Part I
The ‘international’ *amicus curiae*

Chapter § 2 Great expectations? Presumed functions and drawbacks of *amicus curiae* participation

Before embarking on an analysis of the content and legal ramifications of *amicus curiae*, it is worthwhile to consider the justifications underlying its reception in international adjudication, that is, its presumed functions and the associated drawbacks. These considerations will serve as the measuring scale for the effectiveness and added value of *amicus curiae* participation in international dispute settlement throughout this book.

This Chapter will first outline the functions attributed to *amicus curiae* before international courts and tribunals (A.) and then address the feared drawbacks (B.).

A. Presumed functions of amicus curiae

Academic writers and international stakeholders attribute different functions to the international *amicus curiae.* Mainly they are that *amicus curiae* increases the information available to international courts and tribunals (I.); that *amicus curiae* is a medium through which international courts and tribunals are made aware of the public's view in a case and the public interests at stake (II.); that *amicus curiae* increases the legitimacy of international courts and tribunals, as well as contributes to overcoming a democratic deficit in international adjudication (III.); that *amicus curiae* increases the transparency of international adjudication (IV.); and that *amicus curiae* helps to secure the coherence of international law (V.).

I. Broader access to information

Concepts such as *iura novit curia* and – in some courts – an obligation to establish the objective facts of the case require judges to obtain a complete picture of events and the relevant laws and arguments.[1] Proponents of *am-*

1 The latter obligation is not universal. See for many, S. Schill, *Crafting the international economic order: the public function of investment treaty arbitration and its*

icus curiae participation argue that the assistance from *amicus curiae* can support a court in this endeavour and help it to produce decisions of higher quality.[2] *Amici curiae* can soothe the imperfections of the bilateral structure of dispute settlement. Especially where the parties are unwilling or unable to provide the necessary information, where a judge faces a novel legal issue or one that lies outside his area of specialisation or where the caseload makes it impossible for judges and their clerks to conduct extensive legal research, *amici curiae* can provide the requisite information.[3] The CIEL commented on the advantages of *amicus curiae* participation

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significance for the role of the arbitrator, 23 Leiden Journal of International Law (2010), pp. 422-423.

2 See L. Johnson/E. Tuerk, *CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 244, 249; O. Bennaim-Selvi, *Third parties in international investment arbitrations: a trend in motion*, 6 Journal of World Investment and Trade (2005), p. 786; S. Schill, supra note 1, p. 424 (Fact-finding *proprio motu* should be restricted to special circumstances where the interests of non-participating parties are involved, such as issues of corruption). See also P. Carozza, *Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights*, 73 Notre Dame Law Review (1998), p. 1225. *Carozza* contends that the ECtHR does not conduct proper comparative analysis of legal issues, in particular, that it selects the cases it considers arbitrarily. *Amicus curiae* could alleviate this concern.

3 With regard to WTO law, see R. Howse et al*., Written submission of non-party amici curiae in EC-Seals*, 11 February 2013, para. 13 ('The preliminary submissions in this brief are aimed at correcting the misleading and incomplete manner in which Canada has characterized the objectives of the measures at issue in this dispute...'); C. Beharry/M. Kuritzky, *Going green: managing the environment through international investment arbitration*, 30 American University International Law Review (2015), pp. 415-416 ('While interested third parties could always petition the parties to the dispute with their expertise or knowledge, allowing an independent party to provide expertise in a separate process is valuable because it prevents disputing parties from acting as gatekeepers of specialized knowledge.'); G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 783; 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, 447. In the case of corruption or bribery, the parties may try to keep certain information from the court or tribunal. See also *AES v. Hungary* where, according to *Levine*, 'neither Hungary nor the investor would have an interest in emphasizing the fact that the contracts between them may violate the European Commission's restrictions on state aid. The

for the furtherance of the law in respect of cases concerning the Aliens Claims Tort Act before the US Federal Courts:

> *[A]micus curiae* briefs are useful when trying to set new legal precedents enforcing innovative legal concepts, such as environmental rights. Persons or organizations who submit *amicus curiae* briefs can advocate for more novel principles and interpretations of law than the lawyers who directly represent a client in the case are likely to be free to do, given that they must zealously advocate for their client and, as such, will probably feel obliged to argue that the case involves violations of established legal principles with precedent judges can rely on in making their decisions.[4]

In short, *amici curiae* can extend an international court or tribunal's access to relevant information. The term information in this respect is used loosely and collectively to cover both the (legal) arguments a court must apply and consider in the interpretation of the applicable laws, as well as the facts of the case and the relevant context. The idea is that 'the greater the amount of information and views considered, the greater the chances for a good outcome.'[5]

It is particularly important that the decisions of international courts and tribunals are free from error given the significant impact of decisions and their general finality.[6] In *Methanex v. USA*, an *amicus curiae* petitioner, who sought to argue that the interpretation of NAFTA's Chapter 11 should

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claimant would certainly not wish to emphasize that a contract may be based on an illegality, as this may impact their ability to claim damages. As for Hungary, the state may consider it detrimental to emphasize this issue as its primary defence, since its acknowledgment of engaging in state aid may give rise to further actions by the Commission within the EU sphere.' E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 217 [References omitted]. For the award, see *AES Summit Generation Limited and AES-Tisza Erömü Kft. (UK) v. Republic of Hungary* (hereinafter: *AES v. Hungary*), Award, 23 September 2010, ICSID Case No. ARB/07/22.

4 J. Cassel, *Enforcing environmental human rights: selected strategies of U.S. NGOs*, 6 Northwestern Journal of International Human Rights (2007), p. 122 [references omitted].

5 G. Umbricht, supra note 3, p. 774; M. Schachter, *The utility of pro bono representation of U.S.-based amicus curiae in non-U.S. and multi-national courts as a means of advancing the public interest*, 28 Fordham International Law Journal (2004), p. 111 ('[T]he facilitation of an informed, deliberative, and fair-minded court ruling is among the most laudable purposes of an *amicus* submission.').

6 There is a limited review of panel decisions by the WTO Appellate Body under Article 17 of the DSU, and Articles 51 and 52 of the ICSID Convention allow revision

include legal principles relating to sustainable development, submitted that he would contribute to the avoidance of error by providing a 'fresh and relevant perspective' on some of the issues before the tribunal.[7]

Has this function lost some of its relevance lately? Given the ready (online) availability of legal materials, judges are no longer confined to the legal literature available in the court library. In addition, many judges now have clerks to assist them with legal research.[8] Moreover, with the help of new media they can more easily than ever carry out basic fact-checks (to the extent that this is in accordance with the applicable rules). Still, it appears premature to argue that this change obviates information-based *amicus curiae.* While it remains to be examined what has been the impact of the new technologies on information-based *amici curiae*, there seems to be room left for it. Admittedly, the pure transmission of information today is less relevant than a decade ago, but this function may be useful with respect to facts and specialized legal information Above all, *amici curiae* can assist judges in navigating the vast amount of material available on an issue.[9] In this respect, *amici curiae* have shifted from mere (descriptive) providers to pre-screeners of information. This shift is not unproblematic. There is a risk of incomplete and distortive submissions. Nevertheless, these *amici curiae* can reopen the marketplace of ideas before the court. They can highlight or elaborate arguments or facts that the parties have not exhaustively discussed. This may be particularly relevant before courts that form part of specialized subsystems of international law with a clear

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and annulment of awards, if a narrow set of requirements are met. Regarding the effects of erroneous judicial decisions, see M. Reisman, *Nullity and revision: the review and enforcement of international judgments and awards*, New Haven 1971; J. Pauwelyn, *The use of experts in WTO dispute settlement*, 51 International and Comparative Law Quarterly (2002), p. 353 ('The risk of a panel 'getting it wrong', because the parties did not present certain information, has consequences that may affect millions of people'.).

7 *Methanex v. USA*, Decision of the Tribunal on petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 6.

8 But see with regard to the ACtHPR F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 Journal of African Law (2014), p. 37 ('*Amicus* briefs also enable the court to access legal opinion and practical information that a resource and time-constrained court would not otherwise obtain. Without the support of experts and NGOs, the role of the court will be marginal at best.').

