Chapter § 8 Effects on the international dispute settlement system

There is an assumption among scholars and *amicus curiae* proponents that *amici curiae* have had an important effect on international law and on international dispute settlement specifically. The previous Chapters have shown that *amicus curiae* participation indeed has had an effect on the proceedings and decisions of international courts and tribunals. This Chapter adopts a more abstract perspective and asks what has been the impact of the admission and consideration of *amicus curiae* submissions on international dispute settlement in general. To this end, it strings together Chapters 5 to 7 and examines if the influence mirrors the positive or the negative expectations expressed by *amicus curiae* proponents, concerned parties and member states. In short, is the concept a friend or a foe of international dispute settlement?

The aspects considered mirror those raised in Chapter 2, namely, the effect of *amici curiae* on the relationship between international courts and tribunals, the parties and the member states (A.); on the judicial function, in particular, the extent to which the concept has encouraged international courts and tribunals to exercise a public function and place greater weight on public interest considerations (B.); on legitimacy and democratization of international adjudication (C.); on the coherence of international law (D.); on the transparency of international dispute settlement (E.); and on the status of non-state actors in international dispute settlement (F.). Finally, this section considers if any of the concerns of *amicus curiae* participation, especially regarding the practical burdens, has materialized (G.).[1]

1 Changes in concepts of international law and international dispute settlement are rarely due to one factor. It is more accurate to assume that *amicus curiae* participation is but an element in a process of change or an expression thereof. It is hoped that readers will excuse occasional broad brush strokes in this regard. See for other developments, Y. Shany, *No longer a weak department of power? Reflections on the emergence of a new international judiciary*, 20 European Journal of International Law (2009), pp. 73-91.

A. *Effect on the relationship between the court, the disputing parties and the member states:* amici curiae *as evidence of an assertive international judiciary?*

It is no secret that especially before inter-state courts and tribunals the parties tend to wield significant influence over the conduct of the proceedings. Parties that have decided to submit to the jurisdiction of an international court or tribunal have studied its procedural regime and decision-making to predict how their case will evolve. Where the stakes are high – and they usually are in international adjudication – any loss of predictability of the outcome is unwanted.[2] It is therefore little surprising that courts with voluntary jurisdiction have traditionally given great deference to the parties' wishes on how to conduct the proceedings.[3] Of no less relevance is the legislative power wielded by member states over international courts and the applicable law. The final say over procedure and content rests with the respective constituents to a treaty. The existence of international courts, to put it drastically, depends on states' willingness to sustain them.

As shown, most international courts and tribunals' constituent instruments and procedural rules did not explicitly provide for *amicus curiae* participation upon receiving the first requests for admission. International courts and tribunals largely relied on implied powers doctrines to admit *amici curiae*. Procedural gaps are a commonality in international law which lacks the regulatory density of national legal orders. One of the main issues of contention concerning the admission of *amici curiae* appears to have been how and by whom the silence of the applicable rules should be dealt with. Shortly after the *Methanex* tribunal admitted an *amicus curiae* submission, *Stern* argued that the decision precipitated 'une

2 See D. Bowett, *Contemporary developments in legal techniques in the settlement of disputes*, 180 Receuil des Cours (1983-II), p. 169.

3 This was buttressed by the fact that traditionally international dispute settlement was considered only one among many mechanisms (including non-judicial) for conflict resolution. E.g. *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order, 19 August 1929, PCIJ Series A No. 22, p. 13 (The PCIJ defined its task as 'simply an alternative to the direct and friendly settlement of … disputes between the Parties.'). This aspect continues to claim validity in the emphasis on negotiated over adjudicated settlements in the fabric of many international courts and tribunals, e.g. Article 3(7) DSU, Article 39 ECHR. See also F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, pp. 85-87.

nouvelle marginalization du consentement des parties, que est à la base de la procedure d'arbitrage.'[4] *Ishikawa* disagreed:

> [The] acceptance of *amicus curiae* submissions … does not conflict with the disputing parties' power to control the arbitration proceedings, eg to choose: the *lex arbitri*, place of arbitration, arbitral tribunal, language, substantive law governing the dispute and so on. To be sure, it affects the parties' control over the speed at which their case progresses.[5]

Has the admission of and reliance on *amicus curiae* briefs changed the distribution of power between international courts and tribunals vis-à-vis the disputing parties and/or the member states? Does it reflect an emancipation from the parties' influence over the proceedings, a change in the role of international courts and tribunals? How does this relate to the principle of consent? This issue is of high relevance, because consent to submit a dispute to binding judicial settlement constitutes an essential basis for the legitimacy of the outcome.[6] Any defect in this respect may not only affect a party's willingness to implement a decision, but it may prompt questions over its legitimacy.[7]

I. International Court of Justice

Neither the ICJ Statute nor the ICJ in practice have submitted the decision whether to allow an inter-governmental organization to make observations in a case to the will of the parties. Such consent is presumed with the submission of a case to the jurisdiction of the Court and its rules, at least to the extent regulated in Articles 34 and 66 ICJ Statute and Article 69 ICJ Rules. Accordingly, in *Aerial Incident*, the ICJ invited the ICAO to make submissions under Article 34(3) ICJ Statute despite protests by the Iranian

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4 B. Stern, *L'entrée de la société civile dans l'arbitrage entre Etat et investisseur*, 2 Revue de l'arbitrage (2002), p. 339.

5 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 392 [References omitted].

6 E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), pp. 443-444, 449-454.

7 F. Orrego-Vicuña, *Law making in a global society: does consent still matter?,* in: J. Bröhmer/G. Ress (Eds.), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005,* Cologne 2005, p. 199; J. Viñuales, *Amicus intervention in investor-state arbitration*, 61 Dispute Resolution Journal (2007), pp. 72, 75.

agent that an invitation would be inappropriate for legal and practical reasons.[8] However, the Court has not been willing to admit *amici curiae* unless expressly permitted in its Statute (i.e. not beyond the permission given by its member states). Further, it has barely exercised its discretion to invite participation by *amici curiae* under the existing rules.

The ICJ has been more receptive in advisory proceedings. This is unsurprising given their special function (see Section B). The ICJ has placed the decision whether to introduce non-solicited submissions from non-governmental entities into the record in the hands of the parties who, to make things more difficult, must visit the Peace Palace to consult them. Judges may also revert to the briefs, but they have used this possibility sparingly.[9]

Former ICJ President *Higgins* anchors the Court's hesitation in an 'undue deference to the litigants by virtue of their rank as sovereign States' and urges the Court to become more assertive towards the parties in order to have 'proper control over its own procedure.'[10] The ICJ's approach to *amici curiae* is in accordance with the lacklustre use of its investigative powers and its focus on maintaining and nourishing its attractiveness to states, an aspect that cannot be discredited given its voluntary jurisdiction.[11] The Court's increasing caseload seems to have initiated a decrease in the deference accorded to litigating states in the interest of procedural efficiency, but this has not affected its position on *amicus curiae*.[12]

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8 *Aerial Incident of 3rd July 1988 (Islamic Republic of Iran v. United States of America)*, Letter No. 3 (The Agent of the Islamic Republic of Iran to the Registrar of the International Court of Justice), Part IV: Correspondence, ICJ Rep. 1996, pp. 639-645.

9 Submissions from select non-state actors are considered in two narrow constellations out of basic considerations of justice. It seems that these exceptions have not been challenged by treaty members. See Chapter 5.

10 R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 International and Comparative Law Quarterly (2001), p. 124. With approval of the Court, the parties may modify the applicable rules. However, this has not been relevant in the context of external submissions.

11 S. Oda, *The International Court of Justice viewed from the bench (1976-1993)*, 244 Receuil des Cours (1993 VII), p. 31.

12 Regarding the drawbacks of a too-deferential court, see A. Riddell/B. Plant, *Evidence before the International Court of Justice*, London 2009, pp. 20, 24.

II. International Tribunal for the Law of the Sea

Pursuant to Article 45 ITLOS Rules, '[i]n every case submitted to the Tribunal, the President shall ascertain the views of the parties with regard to questions of procedure.' Article 48 ITLOS Rules allows the parties to propose modifications to the Rules subject to the approval of the ITLOS or a Chamber. Like the ICJ, the ITLOS seeks to accommodate the parties' wishes in the proceedings. The concept does not seem to have affected the element of consent in ITLOS or Seabed Dispute Chamber proceedings. Article 84 ITLOS Rules does not subject the admission of submissions from intergovernmental organizations to party consent. However, in the concluded proceedings with *amicus curiae* submissions, the tribunal and the chamber mainly left it to the parties to introduce the submissions into the proceedings.

III. European Court of Human Rights and African Court on Human and Peoples' Rights

The principle of consent is less affected in the ECtHR and the African Court where *amicus curiae* participation is enshrined in the constituent documents and thus has been approved by the member states. The ECtHR has admitted *amici curiae* against the expressed will of both parties.[13] Still, the court is not oblivious to consent, and it has valued it above the defense of the public interest through *amici curiae*. In *Y. v. the United Kingdom*, the court dismissed an *amicus curiae's* protest against a friendly settlement of a case in which the UK government agreed to pay damages for corporal punishment of a pupil by school officials.[14]

IV. Inter-American Court of Human Rights

The IACtHR does not appear to view the issue of *amicus curiae* as one concerning consent. Article 44(3) IACtHR Rules foresees that *amicus curiae* briefs in contentious proceedings 'shall be immediately transmitted to

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13 *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103.

14 *Y. v. the United Kingdom*, Judgment of 29 October 1992, Series A No. 247-A. See also O. De Schutter, *Sur l'émergence de la société civile en droit international: le*

the parties, for their information.' It does not establish any right to comment or veto an *amicus curiae* submission. The parties rarely object to an *amicus curiae* brief and an objection usually does not lead to its exclusion.[15] An exception is made in advisory proceedings under Article 64(2) ACHR, where the compatibility of a domestic law with the ACHR is at issue. In *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the court decided on its own motion to invite the views of several national stakeholders. But it chose the stakeholders in consultation with the government of Costa Rica that had brought the question before it.[16] The treatment of *amici curiae* correlates with the IACtHR's powerful position in proceedings.

V. WTO Appellate Body and panels

The Appellate Body's decision in *US–Shrimp* came as a shock to the WTO membership which had, until then, intentionally excluded the involvement of non-state actors and the consideration of non-trade related issues.[17] The WTO was purposely created for participation by states only. On the political level, the WTO members had been successful in minimiz-

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rôle des associations devant la Cour européenne des droits de l'homme, 7 European Journal of International Law (1996), pp. 393-394.

15 The decision on admission is made by the President of the Court (see Chapter 5). See J. Razzaque, *Changing role of friends of the court in the international courts and tribunals*, 1 Non-State Actors and International Law (2001), p. 186. He states that on several occasions the President of the Court has consulted the IAComHR on an *amicus curiae* submission. However, this is not indicated in the court's case law.

16 C. Ruiz Miguel, *La fundación consultiva en el sistema interamericano de derechos humanos: crisálida de una jurisdicción supra-constitucional?*, in: H. Fix-Zamudio (Ed.), *Liber amicorum Héctor Fix-Zamudio*, Vol. II San José 1998 p. 1361.

17 A. Reinisch/C. Irgel, *The participation of non-governmental organizations (NGOs) in the WTO dispute settlement system*, 1 Non-State Actors and International Law (2001), p. 129. Staff members of the WTO Secretariat considered the decision 'ground-breaking insofar as it allows NGOs to access the dispute settlement process from now on by submitting their own argument before panels and the Appellate Body.' See G. Marceau/P. Pedersen, *Is the WTO open and transparent?*, 33 Journal of World Trade (1999), p. 37.

ing the formal involvement of non-state actors.[18] In the opinion of many states, the admission of *amici curiae* constituted a 'first step towards formal and direct participation for NGOs in the *real* workings of the WTO.'[19] This rendered the issue of *amicus curiae* highly symbolic despite its limited reach and the limited number of requests for participation.

The subsuming by panels and the Appellate Body of *amici curiae* under the DSU was considered to be highly problematic.[20] The Appellate Body's interpretation of Articles 11-13 DSU in *US–Shrimp* redefined panels' investigative powers from what the member states had envisioned – a specific and limited grant of investigative powers to hire scientific experts for the elucidation of technical issues – to an avenue to admit non-governmental entities seeking to implement non-WTO issues in WTO dispute settlement against the expressed will of the parties.[21] Member states argued that the assertion of authority to accept *amicus curiae* briefs was not permissible, because the DSU's silence on the concept was intentional. Accounts of the reasons why it was not included in the DSU differ (see Chapter 5). Critics' arguments are buttressed by Article 3(2) DSU, which emphasizes the limited powers of panels and the Appellate Body by determining that '[r]ecommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.'

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18 Such participation was channeled through states who selected the issues to be addressed and the stakeholders to consider. See S. Charnovitz, *Opening the WTO to nongovernmental interests*, 24 Fordham International Law Journal (2000), pp. 179, 181 (The WTO member states made clear that they did not want NGOs to be directly involved in the work of the WTO with the adoption by the General Council on 18 July 1996 of the *Guidelines for Arrangements on Relations with Non-Governmental Organisations*, WT/L/162. In para. 6, the *Guidelines* establish that consultation and cooperation with NGOs should occur primarily through 'appropriate processes at the national level'. Nonetheless, NGOs had been allowed by the General Council to attend the WTO Ministerial Conferences.).

19 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 European Law Journal (2003), p. 497.

20 An exception is *US–Softwood Lumber VI*. The panel reasoned that it was only allowed to exercise powers explicitly conferred upon it by its member states. See *US–Softwood Lumber VI*, Report of the Panel, adopted on 22 April 2004, WT/DS277/R, p. 86, FN 75.

21 In *US–Shrimp*, Malaysia raised the issue of consent and the limited transfer of power to adjudicating bodies when it argued that the brief could not be accepted in the absence of an express permission in the constituent treaties. See *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 46.

The provision sends a strong signal as to whom the drafters of DSU envisioned to act as the ultimate arbiter in the WTO system.[22]

The ensuing dispute within the WTO system as to who was to take the final decisions over the conduct of proceedings and the role of the dispute settlement body – the Appellate Body or the General Council – intensified when the Appellate Body tried to formalize *amicus curiae* participation by issuing the *EC–Asbestos* Additional Procedure in 2000.[23] It was an attempt to appease the WTO constituency by making transparent the conditions for participation after this had been criticised in the DSB.[24] However, it had the opposite effect. At a special meeting of the General Council to discuss whether non-parties should have any input into pending cases, with the exception of the USA and the European Union, member states harshly criticized the idea of *amicus curiae* participation in WTO dispute settlement. There was consensus that the rights and obligations under the DSU belonged to the WTO members and that any substantive change in the DSU framework, including the participation by non-state actors, an issue of 'critical and systemic concern,' would have to be initiated by them. In their view, the Appellate Body and panels possessed only the powers explicitly conferred upon them in the constituent treaties. *Amicus curiae* participation was considered the first step towards the erosion of sovereignty.[25]

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22 D. McRae, *What is the future of WTO dispute settlement?*, 7 Journal of International Economic Law (2004), pp. 13-14 (He argues that the power is theoretical because of the nearly universal rejection of *amici curiae* and the lack of action.). See also with respect to the power struggle, C. Romano, *The shift from the consensual to the compulsory paradigm in international adjudication: elements for a theory of consent*, 39 New York University Journal of International Law and Politics (2007), p. 855.

23 Cf. M. Matsushita, *Transparency, amicus curiae briefs and third party rights*, 5 Journal of World Investment and Trade (2004), pp. 329-332 (Former Appellate Body member predicting similar controversies until the Appellate Body has achieved a more powerful standing.).

24 Some member states in the DSB criticized that in *US–Lead and Bismuth II* the Appellate Body failed to establish guidelines for *amicus curiae* participation. See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), p. 259.

25 L. Bartholomeusz, supra note 24, p. 263. See also Statement by Korea at DSB Meeting on 23 May 2016, Minutes of Meeting, 29 August 2016, WT/DSB/M/379, para. 6.13 ('Korea wished to propose that Members launch a discussion devoted to the question of the boundaries of appellate review with the goal of finding a common understanding. Korea believed that this was the right way to address the con-

At the end of the meeting, the Chairman advised the Appellate Body to 'exercise extreme caution in future cases until Members had considered what rules were needed.'[26] Member states largely agreed that no *amicus* submissions should be accepted pending a political decision on the concept. So far, no political agreement has been reached (see Chapter 3), and the issue appears to have become the *litmus* test for the direction of the organization. Member states seem worried that future proactive decision-making by the Appellate Body may lead to 'excessive judicial independence' and 'threaten[] both the rule-based certainties that WTO Members had intended between themselves, and the possibility of stable rule-making in trade law.'[27] This also explains why the largest opposition to *amicus* participation stems from developing countries that generally are vocal supporters of an independent and strong trade court, and why the same states voluntarily have concluded rules on *amicus curiae* participation in regional trade agreements.

Despite their express discontent, the WTO member states neither used their powers to dismiss *amicus curiae* participation formally through the negative consensus procedure in the report adoption process in the DSB, nor issued a binding interpretation of the WTO Agreement pursuant to Ar-

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cerns of Members … , while maintaining the integrity and independence of the Appellate Body. … When the Appellate Body had adopted an additional procedure regarding *amicus curiae* briefs during the appeal in the "*EC – Asbestos*" (DS135) dispute, a large majority of Members had thought that the Appellate Body had crossed its limits.').

26 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, para. 120. It is not far-fetched to see a link between the meeting and the subsequent rejection of all *amicus curiae* applications in *EC–Asbestos* on procedural grounds. See Chapter 5 and B. Stern, *The intervention of private entities and states as "friends of the court" in WTO dispute settlement proceedings*, in: P. Macrory et al. (Eds.), *World Trade Organization: legal, economic and political analysis*, Vol. I, New York 2005, p. 1445.

27 C. Lim, *The amicus brief issue at the WTO*, 4 Chinese Journal of International Law (2005), pp. 85, 88, 117 ('If … Members' concerns about textual fidelity and original intent were to be ignored by the Appellate Body because they are (wrongly) seen to be no more than political in nature, then the Appellate Body could end up sending the wrong signal …'). See also WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Uruguay, para. 5 (The WTO was an agreement of a contractual nature that was qualitatively different from other international agreements in the sense that the obligations that stemmed from this contract included the strict fulfillment of the decisions of the DSB to the extent of diminishing the decision-making capacity of Members.).

ticle IX(2) through the Ministerial Conference or the General Council. Further, the admission of *amici curiae* does not appear to have impacted the enforcement of reports.

Irrespective of the backlash from its membership, the Appellate Body and panels have continued to assert their authority to admit *amicus curiae* submissions. As *Howse* notes

> the Appellate Body's affirmation of its 'authority' in *Sardines*, without so much as an allusion to the criticisms by delegates, says volumes about the Appellate Body's implicit view of itself as a judicial body with fundamental independence from the Membership sitting in its DSB capacity, and in particular its *Kompetenz-Kompetenz*.[28]

Considering the way in which *amicus curiae* has been dealt with, it does not seem that the instrument has prompted a real change in the relationship between the dispute settlement organs and parties on the one hand, and member states, on the other hand. There is a noticeable tendency to follow the parties' views as to whether accept or reject a submission. Despite the absence of regulation of *amicus curiae* participation in the working procedures, WTO panels and the Appellate Body have since *US–Shrimp* consulted the parties and third parties prior to exercising their discretion whether to accept an *amicus curiae* submission.[29] In *Australia–Ap-*

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28 R. Howse, supra note 19, p. 507.

29 E.g. *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 107 ('The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute.'); *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 37; *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12-1.13. Exception: *US–Softwood Lumber VI*, Report of the Panel, adopted on 22 April 2004, WT/DS277/R, FN 33. The joint appellees in *US–Shrimp* had argued that due process gave them a right to know the submissions panels intended to consider and to comment on them. See also *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 9; *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R. See also comment by the DSB Chairman that 'solutions developed through specific disputes may not reflect an agreed position of the entire Membership' citing unsolicited *amicus* briefs as an example. WTO DSB, *Special Session of the Dispute Settlement Body – Report by the Chairman, Ambassador Ronald Saborío Soto*, 4 December 2015, TN/DS/28, para. 1.9, FN 10.

ples, the panel accepted the submission from an industry organization only after both parties had stated that they had no objections to the panel accepting the information.[30] Moreover, panels and the Appellate Body regularly supplant the parties' exercise of discretion with their own by finding that unsolicited *amicus curiae* submissions will be accepted and considered only to the extent the parties decide to adopt them as part of their submissions.[31] Further, the parties and third parties essentially possess a veto right concerning oral submissions from *amici curiae* arising out of the general confidentiality of hearings (see Chapters 5 and 6). Where panels and the Appellate Body have considered *amicus curiae* submissions in their decision-making, they have done so only where the issue considered was discussed by the parties. Extraneous legal rules have never been considered based on *amicus curiae* submissions. Thus, ultimately in their dealing with *amici curiae*, panels and the Appellate Body have confirmed rather than disputed that the ultimate power over procedural issues rests with the parties, rendering the admission of *amici curiae* an act of symbolic rather than real emancipation from the parties.

