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Investment Treaty Arbitration and the (New) Law of State Responsibility

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Abstract

The case study of investment treaty arbitration provides an opportunity to examine whether and how the invocation of responsibility by a non-state actor has affected secondary rules of state responsibility. This article takes the analytical perspective of investors, capable of being perceived as right-holders (by reference to human and consular rights), beneficiaries (by reference to the law of treaties rules on third states), or agents (by reference to diplomatic protection). The shift from the state to the investor as the entity invoking responsibility for the breach of investment treaties seems to have influenced the law of state responsibility in a number of distinct ways. The apparent disagreement about the law of state responsibility may sometimes properly relate to questions of treaty interpretation, while in other cases rules from an inter-state context are applied verbatim. In other cases, the different perspectives lead to importantly different conclusions regarding circumstances precluding wrongfulness, elements of remedies, waiver of rights, and, possibly, interpretative relevance of diplomatic protection rules. The overall thesis is that conceptual challenges faced by investment arbitration may be illuminated by the solutions formed by the regimes that provided the background for its creation.

1 Introduction

At the opening of the new millennium and almost half a century after its first serious engagement with the law of state responsibility,[1] in 2001 the International Law Commission (ILC) adopted Articles on Responsibility of States for Internationally

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1 From the many historical narratives of state responsibility one might single out Rosenne, 'State Responsibility: *Festina Lente*', 75 *British Yrbk Int'l L* (2004) 363; and Pellet, 'The ILC's Articles on State Responsibility', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (2010), at 75; see generally Crawford, Pellet, and Olleson, *ibid.*, at Pt II, Sect. 1.

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Wrongful Acts (the '2001 ILC Articles' or 'Articles').[2] The subsequent state practice and judicial decisions accorded 'the presumption of positivity' to the 2001 ILC Articles more generally.[3] Of course, technically the work of the ILC is legally relevant only to the extent, if any, that it either accurately reflects or influences the development of binding rules of international law. The prominence of the Articles' formulae in the legal reasoning of states and tribunals should not detract attention either from the scrutiny of the place and role of the ILC in international law-making,[4] or scrupulous review of instances where either the expression of particular rules[5] or the accuracy with which they reflect the underlying state practice may be questioned.[6] However, (solely) for the purpose of this article, and in no way diminishing the importance of the issues noted above, the great weight and authority of the Articles for the law of inter-state responsibility will be taken as a given.[7]

A different question is whether the expression of the law of inter-state responsibility in the Articles should also provide a starting point in formulating other aspects of the law of international responsibility. Unsurprisingly, the law of individual criminal responsibility with its structural and functional differences has been expressed in different terms;[8] perhaps slightly more surprisingly,[9] the ILC's work on the responsibility of international organizations has closely trailed its earlier work on responsibility of states.[10] With only some arbitrariness, the law of responsibility accruing to entities other than states and international organizations is situated between these two subject-matters. The 2002 Symposium of the *American Journal of International*

2 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts', in *Yrbk Int'l Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1 (Part Two), at 31.

3 Alain Pellet applies the apposite remark to the law of treaties: Pellet, 'L'adaption du droit international aux besoins changeants de la société internationale', 329 *RCADI* (2007) 9, at 40.

4 Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-First Century', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), at 781.

5 E.g., in the *Bosnian Genocide* case, the ICJ recognized the existence of *de facto* organs, redrawing the boundaries between attribution of the conduct of organs and attribution by direction or control: cf. 2001 ILC Articles, *supra* note 2, Arts 4, 8; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)* (Judgment) [2007] ICJ Rep 43, at paras 390–393.

6 E.g., regarding third-party countermeasures, cf. 2001 ILC Articles, *supra* note 2, Art. 54; and Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council', 77 *British Yrbk Int'l L* (2006) 333; Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in Crawford, Pellet, and Olleson, *supra* note 1, at 1137, 1145–1148, and necessity: Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility', 106 *AJIL* (2012) 447, at 451–482.

7 S. Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts* (2008).

8 E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), at 5–7.

9 Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility', 344 *ASIL Proceedings* (2011) 344. Still, a similar methodology had already been applied to the law of treaties and immunity, without causing much controversy: Gaja, 'A "New" Convention on Treaties and International Organizations or between International Organizations: A Critical Commentary', 58 *British Yrbk Int'l L* (1987) 253, at 253–255; Pellet, *supra* note 1, at 90.

