Analogies and Other Regimes of International Law

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I. INTRODUCTION

That investment law is something conceptually unlike anything that (international) legal order had ever managed to generate before is a common theme in the field's writings, expressed in ever more strongly worded terms with each passing decade. One might illustrate the point by considering a few of the leading texts: in 1995, Jan Paulsson suggested that 'this new field of international arbitration ... is dramatically different from anything previously known in international sphere';[1] in 2003, Zachary Douglas noted that '[e]ven [a] superficial appraisal of the different legal relationships and categories arising out of the investment treaty regime is sufficient to disclose its hybrid or *sui generis* character';[2] and, in 2013, Anthea Roberts concluded that 'the investment treaty system may come to be seen as *sui generis*: something that defines its own category'.[3] The present chapter takes an explicitly different starting point: namely, to slightly overstate the point for rhetorical purposes, there is nothing conceptually different, innovatory, or *sui generis* about investment protection law. All of the constituent elements of investment law flow from entirely unremarkable and well known law-making techniques of international law, and could constitute *sui generis* only if that concept were to be given a remarkably broad meaning, as including everything that is not identical to pre-existing blueprints. This point may sound like, but is not meant to be a pejorative one – the manner in which investment protection law is built from its constitutive parts reflects perfectly decent workmanship on the part of treaty drafters – but it is nevertheless the case that neither

* Junior Research Fellow, Merton College, University of Oxford. The chapter borrows from arguments published elsewhere, particularly Paparinskis M., 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 *EJIL* 617; and Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013). Discussions with, and comments by Zachary Douglas, Lawrence Hill-Cawthorne, Jean Ho, Anthea Roberts, Stephan Schill, Antonios Tzanakopoulos, and particularly Jessica Howley have greatly improved the chapter; any errors or omissions are mine alone.

[1] Paulsson J., 'Arbitration without Privity' (1995) 10 *ICSID Rev – Foreign Investment L J* 232, at 256.

[2] Douglas Z., 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *BYBIL* 151, at 152-3.

[3] Roberts A., 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *AJIL* 45, at 94. She continues to say, however and importantly, that 'its identity will have been forged in large part by comparisons being drawn between it and other legal disciplines', idem.

the particular elements nor the broader systemic structures present any conceptual or *sui generis* challenges to traditional canons of international legal reasoning.[4]

The discussion of the nature of investment protection law in the above-mentioned writings in terms of *sui generis* is not an entirely happy one: it may be read to suggest that international legal reasoning faces a particular challenge when confronted with a combination of rules and techniques that originate in other regimes of international law. Quite to the contrary, elaboration of the contours and the content of new regimes that partly borrow and partly diverge from existing practice should be, as it were, the bread and butter of international law, lawyers, and legal process. That is the case at all levels of legal reasoning. As Vaughan Lowe has put it, the general development of international law is a never-ending battle for control of analogy.[5] The same approach applies to particular sources of international law. In customary law, the constitutive elements of practice and *opinio juris* are expressed in necessarily fragmented structural terms. Reasoning by analogy, whether explicitly expressed as such or presented as a re-evaluation of the scope of the rule at a greater degree of abstraction, is therefore a convenient and in fact routine legal technique of identifying custom.[6] Investment protection law, particularly if considered from the perspective of dispute settlement, adopts treaty law as the starting point of reasoning, therefore the relevant question, for the present purpose, relates to the permissible reliance on the experience of similar regimes of international law. Again, the existing structures of legal reasoning regarding

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[4] Comparable to, say, such structural changes in international law as the creation of multilateral obligations and peremptory rules, Crawford J., 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325, at Chs I-III, or extension of the substantive scope of international law to regulation of new subject matters, e.g. Cheng B., *Studies in International Space Law* (Oxford: Clarendon Press, 1997); P Birnie, A Boyle, and C Redgwell, *International Law & the Environment* (3rd edn., Oxford University Press, 2009) Chs 1-2, or qualitative shifts in the existing practice, e.g. grant of broad powers regarding collective security to international organisations, ..., 'Article 39' in Simma B. and others (eds.), *The Charter of the United Nations: A Commentary* (3rd edn., Oxford University Press, 2012) at ... .

[5] Lowe A.V., 'The Role of Equity in International Law' (1988-1989) 12 *Australian Ybk Intl L* 54, at 61; Lowe A.V., 'Can the European Community Bind the Member States on Questions of Customary International Law?' in Koskenniemi M. (ed), *International Law Aspects of the European Union* (The Netherlands: Martinus Nijhoff Publishers, 1998) at 166; also Lowe A.V., 'The Politics of Law-Making' in Byers M. (ed), *The Role of Law in International Politics* (Oxford University Press, 2000) at 201 fn 5.

[6] Lowe 'The Role of Equity in International Law' ibid. at 58-60. The *Arrest Warrant* case provides a good example of reasoning by analogy regarding customary law of immunity of Ministers of Foreign Affairs: the International Court of Justice recognised immunity by reference to similarity of functions of these Ministers with Heads of States and Heads of Government, clearly possessing immunity under customary law, *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (Judgment) [2002] ICJ Rep 3 para 52-4; ibid Dissenting Opinion of Judge Van Den Wyngaert 137 para 14-6; Thirlway H., 'The Law and Procedure of the International Court of Justice 1960-1989. Supplement, 2005: Parts One and Two' (2005) 76 *BYBIL* 1, at 94-5. Within the law of international responsibility, ILC elaborated responsibility of international organisations by (close) analogy with responsibility of States, ILC, 'Draft Articles on Responsibility of International Organizations' in *Report of the Sixty-Third Session of the International Law Commission (2011),* UN Doc A/66/10 51, particularly Parts I-IV.

treaty law are entirely open to such arguments: for example, ordinary meaning of a term or terms in a treaty may be derived from the meaning attributed to like expressions in similar instruments,[7] and the determination of similarity of terms and instruments would proceed by way of analogical reasoning. Investment protection law is part of the general law of treaties, and the determination of ordinariness of meaning by reference to other regimes is a perfectly possible interpretative exercise.

One might say, of course, that the differences between these arguments and the views quoted in the opening sentences to this chapter[8] are merely cosmetic, related to presentation and perspective rather than substance, and similar inquiries, whether perceived as situated within traditional law or as exposing its limitations, are pursued in both cases.[9] Still, the distinction is a very important one in conceptual terms: the argument of this chapter is placed squarely within the four corners of orthodox international law. The challenges in its application do not call for a re-examination of the conceptual underpinnings of the legal order but (only) for a competent application of its clear benchmarks to legal situations that, while quite possibly very complex, are by no means unique in their complexity in the broader perspective of international law.[10]

The starting point of this chapter is that investment law partly borrows and partly diverges from pre-existing regimes of international law, and an interpreter of an investment protection treaty is required to determine the degree of similarity and difference so as to elaborate the ordinary meaning of both particular terms and broader structures. Since investment law may be viewed as a normative progeny of multiple regimes of international law, the interpreter may plausibly rely on different approaches, with importantly different implications for the meaning and operation of particular elements of investment law. The argument will be made in three steps. First, in order to

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[7] Lauterpacht E., 'The Development of the Law of International Organization by the Decisions of International Tribunals' (1976) 152 *Recueil des Cours* 377, at Ch II; Berman F., 'Treaty Interpretation in a Judicial Context' (2004) 29 *Yale J Intl L* 315, at 318; infra section II.

[8] See supra notes 1-3.

[9] It may not be necessarily clear whether the differences in the reading of particular aspects of investment law by the present author stem from a different conceptual starting point or mere disagreements about the small print, compare Paulsson 'Arbitration without Privity', supra note 1, and M Paparinskis, 'Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 *Select Proceedings European Society Intl L* 271; Douglas 'The Hybrid Foundations of Investment Treaty Arbitration', supra note 2, and M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *BYBIL* 264, at 287-92; and in some ways also Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', supra note 3, and M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 *EJIL* 617.

[10] F Berman, 'Evolution or Revolution?' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), particularly at 660-1, 665-9, 672. I do not engage with or challenge Roberts' skilful dissection of paradigms that underlie the assumptions of different actors applying or advocating particular analogies, supra note 3; my modest point is that international law is well equipped for evaluating these claims in legal terms.

situate investment protection law within the broader international legal order, one might draw upon multiple legal techniques from established legal regimes. The models of direct rights, beneficiary rights, and agency will be suggested as the most plausible, relying on techniques drawn from, respectively, the law of human rights, law of treaties on third parties, and diplomatic protection (section II). A firm position regarding the legally most plausible model will not be taken. Instead, the implications of relying on the techniques of those regimes will be spelled out, applying across different branches of international law. The second step of the argument will apply the different perspectives identified earlier to aspects of interpretation and law-making in investment protection law (section III). Thirdly, certain elements of the law of State responsibility will be considered, again from the three different perspectives identified before (section IV). The concluding section will briefly and tentatively suggest further scope for operation of analogy, particularly regarding the imposition of obligations on investors. The overall thesis is that the conceptual perspective of plausibly different readings of the genealogy of foundational structures of investment law is very important, but needs to be applied with subtlety: sometimes all the perspectives point in the same direction; sometimes they do not; sometimes they do but for very different reasons; and, in any event, a diligent application of such traditional techniques of legal reasoning as interpretation, resolution of conflicts, and analogies is just as important for reaching the right legal result.

II. INVESTMENT PROTECTION LAW AND ANALOGIES

The law of treaties permits and requires an interpreter of an investment treaty to rely in the interpretative process on rules of international law extraneous to the particular treaty.[11] While such rules may be brought into the interpretative process in a number of importantly different ways,[12] for the present purpose it is sufficient to consider how

[11] Paparinskis M., 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' in Fauchald O.K. and Nollkaemper A. (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2012); M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013) at 120-53.

[12] I have explained elsewhere why the much-cited methodology for interpreting treaties by reference to other rules of international law, suggested by the ILC Study Group and Campbell McLachlan (to the extent that it is possible to draw a distinction between McLachlan and the Study Group for the particular purpose), Conclusions of the Work of the Study Group, 'Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 Add 1 at para 19(a), 20(a)-(c); McLachlan C., 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279; McLachlan C., 'Investment Treaties and General International Law' (2008) 57 *ICLQ* 361, misrepresents the nuanced framework set up by the VCLT, conflating both the admissibility and weight of interpretative materials, and the qualitatively different manner in which Article 31(1) and 31(3)(c) rely on extraneous rules, Paparinskis M., 'Investment Treaty Interpretation and

similarities in other international rules and regimes may illuminate the ordinary meaning of both particular terms in and the broader operation of investment protection treaties. As Elihu Lauterpacht put it,

> There have been a number of cases in which the Permanent Court of International Justice and the International Court of Justice have, for the purpose of ascertaining the meaning of expressions employed in one treaty, used the device of ascertaining the meaning of similar expressions employed in other treaties. The Court has then proceeded on the basis that the Parties must have had in contemplation at the time when they concluded the second instrument the meaning which had been attributed to like expressions in the earlier instrument.[13]

The technique may be, and has been, applied in a number of situations. The easiest case is that of a treaty rule that reproduces or closely follows an earlier (treaty) rule on precisely the same subject matter, and therefore the meaning attributed to the latter can inform the ordinary meaning of the former.[14] In a more complicated scenario, the pre-existing treaty rules use different terminology and are expressed in a treaty dealing with a different subject matter; still, if the earlier rules and regimes are sufficiently similar, they may *mutatis mutandis* illuminate the ordinary meaning.[15] Importantly for the present

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Customary Law: Preliminary Remarks' in Brown C. and Miles K. (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) at 70-80.

[13] Lauterpacht 'The Development of the Law of International Organization by the Decisions of International Tribunals', supra note 8, at 396, and more generally at Ch II.

[14] The technique is particularly useful for multilateral treaties that borrow from earlier treaties on the same subject, as in law of the sea, e.g. the expression 'harbour works' 'which form an integral part of the harbour system' in Article 11 of the 1982 United Nations Convention on Law of the Sea could be interpreted by reference to the *travaux préparatoires* of Article 8 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 61 para 134, or the Statute of the ICJ could be interpreted by reference to *travaux préparatoires of the* PCIJ Statute, *LaGrand (Germany v US)* [2001] ICJ Rep 466 paras 105-106. Despite some uncertainty about the status of the ILC texts in the interpretation of treaties adopted on their basis, Gardiner R., *Treaty Interpretation* (Oxford University Press, 2008) at 101-3, their authority is best explained as derived not from their status as preparatory materials – which they are not, because members of the ILC do not represent States – but because they also explain 'the meaning which had been attributed to like expressions in the earlier instrument', Lauterpacht, ibid.

