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The Americanization of International Litigation

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The Americanization of International Litigation

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"I'm so bored with the U . . . S . . . A But what can I do?"¹

I. INTRODUCTION

When the organizers of this symposium invited me to come to Columbus, Ohio and speak about the Americanization of international dispute resolution, my first instinct was to ask myself whether such a phenomenon is actually taking place. I soon realized that I could not answer the question without asking myself first what the term "Americanization" means and whether there is a universal understanding of it. This is a problem particularly acute in my case, being a European who works in the United States, as, I am afraid, I have developed a peculiar form of "intellectual strabismus," where I am simultaneously a censorious witness and a bemused accessory of American global cultural ascendancy.

If what is meant by "Americanization" is the spreading, by sheer appreciation, persuasion, awe, blackmail, or brute force, of U.S. styles, concepts, ideas, practices, and preferences to the rest of the world,² then it should be obvious that, while Americanization of the rest of the world might be a desirable goal of the citizens of this country, it is looked at with suspicion, even hostility, by anyone who is not American. I say "should be

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¹ THE CLASH, *I'm So Bored With the U.S.A.*, on CLASH (Epic Records 1977).

² In the early 1900s, Americanization meant taking new immigrants and turning them into Americans, by subtle, and not-so-subtle inducements, whether they wanted to give up their traditional ways or not. See Charles R. Kesler, *The Promise of American Citizenship*, in IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 3 (Noah M.J. Pinkus ed., 1998).

obvious” because Americans are often bewildered when they hear complaints about the overwhelming influence of their culture.

Nowadays, Americanization is a very dangerous concept, and politically supercharged, to the point of creating hysterical and sadly violent reactions.³ In this environment, globalization is often equated with the imposition of American culture on the entire world and the dawn of the American Empire. To the eyes of the great majority of the world—including many fellow Western countries, which started dubbing the United States as the “Extreme West” or more wittily the “Far West”—Americans seem to believe that their institutions must confine all others to history’s trash bin.

While there is some truth in this criticism, and surely the foreign policy of the United States in the aftermath of September 11 does not help to dissipate concerns, it misses a fundamental contradiction. American culture is simultaneously both hegemonic and universalistic, being open to influences as few other cultures of the world are. It absorbs, reprocesses, and sends back to the original creator ideas and institutions that have become ultimately American in the process, but that was certainly not so at the beginning. Cultural influence is often a two-way process, and all the more so in the case of the United States. Paradoxically, considering the way American society is open and receptive, it would also be legitimate to ask whether it is possible to speak of a “Europeanization,” insofar as the United States seems to be poised to replicate some of the mistakes of the past great European Empires (regrettably so, I must add).

In regard to the legal arena, the transmission/reception story, if anything, is extremely intricate and resistant to reduction.⁴ Duncan Kennedy aptly illustrated the cross-Atlantic mutual fertilization of legal cultures and the complexity of the phenomenon, which can be hardly reduced to matters of nationality.⁵ Besides, the question of whether there is a legal field which has

³ See BENJAMIN BARBER, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* 3–4 (1995) (arguing that the clash of consumerist capitalism and religious and tribal fundamentalism has led to one of today’s most important world conflicts).

⁴ The issue of the globalization of legal thought, including its Americanization, in the period 1950–2000, was the object of a conference organized by the European Law Research Center of the Harvard Law School in Spring 2002. Hopefully the results of these discussions will be published in the near future. European Law Research Center, *The Americanization of Legal Thought (1950–2000)*, Academic Conference, at <http://www.law.harvard.edu/programs/elrc/reports/2001-2002/activities.php> (last visited September 25, 2003).

⁵ See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* (1997) (discussing the complex development patterns of legal cultures).

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been primarily a producer and others that have been primarily receivers (i.e., private law → public law → public international law), or whether there are regional variations of the same problem, has not been adequately explored.

How is legal culture produced, received, or adopted? Does production express a will to dominate and influence, or is it more oblivious to the context of its influence? Is production conscious, following a mythical master plan, or unconscious? Is it diffused because of malice, indolence (it is easier to copy than to adapt), lack of capacity, naïveté, or an honest desire to do good? These are questions that need to be answered before one can have an educated debate over the influence of American legal culture. Comparative law does provide many useful tools and insight into the ways legal systems influence each other. The writings of the Italian legal scholar Ugo Mattei on the increasing sway of the United States on legal culture are, in this sense, illuminating.⁶ Legal sociology can make important contributions too.⁷

Granted, legal culture—or, to use a term which has become *démodé* after the demise of socialist thinking, legal consciousness—is not a mystical influence, but rather the result of concrete practices of multiple agents, not exclusively lawyers, in a multitude of national and international systems.⁸ It is exactly on these agents that I would like to focus this Article, and how they can become a possible, and in some cases actual, medium of Americanization of international litigation. My approach is, in a way, sociological and follows the lead of international relations literature that emphasizes the role of groups of experts and practitioners in the diffusion of legal culture, practices and

⁶ See generally Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994).

⁷ In this sense, an excellent study by David Trubek, Yves Dezalay and Ruth Buchanan, published in a special symposium issue of the Case Western Reserve Law Review ("The Future of the Legal Profession"), is particularly worthy of notice. The study is a cooperative transatlantic effort (U.S.-France) that analyzes in-depth the transformation of legal markets by the dictates of globalization. It maps the role international forces, which for most of the paper means "American" forces, play in legal systems and professions, and what role law and lawyers play in the global economic and political restructuring currently underway. The legal field is studied as a social field. David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994).

⁸ *Id.* at 408.

norms.⁹ This Article will thus tackle the question of the actual or potential Americanization of international litigation through the lens of practices and procedures of actual agents, that is to say, "legal culture."

My stated aim warrants two general considerations and four caveats. First, one of the consequences of current American global preponderance is that anything which is thought, said, or written in English tends to be labeled as "American" while the English-speaking world is, of course, much larger and diversified, and often it feels extremely uncomfortable being lumped together with the Yankees. Much of what is generally held to bear an American legal footprint, under closer scrutiny really bears the marks of common law. Moreover, as it will be discussed below, it is extremely hard to determine the true nationality of law firms that operate across boundaries, or the national consciousness of cosmopolitan lawyers.¹⁰

Second, as it will be detailed below, observers and practitioners tend to attribute to America's ill influence the growing tendency to jump at courts, over-litigate, and procedurally tussle.¹¹ While there is some truth to this, albeit hard to conclusively prove, this kind of reasoning not only tends to exaggerate certain censurable features of the American legal culture, but it also deceptively pictures the rest of the world as a merry circle of naïve tenderfeet, an epithet that can hardly characterize Europeans, or better, continental Europeans.

Four caveats must also be made. First, my focus is on international litigation and not international law at large, but one does not exclude the other. International litigation is becoming a crucial engine of the development and implementation of international law. While traditionally these key functions were eminently the domain of States and diplomatic negotiations, as the number of international judicial bodies has boomed and their caseloads have become substantial, jumping to never-before-reached levels, performing these tasks is increasingly shared with a new elite of international judges and a sundry group of governmental and non-governmental actors. Asking what role American legal culture plays in international litigation implies asking also what role American legal culture

⁹ In particular, I refer to the notion of so-called "epistemic communities," a term that indicates "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within the domain or issue-area." Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

¹⁰ See *infra* Part IV.A.

¹¹ See *infra* Part II.

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is playing in international law at large. Yet, this is beyond the scope of this Article.

Second, this Article does not approach the issue from the point of view of America's role as a country in the building of an international judiciary. The issue has not been adequately studied. Too often commentators are too blinded by the spectacular withdrawal of the U.S. acceptance of the International Court of Justice's (ICJ) jurisdiction in the aftermath of the *Nicaragua* case, or the snubbing of, if not overt hostility towards, the International Criminal Court, to be able to fully appreciate how ambivalent and shiftily U.S. attitude has been on the question of the building of an international judiciary. Yet, this topic in itself is important enough to warrant a much larger study.

Third, this Article does not approach the question of the Americanization of international litigation through the prism of the bench either. That is to say, it will not try to discern American strains in international jurisprudence, or, to put it in simpler words, contributions of U.S. judges to international law and jurisprudence, yet another fascinating and oft neglected issue in dire need of thorough discussion.