10 ILC, 'Draft Articles on Responsibility of International Organizations' in *Report of the Sixty-Third Session of the International Law Commission (2011),* UN Doc A/66/10 51.

Law provides an appropriate starting point for formulating the analytical approach to the law of responsibility accruing to investors. Three authors addressed the issue. Edith Brown Weiss criticized the Articles for ignoring the existing practice that, in her view, demonstrated the rights of non-state actors, including investors, to invoke state responsibility.[11] David Caron was concerned that adjudicators might, by giving undue effect to the general rules from the Articles, unconsciously undo the special rules created, and pointed out a possible instance of that in a NAFTA investment arbitration decision.[12] Finally, James Crawford (the ILC Fifth Special Rapporteur on State Responsibility) defended the flexibility of the Articles, noting in particular that they might leave the nature of investors' rights to the particular primary rules.[13] In 2002, the spectrum of ways of possible future development ranged from concerns about insufficient to excessive impact by Articles on the practice involving non-state actors (respectively Weiss and Caron), with Crawford's pragmatic optimism occupying the middle ground.

2013 is an appropriate temporal point for taking stock of the post-2001 developments in state responsibility. The analysis will focus on the case study of investment protection law, examining how rules formulated from an explicitly inter-state perspective have been applied and implemented in a substantively and procedurally mixed legal framework. In order to situate the investor within this framework, one might draw upon multiple legal techniques from established legal regimes.[14] The models of direct rights, beneficiary rights, and agency will be suggested as the most plausible, relying on techniques drawn from, respectively, the law of human rights, law of treaties on third parties, and diplomatic protection (section 2). This is not an argument by analogy, even though the degree of similarity of legal regimes is of legal relevance.[15] In orthodox interpretative terms, the comparable legal regimes against the background of which the investment arbitration regime has been formulated might provide the interpretative ordinariness for the default techniques by which rights within it might be created, exercised, implemented, and terminated. A firm position regarding the legally most plausible model will not be taken. Instead, the implications of relying on the techniques of those regimes will be spelled out, applying across different branches of the law of state responsibility. The interconnected nature of the argument may be of importance for law-makers and disputing parties, demonstrating

[11] Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 *AJIL* (2002) 798, at 812–813, 815–816.

[12] Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *AJIL* (2002) 857, at 870–872.

[13] Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *AJIL* (2002) 874, at 886–888. The Special Rapporteurs on State responsibility were: (1) F.V. García Amador (1956–1961), (2) Roberto Ago (1963–1980), (3) William Riphagen (1980–1986), (4) Gaetano Arangio-Ruiz (1987–1995), and (5) James Crawford (1997–2001): see the ILC materials, available at: untreaty.un.org/ilc/guide/9_6.htm.

[14] Crawford, *supra* note 13, at 886–888; Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 *British Yrbk Int'l L* (2003) 151, at 160–184.

[15] Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', available at: www.iilj.org/courses/documents/Robertsclash.pdf.

the broader systemic implications necessarily flowing from the adoption of certain positions. Conversely, particularly persuasive or puzzling implications of viewing the investors through the lenses of particular regimes will feed back, in their turn, into the debate about the (in)appropriateness of reliance on the regimes.

