Chapter § 4 Characteristics, status and function of *amicus curiae* before international courts

The meaning and function of *amicus curiae* has remained vague, as shown in Chapter 1. The observation from *Bellhouse* and *Lavers* with respect to *amicus curiae* in English law applies also in this context, that '[t]here can be few technical legal terms or definitions as unhelpful as *amicus curiae* … [I]ts meaning is still imprecise and obscure.'[1]

This Chapter attempts to define the instrument from three different perspectives drawing from the analysis of the regulations and case law on *amicus curiae* in Chapters 5 and 6. The first section addresses the common basic characteristics of the instrument. Despite the difference in terminology and the varied reception of *amici curiae* by international courts and tribunals, the analysis shows that *amici curiae* share several procedural characteristics (A.). The second section proposes a functional characterization of the different types of international *amicus curiae* (B.). The third section delineates the instrument and other forms of non-disputing party participation (C.).

A. Characteristics of the international amicus curiae

The following characteristics can be distilled: first, the international *amicus curiae* is a procedural instrument that is fully subject to the discretion of the international court or tribunal (I.). Accordingly, it is both a non-party and a non-party instrument (II.). Third, it seeks to provide information to the court (III.). Fourth, it represents an interest to a court or tribunal (IV.). It is not limited to NGO participation (V.).

This set of characteristics does not claim to be complete also, because *amicus curiae* participation continues to develop and modify with an ever-growing body of case law. But it outlines the most basic common features of the international *amicus curiae* and can serve as the foundation for a ba-

1 J. Bellhouse/A. Lavers, *The modern amicus curiae: a role in arbitration?*, 23 Civil Justice Quarterly (2004), p. 187.

sic common understanding of the instrument, especially in relation to other instruments of participation before international courts and tribunals and national concepts of *amicus curiae*.

I. A procedural instrument

All international courts and tribunals reviewed have considered *amicus curiae* to be a procedural instrument. In most cases, the classification was done by judges during a case, as the matter had not been addressed in the governing instruments at the time of the first request. Since, the concept has been defined in several legal instruments as procedural, including in Article 44 IACtHR Rules and Rule 37(2) ISCID Arbitration Rules.

The initial admission of *amici curiae* in investment arbitration, in WTO dispute settlement and in the regional human rights courts was based on the premise that *amicus curiae* is a procedural instrument. This is because courts and tribunals relied on their reserve procedural powers to justify its admission.[2] In *Suez/Vivendi v. Argentina*, the tribunal noted that it 'face[d] an initial question as to whether permitting an *amicus curiae* submission by a non disputing party is a "procedural question."' Defining procedural question as 'one which relates to the manner of proceeding or which deals with the way to accomplish a stated end,' the tribunal held that the 'admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tri-

2 In *US–Lead and Bismuth II*, when deciding whether it could accept unsolicited *amicus curiae* submissions, the Appellate Body reasoned that it possessed 'broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.' *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, pp. 14-15, paras. 39-42. In *Methanex v. USA*, *UPS v. Canada*, *Suez/Vivendi v. Argentina* and *Suez/InterAguas v. Argentina*, the tribunals relied on their reserve procedural powers in Article 15(1) of the 1976 UNCITRAL Rules and Article 44 ICSID Convention respectively to admit *amicus curiae* submissions. Defining the purpose of Article 15(1) as to 'grant the broadest procedural flexibility within procedural safeguards,' the *Methanex* tribunal found that it had power to accept *amicus curiae*, see *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, p. 13, para. 27; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 39.

bunal to achieve its fundamental task of arriving at a correct decision in this case.'[3]

The consideration of *amicus curiae* as a procedural issue seems to have been pragmatic. *Amicus curiae* was introduced into the practice of most of the international courts and tribunals through petitions by non-state actors seeking to present their views to the court and the parties.[4] International courts and tribunals had to decide whether to accept or refuse these petitions without a clear rule. Their powers were generally confined to those necessary for the conduct of proceedings, i.e. to procedural issues. To be able to consider the admission of *amici curiae,* courts had to define the concept as procedural.[5] In addition, national laws categorize *amicus curiae* uniformly as a procedural instrument (see Chapter 3).

Often, international courts and tribunals have defined *amicus curiae* as a procedural issue without consideration of what a procedural issue is and without pondering the nature of *amicus curiae*. Member states' reactions, especially those in the WTO context, show that this conclusion may have been drawn too easily given that *amicus curiae* engages institutional questions, not only as it is used to address systemic concerns and induces a multilateral element into a bilateral dispute settlement process, but also because *amicus curiae* briefs have the potential to shape the substantive outcome of a case.[6] The views on where to draw the line between procedural

---

3 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 11.

4 H. Ascensio, *L'amicus curiae devant les juridictions internationales*, 105 Revue générale de droit international public (2001), p. 900 ('Ce n'est pas tant que les juridictions internationales aient souhaité recevoir de nombreux avis amicaux; ce sont bien plutôt les personnes avisées qui se sont soundainement bouscoulées à leur porte.').

5 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, pp. 24-25, paras. 61-62; *Methanex v. USA*, Statement of Respondent USA in response to Canada's and Mexico's submissions concerning petitions for *amicus curiae* status, 22 November 2000, p. 2. See also D. Steger, *Amicus curiae: participant or friend? – The WTO and NAFTA experience*, in: A. v. Bogdandy (Ed.), *European integration and international co-ordination – studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, pp. 419, 444.

6 See also J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 76 ('The conclusion as to the procedural nature of the question seems to me somewhat hasty.'); K. Hobér, *Arbitration involving states*, in: L. New-

and substantive issues – and where to place *amicus curiae* – differ widely.[7] The decisive distinction between substantive and procedural participation for tribunals and the WTO Appellate Body and panels has been between participation as a matter of right, for instance, as a party or as a non-disputing contracting party to an investment treaty versus participation subject to the discretion of the international court or tribunal seized.

All international courts and tribunals reviewed consider themselves within the parameters established by the applicable rules in full control over the modalities of *amicus curiae* participation. In so far, it is appropriate to consider the international *amicus curiae* a 'judge-driven process.'[8]

II. A non-party and a non-party instrument

A consequence of the decision that *amicus curiae* is a procedural issue is that it does not become a party upon admission to the proceedings. International courts and tribunals uniformly agree that *amici curiae* do not obtain the procedural and substantive rights accorded to the parties to the proceedings. *Amici curiae* have a right neither to have their submissions considered by an international court or tribunal, nor to remuneration, nor to legal aid, nor to access case documents.[9]

---

man/R. Hill (Eds.), *The leading arbitrators' guide to international arbitration*, New York 2008, Chapter 8, p. 155 (He doubts that Art. 15(1) allows for *amicus curiae*, because it deals with the conduct of the arbitration as between the disputing parties.). However, courts have stressed that *amicus curiae* must fit into the arbitral schedule agreed on by the parties (see Chapter 8).

7 C. Brown, *A common law of international adjudication,* Oxford 2007, p. 8 (He defines procedure as 'all elements of the adjudicatory process other than the application of primary rules of international law which determine the rights and obligations in dispute, and the application of secondary rules of international law which determine the consequences of breaches of primary rules. Thus, "procedure" includes not only the conduct of proceedings, including the power of international courts to rule on preliminary objections, the adduction of evidence, and the exercise of incidental powers, during and after the adjudication on the merits, but also the constitution of international tribunals, and questions relating to their jurisdiction.' [References omitted].).

8 L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 Journal of World Investment and Trade (2004), p. 334.

9 The limitations and determinations of the concept and characteristics of the international *amicus curiae* may more than anything be the consequence of the tribunal's powers. The *Methanex* tribunal acknowledged that the provision could not 'grant

There is consensus that because *amicus curiae* is not a party to the proceedings and does not enjoy party rights, it cannot be bound by the final judgment.[10] The tribunal in *Suez/Vivendi v. Argentina* rejected the claimants' argument that 'the practical effect [of *amicus curiae* participation] would be that Claimants would end up litigating with entities which are not party to the arbitration agreement.'[11] The tribunal stressed that *amicus curiae* was not a form of party participation when rejecting an assimilation of *amicus curiae* with any form of participation as of right:

> An *amicus curiae* is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding. Its role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. … In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the de-

---

the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party [or Non-Disputing NAFTA Party] under Article 1128 of NAFTA.' *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, p. 13, para. 27. The tribunal then noted that it was 'equally precluded from achieving this result indirectly by exercising power over the conduct of the arbitration,' but asserted that *amicus curiae* participation engaged the exercise of its procedural powers rather than forming a third party right. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, pp. 14-15, paras. 29-31. Adopted in *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 39.

10 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 13; *Suez/Interaguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, p. 5, para. 9; *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 61, p. 24; A. Mourre, *Are amici curiae the proper response to the public's concerns on transparency in investment arbitration?,* 5 The Law and Practice of International Courts and Tribunals (2006), p. 262; G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), pp. 773, 780.

11 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 12. See also *Infinito Gold Ltd. v. Republic of Costa Rica* (hereinafter: *Infinito Gold v. Costa Rica*), Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 19 (Claimant argued that: 'Allowing [APREFLOFAS] to participate [as *amicus curiae*] would compel the Claimant to meet two cases at once, which would be unfairly prejudicial.').

> cision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.[12]

Equally, a former President of the IACtHR noted, that '*[a]micus curiae* is a brief whereby an individual or non-governmental organization submits information and views to the Court without having to be a party in the case.'[13] In a NAFTA arbitration under the UNCITRAL Arbitration Rules, the tribunal found that the *amicus curiae* did not have 'any rights as a party or as a non-disputing NAFTA party. It is not participating to vindicate its rights.'[14] The tribunal in *Biwater v. Tanzania* went so far as to explicitly reject the notion of any formalized *amicus curiae* status in the proceedings and stressed the limited scope of a grant of leave:

> [T]he ICSID Rules do not, in terms, provide for an *amicus curiae* "status", in so far as this might be taken to denote a standing in the overall arbitration akin to that of a party, with the full range of procedural privileges that that may entail. Rather, the ICSID Arbitration Rules regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)). Each of these types of participation is to be addressed by a tribunal on an *ad hoc* basis, rather than by the granting of an overall "*amicus curiae status"* for all purposes. Indeed, Rule 37(2) is specifically drafted in terms of the discretion of a tribunal to accept "a" written submission, rather than all submissions from a particular entity. … It also follows that a "non-disputing party" does not become a party to the arbitration by virtue of a tribunal's decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission.[15]

---

12 Id., para.13.

13 *Informe del Presidente de la Corte Interamericana de Derechos Humanos, Juez Cançado Trindade, a la Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente de la Organización de los Estados Americanos en el Marco del Diálogo sobre el sistema interamericano de proteccion de los derechos humanos*, 16 March 2000, Annex 5, pp. 103 in: IACtHR, *informe: bases para un proyecto de protocol a la convención Americana sobre derechos humanos, para fortalecer su mecanismo de protección*, relator: A. Cançado Trindade, Mayo de 2001, Tomo II, 2nd Ed., IACtHR 2003, p. 110.

14 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, p. 24, para. 61.

15 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, pp. 13-14, para. 46. See also *Suez/InterAguas v. Argentina*, Order in response for participation as *amicus curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 46 ('A "non-disputing party" does not become a party to the arbitration by virtue of a tribunal's decision under Rule 37, but is instead offered a specific and defined opportunity to make a particular submission.'); *Vito G. Gallo*

Further, international courts, tribunals and scholars agree that *amicus curiae* is an instrument that is out of the reach of the parties.[16] Contrary to the US *amicus curiae*, the large majority of international courts and tribunals consider the international *amicus curiae* not a tool of the parties in the adversarial process. The IACtHR defines *amicus curiae* as a person or institution that 'is unrelated to the case and to the proceeding.' The Explanatory Note to Protocol No. 11 to the European Convention, which introduced Article 36(2) ECHR, simply states: 'States and persons taking part in such proceedings are not parties to the proceedings.'[17] Moreover, the international courts examined here as soon as *amicus curiae* is appropriated by a party consider it part of the respective party's submissions, thereby stripping it of any individual value. However, in practice, there are some difficulties in ensuring *amicus curiae's* independence from the parties (see Chapter 5).

III. Transmission of information

A further common characteristic is that *amici curiae* seek to impart information and are admitted for their likely utility in the solution of the dispute (see Chapter 5). Article 84 ITLOS Rules and Article 34(2) ICJ Statute point hereto by mentioning the likelihood of useful information as the condition for the invitation of the participation of intergovernmental organizations. Article 2(3) IACtHR Rules purports that an *amicus curiae* submits 'reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding.'[18]

---

v. The Government of Canada (hereinafter: *Vito Gallo v. Canada*), Procedural Order No. 1, 4 June 2008, PCA Case No. 55798, para. 38 ('*Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their briefs must be limited to allegations, without introducing new evidence.').

16 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 268.

17 Explanatory Report to Protocol No. 11, ETS No. 155, para. 91, at: http://conventions.coe.int/Treaty/en/Reports/Html/155.htm (last visited: 28.9.2017).