Finally, this Article will focus only on the major international judicial fora with a global scope and where the presence of the United States, or American nationals, is of consequence, such as the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and the World Trade Organization (WTO) dispute settlement system. Regional judicial bodies, for instance the European Court of Human Rights, which is outside the span of American reach, will of course not be addressed. Additionally, this Article will not consider international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), where the presence of the United States is much felt. Finally, Americanization of international commercial arbitration has been treated elsewhere, and I will defer on this specific field.¹²

A. On the Concept of Americanization in the Legal Arena: A Few Quintessential American Aspects

The concept of Americanization is undoubtedly multifaceted, making it difficult to pinpoint its contours. An approximate way of doing that might be provided by the inductive approach, which means first empirically probing

¹² Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Arbitration?*, 16-4 MEALEY'S INT'L ARB. REP. 37 (2001).

what themes are usually associated with the term “Americanization,” and then inducing some conclusions from the observation.

In the legal arena, there are several themes which are usually, rightly or wrongly, associated with Americanization. The first and perhaps most spectacular is what Robert Kagan describes as “adversarial legalism.”¹³ By “adversarial legalism” he means a:

method of policymaking and dispute resolution with two salient characteristics. The first is *formal legal contestation*—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review. The second is *litigant activism*—a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers.¹⁴

It is a fact, proved by Kagan, that American methods of policy implementation and dispute resolution are more adversarial and legalistic when compared with the systems of other economically advanced countries. Whatever is the source for the seeming love Americans have for lawyers and courtrooms, the bottom line of Kagan’s analysis is that, while adversarial legalism has many virtues, its costs and unpredictability often alienate citizens from the law and frustrate the quest for justice.

“Due process” seemingly is also another quintessential American legal concept. I say “seemingly” because it is difficult to exactly define the concept, since its meaning expands or shrinks according to jurisprudential attitudes of fundamental fairness. At one extreme, “due process” is synonym of fairness and justice, which, of course, is not an invention or monopoly of the United States. At the other end of the spectrum, it becomes coterminous with legal formalism and excessive reliance on sclerosed procedures, a perversion that can be dubbed “proceduralization.” This latter aspect is, in the eyes of many non-Americans, a real American feature, but I suspect this is nothing but a manifestation of the adversarial legalism described by Kagan.

Of course, the “American way of law” has also several virtues, which are widely appreciated, admired, and oft imitated (although sometimes with perverse effects). Probably the most laudable aspect is the stress that is

¹³ ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001).

¹⁴ *Id.*

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placed on access to justice. The idea that in order to be legitimate the legal system must be seen as working on behalf of all segments of society is part and parcel of American political and legal culture. In practice, this translates, *inter alia*, into a drive towards greater access by all sorts of entities, be they international governmental organizations, non-governmental organizations [hereinafter NGOs], or individuals, and in various capacities, to international litigation, pro bono activities, and the so-called "public interest law firm." These are surely archetypal American ideas, but to be fair, they are the evolution of similar older institutions in the Anglo-Saxon legal culture.

B. Some Examples of Americanization of International Litigation

As to the specific field that I was assigned, that is to say litigation before international courts and tribunals, I would like to present a few examples of how these features of American legal culture translate in practical issues. Before moving on to that, however, I need to stress that these are only a few first-person impressions. There is still too little empirical analysis to warrant determinative conclusions. Hopefully, soon this issue will be adequately explored so that discussion can finally move on from unsubstantiated exchanges of accusations of crypto-imperialism or visceral anti-Americanism to a more informed debate. Moreover, it is important to note that international courts and tribunals form a too large and diverse a class, with infinite variations in procedures, styles, and quality of litigation, to be able to draw any meaningful general conclusions. Thus, necessarily, one has to proceed anecdotally.

II. ADVERSARIAL LEGALISM IN ACTION

A. Mega-Litigation

The tendency to over-litigate cases is a worrisome feature of adversarial legalism. It is obviously a concern because it tends to tax the scarce resources (human, financial, and time) of international courts and tribunals, and because it makes litigation costs skyrocket. Moreover, to the extent that litigation through international courts and tribunals is considered a means to peacefully settle disputes, the end result of the process might perversely be a deterioration of relations between the litigants even outside the framework of the immediate object of the dispute.

Since the early 1990s, the idea that more-is-good seems to have taken hold of the litigation strategy of several countries, and this fuels a perverse vicious circle. This applies both to the number of lawyers pleading before the

courts, and to the amount of evidence presented, as well as to the procedural wrangling.

The *Gabcíkovo-Nagymaros* (Hungary/Slovakia) case is an excellent example.¹⁵ In 1997, during the oral phase of the case, the judges of the ICJ heard the arguments and replies of no less than twelve agents and counsels for Hungary¹⁶ and eight for Slovakia.¹⁷ The pleadings before the Court, written and oral, reached the all-time record of twenty-six volumes. One could wonder whether justice was better served by having such a plethora of lawyers arguing before the Court, and even doubt the capacity of the judges to read, let alone to digest, such a quantity of information. Incidentally, on top of the wealth of data provided, since the parties estimated that the judges of the Court could not get a detailed opinion on the facts at issue from the

¹⁵ Gabcíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 1 (Feb. 5). See generally Peter H.F. Bekker, *Gabcíkovo-Nagymaros Project*, 92 AM. J. INT'L L. 273 (1998); Georg M. Berrisch, *The Danube Dam Dispute Under International Law*, 46 AUS. J. PUB. INT'L L. 231 (1994); Cestmír Cepelka, *The Dispute over the Gabcíkovo-Nagymaros Systems of Locks is Drawing to a Close*, 20 POL. Y.B. PUB. INT'L L. 63 (1993); Gabriel Eckstein, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute over Gabcíkovo-Nagymaros*, 19 SUFFOLK TRANSNAT'L L. REV. 67 (1995/96); JOHN FITZMAURICE, *DAMMING THE DANUBE: GABCÍKOVO AND POST-COMMUNIST POLITICS IN EUROPE* (1996); Erik Hoenderkamp, *The Danube: Damned or Dammed?: The Dispute between Hungary and Slovakia Concerning the Gabcíkovo Nagymaros Project*, 8 Leyden J. Int'l L. 287 (1995); Miroslav B. Liska, *Development of the Slovak-Hungarian Section of the Danube, in THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES* 175 (Gerald H. Blake et al. eds., 1995); Boldizsár Nagy, *The Danube Dispute: Conflicting Paradigms*, 128 NEW HUNGARIAN Q. 56 (1992); Boldizsár Nagy, *Divert or Preserve the Danube? Answers 'in Concrete'—a Hungarian Perspective on the Gabcíkovo-Nagymaros Dam Dispute*, 5 REV. EUR. COMMUNITY & INT'L ENVTL. L. 138 (1996); E. Robert, *L' affaire relative au projet Gabcíkovo-Nagymaros: Un nouveau conflit en matiere d'environnement devant la Cour internationale de Justice?*, 47 STUDIA DIPLOMATICA 17 (1996); CESARE P.R. ROMANO, *The Gabcíkovo-Nagymaros Dispute (Hungary/Slovakia)*, in *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES: A PRAGMATIC APPROACH* 246 (2000); Paul R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabcíkovo and Nagymaros Dams*, 19 COLUM. J. ENVTL. L. 1 (1994); Inventory of Conflict and Environment Case Studies, *Danube River Dispute*, in Trade and Environment Database, available at <http://www.american.edu?TED/ice/DANUBE.HTM> (last visited August 25, 2003).

¹⁶ Ambassador Szénási, Prof. Valki, Prof. Kiss, Prof. Vida, Prof. Carbiener, Prof. Crawford, Prof. Nagy, Dr. Kern, Prof. Wheeler, Ms. Gorove, Prof. P.-M. Dupuy, Prof. Sands.

¹⁷ Ambassador Tomka, Dr. Mikulka, Mr. Wordsworth, Prof. McCaffrey, Prof. Mucha, Prof. Pellet, Ms. Refsgaard, Sir Arthur Watts.

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overabundance of material submitted, as well as a videocassette shown during the oral proceedings, a visit to the "scene of the crime" was organized. Between April 1 through April 4, 1997, for the second time in the history of the World Court, the bench left the courtroom in The Hague to visit a number of locations along the Danube and take note of the technical explanations given by the parties' representatives.

Actually, the only other time the judges of the ICJ had taken a field trip was in a very similar case litigated in 1920 before the antecessor of the ICJ, the Permanent Court of International Justice (PCIJ):¹⁸ the *Diversion of Water from the Meuse* case (Netherlands v. Belgium).¹⁹ The comparison with the *Meuse* case, surely not a technically less intricate case, is appalling. In that case, the Dutch delegation was composed of Professor Telders alone, and that of Belgium by two lawyers and one engineer (M. De Ruelle as agent). The pleadings of the case fill just one volume of a few hundred pages.²⁰

For the record, the result in the *Gabcikovo-Nagymaros* case, a clash of legal wisdom and lawyering skills of proportions worthy of Hollywood, was a draw (as was the *Diversion of Water from the Meuse* case, incidentally), for the Court found that none of the parties had complied with their obligations under international law and that they should negotiate a new regime to regulate the matter.²¹ Since the parties have not been able to do so to date, and it has been ten years since the original filing of the case, the case is still formally pending before the Court.

