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Private entities shaping community interests: (re)imagining the 'publicness' of public international law as an epistemic tool

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ABSTRACT

While the very existence of community interests has arguably motivated states to engage in multilateral treaty-making, create international organisations and criminalise conduct internationally, among other things, the foundational 'publicness' of public international law appears largely under-explored among public international lawyers. A turn to publicness is rendered all the more necessary by the blurring divide between public/private, in the face of globalisation processes that have been affecting the way in which public interests, goods and functions traditionally thought to be within the exclusive remit of state sovereignty are defined, negotiated and acted upon by private entities. Looking at 'publicness' as an epistemic tool, this contribution critically revisits how private actors engaging with areas of common interest have actually shaped the contours of 'public' in a public international law context. It suggests to (re)imagine the 'publicness' in order to be able to guide practices instead of being forged by them.

KEYWORDS Publicness; community interests; public interest; public/private divide; public–private partnerships

1. Introduction

The presence of private entities is no novelty in global affairs. In areas regulated by public international law, such as international health, international justice and international human rights, private actors and public entities (states and international organisations) routinely cooperate to achieve common purposes. For instance, in the field of defence and security, states have resorted to private contractors eg, to gain intelligence information

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and to conduct military operations[1] as well as for securing border control, including operating administrative detention and security services.[2] Private actors have also widely contributed to the budgets of international institutions and projects: Open Society Foundations, alongside other philanthropic organisations, donate to the Extraordinary Chambers in the Courts of Cambodia (ECCC) on a regular basis.[3] A number of private foundations such as the Ford Foundation and the Rockefeller Foundation financially supported legacy initiatives of international judicial institutions such as the Special Court for Sierra Leone,[4] seemingly contributing to rule-of-law projects in Sierra Leone. NGOs have been performing activities in the name of public interest, such as gathering and storing evidence in lieu of international institutions[5] or intervening in investor-state disputes based on the existence of a 'public interest' involved in the dispute.

For the purposes of this contribution, the expression 'private entities' is used synonymously with 'non-state actors' and 'private actors'. Drawing from international relations scholars Daphné Josselin and William Wallace, non-state actors are here defined as:

- Largely or entirely autonomous from central government funding and control: emanating from civil society, or from the market economy, or from political impulses beyond state control and direction;
- Operating as or participating in networks which extend across the boundaries of two or more states – thus engaging in 'transnational' relations, linking political systems, economies, societies;
- Acting in ways which affect political outcomes, either within one or more states or within international institutions – either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities.[6]

[1] Simon Chesterman, '"We Can't Spy … If We Can't Buy!": The Privatization of Intelligence and the Limits of Outsourcing "Inherently Governmental Functions"' (2008) 19 *European Journal of International Law* 1055. Chesterman reports that in 2007 US expenditures outsourcing intelligence services to private contractors equalled the 70% of the total US intelligence budget. *Ibid*, 1056.

[2] See Daria Davitti, 'The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs' (2019) 4 *Business and Human Rights Journal* 33; Daria Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control' (2020) 21 *German Law Journal* 487.

[3] Julia Emtseva, 'Philanthrocapitalism, Transitional Justice and the Need for Accountability', blogpost of 12 October 2020 <www.justiceinfo.net/en/45639-philanthrocapitalism-transitional-justice-need-accountability.html> accessed 20 February 2023.

[4] *Ibid*.

[5] On the point, see eg, Michelle Burgis-Kasthala, 'Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice' (2019) 30 *European Journal of International Law* 1165, addressing the question of *public* accountability gaps filled in by new *private or privatized* organizations or approaches (emphasis added). See in particular 1167.

[6] See Daphné Josselin and William Wallace, 'Non-State Actors in World Politics: A Framework' in Daphné Josselin and William Wallace (eds), *Non-State Actors in World Politics* (Palgrave, 2001) 3–4. On the point, see also Philip Alston, 'Not-a-Cat Syndrome: Can International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP, 2005).

Reasons of economic efficiency, know-how and technical expertise have been typically used by states and international organisations to turn to private entities and to promote public–private partnerships,[7] arguably with a view to optimising the delivery of public services and goods. Public goods are by definition non-rival and non-exclusionary, and can be claimed by anyone regardless of nationality.[8] One issue, though, arises out of these narratives of efficiency, technical expertise and cooperation towards common purposes: while private entities typically approach a public good, service or function from a profit-based perspective, community interests warrant protection regardless of whether they are more or less profitable or whether their delivery is more or less efficient. Put differently, as community interests are, by definition, interests that the whole international community aims to protect and that motivate states to cooperate in the first place, they should not be left to the discretion of private entities and to economic/efficiency-led calculations. This tension between economic/efficiency and normative/political rationales does not reflect a purely technocratic problem about delegating or outsourcing public functions to private entities, but engages questions about 'a broader transformation of the mode of governing'[9] and the 'inversion of the hierarchy of public and private',[10] with the subordination of the former to the latter.[11] What is at stake is the very rationale that justifies the existence of the modern state in the first place,[12] and the international community by implication.

Studies in political science have paved the way to reconsider the implications of a growing involvement of private actors in the public sphere from an ethical point of view. In particular, studies have stressed the creation of stronger property rights associated with it,[13] as well as the risk of commodifying functions that lie at the core of state sovereignty. As underscored by Claire Cutler, who pioneered scholarly inquiries on the public/private divide,[14] the 'rise of private transnational authority in structuring the

[7] For an appraisal of the global scale of public-private partnerships (PPPs), see the World Bank database 'PPP Knowledge Lab' at <https://pppknowledgelab.org/data>; and more generally <https://ppp.worldbank.org/public-private-partnership/overview/international-ppp-units> accessed 14 September 2022.

[8] See Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23 *European Journal of International Law* 651, 654.

[9] Chiara Cordelli, *The Privatized State* (Princeton University Press, 2020) 6.

[10] Alain Supiot, 'The Public-Private Relation in the Context of Today's Refeudalization' (2013) 11 *International Journal of Constitutional Law* 129, in particular 130–8.

[11] *Ibid*.

[12] Cordelli (n 9) 11.

[13] Leigh Raymond, *Private Rights in Public Resources – Equity and Property Allocation in Market-Based Environmental Policy* (Routledge, 2003). See also Celine Tan, 'Private Investments, Public Goods: Regulating Markets for Sustainable Development' (2022) 23 *European Business Organization Law Review* 241.

[14] Already in the late '90s Claire Cutler noted the 'troubling and paradoxical exercise of public authority by private actors'. See A Claire Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4 *Review of International Political Economy* 261.

world affairs'[15] results from changes in political authority and altered relations between public and private. While Cutler considers it necessary to define 'the transnational',[16] this contribution takes a different turn and instead considers the concept of 'public' from a public international law standpoint. The assumption is that a lens of *public* international law can hold together a hierarchical view between public and private, on the one hand, and normative expectations about the state conduct vis-à-vis individuals, on the other, in a way that other explanatory or descriptive frameworks – eg, global governance[17] or transnational law[18] – cannot do.

Even if the presence of private entities involved in international public business can be traced back to at least a century ago, international legal scholarship has somehow fallen short of adequately problematising such presence and the implications thereof from a public international law perspective.[19] Most scholarly accounts have rather focused on the identification of community interests in the context of the debate between bilateralism and multilateralism,[20] or on the concept of international community in relation to the doctrine of subjects in international law,[21] providing little attention to the more fundamental concept of 'public' from an international law perspective. Such under-conceptualisation – this contribution claims – may explain why

[15] A Claire Cutler, 'Locating Private Transnational Authority in the Global Political Economy' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (CUP, 2020) 321–47, 324.

[16] *Ibid*, 325.

[17] Zürn defines global governance as 'the exercise of authority across national border as well as consented norms and rules beyond the nation state, both of them justified with reference to common goods or transnational problems'. See Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP, 2018) 3–4.

[18] Peer Zumbansen, 'Transnational Law: Theories and Applications' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (OUP, 2021) 3–30. In considering the value of transnational law as a 'critical methodological framework', Zumbansen admits that ' … the term transnational law has been and continues to be used to *describe* a wide range of issues in connection with the search for solutions in hybrid legal constellations'. *Ibid*, 4 (emphasis added). See also *Ibid*, 10–11.

[19] The literature on the public/private divide among international lawyers has flourished in particular in the last decade. See, eg, Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115; Matthias Goldmann, 'A Matter of Perspective: Global Governance and the Distinction Between Public and Private Authority (and not Law)' (2016) 5 *Global Constitutionalism* 48; Melissa J Durkee, 'International Lobbying Law' (2018) 127 *Yale Law Journal* 1742; Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' (2020) 11 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 118; Anne Peters, 'Towards Transparency as a Global Norm' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP, 2013) 534–607; Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?' (2021) 115 *American Journal of International Law* 452, along with the debate ensuing from Mégret's contribution. See Melissa J Durkee, 'Introduction to the Symposium on Frédéric Mégret, "Are There 'Inherently Sovereign Functions' in International Law?"'(2021) 115 *American Journal of International Law Unbound* 299.

[20] See eg, Samantha Besson, 'Community Interests in the Identification of International Law: With a Special Emphasis on Treaty Interpretation and Customary Law Identification' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP, 2018).

[21] See eg, Andrea Bianchi, 'The Fight for Inclusion: Non-State Actors and International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011).

the practices of private entities in the context of globalisation have gone almost unrestrained, de facto bearing on ideas of 'public' instead of being governed by them. It goes without saying that this does not mean that such under-conceptualisation of 'public' has been the only or exclusive reason for the increasing reach of private entities in the (international) public sphere, but it is reasonable to assume that a foundational understanding of public could have contributed to exposing problematic issues earlier on.

A different vocabulary has been explored more recently by the strand of literature concerned with the 'publicness' of public international law. Within this strand, scholars are reshaping older – and often value-centred – debates around the capability of public international law to speak *in the name of* the public and *for* the public,[22] or around the concept of state and inherently sovereign functions that can be deduced or extrapolated from existing public international law sources.[23] The spectrum of positions spans from conceptions of public as a peculiar attribute of states and state authority,[24] to conceptions approaching the public beyond the state, as something that ought to be construed in relation to public institutions.[25] Far from opening up to delegating public authority to private entities, these positions seek to limit the exercise thereof to formally public entities, instead of being agnostic to hybridisation processes.[26]

The vocabulary of 'publicness' captures an important dimension in the blurring divide between public and private, and the role of non-state actors in the traditionally state-centred international law affairs.[27] Publicness

[22] See eg, Benedict Kingsbury, 'International Law as Inter-Public Law' (2009) 49 *Nomos* 167; Megan Donaldson and Benedict Kingsbury, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011); Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375; Bogdandy, Goldmann and Venzke (n 19), in particular 117, defining the exercise of international public authority as 'the adoption of an act that affects the freedom of others in pursuance of a *common interest*' (emphasis added); Sarah Thin, 'Community Interest and the International Public Legal Order' (2021) 68 *Netherlands International Law Review* 35.

[23] See eg, Mégret (n 19). See also, Nehal Bhuta, 'The State Theory of Grotius' (2020) 73 *Current Legal Problems* 127; Armin von Bogdandy, 'The Publicness of Public International Law Seeing Through Schmitt's *Concept of the Political* – A Contribution to Building Public Law Theory' (4 November 2016), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-22, Published as: Das Öffentliche im Völkerrecht im Lichte von Schmitts 'Begriff des Politischen'. Zugleich ein Beitrag zur Theoriebildung im Öffentlichen Recht. In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), 77 (2017) 4, S. 877–906 <https://ssrn.com/abstract=2864287>; Thin (n 22), in particular footnote 93, mentioning treaties that 'regulate states own domestic sphere or in international areas, rather than being limited to the classical relations between states'.

