2 The structure of existing debate

2.1 Introduction

This chapter examines the justifications and criticisms of investment treaties that are raised in the existing literature. In doing so, it articulates the normative and causal assumptions on which existing arguments are based. This exposition is useful in itself. Greater clarity about the underpinnings of existing arguments can shed new light on a range of debates about investment treaties. In the context of this book, this chapter performs two more specific functions. First, it shows that debate about the level of substantive protection provided by investment treaties seldom stems from fundamental disagreement about which objectives are desirable. Second, it shows that the most disagreement about how much protection investment treaties should provide stems from assumptions, often unarticulated, about the consequences of providing various levels of protection. These observations form the foundation of the framework developed in Chapter 3.

This chapter is structured as follows. Section 2.2 examines social scientific literature that seeks to explain the existence and content of investment treaties. It argues that the basic assumption in this literature is that the objective of investment treaties is to provide economic benefits to states that are party to them. Sections 2.3, 2.4 and 2.5 review normative debate about investment treaties. Section 2.3 reviews criticisms of investment treaties; Section 2.4 considers justifications for investment treaties; and Section 2.5 examines appeals for 'balance' in debate. Each section seeks to identify the methodologies being used and to articulate the normative and causal assumptions made in the course of argument. Section 2.6 concludes that debate about investment treaties can usefully be framed in consequentialist terms. It proposes a synthesis of the normative

premises that underpin debate about investment treaty protections, which can be used as a framework to organise such a consequentialist inquiry.

2.2 Assumptions and premises in social scientific scholarship on investment treaties

There is a substantial body of scholarship that draws on methodologies from political science, economics and international relations to propose and test explanatory theories about investment treaties. This section does not attempt to provide a full review of this literature. Rather, it attempts to show that characterisation of the objectives of investment treaties, and assessment of their effectiveness in realising these objectives, are central concerns in this scholarship. Scholarship focusing on these questions embodies a shared belief that investment treaties are intended to achieve instrumental, economic aims – the attraction of foreign direct investment (FDI) and the creation of net economic benefits.

2.2.1 'Rational actor' theories explaining why states sign investment treaties

A theoretical body of literature seeks to explain why developing states sign bilateral investment treaty (BITs).[1] In this literature, there is a particular focus on the apparent paradox that developing countries signed BITs containing rules for the protection of foreign investment while simultaneously rejecting identical rules in multilateral forums.[2] The methodological basis for this scholarship is the premise that states are unitary actors and that, in signing treaties, they act in their own interests. The majority of contributions to this literature rely on the further assumption that states are capable of rationally and accurately identifying their own interests – that they are rational actors.[3] These premises about the

[1] This literature focuses on BITs; however, its insights are applicable to the multilateral context.

[2] Elkins, Guzman and Simmons, 'Competing for Capital', (2006) 60 International Organization p. 841; Montt, *State Liability in Investment Treaty Arbitration* (2009), p. 112; Bubb and Rose-Ackerman, 'BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment' (2007) 27 *International Review of Law and Economics*, p. 307; Morin and Gagné, 'What Can Best Explain the Prevalance of Bilateralism in the Investment Regime?' (2007) 36 *Journal of International Political Economy*, p. 67.

[3] Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law*, p. 669.

institutional and behavioural characteristics of states are generally assumed rather than proved.

Two more recent contributions challenge the assumption that states act rationally. Yackee argues that the acceptance of certain ideas among policy-makers – that BITs increase inflows of FDI and that FDI is necessary for economic development – rather than the accuracy of these ideas, explains states' behaviour.[4] Poulsen and Aisbett argue that states behave 'predictably irrationally' in the sense that states with no direct experience of investment treaty claims tend to suffer from optimism bias when assessing the costs and benefits of entering into investment treaties.[5]

The prevailing view in explanatory theories of BITs, including Yackee's and Poulsen and Aisbett's, is that capital-importing states sign BITs in an attempt to increase inflow of FDI.[6] These scholars also agree that, were it not for increased FDI, BITs would be contrary to capital-importing states self-interest because they limit states' ability to 'advance and protect their national interests'.[7] Given the central role of FDI in explanations for the existence of investment treaties, a number of studies have sought to investigate whether BITs are effective in attracting FDI.[8]

2.2.2 *Theories explaining the content of investment treaties*

A separate stream of scholarship attempts to explain the particular mix of provisions included in typical BITs. Vandevelde is a key figure in this

[4] Yackee, 'Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment treaty Enthusiasm' (2005) 12 *University of California Davis Journal of International Law and Policy*, p. 202; Alvarez 'The Once and Future Foreign Investment Regime' in Arsanjani et al. (eds), *Looking to the Future: Essays in Honor of Michael Reisman* (2010) pp. 619–622.

[5] Poulsen and Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics*, p. 301.

[6] Yackee, 'Are BITs Such a Bright Idea?', p. 202; Poulsen and Aisbett, 'When the Claim Hits', p. 302; Guzman, 'Why LDCs Sign Treaties that Hurt Them', p. 670; Bubb and Rose-Ackerman, 'BITs and Bargains', p. 302; Salacuse and Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' in Sauvant and Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (2009), p. 120; Sornarajah, *The International Law on Foreign Investment* (3rd edn, 2010), p. 186; Bonilla and Castro, 'A Law-and-Economics Analysis of International Investment Agreements' (2006) [online]; van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 *Review of International Political Economy*, p. 609.

[7] Salacuse and Sullivan, 'Do BITs Really Work?', p. 120. Similarly, Guzman, 'Why LDCs Sign Treaties That Hurt Them', p. 670; Bubb and Rose-Ackerman, 'BITs and Bargains', p. 302; Sornarajah, *The International Law on Foreign Investment*, p. 186.

