Chapter § 9 Conclusion

Heralded as a solution to salient problems of international dispute settlement by some, others consider *amicus curiae* a risk to the foundations of international adjudication. This study has sought to contribute to the debate with an analysis of the *amicus curiae* practice before the ICJ, the ITLOS, the ECtHR, the IACtHR, the ACtHPR, the WTO adjudicating bodies and in investor-state arbitration. Two basic questions have guided this endeavour: what is *amicus curiae* before international courts and tribunals (A.); and is there an added value to its participation (B.)?

A. What is it?

One of the main challenges of the instrument before international courts and tribunals is the many different assumptions and conceptions held of it. No attempts have been made to define the concept at the international level based on how it is used across all international courts and tribunals. Instead, definitions are drawn commonly from national legal systems, which pursue vastly different concepts of *amicus curiae* or are infused by wants and wishes, thereby adding to the misconceptions.

An analysis of regulations and case law of the international courts and tribunals reviewed has shown that the international *amicus curiae* can be described by four basic characteristics: (1) it is a procedural instrument subject to the full discretion of courts; (2) it is not a party and not an instrument of the parties; (3) it transmits to the court information in the broadest sense; and (4) it pursues some form of interest with its participation. In addition, one may add (though a few exceptions exist to this rule) that *amicus curiae* participation means written participation.

Analysis of the pertinent rules and case law revealed that the functions of the instrument have rarely been defined, leaving it to courts to carve out the roles they wish to assign to *amici curiae* in their proceedings. This book proposes a tripartite systematization of the current functions attributed to *amici curiae* by international courts and tribunals: an information-based function, an interest-based function and a systemic function. Information-based *amicus curiae* focuses on the provision of information to the

court, whereas the main purpose of the participation of interest-based *amicus curiae* is to inform the court of a private or public interest that is affected by a case before it. Systemic *amicus curiae* bundles all instances of *amicus curiae* participation where the instrument is used to alleviate systemic deficiencies of international dispute settlement. There is some overlap between these functions and international courts and tribunals often admit *amici curiae* to fulfil several roles.

While all international courts and tribunals with *amicus curiae* practice allow information-based *amicus curiae* – albeit with different emphasis on the information to be conveyed – there are differences in the use of the other functions. Public-interest based *amicus curiae* participation is allowed by all international courts and tribunals. It is the focal point for the admission of *amici curiae* in investment arbitration. Only the ECtHR allows a rich private interest based *amicus curiae* function. Finally, only the ICJ, investment tribunals, the WTO Appellate Body and panels have admitted *amici curiae* to address systemic concerns.

Overall, the concept is highly fluid and flexible. This is a consequence and an advantage of the broad regulatory discretion of international courts and tribunals in this regard. The absence of prescriptive definitions and rules allows international courts and tribunals to tailor *amicus curiae* participation to their needs. However, the adoption of a certain function of *amicus curiae* by an international court or tribunal depends not only on its needs. An analysis of the use and regulation of the instrument reveals that the following factors also play a role: the court's authority under its constitutive instruments, its relationship with the parties and the member states, external pressures and judges' views of their function.

The downside to the flexibility of the instrument is evident: the exact meaning and scope of *amicus curiae* risks to be obscure and, therefore, unpredictable. This is not only problematic for prospective *amici curiae*, but it may also render it difficult for tribunals and parties to see any value in *amicus curiae* participation, lest prospective *amici curiae* make a convincing argument for their involvement. Accordingly, the functions of the instrument have been heavily influenced by the nature and interests of *amicus* applicants.

In brief, apart from the above-listed criteria, the international *amicus curiae* is a chameleon. The term is loosely used by international courts and tribunals to describe a varied procedural creation. It is hoped that the proposed systematization of the concept will help practitioners and scholars

to obtain a clearer view of the possibilities offered by *amicus curiae* participation.

B. *Added value of* amicus curiae *participation in international dispute settlement*

The rise of *amicus curiae* in international adjudication is a consequence of the expansion, growing attractiveness and increased influence exercised by international courts and tribunals. However, *amicus curiae* participation should be pursued only if it adds value to a concrete dispute. It is not necessary, and may even be illegitimate, where it seeks to duplicate existing concepts or mechanisms enshrined in procedural laws or special party agreements.[1] Is there a niche the instrument has or can justifiably fill among existing instruments? Are there uses of the concept that should be excluded, either because they are ineffective or due to their adverse implications for other instruments, principles or structures?