[24] See eg, Mégret (n 19).

[25] See eg, Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound* 307.

[26] See eg, Zürn (n 17) 4: 'Global governance is what claims to be global governance. In this sense, it refers to public authority, independent of the question whether it is carried out by state or non-state actors.'

[27] Ramses Wessel considers that the increasing visibility of non-state actors in international law may suggest that the structure of international law is changing and that 'the development of the "publicness" of international law [results from] an emerging system of global institutional governance'. See Ramses A Wessel, 'Revealing the Publicness of International Law' in Cedric Ryngaert, Erik J Molenaar,

is capable, for instance, of addressing questions of legitimacy and multi-party stakeholders and shareholders involved in the practice of public–private partnerships at the international level,[28] as well as the accountability of public entities for delegating functions typically deemed to be within the exclusive remit of state sovereignty, like detention and security. Publicness can therefore attach both to the formal category of an actor as public, as well as to the material domain encompassing public/community interests. As such, publicness also offers a new framework to revisit the engagement of private entities, including NGOs, with areas of public interest supposedly disregarded by states or by international organisations because of efficiency or expertise considerations.

The definition of 'public'/'publicness' put forward here refers to the authority to stand in the name of and for the community, including by defining community interests,[29] rather than self-or particular interests, in a way that secures legitimacy and accountability towards the members of the community.[30] Authority is a particular form of power stemming from the consent of the governed to be bound by rules.[31] This formal, or 'solid', understanding of authority is in contrast with informal, 'liquid', conceptions of authority that have been developed in the transnational or global context.[32] While liquid conceptions of authority help make sense of complex regulatory realities where global governance actors proliferate and authority is dispersed beyond public authorities, the power of liquidity rests with its descriptive and explanatory force rather than with its normative one. As such, embracing a 'solid' approach to authority does not necessarily mean that processes not involving formal delegation of authority or imposition of rules are ipso

and Sarah Nouwen (eds), *What's Wrong with International Law? – Liber Amicorum A.H.A. Soons* (Brill, 2015) 450–1.

[28] Public-private partnership as a regulatory tool has gained only limited attention among international law scholars, notably in the area of international investment law and international health law. See eg, Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003); Gregory Shaffer, 'What's New in EU Trade Dispute Settlement? Judicialization, Public–Private Networks and the WTO Legal Order' (2016) 13 *Journal of European Public Policy* 832; Gian Luca Burci, 'Public/Private Partnerships in the Public Health Sector' (2009) 6 *International Organizations Law Review* 359; Lisa Clarke, 'Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships' (2011) 12 *Chicago Journal of International Law* 55; Lisa Clarke, *Public-Private Partnerships and Responsibility under International Law – a Global Health Perspective* (Routledge, 2014).

[29] Notably, the definition of international community – whether of states or of individuals – appears intimately connected with the definition of 'public'. On this point, see section 3.a.

[30] As argued by Cohen, principles of democratic legitimacy are 'the ultimate basis of the legitimacy of law today. The normative argument links public power to accountability, representativeness, and, aspirationally, to projects for regulating power so as to foster the common good, both domestic and international'. See Jean L Cohen, 'The Democratic Construction of Inherently Sovereign Functions' (2021) 115 *American Journal of International Law Unbound* 312, 312.

[31] Jessica F Green, *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance* (Princeton University Press, 2014) 27.

[32] See eg, Nico Krisch, 'Authority, Solid and Liquid, in Postnational Governance' in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Elgar, 2016) 25–48.

facto discarded from one's analysis. One could instead consider them relevant to describe private actors in a progression from mere influence to formal authority, or from the expression of aspirations and ideals for a community to the imposition of rules on the same community. In this regard, the concept of liquid authority is methodologically valuable as it enables one to trace different forms of authority beyond coercion and command, to encompass practices evidencing ability to induce deference as well ability to exert control over agendas. A different question, though, is what type of authority, solid vs liquid, formal vs informal, is desirable from a public international viewpoint in the blurred setting in which governance activities unfold.

In line with a solid conception of authority, legitimacy concerns the right of an agent to make and impose certain decisions on others and to have the 'standing to make those decisions in a way that results in the normative situation (the rights and duties) of others subjected to them'.[33] Even if one considers that the right to make such decisions might be delegated to a private entity, such delegation shall be publicly and validly authorised by the people in whose name the right is exercised.[34] Legitimacy and accountability are closely related since power-wielders may be held to account if they fail to act in an authorised or legitimate manner.[35] Thus, a correlative relationship between power to govern and right to hold to account is presumed.[36] Although it could be claimed that states are not the only (public) actors capable to express and protect a polity public interest or common good (eg, international organisations would certainly have a role to play),[37] states still appear best vested in this role for they can ensure institutional mechanisms of accountability and legitimacy vis-à-vis the governed – ultimately individuals – that other actors cannot ensure. Conversely, private entities, including NGOs, would not (yet) present individuals with comparably viable mechanisms of accountability or of legitimacy. This is not to say that states could not or would not misuse their public authority to affect individuals' rights and obligations in the name of public interest. Human rights litigation would certainly offer evidence to the contrary.[38] However, institutional mechanisms enabling individuals' control, and complaints against, states conduct, including under public international law, are not comparable to those available in relation to private actors.

[33] Cordelli (n 9) 6.
[34] In political philosophy these conditions are respectively called 'authorization condition' and 'representation condition'. See *Ibid*, 8–9.
[35] On the point, see Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29, 30.
[36] *Ibid*, 29.
[37] Besson, 'The International Public' (n 25) 310.
[38] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *The Modern Law Review* 671.

This contribution discusses two intertwined questions. The first is descriptive and aims to critically explore how private entities have, alone or in cooperation with public entities, contributed to the defining or shaping of ideas of 'public' in public international law. The second is normative and considers to what extent a dogmatic understanding of 'publicness' among public international lawyers can provide limits and direction to practices that bear on public/community interests. 'Dogmatic' is here used in an epistemic sense, to mean accepted as correct or shared within a certain community and, as such, capable of guiding practices, although not to bind them legally. Throughout the paper, 'define' is deliberately used in a broad sense, as to encompass practices that articulate the 'public', argue from public interest and expressly design or elaborate on the concept of public or community interests, as well as practices that aim at determining the meaning of public interests or at expressing priorities/setting agendas for the international community (eg, through allocating financial resources to certain arguably public interest projects over others, for instance in the context of international organisations).[39] It thus builds on the scholarship aiming at a 'foundational'[40] or 'regulative'[41] idea of public/publicness in public international law, but departs from it in that it argues that regulative ideas should not necessarily be normative (in the sense of *legal* normativity) but can be epistemic, in the sense of ensuing from a shared understanding of what lies at the heart of the *public* character of public international law. Public international law scholars should be at the forefront of this process as they bear epistemic authority in shaping systems of meaning within the community practicing international law.[42]

Rather than offering complete answers, this contribution aims to foster a debate about the character of public international law as *public* and how this virtually sets limits to the role of private entities in relation to the (international) public. In the face of the already widespread usage of categories of 'public' and 'private' in public international law affairs, problematising

[39] Lukes famously described power as taking three forms: material, agenda setting, and ideational. See Steven Lukes, *Power: A Radical View* (Palgrave Macmillan, 2nd edn 2005) 16 ff. For a succinct overview, see Janne Mende, 'Business Authority in Global Governance: Companies Beyond Public and Private Roles' (2022) *Journal of International Political Theory* 1 <https://doi.org/10.1177/17550882221116924>.

[40] Besson, 'The International Public' (n 25) 311, calling for 'foundational' or 'dogmatic' concept of publicness.

[41] See Goldmann (n 19) 50.

[42] This epistemic authority is implicitly referred in Article 38(1)(d) of the Statute of the International Court of Justice, under the expression ' … the teachings of the most highly *qualified* publicists of the various nations, as subsidiary means for the determination of rules of law'. See, by analogy, studies on judicial decisions, eg, Letizia Lo Giacco, *Judicial Decisions in International Law Argumentation – Between Entrapment and Creativity* (Hart, 2022) 181 ff. It is indeed commonplace for scholars to rely on courts' decisions for constructing legal concepts, including that of state. On the point, see eg, Samantha Besson, 'International Courts and the Jurisprudence of Statehood' (2019) 10 *Transnational Legal Theory* 30.

– let alone restraining – the reach of private entities in the international (public) requires unravelling the foundational concept of 'public' from a public international law perspective. Far from being an exclusively nominal issue, the question of what 'public' means, or should mean, in a public international law context has influenced and continues to reproduce on the relation between the public and the private dimension in unexpected and potentially undesirable ways, including how we think about the state, and its capabilities and responsibilities within a given society.

2. Publicness as an epistemic tool: some methodological remarks

Public international law is here approached as an argumentative practice, which relies on knowledge and learning[43] and 'articulates itself around a set of foundational doctrines'.[44] Such doctrines are beliefs that are typically shared among international lawyers and are pervasive in the practice of the discipline: they lie at the foundation of the knowledge that is required in order to do and think about public international law. As such, shared beliefs, and more generally the knowledge about the world we live in and that we experience as reality,[45] condition the understanding of norms and are capable of orienting practices towards certain outcomes, including legal ones. For instance, the doctrine of inherent powers or that of the persistent objector have a doctrinal footprint, rather than stemming from positive legal sources. The acceptance of these doctrines as correct among international lawyers makes it possible for these doctrines to bear on decision-making processes. As such, doctrines carry an epistemic value as they ensue from shared understandings among international lawyers to the extent that deviating from them would be regarded as mistaken. As provocatively argued by Jan Klabbers, 'international law today is no longer about what states do, but has come to be about what international lawyers do'.[46]

In the field of public international law, international lawyers constitute an epistemic community capable of forging systems of meaning and orienting action towards preferred solutions. Following Peter Haas, epistemic communities are defined as 'a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to

[43] Neil MacCormick, *Rhetoric and the Rule of Law – a Theory of Legal Reasoning* (OUP, 2005) 14. Letizia Lo Giacco, '"Intervention by Invitation" and the Construction of the Authority of the Effective Control Test in Legal Argumentation' (2019) 79 *Heidelberg Journal of International Law* 663, 667; Lo Giacco (n 42) 173–6.

[44] Jean d'Aspremont, *Epistemic Forces in International Law – Foundational Doctrines and Techniques of International Legal Argumentation* (Elgar, 2015) 1.

[45] Friedrich Kratochwil, *Rules, Norms and Decisions* (CUP, 1989) 21.

[46] Jan Klabbers, 'On Epistemic Universalism and the Melancholy of International Law' (2018) 29 *European Journal of International Law* 1057.

policy relevant knowledge within that domain or issue-area'.[47] Within an epistemic community, shared beliefs may be normative and principled in that they provide 'value-based rationale for the social action of community members',[48] as well as causal in the sense of being derived from the analysis of problems and useful to elucidating the multiple linkages between policy action and desired outcomes'.[49]

The call to (re)imagine publicness as an epistemic tool that this paper makes shall thus be understood in light of the foregoing, as an foundational shared belief within an epistemic community potentially affecting analyses about the relation between the (international) public and private actors and orienting action towards preferred solutions.

