A NEW STRATOSPHERE? INVESTMENT TREATY ARBITRATION AS 'INTERNATIONALIZED PUBLIC LAW'

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Abstract The idea of investment treaty arbitration as public law is in tension with the concept of international law as a law between representative public agencies. This concept of international law is valuable for its capacity to progress a broad range of public policy aims in an integrated and coordinated manner, including aims extending beyond the economic sphere such as international social, environmental, cultural and related aims. The probable effect on this concept of international law of a radical 'internationalized public law' approach to investment treaty arbitration requires further thought, especially with regard to the potential implications of recognizing investor rights under international law.

Keywords: comparative public law, compensation, international public law, investment treaty arbitration, investor rights, public law, remedies, reparation, State responsibility.

I. INTRODUCTION

Contemporary international economic law and theory encourage and support international commercial private actors' freedoms to invest, disinvest, repatriate capital, buy and sell goods and services, employ, navigate, exploit communal resources, and take business decisions.[1] The advancement of these freedoms through investment protection treaties numbering in their thousands has been a phenomenon of our times.[2] Unique dispute settlement provisions in these treaties have produced a distinct new field of international legal practice: investment treaty arbitration. The practical success of

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[1] TW Waelde 'A Requiem for the "New International Economic Order": The Rise and Fall of Paradigms in International Economic Law' in G Hafner *et al*. (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honor of his 80th Birthday* (Kluwer Law International 1998) 771, 776.

[2] A network of over 3,000 treaties protects and promotes foreign investment, as observed by Zachary Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in P-M Dupuy and JE Viñuales (eds), *Harnessing Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP 2013) 415. Compare this with ten years previously, when Douglas referred to the figure of approximately 2000 treaties. Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYBIL 150, 159. See also A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 57.

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investment treaty arbitration is evidenced by the major acceleration in the volume of arbitrations in the past two decades. Grounded in treaties, this remarkable new field of law involves processes, concepts and expertise from commercial practice and public international law, as well as evoking striking resonances from the fields of public and administrative domestic law. The blended commercial and international legal heritage of investment treaty arbitration is widely recognized,[3] and there is a sense that this new field has still to discover its proper orientation.[4]

The new literature that has advanced public law perspectives on investment treaty arbitration since the turn of the century has been invaluable in generating an awareness around the world that investment disputes with host States are public in character.[5] Even if at one and the same time these disputes are deeply commercial matters, they revolve around the fundamental question of the acceptable exercise of governmental authority.[6] The momentum behind the realization that investment treaty arbitration is, profoundly, an exercise in *public* law must be carried forward. A public law approach will help us understand better the nature, scope and importance of host States' regulatory authority and help us to assess accountability and associated issues in investment treaty arbitration.

However, it must be remembered that investment treaty arbitration is also an exercise in *public international* law. Although scholarly writing acknowledges quite clearly that investment treaty arbitration is a public international law matter,[7] too frequently the fundamental character of investment treaties as inter-State agreements fades into the background.[8] The primary purpose of international investment law is often expressed as being investor protection, rather than with reference to the underpinning public purpose of economic and social development for participating States' peoples and

[3] Douglas, 'The Hybrid Foundations' (n 2); R Hofmann and CJ Tams, 'International Investment Law: Situating an Exotic Special Regime with the Framework of General International Law' in R Hofmann and CJ Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systematic Integration?* (Nomos 2011) 9.

[4] A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45.

[5] G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009); A Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 97; SW Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Role of the Arbitrator' (2010) 23 LIJL 401; SW Schill, 'International Investment Law and Comparative Public Law: An Introduction' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); SW Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) VaJIL 57.

[6] Van Harten (n 5) 4, observing that 'the system's crucial importance is that – unlike any other form of international arbitration – it is a method of public law adjudication, meaning that it is used to resolve *regulatory* disputes between individuals and the State as opposed to reciprocal disputes between private parties or between States.' Emphasis original.

[7] See for instance Van Harten (n 5); Schill, 'Introduction' (n 5) 10–11ff.

[8] As observed by Anne Van Aaken, 'Delegation and Interpretational Methods in International Investment Law', remarks in panel on 'Paradigmatic Changes in the Settlement of International Disputes', 108th Annual Meeting of the American Society of International Law and 76th Biennial Conference of the International Law Association, 7–12 April, 2014; Sir Franklin Berman, 'Evolution or Revolution' in C Brown and K Miles, *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 658, 668.

economies.[9] Arbitrators also demonstrate reluctance to view investment disputes in their broader public international law context,[10] perhaps in part due to sociological factors including arbitrators' backgrounds and expertise.[11]

This article builds on the premise that, in general, adopting a domestic or national public law perspective that regards investment treaty arbitration as judicial review of domestic agencies' decisions is in tension with the structuring of public international law as a law between representative agencies and the idea of investment treaties as embodying inter-State relations. This is because a public law perspective views investment treaty disciplines first and foremost as constraints upon the exercise of State power vis-à-vis private interests, as in classical public and administrative law. Taking a public law perspective means that investment treaty disciplines are viewed as governing the relations *between natural or corporate private persons and host States*. This contrasts with a traditional public international law approach under which international legal relations between States as representative public agencies provide the conceptual framework for arbitral decision-making. Here, investment treaty disciplines are viewed primarily as governing the relations *between States as representatives of their populations*.

A specific concern is that focussing on constraining State power in relation to private interests in the commercial realm can be expected to have a marginalizing effect on the concept of public international law as a law between representative public entities. As discussed further below, this 'inter-representative' quality of public international law brings with it the expectation that legal relations between States will serve as vehicles for carrying forward coordinated and integrated international public policies for economic, social, cultural, health, environmental and vital related purposes.[12] Encouraging States to make and abide by international commitments in all these areas is already a significant challenge. It requires both the surrender of domestic regulatory autonomy and reinforcement of these public policy goals at every turn, including where

[9] For instance, Douglas begins his 2003 article with the observation that 'the principal beneficiary of the investment treaty regime is the investor'. Douglas, 'The Hybrid Foundations' (n 2) 152. cf Roberts, identifying investment promotion rather than investor protection as the raison d'être of the investment treaty system. A Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55(1) HarvIntlLJ 1, 20–4.

[10] Van Aaken (n 8).

[11] Describing how counsel and arbitrators may lack experience in both public and public international law, their expertise lying in the field of commercial dispute resolution, L Reed *et al*. 'Mapping the Future of Investment Treaty Arbitration as a System of Law' (2009) 103(1) *Proceedings of the Annual Meeting ASIL* 323, 326. See also SW Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22(3) EJIL 875, 883, 889.

[12] Scholarly work on the interplay between investment treaty law and law in these fields includes VS Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2013); VS Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014); F Lenzerini, 'Property Protection and Protection of Cultural Heritage' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 541. See also JE Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012); P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009); P-M Dupuy and JE Viñuales (eds), *Harnessing Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP 2013). Consider also CE Foster, 'Adjudication, Arbitration and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible' (2012) 3(3) JIDS 525.

they may negatively affect investments.[13] In its structural failure to contribute to these ends, a public law approach is likely to subtract from the power and effectiveness of important aspects of international law, and even undermine it.

The 'internationalized public law' perspective is the newest incarnation of the public law perspective on investment treaty arbitration. The 'internationalized public law' perspective goes beyond previous public law perspectives in presenting investment treaty arbitration in its very essence as 'internationalized public law'. Certain additional features of the 'internationalized public law' perspective also render it potentially particularly concerning for international law as we know it. These features include the encouragement given to investment treaty tribunals to operationalise indeterminate balancing principles (such as proportionality) as general principles of law, and the likelihood that recognition of investor rights under international law would accompany the widespread adoption of the 'internationalized public law' perspective. The latter especially threatens to detract further from the concept of international law as a law between publicly representative entities.

This article proceeds by introducing the 'internationalized public law' perspective on investment treaty arbitration in Part II. Part III then assesses, and finds wanting, justifications put forward for an 'internationalized public law' perspective, including legal justifications based on the consent of States and the predicted rise of general principles of law as a source of law, as well as functional justifications. In addition, Part III considers the potential justification of an 'internationalized public law' perspective on the basis that investors can be understood as right-holders under investment treaties, and that in investment treaty arbitration they assert those rights in the same way as citizens assert rights against governments in domestic public law proceedings. Part IV, the article's final section, offers a few observations on questions and issues associated with the place to be accorded to private capital within public international law in an increasingly transnationalized economic environment. These questions generate further pause for thought about whether an 'internationalized public law' approach to investment treaty arbitration is truly desirable.

