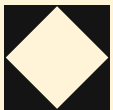


Astrid Wiik

Amicus Curiae before International Courts and Tribunals



Nomos

Successful Dispute Resolution

edited by

Professor Dr. Dres. h.c. Burkhard Hess,
Max Planck Institute Luxembourg for International,
European and Regulatory Procedural Law, Luxembourg

em. Prof. Dr. Dr. h.c. Professor Rüdiger Wolfrum,
Max Planck Foundation for International Peace and the
Rule of Law, Heidelberg

Professor Dr. Dr. h.c. Thomas Pfeiffer, Institute for
Comparative Law, Conflict of Laws and International
Business Law, Heidelberg University

Volume 4

Astrid Wiik

Amicus Curiae before
International Courts and Tribunals



HART
PUBLISHING



Nomos

© **Coverpicture:**

left: Max Planck Institut Heidelberg, © Carola Nerbel, Architekturfotografie in Heidelberg
centre: Institut für internationales Privat- und Wirtschaftsrecht der Universität Heidelberg, © Jens Benninghofen
right: Max Planck Institut Luxemburg, © Christian Aschman

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Heidelberg, Univ., Diss., 2016

ISBN 978-3-8487-3240-1 (Print)
978-3-8452-7592-5 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-0891-2

Library of Congress Cataloging-in-Publication Data

Wiik, Astrid
Amicus Curiae before International Courts and Tribunals
Astrid Wiik
734 p.
Includes bibliographic references.

ISBN 978-1-5099-0891-2 (hardcover Hart)

1st Edition 2018

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2018. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

To my family

Preface

At first sight, one might expect that all legal systems are firmly based on fundamental concepts, implemented by settled institutions. However, in actuality, these preconditions are usually not met as the law is part of the societal, economic and political reality of a broader environment, reflective of the status of and changes in human society in both history and modern times. This situation is especially true for public international law. Here, one fundamental issue concerns the status of actors in the international legal order: are only states and international organizations subjects of modern public international law? Or do we accept that other actors, like non-governmental organizations, multinational enterprises and individuals, enter the scene to vindicate their rights (and individual protections) at the international level? Much has been written about this subject and there is still much scholarship needed to assess the great changes in, and affecting, the international legal order at the beginning of the 21st century.

The uncertainties of the current situation are also reflected in the practices of international courts and tribunals. The proliferation of these courts and tribunals over the last decades – not only with regard to the number of institutions but also in relation to the ever-growing corpus of case-law and practice – has been accompanied by a procedural phenomenon called “amicus curiae”. Although the concept as such is largely unsettled, it is often understood as a procedural vehicle for non-parties, often for non-state actors without legal standing, to influence the decision-making processes of international courts and tribunals by submitting written and – occasionally – even oral statements to those courts. The admissibility of these statements is being disputed, but there is a growing tendency of permitting these interventions, at least in investment arbitration and before human rights bodies. Much attention has been paid to this development which, at a procedural level, reflects the unsettled status of actors in modern public international law. At the same time, the expansion of the amicus curiae corresponds to the pursuit of more transparency in international dispute settlement and reflects the search for more legitimacy in international dispute resolution processes as a whole.

The PhD thesis of Astrid Wiik contributes to this ongoing debate in a remarkable way: She bases her analysis on a broad empirical research by

analysing the case law and the practice of several international courts (the ICJ, the ITLOS, the ECtHR) and dispute settlement bodies such as the WTO Appellate Body and investment arbitration. Her research question does not only ask about the different variations of the *amicus curiae*; Astrid Wiik also wants to know to what extent *amici curiae* really influence international dispute settlement processes and whether the expectation that their involvement in dispute resolution would improve the outcomes in a positive way is really justified. It does not come as a surprise that she comes up with a much more nuanced result than other studies in this field. Indeed, this PhD is the first on the *amicus curiae* phenomenon which is based on a comprehensive review of the practice of international courts and tribunals.

This PhD was written in the framework of the International Max Planck Research School on Successful Dispute Resolution. This Doctoral School was originally organized by the Institute for Comparative Law, and Business Law of the University of Heidelberg and the Max Planck Institute Heidelberg for Comparative Public Law and International Law. In the meantime, the Max Planck Institute Luxembourg for European, International and Regulatory Procedural Law joined the School, as did the Law Faculty of the University of Luxembourg. When she worked on her PhD, Astrid Wiik was strongly involved in the debates of the students and their supervisors; the School offered her the opportunity to spend some time at the Permanent Court of Arbitration in The Hague where she obtained many insights into the “real” world of international dispute settlement. Her study profited considerably from an academic environment which permitted her to engage in comparative research at different research centres in Europe (including Heidelberg, Cambridge and The Hague).

