

**THE QUEST FOR THE HOLY GRAIL OF SOCIAL JUSTICE: SUBSTANTIVE &
PROCEDURAL LAW PROVISIONS FOR AMICUS CURIAE IN INVESTOR-STATE
ICSID ARBITRATION LAW & PRACTICE**

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The Holy Grail of ICSID Arbitration is social justice. Amicus Curiae is the Grail Castle that holds the sacred chalice of ICSID's salvation. This paper comments on both the procedural and substantive law of amicus curiae submissions in Investor-State arbitrations. Issues of human rights and public interest that arise in these disputes must be addressed through an increase of amicus submissions whilst still protecting provisions for confidentiality. Only by identifying matters that are highly relevant to the public interest that normally would not be addressed (either in the dispute or elsewhere) can amicus curiae be used. It is incumbent upon arbitration tribunals to allow these issues to be raised in connection to the dispute so that the procedural and substantive requirements to file leave for amicus curiae can be undertaken. The principle of amicus curiae serves as the foundation for social justice in ICSID arbitrations.

I INTRODUCTION – THE WASTELAND: INTERNATIONAL INVESTMENT
ARBITRATION AND SOCIAL JUSTICE

Our tale opens with the wasteland; a heavy oppressive despair fills the air. Stagnation, doom and ruin have taken hold. The Fisher King suffers from a

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mysterious wound, whose origins have been obscured by the cruel passage of time. Our young and innocent hero, Perceval the Knight, finds himself in the Fisher King's castle, witnessing an extraordinary apparition; a lovely maiden passes before him with a Chalice, from which there falls three droplets of blood. Marvelling at the wonders before him, Perceval is rendered silent, precisely at the time when it is the most urgent to question his vision.¹ But all is not lost. The question that Perceval should have asked when faced with the wasteland, and would have brought salvation: "what is the true nature of the Holy Grail" is being asked now. For it would have been found that the Holy Grail is that which would restore everything to its rightful state. Herein, the question has been answered. The Holy Grail of ICSID arbitration, of course, is justice, and it is through our Sir Perceval, the friend of the Fisher King's Court- the *amicus curiae* who on the quest for salvation reaches the Grail castle and thereby brings about salvation. The idea that international investment arbitration is connected to, and can promote social justice is astonishingly, still debated widely.² Developments in recent decisions to allow *amicus curiae* in investment tribunal have led to considerable and extensive academic discussion, particularly in regards to the overall transparency and questions of procedural fairness of the decision making process.³ These widespread debates revolve around two main principles central to ICSID arbitrations. Only when Sir Perceval conquers these demons on the path to Hell can he reach the Grail Castle.

A *The Battle of Competence*

Many were the battles that our Hero, Sir Perceval, had to fight to reach the Grail Castle. One of these concerns the principle of *compétence de la compétence*. For

¹ There are several versions of the Grail legend. In Lupack, Alan, Oxford Guide to Arthurian Literature and Legend, 2005: "As he continues his journey to his mother, he meets a man fishing, the Fisher King, who offers him hospitality. In his castle, Perceval learns that the Fisher King suffers from a wound, and he witnesses the Grail procession: a young man carries a lance with a drop of blood falling from its tip; he is followed by two attendants carrying a candelabra; then a young lady passes by carrying a grail, which causes 'such brilliant illumination' that 'the candles lost their brightness just as the stars and the moon do with the appearance of the sun' (379); she, in turn, is followed by a woman carrying 'a silver carving platter' (379). Through all of this, Perceval, remembering Gornemant's advice, remains silent even though he is curious about what he sees. Perceval's childish insistence early in the romance on asking a series of questions 'contrasts strikingly with his failure to ask the single question which would have saved the Fisher King' (Lacy 111)."

² James Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice' in Jackson J. (General Editor), Pierre-Marie Dupuy, Francesco Francioni, Ernst-Ulrich Persmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 396: "There is great political, social, and scholarly legal debate about the extent to which international economic law (IEL) rules take into account broader social justice concerns."