II. THE 'INTERNATIONALIZED PUBLIC LAW' PERSPECTIVE

An appreciation of the particular nature of investment arbitration led Thomas Wälde to declare that the future of the discipline lay in the emergence of a new and distinctive modern body of law.[14] This new law was to be generated through the mechanism of arbitral jurisdiction[15] and centred on the idea that investor–State arbitration was analogous to judicial review of host States' actions.[16] According to this vision, public international law was merely a source of applicable law in a global system now populated by private actors empowered to invoke checking and balancing

[13] Foster (n 12). On the necessary surrender of regulatory autonomy in international law today see JK Cogan 'The Regulatory Turn in International Law' (2011) 52(2) HarvIntlLJ 322, 331, 366, 372.

[14] TW Wälde, 'The Specific Nature of Investment Arbitration' in PE Kahn and TW Wälde (eds), *Les Aspects Nouveaux du Droit des Investissements Internationaux* (Martinus Nijhoff 2007) 43.

[15] ibid 56.

[16] ibid, 53–4, 60, 101, 119 citing at 61 Emmanuel Gaillard, *Jurisprudence du CIRDI* (Pedone 2004) at 7, 768.

mechanisms to limit objectionable exercises of governmental authority.[17] Wälde urged an escape from the 'mental prisons' of the traditional public international legal system based on State-to-State relations that had comfortably housed outdated mercantilist economic theories.[18] This novel and pragmatic appreciation of investment arbitration is to be admired. However, the approach is breathtaking for its readiness to propel arbitral practice into new stratospheres. Most notable in this regard was Wälde's assertion that the modern investment law he envisaged was not to be the creation of either national laws or treaties, but rather of arbitrators.[19]

In an extensive body of subsequent scholarship, Stephan Schill makes the more radical suggestion that we conceptualize international investment law and treaty arbitration as internationalized domestic public law disciplines and integrate them 'into a public law model that transcends territorial borders',[20] even a '*lex mercatoria publica*'.[21] This approach is based expressly on the proposition that '[i]nternational investment law differs from traditional public international law in relation to its function',[22] and on a functional equivalence shared rather with domestic public law.[23] The argument refers to the public nature of the subject matter under arbitration, the operation of arbitration as a control on the legality of host States' conduct, and the distinct nature of the obligations at issue, as well as the relationship between the disputing parties.[24]

On this understanding of investment treaty law, the interpretation and application of investment treaties is to be progressed through direct reference to comparative public law.[25] A comparative approach offers a methodology enabling arbitrators to build new understandings of investor protection rules.[26] Arbitrators may find it helpful to employ comparative public law analyses, although there are as yet few instances where this has been done.[27] In some cases arbitrators may be able to do so in support of treaty

[17] ibid 86. [18] ibid 49. [19] ibid 56.

[20] Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 57. 'After all', adds Schill, 'in this perspective, international investment law and investor State arbitration is nothing more than an internationalised discipline of public law'. ibid 102.

[21] The term 'internationalized public law' is Schill's. Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 102. See also Schill, 'W(h)ither Fragmentation?' (n **11**) 897–902. Consider the European Research Council Project 'Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica', directed by Schill, <http://www.mpil.de/en/pub/organization/lex_mp.cfm>.

[22] Schill, 'Introduction' (n 5) 12.

[23] Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 59, 100; Schill, 'Introduction' (n 5) 35. The same characteristics also underpin the distinction between investment treaty arbitration and commercial arbitration. ibid 75–8. See, earlier, Van Harten, *Investment Treaty Arbitration and Public Law* (n 5).

[24] Schill, listed publications.

[25] Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 57.

[26] Schill, 'Introduction' (n 5) 25.

[27] We may note the remarks of the Tribunal in *Toto Construzioni Generali S.P.A. and Republic of Lebanon*, ICSID Case No ARB/07/12, Award of June 7, 2012 that '[t]he fair and equitable treatment standard of international law does not depend on a perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark' para 166. In *Total S.A. v Argentine Republic* the Tribunal began by observing that it is generally relevant to consider what will constitute 'fair and unfair conduct by domestic public authorities in respect to private investors and firms in domestic law'. *Total S.A. v Argentine Republic* ICSID Case No ARB/04/1, Decision on Liability of 27 December 2010, para 111, cited in *Toto*, para 166. The Tribunal then referred to 'a standard of reasonableness and proportionality' in determining compliance with the requirement for fair and equitable treatment. Paras 123, 309(h). One earlier 1995 case is also

interpretation under the usual rules embodied in the Vienna Convention on the Law of Treaties 1969. However, on the 'internationalized public law' approach the expectation is that they will do so on the basis that such comparative analyses may give rise to general principles of law, as discussed further below.

Implicit in the 'internationalized public law' approach to investment treaty arbitration is that arbitral tribunals perform a constitutional or governance function. Santiago Montt has expressly described investment treaty arbitral decision-making as possessing the functional status of 'higher lawmaking',[28] and envisaged the creation of a genuine 'constitutional jurisprudence'.[29] Values-based standards of review, to be developed by arbitral tribunals, would be based on values linking back into commonly recognized representational and constitutional concerns, such as the importance of the 'voice' of government agencies where they represent self-governing peoples on a basis of equality and participation.[30] The expertise accessible to arbitrators and domestic agencies respectively would also be taken into account,[31] as would be the extent to which governments' and investors' interests were protected by existing rights.[32] It seems it would, in effect, become the recognized task of investment treaty tribunals, through a developing jurisprudence, to assess the sufficiency of host States' constitutional arrangements against these standards of review. The idea of investment treaty arbitration as a mechanism of global governance 'serving a constitutional function for the emerging global economy' would become altogether concrete.[33]

The argument for investment treaty law as an 'internationalized public law' discipline is overtly and primarily based on the view that investment treaty law is functionally analogous to judicial review. There is a 'close resemblance between the problems arising in investment treaty arbitration and at the domestic level, namely when individuals are faced with the misuse of governmental powers'.[34] The aim is expressed in terms of meeting the needs of investment law. The argument is that conceptualizing international investment law as an 'internationalized public law' discipline will provide what the infant discipline of international investment law most needs, offering a platform that will help arbitrators form an arbitral jurisprudence in

interesting, precisely because it seems the arbitrators turned to domestic administrative law to determine the case because they did not view their task as being to apply the investment treaty as a public international law instrument. As discussed by Jarrod Hepburn, '*Saar Papier v Poland*: Comparative Public Law and the Second-Ever Investment Treaty Award' <www.ejiltalk.org> 3 February 2015. For cases where tribunals have employed concepts of proportionality see (n 67) and accompanying text.

[28] Montt (n 5) 13–15; as noted by Schill, 'W(h)ither Fragmentation?' (n 11) 899.

[29] Montt (n 5) 84; as noted by Schill, 'W(h)ither Fragmentation?' (n 11) 900. See also Kulick, *Global Public Interest* (n 5) 91–3. Schneiderman has manifested grave concern, with reference to investment law, regarding the constitutional effect of transnational economic regimes. D Schneiderman, 'Investment Rules and the New Constitutionalism' (2000) 25 L&SocInquiry 757. D Schneiderman, 'Constitutionalising Economic Globalisation: Investment Rules and Democracy's Promise' (CUP 2008).

[30] SW Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualising the Standard of Review' (2012) 3(3) JIDS 577, 600–2.

[31] ibid 602–3.

[32] ibid 604.

[33] SW Schill, *The Multilateralization of International Investment Law* (CUP 2009), 372. On investment treaty arbitration as 'a mechanism of global governance' see Schill, 'W(h)ither Fragmentation?' (n 11) 894, 896. Schill, 'Introduction' (n 5) 19–23; Schill, 'Crafting the International Economic Order' (n 5) 413–18. SW Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12(5) German Law Journal 1083, 1086.

[34] Schill, 'Introduction' (n 5) 24.

ways that are sustainable for the investment law system.[35] Importantly, Schill's argument that we should view investment treaty arbitration as 'internationalized public law' goes beyond making an analogy with judicial review under domestic public law and quite literally proposes that investment treaty arbitration be regarded as internationalized public law.

III. JUSTIFICATIONS FOR THE INTERNATIONALIZED PUBLIC LAW PERSPECTIVE

Justifications put forward for the 'internationalized public law' perspective include legal justifications based on the consent of States and the potential rise of general principles of law as a source of law, as well as functional justifications. In the case of the legal justifications, the argument is that State consent and general principles of law provide the requisite authority for a shift in investment treaty arbitration based on an internationalized public law perspective. In the case of general principles of law, this is because such principles are envisaged as providing the substantive basis for arbitral decision-making, despite the indeterminacy of certain concepts potentially eligible for recognition as general principles of law.