More recently, in the *Southern Bluefin Tuna* case,²² the teams of the litigants appearing in Hamburg before the ITLOS, in the provisional

¹⁸ See generally Peter Tomka & Samuel S. Wordsworth, *The First Site of the International Court of Justice in Fulfillment of Its Judicial Function*, 92 AM. J. INT'L L. 133 (1998); Jean-Marc Thouvenin, *La Descente de la Cour sur les Lieux Dans L'Affaire Relative au Projet Gabcikovo-Nagymaros*, 48 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 333 (1997).

¹⁹ *Diversion of Water from the Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28).

²⁰ *Diversion of Water from the Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. C) No. 81 (June 28).

²¹ *Gabcikovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 1, at Operative Paragraph B and C (Feb. 5).

²² *Southern Bluefin Tuna Cases* (N.Z. v. Japan; Austl. v. Japan), 1999 International Tribunal for the Law of the Sea Case Nos. 3 & 4 (Aug. 27), 38 I.L.M. 1624 (1999); *Southern Bluefin Tuna Cases—Arbitral Award* (N.Z. v. Japan; Austl. v. Japan), 2000 Arbitral Tribunal of the United Nations Convention on the Law of the Sea (Aug. 4), available at <http://www.worldbank.org/icsid/bluefintuna/main.htm> (last visited Aug. 25, 2000). See generally R.R. Churchill, *International Tribunal for the Law of the Sea and the Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan): Order for

measures phase of the case, included counting Agents, Counsels, Advocates and Advisers, no less than twenty-nine people in the case of Japan, while the teams of Australia and New Zealand were within more reasonable boundaries (respectively eleven and four). Interestingly, and we will revert to this later on, the team of Japan included also American lawyers from the law firm Cleary, Gottlieb, Steen and Hamilton.²³

Increasing adversarial legalism in the ICJ context also means trying to exploit every provision and comma in the statute and rules of procedure to wear down the adversary, a tactic which, however, often results in wearing down the members of the Court, with unsought effects. To illustrate using the *Gabcíkovo-Nagymaros* case, from the date of the signature of the Special Agreement between Hungary and Slovakia to refer the dispute to the Court (April 7, 1993),²⁴ to the date in which the judgment was rendered (September 25, 1997),²⁵ almost four and half years had passed, and this delay could not be attributed to the Court. Actually, had the case not been brought by agreement between the parties, one might wonder how long it would have taken. In Article 3 of the Special Agreement, the parties decided that not only a memorial and a counter-memorial were to be exchanged, but also replies. Obviously both parties exploited to the full the time-limits allowed for the filing of each: respectively ten months for the memorial,²⁶ seven months for the counter-memorial²⁷ and six months for the reply.²⁸ A further delay was caused at the beginning of 1997 by the request of Slovakia to produce some

the Provisional Measures of 27 August 1999, 49 INT'L & COMP. L.Q. 979 (2000); Moritaka Hayashi, *The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea*, 13 TUL. ENVTL. L.J. 361 (2000); Barbara Kwiatkowska, *Southern Bluefin Tuna*, 94 AM. J. INT'L L. 150 (2000); Barbara Kwiatkowska, *The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases*, 15 INT'L J. MARINE & COASTAL L. 1 (2000); Cesare Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like It or Not*, 32 OCEAN DEV. & INT'L L. 313 (2001); Shabtai Rosenne, *The International Tribunal for the Law of the Sea: Survey for 1999*, 15 INT'L J. MARINE & COASTAL L. 443, 464-74 (2000).

²³ See *infra* Part II.B.

²⁴ *Hungary-Slovak Republic: Special Agreement for Submission to the International Court of Justice Differences Between Them Concerning the Gabcíkovo-Nagymaros Project*, 32 I.L.M. 1293 (1993) [hereinafter *Special Agreement*].

²⁵ *Gabcíkovo-Nagymaros Project (Hung./Slovk.)*, 1997 I.C.J. 1, at Operative Paragraph B and C (Feb. 5).

²⁶ *Special Agreement*, 32 I.L.M. at 1296.

²⁷ *Id.* at art. 3.2.b.

²⁸ This time with a time-limit set by the Court. *Id.* at art. 3.2.c. For the Court's order, see *Gabcíkovo-Nagymaros Project (Hung./Slovk.)*, 1994 I.C.J. 151 (Dec. 20).

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new documents.²⁹ Hungary was allowed sufficient time to comment on those documents and Slovakia to comment on Hungarian observations.

This is nothing compared to the legal wrestling in which Bosnia, Herzegovina, and Yugoslavia locked themselves in the early 1990s in the *Genocide* case. In March 1993, Bosnia and Herzegovina filed a case before the ICJ against the then Federal Republic of Yugoslavia (now Serbia and Montenegro) for the violation of the Convention on the Prevention and Punishment of the Crime of Genocide.³⁰ The filing of the case was followed (as it increasingly happens, but we will revert to this later on) by a request for the indication of provisional measures. The Court, which did indicate measures in April 1993, promptly acted upon the request.³¹ In July 1993, Bosnia and Herzegovina filed a second request for provisional measures, and, once again, the Court passed an order to that effect.³² Two years after, in June 1995, within the time limit for the filing of its Counter-Memorial, Yugoslavia raised certain preliminary objections, to the Court's jurisdiction. One year later, in July 1997, in the Counter-Memorial on the merits of the case, Yugoslavia presented counter-claims against Bosnia and Herzegovina, which were declared by the Court "admissible as such" in December 1997.³³ Because of the new counter-claims, the court extended time-limits for the filing of pleadings on the merits (in total between reply and rejoinder until January 1999, later extended to February 1999, following a request from Yugoslavia, and after the views of Bosnia and Herzegovina had been ascertained). Yugoslavia's counterclaim was withdrawn in September 2001, and this, of course, necessitated the parties to revise their memorial, counter-

²⁹ *Gabcikovo-Nagymaros Project (Hung./Slovk.)*, 1997 I.C.J. 234 (Sept. 25).

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, available at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm> (last visited Sept. 25, 2003); see also *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277.

³¹ *Application of The Convention on The Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, Order of Apr. 8, 1993, available at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm> (last visited Sept. 25, 2003).

³² *Application of the Convention on the Prevention and Punishment of The Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, Order of Sept. 13, 1993, available at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm> (last visited Sept. 25, 2003).

³³ Incidentally, this was the first time that the Court has ruled on the admissibility of counter-claims at a preliminary stage. In the past the Court adjudicated twice on counterclaims (*Asylum (Colom./Peru)*, 1950 I.C.J. 266 (Nov. 20) and *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176 (Aug. 27)), but it did so simultaneously with its final decision on the merits of the case.

memorials, and so on. At the time of this writing, Spring 2003, and ten years after the beginning, the case has not yet been decided on the merits.

Another incident, in the same case, could also be mentioned. In the order on the (second) request of provisional measures, a patently harassed Court made the following statement:

By a series of communications, dated 6 August, 7 August, 8 August, 10 August, 13 August, 22 August, 23 August[,] and 24 August 1993[,] the Agent of Bosnia-Herzegovina stated that he was further amending or supplementing the second request for provisional measures, as well as, in some cases, the Application instituting proceedings . . . during the oral proceedings the Agent of Bosnia-Herzegovina presented to the Court a further written communication, dated 25 August 1993, directed to supplementing and amending the second request for provisional measures and the Application instituting proceedings . . . at the hearing of 26 August 1993 counsel for Yugoslavia protested at “the unending flood of sometimes heavy documentation” from the Agent of Bosnia-Herzegovina, and asked the Court to declare the communication of 25 August 1993 inadmissible; and . . . on 26 August 1993 the Agent of Bosnia-Herzegovina presented to the Court a further written communication supplementing the second request . . . the submission by the Applicant of a series of documents, up to the eve of, and even during, the oral proceedings, in the circumstances set out . . . above, is difficult to reconcile with an orderly progress of the procedure before the Court, and with respect for the principle of equality of the parties.³⁴

Still, the Court eventually found this behavior admissible “taking into account the urgency and the other circumstances of the matter.”³⁵ Granted, the historical and political context in which this particular case took place can explain much of such a baffling way to litigate (and in particular the request for two orders, and the amendments on-the-fly, the counter-claim, and its withdrawal in 2001), but similar instances of legal overkill seem to become disturbingly frequent.