[15] For example, the ICJ relied on the concept of 'freedom of trade' from the 1919 Convention of Saint-German and its judicial interpretation by the PCIJ in the judgment in the *Oscar Chinn* case in interpreting 'freedom of commerce' in a 1955 Treaty of Amity, Economic Relations and Consular Rights, *Oil Platforms (Iran v US)* (Preliminary Objections) [1996] ICJ Rep 803 para 48 (the Court also referred to '[t]reaties dealing with trade and commerce', ibid., para 46). Frank Berman explains the argument 'illuminated as well by the way the terms in question had been used in other treaties of a similar kind' as 'revolving around the ordinary meaning to be given to the text', 'in the sense that a common and widespread usage, once established, could reasonably be said to have represented the assumptions and intentions of the Parties when they made their choice of terms', Berman 'Treaty Interpretation in a Judicial Context', supra note 7, at 318.

purpose, the same type of analysis may be applied not only to identify the meaning of particular treaty terms, but also the meaning and manner of operation of treaty rules and regimes, as well as creation, application, and exercise of rights within them. The *S.S. Wimbledon* case provides an illustration of the manner of reasoning and the type of arguments that an interpreter may apply to regimes that partly borrow and partly diverge from other regimes. The case turned on the interplay of German customary obligations under the law of neutrality and its obligations under the Treaty of Versailles regarding the particular status of Kiel Canal; the practice regarding Suez and Panama Canals was extensively relied on by disputing parties.[16] The Court, even though admitting that '[t]hese rules are not the same in both cases', carefully examined treaties and associated practice and attributed great weight to them *inter alia* as 'illustrations of the general opinion'.[17] The dissenting Judges were less impressed: Schücking because 'the legal situation of the Suez and Panama Canals is entirely different';[18] Anzilloti and Huber because, even if situations were similar, differences in expression of rules required precisely an *a contrario* conclusion.[19]

The degree of underlying structural and functional similarities of regimes and the manner of expression of particular rules formed the contours of the interpretative engagement with other regimes in *S.S. Wimbledon*.[20] The same perspective provides the legal anchor for the comparative argument of viewing investment protection law through the lenses of a number of prominent pre-existing legal regimes of different degrees of similarity.[21] When thinking about the nature investment treaty arbitration, one may draw upon techniques employed in other areas of international law to assist in the task of

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[16] Compare oral pleadings by Basdevant on behalf of France (*Acts and Documents Relating to Judgments and Advisory Opinion Given by the Court* PCIJ Series C03/4 Vol III 202-3, 208-9, 219, 389-90, 395), Hurst on behalf of the UK (ibid 253-62, 267), Ito on behalf of Japan (ibid 295-6), with those of Schiffer on behalf of Germany (ibid 315-6, 343-50, 405-6).

[17] *S.S. Wimbledon* [1923] PCIJ Rep A No 1 16, respectively 25, 28.

[18] Ibid Dissenting Opinion of Judge *ad hoc* Schücking 43 para II.

[19] Ibid Dissenting Opinion of Judges Anzilotti and Huber 35 para 6.

[20] See the arguments by analogy in *Wimbledon* by Basdevant, Hurst, and Schiffer, exploring the degree of similarity of regimes and rules in a sophisticated and subtle manner, supra note 16.

[21] Structure and basic principles of similar rules and regimes may inform the ordinary meaning of particular rules and regimes, e.g. rules on creation and disposal of rights in similar regimes may inform the ordinary meaning of relevant rules in the particular regime. Even if the argument does not rise to the level of ordinary meaning, it may be presented in the form of circumstances of conclusion or other supplementary materials under Article 32 VCLT, and the implicit and unarticulated nature of most questions considered below about interpretation, lawmaking, and responsibility would permit the reliance on such materials because of the 'ambiguous or obscure' meaning proviso in Article 32(a). Roberts' states that VCLT rules 'leave considerable scope for analogical reasoning' but seems to find all subparagraphs unsatisfactory for conclusively anchoring the argument, arguing not so much that VCLT permits reasoning analogy in normative terms (as suggested here), but merely in descriptive terms that it does take place in practice, Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', supra note 3, at 50-52.

situating investment protection law within the legal framework of international law. There are at least three regimes that may provide the default ordinariness against the background of which the broader operation of investment law is read: the law of human rights, law of treaties on third parties, and diplomatic protection.[22] The contours of the arguments regarding these regimes will now be considered in turn.[23]

2.1. International human rights law

The first argument with considerable intuitive appeal views investors as having *direct rights*. The International Court of Justice ('ICJ') has noted in the particular context of consular notification that treaties may create individual rights, whether or not they are human rights.[24] Rights under investment treaties have also been explained in this

[22] It is not obvious that international legal reasoning permits an interpreter of investment treaties (or indeed one who attempts to identify customary law in the area) to rely on other legal regimes to illuminate the operation of the whole investment arbitration regime. The WTO multilateral trading regime may very well be relevant for particular substantive rules (see Kurtz J., 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2010) 20 *EJIL* 749, and subsequent discussion in (2010) 20 (4) *EJIL*) and certain elements of exceptions and safeguards crafted on the basis of GATT rules, but the broader substantive and procedural structures are different to the extent that appropriateness of analogy is questionable, see, in this volume, Wu M., 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime', at ... . . The public law perspective (e.g. van Harten, infra note 28) is certainly capable of providing a powerful normative angle for policy criticisms and reform suggestions regarding international law (generally Wood M., "Constitutionalization' of International Law: A Sceptical Voice' in Kaikobad K. and Bohlander M. (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Leidein: Martinus Nijhoff Publishers 2009)], and domestic public law might even be brought within the interpretative process as general principles (Schill S., 'International Investment Law and Comparative Public Law – An Introduction' in Schill S. (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) at 26-7, although one should not rush into that conclusion, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note 11, at 19-20, 172-4, 255-6). At the same time, the idea that domestic public law can provide the backdrop of ordinariness to international law-making is distinctly odd and counter-intuitive (provided, of course, that States do not explicitly opt into the vernacular of domestic public law, as States borrowing the definition of expropriation from US constitutional law have done, 2012 US Model BIT <www.state.gov/documents/organization/188371.pdf> Annex B). The same conclusion, if for different reasons, applies to private law: while historically international law was reliant on such analogies, particularly in treaty law but also more broadly, the post-World War Two practice has generated its own terms of art that seem sufficiently sophisticated to no longer depend on or necessarily allude to domestic analogies, Crawford J., *State Responsibility: The General Part* (Cambridge University Press, 2013) at ... . See however a more extensive list of permissible analogies, including private international law, international trade law, and domestic public law, Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', supra note 3, at 58-75.

[23] The analytical perspective will be sketched in a necessarily brief manner. For a detailed comparative analysis of investment protection law, human rights law, and diplomatic protection, conducted from the slightly different perspective of the protection of property of investors by different regimes, see, in this volume, Kriebaum U., 'The Nature of Investment Disciplines', at ... .

[24] *LaGrand*, supra note 14, para 77; *Avena and Other Mexican Nationals (Mexico v US)* (Judgment) [2004] ICJ Rep 12 para 40, 124.

manner.[25] International human rights law is a particularly prominent regime of individual rights of both substantive and procedural nature, and there are both arguments in favour of relying on it and important differences that qualify the argument of ordinariness. On the one hand, the particular substantive rights provided by human rights and investment protection law seem substantively similar (denial of justice and rights to a fair trial and liberty; expropriation and deprivation; fair and equitable treatment and protection of property; full protection and security and certain aspects of rights to life and liberty).[26] Whatever position one takes regarding the beneficiary of rights under *primary* obligations in investment protection law, State responsibility in terms of *secondary* rules accrues to individuals and is directly invoked by them under both regimes.[27]

On the other hand, one might critically engage with the comparison between investment law and human rights law on a number of levels.[28] Human rights obligations are importantly different from investment law both in structure and teleology, multilateralism of obligations contrasting with the bilateral(izable) and reciprocal obligations in international economic law.[29] For the argument presented here, the chief concern is that the human rights analogy fails to capture the structural dynamic of the investment protection regime. In particular, the grant of legal protection to investors is explicitly linked with and justified by utilitarian considerations of enticing the non-State actor to make the rational choice of engaging in an investment activity and therefore

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[25] *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 para 154, fn 83; Douglas 'The Hybrid Foundations of Investment Treaty Arbitration', supra note 2, at 160–84.

[26] Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*s, supra note 11, at Chs 7–9.

[27] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts', in *Yrbk Int'l Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 31 Art. 33(2) Commentary 4. A contrary view is taken by Douglas, suggesting that the cause of action may be disaggregated from primary obligations, permitting the investor to claim reparation for the State's failure to adhere to substantive standards, without invoking State responsibility for their breach, Douglas Z., 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in Dupuy P.-M. and Viñuales J.E. (eds.), *Harnessing Foreign Investment to Promote Environmental Protection* (Cambridge University Press, 2013) at 418-24. Whether investment law and arbitration can be analogised with domestic laws such as the U.S. Alien Torts Statute, where international law indeed operates as a standard of liability under a domestic cause of action, ibid. at 423, is a question that cannot be disposed of in a footnote. At this point, it is sufficient to note how counterintuitive the argument is in the face of practice of dispute settlement: pleadings and awards deal with arguments of attribution, circumstances precluding wrongfulness, admissibility of claims, and reparations in terms of international legal responsibility of a host State for a wrongful act, and not as incidentally determining liability under another cause.

[28] Van Harten G., *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) at 136–43; Hirsch M., 'Investment Tribunals and Human Rights: Divergent Paths' in Dupuy P.-M., Francioni F., and Petersmann E.-U. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) at 107–14; in this volume, Hirsch M., 'The Sociology of International Investment Law', at ... .

[29] *Standard Chartered Bank v Tanzania,* ICSID Case no ARB/10/12, Award, 2 November 2012 paras 267-70; Pauwelyn J., 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *EJIL* 907; Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 330–31.

benefiting from protection.[30] The proposition that there might be a rational choice to be made to become human so as to benefit from human rights protection strikes one as patently absurd from the perspective of human rights law;[31] conversely, in investment protection law, the question of whether, when, and how a claimant becomes an investor is an important yet conceptually unremarkable jurisdictional box to be ticked in every dispute. Indeed, the investor may have considerable influence in the formulation of the terms of rights under protection (e.g., in negotiating concessions and stabilization clauses).

2.2. Law of treaties regarding third parties

[30] Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) at 135–6. Reasonable people might and do disagree whether particular formulations of substantive rules can deliver the investment flows promised by the preambles, Vandevelde K., 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harvard J Intl L* 469; Alvarez J., 'The Public International Law Regime Governing International Investment' (2009) 344 *Recueil des Cours* 193, at Ch II, have in fact delivered them, Sauvant K. and Sachs L. (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009), and indeed whether information about investment treaties is available during, and plays a role in the decision-making process about investing, Poulsen L., 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' (2009/2010) *Ybk Intl Investment L Policy*. The modest point made here is that this is what the treaties themselves explicitly set out to do.

[31] Again, the point made is a modest one, even if expressed in strong terms: it suggests only that the beneficiary of human rights does not make a choice to become human so as to benefit from human rights. The point is equally valid for both so-called ethical and political (or functionalist) theories of human rights that disagree whether foundation of human rights lies (respectively) in their inevitable accretion to all human beings by virtue of their humanity or a political choice. For a (critical) overview of recent scholarship see Besson S., 'Human Rights: Ethical, Political ... or Legal? First Steps in a Legal Theory of Human Rights' in Childress III D.E. (ed.), *The Role of Ethics in International Law* (Cambridge University Press, 2012); Tasioulas J., 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1. The latter approach would deny the inevitability of human rights for all human beings but would certainly not condition their existence upon the choice of beneficiaries, focusing instead on the political choice of law-(and institution-)makers to restrict sovereignty or enforce rights. For the best recent version of the argument see Raz J., 'Human Rights in the Emerging World Order' (2010) 1 *Transnational L Theory* 31, at 39-47; Raz J., 'Human Rights without Foundations' in Besson S. and Tasioulas J. (eds.), *The Philosophy of International Law* (Oxford University Press, 2010). A more complicated question is whether one might not say that, in factual terms, an individual who becomes subject to jurisdiction of a State with human rights obligations (or enters the territory, as the case may be for particular treaties) also makes a choice to benefit from those obligations [i.e., a US national investing in the Czech Republic makes a choice to benefit both from the US-Czech BIT and the European Convention of Human Rights ('ECHR')]. One response might be that the situation is different because the inability of an individual to benefit from human rights obligations does not affect her status as a human but only means that *in casu* particular primary rules do not run that far, while for an investor the question of scope of obligation is identical with that of status. An objection to the response is that an alien would be an alien even when not a factual beneficiary of the rules on the treatment of aliens, but there is an important difference in the structure of teleology: for investment protection law, rules exist to encourage investment as an empirical phenomenon, supra note 30; for law of the treatment of aliens, the empirical phenomenon of residence abroad necessitates the rules, Root E., 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *ASIL Proceedings* 16, particularly at 16-9; Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note 11, at 39-40.