VI. Investor-state arbitration

The issue of *amicus curiae* was particularly sensitive in investment arbitration given the pivotal importance assigned to the principle of consent. It gives the parties the casting vote on every significant procedural aspect of a case: the selection of arbiters, the place of arbitration and the applicable rules. The parties can draft their own set of procedural rules or – which is usually done – rely on a set of procedural rules such as the UNCITRAL or ICSID Arbitration Rules (which may be modified by party agreement).[32]

Arbitral tribunals have been very aware in their dealing with *amici curiae* of the consensual nature of arbitration and the limits of their mandates,

30 *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R.

31 E.g. *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12-1.13; *US–Zeroing (EC)*, Report of the Panel, adopted on 23 January 2007, WT/DS294/R, para. 1.7.

32 See Article 1(1) of the 2010 UNCITRAL Rules; Rules 19 and 20 ICSID Arbitration Rules; Article 19(1) of the 1985 UNCITRAL Model Law.

thus, emphasizing rather than diminishing consent.[33] They framed the issue of *amicus curiae* head-on as one of consent. Like many others, the tribunal in *UPS v. Canada* held:

> The disputing parties have consented to arbitration only in respect of the specified matters and only with each other and with no other person. Canada, along with the other NAFTA Parties, has given that consent in advance in article 1122 and the Investor has given it in the particular case by consenting under article 1121. … It is of the essence of arbitration that the tribunal has only the authority conferred on it by the agreement under which it is established, considered in context.[34]

In *Aguas del Tunari v. Bolivia*, a case concerning expropriation claims for the Government of Bolivia's termination of the investor's concession after significant public pressure for rising water rates, the tribunal rejected a request to participate as *amicus curiae* from 300 health and safety and environmental organizations. It found the request to be

> beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved [the ICISD Convention and Arbitration Rules and the Netherlands-Bolivia BIT] and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal.[35]

The parties had opposed to any form of third party participation.[36] The decisions to admit *amici curiae* in *Methanex*, *UPS*, *Suez/InterAguas* and *Suez/Vivendi* deviated from *Aguas del Tunari* in that the tribunals found that the institutional rules selected by the parties explicitly granted them the power to accept *amicus curiae* submissions. Thus, the decisions did

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33 For many, see *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 220 ('It is important to bear in mind, as a paramount factor relating to jurisdiction, that the Tribunal is established by, and derives its powers (if any) from, the consent of the Parties.').

34 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 36. The tribunal sought to strike a balance between *amicus curiae* participation and the principle of consent by reserving for the parties objections to the jurisdiction and issues pertaining to the place of arbitration.

35 *Aguas del Tunari S.A. v. The Republic of Bolivia*, Letter by the tribunal, 29 January 2003, ICSID Case No. ARB/02/3, p. 1.

36 E. Triantafilou, *Amicus submissions in investor-state arbitration after Suez v. Argentina*, 24 Arbitration International (2008), p. 574 (Arguing that the tribunal considered the parties' consent at a higher value than the public interest argued by the petitioners.).

not devalue party consent at all.[37] It was always clear that the parties could exclude *amicus curiae* submissions in future cases by choice of rules not granting residual powers or by *ad hoc* agreement. In addition, in all of these cases, at most only one party, usually the claimant, objected to the admission of *amicus curiae* briefs.[38] The parties are consulted prior to the admission or solicitation of a specific *amicus curiae* brief.[39] Even though the applicable rules assign the ultimate decision over the admission of an *amicus curiae* submission to the tribunal – as in the case of Rule 37(2) ICSID Arbitration Rules and Article 10.20.3 CAFTA – tribunals so far have denied requests for leave to file an *amicus curiae* brief in all instances where both parties voiced their opposition.[40]

Tribunals reacted almost with relief to the adoption of provisions regulating *amicus curiae*. The tribunal in *Glamis v. USA* found that it needed not decide whether it had authority to accept substantive submissions from *amici curiae* as '[t]he Free Trade Commission's Statement on non-disputing party participation indicates that the three states in NAFTA accept

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37 Cf. Article 17 (1) of the 2010 UNCITRAL Arbitration Rules. *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 7 (The tribunal conceded that it had 'no authority to exercise [inherent] power[s] in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure in this case.'). Critical, L. Bartholomeusz, supra note 24, p. 282.

38 The lack of significant backlash by states may be because the first admissions of *amici curiae* occurred under the NAFTA and the UNCITRAL Arbitration Rules. Two of the three NAFTA member states provided for a rich *amicus curiae* practice. In addition, states may have been aware that most of the *amicus curiae* submissions were drafted in their favour.

39 E.g. *Merrill v. Canada*, Letter to petitioners, 31 July 2008, para. 7; *Glamis v. USA*, Award, 8 June 2009, paras. 272, 284-287; *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, paras. 151-154.

40 See *Chevron/Texaco v. Ecuador,* Procedural Order No. 8, 18 April 2011 and Letter to *Amici Curiae* from Permanent Court of Arbitration, 26 April 2011, PCA Case N ° 2009-23*; Biwater v. Tanzania*, Procedural Order No. 6, 25 April 2007, ICSID Case No. ARB/05/22, paras. 3-4 and Award, 24 July 2008, para. 364; *UPS v. Canada*, Direction for the Tribunal on the Participation of *Amici Curiae*, 1 August 2003, paras. 8, 10. In *Piero Foresti v. South Africa*, the tribunal noted that the parties' consent was not a requirement for *amicus curiae* participation, and that Rule 37(2) ICSID Arbitration Rules only required tribunals to consult the parties. *Piero Foresti v. South Africa*, Award, 4 August 2010, ICSID Case No. ARB(AF)/07/1.

such statements. More particularly, the parties in this proceeding do not object to such statements…'[41] Thus, the parties' *and* the member states' consent was considered relevant.

Further, at the initial stage of the proceedings, most tribunals consult with the parties on the procedure to be followed, which is then encapsulated in a procedural order. During these consultations, the issue of *amicus curiae* is often placed on the agenda. Tribunals have explicitly taken note of – and usually adopted – the parties' views on *amicus curiae* participation in general and the modalities of its participation in the particular case.[42] In this respect, tribunals delegate some of their procedural discretion to the parties. Tribunals also consult the parties on requests for leave and *amici curiae's* procedural requests.[43] Tribunals apply the rules regulating the admission of *amici curiae* strictly. They consider the requirement of avoidance of additional burden in terms of both the admission and the process.[44] Furthermore, tribunals have taken due note of regulatory efforts both in the ICSID and in the NAFTA, thereby giving member states a

41 *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005, para. 9.

42 For many, *TCW Group v. Dominican Republic*, Procedural Order No. 2, 15 August 2008, para. 3.6.8*; Methanex v. USA,* Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001*; Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005, para. 6 and Award, 8 June 2009, paras. 272, 284. In *UPS v. Canada*, the tribunal clarified that 'the circumstances and the detail of the making of any *amicus* submissions would be the subject of consultation with the parties,' upon receiving detailed comments by the parties concerning the permissible scope and modalities of *amicus curiae* participation. The procedure subsequently adopted included many of the criteria proposed by the parties. *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, paras. 50, 54, 68, 72, and Procedural directions for *amicus* submissions, 4 April 2003. An exception is *Biwater v. Tanzania*, where the tribunal established a specialized procedure for *amicus curiae* even though the claimant had explicitly requested its rejection for untimeliness. See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007 and Award, 14 July 2008, ICSID Case No. ARB/05/22, paras. 59, 64; *Bear Creek Mining v. Peru*, Procedural Order No. 1, 27 January 2015, ICSID Case No. ARB/14/21, para. 17.

43 *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010*,* PCA Case No. 2008-13, para. 33 ('After consultation with the Parties, the Tribunal provided the Notice of Arbitration and Statement of Claim to the EC.').

44 *Glamis v. USA*, Award, 8 June 2009, paras. 274, 286 and Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, paras. 11-12.

sense of control over the use and development of the concept. A subtle limitation of consent may be read into the change in the wording of Rule 32(2) ICSID Arbitration Rules, which requires parties to object rather than consent to oral participation by non-parties.[45] However, practically, this change has not had any effect (see Chapter 6).

Another area where parties have theoretically lost some influence is the scope of arguments considered by the tribunal. The instrument disrupts the parties' monopoly over the information presented to a tribunal. Rule 37(2) ICSID Arbitration Rules, the FTC Statement, and practice under these and the UNCITRAL Arbitration Rules, expect *amici curiae* to introduce information the parties would not present. This loss of control may impact the parties' litigation strategy and the scope of information provided by them.[46] Legally, this is not problematic given that the issues addressed by *amici curiae* must be within the scope of jurisdiction. Practically, this has not been an issue because tribunals have so far only considered arguments by *amici curiae* that correspond with the issues raised by the parties (see Chapter 7).

Overall, *Stern's* concerns regarding the admission of *amici curiae* have not materialized, unless one pursues an extremely wide understanding of sovereignty as Mexico did in its Article 1128 NAFTA submission in *UPS*. It stated: '[T]he absence of express language in the international treaty means that the Tribunal cannot take it upon itself to authorize actions that sovereign States party to the Treaty did not authorize.'[47] Such a narrow view was not even followed by the tribunal in *Aguas del Tunari*.[48] In addi-

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45 See *Biwater v. Tanzania*, Award, 14 July 2008, ICSID Case No. ARB/05/22, para. 369 ('It may be noted further that the Petitioners did not attend any of the oral hearings in this arbitration. BGT objected to such attendance and, by ICISD Arbitration Rule 32(2), the Arbitral Tribunal therefore had *no power* to permit it.').

46 L. Reed/J. Paulsson/N. Blackaby, *Guide to ICSID arbitration*, 2nd Ed., Alphen aan den Rijn 2011, p. 83.

47 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 56.

48 The tribunal asserted that its decision was not 'in any way prejudging the question of the extent of [its] authority to call witnesses or receive information from non-parties on its own initiative.' Indeed, it later solicited information from the Dutch Government under Rule 34 ICSID Arbitration Rules concerning public statements made by Dutch officials on different provisions of the bilateral investment treaty at issue and to which the parties had referred. See *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, paras. 17-18, 34.

tion, it does not harmonize with the express grant of abstract procedural authority in most institutional rules.

VII. Comparative analysis

International courts and tribunals that traditionally heed sovereignty and grant states significant procedural influence and control have either not allowed for any significant *amicus curiae* participation (ICJ, ITLOS) or have subjected the consideration of *amicus curiae* briefs largely to the will of the parties (WTO, investment arbitration). International courts and tribunals with traditionally strong procedural powers have faced little to no resistance to *amicus curiae* participation and have not considered its admission a matter engaging the principle of consent (ECtHR, IACtHR). *Amicus curiae* has not fundamentally challenged the relationship between the court, the parties and the member states. International courts and tribunals accord significant value to the views of the parties on the admission and modalities of *amicus curiae* participation. Recent codifications of the instrument recognize the permanency of the instrument – and a desire to control it. In addition, *amici curiae* have not affected the parties' rights to solve a case out of court.[49] Overall, the instrument exemplifies the continued relevance of state consent in international adjudication rather than its diminution.[50]

B. *Public interest:* amicus curiae *as motor and evidence of an expanding judicial function?*

The primary function of all courts is the determination of a dispute between two parties.[51] Adopting a simplified view under the private judicial

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49 Cf. *Danell and others v. Sweden* (friendly settlement), No. 54695/00, 17 January 2006, ECHR 2006-I.

50 Re the general relevance of consent, see D. Hollis, *Private actors in public international law: amicus curiae and the case for the retention of state sovereignty*, 25 Boston College International and Comparative Law Review (2002), pp. 250-251 ('The general consent of states creating rules of general application remains the operating principle of the international legal order.').

51 See, for instance, Article 25 ICSID Convention; Article 33 ACHR. See also C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45

function, the disputing parties submit a case to an international court or tribunal to deliver a final and binding decision on the basis of the relevant facts and the applicable law.[52] The case does not extend beyond the parties to the dispute and the court only considers issues that directly contribute to the solution of the dispute.[53]

However, the effects of judgments often reach beyond the parties to a case.[54] For facilitation of argument, all these instances are bundled in the following as an exercise of 'the public function.' Public judicial functions

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Archiv des Völkerrechts (2007), p. 222; C. Knahr, *Participation of non-state actors in the dispute settlement system of the WTO: benefit or burden?*, Frankfurt am Main 2007, p. 161 ('[The] primary goal of any investment arbitration is to resolve the dispute between the parties to the proceeding.'); M. Lachs, *Evidence in the procedure of the International Court of Justice: role of the court*, in: E. Bello/B. Ajibola (Eds.), *Essays in honour of Judge Taslim Olawale Elias*, Dordrecht 1992, p. 266.

52 See C. Brown, *A common law of international adjudication*, Oxford 2007, p. 72. But see V. Lowe, *Private disputes and the public interest in international law*, in: D. French et al. (Eds.), *International law and dispute settlement: new problems and techniques – liber amicorum John G. Merrills*, Oxford 2010, p. 4 ('[W]hile public interest in the integrity of the legal process is engaged if the matter does go to court, the decisions on what is done in respect of the breach of contract, and on whether to have recourse to that legal process in the first place, are entirely a matter for the parties themselves. The obligations which are in question are also created and defined by the parties themselves.'); W. Foster, *Fact finding and the world court*, 7 Canadian Yearbook of International Law (1969), p. 183 ('The aim of international procedure must be to ascertain the substantial truth.').

53 Expressions of the private judicial function are a strong adversarial concept in respect of evidence, control by the parties over the course and conduct of the proceedings and a limitation of the court to party-submitted information. See R. Wolfrum, *International courts and tribunals: evidence,* in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 2; C.Tams/C. Zoellner, supra note 51, p. 223.

54 R. Higgins, *Policy considerations and the international judicial process*, 17 International and Comparative Law Quarterly (1968), pp. 62, 68 ('[P]olicy considerations, even though they differ from "rules", are an integral element of that decision-making process which we call international law. …
There is today at least a minimal agreement that judges have a creating function, that adjudication is not a mere, automatic application of existing rules to particular situation. The interpretive function of judges may do much to fill alleged gaps.'); M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 141-142 ('Ziel des internationalen Prozesses ist nicht primär die Beilegung eines Streits zwischen zwei Parteien, sondern vielmehr die Durchsetzung einer objektiven Rechtsordnung und

may be of a general nature or tied to specific values. They include social governance and the establishment of international peace,[55] the progressive development of a coherent body of international law,[56] deterrence and prevention of international crimes and human rights violations and consideration of public or community interests.[57] The judicial function is a fluid concept. It is influenced by factors such as the type of proceedings (advisory or contentious), the interests affected, the legal and socio-political background of the judges and the legacy of the court.

Is the admission and consideration of *amicus curiae* submissions motor or evidence of a broadening of the judicial function of international courts and tribunals from a private model of dispute settlement to a public-interest based dispute settlement system? Has the participation of *amici curiae* led to increased consideration of public interest issues?

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von Werten der internationalen Gemeinschaft, da die im völkerrechtlichen Prozess betroffene Interessen diejenigen der Parteien regelmäßig transzendieren.' [References omitted]); J. Jackson, *The varied policies of international juridical bodies – reflections on theory and practice*, 25 Michigan Journal of International Law (2004), pp. 875-878. Critical, V. Lowe, *The function of litigation in international society*, 61 International and Comparative Law Quarterly (2012), p. 221 ('The idea of an international community based upon shared global values is a myth; and an unhelpful myth at that. The purpose of international law is not to express, let alone to enforce, a homogenous set of universal values. The structure of international law allows States to be different; indeed, some of its most fundamental principles – sovereignty and self-determination, for instance – serve to secure the right of a State to be different from its neighbours.').

55 M. Benzing, supra note 54, p. 141.

56 H. Lauterpacht, *The development of international law by the international court*, London 1958, pp. 6-7 ('The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction.'); H. Lauterpacht, *The function of law in the international community*, Oxford 1933, pp. 319-320 ('Judicial activity is nothing else than legislation *in concreto*.'); V. Lowe, supra note 54, pp. 212-213 (Besides settling a dispute, the function of litigation is to 'articulat[e] legal principles applicable in the future.').

57 For a consideration of other judicial functions, see C. Brown, supra note 52, pp. 72-77. *Brown* finds that the latter function also includes the need for effective and efficient judicial decision-making. This could equally be considered a precondition for the private function. See *Id.*, p. 73.

I. International Court of Justice[58]

Article 38(1) ICJ Statute alludes to the private judicial function of the ICJ by stipulating that the Court is 'to decide in accordance with international law such disputes as are submitted to it.'[59] Several provisions of the ICJ Statute and Rules point to a public judicial function. Specifically, the rules on intervention and Article 34(2) and (3) ICJ Statute show that the drafters of the Statute expected ICJ judgments to be of relevance beyond the parties.[60]

The ICJ has largely pursued a private judicial function, which is reflected in its approach to evidence and third parties.[61] In *Armed Activities*, it held that

> the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.[62]

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58 Role and function of the International Court of Justice have been an issue of intense scholarly exchange. For many, see I. Scobbie, *Legal reasoning and the judicial function in the International Court*, University of Cambridge: Ph.D. Dissertation, 1990; I. Scobbie, *The theorist as a judge: Hersch Lauterpacht's concept of the international judicial function*, 8 European Journal of International Law (1997), pp. 264-298; L. Damrosch (Ed.), *The International Court of Justice at a crossroads*, Dobbs Ferry 1987; S. Wittich, *The judicial functions of the International Court of Justice*, in: I. Buffard et al. (Eds.), *International law between universalism and fragmentation – Festschrift in honour of Gerhard Hafner*, Leiden 2008, pp. 981-1000.

59 Article 36(2) ICJ Statute clarifies that such disputes must be 'legal disputes.'

60 Articles 34(2) and (3), 62, 63 ICJ Statute, Article 43 ICJ Rules.

61 See also *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order, 19 August 1929, PCIJ Series A No. 22, para. 13. The ICJ has been less hesitant with regard to the interpretation of law. See D. McRae, supra note 22, p. 15.

62 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 26. See also, *Id.*, Diss. Op. Judge Kateka, ICJ Rep. 2005, pp. 168, 190, para. 26. This confirmed earlier statements. See *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, Preliminary Objections, 2 December 1963, ICJ Rep. 1963, pp. 33-34 ('The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.'); *South West Africa (Liberia v. South Africa and*

The ICJ has received numerous calls to expand its function, including from some of its own judges. In the *Pulp Mills* case, several judges expressed a concern that the Court's restrictive attitude to the use of its investigative powers might negatively affect its credibility and popularity in fact-heavy and scientific cases.[63] *Judge Kooijmans* has called for a greater involvement of NGOs as representatives of civil society on the account that it would allow the ICJ to better discharge its function as the principal judicial organ of the United Nations in a 'shrinking and increasingly interdependent world society.'[64] Indeed, the ICJ's interpretation of its function in contentious proceedings is quite narrow when considering that Article 1 UN Charter defines as an aim of the UN system the peaceful settlement of

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Ethiopia v. South Africa), Judgment of 21 December 1962, Joint Diss. Op. Judges Fitzmaurice and Spender, ICJ Rep. 1962, p. 466 ('We are not unmindful of, nor are we insensible to the various considerations of a non-judicial character, social, humanitarian and other, which underlie this case; but these are matters for the political rather than the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.'). Again, in the *Pulp Mills case*, the ICJ in remarkably express terms emphasized its continued adherence to a private judicial function to justify its decision not to carry out fact investigations. See *Pulp Mills case*, Judgment, 20 April 2010, ICJ Rep. 2010, para. 168 ('[I]n keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.'). Critical, *Pulp Mills case*, Judgment, 20 April 2010, Sep. Op. Judge Cançado Trindade, ICJ Rep. 2010, para. 151 ('[P]aragraph 170 of the present Judgment should have pointed out also the additional possibility opened to the Court, if it deemed it necessary, namely, that of obtaining further evidence *motu proprio*.'). See also R. Higgins, supra note 54, p. 61.