18 This view of *amicus* as a neutral bystander has been the prevailing view in the IACtHR. See former Court President *Cançado Trindade*: '*Amicus curiae* is a brief whereby an individual or nongovernmental organization submits information and views to the Court without having to be a party in the case.' Informe del Presidente de la Corte Interamericana de Derechos Humanos, supra note 13, p. 110.

The tribunal in *Suez/Vivendi v. Argentina* viewed the 'traditional role' of *amici curiae* as 'to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide.'[19] The same view has been enshrined in Article 37(2) FTC Statement and the UNCITRAL Rules on Transparency. The WTO Appellate Body and panels have stated in many cases that *amicus curiae* submissions are considered if they are 'pertinent and useful' and of assistance in deciding the case.

IV. An interested participant

There is a widespread assumption or even expectation that the international *amicus curiae* – like the English *amicus curiae* – is a disinterested participant, 'a neutral bystander,' without a vested interest in the outcome of the case or a particular issue.[20]

This assumption is not confirmed by the law and practice concerning the international *amicus curiae*. To the contrary, while there is consensus that *amicus curiae* shall not be a tool of the parties, there is no expectation that it is neutral with respect to the outcome of the case. With the exception of the IACtHR, it is even expected that an *amicus curiae* represent an interest. In investment arbitration, proof of a 'significant interest' is a condition for admission. As an investment tribunal noted, '*[a]mici* are not experts; such third persons are advocates (in the non-pejorative sense) and

19 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para.13.

20 P. Mahoney, *Developments in the procedure of the European Court of Human Rights: The revised rules of the court*, 3 Yearbook of European Law (1983), p. 149 ('The underlying purpose of the third-party rules is the objective one of contributing to the elucidation of the factual and legal issues before the Court, not the subjective one of protecting individual or State interests.'); G. Hernandez, *Non-state actors from the perspective of the International Court of Justice*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London 2011, pp. 140, 146; O. Gerlich, *More than a friend? The European Commission's amicus curiae participation in investor-state arbitration*, in: G. Adinolfi et al. (Eds.), *International economic law*, Springer 2017, p. 253.

not "independent" in that they advance a particular case to a tribunal.'[21] The *EC–Asbestos* Additional Procedure states in Section 7(c) that *amicus curiae* may support the position of one of the parties. Entities seeking to participate in the proceedings before WTO dispute settlement *fora* and the ECtHR are typically interested because they are personally and directly affected by the matter or because they wish to support a certain idea, value or public interest.

The fact that *amici curiae* pursue an interest has attracted scholarly criticism.[22] Critics purport that an *amicus curiae* should be an impartial and fair adviser on questions that the court may have in the course of deciding the dispute. These views seek to transform *amicus curiae* into something reminiscent of an assessor.[23] However, it seems unnecessary and somewhat unrealistic to expect full neutrality. As long as *amici curiae* bear the costs of their participation, most of them will participate only if it also

---

21 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 38. The latter aspect has recently become disputed, see Chapter 5.

22 S. Menétrey, *L'amicus curiae, vers un principe commun de droit procédural?,* Paris 2010, p. 7 ('Par l'utilisation repetee des groupements d'interets, *l'amicus curiae* risqué de romper avec ses fondements proceduraux classiques pour devenir un droit de participation au profit des tiers.'); P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 317 ('Many *amici* are rather friends for themselves than the court and do not care for the truth, but merely want to sell a message.'); C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?,* 60 Aussenwirtschaft (2005), p. 348. As in US practice, there is an erroneous assumption that there has been an increase in *amici curiae* defending an interest while there has been no corresponding increase in information-based *amici.* See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), pp. 279-280 ('[T]he traditional concept of *amici* as neutral bystanders has evolved. To this extent, ordinarily, *amici* are not expected to be completely neutral. When the ECHR appoints as *amicus* a person with a clear interest in the domestic proceedings to which an application relates, it must expect that the *amicus* will make submissions about his or her own interests.' [References omitted]).

23 Regulated in Article 9 ICJ Rules, assessors can be appointed by the Court to support it during the deliberation of a case, without having a vote. Arguing for the introduction of special masters in cases with complex fact-patters, see C. Payne, *Mastering the evidence: improving fact-finding by international courts,* 41 Environmental Law (2011), pp. 1191-1220.

serves their interests in one way or another. Furthermore, submissions are not useless even if *amici curiae* pursue a concrete interest with their brief, as long as the court is aware of it. Finally, overall, *amicus curiae* participation is too sporadic and heterogeneous to substitute clerks and legal secretaries and carry out legal research for judges (see Chapter 5).

V. An instrument of non-state actors?

One recurring myth associated with the international *amicus curiae* is that it is a tool exclusively for non-state actors. The intensely discussed first requests for *amicus curiae* participation in the WTO adjudicating bodies and in investment arbitration have shaped the image of activist NGOs seeking to circumvent rules limiting *locus standi* to states by reverting to this form of participation. Chapter 5 and Annex I show that this impression is not in accordance with the structure of *amicus curiae* participation before international courts and tribunals. The majority of *amicus curiae* participation before international courts and tribunals originates from non-governmental organizations. However, both the existing rules regulating *amicus curiae* participation, as well as *amicus curiae* practice before most international courts and tribunals comprises a more diverse *amicus curiae* structure. While there is no need to recapitulate the findings of Chapters 3 and 5 here, it seems important to recall the limitations of the ICJ to accept (inter-)governmental *amici curiae*, as well as the frequent participation of intergovernmental organizations (and states) before the ECtHR and in investment arbitration. The fact that the concept of *amicus curiae* is mostly relied upon by non-state actors may also be due to the fact that states and intergovernmental organizations use other, including diplomatic channels to communicate their views on certain issues.

B. Functions of the international amicus curiae

This section distils the functions attributed by courts *to amici curiae*.[24] International courts and tribunals rarely comment on the functions they as-

24 The only other effort to systematically categorize the functions of the international *amicus curiae* was undertaken by *Bartholomeusz*. L. Bartholomeusz, supra note 22, pp. 278-279. He distinguishes four 'broad functions' of *amicus curiae*: provi-

sign to *amici curiae*. The functions are established through observations of how submissions are dealt with, an analysis of relevant regulations, and public comments on *amicus curiae* by members of the courts and their staff. On this basis, it is suggested to classify the international *amicus curiae* in three groups: information-based *amicus curiae* (I.), interest-based *amicus curiae* (II.) and system-based *amicus curiae* (III.).

I. Information-based *amicus curiae*

The term information-based *amicus curiae* is used to describe the instances where international courts and tribunals have admitted *amicus curiae* with the primary aim of obtaining information. The term information is considered to include all forms of legal and factual information, irrespective of whether it concerns the heart of a dispute or relates to its periphery. This function leans on the 'traditional' American and the British understanding of *amicus curiae* as an instrument whose purpose is to provide the court with legal and/or factual information to ensure that it has considered all the relevant information before rendering a decision.

All of the international courts and tribunals examined have admitted *amici curiae* for their (prospective) informative value.

The procedural rules of the ICJ and the ITLOS assign the instrument an informative function both in contentious and in advisory proceedings. The ICJ is reluctant to extend information-based *amicus curiae* beyond the possibilities foreseen in the procedural rules. Information has exceptionally been accepted where states were incriminated in proceedings to which they were not a party and the ICJ depended on the information submitted (see Chapters 3 and 5).

The human rights courts all use information-based *amicus curiae*. While the IACtHR's definition of *amicus curiae* explicitly points to this function, the rules of the ECtHR and the ACtHPR do not attribute any specific function to *amicus curiae*. The ECtHR has indicated allowing information-based *amicus curiae*. In the 1980, it held that 'the sole purpose of association of third parties in the Court's proceedings is to serve the

---

sion of specialist legal expertise; of factual information; of due process; and representation of the public interest. Though valuable, his categorization does not include all existing functions. It neglects in particular admission of *amici* to represent a private interest or to address systemic deficiencies.

interest of the proper administration of justice.'[25] Further, it did not contradict the Trade Union Congress' argument for admission as *amicus* in its request in *Young, James and Webster v. the United Kingdom*, a case concerning the legality of British union membership arrangements under the ECHR, that the memorial of the United Kingdom government failed to provide the court with 'full knowledge of the historical, legal and social character of [its] decision and of the consequences which different legal interpretations would in reality create in each relevant country.'[26] A corrective function was assigned to *amicus curiae* in *Hokkanen v. Finland*. Upon request by the applicant, the court granted leave to the maternal grandparents of a child in a custody case to submit written observations on 'any facts which they considered had been dealt with inaccurately in the [European Commission on Human Rights'] report of 22 October 1993.'[27] In one early advisory opinion under Article 64(2) ACHR, *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the IACtHR invited interested stakeholders to participate as *amici curiae*, arguing that it needed to obtain the greatest understanding possible on the subject matter.[28] In *Case of Expelled Dominicans and Haitians v. Dominican Republic*, the IACtHR held that *amicus curiae* briefs were presented 'in order to clarify to the Court some factual or legal matters related to the case being processed by the Court'.[29]

WTO panels' power to accept *amicus curiae* has been attributed to their investigative powers, especially Articles 11 and 13 DSU, which permit panels to request additional information to fulfil their duty to establish the

---

25 *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No. 82 (Written comments shall be directed towards assisting the court in the discharge of its particular and circumscribed task). See also N. Vajic, *Some concluding remarks on NGOs and the European Court on Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 98.

26 Quoted by O. De Schutter, *Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme*, 7 European Journal of International Law (1996), p. 384.

27 *Hokkanen v. Finland*, Judgment of 23 September 1994, Series A No. 299-A, para. 5.

28 *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion No. OC-4/84 of 19 January 1984, IACtHR Series A No. 4, p. 2, para. 4.

29 *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Exceptions, Merits, Reparations and Costs), Series C No. 282, para. 15.

objective facts of the case.[30] Reliance on these provisions indicates that 'a primary purpose of *amici* should be to assist panels to fulfil their obligations by providing additional sources of objective information.'[31] Indeed, an information-based function was implied in *US–Shrimp*. The Appellate Body decided that the 'DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive 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.'[32] Further, in *Turkey–Textiles*, a case concerning the legality under the GATT of the imposition by Turkey of quantitative restrictions on imports of different categories of textiles from India in the framework of its association process with the EU, the panel requested information from the Permanent Representative of the European Communities in Geneva on several issues concerning the association process and the administration of the textiles trade sector. The Chairman of the panel explained to the Permanent Representative that the panel sought to ensure 'the fullest possible understanding of this case.'[33]

The first investment tribunals that admitted *amicus curiae* emphasized its function as an assistant to the court.[34] The *UPS v. Canada* tribunal, interpreting Article 15(1) of the 1976 UNCITRAL Rules, held that '[t]he

30 *Canada – Measures Affecting the Export of Civilian Aircraft* (hereinafter: *Canada–Aircraft*), Report of the Appellate Body, adopted on 20 August 1999, WT/DS70/AB/R, pp. 49-50, paras. 184-185.

31 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), p. 178.

32 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 106.

33 *Turkey–Textiles*, Report of the Panel, adopted on 19 November 1999, WT/DS34/R, pp. 2, 27, paras. 1.11, 4.1.

34 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, paras. 38, 48; *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 19 (The role of an *amicus curiae* is 'not to serve as a litigant … but to assist the Tribunal, the traditional role of an *amicus curiae*.'); *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 23 ('The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided.').

powers [under the provision] are to be used to facilitate the Tribunal's process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it' and '[i]t is within the scope of article 15(1) for the tribunal to receive submissions offered by third parties *with the purpose of assisting the Tribunal* in that process'.[35] Further, the FTC Statement, the ICSID Arbitration Rules and the UNCITRAL Rules on Transparency all require that the admission of *amici curiae* should be guided by the extent to which 'the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.' Case law indicates that the provision of relevant information has constituted a pivotal element in tribunals' decisions whether to grant leave to an *amicus curiae* applicant.[36] In *Piero Foresti v. South Africa*, the tribunal held that the purpose of *amicus curiae* participation under the ICSID Additional Facility Rules was 'to give useful information and accompanying submissions to the Tribunal.'[37] However, the mere provision of information may not suffice. In *Apotex I v. USA,* the tribunal rejected a request because in its view an *amicus curiae* brief on the classification of venture capital as an investment contained 'no more than a legal analysis of the terms of the NAFTA, and previous arbitral decisions on the concept of *"investment*", undistinguished and un-

35 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, p. 24, paras. 60-61 [Emphasis added].

36 *Pac Rim v. El Salvador*, Procedural Order No. 8, 23 March 2011, ICSID Case No. ARB/09/12; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10; *Apotex Inc. v. United States of America* (hereinafter: *Apotex I v. USA*), Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, paras. 21-26. Avoidance of error and obtaining the broadest understanding of the issues appears to have been also the main reason for the admission of an *amicus curiae* submission from the EC in *Eastern Sugar B.V. (Netherlands) v. Czech Republic* (hereinafter: *Eastern Sugar v. Czech Republic*), Partial Award, 27 March 2007, SCC Case No. 088/2004, paras. 97, 119 (Reproduction of a letter dated 13 January 2006). See also *AES v. Hungary*, Award, 23 September 2010, ICSID Case No. ARB/07/22.