Again, and remaining on the ICJ, since the 1990s, exercise of incidental jurisdiction by the Court, revision of judgments, intervention by third parties, and requests to reopen cases, have passed from being exceptional—as perhaps it should normally be—to being the rule. Of the forty-four cases filed

³⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), at paras. 14, 20, & 21, available at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm> (last visited Sept. 25, 2003).

³⁵ *Id.* at para. 21.

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before the Court since 1990 (from the *Libya/Chad Territorial Dispute* case³⁶ to *Certain Criminal Proceedings in France* case),³⁷ in only seven cases the Court was not requested to indicate provisional measures, no preliminary objections were raised, no third party sought to intervene, no counter-claims were filed, or the new case could be considered as a legal spin-off of a previous case.³⁸ Besides, several of those cases are still pending, hence something can still happen. Conversely, provisional measures were requested in twenty-three cases (counting the ten cases filed by Yugoslavia against NATO countries individually, but not including the double request of measures in the above mentioned *Genocide* case).³⁹ Preliminary objections

³⁶ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* 1994 I.C.J. 6 (Feb. 3).

³⁷ *Case Concerning Certain Criminal Proceedings in France, (Congo v. Fr.)* 2003 I.C.J. (forthcoming) (July 11).

³⁸ *Territorial and Maritime Dispute (Nicar. v. Colum)*, 2002 I.C.J. (forthcoming) (Feb. 26); *Certain Property (Liech. v. F.R.G.)*, 2001 I.C.J. (forthcoming) (June 28); *Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, 2000 I.C.J. 21 (Mar. 21); *Frontier Dispute (Benin/Niger)*, 1999 I.C.J. 235 (June 2); *Kasikili/Dedudu Islans (Bots./Namib.)*, 1999 I.C.J. 1045 (Dec. 13); *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (June 30); *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994 I.C.J. 6 (Feb. 3).

³⁹ *Arrest Warrant of 11 April 2000 (Cong. v. Belg.)*, 2002 I.C.J. 3 (Feb. 14); *Legality of Use of Force (Yugoslavia v. Belg.)*, 2001 I.C.J. 13 (Feb. 21); *Legality of Use of Force (Yugoslavia v. Can.)*, 2001 I.C.J. 16 (Feb. 21); *Legality of Use of Force (Yugoslavia v. Fr.)*, 2001 I.C.J. 19 (Feb. 21); *Legality of Use of Force (Yugoslavia v. F.R.G.)*, 2001 I.C.J. 22 (Feb. 21); *Legality of Use of Force (Yugoslavia v. Italy)*, 2001 I.C.J. 25 (Feb. 21); *Legality of Use of Force (Yugoslavia v. Neth.)*, 2001 I.C.J. 28 (Feb. 21); *Legality of Use of Force (Yugoslavia v. Port.)*, 2001 I.C.J. 31 (Feb. 21); *Legality of Use of Force (Yugoslavia v. U.K.)*, 2001 I.C.J. 34 (Feb. 21); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. (forthcoming) (June 27); *Armed Activities on the Territory of the Congo (Congo v. Burundi)*, 2001 I.C.J. 3 (Jan. 30); *Armed Activities on the Territory of the Congo (Congo v. Rwanda)*, 2001 I.C.J. 6 (Jan. 30); *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 2001 I.C.J. (forthcoming) (Nov. 29); *Legality of Use of Force (Yugoslavia v. Spain)*, 1999 I.C.J. 761 (June 2); *Legality of Use of Force (Yugoslavia v. U.S.)*, 1999 I.C.J. 916 (June 2); *Frontier Dispute (Benin/Niger)*, 1999 I.C.J. 235 (June 2); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.)*, 1998 I.C.J. 115 (Feb. 27); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, 1998 I.C.J. 9 (Feb. 22); *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, 1998 I.C.J. 275 (June 11); *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 426 (Nov. 10); *Gabcikovo-Nagymaros Project (Hung./Slovk.)*, 97 I.C.J. 234 (Sept. 5); *Passage Through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 41 (Sept. 10); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. (forthcoming) (Dec. 15); *Case Concerning Armed*

were raised in nineteen cases (again counting the ten cases filed by Yugoslavia against NATO countries individually).⁴⁰ There were four requests for revision or interpretation of previous judgments, or re-examination of the situation⁴¹ (against two such requests in the previous thirty-five years of life of the Court⁴²), plus, as it was said before, in the

Activities in the Territory of the Congo (Congo v. Rwanda (new application)), 2002 I.C.J. (forthcoming) (Sept. 18); Case Concerning Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. (forthcoming) (July 11) .

⁴⁰ Case Concerning Armed Activities on the Territory of the Congo (Congo v. Rwanda) (new application), 2002 I.C.J. (forthcoming) (Sept. 18); Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. (forthcoming) (Mar. 16); Ahmadou Sadio Diallo (Guinea v. Congo), 2000 I.C.J. 146 (Sept. 8); Legality of Use of Force (Yugoslavia v. Belg.), 2001 I.C.J. 13 (Feb. 21); Legality of Use of Force (Yugoslavia v. Can.), 2001 I.C.J. 16 (Feb. 21); Legality of Use of Force (Yugoslavia v. Fr.), 2001 I.C.J. 19 (Feb. 21); Legality of Use of Force (Yugoslavia v. F.R.G.), 2001 I.C.J. 22 (Feb. 21); Legality of Use of Force (Yugoslavia v. Italy), 2001 I.C.J. 25 (Feb. 21); Legality of Use of Force (Yugoslavia v. Neth.), 2001 I.C.J. 28 (Feb. 21); Legality of Use of Force (Yugoslavia v. Port.), 2001 I.C.J. 31 (Feb. 21); Legality of Use of Force (Yugoslavia v. U.K.), 2001 I.C.J. 34 (Feb. 21); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugoslavia), 2000 I.C.J. 12 (June 27); Aerial Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12 (June 21); Legality of Use of Force (Yugoslavia v. Spain), 1999 I.C.J. 761 (June 2); Legality of Use of Force (Yugoslavia v. U.S.), 1999 I.C.J. 916 (June 2); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1998 I.C.J. 9 (Feb. 27); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1998 I.C.J. 115 (Feb. 27); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 1998 I.C.J. 275 (June 11); Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12); Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4); Application of the Convention on the Prevention and Punishment of Genocide, (Bosn. & Herz. v. Yugoslavia), *supra* note 30.

⁴¹ Request for an Examination of Situation in Accordance with Paragraph 63 the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22); Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 1999 I.C.J. 31 (Mar. 25); Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nicar. Intervening), (I.C.J. filed Sept. 10, 2002); Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Yugoslavia v. Bosn. & Herz.) (I.C.J. request inadmissible).

⁴² Request for Interpretation of the Judgment of 20 November 1950 in Asylum Case, (Colom. v. Peru), 1950 I.C.J. 395 (Nov. 27); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis./Libyan Arab Jamahiriya), 1985 I.C.J. 192 (Dec. 10).

Gabcikovo-Nagymaros case, Hungary and Slovakia returned to the Court once they concluded they could not come to the agreement they had been told to negotiate. Finally, in one case, filed by agreement between the parties, a third-party applied to intervene.⁴³

There is no doubt that enthusiastic use of the ICJ is something to be wished for. However, when use turns to exploitation, as increasingly seems to be the case, it can be a legitimate cause of concern. Whether this can be attributed to bad American influences is difficult to prove, but it is a fact that the Peace Palace increasingly resembles a family court in Manhattan for the keenness of its litigants.

B. *The Voir Dire Incident*

Another anecdote, this time at the ITLOS, and concerning the above-mentioned *Southern Bluefin Tuna* case, however, can be traced to a particular American source. To summarize, as the title of the case indicates, the dispute took place between Australia and New Zealand, on the one hand, and Japan, on the other, over the status of that Southern Bluefin Tuna stock in the South Pacific. While Japan insisted that more tuna could be fished without endangering the stock, Australia and New Zealand insisted that could not be done. To block an experimental fishing program by Japan, in the summer of 1999, the two countries filed a case before the ITLOS and demanded the Tribunal to prescribe provisional measures.

What matters for the purpose of this paper is that, because of the scientific uncertainty surrounding the case, Australia and New Zealand introduced an expert witness (besides the reports of the applicants' own scientists: Messrs. Polacheck, Preece, and Murray), Dr. John Beddington, Professor of Applied Population Biology at the Imperial College, London, to discuss the state of the stock. Much to the surprise of the legal team of Australia and New Zealand, and the Tribunal itself, Japan asked to have the expert subjected to a sort of voir dire procedure.⁴⁴ Specifically, Dr. Beddington was to be questioned by the attorneys of Japan about his qualification as an expert. In particular, the voir dire was carried out by Mr. Matthew Slater, a lawyer of the firm Cleary, Gottlieb, Steen and Hamilton.