63 *Pulp Mills case*, Judgment, 20 April 2010, Decl. Judge Yusuf, ICJ Rep. 2010, paras. 1, 5, 13; *Pulp Mills case*, Judgment, 20 April 2010, Joint Diss. Op. Judges Al-Khasawneh and Simma, ICJ Rep. 2010, para. 17 ('The present dispute has been a wasted opportunity for the Court … to avail itself of the procedures in Article 50 of its Statute and Article 67 of its Rules, and establish itself as a careful, systematic court which can be entrusted with complex, scientific evidence, upon which the law (or a breach thereof) by a party can be established. … In a case concerning complex scientific evidence and where, even in the submissions of the Parties, a high degree of scientific uncertainty subsists, it would have been imperative that an expert consultation, in full public view and with the participation of the Parties take place.'). See also M. Benzing, supra note 54, pp. 399-400.

64 P. Kooijmans, *The role of non-state actors and international dispute settlement*, in: W. Heere (Ed.), *From government to governance: the growing impact of non-state actors on the international and European legal system*, The Hague 2003, p. 26.

disputes in compliance not only with international law, but also 'with the principles of justice.' Already in 1947, the General Assembly determined that part of the settlement of disputes was the clarification and progressive development of international law.[65] The ICJ's narrow view may cause difficulty in meeting the demands of today's international reality.[66] As *Dupuy* notes, '[t]he composition of the international community has changed, but the Statute of the Court remains the same.'[67]

The ICJ's role in advisory proceedings is different. Article 96 UN Charter entrusts the Court with the clarification of any legal question, without attaching binding force to the Court's opinion. Here, the ICJ exercises an essentially public function.[68]

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65 UN General Assembly Res. A/RES/181(II), 14 November 1947, Part A. See H. Steinberger, *The ICJ*, in: H. Mosler/R. Bernhardt (Eds.), *Judicial settlement of international disputes*, Berlin 1974, p. 210.

66 See in this regard the criticism by *Sir Robert Jennings*: 'The effect of Article 34(1) is to insulate the Court from this great body of modern international law. ... It is a matter for serious thought and consideration whether more could be done to ensure that the principal judicial organ of the United Nations is the supreme court of the international community, bearing in mind that a court which exists in isolation, however splendid, is not really in a position to be a supreme court in relation to other courts, as it does not have any formal relations with those other courts.' R. Jennings, *The International Court of Justice after fifty years*, 89 American Journal of International Law (1995), p. 504.

67 P. Dupuy, *Article 34*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice, a commentary*, 2nd Ed. Oxford 2012, p. 605, para. 43.

68 See *Nuclear Weapons*, Advisory Opinion, 8 July 1996, Sep. Op. J. Guillaume, ICJ Rep. 1996, p. 293, para. 14 ('I should like solemnly to reaffirm that it is not the role of the judge to take the place of the legislator. … [T]he Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States.'); K. Oellers-Frahm, *Lawmaking through advisory opinions*, 12 German Law Journal (2011), p. 1055 ('In the present context, it may therefore be stated that advisory opinions of international courts or tribunals can at least be considered as formulating shared or community expectations – what it is in the interest of the Court itself as well as in the interest of the judicial function a contribution to the development and certainty of international law – and that they do in fact govern the further behavior of those they address, irrespective of their binding or non-binding effect or their legal impact on international law.'). See also with respect to the ICJ's role in *Legality of the Threat or Use of Nuclear Weapons*, H. Thirlway, *Unacknowledged legislators: some preliminary reflections on the limits of judicial lawmaking*, in: R. Wolfrum et al. (Eds.), *International dispute settlement: room for innovations*, Heidelberg 2012, pp. 311-324; *Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, p. 237, para. 18.

Amicus curiae has not affected the Court's judicial function. The instrument is *de facto* non-existent in contentious proceedings. For advisory proceedings, Practice Direction XII acknowledges the existence of *amicus curiae* submissions by NGOs, but it has not led to an expansion of the ICJ's understanding of its judicial function. The Direction permits those involved in an advisory opinion to consult the *amicus curiae* briefs. However, at the same time, it clarifies that the Court does not endorse the concept, and only a few judges on rare occasions have disclosed having considered *amicus curiae* briefs (see Chapter 7).

II. International Tribunal for the Law of the Sea

The UNCLOS assigns a broader judicial function to the ITLOS. The UNCLOS lists as a purpose the establishment of 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,' as well as seek to take into account 'the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries' in the pursuance of these goals. Especially the Seabed Disputes Chamber must take into consideration the interest of all of mankind in its decision-making as made explicit with respect to issues concerning any commercial use of the ocean floor and its resources extending beyond states' national jurisdiction.[69]

Still, the ITLOS Statute emphasizes that the primary function of the tribunal is the settlement of contentious disputes. This function is flanked by instruments, which allow the consideration of interests other than those conveyed by the parties, including intervention, investigative rules and the power to issue provisional measures to prevent serious harm to the marine environment.[70]

The ITLOS and its Seabed Disputes Chamber have not accepted any of the *amicus curiae* submissions out of the scope of Articles 84 and 133 ITLOS Rules, but the parties may adopt the submissions made. Thus, the

69 See Articles 136, 140 and 186 UNCLOS and the UNCLOS Preamble.
70 C. Brown, supra note 52, p. 77.

concept as such has not prompted the tribunal to expand its judicial function, but it displays its willingness to consider the issues raised by *amici curiae* if appropriated by a party.

III. European Court of Human Rights

Regional human rights courts naturally exercise a strong public interest function, which permeates their procedural rules.[71] Though generally following an adversarial model of dispute settlement, the IACtHR, the ECtHR and the ACtHPR are furnished with broad investigative powers to level the positions of the complainant and the respondent state and to establish the objective facts in light of the gravity of an alleged human rights violation.[72]

Since its early creation, the system of human rights protection in the Council of Europe member states constantly has been expanded, judicialized and formalized. *Amicus curiae* practice has grown with the ECtHR, and *amici curiae* carry out private and public auxiliary functions to assist the court. The insertion of Article 36(2) in the ECHR symbolized an endorsement of the ECtHR's broader public function by the Council of Euro-

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71 The ECtHR has stressed its function as the guardian of human rights in the Council of Europe member states. See R. Schorm-Bernschütz, *Die Tatsachenfeststellung im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Diss. Münster 2004, p. 36, referring to *Ireland v. the United Kingdom*, No. 5310/71, Judgment, 18 January 1978, Series A No. 25, para. 239; *Loizidou v. Turkey*, No. 15318/89, Judgment, 23 March 1995, Series A No. 310, paras. 70, 75, 93; *DeWilde, Ooms and Versyp v. Belgium*, Nos. 2832/66, 2835/66, 2899/66, Judgment, 18 June 1978, Series A No.12, para. 65.

72 With regard to the ECtHR, see R. Wolfrum, *The taking and assessment of evidence by the European Court of Human Rights*, in: S. Breitenmoser et al. (Eds.), *Human rights, democracy and the rule of law – liber amicorum Luzius Wildhaber*, Zürich et al. 2007, pp. 915-916, 918. According to *Wolfrum*, the ECtHR has used its investigating powers scarcely. *Id*., p. 917. Re the IACtHR, see C. Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: reflections on a joint venture*, 12 Human Rights Quarterly (1990), p. 447. Rule 45(1) IACtHPR Rules of Procedure: 'The Court may, of its own accord, or at the request of a party, or the representatives of the Commission, where applicable, obtain any evidence which in its opinion may provide clarification of the facts of the case.' See also J. Kokott, *Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, Habil. Heidelberg 1993, pp. 387-389.

pe member states. The ECHR subjects the admission of *amici curiae* to the public interest by conditioning it on 'the interest of the proper administration of justice.' This requirement permits the ECtHR to assign an *amicus curiae* functions that support it in fulfilling its task.[73]

The member states have recently further strengthened the ECtHR's public function through the creation of a right of intervention for the Commissioner for Human Rights by Protocol No. 14 in Article 36(3) ECHR. The reform was carried out with the aim of protecting the general interest more effectively. Member states expressed the expectation that '[t]he Commissioner's experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties.'[74] Thus, the Commissioner's role is to act as an integrator for similar situations.

IV. Inter-American Court of Human Rights

Pursuant to Article 28 IACtHR Statute and Article 34(3) IACtHR Rules, the IAComHR represents the public interest in all cases before the IACtHR.[75] The IACtHR has stressed that it possesses a public function to establish and maintain social order and to maximize the protection of individuals under the American Convention.[76] The court also appears to be

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73 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. *Dolidze* shows how the first admission of *amici curiae* coincided with the ECtHR 'asserting its Europe wide policy-making role.' See A. Dolidze, *Bridging comparative and international law: amicus curiae participation as a vertical legal transplant*, 26 European Journal of International Law (2015), p. 878.

74 Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention (CETS No. 194), Agreement of Madrid, 12 May 2009, Explanatory Report, para. 87.

75 R. Mackenzie/C. Romano/Y. Shany/P. Sands, *Manual on international courts and tribunals*, 2nd Ed. Oxford 2010, p. 379. See also *Viviana Gallardo et al v. Costa Rica,* Decision, 13 November 1981, Explanation of vote by Judge Piza Escalante, IACtHR Series A No. 101, para. 4 (The IAComHR has 'a *sui generis* role, purely procedural, as an auxiliary of the judiciary, like that of a "Ministerio Publico" of the inter-American system for the protection of human rights.').

76 Article 33 ACHR determines that the court is competent to discharge matters pertaining to the fulfilment of the commitments made by the states parties to the Con-

willing to assume a law-making function to the extent that it has sought, within the confines of its mandate, to ensure coherence and legal certainty in its case law.[77] The IACtHR has established new legal standards and interpretations. In the *Ivcher Bronstein Case*, it emphasized its public function:

> [I]nternational settlement of human rights cases (entrusted to tribunals like the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice); since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter.[78]

Since its inception, the IACtHR has harnessed the concept for its broad judicial function. It made this explicit in *Kimel v. Argentina* upon characterizing *amicus curiae* not only as a source of additional information, but as an instrument to strengthen human rights in the Americas.[79] Thus, *amicus curiae* has not changed the judicial function of the IACtHR, but it has served as a tool for it to exercise its public function.

V. WTO Appellate Body and panels

Article 3(7) DSU establishes that the 'aim of the dispute settlement mechanism is to secure a positive solution to a dispute.' The DSU emphasizes

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vention. Article 1 IACtHR Statute further stipulates: 'The Inter-American Court of Human Rights is an autonomous juridical institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.'

77 D. Shelton, *The jurisprudence of the Inter-American Court of Human Rights*, 10 American University Journal of International Law and Policy (1994), pp. 343-344.

78 *Ivcher Bronstein v. Peru*, Judgment of 24 September 1999 (Competence), IACtHR Series C No. 54, para. 48.

79 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177, pp. 4-5, para. 16; *Castañeda Gutman v. Mexico*, Judgment of 6 August 2008 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 184, p. 5, para. 14.

the private function by encouraging the parties at all times to find a negotiated mutually accepted solution to their dispute.[80]

Several provisions of the DSU indicate that the function of the WTO dispute settlement system is broader. Article 3(2) DSU describes the dispute settlement system as 'a central element in providing security and predictability to the multilateral trading system,' thereby pointing to a stabilizing and integrating function. The WTO Agreement incorporates select community interests pertaining to trade, such as an increase in global welfare through trade liberalization and the furtherance of economic growth of developing countries. Panels and the Appellate Body have an institutional commitment to the promotion of global free trade.[81] Further, Article 11 DSU's objectivity requirement and Article 13 DSU's grant of inquisitorial powers show that panels are not mere private service providers. The norms assert that panels, not the parties, are to establish the factual record.[82] Under Article 13 DSU, panels are not only free in the choice of the sources, individuals and bodies to consult,[83] but also whether to seek any advice at all,[84] whether to accept or reject the information requested

80 R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Diss. Berlin 2007, p. 105; *US–Wool Shirts and Blouses*, Report of the Appellate Body, adopted on 23 May 1997, WT/DS33/AB/R, p. 19 ('[T]he basic aim of dispute settlement in the WTO is to settle disputes.'). See also Article 3(4) DSU.

81 See Chapter 2. See also J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 91. On the Appellate Body as a review instance, see R. Alford, *Reflections on US-Zeroing: a study in judicial overreaching by the WTO Appellate Body (2006-07)*, 45 Columbia Journal of Transnational Law (2006), p. 201, FN 19; S. Croley/J. Jackson, *WTO dispute procedures, standards of review, and deference to national governments*, 90 American Journal of International Law (1996), pp. 195-196.

82 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, paras. 104, 106. See also 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. 325.

83 *EC–Hormones,* Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, p. 56, para. 135 ('[I]t is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings.').

84 See *Argentina–Textiles and Apparel*, Report of the Appellate Body, adopted on 22 April 1998, WT/DS56/AB/R, para. 84 and *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, paras. 299-303, where the

and how to evaluate and assess said information.[85] Panels have acknowledged their public function. However, they have stressed that their role is '[f]irst and foremost … designed to settle disputes.'[86] Indeed, the DSU establishes significant limits on panels' public function to ensure the operability of the private function, such as the scope of jurisdiction, the burden of proof and due process considerations.

Panels and the Appellate Body have embraced a broad judicial function. The Appellate Body has found that Article 3(2) DSU entrusts it and panels with the clarification of the rights and obligations of member states and the creation of a coherent and predictable body of jurisprudence.[87] The Appellate Body has interpreted the investigative authority bestowed upon panels broadly, while emphasizing that the primary function of the WTO Dispute Settlement System is to settle the disputes brought to it.[88]

Appellate Body held that the duty to make an objective assessment of the case was not violated if the panel, in exercise of its discretion under Article 13(2) DSU, decided not to seek information from an external source.

85 Re the case law on panel's role as the trier of facts, see 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, 428, FN. 20.

86 *EC–Bananas III*, Report of the Panel, adopted on 25 September 1997, WT/DS27/R/ECU, p. 301, para. 7.32.

87 *US–Stainless Steel*, Report of the Appellate Body, adopted on 20 May 2008, WT/DS344/AB/R, p. 67, para. 161 ('Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.').

88 E.g. *Korea–Dairy*, Report of the Appellate Body, adopted on 12 January 2000, WT/DS98/AB/R, para. 137. See also Chapter 7. However, see *US–Wool Shirts and Blouses*, Report of the Appellate Body, adopted on 23 May 1997, WT/DS33/AB/R, p. 19 ('Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.').

Former Appellate Body members have indicated that the proactive review of facts and laws may have been due to the 'weakness of the political structure within the WTO.'[89]

Many member states considered the admission of *amicus curiae* briefs to amount to judicial activism, even an assumption of a legislative role.[90] However, the Appellate Body justified the admission with its already existing powers (see Chapter 5). It made no reference to a public interest or any other broader role, but presented the admission as a purely technical issue.

With respect to public interest issues in particular, *amicus curiae* briefs seem barely to have had any impact given panels' and the Appellate Body's reluctance to consider them. The cases where *amici curiae* have been taken into account concern contextual or legal arguments directly relevant to the case as framed by the parties and not matters of general public policy. This indicates that panels and the Appellate Body seek for information to find a solution to the dispute, not to render a general (legislative) decision on the relations between trade and other issues. Panels and the Appellate Body have refused to review briefs addressing arguments not raised by the parties (see Chapter 7). The parties and third parties can always adopt an *amicus'* arguments with the consequence that the Appellate Body or panel is obliged to consider them. Thus, with respect to the

89 D. Ehlermann, *Six years on the bench of the World Trade Court*, 36 Journal of World Trade (2002), pp. 632-636. See also T. Zwart, *Would international courts be able to fill the accountability gap at the global level?*, in: G. Anthony et al. (Eds.), *Values in global administrative law*, Oxford 2011, p. 201 ('[T]he decision-making for all matters other than dispute settlement is by consensus which makes it slow and cumbersome. Consequently, there is a stark contrast between the fast and effective operation of the judicial dispute settlement bodies and the inefficiency and weakness of the political structure. …The Appellate Body has been acting as the constitutional engine of the WTO by shaping and filling in its constitution, by forcing constitutional relations at the central level.').

90 The European Commission at the General Council meeting argued that the Appellate Body had assumed a legislative function due to the WTO legislature's failure to address the issue. See WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by European Commission, para. 96. See also A. Appleton, *Amicus curiae submissions in the Carbon Steel Case: another rabbit from the Appellate Body's hat?*, 3 Journal of International Economic Law (2000), p. 699.

substantive consideration of briefs, the *amicus curiae* practice evinces a strong private judicial function rather than an evolving public function.[91]

VI. Investor-state arbitration

Investment arbitration tribunals embody the private function of dispute settlement. They are established by consent of the parties solely for the solution of their dispute.[92] Traditionally, private arbitrators are charged to focus on the interests of the disputing parties, and not to integrate any societal interests or views in their decisions. Accordingly, intervention, publicity and transparency are atypical features of investor-state arbitration, as is reflected in the majority of investment treaties and institutional rules.[93] They do not inform tribunals on how to reconcile investors' rights with environmental, health or other public interests.[94]

In recent years, there has been a shift in the characterization of the basic structure of investment arbitration. Instead of being considered a sub-area of commercial arbitration, it is increasingly seen as part of a global administrative law.[95] This has entailed calls for a change of the function of in-

91 J. Durling/D. Hardin, *Amicus curiae participation in WTO dispute settlement: reflections on the past decade*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, p. 225.

92 For instance, Article 25 ICSID Convention states that the jurisdiction of the Centre covers 'any legal dispute arising directly out of an investment'. See also Article 1(1) of the 2010 UNCITRAL Arbitration Rules and of the 2013 UNCITRAL Arbitration Rules.

93 See M. Gruner, *Accounting for the public interest in international arbitration: the need for procedural and structural reform*, 41 Columbia Journal of Transnational Law (2003), p. 952.

94 V. Lowe, supra note 54, p. 9.

95 G. Van Harten/M. Loughlin, *Investment treaty arbitration as a species of global administrative law*, 17 European Journal of International Law (2006), p. 121; A. Cohen Smutny, *Investment treaty arbitration and commercial arbitration: are they different ball games? The actual conduct*, in: A. van den Berg (Ed.), *50 years New York Convention*, Alphen aan den Rijn 2009, p. 168 ('[I]nvestment treaty arbitrations are not private disputes. They are disputes about matters of public policy, about legislation, about the conduct of public servants, about national courts, and about the manner in which laws are implemented and regulators regulate. A final award against a state stands as a bill to the taxpayers of a country – and potentially a significant bill at that.').

vestment tribunals, specifically a broadening of their mandate to include considerations beyond the solution of the concrete dispute (see Chapter 2).

The criticism has had an effect on some of the newer investment treaties in force. The current US Model BIT recognizes the public interest explicitly.[96] In addition, several relatively recent legislative efforts indicate a broadening of the judicial function of tribunals. These include the introduction of third party participation and transparency rules in investment treaties and institutional rules (see Chapters 3 and 5).[97]

Arbitral tribunals appear to have cautiously expanded their mandates. One of the most poignant functions assumed by tribunals is the coherence of arbitral decisions, an aspect that traditionally is anathema given the pervasive confidentiality rules.[98]

The admission of *amici curiae* by investment tribunals was motivated by public interest considerations. The *Methanex* tribunal justified its decision to grant leave to file a brief to an *amicus curiae* with the public interest raised by the subject matter:

> [T]here is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.[99]

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96 E.g. Articles 12 and 13 of the 2012 U.S. Model Bilateral Invesment Treaty, at: http://www.state.gov/documents/organization/188371.pdf (last visited: 9.9.2017).

97 The ICSID Convention and its arbitration rules, which were designed specifically for investment arbitration, have always somewhat reflected the public interest element in investment treaty arbitration. C. Tams/C. Zoellner, supra note 51, pp. 224-225. See also public interest elements in other treaties, such as Article 1128 NAFTA, Article 10.20.2 CAFTA and Article 5 UNCITRAL Rules on Transparency.

98 The tribunal in *Saipem SpA v. Bangladesh* went so far as to consider it 'a duty to adopt solutions established in a consistent series of cases [and] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards the certainty of the rule of law.' See *Saipem SpA v. the Peoples' Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ICSID Case No. ARB/05/07, para. 67.

99 *Methanex v. USA,* Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 49. See also *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17

Despite the continued acknowledgment of the public interest in the subject-matter in connection with the admissions of *amici curiae*, tribunals remain cognizant of the strong private function of investment arbitration and the fact that they are bound by the rules agreed upon by the parties.[100] This awareness is reflected in strict timing requirements, restricted access to documents and a limited consideration of 'public-interest'-driven briefs. Instead of these submissions, tribunals have considered with greater frequency submissions from *amici curiae* that focus on certain legal aspects raised by the parties or which provide contextual information. In essence, tribunals have consistently held that any public mandate they may have is confined by the terms of their private function. The tribunal in *Eureko v. Slovak Republic*, for instance, rejected any notion of a law-making function in its partial award:

> In particular, the Tribunal wishes to emphasise that its decisions are here limited both by the requirements of this particular case and by the scope of the arguments presented by the Parties. This award is thus necessarily confined to the specific circumstances of the present case; and the Tribunal does not here

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March 2006, ICSID Case No. ARB/03/17, paras. 18-19; *Biwater v. Tanzania*, Award, 24 July 2008, ICSID Case No. ARB/05/22, para. 358.