After several years of steady work, this PhD project has been successfully completed. This is a great moment, not only for the candidate, but also for the supervisor who has accompanied the author throughout the process. In the case of Astrid Wiik, it was my pleasure to see her research expanding and to share the upcoming results with Rüdiger Wolfrum as a co-supervisor. And I’m also glad to see that Astrid Wiik has started an academic career at Heidelberg University.

Luxembourg, 8 February 2018

Burkhard Hess

Acknowledgments

This book is the outcome of a (long) journey that started at Heidelberg University in 2009, with a keen interest in the role and functioning of international courts and tribunals in the 21st century in view of the changing landscape of actors in the international arena. The concept of *amicus curiae* was repeatedly mentioned in literature as a tool to improve international dispute settlement. However, case law from inter-state courts and the WTO Appellate Body indicated a strong suspicion of this instrument. The lack of a definition of the instrument before any of the international courts and tribunals reviewed when I first embarked on this topic did not contribute to its reputation. Accordingly, the study was based on two aims: first, to grasp the reality of *amicus curiae* before international courts and tribunals. Second, to contrast this reality – including the effectiveness of the instrument – with the expectations attributed to it. The dissertation was written between 2009 and 2014. For the publication, new developments until November 2016 were included. During the years of writing the dissertation and preparing the book, *amicus curiae* practice has continued to expand and solidify, and definitions of the concept before some courts and an increasing number of codifications were achieved. It is the hope that this book will make a humble contribution to the ongoing debates and codification efforts surrounding *amicus curiae*.

This endeavor would not have been possible without the continuous support of my supervisor Professor Burkhard Hess, to whom I am most indebted for his patient guidance and precious advice throughout the writing of the Ph.D. and until its publication. I am also deeply grateful to Professor Rüdiger Wolfrum for his highly valuable feedback on the Ph.D. (and general matters of academia). Without their directive encouragement and advice, I would not have embraced the excitement and uncertainties of an academic career. I would also like to thank Dr. Karin Oellers-Frahm for first pointing me to the topic and for sparking my interest in international dispute settlement.

Thanks to Professor Hess and Professor Wolfrum, I was accepted into the Graduate Academy on Successful Dispute Resolution and the International Max Planck Research School for Successful Dispute Resolution in International Law. Like the Institute for Comparative Law, Conflict of

Laws and International Business Law at Heidelberg University and the Max Planck Institute for Comparative Public Law and International Law, it provided an inspiring work environment in Heidelberg. I also had the pleasure to spend some time as a visiting fellow at the Lauterpacht Centre for International Law in Cambridge in the springs of 2010 and 2011, and I would like to thank its then Director Professor James Crawford and the staff and visitors at the Centre for their warm welcome. I am further indebted to my friends and former colleagues at the Permanent Court of Arbitration. The many discussions on and off topic with professors, friends and colleagues, as well as the overall vibrant research communities in Heidelberg, Cambridge, and The Hague formed a constant source of motivation and new insights into the field of international dispute settlement.

At all the mentioned places, friends and colleagues provided comments, encouragement and the requisite amount of humor and patience to make the experience worthwhile. I am particularly grateful to Natasa Mavronicola, Evgeniya Goriatcheva, Magdalena Słok-Wodkowska, Constanze von Roeder, Jara Mínguez, Naya Pessoa, Katharina Domke-Schmidt, Elisa Novic, Sonja Firl, Clemens Zick, Lisa Staben, Yanying Li, Andreas Laupp, Martin Doe, Margret Solveigardottir and Judith Ulshöfer for reading and commenting on chapters and outlines of the dissertation, for helping with IT and formatting matters, and for tea, cookies and encouragement.

I am also grateful for the generous financial support provided by the Landesstiftung Baden-Württemberg, the IMPRS-SDR and the German Academic Exchange Service DAAD, and to Nomos and Hart Publishing and the editors of the series for offering me the opportunity to publish the dissertation.

Words are insufficient to thank my extended family for the immense support and cheerleading that I have received from over the years. My parents' intellectual curiosity in this world, their humanist values and their love are key guideposts in my life, for which I am very grateful. My siblings have always been great companions, and I would like to thank them for their support and particularly Ivar for his help during the final stretch of the dissertation. I would also like to thank my Mexican family, Nora and Jorge Zertuche, and my Heidelberg family, Volker and Charlotte Soergel, for their interest in my work, their help and many happy hours and inspiring conversations. I would like to dedicate this book to them all.