The rest of the article will discuss different aspects of the law of state responsibility through the lenses of these perspectives, taking in turn the first three parts of the Articles. (This article does not purport exhaustively to systematise arbitral application of the Articles by tribunals, concentrating instead on a limited number of illustrative instances.[16]) The basis of the internationally wrongful act of the state will be addressed first (section 3). In 2001, one might have expected that the identification of the wrongful act, formulated in the Articles from the perspective of the breach of an international obligation rather than an injury to another state,[17] to be unaffected by the introduction of the investor as an entity invoking responsibility. It will be suggested that this assumption has been largely justified, except regarding certain aspects of circumstances precluding wrongfulness that depend upon the conduct of the beneficiary of the obligation. The content of responsibility will be considered next (section 4). Article 33(2) of the Articles provides a without-prejudice formulation regarding responsibility accruing to non-state actors, and in 2001 one might have expected investment arbitrations to proceed in a cautious and careful manner when formulating remedies. That has emphatically not been the case: arbitral practice has sidestepped the explicit reservation and directly relied on the law of inter-state remedies. The normatively unexpected but remarkably uncontroversial practice raises the question about its underlying rationale. Finally, section 5 will address the implementation of state responsibility. This branch of law raises challenges of an again different nature: both to identify the relevance of the law of implementation of responsibility by states to elaborating the explicit treaty rights of investors, and to consider the effect of the possibly parallel rights of the home state to invoke responsibility for the mistreatment of investors. To return to the 2002 *AJIL* symposium, the practice seems to have crystallized somewhere between the predictions of Crawford and Caron, mostly by proceeding through pragmatic and reasonable adjustments but not without riding roughshod over a primary rule or two. The overall thesis is that while the legal character of the investor plays an important role in certain instances, diligent application of such traditional techniques of legal reasoning as interpretation, resolution of conflicts, and analogies is just as important for reaching the right result.

The argument made in the article is a consciously narrow one. State responsibility is not the only regime of international law illuminated by investment law;[18] and investment

[16] For an exhaustive list of arbitral references to Arts see Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', 25 *ICSID Review – Foreign Investment LJ* (2010) 127, at 136–199.

[17] Pellet, 'The Definition of Responsibility in International Law', in Crawford, Pellet, and Olleson, *supra* note 1, at 8–10.

[18] The incomplete overlap of law-making and disputing parties, as well as the decentralized structure of dispute settlement, raises challenging questions of sources and interpretation: *Industria Nacional de Alimentos, SA and Indalsa Perú, SA v. Peru,* ICSID Case no ARB/03/4, Decision on Annulment, 5 Sept. 2007, Dissenting Opinion of Arbitrator Berman, at paras 5–11; *HICEE BV v. Slovakia,* PCA Case

arbitration is not the only regime of international law to raise questions about state responsibility accruing to non-state actors in particular[19] and the place of non-state actors in the international legal order in general.[20] The taxonomy of different legal regimes that provide the background of ordinariness for investment treaties might also affect the thinking about the place of non-state actors in international law, including the imposition of international obligations and international law-making. Possible avenues of further analysis will be indicated in the conclusion to the article (section 6). For the purpose of the argument made, the traditional reading of legal practice capable of contributing to international law will be adopted, limited to state practice even within a procedurally mixed setting.[21]

2 Responsibility Accruing Directly to the Investor

Article 33(2) of the 2001 ILC Articles states that '[t]his part [Part Two] 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'.[22] It leaves open the nature of the 'any right' that accrues to investors under the treaties. The ambiguity is conscious: Crawford explains that investment protection obligations are 'primary obligations … [that] are [either] owed to the qualified investors directly, or only to the other contracting state(s) … [In the former case,] an interstate treaty may create individual rights, whether or not they are classified as "human rights" … [, while in the latter case,] the rights concerned are those of the state, not the investor'.[23]

2009–11, Partial Award, 23 May 2011, at paras 122–147 and Dissenting Opinion of Arbitrator Brower, at paras 25–42; Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *AJIL* (2010) 179; Paparinskis, 'Investment Treaty Interpretation and Customary Law: Preliminary Remarks', in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011); Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules', in O.K. Fauchald and A. Nollkaemper (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (2012); generally see T. Gazzini and E. De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012).

19 Explicit engagement with the Arts at least in the ECtHR seems limited to relatively common-sense rules such as continuing breach: App. Nos 16064/90–16073/90, *Varnava and others v. Turkey* [GC] ECHR Rep 2009, Joint Concurring Opinion of Judges Spielmann and Power, at para. 1; Concurring Opinion of Judge Ziemele, at para. 8; the specific question of restitution: App. No. 58858/00, *Guiso-Gallisay v. Italy* [GC], ECHR, 22 Dec. 2009, at para. 53, or indeed to broader conceptual inquiries about the relationship of different regimes of implementation of responsibility by individual, diplomatic protection, and *erga omnes:* see chaps by Craven, Evans, and McGoldrick in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (2004); and Simma and Pulkowski, '*Leges Speciales* and Self-Contained Regimes', in Crawford, Pellet, and Olleson, *supra* note 1, at 158–162. For a recent overview of general issues see *ibid.*, chs 51.1–51.4.