9 J. Viñuales, *Foreign investment and the environment in international law*, Cambridge 2012, p. 115.

policy mandate in favour of a certain interest.[10] In this regard, *amici* can infuse the deliberations with new views, fortify solid competition and exchange of legal ideas, as well as give guidance on new laws or legal issues outside the judges' core fields of expertise.[11]

II. Representation of 'the' public interest

A second function often presumed is that *amicus curiae* participation allows the representation of public or community interests by civil society. *Amicus curiae* is portrayed as an instrument that complements the 'voluntarist and bilateral origins of international law' with public interest-based normative structures.[12] *Barker* notes the specific ability of fact-focused *amici curiae* to support 'rational decision making, especially when judges are faced with issues having broad political-social ramifications.'[13]

One justification for the involvement of civil society is that international courts routinely assess the conformity with international law of states' conduct and actions adopted under national law, including 'measures of general application intended to promote or achieve important public policy goals [or values]' which concern areas traditionally considered belonging to the sovereign prerogative of nation states.[14] Especially in investment ar-

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10 R. Howse, *Membership and its privileges: the WTO, civil society, and the amicus brief controversy*, 9 European Journal of International Law (2003), p. 502; N. Trocker, *L'"Amicus Curiae" nel giudizio devanti alla Corte Europea dei Diritti Dell'Uomo*, 35 Revista di Diritto Civile (1989), p. 124; S. Joseph, *Democratic deficit, participation and the WTO*, in: S. Joseph/D. Kinley/J. Waincymer (Eds.), *The World Trade Organization and human rights*, Cheltenham and Northampton 2009, p. 316.

11 L. Boisson de Chazournes, *Transparency and amicus curiae briefs*, 5 Journal of World Investment and Trade (2004), p.335.

12 M. Benzing, *Community interests in the procedure of international courts and tribunals*, 5 The Law and Practice of International Courts and Tribunals (2006), p. 371.

13 L. Barker, *Third parties in litigation: a systematic view of the judicial function*, 29 The Journal of Politics (1967), p. 54.

14 K. Kinyua, *Assessing the benefits of accepting amicus curiae briefs in investor-state arbitrations: a developing country's perspective*, Stellenbosch University Faculty of Law, Working Paper Series No. 4 (2009), quoted by E. Levine, supra note 3, p. 200; P. Wieland, *Why the amicus curiae institution is ill-suited to address indigenous peoples' rights before investor-state arbitration tribunals:*

bitration and in WTO dispute settlement, subsystems focused on trade and investment respectively, an increasing number of disputes concern the legality of state measures (including parliamentary acts) seeking to protect public commodities or rights, such as the environment, human rights, water management and public health.[15] The matter has become pressing also for Western countries as they increasingly risk incurring state responsibility for measures carried out in the interest and will of their constituents. In *Methanex v. USA*, one of the *amicus* petitioners argued that the tribunal's decision would have a 'critical impact … on environmental law and other public welfare law-making in the NAFTA region.'[16] Exemplary recent cases include the legality of the EU's ban on the import and marketing of seal and seal products for reasons of public morale which was challenged by Canada under the WTO Agreement, proceedings brought against the Kingdom of Spain for reducing subsidies in the renewable energies sector following the world financial crisis and proceedings against El Salvador for breach of the CAFTA by the mining company Pac Rim Cayman LLC following the refusal of environmental permits required by El Salvadorian

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Glamis Gold and the right of intervention, 3 Trade, Law and Development (2011), p. 338.

15 Investment agreements in their preambles establish as objectives the furtherance of free trade and foreign investment, including effectiveness of any dispute resolution mechanism. Cf. Article 102 NAFTA. See also G. Carvajal Isunza/F. Gonzalez Rojas, *Evidentiary issues on NAFTA Chapter 11 arbitration: searching for the truth between states and investors*, in: T. Weiler (Ed.), *NAFTA investment law and arbitration*, New York 2004, p. 287. For the claim that investment treaty arbitration can be viewed as a system, see S. Schill, *The multilateralization of international investment law*, Cambridge 2009; 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, p. 351. See also the growing literature seeking to accommodate the competing interests within the subsystems. For many, G. Marceau, *WTO dispute settlement and human rights,* 13 European Journal of International Law (2002), p. 753; J. Viñuales, supra note 9. Arguing against the perception of investor-state dispute settlement as a public system and for a characterization as a hybrid public private system, see J. Alvarez, *Is investor-state arbitration "public"?*, 7 Journal of International Dispute Settlement (2016), pp. 534–576.

16 *Methanex v. USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*", 15 January 2001, para. 5 (The *amicus* applicant submitted that the case was also of constitutional importance, thus, raised national public interests.).

law for the extraction and exploitation of gold out of a concern over the pollution of one of the country's most important rivers.[17]

Furthermore, international legal norms tend to be rather abstract having been achieved by inter-state negotiation and compromise. Courts and tribunals must concretize obligations and balance competing interests by way of treaty interpretation, at times to an extent usually reserved for the legislature.[18] Given this reality, international decisions have an important quasi-precedential value.[19]

Moreover, there is an issue of costs: the general public and local communities will ultimately bear (at least the state's share of) the costs of the proceedings and potential damages, as well as may be the recipients of new legislation or executive action.[20]

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17 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (hereinafter: *EC–Seal Products*), Report of the Panel, adopted on 18 June 2014, WT/DS400/R, WT/DS401/R; C. Patrizia/J. Profaizer/I. Timofeyev, *Investment disputes involving the renewable energy industry under the Energy Charter Treaty*, 2 October 2015, GAR, at: http://globalarbitrationreview.com/chapter/1036076/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty (last visited: 28.9.2017); *Pac Rim Cayman LLC v. Republic of El Salvador* (hereinafter: *Pac Rim v. El Salvador*), Notice of Arbitration, 30 September 2009, ICSID Case No. ARB/09/12.

18 C. Brower, supra note 15, pp. 355-356; G. Van Harten, *Investment treaty arbitration and public law,* Oxford 2007, p. 122; C. Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 Journal of International Economic Law (2003), p. 699; V. Lowe, *The function of litigation in international society*, 61 International and Comparative Law Quarterly (2012), p. 214; 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. 39. On the problems associated with the applicability of public interest measures in investment treaty arbitration see A. Kulick, *Global public interest in investment treaty arbitration*, Cambridge 2012, pp. 50-52; S. Schill, *International investment law and comparative public law – an introduction*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, pp. 6-7.

19 Interpretations rendered in investment arbitrations have influenced not only the decision-making in following disputes, but they have also influenced treaty-making. S. Schill, supra note 1, pp. 415-418.

20 In the context of the ECtHR, *amicus curiae* participation has been justified on the ground that a judgment may have an effect on the rights and obligations of everyone within the respondent state's jurisdiction. See A. Lester, *Amici curiae: third-party interventions before the European Court of Human Rights*, in: F. Matscher/H. Petzold (Eds.), *Protecting human rights: the European dimension – studies in honour of Gérard J. Wiarda*, Cologne 1988, p. 342. *Franck* calculated

Also, it is argued that there is a growing number of global interests whose representation cannot (or should not) be left to individual states. In these cases, *amici curiae* shall act as a link between the court and the public by (re)presenting the broader issues affected by the case.[21] In *Biwater v. Tanzania*, *amicus curiae* petitioners submitted that because the arbitration substantially influenced the 'population's ability to enjoy basic human rights … the process should be transparent and permit citizens' participation. In particular, the Arbitral Tribunal should hear from the leading civil society groups in Tanzania on these issues.'[22]

For these reasons, it is said that 'where the award can have deep impacts on such issues of general interest, it would be outrageous for the tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.'[23] The claim is that the affected public should be given a procedural tool to present its viewpoints in proceedings involving matters of public interest. Otherwise, the international court or tribunal may risk its legitimacy.[24] This departure from the doctrine of espousal rests on the belief that the state will (or cannot) represent the

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that the average amount of damages claimed in investment arbitration was about USD 343.4 million. See S. Franck, *Empirically evaluating claims about investment arbitration*, 86 North Carolina Law Review (2007), p. 58. G. Van Harten, supra note 18, p. 1 (The investment claims brought against Argentina in the aftermath of its financial crisis exceeded its financial reserves); F. Marshall/H. Mann, IISD, *Revision of the UNCITRAL Arbitration Rules: good governance and the rule of law: express rules for investor-state arbitrations required*, September 2006, p. 3, at: http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf (last visited: 28.9.2017); R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), p. 84.