This contribution has shown that, ultimately, the relevance of the instrument depends on international courts and tribunals' perception of its usefulness. This again is related to judges' understanding of their judicial function and the ability of *amici curiae* to support the exercise of the judicial function.[2] Based on a review of the influence of *amicus curiae* briefs on the substantive outcome of cases and taking into account the process of participation, it seems that the biggest advantage of the international *amicus curiae* is that it helps to fill information gaps, provides legal analysis, points to relevant laws and interpretations, conveys impact analysis and contextual information and may highlight the various interests involved. *Amici curiae* can infuse the deliberation and decision-making process with new and fresh ideas and thereby contribute to a solid competition of legal ideas. The regional human rights courts, in particular, show the possibili-

1 J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), p. 1363 ('If *amici* are to have a role, it must be because they add something of significance, without denaturing the process. Nor is their inclusion seamless and self-executing; expert and somewhat time-consuming tribunal management of would-be friends is essential, lest there occur significant duplication in submissions or an artificial broadening or redirecting of the dispute.').

2 L. Barker, *Third parties in litigation: a systematic view of the judicial function*, 29 The Journal of Politics (1962), p. 62.

ties offered by the instrument. There, *amici curiae* regularly provide data on national and international laws, impact assessments and highlight the general background of a case or the systemic nature of a problem. These *amici curiae* can help the court to avoid error and ensure that it decides its case on a fully informed basis. In addition, where no mechanism exists for the defence or notification of affected interests – which usually are protected by intervention – *amici curiae* can be used to call to the attention of the court to the interest involved.

However, the instrument cannot fulfil all of the expectations held. In particular, *amicus curiae* participation is too sporadic to alleviate systemic concerns. As currently administered, it is ill-suited to address concerns pertaining to adjudicative legitimacy or to effectively represent the public interest. Public interest-based *amicus curiae* participation has not induced a substantial change in the content of decisions or the process of international judicial decision-making. Especially in investment arbitration and in WTO dispute settlement, the adjudicative bodies only consider the public interest arguments raised by *amici curiae* to the extent that they correspond with those tabled by the parties. This is not because of a lack of sympathy towards these interests. Rather, courts with a strong adversarial tradition specifically are hesitant to expand the consideration of issues beyond the matters raised by the parties, even in cases where this would be within the scope of their material jurisdiction. Still, public interest based *amicus curiae* participation is not fully futile. It can raise a court's awareness for the implications of a dispute from a perspective that is not likely to have been presented to the court otherwise, such as the impact of a decision on the people or alternative ideas and interpretations of the applicable legal instruments. In essence, it serves to show international courts and tribunals that they do not decide in a legal vacuum. Nevertheless, it cannot change the current modus of decision-making, unless the parties are willing to. Further, the instrument cannot effectively substitute intervention to protect and defend a right potentially affected by the outcome of the dispute given that an *amicus curiae* has no right to present its views. Due to its partial nature, courts would also be ill-advised to treat it as an expert-witness – which they have carefully avoided so far.

International courts and tribunals have largely neatly fitted *amicus curiae* into their general operations. The instrument has not revolutionized the current order of international dispute settlement. Neither has it changed the nature of proceedings, nor overturned the adversarial process, nor has

it led to a greater standing of non-state actors before international courts and tribunals.

This contribution has shown that the regulation of the concept is essential for its success. Areas that require additional regulation and clarification include the process of admission, specifically the independence of *amici curiae*, the permissible and preferred substance of submissions and access to relevant documents and information concerning a dispute.[3] Further, courts can improve the application of the already existing requirements. In many instances, requests are granted without proper assessment of the application. International courts and tribunals should at least carefully examine by way of extensive disclosure requirements whether an *amicus curiae* is independent from the parties. Apart from this general condition, this contribution proposes that courts apply a differentiated set of requirements to *amici curiae*, depending on the function they wish to assign to it. In particular, where an *amicus* shall represent certain interests, courts should require it to show in some way that it can rightly claim to represent those interests. Finally, courts must carefully assess the reliability and credibility of submissions. *Amicus curiae* participation may not significantly delay proceedings or heavily increase costs and it must not lead to a violation of party equality.[4] *Amicus curiae* participation is counter-productive where it risks derailing the proceedings. The main goal of the proceedings remains the rendering of an enforceable decision.

If regulated properly to ensure that courts discharge disputes efficiently while respecting the parties' rights, *amici curiae* can function as a valuable asset in the changing environment international courts and tribunals face.

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3 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. 216.

4 See F. Matscher, *Überlegungen über die Einführung der „Interpretationsintervention" im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, in: H. Miehsler (Ed.), *Ius Humanitatis - Festschrift für Alfred Verdross zum 90. Geburtstag*, Berlin 1980, p. 541.