[8] E.g., Buthe and Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis' in Sauvant and Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (2009), p. 193.

literature. His argument begins by distinguishing liberal economic theory from nationalist economic theory.[9] In his view, liberal economic theory is the theory that free markets provide the most efficient means to allocate goods, services and investment flows.[10] This theory might, more precisely, be identified as neo-classical economic theory. He contrasts this with the theory of economic nationalism, a relatively open collection of interventionist theoretical responses to neo-classical economics based on the view that 'a state's economic policy should serve its political policy'.[11]

Vandevelde argues that BITs do not reflect economic liberalism in two key respects. First, economic liberalism calls for competitive equality between all investors, yet BITs provide one group of foreign investors with a set of legal rights beyond those provided to local investors and foreign investors from countries not covered by a BIT.[12] Second, economic liberalism calls for unrestricted investment flows. However, BITs focus on the post-establishment rights of investment and allow states the discretion to exclude foreign investors[13] (although more recent US, Canadian and Japanese BITs do provide a right to pre-establishment national treatment).[14] On the strength of these two arguments, Vandevelde suggests that BITs are better explained by the theories of interventionism and their associated political considerations than a theory of economic liberalism.[15]

A distinct body of social scientific scholarship uses neo-classical economic theory to determine whether investment treaty protections are likely to generate net economic benefits in the states that sign them (that is, to increase economic efficiency).[16] This work has its intellectual roots

[9] Vandevelde, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 *American Journal of International Law*, p. 621.

[10] Ibid., p. 624.

[11] Ibid., p. 622; Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harvard International Law Journal*, p. 476.

[12] Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', p. 630; also, Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23 *American University International Law Review*, p. 549; Lowe, 'Changing Dimensions of International Investment Law', (2007) [online], p. 48.

[13] Vandevelde, 'The Economics of Bilateral Investment Treaties', p. 493.

[14] Dolzer and Schreuer, *Principles of International Investment Law* (2nd edn, 2012), p. 81.

[15] Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', p. 634. For a more recent argument to the same effect, see Lester, 'Liberalization or Litigation? Time to Rethink the International Investment Regime' (2013) *Policy Analysis* [online], p. 10.

[16] E.g., Aisbett, Karp and McAusland, 'Police Powers, Regulatory Taking and the Efficient Compensation of Domestic and Foreign Investors' (2010) 86 *The Economic Record* 367; van

in economic analyses of similar legal rules in domestic legal systems.[17] Its concern is to understand the economic consequences of investment treaty protections, rather than to explain their existence. In doing so, this literature brings greater rigour and specificity to Vandevelde's discussion of the implications of neo-classical economic theory for the design of international legal rules.

2.2.3 Summary of social scientific scholarship

The preceding discussion provides a brief overview of relevant social scientific scholarship on investment treaties. There is no need to resolve debates within this scholarship at this stage. For present purposes, it is sufficient to note that the majority of this literature attributes states' behaviour to their interest in attracting FDI. If one accepts that FDI flows have normative value, then it follows that explanatory theory and evidence examining the relationship between investment treaties and FDI is relevant to normative debate about investment treaty protections.

Vandevelde's explanation of investment treaties' content is also relevant to normative debate. Indeed, he follows his own explanatory arguments to normative conclusions, relying on the premise that economic liberalism (neo-classical economics and its focus on the maximisation of economic efficiency) should be the basis for investment policy.[18] On these grounds, he recommends that the pre-establishment rights of foreign investors should be strengthened and post-establishment protections should be weakened.[19] Similar arguments are put on a firmer theoretical footing in economic analyses of investment treaty protections. The normative conclusions of this literature stem from the premise that legal rules should be evaluated on the basis of whether they increase economic efficiency.[20]

Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 *Journal of International Economic Law*, pp. 509, 537.

[17] E.g., Blume, Rubinfeld and Shapiro, 'The Taking of Land: When Should Compensation Be Paid?' (1984) 99 *The Quarterly Journal of Economics*.

[18] Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', p. 635.

[19] Vandevelde, 'The Economics of Bilateral Investment Treaties', p. 499; similarly Lester, 'Liberalization or Litigation', p. 10.

[20] Bonnitcha and Aisbett, 'An Economic Analysis of Substantive Protections Provided by Investment Treaties' in Sauvant, *Yearbook on International Investment Law & Policy 2011–2012* (2013), p. 683.

2.3 Criticisms of investment treaties

This section examines normative criticisms of investment treaties and investment treaty protections. It identifies six strands of critique in the existing literature.[21] The discussion of each strand of critique seeks to articulate the methodology being used in the literature and to identify the normative and causal assumptions on which existing arguments are based.

2.3.1 Historical methodology and critique

Critiques of investment treaties often rely on historical methodology to highlight the role that political power has played in the development of international investment law.[22] This form of inquiry examines the historical context in which treaties, arbitrations and other legal events occurred to provide explanations for them.[23] Historical inquiry usually continues to conclusions that challenge the legitimacy of international investment law. These claims rely on the implicit normative premise that law should not merely reflect the interests of the powerful. These conclusions are sometimes linked to wider critiques of international economic relations.[24]

Historical methodology illustrates how consensual arrangements can be legally effective, yet normatively questionable. For example, the observation that conditions attached to the grant of US foreign aid were responsible for Costa Rica accepting the jurisdiction of an ICSID tribunal in *Santa Elena* v. *Costa Rica* raises questions about whether the agreement to arbitrate the claim was in Costa Rica's interests.[25] Historical methodology also provides some evidence for the claim that the US and European states promoted customary international law on investment to further their own

[21] For an alternate catalogue of normative objections, see, Atik, 'Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques' (2003) 3 *Asper Review of International Business and Trade Law*, p. 215.

[22] Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 *Singapore Year Book of International Law*, p. 31; Miles, *The Origins of International Investment Law: Empire, the Environment and the Safeguarding of Capital* (2013), chp. 1.

[23] E.g., Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 *The International Lawyer*.

[24] E.g., Blackwood and McBride, 'Investment as the Achilles Heel of Globalisation?: The Ongoing Conflict between the Rights of Capital and the Rights of States' (2006) 25 *Policy and Society*, p. 63.

[25] *Santa Elena* v. *Costa Rica*, Final Award, para. 25; Helms Amendment 22 USC (1994) sec. 2378a.

interests.[26] This supports a related doctrinal critique of the development of customary international law of investment, which requires that *opinio juris*, rather than self-interest or coercion, guide state practice for it to have legal character.[27]

That said, the vast number of investment treaties makes generalisation from specific historical experiences difficult. The hypothesis that BITs are imposed on developing countries by more powerful developed countries does not adequately account for the enormous diversity of bilateral relationships covered by near-identical BITs;[28] in particular, it appears inconsistent with the rapid growth of BITs between pairs of developing countries.[29] In the context of this book, there is a more specific limitation of historical scholarship. In focusing on the way that legal rules and institutions were established, historical scholarship raises important questions about whether given legal rules are justified. However, historical methodology is less well suited to answering the questions it raises. Criticisms of an existing rule's provenance do not provide grounds for choosing between various alternatives to that rule.