³ Ibid 401.

example, “In *Biloune*,⁴ the tribunal stated that while the state conduct in question could constitute a violation of fundamental human rights, the tribunal lacked jurisdiction to address human rights issues because its jurisdiction was limited to commercial disputes.”⁵ The importance of arbitral tribunals to have the competence to address issues related to international public law when they arise has been previously debated by scholars. However, it is argued herein that if issues concerning human rights are implicated in a dispute, then it is necessary for the tribunal to address them. Arbitration tribunals are capable of addressing human rights situations that impact entire communities. Expanding arbitral tribunal competence to address this must be part of the reform of the substantial law dealing with *amicus* submissions in disputes that raise questions of public interest, it is clear that there is an opportunity for a tribunal to address human rights issues because tribunals are frequently faced with important public interest issues. To deny that Investor-State arbitrations can have human rights dimensions and to deny that arbitration can further human rights is a great loss of justice to the general public and to disadvantaged communities. It is argued herein that disputes arising from Investor-State contracts do have a significant role to play in bringing to light human rights concerns and as such have the power to bring about social justice to either disadvantaged communities or those impacted by other public interest factors, for example disputes dealing with basic resources such as water, *inter alia*. Landmark ICSID cases support this argument; empirical evidence has demonstrated Investor-State Investment contracts, and by default, disputes and arbitrations thereof, play an important role in affecting the economy, quality of life and as a result, the human rights issues tied to those factors. Investor-State Arbitrations have far reaching effects and current scholarly debates ignore empirical evidence to this end.

B The Battle of Confidentiality

Although, “commentators and civil society groups have called for increased public involvement in investment arbitration proceedings, in order to incorporate broader policy considerations into the dispute resolution process and add a measure of transparency”⁶ it is argued herein that it is not necessary to involve the public nor to disrupt the confidentiality of arbitration proceedings in order to allow for *amicus curiae*. The attorney or outside expert invited by the arbitral tribunal can be requested to maintain

⁴ *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (1989) 95 ILR 184.

⁵ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties. Standards of Treatment* (Kluwer Law, 2009) 253; see *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (1989) 95 ILR 184.

⁶ Eugenia Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’ (2010) 29(1) *Berkeley Journal of International Law* 200-24, 200.

confidentiality and can address the arbitral tribunal under the confidentiality provisions that bind all other participants, outside of the gaze of public scrutiny, and before the arbitral tribunal takes its impacting decision. The confidentiality and privacy provisions of arbitration proceedings are not *prima facie* a bar against *amicus curiae*. Indeed, the UNCITRAL Rules provision to obtain consent for third-party observance is standard. It is identical to that of the courts, i.e. consent of both parties must be obtained. It must be kept in mind that arbitration requires confidentiality and a delicate balance between investor rights and broader public policy concerns must be adhered to in such a manner so as not to breach the confidentiality of the parties. Names and details can be withheld from the general public. Some reasoning by an arbitrator as to how an arbitral tribunal reached its decision must be given in order to give voice to broader public interest and human rights implications. International Investment Arbitration laws, rules and institutions have been motivated by the negative aspects inherent in Investor-State arbitrations.⁷ The very process of informing the parties of the possibility of inviting *amicus curiae* to brief the arbitral tribunal creates an opportunity for higher awareness of human rights obligations under BITs.⁸

II SIR PERCEVAL, THE FRIEND OF THE FISHER KING'S COURT: THE PRINCIPLE OF THE *AMICUS CURIAE*

Sir Perceval, our hero, the Knight, is the Friend of the Fisher King's Court. It is he who must reach the Grail Castle, for the entire salvation of the kingdom depends on the fulfilment of his noble quest. The well established legal doctrine of *amicus curiae* is the logical nexus that ties legal education, social justice, human rights, economic sustainability and alternative dispute resolution together. The early development of the principle of *amicus curiae*, largely through the US Courts,

⁷ Ibid 3; "International investment regimes have in large part gained popularity due to historical investor concerns about 'being subject to arbitrary and discriminatory treatment by developing-country governments'".