The following sections consider diverse, distant, and more recent practices of encounter between public and private through the lens of legitimacy and accountability. The aim of this scrutiny is twofold. On the one hand, it seeks to trace a historical trajectory between diverse private actors that have engaged with public interests across different areas of public international law. On the other hand, it demonstrates that the activity of private entities did not occur in isolation but *often unfolded in interrelation with the state or public authority*. This approach builds on perspectives viewing the private as acting within the states, at times even through the state,[50] and is in line with the definition of non-state actors offered at the outset of this contribution.

The analysis thus starts off by assuming a neat divide between public, that is, the character of legitimately standing in the name of the society and for the society and being accountable before it, and private, defined *a contrario* as not legitimately standing in the name of the society and for the society and being accountable before it. It then assesses how in practice the two dimensions blend, coalesce, and fade into each other: 'the public goes private and the private goes public'.[51] Finally, it contrasts such practices with scholarly accounts that bear on the concept of 'public', to map out concepts of 'public' in relation to and beyond the state.

3. The role of private actors in public international law

Private actors are not a monolithic category. They encompass a wide range of entities including, but not limited to, civil society actors, transnational

[47] Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1, 3.
[48] *Ibid*.
[49] *Ibid*.
[50] See eg, Cutler, 'Artifice, Ideology and Paradox' (n 14) 262. However, unlike Cutler, this paper is premised on the opposition between public and private.
[51] Magdalena Bexell and Ulrika Mörth, 'Conclusions and Directions' in Magdalena Bexell and Ulrika Mörth (eds), *Democracy and Public-Private Partnerships in Global Governance* (Palgrave Macmillan, 2010) 218, cited in Christer Jönsson, 'The John Holmes Memorial Lecture: International Organizations at the Moving Public-Private Borderline' (2013) 19 *Global Governance* 1, 2.

corporations and single individuals seeking to influence global political agendas. Even though some of these private actors have been usually regarded with trust or with 'strong legitimacy optimism'[52] (eg, NGOs as 'human rights defenders'), from a formal point of view, they all fall within the category of non-state actors and, as such, may not prima facie legitimately stand in the name of and for the community and be accountable before it.

A useful typology accounting for the heterogeneity of private actors draws from management studies and distinguishes between so-called philanthropic organisations, social enterprises and capitalistic firms,[53] based on the motives or rationales that justify their action. While philanthropic organisations pursue 'pure' non-profit goals and capitalistic firms have a for-profit character, social enterprises are instead hybrid entities for they simultaneously pursue social and financial objectives. Importantly, what is key for social enterprises is that 'they fill institutional voids that are unattended by governments and the market'.[54] These institutional voids are usually presented as being generated by a failure of the market – eg, because it is not profitable to invest in a specific public sector – or by a government lacking the means to intervene – eg, because it does not have the necessary technical skills.[55] As such, narratives of efficiency and technical expertise recur to create the conditions for the engagement of private entities with the public business, not only in theory, but also in practice.

Moving from here, this section considers the practices of three categories of private entities engaging with the (international) public sphere, namely, philanthropists financing international organisations, NGOs intervening in international adjudication, and private companies involved in partnerships to deliver public goods. These practices provide not only a snapshot of the variety of forms in which the influence of private entities materialise, but also of the evolution of the cooperative stance between public and private in areas of international public interest from informal to formalised ways of engagement between public and private. This evolution is arguably reflective of a process of consolidation of the influence of private entities on the

[52] Melissa J Durkee, 'International Lobbying Law' (2018) 127 *Yale Journal of International Law* 1742, 1759–60.

[53] Julie Battilana and Silvia Dorado, 'Building Sustainable Hybrid Organizations: The Case of Commercial Microfinance Organizations' (2010) 53 *The Academy of Management Journal* 1419.

[54] Shaker A Zahra, Eric Gedajlovic, Donald O Neubaum and Joe M Shulman, 'A Typology of Social Entrepreneurs: Motives, Search Processes and Ethical Challenges' (2009) 24 *Journal of Business Venturing* 519.

[55] According to Mersland et al., 'social enterprises will target countries that are less developed, institutionally weak, and risky, but not countries where these macroeconomic indicators are at the worst level' as the former type offers 'a desirable balance in the trade-off between social and economic opportunities'. See Roy Mersland, Samuel Anoykye Nyarko, and Amilia Buddhika Sirisena, 'A Hybrid Approach to International Market Selection: The Case of Impact Investing Organizations' (2020) 29 *International Business Review* 101624, 2. For a practical case study, see Daria Davitti, *Investment and Human Rights in Armed Conflict – Charting an Elusive Intersection* (Hart, 2019).

(international) public sphere towards forms of authority over the (international) public sphere.[56]

a. From Andrew Carnegie to Bill Gates: 'the business of doing good'[57]

The history of international law is constellated by the gestures of benevolent private actors such as businessman Henry Dunant on the battlefield of Solferino in 1859 and industrialist Andrew Carnegie as the promoter of the construction of the 'Peace Temple' in 1913. In more recent times, figures like Bill Gates and John D Rockefeller have occupied a prominent role in financing international projects in the field of health and global development.

Indeed, donations of private actors have increasingly become a key input for the budget of international organisations, to the point that earmarked resources (conditioned contributions) not only constitute a growing substantial fragment of the overall contributions to *all* multilateral organisations (in 2012, 70% of the contributions to UN agencies),[58] but also associate with the risk of undermining collective decision-making and traditional conceptions of multilateral governance.[59]

The World Health Organisation (WHO) presents itself as an international organisation, among others, that, in addition to Members States' assessed contributions, is financed by voluntary contributions by Members States as well as other partners.[60] The WHO reports that 88% of all voluntary contributions in 2020–2021 were specified, that is, 'tightly earmarked to specific programmatic areas and/or geographical locations and must be spent within a specified timeframe'[61] compared to 4.1% that were fully unconditional ('core voluntary contributions').[62] While the latter grant the Organisation full flexibility to allocate these funds as deemed most appropriate, specified voluntary contributions are conditioned on the preferences specified by the donor. The WHO also reports that 9.69% of its 2020–2021

[56] Scholars highlight that an excessive focus over delegation of authority, in line with solid conceptions of authority, may obscure liquid forms of authority, which are rather based on practices of recognition and deference. See Nico Krisch, 'Liquid authority in global governance' (2017) 9 *International Theory* 237, 249.

[57] The expression is borrowed by Mersland *et al*. See Mersland, Nyarko, and Sirisena (n 55) 1.

[58] Erin Graham, 'Follow the Money: How Trends in Financing Are Changing Governance at International Organizations' (2017) 8 *Global policy* 15; Erin Graham, 'The Institutional Design of Funding Rules at International Organizations: Explaining the Transformation in Financing the United Nations' (2017) 23 *European Journal of International Relations* 365.

[59] Graham, 'Follow the Money' (n 58) 16.

[60] See *Regulation V* of the Financial Regulations of the WHO.

[61] <www.who.int/about/funding/#:~:text=WHO%20gets%20its%20funding%20from%20two%20main%20sources%3A,is%20agreed%20by%20the%20United%20Nations%20General%20Assembly%29> accessed 7 March 2023.

[62] *Ibid*.

budget was financed by 'Philanthropic Foundations',[63] the majority of which drew from the Bill and Melinda Gates Foundation (87.54%)[64] in the exclusive form of 'specified voluntary contributions'.[65] In its 2019 Report, the Gates Foundation indicates that more than half of its total budget (5'092'000 USD) was invested in the areas of global development (1'712B USD) and global health (1'475B USD).[66] A similar ratio is confirmed in its 2020 Report with 1'793B out of 5'822B total grantee support donated to global health.[67] This appears consonant with the declared mission of the Foundation as 'a nonprofit fighting poverty, disease, and inequity around the world'.[68] However, the capability of private actors to reach where states cannot, in responding to global challenges, carries profound implications. As business historians have underscored,

> entrepreneurial philanthropists [defined as 'entrepreneurs who become major philanthropists'][69] do not see themselves as simply disposing of surplus funds, but rather as actively investing their resources (money, know-how, time, social connections, reputation and prestige) in projects that promise high social rates of return.[70]

Sociologists have associated philanthropists with powerful social actors engaged in the business of *world-making*,[71] conceived as 'the embedded ways in which agents relate to and shape systems of meaning and mobilise collective action to change social arrangements'.[72]

The link between capital and the business of world-making is particularly visible in the legacy left behind by Andrew Carnegie, the American steel industrialist who donated 1.5 million USD for the construction of the Peace Palace in the Hague and the founding of the Carnegie Foundation in 1903.[73] As reported by the webpage of the Peace Palace, after the sale of his company for 480 million USD,

[63] <http://open.who.int/2020-21/budget-and-financing/flow> accessed 14 September 2022.
[64] *Ibid*.
[65] <https://open.who.int/2020-21/contributors/overview/vcs> accessed 7 March 2023.
[66] <www.gatesfoundation.org/about/financials/annual-reports/annual-report-2019> accessed 14 September 2022.
[67] <https://docs.gatesfoundation.org/documents/2020_Annual_Report.pdf> accessed 14 September 2022.
[68] <www.gatesfoundation.org/> accessed 14 September 2022.
[69] Charles Harvey and others, 'Andrew Carnegie and the Foundations of Contemporary Entrepreneurial Philanthropy' (2011) 53 *Business History* 425, 425.
[70] *Ibid*, 425.
[71] Pierre Bourdieu, *Choses dites* (Editions de Minuit, 1987).
[72] Harvey and others (n 69) 426.
[73] Andrew Carnegie, *The Autobiography of Andrew Carnegie* (The Floating Press, 2009) 382: 'From that day the abolition of war grew in importance with me until it finally overshadowed all other issues. The surprising action of the first Hague Conference gave me intense joy. Called primarily to consider disarmament (which proved a dream), it created the commanding reality of a permanent tribunal to settle international disputes. I saw in this the greatest step towards peace that humanity had ever taken, and taken as if by inspiration, without much previous discussion.'

> Carnegie wished to spend the remainder of his life working towards his vision, by responsibly spending his capital. He felt he had an obligation to the society that had offered him so many chances. He saw many opportunities to advance society. According to the philanthropist, science, education and peace were the most important conditions for progress.[74]

This statement goes at the very essence of how private entities may channel resources into projects they subjectively consider to be advancing society. Needless to say, virtually everyone would agree that science, education and peace are desirable goals in any given society, potentially constituting public interests. However, the point rather rests with how priorities are set and to what extent private entities may legitimately determine public interests (ie, attributing a public interest value to science, education and peace). The way in which these public interests materialise are ultimately at the discretion of how these private actors aim to impact the world. As acknowledged by the WHO itself, the budget contribution is a critical tool '*to set and approve the priorities of the Organisation, define the targets to be delivered*, and to monitor their achievement … so as to balance the Organisation's work across the different areas for which it is accountable'.[75]

An inquiry into public goods and community interests is intimately connected to the very concept of international community. If anything is to qualify as a common interest or public good, it will arguably depend on how the concept of international community or polity is defined, for instance whether as a community of states, of humankind, or even as an ecological polity encompassing the human as well as the non-human environment. Although the concept of international community is recurring in contemporary international law discourse – not least because of its positivisation in a number of international law instruments – its genesis ought to be understood in a context of political struggle and epistemic contestation. Relevant arguments for the idea of publicness in international law emerge from the establishment of international institutions that would serve the interests of the international community.