A. Consent

Conceivably, States' consent as representatives of their people could provide a basis for viewing international investment law as 'internationalized public law'. Surely, States must at least have expected arbitral tribunals, operating as a new global network, to develop a set of specific, implementable interpretations of investment treaty investor protection standards, going beyond the vague form taken by these standards in treaty texts?[36]

Or do we have to admit, to the contrary, that States becoming party to investment treaties are unlikely to have done so with the intention or even the expectation that arbitral jurisprudence could enhance a structural weakening of public international law? Even Gus Van Harten and Martin Loughlin, whose work can be read to suggest that consent offers a basis for the transformation of investment treaty law into global administrative law, make the point that '[w]hat remains unclear is the extent to which the established arbitration regime has been the subject of careful forethought by States that remain conscious of the implications of the arrangements they have signed up to'.[37] These doubts are in tension with reliance on the notion of States' consent to investment treaty arbitration as a potentially far-reaching event.[38] Nor is the argument that States may have consented to the establishment of a new edifice of transnational law ultimately sufficient to persuade Van Harten, for one, that States intended the ramifications as he perceives them. Concerned that the investment system be independent, open, fair and balanced, he calls for an international investment court, created by States, to help satisfy

[35] Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 70.

[36] Schill, 'System-Building' (n 33) observing that tribunals' lawmaking 'is a consequence of the position that was envisaged for them by States', 1093. See also Schill, 'W(h)ither Fragmentation?' (n 11) 900, highlighting points made by Montt (n 5) 109. On the role of States' consent, see G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 142–5.

[37] Van Harten and Loughlin (n 36) 150.

[38] ibid 143.

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the criteria of accountability, openness and coherence that should prevail in the determination of allegations concerning the exercise of public power in a well-functioning domestic constitutional system.[39]

At the same time, we would do well to recall that there is also the possibility that, in due course, the acquiescence of States in the interpretative approaches, working methods and findings of investment treaty tribunals could create a basis for arguing that States have consented to aspects of a public law or 'internationalized public law' approach.

B. General Principles of Law

Twinned with the view of investment treaty arbitration as 'internationalized public law' is the idea of employing comparative public law research to identify new general principles of law providing authority for an 'internationalized public law' approach to investment treaty arbitration.[40] The 'general principles of law recognised by civilised nations' are recognized as a source of international law in inter-State relations under Article 38(1)(c) of the Statute of the International Court of Justice.[41] They are regarded as capable of being identified by the study of commonalities in the legal systems of the different nations.[42] General principles are referred to in this article in terms of Article 38(1)(c).[43]

Frequently, general principles of law are procedural in nature, as in the case, for example, of the principles of *res judicata* and the admissibility of circumstantial evidence.[44] In certain instances they may also have an equitable cast, as in the case of estoppel and the principle of good faith.[45] General principles were elaborated in international arbitration early last century.[46] They have been accepted and applied in the context of investment treaty arbitration.[47] However, this has taken place only on

[39] ibid, ch 7, 152–84. See also G Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 627.

[40] Schill, 'Introduction' (n 5) 26–7; Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 90–9, 101–2.

[41] Art 38(1)(c) Statute of the ICJ; Article 38(3) Statute of the Permanent Court of International Justice 1922, PCIJ Publications, Ser D (No 1) 7; B Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (Stevens & Sons 1953); A Pellet, 'Article 38' in A Zimmermann *et al*. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 833; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 34–7.

[42] R Jennings and A Watts, *Oppenheim's International Law* (9th edn, Longmans 1992), vol I, 36, title 12; cf the alternative conceptions of general principles of law in terms of principles of justice among members of the Committee of Jurists preparing the Statute of the International Court of Justice. Crawford, *Brownlie's Principles* (n 41) 34. Pellet (n 41) 833 and discussion at 835.

[43] Although there may be an overlap between the category of general principles referred to in art 38(1)(c) and general principles of international law in the sense of rules of customary international law, as well as with logical propositions that may underlie judicial reasoning. Crawford (n 41) 37.

[44] C Brown, *A Common Law of International Adjudication* (OUP 2007) 53–5, 89–90.

[45] Crawford (n 41) 36.

[46] Pellet (n 41) 833.

[47] M Hirsch, 'Sources of International Investment Law' in AK Bjorklund and A Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012) 9, 24, citing for instance the application of the principle of *res judicata* in *Waste Management v Mexico II*, Decision on Jurisdiction of 26 June 2002, ICSID Case No ARB(AF)/00/3, para 39 and interestingly the principle of unjust enrichment in *Saluka Investments BV (The Netherlands) v Czech Republic*, Partial Award of 17 March 2006, UNCITRAL, para 449.

occasion,[48] and has been criticized where reliance on general principles is perceived as being a subjective exercise.[49] Nevertheless, growing reliance on general principles of law in matters concerning procedural justice is, perhaps, to be expected in investment treaty arbitration as the volume of cases continues to rise.

Of the three sources of international law referred to in Article 38 of the ICJ Statute, 'general principles of law' has the least inter-representative quality. General principles of law are not generated by dialogue or deliberative consensus between and among States as representative public agencies, as are treaties. Nor are general principles of law generated through the conduct of States as representative public agencies in the form of State practice accompanied by an *opinio juris*, as is the case with customary international law. They are generated essentially through States' internal practice and often through the law that governs private, interpersonal relations, in national jurisdictions.[50] There are authors who suggest that general principles are, in essence, a transitory form of international law, the repeated use of which may transform their content into customary international law.[51]

High standards need to be fulfilled to mount a solid argument based on general principles of law, and comparative public law analyses in the field of investment law have been criticized for insufficiently reflecting the breadth of legal traditions.[52] The traditional view is that there is a low level of acceptance of general principles of law generally in international law, suggesting that the pace of any change which seeks to rely on this concept will be slow.[53] The International court of Justice has been parsimonious in its reference to general principles of law.[54] The relative weight to be accorded to general principles has been questioned both generally[55] and in the context of investment treaty arbitration.[56]

Yet those who view investment law as 'internationalized domestic public law' justify this in part by reference to the proposition that investment tribunals will identify or develop new, relatively substantive 'general principles of law', based on comparative public law analysis, to serve as pivotal tools in investment treaty arbitration.[57] Principles identified as general principles of law could be applied in more than one

[48] Hirsch, ibid 24; OK Fauchauld, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2008) 19 EJIL 301, 312.

[49] M Sornarajah, *International Law on Foreign Investment* (2nd edn, CUP 2004) 93–5. See also A Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005) 237.

[50] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co 1927) 67–71.

[51] Kulick (n 5) 164. Pellet (n 41) 782.

[52] V Vadi, 'Book Review: International Investment Law and Comparative Public Law' 15(3) JIEL 917.

[53] B Kingsbury, N Krisch, and RB Stewart 'The Emergence of Global Administrative Law' (2005) 68(3) LCP 15, 29.

[54] Pellet (n 41) 766. See also Jennings and Watts (n 42) vol I, 37–8, title 12.

[55] M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks' in Brown and Miles (n 8) 75–77, 77.

[56] Martins Paparinskis, Remarks on 'Legitimate Expectations: Reflections on Sources of International Law', 13th Annual WTO Conference, British Institute of International and Comparative Law, 15–16 May 2013. See also M Paparinskis, 'Reply to Howley and Howse', expressing scepticism about the role that general principles and analogies from domestic public law may be alleged to play in investment law at <http://www.ejiltalk.org/reply-to-howley-and-house/#more-9705> (EJIL: *Talk!* 24 October 2013).

[57] Schill, 'Introduction' (n 5) 26–9, 37; Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 101.

way.[58] They could be applied in connection with the interpretation of the core disciplines in investment treaties.[59] In addition, general principles are also used in international law to fill gaps or lacunae in the law, and thus could potentially have independent force in some cases.[60] General principles could be applied in identifying basic standards on procedural matters that form part of the core investment disciplines in the way that due process is central to fair and equitable treatment standards.[61]

There are also grounds for concern in relation to certain potential candidates for recognition as general principles of law on an internationalized public law approach, including proportionality.[62] Analyses applying the principle of proportionality could benefit either an investor or a host State, depending on the case,[63] and on how the concept of proportionality is applied.[64] Principles of good faith and reasonableness may also be advanced as applicable general principles of law. A central concern in the context of investment treaty arbitration is that the content of such principles is indeterminate, and these principles, if they are to do their job, go beyond making procedural demands on host States and shade into the substantive. The example of proportionality tends to stand out in this regard, as even its proponents acknowledge.[65] The concept of proportionality is used to determine not just the acceptability of a State's decision-making process, but also the merits of a government's decision, and its substantive or policy content. Yet the principle is a vessel the content of which will be determined primarily through the arbitral process. Diverse arbitral tribunals will determine what amounts to a proportionate measure in the various cases.[66] As one tribunal has said 'The test at the end of the day will

[58] T Gazzini, 'General Principles in the Field of Foreign Investment' (2009) 10 Journal of World Investment and Trade, 103.