⁸ Indeed, an *amicus curiae* submission is not just for the voice of the underrepresented but also a powerful educational tool. It is the State that normally has recourse as well as the duty to address and correct human rights and social justice issues and bring about policy reform. An arbitration proceeding, in addition to balancing the needs of an investor in the face of a potentially unfair government action can also become a forum for social justice and human rights education and good governance in terms of the public interest issues impacting communities that arise as a result of a dispute. An *Amicus* submission is an opportunity to bring out the best from both sides, especially from the State. It must be remembered that parties to Investor-State disputes are, on one side of the dispute, high government officials or agents of State governments; people who, if they given an opportunity to become aware of and well versed in social justice issues and the public interest implications of their dispute could, in future, act as agents for furthering human rights advocacy within their governments, as well as influencing policy.

began prior to the year 1667.⁹ It has a long and distinguished history as an American institution whilst having been subsequently adopted by other national legal systems.¹⁰ *Amicus curiae* submissions have been the means through which national and international tribunals and courts have accepted interventions by third parties not directly involved in the proceedings.¹¹ The use of *amicus curiae* has become so widespread that:

At the international level, the European Court of Human Rights, the Inter-American Court of Human Rights, the European Court of Justice, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the World Trade Organisation Dispute Settlement Body, and NAFTA and ICSID arbitration tribunals have all accepted *amicus* submissions from non-governmental bodies or independent experts.¹²

Moreover, in terms of bilateral investment treaties under ICSID rules, a number of these tribunals have made determinations regarding *amicus* submissions.¹³ *Amicus curiae* submissions that argue for Human Rights are the bridge between International Investment Arbitration and social justice. Although recently the debate has widened to include the Human Rights of investors when breached by expropriation, the Human Rights dimension extends beyond investors' rights or governments and this paper seeks to address local communities' concerns that are affected by investments, for example:

Above and beyond other IEL rules, there appears to be an even stronger rationale for raising human rights issues in the context of investment arbitration, which is a process by which investors are specifically enforcing their property rights. Seen through a rights-based paradigm, there are balancing rights-based claims that states need to take into account in order to ensure that they are protecting the rights of their peoples to essential services such as water, or vulnerable or otherwise disadvantaged groups (for example, indigenous peoples). These are subjects which potentially engage human rights norms and standards set out in international human rights treaties and many national constitutions. Increasing numbers of academic commentators, UN Agencies, and NGOs have picked upon the human rights dimensions of many international investment cases.

III THE PATH TO THE GRAIL CASTLE: THE WASHINGTON CONVENTION AND THE HIGHWAY TO HELL

The increasingly wide gap between Law and Practice in the use of *amicus curiae* in arbitration tribunals is the sole reason that *amicus curiae* is not used as frequently as

⁹ Harrison, above n 2, 400.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 400-1.

¹³ Ibid 403.

it should be and why the state of social justice in ICSID is seen as a wasteland by some scholars. An amendment to the Washington Convention will make sure that our hero, Sir Perceval, makes it all the way to the Grail Castle, otherwise the risks of being waylaid off the Quest and lost in an unknown forest of injustice are very high indeed. Although both NAFTA and ICSID rules have been changed in order to formally institutionalise the procedure by which tribunals should decide upon whether to accept *amicus curiae* submissions¹⁴ or not, the actual practise of the aforementioned is fraught with reluctance to do so. It is argued herein that the *lacunae* between the law of procedure governing the uses of *amicus curiae* and the actual practise is one of substantive law, given especially that there are serious obstacles that lessen its use or impact on decisions by arbitral tribunals. The purpose of this section is to bring to light the obstacles that prevent tribunals from pursuing *amicus* submissions more frequently.