100 *Suez/InterAguas v. Argentina*, Order in Response to a Petition for Participation as *Amici Curiae*, 17 March 2006, ICSID Case No. ARB/03/17, para. 6. In *Biwater v. Tanzania*, the investor stressed the possibilities of the instrument under the private function. It pleaded with the tribunal to allow *amicus curiae* submissions only '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.' See *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 3. Further, the claimant submitted that it was irrelevant that the CIEL and the IISD had expertise in general international law, including on the connection between international investment agreements and national development policy, because political issues of this nature could not bear on the factual and legal issues in the dispute. The tribunal disagreed. It stated: '[E]ven if Claimant ultimately proves that such wider interests, as a matter of fact, are untouched by its claims, the observations 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.' *Id*., para. 54. However, in its award, the tribunal then stressed that it was 'mandated to resolve claims as between [Biwater Gauff Tanzania] and the Republic, but also recognized that this arbitration raises a number of issues of concern to the wider community in Tanzania.' See *Biwater v. Tanzania*, Award, ICSID Case No. ARB/05/22, para. 358.

> intend to decide any general principles for other cases, however ostensibly analogous to this case they might be.[101]

Similarly, the tribunal in *UPS v. Canada* emphasized its private function. It rejected the petitioners' argument that the arbitration was different from private contract based arbitration as 'unhelpful', because its powers could not

> be used to turn … the subject of the arbitration into a different dispute. … Rather, the powers 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 in accordance with the consent of the disputing parties.[102]

Nonetheless, the adoption of rules on *amicus curiae* signals that the *rule makers* accept a broadened mandate, especially as the rules leave room for the submission of information that not merely serves to avoid error in the final award. The rules intend to broaden the perspective of the tribunals by requiring petitioners to introduce information to the tribunal that the parties do not submit and by limiting the concept to those having an interest in the outcome of the arbitration. In addition, the concept has broadened the circle of those permitted to present information to the tribunal.[103]

However, so far, *amicus curiae* has not been very effective as a vehicle for public interest considerations. Portions of *amicus curiae* briefs containing policy considerations and advocating legislative change are generally ignored (see Chapter 7). Public interest considerations are rarely summarized, let alone relied upon in the decision, unless introduced by a party. This may be also because of the difficulties arising in respect of the applicable law. Unless the public interest considerations form part of the applicable law or can be considered in the interpretation of the treaty, tribunals prefer to not consider them at all to avoid challenges to the validity of an

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101 *Eureko v. Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, para. 218. The reason for the tribunal's clear message may have been motivated by the fact that the case generated a high amount of public attention, as the European Commission and stakeholders in several European countries highly anticipated the decision to deduce the future validity of intra-EU BITs.

102 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 60. The respondent in the case acknowledged a general public interest in Chapter-11 disputes. *Id*., para. 52.

103 See also C. Brower, *Obstacles and pathways to consideration of the public interest in investment treaty disputes*, in: K. Sauvant (Ed.), Yearbook on International Investment Law & Policy, Oxford 2008-2009, pp. 360-364.

award.[104] Further, what constitutes a noteworthy public interest has remained rather vague. Tribunals have identified cases concerning essential commodities as raising a public interest, but they have so far not explained convincingly why these cases, more than other investor-state arbitrations that also affect national legislation and budgets, should receive external input. Finally, as *Brower* notes, the cases addressing public interests generally are a fraction of the total cases submitted to investment arbitration and they cannot establish a general framework for the consideration of public interest issues.[105]

VII. Comparative Analysis

Overall, the concept does not seem to have notably expanded the public judicial function of any of the international courts and tribunals considered.[106] *Amicus curiae* participation is virtually absent from the ITLOS and the ICJ and basically ineffective in the WTO dispute settlement system, all of which adhere to a strong private function of dispute settlement. It occurs regularly in the human rights courts including for the representation of public interests in cases engaging conflicting values. By their nature and jurisdiction, these courts exercise a public judicial (or pro-human rights) function and the presence of public interests is apparent to all parties. A certain paradigm shift towards a public judicial function constituted the admission of *amici curiae* out of public interest considerations in investment arbitration. Even though they may not have contributed to an expansion of the judicial function, in several courts, *amici curiae* have drawn attention to public interests involved (even where these were not legally recognized by the respective court or tribunal).

The opening towards *amicus curiae* in the WTO and in investment arbitration goes hand in hand with an increased recognition of public interests in substantive international law, in the applicable legal instruments and in

104 *Id.*, p. 368. See FN 161 of his article for a list of BITs recognizing public interests.

105 *Id.*, p. 360 ('[T]he half-dozen decisions on *amicus* submissions may be too few in number and too narrow in scope to illuminate the public interest for the vast run of investment treaty disputes.').

106 For an opposing view based on the introduction of the concept itself, see Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford handbook of international adjudication*, Oxford 2014, p. 822.

case law. However, investment tribunals, WTO panels and the Appellate Body have not given effect to public interests introduced by *amici curiae* in their decision-making. In addition to concerns over the applicable law, their reluctance may be due also to systemic concerns. Both systems were founded to protect and foster trade and investment respectively. The expressed goal was essentially to take politics out of the equation and focus on a stringent application of the respective international agreements reached between member states.[107] The clash of these agreements with non-trade or investment-related values was not factored into the system which was accordingly ill-equipped to address it. The increasing amount of legitimacy debates certainly paved the ground for *amicus curiae* participation in these *fora*. The mere fact of admission of *amicus curiae* briefs and the granting of an opportunity to directly voice their views to the arbitrators and parties already constitutes a success for *amicus curiae* proponents.

Given its limited effectiveness, is *amicus curiae* the appropriate engine for the introduction of public interest considerations in the judicial process (if we assume that this cannot be left to the disputing parties) (1.)? Have the fears over a denaturation of the judicial function materialized (2.)?

1. The right agent?

An alternative to *amicus curiae* could be the instrument of a public interest representative. The ECJ relies on advocates general to represent the public interest and the IACtHR and the ECtHR allow human rights commissioners to participate in their proceedings.[108]

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107 T. Wälde, *Improving the mechanisms for treaty negotiation and investment disputes – competition and choice as the path to quality and legitimacy*, in: K. Sauvant (Ed.), *Yearbook on International Investment Law & Policy*, Oxford 2008-2009, p. 513.

108 Another possibility could be to exclude certain matters from adjudication, through political question doctrine or arbitrability exceptions. See V. Lowe, supra note 54, pp. 220-222. However, this would remove important issues from the sphere of arbitration, with the potential of abuse. In addition, not all constituent instruments allow courts to refuse adjudication on political grounds. *Wälde* proposes the creation of an appointed impartial defender of the public interest in investment arbitration. See T. Wälde, supra note 107, p. 558.

It is doubtful that *amicus curiae*, as developed by international courts and tribunals, is *en pars* with these other institutionalized forms of participation.[109] *Amicus curiae*'s role as a public interest defender is poorly developed. Rather than to authoritatively represent them, the international *amicus curiae* usually informs international courts and tribunals of possible public interest issues raised in a dispute – or the fact that the public takes an interest in the case at all (IACtHR).[110] International courts and tribunals – with the exception of a few investment tribunals – do not require a special link between the *amicus curiae* and the public interest represented.

The main concern, however, relates to its sporadic nature. Also, where tribunals are open to the concept, they cannot control which, if any, *amicus curiae* seeks to participate. *Amici curiae*, especially NGOs, focus on cases that support their own agenda ('strategic litigation'). Thus, there is no guarantee that a case with an affected public interest will attract *amicus curiae* submissions, let alone by the most legitimate or expert representatives of this interest. It appears more appropriate to consider establishment of a permanent representative of the public interest, as has happened in the ECtHR and the IACtHR.

2. Denaturation of judicial proceedings?

Fears over a denaturation because of overzealous *amici curiae* and tribunals have not materialized. The concern is basically that by opening the proceedings to public-interest based *amici curiae*, courts will lose sight of their original function and end up acting as a quasi-legislative organ seeking to accommodate the general public interest while losing sight of their

109 R. Teitelbaum, *A look at the public interest in investment arbitration: is it unique? What should we do about it?*, 5 Berkeley Journal of International Law (2010), p. 58; Z. Eastman, *NAFTA's Chapter 11: for whose benefit?*, 16 Journal of International Arbitration (1999), pp. 114-117; T. Wälde, *Transparency, amicus curiae briefs and third party rights*, 5 Journal of World Investment and Trade (2004), p. 338.

110 A. Kawharu, *Participation of non-governmental organizations in investment arbitration as amici curiae*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 285.

primary task, the solution of the dispute before them.[111] This is feared to ultimately affect courts' authority and legitimacy.[112] The issue is even more delicate at the international level because of the absence of a central legislative organ able to reverse any unwanted judicial activism.[113] As seen, some of its users consider *amicus curiae* a tool to modify international law.

However, international courts and tribunals have not lost sight of their primary function in their dealing with *amici curiae*. International courts, as *Mendelson* puts it, are not general public enquiries.[114] Although courts may take far-reaching decisions which may *de facto* affect non-parties, their main function is to adjudicate, not to legislate. In so far, the assessment of the tribunal in *Larsen v. Hawaii* still holds true: '[T]he function of international arbitral tribunals in contentious proceedings is to determine disputes between the parties, not to make abstract rulings.'[115] International courts and tribunals cannot remedy the legislative deficiencies of international law. They (rightly) lack mechanisms to ensure popular consent, es-

111 Arguing that courts are ill-suited to adequately protect the public interest, V. Lowe, supra note 54, pp. 14-16.

112 C. Harlow, *Public law and popular justice*, 65 Modern Law Review (2002), p. 2 ('If we allow the campaigning style of politics to invade the legal process, we may end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy.').

113 H. Lauterpacht, *The absence of an international legislature and the compulsory jurisdiction of international tribunals*, 11 British Yearbook of International Law (1930), p. 143 ('Undoubtedly, the absence of international legislation puts a heavy strain upon judicial settlement as an obligatory institution, but to cut the Gordian knot by rejecting, on this account, obligatory arbitration altogether is too simple a solution. To do so is to exhibit an attitude of resignation. An effective international legalization will for a long time continue to be an ideal.'); A. von Bogdandy, *Verfassungsrechtliche Dimensionen der Welthandelsorganisation*, Kritische Justiz (2001), p. 271.

114 In the latter, it is desirable and justified to obtain the broadest range of views on the issues under discussion from experts as well as from any potential stakeholders. See M. Mendelson, *Debate on transparency, amicus curiae briefs and third party participation,* 5 Journal of World Investment and Trade (2004), p. 347.

115 C. Tams/C. Zoellner, supra note 51, FN 22; *Lance Paul Larsen v. Hawaii*, 5 February 2001, PCA Case No. 1999-01, reprinted in 119 ILR, p. 587.

pecially to carry out an inclusive political consultation and deliberation process.[116] Their focus must remain the solution of the case before them.

The issue is different with regard to advisory proceedings, where the primary goal of the proceedings is the clarification of a question of international law.[117] This has consequences for participation. At least in theory, those enjoying *locus standi* do not participate to protect their own rights and obligations. Their contributions, like *amicus curiae* participation, intend to assist the respective international court or tribunal in the consideration of the legal question submitted to it.[118] Given that the aim is to find out what the law is, the rules on participation should be as inclusive as possible to furnish the court with the widest range of relevant information. This is reflected in the broad rules on participation in the procedural regimes of the ICJ and the ITLOS in advisory proceedings.[119]

C. Amicus curiae *as a tool to increase the legitimacy of international adjudication?*

Amici curiae are seen to mitigate legitimacy concerns in respect of the substantive legitimacy of a decision, its procedural legitimacy and the overall acceptance of international dispute settlement. This is because it

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116 R. Kay, *Judicial policy making and the peculiar function of the law*, 40 Connecticut Law Review (2008), pp. 1281, 1283.

117 K. Oellers-Frahm, supra note 68, p. 1046; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'*, in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, p. 145; A. Riddell/B. Plant, supra note 12, p. 359. In its first advisory opinion, the IACtHR defined the purpose of advisory opinions as 'to assist the American States in fulfilling the international human rights obligations and to assist the different organs of the Inter-American system to carry out functions assigned to them in this field.' See "*Other Treaties" subject to the consultative jurisdiction of the court (Article 64 American Convention on Human Rights)*, Advisory Opinion No. OC-1/82 of 24 September 1982, IACtHR Series A No. 1, para. 40; R. Wolfrum, *Advisory opinions: are they a suitable alternative for the settlement of international disputes?*, in: R. Wolfrum et al. (Eds.), *International dispute settlement: room for innovations?*, Heidelberg 2013, pp. 39, 40.

118 S. Rosenne, *The law and practice of the International Court*, Vol. III: Procedure, 2nd Ed., Leiden 2006, p. 1676, para. III.409.

119 H. Thirlway, *Advisory opinions*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online*, Oxford, para. 1.

allows those (factually) affected by a decision to become involved in the proceedings. Further, it provides the adjudicating body with all the information necessary to render a correct decision that will be accepted by the parties and those affected by it.

This section analyzes if these expectations have been met. Specifically, it examines if the concept is an effective tool of participation for those directly or indirectly affected by a judicial decision (I.) and if it has led to improved decisions (II.). In this context, this section will also discuss the requirements *amici curiae* need to comply with to fulfil either of these functions (III.).

I. Procedural legitimacy

Procedural (or input) legitimacy is one of the cornerstones of international adjudicative legitimacy.[120] It ensures that those who are affected by a decision will be willing to accept the outcome, even if it is not in their favour.[121]

Several international courts and tribunals, including investment arbitration tribunals, the ECtHR and the IACtHR, have stated that the instrument increases procedural legitimacy. The *Biwater v. Tanzania* tribunal, for instance, stated that the admission of *amicus curiae* is a tool 'in securing wider confidence in the arbitral process itself.'[122] The ECtHR regularly uses the concept to allow persons potentially affected by a case, including the opposing party in civil proceedings, to voice their views. Also before the WTO Appellate Body and panels, the majority of those seeking to par-

120 R. Howse, *Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence*, in: J. Weiler (Ed.), *The EU, the WTO and the NAFTA*, Oxford 2000, p. 43. One might suggest that the farther removed the decision-maker is from responsibility to a particular electorate, the more legitimacy depends on procedural fairness itself. Referring to M. Cappelletti, *Giudici legislatori?*, Milan 1984, p. 43 ('The legitimacy or credential of the judiciary, unlike that of the other strictly political organs, does not derive from the fact that it represents an electorate, to which it is directly or indirectly responsible. Rather, democratic legitimacy accrues to the judiciary through the fundamental right to respect for the guarantees of "natural justice".').

121 L. Helfer/A. Slaughter, *Toward a theory of effective supranational adjudication*, 107 Yale Law Journal (1997), p. 284; R. Howse, supra note 120, pp. 35-69.

122 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 50.

ticipate as *amicus curiae* are entities representing persons who may be affected by the outcome, particularly business interest groups. In the ECtHR, the WTO adjudicating bodies, the IACtHR and in investor-state arbitration, *amici curiae* seeking to represent the wider views of the public have been granted leave to file a submission (see Chapters 4 and 5 and Section B). In the IACtHR and the ECtHR, *amici curiae* have provided the courts with direct evidence of societal changes in numerous cases involving ethically complex questions, such as abortion or LGBTIQ* rights (see Chapters 6 and 7).[123] Such participation, in turn, may improve international courts' procedural (and institutional) legitimacy, specifically if *amici curiae* initiate and engage in discourse with the general public about the court and its jurisprudence. This is subject to the *amici curiae* themselves being legitimate representatives of the interests tabled (see below).

Further, the main drivers for an inclusion of the public in international adjudication are NGOs with an interest in the issues affected by the dispute. Often these NGOs stem from the local area where the dispute plays out. In these instances, the instrument is used by the stakeholders on whose participation and involvement legitimacy rests. As will be shown below, representativity concerns have in so far not materialized.

Still, there are significant drawbacks to the reliance on *amicus curiae* as a tool for enhanced procedural legitimacy. First, as *Weigand* notes in his case study on the efficiency of the Quechan Indian Nation's participation as *amicus curiae* in *Glamis*, the instrument is an ill-suited substitute for a right to intervene. This is particularly troubling where, as in *Glamis v. USA*, the affected interest is unlikely to be represented adequately by any of the parties.[124] The limited protective capacity of *amicus curiae* rests in its nature as an instrument of the court. *Amici curiae* do not have a right to participate.

Further, *amicus curiae* participation has been largely sporadic. Especially before investment tribunals, the WTO Appellate Body and WTO

123 See also N. Bürli, *Amicus curiae as a means to reinforce the legitimacy of the European Court of Human Rights*, in: S. Flogaitis et al. (Eds.), *The European Court of Human Rights and its discontents*, Cheltenham et al. 2013, p. 143.

124 P. Wieland, *Why the amicus curiae institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals: Glamis Gold and the right of intervention*, 3 Trade Law and Development (2011), p. 336 (He argues that indigenous people should have a right to intervene because of their distinct cultural identity and the right to self-determination.).

panels, the cases with *amicus curiae* participation range in the low double digits. Admittedly, not all cases engage the public interest equally and give rise to legitimacy concerns. Still, the exceptional character of the instrument makes it unsuitable for the addressing of fundamental systemic concerns.[125] The solution to this problem lies hardly in a pro-*amicus curiae* publicity campaign. The use of *amicus curiae* as a link between courts and an affected community shall not be diminished, especially where judges must balance competing interests. In these instances, the submissions from *amici curiae* can, possibly more than the parties' submissions, convey a more direct and real picture of the facts and underlying concerns. However, judges cannot possibly hear the concerns of every potentially affected person and entity, lest they lose sight of their primary task to the detriment of the parties and, as detailed in the previous section, run risk of adopting a legislative role for which they are neither equipped nor legitimized. The difficulty hence lies in finding the right balance between those to involve and those not to involve.[126] This matter has not become problematic in most courts, likely because of the low number *amici curiae* seeking to defend their own rights.[127] But it may have to be addressed when this changes. The best solution in this regard may ultimately be the creation of a representative of the public interest alongside possibilities for *amicus curiae* participation or even intervention as of right for those specifically and directly affected. Such a representative has been introduced recently in the ECtHR.

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125 C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 370.

126 This is left open by R. Reusch, supra note 80, pp. 223-236.

127 However, it is a concern in the ECtHR with regard to the opposing party in the underlying proceedings. The German Constitutional court (BVerfG), in a decision of 14 October 2004, held that the lack of a formal participation mechanism for the winning party in domestic proceedings may lead to restrictions in the national implementation of an ECtHR judgment. The BVerfG noted that a mechanism for participation could ease the problem. Further, there is a concern that the affected person may not know that the losing party has filed an ECtHR application as no formal notification mechanism exists. In Germany, the representative of Germany before the ECtHR notifies the affected parties and informs them of the possibility of participation pursuant to Article 36(2) ECHR. It is argued that the ECtHR should process such notifications. See J. Meyer-Ladewig, *Kommentar zur europäischen Menschenrechtskonvention*, 2nd Ed, Baden-Baden 2006, Artikel 36. See also, N. Bürli, supra note 123, pp. 145-146. *Bürli* critically notes that the court admits the winning party as *amicus curiae* in only a fraction of cases.

Finally, there is an issue of intransparency concerning the rules on *amicus curiae* participation and their application. As shown in Chapters 4 and 5, many rules are highly abstract, and the decision on admission in many courts is intransparent. With the exception of investment tribunals, rejected *amicus curiae* applicants rarely are given reasons for the rejection. This practice might lead to new legitimacy concerns.

II. Substantive legitimacy

Substantive (or output) legitimacy relates to the quality of the decisions rendered by international courts and tribunals. It has been argued that *amici curiae* can improve outcome legitimacy by sharing information with the court on issues in which they are particularly experienced or knowledgeable.

Chapter 6 shows that international courts and tribunals receive a large number of sophisticated and well-researched *amicus curiae* submissions. Submissions tend to be meticulously prepared and it is not uncommon for *amici curiae* to hire legal experts to draft their submissions.[128] Further, expertise and experience are considered indispensable by most international courts and tribunals when deciding on whether to grant leave to file a submission to an *amicus curiae*. However, there is a problem in terms of verification, quality assessment and consideration.