⁴³ Sovereignty over Pulau Litigan and Pulau Sipadan (Indon./Malay.), 2001 I.C.J. (forthcoming) (Oct. 23).

⁴⁴ "Voir Dire" is French for "to speak the truth." See "Voir Dire," BLACK'S LAW DICTIONARY 1271 (abridged 7th ed. 2000) (defining voir dire as "[a] preliminary examination of a prospective juror by a judge or a lawyer to decide whether the prospect is qualified and suitable to serve on a jury" or "[a] preliminary examination to test the competence of a witness or evidence").

The stated purpose was verifying Dr. Beddington's "credibility and capability . . . to offer specialised expertise on matters relevant to the case."⁴⁵ In reality, much of the voir dire examination was a debate between Mr. Slater, Prof. James Crawford, one of the counsels for Australia, and the President of the Tribunal, under whose control the examination took place,⁴⁶ over what ground the voir dire could cover and what should have been left to the successive cross-examination phase.

This voir dire incident is perplexing for a number of reasons. First, examination on the voir dire of experts is extremely unusual in international judicial fora. The only other known instance of preliminary examination of an expert witness to determine competence and independence dates back to the *South West Africa* cases, litigated in the 1960s before the ICJ.⁴⁷ Much as in that case, in the *Southern Bluefin Tuna* case, too, the President of the court was strict in limiting the examination to the witness's expertise, and not to allow it to extend to the witness's views on the matter.⁴⁸ Second, the parties to a case before judicial bodies like the ICJ or ITLOS are sovereign states, not private parties. Because of this patent difference, as countries can choose to be represented by anyone of their choice,⁴⁹ whether that person is an attorney at law admitted to the practice or not, they can also seek the advice and witness from qualified persons of their choice. It is then for the Tribunal to hear what the witness has to say during the examination and cross-examination and decide what weight should be given to the testimony. Finally, from a practical point of view, it is difficult to understand what the voir dire could add to the substance of the case that could not be ascertained during the examination and cross-examination phase.

This kind of episode is typical of American litigation strategies, and voir dire is largely unknown, at least under this specific label and as a specific incident of procedure, around the world (including Japan). At least in this

⁴⁵ *Southern Bluefin Tuna Cases* (N.Z. v. Japan; Austl. v. Japan), 1999 International Tribunal on the Law of the Sea 35 (Aug. 18).

⁴⁶ International Tribunal of the Law of the Sea Rules, Rule 80, available at http://www.itlos.org/documents_publications/documents/rules_en.doc (last visited Sept. 25, 2003).

⁴⁷ See *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1949 I.C.J. Pleadings (X South West Africa) 340; see also SHABTAI ROSENNE, *THE LAW AND THE PRACTICE OF THE INTERNATIONAL COURT* (1920–1996) 1358 (3rd ed. 1997) (reporting the incident).

⁴⁸ *Southern Bluefin Tuna Cases* (N.Z. v. Japan; Austl. v. Japan), 1999 International Tribunal on the Law of the Sea 1 (Aug. 18); *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1950 I.C.J. 135 (July 11).

⁴⁹ On the issue of representation before international judicial bodies, see *infra* Part IV.A.

specific instance of adversarial legalism, there were clear American fingerprints all over the crime scene.

III. THE OPENING OF WTO DISPUTE SETTLEMENT PROCEDURE TO AMICI CURIAE AND PRIVATE LAWYERS

The “American way of law” is not only about over-litigation and crafty lawyers; it is also about openness, participation, and access to justice. There are two aspects of this general issue that I would like to address, namely that of amici curiae and that of private lawyers’ participation in interstate litigation. I will focus on the World Trade Organization (WTO) because, while formally the dispute settlement procedure of the WTO is open only to States (besides the European Community) and litigation takes place States, in reality, States are often only proxies for dueling private commercial enterprises vying for shares of world markets. In this context, issues of greater participation of non-state entities are understandably subjects of intense debate.

A. *The “Amicus Curiae” Debate*⁵⁰

An amicus curiae (“friend of the court”) can be described as a bystander who, without a direct interest in the litigation, on his own initiative brings to the attention of the court matters of fact or law within his knowledge which are in doubt or that might otherwise escape the court’s attention.⁵¹ The amicus might step forward on his own initiative, or he might be requested by the court to present legal arguments which are otherwise unaddressed or unrepresented by the parties. Either way, the primary role of the amicus is to assist the court. In other words, the amicus is a friend of the court, not of either party, nor of the furry little mammals which, for instance, might be the object of the dispute.

Yet, while this is the notion of amicus curiae by the book, over time a more advocacy-oriented amicus function has evolved whereby an organization or group makes submissions to the court either in support of one

⁵⁰ On amicus curiae briefs before international judicial bodies, including the WTO debate, see Christine Chinkin & Ruth MacKenzie, *Intergovernmental Organizations as “Friends of the Court,”* in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 135, 135-162 (Laurence Boisson de Chazournes et al. eds., 2002).

⁵¹ See Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT’L & COMP. L.Q. 1017, 1017 (1967); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694-95 (1963).

of the parties to the dispute, or to further its own interest, or to ensure a wide ventilation of views in what the amicus deems to be the public interest. This wider interpretation of the amicus curiae role has taken hold in the U.S., up to the point that it is formally provided for in the U.S. Supreme Court rules.⁵²

The idea of amicus curiae is, of course, not solely an American one. First, it can be found in most common law legal systems.⁵³ Second, while it is most widely used in common law jurisdictions, it is not unknown in civil law systems (for instance, the *Avocat Général* can be considered as a form of institutionalized friend of the court). But, in the United States, the idea of the amicus as an advocacy-oriented institution has become predominant, and in this specific connotation, it has recently become the subject of intense debate in the WTO.⁵⁴

On the one hand, there are developing countries, which are concerned about the constantly increasing judicialization of the WTO dispute settlement procedures and the possible loss of control of the procedures by the Dispute Settlement Body (DSB), where they have the majority of seats. To them, opening the doors of the WTO to civil society is tantamount to letting in a motley collection of environmental and human rights NGOs, and even industrial lobbying groups, all of them based in the North. Each of these has its own agenda, which, despite claims to the contrary, rarely reflects the interests of developing countries, and has human and financial resources in many cases far superior to those that any given developing country could field in litigation. On the other hand, there are developed countries—but in reality mainly the United States—which advocate for less diplomacy and greater legalism in WTO dispute settlement, and opening to civil society.

⁵² SUP. CT. R. 37.

⁵³ There is a large body of literature addressing the advantages and disadvantages of amicus intervention and its potential implications in common law jurisdictions. See generally Bernard M. Dickens, *A Canadian Development: Non-Party Intervention*, 40 MOD. L. REV. 666 (1977); Susan Kenny, Note, *Interveners and Amici Curiae in the High Court*, 20 ADEL. L. REV. 159 (1998); Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605 (1999); Rosemary Owens, *Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy*, 20 ADEL. L. REV. 193 (1998); Loretta Re, *The Amicus Curiae Brief: Access to the Courts for Public Interest Associations*, 14 MELB. U. L. REV. 522 (1984); David Scriven & Paul Muldoon, *Intervention as Friend of the Court: Rule 13 of the Ontario Rule of Civil Procedure*, 6 ADVOC. Q. 448 (1986).

⁵⁴ See WTO, Minutes of the Meeting of the General Council Held on 22 November 2000, WT/GC/M/60 (Jan. 23, 2001); see also Chinkin, *supra* note 50, at 149–53; Gabrielle Marceau & Matthew Stillwell, *Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies*, 4 J. INT'L ECON. L. 155 (2001).

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As there are no provisions in the basic instrument of the WTO dispute settlement machinery—the Dispute Settlement Understanding (DSU)—explicitly allowing panels or the Appellate Body to receive amicus curiae briefs, eventually panels and the Appellate Body adopted an incremental strategy, inching forward the goal of opening the doors to civil society, but not without being met with fierce, and, so far, decisive resistance by developing countries.