37 *Piero Foresti, Laura de Carli and Others v. the Republic of South Africa* (hereinafter: *Piero Foresti v. South Africa*), Letter by the Secretary of the Tribunal, 5 October 2009, ICSID Case No. ARB(AF)/07/1, para. 2.1.

coloured by any particular background or experience.'[38] This indicates that tribunals do not merely wish to receive legal analysis akin to that provided by the parties, but request legal or factual information or a consideration thereof, which they or the parties are not able to provide.[39]

Thus, all international courts and tribunals embrace the traditional *amicus curiae* function. The analysis of the submissions and applications in Chapters 5 and 6 shows that submissions made usually seek to argue for a certain legal interpretation and rarely comprehensively (and neutrally) inform the court of a certain legal aspect. In so far, the observation by *Moyer* that *amici curiae* remedy a limited staff and a small legal library is no longer fully apposite.[40] The information-based *amicus curiae* is tilting towards legal lobbyism and not a mere (and sporadic) research assistant. The tribunal in *UPS v. Canada* also noted this. It remarked that the 'contribution of an *amicus* might cover such ground [to seek the assistance of independent experts on specialized factual matters], but is likely to cover quite distinct issues (especially of law) and also to approach those issues from a distinct position.'[41] This shift is not unproblematic where *amicus*

---

38 *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para. 23 [Emphasis in original]. The tribunal stressed that 'the requirement of a different expertise, experience or perspective from that of the Disputing Parties ought to be construed broadly, so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.' *Id.*, para. 22.

39 E.g. *Bear Creek Mining v. Peru*, where the tribunal granted leave to the *amicus curiae* request from the NGO DHUMA and Dr. Lopez, because the NGO was a direct witness to the conflict between the local indigenous Aymara communities and the claimant which led to the revocation of the mining concession forming the heart of the damages claims of the claimant, see *Bear Creek Mining Corporation v. Repulic of Peru* (hereinafter: *Bear Creek Mining v. Peru*), ICSID Case No. ARB/14/21, Procedural Order No. 5, 21 July 2016, para. 44 ('[T]he information supplied … is sufficient to show that DHUMA has information and experience specific to the background and development of the Santa Ana Project which may contribute a new perspective.').

40 See C. Moyer, *The role of "amicus curiae" in the Inter-American Court of Human Rights*, in: la corte interamericana de derechos humanos, *estudios y documentos*, 1999, p. 133 ('[T]here is no doubt that the *amicus* brief has been a valuable aid to the Court during its early years when it has been served by a very small staff and has not had access to a first-rate legal library.').

41 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, p. 25, para. 62.

curiae briefs are accepted because of their informative value. The question arises how international courts and tribunal can assess the value and veracity of briefs, especially from *amici* with a concrete agenda. A submission from such an entity may be selective towards the preferred outcome, which may not be noticed by an international court if its resources are too limited to thoroughly scrutinize the submissions and carry out background checks with respect to hidden agendas of the *amicus curiae*, including connections with a party. Courts have been rather oblivious to these risks, even though they can be managed with disclosure requirements (see Chapter 7).

II. Interest-based *amicus curiae*

The second function comprises *amici curiae* that are admitted before an international court or tribunal to defend or (re)present an interest. Such an interest may be public or private. For the purpose of this book, a public interest is an interest that extends beyond the interest of one or a set of defined entities on a local, national or global level.[42] A private interest is understood as any interest which belongs to one person or a defined group of persons.[43]

---

42 M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 Columbia Journal of Transnational Law (2003), pp. 929-932 (It is a 'set of values and norms that serve as ends towards which a community strives.'). For a narrower definition, see M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 The Law and Practice of International Courts and Tribunals (2006), p. 371 ('Community interests…are those which transcend the interest of individual states and protect public goods of the international community as a whole or a group of states.').

43 Reasons why a person may wish to bring a private interest to an international court's attention include: lack of a formalized right to defend an affected interest before the court; holding of an interest similar to the interest that is adjudicated and a concern that the decision may be considered persuasive in subsequent proceeding. See also B. Hess/A. Wiik, *Affected individuals in proceedings before the ICJ, the ITLOS and the ECHR*, in: H. Hestermeyer et al. (Eds.), *Coexistence, cooperation and solidarity – liber amicorum Rüdiger Wolfrum*, Leiden 2012, pp. 1639-1660.

1. International Court of Justice and International Tribunal for the Law of the Sea

Neither the ICJ nor the ITLOS have allowed for interest-based *amicus curiae* participation in contentious proceedings. Their applicable laws foresee the consideration of the interests of non-parties only with regard to intervention and, under specific circumstances, with regard to international organizations (see Section C). ICJ case law shows that the ICJ has been unreceptive to interest-based non-party participation outside the rules on intervention including in situations where the rules on intervention are not applicable because the interests of individuals or private entities are directly affected by the outcome of the case (see Chapter 2).[44] Recent cases show that the ICJ continues to expect states to espouse the interests of their nationals.[45]

In advisory proceedings, the ICJ has created two specific constellations of interest-based *amicus curiae* in its advisory practice for entities not mentioned in Article 66(2) ICJ Statute: where its advisory jurisdiction serves as an appeal mechanism to an international administrative tribunal in employment disputes between an international organization and its (former) employee and for state-like entities whose position is at the heart of the advisory question. The ICJ does not seem willing to expand its practice beyond these two exceptions. In particular, it does not accept written statements defending a public or communal interest beyond the confines of the existing rules.

---

44 See *Trial of Pakistani Prisoners of War case (Pakistan v. India)*, Letter No. 57 (The Minister for Foreign Affairs of Afghanistan to the President of the Court), Part IV: Correspondence, ICJ Rep. 1973, pp. 167-171; Letters No. 67 (The Registrar to the Minister for Foreign Affairs of Afghanistan), Part IV: Correspondence, ICJ Rep. 1973, pp. 167-171, 174-175 and Order of 15 December 1973 (Removal from List), ICJ Rep. 1973, pp. 347-348.

45 See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, p. 99; *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, Order of 5 April 2011 (Removal from List), ICJ Rep. 2011, p. 341. Re the facts of the case, see B. van het Kaar/G. Kaplan, *Airline dispute lands in ICJ: a commentary on the Swissair/Sabena case,* at: http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Commentary_Sabena_EN.pdf (last visited: 28.9.2017).

2. European Court of Human Rights

The ECtHR's *amicus curiae* practice has traditionally been interest-based. The court has a broad understanding of interest-based *amicus curiae*. It grants leave to *amicus curiae* to present direct and indirect, private and public interests, as long as it finds the participation to be 'in the interest of the proper administration of justice' pursuant to Article 36(2) ECHR.[46]

Private-interest *amici curiae* include persons with a legal interest that will directly be affected by the court's decision, because they were the opposing party to the applicant in the domestic proceedings to which the application before the ECtHR relates ('indirect respondent')[47] or, because the legality of a treaty to which they are a party is at issue.[48] This category is particularly relevant in the ECtHR where the winning party from the national court proceedings is not a party to the proceedings before the ECtHR, even though its interests will likely be directly affected by the judgment.[49] For instance, in *Hannover v. Germany*, the court granted leave to the publisher of the German magazine that had printed photographs of Caroline von Hannover and her family in private moments. *Von Hannover* argued that the German judgment permitting publication of the pictures in-

---

46 See A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/Herbert Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, pp. 342-343 ('Mere demonstration by a potential intervener of an interest in the outcome of the proceedings will not suffice. The President must be satisfied that the intervention is likely to assist the Court in the carrying out of its task.').

47 *Mahoney* defines the term as 'someone connected with the particular facts and whose related legal interests are liable to be directly and adversely affected by the judgment, but who is not in the position of having his viewpoint adequately put by the respondent Government.' See P. Mahoney, supra note 20, p. 151.

48 *S.A.R.L. du parc d'activites de Blotzheim et la S.C.I. Haselaecker v. France* (dec.), No. 48897/99, 18 March 2003, ECHR 2003-III (Case concerned the extension of the airport Basel-Mulhouse and the legality of a French-Swiss agreement. Switzerland appeared as *amicus curiae*); *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.) [GC], No. 56672/00, 10 March 2004, ECHR 2004-IV; *Danell and others v. Sweden* (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I. See also E. Bergamini, *L'intervento amicus curiae: recenti evoluzioni di uno strumento di common law fra Unione europea e Corte europea dei diritti dell'uomo*, 42 Diritto communitario e degli scambi internazionali (2003), pp. 181, 183.

49 For many, *Ahrens v. Germany*, No. 45071/09, 22 March 2012.

fringed her rights to respect for her private and family life under Article 8 ECHR. The publisher made factual submissions on the relationship of the applicant's family with the media.[50] This subcategory further includes *amici curiae* whose (private) interest arises from their involvement in the facts of the case[51] or who are *de facto* affected.[52] In *Cha'are Shalom Ve Tsedek v. France*, the applicant argued that France had violated its rights

---

50 *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI. Further examples, *Ahrens v. Germany*, ECtHR No. 45071/09, 22 March 2012; *Goddi v. Italy*, Judgment, 9 April 1984, ECtHR Series A No.76; *Young, James and Webster v. the United Kingdom*, Judgment, 13 August 1981, ECtHR Series A No. 44; *Feldek v. Slovakia*, No. 29032/95 12 July 2001, ECHR 2001-VIII; *Hatton and others v. United Kingdom,* No. 36022/97, 2 October 2001 and [GC], 8 July 2003, ECHR 2003-VIII (Comments by British Airways, the main user of Heathrow Airport on the importance of night flights in a case brought by locals against the airport's noise levels.); *Taskin and others v. Turkey*, No. 46117/99, 10 November 2004, ECHR 2004-X (Case concerned a request for the annulment of a mining concession by ten locals. Factual submission on the gold mine by the concession holder); *Py v. France*, No. 66289/01, 11 January 2005, ECHR 2005-I; *Vrioni and others v. Albania*, No. 2141/03, 24 March 2009; *Zhigalev v. Russia*, No. 54891/00, 6 July 2006; *Eskinazi and Chelouche v. Turkey* (dec.), No. 14600/05, 6 December 2005, ECHR 2005-XIII; *E.O. and V.P. v. Slovakia*, Nos. 56193/00 and 57581/00, 27 April 2004; *Neulinger and Shuruk v. Switzerland*, ECtHR No. 41615/07, 8 January 2009; *Peta Deutschland v. Germany*, No. 43481/09, 8 November 2012; *Schneider v. Germany*, No. 17080/07, 15 September 2011; *von Hannover v. Germany (No. 2)* [GC], Nos. 40660/08 and 60641/08, 7 February 2012, ECHR 2012.

51 *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria*, Nos. 412/03 and 35677/04, 22 January 2009; *Joesoebov v. the Netherlands* (dec.), No. 44719/06, 2 November 2010; *Sindicatul "Păstorul cel bun" v. Romania*, No. 2330/09, 31 January 2012; *Perna v. Italy* [GC], No. 48898/99, 6 May 2003, ECHR 2003-V.

52 *Ilascu and others v. Moldova and Russia* (dec.) [GC], No. 48787/99, 4 July 2001; *Suljagić v. Bosnia and Herzegovina*, No. 27912/02, 3 November 2009; *Kearns v. France*, No. 35991/04, 10 January 2008; *Dichand and others v. Austria*, No. 29271/95, 26 February 2002; *Hokkanen v. Finland*, Judgment of 23 September 1994, Series A No. 299-A; *Buckley v. the United Kingdom*, Judgment of 25 September 1996, Reports 1996-IV; *Mangouras v. Spain* [GC], No. 12050/04, 28 September 2010, ECHR 2010; *Saliyev v. Russia*, No. 35016/03, 21 October 2010; *Öcalan v. Turkey* [GC], No. 46221/99, 12 May 2005, ECHR 2005-IV; *Haas v. Switzerland*, No. 31322/07, 20 January 2011, ECHR 2011; *Peta Deutschland v. Germany*, ECtHR No. 43481/09, 8 November 2012; *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, ECHR 2003-X; *Geotech Kancev GmbH v. Germany*, No. 23646/09, 26 July 2016; *Lambert and others v. France* [GC], No. 46043/14, 5 June 2015; *Vasiliauskas v. Lithuania* [GC], No. 35343/05, 20 October 2015 (Russian government in case concerning genocide conviction of former secu-

under Article 9 ECHR for refusing to grant the approval necessary to access slaughterhouses to perform ritual slaughter pursuant to the ultra-orthodox religious requirements of the applicant's members. The court permitted the Chief Rabbi of France and the organisation ACIP, at the time the only Jewish Association with the permission requested, to appear as *amici curiae*. Both *amici* were heavily involved in the case and considered themselves potentially affected by the outcome.[53] It is necessary to stress already at this point that private interest-based *amicus curiae* participation is purely protective. The court does not adjudicate upon the rights or interests defended by the *amici*. It admits these *amici curiae* to alert it of rights that might conflict with the applicant's claims or may otherwise be affected by its judgment in order to avoid accidentally prejudicing them (see Chapters 6 and 7).[54]

The ECtHR has granted leave to governments, religious groups, trade or other professional unions, and individuals who are not directly affected in their legal position by its judgment, but who might be affected by legislative or administrative changes enacted by the respondent state to comply with the judgment.[55] The ECtHR also allows other state parties to the

---

rity agent for operations against partisan movements in then Lithuanian Soviet Socialist Republic). This category also includes victims and the relatives of the applicant's victims, primarily in proceedings arising out of domestic criminal proceedings. See *Gäfgen v. Germany*, No. 22978/05, 30 June 2008 and [GC], No. 22978/05, 1 June 2010, ECHR 2010.