2.3.2 *Comparative methodology and critique*

Another body of scholarship on investment treaties is grounded in comparative methodology. Comparative methodology is applied both at a micro-level of individual legal rules and a macro-level of legal systems and institutions.[30] Micro-level comparative scholarship on investment treaties compares treaty provisions to legal rules that perform the same function in other legal systems. The majority of micro-level comparative scholarship compares indirect expropriation under investment treaties to US regulatory taking jurisprudence.[31] Other contributions include

26 Sornarajah, *The International Law on Foreign Investment*, pp. 37–8.

27 Wouters, Duquez and Hachez, 'International Investment Law: The Perpetual Search for Consensus' in de Schutter, Swinnen and Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (2013), pp. 36–7.

28 Cf. Blackwood and McBride, 'Investment as the Achilles Heel of Globalisation?', p. 44.

29 Alvarez, 'Review: *Investment Treaty Arbitration and Public Law* by Gus van Harten' (2008) 102 *American Journal of International Law*, p. 913. The spread of BITs between developing countries is documented in UNCTAD, *South-South Investment Agreements Proliferating*, p. 1.

30 This distinction between micro and macro comparative scholarship has been drawn by others, including Zweigert and Kotz, *Introduction to Comparative Law* (2nd edn, 1998), p. 4, and, in the context of investment treaties, Vadi 'Critical Comparisons: the Role of Comparative Law in Investment treaty Arbitration' (2010) 39 *Denver Journal of International Law and Policy*, p. 82.

31 E.g., Stanley, 'Keeping Big Brother out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence'

comparisons between the indirect expropriation jurisprudence of arbitral tribunals and that of the European Court of Human Rights (ECtHR);[32] comparisons between the national treatment jurisprudence of arbitral tribunals and that of the World Trade Organization (WTO);[33] and Kantor's argument that certain decisions interpreting the fair and equitable treatment standard resemble the pre-1934 US constitutional doctrinal of substantive due process.[34]

Micro-level comparative scholarship follows a relatively settled pattern of comparison and contrast to arrive at a set of observations about the differences and similarities between the legal rules under examination. This process often informs subsequent normative conclusions; however, a set of observations about similarities and differences is not sufficient grounds for normative judgement. Although there is intuitive appeal to the claim that investment treaties should not confer greater protection on private property than is common in domestic legal systems, an argument made most forcefully by Montt,[35] without recourse to extra-legal

(2001) 15 *Emory International Law Review*; Shenkman, 'Could Principles of Fifth Amendment Takings Jurisprudence Be Helpful in Analyzing Regulatory Expropriation Claims under International Law?' (2002) 11 *New York University Environmental Law Journal*; Sampliner, 'Arbitration of Expropriation Cases under U.S. Investment Treaties – A Threat to Democracy of the Dog That Didn't Bark' (2003) 18 *ICSID Review – FILJ*, p. 11; Lowe, 'Regulation or Expropriation?' (2002) 55 *Current Legal Problems*, p. 461; Appleton, 'Regulatory Takings: The International Law Perspective' (2002) 11 *New York University Environmental Law Journal*, p. 36; Graham, 'Regulatory Takings, Supernational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations' (1998) 31 *Cornell International Law Journal*, p. 604.

32 E.g., Mountfield, 'Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights' (2002) 11 *New York University Environmental Law Journal*; Ruiz Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors' (2002) 11 *New York University Environmental Law Journal*; Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *Journal of World Investment and Trade*, p. 730; Wälde and Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 *International and Comparative Law Quarterly*, p. 824.

33 Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2009) 20 *European Journal of International Law*, pp. 752–5; Ortino, 'From "Non-discrimination" to "Reasonableness": A Paradigm Shift in International Economic Law?' (2005) [online].

34 Kantor, 'Fair and Equitable Treatment: Echoes of FDR's Court-packing Plan in the International Law Approach Towards Regulatory Expropriation' (2006) 5 *The Law and Practice of International Courts and Tribunals*.

35 Montt, *State Liability in Investment Treaty Arbitration*, p. 22:

> It is shocking to consider that a United States investor may lose a case against its government in the United States Supreme Court, a German investor may lose the same case in the *Bundesverfassungsgericht* (Constitutional Court), and a French

normative criteria, the assertion does not withstand scrutiny. For this comparative argument to avoid circularity, the possibility that domestic legal systems confer unjustifiably inadequate protection on private property must be taken seriously.[36] (Montt avoids this circularity by referring back to the normative arguments that justify the level of protection provided in domestic systems.)

Macro-level comparative scholarship argues that international investment law – as a system of institutions, procedural rules and substantive rules – is analogous to some other body of law. There are three key strands within this literature: one arguing that international investment law is analogous to domestic constitutional law; a second arguing that it is analogous to domestic administrative or public law; and a third arguing that international investment law shares characteristics of several different legal regimes.[37] For present purposes, the third strand is less relevant because it is more focused on clarifying the similarities and differences between international investment law and other legal regimes than using these observations as a basis for criticism or justification of international investment law.[38]

The definitive work comparing investment treaties to public law is Van Harten's *Investment Treaty Arbitration and Public Law*. Van Harten asserts that international investment law is analogous to domestic public law in that it allows individuals to seek redress for a state's improper exercise of regulatory powers.[39] Because of this similarity in function, Van Harten argues that adjudication under investment treaties should conform to public law norms of accountability, openness, coherence and independence.[40] Van Harten also argues that the substantive rules of investment treaties should be interpreted to incorporate principles of deference to state judgement akin to principles of deference in domestic administrative law.[41] These

investor may lose it in the *Conseil d'État*, but, nevertheless, that any of them may win it against a Sri Lanka or Bolivia on the basis of such open-ended BIT principles as no expropriation without compensation or FET.