Summary of Contents

Preface	7
Acknowledgments	9
Table of Abbreviations	23
Chapter § 1 Introduction	25
A. Structure	29
B. Methodology	30
C. Scope of the study	34
Part I The ‘international’ <i>amicus curiae</i>	41
Chapter § 2 Great expectations? Presumed functions and drawbacks of <i>amicus curiae</i> participation	43
A. Presumed functions of <i>amicus curiae</i>	43
B. Presumed drawbacks	64
C. Conclusion	72
Chapter § 3 An international instrument	73
A. <i>Amicus curiae</i> before national courts	74
B. Emergence and rise of <i>amicus curiae</i> before international courts and tribunals	91
C. Conclusion	121
Chapter § 4 Characteristics, status and function of <i>amicus curiae</i> before international courts	123
A. Characteristics of the international <i>amicus curiae</i>	123
B. Functions of the international <i>amicus curiae</i>	132
C. <i>Amicus curiae</i> and other forms of non-party participation	157
D. Conclusion	172

Part II Commonalities and divergences: the procedural laws of <i>amicus curiae</i> participation	175
Chapter § 5 Admission of <i>amicus curiae</i> to the proceedings	177
A. Legal bases for <i>amicus curiae</i> participation	177
B. Conditions concerning the person of <i>amicus curiae</i>	228
C. Request for leave procedures	266
D. Conclusion	314
Chapter § 6 <i>Amici curiae</i> in the proceedings	317
A. Oral and written participation	318
B. Recorded participation	332
C. Formalization of participation	334
D. Substantive requirements and the content of submissions	345
E. Submission of evidence	404
F. Access to documents	408
G. Conclusion	425
Part III The added value of the international <i>amicus curiae</i>	429
Chapter § 7 Does content matter? Substantive effectiveness of <i>amicus curiae</i> submissions	431
A. An obligation to consider?	433
B. International Court of Justice	435
C. International Tribunal for the Law of the Sea	440
D. European Court of Human Rights	443
E. Inter-American Court of Human Rights	450
F. African Court on Human and Peoples' Rights	459
G. WTO Appellate Body and panels	459
H. Investor-state arbitration	469
I. Comparative analysis	479
J. Conclusion	487

Chapter § 8	Effects on the international dispute settlement system	489
A.	Effect on the relationship between the court, the disputing parties and the member states: <i>amici curiae</i> as evidence of an assertive international judiciary?	490
B.	Public interest: <i>amicus curiae</i> as motor and evidence of an expanding judicial function?	504
C.	<i>Amicus curiae</i> as a tool to increase the legitimacy of international adjudication?	525
D.	Increased coherence? Impact on international law	535
E.	Transparency: demise of confidentiality and access to the proceedings and case documents?	538
F.	Impact on <i>locus standi</i> : <i>amicus curiae</i> as a precursor to international legal standing?	542
G.	And the drawbacks?	546
H.	Conclusion	567
Chapter § 9	Conclusion	569
A.	What is it?	569
B.	Added value of <i>amicus curiae</i> participation in international dispute settlement	571
Annex I:	Cases with <i>amicus curiae</i> involvement	575
Annex II		705
Bibliography		707

Contents

Preface	7
Acknowledgments	9
Table of Abbreviations	23
Chapter § 1 Introduction	25
A. Structure	29
B. Methodology	30
C. Scope of the study	34
Part I The ‘international’ <i>amicus curiae</i>	41
Chapter § 2 Great expectations? Presumed functions and drawbacks of <i>amicus curiae</i> participation	43
A. Presumed functions of <i>amicus curiae</i>	43
I. Broader access to information	43
II. Representation of ‘the’ public interest	47
III. Legitimacy and democratization	53
IV. Contribution to the coherence of international law	59
V. Increased transparency	62
B. Presumed drawbacks	64
I. Practical burdens	65
II. Compromising the parties’ rights	65
III. Politicization of disputes, de-legitimization and lobbyism	67
IV. Overwhelming developing countries	70