21 L. Barker, supra note 13, p. 56.

22 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (hereinafter: *Biwater v. Tanzania*), Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 14.

23 A. Mourre, *Are amici curiae the proper response to the public's concerns on transparency in investment arbitration?*, 5 The Law and Practice of International Courts and Tribunals (2006), p. 266; M. Gruner, *Accounting for the public interest in international arbitration*, 41 Columbia Journal of Transnational Law (2003), p. 955; K. Hobér, *Arbitration involving states*, in: L. Newman/R. Hill (Eds.), *The leading arbitrators' guide to international arbitration*, New York 2008, Chapter 8, p. 155.

24 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 2; C. Brower, supra note 15, p. 347 ('[N]o legal regime can maintain legitimacy while ignoring the fundamental needs and values

public interest adequately (or as preferred by the *amicus curiae* applicant), because its primary goal is to win the case.[25] *Amicus curiae* briefs are 'expected to reduce adverse effects of [the parties' arbitration strategies] on the public good of the host State.'[26] The matter is of particular concern in the WTO where critics stress an additional readiness on the part of states to defend the interests of the industry sector at the expense of public interests and values.[27]

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of affected populations.'); 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 (2010), p. 38.

25 For many, G. Umbricht, supra note 3, p. 783 ('The fair representation by governments of every minority forming part of their constituency is a fiction.'); O. De Schutter, *Sur l'émergence de la société civile en droit international: le rôle des associations devant la Cour européenne des droits de l'homme*, 7 European Journal of International Law (1996), p. 407; D. McRae, *What is the future of WTO dispute settlement?*, 7 Journal of International Economic Law (2004), p. 11; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), p. 615 (Reasons why a party may not present an interest adequately include: limited relevance, difficulties in obtaining evidence, lack of resources, litigation strategy, de-politicization of a dispute.); 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. 284 (A state may try to avoid being perceived as anti-investor); R. McCorquodale, *An inclusive international legal system*, 17 Leiden Journal of International Law (2004), pp. 477-504; 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. 74-78.

26 T. Ishikawa, *Third party participation in investment treaty arbitration*, 59 International and Comparative Law Quarterly (2010), p. 398; A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii.

27 R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Berlin 2007, pp. 228-232. In US and EU law, private parties can force their governments or the EC to initiate WTO dispute settlement proceedings respectively. Further, private companies can influence national decision-makers informally. See B. Jansen, *Die Rolle der Privatwirtschaft im Streitschlichtungsverfahren der WTO*, 3 Zeitschrift für europarechtliche Studien (2000), pp. 293-305; J. Dunoff, *The misguided debate over NGO participation at the WTO*, 4 Journal of International Economic Law (1998), pp. 435-436, 441-448 ('[B]oth Kodak and Fuji had input into virtually every stage of WTO processes, including the initial consultations, the selection of panellists, the written submissions, the oral representations and the written responses to the panel's questions. In addition to these informal roles in these formal processes, Kodak and Fuji also attempted to shape the larger political context

Related hereto is the argument that, because at least factually proceedings before international courts extend beyond the parties appearing before them, international courts and tribunals do not only offer a private service to the parties, but execute a broader, public function.[28] Therefore, proceedings should be inclusive.

An issue that requires analysis throughout this contribution is what is the public interest justifying a broadening of the judicial function. The term public interest appears frequently in relation to *amici curiae*, in particular in investor-state arbitration, but it is rarely defined and remains vague. How do we define the public interest? Does it refer to the national interest based on which a certain measure was issued or should it be a general and internationally accepted interest? Are they the same? Can one speak of an international public at all, especially in the investment con-

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within which the WTO dispute resolution proceedings occurred.'); S. Charnovitz, *Participation of nongovernmental organizations in the World Trade Organization*, 17 University of Pennsylvania Journal of International Economic Law (1996), p. 351, FN 99 (He quotes a 1994 speech by then US-Trade Representative *Kantor*, who characterized the GATT panel process as 'star chamber proceedings that are making the most important decisions that affect the lives of all our citizens – especially in the environmental area – and there is no accountability whatsoever.' See M. Kantor, *Remarks on trade and environment at the global legislators' organisation for a balanced environment* on 28 February 1994. The US Congress responded by directing him to seek greater transparency at all WTO levels); A. Schneider, *Democracy and dispute resolution: individual rights in international trade organizations*, 19 University of Pennsylvania Journal of International Economic Law (1998), pp. 587, 594; J. Morison/G. Anthony, *The place of public interest*, in: G. Anthony et al (Eds.), *Values in global administrative law*, Oxford 2011, pp. 217, 229. Critical, M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, 5 World Trade Review (2006), p. 98.

28 R. Higgins, supra note 20, p. 95 ('International law is a facilitating discipline – its purpose is to assist in the achievement of an international stability that is consistent with justice and in the realisation of shared values.'); C. Brower, supra note 15, pp. 423-424 ('Arbitrators in investment treaty cases not only fulfil a function in settling the specific dispute at hand, but also are agents of the international community.'); S. Schill, supra note 1, p. 419; C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 223; G. Van Harten/M. Loughlin, *Investment treaty arbitration as a species of global administrative law*, 17 European Journal of International Law (2006), pp. 145-148. See, however, G. Aguilar Alvarez/W. Park, *The new face of investment arbitration: NAFTA Chapter 11*, 28 Yale Journal of International Law (2003), p. 394.

text?[29] One could argue that all cases involving state participation – thus, every 'international court case' – raises a public interest for they engage the state budget and concern the legality of the exercise of state authority. For the present purpose, this contribution views as pertaining to the public interest all those matters that extend beyond the mere parties to the dispute and affect an abstract local, national, or global constituency.[30] This admittedly broad concept allows for the inclusion of public national and international interests.

III. Legitimacy and democratization

With the growing number of disputes before an increasing number of international courts and tribunals since the early 1990, concerns have arisen over the legitimacy and democracy of international judicial decision-making. While this issue concerns all international courts and tribunals, it is

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29 For a consideration of the international community and community values, see A. Paulus, *Die internationale Gemeinschaft im Völkerrecht*, Munich 2001; 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. 9 ('[W]hat kinds of public interest are appropriate to be put before international tribunals, and who should decide that question? Who should be permitted to make representations in the public interest? Elected local councils? State agencies, such as environmental agencies established by the government of a State? International scientific bodies? Organisations with an explicit political agenda, such as Greenpeace or Amnesty International? You? Me? The Church of Scientology? And again, who decides?'); 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. 230.

30 M. Gruner, supra note 23, pp. 929-932 (It is a 'set of values and norms that serve as ends towards which a community strives.'). M. Benzing, supra note 12, p. 371 ('Community interests … are those which transcend the interests of individual states and protect public goods of the international community as a whole or a group of states.' [References omitted].). A private interest is understood as any interest that belongs to one person or a defined group of persons. See also Chapter 4.

discussed in particular in respect of the compulsory WTO dispute settlement system and investor-state arbitration.[31]

The literature on this issue is vast and continues to expand ranging from highly theoretical considerations to more practical accounts.[32] Matters are made more complex by diverging conceptions of legitimacy, a shift from consent-based to governance-based concepts of international law and the confluence of concerns over the political legitimacy of international subsystems with that of their (quasi-)judicial organs. This contribution only addresses concerns pertaining to adjudicatory legitimacy.[33]

On a basic level, legitimacy is seen as the justification for the exercise of public authority.[34] As a binding decision based on law by a third over a

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31 Regarding the WTO, see R. Reusch, supra note 27, pp. 40-124. ICSID awards can be enforced as judgments of the highest court at the place of enforcement, Article 54(1) ICSID Convention.