First, there is no evidence that any international court or tribunal currently engages in an in-depth control of the quality and veracity of *amicus curiae* submissions. *Amici curiae* are not cross-examined. Courts seem to expect the parties to point to inaccuracies in *amicus curiae* submissions. It has been proposed that instead of *amici curiae*, courts should appoint ex-

128 For example, in the *Arctic Sunrise Case*, the submission from Greenpeace was prepared by Professor Philippe Sands QC, Simon Olleson and Kate Harrison. See *Arctic Sunrise Case*, Provisional Measures, ITLOS Case No. 22, *Amicus Curiae* Submission by Stichting Greenpeace Council (Greenpeace International), 30 October 2013, at: http://www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf (last visited: 19.9.2017); *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, FN 4 (The *amicus curiae* submission by AIIS was prepared by Wilmer Cutler Pickering Hale Dorr LLP.).

perts 'whose reputation actually stands or falls on their impartiality' if they require further information but are not sure that the (relevant) information provided by an *amicus curiae* is impartial.[129] Apart from concerns over additional costs incurred by this proposal, it might suffice to start with requiring *amici curiae* to prove allegations of facts and adhere to scientific guidelines when presenting arguments. There is no justification for placing this burden on the parties' shoulders alone, especially where the parties' possibilities to check submissions are limited.

Second, only the IACtHR and the ECtHR seem to draw from the content of submissions regularly in their decision-making. Neither investment tribunals nor the WTO adjudicative bodies appear to have reviewed the proposals made by *amici curiae* in their submissions, unless the arguments presented were identical to those raised by the parties. WTO panels and the Appellate Body have acknowledged, albeit unrelated to the issue of *amicus curiae* participation, that the WTO Agreement and its Annexes affect the interests of non-state actors and that therefore these have to be taken into account in the interpretation of the rights and obligations of WTO law.[130] The submissions considered stemmed predominantly from affected industry representatives (see Chapter 7). This begs the question if *amicus curiae* at all affects substantive legitimacy. Governments appearing as a party or third party already regularly incorporate the submissions of industry groups in their pleadings, as opposed to those of consumer or environmental organizations, though the latter may change in countries where governments increasingly give weight to non-trade related issues, especially environmental concerns.[131]

Thus, while the instrument has the potential to inform of the various interests possibly affected by their decision, with the exception of the regional human rights courts, international courts and tribunals barely seem

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129 E. Triantafilou, supra note 36, p. 576.

130 *US–Section 301 Trade Act*, Report of the Panel, adopted on 27 January 2000, WT/DS152/R, p. 320, para. 7.73 ('However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix.'); R. Howse, supra note 19, p. 500 ('Indirect access to dispute settlement proceedings through *amicus* submissions recognizes these realities, without thereby changing the nature of the system as one that directly grants rights only among states parties to the treaties.').

131 See D. Prévost, *WTO Subsidies Agreement and privatised companies: Appellate Body amicus curiae briefs*, 27 Legal Issues of Economic Integration (2000), pp. 287, 288.

to have taken into account *amicus curiae* submissions in their substantive decisions. Consequently, the legitimizing effect of the instrument currently is aspirational rather than real. At worst, it may give an appearance of greater legitimacy to the public that may reverse once the public realizes the ineffectiveness of the instrument. There is a risk that lack of substantial consideration of *amicus curiae* briefs may actually deepen legitimacy concerns regarding the WTO dispute settlement system and investment arbitration.[132]

III. Conditions: representativity and accountability

Not every function of *amicus curiae* requires the same set of conditions from the viewpoint of legitimacy. *Dunoff* convinces when he states that 'to the extent that NGO arguments are meritorious, it should not matter whether they are representative or electorally accountable.'[133] This, however, is only valid from the perspective of output legitimacy. Certain requirements are necessary to ensure that a submission is useful. These are especially expertise and quality – requirements that are essential in practice.[134] Further, transparency regarding the provenance of an *amicus curiae* and the drafting process of the brief are essential to ensure its independence from the parties.

Where *amici curiae* are admitted to compensate for a procedural legitimacy deficit (assuming that this is possible), their ideas are not the most relevant factor, but their participation as representatives of an affected

132 D. McRae, supra note 22, p. 12 ('However, the fact that such a brief has never had any perceptible influence on the result of a case has led to scepticism about their value and heightened cynicism about WTO transparency.'); C. Schliemann, *Requirements for amicus curiae participation in international investment arbitration, a deconstruction of the procedural wall erected in joint ICSID Cases ARB/10/25 and ARB/10/15,* 12 The Law and Practice of International Courts and Tribunals (2013), pp. 365-390.

133 J. Dunoff, *The misguided debate over NGO participation at the WTO*, 4 Journal of International Economic Law (1998), p. 439. See also S. Charnovitz, supra note 18, pp. 209-210.

134 E. Bluemel, *Overcoming NGO accountability concerns in international governance,* 31 Brooklyn Journal of International Law (2005), p. 189 ('[E]ffectiveness, expertise and experience are crucial determinants for outcome-based accountability controls.').

group of people or the public as such. As *Marceau* and *Stilwell* note in respect of *amici curiae* in the WTO:

> [R]epresentation and accountability of NGOs may help to confirm their character and the interests they represent. Organizations expressing views of the major sections of the population may help to confirm the legitimacy of the decisions rendered by the dispute settlement system. In many cases, the value of *amicus* briefs will be to provide information on the broader implications of a decision on development, health, the environment, or other facts of general welfare.[135]

Likely for this reason, representativeness, transparency and accountability have virtually not been an issue before the regional human rights courts. These courts do not view the instrument as an agent of democratic legitimacy. It is only where it shall improve systemic procedural legitimacy concerns that it should be required to possess qualities non-state actors typically do not, and possibly cannot, possess. What are the requirements *amici curiae* need to fulfil to transmit procedural legitimacy?[136]

Reinisch and *Irgel* propose to create an accreditation system whereby only those non-state actors are permitted to apply for leave as *amicus curiae* that have shown to possess transparent structures and widespread support.[137] A proposal from the OECD Investment Committee goes further by requiring 'a threshold showing of substantive and legitimate interest by the third parties and also have them demonstrate that they are accountable, professional and transparent themselves by disclosing the origin of the funds with which they operate.'[138] The FTC Statement and other investment arbitration rules already stipulate that *amicus curiae* must stem from a member state. This requirement ensures that only potentially affected *amici curiae* – as constituents of one of the states who will have to imple-

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135 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), p. 180.

136 *Tams* and *Zoellner* promote the idea that at some point civil society as a whole will have developed measures to regulate who will be able to speak for civil society. C. Tams/C. Zoellner, supra note 51, p. 240.

137 A. Reinisch/C. Irgel, supra note 17, p. 132. They acknowledge the difficulty with their approach: 'It is clear that the determination with which NGOs would be entitled to appear before the WTO raises complex questions of evaluation, fairness and equity.'

138 OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, Statement by the OECD Investment Committee*, June 2005, p. 12, para. 45.

ment the interpretation reached by the tribunal – are given a voice in the proceedings. However, this territoriality requirement does not account for *amici curiae* that may be incidentally affected even though they do not reside within the covered territories. In addition, it excludes *amici curiae* with special expertise. *Tienhaara* argues that *amici curiae* themselves need to be democratically legitimized to increase the legitimacy of international proceedings.[139] *Bluemel* argues that the accountability threshold to be fulfilled should depend on the governance function assigned to the specific *amicus curiae*. Accordingly, only when it seeks to represent a particular populace, an *amicus curiae* should be required to possess democratic accountability.[140]

It is important to keep in mind that the instrument is not exclusively used by NGOs. In many instances, especially in the ECtHR, states and intergovernmental organizations make *amicus* submissions. Intergovernmental organizations can validly claim to speak on global issues that fall within their mandate. Equally, states are undisputedly legitimized to speak on behalf of their nationals. In all other cases, the issue is more complex. NGOs are hardly able to satisfy standards of democratic representativity similar to those of states and intergovernmental organizations. Nonetheless, they should comply with some requirement of representativity or connectivity to the interest.[141] This is essential for the credibility of the submission. Representativity can be achieved by requiring prospective *amici curiae* to show that they in fact can speak for the public they claim to speak for, for instance, due to the structure of their membership or their operations in the area where affected people reside.

In some cases, this has been done successfully.[142] In *Aguas del Tunari*, one of the *amicus curiae* applicants submitted that it had conducted a consultation process through which more than 60,000 people had been able to

139 K. Tienhaara, *Third party participation in investment-environment disputes: recent developments*, 16 Review of European Commercial and Environmental Law (2007), pp. 230-242.

140 E. Bluemel, supra note 134, pp. 141-145.

141 J. Viñuales, supra note 81, p. 118.

142 See E. Triantafilou, *Is a connection to the "public interest" a meaningful prerequisite of third party participation in investment arbitration?*, 5 Berkeley Journal of International Law and Policy (2010), pp. 43-44.

comment on the water concession contract to the government.[143] In *UPS*, one of the *amici curiae* represented most of the affected Canadian postal workers in the case.[144] A convincing functional approach to representativity was advocated for by the respondent in *Bear Creek Mining v. Peru*. It argued in response to the claimant that it was irrelevant if the Ayamara communities had officially authorized the *amicus curiae* to speak on their behalf. It reasoned that it sufficed that the *amicus curiae* 'interact[ed] daily with the Aymara communities in ways that make DHUMA uniquely qualified to understand – and allow it to explain to the Tribunal – the communities' rejection of the Santa Ana project. That experience, and not some delegation of power, gives DHUMA the *bona fides* to be a voice for the Aymara communities in this proceeding.'[145] Moreover, in several IACtHR cases, the government's human rights representative appeared as *amicus curiae* to comment on national human rights cases. In some ECtHR cases concerning the rights of homosexuals, the largest European association for LBGTIQ* rights participated as *amicus curiae* and in several abortion cases, the church was permitted to convey its views through the instrument (see Annex I). Some form of self-regulated representativity can also be seen in the efforts of international NGOs to make joint submissions with NGOs from the respondent state, as in *Biwater v. Tanzania* (see Chapter 5).

The discussion on representativity and accountability should not lose sight of the fact that the judge remains the ultimate arbiter of the information presented. He determines which weight to attach to a submission. He can factor the degree to which an *amicus curiae* can claim to speak for a certain constituency into the evaluation of a submission. The judge is ultimately responsible and accountable for the decision rendered. Further-

143 *Aguas del Tunari v. Bolivia,* Petition of La Coordinadora para la Defensa del Agua y Vida et al to the arbitral tribunal, 29 August 2002, ICSID Case No. ARB/02/03, para. 5.

144 *UPS v. Canada*, Application for *amicus curiae* status by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, paras. 1-10, 12-14.

145 *Bear Creek Mining v. Peru*, Respondent's Comments to the Third Party Submission from the Asociación de Derechos Humanos y Medio Ambiente – Puno, ICSID Case No. ARB/14/21, p. 2. The tribunal did not expressly adopt the view, but it stressed that the specific experience of the *amicus curiae* on the ground sufficed to meet the admission criteria. See *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 44.

more, requirements in this respect should not be so limitative as to render it impossible for potential *amici curiae* to satisfy them.

As regards interest capture, it seems that such fears have not materialized in international dispute settlement, even though in some cases extreme pressure is exerted on judges. In the *Lautsi* case, for example, more than ten states used the *amicus curiae* procedure to protest the ECtHR's first instance judgment.[146] Still, *amicus curiae* offers the opportunity to lessen the influence of lobbying, especially by industry and business interest groups, on the disputing parties in dispute settlement proceedings.[147] *Amicus curiae* can reopen and level the playing field of different interests.

D. Increased coherence? Impact on international law

As shown in Chapter 2, *amicus curiae* has been presented as a tool to reduce the risk of a fragmentation of international law. Have the expectations been met?

A comparison of *amicus curiae* submissions and final judgments indicates that regional human rights courts have relied on the analysis of other international courts and tribunal's case law and of novel legal issues provided by *amici curiae*. In *Kurt v. Turkey*, an ECtHR case concerning forced disappearances, Amnesty International submitted a brief that explained and analyzed the IACtHR's case law on the issue, including the constitutive elements of the crime of forced disappearance and the notion that forced disappearances pertained to the right of life rather than the prohibition of torture. The ECtHR adopted several of the arguments of the brief.[148] In *Varnava and others v. Turkey*, the court accepted a written submission from the NGO Redress containing arguments on the obligation to conduct an effective investigation into a forced disappearance and on the

146 *Lautsi and others v. Italy* [GC], No. 30814/06, 18 March 2011, ECHR 2011. See also P. Ala'ï, *Judicial lobbying at the WTO – the debate over the use of amicus curiae briefs and the US experience*, 24 Fordham International Law Journal (2000), pp. 71-72; R. Kay, supra note 116, p. 1279 ('The presence of the particular litigants and their particular circumstances may distort the policy maker's perception of the relevant costs and benefits over the whole universe of affected cases.').

147 See J. Dunoff, supra note 133, p. 439.

148 *Kurt v. Turkey*, Judgment of 25 May 1998, Reports 1998-III. See also *Timurtas v. Turkey*, No. 23531/94, 13 June 2000, ECHR 2000-VI.

reparation and amount of moral damages to be paid to the victims' families under Article 41 ECHR. In its brief, Redress relied *inter alia* on international conventions and the practice of the IACtHR and the ECtHR.[149] The ECtHR has also accepted *amicus curiae* submissions pointing out inconsistencies in its case law.[150]

The IACtHR has also received submissions by non-governmental organizations on the case law of the ECtHR. This includes a brief from Interights on the legality of corporal punishment in *Caesar v. Trinidad and Tobago*. The IACtHR relied on the brief extensively in its finding that there was a norm of customary international law arising from criminal law provisions prohibiting corporal punishment.[151]

Before the WTO adjudicating bodies, investment tribunals and interstate courts, there is less evidence of such a reliance on *amicus curiae* briefs, although many of the briefs advocate specific legal interpretations (see Chapter 6).

The consideration of the practices of other courts and tribunals as such does not pose particular legal concerns. It may be achieved through ordinary treaty interpretation.[152] Article 38(1)(d) ICJ Statute considers judicial decisions as a subsidiary means for the determination of rules of law.

A final observation concerns the remarkable degree to which international courts and tribunals have borrowed from each other in considering their competence to admit unsolicited *amicus curiae* briefs. The WTO Appellate Body and investment tribunals, including tribunals operating under different investment treaties and institutional rules, have significantly drawn from each other with respect to the issue of *amicus curiae*. This is surprising in light of the conflict that surrounded the issue at the WTO, but unsurprising given the proximity of subject matters and the similar structures of panel and arbitration proceedings. Requirements for participation

149 *Varnava and others v. Turkey* [GC], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009, paras. 220-221.

150 *Sergey Zolotukhin v. Russia* [GC], No. 14939/03, 10 February 2009, ECHR 2009, p. 121.

151 *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005 (Merits, Reparations and Costs), IACtHR Series C No. 123, FN 27.

152 See C. Brown, supra note 52, pp. 41-44.

are often borrowed from national laws or other international courts and tribunals.[153]

Overall, the instrument plays a rather marginal role in the efforts to increase the coherence of international law. International courts and tribunals do not seem to need an additional mechanism. There is already quite a high degree of cross-referencing between international courts and tribunals, as well as an effort to ensure coherence within the own case law despite lack of *stare decisis*.[154] Further, coherence is achieved through publicity, debates among scholars and practitioners 'and the competitive collegiality of the global investment arbitration community with repeat players, and intensive cross-fertilization through frequent professional for-

153 For instance, the *Methanex* and *UPS* tribunals borrowed from the *EC–Asbestos* Additional Procedure, while the *Aguas* and *Biwater* tribunals drew from *Methanex*. The FTC Statement has become the general test for all investment tribunals operating under the NAFTA. See, for example, *Merrill v. Canada*, Letter to the interested petitioner, 31 July 2008 and Award, 31 March 2010, para. 22; *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005; *Apotex I v. USA*, Procedural Order No. 2, 11 October 2011, paras. 14-19; *Apotex II v. USA*, Procedural Order on the Participation of the Applicant, BNM, as a non-disputing Party, 4 March 2013, ICSID Case No. ARB(AF)/12/1, paras. 15-19. Where *amicus curiae* participation is not regulated in an investment treaty, tribunals operating under the UNCITRAL Arbitration Rules have borrowed from the standards established by the NAFTA and in ICSID-administered arbitrations. This may have been fuelled by the fact that *amicus curiae* petitions heavily relied on them. Further, the new UNCITRAL Rules on Transparency establish largely the same requirements as the existing rules. See *Chevron/Texaco v. Ecuador,* Procedural Order No. 8, 18 April 2011, and Letter to *Amici Curiae* from Permanent Court of Arbitration, 26 April 2011, PCA Case N° 2009-23.

154 S. Schill, *The multilateralization of international investment law*, Cambridge 2009; A. Reinisch, *The changing international legal framework for dealing with non-state actors*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, pp. 72-73. This is especially the case in the WTO where the Appellate Body strives to ensure systemic coherence. See R. Howse, supra note 120, pp. 51-53. Equally, investment tribunals consider previous awards as creating a legitimate expectation for the outcome. Any deviation from such case law in their view must be justified. See T. Wälde, supra note 107, p. 516 ('[S]ettled jurisprudence … defines with increasing specificity what the law is. The consequence is that settled case law informs new treaty practice and functions as authority in new cases.').

mal and informal communication.'[155] In addition, courts themselves have fostered inter-institutional dialogue and have kept each other abreast of new judgments and developments.[156]

E. *Transparency: demise of confidentiality and access to the proceedings and case documents?*

Transparency has become a key policy goal in many areas of international law. As such, it is not new to judicial proceedings. As in national courts, before most international courts and tribunals, access to the proceedings is considered an essential element of adjudicative legitimacy. It reinforces the democratic accountability of judges.[157] Privacy of hearings is an exception pursued as a principle only by investment tribunals and the WTO dispute settlement organs.[158] For *amici curiae,* the issue of transparency boils down to access to case documents (see Chapter 6).[159] Nevertheless, transparency is relevant in one further regard: Although most transparency initiatives are achieved without the participation of *amici curiae* – in particular, publication of awards and publicity of hearings – they play an important role in engaging the interest of the public in international judicial proceedings. While attendance of public proceedings has been disappointingly low, the publicity generated by *amicus curiae* participation has the potential to inform (or, it is feared, misinform) the general public of the proceedings. Has the involvement of *amici curiae* promoted transparency?

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155 T. Wälde, supra note 107, p. 523. See also F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, p. 69.

156 R. Higgins, *International courts and tribunals – the challenges ahead*, 7 The Law and Practice of International Courts and Tribunals (2008), p. 262.

157 R. Reusch, supra note 80, p. 213.

158 Critical of change, T. Wälde, supra note 107, p. 553 ('[T]ransparency encourages public posturing, which inevitably leads to a freezing of positions; that makes settlement, before, during and after litigation so much more difficult.').

159 This section does not consider post-award transparency given it is only incidentally relevant to *amici curiae* seeking to participate in ongoing proceedings. See N. Rubins, *Opening the investment arbitration process: at what cost, for what benefit, taking stock*, in: R. Hofmann/C. Tams (Eds.), *The International Convention on the Settlement of International Disputes (ICSID): taking stock after 40 years*, Baden-Baden 2007, p. 221.

The issue has been controversial only in WTO dispute settlement and in investment arbitration. Arbitral tribunals, WTO panels and the Appellate Body have referred to transparency as a justification for the admission of *amici curiae* in efforts to respond to public demands for increased procedural transparency. The first tribunals deciding the issue were NAFTA tribunals. Intriguingly, the *Methanex v. USA* tribunal based the admission of *amicus curiae* briefs also on transparency considerations:

> [T]he … 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.[160]

Indeed, the efforts seem to have been largely fuelled by an interest to increase the perceived transparency of proceedings, as the tribunal found subsequently that in terms of access to documents *amici curiae* were to be treated like any other member of the public.

While transparency efforts in investment arbitration proceedings have significantly increased over the last ten years,[161] the direct contributions of *amici curiae* to transparency are limited. As shown, in a few cases, *amici curiae* have been granted increased access to documents. However, decisions rejecting a general duty of confidentiality of arbitration proceedings

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

161 For an overview of the development of transparency in international economic law, see C. Zoellner, *Third-party participation (NGO's and private persons) and transparency in ICSID proceedings*, in: R. Hoffmann/C. Tams (Eds.), *The ICSID – taking stock after 40 years*, Baden-Baden 2007, pp. 183-186, 195; N. Bergman, *Transparency of the proceedings and third party participation*, in C. Giorgetti (Ed.), *Litigating international investment disputes: a practitioner's guide*, Leiden 2014, pp. 379-384. See also the EU Commission's paper on increasing transparency in investor-State arbitration, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, COM(2010) 343, 10. This policy paper is difficult to reconcile with the secrecy surrounding the EC's recent participation as *amicus curiae* in a number of investment arbitrations under the Energy Charter Treaty. For a critical assessment of the expected impact on transparency of the UNCITRAL Transparency Rules and the Mauritius Convention, see J. Fry/O. Repousis, *Towards a new world for investor-state arbitration through transparency*, 48 NYU Journal of Intl. Law and Politics (2016), p. 799.

have been rendered irrespective of *amicus curiae* participation. There is no direct correlation between the instrument and the increasing number of public hearings.[162] Rather, transparency and *amicus curiae* seem to develop in parallel, as the regulatory efforts in this area, notably the UNCITRAL Transparency Rules and the Mauritius Convention suggest.[163] Their expansion seems to be largely the consequence of some countries' efforts, especially the USA and Canada, and a greater willingness by some arbitrators and counsel to open the proceedings to the public.[164] In this regard, *amici curiae* have contributed to transparency efforts indirectly by forcing parties, arbitrators and states to address the issue.