[59] Schill, 'Introduction' (n 5) 26–8; Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 90–1, 101. Consider the diverse contributions to SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010). McLachlan highlights the use of general principles of law to inform the content of 'open-textured' treaty norms. C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 396, 401.

[60] Schill, 'Introduction' (n 5) 28; Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 90–1.

[61] McLachlan *et al.* argue that we should recognize a standard of justice, by which both nationals and foreigners should be treated, as a principle ranking among 'general principles of international law' as referred to in art 38(1)(c) of the ICJ Statute. C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 204–6, paras 7.12–7.15.

[62] SW Schill, 'General Principles of Law and International Investment Law' in T Gazzini and E De Brabandere, *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 133, 178. On proportionality reasoning see *inter alia* B Kingsbury and SW Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 75.

[63] Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 97; Schill (n 62).

[64] See for further interest C Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15(1) JIEL 223–55; C Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4(1) JIDS 197. Henckels considers that, regardless of whether proportionality qualifies as a general principle of law, proportionality-type analyses serve a role in investment treaty arbitration, but seeks to curb or calibrate their scope and effects.

[65] Kingsbury and Schill (n 62) 102–3; Kulick (n 5) 171–3.

[66] See further Foster (n 12) 526, 533–4; CE Foster, 'Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era' (2014) 17(2) JIEL 355. See also J Klabbers,

remain one of overall judgment, balancing the interests of the State against those of the individual, to assess whether the particular sanction is a proportionate response in the particular circumstances'.[67]

The concept of proportionality will potentially lead tribunals into the fundamentals of constitutional grammar,[68] where the subject of proportionality is already a matter of serious debate.[69] Empirical study to date suggests that tribunals may be using language such as 'proportionality' more frequently when expanding rather than when constraining their authority.[70] At least one tribunal has applied instead an inverted 'absence of obvious disproportionality' test.[71] This could be pulled back to an 'indicative' disproportionality test, which could be introduced, for instance, in the application of the fair and equitable test as an *indicator* that there may be non-compliance with the governing substantive requirement—an indicator varying in strength depending on the circumstances.[72] Ideally, States will help provide increasing interpretive guidance for arbitral tribunals on how to structure their reasoning and interpretations in cases where they would otherwise turn directly to criteria such as

'Setting the Scene' in J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 1, 35–6.

[67] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Award of 5 October 2012, para 417. The concept of proportionality was the pivot of the Tribunal's findings that Ecuador had failed to afford fair and equitable treatment to Occidental's investment (paras 384–452), conduct also tantamount to expropriation (paras 453–455), leading to an award against Ecuador of US$1.7bn. The Tribunal cited at length the evidence that Ecuador's law and Constitution specifically required proportionate treatment, paras 396–401, 422 and 427, additionally citing past awards of arbitral tribunals where reference was made to proportionality. This evidence included the Tribunal's reliance on the statement of expert witness Judge Schwebel on proportionality as one of various considerations in the context of fair and equitable treatment in *MTD Equity SDN. BHD. and other v The Republic of Chile*, ICSID Case No ARB/01/7 (25 May 2004), para 109, cited in *Occidental* at para 405; and the controversial decision in *Tecmed S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2 (29 May 2003). The *Occidental* Tribunal did not frame proportionality as a proposed general principle of law, but made the less specific statement that it had no doubt the principle was applicable as a matter of general international law. ibid, para 427. See also Renco's pleadings on fair and equitable treatment in *The Renco Group, Inc. v The Republic of Peru,* ICSID Case No UNCT/13/1.

[68] See eg M Klatt and M Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 1–2.

[69] ibid 3–4.

[70] G Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013) 68.

[71] *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability of 3 October 2006, para 195, dealing with LG&E's claim for expropriation. The Tribunal's decision in *Azurix Corp. v The Argentine Republic* could also be read as supporting a test of obvious disproportionality, as guidance for determining when regulatory actions amounted to expropriation and gave rise to compensation. *Azurix Corp. v The Argentine Republic,* ICSID Case No ARB/01/12, Award of 14 July 2006, paras 311–312.

[72] See, writing on an indicative disproportionality test in the trade field, CE Foster, 'Public Opinion and the Interpretation of the World Trade Organisation's Agreement on Sanitary and Phytosanitary Measures' (2008) 11(2) JIEL 427, 450. Note also the Appellate Body's application of art XX(g) of GATT 1994 in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, where it was considered relevant that the United States' means for securing the conservation of resources were not disproportionately wide in scope and reach in relation to their policy objective. Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, para 140.

proportionality, drawing on the experience in WTO dispute settlement where trade law rules have become increasingly sophisticated in this regard.

At its most extreme, reliance on general principles of law could be considered as offering the foundations of a new system of international relations between States and investors which is no longer to be considered as public international law at all. True, Friedmann suggested as early as 1964 that the changing structure of international law might lead us to draw more fully on general principles of law as a source of international law,[73] including principles from the field of public law. However, Freidmann envisaged this taking place in the context of the increased international administration of matters relating to health, food, transport, and resource conservation, which he called a new 'social' international law, as well as international economic development aid.[74] Discussing the use and adaptation of general principles of law in the evolution of public international law he referred to interpretative principles, including a principle of equity,[75] procedural standards of fairness, and substantive general principles.[76] The current debate takes place in a new international economic legal context and goes significantly further.

At the same time, it is possible that, in due course, support for recognizing a new wave of general principles of law in the context of investment treaty arbitration will generate general acceptance. Alternatively, if there is a proposal that a concept such as proportionality could achieve independent force as a 'principle of general international law' as opposed to a 'general principle of law' under Article 38(1)(c) this raises significant practical, doctrinal and theoretical issues.

C. *Functional Justification*

Alternatively and additionally, functional rather than legal justifications are advanced for viewing investment treaty arbitration as internationalized public law. Functional aspects of investment treaty arbitration that are invoked to justify this analogy between investment treaty arbitration and public law include investment treaty arbitration's authorization of individual claims against governments, the award of damages against governments (which can be viewed as a public law remedy), and the direct enforceability of awards under the ICSID Convention or the New York Convention.[77] We might refer also to the public character of the subject matter which is dealt with in investment disputes and the direct effect of investment arbitral awards on 'the social

[73] Schill, 'Enhancing International Investment Law's Legitimacy' (n 5) 92; and see Kulick (n 5) 920.

[74] WG Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 191.

[75] ibid 196–7. McLachlan promotes reliance on the concept of equity as an important dimension to the fair and equitable treatment standard, suggesting that this concept could perform the function performed by proportionality in human rights law. McLachlan (n 59) 382–3, 400.

[76] Friedmann (n 74) 196.

[77] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID *Convention*), open for signature 18 March 1965, entry into force 14 October 1966, 4 *ILM* 524 (1965); *Convention on the Recognition* and *Enforcement of Foreign Arbitral Awards* (New York 1958) (the *New York Convention*), open for signature 10 June 1958, entry into force 7 June 1959, 330 UNTS 38 (1959). Van Harten and Loughlin (n 36) 127–37. Van Harten (n 5) 5.

fabric'.[78] The function or role of investment tribunals in controlling the exercise of public governmental authority has been viewed as a particularly cogent reason why investment arbitration is 'best analogised to domestic administrative law',[79] although controlling governments' exercise of public authority is a feature of all public international legal adjudication and arbitration.

The functionalist justification for viewing investment treaty arbitration as internationalized public law can be seen as being advanced at several levels. Initially, the aim of adopting public law perspectives on investment treaty arbitration seems to be related to problems internal to investment treaty law, referred to as the 'discontents' of investment treaty arbitration,[80] which can be addressed through 'partial modifications of the commercial arbitration model in view of public law rationales'.[81] The function of investment treaties and investment treaty arbitration is also presented as supporting a market-based global economy.[82] Investment treaty arbitration is potentially a means for the implementation and development of multilateral economic constitutionalism.[83] At other times, there is the promise of a more expansive functionalist approach. Investment treaty arbitration is understood as 'a specific dispute settlement mechanism under international law that forms part of international law's public order function'.[84] Arbitrators are 'agents of the international community'[85] and their role incurs system level obligations.[86]

Even at its most expansive, this functionalist reasoning is insufficiently broad to accommodate the vital functioning characteristics of public international law. The public international legal community's systemic interests range well beyond an 'interest in the functioning of the international investment order', or even indeed in effective dispute settlement as part of international public order.[87] We need a fuller functionalist analysis that is compatible with and responds to the wider aims of the broader public international legal framework. We need a functionalist approach that will support public international law as an inter-representative body of law in which economic and investment aims are pursued as only one dimension of an integrated set of public policies. A further point in relation to the functionalist analyses that have been put forward in support of investment treaty law as an 'internationalized domestic public law' discipline is that they can be seen as being grounded in a normative judgment as to the value of the international economic order to which investment treaties and investment treaty arbitration contribute.[88]

There is another alternative basis for an 'internationalized public law' approach to investment treaty arbitration, which could be seen as a blend of semi-consensualist

[78] Schill, 'Crafting the International Economic Order' (n 5) 410–12.
[79] Van Harten and Loughlin (n 36) 146.
[80] Schill, 'Introduction' (n 5) 4–7.
[81] Schill, 'Crafting the International Economic Order' (n 5) 405.
[82] SW Schill, *The Multilateralization of International Investment Law* (CUP 2009) 8.
[83] '[I]nternational investment law can thus be understood as serving a constituent function for the emerging global economy'. ibid 373. Schill (n 82) 11–19.
[84] SW Schill, 'Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and Its Impact on the Role of the Arbitrator' in T Weiler, F Baetens and T Wälde (eds), *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Martinus Nijhoff 2011) 23–43, 25.
[85] Schill, 'Crafting the International Economic Order' (n 5) 424.
[86] ibid 419.
[87] cf Schill (n 84) 34.
[88] For discussion of international investment law, economic ideology and hegemony, Schill (n 82) 6–8, 7.