The issue first arose before a WTO dispute settlement panel in the *Shrimp-Turtle* case.⁵⁵ In short, the case was brought against the United States by a number of developing countries which objected to U.S. restrictions on the import of shrimp that could not be certified as fished in a turtle-friendly manner (turtles get caught in large numbers in the nets used to catch shrimp and drown). A number of environmental NGOs, several of which are U.S. based, sought to have their views submitted.⁵⁶ At first, the panel found that under the DSU, it had no authority to accept unsolicited amicus briefs. The panel ruling was challenged by the United States. Before the Appellate Body, the U.S. delegation pushed hard to have these briefs considered. Some were even attached to the U.S. submission. Eventually, the Appellate Body found that Articles 12 and 13 of the DSU do give a panel authority “to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.”⁵⁷ Indeed, it found that this authority was necessary to enable the panel to discharge its duty under Article 11 of the DSU to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”⁵⁸ The Appellate Body confirmed that a panel could seek information and technical advice from any individual or body, or from any relevant source, and that there was no prohibition on accepting non-requested information.⁵⁹

⁵⁵ WTO, Report of the Appellate Body, *United States—Importation of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (May 15, 1998).

⁵⁶ These include the World Wide Fund for Nature, the Earth Island Institute, the Humane Society of the United States, and the Sierra Club, the Center for International Environmental Law, the Center for Marine Conservation, the Environment Foundation Limited, the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Accion Ecologica, and Sobrevivencia.

⁵⁷ WTO, Report of the Appellate Body, *United States—Importation of Certain Shrimp and Shrimp Products*, *supra* note 55, para. 106.

⁵⁸ *Id.*

⁵⁹ *Id.* at paras. 101–08.

The second step in the amici debate is the *Carbon Steel* case,⁶⁰ brought against the United States by the European Community (EC). In this case, unsolicited amicus briefs were submitted to the Appellate Body by two U.S. industry lobbies (The American Iron and Steel Institute and The Specialty Steel Industry of North America). The EC contested this, arguing that while amicus briefs from NGOs could be received by panels in terms of Article 13 as set out by the *Shrimp-Turtle* case, Article 13 only enabled receiving factual information and technical advice, and not legal arguments or interpretations from non-members. Eventually, the Appellate Body noted that while nothing in the DSU or Working Procedures provided for it to accept and consider submissions from sources other than parties and third parties in the appeal (i.e., WTO Members), there was also nothing in the governing rules which explicitly prohibited the acceptance and consideration of such briefs.⁶¹ However, the Appellate Body emphasized that individuals and organizations which are not members of the WTO have no legal right to make submissions or to be heard.⁶² Be that as it may, in the end, the Appellate Body stated that it had not found it necessary to take into account the two amicus briefs it had received,⁶³ thus momentarily postponing the wrath of developing countries, which, by now, were paying close attention to these developments.

Although in the aftermath of the *Carbon Steel* case the DSB started debating aloud the issues raised by opening the procedure to civil society, albeit only via amici curiae, it still fell short of behesting the Appellate Body to desist. It did not take long before another case arose that could give the Appellate Body the chance to test how far it could go. A highly visible dispute between France and Canada over a French ban on asbestos, a cancer causing material, had been ruled in favor of France at the panel level. Yet the panel had reached such a conclusion by way of a reasoning that raised the concern of environmental NGOs, as they believed that it might send a signal to regulators that distinctions between safe and poisonous products might raise a WTO dispute, freezing their efforts to make laws to protect human health and the environment.

⁶⁰ WTO, Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (May 10, 2000).

⁶¹ *Id.* at para. 39.

⁶² *Id.* at para. 41.

⁶³ *Id.* at para. 42.

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Canada filed an appeal with the WTO Appellate Body.⁶⁴ Considering the fact that the case had come under the spotlight of environmental NGOs, and in anticipation of the likelihood of a number of amicus submissions, the Appellate Body, pursuant to Article 16(1) of its Working Procedures, adopted an additional procedure setting out guidelines for applications to submit an amicus briefs to it.⁶⁵ Eventually, seventeen NGOs, including Greenpeace, World Wide Fund for Nature, Ban Asbestos Network, International Ban Asbestos Secretariat, the Foundation for International Environmental Law and Development, and the Center for International Environmental Law, submitted briefs.

This *démarche* prompted a huge controversy among WTO Members, with the United States basically being alone to defend the Appellate Body actions, and after a special debate, the Chair of the WTO General Council apparently advised the Appellate Body to proceed with “extreme caution” on the issue of amicus briefs.⁶⁶ Caught between the hammer of environmental NGOs and the anvil of the DSB, the Appellate Body extricated itself from the situation not by admitting that it had actually overstepped its powers, but, more shrewdly, by rejecting all applications to submit amicus briefs on the basis that they failed to comply sufficiently with all the requirements set forth in the Additional Procedure.⁶⁷ There is no need to say that applicants were not informed as to the ways in which they failed to meet the requirements.

B. *Opening to Private Lawyers in the WTO*

While, in the case of amici curiae, the United States is pushing for reform and developing countries are resisting it, on the issue of participation

⁶⁴ WTO, Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

⁶⁵ WTO, Communications of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review*, WT/DS135/9 (Nov. 8, 2000).

⁶⁶ Matthew Stillwell, *Amicus Brief Storm Highlights WTO's Unease with External Transparency*, BRIDGES, Nov.–Dec. 2000, at 1.

⁶⁷ WTO, Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 65, at para. 56.

in WTO proceedings of private lawyers, positions are reversed.⁶⁸ Developing countries argue that because of their lack of human resources necessary to skillfully handle cases, they should be allowed to retain lawyers on the private market. Conversely, developed countries, and the United States in particular, fret about issues of confidentiality of proceedings, possible interference with diplomatic and political decisionmaking by governments, and the opening of floodgates to private interests, where big multinational companies might pressure state representatives to include their own lawyers representing their own interests in the team litigating the case. Yet, on this sensitive issue, developing countries have a powerful ally: the Washington-based "international trade bar."

For more than forty-five years, under the General Agreement on Tariffs and Trade (GATT) system, private counsels were not permitted to represent member governments in dispute settlement proceedings.⁶⁹ When the WTO replaced the GATT, at least during the first years, the same practice prevailed. The absence of private lawyers among the agents and counsels was considered a testimony to the diplomatic roots of the GATT system: a dispute settlement mechanism for States and open only to States and their representatives.

The issue of whether lawyers who are not full-time governmental officials of the litigating country could be allowed to appear before WTO dispute settlement organs (while it had already been long practice to consult with or receive advice from private lawyers outside panel proceedings), was raised first in 1997 in the so-called *Bananas* case.⁷⁰ The United States, as well as Ecuador, Guatemala, Honduras, and Mexico had brought the case against the EC regime for import, sale, and distribution of bananas. During the case, Saint Lucia, which is a major banana producer, intervened as third party. In the proceedings before the panel, the complaining countries objected to the presence of Mr. Christopher Parlin, a private lawyer of the Washington D.C. law firm Winthrop, Stimson, Putnam & Roberts, who had been hired by Saint Lucia to represent it, on the ground that it was long-standing practice that countries be represented exclusively by government

⁶⁸ On this issue, see various articles in the *Journal of International Economic Law.*, 2 J. INT'L ECON. L. 155-84 (1999); see also Rutsel Silvestre J. Martha, *Representation of Parties in World Trade Disputes*, 31 J. WORLD TRADE 83 (1997).

⁶⁹ Gabrielle Marceau, *NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison*, 31 J. WORLD TRADE 25, 63 (1997).

⁷⁰ WTO, Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

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lawyers or government trade experts.⁷¹ The panel upheld the objection. It justified its decision by invoking GATT and WTO practice and its own working procedures, and the fact that that would have been unfair towards those parties that retained private lawyers to prepare the case, but who did not appear before the panel. Moreover, and more interestingly, it reached that conclusion because:

[P]rivate lawyers may not be subject to disciplinary rules such as those applied to member governments, their presence in panel meetings could give rise to concerns about breaches of confidentiality; [because] . . . it could . . . entail disproportionately large financial burdens for . . . smaller members; [and] the presence of private lawyers would change the intergovernmental character of WTO dispute settlement proceedings.⁷²

In the same case, the Appellate Body took a different course.⁷³ In particular, it did not find anything “in the [WTO Agreement], the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO member from determining the composition of its delegation in Appellate Body proceedings.”⁷⁴ The Appellate Body found that it is for each WTO member to decide who should represent it as a member of its delegation in an oral hearing of the Appellate Body.⁷⁵

⁷¹ *Id.*

⁷² *Id.* at para. 7.11.

⁷³ Legally speaking, the Appellate Body did not overturn the decision of the Panel. Indeed, being a third-party in the Banana case, Saint Lucia could not appeal. However, the issue of private counsel representation was raised anew by Saint Lucia before the Appellate Body, when it asked to be represented by a private counsel. *Id.*

⁷⁴ *Id.* at para. 10.