The conditioning of rights upon choice rather than simple belonging to the human (or corporate) race is better captured by the perspective that sees investors as *beneficiaries*.[32] There is support for the view in investment arbitration decisions.[33] The most authoritative international legal regime that deals with the grant of rights to third parties is provided by the law of treaties, and it might be possible to draw upon these rules on third party rights.[34] The Vienna Convention on the Law of Treaties ('VCLT') provides a regime for the creation and modification of rights of third States.[35] The appropriateness of the argument may have to be qualified by special characteristics less obviously present in investment law: in particular, the emphasis that VCLT Articles 34 and 36 place on the consent of third States as a precondition for the creation of rights. On the one hand, investors, unlike States (or international organizations) are not international law-makers. The VCLT regime deals with the grant of rights to entities that could in principle participate in the creation of rights themselves and might therefore be based on certain qualitatively different assumptions.[36] In any event, in most cases investors do not consent in a particular form to protection under investment protection treaties. On the other hand, the act of qualifying for protection and exercise of rights under the regime the purpose of which is to increase the number of qualifying entities may be read as assent of the investor,[37] and the (admittedly rare) requirement to seek confirmation of investments may be seen as an explicit expression of consent that is otherwise implicit.[38]

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[32] The term 'beneficiary', while broad enough to cover those that benefit from a rule in a factual sense, is used here in the technical sense of a beneficiary of rights, just as 'a beneficiary State' in the law of treaties denotes a third State deriving rights from a treaty, 1966 ILC Draft Articles, infra n 36, Art. 32 Commentaries 5, 7, 8.

[33] *RosInvestCo UK Ltd. v Russia,* SCC V 79/2005, Award on Jurisdiction, November 2008 para 153; *Wintershall AG v Argentina,* ICSID Case no ARB/04/14, Award, 8 December 2008 para 114.

[34] Paparinskis, 'Investment Treaty Interpretation and Customary Law: Preliminary Remarks', supra note 12, at 81, n 62; Berman 'Evolution or Revolution?', supra note 10, at 660–2.

[35] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331 Arts. 34, 36, 37.

[36] Chinkin C., *Third Parties in International Law* (Oxford: Clarendon Press, 1993) at 13–14, 120–122. In the ILC, two theories about third party rights were put forward: according to one, third party rights arose from a collateral agreement between the third party and the treaty parties; according to the other, treaty parties could create rights for third parties without a collateral agreement, if they so intended: ILC, 'Draft Articles on the Law of Treaties with Commentaries', in *Yrbk Int'l Law Commission, 1966, Volume II*, A/CN.4/SER.A/1966/Add.1 112 Art. 32, Commentaries 3–6. The disagreement had limited practical effect, and the VCLT leaves the question open: D'Argent P., 'Article 36: Convention of 1969' in Corten O. and Klein P. (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press 2011) at 930–40; D'Argent P., 'Article 37: Convention of 1969', ibid., at 945–6. The distinction may, however, be important for the present purpose: the necessity for a collateral agreement may raise particular challenges for beneficiaries that are non-state actors.

[37] In the law of treaties, the third State's 'assent shall be presumed as long as the contrary is not indicated', VCLT, supra note 35, Art. 36(1). Even the 'collateral agreement' theory accepted that assent 'need not be express but may take the form of a simple exercise of the right offered in the treaty': 1966 ILC Articles, supra note 36, at 229; D'Argent 'Article 36', supra note 36, at 936–8. The *HICEE* award captures the importance of the investor's choice perfectly when it says that 'this is a case of a structured investment,

2.3. Law of diplomatic protection

If human rights provide the most influential analogy in the contemporary law, and the law of third parties may be pointing the finger to the future (where non-State actors evolve from being recipients of a benevolent grant of rights to active participants in the normative process, making the conscious choice to become holders of particularly formulated rights), in the earlier epochs the protection of individuals could be located within the four corners of the inter-State relationship. Even without being needlessly contrarian, one might express some scepticism about the allegedly innovative character of investment protection law:[39] in particular, the language of primary rules expressed in investment treaties may be traced back for centuries;[40] and the substantive and procedural debates often continue those in the classical law.[41] A contemporary reading of investment protection treaties naturally reshapes the structure and operation of the law around investor-State arbitration, but this view may be anachronistic. When treaty drafters of the 1960s-90s supplemented well known substantive rules and inter-State dispute settlement procedures with the untested investor-State arbitration clauses (that were to remain entirely untested until early and substantially untested until late 1990s),[42] it is quite plausible to suggest that they considered their creation to be merely a narrow extension of the inter-State regime.[43]

The procedural rights of investors may then be explained in terms of *delegated rights*. In recent practice, host States have sometimes explained the nature of investment arbitration in these terms, either making it easier for them to rely on restrictive rules from

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structured, that is, to secure certain advantages. ... the burden then rests on the investor to ensure that the structure chosen achieves his intended result, and to undertake all necessary precautions to that end', *HICEE B.V. v Slovakia,* PCA Case no 2009-11, Partial Award, 23 May 2011 para 140 (internal footnote omitted).

38 *Philippe Gruslin v Malaysia,* ICSID Case no ARB/99/3, Award, 27 November 2000 para 25.5–7; *Yaung Chi OO Trading Pte Ltd v. Myanmar,* ICSID Case no ARB/01/1, Award, 31 March 2003 para 53–62.

39 Suggested by authors cited at supra notes 1-3.

40 The idea of most-favoured-nation (MFN) clauses goes back for almost 1000 years, the recognisable form for more than 500 years and the MFN wording for more than 350 years, H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna* (Leiden: AW Sijthoff, 1971) at 110-12; and fair and equitable treatment clauses and rules on protection of property may be traced to at least 17th century treaties, Neufeld, ibid., at 98; Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note n 11, at 57-8, 84-7, 113-5.

41 Crawford J., 'Continuity and Discontinuity in International Dispute Settlement' (2010) 1 *J Intl Dispute Settlement* 3.

42 Parra, infra note 47, at Ch 9.

43 Pauwelyn argues that the emergence of investment treaty law and arbitration was a merely accidental combination of many minor developments, see in this volume, Pauwelyn J., 'Rational Design or Accidental History? The Emergence of International Investment Law' at ... .

customary law of diplomatic protection in the interpretative process or attempting to subject investment obligations to inter-State countermeasures.[44] For this perspective, the practice of diplomatic protection in general and the agency of diplomatic protection in particular provide the background,[45] in the latter case conceptualizing investment treaties as agreements between a principal (home State) and a host State to delegate the right to bring an inter-State claim to the investor (agent) that has been injured by particular conduct. In teleological and policy terms, the introduction of the inter-State procedural dimension may seem unattractive and counter-intuitive, undoing the shift away from the arbitrariness of diplomatic protection and towards greater depoliticisation that has historically[46] – although perhaps less unqualifiedly more recently – been believed to underpin the investment arbitration system.[47]

This section set out the three most plausible arguments of analogy about investment law, without taking a position regarding the correctness of or preference for these positions. The purpose of the chapter is to set out the systemic considerations that flow from adopting particular analogies at many levels: first, as it were, at the macro-level (e.g., 'investment law is like human rights law'); secondly, following the strand of analogical reasoning to a certain conclusion (e.g., 'investors cannot waive their rights to non-discrimination *ex ante*, just like individuals under human rights law'); thirdly, showing how acceptance of particular arguments makes other arguments become possible or impossible, or at least more or less plausible (e.g., if investors cannot waive their rights *ex ante*, it is likely that they also cannot object to a joint termination of the treaty by its parties). Law-makers and settlers of disputes will conduct the debate within the broad contours of these propositions: debating the appropriateness of analogies, content of

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[44] *Loewen v US,* ICSID Additional Facility Case no ARB(AF)/98/3, Award, 26 June 2003 para 233; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico,* ICSID AF Case no ARB/(AF)/04/5, Award, 21 November 2007 paras 176–9; in a different context probably also BVerfG, 2 BvM 1-5/03, 1, 2/06, Order of 8 May 2007 <www.bverfg.de/entscheidungen/ms20070508_2bvm000103en.html> para 54.

[45] On delegation of diplomatic protection see Dugard J., 'Fifth Report on Diplomatic Protection', UN Doc A/CN.4/538 at 4-7.

[46] Shihata I., 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Rev – Foreign Investment LJ* 1; Paulsson 'Arbitration without Privity', supra note 1, at 255-6.

[47] A number of recent writings less obviously fit within the depoliticisation narrative, whether directly challenging its usefulness, Paparinskis 'Limits of Depoliticisation in Contemporary Investor–State Arbitration', supra note 9; explaining the development of investment arbitration without attributing a major role to depoliticisation, Parra A., *History of ICSID* (Oxford University Press, 2012) at 16-8, 82, 143; limiting its explanatory potential to a particular historical period, Puig S., 'Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law' (2013) 44 *Georgetown J Intl L* 531, at 550-8; Puig S., 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2013) 36 *Fordham Intl L J* 465, at 484-8, 495-8; or viewing depoliticisation as merely one of many interlocking narratives, Pauwelyn 'Rational Design or Accidental History? The Emergence of International Investment Law', supra note 43, at ... .

particular rules flowing from analogies, appropriateness of the particular rules and other related rules, appropriate analogies reconstructed back from those rules etc.[48] It remains to be seen how the issue will develop, both in terms of State practice and arbitral decisions, and their doctrinal evaluations: at the moment, each perspective seems to dominate particular aspects of the system, without being excessively concerned about the internal inconsistency. Quite plausibly, the pragmatic 'without prejudice to the broader principle' practice may continue; or a particular perspective may gain general dominance by gradually excluding others; or one perspective could provide the starting point that is tweaked by introduction of special rules, possibly borrowed from other perspectives.[49]

The next sections will elaborate in turn different elements of operation of investment protection law from the perspective of each of those analogies. The analysis does not purport to be exhaustive, picking instead a number of particularly illustrative examples.[50] Section III will address interpretation and law-making; section IV will focus on the law of State responsibility. The concluding section V will briefly and tentatively suggest further operation of arguments by analogy, in particular regarding the imposition of obligations on investors.

III. ANALOGIES: INTERPRETATION AND LAW-MAKING

Debates about the interpretation, application, and change of investment protection law raise a considerable number of issues that may benefit from an explicit application of

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[48] Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 351; Paparinskis 'Investment Treaty Arbitration and the (New) Law of State Responsibility', supra note 9, at 626-7; Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', supra note 3, at 92-3. The to and fro between points of principle, and rights and obligations flowing from those points is the usual frame of reasoning that international law provides for resolving legal disputes of such kind. The law of statehood provides one example of such an approach, with the status of non- (or partly-)recognised States such as the Turkish Republic of Northern Cyprus or Kosovo being debated both at the level of principle and regarding particular rights and obligations flowing from the status (e.g. resources in continental shelf, State immunity, rights under trade law, air law, recognition of judgments), with confirmation or denial of particular rights feeding back into the issues of principle, see, regarding Cyprus, Crawford J., *The Creation of States in International Law* (2nd edn., Oxford: Clarendon Press, 2006) at 146-7; Talmon S., *Kollektive Nichtanekennung illegaler Staaten* (Tübingen: Mohr Siebeck, 2006) at Chs 1, 5-12.

[49] Roberts has suggested that a 'between the poles' position is likely to develop, idem. In technical terms that might mean either the emergence of a new teleology of investment law unlike anything known before or, more plausibly, the third position outlined, taking one (dominant) 'pole' as the general rule and expressing the necessary borrowings from other 'poles' as special rules: a perfectly uncontroversial technique since most of the law of treaties and secondary rules in question are dispositive and open to opt-outs by parties.

