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PUBLIC INTEREST AND TREATY INTERPRETATION

H.E. Judge Hilary Charlesworth
The Interpretation of Human Rights Treaties by the ICJ

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The Interpretation of UNCLOS and Public Interest

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Public Interest in Investor-State Arbitration

Public interest and treaty interpretation concerning human rights in the International Court of Justice

Judge Hilary Charlesworth

Introduction

The concept of 'public interest', the overarching theme of this panel, is often associated with human rights and their interpretation. And yet, despite (or because of) ubiquity, its meaning is elusive, not least because of its multidimensional character. In the context of human rights, individual rights — or interests) — are often pitted against the public interest, as identified by domestic authorities.[1] In international law, this conception of public interest manifests itself in a different vocabulary — notably through the notion of State sovereignty. Other international legal accounts of public interest include the public (or common) interest in international dispute

[1] For a classic example, see *Prince Hans-Adam II of Liechtenstein* v *Germany*, European Court of Human Rights (Grand Chamber), App No 42527/98, Judgment of 12 July 2001, especially para 69.

resolution as opposed to the private concern of disputing States[2] and the public interest character of jus cogens norms that resists derogation by private interests.[3]

Of course, multiple conceptions of the public interest may co-exist and potentially compete in any given case and different interpretative methodologies or outcomes may vindicate different conceptions. For this reason, it is difficult to find a yardstick against which to measure the extent to which the Court's interpretative approach to substantive human rights (found in treaties) serves the public interest in the abstract, outside the context of specific cases.

Public interest considerations are perhaps more obvious at the procedural level, notably in terms of access to a forum (such as the Court) in which substantive conceptions of the public interest can be aired. So, the focus of this paper is how the Court's interpretative methodology has shaped the procedural safeguards that enable the protection and vindication of public interest in the context of human rights provisions. I use the Court's journey from the 1951 Reservations advisory opinion to its preliminary objections decision last year in The Gambia v Myanmar as my case study, making four brief stops along the way.

Reservations to the Genocide Convention (1951)

The first stop, *Reservations to the Genocide Convention*, sets the stage. The question of the permissibility of reservations under the law of treaties, with which the Court was faced, was made in the specific context of a barrage of reservations to the Convention's compromissory clause granting jurisdiction to the Court.[4] As is well-known, the Court, resolved the tension between universality of membership and the integrity of the treaty by basing the permissibility of reservations on their compatibility with the Convention's object and purpose.[5] It has since been argued that the application of this 'middle-path' principle may have undermined human rights protection, especially insofar as it did not foreclose States' exemption from human rights treaty monitoring mechanisms.[6] However, we can equally read the Court's opinion as guided

[2] Robert Kolb, The International Court of Justice (Hart 2013) 10; see also Vaughan Lowe, 'The Function of Litigation in International Society' (2012) 61 International & Comparative Law Quarterly 209, 212-214.
[3] Kolb (n 2) 80-81; Alexander Orakhelashvili, 'Substantive applicable law, consensual judicial jurisdiction, and the public interest in international litigation' (2012) 55 Japanese Yearbook of International Law 31, 44.
[4] *Reservations to the Convention on Genocide, Advisory Opinion* [1951] ICJ Rep 15, 31 (Dissenting Opinion of Judges Guerrero, McNair, Read, Hsu Mo).
[5] *Reservations to the Convention on Genocide, Advisory Opinion* [1951] ICJ Rep 15, 24 and 29.
[6] Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995) 81.

by a commitment to upholding public interest, through ensuring the widest possible participation in a human rights treaty but without jeopardising the treaty's core principles.

South West Africa (1966)

Next comes *South West Africa*, notably its 'second phase'. I will focus on the Court's approach to the interpretation of the Mandate of South West Africa. For the purposes of standing, the Court set out to ascertain whether the applicants possessed 'any legal right or interest'[7] which, in the Court's view, was equivalent to asking whether the respondent had any direct obligation towards them individually.[8] This approach almost eliminated the prospects of legal standing for the fulfilment of obligations that are not bilateral (or at least bilateralisable). The Court's interpretative methodology also took into account the apparent or supposed intentions of the Mandate's drafters at the time of the Mandate's conclusion.[9] Having scrutinised the Mandate through an historical lens, the Court insisted that no legal interests could be recognised in favour of the former members of the League of Nations unless they were expressly stipulated in the Mandate.[10] The Court dismissed as 'extra-legal' Ethiopia and Liberia's argument that the exclusion of such special legal interests would mean that there could be no redress for violations of the Mandate.[11]

While insisting on the text of the Mandate, at some points in its judgment the Court refused to engage with, or draw inferences from, specific terms of the Mandate. For example, the Court denied any 'residual juridical content' to the reference, in the League of Nations Covenant, to the well-being and development of the peoples in Mandated Territories as forming 'a sacred trust of civilisation'.[12] Ironically, this expression had provided the legal foothold for the Court's conclusion, sixteen years earlier, that the mandates system had survived the dissolution of the

[7] *South West Africa, Second Phase* [1966] ICJ Rep 6, 22, para 14.
[8] *South West Africa, Second Phase* [1966] ICJ Rep 6, 22, para 14.
[9] *South West Africa, Second Phase* [1966] ICJ Rep 6, 23, para 16.
[10] *South West Africa, Second Phase* [1966] ICJ Rep 6, 32, para 44: 'such rights of interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law'; ibid, p. 34, para. 51: 'the legal rights and obligations are those, and only those, provided for by the relevant texts, whatever these may be'; ibid, 35, para 54: 'such rights and obligations exist only in so far as there is actual provision for them.'
[11] *South West Africa, Second Phase* [1966] ICJ Rep 6, 47, para 89; see also *South West Africa, Second Phase* [1966] ICJ Rep 6, 34, paras 49-51.
[12] *South West Africa, Second Phase* [1966] ICJ Rep 6, 35, para 54, discussing Art 22 of the Covenant of the League of Nations.

League of Nations.[13] The Court also considered that it was 'highly unlikely' that the drafters intended the compromissory clause to carry the broad scope that its terms allowed.[14]

Barcelona Traction (1970) and DRC v Rwanda (2006)

The controversial aftermath of the judgment is well-known. In articulating the concept of *erga omnes* obligations four years later in *Barcelona Traction*,[15] the Court is said to have sought to mitigate the repercussions of its *South West Africa* judgment in jurisdictional terms, at least in the abstract.[16] On the other hand — and this is the third stop in our journey — the Court in *Armed Activities (DRC* v *Rwanda)* found that reservations to the Genocide Convention (and CERD) were not incompatible with the treaties' object and purpose, and therefore validly barred the Court's jurisdiction in relation to claims under those treaties.[17] Through that decision, the Court declined to expand its jurisdictional reach over potential cases of human rights concern and of clear public interest. This underlines that, for the Court, the protection of the public interest always has to be considered alongside the institutional constraints on the Court's operations, notably the principle of consensual jurisdiction. At the same time, the protection of the public interest dictates that, where such jurisdiction is affirmed, it must be exercised to its full extent.[18]

The Gambia v Myanmar (2022)

This proposition is illustrated by the last, and most recent, stop in this journey: the pending case of *The Gambia* v *Myanmar*. Unlike in *South West Africa*, the Court's enquiry into The

[13] Bin Cheng, 'The 1966 South-West Africa Judgment of the World Court' (1968) 5 Annals Chinese Society of International Law 5, 10, with reference to *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 133: 'These obligations [relating to the administration of the Mandated Territory] represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.'

[14] See *South West Africa, Second Phase* [1966] ICJ Rep 6, 38, para 63.