It is unhelpful that the issue of *amicus curiae* is conflated with that of transparency. Tribunals seem to find that the admission of *amici curiae* satisfies demands for increased transparency. This approach is dangerous. It risks undermining the quality of *amicus curiae* submissions and might indicate an expectation by the tribunal that the main benefit in a submission lies in the signal its admission sends to the general public and non-participating stakeholders.[165] However, as seen, mere admission to the proceedings is not sufficient for most *amici curiae*. They seek to influence the outcome of the proceedings, and not only to educate the public about the proceedings, which can be achieved more directly by publication of documents or through public hearings. Mere admission without visible

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162 See Chapter 6. Whether one can already speak of a general acceptance of publicity or semi-publicity in investment arbitration is doubtful, as most arbitrations remain inaccessible to the public. In favour, L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 179.

163 See *Methanex v. USA,* Submission by Respondent USA and Decision of the tribunal on petitions from third persons to intervene as "*amici curiae*", 15 January 2001, p. 9, para. 17. See also G. Van Harten/M. Loughlin, supra note 95, p. 121.

164 With respect to the leading – and often solitary role – of North American states in pushing for greater transparency in investment arbitration, see J. Fry/O. Repousis, *Towards a new world for investor-state arbitration through transparency*, 48 NYU Journal of Intl. Law and Politics (2016), p. 798.

165 *McRae* argues that the issue of *amicus curiae* has hindered transparency efforts. D. McRae, supra note 22, pp. 12, 17 (*Amicus* briefs 'have made discussion of transparency within the WTO more difficult… [G]iven the fact that *amicus* briefs appear to have had no impact on the decisions of panels or the Appellate Body, there seems justification for suspending the *amicus* briefs process in order that more complete transparency can be worked out.' [Emphasis added]).

consideration of submissions does little to improve general transparency.[166]

Concerns over the negative effects of increased pre-award publicity are difficult to measure. The feared negative side effects include compromise of business secrets and re-politicization of disputes as arbitration proceedings become a 'court of public opinion' where the parties make exaggerated claims to obtain 'nuisance value' compensation and refuse amicable settlement due to public pressure.[167] It is undeniable that many of the cases that have attracted *amici curiae* are politically extremely sensitive. But excluding information on these disputes does not seem to be the appropriate way forward, especially as these risks can at least partly be managed through the redaction of submissions.

The relationship between *amicus curiae* and transparency is not as straightforward as it may seem.[168] Transparency plays a vital role for *amici curiae* at different procedural stages, but *amici curiae* as such are not an instrument of transparency. First, they depend on some transparency to obtain knowledge of the existence of a dispute and its basic facts. Second, for *amicus curiae* participation to be useful and to satisfy request for leave procedures, *amici curiae* depend on access to relevant case documentation.[169] In arbitration and WTO proceedings, these are often difficult to obtain without transparency measures. In so far, transparency is a prereq-

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166 See on this issue in the WTO, D. McRae, supra note 22, p. 17.

167 C. Tams/C. Zoellner, supra note 51, p. 221; N. Rubins, supra note 159, p. 221 (According to *Rubins*, '[t]he increased risk of procedural abuse through the imposition and publicity of frivolous or exaggerated claims is an important cost. The respondent stands to benefit from the intervention of non-party actors, who tend to support the host-State position in their *amicus* submissions, but it is not always clear that such filings are wholly welcome, as they may be seen to distract from the more central aspects of the respondent government's defense.').

168 A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii. He refers to WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statements by Canada, Turkey and Argentina, paras. 71-72, 80 and 93, respectively. Arguing that transparency also includes participation in adjudicative processes, M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 World Trade Review (2006), p. 433; P. Clark/P. Morrison, *Key procedural issues: transparency*, 32 International Lawyer (1998), p. 857.

169 S. Jagusch/J. Sullivan, *A comparison of ICSID and UNCITRAL arbitration: areas of divergence and concern*, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 97; T. Ishikawa, supra note 5, p. 401; N. Blackaby/C. Richard*, Amicus curiae: a*

uisite for the effective use of the instrument. These considerations have led some investment tribunals to grant *amici curiae* privileged access to case-related confidential submissions. In so far, *amicus curiae* has contributed to increased transparency.

F. *Impact on* locus standi*:* amicus curiae *as a precursor to international legal standing?*

The growth in importance of non-governmental actors in all aspects of international law and policy cannot be denied or minimized.[170] It has been accompanied by calls for a more formalized position in international affairs, including in international dispute settlement. The lack of standing before the ICJ especially has been a matter of constant criticism.[171]

Amicus curiae is sometimes viewed as the best alternative to *locus standi* for entities that do not have standing before the international court or tribunal to which the request is addressed. CIEL, a frequent *amicus curiae* participant before the WTO, investment tribunals, the IACtHR and the ECtHR argues:

> [A] public interest group aiming to influence the outcome of a lawsuit often only limits its role to that of *amicus curiae* out of necessity, e.g., when

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panacea for legitimacy in investment arbitration?, in: M. Waibel et al. (Eds.), *The backlash against investment arbitration: perceptions and reality*, Alphen aan den Rijn 2010, p. 267.

170 See R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), pp. 78-95; P. Alston, *The 'not-a-cat' syndrome: can the international human rights regime accommodate non-state actors?*, in: P. Alston (Ed.), *Non-state actors and human rights*, Oxford 2005, pp. 3-36; C. Cutler, *Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, pp. 19-36.

171 The issue was already disputed during the negotiation of the PCIJ Statute. See J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, pp. 57-60; I. Brownlie, *The individual before tribunals exercising international justice*, 11 International and Comparative Law Quarterly (1962), p. 718. In favour of standing by private parties before the WTO dispute settlement organs, G. Schleyer, *Power to the people: allowing private parties to raise claims before the WTO dispute resolution system*, 65 Fordham Law Review (1997), pp. 2275-2312; B. Jillmann, *The access of individuals to international trade dispute settlement*, 13 Journal of International Arbitration (1996), pp. 143-169.

concepts such as standing prevent them from playing a more active role in the case as a party.[172]

Acceptance of and increase in *amicus curiae* submissions have been interpreted as a sign of a growing relevance of non-state actors, as a step towards legal personality or even subjectivity. This has raised the symbolic burden on the concept and clouded both its potential and its limits. This section will not engage in the general debate on legal personality of non-state actors.[173] Instead, it will examine if the instrument of *amicus curiae*, in any way, has formalized participation by non-state actors before international courts and tribunals.

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172 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 5. See *Stephen Porter's* (CIEL) comment during the *Debate on transparency, amicus curiae briefs and third party participation*, reprinted in 5 Journal of World Investment and Trade (2004), pp. 344-345 (*Amicus curiae* participation as a step towards achieving full *locus standi* and intervention rights.); L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 Journal of World Investment and Trade (2004), pp. 341-342 ('[I]f we were to give them a better a role in dispute settlement proceedings we would have fewer *amicus curiae* submissions made by non-governmental organizations and other non-State actors.'). See also the characterization of NGOs by G. Breton-Le Goff*, NGOs' perspectives on non-state actors*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, p. 249 ('Law, for NGOs, is not only an instrument to coerce the action of states; it is also a tool to change the future of our international society to become a society of individuals rather than a society of states.'); F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa,* 58 Journal of African Law (2014), p. 37 ('*Amicus curiae* procedures can be used to circumvent the problem in relation to access to the [ACtHPR], particularly in relation to cases that are referred to the court by the African Commission.').

173 This section is limited to a consideration of the issue of standing. It does not address the issue of legal personality of non-state actors and the surrounding debates. For an overview, see A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009. For a consideration of the legal status of individuals in international law, see A. Orakhelashvili, *The position of the individual in international law*, 31 California Western International Law Journal (2001), pp. 241-276. For a general considerations of the terminology and status of non-state actors in international law law, see P. Alston, supra note 170, pp. 3-36; A. Reinisch, supra note 1544; A. Cançado Trindade, *The emancipation of the individual from his own state: the historical recovery of the human person as subject of the law of nations*, in: S. Breitenmoser et al. (Eds.), *Human rights, democracy and the rule of law – liber amicorum Luzius Wildhaber*, Zürich et al. 2007, p. 164.

To consider whether *amicus curiae* has moved individuals and other non-state actors closer to obtaining party status, it is worthwhile to briefly consider what defines party status to see if *amici curiae* have possibly received a *de facto* party treatment by international courts and tribunals. *Locus standi* describes the right to bring a case before an international court or tribunal. It is essentially synonymous with being a party to a proceeding.[174] Attached to *locus standi* is the right of a party to present its case fully to the adjudicating body through the presentation of arguments and evidence and to receive a reasoned decision on the dispute.

International courts and tribunals have granted *amici curiae* neither typical party rights nor standing. Most international courts and tribunals have conceptualized *amicus curiae* as a procedural concept *sui generis*, located somewhere between an intervener and an expert-witness. In *US–Shrimp*, for example, the Appellate Body drew a clear distinction between party status and *amicus curiae*.[175] Equally, in *UPS v. Canada*, where the petitioners had sought access primarily as parties and only secondary as *amicus curiae*, the tribunal found that none of the international law provisions referred to by the petitioners was applicable and that the petitioners could not enjoy party standing before it in the absence of a party agreement to this effect.[176] The IACtHR has also stated it does not consider *amici curiae* possessing any legal rights or status reserved for the parties. In a case where an individual was directly affected by the court's judgment, the court decided to hear it out of considerations of due process, but strictly separated this exceptional measure from *amicus curiae* participation (see Chapter 6). While non-state actors may submit cases to the IAComHR, Article 61 ACHR clarifies that '[o]nly states parties and the Commission shall have the right to submit a case to the Court.' Article 34(2) ICJ Statute was created by the drafters of the ICJ Statute to remedy the lack of standing of intergovernmental organizations before the Court (see Chapter 3).

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174 A. del Vecchio, *International courts and tribunals, standing*, in: R. Wolfrum et al. (Eds.), *Max Planck Encyclopedia of Public International Law online,* Oxford, para. 1.

175 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 101.

176 *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001, para. 40 and Petition to the arbitral tribunal of the Canadian Union of Postal Workers and the Council of Canadians, 10 May 2001, p. 1, para. 1.

The reality is that access as parties (or interveners) by individuals to an international court or tribunal remains a strictly regulated exception. While *amicus curiae* participation is evidence of a tentative opening and pluralization of international dispute settlement, it cannot be seen as a motor towards a more powerful legal position of non-state actors. The instrument remains very much a matter of tribunals' discretion. Where *amici curiae* have been accepted and considered – in regional human rights courts and in investment arbitration – individuals can already appear as a party (ECtHR, investment arbitration) or as a representative in their own right (IACtHR). Notably, the creation of victims' rights of participation before the IACtHR, including limited standing in contentious cases, developed separately from *amicus curiae* participation.[177]

That the effort to obtain party status through *amicus curiae* participation actually may be harmful to a request for participation as *amicus curiae* is reflected in a note on how to prepare *amicus curiae* requests and submissions to investment tribunals by Advocates for International Development, a NGO focused on providing legal and other support to human rights organizations. The note discourages NGOs from seeking party status to avoid rejection of their *amicus curiae* application.[178]

Overall, the instrument consolidates the limited status held by non-state actors in certain institutions. As *De Brabandere* notes, '[t]he involvement of non-state actors in international dispute resolution seems to be provoked more by a sense of pragmatism than by an ambition to formally bestow upon these actors a certain legal status.'[179]

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177 A. Cançado Trindade, *The right of access to justice in the inter-American system of human rights protection*, 17 Italian Yearbook of International Law (2007), pp. 7-24. On the lack of standing of victims before the IACtHR, see D. Padilla, *The Inter-American Commission on Humans Rights of the Organization of American States: a case study*, 9 American University Journal of International Law & Policy (1993), pp. 108-109.

178 Advocates for International Development, *A "how to" guide to amicus curiae & international investment arbitrations*, 2012, p. 11 (on file with the author).

179 E. De Brabandere, *Non-state actors in international dispute settlement: pragmatism in international law*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, p. 354. See also A. Mantakou, *General principles of law and international arbitration*, 58 Revue Hellenique de Droit International (2005), p. 426; P. Palchetti, *Opening the International Court of Justice to third states: intervention and beyond*, 6 Max Planck Yearbook of United Nations Law (2002), p. 167.

In inter-state courts and tribunals, non-state actors continue to exert their greatest influence through lobbying of the parties. It is well known that in *Japan–Film* both Kodak and Fuji masterminded the proceedings and the governments largely represented the wishes of the two companies.[180] In the IACtHR system, non-state actors already play a strong role. They may file petitions with the IAComHR or act as representative of victims, regardless of whether they themselves have been victim to the alleged act. The IAComHR may appoint non-state actors as part of its team of counsel in the proceedings before the IACtHR. Thus, there seems to be no pressing need to grant non-state actors standing before the court.[181] This form of lobbyism has its setbacks, in particular in its selectiveness and lack of transparency.

There is a key advantage to the limited participation as *amicus curiae*. *Amici curiae* are not bound by the outcome of the dispute through *res judicata*. As a result, they may lobby for an application of the same theory or interpretation of law before the same court over and over again.[182]

G. And the drawbacks?

Some of the assumed drawbacks of *amicus curiae* participation have already been addressed. *Amici curiae* have caused neither a denaturing of the judicial function nor have they notably politicized disputes (see Sections A and B). Further, most international courts and tribunals have not received unmanageable quantities of submissions (see Chapter 3 and Annex I), and there are effective request for leave procedures in place in most international courts and tribunals to filter submissions (see Chapter 5). There is no evidence of an overwhelming of developing countries by *amicus curiae* submissions in proceedings before the WTO adjudicative bod-

180 P. van den Bossche/W. Zdouc*, The law and policy of the World Trade Organization: text, cases and materials*, Cambridge 2013, p. 202.

181 Any person or group of persons or any non-governmental entity legally recognized in a member state may lodge a petition, regardless of whether or not the petitioner is the victim, see D. Shelton, supra note 77, p. 342.

182 CIEL, supra note 172, p. 6. The European Roma Rights Centre has in many cases before the ECtHR submitted the same brief calling for an interpretation of the ECHR in light of the plight of the Roma, see A. Dolidze, *Making international property law: the role of amici curiae in international judicial decision-making*, 40 Syracuse Journal of International and Comparative Law (2012), p. 141.

ies, as a study by *Brühwiler* shows.[183] Her considerations are transferable to investment arbitration where submissions also have most often been made in cases involving developed countries or in defence of the respondent state (see Annex I).

This leaves for consideration if the instrument has compromised the parties' rights (I.), and if it has led to the feared practical burdens (II.).

I. Parties' rights

International courts and tribunals, as well as member states through statutes and rules have sought to regulate *amicus curiae* participation in an effort to protect the parties' rights while maximizing its potential benefits.[184] This was noted by the *UPS* tribunal:

> The requirement of equality and the parties' right to present their cases do limit the power of the Tribunal to conduct the arbitration in such manner as it considers appropriate. That power is to be used not only to protect those rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner. The power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process.[185]

The tribunal in *Philip Morris v. Uruguay* decided in this respect that, '[t]he need to safeguard the integrity of the arbitral process requires in fact that no procedural rights or privileges of any kind be granted to the non-disputing parties.'[186] As noted, the blank denial of access to case related

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183 C. Brühwiler, supra note 125.

184 *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. 28 ('If the Tribunal decides to grant leave to a particular non-disputing party to submit an *amicus curiae* brief, the Tribunal at that time will determine the appropriate procedure governing the brief's submission. The goal of such procedure will be to enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties. In this latter context, the Tribunal will endeavour to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings.').

185 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69.

186 *Philip Morris v. Uruguay,* Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 22.

documents has repercussions for the usefulness and quality of *amicus curiae* submissions.

In the following, focus is held on the parties' procedural rights, specifically due process, procedural fairness and equality of arms.

1. Due process

Procedural fairness and due process apply in international proceedings as a general principle of law (see Article 38(1)(c) ICJ Statute).[187] Although the concept escapes precise definition, the main elements of due process were described as follows by the Appellate Body in *Thailand–Cigarettes (Philippines)*:

> Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defenses, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules.[188]

Due process entails that each party may present its case fully.[189] This presupposes awareness of the issues considered determinative by the interna-

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187 M. Benzing, supra note 54, p. 117 (Due process is a 'necessary component of any legal system seeking legitimacy and effectiveness.'). For an overview of the domestic law origins and development of due process, see A. Mitchell, *Due process in WTO disputes*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement: the first ten years*, Cambridge 2005, pp. 144-148. Several human rights treaties establish due process protections, which may be applied by other courts as far as they consider other rules of international law in their decision-making. These include the ICCPR, the ECHR and the ACHR. See R. Schorm-Bernschütz, supra note 71, p. 52.

188 *Thailand – Customs and fiscal measures on cigarettes from the Philippines* (hereinafter: *Thailand–Cigarettes (Philippines)*), Report of the Appellate Body, adopted on 15 July 2011, WT/DS371/AB/R, para. 147. See also *Claim of the Salvador Commercial Company ("El Triunfo Company")*, Award, 8 May 1902, reprinted in XV UNRIAA, pp. 467-479 (The tribunal decided that the 'due process of judicial proceedings' involves 'notice, full opportunity to be heard, consideration and solemn judgment.'); B. Cheng, *General principles of law as applied by international courts and tribunals*, Cambridge 1953, pp. 291, 293.

189 This procedure accords with due process requirements established by the New York Convention on recognition and enforcement of arbitral awards. The Convention foresees refusal of enforcement in the case of objective inability of a party to present its case (Article V(1)(b) New York Convention). Both parties must

tional court or tribunal. The principle of *audi alteram partem* demands that whenever a tribunal receives new evidence, changes the legal basis of a claim or receives an amendment of the original submission, the parties must have an opportunity to comment thereon.[190] The right to comment must be balanced with the competing interest in an effective and prompt settlement of the dispute. Insufficient opportunity to comment on determinative rules and interpretations may risk the validity of an award or judgment.[191] To diffuse such concerns, *Lew* advocates that the tribunal should 'provide the parties with the opportunity to comment on any matter that may materially affect the tribunal's decision.'[192] In particular, investment arbitration tribunals and the WTO Appellate Body have been very conscious of their due process obligations. The Appellate Body has determined that the exercise of discretion by panels to address procedural issues not explicitly regulated must be in accordance with due process, thereby subjecting *amicus curiae* participation to a full due process re-

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be given the opportunity to present their cases from their respective viewpoints, submit all evidence relevant in their view to an impartial tribunal and receive a just decision. This presupposes, among other, proper notice of the initiation of proceedings, full access to all communications and written submissions without undue delay and a right to comment within reasonable time. The New York Convention is a guiding point for all non-ICSID awards. Ratified by 157 states as of 19 July 2017, it reflects the generally acknowledged fundamental rights of the parties. See also M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2nd Ed., Oxford 2010, pp. 15-17, 40, 187-188.

190 B. Cheng, supra note 188, p. 293.

191 T. Giovannini, *International arbitration and iura novit curia*, in: B. Cremades/M. Fernández-Ballesteros (Eds.), *Liber amicorum Bernardo Cremades*, Madrid 2010, pp. 506-507 (In 2003, the Swiss Supreme Court annulled an international arbitral award, because the tribunal had applied a contractual provision that neither of the parties had found determinative and that had not been discussed by them. Accordingly, they could not have anticipated its application.).