53 *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, 27 June 2000, ECHR 2000-VII.

54 *M.G. v. Germany* (dec.), No. 11103/03, 16 September 2004. But see the rejection of the request for leave from the Evkaf Administration, a religious trust claiming to own some of the properties claimed by the applicant in *Lordos and others v. Turkey*, No. 15973/90, 2 November 2010. See also *Brumârescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I.

55 *Herrmann v. Germany,* No. 9300/07, 20 January 2011 and [GC], 26 June 2012; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V; *Bayatyan v. Armenia* [GC], No. 23459/03, 7 July 2011, ECHR 2011 (European Association of Jehovah's Christian Witnesses on the position of the organisation on the use of arms and their situation in Armenia); *Heinisch v. Germany*, No. 28274/08, 21 July 2011, ECHR 2011 (ver.di, a German trade union, on the organisation of institutional care for the elderly in Germany and working conditions of employees in this sector); *Goudswaard-Van der Lans v. the Netherlands* (dec.), No. 75255/01, 22 September 2005, ECHR 2005-XI; *SAS v. France* [GC], No. 43835/11, 1 July 2014 (Belgium defending the full-face veil ban given that itself had issued a similar ban).

ECHR to argue for a certain interpretation of the ECHR, which may, at some point, become relevant as persuasive case law.[56]

The ECtHR also has developed a strong public interest-based *amicus curiae* practice. It has invited and received submissions from governments and civil society representatives – often representing clashing values – in cases involving ethically and socially controversial issues (see Chapter 5, Section B).

The public interest *amici curiae* often lobby for changes in the court's case law. Briefs address earlier decisions, point to gaps, negative and positive effects of the jurisprudence and highlight the impact a certain interpretation of the ECHR will have. If well executed, such 'feedback' submissions allow for some form of direct communication and dialogue between the court and (parts of) the public and enable it to see if decisions have had the intended effect – or correct them if not. A review of accepted submissions indicates that the court tends to admit only *amici curiae* with some expertise on the relevant issues.[57] This requirement points to a

---

56 In the late 1980, in *Glasenapp v. Germany,* Judgment, 28 August 1986, ECtHR Series A No. 104 and in *Kosiek v. Germany*, Judgment, 28 August 1986, ECtHR Series A No. 105, the ECtHR rejected a request by *amici curiae* that sought to impede the creation of a certain precedent, because it was not aimed at solving the case before it. See also O. De Schutter, supra note 26, p. 391. *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A No. 262; *AB Kurt Kellermann v. Sweden*, No. 41579/98, 26 October 2004; *Association SOS Attentats and De Boëry v. France* [GC], No. 76642/01, 4 October 2006, ECHR 2006-XIV; *Scordino v. Italy (No. 1)* [GC], No. 36813/97, 29 March 2006, ECHR 2006-V; *Ramzy v. the Netherlands* (dec.), No. 25424/05, 27 May 2008; *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, ECHR 2008; *TV Vest AS and Rogaland Pensjonistparti v. Norway*, No. 21132/05, 11 December 2008; *Burden v. the United Kingdom* [GC], No. 13378/05, 29 April 2008; *A. v. the Netherlands*, No. 4900/06, 20 July 2010 (Several states argued for a more deportation-friendly interpretation); *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, ECHR 2011 (The Netherlands and the United Kingdom arguing in defence of the EU's Dublin system for asylum matters); *S.H. and others v. Austria* [GC], No. 57813/00, 3 November 2011, ECHR 2011; *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011; *Schatschaschwili v. Germany* [GC], No. 9154/10, 15 December 2015.

57 The court has received submissions from organizations focusing on a particular public interest or the defence of the human rights of a particular group. They include the European Roma Rights Centre in cases involving the violation of human rights of Roma people and the mental health NGO MIND in cases concerning

strong nexus between information-based and public interest-based *amicus curiae*.[58]

3. Inter-American Court of Human Rights

Only in 2008, in *Kimel v. Argentina* and *Castañeda Gutman v. Mexico*, the IACtHR for the first time explicitly elaborated on its concept of *amicus curiae* upon a challenge by Argentina to a submission from the Civil Rights Association. It first rejected the concept of a private interest-based *amicus curiae* by determining that *amici curiae* were '*not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court*,' a requirement now included in the definition of Article 2(3) IACtHR Rules.[59] While this embraces an information-based function of

---

mentally disabled people. *Chapman and others v. the United Kingdom* [GC], Nos. 27238/95, 24882/94, 24876/94, 25289/94, 18 January 2001, ECHR 2001-I; *Jane Smith v. the United Kingdom* [GC], No. 25154/94, 18 January 2001; *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 1st section, 26 February 2004; *Tănase and others v. Romania* (striking out), No. 62954/00, 26 May 2009; *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 93; *Munjaz v. the United Kingdom*, No. 2913/06, 17 July 2012; *X. v. France*, Judgment of 31 March 1992, Series A No. 234-C; *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, 24 April 2003; *Shelley v. the United Kingdom* (dec.), No. 23800/06, 4 January 2008; *M.W. v. the United Kingdom* (dec.), No. 11313/02, 23 June 2009; *Carson and others v. the United Kingdom* [GC], No. 42184/05, 16 March 2010, ECHR 2010; *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, ECHR 2010; *Axel Springer AG v. Germany* [GC], No. 39954/08, 7 February 2012; *I.G. and others v. Slovakia*, No. 15966/04, 13 November 2012; *Kedzior v. Poland*, No. 45026/07, 16 October 2012; *Kiyutin v. Russia*, No. 2700/10, 10 March 2011.

58 *Greens and M.T. v. the United Kingdom*, Nos. 60041/08 and 60054/08, 23 November 2010, ECHR 2010; *MGN Limited v. the United Kingdom*, No. 39401/04, 18 January 2011; *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011.

59 *Kimel v. Argentina,* Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, para. 16 [Emphasis added]. The exclusion of particular interests may be because the court possesses several distinct mechanisms for the recognition of certain non-party interests. These mechanisms include the screening and preparation of cases by the Inter-American Commission on Human Rights, which can invite affected parties, victims and interest groups to join its legal team before the IACtHR. See, for example, *Velásquez Rodríguez v. Honduras,* Judgment of 29 July 1988 (Merits), IACtHR Series C No. 4. See also T. Buergenthal, *International human rights in a nutshell*, 4th Ed., St. Paul 1999, p. 254. Further, the

amicus curiae, the court also acknowledged a secondary, public interest-based function of *amicus curiae* by stating that:

> On the other hand, the Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, *amici curiai* briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court.[60]

The court's openness to public interest-based *amici curiae* is illustrated also by its public call for *amicus curiae* submissions from different entities and the public society in general through its website.[61] The IACtHR's reluctance to assign a private interest-based function to *amici curiae* has led it to hear on an *ad hoc* basis people directly affected by its judgment, but not as *amicus curiae*.[62] Still, it receives in contentious and advisory proceedings submissions from institutions, which are active advocates on the issues in dispute. On occasion, these groups may be indirectly or directly

---

IACtHR Statute provides a special mechanism for the participation of victims, their next of kin or accredited representatives in Article 25(1) IACtHR Rules. The 'alleged victim or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings.' Article 25(2) determines that in the event of several alleged victims, they shall designate a 'common intervener' to represent them in the case. See M. Pinto, *NGOs and the Inter-American Court of Human Rights*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 52; A. del Vecchio, *International courts and tribunals, standing*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 17. One exceptional case of interest-based *amicus curiae* occurred in *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 144, pp. 7, 10, 38-39, 43, 95-96, paras. 42-44, 62, 196-197.

60 *Caso Kimel v. Argentina*, Judgment of 2 May 2008, IACtHR Series C No. 177, para. 16, pp. 4-5; *Caso Castañeda Gutman v. Estados Unidos Mexicanos*, Judgment of 6 August 2008, IACtHR Series C No. 184, para. 14, p. 5.

61 *Articulo 55 de la Convención Americana Sobre Derechos Humanos*, Advisory Opinion No. OC-20/09, 29 September 2009, IACtHR Series A No. 20, pp. 28-32.

62 *Atalo Riffo y niñas v. Chile*, Judgment of 4 February 2012, IACtHR Series C. No. 239. The court decided to hear the testimony of three minors in a case concerning their mother's loss of custody and their removal from the family home due to her sexual orientation. The children's father request for his and his daughters' direct participation as interveners was denied and he was not allowed to present substantive arguments or evidence as *amicus curiae*.

affected by the court's judgment.[63] But this is not the reason for their admission.

4. WTO Appellate Body and panels

The WTO adjudicating bodies have not expressly assigned a public-interest function to *amicus curiae*. They have on several occasions received submissions from NGOs purporting to represent a public interest or from business and industry groups defending a commercial interest. The panels and the Appellate Body have developed as the decisive admission criterion that submissions should be useful for the decision-making in the case, which can be understood to allow for interest-based briefs. Panels' and the Appellate Body's admission practice indicates a preference for briefs supporting specific commercial over general (and potentially more diffuse)

63 See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*, Advisory Opinion No. OC-5/85 of 13 November 1985, IACtHR Series A No. 5, pp. 6-9*; Enforceability of the right to reply or correction (Articles 14(1), 1(1) and (2) American Convention on Human Rights)*, Advisory Opinion OC-7/85 of 29 August 1986, IACtHR Series A No. 7, p. 9; *Caso de las Hermanas Serrano Cruz v. El Salvador*, Judgment of 23 November 2004 (Preliminary objections), IACtHR Series C, No. 118, paras. 32-35 (Forced disappearances case, submission by Asociación Abuelas de Plaza de Mayo); *Case Yatama v. Nicaragua* (Preliminary objections, Merits, Reparations and Costs), Judgment, 23 June 2005, IACtHR Series C No. 127, paras. 17, 34, 38, 42, 120; *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 209; *Garibaldi v. Brazil*, Judgment of 23 September 2009 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 203; *Fernández Ortega et al. v. Mexico*, Judgment of 30 August 2010 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 215; *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 219; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79, paras. 38, 41-42, pp. 7-8; *Duque v. Colombia*, Judgment of 26 February 2016 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 310; *Flor Freire v. Colombia*, Judgment of 31 August 2016 (Preliminary objections, Merits, Reparations and Costs), IACtHR Series C No. 315. For an analysis of this case, see P. Macklem/E. Morgan, *Indigenous rights in the Inter-American system: the amicus brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua*, 22 Human Rights Quarterly (2000), p. 570.

public interests.[64] The panel in *Australia–Salmon* admitted an *amicus curiae* submission from 'concerned fishermen and processors from South Australia.'[65] In *EC–Asbestos*, the Appellate Body received applications for *amicus curiae* submissions from a large number of asbestos industry organizations and asbestos producers.[66] And in *Australia–Apples*, the panel accepted an unsolicited letter from Apple and Pear Australia Ltd, an Australian industry organization representing the interests of commercial apple and pear growers in Australia.[67]

64 *European Communities – Export Subsidies on Sugar* (hereinafter: *EC–Sugar*), Report of the Appellate Body, adopted on 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R; *EC–Bed Linen*, Report of the Panel, adopted on 12 March 2001, WT/DS141/R. In *US–Section 110 (5) Copyright Act*, the panel received a copy of a letter to the US Trade Representative by a law firm representing the American Society of Composers, Authors and Publishers ('ASCAP') which was affected by the dispute. The panel accepted the brief but decided not to rely on it for its findings because it 'essentially duplicated information already submitted by the parties'. See *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R.

65 *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW.

66 As noted, all applications for grant of leave to file an *amicus* brief were ultimately rejected for formal deficiencies. *EC–Asbestos*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, FN 30-33. Similarly, in *US–Lead and Bismuth II*, the Appellate Body received a written submission from the industry association American Iron and Steel Institute and the Specialty Steel Industry of North America representing the interests of steel manufacturers. *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 42.

67 *Australia–Measures Affecting the Importation of Apples from New Zealand* (hereinafter: *Australia–Apples*), Report of the Panel, adopted on 17 December 2010, WT/DS367/R. See also *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter: *US–Clove Cigarettes*), Report of the Appellate Body, adopted on 24 April 2012, WT/DS406/AB/R, p. 4, para. 10 (Rejection of two *amicus curiae* briefs one of which stemmed from a group of anti-tobacco lobbying organizations).