[15] *Barcelona Traction, Light and Power Company, Limited (Belgium* v *Spain)* [1970] ICJ Rep 3, 33, paras 33-34.

[16] James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 RCADI 27, 196; Christian Tams and Antonios Tzanakopoulos, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781, 792.

[17] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility* [2006] ICJ Rep 6, 32, para 67 (with respect to the Genocide Convention); ibid 35, para 77 (with respect to CERD).

[18] See *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13, 23, para 19: 'The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent.'

Gambia's standing did not directly revolve around any legal interest or special interest that the applicant ought to demonstrate, or to the bilateralisable character of the obligations under the Convention. Instead, the question was the legal relationship between the parties to the Convention, which in turn flowed directly from the Convention's object and purpose, as this had been identified in the Court's Advisory Opinion on *Reservations to the Genocide Convention*.[19] While in *South West Africa* the Court considered that the interest in carrying out the sacred trust of civilisation lacked 'juridical expression',[20] in *The Gambia* v *Myanmar* the fact that the parties to the Convention had a common interest in compliance with its obligations sufficed to provide all parties with legal standing.

In addition, the Court attached weight to the argument that there would be no legal redress against alleged violations of the Convention if some special interest were necessary — the same argument that had been considered 'extra-legal' in *South West Africa*.[21] Continuing an implicit dialogue with its *South West Africa* judgment, the Court in *The Gambia* v *Myanmar* effectively held that any restrictions on standing, rather than any expansions, needed to be spelt out in the Convention.[22] Thus, the standard and rather modest compromissory clause in the Genocide Convention was held to permit — or, rather, not to preclude — the invocation by any State party of another party's alleged responsibility.[23]

Conclusion

The journey from *Reservations* to *The Gambia v Myanmar* suggests that the Court's approach to treaty interpretation has developed in the direction of simplifying the articulation of human rights grievances, promoting the public interest. Of course, neither the credit (nor the responsibility) for this development is due to the Court alone. Judgments of the ICJ are notoriously frugal in revealing their academic sources.[24] Still, the Court's reasoning in

[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v *Myanmar), Judgment of 22 July 2022* (not yet reported), para 106.
[20] See *South West Africa, Second Phase* [1966] ICJ Rep 6, 34, para 51.
[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v *Myanmar), Judgment of 22 July 2022* (not yet reported), para 108; see also para 109.
[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v *Myanmar), Judgment of 22 July 2022* (not yet reported), para 110.
[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v *Myanmar), Judgment of 22 July 2022* (not yet reported), para 110.
[24] Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 CamJICompL 136, 151. In this regard, compare the Declaration of Judge ad hoc Kress in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v *Myanmar), Judgment of 22 July 2022* (not yet reported).

The Gambia v *Myanmar* (as well as in its precursor, *Belgium* v *Senegal*), is imbued with the principles for the invocation of responsibility in the public, or in the Court's terms, common interest, that were expounded by the International Law Commission and systematised by James Crawford as its Special Rapporteur.[25] Those principles were in turn inspired by the seeds sown by the Court in *Barcelona Traction* and by extensive practice. This jurisprudential conversation among States, the Court, and the ILC illustrates that the development of legal principles that defend and advance the public interest is a collective enterprise — a matter that is itself of a public interest.

[25] Articles on the Responsibility of States for Internationally Wrongful Acts [2001]-II(2) YBILC 30, 126-127, paras 1-10 (Commentary to Art 48); see already James Crawford, 'Third report on State responsibility' [2000]-II(1) YBILC 4, 97-99, paras 369-375.

THE INTERPRETATION OF UNCLOS AND PUBLIC INTEREST

Tullio Treves

UNCLOS (the Convention)is an international treaty and must be interpreted following the rules of international law – largely incorporated in the Vienna Convention on the Law of Treaties - concerning the interpretation of treaties.

Public interest concerns are not directly mentioned in the rules on treaty interpretation. They may, however, be relevant in determining, under article 31 (1), the "object and purpose" of the Convention. A brief indication of the object and purpose of UNCLOS may be seen in the "goals" mentioned in the following paragraph of the preamble:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

The Preamble further specifies that:

the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,

and expresses the desire that the Convention develops the principle that the seabed beyond the limits of national jurisdiction and its resources are the common heritage of mankind.

The general interest of all States is addressed by the Convention in the provisions implementing the "goals" mentioned above. While the Convention does not include rules explicitly addressing its interpretation, the above quoted provision of the Preamble stating that the legal order of the seas must be established "with due regard to the sovereignty of all States", followed by various provisions of the Convention referring to due regard, may be useful in interpreting certain provisions.

"Due regard" (as well as the sometimes used equivalent term "reasonable regard") is the notion through which the Convention addresses the situations of potential conflict between equally licit activities in the seas. So, under article 87, freedoms of the high seas must be exercised "with due regard to the right of other States in the exercise of the freedom of the high seas". The freedoms of the high seas that, under the Convention, apply to the exclusive economic zone must be exercised with "due regard to the rights and duties of the coastal State" according to article 58 (4) while the coastal States' rights in the exclusive economic zone must be exercised with "due regard to the rights and duties of other States" according to article 56(2).

There are several due regard provisions in the Convention. It would be too long to list them all. Two examples may be added to the mention made above of article 87 on the high seas and of articles 56 and 58 on the exclusive economic zone

Under article 79 (4) States exercising their right to lay cables and pipelines on the continental shelf "shall have due regard to cables or pipelines already in position". Another example is in article 234, stating that laws and regulations concerning pollution from vessels in ice-covered areas within the exclusive economic zone "shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence". Another is art. 147 concerning "accommodation of activities in the Area and in the marine environment". While para 1 states that activities in the Area (i.e. exploration and exploitation of mineral resources) "shall be carried out with reasonable regard for other activities in the marine environment", para 3 states that : "Other activities in the marine environment shall be conducted with reasonable regard for activities in the Area".

The obligation of 'due regard' is set out as reciprocal in key provisions of the Convention. Reciprocal due regard is clearly provided in Article 87 (2) as regards the exercise by States of freedoms of the high seas in relation to the exercise by other States of these freedoms. So, for instance, the freedom of navigation shall be exercised with due regard to the freedom of other States to lay cables and pipelines, and the freedom of laying cables and pipelines shall be conducted with due regard to the freedom of navigation of other States. Similarly, under Article 147 (1) and (3), activities in the Area shall be carried out with reasonable regard for other activities in the marine environment and such other activities shall be carried out with reasonable regard to activities in the Area.

Not all the provisions concerning competition between equally legitimate activities and containing a 'due regard' obligation are, however, couched in reciprocal terms. So, Article 87 (2) states that freedoms of the high seas shall be exercised by all States with 'due regard for the

rights under the Convention with respect to activities in the Area', but does not say that activities in the Area must be exercised with due regard to the exercise by other States of the freedoms of the high seas. Similarly, Article 79 (2) states that the rights of the coastal State over the continental shelf must not 'infringe or result in any unjustifiable interference' with navigation and other rights and freedoms of other States, but does not state that the exercise of such other freedoms must not infringe or unjustifiably interfere with the exercise of the coastal State's rights on the continental shelf. Looking at these provisions in context, one should not give too much importance to the lack of reciprocity in their drafting.

Due regard has been correctly defined by ITLOS in the *Bangladesh*/*Myanmar* judgment as a "principle" "reflected" in various articles of the Convention and consequently, applicable to the so-called "grey areas" – that are spaces whose regime is not covered by UNCLOS. Professor Oxman has accepted this view stating that "the specific provisions of the Convention are manifestations of a more general organizing principle of due regard in the law of the sea".