In tracing the origin of the international community, Evgeny Roshchin signposts The Hague peace conferences of 1899 and 1907 as the two constitutive moments in which the concept was first 'admitted into the conventional vocabulary of international law and diplomacy' through a process of conceptual innovation.[76] Far from being a utopian ideal in the mouth of state representatives, the concept of international community was intimately

[74] As reported by the Peace Palace website, Carnegie obtained this money from the selling of the Carnegie Steel Company for 480 million USD. The Peace Palace could hence be built with less than 0.4% of his fortune. See <www.vredespaleis.nl/carnegie/andrewcarnegie/?lang=en> accessed 7 March 2023.

[75] <www.who.int/about/accountability/budget> accessed 7 March 2023.

[76] Evgeny Roshchin, 'The Hague Conferences and "International Community": A Politics of Conceptual Innovation' (2016) 43 *Review of International Studies* 177, 178.

rooted in the project of creating international institutions engineered by public officials as much as by private businessmen. If a permanent court of arbitration was to be established, it was necessary to justify it by reference to shared rather than particular needs. Hence, the concept of international community arguably entered the international law vocabulary 'as a result of debates over international institutions, which were to acquire "universal" character' and to serve shared interests and values.[77] The concept of international community notably replaced *ancien régime* expressions such as 'concert' or 'alliance', which were less conductive to the idea of shared interests and public goods as compared to the concept of society/community.[78] As such, in the preamble to the Convention for Pacific Settlement of International Disputes, the participating 'Powers' recognised 'the solidarity uniting the members of the society of civilised nations (*la societé des nations civilisées*)'.[79]

State representatives in The Hague endorsed 'the ideal of a universal peace and a brotherhood of peoples' and the 'welfare of humanity', as well as 'a fraternal approach of the nations and the stability of general peace', under the banner of 'peace through law'. Assertive speeches about the existence of a community of states were persuasive about the degree of common interests among the nations and succeeded in presenting the permanent court of arbitration as an international institution serving the public interest. It is precisely against this background that the contemporary literature on the function of international adjudication as a global public good should to be read.[80]

Nevertheless, as hinted earlier, looking at only state representatives would offer a partial picture of the project of realising 'peace through law'. Since the 1810s, organised pressure groups started taking shape in the civil society, among which the peace movement that had its centre of gravity in Britain and the US.[81] The peace movement was consolidated in the establishment of the London Peace Society in 1816 and of the American Peace Society in

[77] *Ibid*, 179.

[78] *Ibid*, 184. However, Roshchin makes it clear that that such concept was not universal and omnicomprehensive, but rather limited to the community of 'civilized nations'. The association between the existence of an international community and community interests lies at the foundation of various doctrines on international law. See, inter alia, Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217.

[79] 'Preamble' in James Brown Scott (ed), *The Proceedings of The Hague Peace Conference: Translations of the Original Texts* (OUP, 1920) 236. On the point, see Roshchin (n 76) 183. For a historiographical appraisal of The Hague peace conferences, see Maartje Abbenhuis, '"This is an Account of Failure": The Contested Historiography of the Hague Peace Conferences of 1899, 1907 and 1915' (2021) 32 *Diplomacy & Statecraft* 1.

[80] André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 *European Journal of International Law* 769; Joshua Paine, 'International Adjudication as a Global Public Good' (2018) 29 *European Journal of International Law* 1223.

[81] Randall Lesaffer, 'The Temple of Peace. The Hague Peace Conferences, Andrew Carnegie and the Building of the Peace Palace (1898–1913)' (2013) 140 *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, Preadviezen* 1, 13.

1827–1828. By the end of the nineteenth century, there were more than 100 peace societies participating in the annual Universal Peace Conference.[82] While its aspiration was to forge an international public opinion[83] that could influence the action of states and support its political project, the peace movement yet remained 'an elitist affair'.[84] Networks of politicians, peace advocates and industrialists animated the movement in the name of religious values (eg, charity) and free trade. The turn to a 'scientific philanthropism' in the beginning of the twentieth century epitomises the role played by wealthy individuals in promoting internationalism and pragmatic pacificism to tackle societal problems,[85] as well as in shaping the world according to their own preferences. A prominent example is offered by the 1896 Washington Arbitration Conference during which Assembly President George Edmunds advocated for the establishment of permanent institutions for international dispute settlement as follows:

> Now we come here in order that we may deepen the channels and strengthen the mighty course of civilization and religion and humanity, *by doing what we may to promote and aid our government, and so far our influence and example will do, our kindred government, to get a footing of practical arbitration that shall stand as a permanent means of peace between us, and finally between all nations*. I shall hope, gentlemen, that your deliberations will promote, as they must, *the good end we have in view*. But in order to promote it, it is not today nor tomorrow at this meeting, but all the time, that our influence must continue to be exerted. To accomplish great results, through processes that are somewhat difficult, but can be solved I am sure, it is necessary that the forces of public opinion shall be as constant as persistent as the law of gravitation. That makes empires of peace, that makes progress, that makes success. We must try to operate upon that force.[86]

The audience comprised state representatives as well as prominent industrialists, including Carnegie himself, thus evidencing a mutual exchange between states and private actors in shaping the idea of an international community and its interests. As such, private actors have been entrenched in the international public sphere ever since its inception, notwithstanding traditional arguments of legal personality that would cloud their role in public international law while putting the state at its centre.[87] Today, like yesterday, industrialists act via seemingly noble activities like the 'peace through

[82] *Ibid*.
[83] See eg, Martha D Adams, 'The Washington Arbitration Conference' (1896) 58 *The Advocate for Peace (1894-1920)* 110.
[84] Lesaffer (n 81) 13.
[85] Peter Weber, 'The Pacifism of Andrew Carnegie and Edwin Ginn: The Emergence of a Philanthropic Internationalism' (2015) 29 *Global Society* 530, 533–6. Weber inserts his account on 'scientific philanthropism' into a clear American tradition, which offers persuasive explanations of current international philanthropic practices.
[86] Adams (n 83), in particular 111–12 (emphasis added).
[87] See, among others, James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill, 2018); Eyal Benvenisti and Doreen Lustig, 'Revisiting the Memory of Solferino:

law' movement, to influence public opinion and ultimately shape the co-constitutive understanding of the international community and its interests.

b. NGOs as representatives of public interests

International investment law has been the terrain on which the challenge of dealing with the public/private divide, in particular with 'public interests' and private stakeholders, has emerged more prominently as compared to other areas of public international law.[88] A reason for this is rooted in the inter-state nature of the legal obligations implicated, but the essentially commercial nature of the disputes to be settled, typically associated with private actors. For Vaughan Lowe, the convergence of two phenomena makes the essential distinction between public and private worthy of closer consideration by international lawyers:[89] on the one hand, the 'growth in the scale and the pervasiveness of the power of private corporations, and the dependence of individuals and societies upon them'; on the other, the multiplication of international investment treaties whereby States establish – directly or indirectly – private rights for companies.[90] Lowe interrogates the extent to which a consent-based international legal order can secure the public interest.[91] However, the question seems restricted to the capability of international dispute settlement mechanisms to adjudicate public interests in a transparent manner when private corporations are involved, rather than to the implications of the growing engagement of private entities with the public interest, more broadly.[92] In focusing on the latter aspect, this section zooms in on NGOs intervening, through amicus curiae submissions,[93] in investor-state proceedings. It also considers the role of tribunals in validating arguments on the grounds of public interest, and 'public' more generally, that enable such interventions in the first place.

Knowledge Production and the Laws of War' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames* (OUP, 2021).

[88] Andreas Kulick, *Global Public Interest in International Investment Law* (CUP, 2012) 50–56; Josè E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 *Journal of International Dispute Settlement* 534, 540.

[89] Vaughan Lowe, 'Private Disputes and the Public Interest in International Law' in Duncan French, Matthew Saul, Nigel D White, *International Law and Dispute Settlement – New Problems and Techniques* (Hart, 2010) 5.

[90] *Ibid*, 6.

[91] *Ibid*, 13–14.

[92] *Ibid*, 11.

[93] Commentaries about amicus curiae interventions in international adjudication have laid down some important groundwork into the concept of 'public interest' and the conditions under which should be allowed to submit amicus curiae in international investor-state proceedings. See eg, Eric de Brabandere, 'NGOs and the Public Interest: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' (2011) 12 *Chicago Journal of International Law* 85; Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (Hart, 2018) 47, Chen Yu, '*Amicus Curiae* Participation is ISDS: A Caution Against Political Intervention in Treaty Interpretation' (2002) 35 *ICSID Review-Foreign Investment Law Journal* 223. See more generally, Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility* (Edward Elgar, 2008).

To start with, unlike other international legal sources, bilateral investment treaties (BIT) contain several references to the concept of 'public interest'. For instance, the 2007 Model BIT of Norway makes it clear that the agreement does not intervene in the state's legitimate exercise of authority where major public interests are affected, and refers to 'the protection of public health, safety and the environment' as 'legitimate policy objectives of public interest'.[94] In a similar vein, the 2012 US Model BIT refers to the protection of 'legitimate public welfare objectives, such as public health, safety, and the environment' as an exception to the prohibition of expropriation.[95] By contrast, the 2003 Model BIT of India does not provide any exemplification of the 'public purpose' mentioned as an exemption to expropriation or nationalisation under article 5 of the Model BIT.[96] A similar approach is evidenced in the 2003 Italian Model BIT.[97] International investment treaties hence appear to be a site in which states sovereignty is embodied in exception clauses invoking the public interest that, in this context, is the interest of the community it governs at the national level. The state may thus be seen to operate as the conduit through which the preferences of individuals and groups at the domestic level are translated into international relations.[98]

There is however another way in which arguments from public interest arose in investor-state proceedings, not in the context of exceptions to state expropriation but in relation to the conditions for permitting third-party submissions. The practice of granting NGOs amicus curiae where a 'public interest' is at stake has developed since the 2001 *Methanex* decision by a NAFTA Chapter 11 Arbitral Tribunal.[99] Methanex (the investor) was a producer of methanol, a key component of MTBE in gasoline, which sought compensation for the loss of its market share caused by the ban on

[94] Agreement Between the Kingdom of Norway and … for the Promotion and Protection of Investments, issued on 19 December 2007 ('2007 Norway Model BIT'), footnote 2 <www.italaw.com/sites/default/files/archive/ita1031.pdf>: 'The Parties agree/ are of the understanding that a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, safety and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.' See also Commentary to the 2007 Norway Model Agreement <www.italaw.com/sites/default/files/archive/ita1029.pdf> 14.

[95] 2012 US Model Bilateral Investment Treaty ('2012 US Model BIT'), Annex B <www.italaw.com/sites/default/files/archive/ita1028.pdf>.

[96] 2003 Indian Model Text of BIPA <www.italaw.com/sites/default/files/archive/ita1026.pdf>.

[97] 2003 Italian Model BIT <www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf>.

[98] Andrew Moravcsik, 'The Ethics of the New Liberalism' in Christian Reus-Smit and Duncan Snidal (eds), *Oxford Handbook of International Relations* (OUP, 2008) 237.