[50] For an analysis of the nature of rights through different conceptualisations of remedies, sharing some of the starting points of this chapter, see in this volume, Puig S., 'No Right without a Remedy: Conceptual Foundations of Investor-State Arbitration' at ... . More generally, see Roberts 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', supra note 3.

analogical reasoning. With a certain amount of arbitrariness, this section focuses on a more limited number of issues that have either been prominent in practice or highlight the nature of investment law in a particularly unusual manner. The general rule and supplementary means of interpreting treaties, as set out in Articles 31 and 32 VCLT and customary law, apply to all treaties, including investment protection treaties.[51] Just as in any other area of international law, reasonable observers and not necessarily reasonable disputing parties and law-makers may disagree about the most persuasive interpretation of particular terms and provisions of investment treaties. Still, three aspects of the traditional interpretative argument and two aspects of the rules on law-making may be thought to raise particular challenges for investment law: first, how does the incomplete overlap between disputing and law-making parties (investor-State and State-State(s)/international organisations) affect the interpretative materials extraneous to the treaty text that emanate from the law-makers after the conclusion of the treaty (3.1.)? Secondly, can an interpreter rely on rules of domestic public law in interpreting investment treaties (3.2.)? Thirdly, what is the status of interpretative materials to which an investor does not have access (3.3.)? The reshaping of investment protection law around procedural powers of investors permits a question with a provocative twist: have investors also obtained new powers of interpretation and law-making? (3.4.). Finally, when substantive and procedural rights of investors are expressed in treaties, are these rights in any way protected from joint conduct of treaty-makers in amending and terminating treaties (3.5.)? These issues will be considered in turn.

3.1. Interpretation and subsequent agreement and practice

Subsequent agreement and practice are accepted as interpretative materials pursuant to Article 31(3)(a) and (b) VCLT.[52] While generalisation cannot do justice to peculiarities of particular disputes, it is plausible to suggest that the probable overlap between law-making and disputing parties will often minimise the likelihood of consensus necessary to

[51] It is now accepted that VCLT rules on interpretation apply to all treaties, whether as treaty rules, *Application of the Interim Accord of 13 September 1995 (FYRM v Greece)* [2011] ICJ Rep para 91, or as codification of customary law, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 paras 64-5; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 para 94. One might conceivably imagine the structure of an argument for residual application of pre-VCLT rules in particular investment arbitrations, but it would be bound to run into unsolvable practical difficulties, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note 11, at 138-41.

[52] See generally <http://untreaty.un.org/ilc/guide/1_11.htm>; Nolte G. (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013).

produce such materials. However, the mixed procedural setting of investor-State arbitrations puts the law-making and disputing hats on different heads, and sharpens the focus on questions that might have been implicit before. Can States agree on interpretation so as to preclude an argument based on an interpretation of a similar rule in a third party treaty?[53] Can pleadings of (respondent) States expressed regarding the same treaty in different proceedings contribute to subsequent practice?[54] What if the pleadings only reflect particular tactics of litigation, striving for the narrowest possible reading of the treaty, and are not intended to express a broader view of the treaty? Can (respondent) States put on their law-making hats and adopt a certain interpretation through subsequent agreement that they have unsuccessfully defended while wearing their respondent's hats? Can States simultaneously wear their law-makers' and respondents' hats, reinterpreting rules at issue in pending disputes?[55] And can the subsequent agreement apply to the pending disputes?[56] Leading writings regarding inter-State practice and agreements already frame the debate in terms of analogies: Campbell McLachlan's scepticism about the interpretative role of inter-State practice in a regime based on private enforcement fits well within his broader argument for greater reliance on human rights law,[57] and Anthea Roberts' rich and subtle argument in favour of such a role explicitly relies on its acceptance in both inter-State and human rights law, suggesting that it should therefore similarly apply in investment protection law.[58]

As a preliminary point, in terms of the effect of inter-State practice and agreements a distinction may be drawn between materials that are formulated so as to have prospective

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53 As some States have done to exclude the application of MFN clauses to rules of international dispute settlement after the award in the *Maffezini v Spain* case, Simma B., 'Miscellaneous Thoughts on Subsequent Agreement and Practice' in Nolte, ibid., at 46.

54 In NAFTA, pleadings and submissions of parties in earlier cases were taken into account to read Chapter Eleven as excluding investors that have not invested in any State apart from the home State, *Canadian Cattlemen for Fair Trade v Canada,* UNCITRAL Arbitration, Award on Jurisdiction, 28 January 200 para 181-9; and as reading investors' rights as being rights of their home States, to which countermeasures could in principle apply, *ADM,* supra note 44, para 176.

55 The agreed interpretation of NAFTA Free Trade Commission that treaty obligation to provide fair and equitable treatment did not extend beyond customary law obligations of treatment of aliens were perceived by some in these terms, see *Methanex* Jennings, infra note 74. The inelegance of the particular anthropomorphic metaphor may be avoided by applying it to the two-headed Zaphod Beeblebrox, who presumably could wear two hats simultaneously, D Adams, *The Hitch Hiker's Guide to Galaxy* (1979) [although admittedly not in the movie version, <www.imdb/com/title/tt0371724> (2005), where Beeblebrox is depicted as 'two-faced in the most interesting way', rather than two-headed, R Ebert, 28 April 2005, <www.rogerebert.com/reviews/the-hitchhikers-guide-to-the-galaxy-2005>].

56 Of course, different questions raise different considerations, quite apart from the perspective of analogy, and the analysis is necessarily simplified by excluding those distinctions.

57 C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, cf. 372 and 382, 96, 400-1.

58 A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, particularly 198-225. Compare also positions of Crawford, infra note 63, and Alvarez, infra note 69.

effect ('this is how we agree the treaty will be interpreted/this is how we apply the treaty, differently from its ordinary meaning') and retrospective effect ('this is how we have always understood the treaty').[59] In the former case, general rules of inter-temporal law are sufficient to dispose of the issue, whatever the argument by analogy: an interpreter has to consider the content of the law in force at the time of the dispute,[60] therefore materials in existence at that point are included in the interpretative exercise and materials not in existence are excluded from it. This proposition is equally valid for international human rights, law of third parties, and law of diplomatic protection.

In the latter case, diplomatic protection analogy would feel least troubled about the manner in which the content of primary rules is established, since the investor is not their beneficiary and only invokes responsibility for their breach. The authority of States to create *lex specialis* rules with retrospective effect for the purposes of adjudication is well-established: '[f]rom the time of the *Alabama* award, States may agree to arbitrate by specifying the principles or rules of law they wish the tribunal to apply'.[61] It is hard to see how a hypothetical US ship-owner making a claim before the *Alabama* Tribunal could have objected to the *lex specialis* statement of the law of neutrality provided by the US and GB;[62] it is equally hard to see how an investor could successfully challenge even very significant retrospective changes before Tribunals like *Methanex v US* (from the award of

[59] I.e., the distinction between, in formal terms, 'from now on, we agree to read fair and equitable treatment as not protecting legitimate expectations, unlike we did before/from now on, we agree to read fair and equitable treatment as not protecting legitimate expectations, even though the position before was ambiguous' and 'even though fair and equitable treatment always protected legitimate expectations, we agree to read the treaty as if it never did'. Roberts seems to suggest that subsequent agreement and practice are necessarily retrospective, ibid 201, 12, but the better view is that different materials might have different temporal effect, depending on their content. By analogy with the development of customary international law, if a new customary rule cannot be invoked retrospectively against a State that was not bound by the particular rule on a given day (to borrow the phrase from Crawford J. and Viles T., 'International Law on a Given Day' in Ginter K. and others (eds.), *Festschrift für Karl Zemanek* (Berlin: Duncker and Humblot, 1994), newly developed interpretative materials cannot be applied to determination of legal situations before their creation. For example, even though the meaning of the term 'commercio' in a mid-nineteenth century treaty has changed and evolved to include, in the twenty-first century, transportation of persons, *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 para 57-71, this evolution could not have retrospective effect on the interpretation of the treaty obligations in (pre-evolution) nineteenth century. The merely prospective effect of evolutionary terms illustrates a broader point about the prospective effect of materials that reflect legal change, e.g. subsequent practice showing different intent (regarding 'commercio', such practice existed only in the first decade of this century, ibid., Separate Opinion of Judge Skotnikov 283 para 9-10, and surely could not have been invoked regarding earlier conduct), or newly 'relevant' treaties or rules of general international law.

[60] *Island of Palmas Case (Netherlands/US)* (1928) 2 RIAA 829, at 845; for State responsibility, 2001 ILC Articles, supra note 27, Art. 13.

[61] *Methanex Corporation v US,* UNCITRAL Arbitration, Final Award, 3 August 2005 Part IV – Chapter C [23] (internal footnote omitted).

[62] *Alabama Claims (US v GB)* (Award) (1872) 29 RIAA 125, 129-30. Of course, individuals did not have access to the *Alabama* Tribunal, and in any event a US ship-owner would not have objected to the *lex specialis* rule because it *in limine* excluded the best legal arguments that GB could have made, T Bingham, 'The Alabama Claims Arbitration' (2005) 54 ICLQ 1, 23-4, but the hypothetical example illustrates the point sufficiently well.

which the quote about *Alabama* is taken), for which the starting point of reasoning is the inter-State perspective.[63]

From the perspective of human rights, the European Court of Human Rights ('ECtHR') has sometimes relied on subsequent practice with remarkably far-reaching effect.[64] Still, an (uncharitable) reading would see subsequent practice as one of many criss-crossing and overlapping riverbeds that each may, when necessary, contain the Court's unstoppable flood of case law towards increasingly progressive and far-reaching obligations,[65] thus making the contours of the precise legal argument fuzzy and unhelpful as a basis of analogy.[66] It is intuitively plausible to view the subsequent practice and agreement with greater scepticism when individual rights are involved,[67] but it is more complicated to articulate this intuition in legal terms.[68] Unless special rules of treaty interpretation have emerged,[69] these materials are admissible for the interpretative

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[63] As James Crawford puts it regarding NAFTA FTC interpretations, '[i]nternational law says that the parties to a treaty own a treaty and can interpret it', Crawford J., 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention' in Nolte, supra note 52, 29 at 31.

[64] E.g., the Court has taken the view that rules permitting capital punishment in certain circumstances have been subject to an interpretative amendment by contrary international and domestic State practice that extends the prohibition to all circumstances, *Al-Saadon and Mufdhi v UK* (App no 61948/98) (2010) ECHR Reports 2010 paras 119-20.

[65] H Butterfield, *The Whig Interpretation of History* (1931). Practice of States has been taken into account in support of a narrow reading of the territorial scope of the ECHR, but it seems to have been an exceptional occurrence and has never been repeated in the subsequent consideration of the issue, *Bankovi□ and Others v Belgium and Others* (App no 52207/99) [GC] ECHR Reports 2001-XII para 62.

[66] In particular, since changes in meaning can take place through subsequent practice, evolution of generic terms, *Dispute Regarding Navigational and Related Rights*, supra note 59, para 64, subsequent agreement, or emergence of new 'relevant' rules, it is often unclear under which heading the Court's search for consensus in domestic and international law falls, *Demir and Baykara v Turkey* (App no 34503/97) [GC] (2008) ECRH Reports 2008 para 76-84; *X and Others v Austria* (App no 19010/07) [GC] (2013) ECHR Reports 2013, Joint Partly Dissenting Opinion para 12-23; G Nolte, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation', UN Doc A/CN.4/660 [37]-[38]. (Indeed, Judge Ziemele has recently suggested that the concepts of regional custom and persistent objectors may also explain the search for consensus, Ziemele I., 'Customary International Law in the Case Law of the European Court of Human Rights – The Method' (2013) 12 *L Practice Intl Courts Tribunals* 243, at 248-51.) Moreover, the invention of the partly new nomenclature of interpretative terms (so as to enable the Court to respond to the early challenge of Judge Fitzmaurice that its practice did not comply with VCLT), makes a neat taxonomy of the Court's argument under the VCLT an ever harder endeavour, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment,* supra note 11, at 150-2. Still, it seems plausible to read most of these cases as not relating to subsequent practice and agreement in the technical sense and therefore not helpful for the argument of analogy explored here at all. The question posed by the famous *Lautsi* case about whether freedom of religion is compatible with crucifixes in Italian classroom provides a convenient example: when Joseph Weiler describes far-reaching implications that the Chamber's anti-crucifix judgment might have, he is surely not saying that the UK's national anthem and the Irish Constitutional Preamble are subsequent practice in the application of the ECHR (but rather that the conclusion of the Court is absurd or that no evolutionary consensus can be demonstrated), Weiler J., '*Lautsi:* Crucifix in the Classroom Redux' (2010) 21 *EJIL* 1, at 2.