⁷⁵ See *United Nations Draft Articles on the Representation of States in their Relations with International Organizations*, U.N. Doc. A/CONF.67/4 (1975) (providing that “the freedom of choice by the sending State of the members of the mission is a principle basic to the effective performance of the functions of the mission”); see also INTERNATIONAL LAW COMMISSION, *THE WORK OF THE INTERNATIONAL LAW COMMISSION 70–71* (5th ed. 1996). The Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of March 13, 1975, does not place any major limitations on States’ missions but for the size of the mission, which should be reasonable and proportionate, and for the case in which members of the mission are nationals of or permanent residents of the host state. Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, Mar. 14, 1975, U.N. Doc. A/CONF.67/16 (1975).

Although the Appellate Body's decision was limited to Saint Lucia's specific request regarding representation in the specific case, and thus does not have value as legal precedent, the reasoning that supports this decision applies just as easily to panels as to the Appellate Body's future proceedings. Since then, appearances of private lawyers have become a regular feature in WTO litigation. Still, the issue of representation of countries in proceedings before WTO dispute settlement bodies remains a complex one. Indeed, developing countries might not necessarily, or not always, desire private counsel representation. For instance, in the *Gasoline* case, Latin American countries declined to bring their private counsel into the room when invited to do so by the Appellate Body.⁷⁶

As indicated previously, the opening of the WTO to private lawyers has been the result of an alliance-of-convenience between developing countries, which have the majority of seats in the DSB, and the "international trade bar." Needless to say, many law firms and lawyers saw the opening of the WTO dispute settlement procedure as a new El Dorado. It should be no surprise that in 1998 the House of Delegates of the American Bar Association (ABA) accepted a resolution recommended by the ABA Section on International Law and Practice encouraging the U.S. government to change its negative stance on the matter.⁷⁷

American law firms and lawyers are the first, although not the only ones, to benefit from this. Washington, D.C. has the highest concentration of attorneys specialized on trade and WTO issues, and certainly more than the direct competitor, which is Geneva, where the WTO is based.⁷⁸ Many former employees of the Office of the U.S. Trade Representative have developed Washington-based WTO practices. Not surprisingly, it has also probably the highest concentration of attorneys specialized on anti-dumping. Several of these D.C. law firms have started opening offices in Geneva to tap into this new source of business.

⁷⁶ WTO Report of the Appellate Body, *United States—Standard for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 6, 1996), 35 I.L.M. 603 (1996); see also Jessica Pearlman, *Participation by Private Counsel in WTO Dispute Settlement Proceedings*, 30 LAW & POL'Y INT'L BUS. 399, 410 (1999).

⁷⁷ American Bar Association, House of Delegates, *Report of Action Taken at 1998 Midyear Meeting*, No. 118a (Feb. 2, 1998), available at <http://www.abanet.org/leadership/98midhod.html> (last visited Sept. 25, 2003); see also Pearlman, *supra* note 76, at 405.

⁷⁸ Arthur E. Appleton, *Private Counsel and the WTO*, Online Paper (Feb. 2000), at <http://www.acici.org/aitic/documents/diverse/download/2000-04-en.doc> (last visited Sept. 25, 2003).

IV. MEDIA OF AMERICANIZATION

These were just some anecdotes, more or less involving American actors or practices. Whether these amount to evidence of a creeping Americanization of international litigation is hard to tell, and perhaps it is not really the point. As I stated at the beginning of this Article, the transmission of legal culture is extremely complex and resistant to reduction to a simplistic producer/receiver process. What is more interesting is rather the medium through which American legal culture, practice, style, strategy, views, values, and idiosyncrasies might spread.

Admittedly, it is difficult to pinpoint a few elements peculiar to the international legal field amongst the multiple expressions of American hegemony. Again, many traits are not necessarily American as such, but are rather Anglo-American or features common to most common law countries. This forewarning is necessary to introduce two possible vehicles of Americanization: the rise of the American law firm model in public international litigation, and the related predominance of American and British law firms in this area; and English as the predominant language of international litigation.

A. The Rise of the American Law Firm Model⁷⁹

International litigation, once the exclusive domain of diplomats, government officials, and law professors, is increasingly attracting private practitioners and their law firms. This is the result of the fact that the proliferation of international judicial bodies, and their increasing use, finally generates a sufficient workload to justify professional specialization in this very selective area of litigation. In the realm of law firms with an international or transnational practice, it is widely acknowledged that in the past few decades the American model (but not necessarily American law firms as such) has won the struggle for supremacy.

As in many other fields, the typical American law firm is big, multi-purpose, commercially oriented, and ruthless in the hunt for cases. This was the model created by the pioneer Paul Cravath in the late nineteenth century, which has eventually come to dominate the American legal scene and, from there, the world. The law firm à-la Cravath is both the emblem and the engine of the American legal field.⁸⁰ Unlike its European counterparts, it concentrates expertise in many fields, offers advisory services that extend

⁷⁹ See generally Trubek, *supra* note 7.

⁸⁰ *Id.* at 423.

well beyond narrow legal advice, litigation, and preparation of documents, and operates on a regional or national scale. American corporate lawyering emphasizes strategic planning and advice to clients, and has the capacity to operate in legal and quasi-legal arenas. In other words, American law firms provide full services, including the preparation of legislation and administrative regulations, as well as lobbying and other forms of non-judicial advocacy.

One of the possible explanations of the eventual rise of the American-style law firm in the global arena, and one that uses Darwinian arguments, is that American law firms have been selected by the vicious struggle for national predominance.⁸¹ Variations in laws from state to state within the United States have forced large firms to develop the capacity to analyze and compare different and competing legal orders, and develop strategies through which their clients can benefit from the legal diversity and complexity inherent in the federal system of law. These skills make the difference once U.S. law firms have started exporting their practices abroad.

In contrast, before the rise of the American model and the heightened political and economic integration of the European continent, the average European law firm was small or even a solo enterprise. The idea of the lawyer as a general advisor, or the law firm as a conglomerate of specialties, was slow to develop. European law firms were not used to lobby and confabulate with political power. The European model did not place much stress on pro bono activities or public interest law either.

There is also another difference in the legal culture that matters, which is the transformation of the identity and status of the typical lawyer appearing before a court of law.⁸² Americans tend to give greater status to practitioners over higher academics. In the United States, besides a few judges of the highest courts, the corporate lawyer is at the peak of the legal profession. Conversely, in the case of Europeans it used to be the reverse. Historically, the legal systems of continental Europe rested their legitimacy on the authority of legal science. Legal authority was derived from codes which were scientifically constructed, and embodied in authoritative doctrine maintained by those at the top of the academic pyramid. The division of labor and status between those who practiced the law and those who made and interpreted it was clearly defined. Practitioners who had regular contact with the realities of everyday legal life were seen as inferior to leading academics.⁸³

⁸¹ *Id.* at 423-24.

⁸² *Id.* at 421-23.

⁸³ *Id.* at 421-22.

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The Americanization of international litigation follows a couple of decades after the revolution brought by American law firms in Europe and the Americanization of European law firms. Nowadays, the field is dominated by a handful of large American⁸⁴ and British law firms,⁸⁵ whatever national labels in such an intricate and transnational world might mean. A few small law firms, like the London-based Matrix Chambers, or the Geneva-based Lalive and Partners, or Van den Biesen, Prakken, Böhler in Amsterdam, or Wladimiroff, Waling, Schreuders in The Hague, have found small niches on their own. The great majority, if not the totality, of private lawyers appearing in international judicial fora are either attorneys of these law firms, or, as traditionally, are professors of international law. Yet, the important difference, as contrasted to the past, is that more and more often academics do not appear in their own personal capacity, but as counsels or partners of these private law firms where they practice besides their ordinary teaching duties (something which has always been done by most law professors, but that hitherto had not been done by professors of public international law). Undoubtedly, the stateless community of public international lawyers is cosmopolitan and that perfectly suits Americanism.

B. Language

A second medium injecting American legal culture in international litigation is the predominance of English as working language of international courts and tribunals. This issue might seem trivial, or self-explanatory, which accounts for its usual oversight, but it is not so to those like myself who have not been reared reading Shakespeare or Molière.

There is no need to dwell upon the rise of English to modern *lingua franca* (after Greek, Latin, and French, in this order, have carried out that function) and the role this has played in fostering the commercial and cultural Anglo-American hegemony. In the field of international litigation, it suffices to say that it plays a role as well and very likely a decisive one. Indeed, to effectively plead before an international bench one has to be not only fluent at least in one of the official working languages, but command must be of such a level as to be able to rival that of colleagues who have been born speaking that language and have spent their whole life practicing law in it. As Shabtai Rosenne and Keith Highet—two old hands of the ICJ and

⁸⁴ *E.g.*, Cleary, Gottlieb, Steen & Hamilton; Debevoise & Plimpton; LeBoeuf, Lamb, Greene & MacRae; White & Case; Baker & McKenzie.