[99] *In the Matter of an International Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Between Methanex Corporation and the United States of America*, Decision of the Tribunal of Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, (hereinafter '*Methanex* decision') <www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf> accessed 25 February 2023.

using MTBE in gasoline in California due to environmental and public health reasons. In introducing the ban, the government relied on a scientific report which found the gasoline produced with MTBE posed a significant risk of drinking water contamination when it leaked from underground tanker and pipelines. In the view of the investor, this measure was tantamount to expropriation.[100] In determining its power to admit the submissions of two NGOs, the tribunal considered that there was 'an undoubtedly public interest'[101] in the arbitration:

> The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. *The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions*. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent – or conversely be harmed if seen as unduly secretive.[102]

Two points are in order. First, the tribunal considers *that the mere involvement of a State in a dispute does not make the disputed issue one of public interest*. For the tribunal, the public interest character rather stems from the subject-matter involved in the dispute. This position appears open to a case-by-case basis rather than assuming that the investor-state dispute settlement is per se public because it concerns governmental decisions that involve the public interest.[103] As such, the tribunal does not seem to embrace a view that binds together the state and decisions on public interests.

Second, the *Methanex* decision recalls that NGOs '[p]ermission was sought on the basis of the *immense public importance* of the case and the critical impact that the Tribunal's decision will have on environmental and other *public welfare law-making* in the NAFTA region'.[104] In particular, the NGOs' petition

> argued that the case raised issues of constitutional importance, concerning the balance between (a) governmental authority to implement environmental regulations and (b) property rights. It contended that the outcome in this

[100] In 2005, the tribunal dismissed the investor's claim entirely. See *In the Matter of an International Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Between Methanex Corporation and the United States of America,* Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (hereinafter '*Methanex* award') <www.italaw.com/sites/default/files/case-documents/ita0529.pdf>.

[101] *Methanex* decision (n 99) para 49.

[102] *Ibid* (emphasis added).

[103] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law* 45, 45. See also Yanwen Zhang, 'The Judicial Function of Investment Tribunals: Taking Foundational Assumptions Seriously'(2022) 25 *Journal of International Economic Law* 129.

[104] *Methanex* decision (n 99) para 5 (emphasis added).

> case might affect the willingness of governments at all levels in the NAFTA States … to implement measures to protect the environment and human health.[105]

The tribunal accepted this line of argument, de facto validating the claim that NGOs' intervention is sought based on the public relevance of the case. Further, the *Methanex* decision considers the contention advanced by the NGO 'that the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable development',[106] and that 'participation of an *amicus* would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA'.[107]

These findings are no doubt context-specific for international investment law is set out to protect foreign investments against unlawful action by the host state. However, imageries of 'public' and its relation to the state and non-state actors are nested in the reasoning of investment tribunals and are likely to trespass the contours of investor-state disputes, especially where the participation of non-state actors is seen to reach where the state does not.

In other words, while granting permission to file amici curiae has been viewed as a positive development in international adjudication for it enhances public participation, at the same time it has also familiarised international lawyers with looking at private entities engaging with public interests, and with thinking of public interests and the state disjunctively, in that it is not necessarily or exclusively for the state to advocate or represent such interests. What is more, third-party submissions were supported by the respondent state, to signify that the role played by NGOs as defenders of public interest is not challenged – at least not in the specific instance – but rather *seconded* by the state itself.[108]

The *Methanex* case is also a substantive illustration of public interests – ie, environmental and public health – that have been invoked as exceptions to expropriation and other substantive standards like fair and equitable treatment. Analogous findings may be inferred from the *Glamis* case.[109] Here a Canadian gold mining company – Glamis Gold Ltd. – pursued a mining

[105] *Ibid*, para 8.
[106] *Ibid*, para 5.
[107] *Ibid*.
[108] Notably, other more informal forms of participation can be envisioned: eg, lobbying in reform processes of international institutions, such as the Coalition for the International Criminal Court and their lobbying activity at the ICC Assembly of State Parties.
[109] *An Arbitration Under Chapter 11 of the North American Free Trade Agreement (NAFTA), in Accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and Administered by the International Centre for Settlement of Investment Disputes (ICSID), Glamis Gold Ltd v The United States of America,* Decision on Application and Submission by Quechan Indian Nation, 16 September 2005 <www.italaw.com/sites/default/files/case-documents/ita0366.pdf> accessed 30 June 2021. The decision however does not expressly state the grounds for granting permission. Those grounds are clearly articulated in the third party application of 19 August 2005 <www.italaw.com/sites/default/files/case-documents/italaw8854.pdf> as well as in the Respondent's

project in areas sacred to Native American tribes in California with potential environmental and cultural impacts on Native American ancestral territory. The US, as the respondent state, supported the submission of the Quechan Indian Nation based, inter alia, on 'an undoubtedly public interest' in the arbitration, implicating core governmental functions:

> (…) Finally, there is undoubtedly a public interest in this arbitration. Unlike a purely commercial arbitration, *this case implicates core governmental functions*. Glamis's claim implicates issues of government regulation, expropriation and State responsibility. Its challenge to the California legislation and regulations, in particular, implicate issues of considerable public interest.[110]

In the *Suez/Vivendi* case,[111] the ICSID Tribunal also granted amicus curiae interventions based on the 'significant public interest' involved, namely 'that the investment dispute centres around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities'[112] which, providing basic public services to millions of people, 'may raise a variety of complex public and international law questions, including human rights considerations'.[113] A similar position is evidenced in the *Biwater Gauff* case dealing with the privatisation of water infrastructure,[114] in which the tribunal granted five NGOs permission to file amicus curiae under the then newly adopted Rule 37(2) of the 2006 ICSID Arbitration Rules, which expressly set out this power ('… the Tribunal *may* allow a person or entity that is not a party to the dispute … to file a written submission with the Tribunal regarding a matter within the scope of the dispute'). In their petition, those NGOs put forward arguments that expand the reach of their action on public interest potentially to the 'entire international community':

> This arbitration raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries (*and indeed all countries*) that have privatized, or are contemplating a possible privatization of, water or other infrastructure services. The arbitration also raises issues from a broader sustainable development perspective and *is potentially of relevance for the entire international community*.[115]

submission supporting such application of 15 September 2005 <www.italaw.com/sites/default/files/case-documents/italaw8855.pdf>.

[110] *Glamis,* United States Submission Regarding the Quechan Indian Nation Application, 15 September 2005, 2 <www.italaw.com/sites/default/files/case-documents/italaw8855.pdf> accessed 14 September 2022.

[111] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, ICSID Case No ARB/03/19 (formerly Aguas Argentinas, SA), Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, SA v Argentine Re*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005 (hereinafter '*Suez/Vivendi* case').

[112] *Ibid*, para 19.

[113] *Ibid*.

[114] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22,* Award, 24 July 2008 ('*Biwater Gauff* case').

[115] *Biwater Gauff* case, 'Petition for Amicus Curiae Status', 27 November 2006, 7 (emphasis added).

Plainly, the more issues of public interest have been engaged in investment arbitration, the more – and rightly so – questions of transparency and public participation have become prominent. As stated by the tribunal in *Suez/Vivendi*, 'public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function'.[116]

Concerns about transparency led to a series of important changes in international investment arbitration, including the adoption of the 2014 Rules on Transparency by the United Nations Commission on International Trade Law (UNCITRAL),[117] the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention'),[118] which entered into force in 2017 but has only been ratified by nine states so far,[119] and the latest comprehensive reform of Arbitration Rules and Regulations of the International Centre on for Settlement of Investment Disputes adopted in 2022 ('new ICSID rules' or '2022 Arbitration Rules') and in force since 1 July 2022.[120] These rules confirm that non-disputing parties may apply for permission to file a submission in the proceedings (Rule 67 of the 2022 Arbitration Rules). Yet, while the objective to move away from private and confidential has been central to these developments,[121] questions about the legitimacy of private actors to speak in the name of and for public interests appear under-explored in the debates surrounding these developments.[122]

[116] *Suez/Vivendi* case, para 22.

[117] UNCITRAL (The United Nations Commission on International Trade Law) Rules on Transparency in Treaty-based Investor-State Arbitration (2013) <https://jusmundi.com/en/document/rule/en-uncitral-the-united-nations-commission-on-international-trade-law-rules-on-transparency-in-treaty-based-investor-state-arbitration-2013-uncitral-rules-on-transparency-2013-thursday-11th-july-2013>.

[118] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration <https://jusmundi.com/en/document/treaty/en-united-nations-convention-on-transparency-in-treaty-based-investor-state-arbitration-mauritius-convention-on-transparency-2014-wednesday-10th-december-2014>.

[119] <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 7 March 2023.

[120] The new ICSID rules (ICSID/15/Rev. 3) were adopted on 21 March 2022 and entered into force on 1 July 2022. See <https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf>.

[121] For a broader overview, see Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP, 2014).

[122] On this very point, Lorenzo Cotula, 'Democracy and International Investment Law' (2017) 30 *Leiden Journal of International Law* 35, 377: ' … it is important to problematize the equivalence often too quickly drawn between "democracy in action" and NGOs activities'. An interesting strand of scholarship has conceptualised NGOs participation through the lens of transparency, legitimacy and democracy. See eg, Wolfgang Benedek, 'The Emerging Global Civil Society: Achievements and Prospects' in Volker Rittberger and Martin Nettesheim (eds), *Authority in the Global Political Economy* (Palgrave Macmillan, 2008); Wolfgang Benedek, 'Multi-Stakeholderism in the Development of International Law' in 'From Bilateralism to Publicness in International Law' in Fastenrath and others (eds) (n 22) 203; Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration* (Brill, 2018).

An ambivalent role of NGOs ensues from this cursory overview. On the one hand, their participation offers arguments that seek to influence the outcome of cases of public interest, and bear on the concept of public. On the other hand, as 'friends of the court', NGOs present themselves as assisting the court to gain all relevant information to adjudicate the dispute, thus performing a sort of 'public guardian' function. Similarly, in the ambit of international human rights law, NGOs have even gained recognition as 'public watchdogs' for they 'draw attention to matters of public interest'.[123] Although questions on amicus curiae have been framed as a *power* of the tribunal to receive third-party submissions rather than as the entitlement of the NGO to represent the public interest,[124] the possibility for NGOs to request intervention seem to implicate that they may legitimately express what is in the public interest. This aspect, however, does not seem to have raised controversy, for instance in the context of the ongoing travaux by UNCITRAL Working Group III on ISDS reform.[125] What is more, neither states – which often supported the filing of amicus curiae briefs – nor tribunals – which in several occasions accepted arguments from public interest advanced by NGOs – opposed NGOs' participation based on legitimacy or accountability reasons, to the extent that such practice resulted in amendments of arbitration rules.

c. Public–private partnerships in international law: towards a formalised collaboration?

The resort to public–private partnerships (PPPs) by states and international organisations (IOs) alike is one of the cross-cutting features of contemporary international affairs.[126] Despite the increased attention towards

[123] See eg, ECtHR, *Vides Aizsardzibas Klubs v Latvia*, 57829/00, 24 May 2004, para 42, in which the Court considered the role as watchdog of an NGO specialized in the relevant sector, to draw attention to issues of public interest, namely malfunctions in an important sector managed by the local authorities: 'la résolution litigieuse avait pour but principal d'attirer l'attention des autorités publiques compétentes sur une question sensible d'intérêt public, à savoir les dysfonctionnements dans un secteur important géré par l'administration locale. En tant qu'organisation non gouvernementale spécialisée en la matière, la requérante a donc exercé son rôle de 'chien de garde' conféré par la loi sur la protection de l'environnement. See also ECtHR, *Animal Defenders International v the United Kingdom* (GC), 48876/08, 22 April 2013, para 103, in which the Court reasserts the role of NGOs as public watchdogs for they 'draw attention to matters of public interest'.