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and functionalist approaches but which its author has explicitly denominated 'normative'.[89] On this approach, the object and purpose of investment treaties provide potential grounds for a new investment treaty jurisprudence built on comparative public law. For instance, the potential contribution of the rule of law to encouraging the increased investment and economic growth envisaged in investment treaties inspires a 'rule-of-law' based interpretation of the requirement to accord investors 'fair and equitable' treatment.[90] However, this argument, whether applied on its own or together with more clearly consent-based and/or functionalist reasoning, again raises the concerns identified above in relation to functionalist justifications for a public law approach to investment treaty arbitration.

D. Investor Rights

Finally, there is the question of whether investors have rights under investment treaties. The literature advocating an 'internationalized public law' approach to investment treaty arbitration is likely to be understood with reference to this further potential justification. It must be said at the outset that authors including Schill recognize that this is a controversial question and, indeed, it has not yet been advanced in support of an 'internationalized public law' perspective on investment treaty arbitration.[91] However, the question of investor rights must presumably go with this territory. The argument for investor rights potentially provides a huge boost to the idea that investment treaty arbitration can be viewed as 'internationalized public law', because it buttresses so strongly the underlying analogy between investment treaty arbitration and judicial review for the enforcement of individuals' rights under domestic public law. However, the idea of investor rights requires careful thought, not least because of the wider implications of this for investor personality and standing in international law more generally. In the long term, this is potentially where an 'internationalized public law' approach may have the deepest implications for public international law as a law between representative public agencies.

This subsection first distinguishes procedural rights to arbitrate from substantive rights under international law. The subsection then considers whether investors hold substantive rights under investment treaties. First, it considers whether investors may have primary rights under investment treaties and, second, the alternative idea that investors may hold secondary rights (most notably including rights to a remedy) without holding primary rights. The subsection concludes that the law and the practice on investor rights are presently in a state of transition.

1. Primary rights

The procedural empowerment of investors under the investment treaty system has quickly evolved to the point where it is considered in terms of investors holding their

[89] SW Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 151; see in particular at 177–181.

[90] ibid. See critical comment on the broader subject of rule of law arguments by Van Harten (n 39).

[91] Schill, 'W(h)ither Fragmentation?' (n 11) 880, fn 23; Roberts (n 9) 37.

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own *procedural rights* under investment treaties. Revolutionary at its inception, this development has proved striking and significant in its power and implications.[92] Until a decade ago, it is probably fair to say that it was generally believed that the intention behind the contemporary web of investment treaties, and the ICSID Convention itself, was merely to extend the scope of the existing inter-State investment protection regime by establishing a new form of privately instigated dispute settlement.[93] Today, the ability of investors' to initiate arbitral proceedings is clearly understood as reflecting a procedural right to commence arbitration.[94] However, can we assume that investors have *substantive rights*? Statements to this effect are already on the record,[95] but they are at odds with traditional assumptions.

Investors' substantive legal interests under investment treaty regimes are easily viewed as 'rights'. The practice of investment treaty arbitration is consistent with the assumption that the investor is vindicating his, her, or more frequently its, own rights.[96] The investor's procedural autonomy further 'makes the reading of direct rights intuitively attractive'.[97] The notion is also enhanced by practical observations, for instance that States party to the ICSID Convention may no longer espouse their nationals' investment claims once a national submits a dispute to an arbitration.[98] Braun reasons that investors are actors capable of performing in international law, and that direct investor rights-holding will serve the public interest in the application and

[92] J Pauwelyn, discussing the Award in *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990. J Pauwelyn, 'Rational Design or Accidental History? The Emergence of International Investment Law' in Z Douglas, J Pauwelyn and J Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 11, 31.

[93] M Paparinskis, 'Analogies and Other Regimes of International Law' in Z Douglas, J Pauwelyn and J Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 95, although stating this less strongly.

[94] K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 106–8, citing *inter alia* the English Court of Appeal decision in *Republic of Ecuador v Occidental Exploration and Production Company* [2006] 1 QB 432 (CS (Civ)); Douglas, 'The Enforcement of Environmental Norms' (n 2) 419.

[95] Wälde, 'The Specific Nature of Investment Arbitration' (n 14) 92. This view has also been adopted by tribunals. See *Corn Products International, Inc. v United Mexican States*, ICSID Case No ARB (AF)/04/1 (NAFTA) Decision on Responsibility, 15 January 2008, paras 165–176; *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2 (NAFTA), Award, 18 September 2009, paras 423–428. Interestingly the language of paras 82–83 of the Separate Opinion of Arthur W Rovine in the earlier case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States*, ICSID Case No ARB (AF)/04/5 (NAFTA), Award and Separate Opinion of 26 September 2007, refers largely to investors' rights to redress rather than to substantive rights in terms of benefitting from guaranteed standards of treatment.

[96] Douglas, 'The Hybrid Foundations' (n 2) 182, 282; Z Douglas, *The International Law of Investment Claims* (CUP 2009) 32.

[97] M Paparinskis, 'Investment Treaty Arbitration and the (New) Law on State Responsibility' (2013) 24(2) EJIL 617, 626. Roberts for instance writes 'I contend that, given that both home States and investors have an interest in vindicating investment treaty obligations, and that both have been granted a procedural mechanism for doing so, we should presume that both have been granted substantive rights under investment treaties absent clear wording to the contrary.' Roberts, 'State-to-State Investment Treaty Arbitration' (n 9) 39.

[98] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (n 77) art 27. JE Alvarez, 'Are Corporations 'Subjects' of International Law?' (2011) 9 Santa Clara Journal of International Law 13–14.

enforcement of investment law,[99] and help ensure the protection of private interests in the context of globalisation.[100] However, investment treaty arbitration may well have the capacity to serve the public interest, and protect private interests, without recognition of primary investor rights. Also, there are alternative ways to explain investors' entitlements to remedies, if that is the aim, as discussed below.[101]

A traditional starting point for considering investor rights would be the understanding that investors do not have substantive rights under customary international law.[102] As for treaty law, *prima facie*, the obligations contained in investment treaties are obligations owed between the States which conclude them. Their language and structure generally differ from documents in which the rights of the individual are centrally proclaimed. Rather, their terms require that the parties act in accordance with certain investment protection standards that will benefit investors, including the standards of national treatment, fair and equitable treatment, full protection and security, and the disciplines governing expropriation. From this perspective, any investor 'rights' would appear to be 'derivative', rather than rights belonging directly to investors as right-holders.[103] The situation is different where a treaty is cast in terms specifically referring to investors' rights, but this is very rare.[104] On the traditional approach, individuals with property and interests abroad have benefitted from standards of treatment that are binding between States,[105] with reparation assessed according to the harm done to the individual.

The idea that substantive international legal rights for investors can be derived from investment treaties benefits from an analogy with human rights recognized under international human rights covenants.[106] Investor rights also benefit from an analogy with individual rights that might be considered similar to human rights. We have seen the International Court of Justice, in the case of *LaGrand (Germany v United States of America)*, declare there to be certain individual rights on the part of detained persons under the Vienna Convention on Consular Relations.[107] However, this analogy does

[99] TR Braun, 'Globalisation-Driven Innovation: The Investor As a Partial Subject in Public International Law: An Inquiry into the Nature and Limits of Investor Rights' (2014) 15 The Journal of World Investment and Trade 73, 76.

[100] ibid 106–7.

[101] See text accompanying notes 112–123.