36 Ibid., p. 166.

37 Leeks, 'The Relationship Between Bilateral Investment treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) 65 *University of Toronto Faculty of Law Review*, p. 3; Marjosola, 'Public/Private Conflict in Investment Treaty Arbitration – a Study on Umbrella Clauses' (2009) *Helsinki Law Review*, p. 104.

38 E.g., Roberts, 'Clash of Paradigms: The Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law*, p. 94; Paparinskis, 'Analogies and Other Regimes of International Law' in Douglas, Pauwely and Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014), p. 12.

39 Van Harten, *Investment Treaty Arbitration and Public Law* (2007), p. 67. 40 Ibid., p. 152.

41 Ibid., p. 144.

arguments are developed in greater detail in a subsequent monograph, *Sovereign Choices and Sovereign Constraints*,[42] but van Harten's primary critique remains focused on the institutions and procedural rules governing investment treaty arbitration.[43]

Poirier also argues for deference, without relying so heavily on the public law analogy.[44] He contends that legal regimes embody negotiated social settlements that balance the interests of property protection against the interests advanced through government regulation. These social settlements are legitimately renegotiated by the polity governed by them from time to time.[45] This justifies the claim that investment treaties should defer to the balance struck between the protection of property rights and regulatory prerogatives within a given state. On this basis, he suggests that investment disputes should be litigated in national courts, with international arbitration available to review whether these proceedings were tainted by discrimination only after local remedies have been exhausted.[46] Recognising that this institutional reform is impractical, he argues that the second-best solution would be an appellate mechanism to review arbitration decisions,[47] thereby reaching normative conclusions similar to Van Harten's.

Schneiderman uses the comparison of investment treaties to domestic constitutional law as a basis for critique. He establishes the analogy to constitutional law by arguing that 'investment rules can be viewed as a set of binding, irrevocable constraints designed to insulate economic policy from majoritarian politics.'[48] In Schneiderman's view, constitutional rules should provide only the minimum legal basis necessary for societal dispute resolution.[49] This justifies his normative conclusion, a complete rejection of investment treaties in favour of national statutory alternatives.[50]

Critiques based on comparisons of investment treaties to public law and constitutional law are united by a common norm: that international legal adjudication should show a degree of deference to judgements made in the domestic political sphere. Constitutional critiques generally rely

42 Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013), pp. 3–5.

43 Ibid., p. 6; Van Harten, *Investment Treaty Arbitration and Public Law*, p. 151.

44 Poirier, 'The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist' (2003) 33 *Environmental Law*, p. 918.

45 Ibid., p. 858. 46 Ibid., p. 919. 47 Ibid., p. 924.

48 Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008), p. 3.

49 Ibid., p. 236. 50 Ibid., p. 232.

on a stronger formulation of the principle of deference – thus, Schneiderman rejects any international review of governmental measures affecting foreign investors. Public law critiques propose a weaker principle of deference, one that would allow international review of governmental measures provided that institutions of adjudication and review possessed the characteristics of domestic courts exercising powers of judicial review. Both sets of critiques are primarily directed to the institutional structure of adjudication and review established by investment treaties.

Deference might also be invoked as a norm to evaluate alternative levels of substantive protection.[51] Montt has made this argument, relying on the comparative justification that domestic courts show a high degree of deference to governmental measures that do not entail the total destruction of property rights.[52] To the extent that this comparative methodology has a normative basis, it is through the incorporation of normative arguments about the appropriate level of deference to the exercise of public power from domestic law.[53] This engages a rich and sophisticated literature which spans constitutional theory, public law and, more recently in the United Kingdom, human rights review. A full assessment of this literature is beyond the scope of this book. Nevertheless, four basic justifications for deference in a domestic context can be identified. A brief assessment of these justifications shows that the case for treating the principle of deference to domestic political judgements as a *primary* norm that investment treaties should promote is less compelling than it might initially appear.

Democratic legitimacy is the foundation of many arguments for judicial deference.[54] A simplified version of this argument is that judges are not elected, so courts should defer to substantive value judgements made by elected officials and those exercising authority delegated by elected officials.[55] This argument has less force in the context of investment

[51] An argument for deference to host states in the interpretation and application of exceptions to investment treaty protections is made in Burke-White and von Staden, 'Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale Journal of International Law*, p. 297.

[52] Montt, *State Liability in Investment Treaty Arbitration*, pp. 22, 229. [53] Ibid., p. 166.

[54] Ibid., p. 227; Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Taggart (ed), *The Province of Administrative Law* (1997), p. 305; Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal*, p. 1361; King, *Judging Social Rights* (2012), p. 153; *International Transport Roth GmbH* v. *Secretary of State for the Home Department* (2003) QB 728, paras. 81–7.

[55] Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 *International Journal of Constitutional Law*, p. 619; similarly, Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law*, p. 782.

treaties because many of the states bound by them are not democratic.[56] Any general case for deference to public decision-making in the interpretation of investment treaty protections cannot be premised on the assumption that public decision-making is necessarily democratic.

A second, closely related, argument for deference in public law is based on the recognition that certain policy choices require the reconciliation of competing interests and values.[57] The argument is that, insofar as trade-offs between different values must necessarily be made, they are better made by decision-makers that are 'more closely acquainted with local issues, sensitivities and traditions.'[58] However, this reluctance to intrude into the merits of policy choices is based on the presumption that granting a public law remedy would invalidate the value judgement made by the decision maker, circumscribing the scope of its policy choice.[59] The situation under an investment treaty is different. The remedies awarded in investor-state arbitration do not invalidate a state's policy choice; they allow a state to maintain its preferred policy and compensate the foreign investor.[60]

A third argument for deference is that primary decision-makers have greater expertise in determining relevant facts and in assessing the likely consequences of various policy options under consideration.[61] This argument does not purport to offer a general justification for deference to primary decision-makers. Rather, arguments for deference based on institutional expertise are both consequentialist and contextual in character; they concern the practical implications of different institutions' relative abilities to gather and evaluate factual information on particular questions.[62] Consequentialist, expertise-based justifications for deference

[56] Alvarez, 'Review: *Investment Treaty Arbitration and Public Law* by Gus van Harten', p. 913.

[57] Edley, *Administrative Law* (1990), p. 34.

[58] Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 *Journal of International Dispute Settlement*, p. 205; similarly, Poirier, 'The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist', p. 858.