20 K. Parlett, *The Individual in the International Legal System* (2011), at chs 3–5; Roberts and Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', 37 *Yale J Int'l L* (2012) 107; M. Karavias, *Corporate Obligations under International Law* (2013).

21 Lowe, 'Corporations as International Actors and Law Makers', 14 *Italian Ybk Int'l L* (2004) 23, at 24; M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013), at 147–150.

22 2001 ILC Articles, *supra* note 2, Art. 33(2); see the *mutatis mutandis* identical rule in 2011 ILC Articles, *supra* note 10, Art. 33(2).

23 Crawford, *supra* note 13, at 887–888 (internal footnote omitted).

When thinking about the nature of the investor's rights in investment treaty arbitration, one may draw upon techniques employed in other areas of international law to assist in the task of situating the investor within the legal framework of state responsibility. In technical terms, the more elaborate pre-existing legal regimes provide the *mutatis mutandis* interpretative ordinariness against the background of which the operation of investment protection law may be read.[24] It is useful to draw upon the historical debates regarding access of individuals to international courts; in fact, the first third of the last century provided perspectives of almost unparalleled richness.[25] For example, when states discussed for the first time the creation of an international judicial body with access to individuals in the 1907 Second Hague Conference, they approached it with perfect nonchalance and engaged in a sophisticated discussion of the policy value of individual access, moving on to debate different pragmatic procedural solutions regarding vexatious claims, including the award of costs.[26] The PCIJ also considered in passing the nature of international tribunals dealing with individual claims in the cases relating to the factory of Chorzow, even if the language of judgments leaves open several plausible readings of the underlying rationale.[27]

There are at least three regimes that may provide the default ordinariness against the background of which the operation of investment law is read. The first argument with considerable intuitive appeal views investors as having *direct rights*. In the

[24] The ordinary meaning of treaty terms may derive from the meaning attributed to like expressions and concepts in earlier instruments of a similar character: E. Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals', 152 *RCADI* (1976) 377, at 396; Paparinskis, '*Pari Materia* Investment Protection Rules', *supra* note 18, at 96–99.

[25] The International Prize Court provided access to individuals: Convention (XII) relative à l'établissement d'une Cour internationale des prises *Deuxième conférence internationale de la paix. Actes et documents* (1907), at 668, Arts 4, 5 (the treaty never entered into force for unrelated reasons). After World War I, individuals had extensive access to Mixed Arbitral Tribunals (MAT): *Recueil des décisions des Tribunaux Arbitraux Mixtes institués par les Traités de Paix* (1922–1930). Individuals also had access to the short-lived Central American Court of Justice: Hudson, 'The Central American Court of Justice', 26 *AJIL* (1932) 759, at 769–770, 772–773.

[26] The drafting process of the International Prize Court illustrates the openness of states to the concept of individual access. Sir Edward Fry (UK) was the only one who objected to giving access to entities other than states but mainly on the grounds of logic rather than the impossibility of having individual access: *Deuxième conférence internationale de la paix. Actes et documents* (Tome II, 1907), at 789–790. Other participants supported individual access without even mentioning Fry's argument: see Kriege (Germany), Hagerup (Norway), Bustamante (Cuba), Borel (Switzerland), and Choate (US): *ibid.*, at 790–791, 811.

[27] The Court did not follow the theory that an individual is an agent of the state: it rejected the Polish admissibility objection of *litispendence* because the parties before the Court and the MAT were different: *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (Preliminary Objections) [1925] PCIJ Rep Series A No. 5, at 20. It is less clear what the Court thought about the legal nature of the MAT and the Upper Silesian Arbitral Tribunal (USAT) in positive terms: its position seemed to evolve from viewing MAT as something between the Court and domestic courts: *ibid.*, to describing the rights of affected individuals and companies to bring claims to MAT and USAT for *inter alia* breaches of international law: *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* [1926] PCIJ Rep Series A No. 7, at 33, *Factory at Chorzow (Germany v. Poland)* (Jurisdiction) [1927] PCIJ Rep Series A No. 9, at 26–31, and noting 'that the Geneva Convention, with its very elaborate system of legal remedies, has created or maintained for certain categories of private claims arbitral tribunals of a special international character': *Factory at Chorzow (Germany v. Poland)* (Merits) [1928] PCIJ Rep Series A No. 17, at 27.