[124] *Methanex* decision (n 99) para 5 referring to '… grant the Petition under its general procedural powers contained in Article 15 of the UNCITRAL Arbitration Rules'; para 24 'power [of the Tribunal] to accept *amicus* submissions'; para 25 'the Tribunal's powers in this respect must be inferred, if at all, from its more general procedural powers'; para 53 'the Tribunal declares that it has the power to accept *amicus* written submissions from the Petitioners'.

[125] Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission on International Trade Law <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 7 March 2023.

[126] For an appraisal of the global scale of PPPs, see the World Bank database 'PPP Knowledge Lab' at <https://pppknowledgelab.org/data>; and more generally <https://ppp.worldbank.org/public-private-partnership/overview/international-ppp-units>.

transnationalisation processes in the international law debate,[127] public–private partnerships as a regulatory tool have attracted sparse attention among public international law scholars, as opposed to public administration scholars[128] and economists, who have been exploring it for decades.[129]

Several definitions of PPP exist to date. The United Nations Organisation (UN) defines public–private partnerships (PPPs) as 'voluntary and collaborative relationships between various parties, both State and non-State, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks and responsibilities, resources and benefits'.[130] Such a definition is broad enough to include formal partnerships such as procurement contracts, as well as more informal ones, like the case of non-state parties sponsoring public interest projects. Global partnerships between the UN and the private sector appear key to UN missions, as well as to the implementation of the 2030 Agenda for Sustainable Development.[131] An alternative definition is offered by the Organisation for Economic Co-operation and Development (OECD), which describes PPPs as 'long term agreements between the government and a private partner whereby the private partner delivers and funds public services using a capital asset, sharing the associated risks'.[132] In 2012, the OECD compiled a list of 'Principles for Public Governance of Public-Private Partnerships'[133] to guide policy-makers in ensuring that PPPs are value for money for the public sector. This document acknowledges that PPPs are a regulatory instrument *warranting public governance*, though primarily stressing the economic aspects involved in those partnerships, rather than the legal or political ones. By far and large, states – alone or jointly with international organisations – pursue PPPs to delegate/outsource public functions, deliver public services, and provide public goods. As such, PPPs seemingly contribute to make the theoretical divide between public and private increasingly blurred, by giving private entities standing to negotiate

[127] See eg, Tilmann Altwicker, 'Transnationalising Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 *European Journal of International Law* 581.

[128] Emanuel Savas, *Privatization and Public–Private Partnerships* (Chatham House, 2000); Stephen P Osborne (ed), *Public-Private Partnerships: Theory and Practice in International Perspective* (Routledge, 2000); John Forrer and others, 'Public–Private Partnerships and the Public Accountability Question' (2010) 70 *Public Administration Review* 475.

[129] Timothy Besley and Maitreesh Ghatak, 'Government Versus Private Ownership of Public Goods' (2001) 116 *The Quarterly Journal of Economics* 1343; Timothy Besley and Maitreesh Ghatak, 'Public–Private Partnerships for the Provision of Public Goods: Theory and an Application to NGOs' (2017) 71 *Research in Economics* 356.

[130] A/60/214, Secretary-General Report 'Enhanced Cooperation Between the United Nations and All Relevant Partners, In Particular the Private Sector', 10 August 2005, para 8 (emphasis added).

[131] A/RES/70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development', 21 October 2015, paras 39–43.

[132] <www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm> accessed 15 February 2023.

[133] OECD, 'Principles for the Public Governance of Public-Private Partnership' (May 2012) <www.oecd.org/governance/budgeting/PPP-Recommendation.pdf> accessed 15 February 2023.

the content of those 'common purposes' in a private fashion. In the words of the UN Secretary General, '[t]hese partnerships … raise concerns about accountability as *they give non-State actors an active role in shaping public policymaking* … and require a careful balancing of action and accountability, impact orientation and inclusiveness'.[134]

To illustrate the currency of PPPs in international law affairs, one could refer to the 'Build Back a Better World' joint initiative (hereinafter 'B3W') launched by the G7 leaders in June 2021 when gathered in Cornwall (UK) to promote infrastructures in developing countries. Through the B3W, 'the G7 and other like-minded partners *will coordinate in mobilising private-sector capital in four areas of focus – climate, health and health security, digital technology, and gender equity and equality – with catalytic investments from our respective development finance institutions*'.[135] The initiative aims to help narrow the $40+ trillion infrastructure needs gap in the developing world and

> to develop a partnership [that] will orient development finance tools toward the range of challenges faced by developing countries, including in resilient infrastructure and technologies to address the impacts of climate change; health systems and security; developing digital solutions; and advancing gender equality and education. A particular priority will be an initiative for clean and green growth to drive a sustainable and green transition in line with the Paris Agreement and Agenda 2030.[136]

As recalled in the G7 Summit Communiqué, six key principles inform the B3W initiative: (i) values-driven; (ii) intensive collaboration; (iii) market-led; (iv) strong standards; (v) enhanced multilateral finance; (vi) and strategic partnerships.[137] The third principle, market-led, is explained on the premise that 'current funding and financing approaches are not adequate to address the infrastructure financing gap'. The G7 leaders are thus 'committed to enhancing the development finance tools at [their] disposal, *including by mobilising private sector capital and expertise, through a strengthened and more integrated approach across the public and private sector* (…)'.[138] While the third principle focuses on mobilising private sector capital and expertise through public–private partnership frameworks, the fifth principle

[134] A/60/214, para 14 (emphasis added).
[135] The White House Press Release, 'President Biden and G7 Leaders Launch Build Back Better World (B3W) Partnership', 12 June 2021 <www.whitehouse.gov/briefing-room/statements-releases/2021/06/12/fact-sheet-president-biden-and-g7-leaders-launch-build-back-better-world-b3w-partnership/> accessed 15 February 2023 (emphasis added).
[136] *Carbis Bay G7 Summit Communiqué – Our Shared Agenda for Global Action to Build Back Better*, June 2021, para 67 <www.consilium.europa.eu/media/50361/carbis-bay-g7-summit-communique.pdf> accessed 14 September 2022. In essence, the B3W seems a tool of strategic competition towards China's Belt and Road Initiative (BRI) adopted in 2017. For more information, see <https://merics.org/en/tracker/mapping-belt-and-road-initiative-where-we-stand> accessed 14 September 2022.
[137] *Carbis Bay G7 Summit Communiqué*, para 67.
[138] *Ibid* (emphasis added).

revolves around cooperation with international financial institutions to 'increase the mobilisation of capital needed for impactful and sustainable infrastructure investment'.[139] The US press release specifies that such capital is both private and public.[140] As such, B3W epitomises formulas of public–private partnership that are promoted to foster so-called impact investments in the five areas of interest, namely climate, health, security, digital technology, and gender equity and equality. What is more, states may need to provide implementation tools of PPP agreements that will necessarily impact the definition of public interests in scope and character.

PPPs are not the only legal instruments envisioning – in a literal sense – formal collaborations between public and private dimensions. In public international law, some legal sources appear to do the same. An illustration is offered by customary international law as reflected in Article 5 of the UN International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), which pertains to the attribution to the state of conduct of persons or entities empowered by the state's internal law to 'exercise elements of governmental authority':[141]

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[142]

There are three criteria for the attribution of conduct to the state under Article 5 ARSIWA. First, the wrongful act shall constitute an exercise of governmental authority. Second, the private entity shall be empowered by the law of the state to exercise such authority. And third, the private entity shall in fact be acting in the exercise of governmental authority. Key to the functional test under Article 5 ARSIWA is thus the concept of governmental authority, for which no agreed definition exists to date.[143] While admitting that the scope of governmental authority may vary depending on the

[139] *Ibid*.

[140] The White House Press Release, 'President Biden and G7 Leaders Launch Build Back Better World (B3W) Partnership', 12 June 2021 <www.whitehouse.gov/briefing-room/statements-releases/2021/06/12/fact-sheet-president-biden-and-g7-leaders-launch-build-back-better-world-b3w-partnership/> accessed 15 February 2023: 'Multilateral development banks and other international financial institutions (IFIs) have developed rigorous standards for project planning, implementation, social and environmental safeguards, and analytical capability. The United States will incorporate these standards and safeguards to help ensure that U.S. taxpayer resources are used appropriately and effectively. We will work with the IFIs to enhance their catalytic impact and increase the mobilization of capital – both public and private – needed for impactful and sustainable infrastructure investment.'

[141] Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), A/56/49(Vol. I)/Corr.4, 12 December 2001. Though formally non-legally binding, it is uncontroversial that these Articles codify existing customary international law.

[142] Art 5 ARSIWA.

[143] Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (CUP, 2011) 100.

particular society, history and traditions,[144] the Commentary to Article 5 yet regards certain functions, such as policing, detention and discipline pursuant to a judicial sentence or prison regulations, as intrinsically public.[145] However, the ARSIWA only governs the responsibility of states for the conduct of private entities exercising governmental authority but does not, per se, prohibit the delegation of such authority. This results from the distinction between primary and secondary rules of international law, which has informed the work of the ILC on the law of state responsibility.[146] Yet the very envisioning of Article 5 acknowledges the possibility that states can – as a matter of fact, not of law – empower private entities to perform functions entailing governmental authority – eg, through PPPs.

Interestingly, the Commentary to the Articles on State Responsibility considers factors such as the classification of an entity as private or public, the participation of the State in its capital, or in the ownership of its assets not decisive for the purposes of attribution of state responsibility.[147] What matters instead is that '[private entities] are empowered, if only exceptionally and to a limited extent, to exercise specific functions which are akin to those normally exercised by the organs of the State'.[148] The expression *normally exercised by the organs of the State* seems to presuppose an array of functions inherently associated with the exercise of governmental authority. This is the case of former state corporations that have been privatised but still retain some public functions,[149] or of private companies empowered by the law

[144] ARSIWA, Commentary to Art 5, para 6.

[145] *Ibid*, para 2.

[146] The distinction is attributed to *Special Rapporteur* Roberto Ago and made clear in his 1969 ILC Report. See ILC, *Yearbook of the International Law Commission* [1969], *Summary Records of the Twenty-First Session 2 June–8 August 1969*, vol I, UN Doc A/CN.4/SER. A/1969, p 109, in particular para 7: '… the distinction which was being adopted could be described as the distinction between primary, material or substantive rales of international law, on the one hand, and secondary or functional rules, on the other. Primary rules were intended to influence the conduct of States directly; secondary rules, which were those of State responsibility proper, were intended to promote the practical realization of the substance of international law contained in the primary rules'.

[147] ARSIWA, Commentary to Art 5, para 3.