[67] Nolte 'First Report', ibid., para 30 fn 76; Alvarez J., 'Limits of Change by Way of Subsequent Agreements and Practice' in Nolte, supra note 52, 123, at 126-7, 131-2.

[68] Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 342.

[69] Alvarez, supra 67, seems to suggest that a special rule precludes the admissibility of subsequent practice from treaties with third party beneficiaries and compulsory dispute settlement, unless parties explicitly provide for the regime, as they have under NAFTA FTC rules on interpretation. I have elaborated

exercise, and possible reasons for limiting the weight of restrictive practice in human rights (the teleology of protection of human rights, multilateral structure of obligations, and possibly peremptory character of particular rules) are less applicable or entirely inapplicable to investment law (utilitarian in justification, bilateral(isable) in structure, and dispositive in character).

It is more plausible to say that the practice or agreement of treaty parties is insufficient to affect an interpretative change in the law of third parties (e.g., if a bilateral treaty gives right to everybody to pass through a canal, the practice of States exercising the right would have to be taken into account in interpretation). However, the rationale for that would lie in third States' rights, particularly if read as established by a collateral agreement, with the traditional rules of interpretation requiring practice and agreement of all States to the agreement (i.e. both contracting parties in the technical sense and the right-holders); the argument would depend on the whether investors can be analogised to third parties in the law-making sense (see *infra* 3.4.). Roberts has suggested that retrospective and unreasonable interpretations by States might be rejected by Tribunals, relying on estoppel, legitimate expectations, or good faith.[70] Leaving aside the underlying assumption that international law permits a number of reasonable interpretations of treaties,[71] at least two of these arguments may be considered from the perspective of analogy. Estoppel, presupposing normal interaction between structurally equal actors with possible legal consequences, would not easily fit the individual rights perspective,[72] but would be perfectly explicable in the third parties' model, providing an alternative explanation to the collateral agreement theory; an argument of good faith or abuse of

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elsewhere my view that, while there is no reason of principle why such dispositive rules of law of treaties could not be changed, it probably has not happened so far, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note 11, at 141-53.

[70] Roberts 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', supra note 58, at 211-5.

[71] In jurisprudential terms, an acceptance of a multiplicity of reasonable interpretations as possible cannot escape being an implicit snub to Dworkin and an equally implicit nod to Kelsen, Lowe V. and Tzanakopoulos A., 'Introduction: The Abyei Arbitration' in *The Abyei Arbitration (The Government of Sudan / The Sudan People's Liberation Movement/Army): Final Award of 2009* (PCA, 2012) 14. It is not necessarily clear whether international practice accepts the existence of a multiplicity of reasonable interpretations outside the peculiar situation of judicial review of interpretation by other decision-making bodies, compare a summary of such practice, *The Abyei Arbitration (The Government of Sudan / The Sudan People's Liberation Movement/Army)* (2009), ibid., para 504-10, 512, 526-35, and the proposition that 'a treaty can have only one authentic meaning', *HICEE*, supra note 37, at para 139.

[72] Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note n 11, at 253. The inter-State perspective is more ambiguous: estoppel can certainly operate vis-à-vis States, but could it be invoked by an agent of a State against the joint conduct of both States?

process[73] would have more persuasive force in a human rights model than in an inter-State one.[74]

3.2. Interpretation and comparative public law

Comparative public law is present in the contemporary scholarship and practice of investment protection law in many guises, some relying on and some likely moving beyond the legal anchor provided by the 'other relevant rules' proviso of Article 31(3)(c) of VCLT. Tribunals sometimes look at domestic public law when interpreting particular substantive obligations in investment protection treaties.[75] Attitudes to domestic public law in legal writings cover a wide spectrum indeed: Stephan Schill argues in favour of a (re)reading of investment law through the lenses of public law, particularly domestic public law;[76] Santiago Montt suggests the consensus of developed systems of administrative and constitutional as the upper benchmark for interpreting substantive investment obligations;[77] Anthea Roberts considers debate about standards of review under a public law paradigm to be one of the chief questions facing investment law;[78] and Gus Van Harten is famously sceptical about whether the decentralised structure of arbitration can ever satisfy the minimum standards of public law adjudication.[79]

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[73] Paparinskis M., 'Inherent Powers of ICSID Tribunals: Broad and Rightly so' in Laird I. and Weiler T., (eds.), *Investment Treaty Arbitration and International Law* (Vol 5, New York: JurisNet, LLC, 2012) at 27-31.

[74] Libya's objection to abuse of process by reliance on non-judicial procedures in the UN Security Council by the US and the UK to set aside treaty rules in question, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK and Libya v US)* Pleadings CR 97/20, 17 October 1997 <www.icj-cij.org/docket/files/88/5205.pdf> para 3.17 (Jean Salmon on behalf of Libya), did not impress the ICJ. There is an interesting contrast to be drawn between the position of Robert Jennings in *Lockerbie*, not finding the use of privileged law-making procedures problematic at all, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya* v *UK)* (Preliminary Objections) [1998] ICJ Rep 9, Dissenting Opinion of Judge Jennings 99, particularly at 107-12, and his later expert opinion in *Methanex,* sharply critical of interpretative statement on fair and equitable treatment by the NAFTA Free Trade Commission, *Methanex Corporation v United States of America,* UNCITRAL Arbitration, Second Expert Opinion of Sir Robert Jennings, September 6, 2001 at 6-7. Leaving aside the substantive and procedural peculiarities of *Lockerbie*, the inconsistency between Jennings in *Lockerbie* and *Methanex* may also be explained from the perspective of this chapter: perhaps Sir Robert in *Lockerbie* (just as the *Methanex* Tribunal, supra note 61) viewed the question entirely through the inter-State lenses, while the reliance on human rights and due process in domestic law in his expert opinion (ibid., at 4, 7) suggests an adoption of the very different individual rights analogy.

[75] E.g. regarding legitimate expectations and fair and equitable treatment more broadly, *International Thunderbird Gaming Corporation v Mexico,* UNCITRAL Arbitration, Final Award, 26 January 2006, Separate Opinion of Arbitrator Waelde para 27-8; *Total SA v Argentina*, ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010 para 128-30.

[76] Schill S. (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010).

[77] Montt S., *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart Publishing, 2009).

[78] Roberts A., 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) 16 *ICCA Congress Series* 170.

[79] Van Harten, supra note 28.

Reasonable people may disagree about the degree to which such arguments – illuminating as they are in providing new perspectives of policy criticisms and suggestions for reform[80] – fit within the four corners of traditional legal reasoning for relying on domestic law.[81] Still, certain assumptions about functional similarities between different regimes that necessarily underpin such comparative arguments[82] may benefit from consideration of systemic analogies, particularly if they are presented for the purposes of a legal argument.

Reliance on domestic public law fits quite neatly within the international human rights argument, particularly if the foundation of the latter is explained in terms of the political choice to limit sovereignty and create instruments for enforcement of such limitations.[83] Indeed, the great *Golder v UK* judgement of the ECtHR explicitly relied on the 'principle whereby a civil claim must be capable of being submitted to a judge' in terms of Article 31(3)(c) VCLT to support its interpretation of the human right to fair trial: for the Court, domestic public law occupied the same legal space as international human rights law.[84] Conversely, from the inter-State perspective, substantive rules run only between the States, and the investor merely benefits from them in factual terms and invokes responsibility for their breach. Within the four corners of this argument, there can be no functional similarity between (international) inter-State and (domestic) individual-State legal regimes that would permit any kind of reliance on domestic public law.[85] (This argument has considerable force even if the human rights perspective is adopted: the home State of the investor can still invoke State responsibility for the breach of investment protection treaties on the basis of diplomatic protection;[86] public law paradigms of individual rights and review do not fit the inter-State context; it cannot

[80] Wood, supra note 22.

[81] In particular the rather stringent criteria both for identifying general principles of domestic law and taking them into account under Article 31(3)(c) VCLT, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note 11, at 19-20, 172-4, 255-6.

[82] Michaels R., 'The Functional Method of Comparative Law' in Reimann M. and Zimmermann R. (eds.), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006).

[83] See discussion at supra note 32.

[84] *Golder v UK* (App no 4451/70) (1975) Series A no 18 para 35.

[85] If a particular issue known in domestic law has to be addressed at the international level, but standards of domestic public law are not transposable into international law, international is perfectly capable to create its own terminology or criteria for addressing the issues. When Japan and Australia recently debated the standard of review before the ICJ in the *Whaling* case, Japan only briefly referred to the variety of domestic approaches as part of its analysis of the international position, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Pleadings CR 2013/15, 4 July 2013 <http://www.icj-cij.org/docket/files/148/17438.pdf> 18 para 28 (Lowe); Australia did not mention domestic standards at all.

[86] Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 281-97. The suggestions *en passant* to the contrary, *Italy et Cuba* (Sentence preliminaire) (2005) para 65; *Italy et Cuba* (Sentence finale) (2008) para 141, are not entirely persuasive, Paparinskis 'Investment Treaty Arbitration and the (New) Law of State Responsibility', supra note 9, at 643.

be the case that existence and scope of responsibility, and legal principles used to address these matters, vary depending on the entity invoking responsibility; *ergo*, the public law reading of investor-State legal relationship may have to be critically reconsidered.) Finally, if the human rights argument accepts and the inter-State argument rejects the analogy of domestic public law in unqualified terms, the answer provided by the third parties perspective is less clear cut. Perhaps a qualified analogy could be made with public law, but, rather than with the usually considered rules of public law that deal with the limitation of powers of public *vis-à-vis* private person, with the rules that separate and limit public powers between different public persons.[87]

3.3. Interpretation and inaccessible materials

It has been suggested that a particular interpretative challenge is raised by interpretative materials, particularly but not exclusively preparatory materials, to which investors do not necessarily have access but which may affect the meaning of investment rules.[88] An example of the challenge is provided by the *HICEE v Slovakia* award, where the Tribunal interpreted a Dutch-Slovak BIT as not applying to indirect investments, attributing considerable weight in this process to an explanatory note submitted by the Netherlands as part of its domestic ratification process.[89] The *HICEE* Tribunal explicitly set out the competing policies: on the one hand, the authentic meaning of the treaty surely could not vary according to the parties to a dispute; on the other hand, the result could be unfair to the investor if the materials are not publicly accessible.[90] On the facts of the case, the materials were or would have been available to an appropriately diligent investor, therefore the question of principle about the effect of non-accessible materials to diligent investors was not conclusively dealt with.

How would the tension be resolved by putting the analysis in the comparative perspective? The diplomatic protection perspective would be least worried about unfairness to the investor: if investment protection obligations are owed solely by and to the States, then it is entirely normal that their (only) authentic content is established in the traditional manner prescribed by Article 31 and 32 VCLT, whatever the degree of

[87] Crawford 'Multilateral Rights and Obligations in International Law', supra note 4, at 345.
[88] Arsanjani M.H. and Reisman M., 'Interpreting Treaties for the Benefit of Third Parties: The "*Salvors*' Doctrine" and the Use of Legislative History in Investment Treaties' (2010) 104 *AJIL* 597, at 603-4; Berman 'Evolution or Revolution?', supra note 10, at 669.
[89] Compare *HICEE*, supra note 37, para 128-40 and ibid., Dissenting Opinion of Judge Brower, 23 May 2011 para 25-39.
[90] *HICEE*, supra note 37, para 139-40.

familiarity that factual beneficiaries of these rules may have with the materials. From the perspective of human rights, possible scepticism about preparatory materials may arise out of the qualitatively different concern that restrictiveness of drafters may defeat the object and purpose of human rights protection.[91] However, it is unlikely that the secrecy of materials would be a separate consideration, since humans do not face the choice of becoming (fully informed) holders of human rights.[92]

Conversely, establishment of both rights and obligations for third States is based on consent,[93] and a suggestion that the content of consent might be affected by materials unavailable to the entity expressing consent is striking.[94] A further analogy from law of treaties may be drawn with the position of parties to multilateral treaties that have acceded after negotiations, with the same challenge of existence of admissible interpretative materials of which a party is unaware.[95] The drafters of the VCLT have been unwilling to take a clear stance on the matter: on the one hand, unlike the PCIJ,[96] VCLT accepts preparatory materials as admissible without regard to the participation of particular parties in their drafting;[97] on the other hand, the factual assumption that new parties could ask for and receive materials and the normative intuition that opposability of secret materials would be unfair leave unarticulated the legal solution for the hard cases where the question does arise in these terms.[98] Consequently, while an impatient purist might say that the tension between singularity of meaning and unfairness of secret materials set out in *HICEE* is unsolvable in principle, precisely the same dilemma is faced by the general law of treaties. The acceptance of accessibility of materials as the benchmark of fairness to the investor[99] is also similar to the approach that general law of treaties would probably adopt regarding States not privy to the drafting process,

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[91] Letsas G., 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 *EJIL* 509, at 517, 519, 536-8. The reported scepticism of the ECtHR may be overstated, see recent consideration of preparatory materials in *Bayatayan v Armenia* (App no 23459/03) [GC] (2011) ECHR Reports 2011 para 100; *Hirsi Jamaa and Others v Italy* (App no 27765/09) [GC] (2012) ECHR Reports 2012 para 174; *Sitaropoulos and Giakoumpoulos v Greece* (App no 42202/07) [GC] (2012) ECHR Reports 2012 para 63, and in any event could be an application in a particular substantive area of the distinction that VCLT draws between the general rule of Article 31 and supplementary materials of Article 32, and not an innovation of human rights law, Christoffersen J., 'Impact on General Principles of Treaty Interpretation' in Kamminga M.T. and Scheinin M. (eds.), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) particularly at 42-50.