As recalled above, in the *Bay of Bengal* judgment the ITLOS saw the obligation of 'due regard' as a 'principle' 'reflected' in the LOSC provisions utilizing it. What is the legal nature of such a 'principle'? One could argue that the extension to situations not envisaged by the rules of the LOSC providing for due regard is effected by way of analogy, so that there would be a treaty basis to such an extension. However, one could also argue that the existing rules of 'due regard' reflect a broader customary law rule necessarily implied in the need to ensure coexistence between the customary freedoms of the high seas, the rights in the Area, and the rights of coastal States in the EEZ and on the continental shelf.[26]

This "organizing" principle, that I would hesitate to call "customary", may be seen also, in my view, as an interpretative principle, in other words, a principle that applies to the interpretation of the Convention in all cases in which there are equally legitimate activities in an area of the sea. The interpretative nature – or at least the possibility of utilizing it for interpretative purposes- of the "due regard" principle permits to apply it in all cases in which there is competition between equally licit activities in an area of the sea even when due regard is not explicitly mentioned in the Convention. So, to refer to an example made above, navigation and other freedoms of the high seas must be exercised with due regard to the rights of the coastal

[26] According to D Guifoyle, "Article 87, Freedom of the high seas'"in Proelss (ed) (fn 23) p. 678, at 681, the ILC 'appeared to consider the rule at customary internatio nal law to be that: 'States are bound to refrain from acts which might adversely affect the uses of the high seas by nationals of other States'.

State on the continental shelf even though the Convention mentions only due regard for navigation in the exercise of the coastal State's rights on the continental shelf.

It has been stated that due regard is a procedural principle because its application requires consultations aiming at obtaining "a balance of rights and interests" (to use language in the *Chagos* award) not necessarily involving that one activity is granted a priority (as clearly stated in the same Award). It can be agreed that due regard is a procedural principle because it requires that the States involved in competing activities engage in a process of consultations that must be timely and include reciprocal communication of the relevant information. It is not, however, merely procedural. It aims at obtaining a substantive result, namely, to use the terminology of the title of article 147, to ensure "accommodation" of competing activities. It requires that States engaged in these activities exercise restraint and consideration of the other State's interests. This principle serves to avoid or to eliminate conflicts. Consequently it serves the general interest.

While the elimination of conflicts through accommodation of activities and self restraint is applicable throughout the Convention and can be seen as the substantive content of the due regard obligations, there are a few provisions in which other general interests are taken into account. These are the interests of the human being as such emerging in provisions imposing that in matters of fishing coastal State's penalties for violations of relevant laws and regulations "may not include imprisonment" (art. 73 para 3) and that "monetary penalties only" may be imposed for violations of national laws and regulations or applicable international rules and standards by foreign vessels beyond the territorial sea, and , with an exception, within the territorial sea (art. 230).

The Public Interest in Investor-State Proceedings

Makane Mbengue

Introduction

1. Few fields of international law have seen greater developments in recent decades that investor-state dispute-settlement (ISDS). Although the network of international investment agreements (IIA) and other relevant instruments that gave rise to ISDS disputes dates from the last decades of the 20th century, the field's remarkable growth has taken place in the last two decades and a half, and has seen in short procession a flurry of adaptations, evolutions, and novel ideas. Further reforms are expected to emerge from the ongoing work of UNCITRAL Working Group III.[27]

2. In particular, IDSD tribunals have increasingly had to reckon with the "public interest", a quasi-legal concept whose insertion into dispute-settlement proceedings has proven a challenge. From a process originally meant to right wrongs affecting public interests and led by cold-blooded legal experts,[28] ISDS arbitrators are now called upon to balance these private interests with the public welfare. Public interests have gained increasing traction in ISDS proceedings due to concerns about their potential impact on the environment, human rights, and socio-economic development, and against a background of fear that ISDS disputes might cause regulatory chill – and thus harm regulations designed to enhance collective purposes.[29] Given, further, the potentially substantial monetary liability for public treasuries, and the fact that investor-state arbitrations often involve direct allegations of governmental misconduct,[30] the public interest entailed by investor-state proceedings is often greater than in other types of international disputes.[31]

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[27] For the latest progress in this context, see https://uncitral.un.org/en/working_groups/3/investor-state.

[28] See Pauwelyn J, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus" (2015) 109 *American Journal of International Law* 761: "Now that ISDS is set up for, and initiated against, also developed nations such as Canada, the US, Australia and European countries who already have a firmly established rule of law, and scrutinizes public laws and regulations (rather than just contracts), the legal constraints inherent in ISDS require more, not less, politics, participation and 'voice' by both governments and civil society."

[29] See Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law* 775, at 782: "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." See also Caroline Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 JIEL 1, at 27.

[30] See Alessandra Arcuri & Francesco Montanaro, "Justice for All: Protecting the Public Interest in Investment Treaties" (2018) 59 *BC Law Review* 2791, at 2804: "virtually all investment disputes directly or indirectly pertain to the exercise of public power and affect the public interest."

[31] On the flip side of this greater role for the public interest in ISDS proceedings may be the idea, that, in some circumstances, only actions taken by a state in a sovereign capacity is susceptible to breach international investment protections. See, e.g., *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), at 253: "What all these decisions have in common is that for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its

3. How to intergrate public interests in ISDS proceedings has therefore become a topic of intense scholarly debate, with divergent views on the required balance between a number of factors, such as confidentiality, transparency, investor protection, and a state's regulatory power. In light of this debate, this paper will explore the different dimensions of public interest in ISDS proceedings, including its implications for the legitimacy of the ISDS system.

4. To do so, this paper will distinguish between different kinds of public interest, as it informs ISDS proceedings. First is processual public interest (**A**), which manifests itself in prying open ISDS proceedings to ensure the participation and knowledge of groups beyond the usual parties to a case. The second kind, substantial public interest, seeks to ensure that the law is interpreted and applied in ways that align with public welfare and purposes (**B**). In both areas, the analysis will give a particular stress to the potential impact of the ongoing reform efforts within the ISDS system on the incorporation and protection of public interest concerns.

A. Processual Public Interest

5. The notion of public interest has been at the root of many recent procedural developments in the field of ISDS. To wit, the mandate of the UNCITRAL Working Group III proceedings, on reform of ISDS, is focused on such procedural developments.[32]

6. This focus on procedural features has many advantages: it is easier to change the rules under which tribunals and arbitral proceedings operate than the underlying, decentralised network of bilateral investment treaties that govern the merits of these disputes. In turn, arbitral rules typically allocate a large degree of flexibility to arbitrators – allowing them to accurately steer the case and the proceedings in line with greater concerns, such as the need to marry public interest with the requirements of a given investor-state case.

7. These developments fall within two main lines of procedural approaches: the first one seek to promote participation in ISDS proceedings (**1**), be it by emphasising the role of non-disputing parties, or that of *amici curiae*. The second approach, meanwhile, is focused on the transparency of ISDS proceedings (**2**), not only with respect to the publication of key information about these proceedings, but also by strengthening the tribunals' role in giving reasons and laying bare their reasoning.[33]

"superior governmental power". It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action."

[32] Arato, J., Clausseen, K., & Langford, M.: 'The investor-state dispute settlement reform process: design, dilemmas and discontents' (2023) *Journal of International Dispute Settlement*, at 3-4.

[33] Other procedural approaches are also relevant when accomodating the public interest, such as for instance the mechanisms underlying the appointment of adjudicators: see Waibel M, 'Arbitrator Selection – towards Greater State Control', *in* Kulick A., *Reassertion of Control over the Investment Treaty Regime* (CUP 2017), at 335: "Arbitrator selection, particularly by the disputing parties, may feed the perception that investment treaty arbitration – despite the prominence of the public interest in at least some cases – is at heart a purely private system of dispute resolution, designed to benefit only the disputing parties".
See also J. Dahlquist, *The Use of Commercial Arbitration Rules in Investment Treaty Disputes*, Phd Thesis, at 36, noting that commercial arbitration institutions have tended to prefer the appointment of three-members tribunals to sole arbitrators (common in commercial cases), in disputes involving sovereigns or investment treaties, likely in view of the greater public interest involved in such cases.