5. Investor-state arbitration

Rules governing *amicus curiae* participation determine that tribunals should consider in their decision whether to grant leave to *amici curiae* if the applicant has a significant interest in the subject-matter of the arbitration. In *Apotex I*, the tribunal reasoned that this required that 'the rights or principles [the *amicus*] may represent or defend might be directly or indirectly affected by the specific ... issue on which it intends to make submissions, or indeed by the outcome of the overall proceedings.'[68] Case law shows that investment tribunals often admit *amici curiae* to present on a public interest. In *Biwater v. Tanzania*, the tribunal, having examined the *amicus curiae* petitioners' profiles, found that 'given the particular qualifications of the Petitioners, … it is envisaged that the Petitioners will address broad policy issues concerning sustainable development, environment, human rights, and governmental policy.'[69] The emphasis on public interest *amici curiae* is not surprising, as the rationale for the admission of *amici curiae* in the first place was to respond to the public interest that arose from the subject matter of the dispute (see Chapter 3). This requirement has been maintained since, and *amici curiae* purporting to be connected to those who will bear the consequences of a decision are usually admitted (see Chapter 5). This concerns in particular cases involving public commodities, such as access to water, the protection of the environment, human, or indigenous rights. The public interests these *amicus curiae* represent predominantly relate to local and national public interests. These are increasingly internationalized as displayed in the increasing number of joint submissions from national and international NGOs combining international legal arguments with contextual background information on the affected local area or the national debates held on the issue in

68 *Apotex I v. USA*, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011, para. 28.

69 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para 64.

dispute.[70] Some tribunals have also considered as a relevant interest that the award will affect how similar cases are dealt with.[71]

Tribunals further have granted leave to *amici curiae* with a more direct interest in the outcome of the arbitration. In *Glamis v. USA*, the tribunal admitted an *amicus curiae* brief from the National Mining Association, a national not-for-profit organization that represented the interests of the mining industry in the US. The brief addressed the possible negative effects for mining investors of regulatory uncertainty in US mining laws and the '*de facto* bans on the open-pit mining of valuable mineral resources through reclamation requirements inconsistent with accepted and economically feasible best practices.'[72] Further, the Quechan Indian Nation outlined its (affected) rights connected to the land where the mines were built, and emphasized its vulnerability to the substantive outcome of the case.[73] The Tribunal decided to accept all of the *amicus curiae* submissions, including some more general public interest-based *amicus curiae* briefs, noting the 'public and remedial purposes of non-disputing [party] submissions.'[74] A directly interested *amicus curiae* was admitted by the tribunal

---

70 E.g. *Pac Rim v. El Salvador*, Submission of *amicus curiae* brief by CIEL et al., 20 May 2011, at: http://www.ciel.org/Publications/PAC_RIM_Amicus_20May11_Eng.pdf; *Biwater v. Tanzania*, *Amicus curiae* submission of Lawyers Environmental Action Team, Legal and Human Rights Centre, Tanzanian Gender Networking Programme, CIEL, IISD, 16 March 2007, ICSID Case No. ARB/05/22, at: http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf (both last visited: 28.9.2017); *Bear Creek Mining v. Peru*, *Amicus curiae* request for leave dated 9 June 2016 from the Peruvian NGO Derechos Humanos y Medio Ambiente and Dr. Carlos Lopez PhD, Senior Legal Adviser to the International Commission of Jurists, Geneva, ICSID Case No. ARB/14/21.

71 *Suez/Vivendi v. Argentina*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007, ICSID Case No. ARB/03/19, para. 18 ('[B]ecause of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.'). Opposing such a notion, Claimant in *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 19.

72 *Glamis v. USA*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, 13 October 2006, p. 3.

73 *Glamis v. USA*, Application for Leave by the Quechan Indian Nation, 19 August 2005.

74 *Glamis v. USA*, Award, 8 June 2009, para. 286.

in *Infinito Gold v. Costa Rica*. The tribunal granted leave to the environmental NGO APREFLOFAS. The NGO had been the plaintiff in the domestic proceedings before an administrative appeals court that revoked Infinito Gold's exploitation concession and gave rise to the arbitration. In its order granting leave, the tribunal highlighted that because 'claimant now impugns the judgment that APREFLOFAS obtained is contrary to international law … APREFLOFAS can thus be deemed to have an interest in ensuring that this Tribunal has all the information necessary to its decision-making.'[75]

The European Commission has carved out a special form of interest representation. It has actively sought to participate in investor-state arbitrations involving EU law – so far in approximately 25 cases (see Annex I).[76] In doing so, it not merely seeks to impart information as an expert on EU law, but acts as a watchdog over the adherence to and implementation of EU law, as first exemplified in *Micula v. Romania*.[77] In *Electrabel v. Hungary*, the tribunal acknowledged that the European Commission had

---

75 *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 36.

76 Since 2012, more than 25 investor-state arbitrations have been initiated under the Energy Charter Treaty by EU nationals against several EU member states, in particular against Spain and the Czech Republic, over claims for indirect expropriation and violation of the guarantee of fair and equitable treatment after the countries issued measures that reduced financial incentives to invest in the renewable energies sector. Spain in 2004 had established a special subsidies regime to boost its electric energy sector by Royal Decree No. 436/2004. Due to the financial crisis, several measures were revoked, and in 2014, the advantageous tariff and remuneration system was replaced. See also O. Gerlich, supra note 20, p. 264.

77 *Micula v. Romania* concerned the legality of a repeal of tax incentive measures for certain Swedish investments in Romania. The repeal was in part to comply with EU state aid rules in order to fulfil the requirements of the EU's Common Position on Romania's compliance with the EU accession criteria. The EC participated in the arbitration as *amicus curiae.* It argued in its brief that the Sweden-Romania BIT should be interpreted in accordance with EU law. Otherwise, the award would not be enforceable in the EU. The tribunal (unfortunately) left open the issue of interaction of EU law and the BIT when it found for the investors and ordered Romania to pay EUR 82 million in damages for violation of the fair and equitable treatment standard. In January 2014, the EC informed Romania that any implementation of the award would amount to new state aid and would have to be notified to it. Romania informed the EC that the award had been partially complied with by offsetting some of the damages against the investors' tax debts. On 26 May 2014, the EU notified Romania that it had issued a suspension injunction, which obliged it to not enforce the award. In October 2014, it launched a formal

'much more than "a significant interest" in these arbitration proceedings' lamenting that the EC 'could not play a more active role as a non-disputing party in [the] arbitration.'[78]

While these cases signal a shift towards *amici curiae* pursuing more particular (public) interests, *amici curiae* presenting a purely commercial interest are rejected (see Chapter 5). Further, *amici curiae* rarely are assigned a pure interest-based function. Their submissions are coupled with an information-based function. The claimant's argument in the course of the request for leave proceedings in *Biwater v. Tanzania* is exemplary:

> The [*amicus curiae*] petitioners should only be accorded *amicus* status if the issues they raise and the interests they represent will contribute information and insight in relation to the determinations that are necessary for the Arbitral Tribunal to make in order to resolve this dispute.[79]

This ensures that *amicus curiae* participation remains incidental to pending proceedings.

---

investigation under Article 108(2) TFEU. See *Ioan Micula, Viorel Micula and others v. Romania* (hereinafter: *Micula v. Romania*), Award, 11 December 2013, ICSID Case No. ARB/05/20, para. 36; EC, *State aid SA.38517(2014/C) (ex 2014/NN) – Romania, Implementation of Arbitral Award Micula v. Romania of 11 December 2011,* 1 October 2014, C(2014) 6848 final. See also C. Tietje/C. Wackernagel, *Outlawing compliance? – The enforcement of intra-EU investment awards and EU state aid law*, Policy Papers on Transnational Economic Law No. 14 (June 2014). The EC has also intervened as *amicus curiae* in district and appellate court proceedings initiated by Romania to halt the enforcement of the award. See *Micula et al. v. the Government of Romania*, No. 1:2015mc00107, Document 66 (S.D.N.Y. 2015); *Ioan Micula, European Food S.A., S.C. Starmill S.R.L., Multipack S.R.L. v. the Government of Romania*, Brief for *Amicus Curiae* [by] the Commission of the European Union in Support of Defendant-Appellant, 4 February 2016 (2nd Cir. 2016). See also H. Wehland, *The enforcement of intra-EU BIT awards: Micula v. Romania and beyond*, 17 Journal of World Investment and Trade (2016), pp. 942-963.

78 *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/09, para. 4.92.

79 *Biwater v. Tanzania*, and Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 31. See also *Biwater v. Tanzania,* Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 366 ('In this case, given the particular qualifications of the Petitioners, and the basis for their intervention as articulated in the Petition, it was envisaged that the Petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy.').

6. Comparative analysis

It is noticeable that interest-based *amici curiae* play a more significant role in courts with no or very limited rules on intervention.[80] The ECHR for instance only establishes a right of intervention for the national state of the applicant, see Article 36(1) ECHR.[81] Private-interest *amici curiae* are used by the court as a means to ensure some form of due process. The IACtHR has a strong public interest-based *amicus curiae* practice in contentious and in advisory proceedings, but it rejects the idea of private interest-based *amici curiae*. Article 25 IACtHR Rules establishes a special participation mechanism for alleged victims or their specially appointed representatives. In investment arbitration, there is a strong focus on public interest-based *amici curiae*. This is likely a result of the reliance on public interest considerations to justify the general admission of *amicus curiae*. The WTO takes a different position. It favours *amici curiae* that defend concrete trade and business interests. This approach accords with the historical focus of the WTO on trade liberalization and facilitation.

There is no clear case law on the preferred public interest with the exception of investment tribunals (see Chapter 5). No international court or tribunal has elaborated any requirements concerning the nature of the public interest to be represented.

III. Systemic *amicus curiae*

The systemic *amicus curiae* describes instances where *amici curiae* are admitted to the proceedings to remedy certain (perceived) deficiencies of an international court or tribunal relating to its structure or set-up.

Amicus curiae participation to alleviate systemic concerns is rare in international dispute settlement. One example is the ICJ's admission of written submissions by officials employed by an international organization in review proceedings to overcome the lack of standing of individuals and grant some form of due process and access to justice (see Chapter 5). Fur-

80 See G. Umbricht, supra note 10, p. 784 ('The gap between individuals who are allowed to participate in procedures and individuals who are affected by the relevant decision is wider at an international level than it is at a national level.').

81 E.g. *M.G. v. Germany* (dec.), ECtHR No. 11103/03, 16 September 2004; *A. v the United Kingdom*, No. 35373/97, 17 December 2002, ECHR 2002-X.

ther, investment tribunals have cited transparency and legitimacy concerns as a reason for the admission of *amicus curiae* submissions.[82] In *Methanex v. USA*, the tribunal noted that

> the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.[83]

Similarly, in *Suez/InterAguas v. Argentina* and in *Suez/Vivendi v. Argentina*, the ICSID-administered arbitral tribunals found that

> [t]he acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. … Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.[84]

---

82 See *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 70; *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50 ('[T]he Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself.'); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (hereinafter: *Philip Morris v. Uruguay*), Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 28 ('[The tribunal] considers that in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large.').
Legal scholars surmise that the assertion of authority to admit *amici curiae* may have been motivated by a wish to alleviate criticism about the lack of transparency in WTO dispute settlement (see Chapter 2). However, neither panels nor the Appellate Body have relied on this consideration alone to justify the admission of *amici curiae*.

83 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae'*, 15 January 2001, para. 49.

84 *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para. 22. See also *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Par-

The UNCITRAL Rules on Transparency in their Article 4(a) make '[t]he public interest in transparency' a factor in tribunals' exercise of discretion. This concern was voiced by many of the *amicus curiae* petitioners. In its request for leave in *Methanex v. USA*, the IISD, for instance, argued that the tribunal would be perceived as intransparent and private if it chose not to accept the organization's *amicus curiae* brief.[85] However, the alleviation of systemic deficiencies is generally only considered a supplemental benefit.[86]

IV. Analysis

The functions of the international *amicus curiae* were not defined prior to the first use of the concept before international courts or tribunals. Thus, international courts and tribunals had to carve out the concept's functions. Only investment tribunals and the IACtHR have openly discussed the functions of *amicus curiae* in their proceedings. Despite extensively justifying its admission, WTO Appellate Body and panels have not commented on the functions of *amicus curiae* in their case law.

Despite overlaps and similarities, the instrument does not have a general joint function before international courts and tribunals (1.). Further, its functions are constantly evolving (2.). This raises the question of limits to the functions courts can assign to *amici curiae* (3.).

---

ticipation as *Amicus Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 21.

85 *Methanex v. USA*, Petition to the Arbitral Tribunal Submitted by the International Institute for Sustainable Development, 25 August 2000, p. 3, paras. 3.7-3.8.