V. Unmanageable quantities of submissions	71
VI. Denaturing of the judicial function	72
C. Conclusion	72
Chapter § 3 An international instrument	73
A. <i>Amicus curiae</i> before national courts	74
I. The origins of <i>amicus curiae</i>	74
II. <i>Amicus curiae</i> before the English courts	76
III. <i>Amicus curiae</i> before the United States Federal Courts and the Supreme Court	81
IV. Internationalization: <i>amicus curiae</i> in civil law systems and in inter- and supranational legal instruments	86
V. Comparative analysis	90
B. Emergence and rise of <i>amicus curiae</i> before international courts and tribunals	91
I. International Court of Justice	91
II. International Tribunal for the Law of the Sea	100
III. European Court of Human Rights	103
IV. Inter-American Court of Human Rights	106
V. African Court on Human and Peoples' Rights	108
VI. WTO Appellate Body and panels	109
VII. Investor-state arbitration	115
C. Conclusion	121
Chapter § 4 Characteristics, status and function of <i>amicus curiae</i> before international courts	123
A. Characteristics of the international <i>amicus curiae</i>	123
I. A procedural instrument	124
II. A non-party and a non-party instrument	126
III. Transmission of information	129
IV. An interested participant	130
V. An instrument of non-state actors?	132
B. Functions of the international <i>amicus curiae</i>	132

I. Information-based <i>amicus curiae</i>	133
II. Interest-based <i>amicus curiae</i>	138
1. International Court of Justice and International Tribunal for the Law of the Sea	139
2. European Court of Human Rights	140
3. Inter-American Court of Human Rights	144
4. WTO Appellate Body and panels	146
5. Investor-state arbitration	148
6. Comparative analysis	152
III. Systemic <i>amicus curiae</i>	152
IV. Analysis	154
1. The myth of ‘the’ international <i>amicus curiae</i>	155
2. An evolving concept	156
3. Are there limits to the functions <i>amici curiae</i> may assume?	156
C. <i>Amicus curiae</i> and other forms of non-party participation	157
I. International Court of Justice and International Tribunal for the Law of the Sea	159
II. WTO Appellate Body and panels	164
III. Investor-state arbitration	168
IV. Comparative analysis	171
D. Conclusion	172
Part II Commonalities and divergences: the procedural laws of <i>amicus curiae</i> participation	175
Chapter § 5 Admission of <i>amicus curiae</i> to the proceedings	177
A. Legal bases for <i>amicus curiae</i> participation	177
I. International Court of Justice	180
II. International Tribunal for the Law of the Sea	191
III. European Court of Human Rights	195
IV. Inter-American Court of Human Rights	197
V. African Court on Human and Peoples’ Rights	200
VI. WTO Appellate Body and panels	202
1. Panels	202

2. Appellate Body	207
VII. Investor-state arbitration	213
1. Clauses in investment treaties	213
2. Clauses in institutional procedural rules	215
3. Implied powers	222
4. <i>Ad hoc</i> agreements	224
VIII. Comparative analysis	225
1. Codification and informal doctrine precedent?	226
2. Common regulatory approaches	227
B. Conditions concerning the person of <i>amicus curiae</i>	228
I. International Court of Justice	229
II. International Tribunal for the Law of the Sea	231
III. European Court of Human Rights	235
IV. Inter-American Court of Human Rights	241
V. African Court on Human and Peoples' Rights	246
VI. WTO Appellate Body and panels	247
VII. Investor-state arbitration	250
1. Legal standards	250
2. Application	253
VIII. Comparative analysis	261
C. Request for leave procedures	266
I. Formal requirements	269
1. Timing	269
2. Form and length	283
II. Substantive requirements concerning the application	284
1. International Court of Justice	284
2. European Court on Human Rights	284
3. African Court on Human and Peoples' Rights	286
4. WTO Appellate Body and panels	286
5. Investor-state arbitration	287
III. Full discretion: decision on admissibility	304
IV. Comparative analysis	312
D. Conclusion	314
Chapter § 6 <i>Amici curiae</i> in the proceedings	317
A. Oral and written participation	318

I. International Court of Justice	318
II. International Tribunal for the Law of the Sea	319
III. European Court of Human Rights	320
IV. Inter-American Court of Human Rights	323
V. African Court on Human and Peoples' Rights	325
VI. WTO Appellate Body and panels	326
VII. Investor-state arbitration	328
VIII. Comparative Analysis	330
1. Confidential and/or private nature of the dispute settlement mechanism	331
2. Regulatory reasons	332
3. Efficiency, costs and control	332
4. Personal views of judges	332
B. Recorded participation	332
C. Formalization of participation	334
I. Form of written submissions	335
1. Length	335
2. Language	336
3. Authentication	339
4. Failure to comply	342
II. Comparative analysis	343
D. Substantive requirements and the content of submissions	345
I. International Court of Justice and International Tribunal for the Law of the Sea	346
II. European Court of Human Rights	350
III. Inter-American Court of Human Rights	362
IV. African Court on Human and Peoples' Rights	369
V. WTO Appellate Body and panels	370
VI. Investor-state arbitration	381
1. Legal standards	381
2. Particular knowledge or perspective: human rights and EU law?	382
3. Within the scope of the dispute	388
4. Applicable law and its limits	393
VII. Comparative analysis	401
E. Submission of evidence	404
F. Access to documents	408