[102] 'By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights …'. *Mavrommatis Palestine Concessions Case* (1924) PCIJ Ser A No 2, 12. See Douglas, 'The Hybrid Foundations' (n 2) 164–6.

[103] The term 'derivative' is employed by Douglas, 'The Hybrid Foundations' (n 2) 162–3; Douglas, *The International Law of Investment Claims* (n 96) 11–32, discussing also how the derivative approach has been promoted within investment arbitration under the North American Free Trade Agreement. Braun (n 99) 87. See the overview of the state of play in McLachlan *et al.* (n 61) 61–5.

[104] See (n 110).

[105] Douglas, 'The Hybrid Foundations' (n 2) 164–5. Consider, for instance, *Barcelona Traction, Light and Power Co. (Belgium v Spain)* [1970] ICJ Rep 3.

[106] eg Douglas, 'The Hybrid Foundations' (n 2) 153–4; Van Harten, *Investment Treaty Arbitration and Public Law* (n 5) 136.

[107] *LaGrand (Germany v United States of America)*, Judgment of 27 June 2001 (Merits) [2001] ICJ Reports 466. The relevant provision, art 36(1)(b) of the Vienna Convention on Consular Relations, provides that: '[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his *rights* under this

not necessarily apply in relation to the primary substantive rights contained in investment treaties as a class, and can be considered to apply only where investment treaties specifically state that investors have substantive rights.

The International Law Commission has envisaged the possibility that bilateral or regional investment protection agreements may create primary obligations owed by host States to private actors. The Commission's 2001 commentary to the Commission's Articles on State Responsibility suggested that '[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or *regional investment protection agreements*.'[108]

However, the Commission's Articles neither specifically encouraged nor precluded the possibility that investment treaties might be regarded as creating primary rights for investors generally, as a class of treaty. Indeed, James Crawford, who was the ILC's Special Rapporteur on State Responsibility from 1997 to 2001, has written that '[i]t is a matter of interpretation whether the primary obligations (e.g., of fair and equitable treatment) created by such a treaty are owed to qualified investors directly, or only to the other contracting State(s)'.[109] The better view of the Commission's position is that whether investment treaties grant primary rights to individual investors depends on their interpretation. We can sensibly look to the wording of each investment treaty, and whether for instance the treaty expressly states that the investor 'shall have the right' to certain treatment.[110] On this reading, there is ample scope for the view that investment treaties as a class do not grant primary rights to individual investors, though they may do so on occasion expressly in particular cases. In passing, it is important to note, too, that Martins Paparinskis' work, identifying three competing models for primary right-holding by investors that currently inform practice in the implementation of the rules on State responsibility in investment treaty arbitration, is not based on the premise that investors are, in fact, primary right-holders.[111]

subparagraph.' Vienna Convention on Consular Relations 1963, 596 UNTS 261, open for signature 24 April 1963, entry into force 19 March 1967. (Emphasis added.)

[108] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 210, para 4 of the Commentary to art 3. (Emphasis added.)

[109] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) AJIL 874, 887. Crawford has also observed that the character of investor rights will depend on the treaty in question. J Crawford, 'International Law as an Open System' in J Crawford, *International Law As an Open System: Selected Essays* (Cameron May 2002) 17, 36.

[110] Parlett (n 94) 108. Parlett instances the Energy Charter Treaty, art 13(2), 17 December 1994, entry into force 16 April 1998, 2080 UNTS 100. This provision sets out a right to prompt review in domestic law in case of expropriation. Energy Charter Treaty, 17 December 1994, entry into force 16 April 1998, 2080 UNTS 100. Douglas has referred to the Austria model BIT provision on expropriation, also stating that an investor 'shall have the right to prompt review of its case, including the valuation of its investment and the payment of compensation'. Art 5(3) Austria model BIT, vol VII *International Investment Agreements: A Compendium* (UNCTAD 2002) 262. Douglas, 'The Hybrid Foundations' (n 2) 183; Douglas, *The International Law of Investment Claims* (n 96) 35.

[111] Paparinskis, 'Investment Treaty Arbitration and the (New) Law on State Responsibility' (n 97).

2. Secondary rights

The International Law Commission is clear that secondary rights, in the form of 'rights arising from the international responsibility of a State' (including an entitlement to reparation) 'may accrue directly to any person or entity other than a State'.[112] However, it is clear too that secondary obligations arising from a breach of international law might be owed to investors not as primary right-holders but by virtue of primary obligations that are owed to a State, i.e. the investor's home State. On one approach, these secondary obligations may be triggered by the investor opting into the situation by commencing arbitral proceedings. The latter is the position as envisaged by Zachary Douglas.[113] Douglas' position is not fully persuasive, but the existence of his proffered explanation of investor entitlements to remedies may be allowing international law to defer addressing the issue at present.

On Douglas' view, entitlements to remedies may arise by virtue of States' and investors' agreements to arbitrate, rather than directly from an investment treaty. When investors file a claim under an investment treaty not only do they perfect the host State's unilateral offer to arbitrate, but the claimant then 'becomes a counterparty to the host State's obligation to submit to international arbitration for an assessment of its conduct towards the claimant's investment on the basis of the norms of investment protection set out in the treaty.'[114] The host State's obligation includes a duty to remedy the situation if the host State is found not to be acting in compliance with the norms in the applicable investment treaty.[115] On this approach investors appear to have no primary rights of their own, unless expressly stated in the applicable treaty. Douglas suggests that '[t]he minimum standards of investment protection could thus be characterized as the applicable adjudicative standards for the claimant's cause of action rather than binding obligations owed directly to the investor'.[116]

Douglas' approach may be playing an important transitional role while further consideration is given to the position and legal status of capital and private transnational interests within, and in relation to, public international law. A distinct regime on remedies for investors may be in the process of evolving as part of that wider process. Douglas observes that '[t]he secondary obligations generated by the implementation of State responsibility in these cases are different in juridical character

[112] Part Two of the Articles, dealing with the content of State responsibility, is written without prejudice to any such rights. Art 33(2) of the ILC Articles, above n 158, states that 'This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'. See also Commentary to art 28, para (3), Crawford, above n 108, 193, and Commentary to Chapter I of Part II, General Principles, para 2, Crawford, above n 108, 192. Crawford observes that 'Responsibility is no longer an exclusively bilateral, inter-State matter.' Crawford, 'International Law as an Open System' (n 109) 29.

[113] Douglas, 'The Hybrid Foundations' (n 2); Douglas (n 97). Crawford observes that 'A new legal relation, directly between the investor and the responsible State, is thereby formed, *if it did not already exist*.' Crawford, 'A Retrospect' (n 109) 888. (Emphasis added).

[114] Douglas 'The Enforcement of Environmental Norms' (n 2) 419–20; Douglas, *The International Law of Investment Claims* (n 96) 35. See, previously, Douglas, 'The Hybrid Foundations' (n 2) 184.

[115] Douglas, *The International Law of Investment Claims* (n 96) 35. See, previously, Douglas, 'The Hybrid Foundations' (n 2) 184.

[116] Douglas, *The International Law of Investment Claims* (n 96) 35. See, previously, Douglas, 'The Hybrid Foundations' (n 2) 184.

from secondary obligations that arise on the inter-State plane'.[117] In this subsystem, for instance, the forms of reparation might differ from the traditional formula applying between States.[118] Learned authors are already engaging closely with the question whether the range or scope of the legal consequences of breach as traditionally applied between States may require varied or calibrated application.[119]

However, the present situation is awkward. Accepting the agreement to arbitrate as creating an investor's entitlement to a remedy requires a realignment in perspective for the public international lawyer. It requires us to accept that investors' entitlements to remedies, unlike the secondary rights owed by States to one another under the law on State responsibility, are conditional, or contingent. Investors' entitlements to remedies would only come into being *if* arbitration is sought. Under the usual theory of objective responsibility that applies throughout public international law, a State's obligation to compensate arises at the time of breach, and secondary rights to a remedy under the law on State responsibility exists unconditionally and objectively. For instance, secondary rights would remain applicable in relation to practice under a treaty that does not allow for investor–State arbitration. Yet on Douglas' approach investor entitlements to a remedy presumably do not arise here at all. A further result of Douglas' approach is that an investor will need to be financially able to initiate arbitration before any legal entitlement to a remedy would arise.

In designing law to govern investor remedies in future, it will be important to preserve the position of the State as the primary right-holder under investment treaties. At present, Douglas' description of investment treaty arbitration as a new, specialized subsystem of State responsibility tends to overlook the underlying legal interest and status of home States.[120] Under Douglas' investor–State regime it might even be that home States would have no remaining legal interest in an investment treaty arbitration instituted

[117] Z Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in J Crawford, A Pellet, S Olleson and K Parlett (eds), *The Law of International Responsibility* (OUP 2010) 815, 819.