32 S. Schill, supra note 1, p. 6, FN 8 (Signs of the legitimacy crisis in investment arbitration are seen in the withdrawal of several Latin American states such as Bolivia and Venezuela from investment treaties and the ICSID Convention); A. Van Duzer, *Enhancing the procedural legitimacy of investor-state arbitration through transparency and amicus curiae participation*, 52 McGill Law Journal (2007), pp. 681-723; C. Forcese, *Does the sky fall? NAFTA Chapter 11 dispute settlement and democratic accountability*, 14 Michigan State Journal of International Law (2006), p. 315; S. Joseph, supra note 10, pp. 316-319. T. Ishikawa, supra note 26, p. 399; 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. 137; D. Prévost, *WTO Subsidies Agreement and privatised companies: Appellate Body amicus curiae briefs*, 27 Legal Issues of Economic Integration (2000), p. 287. The criticism of closed dispute-settlement proceedings relates to a larger debate on the lack of public participation in all areas of WTO activity, see R. Housman, *Symposium: democratizing international trade decision-making*, 27 Cornell International Law Journal (1994), pp. 699-747.

33 But see also A. von Bogdandy/I. Venzke, *In whose name? An investigation of international courts' public authority and its democratic justification*, 23 European Journal of International Law (2012), pp. 7-41; With respect to the political legitimacy of subsystems, see R. Reusch, supra note 27; R. Howse, supra note 10, pp. 496-497.

34 R. Wolfrum, *Legitimacy of international law from a legal perspective: some introductory considerations*, in: R. Wolfrum/V. Röben (Eds.), *Legitimacy in international law*, Berlin 2008, p. 6; A. Voßkuhle/G. Sydow, *Die demokratische Legitimation des Richters*, 57 Juristische Zeitung (2002), pp. 673-682. For this and other, including positivist definitions of legitimacy, see R. Reusch, supra note 27, pp. 35-36; H. Kelsen, *Principles of international law*, New York 1952.

(disputed) fact pattern, adjudication squarely falls within this category.[35] The legitimacy of adjudication is generally seen to depend on two pillars: the selection of an impartial, independent and knowledgeable adjudicator and the creation of an adequate procedure that permits participation of all those affected by a decision. In international law, in addition, traditionally legitimacy stems from a state's voluntary submission to a court's jurisdiction as expressed by the principle of consent.[36] If duly exercised, these pillars secure a final rational decision that is accepted by those addressed and affected by it.[37]

Legitimacy considerations with respect to *amicus curiae* address procedural and substantive legitimacy. Procedural legitimacy (or input legitimacy) demands that judges decide on the basis of the applicable law, give the parties adequate opportunity to argue their case, respect basic considerations of due process and fair trial and give those affected by a decision the opportunity to participate.[38] Substantive (or output) legitimacy relates to the quality of the decision rendered by an international court or tribunal.

The argument for a procedural legitimacy deficit builds on the same structure as the argument for representation of the public interest: international courts are increasingly called upon to determine the legality with international law of domestic regulatory measures on issues of general public interest in a binding and final manner.[39] Related hereto is the concern that these decisions often directly or indirectly affect entities without

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35 A. Voßkuhle/G. Sydow, supra note 34, pp. 674-675. On why the WTO dispute settlement system falls hereunder even though the DSB adopts the reports, see R. Reusch, supra note 27, pp. 61, 123-124.

36 R. Reusch, supra note 27, pp. 202-236.

37 D. Esty, *We the people: civil society and the World Trade Organization*, in: M. Bronckers/R. Quick (Eds.), *New directions in international economic law – essays in honour of John H. Jackson*, The Hague 2000, p. 92 ('The ongoing legitimacy of the WTO depends on the public perception that its decisions are based on sound logic, not whim or special interest pressures.'); G. Van Harten, supra note 18, p. 159.

38 R. Reusch, supra note 27, pp. 202-236; R. Wolfrum, supra note 34, p. 6; R. Howse, supra note 18, p. 42 (*Howse* argues that at a minimum level it suffices to establish publicity so that those affected can understand how they are affected and on what basis the outcome was achieved.); M. Slotboom, supra note 27, p. 99. See also N. Luhmann, *Legitimation durch Verfahren*, 2nd Ed., Frankfurt a.M. 1989.

39 R. Wolfrum, supra note 34, p. 6; A. von Bogdandy/I. Venzke, supra note 33, p. 31; B. Choudhury, *Recapturing public power: is investment arbitration's engagement of the public interest contributing to the democratic deficit?*, 41 Vanderbilt Journal

standing, hence, without the ability to defend their position in court.[40] Both *Rosenne* and *Brownlie* have called for a formal right of individuals to be heard in cases affecting their legal rights before the ICJ.[41]

There is an additional layer of concerns connected to the legitimacy of the adjudicators as the following statement by *Choudry* concerning investment arbitration shows:

> Public interest regulations are promulgated by elected officials to protect the welfare of the state's citizens and nationals. Thus, interference with these regulations by unelected and unappointed arbitrators is not consistent with basic principles of democracy. … [C]orrecting the democratic deficit … involves concepts of legitimacy, which requires the inclusion of core democratic values in the investment arbitration process. Thus, public participation in the decision-making process should be encouraged on the part of stakeholders whose interests may not be adequately represented by a member state.[42]

The view is that because adjudicators are so far removed from those they ultimately adjudicate upon (under novel concepts: individuals) and states increasingly transfer powers to international organizations (and thus potentially to international adjudication), international judges' democratic le-

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of Transnational Law (2008), p. 775; E. Levine, supra note 3, p. 205; T. Ishikawa, supra note 26, p. 399; J. Dunoff, supra note 27, pp. 733, 758 (A general contention is that WTO rules unduly restrict the regulatory capacities of states, which is particularly problematic if they affect the ability of states to enact laws that reflect the democratic will of their people); S. Joseph, supra note 10, p. 314; D. McRae, supra note 25, p. 21.

40 A. von Bogdandy/I. Venzke, supra note 33, p. 36.

41 S. Rosenne, *Reflections on the position of the individual in inter-state litigation*, in: P. Sanders (Ed.), *International arbitration – liber amicorum for Martin Domke*, The Hague 1967, reprinted in: S. Rosenne, *An international law miscellany*, Dordrecht 1993, p. 123; I. Brownlie, *The individual before tribunals exercising international justice*, 11 International and Comparative Law Quarterly (1962), p. 716 ('Even if the individual is not to be given procedural capacity a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure.' [References omitted]).

42 B. Choudhury, supra note 39, p. 782 and 807-808 [References omitted]. See also J. Atik, *Legitimacy, transparency and NGO participation in the NAFTA Chapter 11 process*, in: T. Weiler (Ed.), *NAFTA investment law and arbitration: past issues, current practice, future prospects*, New York 2004, pp. 136, 138; C. Tams/C. Zoellner, supra note 28, p. 225; D. Esty, supra note 37, p. 90; M. Laidhold, *Private party access to the WTO: do recent developments in international trade dispute resolution really give private organizations a voice in the WTO?*, 12 The Transnational Lawyer (1999), pp. 432-433.

gitimization, which is exercised through national election processes, is too remote to justify the exercise of authority without additional mechanisms of civic participation. Lack of broad public support, it is argued, may compromise the validity and the legitimacy of decisions.[43]

Amicus curiae participation is said to improve the acceptance and credibility of proceedings by guaranteeing public input and the adequate presentation of all of the interests involved.[44] By inviting *amici curiae* with a stake in one of the (unrepresented) issues to partake in disputes where global values clash, international courts and tribunals can increase proce-

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43 D. Esty, supra note 37, p. 89; R. Reusch, supra note 27, pp. 126-127. R. Howse, *How to begin to think about the "democratic deficit at the WTO"*, in: R. Howse (Ed.), *The WTO system: law, politics and legitimacy*, London 2007, pp. 57-75. For a definition of 'democratic values', namely inclusiveness, transparency and value pluralism, see S. Joseph, supra note 10, p. 316.