classical legal writings, the explanation of procedural rights of individuals as direct rights under the particular treaty instrument was the most popular.[28] More recently, the ICJ has noted in the particular context of consular notification that treaties may create individual rights, whether or not they are human rights.[29] Rights under investment treaties have also been explained in this manner.[30] While this approach would identify the nature of the rights, the manner of establishing, exercising, and terminating the rights would have to be derived from the textual expression of the rights in the treaty text.

If one considers human rights as a particularly prominent regime of individual rights, there are both arguments in favour of relying on it and important differences that qualify the argument of ordinariness. On the one hand, the particular rights provided seem functionally analogous (denial of justice and rights to a fair trial and liberty; expropriation and deprivation; fair and equitable treatment and protection of property; full protection and security and aspects of rights to life and liberty).[31] Responsibility accrues directly to individuals and is invoked by them under both regimes.[32] At the same time, one might critically engage with the comparison between investment law and human rights law on a number of levels.[33] Human rights obligations are importantly different from investment law both in structure and teleology, multilateralism of obligations contrasting the bilateral(izable) and reciprocal obligations in international economic law.[34] For the present purpose the particular concern is that it fails to capture the structural dynamic of the regime. In particular, the grant of investment protection is explicitly linked with and justified by utilitarian considerations of enticing the non-state actor consciously to make the choice of entering the particular regime.[35] Indeed, the investor may have considerable influence in the

[28] Baumgarten, 'La protection des intérets des particuliers devants les jurisdictions internationales', 59 *Revue de droit international et de législation comparée* (1922) 742, at 772–773; Cavaglieri, 'I sogetti del diritto internazionale', III (4) *Rivista di diritto internazionale* (1925) 18, at 26–27; A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), at 159–160; Rundstein, 'L'arbitrage international en matière privée', 23 *RCADI* (1928) 331, at 381–398; Séfériadès, 'Le probleme de l'accès des particuliers a des juridictions internationales', 51 *RCADI* (1935) 1, at 38–41.

[29] *LaGrand (Germany v. US)* (Judgment) [2001] ICJ Rep 466, at para. 77; *Avena and Other Mexican Nationals (Mexico v. US)* (Judgment) [2004] ICJ Rep 12, at paras 40, 124.

[30] *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case Nos ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004, at para. 154, n. 83; Douglas, *supra* note 14, at 160–184.

[31] Paparinskis, *supra* note 21, at chs 7–9.

[32] 2001 ILC Articles, *supra* note 2, Art. 33(2), Commentary 4.

[33] G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 136–143; Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in P.-M. Dupuy, F. Francioni, and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), at 97, 107–114.

[34] Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 *EJIL* (2003) 907; Paparinskis, 'Investment Arbitration and the Law of Countermeasures', 79 *British Yrbk Int'l L* (2008) 264, at 330–331.

[35] Z. Douglas, *The International Law of Investment Claims* (2009), at 135–136. Reasonable people might disagree whether particular formulations of substantive rules can deliver or have in fact delivered the investment flows promised by the preambles: Vandevelde, 'The Economics of Bilateral Investment Treaties', 41 *Harvard J Intl L* (2000) 469; Alvarez, 'The Public International Law Regime Governing International

formulation of the terms of rights under protection (e.g., concessions and stabilization clauses). The conditioning of rights upon choice rather than simple belonging to the human (or corporate) race is arguably better captured by the perspective that sees investors as *beneficiaries*. Some classical writings also explained individual procedural rights by reference to the rules on the creation of rights for third persons,[36] and there is support for the view in investment arbitration decisions.[37]