[92] *HICEE*, supra note 37, para 140, fn 189.

[93] VCLT (n 33) art 34. Admittedly, 'assent' to rights in Article 36(1) is weaker than 'expressly accepts that obligation in writing' in Article 35, but they are both expressions of consent.

[94] Particularly if the theory of collateral agreement is adopted, n 34.

[95] I am grateful to Greg Simms for bringing my attention to this problem.

[96] *Territorial Jurisdiction of the International Commission of the River Oder* (*UK, Czechoslovakia, Denmark, France, Germany and Sweden v Poland*) (Order) [1929] PCIJ Rep Series A 23 42.

[97] Le Bouthillier Y., 'Article 32 (1969)' in Corten and Klein, supra note 36, at 856.

[98] Ibid.

[99] *HICEE*, supra note 37, para 140; *HICEE* Brower, supra note 88, para 33.

suggesting that the backdrop of the law of third parties is very much influencing the interpreters, at least for the particular purpose.

3.4. Interpretation and law-making and investors' practice

It is clear that, as a practical matter, investors play an important procedural role in investment arbitration. It is less clear whether the practical importance also leads to or signifies direct legal influence. If investors' conduct and pleadings could be considered as relevant for the purpose of identifying treaty and customary law, it would call for an analysis of a qualitatively different level, also impacting the perception of rules of interpretation. Vaughan Lowe has posed the question in the following terms:

> If, for example in the course of US-Mexican claims concerning the treatment of the property of foreign nationals, claims are put forward and accepted by States, we say that the process – to the extent that it reflects and international consensus, at least – generates customary international law. Why should we not say so if the claim is made or accepted in the course of dealings between companies and States?[100]

One might pose further questions of a similar kind: could pleadings by investors contribute to customary international law and to subsequent practice for interpretation of particular treaties? For example, if 80% investors bringing claims against Argentina on the basis of US-Argentina BIT argue that the non-precluded-measure clause in Article XI has to be interpreted narrowly, would these pleadings themselves contribute to interpretation of the treaty as consistent and concordant practice? And what if 95% of all investment treaty claims argue that fair and equitable treatment requires the respect for legitimate expectations as a matter of customary law: would that count as widespread practice, similarly to the way how one would perceive a position by 95% of States? There might also be non-litigation practice by investors relating to particular concepts: for example, could the 'standard practice accepted by governments, lenders and other equity investments to include the sponsors' development expenditures in the investment cost' contribute to the meaning of 'investment' under the ICSID Convention or particular

[100] Lowe A.V., 'Corporations as International Actors and Law Makers' (2004) 14 *Italian Ybk Intl* L 23, at 24.

investment protection treaties?[101] To consider a yet different example, one imagines that a joint position of OECD or EU members on the meaning of investment protection obligations in their treaties or customary international law would have considerable impact in both settings. Could a similar position by the US Chamber of Commerce, expressed as a standard form for describing the legal content of obligations allegedly breached (e.g. that 'fair and equitable treatment requires the respect for legitimate expectations of investors'), have a similar effect, particularly taking into account the large proportion of US investors among claimants?

The present argument is a consciously narrow one. One might ask and answer not dissimilar questions without leaving the four corners of traditional sources.[102] One might also consider whether other seemingly peculiar characteristics of investment law, like its bilateral form and decentralised adjudication, require or lead to special interpretative rules.[103] This argument considers only the law-making capacities of investors as non-making actors and only from the three comparative perspectives. The human rights perspective would require a negative answer. Human rights courts have stressed the specialty of interpretation of human rights treaties, but the rationale for that is derived from the structure and purpose of human rights treaties, rather than from the law-making role of the individuals enjoying or claiming protection.[104] Or, to put it differently, the importance of individuals resides not in their law-making status but in the nature of rights that law-makers have created for their benefit. Holding individual rights under international law without more does not grant particular law-making powers to the beneficiary.[105]

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[101] *Mihaly International Corporation v Sri Lanka,* ICSID Case no ARB/00/2, Award, 15 March 2002 para 34. The *Mihaly* Tribunal limited its consideration to 'the current and past practice of ICSID and the practice of States as evidenced in multilateral and bilateral agreement binding on states', ibid., para 58, rejecting the argument.

[102] E.g., one might answer Lowe, supra note 100, by saying that an acceptance by US of claims by Mexican nationals and similar acceptance of Mexico of claims by US nationals is identical to acceptance of inter-State claims, since the procedural motivation of practice and *opinio juris* do not affect their content and law-making potential. One might also describe the argument by the investor in *Mihaly* (cited at supra note 101), as either similarly focusing on the practice of States, whatever the rationale for its formation, or as searching for the ordinary meaning of the term reflected in its technical usage.

[103] I am sceptical about the claim that special rules of interpretation of investment treaty law have emerged or been created, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment*, supra note 11, at 141-53.

[104] Christoffersen, supra note 91.

[105] Kohen singles out human rights and investment treaties as examples for the proposition that '[t]he practice that really counts is that of the *parties* to the treaty. Private actors' conduct can serve as a catalyst', Kohen M., 'Keeping Subsequent Agreements and Practice in Their Right Limits' in Nolte, supra note 52, at 41 (emphasis in the original), also at 42. Even arguments to the contrary accept that a fairly fundamental rethinking of traditional doctrine would be required, Ochoa C., 'The Individual and Customary International Law Formation' (2007) 48 *Virginia J Intl L* 119, particularly at 151-64; Roberts A. and

Somewhat counter-intuitively, both diplomatic protection and third party perspectives are more open to a law-making role of individuals than human rights, if for very different reasons. If the investor invokes responsibility on behalf of the home State under the delegated diplomatic protection, and if agents in general are able to change the legal relations of the principal 'as if [acts] had been personally performed by the latter',[106] one might say that, within these procedural limits, the investor's pleadings should have the same impact on interpretation of treaties and development of customary law as if they 'had been personally performed by' the home State. The practical implications of the argument may seem sometimes odd: necessarily divergent arguments by different US investors under different US BITs, as well as sometimes explicitly contradictory arguments of US and its investors in particular cases under NAFTA and DR-CAFTA would have to be explained. Still, these are objections that are properly read as relating to the weight of practice. Even in the traditional scheme of sources, a State's position may differ between different fora, different points in time, and different organs of the State, and may be expressed with different degrees of clarity. In the third party model, it is plausible to suggest that the third State would contribute to treaty interpretation in the exercise of its rights. For example, if a bilateral treaty gives a right to a third State to pass through a canal, the practice of the State exercising the right would be likely to be counted as interpretative practice, and its consent would probably be required for an agreement on interpretation, particularly if the third State's right is viewed as established by a collateral agreement.[107] Overall, different readings of the interpretative role of investors highlight investment law from a slightly counter-intuitive angle: unless the traditional framework of sources is reconceptualised to include individuals in the law-making process, such powers have to be derived from States, whether by tying the investor back to its home State or removing it from it so strongly as to analogise it to a third State.

3.5. Law-making and the treaty-making by States

Investment protection treaties traditionally provide investors with important substantive and procedural guarantees, and also safeguard them from the effect of unilateral

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Sivakumaran S., 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 *Yale J Intl L* 107, particularly at 149-51.

[106] Sereni A.P., 'Agency in International Law' (1940) 34 *AJIL* 638, at 655.

[107] The response to Kohen, supra note 105, would therefore be that third parties are, for the particular purpose, parties to the treaty.

termination, in particular by providing a so-called 'tail' period of maintaining the protection of a unilaterally terminated treaty.[108] It is less obvious whether investors also have protection from States acting jointly in the amendment or termination of the treaty.[109] The changes could favour particular States, for example by limiting or even fully removing particular substantive obligations. However, similar conceptual questions would be raised by more constructive changes: for example, if States want to create a permanent judicial body to which they can transfer future treaty claims with some substantive and procedural modifications. There is limited State practice that touches upon these issues: reportedly, some States have mutually terminated bilateral investment treaties after first amending them to remove 'tail' periods;[110] while the 2006 Softwood Lumber Agreement between Canada and the US not only settles the pending claims with investors but also deals with prospective challenges at the level of suspension of investor–State arbitration.[111] Again, the question for the present purpose is posed in consciously narrow terms: it does not look at the technical law of treaties aspects of the particular arrangements;[112] it does not consider the treatment of rights arising out of breaches that have already occurred (because these are matters of State responsibility rather than the existence of primary rules, see infra 4.3.); and it considers the question solely in terms of the comparative argument. The diplomatic protection perspective may be disposed of briefly: for its purposes, international law becomes concerned with the investor only when the breach of the treaty takes place and the inter-State right to invoke responsibility is delegated to the investor; before that, the existence and content of primary rules, from which the investor may factually benefit in the future, can be of no concern to it.

One might expect the human rights perspective to be more promising for the investor. Still, it seems that joint modification and termination of treaty rules is not

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[108] E.g., for 10 years: Caplan L. and Sharpe J., 'United States' in Brown C. (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) at 820; for 20 years: Banifatemi Y. and von Walter A., 'France', ibid., at 286; Dolzer R. and Kim Y.-I., 'Germany', ibid., at 318.

[109] Van Aaken suggests that amendment, withdrawal, and termination are always available, whoever might be protected by the treaty regime, in this volume, Van Aaken A., 'Control Mechanisms in International Law', at ... .

[110] Investment Arbitration Reporter, 'Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protection for Existing Investments' 1 February 2011 <www.iareporter.com>.

[111] Canada–US Softwood Lumber Agreement <www.international.gc.ca/controls-controles/assets/pdfs/softwood/SLA-en.pdf> (adopted 12 September 2006), Arts. X(1)(a), XI(2).

[112] E.g. whether the pre-termination amendment of the 'tail' clauses was superfluous because the clauses were meant to apply to unilateral terminations only, supra note 110, and whether a multilateral investment protection treaty is sufficiently bilateralisable that two States can suspend investor-State dispute settlement mechanism *inter se* without the involvement of the third State party, supra note 111.

affected by the conferral of individual rights by those rules.[113] The convoluted process by which the South African Development Community is winding down the individual-State claims procedure of its Court (seemingly riding roughshod over some of the relevant rules regarding amendments and judicial independence)[114] makes a clear legal evaluation complicated. Still, the right of States to collectively suspend the operation of human rights courts in principle – as opposed to the policy wisdom of such a choice in the particular circumstances – does not seem to have been challenged. Another example is provided by the House of Lords judgment in the *Al-Jedda* case where the obligation under Article 103 of UN Charter (to comply, *in casu*, with a UN Security Council Resolution),[115] was found to prevail over human rights obligations of Article 5 of the European Convention of Human Rights ('ECHR'), despite the individual human rights granted by that provision.[116] The House of Lords in *Al-Jedda* viewed ECHR as suspended through the procedures provided in a pre-existing agreement, while the 2006 Softwood Lumber Agreement was suspended by an *ad hoc* agreement, but the legal principle underlying both operations is the same. Investment protection treaties read through the lenses of international human rights could therefore provide little protection to investors from prospective amendments.[117]

The third party argument is most promising to the investor, even if its contours are, for a number of reasons, quite blurred. Article 37(2) of VCLT provides that 'the right [of the third State] may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State'. If the proviso of the second half of the sentence is established, then consent of the third party is necessary, and the right of the third State to pass through a

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[113] The situation is less clear regarding unilateral termination of human rights treaties, Tyagi Y., 'The Denunciation of Human Rights Treaties' (2008) 70 *BYBIL* 86, but the present inquiry is directed solely at joint amendments and terminations. I am grateful to Lawrence Hill-Cawthorne for pointing out the possible relevance of the treatment of human rights treaties in State succession context for other types of comparative argument.