Investor-State Commercial and Investment Arbitrations are unique compared to those arbitrations conducted exclusively between States or between non-State parties. Investor-State arbitrations, by their intrinsic properties, are different from International Commercial Arbitrations.¹⁵ Investor-State arbitrations raise broad questions of public international law by their inherent nature. The implications issues raised by parties and Tribunals of Investor-State Arbitrations nearly almost always, by default, have broad consequences¹⁶ in the area of public international law; namely issues concerned with sovereign immunity, state sovereignty, and human rights. Indeed, the implications are staggering and have wide-reaching effects. It is argued also that even though the Washington Convention is silent on public policy, the way Sir Perceval was silent in the face of the apparition, public policy is an automatic aspect of dealing with a State. It has even been argued that, “the Investor-State dispute resolution system is ‘transfer[ring] decision-making from the national to the international level.’”¹⁷ An over concern with upholding a highly conservative view of State Sovereignty functions at the expense of legitimate global and international humanitarian concerns, either in regards to human rights, environmental protection, and investment protection. It is not so much a question as

¹⁴ Ibid 404.

¹⁵ Above n 5, 6: “Unlike commercial arbitration, which ordinarily involves disputes affecting two private contracting parties, State-Investor arbitration frequently concerns the public service sector, such as water, oil and gas, or waste management, and implicates ‘government regulation aimed at the protection of public welfare [such as] human rights, health and safety, labour laws, [or] environmental protection.’”

¹⁶ Ibid 1: “The controversy stems from the fact that while arbitration is traditionally a largely confidential and private dispute resolution mechanism, the involvement of a State in the investment context can lead to arbitral decisions which affect a significantly broader range of actors than the two parties to the dispute”.

¹⁷

For a well research treatise on the subject, see: Mary B Ayad, ‘Investor Risks due to ‘Sovereign Immunity Pleas in Court Rulings on Arbitral Award Enforcement of MENA-FI Investments can be Mitigated via a Harmonised International Commercial Arbitration Law Code’ (2010) 11(5) *Journal of World Investment and Trade*.

eroding State sovereignty as it is requesting States to consider a more trans-national public policy: “Choudhury, for instance, expresses the following concern: ‘[t]he growth in investment arbitration has also extended the powers of the international bodies governing these disputes. In particular, the arbitrators governing these disputes are now regularly reviewing domestic public interest issues due to their expanded role. In fact, in some cases arbitrators are effectively striking down national regulations.’”¹⁸ This is not necessarily a bad thing. If the national legislation is in contradiction with the Constitution of that State, this is in line with the arbitrator’s duty to apply the law to the dispute. ‘The Law’ would have to be that of the Constitution in the case of a contradiction between national legislation and the Constitution. If the national legislation is in contradiction with a treaty pertaining to a dispute, or in contradiction to the UNCITRAL Rules, or other Rules, the arbitrator is still acting within legally prescribed boundaries, within his or her competence and jurisdiction because if the Treaty or UNCITRAL or other Rules have been signed and ratified by the State, they are to be considered as national law, normally subordinate only to the Constitution in the event of a contradiction, and as such are legally binding above and beyond other conflicting legislation that does not take into consideration the legally binding nature of signing and ratifying Treaties, the UNCITRAL or other rules. Moreover, not all national legislation supports a transnational public policy. It may reflect narrow parochial state interests. It may be against human rights provisions that were signed and ratified by the State in question and it may simply be an overuse of the plea of sovereign immunity to escape from these legally binding *international* obligations, if signed and ratified. The arguments against arbitral jurisdiction can also take a different form. “Some academics have gone as far as describing international investment arbitration as a developing species of ‘global administrative law’: they suggest that investment arbitration obligates host states to arbitrate disputes which stem from sovereign acts, and thus function as a control mechanism over the exercise of government authority. It has therefore been argued that ‘investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration.’”¹⁹ This argument has merit, but conversely, first, it is a faulty premise to suggest that a state acting commercially with a commercial actor is obligated to ‘arbitrate disputes which stem from sovereign acts’, because it is a commercial act. There is a well established distinction in international public law between a commercial act, *acta jure gestionis* and a State act, *acta jure imperii*. That investment arbitration only ‘obligates host states to arbitrate disputes’ and thus ‘functions as a control mechanism over the exercise of government authority’, is a faulty premise for the reason that a State, acting as a State in its fully sovereign rights, signs a Treaty or Contract with an arbitration clause, by its own consent, obligating itself, and as an act of its own sovereignty. The obligation is by chose and to conflate governmental authority with irresponsibility is a dangerous matter in public international law as well as in private international law. Although the reality is more complex, this fine distinction between *acta jure imperii* and *acta jure*