8. Critically, both approaches are self-reinforcing: by increasing transparency over ISDS, states can ensure greater participation; and by normalising participation by non-disputing party and other public interest groups in ISDS proceedings, they promote the role and need for greater transparency in this field.

1. Participation

9. Expanding participation in ISDS proceedings to non-parties allows a broader range of interests to be represented, promotes accountability, and enhances the legitimacy of the ISDS system. The rationale behind such greater participation is two-fold.

10. First, by promoting participation in the ISDS system, arbitrators and parties cannot avoid taking the public interest into account; in other words, these procedural mechanisms are designed such as to steer a certain kind of information to adjudicators, in a context where the parties might not be willing or able to provide that information.[34] For instance, the *amicus* submission of the International Institute for Sustainable Development in the *Methanex* case dealt with a variety of issues, procedural as well as substantive, highligting the public interest aspects of these issues.[35] This procedural device hinges on the (implied) hope that this information will ultimately prove relevant and material to the dispute at hand – or at least that it will be given a fair hearing.

11. Second, enhanced participation *in itself* pertains to the public interest. This includes an interest for civil society in *knowing* more about ISDS disputes, their unfolding and their outcome,[36] including with respect to the reasoning used by tribunals. Increased participation also furthers the public interest in letting other entities than states take chip in, breaking the "one against one" framework that typify international law disputes[37] – a necessity in a globalised world where the public interest can be represented by stakeholders other than states.[38] For instance, *amici curiae* can raise issues of corruption, in a context where both the state and the investor would prefer that aspect of the dispute to remain under wraps.[39]

12. In this context, there are two broads categories of interested parties in ISDS proceedings: states other than the respondent, be they the home state of the claimant-investor or third-party states with an interest in the dispute (*a*), and other parties acting as *amicus curiae* (*b*). Both have

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[34] See Boisson de Chazournes L. & Mbengue M., 'The *Amici Curiae* and the WTO Dispute Settlement System: the Doors are Open' (2003) *The Law and Practice of International Courts and Tribunals* 2, 205-248, at 208.

[35] see *Methanex Corporation v. United States of America*, Amicus Curiae Submissions by the IISD (9 March 2004). For further examples, see Saei J, "Amicus Curious: Structure and Play in Investment Arbitration" (2017) 8 *Transnational Legal Theory* 247, at 283.

[36] Ruth Teitelbaum, 'A Look At The Public Interest In Investment Arbitration: Is It Unique' 5.

[37] See Mbengue M. & Tignino, M., "Transparency, Public Participation and Amicus Curiae in Water Disputes", *in* Brown Weiss E. (ed.), *Fresh water and international economic law* (OUP 2005), 367–405, at 367: public participation "challenges established boundaries and concepts of law by cutting across distinctions and dichocomies, such as national versus intematÎonallaw, private versus public law, and prÎvate versus public interests."

[38] Ascencio H., 'L'*Amicus Curiae* devant les juridictions internationales' (2001) 105 *RGDIP* 4, at 900.

[39] As happened, notably, in *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021), at 178.

a role to play in bringing forth the public interest in these proceedings. By allowing for a more diverse range of perspectives and expertise to be considered, the participation of amici curiae and third states contributes to a more robust, transparent, and legitimate ISDS system.

a. Non-Disputing Party

13. Traditionally, ISDS proceedings were solely focused on the disputing parties, excluding third-party interests. This was in line with the customary international law approach to dispute resolution, as exemplified by the traditional high bar for third states to intervene before the International Court of Justice (ICJ).[40] However, recent developments in ISDS have sought to broaden the scope of participation to include non-disputing parties, primarily home states and other stakeholders affected by the dispute.

14. Third-party home states are particularly susceptible to contribute to the ISDS proceedings. Such states may indeed have a better understanding of the domestic regulatory landscape, and/or the public policies underlying relevant to a conflictual situation between states and investors, especially if they themselves had had to consider the same public policy issues – a likely circumstance in a world where states and regulators learn from one another.[41] Additionally, home states may have first-hand knowledge of the investor's conduct within their jurisdiction and be aware of any potential negative implications on the environment, human rights, or socio-economic development. By providing this information to the tribunal, third-party home states can contribute to a more balanced assessment of the dispute, ensuring that public interest concerns are adequately addressed alongside investor protection.

15. In the same vein, third-party states in the context of multilateral treaties also intervene in ways that promote the public interest. These states have a vested interest in the interpretation and application of treaty provisions, as the outcome of a case may have implications for their own regulatory frameworks and future disputes. By intervening in ISDS proceedings, third-party states can provide valuable insights into the objectives and spirit of the treaty, which can help the tribunal interpret and apply its provisions in a manner that is consistent with the public interest. Accordingly, both kinds of states are increasingly intervening in ISDS disputes to ensure that the public interest is appropriately considered and safeguarded.

16. This shift has been facilitated by the structural features of ISDS, whose proceedings are usually based on bilateral or multilateral treaties between states. From this basis, ISDS disputes typically involve only one state as respondent, while the set of potential claimants remain relatively open-ended, as long as they originate from their "home state". While the same structural features have for long restrained home states to participate – since ISDS disputes are

[40] For instance, out of the 15 applications to intervene in 11 different cases up to 2022, the ICJ has granted only three such applications.

[41] Saei J, "Amicus Curious: Structure and Play in Investment Arbitration" (2017) 8 *Transnational Legal Theory* 247, at 250, noting that "[w]hen NDTPs enter the field, they attempt to join the 'game' by formulating utterances recognizable in the context of arbitration as 'legal' or 'factual' arguments, but increasingly they make policy arguments as well. In this way, specialized segments of global society, represented by various NDTPs, link themselves more or less closely with the evolution of arbitration law and vice versa."

meant to depoliticise disputes, and exclude recourse to diplomatic protection[42] – states and tribunals have gradually came to consider that interventions focused on legal issues do not qualify as diplomatic protection.

17. In this context, the participation of third-party states has also been greatly facilitated by new treaty language, starting with North American Free Trade Agreement (NAFTA) in 1992. NAFTA introduced innovative provisions, such as Article 1128, which allowed non-disputing Party submissions on questions of treaty interpretation. This opened the door for greater involvement of third-party states in ISDS proceedings, ensuring that their perspectives on treaty interpretation would be considered by the tribunals.

18. Throughout the 2000s and 2010s, this trend of promoting third-party state intervention continued, with numerous investment treaties incorporating similar provisions, on the model notably of the US and Canadian Model BITs. In addition, regional trade agreements, such as the 2010 ASEAN Comprehensive Investment Agreement (ACIA) and the 2016 Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, also recognized the importance of third-party state participation. Both agreements included provisions that enabled non-disputing Party submissions on treaty interpretation matters (ACIA Article 33, and CETA Article 8.25). The most recent ICSID Arbitration Rules, adopted in 2022, include a provision specific to the intervention of "Non-Disputing Treaty Party", mandating tribunals to accept such requests for intervention – by contrast with requests from other, no-state parties.[43]

19. As a result of these developments in treaty language, third-party state intervention in ISDS proceedings became more common, ensuring that a broader range of interests and perspectives would be taken into account in the dispute resolution process. This, in turn, contributed to the evolution of ISDS towards a more inclusive and transparent system, where public interest considerations play an increasingly significant role.

b. Amici curiae

20. Besides states, be they home states or mere third-party, the two last decades have also seen an increased participation of private parties and non-governmental associations/organizations, acting as *amicus curiae* – or "friends of the court". In this respect, ISDS proceedings have followed a trend also prevalent in other international *fora*, such as international trade disputes before the WTO.[44]

21. The rise of *amicus curiae* participation in ISDS proceedings can be attributed to several factors. First and foremost, the growing recognition of the potential impact of ISDS decisions

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[42] See, e.g., the observations of the majority in *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award (1 September 2000), at 15-17 [excerpts].