[59] *Associated Provincial Picture Houses* v. *Wednesbury Corporation* (1948) 1 KB 223.

[60] Schill, *The Multilateralization of International Investment Law* (2009), p. 250; for more detailed discussion, see Section 3.3.

[61] Burke-White and von Staden, 'Private Litigation in a Public Sphere', p. 329; Henckels 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investment Treaty Arbitration' (2012) 15 *Journal of International Economic Law*, p. 244.

[62] Henckels, 'Balancing Investment Protection and the Public Interest', p. 211.

may be relevant to an inquiry into the level of protection that investment treaties should provide. For example, arbitral tribunals are relatively well-placed to determine whether an environmental measure has deprived a foreign investor of its rights in an investment but less well placed to determine whether other policy measures would have been equally effective in achieving the same environmental objectives. I explore these issues and their implications in greater detail in Chapter 3.

Fourth, as a question of comparative scholarship, the degree of deference (if any) that judges in domestic courts show to the substantive judgements made in the political sphere varies significantly. One of the grounds on which it varies is the extent to which the normative justification for judicial review rests on the protection of private rights, as opposed to the promotion of reasoned public decision-making. Thus, in judicial review of the exercise of public power under the Equal Protection Clause of the Fourteenth Amendment, the US Supreme Court usually applies the deferential standard of rational basis review.[63] However, in cases in which the exercise of public power infringes a 'fundamental right' or involves the use of a 'suspect classification', the Court applies the less deferential standard of strict scrutiny.[64] This illustrates that deference to public power is not necessarily a normative premise. Rather, normative premises about the interests that should be protected by judicial review entail conclusions about the appropriate degree of deference.

This fourth issue is illustrated by the fact that the comparisons between investment treaties and domestic public law are also used as a foundation for arguments for *less* deference: the claim that the protections of investment treaties should provide greater certainty as to the extent of investors' rights.[65] In making this argument, Sanders draws on the work of Hayek, who argues that legal rules protecting private rights from interference by the state should be clear and certain because governments are capable of exploiting their power over individuals.[66]

In a similar vein, there are scholars who accept the analogy of international investment law to constitutional law but arrive at different

63 *United States* v. *Carolene Products Company* 504 US 144 (1938) 152.

64 *Skinner* v. *State of Oklahoma*, ex. rel. *Williamson* 316 US 535 (1942) 541; *Korematsu* v. *United States* 323 US 214 (1944) 216.

65 Sanders, 'Of All Things Made in America Why Are We Exporting the *Penn Central* Test?' (2010) 30 *Northwestern Journal of International Law and Business*, p. 372. Epstein, *Takings*, p. 148, developing a similar argument at great length, in the context of the US 5th Amendment.

66 Sanders, 'Of All Things Made in America Why Are We Exporting the *Penn Central* Test?' p. 372.

normative conclusions to Schneiderman. Schill, for example, accepts that international investment law does possess a threshold level of legitimacy as a constitutional system.[67] He argues that international investment law should mirror the level of deference that domestic legal systems provide when balancing the same private rights and public interests.[68] Thus, while accepting the same underlying constitutional analogy,[69] he advocates a view that is significantly less deferential than Schneiderman's. Petersmann goes still further, implying that the constitutional character of investment treaties is sufficient to demonstrate their legitimacy.[70] He argues that the substantive and procedural rules of investment treaties should draw more heavily on the 'constitutional principles' that protect individuals' fundamental rights in international economic law and human rights law, a position that appears to downplay the need for deference to decisions made in the political sphere.[71]

There is no need to resolve these debates among proponents of comparative methodology. The purpose of this review is simply to show that comparative methodology is, foremost, a descriptive methodology.[72] Comparative claims describe, with attention to certain features, the similarities and differences of the legal phenomena compared. Moving from comparative observations to normative conclusions requires a set of normative criteria by which the compared subjects should be evaluated. The difference between Van Harten's and Sanders' arguments illustrates that relying on a different set of normative premises will lead to different normative conclusions, notwithstanding a shared set of observations about the similarities between given legal regimes. To the extent that comparative scholarship is relevant to normative debate about the level of protection that investment treaties should provide, it raises the question of

67 Schill, *The Multilateralization of International Investment Law*, p. 373.

68 Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualising the Standard of Review' (2012) 3 *Journal of International Dispute Settlement*, p. 31.

69 Although Schill sometimes uses the term 'public law', it is clear that he is referring primarily to domestic constitutional law, not domestic administrative law, see, e.g., ibid., p. 23.

70 Petersmann, 'Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration' in Binder et al. (eds), *International Investment Law for the 21st Century* (2009), p. 883.

71 Petersmann, 'Constitutional Theories of International Economic Adjudication and Investor-State Arbitration' in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 193.

72 Cf. Maupin 'Public and Private in International Investment Law' (2014) 54 *Virginia Journal of International Law* (forthcoming), pp. 47–8, arguing that comparative claims entail normative conclusions.

the appropriate level of deference to the judgements made in the domestic political sphere. This section argues that the question of deference to government decision-makers is better understood as a conclusion that follows from premises about the primary norms that law should promote than as a primary norm itself.

2.3.3 *Razian rule of law norms as a basis for critique*

Another critique of investment treaties relies directly on principles that relate to desirable formal characteristics of law and of legal institutions that apply the law. These principles – that the judiciary should be independent, courts open and accessible and natural justice observed and that the law should be prospective, open and clear and relatively stable – can all be rationalised as components of Raz's conception of the rule of law.[73] A different conception of the rule of law, one that also speaks to the substantive content of law, is sometimes invoked as a justification for investment treaties.[74] There is no need to determine which is the 'correct' conception of the rule of law. Instead, grouping institutional, procedural and formal critiques together under the Razian banner, while addressing the substantive norms raised by other scholars separately, is a way of clarifying existing arguments in the literature that use the phrase 'the rule of law' to mean different things.[75]

Scholarship relying on Razian rule of law principles is predominantly concerned with the institution of investor-state arbitration.[76] Critics have argued that the institution of investor-state arbitration is neither open nor independent and that it fails to meet the requirements of the rule of law.[77] A more specific iteration of this critique is that arbitrators, as an epistemic community, have an interest in expanding the system of investor protection and so tend to interpret treaty standards broadly.[78]

[73] Raz, 'The Rule of Law and Its Virtue' (1977) 93 *The Law Quarterly Review*, p. 202.
[74] Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010), p. 2; see Section 2.4.3.
[75] Similarly, Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law, p. 487.
[76] van Harten, 'Perceived Bias in Investment Treaty Arbitration' in Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010), p. 434.
[77] Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty' in Shan, Simons and Singh (eds), *Redefining Sovereignty in International Economic Law* (2008), p. 215.
[78] Corporate Observatory Europe and the Transnational Institute, *Profiting from Injustice*, [online], p. 35; Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration', p. 218; van Harten, *Investment Treaty Arbitration and Public Law*, p. 152.