86 In *Biwater v. Tanzania*, the tribunal seems to have placed greater emphasis on this factor than other tribunals. The tribunal dismissed the claimant's argument that the public interest was not engaged in light of the investor's termination of the investment. The tribunal held that even if a public interest was not at stake, 'the observation of the tribunal in the *Methanex* case still applies with force, namely, that "the acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor state arbitration".' [Emphasis and reference omitted]. See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 54.

1. The myth of 'the' international *amicus curiae*

All international courts and tribunals use *amicus curiae* as an information provider. However, there are notable differences as to how courts use information-based *amicus curiae*. Information-based *amicus curiae* participation ranges from the pure transmission of non-redacted documents to the presentation of *amici curiae*'s experiences, views and legal arguments. Investment tribunals, for instance, expect an *amicus curiae* to give its own interpretation of events or to argue a legal issue from its own perspective. Before the ECtHR, there is a large practice of submissions on the human rights situations in certain countries that aims to complete the court's fact record. These *amici curiae* are used for their information value, not their personal opinions.

Further, most international courts and tribunals allow *amicus curiae* participation in the public interest, even though only few of them pronounce this function as clearly as investment tribunals and the IACtHR. Even fewer international courts and tribunals grant leave to *amici curiae* to present a private interest. Private interest-based *amicus curiae* participation occurs mainly before the ECtHR. WTO panels and, in one case, an investment tribunal have also received *amicus curiae* submissions from business interest groups.

Several academics argue that the instrument should be defined clearly to create a single 'international *amicus curiae.*'[87] A common, singular concept of *amicus curiae* in international dispute settlement has its advantages in respect of clarity of the instrument. However, the creation of a single international *amicus curiae* fails to take into account the significant differences between international courts and tribunals. Their institutional needs, their functions and their constituencies are very diverse. Further, the advantage of the current *amicus curiae* practice is its flexibility. International courts and tribunals are free to consider what kind of participation would be beneficial to their proceedings and tasks, and they can shape the instrument accordingly. The instrument would lose many of its advantages if it would be standardised, regardless of the practical difficulties in achieving such an endeavour in the fragmented landscape of international dispute settlement.

87 Cf. S. Menétrey, supra note 22, pp. 2-4.

2. An evolving concept

Amicus curiae has changed significantly in the last fifteen years, both in terms of regulation and the functions assigned to it. For instance, the ECtHR has expanded *amicus curiae* from an instrument to call attention to private interests to one that introduces public interests.[88] This has allowed in particular civil society groups and member states to present statements in cases engaging competing values. Investment arbitration tribunals and the WTO adjudicating institutions have developed the instrument in the opposite direction. Having admitted at first only NGOs seeking to present non-trade and non-investment related general public interests, they increasingly have admitted entities (re)presenting interests that are more particular.

3. Are there limits to the functions *amici curiae* may assume?

International courts and tribunals most often admit *amici curiae* through their inherent procedural powers. Accordingly, *amici* cannot fulfil functions that international courts and tribunals cannot transfer. This has become relevant in particular with respect to interest-based *amicus curiae* participation. The instrument cannot be used to introduce a new party through the backdoor or to extend the scope of the dispute. This also entails that the use of *amicus curiae* to obtain standing is moot (see Chapter 8). The *UPS v. Canada* tribunal stressed that it would overextend the instrument if an *amicus curiae* could participate to 'vindicate its rights.'[89] It can merely alert an international court or tribunal of a possibly conflicting right or interest, not have it adjudicated.

---

88 This was possible by the dropping of the requirement that an *amicus curiae* show a 'sufficiently proximate connection' between its submission and the case. See *Glasenapp v. Germany,* Judgment, 28 August 1986, ECtHR Series A No. 104 and *Kosiek v. Germany*, Judgment, 28 August 1986, ECtHR Series A No. 105, where the court did not grant leave to *amici curiae* seeking to submit information about practices in states other than the defendant state for lack of a 'sufficiently proximate connection'. The court found that the *amici curiae* could bring their own claim to the EComHR, if they considered themselves affected or harmed by a state measure.

89 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 61.

The variety of functions implies the question if it is adequate to subject all *amici curiae* to the same rules and standards. Should different sets of rules apply depending on the function of *amicus curiae*, such as a requirement for public interest-based *amicus curiae* that it can legitimately represent a specific interest or the requirement that information-based *amicus curiae* must be impartial and independent? A differentiated regulatory framework could increase the utility and quality of *amicus curiae* briefs, but it would also raise the administrative burdens of international courts and tribunals.

C. Amicus curiae *and other forms of non-party participation*

This section explores how *amicus curiae* relates to other forms of non-party participation, especially intervention and participation by non-disputing member states to a treaty.[90]

Differentiating *amicus curiae* from intervention and other forms of non-party participation is challenging because of the functional overlaps between the two instruments and because neither concept is viewed uniform-

90 There may be some functional overlaps between *amicus curiae* and evidentiary instruments, as noted by the tribunal in *Methanex v. USA*. See *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 13. However, as Chapter 7 shows, there are obvious differences between witnesses, experts and expert-witnesses, on the one hand, and *amicus curiae*, on the other hand. The actual functions of *amicus curiae* including information-based *amicus curiae* differ significantly from the established categories of evidence. An *amicus curiae* is expected to voice its own views and provide argument, including (and often especially) on legal issues. This is not the case for experts and witnesses. They shall complete the fact record. Moreover, an *amicus curiae* is not limited to questions posed to it by the court or tribunal. Also, it can seek to participate without having been solicited, and it is usually not bound by any special duties or rules (see Chapters 5 and 6). Finally, even though a few regulations and courts, including Rule 37(2) ICSID Arbitration Rules, address *amicus curiae* under the heading of evidence, all international courts and tribunals reviewed treat it as separate from the established categories of evidence, as a concept *sui generis*. See Chapter 7 and L. Bartholomeusz, supra note 22, p. 273 ('[*A*]*mici* can perform a function similar to that of an expert. In appointing *amici*, international jurisdictions rarely, if ever, rely on their power to appoint third parties as experts ...' [References omitted]); J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 International and Comparative Law Quarterly (2002), pp. 325-364.

ly in international dispute settlement.[91] *Zimmermann* defines intervention before international courts and tribunals as 'the participation of third states in ... proceedings while not being either the applicant or the respondent due to a legal interest in the underlying legal issues.'[92] Before several international courts and tribunals, *amici curiae* participate to highlight specific interests. Interveners, like *amici,* approach the court in the hope that their submissions will be considered in the final decision. Intervention, non-party participation by member states and *amicus curiae* participation are all forms of third party participation in that they pierce the traditionally bilateral dispute settlement process.[93] This functional overlap has led to concerns that *amicus curiae* could undermine the prerequisites for intervention.

---

91 Institut de Droit International, Rapporteur R. Bernhardt, *Judicial and arbitral settlement of disputes involving more than two states*, Session 11 (Berlin), 68 Institute of International Law Annuaire (1999), p. 113 (He does not take into consideration interest-based *amicus curiae*: 'The only valid purpose of intervention is to protect a specific and own legal interest while *amicus curiae* participation assumes another perspective in that it exclusively aims to inform the Court on matters of law or fact in order to facilitate the Court's fulfillment of its tasks.'). In his Dissenting Opinion in *Continental Shelf*, *Judge Ago* equated the concepts. He held that the object of intervention was to provide the Court with information on the extent of the intervener's claims and the legal foundations on which it based them 'with the sole purpose, however, of demonstrating that those claims deserve to be taken seriously, and certainly not of obtaining a definitive recognition of them by the Court'. See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 21 March 1984, Diss. Opinion of Judge Ago, ICJ Rep. 1984, pp. 123-124, para. 14; P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 Max-Planck Yearbook of United Nations Law (2002), p. 149, FN 24.

92 A. Zimmermann, *International courts and tribunals, intervention in proceedings,* in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 1. Traditionally, there are two types of intervention before international courts: intervention as of right, where the interpretation of a treaty to which a third state is a member is at issue, and discretionary intervention, where the legal interest of a third party may be affected by the outcome of the case.

93 See A. Zimmermann, supra note 92, para. 3; S. Rosenne, *International Court of Justice*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, paras. 92-94.

I. International Court of Justice and International Tribunal for the Law of the Sea

The ICJ Statute provides for discretionary intervention and intervention as of right. Article 62 ICJ Statute allows a state to request permission to intervene if it considers having 'an interest of a legal nature which may be affected by the decision in the case.' Article 63 allows intervention by states '[w]henever the construction of a convention to which States other than those concerned in the case are parties is in question.'[94] The latter form of intervention has been considered to be functionally akin to *amicus curiae* participation because of its purpose to promote and facilitate the uniform interpretation of multilateral conventions.[95] Indeed, there is a similarity in the sense that Article 63 establishes an incidental consultative process which extends the ICJ's basis for decision-making in the interpretation of a convention.[96] Still, the comparison falls short: first, Article 63(2) expands the judgment's binding effect on the intervening state with regard to the interpretation of the convention. Second, Article 63, by its wording, grants a *right* to intervene.[97] The ICJ denies this right only where

---

94 For a detailed analysis of intervention before the ICJ, see S. Rosenne, *The law and practice of the International Court of Justice*, 4th Ed., Leiden 2006, Chapter 26; C. Chinkin, *Article 63*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed. Oxford 2012, para. 24. The intervening state does not need to show a particular legal interest. An abstract interest is presumed by membership to the convention. See S. Oda, *Intervention in the International Court of Justice*, in: R. Bernhardt et al (Eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit und Menschenrechte, Festschrift für Hermann Mosler*, Berlin et al. 1983, p. 644. The prevailing view is that the convention must be of some relevance to the case. See K. Günther, *Zulässigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH*, 34 German Yearbook of International Law (1991), p. 286; *Haya de la Torre (Colombia v. Peru)*, Judgment, 13 June 1951, ICJ Rep. 1951, p. 76 ('[E]very intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings.').

95 K. Günther, supra note 94, p. 285; S. Oda, supra note 94, p. 635, citing the Advisory Committee of Jurists of The Hague in 1920; C. Chinkin, supra note 94, p. 1575, para. 4.

96 K. Günther, supra note 94, pp. 287-288; P. Palchetti, supra note 91, pp. 141-142.

97 T. Elias, *The limits of the right to intervention in a case before the International Court of Justice*, in: R. Bernhardt et al. (Eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit und Menschenrechte, Festschrift für Hermann Mosler*,

it finds that an intervention is not 'genuine.'[98] *Amicus curiae* participation in contentious proceedings remains limited to the narrow confines of Article 34(2) ICJ Statute, which differs in personal scope and content from intervention in so far as only intergovernmental organizations may participate and they must submit information relevant to the case before the Court. Article 34(3) ICJ Statute together with Article 69(3) ICJ Rules, however, establishes a provision similar to Article 63 ICJ Statute for intergovernmental organizations whose constituent instruments or an instrument adopted thereunder is in question before the Court.

The ICJ understands intervention under Article 62 ICJ Statute as purely protective.[99] The term 'interest of a legal nature' is not further specified, but the ordinary meaning of the term denotes less than a legal right, but more than a purely economic or political interest.[100] The ICJ has held that the interest must be the *own* interest of the applicant, but it needs neither

---

Berlin et al. 1983, p. 166. The ICJ did not follow this view. It denied El Salvador's application for permission to intervene under Article 63 in the *Nicaragua case*. See *Nicaragua Case*, Declaration of Intervention, Order of 4 October 1984, ICJ Rep. 1984, p. 215.

98 See the analysis by K. Günther, supra note 94, p. 287.

99 Applicants must state the purpose of the intervention to facilitate the Court's decision on the existence of a genuine interest (Article 81(2)(b) ICJ Rules). See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, Diss. Op. Judge Jennings, ICJ Rep. 1984, p. 152, para. 14 ('As to the "precise object of the intervention", this is presumably to enable the Court to assure itself how far the object is indeed the safeguarding of legal rights which may be affected by the decision, and how far other purposes might be involved.'). Intervening states may not seek a decision on their interests. The Court considers as a valid objective information on the nature of the potentially affected legal interests. Critical, P. Palchetti, supra note 91, p. 147. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras),* Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 130, para. 90; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Application to Intervene, Order of 21 October 1999, ICJ Rep. 1999, p. 1034, para. 14; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 23 October 2001, ICJ Rep. 2001, p. 606, paras. 87-88. See also the heavily criticized rejection of Italy's application in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, pp. 9-28, paras. 13-45; C. Chinkin, supra note 94, *Article 62*, para. 55.

100 K. Günther, supra note 94, p. 266. This was the intention of the drafters of the PCIJ Statute, see Advisory Committee of Jurists, Procès-verbaux des séances du

to be direct, nor substantial, nor specific to the state seeking to intervene.[101] Already the PCIJ Statute's *travaux preparatoires* indicate that the provision did not intend to allow states to intervene to make submissions on abstract questions of law in the interest of a 'harmonious development' of international law – a typical motivation for participation as *amicus curiae*. The ICJ has confirmed this in its practice.[102] In a dispute between Libya and Malta, the Court decided with respect to Italy's application for permission to intervene that intervention was not permissible if its main purpose was to assist the Court, therewith drawing a clear line to *amicus curiae*.[103] However, the ICJ expanded the understanding of interest of a legal nature in a judgment on the application for permission to intervene by

---

Comité, PCIJ 1920, pp. 745-746. Some scholars equate interest of a legal nature with a legal right. See T. Elias, supra note 97, pp. 160-161.