[43] See Rule 68, ICSID Arbitration Rules (2022), available at: https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/chapter-x-publication%2C-access-to-proceedings-and-non-disputing-party-submissions#rule-8731.

[44] Boisson de Chazournes L. & Mbengue M., *op. cit.*

on public interest issues, such as the environment, human rights, and socio-economic development, has led to heightened interest from various stakeholders in the outcomes of these disputes. As a result, private parties and non-governmental associations have sought to contribute their expertise and perspectives to help inform the tribunals' decision-making processes.

22. This greater willingness to intervene has been facilitated by the evolution of procedural rules in ISDS. For example, the International Centre for Settlement of Investment Disputes (ICSID) amended its Arbitration Rules in 2006 to expressly allow for the submission of amicus curiae briefs (Rule 37.2, now Rule 67 under the 2022 Rules). Similarly, the United Nations Commission on International Trade Law (UNCITRAL) adopted its Rules on Transparency in Treaty-based Investor-State Arbitration in 2013, which provided for the acceptance of amicus curiae submissions in certain circumstances (Article 4). The openness towards the participation of *amici curiae* is also evidenced in the text of recent investment treaties and regional trade agreements: CETA, for instance, contains provisions allowing the tribunal to accept amicus curiae submissions (Article 8.27).

23. These evolutions have been accompanied by a growing acknowledgment, from investment tribunals, that *amici curiae* have a role to play in ISDS proceedings. Crucially, the "public interest" has been deployed as a factor to allow participation by such parties: in the seminal case of *Methanex v. USA*, the tribunal found that, given the public interest at stake in the arbitration, "the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm."[45] In the same vein, the tribunal in *Philip Morris v. Uruguay* accepted the intervention of *amici curiae*, considering that "[...] in view of the public interest involved in this case, granting the Request would support the transparency of the proceeding and its acceptability by users at large."[46] The point had also been put well by the tribunal in *Biwater Gauff v. Tanzania*, which held that:

> [...] the Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself

24. Yet, one strand of the jurisprudence has also considered that an ill-defined "public interest" alone should not be enough to allow access to arbitral proceedings. Starting with *Apotex v. USA*,[47] some tribunals have indeed considered than more than a general interest in a

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[45] *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (15 January 2001), at 49. See also *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005), at 19-21.

[46] *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3 (15 February 2015), at 28. For the same reason based on public interest, the tribunal decided to make this PO non-confidential: see *ibid*, at 32.

[47] *Apotex Inc. v. United States of America*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party (4 March 2013).

dispute was required for *amici* to intervene.[48] Tribunals have also looked dimly on petitioners who would espouse too closely the views of one of the parties – typically the respondent state.[49]

25. Notwithstanding this sometimes sceptical approach, there is not denying that *amicus curiae* submissions have been multiplied in recent cases. Some tribunals have now even pro-actively sought out such participation[50] – a procedural move that has also been echoed in recent treaties.[51]

26. Accordingly, while recent jurisprudence has tended to exercise some degree of vigilance as to who can or cannot intervene in ISDS proceedings, there has been an increased sentiment that *amici curiae* have a role to play in enhancing the role played by the public interest in such proceedings.

2. Transparency

27. Transparency has been an important topic in this fields for years, and indeed was one of the earliest and sharpest criticisms addressed to ISDS proceedings.[52] This has led to reforms and developments that can be declined in at least two, overlapping approaches: transparency in the existence of arbitration and the publication of relevant documents (*a*), and transparency in the reasons that led a tribunal to rule in a particular dispute (*b*).

a. Publication

28. From the outset, the lack of transparency of ISDS proceedings has been associated with the "legitimacy crisis" and the "backlash" against that field.

29. This growing emphasis on transparency is a response to concerns about the potential impact of ISDS decisions on public policy, the environment, and human rights, as well as the need to ensure the legitimacy and accountability of the ISDS system. Transparency of the proceedings, the reasoning goes, allows the public to access the documents and decisions of the tribunal, which can be used to inform public debate and policy-making.

30. Tribunals themselves have long recognised the relationship between enhanced transparency and legitimacy. As put by the tribunal in *Methanex v. USA*, this relationship is especially potent when a significant public interest is involved in the case:

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48 *Odissey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6 (20 December 2021), at 19; *Resolute Forests Products Inc. v. Canada*, PCA Case No. 2016-13, Procedural Order No. 6 (29 June 2017), at 4.6. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (18 February 2019), at 34.

49 [Example from Spain's Intra-EU cases]

50 See, e.g., Tennant Energy, LLC v. Canada, PCA Case No. 2018-54, Press Release (23 June 2021).

51 Agreement Between The Government Of The Democratic Republic Of Congo (DRC) And The Government Of The Republic Of Rwanda On Investment Promotion And Protection (26 June 2021), Article 36.

52 Michael Faure & Wanli Ma, 'Investor-State Arbitration: Economic and Empirical Perspectives' (2020) 41 *Michigan Journal of International Law* 1, at 51.

> The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater interest in this arbitration than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. [The …] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.[53]

31. In front of the growing interest of parties in ISDS proceedings, new rules have been adopted to enhance the publication of documents and awards. Already in their Free Trade Agreement, the US and Singapore included a section entitled "Transparency of Arbitral Proceedings", which provides in Article 15.20(2) that:

> The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

32. The growing role of transparency then gathered steam, leading to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, which apply to disputes under IIAs entered into force after April 1, 2014, provide for an obligation to publish the excerpts of the arbitration decisions, regardless of the consent of the parties, as well as an obligation to publish the documents submitted by the parties during the arbitral proceedings, except for those containing confidential or protected information or information that could affect the respondent's essential security interests.

b. Reason-giving

33. Publishing ISDS documents would meet no purpose if these documents merely stated the outcome of a dispute, without further reference to the laws being applied and the tribunal that led the tribunal to rule one way or another. For this reason, the requirement that ISDS awards and decisions be *in writing* and reasoned has frequently been stressed in this context; as put by the doctrine:

> Reason-giving is also important for the State as a potential repeat defendant, and for non-litigants more generally, as it is the part of the arbitral award which guides future conduct and shapes the normative expectations of a wider audience as tribunals increasingly follow common-law type rationalities and apply structures of reasoning that heavily use and rely on investment arbitration precedent. It is this prospective effect or shaping impact that lies at the heart of the view of investment arbitration tribunals as regulators. The reasoning of arbitral awards is thus of considerable importance both for the non-electoral legitimacy of

[53] *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (15 January 2001), at 49.

the tribunals, and with regard to its regulatory impact on future State administrative and regulatory behavior.[54]

34. To some extent, this requirement is already embodied in the most important instruments governing ISDS disputes, and notably in the ICSID Convention, whose fifth ground of annulment in Article 52(1)(e) provides that tribunals should not fail to state reasons for their finding. While this requirement has been traditionally interpreted as being for the benefits of the parties to the dispute,[55] recent jurisprudence has tempered that view. In particular, in a ground-breaking decision, the *ad hoc* committee in *Perenco v. Ecuador* recently ruled that parties to ICSID proceedings cannot agree between themselves that the tribunal omit some part of its reasoning,[56] holding that "a statement of reasons for a judicial or an arbitral decision is fundamental for adjudication of justice, particularly in ICSID arbitration."[57]