This second hypothesis is plausible; however, to credibly test it, an anthropological and sociological inquiry into the opinions and motivations of arbitrators would be necessary.[79]

A distinct body of scholarship considers the relationship between the investment treaties and the degree of respect for the rule of law in the states that are party to them. In an early contribution, Crawford endorsed a Razian understanding of the rule of law[80] and argued that the role of investment treaties was to 'reinforce, and on occasion to institute, the rule of law internally' within states.[81] A second strand of arbitral and scholarly discussion focuses on legal questions arising from corruption, which is a specific and serious contravention of the rule of law.[82] The shared premise in these discussions is that discouraging corruption is an important policy objective.[83] More recently, other scholars have used social scientific methodologies to examine empirically whether investment treaties do reinforce and support respect for the rule of law.[84] The findings are mixed. For present purposes, however, the key point is that this literature is based on an agreed premise that greater respect for the rule of law in domestic legal systems would be desirable.

2.3.4 *Sovereignty as a basis for critique*

The norm that the sovereignty of states should be respected is often invoked to critique the substantive content of investment treaties.[85] The meaning of sovereignty is not explored in detail in this literature, but

[79] Shackelford, 'Investment Treaty Arbitration and Public Law, by Gus van Harten' (2008) 44 *Stanford Journal of International Law*, p. 218.
[80] Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review*, p. 4.
[81] Ibid., p. 8; similarly Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Schill (ed), *International Investment Law and Comparative Public Law* (2010), p. 182.
[82] Raz, 'The Rule of Law and Its Virtue', p. 195.
[83] *Siag* v. *Egypt*, Dissenting Opinion of Professor Francisco Orrego Vicuña, pp. 4–5; Kulick, *Global Public Interest in International Investment Law* (2012), p. 332; Bishop, 'Toward a More Flexible Approach to the International Legal Consequences of Corruption' (2010) 25 *ICSID Review*, p. 65.
[84] Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics*, p. 121; Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 *Global Business and Development Law Journal*, p. 365.
[85] Shan, 'Calvo Doctrine, State Sovereignty and the Changing Landscape of International Law' in Shan, Simons and Singh (eds), *Redefining Sovereignty in International Economic Law* (2008), p. 311; Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration', p. 205; Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2007) 47 *Virginia Journal of International Law*, p. 963; Cheng,

it appears to refer to a state's entitlement to exercise power within its territory, subject only to the constraints of its own laws.[86] The use of this unqualified conception of sovereignty as a basis for normative critique is problematic. It is self-evident that investment treaties place limits on host states' sovereignty, in the sense that they require states to compensate investors for otherwise permissible exercises of governmental power. The same could be said for any rule of international law.[87]

Most scholars recognise that, despite its rhetorical appeal, an unqualified norm of sovereignty is not a coherent basis for normative critique.[88] The more coherent objection is that investment treaties interfere with states' ability, in practice, to implement certain desirable policies within their territory.[89] These arguments are often articulated through the language of a sovereign's 'right to regulate'.[90] For example, Muchlinski argues that investment treaties should respect a state's 'right to regulate for legitimate policy purposes', while accepting the legitimacy of restrictions on sovereignty that prevent 'abuses of power which impact adversely on investors'.[91] Disagreement about the extent of legitimate interference with sovereignty can then only be resolved by recourse to norms other than sovereignty: debate about whether the benefits of investment treaties are sufficient to justify the added difficulty and expense to a state in pursuing certain policies.[92] Engagement with this debate, in turn,

'Power, Authority and International Investment Law' (2005) 20 *American University International Law Review*, p. 507.

86 E.g., Choudhury, 'Recapturing Public Power', p. 777.

87 Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Binder et al. (eds), *International Investment Law for the 21st Century* (2009), p. 735.

88 This argument is made succinctly in Lowe, 'Sovereignty and International Economic Law' in Shan, Simons and Singh (eds), *Redefining Sovereignty in International Economic Law* (2008), p. 79.

89 Yannaca-Small, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) [online], p. 2; Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 307; Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' (2005) [online], p. 3. Here, I rely on the understanding of sovereignty proposed in Howse, 'Sovereignty, Lost and Found' in Shan, Simons and Singh (eds), *Redefining Sovereignty in International Economic Law* (2008), p. 61.

90 Mann H, 'The Right of States to Regulate and International Investment Law' (2002) [online], p. 5; Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law*, p. 1042.

91 Muchlinski, 'Policy Issues' in Muchlinski, Ortino and Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p. 14.

92 Hamilton and Rochwerger, 'Trade and Investment', p. 21; Ryan, 'Meeting Expectations', p. 761; Karl, 'International Investment Arbitration', p. 244.

requires consideration of empirical questions about the extent to which investment treaties discourage or prevent states from pursuing specific policies.

There is a wider body of literature that discusses the concept of sovereignty that is not commonly referred to in debates about investment treaties. It is worth noting that the conclusion of the previous paragraph – that a sovereignty-based critique is only coherent to the extent that it relies on norms other than an appeal to states' entitlement to exercise unrestricted power within their own territory – is consistent with this wider literature. Recent contributions from Jackson and Sarooshi both argue that the normative value of sovereignty rests on the extent to which it embodies other, prior, norms. In Jackson's view, a normatively justifiable conception of sovereignty should reflect a 'pragmatic functionalism' about whether given regulatory powers should be exercised at the national or an international level.[93] In Sarooshi's view, sovereignty retains normative force to the extent it can be justified by norms of 'legitimacy, autonomy, self-determination, freedom, accountability, security and equality'.[94]

2.3.5 *Human rights norms as a basis for critique*

Many recent critiques of investment treaties are based on human rights norms.[95] Human rights are raised in a number of different contexts in debate, including in critique of the institution of investor-state arbitration. Human rights norms also provide a link to doctrinal arguments about the proper interpretation of existing investment treaties because human rights norms are embodied legally in human rights law.[96] This book is specifically concerned with the role of human rights norms as criteria to evaluate the level of substantive protection provided by

93 Jackson, 'Sovereignty-Modern', p. 801.

94 Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty', p. 1115.