¹⁸ See Ibid 6

¹⁹ See Ibid 6.

gestionis must be maintained, together with the understanding that the international system is based on, and must continue to be based on consent and cooperation, by State players who are first amongst equals.

Hence, these types of arbitrations are important forums for addressing and resolving those public interest issues that arise within an arbitration proceeding. There is an ethical obligation for the tribunal to acknowledge the existence of these issues, and to articulate a response to them, in its capacity of adjudicating the dispute, if for no other reason than to allow the possibility for *amicus curiae*. The far reaching implications of certain issues raised within a confidential²⁰ Investor-State arbitration opens the door both for the requirement and the opportunity for *amicus curiae*. In this context *amicus curiae* can be used bring to light those issues involving human rights as a result of a potential or actual arbitral tribunal decision. By analogy, procedurally, the precedent of the use of *amicus curiae* before a national court, in which an issue must have been raised first by one of the parties' counsel in the course of litigation before an *amicus curiae* on that issue can be expounded, it then follows that within an arbitration proceeding it is incumbent on the arbitrator to permit counsel on either side to raise potential issues with broader public interest implications. This fact alone does not necessitate that the entire process of confidentiality be undermined by arbitration tribunals, but hedges future risk that if there are issues related to human rights and broader public policy concerns that they will be swept under the carpet. Thus: "First, investment arbitral proceedings frequently rely on the same procedural rules which govern commercial arbitration and contain certain privacy and confidentiality rights. For instance, the UNCITRAL Rules, which are frequently used in investment arbitration disputes, ensure the parties' rights to privacy by guaranteeing in-camera proceedings without access by third parties unless the disputing parties consent otherwise. The rules (sic) also restrict the publication of any awards without the parties' consent. Although the question of whether there is a general duty of confidentiality which prohibits access to documents remains unsettled, arbitral panels proceeding under the UNCITRAL rules (sic) tend to accept parties' rights to prohibit third-party access to relevant documents by express agreement. There are also similar privacy and confidentiality rights in the investment-specific ICSID regime. For instance, the ICSID Convention disallows publication of the award without the consent of the parties, while the ICSID Rules prohibit attendance of third parties at arbitral hearings without the parties consent. As such, the institutional rules and the consent-based nature of arbitration have traditionally provided disputing parties with the advantage of fashioning investment arbitration proceedings to preserve privacy and

²⁰ Above n 6, 204; One of the most important and attractive feature of arbitration is "[t]he implication . . . that what proceeds in the arbitration will not only be kept private between the parties but will remain absolutely confidential.' This concept of privacy and confidentiality originates primarily from the foundational underpinnings of international commercial arbitration, but also has to a considerable extent been translated into the investment context."

confidentiality.”²¹ This admission of evidence and discussion of human rights and broader policy concerns allows the possibility of the arbitral tribunal, at a later date, to permit *amicus curiae*. It must be noted also that there is a fine line between the concept of public interest and the doctrine of public policy.

This is therefore not a call to open investment arbitration proceedings to the public, but only to allow *amicus curiae* to function in exactly the same way it does before a court, when there are public policy and human rights considerations present before an arbitral tribunal. Many lawyers and practitioners of arbitration are well aware of *amicus curiae* at the level of the court. What is a lesser known fact²² except amongst specialists, is that even in the context of the deliberations and adjudication of an arbitral tribunal, is that it too can act analogously to the Court by inviting third parties²³ to present an *amicus* brief.²⁴ The implications of the interests²⁵ of the third parties must be considered. They normally must not have a direct interest in a case nor act in a shareholding capacity, but as advocates for those who cannot advocate for themselves and would be greatly impacted by the outcome of an arbitral tribunal’s decision. A proper *amicus curiae* originates from a neutral expert in the areas of human rights, social justice, civil rights, public interest and public policy reform, as well as the constitutional law, statute law or treaty law obligations implicated in a potential decision and how the outcome of a decision in light of existing legislation manifests in the broader impact upon a community or group of people who would be influenced by the decision but do not have the legal voice to raise their concerns.