35. The same idea was expressed even more forcefully in the recent decision on annulment in *Valores Mundiales v. Venezuela*:

> The purpose of the requirement to express reasons is for the parties to understand the arbitrators' decision and its factual and legal premises, as well as their assessment of the evidence, which constitutes a guarantee of transparency and intelligibility to avoid arbitrary decisions. The obligation to motivate awards is so central to the ICSID system that the parties cannot even waive it. This is because, as the committee highlighted in Tidewater v. Venezuela, the disputes submitted to ICSID jurisdiction concern the actions of various state powers (legislative, executive, and judicial) and involve a waiver by the States of their sovereign prerogatives in order to allow arbitrators to determine the legality or illegality of their actions. Thus, understanding the decision of the ICSID arbitration tribunals is in the interest of all those who are part of the State involved in the dispute, including its population.[58]

36. In this context, it is not surprising that many investment treaties stress the requirements to give reasons: BITs signed by Qatar, for instance, have long required that "the Tribunal shall interpret its award and give reasons and. bases of its decision at the request of either Party".[59]

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54 Kingsbury B & Schill S., 'Investor-State Arbitration As Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2011) 8 *Transnational Dispute Management* 2, at 44-45.

55 Ibid., at 45.

56 Thus distinguishing ICSID arbitrations from the proceedings taking place under the UNCITRAL Rules, where Article 32(3) authorises the parties to waive the tribunal's obligation to state reasons. There is, however, no publicly-known ISDS proceedings under the UNCITRAL Rules that saw the parties avail themselves of this option.

57 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment (28 May 2021), at 161.

58 *Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, decision on annulment (21 December 2021), at 175 [Free translation].

59 See, e.g., Agreement Between the Council of Ministers of the Republic of Albania and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments (18 October 2011), Article 9(d).

In the same vein, the recent UAE-Ukraine BIT provides that "When the tribunal renders an award, it shall state its legal basis and, upon request of either party, shall interpret it."[60]

B. Substantial Public Interest

37. The public interest can also be taken into account directly in the context of investment disputes; in other words, ISDS proceedings can move from a purely private dispute (albeit one involving a state) to a broader forum where public welfare and the motivations of a state should inform the reasoning of the tribunal.

3. Rule-Making

38. The first way for states to ensure that the public interest is better taken into account by ISDS arbitrators lie in baking it in the substantial provisions applied and interpreted by tribunals in investment disputes. By doing so, states can better highlight the role played by public interest in the protection granted to investors, and inform these investors' litigation strategies – as well as the adjudicators' ultimate conclusions.

39. In this respect, public interest can enter the substance of a dispute in two ways: by laying out rules that specifically provide for a role for public interest in the investment framework (*a*); by limiting the investment protections with various references to the public interest (*b*); and/or by providing for general exceptions.

a. The investment framework

40. Recent investment treaties have sought to incorporate a concern for the public interest at the investment stage, before any dispute even arose. This is what has long been at play in the Preambular language of many BITs that have insisted on their right to regulate, or on the fact that foreign investments are merely a mean towards other, broader public interest goals, such as sustainable development.[61]

41. More recent investment agreements have gone further. For instance, the Morocco-Nigeria BIT provides that investments should proceed on the basis of such as social and environmental impact assessments, but also that investors should respect human rights and pursue sustainable development.[62] The BIT also provides that the arbitral tribunal shall take into account the contribution of the investment to the sustainable development of the host state and the compliance of the investor with its obligations under the BIT when deciding on liability and damages.

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[60] Agreement Between The Government Of The United Arab Emirates And The Government Of Ukraine On The Promotion And Protection Of Investments (21 January 2003), Article 9(3).

[61] See, e.g., Netherlands Model Investment Agreement (22 March 2019), Preamble, at paras. 3-5.

[62] Reciprocal Investment Promotion And Protection Agreement Between The Government Of The Kingdom Of Morocco And The Government Of The Federal Republic Of Nigeria (3 December 2016), Article 14.

42. For the same purpose, other treaties have boosted the obligations bearing on investors.[63] These provisions may encourage investors to act responsibly and to respect the public interest of the host state, as well as to prevent frivolous or abusive claims. More recent instruments are even explicit in casting investors obligations as a form of *quid pro quo*: foreign investors and economic actors may receive the benefits from a treaty (such as investment protections) only if they comply with their obligations. The Pan-African Investment Code, for instance, states that:

> Where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.[64]

43. Different, more procedural approaches also allow for further relevance for the public interest. For instance, the common obligations for investors to first try local remedy can be an opportunity for local regulators and adjudicators to give a first idea of where a given dispute meets and is informed by the underlying public interest. For instance, the 2004 US Model BIT (Article 21) require investors to first refer their dispute to competent tax authorities before resorting to investor-state arbitration procedures. This approach enables gatekeepers, such as competent tax authorities, to determine the scope of investment treaty obligations and preserve the balance between public and private adjudication, ensuring that public interest is served.[65]

44. Finally, further examples of new instruments that insert the public interest into the international investment framework include national laws on investments and related instruments. For instance, Tanzania's *Natural Wealth and Resources (Permanent Sovereignty) Act*, enacted in 2017, provides that any contract related to the state's mineral wealth shall be void, except "where the interests of the People and the United Republic are fully secured". This is in line with the Act's Preamble, which stresses that:

> the United Republic being a sovereign state has permanent sovereignty over all natural wealth and resources thence imposing on the Government the responsibility of ensuring that interests of the People and the United Republic are paramount and protected in any arrangement or agreement which the Government makes or enters in respect of such natural wealth and resources.

b. Investment Protections

45. The first way for states to ensure that the public interest is taken into account is by baking it into the existing standards of protection. Notably, the existence of a "public purpose" has

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63 For an overview, see Mbengue M. & Charlotin D., "Role and Responsibilities of States to Ensure MNEs Compliance with Environment and Human Rights Obligations" (2023) ICC Dossier (*forthcoming*).

64 African Union, Draft Pan African Investment Code, December 2016, Article 43(1). See also ECOWAS Supplementary Act on Investments, A/SA.3/12/08, 19 December 2008, Article 18(4).

65 See Teitelbaum (n 8) 61.

long been a test of the lawfulness of an expropriation, including in the treaties that are precursors to BIT. As recently put by the ICJ, in relation to a 1955 Treaty on Freedom of Commerce:

> It has long been recognized in international law that the bona fide non-discriminatory exercise of certain regulatory powers by the government aimed at the protection of legitimate public welfare is not deemed expropriatory or compensable. [...] Governmental powers in this respect, however, are not unlimited.[66]

46. Accordingly, from the outset the ISDS jurisprudence has seen tribunals acknowledge the role of public interest when ruling on investments disputes. For instance, in *SPP v. Egypt*, the tribunal ruled that:[67]

> Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain. The right was exercised for a public purpose, namely, the preservation and protection of antiquities in the area. Nor have the Claimants challenged the Respondent's right to cancel the project. Rather, they claim that the cancellation amounted to an expropriation of their investment for which they are entitled to compensation under both Egyptian law and international law.

47. Yet, in view of the experience of ISDS proceedings since the turn of the century, and in particular the view of some states that tribunals were not sufficiently taking public welfare into account, more specialised language has emerged in recent treaties, boosting the role of the public interest in expropriation provisions.[68] For instance, some Canadian treaties provide explicitly that:

> Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[69]

48. This balance can also take place at the stage of the assessment of compensation, as is provided for in the SADC Model BIT:

> The assessment of fair and adequate compensation must be based on a fair balance between the public interest and the interests of the injured parties, taking into account all relevant circumstances, and taking into account the current and past use of the property, the history

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66 *Certain Iranian Assets* (Iran v. US), Judgment (30 March 2023), at 185.