44 R. Higgins*, Remedies and the International Court of Justice: an introduction*, in: M. Evans (Ed.), *Remedies in international law*, Oxford 1998, p. 1; C. Chinkin/R. Mackenzie, supra note 32, p. 137; E. De Brabandere, *NGOs and the „public interest" – the legality and rationale of amicus curiae interventions in international economic and investment disputes*, 12 Chinese Journal of International Law (2011), pp. 85-113; C. Tams/C. Zoellner, supra note 28, p. 238; 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. 212. In the context of the WTO, see. G. Umbricht, supra note 3, p. 783; D. Esty, supra note 37, p. 90; R. Howse, supra note 18, p. 40 ('[E]ven from an internal perspective of effective 'regime management', there is an urgency to seek a new basis for the 'social legitimacy' of dispute settlement outcomes, a basis sensitive to the concern of critics or sceptics concerning the project of global economic liberalism that the whole undertaking of international trade law is tilted towards the privileging of free trade against other competing, relevant values of equal or greater legitimacy in themselves.'); N. Blackaby/C. Richard, *Amicus curiae: a 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. 269 ('Considering that public participation is at the heart of democratic processes, it is assumed that increased civil society participation will enhance the legitimacy and acceptance of the system.' [References omitted]. The basis of this argument is fragile. It presumes that the specific *amicus curiae* fulfils the requirements of a legitimate representative of public interests (see also Chapters 5 and 8)); A. von Bogdandy/I. Venzke, supra note 33, p. 29 ('[*Amici curiae*] may bridge the gap between the legal procedures and a global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalization that contribute to discussions and mobilize the general public.').

dural legitimacy.[45] *Crawford* and *Marks* see 'the vastly enhanced participation in recent years of non-governmental organizations at the international level [as] one indication of the pressures and possibilities for democracy in global decision-making.'[46] Similarly, then-WTO Director-General *Lamy* considered the admission of *amici curiae* a recognition of the importance of the views of civil society in WTO adjudication.[47] A group of Tanzanian and international NGOs argued as follows in their request to be admitted as *amici curiae* in *Biwater v. Tanzania*:

> Finally, the petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public, which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context.[48]

Further, the instrument is seen as a link between international courts and the individual.[49] The argument is that *amicus curiae* participation will inform the wider public of ongoing proceedings that may have a significant impact on the economy of their state and important public interests and, in

45 L. Boisson de Chazournes, supra note 11, pp. 333-336; F. Orrego Vicuña, *International dispute settlement in an evolving global society: constitutionalization, accessibility, privatization*, Cambridge 2004, p. 29.

46 J. Crawford/S. Marks, *The global democracy deficit: an essay on international law and its limits*, in: D. Archibugi/D. Held/M. Köhler (Eds.), *Re-imagining political community*, Stanford 1998, p. 83. See also S. Joseph, supra note 10, pp. 316, 327; R. Howse, supra note 43, pp. 57-75.

47 P. Lamy, *Towards global governance? Speech of 21 October 2005*, Master of Public Affairs Inaugural Lecture at the Institut d'Etudes Politiques de Paris, at: https://www.wto.org/english/news_e/sppl_e/sppl12_e.htm (last visited: 28.9.2017).

48 *Biwater v. Tanzania*, Procedural Order No. 5, 2 February 2007, ICSID Case No. ARB/05/22, para. 24. See also D. Esty, supra note 37, p. 93 (He goes further by requesting that NGOs should be granted permission to observe the parties' presentations to panels, as well as obtain immediate access to all written submissions.)

49 Three days after the panel's decision in *US–Shrimp* that it lacked power to accept *amicus curiae* briefs, then-US President *Bill Clinton* endorsed *amicus* participation in the WTO dispute settlement system: 'Today, there is no mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file '*amicus briefs*,' to help inform the panels in their deliberations.' Statement by H.E. Mr. William J. Clinton in Geneva on the Occasion of the 50th Anniversary of GATT/WTO, 18 May 1998, para. 108.

return, that *amici* will report the public's views back to the tribunal.[50] This may contribute to repealing notions of 'secret trade courts' that may force governments in the long run to seek other dispute resolution mechanisms. The admission of *amicus curiae* is presented as *sine qua non* for the continued existence of international judicial dispute settlement.

The substantive legitimacy of a decision is said to be enhanced by taking these arguments seriously and thereby rendering a more informed decision of better quality and free from error.

In short, *amicus curiae* is seen to improve adjudicatory legitimacy in the following ways: first, as an instrument to ensure procedural legitimacy by allowing those affected by a decision to become involved in the proceedings and as a tool to increase the public acceptance of international dispute settlement; second, as an instrument to increase the substantive legitimacy of a decision by providing the tribunal with all information necessary to render a fully-informed decision.

IV. Contribution to the coherence of international law

International law enjoys generally low levels of coherence because of its lack of a central legislature and its inter-subjective character. Often, courts

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50 E. Triantafilou, *Amicus submissions in investor state arbitration after Suez v. Argentina*, 24 Arbitration International (2008), p. 575 ('[A] transparent arbitral process allows citizens to monitor actively the conscientiousness of the government's representatives in protecting the rights of the public and ensuring the sound disbursement of public money.'); M. Brus, *Third party dispute settlement in an interdependent world: developing a theoretical framework*, Dordrecht 1995, pp. 229-230 ('Involvement of non-state actors is particularly suitable for the upgrading of the community interest through participation in informal decision-making. Their expertise, creativity and critical attitude is an incentive for states not to lose sight of the common interest.'). According to a study on NGO involvement in international law, NGO participation may promote legitimacy by way of monitoring the process and communicating its results to the relevant constituencies and by acting as a channel of information between decision makers and constituencies. See S. Charnovitz, *Nongovernmental organizations and international law*, 100 American Journal of International Law (2006), pp. 348-372. This view has found some reflection in environmental treaties. See *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/Conf.151/5/rev (1992); *Agenda 21*, UNCED, Annex II, UN Doc. A/CONF151/26/Rev (1992).

are given the role of 'agents of legal unity.'[51] The significant growth in number of international courts and tribunals since the early 1990 has raised concerns over an increasing fragmentation of international law in the absence of formal precedent and the lack of a coordinating judicial system.[52] Concerns are amplified by the fact that many courts form part of powerful subsystems of international law with potentially competing values.[53] The phenomenon as such has been analysed in depth elsewhere.[54] Of relevance for this contribution is the concern that different international

51 Y. Shany, *The competing jurisdictions of international courts and tribunals*, Oxford 2003, p. 114.

52 Rejecting the notion of an international judicial system, Y. Shany, supra note 51, pp. 104-110.

53 See Y. Shany, supra note 51, pp. 87-104, 113-114 (While we can speak of a system of international law from which no subsystem can isolate itself as a 'self-contained regime' if it wishes to fulfil its constituent's legitimate expectations and avoid being perceived as 'unduly biased towards a particular political agenda', there is no such correlating system with respect to international courts.).

54 The WTO Appellate Body in *US–Stainless Steel* found that it was obliged to follow earlier decisions due to its obligation under Article 3(2) DSU to ensure security and predictability in the WTO dispute settlement system. See *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (hereinafter: *US–Stainless Steel*), Report of the Appellate Body, adopted on 20 May 2008, WT/DS344/AB/R, p. 67, para. 160. See also *Saipem S.p.A. v. the People's Republic of Bangladesh*, Decision, 21 March 2007, ICSID Case No. ARB/05/07, para. 67 ('[The Tribunal] believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has 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 certainty of the rule of law.' [References omitted]); H. Lauterpacht, *The so-called Anglo-American and continental schools of thought in international law*, 12 British Yearbook of International Law (1931), p. 53. Regarding the proliferation of international courts and tribunals, see E. Lauterpacht, *Principles of procedure in international litigation*, 345 Receuil des Cours (2009), p. 527; J. Charney, *The impact on the international legal system of the growth of international courts and tribunals*, 31 NYU Journal of International Law and Politics (1999), p. 697; C. Brown, *A common law of international adjudication*, Oxford 2007, p. 16; C. Brown, *The cross-fertilization of principles relating to procedure and remedies in the jurisprudence of international courts and tribunals*, 30 Loyola of Los Angeles International and Comparative Law Review (2008), pp. 219-220; G. Hafner, *Risks ensuing from the fragmentation of international law*, in: International Law Commission, Work of its Fifty-Second Session, UN Doc. A/55/10, para. 143; International Law Commission, *Fragmentation of international*

courts or tribunals may arrive at diverging, even opposing decisions in cases with comparable or identical fact patterns.[55] The fear is that if this were to occur regularly, international law might lose its normative force, as well as compromise the credibility, effectiveness and legitimacy of international adjudication.[56] This has prompted calls for subsystems of international law to 'evolve and be interpreted consistently with international law' and for the courts pertaining to such subsystems to strive to ensure uniform application and interpretation of international law.[57] In this vein, courts are requested to give greater weight to the pertinent case law of other international courts and tribunals despite the absence of binding precedent in international law.[58]

By providing cross-references to and analysis of the case law and views of other international courts and tribunals, *amici curiae*, it is argued, can

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law: difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, 13 April 2006; R. Jennings, *The role of the International Court of Justice*, 68 British Yearbook of International Law (1997), p. 60; R. Higgins, *Respecting sovereign states and running a tight courtroom*, 50 International and Comparative Law Quarterly (2001), p. 122. Disputing that fragmentation is problematic, see 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 of International Investment Law and Policy (2008-2009), pp. 508-509, 516-521.