The most authoritative international legal regime that deals with the grant of rights to third parties is provided by the law of treaties, and it may be possible to draw upon these rules on third party rights.[38] The Vienna Convention on the Law of Treaties ('VCLT') provides a regime for the creation and modification of rights of third states.[39] The appropriateness of the argument may have to be qualified by special characteristics less obviously present in investment law: in particular, the emphasis that VCLT Articles 34 and 36 place on the consent of third states as a precondition for the creation of rights. On the one hand, investors, unlike states (or international organizations) are not international law-makers. The VCLT regime deals with the grant of rights to entities that could in principle participate in the creation of rights themselves; it might therefore be based on certain assumptions that are qualitatively different from those underpinning individual rights.[40] In any event, in most cases investors do not consent in a particular form to protection under investment protection treaties. On the other hand, the (rare) requirement to seek confirmation of investments may be seen as an explicit consent,[41] and the act of qualifying for protection and exercise of rights under the regime the purpose of which is to increase the qualifying entities may be read as assent of the investor.[42]

Investment', 344 *RCADI* (2009) 193, at ch. II; K. Sauvant and L. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009). The modest point made here is that this is what the treaties themselves explicitly set out to do.

36 Diena, 'L'individu devant l'autorité judiciaire et le droit international', 16 *RGDIP* (1909) 57, at 71–76.

37 *Wintershall AG v. Argentina,* ICSID Case No. ARB/04/14, Award, 8 Dec. 2008, at para. 114; *RosInvestCo UK Ltd v. Russia,* SCC V 79/2005, Final Award, 12 Sept. 2010, at para. 153.

38 Paparinskis 'Investment Treaty Interpretation', *supra* note 18, at 81, n. 62; Berman, 'Evolution or Revolution?' in Brown and Mills, *supra* note 18, at 660–661.

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

40 C. Chinkin, *Third Parties in International Law* (1993), at 13–14, 120–122. In the ILC, two theories about third party rights were put forward: according to one, third party rights arose from a collateral agreement between the third party and the treaty parties; according to the other, treaty parties could create rights for third parties without a collateral agreement, if they so intended: ILC, 'Draft Articles on the Law of Treaties with Commentaries', in *Yrbk Int'l Law Commission, 1966, Volume II*, A/CN.4/SER.A/1966/Add.1 112, Art. 32, Commentaries 3–6. The disagreement had limited practical effect, and the VCLT leaves the question open: D'Argent, 'Article 36: Convention of 1969', in O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (2011), at 930–940; D'Argent, 'Article 37: Convention of 1969', in *ibid.*, at 945–946. The distinction may, however, be important for the present purpose: the necessity for a collateral agreement may raise particular challenges for beneficiaries that are non-state actors.

41 *Philippe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Award, 27 Nov. 2000, at paras 25.5–25.7; *Yaung Chi OO Trading Pte Ltd v. Myanmar,* ICSID Case No. ARB/01/1, Award, 31 Mar. 2003, at paras 53–62.

42 In the law of treaties, the third state's 'assent shall be presumed as long as the contrary is not indicated': VCLT, *supra* note 39, Art. 36(1). Even the 'collateral agreement' theory, *supra* note 40, accepted that

If human rights provide the most influential analogy in the contemporary law, and the law of third parties may be pointing the finger to the future (where non-state actors evolve from being recipients of a benevolent grant of rights to active participants in the normative process, making the conscious choice to become holders of particularly formulated rights), in the earlier epochs the protection of individuals could be located within the four corners of the inter-state relationship. The procedural rights of investors may then be explained in terms of *delegated rights*.[43] In the classical legal writings, one (and probably minority) view was that treaties setting up international courts delegated the procedural rights of the home state to its nationals.[44] In more recent practice, host states have sometimes explained the nature of investment arbitration in these terms, either enabling them to rely on restrictive rules from customary law of diplomatic protection in the interpretative process or attempting to subject it to inter-state countermeasures.[45] If one were to accept this perspective, it would be possible to draw on the classical practice of agency of diplomatic protection,[46] conceptualizing investment treaties as agreements between a principal (home state) and a host state to delegate the right to bring an inter-state claim to the investor (agent) that has been injured by particular conduct.[47] With all due caution, it might also be possible to rely on other legal regimes based on agency,[48] and perhaps

assent 'need not be express but may take the form of a simple exercise of the right offered in the treaty': 1966 ILC Articles, *supra* note 40, at 229; D'Argent 'Article 36', *supra* note 40, at 936–938.