[114] Cowell F., 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13 *Human Rights L Rev* 153, at 161-4; de Wet E., 'The Rise and Fall of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) 28 *ICSID Rev – Foreign Investment L J* 45, at 47-8, 58.

[115] See generally Tzanakopoulos A., *Disobeying the Security Council* (Oxford University Press, 2011) 74-6.

[116] *R (on the Application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 para 26-39 (Lord Bingham), 115-8 (Lord Roger), 125-9 (Baroness Hale), 131-6 (Lord Carswell), 151-2 (Lord Brown). The ECtHR rejected the interpretation of the Resolution in question by the House of Lords, finding that the ECHR and SC Resolutions were not in conflict, therefore it did not reach the stage of applying Article 103 to resolve the conflict; still, it did not suggest that individual rights derived from primary rules could survive the prevailing over them of other primary rules, *Al-Jedda v UK* (App no 27021/08) [GC] (2011) ECHR Reports 2011 para 100-106; ibid., Partially Dissenting Opinion of Judge Poalelungi; also *Nada v Switzerland* (App no 10593/08) (App no 10393/08) [GC] (2012) ECHR Reports 2012 para 171-2, 175-97; *Stichting Mothers of Srebrenica and Others v the Netherlands* (App no 65542/12) (2013) ECHR 11 June 2013 para 145.

[117] Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 342.

canal (to return to the example considered before) may be revoked or modified only by the consent of that third State. By analogy, an amendment removing the 'tail' period of a treaty or a suspension of prospective right to investor-State arbitration could affect the rights of an investor only after their consent. In a modified *Al-Jedda* example, prevalence of a SC Resolution over a treaty would not revoke or modify rights of third States on the basis of that treaty (provided, of course, that for the sake of this example the third State is not a member of UN itself, since Article 103 would then prevail over those rights as well).

The ambiguity of the argument by analogy appears at two levels. The benchmark in the law of treaties is not very clear: in an attempt to balance conflicting considerations of providing solidity and firmness to third parties' rights and not discouraging States from creating such rights, and in the absence of pertinent State practice and case law, the International Law Commission ('ILC') and Vienna Conference formulated the rule on the basis of logic and policy, leaving open the question about its customary status.[118] The wavering (between a presumption against revocability in the first drafts and a presumption in favour of revocability in the final ILC draft and VCLT)[119] suggests the absence of any structural or principled reasons for resolving the policy tension in precisely this way that should be attributed broader relevance. Secondly, even if the VCLT presumption in favour of revocability is adopted, the decisive question is whether it has been rebutted by 'the terms or nature of the treaty provision' or 'an agreement or understanding' with the third party.[120] An agreement with a particular investor or even a general promise to all investors by a State that a treaty will not be amended may rebut the presumption as 'an agreement or understanding'. 'The terms or nature of the treaty provision' in investment law might conceivably support both sides of the policy argument: on the one hand, without firmness and stability of investors' rights the teleology of reciprocity between investment protection and investment flows could hardly be fulfilled; on the other hand, an excessive emphasis on immutability of investors' rights could discourage the creation of these rights in the first place, particularly in light of the increasing appreciation of how nuanced policies might be expressed in importantly different treaty terms, sometimes significantly changing during the operation of the treaty.

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[118] D'Argent 'Article 37', supra note 36, at 944-6.
[119] 1966 ILC Articles, supra note 36, Art. 33(2) at 230 para 4; D'Argent 'Article 37', supra note 36, at 944.
[120] 1966 ILC Articles, supra note 36, Art. 33(2) at 230 para 4.

IV. ANALOGIES: STATE RESPONSIBILITY

The whole corpus of the law of State responsibility could be subject to a comparative analysis from the perspective of investment protection law. With considerable arbitrariness, this section focuses on a number of case studies that highlight the variety of ways how secondary rules of State responsibility for the breach of investment protection obligations interrelate with these primary rules and procedures for settling investment disputes.[121] The argument will be made in three steps: first, two circumstances precluding wrongfulness that may raise particular challenges for investment law – consent and countermeasures – will be considered (4.1.); secondly, the content of State responsibility will be dealt with (4.2.); thirdly, waivers of responsibility will be addressed (4.3.). These case studies highlight three distinct aspects of the legal challenge: one might expect that the existence of State responsibility would not be affected by the entity invoking responsibility, but circumstances precluding wrongfulness show how that perspective may become very important; equally, one might expect that the without-prejudice expression of content of inter-State responsibility regarding available reparations would make the perspective of the investor very important but it has been almost irrelevant; finally, the rules on waivers show the complexity of synchronising the impact of treaty and secondary rules on the issue where the comparative perspective is necessary but not sufficient.

4.1. Circumstances precluding wrongfulness: consent and countermeasures

In the 2001 Articles on State responsibility ('2001 ILC Articles'), the ILC chose to approach the existence of international responsibility solely from the perspective of attribution and breach, leaving fault and damages to primary rules and injury and invocation to implementation of responsibility. A plausible proposition would therefore be that the determination of the internationally wrongful act of the State is entirely unaffected by the identity of the beneficiary of the obligation.[122] However, circumstances precluding wrongfulness do raise some interesting questions. This section will in turn

[121] I have discussed the issue at greater length elsewhere, therefore will be relatively brief and sparing with footnotes in this section, for the full argument see Paparinskis 'Investment Treaty Arbitration and the (New) Law of State Responsibility', supra note 9, at 627-46.

[122] Crawford J., 'International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration', in Hofmann R. and Tams C. (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos, 2011) at 25.

consider consent and countermeasures (other aspects of circumstances precluding wrongfulness, particularly necessity, despite the controversy surrounding interpretation and application, do not seem to be affected by the nature of the entity invoking responsibility[123]).

A valid consent to the commission of a given act precludes wrongfulness of that act.[124] One might consider the relevance of consent given by two entities: the investor and its home State. Whatever view one takes of the legal nature of the investor more broadly, the primary rule in question may already take into account consent by an individual. The commentary to the 2001 ILC Articles makes the point by reference to human rights law,[125] and State responsibility for mistreatment of investors has sometimes been based on duress by the State in concluding contracts with the investor.[126] In these cases, validity of consent operates as an element of primary rules and is unaffected by the nature of the entity invoking responsibility.[127] Moving further and considering the comparative argument, the position of human rights law would probably limit the role of consent to that accepted by the particular primary rule.[128] The *SGS v Philippines* Tribunal has stated that '[i]t is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law'.[129] If the investor engages in delegated diplomatic protection, it cannot exercise consent as a circumstance precluding wrongfulness: primary obligations are owed only to the home State, and the procedural rights of the investor to invoke responsibility arise only when a (properly) wrongful breach has taken place. From the third party perspective, it is plausible to suggest that a third State, capable of possessing a right to consent to a revocation or modification of rights under Article 37 of the VCLT as a matter of primary rules, would *mutatis mutandis* or even *a fortiori* be entitled to provide consent to preclude wrongfulness. The same argument

123 In his critical analysis of the awards regarding necessity invoked by Argentina, Kurtz focuses on the excessive reliance on customary law in the interpretative process, and does not seem to suggest that the individual perspective raises a particular challenge, see in this volume, Kurtz J., 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' at ... .

124 2001 ILC Articles, supra note 27, Art. 20.

125 Ibid., Art. 20 Commentary 10.

126 *Desert Line Projects LLC v. Yemen,* ICSID Case no ARB/05/17, Award, 6 February 2008 para 148–94.

127 See references to the old cases on the basis of diplomatic protection that identify the same legal rule: ibid., para 172–3.

128 The ECtHR has concluded that a waiver of the right to fair trial is possible: *Idalov v Russia* (App no 5826/03) [GC] (2012) ECHR Judgment of 22 May 2012 para 172, while of the right to be subject to discrimination on the basis of sex and race is not: *Konstantin Markin v Russia* (App no 30078/06) [GC] (2012) ECHR Rep 2012 para 150. It is complicated to derive much from this practice that would not circularly lead back to the particular primary rule in the particular regime.

129 *SGS II*, supra note 25, para 154.

would apply to an investor. For the purposes of consent, the direct rights and agency models would lead in a different direction from the third party rights.

The home State might also wish to exercise consent as a circumstance precluding wrongfulness, for example, in the context of a broader settlement of disputes with the host State or because it does not wish to see a certain issue subject to formalized dispute settlement. If the investor is only an agent of diplomatic protection, then consent would successfully preclude wrongfulness: the primary obligation is owed only to the home State and the investor has no rights before the breach has taken place. If the investor is a right-holder or a third party beneficiary, then consent may be opposable to its home State but not to itself. The 2006 Softwood Lumber Agreement leaves the question open, the investors settling the pending claims but not consenting to the lawfulness of any future conduct.[130]

A different legal challenge is raised by an attempt by a State to preclude wrongfulness for the breach of an investment treaty by characterizing it as a countermeasure in response to an anterior breach by a home State[131] (saying e.g. that discrimination of investors is not wrongful because it is taken in response to a wrongful act by the home State of the investors). The argument against the application of countermeasures may be expressed in a variety ways, including *lex specialis*, peremptory rules, analogies with humanitarian law, substantive importance of the rights, structure of obligations, and, importantly for the present purpose, nature of rights. The arguments other than the last one will not be considered here.[132] It is suggested that even though the host State may in principle apply countermeasures to investment obligations, their effect and limits depend on the nature of the investors' rights. Countermeasures are relative in effect and may not be adopted otherwise than in response to a prior breach of international law by the entity to which the obligation is owed. From the perspective of delegated diplomatic protection, the host State owes primary obligations only to the home State, and the investor only invokes responsibility for their breach; consequently, countermeasures can be successfully opposed to the only beneficiary of the obligation and can in principle successfully preclude wrongfulness, provided that other criteria are satisfied.[133] However, if the investor is also the beneficiary of the obligation (whether akin to a third party or as

[130] See supra note 111.
[131] *ADM,* supra note 44, para 110–80; *Corn Products International, Inc v Mexico*, ICSID AF Case no ARB/(AF)/04/1, Decision on Responsibility, 15 January 2008 para 144–91; *Cargill, Inc v Mexico,* ICSID AF Case no ARB/(AF)/05/2, Award, 18 September 2009 para 410–30.
[132] See Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 317–51.
[133] *ADM,* supra note 44, para 110–80. On the substantive and procedural requirements of countermeasures see 2001 ILC Articles, supra note 27, Arts. 51–53.

an entity with direct rights), then the precluding wrongfulness of countermeasures, while opposable to one beneficiary (the home State), is not opposable to the other beneficiary (the investor).[134] The ILC's work on countermeasures and human rights in the context of obligations not subject to countermeasures supports the view that in the particular context non-State actors that are beneficiaries of the obligations may be appropriately analogized to third States.[135] For countermeasures, the direct and third party rights lead to a different conclusion from the agency model.

4.2. Content of international responsibility of a State

Part Two of the 2001 ILC Articles explicitly deals with responsibility directly accruing to non-State actors by providing, in Article 33(2), a rule of no prejudice. If one were to try to predict the elaboration of the law of remedies from the perspective of 2001, it would be plausible to rely on Article 33(2) to expect careful analysis of whether, how, and to what extent the remedies expressed in Part Two could be applied in the investor–State setting.[136] However, the post-2001 practice has proceeded in an entirely different direction. Article 33(2) is rarely invoked in the consideration of the content of State responsibility to investors. The rules and principles laid out in Part Two are in most instances relied on directly and without an obvious acknowledgment that the without-prejudice rule calls for some additional legal justification. To consider only one of many examples, the US$ 1.7 billion award in *Occidental v. Ecuador* quantified damages on the basis of a 25 per cent contribution to the injury by the investor, in accordance with Article 39.[137] The question is how one can square the commonplace invocation and application of the rules of inter-State responsibility from Part Two with the at best neutral attitude called for by Article 33(2) for cases of State responsibility to non-State actors. One might suggest a number of possible explanations, both from the comparative perspectives and by considering other techniques of legal reasoning.[138]

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134 *Corn Products*, supra note 131, para 153–91; *Cargill*, supra note 131, para 420–30.
135 Paparinskis 'Investment Arbitration and the Law of Countermeasures', supra note 9, at 331-4.
136 Crawford J., 'Similarity of Issues' in Banifatemi Y. (ed.), *Precedent in International Arbitration* (New York: Juris Publishing, 2008) 97, at 100.
137 *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Ecuador,* ICSID Case no ARB/06/11, Award, 5 October 2012 para 665–8, 673.
138 I have explained elsewhere why the traditional reading of sources, according to which judgments and awards may elaborate, but not create, rules of international law, is the correct position also regarding investment arbitration, Paparinskis *The International Minimum Standard and Fair and Equitable Treatment,* supra note 11, at 120-53. For a contrary view, see in this volume, Grisel F., 'Sources of Foreign Investment Law', at ... .