95 Hamilton and Rochwerger, 'Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties' (2005) 18 *New York International Law Review*, p. 45; Schreiber, 'Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations' (2008) 48 *Natural Resources Journal*; Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization' (2005) [online]; Brower CH, 'NAFTA's Investment Chapter: Initial Thoughts about Second-Generation Rights' (2003) 36 *Vanderbilt Journal of Transnational Law*; Peterson and Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (2003), p. 22.

96 Harrison, 'Human Rights Arguments in *Amicus Curiae* Submissions' in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 413; Kulick, *Global Public Interest*, pp. 269–71.

investment treaties. To reach this scholarship, it is first necessary to distinguish doctrinal debate about the relevance of human rights law to the application and interpretation of investment treaties.

There are two scenarios in which human rights law might, arguably, be relevant in the resolution of a claim that a state has breached an investment treaty protection: a state's human rights obligations could displace an inconsistent obligation under an investment treaty, or a state's human rights obligations could be invoked to assist in the interpretation of the scope of a state's obligations under an investment treaty. The former situation is unlikely. If two rules of international law are inconsistent, one will displace the other, according to the principles of *lex specialis* and *lex posterior*.[97] Inconsistency does not arise by virtue of the fact that the two rules apply to the same conduct simultaneously. State conduct in a given field is regularly subject to obligations arising from different sources, and these 'multiple obligations regulating the same conduct are perfectly capable of coexistence'.[98] It must be impossible for a state to comply simultaneously with its investment treaty obligations and human rights obligations for them to be inconsistent in the doctrinal sense.[99]

It is difficult to imagine a situation in which a state's human rights and investment treaty obligations would be doctrinally inconsistent.[100] Consider, for example, a situation in which an investor that has been awarded an exclusive water concession significantly increases the price

[97] Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in Binder et al. (eds), *International Investment Law for the 21st Century* (2009), p. 816.

[98] Ibid., p. 816; similarly, Study Group of the International Law Commission, *Fragmentation of International Law* (2006), para. 4:

> *The principle of harmonization.* It is a generally accepted principle that when several [legal] norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.

[99] Hirsch, 'Interactions between Investment and Non-Investment Obligations' in Muchlinski, Ortino and Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p. 174; Wierzbowski and Gubrynowicz, 'Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions' in Binder et al. (eds), *International Investment Law for the 21st Century* (2009), p. 546.

[100] Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 308; Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 485; Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', fn. 420; Kulick, *Global Public Interest*, p. 306.

of water.[101] To satisfy its obligation to ensure that residents have affordable access to water,[102] the state could have written a universal access obligation into the original concession contract, thereby avoiding any potential conflict with its obligations under the investment treaty.[103] Alternatively, the state could intervene *ex post* by subsidising the supply of water to ensure affordable access, without affecting the price charged by the investor, or it could simply expropriate the concession and compensate the investor.[104] There may be a number of policy reasons why each of these solutions is unsatisfactory, but this serves to emphasise that many of the concerns about the potential inconsistency between investment treaties and human rights are consequentialist in character.

The improbability of a state's human rights and investment treaty obligations being inconsistent means that most doctrinal scholarship focuses on the role of international human rights law in investment treaty interpretation.[105] The starting point for an inquiry is Article 31(3)(c) of the Vienna Convention of the Law of Treaties (VCLT); the threshold question is whether a human rights instrument ratified by all the parties to the investment treaty in question is a 'relevant rule of international law applicable in the relations between the parties'.[106] Even if human rights obligations meet this requirement, there remains a difficult doctrinal question of the weight to be given to human rights law in the process of interpreting investment treaties.[107] An alternative approach in doctrinal investigation of the role of human rights obligations in investment treaty interpretation relies on inductive methodology. It involves the compilation and classification of references to human rights law and cases in international investment arbitrations.[108]

[101] Kriebaum, 'Privatizing Human Rights: The Interface between International Investment Protection and Human Rights' (2006) 3 *Transnational Dispute Management*, p. 6.

[102] General Comment No. 15 'The Right to Water' (2002) E/C.12/2002/11, paras. 26–7.

[103] Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly*, p. 595.

[104] *Suez and Vivendi; AWG Group* v. *Argentina*, Decision on Liability, para. 262.

[105] Simma and Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Binder et al. (eds), *International Investment Law for the 21st Century* (2009), p. 691.

[106] Vienna Convention on the Law of Treaties (VCLT) (23 May 1969).

[107] McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly*, p. 310.

[108] E.g., Reiner and Schreuer, 'Human Rights and International Investment Arbitration', in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 88; Hirsch, 'Investment Tribunals and Human Rights', p. 99;

A distinct strand of scholarship criticises investment treaties on the grounds that they jeopardise the realisation of human rights norms *in practice*. This scholarship may refer to human rights instruments in the elucidation of human rights norms, but the argument does not depend on these norms having a legal character.[109] The most common methodology is case-study – either actual or hypothetical – which illustrates the consequences of an investment treaty protections being applied in a given factual scenario. Common criticisms of investment treaties are that investors may 'challenge human rights inspired measures';[110] that investment treaties 'have the potential to restrict state capacity to regulate in the public interest in the sphere of human rights';[111] and that investment law may cause 'regulatory chill' of measures that are effective in realising human rights.[112]

This failure to distinguish between different types of claims leads to confusion in the 'debate' on human rights and investment law. The most strident human rights critiques of investment treaties are based on consequentialist arguments, even when these critiques invoke the legal character of human rights.[113] The central claim in this literature is that limitations placed on the state by investment treaties have negative consequences for the realisation of human rights. On the other side, the principal set of responses is that investment treaties and human rights law are not antagonistic: because there is no doctrinal inconsistency between them;[114] because human rights jurisprudence is sometimes used to interpret investment treaties;[115] and because state conduct which violates an

Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (2009), p. 21.