IV THE GRAIL CASTLE MOUNTAIN: LANDMARK ICSID CASES

²¹ Ibid.

²² Ibid 2; see pending International Centre for the Settlement of Investment Disputes (ICSID), *AES Summit Generation Limited and AES-Tisza Eromu Kft v Republic of Hungary* (“AES”).

²³ Ibid; in the AES case, “the European Commission (“Commission”) has gained *amicus curiae* status to represent the European Community’s (“EC”) interest in enforcing competition law”.

²⁴ Ibid; “One avenue, which has increasingly been relied on to include broader interests in State-Investor arbitration is *amicus curiae* (or third party) intervention in arbitral proceedings. Arbitrators in investment disputes have over the last decade begun showing greater willingness to provide third parties with a very limited mandate to participate by way of written *amicus* briefs. In a number of high-profile arbitrations, non-governmental organizations (“NGOs”) have intervened in order to provide expertise on ‘thematic’ issues of public policy implicated in the dispute. More recently, the range of potential interveners has expanded beyond civil society groups.”

²⁵ Ibid: “The increase in and diversification of third parties seeking *amicus* standing raises complex questions regarding the nature of the interests that third parties may represent, the benefits and negative side-effects of their involvement, as well as the different forms that their participations should take in the future.”

As Sir Perceval journeyed from the Fisher King's Wasteland along the path to the Grail Castle, a path built on the auspices of the Washington Convention, he reached the Grail Castle. Everyone knows that the Grail Castle is built on a mountain above a lake and that the Grail Castle holds the Holy Grail. Herein, the Grail Castle is built upon the pillars of the landmark ICSID cases that have allowed *amicus curiae* to be previously utilised to bring about social justice. The high importance of the following ICSID cases rests upon the facts that, "all three cases have involved the privatization of water industries and subsequent claims by investors that their properties have been expropriated or that they have been otherwise unfairly treated as per the treaty in question."²⁶ The weighing on one hand of a scarce resource such as potable water and the ensuing public interest impact on a wider community against investor rights to be free from unfair treatment and expropriation brings to the fore of the discussion the conflicting, but equally valid matters that arise in investment disputes.

A *Aguas del Tunari SA v Bolivia, Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina, Biwater v Tanzania*

In, *Aguas del Tunari SA v Bolivia*²⁷ the dispute arose when widespread protests over an increase in the water rate by *Aguas del Tunari*,²⁸ owned by the US firm of Betchel, led the company to abandon its concession and file a compensation claim through ICSID.²⁹ Initially, during the 'jurisdictional' stage of the ICSID proceedings, the individuals and civil society organisations petitioning for *amicus curiae* status, *inter alia*, were refused permission.³⁰ Eventually the proceedings were settled with nominal compensation to Betchel.³¹

In, *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina*,³² it was decided for the first time by an ICSID tribunal that it had authority to accept *amicus* submissions and to grant a non-party *amicus curiae*

²⁶ Harrison, above n 2, 403.

²⁷ *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/03, Washington DC October 21, 2005. Decision on Respondent's objection to jurisdiction.

²⁸ Ibid.

²⁹ Harrison, above n 2, 403.

³⁰ Ibid.

³¹ Ibid.