55 On these conflicts, which *Treves* calls jurisprudential conflicts, see T. Treves, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 NYU Journal of International Law and Politics (1999), pp. 809-821. Regarding parallel jurisdiction, see H. Sauer, *Jurisdiktionskonflikte im Mehrebenensystem: Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen*, Berlin 2008; Y. Shany, supra note 51.

56 L. Helfer/ A. Slaughter, *Toward a theory of effective supranational adjudication*, 107 Yale Law Journal (1997), pp. 374-375; S. Franck, *The legitimacy crisis in investment arbitration: privatizing public international law through inconsistent decisions*, 73 Fordham Law Review (2005), p. 1523. According to Kelsen, the principle of non-contradiction is part of the basic norm of a legal system, H. Kelsen, *General theory of law and state*, Cambridge 1949, p. 406.

57 A. van Aaken, *Fragmentation of international law: the case of international investment protection*, 17 Finnish Yearbook International Law (2006), p. 91. See also Y. Shany, *One law to rule them all: should international courts be viewed as guardians of procedural order and legal uniformity?,* in: O. Fauchald/A. Nollkaemper (Eds.), *The practice of international courts and the (de-)fragmentation of international law*, Oxford 2012, p. 15.

58 Y. Shany, supra note 51, p. 110.

inform the deciding international court or tribunal of the legal interpretation of a norm by other international courts or tribunals, encourage inter-judicial dialogue and draw attention to potential jurisprudential conflicts.[59] This, of course, presupposes willingness on the part of international courts and tribunals to take into consideration the decisions of other international courts and tribunals given the absence of *stare decisis*.[60]

V. Increased transparency

Most international courts and tribunals provide to the public, with varying frequency and at different times, information and documents on pending and concluded cases. In particular, investment tribunals and the WTO dispute settlement institutions are criticized for lack of transparency in their proceedings and decision-making despite efforts towards greater transparency.[61]

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59 *Mackenzie* and *Chinkin* consider it an option for an international court to submit *amicus* briefs on an issue of law it has decided to a court dealing with the same issue to avoid fragmentation. See C. Chinkin/ R. Mackenzie, supra note 32*,* p. 159; V. Vadi, *Beyond known worlds: climate change governance by arbitral tribunals?*, 48 Vanderbilt Journal of Transnational Law (2015), p. 1338; Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 821 (On *amici curiae*: 'Their goal, however, is to introduce public interest considerations into the decision – and indirectly, to impact the development of international law – rather than to affect the outcome of the specific case.').

60 This does not seem to be a problem. See E. Lauterpacht, supra note 54, pp. 527-528; J. Charney, *Is international law threatened by multiple international tribunals?,* 271 Receuil des Cours (1998), pp. 101-373. See also H. Lauterpacht, *The development of international law by the International Court*, London 1958, p. 14 ('The Court follows its own decisions … , because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and … because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.'). Less hopeful, N. Rubins, *Opening the investment arbitration process: at what cost, for what benefit?*, 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. 217.

61 D. McRae, supra note 25, p. 12 ('Lack of transparency is a critical issue for the credibility of the WTO dispute settlement system.'); C. Knahr/A. Reinisch, *Trans-*

The understanding of the term transparency varies. Here, the definition adopted by *Asteriti* and *Tams* is followed. Accordingly, transparency is the availability of information about the proceedings, whereas confidentiality describes the restriction of information about the proceedings to the parties. Correlatively, privacy describes limitation of access to the proceedings, whereas inclusiveness describes access to the proceedings to entities other than the parties.[62]

Investment tribunals specifically have come under pressure for 'obsessive secrecy' of proceedings resulting from the use of confidentiality-focused commercial arbitration rules in investment treaty arbitrations.[63] Critics have gone so far as to predict an end of investment arbitration due to its opacity.[64] Claims for increased transparency are justified on the same basis as those pertaining to the inclusion of public interest considerations.

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parency versus confidentiality in international investment arbitration – The Biwater Gauff compromise, 6 The Law and Practice of International Courts and Tribunals (2007), p. 97. See also J. Lacarte, *Transparency, public debate and participation by NGOs in the WTO: a WTO perspective*, 7 Journal of International Economic Law (2004), pp. 685-686 (He proposes alternative mechanisms, such as the creation of an Advisory Economic and Social Committee composed of NGOs, which would make recommendations on WTO reform to the membership. Alternatively, he favours a stronger involvement of parliamentarians.).

62 A. Asteriti/C. Tams, *Transparency and representation of the public interest in investment treaty arbitration*, in: S. Schill (Ed.), *International investment law and comparative public law*, Oxford 2010, pp. 787-816. A broader definition including opportunities for participation, awareness of and access to the dispute settlement process is proposed by L. Chin Leng, *The amicus brief issue at the WTO*, 4 Chinese Journal of International Law (2005), p. 86. See also N. Blackaby/C. Richard, supra note 44, p. 256.

63 J. Atik, supra note 42, p. 148; N. Blackaby/C. Richard, supra note 44, p. 253; T. Wälde, supra note 54, p. 550, FN 139. Of certain fame is a quote from a NYT article from A. De Palma, *NAFTA's powerful little secret: Obscure tribunals settle disputes, but go too far, critics say*, The New York Times, 11 March 2001 ('[Their] meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations changed. And it is all in the name of protecting the rights of foreign investors under the North America Free Trade Agreement.').

64 A. Mourre, supra note 23, p. 266 ('If the worries of the public are not properly addressed, States will step back from arbitration, and there is a risk that investors will, one day, be sent back to the old and ineffective mechanism of diplomatic protection.').

The instrument is presented as an agent of increased transparency together with other mechanisms, such as publication of judgments and awards.[65] In several investment arbitration cases, *amicus curiae* applicants opined that their participation would 'allay public disquiet as to the closed nature of arbitration proceedings.'[66] It is argued that enhanced *amicus curiae* participation may educate the public about international dispute settlement, which in turn may increase its acceptance.[67] Sporadically, doubts have been raised as to whether the instrument truly supports transparency. *Amici curiae* seek not merely to obtain information about the proceedings, but to participate in them. Given the amount of negative reactions this has generated in the WTO, *McRae* views *amicus curiae* as a roadblock to transparency.[68] In how far this is the case will be examined. Certainly, the instrument is dependent on transparency as the joint *amicus curiae* submission of the IISD and Earthjustice in *Methanex v. USA* shows. After the parties consented to open their proceedings to the public, the *amici curiae* realized that the respondent USA was defending the measures adopted against MTBE only on the basis of public health. They (unsuccessfully) petitioned the tribunal for permission to submit a post-hearing brief to argue that the measure also should be regarded as furthering environmental objectives.[69]

B. Presumed drawbacks

Despite its potential advantages, the admission of *amici curiae* to international proceedings entails risks. Especially states have expressed concerns

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65 Other tools to increase transparency include public registration of a case; publication of awards, submissions, decisions and case files; opening of hearings; and publication of interpretative notes. C. Knahr/A. Reinisch, supra note 61, p. 97.

66 *Methanex v. USA*, Decision of the tribunal on petitions from third persons to intervene as '*amici curiae*', 15 January 2001, para. 5. See also *UPS v. Canada*, Petition by the Canadian Union of Postal Workers and the Council of Canadians, 17 October 2001, para. 3 (ii).

67 G. Umbricht, supra note 3, p. 783; C. Tams/C. Zoellner, supra note 28, p. 237.

68 D. McRae, supra note 25, p. 17. Critical also C. Brower, *Structure, legitimacy and NAFTA's investment chapter*, 36 Vanderbilt Journal of Transnational Law (2003), pp. 72-73.