[148] *Ibid*. Articles 4 and 5 ARSIWA differ in that the former deals with a structural test of attribution, based on the formally public character of agents whose conduct is sought to be attributed to the state, while the latter concerns the functions which are public by nature, and thus warrant a functional test. On the point, see James Crawford, *State Responsibility: The General Part* (CUP, 2013) 127–8. An illustrative application of the functional test is to be found in the jurisprudence of the Iran-US Claims Tribunal relating to the attribution of conduct of private entities to Iran. In particular, in the *Hyatt International Corporation v Iran case*, the Tribunal found the conduct of parastatal entity 'Foundation for the Oppressed', namely 'the holding of properties confiscated by the Government and the management of those properties for *public purposes*, particularly for the provision of housing and other needs of the poor', attributable to the state of Iran. See *Hyatt International Corporation v Iran* (1985) 9 Iran-US CTR 72, 27. See also 31: 'In view of the circumstances of its establishment and mode of governance, and in view of the functions it fulfils, the Tribunal concludes that the … Foundation for the Oppressed has been and continues to be an instrumentally controlled by the Government of the Islamic Republic of Iran.'

[149] *Ibid*, para 1. An illustrative application of the functional test is to be found in the jurisprudence of the Iran-US Claims Tribunal relating to the attribution of conduct of private entities to Iran. In particular, in the *Hyatt International Corporation v Iran case*, the Tribunal found the conduct of parastatal entity

of the state to 'exercise functions *of a public character* normally exercised by state organs'.[150] Accordingly, if states have historically or ordinarily treated certain functions as governmental, then these should be considered state functions. However, as noted by some commentators, this practice-led approach is not satisfactory as it would potentially justify the opposite conclusion based on the increasing practice of private actors exercising public functions.[151] In this vein, Hannah Tonkin suggests a 'private person test' according to which, as long as a function may not be performed by a private person without the authorisation of the state, the function is to be regarded as public.[152]

An example in kind is offered by Article VI of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of the Outer Space, including the Moon and Other Celestial Bodies,[153] which admits that 'national activities' in outer space may be carried out 'by governmental agencies or by non-governmental entities', provided that the activities of non-governmental entities in outer space, including the Moon and other celestial bodies, require authorisation and continuing supervision by the appropriate State Party to the Treaty.[154] This provision is due to gain increasing attention as states are progressively opening up the space sector for commercial business. In the US, for instance, SpaceX and Boeing have partnered with NASA to provide capsules capable of launching US astronauts in the space multiple times per year and develop a Commercial Crew Program to fly human space transportation systems.[155] The US national space agency justifies the partnership with private companies in economic terms, ie, to achieve 'safe, reliable and cost-effective access to

'Foundation for the Oppressed', namely 'the holding of properties confiscated by the Government and the management of those properties for *public purposes*, particularly for the provision of housing and other needs of the poor', attributable to the state of Iran. See *Hyatt International Corporation v Iran* (1985) 9 Iran-US CTR 72, 27. See also 31: 'In view of the circumstances of its establishment and mode of governance, and in view of the functions it fulfils, the Tribunal concludes that the … Foundation for the Oppressed has been and continues to be an instrumentally controlled by the Government of the Islamic Republic of Iran.'

[150] ARSIWA, Commentary to Art 5, para 2.

[151] Tonkin (n 143) 101.

[152] *Ibid*, 102.

[153] Treaty on Principles Governing the Activities of States in the Exploration and Use of the Outer Space, including the Moon and Other Celestial Bodies, RES 2222 (XXI)/1966 ('Outer Space Treaty').

[154] Article VI of the Outer Space Treaty: 'States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.'

[155] <www.nasa.gov/exploration/commercial/crew/index.html>.

and from the International Space Station and low-Earth orbit'.[156] Nevertheless, the commercial involvement of private companies in the space industry should not cloud the wider public interests engaged in space missions, such as mining, manufacture and experiment in outer space and the adverse environmental impact that space missions can produce.

Interestingly, in the US, the involvement of private entities in the public sector has been problematised under the rubric of 'inherently governmental functions'. The fact that the US Department of Defense has outsourced inherently governmental functions to private entities is imputed to existing competing definitions of 'inherently governmental function', which the Congressional Research Service was mandated to dissolve by identifying a single consistent definition of 'inherently governmental function' to be applied throughout the different governmental departments. If the state is the unique bearer of inherently governmental functions, then the functions cannot be contracted out to private entities because 'they are intimately related to the public interest'.[157] In this optic, a (dogmatic) qualification of a function as inherently governmental would set limitations on the state to outsource it to the private sector. Likewise, resorting to publicness as an epistemic tool would enable a more adequate problematisation of PPPs, amid other practices where public and private encounter, beyond canonical economic or efficiency rationales.

The point of this section was to show evidence of a consolidating role of non-state actors in the international public sphere, by reference to PPPs as possible instruments of empowerment by the state, as well as to public international law instruments addressing concepts like 'governmental authority', or governing activities of non-governmental entities in areas involving public commons, such as outer space. These instruments are notably underpinned by ideas of public, the state and their relation that are reproduced in the legal discourse without much critical attention. A turn to publicness would contribute to unpack such underpinnings.

4. The 'public' dimension in public international law scholarship

Ideas about 'public' have informed definitions of public international law, first of all by contrast to private international law. Cutler, for instance, considers that 'public international law deals with matters relating to states, international organizations and, to a very limited extent, corporations and

[156] <www.nasa.gov/content/commercial-crew-program-the-essentials>.

[157] John R Luckey, Valerie Bailey Grasso, and Kate M Manuel, 'Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress, Congressional Research Service Report for the Congress of 22 July 2009 (R40641) https://fas.org/sgp/crs/misc/R40641.pdf.

individuals that raise "an international legal interest"'.[158] Conversely, private international law refers to the set of 'rules that determine which national law applies to transactions involving persons or corporations from different states' and possessing a 'trans-border element',[159] ie, when elements of domestic and foreign law encounter. As such, the distinction between public and private is primarily articulated on the basis of the subjects involved and on the laws relevant to the dispute, without presuming any inherent link between the publicness of international law and the role of the state within the community. Interestingly she observes that 'the content of the public and private realms has not remained constant'[160] but changed by the capitalist patterns in play.[161] Similarly to Cutler, Joshua Paine maintains that 'the public or private characteristics of any good are typically constructed through legal and political processes, rather than arising from inherent properties of the underlying problem'.[162] It is evident that the concept of public behind such a position does not presume any inherently public function that the state as the principal public authority ought to perform, nor does it warrant the collective action of a community for the realisation of public goods.

Conversely, some commentators attempted to bind together the state to the delivery of public goods or to inherently sovereign functions. For instance, Daniel Augenstein contends,

> … the standard economic approach [to public goods] proves unsatisfactory because … it denies the constitutive role of politics in decisions concerning their production, distribution, and alignment. Its ostensibly technical and value-neutral definition of public goods on grounds of market efficiency conceals that the distinction between (what ought to be) public and (what ought to be) private is itself a public and political decision.[163]

Such a distinction appears to be inescapably normative in that it associates the concept of public with functions that the state, or a public authority, ought to perform. In a similar spirit, Frédéric Mégret explores the very legality of privatisation from a public international law perspective by inquiring whether rules or arguments of public international law 'mandate the publicness of certain functions', termed 'inherently sovereign'.[164] Mégret claims to reconstruct the concept of state 'from without' by deducting inherently

[158] Cutler, 'Artifice, Ideology and Paradox' (n 14) 264.
[159] *Ibid*. See also Cutler, 'Locating Private Transnational Authority' (n 15) 327.
[160] Cutler, 'Artifice, Ideology and Paradox' (n 14) 262.
[161] On the point, see also Jacqueline Best and Alexandra Gheciu (eds), *The Return of the Public in Global Governance* (CUP, 2014) 3 ff.
[162] Paine (n 80) 1227. Similarly, see Daniel Augenstein, 'To Whom It May Concern: International Human Rights Law and Global Public Goods' (2016) 23 *Indiana Journal of Global Legal Studies* 225, 230: ' … the basic point is that the production of public goods involves political choices that cannot be gauged by a technical exercise in economic optimization'.
[163] Augenstein (n 162) 231.
[164] Mégret (n 19) 454.

sovereign functions 'from the finalities of the international legal system rather than states' self-projection'.[165] However, while Mégret appears to embrace the international law canon seeing the state as a black-box – ie, neutral as to forms of government and domestic constructions of public – his analysis is nevertheless informed by a concept of state that would prevent private entities from exercising inherently sovereign functions, thus evidencing at least two limits to this otherwise illuminating approach. First, by definition, a sovereign has the authority to delegate its functions to any other entity, unless limits to such authority are traced eg, in the democratic foundations of the state,[166] in the international legal obligations in force,[167] or in the *public* foundations of public international law. Secondly, private actors – despite being a heterogeneous category – appear to be somewhat univocally understood in Mégret's account. Instead, a qualitatively different analysis is needed to appraise how they managed to bear on defining, shaping and litigating public interests.

Of particular relevance for the understanding of statehood in relation to public goods and interests is Alexander Orakhelashvili's intervention in approaching the concept of state at the intersection between international law and international politics. Orakhelashvili considers states unique for their 'suitability to undertake multiple tasks or functions, such as treaty making, diplomacy or war, as the international legal system expects its basic units to do'.[168] In particular, an important association is drawn between statehood and 'the autonomous ability to define the *relevant society's public good*'.[169]

> Statehood implies not only the exercise of public authority (which historically has also been available to municipal, feudal and religious authorities), but also the autonomous ability to define the relevant society's public good and hence supremacy over all entities within the State's internal realm, and non-subordination to any other external entity. It is inherent to the concept of State that any public authority not derived from the State legal order will be absorbed into it, and any public authority exercised by a non-State entity will be derived or outsourced from it.[170]

The relation between statehood and public raises an important point of reflection. As far as the state is understood as the *unique* subject vested with the authority and autonomy to determine the public good, other non-state entities are by necessity excluded, unless their authority is

[165] *Ibid*, 464.
[166] On the point see also Cohen (n 30).
[167] As discussed (see section 3.c), public international law contains several norms that appear to admit the activity of non-state entities in performing public functions.
[168] Alexander Orakhelashvili, *International Law and International Politics – Foundations of Interdisciplinary Analysis* (Elgar, 2020) 2 (emphasis added).
[169] *Ibid*.
[170] *Ibid*, 2–3.

derived from or outsourced by the state.[171] This concept of the state well accords with the tenet of state sovereignty in international law, in that it makes reference to the capability of expressing a unitary will embodying the purpose of a nation. However, it also shows its limits given the canonical absence of a single centralised authority at the international law level. In fact, if it is for the state to express the public interest so determined at the domestic level, the public authority entrusted to secure the public interest in international law is far less clear. In international law, an excessive focus on individual state interests may even stall the realisation of public goods.[172]

Tackling this issue, Jeremy Waldron assumes the vantage point of the rule of law, defined as a restraint of governmental power and as protective of human individuals.[173] Waldron inquires whether the rule of law, which constrains the action of the state and public officers vis-à-vis individuals subjected to their authority at the national level, finds equivalent application at the international level where, by definition, there is no such single centralised authority. Notably, this point is of relevance because it would enable the public/private distinction to be thought of as independent from the concept of state to the benefit of humankind.[174] Departing from the traditional view that international law governs inter-state relations, Waldron postulates international law as a drive to improve the lives of individuals in the world. As such, if an equivalent of the rule of law applies at the international level, it is for the sake of protecting human individuals, rather than states.[175] After all – the argument goes – at the national level, states themselves are created for that purpose.[176] Warldron's understanding of international law thus informs his concept of the rule of law and, at the same time, it has implications also for his theory of the state at the domestic level. This view appears particularly persuasive for exploring the conditions under which public interests can be legitimately defined.