³² *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/03/19 (France/Argentina and Spain/ Argentina BITs); *AWG Group Limited v Argentina*, UNCITRAL (UK/Argentina BIT), Decision on Liability 30 July 2010 (Separate Opinion of Arbitrator Pedro Nikken); See also *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/03/19 (France/Argentina and Spain/ Argentina BITs); and *AWG Group Limited v Argentina*, UNCITRAL (UK/Argentina BIT) Decision on a Second Proposal for the Disqualification of a Member of an Arbitral Tribunal, 12 May 2008.

status. The same decision was also made in *Suez*³³ and *Interaguas v Argentina*.³⁴ In both of these cases, the dispute arose due to the Argentinean financial economic crisis of 2001.³⁵ The decision of the government to freeze public utility rates and to not peg the peso to the US dollar led to claimants running out of water and sanitation services and to negative impacts on their businesses.³⁶

It is the underlying principle that makes ADR, particularly Arbitration even more important than scholars in the past have been willing to admit. For example, “The decision on *amicus curiae* in *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina* noted that the dispute involved the water distribution and sewage systems of a large metropolitan area which provides basic public services to millions of people, and ‘as a result may raise a variety of complex public and international law questions, including human rights considerations’.”³⁷ In *Biwater v Tanzania*³⁸ a dispute involving privatisation of water services and ensuing claims of expropriation, was granted leave to file for an *amicus curiae*, which was submitted by a collection of national and international NGOs.³⁹

B Methanex

*Methanex*⁴⁰ was the first case to open up investment arbitration proceedings to *amicus curiae* submissions, allowing for wider public participation.⁴¹ The dispute in *Methanex* arose from an investor (claimant) claim under NAFTA Chapter 11 due to a California ban on a gasoline additive.⁴² The claimant sought damages amounting to US \$970 million. The United States government (respondent) argued that the ban was in place due to health risks connected with the additive because it contaminated groundwater.⁴³ The public interest concern inviting the *amicus* submission was the widespread effect on the general public health and the environment through an enactment of a government measure, especially in light of an enormous claim for damages by the private corporation.⁴⁴ Given that both the US and Canadian

³³ *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* ICSID Case No. ARB/03/17 (France/Argentina and Spain/Argentina BITs) Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008.

³⁴ Harrison, above n 2, 403.

³⁵ Ibid 404.

³⁶ Ibid.

³⁷ Above n 5, 253.

³⁸ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (UK/Tanzania BIT) Award, 24 July 2008 and Concurring and Dissenting Opinion, 18 July 2008.

³⁹ Harrison, above n 2, 404.

⁴⁰ *Methanex Corporation v United States of America*, UNCITRAL (NAFTA) Final Award, 3 August 2005.

⁴¹ Harrison, above n 2, 401.

⁴² Harrison, above n 2, 401.

⁴³ Ibid 401-2.

⁴⁴ Ibid 402.

governments successfully argued the merits of public interest together with the need for transparency and openness in NAFTA proceedings, permission to file for leave to file an *amicus* petition was granted and consequently briefs from a number of civil society groups were accepted by the *Methanex* tribunal.⁴⁵

C *UPS v Canada and Glamis Gold v USA*

Under the UNCITRAL RULES two further NAFTA tribunals ruled that they had the power to accept *amicus* submissions; *UPS*⁴⁶ v *Canada*⁴⁷ and *Glamis Gold*⁴⁸ v *USA*.⁴⁹ In *Glamis*, *Glamis* claimed damages arising from a frustrated mining concession in which federal regulations imposed obligations to clean up the mining area because it was in the vicinity of sites sacred to the Quechan Indian Nation.⁵⁰ The progress towards the Quest for social justice made in this case is that the tribunal accepted an *amicus* submission from the Quechan Indian Nation, on the premises that, “the tribunal is required to interpret provisions of NAFTA in accordance with relevant provisions of international law,”⁵¹ and, these include, “extensive international protection of the rights of indigenous peoples with regard to their cultural and religious rights and land rights.”⁵²

V THE GRAIL CASTLE: DRAFT ARTICLE PROVISION TO FILL THE GAP BETWEEN LAW AND PRACTICE

The main point of this paper is that in the *lacunae* between the law governing the procedures of *amicus curiae* on one hand, and the actual use and impact of this device by tribunals on the other hand, is detrimentally wide. Just as the highway to hell is very wide indeed, so is this one. The solution that is required is that tribunals constantly maintain an awareness of the social justice and public interest issues that are implicated in any given commercial or investment dispute involving a state. The

⁴⁵ Ibid 402.