192 J. Lew, *Iura novit curia and due process*, in: L. Lévy/S. Lazareff (Eds.), *Liber amicorum en l'honneur de Serge Lazareff*, Paris 2011, pp. 413-414, 416; *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports (1994), p. 95, para. 91; *Iurii Bogdanove, Agurdino-Invest Ltd. and Agurdino-Chima JSC v. Republic of Moldova*, SCC, Arbitral Award, 22 September 2005, para. 2.2.1, FN 63. See also E. Lauterpacht, supra note 6, pp. 521-522. In *Australia–Salmon*, the Appellate Body admonished panels that despite efforts to increase flexibility, proceedings had to conform to the requirements of due process, in particular adequate opportunity to comment on the evidence by the parties. See *Australia–Salmon*, Recourse to Article 21(5), Report of the Panel, adopted on 18 February 2000, WT/DS18/RW.

view.[193] And Rule 37(2) ICSID Arbitration Rules, No. 7 FTC Statement and Article 4 UNCITRAL Rules on Transparency instruct tribunals to 'ensure at all times during the proceedings that *amicus curiae* submissions will not disrupt the proceedings or *unduly* burden or prejudice either party.'[194] This clarifies that in case of doubt party rights trump *amicus curiae* participation. How have these requirements been interpreted in practice? How have other courts and tribunals balanced due process and *amicus curiae*?

International courts and tribunals rely largely on four measures to ensure due process in relation to *amicus curiae* participation: notification; opportunity to comment; timing; and exclusion of submissions and applications.

International courts and tribunals notify the parties, third parties and other participants such as victim representatives (IACtHR) of requests for leave to submit a brief as *amicus curiae*. Most international courts and tribunals also transmit the *amicus curiae* submissions to the parties.[195] The ECtHR Rules, the IACtHR Rules, the ACtHPR, the ICJ Statute with respect to advisory proceedings and the FTC Statement mention the require-

193 The Appellate Body has anchored a general due process obligation for panels in Article 11 DSU. See *Canada/US–Continued Suspension*, Report of the Appellate Body, adopted on 14 November 2008, WT/DS320/AB/R, WT/DS321/AB/R, para. 433; *Thailand–H-Beams*, Report of the Appellate Body, adopted on 5 April 2001, WT/DS122/AB/R, para. 88; *EC–Hormones,* Report of the Appellate Body, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, FN 138; *EC–Tariff Preferences*, Report of the Appellate Body, adopted on 20 April 2004, WT/DS246/AB/R, para. 7.8. Critical, A. Mitchell, supra note 187, p. 160 ('The concept is necessarily broad but unnecessarily vague in current WTO jurisprudence.'). The panel in *EC–Sugar* was adamant that 'it does not consider that *amicus curiae* briefs can be taken into account in a manner that would circumvent the parties' rights and obligations under the DSU, the Agreement on Agriculture and the WTO Agreement generally.' See *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.80.

194 [Emphasis added.]. See also *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69 ('The power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process.').

195 E.g. *EC–Bed Linen*, Report of the Panel, adopted on 12 March 2001, WT/DS141/R, p. 6, FN 10; *US–Shrimp*, Recourse to Article 21(5), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 3.7. See also G. Marceau/M. Stilwell, supra note 135, p. 161.

ment in their procedural rules, but it has also been acknowledged by the other international courts and tribunals reviewed in practice.[196] The notification and transmission of requests and submissions is necessary to enable the parties to react to the participation on a fully informed basis.

Most international courts and tribunals accord the parties a right to comment on *amicus curiae* submissions. The ICJ and the ITLOS Rules establish a limited opportunity to comment on *amicus curiae* submissions. Where intergovernmental organizations submit information on their own initiative, Articles 69(2) ICJ Rules and Article 84(2) ITLOS Rules foresee that the Court and the tribunal *may* authorize the parties to comment. Rule 44(6) ECtHR Rules grants parties the right 'subject to any conditions, including time-limits set by the President of the Chamber' to make written or, if necessary, oral observations in reply.[197] ECtHR judgments rarely summarize or mention party comments.[198] This makes it difficult to determine if the right is used often. A right to comment on unsolicited *amicus*

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196 Rule 44(6) ECtHR Rules; Article 44(3) IACtHR Rules; Section 46 ACtHPR Practice Directions (The *amicus curiae* brief and its annexes submitted to the Court on a matter shall be immediately transmitted to all the parties, for their information.); Section B, para. 4 FTC Statement. The ITLOS and ICJ Rules only foresee transmission of submissions in advisory proceedings explicitly, see Article 133 ITLOS Rules, Article 105 ICJ Rules, but transmission of submissions made pursuant to Article 34(2) ICJ Statute and Article 84 ITLOS Rules is encompassed where the courts use their discretion to authorize party comments on these submissions. The IACtHR transmits submissions also to other *amici curiae* and other participants, such as victim representatives. See *The girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 130, p. 12, para. 54. Under Article 13(2) DSU, panels are obliged to inform a member state's authorities when seeking information from an individual or body within its jurisdiction.

197 Rule 61(3) of the 1998 ECtHR Rules foresaw only written observations in response to a submission.

198 Summaries are made usually only of substantive comments. For many, see *Blecic v. Croatia*, No. 59532/00, 29 July 2004; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, ECHR 2005-V (The court took note of the government's repudiation of the third parties' comments.); *Perínçek v. Switzerland* [GC], No. 27510/08, 15 October 2015; *Sabure Malik v. the United Kingdom*, No. 32968/11, 30 June 2016 (striking out). The first case seems to have been *Brannigan and McBride v. the United Kingdom*, Judgment of 25 May 1993, Series A No. 258-B, where the United Kingdom was granted permission to file comments on certain aspects of the *amici's* observations. See also *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103 (The court admitted an *amicus curiae* brief even though the parties had

curiae briefs has been granted in all cases by WTO panels and the Appellate Body.[199] The requirement accords with the DSU's broad rules on par-

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forgone filings and therefore had no opportunity to comment on the submission). Cases mentioning party comments: *Saunders v. the United Kingdom*, Judgment of 17 December 1996, Reports 1996-VI; *Nikula v. Finland*, No. 31611/96, 21 March 2002, ECHR 2002-II; *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, ECHR 2004-VI; *Akdivar and others v. Turkey*, Judgment of 16 September 1996, Reports 1996-VI; *Pini and others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V; *Brumârescu v. Romania (Article 41)* (just satisfaction) [GC], No. 28342/95, 23 January 2001, ECHR 2001-I (applicant submitted three replies); *Adali v. Turkey*, No. 38187/97, 31 March 2005; *Association SOS Attentats and De Boëry v. France* [GC], No. 76642/01, 4 October 2006, ECHR 2006-XIV; *McCann and others v. the United Kingdom*, Judgment of 27 September 1995, Series A No. 324. In some cases, the parties have commented on the permissible scope of a submission or objected to the participation of certain *amici*. An exception is *Lobo Machado v. Portugal*, Judgment of 20 February 1996, Reports 1996-I, where counsel for the applicant commented on the scope of Belgium's *amicus curiae* submission after permission had been given to Belgium to make submissions. In *Mikheyev v. Russia*, No. 77617/01, 26 January 2006, the Russian Government objected to the participation of the Russian applicant NGOs and requested that the Court reject the NGO's conclusions. See also *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A No. 44; *Armani Da Silva v. the United Kingdom* [GC], No. 5878/08, Judgment of 30 March 2016.

199 E.g. *EC–Asbestos*, Report of the Panel, adopted on 18 September 2000, WT/DS135/R, paras. 6.2-6.3; *US–Lead and Bismuth II*, Report of the Appellate Body, adopted on 7 June 2000, WT/DS138/AB/R, para. 37; *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, paras. 7.77, 7.80; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 19; *China–Auto Parts*, Report of the Appellate Body, adopted on 12 January 2009, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, para. 11; *US–Softwood Lumber III*, Report of the Panel, adopted on 1 November 2002, WT/DS236/R, para. 7.2; *US–Shrimp*, Recourse to Article 21(5) (Malaysia), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 3.7; *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R; Section 9 *EC–Asbestos* Additional Procedure. In earlier cases, in response to joint appellees' argument that '[d]ue process requires that a party know what submissions a panel intends to consider and that all parties be given an opportunity to respond to all submissions,' the Appellate Body reasoned that 'the exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute.' *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, paras. 33, 107. See also *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, para. 7.77, FN. 418; *EC–Seal Products*, Report of the Appellate Body, adopted on 18

ties' rights to comment.[200] In *US–Lead and Bismuth II*, the panel held that the inability of the parties to comment on a brief received after the deadline for the parties' rebuttal submissions raised 'serious due process concerns as to the extent to which the Panel could consider the brief.'[201] Further, although Article 13 DSU does not establish a consultation requirement prior to seeking expert advice[202] and consultation in procedural matters is mandatory pursuant to Article 12 DSU only where a panel wishes to deviate from the Panel Working Procedures or to establish the procedural timetable, panels and the Appellate Body commonly seek the parties' views on how to approach a request for participation as *amicus curiae* (see Chapter 5). Investment tribunals have since the first *amicus curiae* petitions acknowledged a right of the parties to comment on submissions.[203] Rule 37(2) ICSID Arbitration Rules, Section B, paras. 5 and 8 FTC Statement and Article 4 UNCITRAL Rules on Transparency oblige tribunals to consult the parties on the admission *and* submissions of *amici curiae*.[204] In *Methanex v. USA*, the tribunal clarified that the right to comment was not

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June 2014, WT/DS400/AB/R, WT/DS401/AB/R, para. 1.15 (Parties must be given an adequate opportunity fully to consider any written submission filed with the Appellate Body.).

200 With respect to the second ruling procedure under Article 15 DSU specifically, see G. Marceau/M. Stilwell, supra note 135, p. 184.

201 *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/AB/R, para. 6.3.

202 Where panels request information pursuant to Article 13(2) DSU, the parties are invited only to comment on the reply received and not on the panel's decision on whether to request information. See *China–Auto Parts*, Report of the Panel, adopted on 12 January 2009, WT/DS339/R, WT/DS340/R, WT/DS342/R, paras. 2.5-2.6; *US–Section 110(5) Copyright Act*, Report of the Panel, adopted on 27 July 2000, WT/DS160/R; *EC–Trademarks and Geographical Indications*, Report of the Panel, adopted on 15 March 2005, WT/DS174/R, para. 2.16; *Dominican Republic–Import and Sale of Cigarettes*, Report of the Panel, adopted on 19 May 2005, WT/DS302/R, p.1, para. 1.8.

203 *UPS v. Canada*, Decision of the tribunal on petitions for intervention and participation as *amici curiae*, 17 October 2001, para. 69 ('The Parties would also *be entitled* to have the opportunity to respond to any such submissions.' [Emphasis added]).

204 The condition is also enshrined in the general procedural clauses, see Article 17(1) of the 2010 UNCITRAL Rules. See also *UPS v. Canada*, Direction of the Tribunal on the Participation of *amici curiae*, 1 August 2003, paras. 6-7, 9; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 15.

tantamount to a right to cross-examine an *amicus curiae*, because it was not a witness.[205] In *Philip Morris v. Uruguay*, the tribunal barred the parties from submitting documents or other evidence together with their comments on the *amicus* briefs.[206] The limitation seems useful to ensure that parties do not use their right to comment to circumvent the procedures agreed for party submissions. The parties (and participating NAFTA states) use their right to comment in almost every case.

The IACtHR is the only court not to mention a right to comment. Moreover, Article 44(3) IACtHR Rules determines that *amicus curiae* briefs in contentious proceedings 'shall be immediately transmitted to the parties, for their information.' This wording signals agreement with the court practice, albeit several judgments mention that the parties were given an opportunity to comment and used it.[207] Because *amicus* submissions may be submitted even after closure of the proceedings, there is a risk that the parties will not have an opportunity to respond properly to the *amici's* arguments.

Must international courts and tribunals seek the parties' comments on *all amicus curiae* submissions? This may entail significant delays in the proceedings, especially if tribunals receive dozens of (lengthy) submissions. Moreover, the requirement is futile if a court or tribunal does not intend to consider a submission. In *US–Tuna II (Mexico)*, the panel specified that due process required it to seek the parties' views on the *amicus curiae* brief from Humane Society International and American University's Washington College of Law only to the extent it considered the information in the brief and the evidence attached to it relevant for its final assessment of the case.[208] This is in accordance with its general views on its due

205 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001, para. 14.

206 *Philip Morris v. Uruguay,* Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 30.

207 *Kimel v. Argentina*, Judgment of 2 May 2008 (Merits, Reparations and Costs), IACtHR Series C No. 177; *Fernández Ortega et al. v. Mexico*, Judgment of 30 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 215; *Rosendo-Cantú and other v. Mexico*, Judgment of 31 August 2010 (Preliminary Objections, Merits, Reparations and Costs), IACtHR Series C No. 216.

208 *US–Tuna II (Mexico)*, Report of the Appellate Body, adopted on 13 June 2012, WT/DS381/AB/R, para. 7.9, FN 559 ('[I]nsofar as the Panel deemed this infor-

process duties under Article 11 DSU.[209] Due process includes that each party understands what are the claims being made and that they are furnished with sufficient time and possibilities to react and respond to relevant submissions and evidence.[210] In *Thailand–Cigarettes (Philippines)*, the Appellate Body specified the scope of the right to respond in panel proceedings. Noting competing interests, such as the prompt settlement of disputes enshrined in Articles 3(3) and 12(2) DSU, it found that

> due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties.[211]

These considerations are relevant for all international courts and tribunals that must balance the same competing interests. ICISD tribunals and the Annulment Committee have held that the parties should not have to bear surprising decisions if a tribunal relies on a legal reasoning that they could not have expected and on which they therefore did not comment.[212]

International courts and tribunals do not seem to limit the scope of permissible party comments. Comments have addressed a court's general or specific authority to accept *amicus curiae* submissions, the relevancy of a

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mation to be relevant for the purposes of its assessment, it invited Mexico to comment on it in order to take full account of Mexico's right of response and defense in respect of due process considerations.').

209 G. Marceau/M. Stilwell, supra note 135, p. 184.

210 In *Australia–Salmon*, the Appellate Body instructed panels that while Article 12(2) DSU provided that '"[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process," a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted.' It found that the opportunity to respond also included claims made against a party and decided that the requirement was satisfied by granting a party the requested additional time to respond. See *Australia–Salmon (Art. 21.5)*, Report of the Panel, adopted on 18 February 2000, WT/DS18/RW, paras. 272, 278.

211 *Thailand–Cigarettes (Philippines)*, Report of the Appellate Body, adopted on 15 July 2011, WT/DS371/AB/R, para. 155.

212 See J. Lew, supra note 192, p. 410; C. Alberti, *Iura novit curia in international commercial arbitration*, in: S. Kröll/L. Mistelis/P. Perales Viscasillas/V. Rogers (Eds.), *International arbitration and international commercial law: liber amicorum Eric Bergsten*, Alphen aan den Rijn 2011, p. 24.

brief or of specific substantive arguments and procedural aspects of *amicus* participation.[213]

The right to comment is only valuable to the extent to which courts and tribunals take note of it. Especially investment tribunals, WTO panels and the Appellate Body summarize the parties' comments and note the parties' positions.[214] In the WTO, the right to comment on submissions that have been adopted by a party has caused concern. Parties have pointed out that due to the simultaneous submission of the parties' second written submissions the permission to append an *amicus curiae* brief to the second submission deprives the other party of its right to comment.[215] However, this can be remedied by allowing parties to comment on the submission during the second hearing.

One issue that has not been addressed sufficiently by international courts and tribunals was raised by the joint appellees in *US–Shrimp*, namely, that the parties may 'feel obliged to respond to all unsolicited submissions – just in case one of the unsolicited submissions catches the at-

213 E.g. *Brazil–Retreaded Tyres*, Report of the Panel, adopted on 17 December 2007, WT/DS332/R, p. 5; *US–Shrimp*, Recourse to Article 21(5) (Malaysia), Report of the Panel, adopted on 21 November 2001, WT/DS58/RW, para. 3.7 ('The Panel informed the Parties that they may comment in their submissions on the admissibility and relevance of these submissions.'); *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R, paras. 5.55-5.56; *US–Countervailing Measures on Certain EC Products*, Report of the Appellate Body, adopted on 8 January 2003, WT/DS212/AB/R, para. 76; *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R (exceptional two-stage process for comments). See however, *US–Softwood Lumber III*, Report of the Panel, adopted on 1 November 2002, WT/DS236/R, para. 7.2 (Three late *amicus curiae* submissions were not transmitted to the parties for comment due to untimeliness.).

214 See *US–Steel Safeguards*, Report of the Appellate Body, adopted on 10 December 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, paras. 10; *EC–Biotech*, Report of the Panel, adopted on 21 November 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.10, FN 224; *EC–Salmon*, Report of the Panel, adopted on 15 January 2008, WT/DS337/R, paras. 1.12-1.13; *US–Zeroing (EC)*, Report of the Panel, adopted on 23 January 2007, WT/DS294/R, para. 1.7; *US–Softwood Lumber VI*, Report of the Panel, adopted on 22 April 2004, WT/DS277/R; *Australia–Apples*, Report of the Panel, adopted on 17 December 2010, WT/DS367/R.

215 *US–Shrimp*, Report of the Panel, adopted on 6 November 1998, WT/DS58/R, para. 3.130.

tention of a panel member.'[216] Indeed, the parties generally respond to the arguments raised in *amicus* briefs.[217] This may cause a real problem for parties with limited resources. In the worst case, it may deepen a factual inequality between the parties. Parties have addressed this dilemma differently.[218] A selective request for leave procedure and a clear determination by international courts and tribunals of the expected content of submissions at the admission stage could alleviate such concerns. Overall, only with regard to the IACtHR a change in practice seems necessary. All other courts consider a right to comment pivotal.

2. Procedural fairness and equality between the parties

Formally, the participation of an *amicus curiae* does not affect the status of either party. However, materially it may threaten the equality of the parties, as acknowledged by Rule 37(2) ICSID Arbitration Rules. Virtually all international courts and tribunals allow partial *amicus curiae* submissions. In this respect, *Wälde* worried that

> there is little discipline and sanction available for preventing the *amicus* brief to be used to throw dirt against the Claimant. In addition, there has to be concern over NGO activist campaigning against the other side's party, staff, experts, witnesses, counsel, tribunal members, and hosting institution.[219]

Further, it is common practice before WTO panels, the Appellate Body, investment tribunals, the ECtHR and the IACtHR that the parties endorse

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216 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 33.

217 For instance, in *US–Softwood Lumber IV*, Canada picked up – but did not adopt – an argument raised by *amicus* in its response to questions. The USA had adopted the *amicus* submission. *US–Softwood Lumber IV*, Report of the Appellate Body, adopted on 17 February 2004, WT/DS257/AB/R.

218 Regarding the WTO, see A. Appleton, *Shrimp/Turtle: untangling the nets*, 2 Journal of International Economic Law (1999), p. 488, FN. 43 (He observes that in *US–Shrimp*, the appellees took different approaches. Malaysia chose to respond to the arguments made by non-members in Exhibits 1-3 of its appellee's submission. The Joint Appellees chose not to respond until the Appellate Body handed down its Preliminary Ruling accepting the non-member submissions and offering the Joint Appellees and third parties a second opportunity to respond. See also *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 85.

219 T. Wälde, supra note 107, p. 553 [Emphasis added].

arguments made by *amici curiae* without formally adopting the submission as their own.[220] The possible inequality created by this additional support may be occasional or, where *amici curiae* tend to support one of the sides, structural. For instance, in investment arbitration *amici curiae* overwhelmingly support the views of the host states.[221] How do courts tackle this issue, if at all?

Juridical equality between the parties in their capacity as litigants is one of the 'cardinal characteristics of a judicial process.'[222] *Benzing* delineates the concept as encompassing a right by each party to equal treatment in the proceedings with regard to the presentation of arguments and an equal opportunity to fully present its own case and to review and respond to the

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220 *Kress v. France* [GC], No. 39594/98, 7 June 2001, ECHR 2001-VI; *Annen v. Germany*, No. 3690/10, Judgment of 26 November 2015; *Glamis v. USA*, Decision on application and submission by Quechan Indian Nation, 16 September 2005. The USA supported the admission of the submission by the Quechan Indian Nation, which argued that the California and the government's measures did not violate the BIT. *Glamis v. USA*, United States Submission Regarding Quechan Indian Nation Application, 15 September 2005.

221 E.g. *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 31; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001; *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001; *Glamis v. USA*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, paras. 6-7, 11-12. See also C. Tams/C. Zoellner, supra note 51, p. 221; *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 24 ('This burden would be disproportionately heavy for Claimant. The Applicant has expressed anti-mining and/or anti-ISDS views and has aligned with or echoed the views of Respondent.').