109 Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', fn. 214.

110 Peterson and Gray, *International Human Rights in Bilateral Investment Treaties and in Investment treaty Arbitration*, p. 23.

111 Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', fn. 19.

112 High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment* (2003), p. 21; Van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law*, p. 131.

113 Mann H, 'International Investment Agreements, Business and Human Rights' (2008), p. 15.

114 Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative and International Law*, p. 100.

115 Ibid., p. 83.

investor's human rights may also constitute a breach of an investment treaty.[116] Thus framed, the two sides of the debate do not join issue. It is possible for all the doctrinal claims about the relationship between investment treaties and human rights law to be correct and also for investment treaties to have the consequence of jeopardising the realisation of human rights.

This review of existing critiques of investment treaties on human rights grounds leads to three conclusions. First, some scholars criticise investment treaties for interfering with the realisation of human rights. This criticism is not answered by the claim that investment treaties are consistent with international human rights law. Second, to the extent that human rights norms provide a basis for critique of investment treaty protections, they rely on implicit causal assumptions about the likely consequences of a given protections for the realisation of human rights. The argument is not that investment treaty protections directly interfere with the human rights of individuals in host states – investment treaties govern the relationship between foreign investors and host states, not the relationship between foreign investors and individuals – but that the *effect* of investment treaty protections is to discourage states from taking effective steps to realise human rights in practice.[117] Third, there is little disagreement in this literature about the particular norms that fall within the set of human rights norms, nor dissent from the premise that the realisation of these norms would be desirable.

2.3.6 Environmental norms as a basis for critique

Environmental norms – that natural resources, ecosystems and biodiversity have intrinsic normative value and should be conserved – are another basis for critique of investment treaties. The structure of argument in this literature is relatively clear and so can be summarised succinctly. The basic argument is that investment treaties threaten host states' ability to enact environmental measures. The argument relies on the implicit causal assumption that investment treaties discourage decision-makers in host states from introducing environmental regulations because they require host states to compensate foreign investors when environmental

116 Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 273.

117 Krommendijk and Morijn, 'Proportional by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Dupuy, Francioni and Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), p. 423.

measures affect their interests and, further, because they create uncertainty about the scope of non-compensable regulatory activity.[118] These concerns are both based on a form of consequential reasoning. They are potentially relevant to the evaluation of investment treaties protections because they are linked to the scope of legal protection provided by investment treaties.

A related critique of investment treaties is grounded in the concept of sustainable development. In the literature on investment treaties, the concept is usually defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[119] This definition provides clarity on the meaning of 'sustainability' – a specific form of inter-generational equity – without shedding much light on the concept of 'development' that is subject to the constraint of sustainability. In practice, the phrase 'sustainable development' functions either as a portmanteau for a collection of incommensurable norms that include environmental conservation, economic growth, realisation of human rights and distributive justice;[120] an interstitial principle – a secondary norm governing the balancing of competing primary norms such as these;[121] or as both a portmanteau and an interstitial norm.[122] Critiques of investment treaties that rely on the concept

[118] Been and Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2003) 78 *New York University Law Review*, p. 132; Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009), p. 276; Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29 *Golden Gate University Law Review*, p. 467.

[119] Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', p. 1067; Cordonier Segger and Newcombe, 'An Integrated Agenda for Sustainable Development in International Investment Law' in Cordonier Segger, Gehring and Newcombe (eds), *Sustainable Development in World Investment Law* (2011), p. 105, both citing Bruntland Report of the World Commission on Environment and Development, Our Common Future, Annex, UN Doc A/42/427 (1987).

[120] Mayeda, 'Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries' in Cordonier Segger, Gehring and Newcombe (eds), *Sustainable Development in World Investment Law* (2011), p. 542.

[121] Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', p. 1070, citing, Lowe, 'Sustainable Development and Unsustainable Arguments' in Boyle and Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), p. 31.

[122] Cordonier Segger and Newcombe, 'An Integrated Agenda for Sustainable Development in International Investment Law', p. 104, citing *New Delhi Declaration on Principle of International Law Relating to Sustainable Development*, ILA Resolution 3/2002, Annex, UN Doc A/57/329 (2002).

of sustainable development tend to invoke both understandings of sustainable development: their criticism is that the economic benefits that flow from investment treaties are insufficient to justify their other consequences, articulated in terms of environmental, distributive justice or human rights norms.[123]

While acknowledging the concerns that underpin these criticisms of investment treaties, there is no need to add sustainable development to the set of primary norms capable of justifying a preference between different levels of investment treaty protection. To the extent that sustainable development functions as a portmanteau of other primary norms, these norms can be examined with greater precision if they are identified specifically. To the extent that sustainable development operates as a secondary, or interstitial, norm, its significance is examined subsequently.[124]

2.4 Justifications for investment treaties and investment treaty protections

This section examines justifications of investment treaties and investment treaty protections. Leaving potential 'economic' justifications for investment treaties to one side,[125] it identifies three strands of justification in the existing literature. The discussion of each strand seeks to articulate the methodology being used in the literature and the normative and causal assumptions that underpin it.

2.4.1 Realisation of treaties' purpose as a basis for justification

A wide range of contributions in the existing literature refer to investment treaties' purpose in the course of argument. Discussions of purpose raise two sets of issues: how investment treaties' purpose should be characterised and the significance of investment treaties' purpose in wider argument. As already noted, the prevailing view in social scientific literature is that developing states sign investment treaties for the purpose of attracting FDI.[126] In this literature, a treaty's purpose is invoked as an *explanation* for states' decision to sign that treaty.

[123] Mayeda, 'Sustainable International Investment Agreements', p. 772; Cordonier Segger and Kent, 'Promoting Sustainable Investment through International Law' in Cordonier Segger, Gehring and Newcombe (eds), *Sustainable Development in World Investment Law* (2011), p. 772; cf. Newcombe, 'Sustainable Development and Investment Treaty Law', p. 359.

[124] See Section 2.5. [125] See Section 2.2. [126] See Section 2.2.1.