First, technically the most accurate explanation would be to rely on the agency approach and to say that investor–State arbitration is not an invocation of State responsibility by the beneficiary of the particular primary rule but a delegated and modified exercise of diplomatic protection. If that is the case, Article 33(2) would not be relevant because the rights would accrue only to the home State, and the inter-State rules on responsibility laid out in Part Two of the 2001 ILC Articles would be delegated and apply directly. In schematic terms, if a rule is formulated as 'if A, then B; but if C, then without prejudice to B', then direct application of B without any additional legal reasoning suggests that the first part of the legal rule set out above is in play. Another explanation might view this practice as implicitly supporting the third party rights perspective, drawing on the regime of States and international organizations so broadly as to also rely on their remedies. Finally, from the direct rights perspective, one might note that the ECtHR has also drawn upon the exposition of remedies in ILC Articles, with just as little attention to the without-prejudice clause of Article 33(2) as investment Tribunals.[139] All three perspectives may support the wholesale application of remedies, with the first technically uncontroversial but probably not reflecting the thinking of Tribunals, and the latter two far-reaching both in scope and implications.

Secondly, one might explain the prevalent practice by reference to other legal techniques. Certain aspects of the content of responsibility follow automatically from the wrongfulness of conduct even without invocation. Articles 29 and 30 set out the obligations of, respectively, the continued duty of performance and, importantly for our purpose, of cessation of the continuing wrongful act. In some cases, cessation may seem very similar to restitution;[140] still, it would not be helpful for justifying clearly compensatory remedies. Another argument is that remedies discussed in Part Two are derived from the illegality of the act rather than the nature of the beneficiary of the obligation, and therefore are applicable with equal force in any context (including investor–State arbitration) where consequences of a breach of international law by a State are considered.[141] The practice of the ECtHR[142] and the 2012 judgment of the ICJ on compensation in the *Diallo* case are consistent with this proposition from the opposite perspectives, the latter judgment relying *inter alia* on the practice of international courts

[139] *Guiso-Gallisay v Italy* (App no 58858/00) [GC] (2009) ECHR 22 December 2009 para 53.
[140] 2001 ILC Articles, supra note 27, Art. 33 Commentary 7.
[141] The famous sentences on State responsibility from PCIJ are consistent with this proposition, *Factory at Chorzow (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17 47.
[142] The ECtHR has relied on *Chorzow,* the Articles, and mixed arbitrations to formulate its remedies, particularly regarding restitution: *Guiso*, supra note 138, para 49–54.

with individual access 'which have applied general principles governing compensation' to elaborate the rules on compensation in an inter-State diplomatic protection case.[143]

A different way of articulating the argument would employ analogy, taking the expression of rules in the ILC Articles as the benchmark for, as it were, a normal and natural regime of responsibility, and would consider whether there is a reason not to apply it beyond inter-State responsibility. This type of argument might be equally valid under all comparative perspectives, but it also might sometimes presuppose a certain structure of rights (for example, the approval of application of the rules on contribution by analogy in the *MTD v Chile* annulment decision would seem to depend on the contribution by the beneficiary of the obligation, possibly not satisfied if obligations run only on the inter-State level).[144] Finally, even if some aspects of transposition of remedies were questionable, of importance is the lack of objections by States: the widespread and consistent failure of States to challenge the extension of (particular) inter-State remedies, whether by invoking their standards directly, complying with them, or even failing to comply with them without a specific challenge, could provide the law-making seal of approval to the possibly suspect elements of practice of the last decade. The rules on remedies demonstrate the complexity of legal reasoning regarding State responsibility, weaving together comparative perspectives with a variety of interrelated arguments about the scope of customary rules and determination of their content by analogy.

4.3. Waiver of State responsibility

The loss of the right to invoke responsibility may be considered on two levels: loss of the investor's right to invoke responsibility, and the ability of the State to affect the right of its investor to invoke responsibility. The investor's right to waive its right to invoke responsibility may be further considered in two contexts: more generally, as a right to waive treaty rights; and, more particularly, regarding contractual rights and exclusive choice of forum, especially in cases on umbrella clauses.[145] The cases on umbrella clauses raise special questions about the scope and methods of determination of the underlying

[143] *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 000 para 13, 18, 24, 33, 40, 49, 56; ibid., Declaration of Judge Yusuf 12–5; ibid., Declaration of Judge Greenwood para 8–9.
[144] *MTD Equity Sdn Bhv. and MTD Chile SA v. Chile*, ICSID Case no ARB/01/07, Decision on Annulment, 21 March 2007 para 99.
[145] See the summary of case law in *SGS Société Générale de Surveillance SA v. Paraguay*, ICSID Case no ARB/07/29, Decision on Jurisdiction, 12 February 2010 para 177–81.

contractual obligation. Since the benchmark is set either by the primary obligation of umbrella clauses or by admissibility objections, it does not seem that the perspective of investors' rights would affect the analysis, whether the investor is the beneficiary of the obligation or merely an agent. Indeed, a leading decision on the issue relied on the diplomatic protection cases regarding contracts with exclusive jurisdictional clauses.[146]

It seems that no Tribunal has so far decided directly the more general question whether an investor can waive a treaty right, even though there are indications both in favour[147] and against such a right.[148] If the investor's rights are direct, one might be inspired by the rules on human rights, and be cautious at least about prospective waivers of rights within the regime created to protect individuals subject to it. Conversely, settlement, reflecting genuine and informed consent and perhaps even taking into account broader systemic implications on investment protection of the State's conduct, would be possible.[149] If the investor is a beneficiary of treaty rights in favour of third persons, the right of waiver would be perfectly unproblematic. The VCLT regime on the creation of rights in Articles 34, 36, and 37 protects the third State from the creation or modification of rights without its consent but in no way limits the right of the third State to cease benefiting from its rights.[150] Finally, if the investor acts as an agent, one might be tempted to accept its right to waive the procedural rights, both in light of what has been suggested to be the general principle of agency in international law[151] and because the underlying rationale of the regime would be to protect individuals not as subjects but as mere objects of protection.

A narrower question relates to the right of the State to affect the investor's right to invoke responsibility, whether by settling a particular arbitration on the inter-State level, or, in more positive terms, transferring existing treaty claims to another adjudicative body. The perspective of investors' rights may again be useful. If the investor's rights are direct, then the basic proposition that a person can waive its own rights but not the rights of a third person would preclude the home State from waiving its nationals' rights. If the

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146 *SGS II*, supra note 25, para 150–52.
147 *Aguas del Tunari SA v Bolivia,* ICSID Case no ARB/02/03, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 para 118.
148 *SGS II*, supra note 25, para 154.
149 ECtHR cases regarding the role of consent in the application of primary human rights obligations, supra note 128, that emphasize the necessity for informed consent with foreseeable consequences and procedural safeguards, are applicable *a fortiori* to waiver of claims under settlement, where the Court additionally reviews whether the settlement is based 'on respect for human rights': *Broniowski v Poland* (App no 31433/96) [GC] (2005) ECHR Rep 2005-IX para 33 ff.
150 1966 Draft Articles, supra note 36, Art. 33 Commentaries 2, 4; D'Argent 'Article 36', supra note 36, at 938; D'Argent 'Article 37', supra note 36, at 946.
151 Sereni, supra note 106, at 660.

investor is a beneficiary akin to a third State, then one may need to return to the somewhat ambiguously expressed rule on revocation or modification of rights in Article 37(2) of the VCLT discussed above,[152] applying it more broadly to secondary rules arising out of the breach of the primary rights of third parties. The Softwood Lumber Agreement again leaves the question open, with the investors settling the pending claims and States suspending investor–State arbitration in prospective terms.[153] Finally, if the investor is an agent, the argument for the residual capacity of the principal to revoke its authority is at its strongest, although the creation of compulsory arbitration might again limit the residual dispositive rights. It would seem that while the perspective of investors' rights provides an important starting point of analysis, the formulation of the treaty rules may be as important in reversing presumptions or restricting residual dispositive rights.

V. CONCLUSION

This chapter has attempted to spell out the contours of two propositions about investment law: first, its delightful systemic complexity may be explained as flowing from a position at the centre of a normative triangle, the three corners of which are occupied by well-established regimes, upon each of which investment law partly draws; secondly, the challenge of explaining investment law is by no means unique in its complexity in the broader perspective of international law, and in fact is precisely what international law should be able to deal with, in a conceptually (even if not technically) mundane and unremarkable manner. The argument has been presented in three parts. Section II formulated the theoretical perspective, suggesting that the corners of the triangle are taken by international human rights law, law of third parties, and law of diplomatic protection, each having a plausible claim for being the most appropriate systemic analogy. Sections III and IV applied the theoretical perspective to practical case studies, exploring whether and how different analogies lead to importantly different results in practical application of rules of interpretation, law-making, and State responsibility.

The scope of the chapter is limited, and the examples considered necessarily selective. At this point, it is not possible to do more than note that the suggested taxonomy of analogical reasoning may illuminate other questions facing investment law, for example the imposition of international obligations. If the investor–State regime borrows its structure from the human rights regimes, one may feel cautious about using

[152] At 3.5.
[153] Canada–US Softwood Lumber Agreement, supra note 111.

it to impose international obligations on the entity bearing rights. A systemically more appealing solution would be to articulate possible concerns in terms either of jurisdiction (definition of investment) or admissibility (abuse of process), or primary rules (particular criteria or exceptions). One might respond with a similar intuition if the investor–State regime were to be based on an agency of diplomatic protection: if the primary rules ran solely between States, it would be odd to create a primary rule to bind an actor whose only connection with the regime was to be an agent for the exercise of a secondary right. Conversely, from the perspective of third parties, the imposition of the obligation is entirely unremarkable in conceptual terms, to the extent that the consent is provided in an appropriately express form.[154] Debates about human rights obligations of corporations have been informed by not dissimilar assumptions about a possible connection between State-like power, increasingly wielded by corporations, and international responsibility. [155]

The overall thesis is that the conceptual perspective of plausibly different readings of the genealogy of foundational structures of investment law is very important, but needs to be applied with subtlety: sometimes all the perspectives point in the same direction; sometimes they do not; sometimes they do but for very different reasons; and, in any event, a diligent application of such traditional techniques of legal reasoning as interpretation, resolution of conflicts, and analogies is just as important for reaching the right legal result. While generalisations may be misleading, each analogy comes with its own internal systemic logic: for example, international human rights would bring in comparative public law but would not protect against changes of primary rules by law-makers; diplomatic protection would be subject to countermeasures but could significantly affect the development of treaty and customary law; and third parties might object to re-interpretation and treaty amendments but might provide consent to preclude wrongfulness. To an extent, it is not terribly controversial or unexpected to suggest that a sustainable system will not exclusively favour a narrow set of stakeholders, and important rights and remedies are likely be balanced with restrictions and obligations expressed elsewhere. Still, the sometimes excessive focus on narrow comparative arguments, thought to favour only particular interests, makes the repeated emphasis on systemic

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[154] See VCLT, supra note 34, Art. 35; Laly-Chevalier C., 'Article 35', in Corten and Klein, supra note 36, at 907–914.

[155] E.g. Ratner S., 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale J Intl L* 442, particularly at 461-5, 506-22; Vásquez C., 'Direct vs. Indirect Obligations of Corporations under International Law' (2004-2005) 43 *Columbia J Transnational L* 927, particularly at 947-58; Ruggie J., 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *AJIL* 819, at 824-7; Knox J., 'Horizontal Human Rights Law' (2008) 102 *AJIL* 1, at 40-43.

balance underpinning all comparative arguments of systemic nature important.[156] To conclude, there are many directions in which the argument about investment law may be taken; the modest point made by this chapter is that the conceptual challenges faced by the 'brave new world' of investment arbitration may be illuminated by the solutions of the regimes that formed the background for its creation.[157]

[156] Alvarez J., 'Are Corporations "Subjects" of International Law' (2011) 9 *Santa Clara J Intl L* 1, at 23-34.
[157] Crawford 'Continuity and Discontinuity in International Dispute Settlement', supra note 41, at 3–4, 24.