In contrast to cosmopolitan universalistic approaches aspiring to a global constitutional order, Benedict Kingsbury proposes 'a view of international society and its law as a structure of "inter-public" public law'.[177] This suggestion is worth noting as it puts at its core the concept of public while operating in the context of international law. Kingsbury describes the quality of law as 'public' to mean that it stands in the name of the whole society and 'addresses

[171] Similarly, Martin Loughlin posits a concept of the state as 'nothing less than the *sine qua non* of public law'. Martin Loughlin, *Foundations of Public Law* (OUP, 2010) 183. For a critical account of this position, see Haris Psarras, 'The State; a Sine Qua Non of Public Law? A Critique of Martin Loughlin's State-Centred Approach to Public Law' (2019) 10 *Jurisprudence* 39.
[172] Nollkaemper (n 80) 770.
[173] Jeremy Waldron, 'Are Sovereigns Entitles to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 323.
[174] *Ibid*.
[175] *Ibid*, 325.
[176] *Ibid*.
[177] Kingsbury (n 22) 173.

matters of concern to the society as such'.[178] Public is thus inherently connected to the feature of 'generality, which is a necessary element in the concept of law under modern democratic conditions'.[179] In international law, this would translate into the characteristic of international law 'to stand in the name of the whole society, and to speak to that whole society',[180] which nurtures universalist aspirations and acknowledges the function of public international law to express and protect public interests. For Kingsbury, 'the normative content of international law is immanent in the public quality of law in general and in the inter-public quality of international law'.[181] Yet Kingsbury's theory of publicness subscribes to the 'irreducible pluralism of publics'[182] that situates his theory apart from global constitutional exponents. As such, Kingsbury's account challenges the unity of the concept of public among theorists of public international law.

Scholars have also referred to areas of common interest – eg, those relating to international peace and security, global health, human rights, justice, often the object of multilateral conventions that aspire to be universal in character or governed by international organisations – as opposed to those having a more contractual character. By the same token, André Nollkaemper refers to the international protection of human rights and the protection of whales as 'regimes underpinned by common, hierarchically higher values'.[183] While the concept of public looms large in Nollkaemper's account, it is more precisely the concept of *public good* that is foundational to his analysis. Two conceptualisations of public good are distinguished by Nollkaemper: a normative one, based on the substance of 'values or interests that are considered to be good for the international community as a whole' such as 'outlawing acts of aggression and genocide, the protection of individuals from slavery and racial discrimination, the right to self-determination and perhaps the obligation to protect the global environment';[184] and an enforcement-based conceptualisation, defining public goods as 'values that everyone has an interest in … [although] individual states … tend to rely on the efforts of others'.[185] This conception has a clear kinship with Bruno Simma's account of community interests, namely '[corresponding] to the needs,

[178] *Ibid*, 175–6.
[179] *Ibid*.
[180] *Ibid*, 179.
[181] *Ibid*, 174.
[182] *Ibid*, 175.
[183] Nollkaemper (n 80) 770. Similarly, Bogdandy et al. argue that 'it seems to be common ground that public authority should advance common interests and that it should do so in a way that merits obedience'. See Bogdandy, Goldmann, and Venzke (n 19) 117.
[184] Nollkaemper (n 80) 776.
[185] *Ibid*. On the point, see also Paine (n 80) 1225: ' … the public functions of international adjudication can be understood as involving the production of public goods, which generate costs or benefits for virtually all actors, irrespective of whether they have contributed to the costs of engaging in a particular instance of litigation or of creating and sustaining the relevant international tribunal'.

hopes and fears of all human beings, and [attempting] to cope with problems the solutions of which may be decisive for the survival of entire mankind'.[186] Unlike Simma's, Nollkaemper's latter conceptualisation does not derive a normative statement about the foundations of the international community from the *erga omnes* character of certain norms. It rather copes with the 'under-enforcement of norms that protect the *public interest*'.[187] Further, Martti Koskenniemi approaches public international law as a field of potential disagreement containing a whole of 'contested ideas about legitimate government, justified forms of violence, universal rights and the direction of human progress'.[188] Even if struggle is in focus, such definition still contributes to delineate areas with states have common interest to regulate.[189]

Although a certain affiliation between 'public goods', 'public interest', 'community interests' and 'values' and their exemplification in a public international law setting emerges from this cursory overview, ideas of 'public' have been implanted in the discourse but not quite articulated.[190] Three broad understandings of publicness may be distilled from the above survey: (i) a normative understanding articulated on a neat distinction between public and private, that looks at public as the exclusive department of state/public authority, thus drawing a connection between 'public' and statehood; (ii) an understanding of publicness building on the blurring divide between public and public authority, that admits that public be disentangled from the state/public authority; (iii) an understanding of publicness derived from the features of generality of law and the society of individuals as the beneficiary of the protection afforded by public international law. This strand highlights the conditions under which public authority may be exercised, rather than hinging on the formal character of an agent as public or as private that may legitimately exercise public authority.

The present contribution builds on the first strand. Indeed, if publicness entails the criteria of accountability and legitimacy, decisions that aim at impacting the normative situation of the governed (ie, obligations and responsibilities, rights and powers ultimately of individuals) necessarily

[186] Simma (n 78) 244.
[187] Nollkaemper (n 80) 777.
[188] Martti Koskenniemi, 'International Law in the World of Ideas' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP, 2012) 47.
[189] For a powerful critique of commonalities as constitutive of an international community, see Monica Hakimi, 'Constructing an International Community' (2017) 111 *American Journal of International Law* 317, in particular 347 ff.
[190] Among existing scholarship on 'public' or on the private/public divide, see eg, Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387; Kingsbury (n 22); Donaldson and Kingsbury (n 22); Alvarez (n 88); Nollkaemper (n 80); Ralf Michaels, 'Private International Law and the Question of Universal Values' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law – Contemporary Challenges and Continuous Relevance* (Elgar, 2019); Ralf Michaels, 'International Arbitration as Private and Public Good' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP, 2020); Orakhelashvili (n 168); Mégret (n 19); Bogdandy (n 23).

warrant their public and valid authorisation. This position assumes an inherent link between public interests and the authority to speak in the name of and for the community. As such, it considers that public interests should be publicly governed and that the role of private entities should be restrained, based on criteria of legitimacy and accountability. This stance aligns with positions ranging from conceptions of public as pertaining to states and state authority,[191] to conceptions approaching the public beyond the state, as something that ought to be construed in relation to public institutions.[192] However, it departs from positions that admit that private entities may perform governmental functions, deliver public goods or in articulate public interests in judicial fora unconditionally. Importantly, although one could imagine a post-national concept of public, un-tied from the concept of state, the state nevertheless appears to date a necessary intermediary for processing and expressing normative claims of the public interest at the international level, as well as for a political and legal determination of community interests in concert with other states, as it typically occurs in the context of international organisations.

5. Concluding remarks: the way forward

Even if the concept of public looms large in various institutes of public international law, outspoken reflections on what makes public international law *public* are still inadequate. Instead, commentators have insisted on a new transnational framework that could make sense of processes 'which render classical categories of 'national' versus 'international', or of 'public' versus 'private' unfit for the current reality. In this context, interventions concerned with 'transnationalisation' understood as the 'growing cross-border interaction, cooperation and transaction by state, economic and civil society actors',[193] have been predominant.[194] Similarly, the concept of transnational law defined as 'all law which regulates actions that transcend national frontiers' and 'covers both public and private international law and other rules which do not wholly fit into these categories',[195] gained traction as well as that of global law defined as 'any practical endorsement of or commitment to the universal or global-in-general warrant of some laws or of some dimension of law'.[196] Only recently have public international lawyers developed

[191] See eg, Mégret (n 19).
[192] See eg, Besson, 'The International Public' (n 25).
[193] Altwicker (n 127) 582–3.
[194] Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 *Journal of Law & Sociology* 50. See also Neil Walker, *Intimations of Global Law* (CUP, 2014).
[195] Philip Jessup, *Transnational Law* (Yale University Press, 1956) 2.
[196] Neil Walker, *Intimations of Global Law* (CUP, 2014) 18.

more outspoken reflections about questions of publicness offering some important groundwork on the issue.

Nevertheless, as this contribution shows, ideas of 'public' have for long permeated the international legal discipline. Contrarily to a traditional legal lens that would see the definition of public interest as a state-centred activity, private entities have played a crucial role in shaping those ideas of 'public' in public international law. Between end of eighteenth and beginning of nineteenth century, private actors contributed to forging the very concept of international community on the basis of which shared interests could be delineated. Philanthropists and philanthropic foundations (see Carnegie and the Gates Foundation, among others) have fuelled enormous resources – even exceeding the capacity of single governments – to support the creation of international institutions or to sustain their budget, with a view to realise certain goals. Since the 2001 *Methanex* case, there are several instances of NGOs being granted intervention in investor-state arbitration on the strength of the 'public interests' involved in the case. In view of such practices, the influence of private actors appears well-entrenched in the public international sphere to the extent that formalised public–private partnerships now look like almost a natural evolution of the blurred public/private divide in international affairs. Across spaces and times, reasons of (economic) efficiency and technical expertise have been often invoked to enable the cooperation with private entities, suggesting that market rationales are already very much ingrained in arguments from public interest.

The point of showcasing the practices of private actors engaging with public interests was neither to prove that the action of private entities concealed discrete self-interests, nor to demonstrate that such interests could not be regarded as public within the international community. The aim was rather to demonstrate how private entities have acted in the (international) public sphere, across legal fields and generations, in a rather unrestrained manner, without strong objections by public authorities. On the contrary, private entities have been capable to bear on the public sphere with the cooperative stance of public entities, like states and international organisations, or entities exercising public authority, such as investment tribunals.

Against this background, the paper suggested to look at the publicness of public international law, not as a legal concept but as an epistemic tool, on the same strength as other dogmatic concepts have informed and oriented legal reasoning towards preferred solutions.

An understanding of publicness along the terms proposed by this contribution would be capable of meaningfully affecting decisions about the participation of private entities in the public sphere. One could for instance refer to the discourse about whether or not non-state actors are suitable subjects to ensure respect of human rights or protection of the environment,

since they lack international legal personality. In a way, these type of questions obscure the central stake of globalisation processes that is not – contrarily to most of accounts – to recognise corporations as international legal persons bound by legal obligations, but more fundamentally to ensure that public interests of the international community remain subject to public authority. Upon closer look, the latter claim would firmly oppose the former. Indeed, if public interests are the exclusive department of public authority (in primis the state), then acknowledging private entities as international legal persons would even facilitate their growing engagement with (international) public affairs.

This contribution calls for reconsidering these debates through the lens of publicness, to construct a shared understanding of what public means in a public international law context, capable of orienting future practices and assessing past ones. International lawyers shall thus continue to zoom in on practices blending public and private dimensions to consider the realm of 'public' we seek public international law to protect and preserve from private activity based on legitimacy and accountability criteria. What is at stake here is not only the reconfiguring relations between public and private that have escaped the terrain of analysis by public international law scholars for decades but the risk that states might become empty shells vis-à-vis individuals in the international community.

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