67 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), at 158.

68 The

69 See Agreement between the Government of Canada and the Government of the Republic of Peru for the promotion and protection of investments (14 November 2006), Annex B, recording the parties' understanding as to Article 13(1) on Expropriation. Similar language can be found, e.g., in the EU-Singapore Investment Agreement (15 October 2018), Annex 1, at 1(2).

of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of past profits made by foreign investors through the investment, and duration of the investment.[70]

49. Other investment protections have likewise long had the potential to accommodate the public interest: this includes the fair and equitable treatment (FET) standard, whose open-endedness was particularly susceptible to receive interpretations and applications that take the public interest into account (as noted further below).[71] Here as well, however, more recent formulations of the treaty have insisted not only on the states' right to regulate in the public interest, but on how that interest should inform the analysis of any tribunal called upon to apply the FET standard. Notably, on the model especially of the CETA, recent treaty practice has endeavoured to exhaustively the circumstances whereby a state could breach that standard – cutting down on the traditional open-endedness.[72]

50. In the same vein, but this time concerned with the national treatment and most-favoured-nation treatment, the Investment Protocol to the AfCFTA provides that:

> Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment shall not be construed as a breach of [that standard].[73]

c. Exceptions

51. Another approach to rule-making designed to booster the role of the public interest is to include "exceptions" or "non-preclusion" clauses in investment agreements. Such clauses typically provide for a list of traditional public interest objectives – such as the environment, public health, etc. – that are explicitly meant to shield state actions from most forms of liability.[74] These exceptions, the drafters' reasoning goes, are likely to "push tribunals into exactly the kind of proportionality-based posture that some of the most influential tribunals

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70 SADC Model Bilateral Investment Treaty (2012), Article 6.2

71 See McLachlan C, "Investment Treaties and General International Law" (2008) 57 *International & Comparative Law Quarterly* 361, at 382-3, noting that the "inclusion of the reference to equitable treatment also provides a means by which an appropriate balance may be struck between the protection of the investor and the public interest which the host State may properly seek to protect in the light of the particular circumstances then prevailing."

72 See, e.g., Agreement Between The Swiss Federal Council And The Government Of The Republic Of Indonesia On The Promotion And Reciprocal Protection Of Investments (25 May 2022), Article 4(2).

73 Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, Final Draft (October 2022), Article 13 and 15.

74 See, e.g., Agreement between the United States of America, the United Mexican States, and Canada (30 November 2018), Article 14.16. Many of these clauses maintain an exception for state conduct that qualifies as arbitrary or unjustifiable discrimination.

have already adopted".[75] Treaty drafters have enthusiastically adopted exceptions in recent treaties.[76]

52. One potential limitation of general exceptions, however, is that by spelling out explicitly a range of public policy objectives, they may lead tribunals to consider that other objectives are not similarly covered. This is exactly what happened in *Bear Creek v. Peru*, for instance, in which a tribunal concluded that "the interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case."[77]

1. Interpretation and application by tribunals

53. A second approach to deploy the public interest through the substantive law is at the arbitral stage, with the tribunal factoring in such interests and balancing them against the private interests represented in the ISDS proceedings. Beyond instances where a tribunal has to rule on the existence of public interest proper (for instance, in the context of an expropriation analysis[78]), there are at least two avenues to do so: through the doctrine of proportionality, notably as applied to interpret and apply investment protections (*a*); and through a heightened concern for a number of public policy issues (*b*).

a. Proportionality

54. Over the years, tribunals have increasingly integrated the doctrine of proportionality and the margin of appreciation in their analyses on the merits of ISDS cases. The two concepts allow tribunals to strike a balance between the respondent-state's legitimate regulatory and public interests, and the protection of investors' rights.

55. While both proportionality and the margin of appreciation have been applied in applying a variety of investment protections, as well as in more procedural settings, they have been particularly fruitful under the aegis of the fair and equitable treatment (FET) standard,[79] the "paradigmatic example of an open-ended, incomplete norm, combining expansive functional

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[75] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy.* (Oxford University Press 2017) 217.

[76] For empirical data, see, e.g., Alschner W and Skougarevskiy D, "Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice".

[77] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (30 November 2017), at 473.

[78] See, e.g., *ADC Affiliate Limited & ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 , Award (2 October 2006), at 432: "a treaty requirement for "public interest" requires some genuine interest of the public. If mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."

[79] See McLachlan C, "Investment Treaties and General International Law" (2008) 57 *International & Comparative Law Quarterly* 361, at 382: the "inclusion of the reference to equitable treatment also provides a means by which an appropriate balance may be struck between the protection of the investor and the public interest which the host State may properly seek to protect in the light of the particular circumstances then prevailing."

logics, indeterminacy, and breadth."[80] The paramount example of tribunals exercising proportionality to accommodate the public interest can be found in *Saluka v. Czech Republic*, where the arbitrators noted that:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of "fair and equitable treatment" by the host State must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. [...] The determination of a breach of [the FET standard] therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.[81]

56. This frequently-cited analysis has informed the work of later tribunals,[82] and has informed a general sense that regulation in the public interest should be granted a degree of deference.[83] While it is possible tribunals have adopted this approach presumably in acknowledgment that this would help them fight against the charge of pro-investor bias.[84] Empirical analyses seem to indicate that, in the most environmentally-sensitive cases, for instance, investors have rarely won[85] – though such statistics can be misleading given the relatively low sample of cases studied in this context, the unknown number of disputes that never made to the arbitral stage.[86]

57. Proportionality has found its way beyond standard investment protections, as more procedural analysis are sometimes explicitly framed as allowing to weigh public interests. For instance, in *Caratube v. Kazakhstan*, the ICSID tribunal ruled that provisional measures should be granted only if they are proportionate, with the tribunal stressing that it should:

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80 ibid 191.

81 *Saluka v. Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), at 305-6.

82 This jurisprudential cross-fertilisation, however, is not without critics: the *Saluka* partial award itself strongly relies on analyses developped in *Tecmed* with respect to the role of legitimate expectations: see Chen RC, "Precedent and Dialogue in Investment Treaty Arbitration" (2019) 60 *Harvard International Law Journal* 47, at 87-88.

83 See, e.g., *Lone Pine Resources Inc. v. Canada*, ICSID Case No. UNCT/15/2, Final Award (21 November 2022), at 624: "Several investment tribunals have confirmed – and this Tribunal, too, subscribes to this position – that a high measure of deference must be given to the right of the host State to make regulatory changes in light of the public interest."

84 Stone Sweet, A. and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy.* (Oxford University Press, 2017), at 172, noting that in ISDS proceedings, "where states- as-respondents directly plead the public interest in their defence, adopting a balancing posture is a straightforward means of countering charges of investor bias."

85 Daniel Behn & Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration' (2017) 18 *The Journal of World Investment & Trade* 1, at 38.

86 Ibid., at 44-45.

be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests.[87]

58. Not all tribunals, however, have been convinced that deploying these legal concepts is proper. Some have expressed concerns that incorporating proportionality and margin of appreciation might lead to inconsistency in the application of investment protections, or even give too much deference to the state at the expense of investor rights. In the context of an expropriation dispute, the tribunal in *Santa Elena v. Costa Rica* was straightforward:

> [T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[88]

59. The conflict between these two approaches is notably patent in the dissenting opinion of Judd Kessler in RWE Innogy v. Spain. According to Mr. Kessler, his disagreement with his co-arbitrators may:

> result from two different schools of legal thought regarding the entire enterprise of international investment arbitration. If I am correct, and I may not be, these differences have their roots, on the one hand, in the origins of investment arbitration where — after World War II — there was an urgent need to increase the flow of private investment resources to developing nations. On the other hand, more recently, a significant number of estimable practitioners and legal scholars have suggested that the investment arbitration process is not sufficiently structured. They maintain that investment tribunals should not focus so much on the tribulations of private investors. Instead they should be more deferential to the decisions of governments – especially democratically elected governments – and their respective agents.[89]

60. Which school of thought will prevail and decide future ISDS dispute remains to be seen – but this is a question that will be deeply influenced by the treaties and other international instruments executed by state in this respect.

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87 *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Claimant's Request for Provisional Measures (4 December 2014), at 121. See also *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7 (11 July 2022), at 92: "State sovereignty in respect of activities serving public interests is an important consideration which has been given due weight by the Tribunal."

88 *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, at 71-2.

89 *RWE Innogy Gmbh & RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Separate Opinion of Mr. Judd L. Kessler (1 December 2020), at 7.

b. Public policy

61. Finally, the public interest can be deployed by tribunal itself, *suo motu*, with respect to specific matters that are widely recognised as pertaining to the public interest. Crucially, this approach entails that a tribunal might disagree with what a state considers the public interest – although the latter's view on what constitutes the public interest should be given deference, it is not dispositive.

62. An example of this approach can be found in *Spentex v. Uzbekistan*, whereby the tribunal, upon a finding of bribery that led to the claims' dismissal, declined to award the state its legal costs – in recognition that the state had participated in the bribery.[90] Instead, the tribunal ordered the respondent to donate 8 million USD to a UN anti-corruption initiative, failing which the state would have to cover the claimant's legal bill.

C. The Public Interest in modern ISDS proceedings

63. From this overview of the recent developments in the field of ISDS, there is no denying that the need to take a broader account of the public interest has led to many procedural and substantial developments. Nevertheless, there remains acknowledged limits to the field's capacity to take the public welfare into account (*a*), and these limits might require all stakeholders to invent new and more radical reform approaches (*b*).

a. Limits

64. While these reforms have substantially answered the early calls for greater transparency and participation in ISDS proceedings, they have generally failed to solve this regime's legitimacy crisis. For instance, although the CETA was touted by the EU and Canada as the most advanced approach to conjugate investor-state settlement of disputes and the public interest, notably through stringent transparency obligations and the establishment of a standing tribunal, its adoption has been loudly contested by civil society groups and some EU member states.[91] Likewise, some of the countries that joined the Transatlantic Trade and Investment Agreement (TTIP) have made sure to opt out the treaty's ISDS chapter, a move that "reflects the negative perception of ISDS generally."[92]

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[90] The award is not publicly available, but the outcome is recounted in L. Peterson & V. Djanic, 'In an innovative award, arbitrators pressure Uzbekistan – under threat of adverse cost order – to donate to UN anti-corruption initiative; also propose future treaty-drafting changes that would penalize states for corruption' (*Investment Arbitration Reporter*, 22 June 2017), available at https://www.iareporter.com/articles/in-an-innovative-award-arbitrators-pressure-uzbekistan-under-threat-of-adverse-cost-order-to-donate-to-un-anti-corruption-initiative-also-propose-future-treaty-drafting-changes-that-woul/.

[91] See DW, 'Thousands rally against CETA, TTIP in Brussels' (DW, 20 September 2016), available at https://www.dw.com/en/thousands-protest-against-ceta-and-ttip-in-brussels/a-19564581.

[92] Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) 18 Chicago Journal of International Law <https://chicagounbound.uchicago.edu/cjil/vol18/iss1/9>., at 345: "Australia refused to sign onto the investment provision of the Agreement, even in light of the seemingly more state-favoring language. Australia did not want to restrict its ability to regulate in environmental and social areas."

65. This is unsurprising: the procedural devices designed to enhance public interest do not guarantee a particular outcome. For instance, while it is hoped that the participation of non-disputing parties or *amici curiae* – if they can even be submitted[93] – will bring the tribunal's attention to issues of public welfare, nothing, however, ultimately prevents the arbitrators to ignore this information and rule without taking it into account, or after paying mere lip service to the public welfare aspects of the dispute.[94]

66. Other aspects of the proceedings, such as arbitrator selection, have proven much harder to reform.[95] And indeed, the whole focus on procedural rather than substantive multilateral reform has been criticised has underambitious and unlikely to properly meet the challenges to the ISDS regime.[96]

67. As for baking in the public interest in the substance of international investment, that approach also has limits. The *Eco Oro* arbitration is a case in point: while the underlying agreement included a general exception clause that covered environmental measures, on which Colombia relied, the tribunal interpreted these general exceptions in a way that made little difference to the outcome of the dispute.[97]

b. Way forward

68. This conclusion does not necessarily mean that ISDS is impossible to reform to meet the states' expectations and better take into account public welfare objectives. Instead, it just indicates that further reforms might be necessary to achieve that purpose.

69. While much has been done at the procedural level, other devices remain available and could be more broadly implemented in international investment agreements and procedural rules alike. Mandatory interpretations by joint treaty committees, for instance, would help steer a tribunal's decision towards a particular reading of the governing treaty. Positive presumptions could also be added as a matter of proof or evidence, so as to better align the states' favoured outcomes with the ISDS proceedings.

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93 See, e.g., *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012), at 56-57, where the tribunal considered that the indigenous people whose land rights had been impacted by the investment would not bring a relevant insight into the dispute.

94 Saei J, "Amicus Curious: Structure and Play in Investment Arbitration" (2017) 8 Transnational Legal Theory 247, at 289, holding that the duty to hear non-disputing treaty parties "is a small but important step away from purely private dispute resolution and towards public adjudication. On the other hand, ICSID arbitrators still control who they ultimately listen to, and may certainly choose to ignore some petitions. But they must still justify their decisions according to the law."

95 Alessandra Arcuri & Francesco Montanaro, "Justice for All: Protecting the Public Interest in Investment Treaties" (2018) 59 *BC Law Review* 2791, at 2802, noting that the "questionable procedures for arbitrator selection remain unchanged and proposals to introduce an appellate review mechanism remain dead letter in most IIAs."

96 Arato, J., Clausseen, K., & Langford, M.: 'The investor-state dispute settlement reform process: design, dilemmas and discontents' (2023) *Journal of International Dispute Settlement*, at 3.

97 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. Arb/16/41, Decision On Jurisdiction, Liability And Directions On Quantum (9 September 2021), at 830: "The Tribunal therefore construes Article 2201(3) such that whilst a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201(3) without finding itself in breach of the FTA, this does not prevent an investor claiming under Chapter Eight that such a measure entitles it to the payment of compensation."

70. Meanwhile, the broader reform of ISDS at the substantial level has barely started to be undertaken: while some treaties have started to rephrase or reformulate the traditional standards of protection, much remains to be done in this respect. Notably, the asymmetric nature of ISDS, which is likely to remain a sticking point for the foreseeable future,[98] can be remedied: future reforms could offer a jurisdictional pathway not only state's counterclaims,[99] but also for direct claims by affected communities against states or multinational enterprises.[100]

98 *Ibid*, at 2803.

99 *Ibid*, at 2798-9.

100 For this argument in the context of growing need to hold multinational enterprises to account, see Mbengue M. & Charlotin D., "Role and Responsibilities of States to Ensure MNEs Compliance with Environment and Human Rights Obligations" (2023) ICC Dossier (*forthcoming*).