69 K. Tienhaara, *Third party participation in investment-environment disputes: recent developments*, 16 Review of European Community Law and International Environmental Law (2007), p. 240.

with regard to the concept. They fear *inter alia* additional practical burdens (I.); a curtailing of the parties' procedural rights (II); a politicization of disputes (III.); additional burdens on developing countries (IV.); unmanageable quantities of submissions (V.); and a denaturing of the judicial function (VI.).

I. Practical burdens

Amicus curiae participation could entail practical burdens on the disputing parties and the court.[70] The concerns are largely twofold: *amici curiae* can cause a considerable increase in costs resulting from the parties' need to review and possibly respond to briefs.[71] Further, *amici curiae* may cause a significant delay in the proceedings, as international courts and tribunals need to add additional procedures and accommodate the parties' right to comment. In extreme cases, courts may feel the need to conduct an additional round of submissions on the issues raised in an *amicus curiae* brief.

II. Compromising the parties' rights

States have expressed concern that *amicus curiae* participation may also affect their procedural rights and their position in the proceedings.[72] These concerns must be taken seriously, because the violation of fundamental procedural rights by a tribunal may affect the validity of a judgment, award or decision. International courts and tribunals must apply standards that will ensure that the enforcement of a judicial decision is not at risk.[73]

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70 E. Levine, supra note 3, p. 219.

71 WTO General Council, *Minutes of Meeting of 22 November 2000,* WT/GC/M/60, Statement by Mexico, para 51.

72 See also A. Bianchi, supra note 26, p. xxii ('[I]n certain particular contexts, the increasing involvement of civil society groups and professional associations can be perceived by the 'users' of judicial mechanisms as an undue interference, and, potentially, a disruptive element in the complex process of interest-accommodation that third party settlement inevitably entails.').

73 M. Kurkela/S. Turunen, *Due process in international commercial arbitration*, 2nd Ed., Oxford 2010, p. 1 ('Making certain the award is enforceable is one of the most central duties of the arbitral tribunal.'). A violation of equality of arms can

One concern is obvious: the presentation of submissions in favour of one party may risk tilting the delicate procedural equality of the parties. It will be shown later that virtually all international courts and tribunals permit *amicus curiae* submissions to argue for or against a party. Further, it is common practice before WTO panels, the Appellate Body, investment tribunals and the ECtHR that the parties endorse arguments made by *amici curiae* without formally adopting them as their own.[74] Referring to the intense public campaigning by the *amicus curiae* applicants in and outside the proceedings against the claimant in *Biwater v. Tanzania*, a water-privatization-related investment dispute, *Wälde* argued that the risk of material inequality is real: '*Amicus* briefs can … directly or indirectly impugn the investor or the social acceptability of the investor's conduct, without supplying evidence or being subjected to cross-examination.'[75] This can entail a substantial financial and time burden for the claimants, as they must defend themselves against the respondent *and* the *amicus curiae* in and out of the proceedings. The possible inequality created by this additional support may be occasional or, where *amici curiae* tend to support one of the sides, structural.

Moreover, international courts and tribunals have explicitly acknowledged an obligation to resolve disputes in a speedy manner.[76] This issue has frequently been thematized in WTO dispute settlement. Article 12(2)

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lead to annulment of an award pursuant to Article 52 ICSID Convention as a serious departure from a fundamental rule of procedure.

74 E.g. *Kress v. France* [GC], No. 39594/98, 7 June 2001, ECHR 2001-VI; *Glamis Gold Limited v. United States of America* (hereinafter: *Glamis v. USA*), Respondent's submission on Quechan application, 15 September 2005. The USA supported the admission of the Quechan's submission, which argued that the California and federal governments' measures did not violate the BIT.

75 T. Wälde, *Equality of arms in investment arbitration: procedural challenges*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements: a guide to the key issues*, New York 2010, p. 178 [Emphasis added]; A. Menaker, *Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration*, in: K. Yannaca-Small (Ed.), *Arbitration under international investment agreements*, New York 2010, pp. 145-147.

76 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase),* Judgment, 5 February 1970, ICJ Rep. 1970, p. 31, para. 27 ('[The Court] remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.'); B. Cheng, *General principles of law as applied by international courts and tribunals*, London 1953, p. 295 ('[There is a] public need that there

DSU determines that 'panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process.'[77] These obligations may be compromised if *amicus curiae* submissions are made and accepted late in the proceedings or if submissions are extremely long or numerous.

III. Politicization of disputes, de-legitimization and lobbyism

Many WTO member states in reaction to the admission of *amici curiae* expressed the concern that matters not addressed in the WTO Agreements such as the environment, social or labour issues would suddenly be discussed in the realm of dispute settlement proceedings and disrupt the carefully negotiated trade system, provoke a clash of legal cultures and create additional burdens for already under-resourced developing countries.[78] Faced with hundreds of letters and submissions from individuals and non-governmental entities in *Nuclear Weapons* – which had been brought to the ICJ by the General Assembly after intense lobbying by NGOs – *Judge Guillaume* expressed his discontent by arguing that states and intergovernmental organizations required protection against 'powerful pressure groups which besiege them today with the support of the mass media.'[79]

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should be an early settlement of all disputes …, not to mention the consideration that time-limits once set should in principle be observed.'); A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 32.

77 See also *US–Shrimp*, Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 105; *United States – Tax Treatment for "Foreign Sales Corporations"* (hereinafter: *US–FSC*), Report of the Appellate Body, adopted on 20 March 2000, WT/DS108/AB/R, para. 166 ('The procedural rules of WTO dispute settlement are designed to promote … the fair, prompt and effective resolution of trade disputes.').

78 WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Brazil, para. 46 ('[T]he dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism.'); WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by Costa Rica, para. 70; G. Umbricht, supra note 3, pp. 773, 781, 787-788 (He considers the debate partly a clash of legal cultures. But this does not explain why except for the USA and the EU all WTO members have rejected *amicus curiae*.).

79 *Legality of the Threat or Use of Nuclear Weapons* (hereinafter: *Nuclear Weapons*), Advisory Opinion, 8 July 1996, Sep. Op. Judge Guillaume, ICJ Rep. 1996, p. 287.

The matter is exacerbated by transparency measures, which may prompt disputing governments to emphasize their national (protectionist) interests and refute attempts at negotiated settlements in an effort to save face and secure constituents' votes in the next national elections.[80] *Brühwiler* argues that this concern cannot be attributed to *amicus curiae*, because it is not the *amicus* submission that politicizes the dispute settlement system. The subject matter of the dispute attracts *amici curiae*.[81] Nonetheless, the information contributed by an *amicus*, as well as the manner in which it is presented may put a spotlight on politically sensitive aspects of the dispute which the parties did not intend to bring before the international court or tribunal (and which may not fall under its material jurisdiction).

Related hereto is the concern that the instrument further delegitimizes rather than legitimizes international dispute settlement.[82] It is said that especially financially powerful *amici curiae,* including foreign governments with different policies, might derail the proceedings with a hidden agenda. It is no secret that NGOs and other entities seek to push their own agendas through *amicus curiae* participation. Cases are chosen not solely for the interests engaged, but for the impact (and other benefits) *amici curiae* calculate generating through their participation.[83] Many NGOs do not seek to defend a public interest or common good, but an exclusive interest held by a few. Merely by powerful appearance and the presentation of 'the' (alleged) public interest, international courts and tribunals may be captured by the interest-groups' own interests without these interests necessarily

80 P. Nichols, *Extension of standing in World Trade Organization disputes to non-government parties*, 17 University of Pennsylvania Journal of International Economic Law (1996), p. 314 (Arguing that granting of standing, as a stronger measure, would expose international dispute settlement to protectionist pressures, especially from interest groups.).

81 C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 376.

82 Some argue that *amici curiae* should not be burdened with any additional requirements given their awareness raising function, which, in the view of some, is separate from representation. Others, in turn, demand that *amici* fulfil a set of criteria and doubt that *amici curiae* can act as legitimate representatives on the international level. See P. Spiro, *Accounting for NGOs*, 3 Chicago Journal of International Law (2002), pp. 161, 163; J. Dunoff, supra note 27, p. 438.