43 Douglas' suggested terminology of 'derivative rights', *supra* note 14, at 163 ff, may be misleading because such terms can also be used to describe the law-making process from which the rights are derived (see *HICEE*, *supra* note 18, at para. 139), and in any event do not quite capture the important point that the investor does not become a holder of the rights but remains a mere agent: Paparinskis, 'Investment Treaty Interpretation', *supra* note 18, at n. 62.

44 Donker-Curtius, 'La Cour internationale des prises', 11 *Revue de droit international et de législation comparée* (1909) 5, at 18–19, 27–32, Blühdorn, 'La fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les Traités de Paris', 41 *RCADI* (1932) 141, at 144–145.

45 *Loewen v. US,* ICSID Additional Facility Case No. ARB(AF)/98/3, Award, 26 June 2003, at para. 233; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v. Mexico*, ICSID AF Case No. ARB/(AF)/04/5, Award, 21 Nov. 2007, at paras 176–179; in a different context probably also BVerfG, 2 BvM 1–5/03, 1, 2/06, Order of 8 May 2007, available at: www.bverfg.de/entscheidungen/ms20070508_2bvm000103en.html, at para. 54.

46 On delegation of diplomatic protection see E. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), at 471–475; Sereni, 'La Représentation en Droit International', 73 *RCADI* (1948) 69, at 112–117; Dugard, 'Fifth Report on Diplomatic Protection', UN Doc A/CN.4/538 4-7. Special Rapporteur Dugard thought that there were no general rules on delegated diplomatic protection and everything depended on the treaty in question: *ibid.*, at para. 9. The debate in the ILC was inconclusive, particularly in light of the limited state practice, but the common thread running through it was the permissibility of delegation subject to consent of the respondent state: *Yrbk Int'l Law Commission,* 2004, i, UN Doc A/CN.4/SER.A/2004 4 (Gaja), 7 (Koskenniemi, Galicki), 27 (Dugard) (although not without sceptical voices: *ibid.*, at 14 (Economides), 19 (Xue)).

47 On the form and implications of such a hypothetical treaty rule see Paparinskis, 'Investment Treaty Interpretation', *supra* note 18, at 84–85.

48 Agency arrangements operated in the law of statehood, probably most prominently but not exclusively regarding protectorates: Chinkin, *supra* note 40, at 64–67; J. Crawford, *The Creation of States in International Law* (2006), at 314–316, and one might also perceive the relationships between states and international

even on generally accepted approaches to agency in domestic legal systems (should such rules exist).[49] Of course, in teleological and policy terms, the reintroduction of the inter-state procedural dimension may seem unattractive and counter-intuitive, undoing the shift away from the arbitrariness of diplomatic protection and towards greater depoliticization, historically believed to underpin the investment arbitration system.[50]

This article focuses on the implications that flow from relying on these regimes, and does not take a firm position regarding the correctness of these positions. In any event, the choice between the direct rights and agency approaches is ultimately a matter of treaty interpretation. The most authoritative guidance regarding the determination of individual treaty rights is provided by the *LaGrand* case of the ICJ. As *per LaGrand*, the two considerations weighing in favour of the direct nature of the rights are: first, formulation of the treaty rule in such a manner that its application is conditional upon the individual's conduct (in the context of consular notification, 'at the request of the detained person', 'any communication by the detained person'); secondly, the formulation of unconditional obligations by the state in the language of individual 'rights'.[51]

When reading investment treaties, one may point to arguments both in favour and against direct investor's rights.[52] On the one hand, the investor–state arbitration procedure is usually formulated as an elective right of the investor to submit a claim against the state, and the general procedural autonomy of the investor makes the reading of direct rights intuitively attractive.[53] Investment treaties may use the language of 'rights' in the formulation of rules or contextual or preambular references, and particular rules (for example, expropriation and transfers) may be conditional on the investor's conduct. Conversely, other treaties may define investment rules solely in terms of obligations. Rules on 'denial of benefits', both by describing investment protection rules as 'benefits', rather than rights, and if read as permitting denial with retrospective effect, fit more comfortably within a legal relationship that is not expressed

organizations in these terms: Sarooshi, 'