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# **Public Interests in Water Concession Disputes**

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## **Abstract**

*The flux of foreign investment into the water industry led to the internationalisation of contracts and of the method of settlement of possible disputes. When disputes over the performance of a water concession give origin to investor-state arbitrations, public authorities are put in a challenging position. The state need to combine two different roles – its role in the provision of services of public interest and the fulfilment of its international legal obligations arising from international investment agreements. The complexity of this relationship is patent in a variety of procedural and substantive issues that have been surfacing in arbitration proceedings conducted before the International Centre for Settlement of Investment Disputes. The purpose of this dissertation is to discuss the impact of investment arbitration on the protection of public interests associated with water services. In deciding these cases arbitrators are contributing significantly in shaping the contours and substance of an emerging international economic water services regime. Through the looking glass of arbitration awards one can realise the substantial consequences that the international investment regime has been producing on water markets and how significantly it has been impacting the public interests associated with water services. Due consideration of the public interests in water concession disputes requires concerted action in two different domains: changing the investment arbitration mechanism, by promoting the transparency of proceedings and the participation of non-parties; and changing the regulatory framework that underpins investments in water services. Combined, these improvements are likely to infuse public interests into water concession arbitrations.*

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I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

A handwritten signature in blue ink that reads "Fernando Miguel Dias Simões". The signature is written in a cursive style and is underlined.

Fernando Miguel Dias Simões

## CHAPTER I – GLOBALISATION OF THE WATER INDUSTRY

### 1. Water: from the State to the Market

The provision of urban water services has historically been considered a ‘public service’. The ‘public’ label resulted from the fact that these services were owned and operated by a public entity. From a different perspective, water services were also defined as ‘public’ because they were offered to the general community and perceived as vital for the satisfaction of citizens’ needs. Taking into account that water supply served key public interests, both ownership and operation were considered of strategic importance and remained strictly within the realm of the public sector.

Water supply is operated through a vast physical network, from well to tap. The operation of this grid requires substantial technical expertise, maintenance, and investment. All over the world governments were faced with deteriorating water systems and the scarcity of capital to maintain and improve networks. Public authorities started mulling the possibility of allowing private participation in the provision of water services by means of different instruments known as Public-Private Partnerships. This concept refers to an assortment of contractual arrangements whereby private companies build, manage, and/or operate water infrastructures on behalf of governments.<sup>1</sup> Essentially two arguments were advanced in favour of Public-Private Partnerships: first, governments could attract the huge funding needed for the maintenance and expansion of water infrastructures; second, they could benefit from the technical and commercial savoir-faire of private companies.<sup>2</sup> This shift towards the market in search of efficiency and sustainability was boosted by a growing discourse about water as an economic good, epitomised in the 1992 ‘Dublin Statement on Water and Sustainable Development’, also known as ‘the Dublin Principles’.<sup>3</sup> The statement included the principle that ‘water has an economic value in all its competing uses and should be recognized as an economic good’. This momentous change in the way water was understood – from a public to an economic good – was reiterated by

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<sup>1</sup> K. Bakker, “Privatizing Water: Governance Failure and the World’s Urban Water Crisis”, Ithaca: Cornell University Press, 2010 p. xv.

<sup>2</sup> See, e.g., X. Mandri-Perrott, D. Stiggers, “Public Private Partnerships in the Water Sector. Innovation and Financial Sustainability”, London: IWA Publishing, 2013 pp. 3 ff.

<sup>3</sup> Several Authors, The Dublin Statement on Water and Sustainable Development, Dublin, 31 January 1992, available at <http://www.wmo.int/pages/prog/hwrp/documents/english/icwedece.html>.

numerous international, multilateral and bilateral agencies, calling for significant changes in national regulatory frameworks so as to allow private sector participation in water services.

Public-Private Partnerships assume varied shapes. The concession model is the most comprehensive form of private participation in water services provision. By means of this contract, the public authority (the ‘grantor’) transfers to a private company (the ‘concessionaire’) the commercial management of abstraction, treatment, distribution, and sale of water in a specific city or region. In some cases water supply is combined with the operation of the sewerage system. The concessionaire is responsible for the capital investments and assumes the full risk of operating the assets. In exchange the concessionaire is entitled to bill and collect payments from all customers at tariff levels agreed with the public entity.<sup>4</sup> Normally these contracts have a long period of duration depending on the level of investment and the payback period needed for the concessionaire to recover investment costs. At the end of the contract the concessionaire hands back all works and equipment to the state.

The marketisation of water management deeply transformed the role of the state in the provision of these services. The conclusion of concession contracts lead to an emphasis on the economics of private investment – the sector entered the age of ‘economization of fresh water’.<sup>5</sup> Nevertheless, public authorities are still required to ensure that water services are carried out in accordance with their essential public function.<sup>6</sup> The concept of ‘public service’ was not rendered useless as public service obligations may also be discharged under private-law regimes.<sup>7</sup> The unrelieved responsibility of states for water service provision has been confirmed in several international documents. In August 2000 the International Council of Environmental Law submitted a written statement to the Economic and Social Council of the United Nations arguing that ‘irrespective of the form of water service management and the degree of involvement of private companies in the service, the public authorities must exercise control over the operations of the various public or private bodies involved in water service management. This includes, in particular, the financing of works, the quality of the water, continuity of the

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<sup>4</sup> A. Nickson, R. Franceys, “Tapping the Market: The Challenge of Institutional Reform in the Urban Water Sector”, New York: Palgrave Macmillan, 2003 pp. 73-74.

<sup>5</sup> L. De Chazournes, “Fresh Water in International Law”, Oxford: Oxford University Press, 2013 p. 96.

<sup>6</sup> F. Costamagna, Regulating Public Services and International Investment Law, in M. Krajewski (ed.), “Services of General Interest Beyond the Single Market. External and International Law Dimensions”, The Hague: T.M.C. Asser Press, 2015 p. 79.

<sup>7</sup> H. Wollmann, G. Marcou, Introduction, in H. Wollmann, G. Marcou (eds.), “The Provision of Public Services in Europe: Between State, Local Government and Market”, Cheltenham: Edward Elgar Publishing, 2010 p. 4.

service, pricing, drafting of specifications, degree of treatment and user participation’.<sup>8</sup> In 2010 the Human Rights Council reaffirmed that the delegation of the delivery of water services to a third party does not exempt public authorities from their obligations and called upon States to adopt measures to fulfil their duties.<sup>9</sup>

The provision of water services has long been qualified as a ‘public service’. Yet, the concept is vague as services are organised in different ways from country to country. In the European Union the concept evolved to the notions of ‘Services of General Interest’ and ‘Services of General Economic Interest’. While the former refers to services that public authorities classify as being of general interest and, therefore, subject to specific public service obligations; the latter covers economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions) by the market without public intervention.<sup>10</sup> Specific requirements – known as ‘public service obligations’ – are imposed on service providers relating to security of supply, regularity, quality and price of supplies, and environmental protection.<sup>11</sup>

Because of its association with public interests, the provision of water services requires some form of regulation. Four distinct elements are included in the regulatory regime: the general framework of laws, constitutional rules, and administrative structures; water resource and environmental laws; specific water and sanitation sector regulation; and the individual contracts under which the private company operates.<sup>12</sup> The concession contract is the main source of obligations for the parties. Taking into account the importance of the service rendered, the substantial financial means involved, and the lengthy duration of the arrangement, parties enter into a complex contractual framework that governs basic matters such as tariffs,

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<sup>8</sup> International Council of Environmental Law, *The Realization of Economic, Social and Cultural Rights*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Agenda Item 4, E/CN.4/Sub.2/2000/NGO/19, of 7 August 2000.

<sup>9</sup> United Nations Human Rights Council, Resolution 15/9: Human Rights and Access to Safe Drinking Water and Sanitation, A/HRC/RES/15/9, of 6 October 2010.

<sup>10</sup> European Commission, *A Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, of 20 December 2011 p. 3.

<sup>11</sup> M. Hennig, *Public Service Obligations: Protection of Public Service Values in a National and European Context*, in E. Szyszczak, J. Davies, M. Andenæs, T. Bekkedal (eds.), “Developments in Services of General Interest”, The Hague: Springer, 2011, p. 180.

<sup>12</sup> J. Rees, *Regulation and Private Participation in the Water and Sanitation Sector*, in *Natural Resources Forum*, 1998, 22(2), pp. 103-104.



performance targets, quality standards, penalties, and termination.<sup>13</sup> Normally the contract also imposes specific public service obligations that include the obligation to supply, equal treatment of users, continuity of service, and the like. In exchange, some exclusive rights are usually granted to the concessionaire.<sup>14</sup>

The provision of water services is also subject to a vast legal framework. Legislators at the national or local level enact legal provisions applicable to water services in general and to water concessions specifically: laws on the privatisation process, the provision of water services, environmental laws, etc. The creation of this legal kaleidoscope is normally accompanied by the creation of a regulatory agency to monitor the sector. This body of rules does not merely cover the relationship between the state and the private partner – as the service is delivered to the public, it is also necessary to regulate the rights of citizens (users/consumers), the third parties to the concession contract who enter into water supply contracts with the concessionaire. Taking into account the public nature of the service, the regulatory web is composed of provisions that impose certain principles such as universality, equality, continuity, impartiality, adaption to the needs of users, etc. Citizens are configured as holding certain rights, namely the right of physical and economic access to the services, their quality, information about services, complaints about services and participation in decisions.<sup>15</sup> The traditional bilateral relationship between the state and the citizen is replaced with a triangle, where the state is the regulator of the new provider-consumer relationship.<sup>16</sup>

## **2. The Global Water Market and Investor-State Arbitration**

The new market-oriented approach paved the way for the emergence of a global marketplace for private water services. Companies started marketing their ability to make significant capital investments in infrastructures and operate systems in an efficient manner. The

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<sup>13</sup> P. Spiller, *Basic Economic Principles of Infrastructure Liberalization: a Transaction Cost Perspective*, in M. Finger, R. Künneke (eds.), *International Handbook of Network Industries: The Liberalization of Infrastructure*, Cheltenham: Edward Elgar Publishing, 2011 p. 21.

<sup>14</sup> P. Guislain, M. Kerf, *“Concessions – The Way to Privatize Infrastructure Sector Monopolies”*, Washington, DC: World Bank, 1995 p. 3.

<sup>15</sup> J. Baptista, *“The Regulation of Water and Waste Services: An Integrated Approach”*, London: IWA Publishing, 2014 pp. 27 ff.

<sup>16</sup> H. Micklitz, *Universal Services: Nucleus for a Social European Private Law*, in M. Cremona (ed.), *Market Integration and Public Services in the European Union*, Oxford: Oxford University Press, 2011 p. 76.

combined forces of privatisation and globalisation resulted in a vast number of concession contracts being concluded between water companies and foreign states.

The increase in the flux of foreign investment in water services which took place over the last decades would not have been possible without the establishment of a transnational system of substantive and procedural guarantees. Currently this system consists of a vast network of international investment agreements supplemented by the general rules of international law. Investment agreements are a form of international hard law that creates a series of obligations owed by the host state towards foreign investors.<sup>17</sup> These include the obligation to treat foreign investors fairly and equitably; provide foreign investors full protection and security; not to expropriate foreign investment except under certain conditions; not to treat covered foreign investors less favourably than foreign investors from third countries; and not to treat covered foreign investors less favourably than domestic investors. Many investment agreements include concessions in their definitions of investment.<sup>18</sup> Even in the absence of express reference, concessions can be considered investments to the extent that they require the investor to commit capital to a venture with the expectation of receiving a return at a later moment.<sup>19</sup>

International investment agreements also include procedural protections. They typically contain clauses that grant to the investor the option of either filing claims in the local courts of the host state or of initiating an international arbitration.<sup>20</sup> The latter is frequently conducted before the International Centre for Settlement of Investment Disputes (ICSID), a World Bank-affiliated institution established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention').<sup>21</sup> Water services are increasingly implicated in investor-state disputes. According to figures from the ICSID, six

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<sup>17</sup> See, generally, R. Dolzer, C. Schreuer, "Principles of International Investment Law", Oxford, Oxford University Press, 2008.

<sup>18</sup> United Nations Conference on Trade and Development, "Scope and Definition: a Sequel", UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva: United Nations, 2011, p. 31.

<sup>19</sup> J. Salacuse, "The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital", Oxford: Oxford University Press, 2013 p. 17.

<sup>20</sup> See, generally, C. Dugan, D. Wallace Jr., N. Rubins, B. Sabahi, "Investor-State Arbitration", Oxford: Oxford University Press, 2008.

<sup>21</sup> ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf).

percent of all registered ICSID disputes have involved water, sanitation, or flood protection.<sup>22</sup> To be sure, the ICSID has already administered 13 cases arising from water concession contracts.<sup>23</sup>

In such disputes the foreign investor claims that certain acts or omissions of organs of the central government or local authorities, which resulted in damages to his investment, violate the host state's obligations under an international investment agreement. The entry of foreign investment in the water industry had a significant impact on the relationship between the parties and on the adjudication of possible disputes between them. When the management of water services is transferred to a domestic company, the contract is regulated by the domestic legal system and disputes are normally solved through local courts. Differently, when states delegate the management of water services on a foreign company, the foreign investor is protected by investment treaties which have been negotiated between the host state and the investor's national government, and the dispute will be settled by an international arbitral tribunal.

Investor-state disputes arise from a long term relationship between investor and state. Salacuse describes this relationship as a 'complex connection, often amounting to a state of interdependence, between the investor and the Host State'.<sup>24</sup> The complexity of this relationship is patent in a variety of procedural and substantive issues that have been surfacing in arbitration proceedings conducted before the ICSID. The purpose of this dissertation is to discuss the impact of investment arbitration on the protection of public interests associated with water services. Despite the social and economic relevance of this phenomenon, it has received little attention from scholars. Probably this silence is an eloquent expression of the convoluted character of

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<sup>22</sup> ICSID, The ICSID Caseload – Statistics (Issue 2015-2), available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf), p. 12.

<sup>23</sup> Cases concluded: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3 ('Vivendi v. Argentina'); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12 ('Azurix v. Argentina'); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17 ('Suez/Interagua'); *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22 ('Biwater v. Tanzania'); *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17 ('Impregilo v. Argentina'). Cases pending: *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19 ('Suez/Vivendi v. Argentina'); *SAUR International v. Argentina*, ICSID Case No. ARB/04/4 ('SAUR International v. Argentina'); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26 ('Urbaser v. Argentina'); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Estonia*, ICSID Case No. ARB/14/24. Cases discontinued: *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3 ('Aguas del Tunari v. Bolivia'); *Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/18; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/03/30; *Gelsenwasser AG v. Algeria*, ICSID Case No. ARB/12/32.

<sup>24</sup> J. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, in *Fordham International Law Journal*, 2007, 31, p. 141.

these disputes which are governed by a wide array of laws including investment law, international law, human rights standards, contractual rights and obligations, and national laws.<sup>25</sup> As there is no international body responsible for water services, the regulation of these services is highly fragmented and chaotic. However, the existence of transnational legal frameworks for investment protection and dispute settlement produced an important result: it inadvertently formed an emerging system of regulatory governance. In deciding these cases arbitrators are contributing significantly in shaping the contours and substance of an emerging international economic water services regime.<sup>26</sup> Through the looking glass of arbitration awards one can realise the substantial consequences that the international investment regime has been producing on water markets and how significantly it has been impacting the public interests associated with water services.

The dissertation proceeds as follows. Chapter II examines several criticisms, of procedural and substantive nature, that have been levelled against Investor-State Arbitration in general. These critiques evidence the ‘growing pains’ of a dispute settlement mechanism that has expanded, in both scope and importance, to a level that could not have been predicted when it was first implemented. In the specific case of water disputes, several symptoms of these ‘growing pains’ evidence the profound impact that investment arbitration produced in the water industry. The legal principles and frameworks that traditionally supported investor-state arbitration did not properly ensure the protection of the public interests associated with water services. An analysis of the extant case law allows to diagnose the persistence of some disorders that, while of general nature, are particularly expressive in water disputes. Although the system has been reforming over the last years in order to cure some of its flaws, the current situation is still insatisfactory. Chapter III discusses some remedies that can be prescribed in order to ensure due consideration of public interests in water services disputes. It is argued that action is needed in two different domains: additional reforms in the investor-state system; and improvements in the regulatory framework that governs these disputes (investment treaties and concession contracts). It is hoped that these suggestions will contribute to strike a proper balance between public and private interests in the water industry. Finally, Chapter IV offers some conclusions.

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<sup>25</sup> J. Chaisse, M. Polo, Globalization of Water Privatization: Ramifications of Investor-State Disputes in the “Blue Gold” Economy, in *Boston College International & Comparative Law Review*, 2015, 38(1), pp. 13-14.

<sup>26</sup> *Ibid*, pp. 4, 62.

## CHAPTER II – PUBLIC INTERESTS IN WATER CONCESSION ARBITRATIONS

### 3. The ‘Growing Pains’ of Investor-State Arbitration

Investor-state arbitration has been attracting substantial criticism over the last years, with several stakeholders voicing concerns about the way in which this dispute settlement mechanism is structured and operated. While critiques focus on different issues with varying impact on the overall nature and efficiency of the system, together they have led to a sizeable literature on a purported ‘crisis’ of the system.<sup>27</sup> Signs of dissatisfaction can be seen in the adjustment of the substance and procedure of investment treaties in ways that reflect concerns about previous trends or, even more clearly, in the withdrawal of some states (Bolivia, Ecuador, and Venezuela) from the ICSID Convention. Taken together, these developments suggest the existence of, at least, ‘growing pains’ and call for a re-thinking and re-shaping of the system. Over the next pages we examine some of the critiques that have been levelled against the investment arbitration regime and discuss how the system has been readjusting in the hope of addressing them.

#### 3.1 Lack of Transparency

First, investor-state arbitration has been accused of lacking transparency. In the realm of investment arbitration ‘transparency’ refers to the extent to which the general public may be alerted to the existence of the dispute, have access to key arbitration documents, and attend any oral hearings.<sup>28</sup> For the most part, the investment arbitration process parallels the commercial arbitration mechanism, where disputing parties are masters of the proceedings and generally favour confidentiality. The procedural rules are often the same as those applicable to ordinary commercial arbitration between private parties. The arbitration rules of the ICSID are the only

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<sup>27</sup> See, e.g., C. N. Brower, C. H. Brower II, J. Sharpe, *The Coming Crisis in the Global Adjudication System*, in *Arbitration International*, 2003, 19(4), pp. 415-440.

<sup>28</sup> N. Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, in Hofmann, R., Tams, C. (eds.), *“The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years”*, Baden-Baden: Nomos, 2007, p. 214; K. Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line favorably for the Public Interest*, in *Fordham International Law Journal*, 2012, 35, p. 528.

set of arbitral rules designed specifically for investor-state arbitration. As a result, confidentiality has been a traditional feature of investment arbitration. The topic has assumed considerable importance over the last years, with some accusing the system of being secret.<sup>29</sup>

Several commentators have criticised the emulation of the confidential model, highlighting that investor-state arbitration is fundamentally distinct. Investment disputes often raise public interest issues – because their subject matter impacts on the provision of public services<sup>30</sup> or touches upon sensitive socio-political concerns – which are normally absent from commercial arbitration.<sup>31</sup> Investors challenge measures adopted by the host-state that the latter frequently argues to be in the public interest. The arbitral tribunal performs a supranational review of state acts, scrutinising the conduct of public entities against the standards of treatment prescribed in international investment agreements. As it functions as an equivalent of judicial review of governmental measures, substantial public interests are involved.<sup>32</sup> The outcome of proceedings may limit the future legislative and administrative freedom of manoeuvre of states, affecting their ability to pursue public welfare policies.<sup>33</sup> Because the controversy is so deeply connected with national policies, the ultimate resolution will have direct effects on the population. Such proceedings are public by their very nature and need to be accessible to the public.

Even though investment disputes have the potential to significantly affect public interests, they are decided in a process that was originally designed to address private controversies, without due regard to the importance of transparency for democratic governance.<sup>34</sup> This traditional emphasis on confidentiality increases the arbitrators' perception that their main

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<sup>29</sup> See, e.g., A. De Palma, *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far Critics Say*, in *New York Times*, 11 March 2001, p. 1; *New York Times*, Editorial: *The Secret Trade Courts*, in *New York Times*, 27 September 2004; *The Economist*, *Behind Closed Doors*; *Investment Arbitration and Secrecy*, in *The Economist*, 25 April 2009, p. 63.

<sup>30</sup> L. Mistelis, *Confidentiality and Third-Party Participation: UPS v Canada and Methanex Corp. v. United States*, in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London: Cameron May, 2005, p. 197.

<sup>31</sup> R. Buckley, P. Blyschak, *Guarding the Open Door: Non-Party Participation Before the International Centre for Settlement of Investment Disputes*, in *Banking and Finance Law Review*, 2007, 22(3), p. 354.

<sup>32</sup> N. Blackaby, C. Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in Waibel, M., Kaushal, A., Chung, K., Balchin, C. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Alphen aan den Rijn: Kluwer Law International, 2010, p. 255.

<sup>33</sup> C. Knahr, A. Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, in *Law and Practice of International Courts and Tribunals*, 2006, 6, p. 113; K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Cambridge: Cambridge University Press, 2013, pp. 373-374.

<sup>34</sup> B. Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, in *Vanderbilt Journal of Transnational Law*, 2008, 41, pp. 782 ff.

function is to settle a private dispute between the parties, without duly taking account of larger public interests.<sup>35</sup> This lack of transparency hampers efforts to track investment treaty disputes, monitor their frequency, and evaluate their consequences. The specific characteristics of international investment arbitration justify a greater measure of transparency.<sup>36</sup> The fact that we are dealing with public law disputes requires that the host state's public has the opportunity to be informed about the behavior of governments and arbitral tribunals.<sup>37</sup>

Concerns about the lack of transparency of the investment arbitration system cross different moments of the proceedings.

First, there may be lack of transparency regarding the initiation of a dispute. Most investment treaties do not require investors to publicly manifest their intention to launch a dispute settlement process. In ICSID arbitration all new cases are registered,<sup>38</sup> this information is also posted on the ICSID website with reference to the name of the parties and the subject matter of the dispute.<sup>39</sup> Still, this information says little about the contours of the case. This lack of publicly accessible information makes it extremely hard to have exact knowledge of the existence, number and nature of investor-state disputes, rendering the protection of possible public interests involved in such disputes quite difficult.<sup>40</sup>

Second, procedural rules typically do not provide for public access to arbitral documents. This means that non-parties and the general public have minimal if any access to pleadings and evidence.<sup>41</sup> Pursuant to rule 6(2) of the ICSID Arbitration rules,<sup>42</sup> before or at the first session of the tribunal, each arbitrator shall sign a declaration promising to 'keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal'. As regards the minutes and other records of

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<sup>35</sup> M. Hirsch, *Investment Tribunals and Human Rights Treaties: a Sociological Perspective*, in F. Baetens (ed.), "Investment Law within International Law: Integrationist Perspectives", Cambridge: Cambridge University Press, 2013, p. 98.

<sup>36</sup> J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation, and NAFTA Leadership*, in *University of Kansas Law Review*, 2006, 54, pp. 1348 ff.

<sup>37</sup> S. Schill, *International Investment Law and Comparative Public Law – an Introduction*, in S. Schill (ed.), "International Investment Law and Comparative Public Law", Oxford: Oxford University Press, 2010, pp. 14-15.

<sup>38</sup> ICSID, *Administrative and Financial Regulations, Regulation 22(1)*, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf).

<sup>39</sup> ICSID, *Cases*, available at <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>.

<sup>40</sup> N. Blackaby, *Public Interest and Investment Treaty Arbitration*, in A. Jan van den Berg (ed.), "International Commercial Arbitration: Important Contemporary Questions", London: Kluwer Law International, 2003, p. 359.

<sup>41</sup> S. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, in *Fordham Law Review*, 2005, 73(4), pp. 1544-1545.

<sup>42</sup> ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf).

proceedings and arbitral awards, and pursuant to Regulation 22(2) of the Administrative and Financial Regulations, they can only be published with both parties' consent.

As for hearings, Rule 32(2) provides: 'Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.' As the consent of the parties is required, public access to the proceedings remains conditional. This precludes an informed debate on both the quality of the process itself and the substantive issues which might touch on matters of public interest.<sup>43</sup>

Finally, once the dispute is settled, there may be a lack of public access to the arbitral award. The decision on whether to authorise the publication of the final award has traditionally remained in the hands of the parties. This means that even those disputes that involve public interests may be shrouded in secrecy unless both investor and host state give their consent to publication. Public access to arbitral awards is important to allow for public scrutiny of arbitral decisions – thus promoting their transparency and legitimacy – but also for the very efficiency of the overall investor-state arbitration system. The publication of arbitral decisions allows for the formation of a consistent jurisprudence, promoting legal certainty and ensuring predictability, which in turn increases the confidence in the system.<sup>44</sup> Furthermore, it may contribute to the avoidance of unnecessary disputes, as previous awards constitute a point of reference around which parties and arbitrators form expectations regarding future decisions.<sup>45</sup>

Most arbitration rules contain no explicit legal obligation to make arbitral awards public. Pursuant to Rule 48(4) of the ICSID Arbitration Rules, the Centre 'shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.' The Centre usually obtains the consent of the parties for such publication. It then posts the award on the website of ICSID and reprints it in the ICSID Review – Foreign Investment Law Journal. The ICSID rules and regulations do not refer specifically to the actions of the parties. As a result, it is not clear

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<sup>43</sup> Blackaby, *Public Interest and Investment Treaty Arbitration*, pp. 359-360.

<sup>44</sup> Knahr and Reinisch, *Transparency versus Confidentiality*, p. 111.

<sup>45</sup> Schill, *International Investment Law and Comparative Public Law*, pp. 18-19.



whether they can disclose any documents, including the final award.<sup>46</sup> In practice, it is common for one of the parties to submit the award for publication in a journal. Many arbitral awards are also available online.<sup>47</sup> Sometimes awards circulate within the legal community without identifying information. While these ‘sanitised awards’ provide useful substantive information, they offer no information about the parties’ identities and the basic contours of the dispute.<sup>48</sup> To sum up, a lot of information is publicly available, but how much is not available is unknown.<sup>49</sup>

### 3.2 Lack of Public Participation

Another common criticism regards the lack of openness of the investor-state arbitration system to public participation.<sup>50</sup> Since it is modelled after commercial arbitration, where the only relevant interests are those of the parties, investor-state arbitration does not generally allow for public access to the arbitral proceedings. Because investor-state arbitration frequently raises matters of public concern, interested third parties such as public interest groups and non-governmental organisations (NGOs) argue that they should have access to the decision-making process. The problems dealt with by investment tribunals are often social challenges and quite understandably civil society wants to have its say.<sup>51</sup>

As a result of the mounting pressure for more public participation in arbitration proceedings, ICSID decided in 2006 to amend its Arbitration Rules. The revised text of Rule 32(2) provides: ‘Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.’

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<sup>46</sup> Knahr and Reinisch, *Transparency versus Confidentiality*, p. 100.

<sup>47</sup> See, e.g., the *Investment Treaty Arbitration* website, available at <http://www.italaw.com>, and the *Investment Claims* website, available at <http://www.investmentclaims.com>.

<sup>48</sup> L. Peterson, *All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, in L. Zarsky (ed.), *“International Investment for Sustainable Development: Balancing Rights and Rewards”*, London: Earthscan, 2005, p. 130.

<sup>49</sup> S. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, in *Lewis & Clark Law Review*, 2013, 17(2), p. 427.

<sup>50</sup> See, e.g., C. Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, in *Arbitration International*, 2007, 23(2), pp. 327-355.

<sup>51</sup> B. Stern, *Civil Society’s Voice in the Settlement of International Economic Disputes*, in *ICSID Review*, 2007, 22(2), pp. 280-348.

As regards the submission of briefs by third parties, a new was introduced making it clear that ICSID tribunals may accept and consider written submissions from a non-disputing party. Pursuant to Rule 37(2) of the ICSID Arbitration Rules,

‘After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.’

The new rule makes an express reference to the participation of non-parties in the proceedings, namely by allowing them to file written submissions. This basically corresponds to the figure of *amicus curiae*. An *amicus curiae*, literally ‘a friend of the court’, is, according to Black’s Law Dictionary, ‘a person who is not a party to a law suit but who petitions courts or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.’<sup>52</sup> Normally *amici curiae* are individuals or organisations who are not a party to the arbitration but believe that the outcome of the proceedings may affect their interests and therefore want to intervene.

The participation of non-parties in investment arbitration has been justified as a useful tool to uphold different public interests. First, it increases the transparency of the system.<sup>53</sup> Second, it promotes greater accountability of investor-state arbitration.<sup>54</sup> Third, it increases the openness of investment treaty arbitration to civil society, ensuring that the broader community

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<sup>52</sup> B. Garner (ed.), “Black’s Law Dictionary”, 8th Edition, St. Paul: Thomson West, 2004 p. 93.

<sup>53</sup> L. De Chazournes, Transparency and Amicus Curiae Briefs, in *Journal of World Investment and Trade*, 2004, 5, 333-336; Knahr and Reinisch, Transparency versus Confidentiality, p. 97; E. De Brabandere, NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes, in *Chicago Journal of International Law*, 2011, 12(1), p. 102; E. Levine, Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation, in *Berkeley Journal of International Law*, 2011, 29(1), p. 206.

<sup>54</sup> J. VanDuzer, Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation, in *McGill Law Journal*, 2007, 52, p. 696; L. Bastin, The Amicus Curiae in Investor-State Arbitration, *Cambridge Journal of International and Comparative Law*, 2012, 1(3), p. 227.

does not perceive it as ‘secretive’.<sup>55</sup> This is in line with the changing nature of investment arbitration, where tribunals are increasingly required to settle disputes that touch upon public interests.<sup>56</sup> The participation of civil society in the proceedings is meant to ensure the sensitivity of governmental entities towards the possible consequences of the arbitral award. Allowing for amicus curiae participation shows the community how concerned investment tribunals are about issues societal concerns such as the protection of public health or the environment.<sup>57</sup>

Amicus curiae participation has also been justified as a way to help investment tribunals to render better awards. For different reasons, parties to the dispute may lack either the necessary ability or the appropriate incentives to submit all of the relevant facts, legal arguments, and policy implications to the tribunal.<sup>58</sup> Amicus may provide the tribunal with its expert scientific or technical knowledge, or provide an additional layer of factual information relevant to the dispute. Furthermore, amicus briefs can contain legal arguments or perspectives not addressed by the parties.<sup>59</sup> This might open the door for some creative legal thinking,<sup>60</sup> grant third parties a role in investment treaty arbitration – and, in a broader sense, in the making of international policy and law<sup>61</sup> – and possibly even contribute to reduce the perceived fragmentation of international law.<sup>62</sup> Third party involvement serves both to improve the quality of the award and to assist in the development of investment law as a whole.<sup>63</sup> Third-party involvement is not, by definition, limited to written submissions. Frequently amici request permission to consult the disputing parties’ documents, respond to questions from the tribunal, attend the hearings, or make oral submissions. Rule 37(2) of the ICSID Arbitration Rules governs amicus curiae admission but

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<sup>55</sup> E. De Brabandere, Non-state Actors in International Dispute Settlement: Pragmatism in International Law, in J. d’Aspremont (ed.), “Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law”, Abingdon: Routledge, 2011, p. 353.

<sup>56</sup> A. Newcombe, A. Lemaire, Should Amici Curiae Participate in Investment Treaty Arbitrations?, in *Vindobona Journal of International Commercial Law and Arbitration*, 2001, 5, p. 40.

<sup>57</sup> A. Mourre, Are Amici Curiae the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration?, in *The Law and Practice of International Courts and Tribunals*, 2006, 5, p. 266.

<sup>58</sup> D. Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, in *American Journal of International Law*, 1994, 88(4), p. 615.

<sup>59</sup> D. Magraw, Jr., N. Amerasinghe, Transparency and Public Participation in Investor-State Arbitration, *ILSA Journal of International and Comparative Law*, 2008, 15(2), p. 347; T. Ishikawa, Third Party Participation in Investment Arbitration, in *International and Comparative Law Quarterly*, 2010, 59(2), pp. 402-403.

<sup>60</sup> De Chazournes, Transparency and Amicus Curiae Briefs, p. 335.

<sup>61</sup> Ishikawa, Third Party Participation in Investment Arbitration, p. 377.

<sup>62</sup> L. Bartholomeusz, The Amicus Curiae before International Courts and Tribunals, in *Non-State Actors and International Law*, 2005, 5, p. 278.

<sup>63</sup> Levine, Amicus Curiae, p. 217.

does not regulate access to documents. The grant of *amicus curiae* status does not automatically give the petitioners access to the parties' submissions.

Potential *amici curiae* need to have access to the parties' submissions and other relevant documents. First, because only that will allow them to understand the nature of the dispute and the issues raised therein and decide whether they want to intervene. Non-parties are unlikely to have a complete picture of the dispute by relying solely on the tiny description available on the ICSID website or by reading press reports. Second, only access to the arbitration key documents will allow *amicus* to determine whether they can actually 'assist the Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties' as stipulated in the ICSID Arbitration Rules. Without access to relevant documents and proceedings, third parties' ability to formulate effective, meaningful, and informed submissions is seriously limited; even worse, they may end up giving opinions based on inaccurate or incomplete information. As they do not know whether the parties have already addressed their main concerns, there is also a risk of redundancy or overlap.

Another common request by *amici curiae* is to be granted access to the hearings. Rule 32 addresses this issue and stipulates that the tribunal can allow non-parties to attend the hearings unless either party objects. As a result, *amici* are normally not allowed to attend the hearings or deliver oral arguments before the tribunal.

Even after the 2006 amendments, the ICSID Arbitration Rules do not go far enough in ensuring adequate levels of transparency and public participation in investor-state disputes. Granting third parties the right to file *amicus* briefs without simultaneously granting them access to the arbitration proceedings does not provide them or the wider public with a real view of the dispute or answer their pleas for greater transparency and public input.<sup>64</sup> The current rules significantly contain the potential advantages of *amicus curiae* intervention. Admitting *amici* without granting them true access to the proceedings is at most a 'political quick fix'.<sup>65</sup>

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<sup>64</sup> Blackaby and Richard, *Amicus Curiae*, p. 267.

<sup>65</sup> *Ibid*, p. 274.

### 3.3 Disregard for Public Interests

A third criticism, of a substantial nature, regards the lack of balance between the rights of investors and non-investment concerns. Over the last decades investor-state arbitration stretched not only in number of cases but also in the range of issues that trigger those disputes. Arbitrators have been called to address a multiplicity of regulatory issues, from the provision of basic public services to the protection of human rights.<sup>66</sup> No longer limited to the technical intricacies of investment law, contemporary arbitrations frequently implicate general issues regarding the scope of the regulatory powers of the respondent states. The growing complexity of the legal issues faced by investment tribunals calls for an examination of the relationship between the private rights of investors and non-investment concerns.<sup>67</sup>

According to some commentators, investors have been able to contest legislative and administrative measures that would normally fall within the scope of sovereign states because arbitrators have construed the standards of treatment contained in international investment agreements in an overly expansive manner.<sup>68</sup> Arbitrators use imprecise provisions on investor protection to meddle in the regulatory space of host states, reviewing public policy decisions and thus limiting the jurisdiction of domestic courts and regulators. This results in a shrinking of domestic policy space and interferes with the state's ability to determine its own obligations under national law.<sup>69</sup> Some authors talk about a potential 'regulatory chill', as the strict application of investment law by arbitrators may have a chilling effect on host states' regulatory initiatives that are needed to address non-investment policy goals.<sup>70</sup> The notion of regulatory chill suggests that the investment arbitration system may impact the normal course of policy

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<sup>66</sup> W. Burke-White, A. Von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, in *Yale Journal of International Law*, 2010, 35, p. 284.

<sup>67</sup> See e.g., M. Hirsch, *Interactions Between Investment and Non-investment Obligations*, in P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook on International Investment Law*, Oxford: Oxford University Press, 2008, 154-181.

<sup>68</sup> M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in K. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford: Oxford University Press, 2008, pp. 39 ff; Several Authors, *Public Statement on the International Investment Regime*, 31 August 2010, available at <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010>.

<sup>69</sup> G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford: Oxford University Press, 2007, p. 5; A. Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, in *Harvard International Law Journal*, 2009, 50(2), p. 516.

<sup>70</sup> See United Nations Conference on Trade and Development, *World Investment Report 2003. FDI Policies for Development, National and International Perspectives*, United Nations: New York and Geneva, 2003, pp. 110 ff; International Law Association, *Report of the Rio de Janeiro Conference on International Law on Sustainable Development*, 2008, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>.

development and implementation. In some circumstances governments may fail to modify, enact or enforce new regulatory measures because they are afraid of facing arbitration proceedings.<sup>71</sup>

Some commentators go farther and contend that the current system does not strike a proper balance between the interests of investors and other important social goals, or is even biased in favour of the former.<sup>72</sup> From this perspective, investment arbitration has been biased in favour of foreign investors to the detriment of the sovereign power and duty of host states to pursue the general interest for their populations. This lack of balance results, *inter alia*, from an alleged predisposition of arbitrators towards the primacy of commercial interests.<sup>73</sup> According to this perspective, arbitrators tend to overlook the broader public interests involved in investment disputes, including host states' international law obligations outside investment treaties.

A related critique is the so-called 'fragmentation' of international law. Some argue that arbitrators apply the provisions of investment agreements in isolation and show some aversion to applying non-investment rules to the dispute, even when they are arguably pertinent.<sup>74</sup> This alleged fragmentation has resulted in awards in which investment obligations were ranked above obligations of diverse nature or applied as a sort of 'self-contained regime'. This significantly constrains states' ability to implement policy goals to which they may be committed.

#### **4. Symptoms of the Growing Pains in Water Disputes**

On the preceding pages we discussed three central flaws that have been identified in the investor-state arbitration system. They all reveal how difficult it is to reconcile the promotion and protection of private interests (those of investors) with the safeguard of collective interests associated with public services. These disorders are eloquently evidenced by particular symptoms in cases concerning water concessions. The extant case law reveals the substantial

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<sup>71</sup> K. Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in C. Brown, K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge: Cambridge University Press, 2011, p. 610.

<sup>72</sup> See, e.g., O. Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, in *Virginia Journal of International Law*, 2007, 47(4), pp. 956 ff.

<sup>73</sup> M. Sornarajah, *Power and Justice in Foreign Investment Arbitration*, in *Journal of International Arbitration*, 1997, 14(3), pp. 103-140; C. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, in *Essays in Transnational Economic Law*, Institut für Wirtschaftsrecht, Wittenberg, 2006, 57, pp. 31-33.

<sup>74</sup> M. Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, in T. Bröde, Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, Oxford: Hart, 2008, pp. 321-43;

consequences that the international investment regime has been producing on water markets and how significantly it has been impacting the public interests associated with water provision.

#### 4.1 Muddy Waters?

Investor-state arbitration has been accused of not being transparent. Transparency is essential for the legitimacy of any dispute settlement mechanism but also, more broadly, in the provision of any service that satisfies public needs. The tenet of transparency entails the availability of information on water management projects. An example of the importance of transparency in the provision of water services can be found on General Comment no. 15 on The Right to Water,<sup>75</sup> issued in 2002 by the United Nations Committee on Economic, Social and Cultural Rights, and which has been invoked by some authors to advocate the existence of a ‘human right to water.’<sup>76</sup> According to General Comment no. 15,<sup>77</sup> this right contains a requirement of informational accessibility: accessibility includes the right to seek, receive and impart information concerning water issues. Individuals should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.

Commentators have argued that Public-Private Partnerships provide only limited opportunities for meaningful levels of transparency<sup>78</sup> and that concessions are particularly opaque due to their long-term, often-complex financial structures.<sup>79</sup> Sometimes governments authorise large infrastructure projects and water concession contracts without consultation with local communities. As a result, private participation in water management may reduce transparency and accountability.<sup>80</sup> The introduction of private partners moves governance from

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<sup>75</sup> United Nations Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment no. 15 (2002), The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, of 20 January 2003, pp. 6, 15.

<sup>76</sup> See 4.3.1.

<sup>77</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment no. 15, pp. 6, 15.

<sup>78</sup> M. Haque, The Diminishing Publicness of Public Service under the Current Mode of Governance, in *Public Administration Review*, 2001, 61(1), p. 71; G. Hodge, C. Greve, Public-Private Partnerships: an International Performance Review, in *Public Administration Review*, 2007, 67(3), p. 552.

<sup>79</sup> P. Bloomfield, The Challenging Business of Long-term Public Private Partnerships: Reflections on Local Experience, in *Public Administration Review*, 66(3), pp. 403 ff.

<sup>80</sup> R. Glennon, “Unquenchable: America’s Water Crisis and What to do About it”, Washington: Island Press, 2009, p. 249.

transparent public documentation to private, confidential contracts not accessible to the general public.

Individuals and public interest organisations have been demanding more transparency regarding private participation in water systems.<sup>81</sup> When a dispute over a water concession contract is brought before an investment tribunal, the existence of public interests is evident, as the outcome of the dispute may have an impact upon on the provision and costs of a vital public service. Some argue that the investor-state mechanism favours concessionaires because they can carefully restrict the amount of information released to the public. This is relevant not only for the specific dispute but also because it can help water companies in future dealings with other states, where they can hide troublesome past cases.<sup>82</sup>

The first case to raise public concern about transparency of the proceedings in water disputes was *Aguas del Tunari v. Bolivia*. Several NGOs and individuals submitted a petition to the tribunal requesting that it made public all documents, proceedings and hearings, and any decisions of the tribunal generated during the process. At the time this matter was regulated by ICSID Arbitration Rule 32 (2), which required parties' consent for third parties to attend the hearings. The tribunal rejected the requests arguing that they were beyond its powers, that the parties' consent was not present, and that there was no need to call witnesses or seek supplementary non-party submissions.<sup>83</sup>

The second case raising transparency concerns was *Suez/Vivendi v. Argentina*. Five NGOs filed a petition asking the tribunal to grant access to the hearings in the case, access to documents, and permission to present legal arguments as *amicus curiae*. The tribunal denied petitioners' request to attend the hearings based on the claimants' refusal. The decision on the request for access to documents was deferred until the grant of a leave to file an *amicus curiae* brief.<sup>84</sup>

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<sup>81</sup> J. Razzaque, *Public Participation in Water Governance*, in J. Dellapenna, J. Gupta (eds.), "The Evolution of the Law and Politics of Water", London: Springer, 2009, p. 353.

<sup>82</sup> T. O'Neill, *Water and Freedom: The Privatization of Water and its Implications for Democracy and Human Rights in the Developing World*, in *Colorado Journal of International Environmental Law and Policy*, 2005-2006, 17(2), p. 374.

<sup>83</sup> Letter to J. Martin Wagner from David D. Caron, President of the Tribunal, in re *Aguas del Tunari vs. The Republic of Bolivia*, Jan. 29, 2003, available at [http://www.italaw.com/sites/default/files/case-documents/ita0019\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf).

<sup>84</sup> Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC516\\_En&caseId=C19](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC516_En&caseId=C19).



The third case was *Suez/Interagua v. Argentina*. Several interested parties submitted a petition asking the tribunal to allow the presentation of oral arguments at the hearings, access to documents, and to submit *amicus curiae* briefs. The tribunal was exactly the same as in *Suez/Vivendi v. Argentina* and held that the issues raised in the petition were virtually identical to those raised in the petition filed in that case, denying the petitioners' request to attend the hearings on the same grounds.<sup>85</sup> Additionally, the tribunal decided to grant an opportunity to the petitioners to apply for leave to make *amicus curiae* submission. Finally, the tribunal denied the petitioners' request for access documents, but specified that it would consider whether access to documents can be granted as a matter of principle and reconsider the petitioners' qualification if and when the petitioners provide the tribunal with convincing information and reasons that they qualify as *amicus curiae*.

A final case raising concerns about transparency of the proceedings was *Biwater v. Tanzania*. The investor filed a request for provisional measures on confidentiality, complaining that the respondent state had unilaterally disclosed documents without an agreement of both parties to this effect. The tribunal issued a procedural order<sup>86</sup> acknowledging that it had to strike a balance between transparency and the procedural integrity of the arbitration. While parties were free to conclude any agreements they choose concerning confidentiality, such an agreement had not been reached. Similarly, the applicable investment treaty did not contain any provision on confidentiality. Furthermore, there was no provision imposing a general duty of confidentiality in ICSID arbitrations or imposing a general rule of transparency. While the 2006 amendments to the ICSID Arbitration Rules reflected the trend in investment arbitration towards transparency, they were silent on the issue of disclosure of documents by the disputing parties.

The procedural order differentiates between documents submitted during the proceedings and the final award, reaching to different conclusions as to the permissibility of their publication and distribution. The tribunal took a 'police patrol' rather than a 'fire alarm' approach, arguing that its function was not to merely react after harm had already been done to one of the parties.<sup>87</sup> The tribunal considered that there was a risk of aggravation of the dispute as a result of previous

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<sup>85</sup> Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC512\\_En&caseId=C18](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC512_En&caseId=C18).

<sup>86</sup> Procedural Order no. 3, 29 September 2006, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1583\\_En&caseId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1583_En&caseId=C67).

<sup>87</sup> See Knahr and Reinisch, *Transparency versus Confidentiality*, p. 107.

inflamed discussion of the case in the media. On the other hand, taking into account the public interests associated with the dispute, any restrictions should be carefully and narrowly delimited. In the end, the tribunal reached a rather nuanced conclusion distinguishing between different aspects of transparency and confidentiality and different types of documents.<sup>88</sup>

## 4.2 Myopic Amici?

The second criticism regards the lack of openness of investor-state arbitration to public participation. Traditionally third parties are not allowed to participate in the proceedings. This is especially problematic in disputes over services that satisfy public interests such as water provision. The governance of water services is interwoven with the exercise of citizenship rights. This entails the right to participate in the decisions about how water services are managed. One of the 'Dublin Principles' is that water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels. This means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects.<sup>89</sup> According to General Comment no. 15 on the Right to Water, the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.<sup>90</sup> Participatory governance can make decision-making more effective, lead to greater political acceptability of decisions and foster accountability.

Public-Private Partnerships are frequently presented as less representative and participatory than public management.<sup>91</sup> Further, authors have argued that public participation is undermined in concession contracts due to their long-term, complex financial structures.<sup>92</sup> As a result, private participation in water management may reduce public participation and accountability.<sup>93</sup> Individuals and public interest organisations have been demanding greater

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<sup>88</sup> Ibid.

<sup>89</sup> Several Authors, The Dublin Statement, Principle No 2.

<sup>90</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment no. 15, p. 15.

<sup>91</sup> Hodge and Greve, Public-Private Partnerships, p. 552.

<sup>92</sup> Bloomfield, The Challenging Business, p. 401.

<sup>93</sup> Glennon, Unquenchable, p. 249.

consultation and public scrutiny over private participation in water systems.<sup>94</sup> Calls for greater input from civil society extend to arbitration proceedings. To address public interest concerns, individuals and public interest groups have been resorting to the institution of *amicus curiae*. Thus far *amicus curiae* participation has been granted in several ICSID proceedings, almost all of them related to water concessions. This is no coincidence as water provision is a public service and private involvement sparks heated discussion. Tribunals faced with water disputes never fail to mention the ‘public nature’ of these cases.

In *Aguas del Tunari v. Bolivia* the petitioners also introduced an application to participate as parties – or, alternatively, to be granted *amicus curiae* status – invoking the public character of the dispute. The tribunal rejected the request based on the three arguments mentioned previously. The tribunal’s decision, besides raising criticism about the secrecy of ICSID proceedings, reinforced the idea that such arbitrations involved nothing beyond the parties. One NGO lambasted the decision as ‘profoundly undemocratic’, ‘inexcusable’, a ‘closed-door process’ and an ‘extreme example of excessive power granted to corporations’.<sup>95</sup>

The second time non-parties requested permission to take part in the proceedings as *amicus curiae* was in the *Suez/Vivendi v. Argentina* case. In contrast with the decision in *Aguas del Tunari*, the tribunal held that it had the power under article 44 of the ICSID Convention, which grants the arbitral tribunal the power to decide on procedural questions that are not regulated by the rules of the ICSID Convention, to grant *amicus curiae* status. The tribunal decided that the exercise of the power to accept *amicus* submissions should depend on three criteria: the appropriateness of the subject matter of the case; the suitability of a given nonparty to act as *amicus curiae*, and the procedure by which the *amicus* submission is made and considered. The petitioners had also requested access to arbitral documents but claimants opposed the request. The tribunal recalled that the revision of the ICSID Arbitration Rules did not deal with *amicus*’s access to the record and thus provided no guidance. It considered that the petitioners had sufficient information even without being granted access to the arbitration record.<sup>96</sup>

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<sup>94</sup> Razzaque, *Public Participation*, p. 353.

<sup>95</sup> Earth Justice, *Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water*, 12 February 2003, available at <http://earthjustice.org/news/press/2003/secretive-world-bank-tribunal-bans-public-and-media-participation-in-bechtel-lawsuit-over-access-to-water>.

<sup>96</sup> Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, of 12 February 2007, para 24, available at

The third case was *Suez/Interagua v. Argentina*. The tribunal was exactly the same as in *Suez/Vivendi v. Argentina* and the decision closely similar. While petitioners were granted an opportunity to apply for *amicus curiae* status; their request to attend the hearings was denied due to lack of consent by both parties. The request for access documents was rejected, being specified that the tribunal would consider whether access to documents could be granted and reconsider the petitioners' qualification if and when the petitioners provided convincing information and reasons that they qualified as *amicus curiae*.<sup>97</sup>

Finally, in *Biwater v. Tanzania*, five NGOs applied for *amicus* status. This was the first case where the new Rule 37(2) was applied. The petitioners requested access to arbitral documents and oral hearings. The tribunal denied access to the parties' written pleadings, observing that it did not feel the information was necessary for the petitioners to make their submissions on the ground that the dispute was a 'very public and widely reported dispute' and that the information that led to the amici's 'application to intervene' was sufficient to make further submissions. Access to hearings was also refused in the absence of both parties' consent. Nevertheless, the tribunal reserved the right to ask the NGOs specific questions in relation to their written submission.<sup>98</sup>

The petitioners had to file a written submission without having seen the pleadings or other documents. In taking this position, the tribunal impaired the ability of petitioners to provide their 'perspectives, arguments and expertise that will help it to arrive at a correct decision.' The potential relevance of the submission was irremediably affected because the petitioners had no access to the allegations made by the claimant, the legal framing of its claim, and the respondent's defence.<sup>99</sup> Unsurprisingly, the amici submitted a brief that was based on self-admittedly speculative arguments.<sup>100</sup> The tribunal later justified its divergence on one of the petitioner's assertions by noting that the petitioners did not have all the relevant information.<sup>101</sup>

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[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519\\_En&caseId=C19](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519_En&caseId=C19).

<sup>97</sup> Order in Response to a Petition for Participation as *Amicus Curiae*, of 17 March 2006, para. 34.

<sup>98</sup> Procedural Order no. 5, of 2 February 2007, para. 65, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1584\\_En&caseId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1584_En&caseId=C67).

<sup>99</sup> F. Marshall, *The Precarious State of Sunshine: Case Comment on Procedural Orders in the Biwater Gauff (Tanzania) Ltd. v. Tanzania Investor-State Arbitration*, in *McGill International Journal of Sustainable Development Law and Policy*, 2007, 3(2), pp. 202-203.

<sup>100</sup> Lawyers' Environmental Action Team, Legal and Human Rights Centre, Tanzania Gender Networking Programme, Center for International Environmental Law, International Institute for Sustainable Development,

Because they were denied access to the key arbitral documents and hearings, amicus curiae were not totally blindfolded, but at least myopic. They were not totally ignorant of the circumstances of the case – because it was a ‘very public and widely reported dispute’ – but did not perceive it with a clear vision. Their comprehension of the facts and issues raised was blurred. Because they were not given the chance to read the claim and reply, the concession contract, go through the parties submissions, and attend the hearings, they were seriously prevented from exercising their function.

Tribunals should have the power to decide whether to grant access to some or all of the documents on the record. Without prior access to party submissions, amici will have, at most, a merely speculative sense of the factual and legal arguments that the parties have made or intend to make, and will probably tend to offer tribunals arguments largely redundant to, or even irrelevant to, those contained in party submissions.<sup>102</sup> A distinction needs to be drawn between transparency and public participation. One thing is to have access to information on the dispute; another is to be able to take part in the arbitration, not passively but actively, having a chance to influence the course of proceedings. If amici are not given a proper chance to get acquainted with the statements of claim and defence, analyse the concession contract and other essential documents, and attend the hearings, they are seriously prevented from exercising their role. Without effective knowledge of the essential elements of the dispute, amici are precluded from making informed submissions and instil public concerns into the decision-making process. The openness of proceedings to civil society – namely through the participation of amici curiae – requires a higher measure of transparency. Indeed, openness implies a form of active transparency – amici need to be able not only to ‘see’ what is going on but also to actively participate in the proceedings. Naturally, the issues of transparency and third party participation are intimately linked. Transparency allows for more informed public participation; just like third party participation increases the transparency of the process.

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Amicus Curiae Submission, 26 March 2007, para. 13, available at [http://www.ciel.org/Publications/Biwater\\_Amicus\\_26March.pdf](http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf).

<sup>101</sup> Award of 24 July 2008, p. 153, n. 208, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589\\_En&caseId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67).

<sup>102</sup> J. Wong, J. Yackee, The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns’, in K. Sauvant (ed.), “Yearbook on International Investment Law & Policy 2009-2010, Oxford: Oxford University Press, 2010, pp. 266, 269.

### 4.3 Public Interests Down the Drain?

Finally, investment arbitration has been accused of not balancing the rights of investors and non-investment concerns. Because water services are associated with public interests, water-related disputes provide an eloquent example of this clash between private and public interests.

The flux of foreign investment into the water industry led to the internationalisation of disputes and of their method of settlement. When disputes over the performance of a water concession give origin to investment claims, public authorities are put in a challenging position. The state need to combine two different roles – its role in the provision of services of public interest and the fulfilment of its international legal obligations arising from international investment agreements. The combination of these two dimensions results in the creation of an entirely ‘new creature’ – disputes initiated by foreign investors against states alleging violations of their rights under investment treaties for regulatory measures which states argue were taken to protect essential public interests.<sup>103</sup>

One of the reasons why investor-state arbitration is surrounded by controversy is the fact that it is based on investment treaties, perceived by many as legal instruments that constrain the ability of governments to regulate the activity of companies inside their territory. This risk is especially acute when investors are in charge of the provision of services of public interest. Some claim that investment agreements are framed within a liberal model that prioritises the protection of investor’s rights over the protection of public interests. From this viewpoint, investment treaties are a form of international regulation that focuses primarily on the protection of investors’ interests.<sup>104</sup> They put forward a series of international obligations that may collide with measures adopted by national authorities. Albeit the state has delegated the operation of water systems, it is still responsible for the regulation of private operators. The protection of the public interests associated with these services is in flux, as it follows the ever-changing needs of society. As a result, the regulatory framework agreed upon between state and investor may undergo significant changes so as to adjust to unexpected events or adapt to new challenges. The problem is that international investment agreements petrify the normative environment

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<sup>103</sup> M. Mourra, Privatization of Water Management in Latin America, in M. Mourra, T. Carbonneau (eds.), “Latin American Investment Treaty Arbitration: The Controversies and Conflicts”, Alphen aan den Rijn: Kluwer Law International, 2008, p. 85.

<sup>104</sup> B. Morgan, The North-South Politics of Necessity: Regulating for Basic Rights between National and International Levels, in *Journal of Consumer Policy*, 2006, 29, p. 473.

contemporary to their conclusion, embedding the expectations that the host state and the investor had in that moment. As a result, international investment agreements place a heavy burden on public authorities if they wish to adopt measures not envisioned by the investor or do so in a surprising manner.<sup>105</sup> Water companies feel comfortable with this scenario where standards of behaviour are set nationally (both contractually and legally) but disputes are solved in the international arena, based on international investment agreements that protect them from domestic policies they find harmful to their interests. Consequently, the threat of recourse to international arbitration cast a shadow over national policymaking.<sup>106</sup> Furthermore, because domestic policy choices are reviewed by international tribunals, investment agreements can lock countries into an irreversible process of privatisation of the water sector.<sup>107</sup>

In a typical investment dispute the investor claims compensation for damages it has allegedly suffered as a result of measures adopted by the host state. Most of the disputes to date involved allegations of indirect or ‘regulatory expropriation’, or allegations that regulatory measures taken by the state constitute ‘unfair or inequitable treatment’. In the context of water concessions, an investor may challenge decisions such as the modification of the amount or duration of the investment, applicable operational requirements such as quality standards, or the tariffs that the investor is allowed to charge.<sup>108</sup> Issues of price and quality control are often at the heart of the dispute. These are, however, central topics in the regulation of public services as they determine the conditions of access of citizens to the services.<sup>109</sup> The potential for conflict is self-evident.

Investment law, and the arbitral decisions applying it, has been biased in favour of investors to the detriment of the sovereign power of host states to pursue the general interest for their populations. This lack of balance results, inter alia, from an alleged predisposition of arbitrators towards the primacy of commercial interests. Concerns about the independence and impartiality of arbitrators are augmented in water disputes before the ICSID, with some arguing

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<sup>105</sup> M. Krajewski, *Investment Law and Public Services*, 2012, p. 13, available at: <http://ssrn.com/abstract=2038514>.

<sup>106</sup> B. Morgan, *The Limits of Transnational Transformations of the State: Comparative Regulatory Regimes in the Delivery of Urban Water Services*, in G. Shaffer (ed.), “*Transnational Legal Ordering and State Change*”, Cambridge: Cambridge University Press, 2012, p. 183.

<sup>107</sup> Center for International Environmental Law, *Going with the Flow: How International Trade, Finance and Investment Regimes Affect the Provision of Water to the Poor*, 2003, pp. 3 ff, available at [http://www.ciel.org/wp-content/uploads/2015/03/Waterbrief\\_3Sept03.pdf](http://www.ciel.org/wp-content/uploads/2015/03/Waterbrief_3Sept03.pdf).

<sup>108</sup> B. Morgan, *Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law*, in *European Journal of International Law*, 2006, 17(1), p. 9.

<sup>109</sup> Krajewski, *Investment Law and Public Services*, p. 14.

that water companies see this institution – affiliated with the World Bank – as an ideal forum because the World Bank has been supporting privatisation of water services for decades.<sup>110</sup> Some argue that the cases of Bolivia and Argentina demonstrate the persistent influence of the ICSID on water sector reforms and policies. From this angle, the institutions that promoted privatisation are sustained through institutional frameworks such as the rules of the ICSID.<sup>111</sup>

An analysis of the decisions rendered by ICSID tribunals shows that arbitral panels have largely failed to understand the importance of the lawful exercise of state's regulatory powers in the area of essential public services as they tend to consider alleged breaches of treaty obligations in isolation from a wide range of issues that are necessarily associated with the concession contract. These decisions seem oblivious to the specific characteristics of water concessions, namely the context of the privatisation process and the mechanisms through which public service regulations and contracts are put in place. Tribunals have not adequately weighted the interests of parties other than the disputing parties, nor the special duties and obligations a state has in a public-private partnership. This suggests that arbitrators do not have the capacity or expertise to identify the intricate crossing of domestic private/public law and international public/private law that takes place in disputes over water concession contracts.<sup>112</sup>

#### 4.3.1 The Human Right to Water: Just an Aspirational Buzzword?

The investment arbitration system has been accused of not striking a proper balance between the goal of investment protection and other important social concerns. According to this line of thinking, arbitrators tend to overlook the broader public interests involved in investment disputes and host states' obligations outside investment treaties. In the case of water disputes this aversion to apply non-investment rules, when they would arguably be applicable, has been insistently criticised by authors who advocate that water is a human right. The campaign for the recognition of a 'human right to water' emerged as a response to the privatisation trend. This movement argues that water is a fundamental human right and therefore should not be subject to

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<sup>110</sup> M. Goldman, How "Water for All!" Policy Became Hegemonic: The Power of the World Bank and its Transnational Policy Networks, in *Geoforum*, 2007, 38, p. 797.

<sup>111</sup> M. Laffey, J. Weldes, Policing and Global Governance, in M. Barnett and R. Duvall (eds.), "Power in Global Governance", Cambridge: Cambridge University Press, 2005, p. 73.

<sup>112</sup> D. Allen, "This Business Will Never Hold Water:" International Investment Arbitration on Public-Private Water Service Provision – A Comment on *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, 2010, p. 29, available at <http://ssrn.com/abstract=1540256>.



private management, calling for the affirmation of this human right in national legislation and the prohibition of privatisation of water services. The use of the rhetoric of human rights in water concession arbitrations replicates some of these arguments, turning investment arbitration into a floor for heated discussions not only about the alleged violation of an investment treaty but also the potential breach of a human right. The defective performance of a particular concessionaire may be presented as a symbol of the failure of the Public-Private Partnership model and call for a return to publicly-managed systems. This puts an increased spotlight on the dispute.

A human right to water is not expressly recognised in generally applicable and binding international agreements, leading to uncertainty over the existence of this right. Even though the right to water is not explicitly mentioned in the International Covenant on Economic, Social, and Cultural Rights, in 2002 the United Nations Committee on Economic, Social and Cultural Rights, which oversees implementation of the Covenant, issued a General Comment (No 15) clearly stating the existence of a right to water under Article 11 (the right to an adequate standard of living) and Article 12 (the right to the highest attainable standard of health). The right to water is inferred from both of these articulated rights. According to the Committee, Article 11(1) ‘specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living “including adequate food, clothing and housing”’. The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.’<sup>113</sup>

General Comment No. 15 lays down the normative content of the right encompassing both procedural and substantive components. The substantive dimensions comprise availability, quality, and accessibility, including the principle that ‘water, and water facilities and services, must be affordable for all.’<sup>114</sup> The procedural components consist of the right to information concerning water issues, the right to participate, and the right to effective remedies.<sup>115</sup> The existence of a human right to water imposes a ‘constant and continuing duty’ on states to ‘move as expeditiously and effectively as possible towards the full realization of the right to water’,<sup>116</sup> namely through the fulfilment of three types of obligations: obligations to respect, obligations to

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<sup>113</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment no. 15, para. 3.

<sup>114</sup> *Ibid*, para. 12.

<sup>115</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment no. 15, paras. 12(c)(iv), 48 and 55.

<sup>116</sup> *Ibid*, paras. 17 ff.

protect and obligations to fulfil.<sup>117</sup> The Committee underlines that where water services are operated or controlled by third parties, state parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.<sup>118</sup>

Despite the assertion of a human right to water in General Comment No. 15, the fact is that it is not a binding agreement ratified by states. In 2010, the United Nations General Assembly went further and adopted a resolution recognising an international human right to water,<sup>119</sup> followed by a resolution adopted by the United Nations Human Rights Council on the human rights and access to safe drinking water and sanitation.<sup>120</sup> The United Nations Assembly resolution declared the right to safe and clean drinking water as a human right that is essential for the full enjoyment of life and all human rights. However, forty-one countries abstained from signing the resolution when it was first introduced.<sup>121</sup> As a result, and for now, the claim to a human right to water rests on shaky legal ground.<sup>122</sup> There is currently no internationally recognised ‘right to water’, in the sense of a legally binding norm.<sup>123</sup> Some authors talk about the human right to water as an emerging, aspirational, or implicit right.<sup>124</sup> Others argue that the human right to water is evolving into becoming a part of customary international law.<sup>125</sup>

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<sup>117</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment no. 15, paras. 20 ff.

<sup>118</sup> *Ibid.*, para. 24.

<sup>119</sup> United Nations General Assembly, Resolution adopted by the General Assembly on 28 July 2010 [without reference to a Main Committee (A/64/L.63/Rev.1 and Add.1)] 64/292. The Human Right to Water and Sanitation.

<sup>120</sup> United Nations Human Rights Council, Resolution 15/9: Human Rights and Access to Safe Drinking Water and Sanitation.

<sup>121</sup> See Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions, U.N. Press Release GA/10967, of 28 July 2010.

<sup>122</sup> K. Bakker, The “Commons” Versus the “Commodity”: Alter-globalization, Anti-privatization and the Human Right to Water in the Global South, in *Antipode*, 2007, 39(3), p. 437.

<sup>123</sup> P. Thielbörger, The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?, in P. Dupuy, E. Petersmann, F. Francioni (eds.), “Human Rights in International Investment Law and Arbitration”, Oxford: Oxford University Press, 2009, p. 488.

<sup>124</sup> A. Hardberger, Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates, in *Northwestern Journal of International Human Rights*, 2005, 4(2), pp. 331-333; V. Petrova, At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water, in *Brooklyn Journal of International Law*, 2005-2006, 31(2), pp. 593-601; M. Fitzmaurice, The Human Right to Water, in *Fordham Environmental Law Review*, 2006-2007, 18, pp. 537-556; M. Williams, Privatization and the Human Right to Water: Challenges for the New Century, in *Michigan Journal of International Law*, 2007, 28, pp.472-480.

<sup>125</sup> J. Astle, Between the Market and the Commons: Ensuring the Right to Water in Rural Communities, in *Denver Journal of International Law and Policy*, 2005, 33(4), p. 590; P. Thielbörger, “The Right(s) to Water: The Multi-level Governance of a Unique Human Right”, Heidelberg: Springer, 2014, p. 39.

A right to water is instrumental in making water a legal entitlement, rather than a commodity, thereby giving each citizen a range of legal tools to secure their rights.<sup>126</sup> However, the affirmation of such a right is not in itself incompatible with private operation of water services.<sup>127</sup> While governments under General Comment No. 15 are required to provide access to affordable, safe water without discrimination, the question of private or public control is not discussed. The United Nations Committee on Economic, Social and Cultural Rights' definition of the right to water is too broad to simply rule out the possibility of privatisation.<sup>128</sup> Furthermore, General Comment No. 15 itself makes several references to the role of the private sector in water services.<sup>129</sup> The human right to water has an aspirational dimension, as it raises expectations and places responsibility for such expectations on both public and private actors. The focus is not on the advantages of public versus private management but rather on the responsibilities and accountability of all actors involved in water provision.<sup>130</sup> States are required to fulfil their responsibilities whether they deliver the service directly or not. This helps to clarify the minimum obligations of governments and private companies and provides a legal framework for action.

The intersection between the obligations that result from the essential nature of water services and from international investment treaties puts public authorities in a challenging position. The state is subject to positive obligations and must take adequate measures to respect, protect, and fulfil human rights within its territory. As a result, public entities may want to intervene to protect certain fundamental interests of their population. However, by taking measures in furtherance of its human rights obligations, host states might breach investment rules. This seems to create a clash between the obligation to protect the foreign investments of water companies against the obligation to adopt regulatory measures needed to protect the human right to water. Even though the state has the right – and also the obligation – to regulate essential services such as water, the existence of obligations arising from international

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<sup>126</sup> World Health Organisation, “The Right to Water”, February 2003, p. 9, available at [http://www.who.int/water\\_sanitation\\_health/en/righttowater.pdf](http://www.who.int/water_sanitation_health/en/righttowater.pdf).

<sup>127</sup> Sánchez-Moreno, M., Higgins, T., No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia, in *Fordham International Law Journal*, 2003, 27(5), p. 1776; H. Smets: Economics of Water Services and the Right to Water, in E. Weiss, L. de Chazournes, N. Bernasconi-Osterwalder (eds.), “Fresh Water and International Economic Law”, Oxford: Oxford University Press, 2005, p. 173.

<sup>128</sup> O’Neill, *Water and Freedom*, p. 382.

<sup>129</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment no. 15, paras. 27 and 49.

<sup>130</sup> Bakker, *Privatizing Water*, p. 13.

investment agreements may reduce their regulatory autonomy and affect the human right to water on the ground.<sup>131</sup>

Investment arbitration has been accused of focusing on the law and logic of international investment law without taking into account non-investment rules arguably applicable to disputes. This apparent ‘fragmentation’ has especially been noted with regard to the connection between investment law and human rights, calling for an assessment of the interaction between these two dimensions of international law.<sup>132</sup> The existence of a fundamental inconsistency between investment obligations and human rights obligations has been invoked by host states as a defence to justify a breach of their obligations under international investment agreements. The United Nations High Commissioner for Human Rights encouraged states to raise their human rights obligations in investment arbitrations ‘where a decision of a tribunal might affect the enjoyment of human rights nationally or where the interpretation of a provision in an investment agreement might have a human rights dimension’.<sup>133</sup> Some argue that in doing so states show their good faith effort to respect different international obligations simultaneously.<sup>134</sup> Still, in a number of investment proceedings host states did not make use of human rights arguments. This might be due to fear of acknowledging obligations for themselves in other settings<sup>135</sup> or because human rights violations by the investor may sometimes occur in complicity with the host state.<sup>136</sup> Non-parties have also been using their *amicus curiae* status to bring human rights considerations to the attention of the tribunal. This is especially important because, for different reasons, states and

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<sup>131</sup> A. De Wolf, *Human Rights and the Regulation of Privatized Essential Services*, in *Netherlands International Law Review*, 2013, 60(2), p. 167.

<sup>132</sup> See, e.g., P. Dupuy, F. Francioni, E. Petersmann (eds.), *“Human Rights, International Investment Law and Investor-State Arbitration”*, Oxford: Oxford University Press, 2009; C. Meckenstock, *“Investment Protection and Human Rights Regulation: Two Aims in a Relationship of Solvable Tension”*, Bader-Baden: Nomos, 2010; B. Simma, *Foreign Investment Arbitration: A Place for Human Rights*, *International and Comparative Law Quarterly*, 2011, 60(3), 573-596.

<sup>133</sup> United Nations High Commissioner for Human Rights, *Trade and Investment*, E/CN.4/Sub.2/2003/9, of 2 July 2003, para. 57.

<sup>134</sup> J. Krommendijk, J. Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration, in P. Dupuy, F. Francioni, E. Petersmann (eds.), *“Human Rights, International Investment Law and Investor-State Arbitration”*, Oxford: Oxford University Press, 2009, p. 430.

<sup>135</sup> J. Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in P. Dupuy, F. Francioni, E. Petersmann (eds.), *“Human Rights in International Investment Law and Arbitration”*, Oxford: Oxford University Press, 2009, p. 414; B. Simma, T. Kill, *Harmonizing Investment Protection and International Human Rights. First Step towards a Methodology*, in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *“International Investment Law for the 21st Century”*, Oxford: Oxford University Press, 2009, p. 680, n 11.

<sup>136</sup> C. Reiner, C. Schreuer, *Human Rights and International Investment Arbitration*, in P. Dupuy, F. Francioni, E. Petersmann (eds.), *“Human Rights, International Investment Law and Investor-State Arbitration”*, Oxford: Oxford University Press, 2009, p. 89.

investors may not do so, even when the case might have an important human rights component.<sup>137</sup> Amici may voice the concerns of the affected citizens by advocating in favour of a certain interpretation of investment rules or by relying on the host state's human rights obligations in order to defend its measures.

While human rights arguments in investment arbitration are a relatively recent phenomenon, in cases involving water concessions tribunals have been forced to mention the right to water, if not to take it into consideration. Both *Aguas del Tunari v. Bolivia* and *Vivendi v. Argentina* concerned situations where water prices had risen dramatically. Tribunals, however, did not directly address human rights concerns.<sup>138</sup> In *Azurix v. Argentina* the host state claimed that there was a conflict between the investment treaty and the protection of consumers' rights, arguing that such a conflict should be resolved in favour of human rights because consumers' public interests should prevail over the private interest of service providers. The tribunal avoided the conflict by noting that 'the matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case'.<sup>139</sup> This indicates that, though open to consider the problem, the tribunal saw the alleged conflict as irrelevant.<sup>140</sup>

In both *Suez/Interagua* and *Suez/Vivendi* the respondent state (Argentina) asserted that it adopted some measures in order to protect citizens' human right to water, and that even if certain of its actions might have breached investment provisions, it should be absolved of liability by virtue of the defence of necessity under customary international law. Both awards, rendered by the same panel, addressed the relevance of human rights obligations as regards the interpretation of the concept of fair and equitable treatment. According to the tribunals, in interpreting this standard it was necessary to bear in mind that the concession contract was subject to the regulatory authority of the Argentine state, which had 'a reasonable right to regulate'. Thus, the tribunal had to balance the legitimate and reasonable expectations of the investor with

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<sup>137</sup> E. De Brabandere, *Human Rights Considerations in International Investment Arbitration*, in M. Fitzmaurice, P. Merkouris (eds.), "The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications", Leiden: Brill, 2012, p. 209.

<sup>138</sup> Thielbörger, *The Human Right to Water Versus Investor Rights*, p. 507.

<sup>139</sup> Award of 14 July 2006, para. 261, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507\\_En&caseId=C5](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5).

<sup>140</sup> J. Fry, *International Human Rights Law in Investment Arbitration: Evidence of international Law's Unity*, in *Duke Journal of Comparative and International Law*, 2007, 18, p. 100.

Argentina's right to 'regulate the provision of a vital public service'.<sup>141</sup> The panels found that Argentina's refusal to revise the tariff in accordance with the concession contract and the regulatory framework violated its commitments under the investment treaty to treat the claimants' investments fairly and equitably. Both tribunals also discussed the defence of necessity in length. While acknowledging that the provision of water services was vital to well-being of the population and therefore an essential interest of the Argentine state, tribunals were not convinced that the only way that Argentina could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the investors. Finally, arbitrators analysed whether the termination of the concession contract by the grantor constituted a breach of the investment treaty. They held that Argentina's termination of the concession was done pursuant to the concession contract, finding that the record was insufficient to establish that Argentina had breached the fair and equitable treatment standard.

Even though Argentina made use of human rights arguments in both cases (amplified by amicus briefs in *Suez/Vivendi*) the fact is that arbitral panels did not comment on the relevance of human rights provisions in the interpretation of the relevant treaties nor did they make any reference to them in the awards. This is in contradiction with the considerations made by the tribunals when replying to requests for amicus participation, where they held that these disputes 'raised a variety of complex public and international law questions, including human rights considerations'.<sup>142</sup> Apparently arbitrators were only concerned with dismissing the claim that human rights law should take precedence over investment law, failing to consider the role and potential impact of human rights obligations in those disputes.<sup>143</sup>

In *Biwater v. Tanzania* the tribunal recognised the relevance of human rights considerations in its Procedural Order No. 5,<sup>144</sup> which granted the amici the right to make a submission. However, like in previous cases, the discussion on the role of human rights in the application and interpretation of the investment treaty appears to be absent from the final award. Negligible attention was paid to the human rights or public interest angles of the case, despite

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<sup>141</sup> *Suez/Interagua*, Decision on Liability, of 30 July 2010, para. 216, available at <http://www.italaw.com/sites/default/files/case-documents/ita0813.pdf>; *Suez/Vivendi*, Decision on Liability, of 30 July 2010, para. 236, available at <http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf>.

<sup>142</sup> *Suez/Interagua v. Argentina*, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, para 18; *Suez/Vivendi v. Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para 19.

<sup>143</sup> S. Schadendorf, Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations', in *Transnational Dispute Management*, 2013, 10(1), pp. 18-19.

<sup>144</sup> Procedural Order no. 5, of 2 February 2007, para. 52.

their acknowledged relevance. While the award summarises the amici's arguments, it shows little evidence of their influence. According to one author, this decision reflects the one-dimensional weighting of duties and responsibilities that characterises investment treaties.<sup>145</sup>

In *Impregilo v. Argentina* the host state also tried to articulate a defence based on the protection of human rights, but in a quite timid fashion. Argentina claimed that the regulatory actions taken by public authorities were lawful and proportionate, and that the regulatory powers of the state were 'particularly important in order to guarantee its inhabitants the human right to water.'<sup>146</sup> Again, Argentina claimed that the investment obligations assumed by the country did not prevail over the obligations assumed in treaties on human rights. Therefore, the obligations arising from the investment treaty must not be construed separately but in accordance with the rules on protection of human rights. Argentina did not elaborate further on the purported human right to water, and the award is totally silent on the matter.

In *SAUR International v. Argentina*, once again the respondent state tried to argue that the applicable international investment treaty regime did not modify its international human rights obligations. It urged the tribunal to interpret its international investment treaty obligations in harmony with norms of international human rights protection and in particular, those related to the right to water.<sup>147</sup> The tribunal agreed that human rights provisions in general, and the right to water specifically, were a source of law that it needed to take into consideration in reaching its decision. It specified, however, that those rights were compatible with the right of the investor to be protected under the applicable investment treaty stating that the two bodies of law operated on different levels. The tribunal concluded that it had to balance the two principles, and ultimately found that Argentina had violated its investment obligations.<sup>148</sup> The award only refers to human rights provisions when summarising the arguments presented by the host state, otherwise the decision is silent about human rights considerations.

Human rights considerations are slowly making their way into investment disputes. However, there is still a considerable gap between the logic, principles, and legal frameworks

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<sup>145</sup> F. Aldson, *Biwater v Tanzania: do Corporations have Human Rights and Sustainable Development Obligations Stemming from Private Sector Involvement in Natural Resource Provision?*, in *Environmental Liability - Law, Policy and Practice*, 2010, 18(2), p. 63.

<sup>146</sup> Award of 21 June 2011, para. 261, available at <http://www.italaw.com/sites/default/files/case-documents/ita0418.pdf>.

<sup>147</sup> Decision on jurisdiction and liability, of 6 June 2012, para. 328, available at <http://www.italaw.com/sites/default/files/case-documents/ita1016.pdf>.

<sup>148</sup> *Ibid*, part VI (decision), available at <http://www.italaw.com/sites/default/files/case-documents/ita1016.pdf>.

pertaining to such diverse considerations – investment protection and human rights promotion. Therefore, the precise relationship between international human rights law and international investment law remains unclear. Arbitrators faced with human rights arguments have dismissed them on procedural grounds instead of dealing with the substantive issues they raise.<sup>149</sup> So far arbitrators have either escaped from developing a comprehensive balanced approach to human rights issues<sup>150</sup> or addressed these questions in a sporadic manner.<sup>151</sup> One of the reasons for this is probably the insufficient clarity about the status of the right to water.<sup>152</sup>

Amici curiae have not been more successful in their endeavour to draw the tribunal's attention to human rights considerations. The impact of amicus participation in the outcome of the dispute is hard to assess since tribunals at most summarise their arguments but do not address them specifically. As a result, human rights considerations introduced by amici have had a limited success, facing the same reluctance by investment tribunals to engage in human rights discussions.<sup>153</sup> Arbitral tribunals seem to be more concerned with tackling the accusations of reduced transparency and legitimacy of the arbitration system than with taking into account human rights concerns.<sup>154</sup> Still, amicus curiae participation is a useful tool that may add a human rights dimension to investment arbitration.<sup>155</sup>

The cases discussed above illustrate how complex it is for tribunals to balance the reasonable expectations of investors with the right to regulate the provision of public services. The relationship between international investment law and the regulation of public services is a tense one, and can become an increasingly relevant issue in investor-state arbitration. Private participation in water provision created a new dimension to how positive and negative duties with respect to the human right to water were traditionally perceived.<sup>156</sup> International investment agreements accord investors special substantive and procedural protections that also benefit those companies investing in foreign water markets. The source of the tension between

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<sup>149</sup> Reiner and Schreuer, *Human Rights and International Investment Arbitration*, pp. 89-90; B. Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, in *Columbia Journal of Transnational Law*, 2011, 49, pp. 676-677.

<sup>150</sup> F. Marrella, *On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration*, in *International Community Law Review*, 2010, 12(3), p. 348.

<sup>151</sup> Hirsch, *Interactions between Investment and Non-investment Obligations*, p. 163.

<sup>152</sup> Thielbörger, *The Human Right to Water Versus Investor Rights*, p. 487.

<sup>153</sup> De Brabandere, *Human Rights Considerations*, p. 214.

<sup>154</sup> Schadendorf, *Human Rights Arguments*, p. 23.

<sup>155</sup> De Brabandere, *Human Rights Considerations*, p. 214.

<sup>156</sup> Aldson, *Biwater v Tanzania*, p. 65.



international investment law and human rights, namely a purported human right to water, is that international law did not adjust to these developments appropriately. Investment law does not impose binding obligations on companies which could assist states in the fulfilment of their human rights duties. This precludes any meaningful consideration of investors' human rights obligations.

#### 4.3.2 Erosion of the Concept of Public Services

The clash between investment law and public interests in water concession disputes has, thus far, been essentially framed using the language of human rights, namely, the human right to water. The human rights narrative is used to illustrate the tension between investment protection and non-investment concerns. This perspective has merited substantial academic attention but produced little, if any, impact on the decisions of arbitral tribunals. While societal interests associated with water services have been repeatedly associated with the language of human rights, the traditional qualification of water services as 'public services' or 'services of public interest' has been incomprehensibly overlooked. Several actors have called for the need to assess the interaction between human rights and investment law when discussing water disputes. However, another assessment needs to be made: one that focuses on the possible conflict between investor rights and its public service obligations. This exercise identifies several common points between the language of human rights and the narrative of public service obligations. What is more, it helps to clarify the unique nature of water services, which are regulated in different dimensions, both at the national (public service obligations) and international level (human rights obligations). One wonders whether public interests would have been addressed differently by investment tribunals if states and amicus curiae had based their arguments in the legal and contractual provisions that impose public service obligations on water service providers instead of resorting to the language of human rights.

The concept of 'public service' has always been ambiguous, and its political definition quite elusive. It is neither a term of international law nor of any particular national legal system. Public-private partnerships promoted the dissociation between services provided by the state and services that relate to public interests, frequently without the creation of a clear legal framework to govern them. This poses a challenge to the publicness of public services due to the

reorientation of state policies and administrative reforms towards the principles of market and business management.<sup>157</sup> The globalisation process further affected the definition and contents of what used to be considered a ‘public service’. The concept has been eroded, both in its political and legal dimensions. It has not been upgraded to a transnational dimension and adjusted to the new landscape of open markets. Public international law has paid little attention to privatisation, in clear contrast to the consideration it has given to privatisation’s antithesis, nationalisation.<sup>158</sup>

Despite its evident connection to water disputes, the concept of ‘public service’ seems to be lost in the combat between investors and host states or, at least, when it makes a short appearance, it is disguised – wrapped in ‘human rights’ or ‘public interests’ considerations. This erodes the concept by omitting the reference to its most important consequence – the existence of ‘public service obligations’. Probably this is one of the reasons why non-investment considerations have been framed in the ‘language’ of human rights – the absence of a visible international discourse on public services. Still, the importance of access to water has been acknowledged within the two different normative and analytical frameworks. Both the human rights and the public services approach serve as regulatory safeguards.<sup>159</sup> However, while human rights have an international dimension, public services are contained in the domestic sphere. Whereas the human rights concept refers mainly to human rights law as part of international law, essential services are to be situated in an economic law analysis, more common to be found in the context of the World Trade Organisation and the European Union.<sup>160</sup>

The concept of public service has been absent from investor-state arbitrations because it has a national nature that does not fit well with the ‘international’ and ‘treaty-based’ nature of such disputes. This notion that has its roots in national legal systems. Even in Europe, a remarkable example of legislative integration and harmonisation, the regulation of this issue is left to member-states. Investor-state disputes generally apply international law, and even when references are made to national laws, they do not go so far as to include a serious analysis of what ‘public service’ means or what ‘public services obligations’ it entails. Investment treaty arbitration is a dispute settlement method aimed primarily at establishing whether the host state has violated its international obligations under an international investment agreement. As a

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<sup>157</sup> Haque, *The Diminishing Publicness*, p. 66.

<sup>158</sup> A. De Wolf, “Reconciling Privatization with Human Rights”, Antwerpen: Intersentia, 2011, pp. 71-72.

<sup>159</sup> W. Vandenhoe, T. Wielders, *Water as a Human Right – Water as an Essential Service: Does it Matter?*, in *Netherlands Quarterly of Human Rights*, 2008, 26(3), p. 422.

<sup>160</sup> *Ibid*, p. 392.

consequence, the applicable law essentially consists of public international law. This is not to say that municipal law has no role to play, but its application to the dispute as such is limited compared with public international law. As a result of the international nature of the proceedings, there is a pre-eminent influence of public international law.<sup>161</sup>

National law – where the regulation of the provision of essential services like water is to be found – does not necessarily have to be excluded from investor-state proceedings. Pursuant to the first part of Article 42(1) of the ICSID Convention, the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. Some investment treaties contain an express choice of law clause. In this case, the origin of the choice of law rule is self-evident: the treaty itself. Furthermore, in disputes concerning water services the investor and the host state entered into a direct contractual relation – the concession contract – which may contain a choice of law provision. If any of these choice of law clauses refer to national law, then national legislation, including rules on public services, is evidently applicable. The reference to the law of the host state is likely to occur in concession contracts. If the parties so agree, national law will be applicable to the rights and obligations of the parties. The applicable law clauses of many investment treaties also refer to national law. In such cases both systems of law – national and international – must be applied by the tribunal. The combination of these diverse bodies of law is possible because each one plays a distinct role. The law of the host state governs the transaction arrived at between the investor and the host state, whereas the function of international law is to act as a review mechanism for the impugned transaction. The conduct of the host state is assessed by reference to the standards set out in the investment treaty.<sup>162</sup>

Still, the fact is that most investment treaties do not contain an express choice of law clause.<sup>163</sup> The second part of article 42(1) of the ICSID Convention provides that in the absence of an agreement the tribunal shall apply the law of the contracting state party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable. Thus, this provision establishes that the law chosen by the parties constitutes the applicable law

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<sup>161</sup> E. De Brabandere, “Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications”, Cambridge: Cambridge University Press, 2014, p. 122.

<sup>162</sup> J. Crawford, “State Responsibility: The General Part”, Cambridge: Cambridge University Press, 2013, p. 102.

<sup>163</sup> Y. Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in K. Yannaca-Small (ed.), “Arbitration under International Investment Agreements. A Guide to the Key Issues”, Oxford: Oxford University Press, 2010, p. 197.

and, in the absence thereof, that the tribunal should apply the law of the host state and the relevant rules of international law. Arbitrators' recourse to both laws is mandatory.

Even though national law may be relevant for dealing with certain issues, the fact is that tribunals rely mostly on public international law. This is the logical consequence of the fact that investment tribunals are mandated to determine whether the respondent state has breached its obligations under the applicable investment treaty. Sometimes, however, the analysis of whether a treaty obligation has been breached first requires an analysis of the existence of a contract breach. The annulment committee in *Vivendi v. Argentina* noted that 'whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract.'<sup>164</sup> In such cases, international law is applicable to evaluate a treaty claim (e.g., whether the state breached an international obligation arising from an international treaty), whereas domestic law applies to assess a contract claim (e.g., whether termination of an investment contract by the host state was justified by the investors' violation of domestic law).<sup>165</sup> In concluding that a treaty cause of action differs from a contractual cause of action because 'it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard', the annulment committee did not necessarily deny national law's potential relevance to the determination of the applicable treaty standard. Indeed, it may be necessary for a tribunal to take into account a contract's terms in determining whether there has been a breach of a distinct standard of international law, and in that case national law may be relevant because the contract is normally governed by domestic law.<sup>166</sup>

Arbitrators focus stringently on the rights of the investor as expressed in investment agreements, making limited recourse to other sources of law. This approach leads to a shrinking of the sources of substantive law being considered, namely the national law, where the concept of public service and the public service obligations arising therefrom can be found. In *Azurix v. Argentina*, for instance, the tribunal noted that the law of Argentina would be helpful in carrying

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<sup>164</sup> Decision on Annulment, of 3 July 2002, para. 96, available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552\\_En&caseId=C159](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552_En&caseId=C159).

<sup>165</sup> J. Viñuales, "Foreign Investment and the Environment in International Law", Cambridge: Cambridge University Press, 2012, p. 106.

<sup>166</sup> M. Sasson, "Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law", *Alphen aan den Rijn: Kluwer Law International*, 2010, pp. 167, 171.

out the tribunal's inquiry into the alleged breaches of the concession contract to which Argentina's law applied, but added that it was only an element of the inquiry because of the treaty nature of the claims.<sup>167</sup> Ultimately the decision failed to effectively address the obligations that resulted from the fact that this was a public service according to the laws of Argentina. The tribunal interpreted the respective rights of the parties under the concession contract but without testing that interpretation against the applicable law, downplaying the critical role of national law as the source of the rights comprising the investment.<sup>168</sup> Other awards also narrowed down the object and purpose of investment arbitration to the analysis of investment treaties, overlooking the extensive legal framework applicable to the provision of water services. In both *Suez/Interagua v. Argentina* and *Suez/Vivendi v. Argentina*, the tribunal acknowledged that 'an analysis of this investment dispute must begin with an understanding of the legal framework of the concession (...) since that framework is an important source of the rights, obligations, and expectations of the parties to the dispute'.<sup>169</sup> Still, arbitrators did not seem to extract any relevant consequences from a merely perfunctory analysis of the Argentine Water Law. The same can be said about *Biwater v. Tanzania*, where the tribunal barely addressed the lease contract and the legal obligation imposed on the investor to maintain safe drinking water in the city.

In *SAUR International v. Argentina* the tribunal seemed to pay more attention to national law in the resolution of the dispute. Analysing the investment treaty, the tribunal acknowledged that it had to take into account the Argentinian legal system, including the concession contract and all other contracts related to the investment, which were all subject to the laws of Argentina, and the applicable principles of public international law.<sup>170</sup> On the relationship between these different sources of law, it stated that they should not be ranked according to hierarchy but rather speciality – each question should be governed by the rules most suited to its nature. Therefore, the international responsibility of Argentina should be assessed pursuant to the investment agreement and the applicable principles of public international law; whereas the non-performance of the contract, the administrative intervention of public authorities, or the

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<sup>167</sup> Award of 14 July 2006, para. 67.

<sup>168</sup> Z. Douglas, "The International Law of Investment Claims", Cambridge: Cambridge University Press, 2009, pp. 71-72.

<sup>169</sup> *Suez/Interagua v. Argentina*, Decision on Liability, of 30 July 2010, para. 64; *Suez/Vivendi v. Argentina*, Decision on Liability, of 30 July 2010, para. 66.

<sup>170</sup> Decision on jurisdiction and liability, of 4 June 2012, para. 326, available at <http://www.italaw.com/sites/default/files/case-documents/ita1016.pdf>.

rescission of the contract should be analysed under the light of Argentinian law.<sup>171</sup> The award made several references to the national legal framework and seemed more willing to take into account its provisions when assessing the legality of the measures adopted by the respondent state. While the tribunal ultimately decided that Argentina had adopted a series of expropriatory measures and breached the standards of fair and equitable treatment, the arbitrators seemed to be more aware that the conformity of such measures also had to be checked against the local legal environment that surrounded the intervention of the Argentinian state.

Another unsettling aspect of the case law on water concession contracts is the lack of references to their main source: the concession contract. The origins of investment arbitration lie in public international law instruments between sovereign states. However, the fact that investment arbitration is founded on public international law and state consent does not mean that the underlying investment contract and the domestic law of the host state become irrelevant. Inversely, investor-state arbitration is intricately connected to both.<sup>172</sup> Besides overlooking the applicable national law, arbitrators have also been paying little attention to the primary source of the investment relationship: the concession contract. Concession contracts are not ordinary commercial contracts. They have different goals and contents, deeply associated with the promotion and protection of public interests. Hence, the procedure for their conclusion is distinct, frequently requiring ministerial, administrative, or legislative authorisation before becoming binding. These bureaucratic procedures are an indication of how public interests are a fundamental element of the contract.<sup>173</sup> Because water concession contracts are deeply associated with public concerns, they contain express references to the public service obligations of the concessionaire (and investor). Furthermore, concession contracts frequently contain a choice of law provision. If this clause refers to national law, then national legislation, including rules on public services, is evidently applicable.

In *Azurix v. Argentina* the respondent state repeatedly argued that all of its actions complied with the concession agreement and the regulatory framework. The tribunal noted that contractual breaches by a state party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches could be considered to be measures

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<sup>171</sup> *Ibid*, para. 327.

<sup>172</sup> C. N. Brower, S. Kumar, *Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*, in *ICSID Review*, 2015, 30(1), p. 44.

<sup>173</sup> M. Sornarajah, "The Settlement of Foreign Investment Disputes", The Hague: Kluwer Law International, 2000, pp. 86-87.

tantamount to expropriation would depend on whether the State or its instrumentality had breached the contract in the exercise of its sovereign authority, or as a party to a contract. In considering each of the grounds which the claimant had advanced, the tribunal had to assess them from the perspective of possible breaches of the investment treaty and of whether they reflected the exercise of specific functions of a sovereign.<sup>174</sup> In the end, the tribunal found that measures taken by Argentinian authorities prohibiting the investor from collecting tariffs in relation to its water and sewage operations were arbitrary because they were not based on the law or the concession agreement.<sup>175</sup>

In *Vivendi v. Argentina* the tribunal, based on the distinction between treaty claims and contract claims, considered that it was not necessary to come to a definitive view as to whether either party had or not breached the concession agreement in order to settle the dispute.<sup>176</sup> As a result, the award did not examine the contractual provisions, considering that the claims presented by the investor had to be assessed against the ‘independent standard’ provided by the investment treaty.

The investment contract plays a fundamental role in setting the legitimate expectations of the investor. Frequently arbitral tribunals referring to the obligation to maintain a stable legal environment discuss the legitimate expectations created by contractual instruments. In both *Suez/Interagua v. Argentina* and *Suez/Vivendi v. Argentina* the tribunal had to assess a refusal of the host state to update tariffs in accordance with the terms set out in the concession contract and domestic legislation. While the tribunals refer several times to ‘legal framework’ in the context of the fair and equitable treatment clause, the awards reveal that the investor’s legitimate expectations were based on both the contract and the domestic legislation, and even suggest that the dominant element of this ‘legal framework’ was the concession contract. The tribunals stated that the concession contract and the legal framework of the concession ‘set down the conditions offered’ at the time the investor made its investment; ‘they were not established unilaterally but by the agreement’ between the local authorities and the investors; and they ‘existed and were enforceable by law’. Arbitral panels added that ‘like any rational investor’, investors attached ‘great importance to the tariff regime stipulated in the concession contract and the regulatory

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<sup>174</sup> Award of 14 July 2006, paras. 314-315.

<sup>175</sup> *Ibid*, para. 393.

<sup>176</sup> Award of 20 August 2007, paras. 7.3.10-7.3.11, available at <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>.

framework'. The expectations of the investor were included in the concession contract, a 'document which certainly reflects in detail the claimants' legitimate expectations', as well as those of the host state. 'In view of the central role' that the concession contract and legal framework played in establishing the concession, the investor's expectations that the host state would respect the concession contract throughout the thirty-year life of the concession was 'legitimate, reasonable, and justified'.<sup>177</sup> Both tribunals concluded that the 'persistent and rigid refusal to revise the tariff in accordance with the concession contract and the regulatory framework' violated Argentina's commitments under the investment treaty to treat the investors' investments fairly and equitably.<sup>178</sup>

It is surprising to notice that these awards do not go through the concession contract and the domestic legislation in the same detail when assessing the measures adopted by Argentina in order to protect the access to water of the populations. It is true that Argentina tried to justify possible breaches of its investment obligations by invoking the protection of the human right to water as a defence of necessity, thereby putting the problem at the level of international law. Still, arbitrators should have analysed more thoroughly the contents of the concession contract and the domestic legislation, as they establish the duties and obligations of the investor, namely the fulfilment of public service obligations. It is paradoxical that tribunals acknowledge that the contract and the legal framework reflect in detail the investor's 'legitimate expectations', but ignore that same contractual and legal framework when analysing the host state's legitimate expectations that the investor would respect its public service obligations. One wonders whether these tribunal would have addressed the question differently if Argentina had framed its arguments under the language of public services obligations (founded on the concession contract and the domestic legal framework) instead of the rhetoric of human rights.

In *Impregilo v. Argentina*, as many of the measures complained of by the investor concerned the investment contract, the arbitral tribunal found it appropriate to examine whether the alleged contractual breaches could affect Argentina's responsibility under the investment treaty.<sup>179</sup> The tribunal found that Argentina, by failing to restore a reasonable equilibrium in the concession, breached its duty under the investment treaty to afford a fair and equitable treatment

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<sup>177</sup> *Suez/Interagua v. Argentina*, Decision on Liability, of 30 July 2010, para. 212; *Suez/Vivendi v. Argentina*, Decision on Liability, of 30 July 2010, para. 231.

<sup>178</sup> *Suez/Interagua v. Argentina*, Decision on Liability, of 30 July 2010, para. 218; *Suez/Vivendi v. Argentina*, Decision on Liability, of 30 July 2010, para. 238.

<sup>179</sup> Award of 21 June 2011, para. 298-299.



to the investor.<sup>180</sup> This decision acknowledges that the legal framework that surrounds the investment includes the national law and the concession contract. If the breach of the investment treaty touches upon contractual rights, then the arbitrators need to take the contractual provisions into account, as it is against such provisions that the legality of the host state's measure will be checked. This unusual attention paid to the concession contract results from the fact that the claims complained of by the investor concerned the contractual relationship with the host state. As a result, the arbitral tribunal felt compelled to examine such contractual provisions. In most cases investors do not frame their case as a breach of the contract that also amounts to a breach of investment treaty obligations, which explains why arbitrators normally do not examine the concession contract in detail. One wonders if the arbitral tribunal would be willing to devote such attention to the concession contract if the claim presented by the investor was treated merely as a 'treaty claim'. This decision highlights that the concession contract is a fundamental source of the parties' obligations and that arbitrators should check the legality of the host state's against those provisions, namely when respondent states argue that their measures are justified by a breach of the concession contract and are justified by the provisions of that same contract.

The concept of public service has been absent from investment arbitration because it is stranded on domestic legislation, which has been consistently overlooked in favour of investment law. The inexistence of an international legal framework on 'public services' or on 'public service obligations' results in the scarce relevance of these provisions. A tension exists between national conceptions of 'public service' and the international logic of foreign investment, based on the language laid down in investment treaties. While the latter are the result of a multiplicity of international treaties and regulatory frameworks, the former are still deeply national. The regulatory framework embodying the concept of public service is found in national law, and does not have an international dimension. The 'division of labour' in international investment law has traditionally been as follows: investors' duties are regulated at the domestic level, whereas investors' rights are protected at the international level.<sup>181</sup> The concept of 'public service' resists internationalisation. The idea of 'public service obligations' lacks an international dimension and is thus not contemplated by arbitrators. The *Suez/Interagua v. Argentina* and *Suez/Vivendi v. Argentina* cases illustrate the existent asymmetry between the legitimate expectations of the

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<sup>180</sup> Ibid, para. 331.

<sup>181</sup> Krajewski, *Investment Law and Public Services*, p. 14.

investor – which are grounded not only on the investment treaty but also on national law and contractual instruments – and the legitimate expectations of the host state, which find no protection on investment treaties and are frequently overlooked in arbitration proceedings because of the predominance of international law.

## CHAPTER III – INFUSING PUBLIC INTERESTS INTO WATER CONCESSION ARBITRATIONS

As discussed in the previous Chapter, the principles and legal frameworks that traditionally supported investor-state arbitration did not ensure the protection of the public interests associated with water services. Despite recent reforming efforts, the current system is still far from properly balancing the goals of investment protection and promotion with the public function of these services.

Water concession contracts are not trivial investments. The nature of the interests associated with these services requires a special legal framework, embodied in carefully designed concession contracts but also investment treaties that allow for the consideration of the specific problems that may arise from foreign investments in the water industry. Furthermore, those in charge of arbitrating these disputes should have a clear understanding of the public interests that surround water concession contracts. According to Truswell, a consistent treatment of water contracts can emerge from three different aspects: the awards of international investment tribunals; the subjection of water services to special provisions within investment treaties; and the inclusion of special provisions in contracts governing water services.<sup>182</sup> In our opinion, due consideration of the public interests in water concession disputes requires concerted action in two different domains: changing the investment arbitration mechanism, by promoting the transparency of proceedings and the participation of non-parties; and changing the regulatory framework that underpins investments in water services. Combined, these improvements are likely to infuse public interests into water concession arbitrations.

### **5. Changes from Within**

The current investor-state arbitration system is clearly unsatisfactory. A reform is necessary so as to strike a proper balance between public policy concerns and investment promotion and protection. The procedural flaws identified previously perpetuate a system and culture that is antagonistic to the proper consideration of public policy issues in investment

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<sup>182</sup> E. Truswell, *Thirst for Profit: Water Privatisation, Investment Law and a Human Right to Water*, in C. Brown, K. Miles (eds.), “Evolution in Investment Treaty Law and Arbitration”, Cambridge: Cambridge University Press, 2011, p. 584.

disputes.<sup>183</sup> The system needs to be reformed under penalty of dying before it can survive its growing pains.

### 5.1 Transparency of Proceedings

In the last few years there has been a dawning recognition that conducting investor-state arbitrations out of the public eye is problematic in democratic systems. Several modern investment treaties provide for greater transparency throughout the different stages of the proceedings. The implementation of these new instruments in practice provides useful insights for the reform of the ICSID Arbitration Rules. Furthermore, in April 2014 UNCITRAL opened a Transparency Registry for investor-state arbitrations, which makes a broad range of additional awards and pleadings available.<sup>184</sup> The Transparency Registry has been established under the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration, effective as of 1 April 2014.<sup>185</sup>

Concerns over lack of transparency have also been addressed by the ICSID to some extent. Still, there is room to improve and render ICSID arbitration proceedings more transparent. Even though the existence of a new case is posted on the ICSID website with reference to the name of the parties and the subject matter of the dispute, this information is clearly scarce and says little about the contours of the case. Differently, some investment treaties now provide for greater transparency regarding the initiation of arbitral proceedings. Article 29(1) of the 2012 U.S. Model Bilateral Investment Treaty<sup>186</sup>, for instance, provides that the respondent shall, after receiving the notice of intent and the notice of arbitration, promptly transmit them to the non-disputing party and make them available to the public. Similarly, article 2 of the UNCITRAL Rules on Transparency provides that once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of

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<sup>183</sup> K. Miles, *Reconceptualising International Investment Law: Bringing the Public Interest into Private Business*, in M. Lewis, S. Frankel (eds.), *“International Economic Law and National Autonomy”*, Cambridge: Cambridge University Press, 2010, p. 307.

<sup>184</sup> United Nations Commission on International Trade Law, *Transparency Registry*, available at [www.uncitral.org/transparency-registry](http://www.uncitral.org/transparency-registry).

<sup>185</sup> United Nations Commission on International Trade Law, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html).

<sup>186</sup> Government of the United States of America, *2012 U.S. Model Bilateral Investment Treaty*, available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

the notice of arbitration to the repository of published information. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made. Furthermore, the first paragraph of article 3 adds that, subject to article 7 (confidential or protected information) the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party shall be made available to the public. The ICSID Rules could be amended in the same vein so as to make sure that this information is made available on its website, allowing the general public to have a more precise idea about the existence of the dispute and the public interests that might possibly be involved.

Furthermore, even after the 2006 amendments, the access by the public to arbitration documents and hearings is still handled rather restrictively under the ICSID arbitration rules. In the framework of the North American Free Trade Agreement (NAFTA), public access to arbitration documents is much easier. In a 2001 Statement,<sup>187</sup> the Free Trade Commission clarified that ‘nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules’. Therefore, the NAFTA parties agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: confidential business information; information which is privileged or otherwise protected from disclosure under the party’s domestic law; and information which the party must withhold pursuant to the relevant arbitral rules, as applied. The parties reaffirmed that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents. This clear stance in favour of transparency appears to have affected treaty practice in a certain way, in that a new generation of investment treaties is more open to the publication of documents. Article 29(1) of the 2012 U.S. Model Bilateral Investment Treaty, for example, provides that the respondent shall, after

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<sup>187</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at [http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp).

receiving the following documents, promptly transmit them to the non-disputing party and make them available to the public: pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal. Similarly, article 3 of the UNCITRAL Rules on Transparency requires the following documents to be made available to the public, subject to some limitation on confidential or protected information: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing party (or parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

There is also a growing trend in favor of allowing public access to the arbitral hearings. Within NAFTA, Canada, the United States, and Mexico have agreed that investor-state hearings should be open to the public.<sup>188</sup> Similarly, article 29(2) of the 2012 U.S. Model Bilateral Investment Treaty provides: ‘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.’ Pursuant to article 6 of the UNCITRAL Rules on Transparency, hearings for the presentation of evidence or for oral argument shall be public. Where there is a need to protect confidential information or the integrity of the arbitral process, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible. Oral hearings of investment arbitrations should, in

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<sup>188</sup> NAFTA Free Trade Commission Joint Statement, “Decade of Achievement”, San Antonio, July 16, 2004, available online at [http://www.sice.oas.org/tpd/nafta/Commission/Statement2004\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/Statement2004_e.asp).

principle, be opened to the public. This allows the general public to have access to the proceedings, even if just as observers and not amici. According to Parra, the time may have come for ICSID ‘to reverse the general rules regarding access to documents and attendance at hearings in arbitration cases’ and, more particularly, ‘ICSID might amend its Regulations and Rules to provide for the publication of all documents generated in proceedings, unless or to the extent decided otherwise by the arbitrators, and for tribunals to have full authority to allow third parties to attend or observe hearings (eliminating a party’s right to veto such attendance or observance of hearings)’.<sup>189</sup>

Finally, it is also necessary to increase transparency as regards the publication of final awards. Rule 48(4) of the ICSID Arbitration Rules still makes the publication of the award dependent upon the consent of the parties. While this provision requires the centre to include in its publications excerpts of the legal reasoning of the tribunal, the truth is that only access to have a thorough vision of the proceedings and how public interests were handled by respondent states and the panel of arbitrators. The full text of arbitral awards should be accessible to the general public, subject to the necessary safeguards for the protection of confidential business and governmental information. This is possible in most cases and requires only certain exceptions to the rule which may be practically accomplished by deleting parts of an award.<sup>190</sup> This would enhance the effectiveness and public acceptance of international investment arbitration, as well as contribute to the development of a public body of jurisprudence. Recent trends in investment treaties also indicate a greater willingness to make arbitration awards publicly available. In the NAFTA context, states or the investor may unilaterally make the award public.<sup>191</sup> Article 29(1) of the 2012 U.S. Model Bilateral Investment Treaty mandates publication of all orders, awards and decisions of the tribunal. The publication is subject to essential security exceptions and to special procedures that can be invoked at a disputing party’s request to protect confidential information. Similarly, article 3 of the UNCITRAL Rules on Transparency provides that orders, decisions and awards of the arbitral tribunal shall be available to the public, subject only to some limitations regarding confidential or protected information. An amendment to the ICSID Arbitration Rules providing for the mandatory publication of complete awards in a similar

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<sup>189</sup> A. Parra, A., “The History of ICSID”, Oxford: Oxford University Press, 2012, pp. 323-324.

<sup>190</sup> Knahr and Reinisch, *Transparency versus Confidentiality*, p. 115.

<sup>191</sup> NAFTA, article 1137 and annex 1137.4.

fashion would be a welcome development and contribute to enhance the transparency of ICSID arbitration.

Even if the ICSID decides not to amend its Arbitration Rules in the near future, there is another avenue that host states may pursue to provide for greater transparency in investor-state arbitration: the inclusion of specific provisions on investment treaties and investment agreements such as concession contracts. Indeed, negotiating parties can agree on transparency provisions directly in the concession contract or indirectly in the investment treaty, on how to conduct any subsequent arbitrations. Host states should strive to include in these instruments a public right of access to information, subject only to strict limitations regarding genuinely commercially sensitive information. The existence of public interests associated to investor-state arbitrations should lead to a presumption of publicity of the proceedings, unless confidentiality can be justified, in whole or in part.<sup>192</sup>

Overall, investor-state arbitrations regarding water concession contracts call for a greater measure of transparency. These are not trivial commercial disputes. While confidential business information must be protected, when a crucial public good like water is involved there should be information to the public about the terms of the privatisation and its impact on the society. Greater transparency enhances the public's ability to follow pending investment disputes and understand the growing body of investment arbitration awards. This would lead to more responsible contracting by companies and governments, and contribute to more consistent rulings by arbitrators, thereby reinforcing predictability and legitimacy of international law.<sup>193</sup> Instilling greater transparency into the process would also provide for a measure of accountability for the arbitrators, giving them greater incentive to consider the public's interest.

## **5.2 Participation of Non-parties**

Investor-state arbitration has also been accused of lack of openness to the wider society. Third party participation in water disputes is – like in other disputes involving public goods – essential for the protection of public interests. Past experiences have shown that partnerships in the water sector should not simply be viewed as bilateral relationships between the public and

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<sup>192</sup> B. Cremades, D. Cairns, *The Brave New World of Global Arbitration*, in *Journal of World Investment*, 2002, 3, p. 197.

<sup>193</sup> Marrella, *On the Changing Structure of International Investment Law*, p. 359.



the private sector as they generate strong interest from consumers and communities.<sup>194</sup> The principle of public participation should be better balanced against other rationales of the investor-state dispute settlement mechanism.

The last years have witnessed an undeniable shift in investment arbitration toward greater tolerance of third-party participation. Amicus curiae participation is becoming a fixture in investor-state arbitration in cases implicating important public policy considerations. As a result, critiques of the system based on lack of transparency and openness to third party participation are diminishing in tone.<sup>195</sup> The 2006 amendments to the ICSID rules endowed the system with greater transparency and facilitated the participation of civil society in disputes. Still, the ICSID Rules do not go far enough in ensuring a full application of the public participation principle. The ICSID Arbitration Rules should allow for broader participation rights that go beyond the mere possibility to make written submissions. Timely disclosure of key documents such as briefs, final awards, and transcripts will assist persons submitting amicus briefs to be more efficient in making their own submissions. Proper disclosure of information is vital for better participation, and the disadvantages are minimal.<sup>196</sup>

Another important change would be the deletion of the right of parties to oppose the access of amici curiae to hearings. ICSID tribunals should have the power to decide for themselves whether to permit amici curiae access to hearing. This could be achieved simply by removing the prerequisite of ‘the consent of the parties’ mentioned on Arbitration Rule 32(2), or by introducing criteria similar to those in Arbitration Rule 37(2) concerning written submissions. The removal of the veto power of the parties would increase the sphere of activity of amici curiae.<sup>197</sup> An evolution of the rule in this sense seems unstoppable in the long run.<sup>198</sup> As mentioned, article 6 of the UNCITRAL Rules on Transparency establishes the general principle that hearings for the presentation of evidence or for oral argument shall be public, subject only to a few limitations.

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<sup>194</sup> C. Kauffmann, Financing Water Quality Management, in A. Biswas, C. Tortajada, R. Izquierdo (eds.), “Water Quality Management: Present Situations, Challenges and Future Perspectives”, Abingdon: Routledge, 2012, p. 96.

<sup>195</sup> VanDuzer, Enhancing the Procedural Legitimacy, pp. 687, 723.

<sup>196</sup> Magraw Jr. and Amerasinghe, Transparency and Public Participation, pp. 358-359.

<sup>197</sup> Bastin, The Amicus Curiae, p. 232.

<sup>198</sup> C. Zoellner, Third-Party Participation (NGO’s and Private Persons) and Transparency in ICSID Proceedings, in R. Hofmann, C. Tams (eds.), “The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years”, Baden-Baden: Nomos, 2007, p. 206.

Measures conducive to greater transparency and openness of investor-state arbitration can be included in arbitration rules but also in investment treaties and concession contracts. During the negotiation of these instruments host states should insist on the incorporation of express rules allowing for amicus curiae participation and granting third parties with access to the documents and hearings. In case of a dispute the parties – namely, the investor – will not have the possibility of refusing public participation since the procedure to be applied by the tribunal is determined not only by the applicable rules of the arbitration institution, but also those defined by the state when expressing consent to arbitration in an investment treaty.<sup>199</sup> While this method of attaining amicus curiae participation is not as all-encompassing as amending the ICSID Arbitration Rules, it has an incremental effect.<sup>200</sup>

The expansion of the participatory rights of amici curiae should, naturally, be made with caution. Still, if concerns regarding confidential information and the cost and time-efficiency are properly taken into account, it seems possible to strike an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of state-investor dispute resolution.<sup>201</sup> Most, if not all, potential costs of increased transparency can be avoided if tribunals carefully exercise their discretion in the fields of transparency and third party participation. And, because the parties choose their arbitrators and trust them to rule on the substantive issues, there is no convincing reason why tribunals should be unfit to properly manage these procedural competence as well.<sup>202</sup>

## 6. Changes to the Regulatory Framework

There is an ongoing clash between the investment obligations of host states and the public service obligations associated with essential services like water provision. International investment agreements impose investment obligations on host states but do not preclude their responsibility for the protection of public interests associated with these services. The conclusion of concession contracts does not render the concept of ‘public service’ useless, as public service obligations may also be discharged by private operators. Water services still serve public

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<sup>199</sup> De Brabandere, *Investment Treaty Arbitration*, p. 163.

<sup>200</sup> Bastin, *The Amicus Curiae*, pp. 232-233.

<sup>201</sup> Levine, *Amicus Curiae*, p. 223.

<sup>202</sup> Zoellner, *Third-Party Participation*, p. 207.

interests but are carried out by a private company, subject to the control and monitoring of the state. Public authorities are required to readjust to the new situation created by privatisation by developing new mechanisms to ensure both the protection of investments and of citizens' rights.

The need to change the existing legal framework so as to reflect non-investment concerns has been underlined by several authors from the perspective of human rights. Since private operators assume some of the state's duties regarding the provision of water services, they necessarily take on some of the responsibility for the accompanying human rights obligations. One way to enforce these responsibilities is to factor them into contracts and investment treaties. The tribunal's ability and willingness to take account of public interests depends on the applicable law. While international investment agreements are a primary source of rights and obligations of the parties, they cannot be wholly separated from the contract or from domestic law. In fact, the investment treaty and the investment contract are mutually reinforcing.<sup>203</sup> Host states need to reshape both legal instruments so as to make it clear that investment in water services is not only governed by the investment treaty but also by the concession contract and the domestic legislation, which contain public service obligations. One way of enhancing the visibility of these obligations in investor-state disputes, thus emphasising their binding nature, is to expressly include adequate provisions in concession contracts and investment agreements.

### **6.1 Refinement of Concession Contracts**

The concession contract is the centrepiece of the regulatory framework. Because of their distinctive subject-matter and of the long-term nature of the relationship, investments in the area of public services require a long and intricate negotiation between the investor and the host state, which is embodied in the concession contract and related contractual documents. This means that, even where investment treaties between the host state and the state of the investor exist, they are not self-sufficient. Investment contracts such as concession contracts are still frequent, and the existence of investment treaties did not render them obsolete. In fact, these legal instruments are probably the most effective investment protection instruments available because they allow investors to draft terms tailored to specific investment needs. Differently, investment

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<sup>203</sup> Brower and Kumar, *Investomercial Arbitration*, p. 55.

treaties are much more general and vague, and in some cases might be unsuited to particular investment projects.<sup>204</sup>

Host states should be aware of the central role played by the concession contract in shaping the contours of the relationship with the foreign investor. Therefore, before entering into any Public-Private Partnership for the provision of water services, states should introduce the appropriate regulatory framework in the concession contract.<sup>205</sup> Careful design of concession contracts would allow the host state to clearly set out in the contract in which situations it would be allowed to intervene in the protection of relevant public interests, and through which measures.<sup>206</sup> Concession contracts should reflect a careful allocation of responsibilities between host states and private operators. Both parties should be sensitive to the implications of the contract and share the costs for the fulfilment of the relevant public service obligations at the outset of their relationship.<sup>207</sup>

States should strive to give more prominence to public service obligations in the concession contract. This legal instrument puts forward the specific regulatory framework of the relationship between grantor and concessionaire, describing their rights and obligations. More than that, a concession contract has a dual nature of both contract and an act of the sovereign.<sup>208</sup> As a result, these contracts should be treated as public policy mechanisms rather than merely private contracts.<sup>209</sup> Concession contracts should clearly set out the rights and obligations of the concessionaire, including the fulfilment of public service obligations. According to Petersmann<sup>210</sup>, if Argentina had included human rights obligations in the concession contracts, the subsequent investment disputes might have been avoided. Similarly, the inclusion of provisions on public service obligations would shape the concessionaire's legitimate expectations decisively. The inclusion of clear and unequivocal references to public service

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<sup>204</sup> J. Yackee, Do We Really Need BITS? Toward a Return to Contract in International Investment Law, in *Asian Journal of WTO & International Health Law and Policy*, 2008, 3, pp. 133-134.

<sup>205</sup> O. McIntyre, Emergence of the Human Right to Water in an Era of Globalization and Its Implications for International Investment Law, in J. Addicott, M. Bhuiyan, T. Chowdhury (eds.), "Globalization, International Law, and Human Rights", Oxford: Oxford University Press, 2011, pp. 172-173.

<sup>206</sup> Truswell, Thirst for Profit, p. 584.

<sup>207</sup> U. Kriebaum, Privatizing Human Rights: the Interface Between International Investment Protection and Human Rights, in Reinisch, A., Kriebaum, U. (eds.), "The Law of International Relations – Liber Amicorum Hanspeter Neuhold", Utrecht: Eleven International Publishing, 2007, p. 189.

<sup>208</sup> J. Salacuse, *The Three Laws*, p. 227.

<sup>209</sup> N. Miranda, Concession Agreements: From Private Contract to Public Policy, in *Yale Law Journal*, 2007, 117(3), p. 532.

<sup>210</sup> E. Petersmann, Human Rights, International Economic Law and 'Constitutional Justice', in *European Journal of International Law*, 2008, 19(4), p. 795.

obligations in the concession contract might contribute to elevate the profile of these obligations and avoid the recourse to the language of human rights, which has been articulated by respondent states with little success. The argument according to which arbitrators shy away from considering human rights due to their lack of experience in this specialised field of law<sup>211</sup> would stand no longer. In fact, investment arbitrators are far more used to interpreting and applying contractual provisions than human rights treaties. In this case the state's defence would be based on contractual provisions detailing the existence of certain public service obligations binding the foreign investor, making them unequivocally applicable to the dispute.

## 6.2 Recalibration of Investment Treaties

Another important avenue for balancing investment protection and the protection of public interests associated with water services is through careful drafting of investment treaties. This second approach might be even more successful because, as demonstrated above, arbitrators rely mainly in the text of investment treaties.

International investment agreements generally focus on investment promotion and protection, lacking any references to public interests. While states want to promote foreign investment, they also have an interest in pursuing other values, including protection of the environment, public health, human rights, and labour rights. As a result, when concluding investment treaties, states often seek to advance the interests of several different constituencies.<sup>212</sup> Given the need to reach a compromise, frequently international investment agreements convey the obligations of investors using rather broad and general language. Still, they should not restrict the state's right (and obligation) to supervise and regulate the provision of public services. Investment treaties should make clear that investor accountability is as essential as investor rights.<sup>213</sup> Public concerns such as the protection of consumers' rights, labour rights, and of the environment should be included in investment treaties. Reacting to several

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<sup>211</sup> I. Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, in P. Dupuy, F. Francioni, E. Petersmann (eds.), "Human Rights, International Investment Law and Investor-State Arbitration", Oxford: Oxford University Press, 2009, p. 342.

<sup>212</sup> C. H. Brower II, *Corporations as Plaintiffs under International Law: Three Narratives about Investment Treaties*, in *Santa Clara Journal of International Law*, 2011, 9, p. 190.

<sup>213</sup> A. Bjorklund, *Improving the International Investment Law and Policy System*, in J. Alvarez, K. Sauvant, K. Ahmed, G. Vizcaino (eds.), "The Evolving International Investment Regime: Expectations, Realities, Options", Oxford: Oxford University Press, 2011, p. 229.

decisions that were perceived as too restrictive of state's regulatory powers, several states have decided to revamp their investment agreements. This entails a 'reappraisal' or 'recalibration' of international investment instruments.<sup>214</sup> These legal instruments need to be drafted in a way that strikes a better balance between the objective of protecting foreign investment and the other interests and values which foreign investment could impact. The goal is to clarify the state's rights and duties to regulate and protect public interests.<sup>215</sup> Better drafting should provide clearer guidance to arbitration panels, ensuring greater predictability and coherence in the interpretation of treaty terms.<sup>216</sup>

This trend has been especially noticeable as regards the perceived conflict between investment standards of protection and human rights protection. States have been urged to make sure that they retain adequate policy and regulatory ability to protect human rights when negotiating and concluding investment agreements.<sup>217</sup> Host States should act in a preventive manner, in line with appropriate due diligence standards, allowing them to comply both with investment standards of protection and obligations of a diverse nature.<sup>218</sup>

### 6.2.1 Provisions on Public Service Obligations

There are several different tools available so as to strike a balance between investment obligations and non-investment concerns. The most obvious option is to insert specific provisions on the investment agreement defining the rights and obligations of the parties and ensuring unequivocally that states can regulate in order to achieve public policy goals. In the

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<sup>214</sup> P. Juillard, *The Law of International Investment: Can the Imbalance be Redressed?*, in K. Sauvant (ed.), *Yearbook of International Investment Law and Policy 2008-2009*, Oxford: Oxford University Press, 2009, p. 280; J. Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, in *Harvard International Law Journal*, 2010, 51, p. 314.

<sup>215</sup> E. Petersmann, *"International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods"*, Oxford: Hart Publishing, 2012, p. 290.

<sup>216</sup> V. Prislán, *Non-Investment Obligations in Investment Treaty Arbitration: Towards a Greater Role for States?*, in F. Baetens (ed.), *"Investment Law within International Law: Integrationist Perspectives"*, Cambridge: Cambridge University Press, 2013, p. 476.

<sup>217</sup> See, e.g., United Nations High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9, of 25 June 2002, pp. 10-11; United Nations High Commissioner for Human Rights, *Trade and Investment*, para. 58; United Nations Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie – *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, of 21 March 2011, para. 9.

<sup>218</sup> A. Tanzi, *Recent Trends in International Investment Arbitration and the Protection of Human Rights in the Public Services Sector*, in N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds.), *"International Courts and the Development of International Law"*, The Hague: TMC Asser Press, 2013, pp. 596-597.

specific case of water services, this would be achieved by giving greater visibility and prominence to public service obligations, thus reinforcing their binding nature. As investment tribunals rely essentially on the text of the investment treaty, the inclusion of express provisions within the legal instrument would dissipate any possible doubts over the direct and necessary applicability of these obligations. However, the scope of international investment agreements is wide, including activities and sectors that are quite dissimilar. Most investments are made in areas which are not subject to public service obligations. When states negotiate investment agreements they have in mind a wide range of sectors and activities, and therefore use broad and general language to govern them a systematic and coherent manner. Still, it would be possible to include a special chapter on public service obligations, which would only be applicable to the types of investments defined therein.

### 6.2.2 Provisions on the Applicable Law

The legislative technique described above entails the inclusion of specific provisions on public service obligations in the text of the investment agreement itself. A similar result can be achieved through the inclusion of provisions in the investment agreement referring to national laws where these obligations are enshrined. The goal here is to make it clear that those provisions are a part of the applicable law. As discussed above, the legal framework for investments in water services consists of the relevant host country legislation, its system of regulations, and the concession agreement. While the concession agreement stipulates key provisions governing the relationship between the host country and the investor, the source of many of those concession provisions is set out in the law and regulations of the host country. Frequently investment agreements contain clauses requiring that investments be ‘in accordance with host state law’. These clauses emphasise the relevance of domestic law for investment disputes, thereby offering a possibility to take non-investment concerns into consideration.<sup>219</sup> If host states want investment tribunals to balance investor rights with the essential character of public services they can draw their attention to the express applicability of any legal provisions that impose public service obligations. National law is already applicable, as discussed previously, to most investor-state

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<sup>219</sup> C. Schreuer, U. Kriebaum, From Individual to Community Interest in International Investment Law, in U. Fastenrath, R. Geiger, D. Khan, A. Paulus, S. Von Schorlemer, C. Vedder (eds.), “From Bilateralism to Community Interest: Essays in Honour of Bruno Simma”, Oxford: Oxford University Press, 2011, p. 1095.

disputes. The problem is that most tribunals have been focusing primarily on international law, namely the investment agreement. This requires host states to make an effort to include clauses that underline the applicability of national laws, clearly highlighting that the provisions of the treaty do not in any way exclude the application of national legislation governing water services. This would function as a reminder for arbitral tribunals that investment in water services is subject to a vast legal framework, including general laws, consumer protection rules, and administrative provisions.

### 6.2.3 Exception Clauses

Another technique that host states can use is to include an exception clause in the international investment agreement. This type of clause is used to exclude particular sectors or subject matters from investment agreement obligations or to permit measures necessary to meet specific objectives, including protecting essential security interests, public order, human health and the environment.<sup>220</sup> The purpose of these clauses is to make it clear in the investment treaty that states should be exempted from liability when they adopt measures to protect public welfare. Rather than directing a tribunal to balance the competing objectives of investor protection against non-investment concerns in determining whether the treaty has been breached, exception clauses direct the tribunal to balance specified objectives in determining whether a given breach is excused.<sup>221</sup> The tribunal must assess the state's motives and whether there is a public welfare component to the practice as well as the effect of the state practice.<sup>222</sup> A growing number of investment treaties includes exception clauses to ensure that investors' rights are balanced against the regulatory concerns of host states, such as the protection of human health or of the environment.<sup>223</sup> Some expressly state that non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute expropriation. This language makes it significantly more difficult for investors to convince the tribunal that a regulatory measure is a breach of the

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<sup>220</sup> See Choudhury, *Exception Provisions*, pp. 670-716.

<sup>221</sup> S. Spears, *Making Way for the Public Interest in International Investment Agreements*, in C. Brown, K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge: Cambridge University Press, 2011, p. 287.

<sup>222</sup> Karamanian, *The Place of Human Rights*, p. 442.

<sup>223</sup> Prislán, *Non-Investment Obligations*, pp. 476-477.



investment treaty.<sup>224</sup> Similar clauses could make an explicit reference to measures adopted by the host state in order to protect public interests associated with water provision, clarifying that such measures do not constitute a breach of the investment treaty. Exception clauses render the treaties more flexible and at the same time restrain the interpretational leeway of tribunals. Still, they leave room for judicial scrutiny as they are subject to the usual interpretational rules of the Vienna Convention on the Law of Treaties.<sup>225</sup>

The combined effect of these measures is likely to instil greater consideration for non-investment concerns – namely, greater enforcement of public service obligations – in the resolution of investor-state disputes. While new ways of drafting investment agreements can inspire investment tribunals to take into account non-investment legal provisions, it is still too early to assess the true impact of recent investment treaties on investment law and practice. Furthermore, it is a tremendously slow and demanding effort to revise and amend the plethora of investment agreements currently in force. The large majority of current investment agreements will remain in force for several years. As a result, problems of articulation between the essential nature of water services and investment protection are likely to continue for some time.

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<sup>224</sup> K. Cross, *Converging Trends in Investment Treaty Practice*, in *North Carolina Journal of International Law and Commercial Regulation*, 2012, 38, p. 191.

<sup>225</sup> A. Van Aaken, *International Investment Law between Commitment and Flexibility: a Contract Theory Analysis*, in *Journal of International Economic Law*, 2009, 12(2), p. 526.

## CHAPTER IV – CONCLUSIONS

The marketisation of water management deeply transformed the role of the state in the provision of these services. When states delegate the management of water services on a foreign company, the foreign investor is frequently protected by investment treaties and entitled to submit any disputes to an international arbitral tribunal. Through the looking glass of arbitration awards one can realise the substantial consequences that the international investment regime has been producing on water markets. Different issues have been surfacing in recent decisions. Problems of procedural nature include the lack of transparency and public participation of arbitral proceedings. From a substantive perspective, arbitral panels have been focusing on the logic of international investment law without taking into account non-investment rules arguably applicable to disputes, specifically a purported human right to water. The qualification of water services as public services, and the specific obligations that follow flow that status, have also been overlooked. The complexity of water disputes calls for a re-assessment of the interaction between investment law, national law, and investment contracts.

Despite recent reforming efforts, the current system is still far from properly balancing investment protection with the public function of water services. Due consideration of the public interests associated with these disputes requires concerted action in two different domains: changing the investment arbitration mechanism, by promoting the transparency of proceedings and the participation of non-parties; and changing the regulatory framework that underpins investments in water services. First, investor-state arbitrations regarding water concession contracts call for a greater measure of transparency. While confidential business information must be protected, when a crucial public good like water is involved there should be information to the public about the terms of the privatisation and its impact on the society. Instilling greater transparency into the process would provide for a measure of accountability for the arbitrators, giving them greater incentive to consider the public's interest. Second, the principle of public participation should be better balanced against other rationales of the investor-state dispute settlement mechanism. The ICSID Arbitration Rules should allow for broader participation rights that go beyond the mere possibility to make written submissions. Proper disclosure of information and the grant of access to oral hearings are vital to increase civil society's participation in water disputes.

While international investment agreements are a primary source of rights and obligations of the parties, they cannot be separated from the concession contract and domestic law. Host states should reshape both investment contracts and investment treaties, making it clear that investments in water services are not only governed by international investment law but also by the concession contract and the domestic legislation, which impose public service obligations. Both legal instruments should reflect a careful allocation of responsibilities between states and private operators. Such amendments are likely to contribute to strike a proper balance between public and private interests in the water industry.

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