[118] Douglas, 'The Hybrid Foundations' (n 117) 170 and 190–4. Douglas, 'Investment Treaty Arbitration and ICSID' (n 117) 829.

[119] See arts 34–37 of the International Law Commission's Articles on State Responsibility (n 108); and see Douglas, 'Investment Treaty Arbitration and ICSID' (n 117) 820, 829–32. For a starting point, Braun (n 99) 115. Van Aaken advocates greater use in investment law of the preventive and restitutive remedies characterizing municipal legal orders. A Van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Schill, *International Investment Law and Comparative Public Law* (n 5) 721. Schill (n 82) 721. See also I Marboe, 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 377 and note U Kriebaum, 'Restitution in International Investment Law' in R Hofmann and CJ Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systematic Integration?* (Nomos 2011) 201.

[120] Douglas, 'The Hybrid Foundations' (n 2) 184–93, 282 and see at 187, referring to work carried out by Riphagen, Third Special Rapporteur on the topic of State Responsibility, International Law Commission, including the 'Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles) (1983) 2 UNYBILC 22, UN Doc A/CN.4/354/Add. 1 & 2, see especially at para 35. See also (n 117) 819. Indeed, Douglas observes this may be the case even where investors are primary substantive right-holders. Douglas, 'The Hybrid Foundations' (n 2) 182–4.

against another State by their nationals.[121] Douglas makes the argument that the interests of home States are not taken into account in the assessment of damages by a tribunal. However, he does not reflect that the reparation afforded through investment treaty arbitration may comprise a significant sum from the perspective of the host State. Home States are, arguably, thus provided with a form of satisfaction as a result of such rulings in favour of their investors, to the extent that such ruling amounts to a public finding relating to the magnitude of the breach.[122]

The inevitable conclusion on the question of whether investors have substantive primary or secondary rights is that it appears they may possess neither. However, the lack of a clearly established legal basis for the award of remedies to investors does not greatly impede the practice of awarding substantial remedies. This may well be due to the presence of Douglas' theory about the basis of investor entitlements to remedies. As to the future, if the idea of there being a specific law on investor remedies were to be pursued, this would not have to be based on the view that investors hold either primary or secondary rights under investment treaties. However, progress towards a clear approach to remedies may be difficult because once this debate is opened up many additional difficult and unresolved matters concerning the application of the law on State responsibility in investment treaty arbitration may also call for consideration.[123]

IV. IMPLICATIONS OF 'INTERNATIONALIZED PUBLIC LAW' FOR PUBLIC INTERNATIONAL LAW

International law needs to maintain, as a central feature, the expectation that public agencies interact in a representative capacity to make, develop and administer international legal rules in a coordinated, integrated and publicly accountable manner. Put more simply, we need representative governments, or similar agencies, to relate or interact for us in all matters of international legal public policy.[124] We also need a concept of the territorial or popular entities that these governments or agencies are considered as representing, and to which we expect them to be accountable.[125] Presently we use the notion of the State, possessed of objective international legal personality, for these and other purposes.[126] States essentially remain the entities who

[121] Douglas, 'The Hybrid Foundations' (n 2) 169–70, canvassing instances where States' submissions to arbitral tribunals have been rejected. Douglas, *The International Law of Investment Claims* (n 96) 17–19.

[122] On satisfaction as a form of reparation, see arts 34 and 37 of the International Law Commission's Articles on State Responsibility (n 109).

[123] As discussed engagingly by Paparinskis (n 97).

[124] B Kingsbury, 'International Law as Inter-Public Law' in HR Richardson and MS Williams (eds), *Nomos XLIX: Moral Universalism and Pluralism* (New York University Press 2009) 167. Describing international law as based on the dialectic interplay between the ideals of a relational and an institutional law, see RJ Dupuy, 'Communauté Internationale et Disparités de Développement' (1979-IV) 165 Recueil des Cours 9. Viewing investment treaty law within international law as a blended relational and institutional law, see P Šturma, 'Relations between International Investment Law and Domestic Public Law: No Love at First Sight' in R Hofmann and CJ Tams, (eds), *International Investment Law and its Others* (Nomos 2012) 203, 205, 210–11.

[125] B Kingsbury and M Donaldson, 'From Bilateralism to Publicness in International Law' in U Fastenrath *et al*. (eds), *Essays in Honour of Bruno Simma* (OUP 2011) 86. M-S Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20(4) EJIL 977.

[126] Constituencies ought not be viewed, though, as restricted to national constituencies, and constituencies may overlap with one another. Kingsbury and Donaldson (n 125); Kingsbury (n 124) 85.

generate international law,[127] as well as the controllers of access to international courts and tribunals.[128] This may not be the case indefinitely. International institutions continue to grow in number and diversity and in many jurisdictions the State is becoming increasingly disaggregated and new hubs of law and policy are becoming internationally operational.[129] Yet whatever may be its form in future, we will continue to need a concept of international law that is founded upon relationships between publicly representative agencies.

The dynamics which accompany a public law perspective on investment treaty arbitration emphasize the relations *between natural or corporate private persons and host States* rather than the inter-representative, intergovernmental public policy 'bargain' that underpins investment treaties. Whilst there will be cases in which a public law perspective on investment treaty arbitration helps tribunals to accommodate domestic regulatory autonomy, the public law perspective on investment treaty arbitration may have profound effects on public international law. An 'internationalized public law' perspective may even remove a large body of international legal practice beyond the scope of international law as an inter-representative law. The result is likely to be that the power of international law to advance international public policy in economic and non-economic spheres in an integrated and coordinated way is de-accentuated. Further, fragmentation in international law is likely to be increased rather than reduced.

Investment treaty tribunals may not always be well equipped to cope with these issues. Many investment treaty arbitrators have little experience in public policy or expertise in the fields of national or international environmental law, human rights, international health law, and international law relating to these and wider non-commercial interests. Generally the arbitrator's primary aim is diligently to settle the dispute at hand. Arbitrators do not frequently consider themselves to be 'guardians' of public policy in the broad sense.[130] The public law perspective in general is likely in practice to widen the divide between investment treaty law and other fields of international law which have an important bearing on international investment law and policy, and on certain investment disputes. As Kate Miles insightfully remarks, administrative law perspectives emphasize the procedures over the substance of good government and may disconnect State administrative agencies from the human rights, environmental and economic needs of States while privileging provision of 'rule of law' to political and private elites.[131]

The even more radical proposition that we view investment treaty arbitration as 'internationalized public law' in essence, and the idea that investors may hold substantive rights at public international law, must also be seen in a wider perspective. The broader international landscape incorporates new patterns of international legal

[127] Parlett (n 94) 352, 357.

[128] ibid 350, 357 and Conclusion.

[129] Consider A-M Slaughter, 'The New World Order' (1997) 76(5) Foreign Affairs 183; A-M Slaughter, *A New World Order* (Princeton University Press 2004).

[130] S Wilske and M Raible, 'The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go beyond Solving Legal Disputes?' in CA Rogers and RP Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 249.

[131] K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 332–5. Also Foster, 'Diminished Ambitions' (n 66) 357. Consider also A von Bogdandy and I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014) noting that functionalist approaches may lead to weaknesses in legitimacy and observing that 'the specific focus of an international court can easily lead to a strong orientation toward the 'regime interest' at the expense of other principles', 97.

relationship between States and companies in fields beyond investment treaty arbitration, posing new questions about the corporate role in international law.[132] For instance, private trading rights have become a recognized concept in the WTO following the accession of China in 2001. China's Accession Protocol guarantees trading rights to private enterprises, and these rights have featured in several disputes already.[133] To take another development, a State may now take arbitral proceedings against a corporate entity in the Permanent Court of Arbitration for harm caused by genetically modified organisms, based on standing corporate offers to arbitrate sourced in a contractual arrangement between the world's six leading biotech companies.[134] Previously the expectation might have been that such matters would be governed by intergovernmental treaty, setting the terms on which governments made commitments to one another to control companies engaged in potentially harmful activities. Instead, the standards by which they will be held accountable have been set by the companies themselves.[135] Private standard setting is also a significant topic of discussion in the WTO, although in that setting the issue is that its practical effect is to supplement rather than replace intergovernmental standard-setting.

Contemporary authors emphasize the part played by non-State participants in the international legal system.[136] At times they advocate greater recognition of private interests within international economic law, putting forward cogent critiques of how global economic governance excludes the citizen and individual.[137] Certainly, it makes sense to ask whether there is 'inherent in international law the requirement that it is primarily an inter-State system'.[138] However, opinion remains divided both about assertions that we are on a trajectory towards the recognition of objective corporate personality under public international law, and as to whether this is desirable.[139]

[132] Consider the *Advisory Opinion of the Seabed Disputes Chamber on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area*, Case No 17, Seabed Disputes Chamber of the International Tribunal of the Law of the Sea, Advisory Opinion of 1 February 2011, 50 ILM 458.