83 J. Cassel, supra note 4, pp. 113, 115; J. Viñuales, supra note 9, p. 75. Private entities dependent on public financing typically compete for public support. See S. Charnovitz, supra note 27, p. 363.

equalling those of the group they claim to represent.[84] Further, 'certain interests [may] exert disproportionate influence.'[85] Commentators agree that this risk is one pertaining largely to NGOs and their frequent lack of accountability and representativeness including towards the community whose values and interests they purport to represent.[86] *Bolton* even argues that 'the civil society idea actually suggests a "corporativist" approach to international decision-making that is dramatically troubling for democratic theory because it posits "interests" (whether NGO or businesses) as legitimate actors along with popularly elected governments.'[87] And *Blackaby* and *Richard* argue in relation to the admission of an US-based *amicus curiae* in *Biwater v. Tanzania*:

> The representative character and the source of the legitimacy of civil society groups seeking to submit *amicus curiae* briefs appear to be a common assumption. Yet the assumption may be flawed: how is, for example, a Washington-based NGO representative of Tanzanian civil society, and how is it best placed to advocate the interests of the Tanzanian people? Surely the state-party to the arbitration, if democratically elected, has far more legitima-

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84 J. Coe, *Transparency in the resolution of investor-state disputes – adoption, adaptation, and NAFTA leadership*, 54 Kansas Law Review (2006), p. 1363, FN 134. See also M. Schachter, supra note 5, pp. 116-117 ('As an advocacy mechanism, [*amicus curiae*] is generally less expensive than lobbying efforts or the mounting of an extensive publicity campaign. *Amicus* participation is also less costly than the initiation of a separate lawsuit by the interested party.').

85 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. 130.

86 C. Brower, supra note 68, p. 73 ('[M]any NGOs have very specific agendas and are not accountable to their own members, much less to the general public.' [References omitted].); R. Keohane, *Global governance and democratic accountability*, in: R. Wilkinson (Ed.), *The global governance reader*, London 2005, p. 148 ('[NGO's] claims to a legitimate voice over policy are based on the disadvantaged people for whom they claim to speak, and on the abstract principles that they espouse. But they are internally accountable to wealthy, relatively public-spirited people in the United States and other rich countries, who do not experience the results of their actions. Hence, there is a danger that they will engage in symbolic politics, satisfying to their internal constituencies but unresponsive to the real needs of the people whom they claim to serve.').

87 J. Bolton, *Should we take global governance seriously?*, 1 Chicago Journal of International Law (2000), p. 218.

cy to represent its constituents than unaccountable (and sometimes foreign) NGOs?[88]

In the WTO and investment arbitration, the concern over interest capture appears to be amplified by the fact that some view NGOs as striving to inscribe intrusive labour and environmental standards into the rule-book to reduce trade liberalization and the amount of foreign direct investment in developing countries.[89] Indeed, NGOs have publicly argued that *amicus curiae* participation before international courts and tribunals is an effective way to create publicity for the issues on their agenda and to push for novel interpretations.[90] In addition, it is feared that *amici curiae* may be partial towards one of the parties having received financial or other support from them, or that they lack the necessary expertise and experience regarding the issues commented on.

IV. Overwhelming developing countries

Another concern, which is mainly held by developing countries, is that most *amicus curiae* participants are well-funded Western non-governmental organizations.[91] It is assumed that they will largely oppose arguments presented by less developed or less affluent countries creating additional burdens for them and thereby deepening the structural inequality between the parties.[92] *Marceau* and *Stilwell* argue in respect of WTO practice:

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88 N. Blackaby/C. Richard, supra note 44, p. 269 [Emphasis added and references omitted].

89 P. Ala'ï, *Judicial lobbying at the WTO – the debate over the use of amicus curiae briefs and the U.S. experience*, 24 Fordham International Law Journal (2000), pp. 62-94.

90 J. Cassel, supra note 4, p. 116 ('A further reason why CIEL has chosen to petition the IACHR is that CIEL believes that such petitions can create publicity – and therefore increased awareness – of the link between human rights and the environment.').

91 H. Pham, *Developing countries and the WTO: the need for more mediation in the DSU*, 9 Harvard Negotiation Law Review (2004), pp. 350-351 (For developing countries, *amicus curiae* participation is one of the three most problematic issues concerning the DSU reform.).

92 S. Joseph, supra note 10, p. 321; D. McRae, supra note 25, p. 12; B. Stern, *The emergence of non-state actors in international commercial disputes through WTO Appellate Body case-law*, in: G. Sacerdoti et al. (Eds.), *The WTO at ten: the contribution of the dispute settlement system*, Cambridge 2006, p. 382 (*Stern* worries

NGOs participating as *amici* have often represented, directly or indirectly, commercial interests. This fact concerns many WTO members, which believe that participation of *amici* will further shift the balance of WTO dispute settlement towards developed countries, their NGOs and their multinational corporations.[93]

V. Unmanageable quantities of submissions

Another concern is that international courts and tribunals will be flooded by numerous submissions many of which will not be of any assistance, but instead will hinder the court or tribunal in the exercise of its judicial mandate. This was one of the reasons for the ICJ's refusal to accept *amici curiae* in *South West Africa* (see Chapter 5).

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that some states could take advantage of *amicus curiae*: 'Even among the countries of the North, the unlimited acceptance of *amicus curiae* briefs would probably favour, in particular, the larger international NGOs, most of which would appear to be of American origin, as well as the extremely well-organized and powerful US lobbies. ... [I]t seems very likely that if there were unlimited authorization to file *amicus curiae* briefs, the big winner, in terms of relative influence, would be the United States.'). However, see C. Brühwiler, supra note 81, p. 370 ('In cases touching upon environmental or public health issues, *amici curiae* can indeed be termed as foes of developing countries – meaning their governments – as NGOs operating in these fields have defended conservatory policies they consider necessary, but which violated WTO agreements. At the domestic level, however, the same entities regularly represent interests that conflict with their government's programme: these NGOs engage for global issues and are not mere advocates of any governments.' She admits that the majority of *amicus* submissions stems from NGOs situated in developed countries.). See WTO General Council, *Minutes of Meeting of 22 November 2000,* WT/GC/M/60, Statement by Costa Rica, para. 70; WTO General Council, *Minutes of Meeting of 22 November 2000*, WT/GC/M/60, Statement by India, para. 38 ('[T]he Appellate Body's approach would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.').

93 G. Marceau/M. Stilwell, *Practical suggestions for amicus curiae briefs before WTO adjudicating bodies*, 4 Journal of International Economic Law (2001), p. 180 [References omitted]. See also R. Mackenzie, *The amicus curiae in international courts: towards common procedural approaches*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 300.

VI. Denaturing of the judicial function

This concern pertains to the separation of powers and the role of the judiciary. Courts are seized to decide concrete disputes. The participation of *amici curiae*, especially if pushing for the consideration of a broad public interest, could inject a legislative notion into the process.[94] In addition to having to decide the dispute between the parties, an international court or tribunal may suddenly feel pressured to accommodate the – possibly heterogeneous – interests of the public. As a result, a court might try to balance an unquantifiable number of interests, much like a legislature, and thereby lose sight of the parties before it. This risk is amplified on the international level given the absence of an international legislature to counterbalance judicial activism. While it may be valuable for a court to be aware of the broader implications of its decisions, it is questionable if the adjudication of such implications falls under its mandate. Further, the sphere of governmental responsibilities generally entails – also when appearing as a party or as an intervener (or in another capacity) – calling attention to public interest considerations.

C. Conclusion

The dramatic growth of international courts and tribunals and the ever-increasing number of international disputes has placed international adjudication in the spotlight. *Amicus curiae* participation and all the expectations and concerns related to it must be seen as a consequence of this expanding success.

The extent to which many of the above-outlined expectations and drawbacks materialize is largely a result of the content and regulation of *amicus curiae*. These, again, often mirror the initial reception of *amicus curiae* before each of the international courts and tribunals reviewed. The following Chapter therefore addresses *amicus curiae* participation from a historical viewpoint.

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94 Regarding *amicus curiae* participation before US courts in the 1960, *Barker* noted that: 'How groups bring issues to the court is strikingly similar to the way in which they bring issues to the legislature. … Just as group participation injects a more popular and majoritarian characteristic into the legislative process, it does the same for the judicial process.' see L. Barker, supra note 13, p. 62.