101 C. Chinkin, supra note 94, *Article 63*, para. 42; *Land Island and Maritime Frontier Dispute (El Salvador/Honduras),* Application to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, para. 61 and p. 124, para. 76. On public interest intervention, see C. Chinkin, *Article 62*, supra note 94, p. 1558, para. 66 (*Chinkin* argues that the PCIJ indirectly suggested the 'concept of a public interest intervention' in the case *Railway Traffic Between Lithuania and Poland,* because it asserted third party interests in freedom of transit and communications. However, no state found it necessary to intervene. She contends that nevertheless the ICJ is unlikely to permit such intervention in light of its restrictive decision in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, Judgment 14 April 1981, ICJ Rep. 1981, p. 9, paras. 12-13). See also M. Benzing, supra note 42, pp. 384-385.

102 See E. Jiménez de Aréchaga, *Intervention under Article 62 of the Statute of the International Court of Justice*, in: R. Bernhardt et al. (Eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit und Menschenrechte, Festschrift für Hermann Mosler*, Berlin et al. 1983, pp. 456-458; S. Oda, supra note 94, p. 635; K. Günther, supra note 94, p. 267.

103 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, pp. 25-26, paras. 40-42. In the first successful intervention pursuant to Article 62, in *Land, Island and Maritime Frontier Dispute between El Salvador and Honduras*, Nicaragua was granted permission to intervene only in respect of an inseparable condominium in the Gulf of Fonseca between the three states because of its 'community interest'. The ICJ considered the other two grounds upon which Nicaragua sought to intervene too remote. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras),* Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 137, para. 105. S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht 1993, p. 148; K. Günther, supra note 94, p. 264. The Court's rejection of Malta's application to intervene in the *Continental Shelf case* between Libya and Tunisia displays the ICJ's reluctance

the Philippines in the case *Sovereignty over Pulau Ligitan and Pulau Sidapan,* approximating intervention and *amicus curiae* participation. The Court stressed the need for ownership of a specific interest of a legal nature.[104] However, it deviated from its earlier jurisprudence by finding that the interest did not need to be affected by the subject matter of the case. It sufficed if the Court's reasoning could affect the applicant's legal interests.[105] The ICJ's decision marks a significant deviation from its earlier held position. Now, an intervener can seek to submit its views on specific issues of interpretation of laws or fact to prevent a decision that might

---

to broaden the scope of 'legal interest'. The Court found that an interest in the applicable general principles and rules of international law, and, in particular, an interest in the 'potential implications of reasons which the Court may give in its decision' did not constitute an interest of a legal nature. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, Judgment 14 April 1981, ICJ Rep. 1981, p. 12, para. 19.

104 Insofar, the ICJ solidified its position established earlier with regard to Malta's application for permission to intervene when it stressed: 'The wish of a State to forestall interpretations by the Court that might be inconsistent with responses it might wish to make, in another claim, to instruments that are not themselves sources of the title it claims, is simply too remote for purposes of Article 62.' See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 23 October 2001, ICJ Rep. 2001, pp. 603-604, para. 83.

105 Ultimately, the application of the Philippines was unsuccessful for other reasons, see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, 23 October 2001, ICJ Rep. 2001, p. 607, paras. 93-94. The decision constitutes a startling deviation from the position already held by the PCIJ that intervention under Article 62 depends on an 'independent submission of a specific claim' by the applicant 'which may be affected by the operative part of the Court's judgment.' *Case of the SS Wimbledon*, Question of Intervention by Poland, Judgment, 28 June 1923, PCIJ Series A No. 1, p. 12, see E. Jiménez de Aréchaga, supra note 102, p. 461. The decision is in line with *Judge Oda's* push towards a broader scope of intervention. *Judge Oda* has consistently argued that Article 62 should be read in the light of Article 63. A state should be allowed to intervene under Article 62 to make submissions on the interpretation of principles and rules of international law, which the Court may address in its reasoning, as long as the state can show the existence of an interest of a legal nature. See S. Oda, supra note 94, pp. 646-648. Critical, *Palchetti* who argues for a return to a narrow scope of intervention and for the creation of (inclusive) separate rules on *amicus curiae* participation. Intervention re the reasoning should, in his view, depend upon the impact the reasoning of the Court will have on the state. See P. Palchetti, supra note 91, pp. 156-157, 162.

negatively affect its legal interests in future cases.[106] This has moved intervention closer to *amicus curiae* participation. Still, the Court continues to emphasize that intervention is not a mechanism for it to obtain additional information on the case from non-parties.[107]

A further convergence of the concepts results from the effects a decision has on the intervener: the ICJ has developed two forms of intervention under Article 62 ICJ Statute based on the requirement of a jurisdictional link between the intervener and the parties: the non-party intervener and the party intervener.[108] Similar to *amicus curiae* in other *fora,* the non-party intervener under Article 62 informs the ICJ of its legal interests that may be affected with the aim of protecting those interests, but without obtaining a ruling on them due to lack of a jurisdictional band.[109] The main difference between *amicus curiae* and non-party intervention boils down to the fact that the non-party intervener has a right to have its submission

106 As a caveat, the ICJ added that in such a situation, the state seeking to intervene 'necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have.' *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, 23 October 2001, ICJ Rep. 2001, para. 59.

107 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras),* Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 130, paras. 89-90; C. Chinkin, supra note 94, p. 1533, para. 9.

108 Regarding the dispute on the necessity of a jurisdictional link, see K. Günther, supra note 94, p. 274; T. Elias, supra note 97, pp. 163-166, 168 (He rejects the concept of non-party intervention as a 'ludicrous enigma'); E. Jiménez de Aréchaga, supra note 102, pp. 454, 462-465; S. Oda, supra note 94, pp. 641-644; E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), pp. 462-464. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras),* Application by Nicaragua for Permission to Intervene, Judgment, 13 September 1990, ICJ Rep. 1990, p. 135, para. 99; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, 23 October 2001, ICJ Rep. 2001, p. 589, para. 36.

109 R. Bernhardt, supra note 91, pp. 86-87. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening),* Judgment (Merits), 11 September 1992, ICJ Rep. p. 610, para. 423 ('[T]he right to be heard, which the intervener does acquire, does not carry with it the obligation of being bound by the decision.'). Critical, Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 814 ('If third parties are given the opportunity to influence the progression and possibly the outcome of a case, even against the opposition of the parties, it would seem unfair that they benefit from intervention without bearing some corresponding commitment.' [With further references].).

considered whereas an *amicus curiae* does not. *Bernhardt* even argues that the broad approach to intervention renders obsolete *amicus curiae* participation before the ICJ.[110] What is clear is that any admission of *amicus curiae* by the ICJ would require it to elaborate on how it relates to this broad concept of intervention. The existing rules on *amicus curiae* and intervention indicate that the main difference boils down to the personal scope of participants and the purely protective purpose of intervention before the ICJ.

Intervention before the ITLOS follows the two-pronged approach to intervention established by the ICJ Statute. Article 31 ITLOS Statute addresses intervention to protect an interest of a legal nature, whereas intervention pursuant to Article 32 ITLOS Statute regulates intervention when the interpretation or application of the UNCLOS or another international agreement is in question. The ITLOS Statute determines explicitly that in both cases the intervener is bound by the judgment to the extent of his intervention.[111] This is a clear difference to *amicus curiae* participation and might indicate that the drafters of the Statute intended intervention before the ITLOS to be resorted to for the protection of rights rather than the development of international law.

II. WTO Appellate Body and panels

Article 10(2) DSU grants '[a]ny Member having a substantial interest in a matter before a panel and having notified its interest to the DSB … an op-

110 R. Bernhardt, supra note 91, pp. 113-114.

111 Article 31 ITLOS Statute: '1. Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene. …
3. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.'
Article 32 ITLOS Statute: '1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith.
2. Whenever pursuant to article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all parties to the agreement.
3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.'

portunity to be heard by the panel and to make written submissions to the panel.' Article 17(4) DSU determines that '[t]hird parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard, by the Appellate Body.' Member states frequently intervene in panel and Appellate Body proceedings. Like *amicus curiae*, third parties are not bound by the panel or Appellate Body reports.[112] The substantial interest need neither be legal nor belong to the third party in the form of a subjective right.[113] A general interest in the interpretation of the WTO Agreement and its related agreements suffices. In so far, there is a parallel to *amicus curiae* participation. Third parties – like *amici curiae* – may possess a direct interest in the outcome of the case.[114]

Third parties generally make written and oral submissions. They receive privileged access to some of the party submissions.[115] They have a right to reply to the parties' comments on their submissions. The Appellate Body has clarified that the role of third parties is not tantamount to that of parties. Third parties are not in a position to determine procedural

112 *Japan – Taxes on Alcoholic Beverages* (hereinafter: *Japan–Alcoholic Beverages II*), Report of the Appellate Body, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

113 E.g. *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (hereinafter: *EC–Bananas III*), Report of the Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R. See also J. Koepp, *Die Intervention im WTO-Streitbeilegungsverfahren. Eine rechtsvergleichende Untersuchung im internationalen Verfahrensrecht*, Hamburger Studien zum Europäischen und Internationalen Recht, Band 32, Berlin 2001, pp. 68-74.

114 *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products* (hereinafter: *EC–IT Products*), Report of the Panel, adopted on 22 September 2010, WT/DS375/R, WT/DS376/R, WT/DS377/R, para. 7.78. The equivalent provisions in the Working Procedures for Appellate Review neither have such a limitation. See Rule 24 Working Procedures for Appellate Review of 16 August 2010, WT/AB/WP/6.

115 *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (hereinafter: *Canada–Wheat Exports and Grain Imports*), Report of the Panel, adopted on 27 September 2004, WT/DS276/R, pp. 111-113, para. 6.6; *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (hereinafter: *Australia–Automotive Leather II*), Recourse to Article 21.5 (US), Report of the Panel, adopted on 11 February 2000, WT/DS126/RW, para. 3.9. The extent of third parties' access to documentation under Article 10(3) DSU has been controversial.

issues.[116] They cannot expand the panel's mandate. Accordingly, panels and the Appellate Body ignore submissions on issues outside the scope of the dispute.[117]

Panels and the Appellate Body have limited discretion with respect to third parties. Applicants that submit the Article 10(2) DSU notification in a timely fashion are automatically admitted as a third party. There is no assessment of the substantive requirements.[118] *Koepp* argues that the liberal approach to third party intervention and the large amount of interventions result from the complex network of multilateral rights and obligations established by the WTO Agreement. WTO obligations are owed to all members of the trading system. Violations of obligations therefore concern all members and can rarely be severed into the bilateral structure of judicial dispute settlement. Third party participation is institutionally encouraged and third parties are intensely involved in proceedings, as panels often request additional information from them.[119]

Member states have claimed that *amici curiae* could undermine their rights as third parties, because they do not have to prove a substantial interest in the case while taking the liberty to comment on issues affecting all member states. The Appellate Body faced a true test in *EC–Sardines* when it received an *amicus* submission from Morocco (see Chapter 5).[120]

This concern is unfounded. Despite many similarities, the categorical differentiation between *amicus curiae* and third-party participation is

---

116 *Canada/USA – Continued Suspension of Obligations in the EC–Hormones Dispute* (hereinafter: *Canada/US–Continued Suspension*), Reports of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, Annex IV, para. 9.

117 *United States – Sections 301-310 of the Trade Act 1974* (hereinafter: *US–Section 301 Trade Act*), Report of the Panel, adopted on 27 January 2000, WT/DS152/R, p. 302, para. 7.13 ('The mandate we have been given in this dispute is limited to the specific EC claims set out … above. … It is not our task to examine any aspects of Sections 301-310 outside the EC claims.').

118 See Section 6(1) Panel Working Procedures. J. Koepp, supra note 113, p. 78.

119 J. Koepp, supra note 113, pp. 84, 227.

120 Also, it was argued that *amicus* participation grants more and additional rights to non-members than to WTO member states as the latter must comply with Article 10(2) DSU. The admission of Morocco as *amicus curiae* dispelled this argument. See Canada in *European Communities – Trade Description of Sardines* (hereinafter: *EC–Sardines*), Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, p. 36, para. 155; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 7.

strictly maintained in practice by the Appellate Body.[121] In *EC–Sardines*, the Appellate Body emphasized that the existence of a right of intervention did not justify 'treating the WTO Members differently from non-WTO Members in the exercise of [its] authority to receive *amicus curiae* briefs. … Just because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an *amicus curiae* is prohibited.'[122] The Appellate Body reasoned that the admission of *amicus curiae* submissions by non-WTO entities *a fortiori* entitled it to receive *amicus curiae* submissions from member states, and that such participation was less than participation as a third party, i.e. a member state did not have a right to have its *amicus curiae* submission accepted or considered.[123] Moreover, *amicus curiae* has no right of participation and it is treated like any other member of the public in terms of access to hearings, documents and the case record (see Chapter 6). In particular, the Appellate Body's expansive interpretation of Article 10(3) DSU's obligation that third parties be provided with party submissions has not at all been applied to *amici curiae*. This is despite the Appellate Body's acknowledgment regarding third parties that full access to case-related submissions more likely will 'guarantee that the third parties can participate at a session of the first meeting with the panel in a full

121 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101 ('Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel.' [References omitted]); *US-Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, paras. 39-40 ('[W]e are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal,' while '[w]e wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute.').