222 B. Cheng, supra note 188, p. 290; M. Reisman, *Nullity and revision*, New Haven 1971, pp. 586-589; L. Gross, *Participation of individuals in advisory proceedings before the International Court of Justice: question of equality between the parties*, 52 American Journal of International Law (1958), p. 23; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, 23 October 1956, Sep. Op. Judge Winiarski, ICJ Rep. 1956, p. 106 ('The Court also respects two fundamental principles of procedure from which, as a judicial body, it cannot depart: *audiatur et altera pars* and the equality of the parties before a Court.'); T. Wälde, *Procedural challenges in investment arbitration under the shadow of the dual role of the state: asymmetries and tribunals' duty to ensure, pro-actively, the equality of arms*, 26 Arbitration International (2010), p. 10; *Methanex v. USA*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Pt. II, Ch. H, pp. 25, 54. M. Benzing, supra note 54, p. 117.

other party's legal and factual arguments.[223] The obligation goes further in that courts must employ all available measures to establish procedural equality between the parties.[224]

An *amicus curiae* may draw the attention to a set of facts or legal arguments that a party has overlooked or barely elaborated on and which are detrimental to the case of the other party. This party may then be forced to change its litigation strategy to respond to arguments that had not been raised before. For instance, in *EC–Sugar*, the complainants felt it necessary to challenge in detail the fact submissions made by the *amicus curiae*, the German association of sugar producers WVZ. WVZ argued that C sugar, which is sugar not receiving the fixed intervention price, did not benefit from export subsidies. The complainants submitted that calculations by WVZ were based on inaccurate or misinterpreted data and that sugar producers received more than the allowed intervention price.[225] While this does not happen frequently, the *Soering* case shows that one *amicus curiae* can turn a case around (see Chapter 7). As regards investor-state arbitration, Rule 37(2) ICSID Arbitration Rules does not furnish tribunals with concrete tools to mitigate the risks to party equality. It vaguely obliges tribunals 'to ensure that the non-disputing party submission does

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223 M. Benzing, supra note 54, pp. 117-118. For his differentiation between legal and factual equality of the parties, see *Id.*, p. 118, citing Article 43(2) ICJ Statute, *Island of Palmas case (The Netherlands v. USA)*, 4 April 1928, II UNRIAA (1949), p. 842; A. Mawdsley, *Evidence before the International Court of Justice*, in: R. Macdonald (Ed.), *Essays in honour of Wang Tieya*, Dordrecht 1994, p. 539; T. Wälde, supra note 222, p. 11; *The Prosecutor v. Dusko Tadic*, ICTY Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, p. 22, para. 52.

224 T. Wälde, supra note 222, pp. 13, 39-40. For instance, in human rights litigation the rules and the court support the structurally less powerful complainant to secure procedural equality. See R. Kolb, *General principles of procedural law*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. Tams (Eds.), *The Statute of the International Court of Justice*, 2nd Ed, Oxford 2012, p. 877, FN. 9.

225 The WVZ had sought to refute Australia, Brazil and Thailand's argument that the EC had exceeded its WTO export subsidy commitments *inter alia* through cross-subsidization of exports of C sugar due to guaranteed high annual support prices for a given quantity of sugar (A and B sugar). See *EC–Sugar*, Report of the Panel, adopted on 19 May 2005, WT/DS265/R, WT/DS266/R, WT/DS283/R, paras. 7.76, 7.78-7.79. (WVZ argued in essence that the EC's intervention price did not cover the average total cost of producing A, B and C sugar in the EC). For an analysis of the case, see B. Hoekman/R. Howse, *European Community–Sugar: subsidization and the World Trade Organization*, Policy Research Working Paper 4336, 2007.

not disrupt the proceeding or unduly burden or unfairly prejudice either party.' Under the UNCITRAL Arbitration Rules, tribunals owe according to its *travaux preparatoires* 'not so much formal equality as equality in the sense of justice and fairness.'[226] The review of cases shows that tribunals focus on formal equality and mostly ignore potential material burdens arising from *amicus curiae* involvement.[227] In *Bear Creek Mining v. Peru*, the tribunal rejected the claimant's contention that it faced an undue burden on formal grounds. These included the length of the submission (17 pages), the timing of the submission (more than one month prior to the parties' scheduled deadline for comments) and procedural fairness and clarity given that, from the outset of the proceedings, the possibility of *amicus curiae* participation had been accounted for in the procedural calendar.[228] The tribunal did not elaborate how the fact that the submissions from the *amicus* were supportive of the respondent by attributing responsibility to the claimant would affect the claimants' case. This has also been the practice in the case of *amicus curiae* participation by the European Commission. The Commission tends to openly side with the party whose arguments give effect to the EU law at issue – and it even has taken steps in the post-award phase that hinder enforcement of awards not giving effect to its arguments. Particularly also because EU law obliges EU member states to cooperate with the European Commission when it participates as *amicus curiae*, the additional burden on the claimant is tangible and should not be ignored by tribunals.

Harrison rightly notes that 'whether one thinks that the burden or bias towards one of the parties is unacceptable or not ... largely depends on per-

226 M. Pellonpää/D. Caron, *The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal*, Helsinki 1994, p. 22. Article 17(1) of the 2010 UNCITRAL Arbitration Rules (and of the 2013 UNCITRAL Arbitration Rules) determines that a tribunal may only exercise its procedural discretion on the condition that the parties are treated with equality and that each party is given a reasonable opportunity to present its case.

227 For instance, the *Methanex v. USA* tribunal indicated that it found the potential material burden of *amicus curiae* participation not excessive. It did not discuss how it would handle a possible scenario of inequality.

228 *Bear Creek Mining v. Peru*, Procedural Order No. 5, 21 July 2016, ICSID Case No. ARB/14/21, para. 58.

spective.'[229] The main risks in this regard are secretly party-sponsored *amicus curiae* briefs. If an *amicus curiae* is independent of the parties, neither party is directly prepared for the information submitted by it. The party to whose disadvantage the information is submitted would equally have to accept it if it originated from the bench or the opposing party. Where the information risks turning a case around, the tribunal can reinstate party equality by giving the party an adequate opportunity to comment on the information, or, in extreme cases, disregard it. However, the situation is different where a party secretly sponsors an *amicus curiae* submission. In that case, the opposing party has less opportunity to make its case compared with the other party. This risk can be remedied with strict disclosure requirements.

II. Practical burdens

Two aspects are considered in more detail: whether *amicus curiae* has caused significant delay in proceedings (1.) and whether it has led to additional costs for the parties (2.).

1. Right to a speedy trial and undue delay?

The participation of an *amicus curiae* can cause a delay in the proceedings as international courts and tribunals must accommodate additional procedures, including parties' rights to comment. International courts and tribunals have explicitly acknowledged an obligation to resolve disputes in a speedy manner.[230] This issue has frequently been thematised in WTO dispute settlement. Article 12(2) DSU determines that 'panel procedures should provide sufficient flexibility so as to ensure high-quality panel re-

229 J. Harrison, *Human rights arguments in "amicus curiae" submissions: promoting social justice?,* in P.M. Dupuy/F. Francioni/E.U. Petersmann (Eds.), *Human rights in international investment law and arbitration*, Oxford 2009, pp. 396-421.

230 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase),* Judgment, 5 February 1970, ICJ Rep. 1970, p. 30, para. 27; B. Cheng, supra note 188, p. 295 (There is a public need for speedy settlement of disputes.); A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 32.

ports while not unduly delaying the panel process.'[231] In *EC–Sardines*, the Appellate Body held that because 'the procedural rules of WTO dispute settlement are designed to promote … the fair, prompt and effective resolution of trade disputes' it could reject an *amicus curiae* brief if its acceptance would interfere with these aspirations.[232] In practice, the main case is that a WTO member seeks to submit an *amicus curiae* brief late in the proceedings.[233]

It is difficult to measure to what extent disputes have been delayed by *amicus curiae* participation. Delays are most apparent in investment arbitration where additional deadlines are set to accommodate *amicus curiae* participation and parties are given additional time to comment on *amicus* submissions. Tribunals can minimize delays by timing *amicus curiae* applications and submissions into natural breaks in the proceedings or by aligning *amicus curiae* with the schedule for submissions, such as setting the same deadline as for comments on Article 1128 NAFTA submissions. The IACtHR relies on a fixed deadline for submissions. Similarly, WTO panels and the Appellate Body have minimized delays by excluding submissions that would require adjustment of the schedule of submissions. Thus, the effect on the parties' right to a speedy trial due to *amicus curiae* submissions appears to be manageable and limited.

2. Exploding costs?

No study has been conducted in any of the reviewed international courts or tribunals measuring the additional costs incurred by *amicus curiae* participation. That *amici curiae* raise the costs of proceedings is most evident in investment arbitration. *Amicus curiae* briefs tend to demand at least two

231 *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 105.

232 *EC–Sardines*, Report of the Appellate Body, adopted on 23 October 2002, WT/DS231/AB/R, para. 167.

233 E.g. *US–Lead and Bismuth II*, Report of the Panel, adopted on 7 June 2000, WT/DS138/R, para. 6.3 (The panel rejected a submission by the American Iron and Steel Institute (AISI) for untimeliness. The panel held that it had the power to delay the proceedings pursuant to Article 12(1) DSU to accommodate AISI's submission in the proceedings, but found that the delay would not be justified). Confirming, *European Communities – Selected Customs Matters*, Report of the Panel, adopted on 11 December 2006, WT/DS315/R, FN 209.

additional rounds of party comments – one prior to the grant of leave and one once the submission has been received. Moreover, tribunals issue additional procedural orders determining the procedure to be applied, and tribunal members and secretaries face additional administrative and reading work.

Parties have rarely raised the issue of allocation of additional costs incurred by *amici curiae*. Further, none of the regulations on *amicus curiae* addresses it.[234] Currently, *amici curiae* tend to bear the costs of their participation save the additional procedural and administrative costs incurred by their participation, which are borne by the parties who also cover their own additional legal and other costs. Where applicable, the parties cover the additional court fees. Only before the ICTY, *amici curiae* may receive reimbursement of their costs if the participation was by invitation.[235] In all other international courts and tribunals, *amici curiae* do not have rights of remuneration, legal aid or damages. In *Koua Poirrez v. France*, the father of the applicant, after having participated as *amicus curiae*, claimed pecuniary damages for the allegedly excessive length of the proceedings. The ECtHR denied the claim on the basis that Article 41 ECHR foresaw pecuniary damages only for parties, and that *amicus curiae* participation conferred a status lesser than that of a party.[236] For the same reason the ECtHR has denied requests for legal aid, as well as reimbursement of costs

234 Exceptionally, *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001, para. 14 ('Granting to the petitioners *amici* status would substantially increase the costs of proceedings.'); *Commerce Group v. El Salvador*, Minutes of the First Session of the Tribunal, 27 July 2010, ICSID Case No. ARB/09/17, para. 20 ('The parties were in principle willing to arrange for webcasting of hearings but subjected their decision to a review of the costs involved.'). In *UPS v. Canada*, the investor complained of the procedural delay and the additional costs incurred due to three Article 1128 NAFTA submissions by the USA and Mexico respectively to each of which the disputing parties replied. See *UPS v. Canada*, Investor's reply to the 1128 Submissions of the United States and Mexico, 21 May 2002; 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. 154.

235 ICTY Information on the Submission of *Amicus Curiae* Briefs, March 1997, para. 5f.

236 *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, ECHR 2003-X, para. 69.

for an *amicus curiae* submission.[237] This is to be welcomed. The purpose of legal aid is to ensure access to justice independently of the financial situation of the person asserting or defending a right. It is tied to party status. Moreover, if *amici curiae* were allowed to obtain damages, potential parties could prefer to participate as *amici curiae* to assert their rights without running the risk of an adverse judgment.[238]

However, it may be worthwhile for all international courts and tribunals to contemplate remuneration (at cost) of solicited and unsolicited *amicus curiae* briefs whose submission was found to be useful in order to ensure that submissions are of a high quality. The provisions on remuneration of court-appointed experts and witnesses could serve as a model.[239] It is surprising that not all international courts and tribunals order the reimbursement of the costs incurred in the preparation of solicited *amicus curiae* submissions given that they constitute a service to the international court or tribunal and the reimbursement of expert costs.

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237 *Goddi v. Italy*, Judgment of 9 April 1984, ECtHR Series A No.76. The *amicus curiae* application was rejected for untimeliness and lack of complying with formal requirements. See also D. Harris/M. O'Boyle/C. Warbrick, *Law of the European Convention on Human Rights*, 2nd Ed., Oxford 2009, p. 669.

238 For lack of party status, *amici curiae* cannot be the addressees of claims in the proceedings. See *Musci v. Italy* [GC], No. 64699/01, 19 March 2006, ECHR 2006-V; *Cocchiarella v. Italy* [GC], No. 64886/01, 29 March 2006, ECHR 2006-V; *Giuseppe Mostacciuolo (No. 1) v. Italy* [GC], No. 64705/01, 29 March 2006. In his dissenting opinion, *Judge Azevedo* criticized that the acceptance of information outside the rules on intervention would allow a state to submit information while 'escap[ing] the possibility of a decision adverse to itself.' The rights of an accused state not party to the proceedings were, in his view, sufficiently safeguarded by the ICJ's limited jurisdiction *inter partes* (cf. Article 59 ICJ Statute). *Corfu Channel case,* Judgment (Merits), Diss. Op. Judge Azevedo, 9 April 1949, ICJ Rep. 1949, p. 89. Regarding the limited protection offered by Article 59 ICJ Statute against 'persuasive precedent', see S. Rosenne, supra note 118, pp. 1580-1598, 1605-1606.

239 In the WTO, for instance, costs and expenses incurred by the participation of experts are paid out of the WTO budget. Experts are remunerated on a day-fee basis and receive reimbursement for travel costs and expenses. M. Cossy, *Panels' consultation with scientific experts: the right to seek information under Art. 13 DSU*, in: R. Yerxa/B. Wilson (Eds.), *Key issues in WTO dispute settlement*, Cambridge 2005, pp. 215, 217 (*Cossy* states that the daily rate amounted to around 600 Swiss francs per day in 2005). In the ECtHR, expert fees and costs are borne by the Council of Europe budget. R. Schorm-Bernschütz, supra note 71, p. 105. See also Article 83 ITLOS Rules.

Further, international courts and tribunals can ensure that the additional costs are kept to a minimum, for instance, by limiting the length of submissions, specifying the issues to be commented upon, rejecting duplicative submissions or ordering *amici curiae* to submit joint briefs. At least in investment arbitration, the issue of additional costs factors into a tribunal's admission decision. Article 17(1) of the 2010 and 2013 UNCITRAL Arbitration Rules requires that tribunals conduct proceedings without incurring unnecessary expenses.[240] Among the most overt cost-management strategies applied are the exclusion of *amici curiae* from oral proceedings, the limitation to one written submission – possibly even a joint submission by all *amici curiae* – and the general denial of a possibility of reply by *amici curiae* to the parties' comments.

Could an international court or tribunal order an *amicus curiae* to cover the courts' and/or the parties' costs of its participation? Most of the rules only foresee allocation of costs between the court and the parties.[241] In several cases against Italy concerning the derisory amount awarded in damages in cases of excessive length of proceedings, the applicants requested that the ECtHR order each of the three third-party interveners to reimburse the costs of the responding memorials. The ECtHR rejected the request by stating that 'the present case is directed only against Italy and it is only in respect of that country that [the court] has found a violation of the Convention. Accordingly, any request for an order against another country for the reimbursement of costs and expenses must be rejected.'[242] In an investment arbitration concerning a South African mining dispute,

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240 See also, for many, *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001; *UPS v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001.

241 E.g. Rule 28 ICSID Arbitration Rules; Articles 40 and 42 of the 2010 and 2013 UNCITRAL Arbitration Rules; Article 64 ICJ Statute; Article 97 ICJ Rules; Article 34 ITLOS Statute. Rule A5(6) ECtHR Rules exceptionally foresees that costs of witnesses, experts or other persons summoned at the request of a third party can be awarded against the third party or the Council of Europe. See also Sec. 4, Practice Direction on just satisfaction claims.

242 *Cocchiarella v. Italy* [GC], No. 64886/01, 29 March 2006, ECHR 2006-V, para. 146. See also *Riccardi Pizzati v. Italy* [GC], No. 62361/00, 29 March 2006, paras. 145, 147; *Giuseppe Mostacciuolo (No. 1) v. Italy* [GC], No. 64705/01, 29 March 2006; *Apicella v. Italy* [GC], No. 64890/01, 29 March 2006; *Ernestina Zullo v. Italy* [GC], No. 64897/01, 29 March 2006; *Giuseppe Mostacciuolo (No. 2) v. Italy* [GC], No. 65102/01, 29 March 2006. The costs were moderate, amounting

the parties requested that the prospective *amici curiae* should cover the costs of their participation. In another case, one party requested a retainer fee for any costs incurred.[243] It seems that tribunals did not adopt these suggestions. In *Philip Morris v. Uruguay*, the tribunal reserved the right to order any *amici curiae* to pay or reimburse upon request either party for 'properly documented costs it has incurred by reason of the Submission' but later it did not issue such a cost order.[244] While there is no legal impediment to conditioning the participation of *amici curiae* on the payment of a fee, especially where they have a direct benefit from participating in the form of increased publicity and credibility,[245] another question is if this outcome is desirable. Requiring *amici curiae* to pay for participation could have a chilling effect on *amici's* willingness to participate. With respect to investment arbitration, *Rubins* contemplates that it may be appropriate to let states bear the financial burden of *amicus curiae* participation, because of the competitive benefits they receive in FDI placement through the conclusion of investment treaties, because the benefits of *amicus curiae* participation outweigh its costs and because the existence of the investment arbitration system depends to some degree on public support which may be secured through *amicus curiae* participation.[246] In the WTO, Jordan proposed the creation of a fund to assist developing countries or least developed countries with the response to *amicus curiae* briefs.[247] In this scenario, the additional costs are borne on a voluntary basis by WTO members. None of these proposals seem feasible at the moment. It is more

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to EUR 1,904.06 plus a 2% contribution to a lawyers' insurance fund and 20% value-added tax per submission.

243 See L. Peterson, *Claimant in garbage disposal dispute with Canada seeks closed-door hearings and wants amicus curiae to pay $25,000 fee*, 12 November 2008. The case in question was *Vito Gallo v. Canada,* PCA Case No. 55798. The request was not included in Procedural Order No. 1, which regulated *amicus curiae*. In *Infinito Gold v. Costa Rica*, the tribunal reserved the allocation of costs incurred by *amicus curiae* participation for a later decision, see *Infinito Gold v. Costa Rica*, Procedural Order No. 2, 1 June 2016, ICSID Case No. ARB/14/5, para. 49 e.

244 *Philip Morris v. Uruguay,* Procedural Order No. 3, 17 February 2015, ICSID Case No. ARB/10/7, para. 31.

245 In favour, N. Rubins, supra note 159, p. 222.

246 *Id.*, p. 222.

247 Dispute Settlement Body, *Special Session, Jordan's further contribution towards the improvement and clarification of the Dispute Settlement Understanding*, 21 March 2003, TN/DS/W/53, p. 2.

likely that tribunals will exclude *amicus curiae* briefs that prove to be too costly for a party.

H. Conclusion

The overall impact of *amicus curiae* participation on the system of international dispute settlement remains largely theoretical. *Amicus curiae* participation has affected the relationship between courts and the parties mostly in a symbolic manner. By admitting *amici curiae* against the expressed will of the parties, some international courts and tribunals have shown that they do not consider themselves merely as facilitators of diplomatic dispute settlement. The admission of *amici curiae* may insofar be considered a step towards a greater judicialization of international courts and tribunals. However, it has not broadened the public function of international courts and tribunals. Its handling in each court and tribunal rather is a reflection of how the court or tribunal views its own function. Despite their limited success especially in investment arbitration, the WTO and in inter-state courts, the instrument can be used to draw attention to public interests involved (even if they are not legally recognized by the court or tribunal).

Amici curiae have also had a minor impact on the legitimacy of international adjudication. If at all, the instrument can be seen to add to the quality of judgments. As most courts do not consider *amicus curiae* submissions substantively, the legitimatory potential of *amicus curiae* participation remains largely unsourced. Exceptions are the ECtHR and the IACtHR. Both courts have relied on *amici curiae* to support their legal interpretation. In this limited form, *amicus curiae* has contributed to the coherence of international law.

The instrument's effect on transparency is ambivalent. It is much more a beneficiary of increased transparency than its motor. This seems to be changing in investment arbitration, where recent decisions show a tendency to grant *amici* access to certain documentation. At the same time, the instrument has reinforced the lack of standing of non-governmental entities before many international courts and tribunals.

The relationship between *amicus curiae* and parties' rights is ultimately a question of balancing of interests with the parties' procedural guarantees setting the outer limit for the embedding of *amicus curiae* in the proceedings. International courts and tribunals protect the parties' rights largely

through notification of *amicus curiae* submissions and a right to comment. In practice, the main balancing appears to occur with respect to the obligation to conduct proceedings efficiently. The feared negative impacts of *amicus curiae* participation have not materialized.