protection of that right for the generations to come.137

These decisions and measures represent a view of standing broader than the narrow view applied in many common law countries. In the United States, for example, requirements for establishing standing have been a significant and often insurmountable hurdle for many public interest advocates, preventing them from initiating or joining litigation.138 The high rate of non-party participation as amici curiae in the United States can therefore be seen as a response to or way around the barrier imposed by standing limitations.139

**Public Interest Litigation in India**

The Indian legal system has a different approach to public participation that is of note. It shares some characteristics with the European approach, especially with respect to expanding standing rights. Indian courts also have a practice of appointing amici curiae, albeit in the context of public interest litigation.140 However, the definition of amici curiae and public interest litigation in the Indian legal system is distinct from the terminology used in the traditional common law context.141 First, an amicus curiae is a court appointed third party who investigates the facts surrounding a case, which resembles the inquisitorial process found in civil law systems.142 Courts will use this process in the context of Public Interest Litigation.

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137 Minors Oposa v. Factoran, (S.C. July 30, 1993) (Opinion of Associate Justice Hilario G. Davide Jr.). (Phil.)
138 See generally Douglas L. Parker, *Standing to Litigate*, supra note 125, 287-88 (discussing standing requirements in the United States and effects those requirements have had on public interest groups’ abilities to initiate legal actions).
139 Likewise, the relatively relaxed notion of standing applied in many civil countries could have had the opposite effect – the effect of lessening public interest advocates’ desires or needs to participate as non-parties in disputes between other parties – and could therefore be one reason why amicus curiae practice in civil law countries is less developed than in common law systems.
141 A detailed comparison between “public interest litigation” in these models will not be undertaken here.
142 Sood, *supra* note 140, at 842.
Litigation because it is more collaborative in nature, unlike other systems that maintain the adversarial nature of proceedings but allow third party submissions in matters of public concern. Second, in India Public Interest Litigation is better described as “social action litigation,” since its purpose is to enforce constitutional rights. It is less about involving third parties in private litigation or ensuring participation in government decision-making than it is about protecting the “legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position.” While these procedures do not directly mirror the amicus procedures in the United States and England, they act as functional equivalents to public participation in litigation. This is because the Supreme Court of India has broad standing requirements for initiating constitutional rights protection.

The Court's power is derived from Article 32 of the Constitution, which guarantees “the right to move the Supreme Court by appropriate proceedings” to enforce fundamental constitutional rights. It enabled the Court to relax standing requirements, thus allowing “any person to move the court when there was a violation of a fundamental right” and permit the initiation of formal proceedings via informal letters to judges. Matters initiated in this respect transformed into inquisitorial type processes, leaving behind the traditional adversarial court proceeding. Justice Bhagwati stressed that the purpose of these expansions was to “promote and vindicate public interest” and not solely the individual rights granted under the Constitution. Another very interesting reform was relaxing the rule on ripeness or prematurity – the rule that courts can only determine issues once it becomes necessary. In India, questions of fundamental rights can be decided even before the actual invasion or harm takes place. One of the best examples of Public Interest Litigation in practice is the decision in Azad Piksha Pullers Union v. Punjab. A Punjab licensing regulation posed potential unemployment for many rikshaw drivers who did not own their vehicles. The standing provisions allowed a number of social action groups to appear in court on behalf of the underprivileged rikshaw pullers. The regulation was challenged

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144 People's Union for Democratic Rights (PUDR) v. Union of India (1983) 1 S.C.R. 456, P2 (India).
145 Indian Const. Art. 32 §1.
146 Sathe, supra note 143. at 74.
147 Id. at 73.
148 Id. at 73.
149 Id. at 75.
150 Id. at 67.
152 Id. at 79.
before actual harm took place and, after deciding that it would violate their rights, the court provided for a loan scheme that would mitigate any potential harm.153

In recent years, the procedure of initiating proceedings via informal letters has been criticized.154 There were concerns that known activists would write to specific judges and that this could bias the process.155 Much of this criticism has been resolved by appointing lawyers as *amicus curiae*, in the context of appointing representation for individuals who cannot afford legal representation.156 Now, the lawyers will write a petition to the court based on the letters. Hence, the practice of writing letters to judges has diminished; however, the expansion of standing is still effective in bringing the interests of social groups to the court's attention.

VI. Conclusion

Courts – whether domestic or international – handle a myriad of disputes with significant implications for various issues affecting the public interest, such as those relating to environmental protection, access to natural resources, social justice, and consumer and worker protection. In light of this reality, both common and civil law countries have developed various mechanisms to ensure that public interest concerns have a means of representation within their respective domestic legal systems, whether that be through granting public interest advocates broad rights of standing to initiate actions, allowing them to intervene in disputes between other parties, permitting them to submit *amicus curiae* briefs, and/or creating government institutions whose specific purpose is to represent the public.

Similarly, various international tribunals recognizing the impacts of their decisions on public interest issues have also declared that it is appropriate to provide means of public interest participation and have opened up one such avenue by permitting interested non-parties to serve as *amici curiae*, letting them play a relatively unobtrusive but possibly influential role in the litigation.157 Nevertheless, despite the limited participatory rights of

154 Id. at 77.
155 Id. at 77.
156 Id. at 77.
amici curiae, there remains some resistance to permitting submissions from such non-parties in international dispute settlement. As is shown above, however, a policy of preventing public interest concerns from being represented in relevant disputes runs counter to the long traditions of many common and civil countries; and, consequently, arguments that an international tribunal should adopt such a policy by refusing to allow any amicus curiae (or other means of public interest representation) should not be viewed as merely being arguments against adoption of a new procedure, but should be recognized as advocating for a departure from previous well-established and important practices. Indeed, a variety of common, civil, and mixed law countries allow for amicus curiae briefs to contribute to better informed legal decisions in cases concerning the public interest.