[133] *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Panel Report WT/DS363/R, Appellate Body Report WT/DS363/AB/R, adopted 19 January 2010; *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, Panel Reports WT/DS431/R; WT/DS432/R; WT/DS433/R, Appellate Body Reports WT/DS431/AB/R, circulated 7 August 2014.

[134] See 'The Compact: A Contractual Mechanism for Response in the Event of Damage to Biological Diversity Caused by the Release of a Living Modified Organism', 17 May 2010. See also First Amended Text, 19 November 2012, Second Amended Text, 18 September 2012. Available at <www.biodiversitycompact.org>.

[135] Foster, 'Diminished Ambitions' (n 66).

[136] R McCorquodale 'An Inclusive International Legal System (2004) 17 LIJL 477; R McCorquodale, 'The Individual and the International Legal System' in M Evans (ed), *International Law* (3rd edn, OUP 2010) 284.

[137] E-U Petersmann, 'The Future of International Economic Law: A Research Agenda' in C Joerges and E-U Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law* (OUP 2011) 546.

[138] R Higgins, '"Conceptual Thinking about the Individual in International Law"', (1978) 4(1) British Journal of International Studies 1, 2.

[139] See JG Ku, 'The Limits of Corporate Rights under International Law' (2012) 12 Chicago Journal of International Law 729, 729, 754 and P-M Dupuy, 'Unification Rather Than Fragmentation of International Law? The Case of International Human Rights Law and International Investment Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 45, 61; See

Those who seek the greater accountability of companies operating internationally may believe this justifies pushing for their recognition as objective persons,[140] or at least for a form of personality that makes them more responsible for their conduct under public international law.[141] Those who endorse the idea of corporate human rights have also been understood as seeking the recognition of objective corporate personality.[142]

Undeniably, investors' standing to initiate arbitral proceedings against States, and their capacity to benefit from reparation as a result of breaches of investment treaties, creates for them an enhanced international legal personality and status. The potential for movement in new directions is illustrated by Douglas' suggestion that where an investment treaty creates jurisdiction over 'all disputes relating to an investment', an investor could raise a claim that a State has breached its obligations under international environmental law.[143] Claims of this nature have traditionally been a matter of inter-State relations, and in a few cases of claims against States by natural persons. Investor motivations for making a claim, and their long-term litigation strategies, will undoubtedly differ from those of public actors and private individuals alleging breaches of human rights.[144]

The dynamics accompanying an internationalized public law perspective on investment treaty arbitration also link into a range of further issues concerning the future form of inter-representative public international law.[145] Under public international law the State is the entity whose actions are judged. Whether a breach of an international legal commitment has been occasioned by one or another agency, organ, representative or other incarnation of the State is of no significance to the binary question of whether a State is responsible. Might it be that investment treaty

Seidl-Hohenveldern's discussion on the widening of the notion of subjects of international law. I Seidl-Hohenveldern, *International Economic Law* (3rd rev edn, Kluwer Law International 1999) Ch II, 9–17.

[140] Alvarez (n 98).

[141] P Dumberry, 'Corporate Investors' International Legal Personality and their Accountability for Human Rights Violations under IIAs' in A De Mestral and C Lévesque (eds), *Improving International Investment Agreements* (Routledge 2013) 179. Even though international corporate actors attract already a growing responsibility for their actions. Alvarez (n 98) 31, discussing the work of United Nations Special Representative on Business and Human Rights, John Ruggie. See *UN Guiding Principles on Business and Human Rights, Advance Edited Version* A/HRC/17/31 (21 March 2011). Consider also the Organisation for Economic Co-operation and Development (OECD) *Guidelines for Multinational Enterprises*, 2011 Edition, first drawn up in 1976. OECD Guidelines for Multinational Enterprises, OECD Publishing; United Nations 'UN Global Compact: The Ten Principles' (2013) <www.unglobalcompact.org>.

[142] See Ku (n 139). The Tribunal in *Plama Consortium* referred to investors' step-by-step 'transition from objects to subjects of international law' as part of the process by which the 'legal architecture of a liberal global economy' is gradually constructed, as noted by Braun (n 99) 107, citing *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005, para 141.

[143] Douglas, 'The Enforcement of Environmental Norms' (n 2) 242.

[144] For debate over the implications of corporate personality in international law see further eg TR Braun, 'Globalization: The Driving Force in International Investment Law' in M Waibel, A Kaushal, L Kyo-Hwa Chung and C Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law and Business 2010) 491.

[145] To situate this point within a broad, forward-looking perspective see D Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25(1) EJIL 9, including Bethlehem's proposed conception of international legal relations taking the form of a three-tiered *lex congregato* incorporating industry-driven standards of conduct at 24.

law triggers the replacement of the State as the entity subject to 'review' by the relevant governmental agencies of a State that hosts foreign investment?[146] Indeed, authors have suggested that the nature of arbitral control should differ depending on the organ that has caused the breach.[147] There is also the question of the relative authority of interpretive statements made by different State agencies.

This article does recognize the obvious potential value in notions of global administrative law and in the international reinforcement of the procedural values of public law,[148] and the clear compatibility of global administrative law thinking and public law approaches to investment treaty arbitration.[149] However, the real heft of the global administrative law movement lies in encouraging the scrutiny of compliance with good process and related rule-of-law based requirements at all levels of global governance. One of the most fundamental and troubling questions about the public law perspective on investment treaty arbitration is that it may sometimes ask investment treaty arbitrators to deploy tools that will judge the substance and not merely the process of host States' administrative decision-making, by criteria such as proportionality and reasonableness. The associated difficulties, and the question of the extent to which this is appropriate, have been subject to broad debate in the literature. Significantly, inquiry into the feasibility of a global administrative law has tended to 'bracket' or 'park' questions of democracy for the time being.[150]

Admittedly, public international law as it operates today is itself deeply problematic partly because frequently governments do not properly or fully represent their populations in a legitimate or democratic sense.[151] Indeed, investment treaty law itself is already the subject of deep criticism, partly as a result of its being produced by distinctly executive government processes.[152] However, the focus of this article is not on exploring options for improving representivity. The article leaves open the far-reaching issue of the form and combination of representational mechanisms in public international law. It does not seek explicitly to advance the view that the legal authority of public agencies must depend on the legitimacy of their representation. It also bypasses the problem of operationalizing the notion of a constituency that is not derived from concepts such as nationality or territory. Simply, it questions the change in the basic concept and dynamics of public international law to which both the general public law perspective, and specifically an 'internationalized public law perspective' on investment treaty arbitration will contribute.

[146] Van Harten and Loughlin (n 36) 146 observe that this is presently a point of difference between domestic administrative judicial review and investment treaty arbitration in which proceedings are taken against the State as a whole.

[147] G Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' (n 39) 633; Schill, 'Deference' (n 30) 591.

[148] Kingsbury, Krisch and Stewart (n 53).

[149] Van Harten and Loughlin (n 36).

[150] Kingsbury, 'International Law as Inter-Public Law' (n 124) 197; Kingsbury, Krisch and Stewart (n 53) 50. Kingsbury and Donaldson (n 125).

[151] Kingsbury declines to take a commitment to national democracy as a starting point in developing a concept of international law, in part because globalization threatens this democracy. Kingsbury, 'International Law as Inter-Public Law' (n 124) 193–6.

[152] Waibel *et al.* (n 144).

V. CONCLUSION

Investment treaties have been created by governments, through the mechanism and authority of the State, precisely to give effect to investor-friendly economic policies. Their aim is to generate conditions for the commercial interplay of private interests in ways that will enhance the economic interests of their populations. Investor–State dispute settlement has been established with a view to supporting the achievement of these aims. The 'vindication' of the investor's 'rights' is utterly central to the experience from the investor's point of view. Further, it is true, as Paulsson has said, that investment treaty arbitration 'allows the true complainant to face the true defendant', bringing clarity and realism'.[153] However, the confrontation of commercial and governmental interests that takes place in an investment treaty arbitration, and the energy poured into this process by investors, governments and arbitrators, should not be permitted to eclipse the broader picture.

From a global public policy perspective, overarching factors are undoubtedly more important than the investor's interests. If we value the system of public international law as a law between representative entities for the integrated pursuit of public policies beyond economic liberalism, we will pause to consider further the implications of the new 'internationalized public law' perspective. A conception of investment treaty arbitration as, in essence, 'internationalized public law' is likely to be accompanied by recognition of investor rights and threatens structural and conceptual change within international law that could be difficult to reverse.

[153] J Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review – Foreign Investment Law Journal 232.