⁸⁵ *E.g.*, Eversheds; Freshfields, Bruckhaus, Deringer; Kendall Freeman; Herbert Smith; Clifford Chance.

amongst the selected few that can claim to be part of the ICJ "invisible bar,"⁸⁶—wrote, the importance of oral proceedings before the ICJ cannot be overestimated, as effective oral pleading can make the difference between defeat or victory.⁸⁷

English is the official working language of the ICJ (together with French)⁸⁸ and the ITLOS (again, together with French).⁸⁹ At the WTO, English, French, and Spanish are official languages, and in theory the parties may use any of the three during proceedings, but, in reality, most proceedings are conducted in English only.⁹⁰ It should be no surprise that the overwhelming majority of lawyers appearing before these bodies are of either English or French (less so) mother tongue.

An extrapolation of some data contained in a very interesting and recent article revealingly entitled "How International is International Law?" will illustrate the point. Kurt Gaubatz and Matthew MacArthur carefully tabulated fifty years of practice (1948-1998) before the ICJ.⁹¹ In particular, they examined every contentious case that included oral proceedings regarding preliminary objections, interim measures, permission to intervene, or merits, and compiled data on the lawyers who participated in each sitting of the oral proceedings of those cases. The data they collected includes information on 47 cases, involving 50 countries and 593 legal teams, argued over the course of approximately 1,000 public sittings.⁹² Excluding national

⁸⁶ As of 2000, only fourteen lawyers had pleaded in three cases or more. Of these, six were British, four French, and the other four were respectively an American, an Australian, a Belgian and a Uruguayan. Alain Pellet, *The Role of the International Lawyer in International Litigation*, in *THE INTERNATIONAL LAWYER AS PRACTITIONER* 147, 148-49 (Chanke Wickremasinghe ed., 2000).

⁸⁷ SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 129 (5th ed.1995); Keith Highet, Book Review, 86 *AM. J. INT'L L.* 400, 402 (1992) (reviewing TERRY D. GILL, *LITIGATION STRATEGY AT THE INTERNATIONAL COURT: A CASE STUDY OF THE NICARAGUA V. UNITED STATES DISPUTE* (1989)).

⁸⁸ I.C.J. Statute, art. 39.1, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (last visited Sept. 25, 2003).

⁸⁹ International Tribunal of the Law of the Sea Rules, art. 43, available at http://www.itlos.org/documents_publications/documents/rules_en.doc (last visited Sept. 25, 2003).

⁹⁰ PHILLIPPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 78 (1999).

⁹¹ Kurt Taylor Gaubatz & Matthew MacArthur, *How International is 'International' Law?*, 22 *MICH. J. INT'L L.* 239 (2001).

⁹² *Id.* at 250-51.

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lawyers,⁹³ when non-national lawyers are hired, 80% of the time⁹⁴ they come from just four countries, two (one at least partly) Francophone and two Anglophone.⁹⁵ Other countries, which are neither Francophone nor Anglophone, and have provided lawyers pleading orally before the court are Italy, Spain, Germany, Netherlands, Portugal, Japan, Denmark, Uruguay, Czechoslovakia, India, and Israel (this excludes Switzerland, Canada, Australia, Liberia, and Madagascar where French is also an official language). All these countries together have provided only forty lawyers, pleading fifty-two times over fifty years of the life of the ICJ.⁹⁶ This does not take into account two further facts. First, those lawyers who do plead in English or French without it being their mother tongue are very likely to have actually had French or English as their mother tongue nonetheless. Second, to be able to plead effectively in English or French without it being one's mother tongue requires long years of specific study. That means that those who do plead in English or French without being mother tongue, are very likely to have spent a long time studying in the United States, the United Kingdom, or France, thus becoming spontaneous vehicles of the legal culture of those countries.

Similar detailed and comprehensive data for the ITLOS and WTO is not available, but figures are not likely to be much different from those of the ICJ. Actually, representation by non-nationals is likely to be even more tilted in favor of Anglophones and Francophones in those two fora. Indeed, even a cursory look at the eight cases where oral pleadings have been made to date before the ITLOS,⁹⁷ it is evident that French, British, Australian, New Zealand, and American lawyers have pleaded the most as non-nationals. In the case of the WTO, as it was previously noted, most of private lawyers representing countries in WTO proceedings come from Washington D.C. law firms.

Finally, make no mistake about it, while from this picture it seems that, after all, by the strenuous defense of their language, at least before the ICJ,

⁹³ That is, lawyers which have the same nationality of the party they represent.

⁹⁴ Calculated over the total number of appearances (265) by lawyers in oral proceedings.

⁹⁵ France (with 35 lawyers, appearing 78 times), United Kingdom (35 lawyers and 74 times), the United States (27 lawyers, 48 times), and Belgium (9 lawyers for 22 appearances).

⁹⁶ *Id.* at 258-59, tbl. 5.

⁹⁷ In the "*Chaisiri Reefer 2*" Case (*Pan. v. Yemen*), Prompt Release, and the Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile/Eur. Community*), no oral pleadings have been made.

the French are holding out as the last bastion of civil law in a sea of common lawyers, in reality the battle has been lost when increasingly the younger generations select English speaking countries to pursue legal studies abroad. The future speaks English, *ça va sans dire*, and common law and American culture will increasingly inform international litigation.

V. CONCLUSIONS

The World Values Survey, a research project of the University of Michigan's Institute for Social Research about the attitudes, values, and beliefs of a large number of societies all over the world over the past twenty years, seems to indicate that while expectedly economic development brings along pervasive cultural changes, it still does not produce a uniform global culture.⁹⁸ According to the survey, industrializing societies do not seem to show signs of becoming like the United States. In other words, it seems that the world talks the American talk when convenient, but, in the end, it does not adopt American values.⁹⁹

Writing about the "Americanization" of international commercial arbitration, Reed and Sutcliffe concluded that "American practices are now integrated into the historically Western European playing field of international commercial arbitration [and that] . . . those practices are not out of balance with civil law practices." In sum, "it is more accurate, at the opening of the 21st century, to describe international arbitration as increasingly 'homogenized' rather than 'Americanized.'"¹⁰⁰

Not being American myself, I tend to come to less conciliatory conclusions, but I am still a far cry from the opposite extreme of "Legal Imperialism."¹⁰¹ Undoubtedly, contemporary public international law shows signs of the contamination by American legal consciousness in its doctrinal structures, institutions, and discourse. Due to the economic, political, and military dominance it enjoys (although it is far more limited than most people assume), it is inevitable that the United States should have also started making its weight felt in the legal field. Had it not, it would have been a very

⁹⁸ University of Michigan Institute for Social Research, *World Values Survey*, at <http://www.worldvaluessurvey.org/library/index.html> (last visited on Sept. 25, 2003).

⁹⁹ Ronald Inglehart & Wayne Baker, *Modernization's Challenge to Traditional Values: Who's Afraid of Ronald McDonald?*, *THE FUTURIST*, Mar.-Apr. 2001, at 16.

¹⁰⁰ Reed & Sutcliffe, *supra* note 12, at 37.

¹⁰¹ The expression is borrowed from the seminal book by James Gardner. See James Gardner, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1981); see also generally Mattei, *supra* note 6.

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strange anomaly, indeed. I suspect that the U.S. influence is more felt in the domestic legal sphere and in international trade law than in public international law, but this is only a conjecture.

This Article has presented a few recent anecdotes to illustrate instances of possible Americanization of international litigation. In the WTO, U.S. influence may explain why adjudication appears to be the dominate means of settling trade disputes, which is ultimately developed at the expense of negotiation. Surely the United States (meaning both the U.S. government or interest of private American actors) is the force behind the drive to opening the WTO dispute settlement procedure to amici curiae and private lawyers. The ICJ is as busy as ever, and procedural wrangling and over-litigation are becoming significant. Whether this can be attributed to American influence is questionable. But surely, it is a world where American and British law firms dominate the scene, and where English is increasingly the only language spoken. Obviously, language is only the external appearance of thought.

In other words, evidence available is simply not enough to level charges of Americanization. However, to be able to reach sound conclusions on whether the American legal culture has an impact on international litigation, there is the need for a comprehensive, systematic and cross-disciplined study, which enlists, besides scholars of public international law, comparative lawyers and legal sociologists. Clearly, this endeavor is beyond the scope of these few observations. Whether more U.S. influence in the field of international litigation is, in the end, a positive or negative development, is open to dispute.