122 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 165.

123 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 164.

and meaningful fashion that would not be possible if the third parties were denied written submissions made to the panel before that meeting [and that] panels themselves will thereby benefit more from the contributions made by third parties.'[124]

III. Investor-state arbitration

Institutional rules and investment treaties are virtually silent on the topic of intervention as of right, but an increased number of multilateral investment treaties and a few bilateral investment treaties have established the possibility for states parties to an investment treaty to make submissions on issues of interpretation of the investment treaty in arbitrations where they are not appearing as party. Prominent examples include Article 1128 NAFTA, Article 10.20.2 CAFTA and Article 5 UNCITRAL Rules on Transparency.[125] The procedures are used regularly.[126] The amount of submissions is not limited and it is common for parties to file several submis-

---

124 *US–FSC*, Recourse to Article 21.5 (EC), Report of the Appellate Body, adopted on 29 January 2002, WT/DS108/AB/RW, p. 76, para. 249.

125 See Article 1128 NAFTA: 'On a written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.'
Article 10.20.2. CAFTA: 'A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.'
Article 5 UNCITRAL Rules on Transparency: '(1) The arbitral tribunal shall, subject to paragraph 4, allow, or … may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.
(2) The arbitral tribunal …. may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. …'

126 E.g. in *UPS v. Canada*, First Submission under Art. 1128 NAFTA of the Government of Mexico, 11 June 2001 and First Submission of the United States of America, 11 June 2001; *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 25; *Ethyl Corporation v. the Government of Canada* (hereinafter: *Ethyl Corp. v. Canada*), Award on Jurisdiction, 24 June 1998 para. 36; *Pac Rim v. El Salvador*, Non-Disputing Party Submission of the Republic of Costa Rica, 13 May 2011, ICSID Case No. ARB/09/12; *Commerce Group Corp. and San Sebastián Gold Mines, Inc. v. El Salvador* (hereinafter: *Commerce Group v. El Salvador*), Non-Disputing Party Submission of the Republic of Costa Rica, 20 October 2010, ICSID Case No. ARB/09/17. See also G. Kaufmann-Kohler, *Non-disputing state submissions in investment arbitration: resurgence of diplomatic protection?*, in: L. Boisson de Chazournes et al. (Eds.), *Diplomatic and judicial means of dispute settlement*, Leiden 2013, p. 311.

sions in a case.[127] Permission to intervene is granted if the formal requirements are fulfilled.[128] Though formally limited to issues of NAFTA interpretation, some of the Article 1128 interveners have also addressed factual aspects of the pending case, which, notably, were not rejected by the respective tribunals.[129]

NAFTA investment tribunals have denied that there is any overlap between Article 1128 and *amicus curiae* participation based on the formal argument that third-party participation is a right, whereas *amicus curiae* participation is a privilege subject to the discretion of the tribunal.[130] However, there is a functional and substantive overlap between the two

---

127 E.g. in *Pope and Talbot, Inc. v. the Government of Canada*, the USA made eight 1128 submissions, at: http://www.state.gov/s/l/c3747.htm (last visited: 28.9.2017).

128 M. Hunter/A. Barbuk, *Procedural aspects of non-disputing party interventions in Chapter 11 arbitrations*, 3 Asper Review of International Business and Trade Law (2003), p. 157. See also Mexico's arguments in *Methanex v. USA* on the effect of Article 1128 submissions: 'Mexico agrees with the US that where there is agreement on a matter of treaty interpretation between the disputing NAFTA Party and the non-disputing NAFTA Parties through their Article 1128 submissions, this "constitutes a practice … establish[ing] the agreement of the parties regarding [the NAFTA's] interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention," and that such agreement is "authoritative". The Treaty has been negotiated and administered by the NAFTA Parties and their shared views, as all of the sovereign States party to the Agreement, should be considered authoritative on a point of interpretation.' [References omitted]. See *Methanex v. USA*, Article 1128 NAFTA submission, 30 April 2001, p. 1, para. 1.

129 See T. Weiler, *The Ethyl arbitration: first of its kind and a harbinger of things to come*, 11 American Review of International Arbitration (2001), p. 201 (*Weiler* urges tribunals to ignore such submissions 'to preserve the integrity of arbitrators by ensuring that the parties to them remain the primary actors, rather than other NAFTA parties who may have their own trade and investment policy agendas.'). See also M. Hunter/A. Barbuk, supra note 128, pp. 163-164.

130 The *Methanex* tribunal stated that it had no power pursuant to Article 15(1) of the 1976 UNCTRAL Arbitration Rules to grant the petitioners 'the substantive rights of NAFTA Parties under Article 1128 of NAFTA.' *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *'Amici Curiae'*, 15 January 2001, para. 27. The *Methanex* tribunal reasoned that participation under Article 1128 NAFTA was not affected by *amicus curiae* participation. See *Methanex v. USA*, *id.* para. 38. See also the arguments by the respondent USA: 'The NAFTA [in Article 1128] provides only the State Parties with a right to make submissions to tribunals on questions of the interpretation of NAFTA. No provision of the NAFTA, however, limits a tribunal's ability to accept, as a matter of discretion, submissions by other non-parties.' [Emphasis omitted]. See

concepts. Even though they are not limited to commenting on matters of investment treaty interpretation like non-disputing parties, *amici curiae* often seek to do so in their attempts to harmonize investment treaties and other international law obligations.[131] In addition, tribunals tend to align procedures such as the timing of submissions for practical reasons (see Chapter 6). In cases that do not provide for interpretative intervention, parties to the underlying investment treaty have participated as *amicus curiae*.[132] The most distinct difference between the mechanisms in investment arbitration is that *amicus curiae* has no right of participation. Unlike the non-disputing contracting states whose justified interest in the case is presumed, prospective *amici* must apply for permission to participate and show possessing a special interest in the case as well as a unique expertise that will help the tribunal to decide the case. A sparsely discussed obfuscation of the concepts, at least in practice, risks arising from the EC's participation as *amicus curiae* in cases with an EU law dimension. Based on Article 13(b) of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012, the European Commission requests to participate 'where appropriate' in investor-state arbitrations based on investment treaties concluded between a member state and a third country. While not possessing a formal right of participation, tribunals might find it difficult to resist the EC's request to participate given that the EC does not hesitate to take measures against the enforcement of investment awards it considers incompatible with EU law (see Section

---

Methanex v. USA, Statement of Respondent USA in response to Canada's and Mexico's submissions concerning petitions for *amicus curiae* status, 22 November 2000, p. 2. See also D. Steger, supra note 5, p. 444.

131 *Kaufmann-Kohler* calls for a limitation of *amicus curiae* briefs to legal matters in order to avoid a breach of Article 27 ICSID Convention in ICSID-administered cases where states parties use the instrument to comment on the investment treaty. Article 27 prohibits diplomatic protection by the national state of investors that have initiated arbitration. See G. Kaufmann-Kohler, supra note 126, pp. 318-319.

132 *Achmea B.V. v. the Slovak Republic*, (formerly *Eureko B.V. v. the Slovak Republic*) (hereinafter: *Eureko v. Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13; *Aguas del Tunari, S.A. v. the Republic of Bolivia* (hereinafter: *Aguas del Tunari v. Bolivia*), Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, p. 10, para. 47.

B).[133] Another notable difference is that, unlike most *amici curiae,* third parties receive privileged access to information (see Chapter 6).

IV. Comparative analysis

The interaction between *amicus curiae* and intervention depends on the concrete regulation of the two mechanisms in the applicable procedural regimes. International courts and tribunals formally differentiate between intervention and *amicus curiae*. As a basic rule, everyone can act as *amicus curiae*, but to appear as an intervener one must have the right to do so under the applicable procedural laws. International courts and tribunals that allow *amicus curiae* participation to defend an individualized interest typically do not provide for intervention as of right.

While intervention and *amicus curiae* functionally overlap, one significant difference remains; an intervener possesses a right to participate and a right to be heard in the proceedings. His interest in the case is legally protected.[134] *Amicus curiae* participation is subject to the discretion of the court. For this reason, the conditions permitting intervention are generally narrow. Intervention is usually restricted to a certain set of entities (usually the parties to the statute) and the intervener must prove a legitimate (legal)

---

133 V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 Vanderbilt Journal of Transnational Law (2015), p. 1339 (Arguing that while the EU has no extra rights in investment arbitration, 'still it is not a mere third party'. She also acknowledges that the EC so far has not 'at least to the outside world' received special treatment compared to other *amici curiae*.).

134 Often, it is stated that interveners become bound by the judgment to the extent of their intervention. This is not the case in all international courts. See A. Zimmermann, supra note 92, paras. 1, 4. *Zimmermann* further posits that intervention is an acknowledgment of the *de-facto* effect of judgments on third party interests and the limited protection offered by the principle of *res inter alios acta* enshrined in Article 59 ICJ Statute. Because of the lack of compulsory jurisdiction, the ICJ has at times protected the interests of third parties unwilling to intervene by limiting the scope of the dispute brought before it, if the rights of the third party formed the subject matter of the dispute. E.g. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Judgment, 15 June 1954, ICJ Rep. 1954, p. 19; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, p. 25-26, paras. 40-42; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, 21 March 1984, ICJ Rep. 1984, p. 28, para. 46.

interest or right which again must be closely related to the case.[135] The requirements for *amicus curiae* participation differ, but tend to be less strict and grant the tribunal a greater degree of discretion in the handling of petitions and briefs, also with regard to the purpose of participation (see Chapters 5 and 6). The requirements for intervention seem to have been neither lessened where *amicus curiae* participation is possible, nor have *amici* received preferential treatment. Where *amicus* participation is not permitted, particularly in the ICJ, intervention has been extended to cover participation similar to that of *amicus curiae*.[136] This reinforces the usefulness of opening to *amicus curiae* participation to avoid blurring the concepts.

D. Conclusion

Before all international courts and tribunals reviewed, *amicus curiae* is a procedural instrument subject to full judicial discretion. It provides information to the court and may not be used by the parties as a litigation tool. These few common characteristics show that the international *amicus curiae* differs fundamentally from national concepts of the instrument. It is neither a court-appointed, neutral or impartial legal adviser (as in English law), nor a litigation tool of the parties (as in US law).

Apart from the common procedural characteristics, *amicus curiae* is a flexible and varied concept. International courts and tribunals assign different functions to *amicus curiae*. This book proposes to break them into three basic categories: information-based *amicus curiae*, interest-based *amicus curiae*, and systemic *amicus curiae*. All international courts and tribunals rely on information-based *amicus curiae* and most assign also an interest-based function to *amicus curiae*, but only investment tribunals and the ICJ have admitted *amici* to alleviate systemic concerns. Within the categories, significant differences between the functions exist. This flexibility

---

135 Cf. Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 808.

136 Id., p. 809 ('An exceptional right to intervene due to an interest in the development of the law not linked directly to a case is allowed at the … ICJ, … ITLOS, … CCJ, and … PCA. These courts not only allow intervention but actively solicit it, whenever at issue is the construction of a treaty to which states or organizations other than those concerned in the case are parties. The exclusivity of intervention in treaty interpretation but not in questions of general international law can hardly be justified on normative grounds.' [References omitted]).

is the instrument's true advantage. It allows courts and tribunals to adapt the instrument to their specific needs. *Amicus curiae* should not be streamlined and generalized to establish a common concept of *amicus curiae*. Any broad generalizations risk oversimplification and ignorance of subtle, but decisive differences mandated by reality.

While there is a functional overlap with intervention and other forms of non-disputing party participation, international courts and tribunals that allow for several forms of participation strictly distinguish between them. An *amicus curiae* does not acquire any formal status with its admission. It is not given any general or special procedural powers or duties. In short, 'the third person acquires no rights at all.'[137] The fear that *amicus curiae* as a 'soft' third party would undermine formal non-party participation mechanisms has not materialized within an international court or tribunal's procedural regime. However, those international courts and tribunals whose procedural framework does not allow for other forms of third- party participation tend to assign to *amici curiae* a wider set of functions, including functions that are reserved for intervention in other international courts and tribunals, such as the assertion of particular (legal) interests or rights, or submissions on the interpretation of a convention or treaty to which the *amicus curiae* is a party.

137 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, para. 30.