⁴⁶ *United Parcel Service of America, Inc v Government of Canada*, Nafta/UNCITRAL Arbitration Rules Proceeding, Washington, DC, July 25, 2002, The Hearing on the Merits.

⁴⁷ Harrison, above n 2, 402: In this case “the United Parcel Service (UPS), a US courier service, alleged that Canada Post used its monopoly in postal letters to compete unfairly with competitors in courier services, including UPS itself. Amicus submissions were accepted from the Canadian Union of Postal Workers (CUPW), the Council of Guardians, and the US Chamber of Commerce.”

⁴⁸ *Glamis Gold v USA*, UNCITRAL (NAFTA), Award, 8 June 2009.

⁴⁹ Harrison, above n 2, 402-3: “The second case was that of *Glamis Gold v USA*, which involved a claim by the firm *Glamis Gold* relating to mining concessions. *Glamis* argued that compliance with environmental regulations involving aboriginal land made the value of their investments worthless. Submissions were accepted from the Quechan Indian Nation, as well as various environmental groups and the National Mining Association.”

⁵⁰ Harrison, above n 2, 408.

⁵¹ Ibid.

⁵² Ibid.

only way back to the straight and narrow path that guarantees that tribunals fulfil this important duty is to legislate it. The tribunal must be required to address these public interest and social justice issues that have bearing on human rights. It is not enough to be empowered to be competent to invite *amicus curiae*, the standard must be higher. Tribunals must be legally and ethically bound to address any human rights, social justice or public interest issues that arise in a dispute, without waiting for an *amicus curiae* submission to be filed. Not only that, but they must take into consideration the *amicus* submission into their decision. The reason for this is simply because the absence of transparency and openness regularly prevents the general public, and as such, a disinterested third party *amicus curiae* from having the opportunity to address these public interest issues. A drafted legal provision that deals with this issue is needed in order to circumvent the effect of the secrecy shrouding investment arbitrations without compromising the importance of confidentiality. This is the practical and fair approach. A draft article provision to the effect that when an arbitration tribunal is faced with issues concerning human rights on a grand scale and public interest questions must be given the jurisdictional competence to raise the implications of the case throughout the course of the proceedings so that the procedural law governing the allowance of *amicus curiae* can be activated. *Amicus curiae* cannot occur unless the general public and the third parties are aware of the issues implicated in an arbitration proceeding. In order for that to occur, given the high level of confidentiality, the arbitral tribunal has the sole power to ensure that any public interest issues are brought to light and to allow the opportunity for an *amicus* submission to occur. It is argued herein that the decisions of tribunals and the reasoning of arbitrators plays a vital role in making social justice accessible to the general public and to communities that are disadvantaged when they decide in accordance to *amicus* submissions.

VI CONCLUSION – THE HOLY GRAIL OF SALVATION: SOCIAL JUSTICE

It is only by balancing investor rights with State and public interest rights can the quest for the Holy Grail of ICSID arbitrations be said to be fulfilled. The aforementioned Draft Article Provision as an amendment to the Washington Convention, to make it mandatory that arbitral tribunals allow the discussion of public interest questions in such a manner that *amicus* submission may be brought to bear on arbitral tribunal decisions, is the Grail Castle housing the Holy Grail of social justice. With the arrival of a Draft Article Provision as an amendment to the Washington Convention to create mandatory procedures that will invite *amicus curiae* submissions if a dispute involves a public interest, Sir Perceval has fulfilled his Quest and the salvation of social justice can unfold. In this way, Sir Perceval, the Knight, is truly ‘the friend’ of the Fisher King’s Court who restored the wasteland plagued by injustice through the restoration of social justice.