I. International Court of Justice and International Tribunal for the Law of the Sea	409
II. European Court of Human Rights, Inter-American Court of Human Rights and African Court on Human and Peoples' Rights	411
III. WTO Appellate Body and panels	412
IV. Investor-state arbitration	417
V. Comparative analysis	425
G. Conclusion	425
Part III The added value of the international <i>amicus curiae</i>	429
Chapter § 7 Does content matter? Substantive effectiveness of <i>amicus curiae</i> submissions	431
A. An obligation to consider?	433
B. International Court of Justice	435
C. International Tribunal for the Law of the Sea	440
D. European Court of Human Rights	443
E. Inter-American Court of Human Rights	450
F. African Court on Human and Peoples' Rights	459
G. WTO Appellate Body and panels	459
H. Investor-state arbitration	469
I. Comparative analysis	479
I. Why the hesitation?	482
II. Elements of successful briefs	484
III. Limits to the consideration of briefs	484
J. Conclusion	487

Chapter § 8	Effects on the international dispute settlement system	489
A.	Effect on the relationship between the court, the disputing parties and the member states: <i>amici curiae</i> as evidence of an assertive international judiciary?	490
	I. International Court of Justice	491
	II. International Tribunal for the Law of the Sea	493
	III. European Court of Human Rights and African Court on Human and Peoples' Rights	493
	IV. Inter-American Court of Human Rights	493
	V. WTO Appellate Body and panels	494
	VI. Investor-state arbitration	499
	VII. Comparative analysis	504
B.	Public interest: <i>amicus curiae</i> as motor and evidence of an expanding judicial function?	504
	I. International Court of Justice	507
	II. International Tribunal for the Law of the Sea	510
	III. European Court of Human Rights	511
	IV. Inter-American Court of Human Rights	512
	V. WTO Appellate Body and panels	513
	VI. Investor-state arbitration	517
	VII. Comparative Analysis	521
	1. The right agent?	522
	2. Denaturation of judicial proceedings?	523
C.	<i>Amicus curiae</i> as a tool to increase the legitimacy of international adjudication?	525
	I. Procedural legitimacy	526
	II. Substantive legitimacy	529
	III. Conditions: representativity and accountability	531
D.	Increased coherence? Impact on international law	535
E.	Transparency: demise of confidentiality and access to the proceedings and case documents?	538
F.	Impact on <i>locus standi</i> : <i>amicus curiae</i> as a precursor to international legal standing?	542
G.	And the drawbacks?	546

Contents

I. Parties' rights	547
1. Due process	548
2. Procedural fairness and equality between the parties	557
II. Practical burdens	561
1. Right to a speedy trial and undue delay?	561
2. Exploding costs?	562
H. Conclusion	567
Chapter § 9 Conclusion	569
A. What is it?	569
B. Added value of <i>amicus curiae</i> participation in international dispute settlement	571
Annex I: Cases with <i>amicus curiae</i> involvement	575
Annex II	705
Bibliography	707

Table of Abbreviations

ACHR	American Convention on Human Rights
BIT	Bilateral Investment Treaty
CAFTA	Dominican Republic-Central America Free Trade Agreement
CEJIL	Center for Justice and International Law
CIEL	Centre for International Environmental Law
DSU	Dispute Settlement Understanding
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECtHR Rules	Rules of the European Court of Human Rights
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FTC	Free Trade Commission (NAFTA)
FTC Note	FTC Note of Interpretation of Certain Chapter 11 Provisions
FTC Statement	FTC Statement on non-disputing party participation
GPI	Stichting Greenpeace International
IACtHR	Inter-American Court of Human Rights
IACtHR Rules	Rules of the Inter-American Court of Human Rights
IACtHR Statute	Statute of the Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rules	Rules of Procedure of the International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea

Table of Abbreviations

ITLOS Rules	Rules of the International Tribunal for the Law of the Sea
ITLOS Statute	Statute of the International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUSCT	Iran-United States Claims Tribunal
MIT	Multilateral investment treaty
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OAS	Organization of American States
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
SPS Agreement	The WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	WTO Agreement on Technical Barriers to Trade
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization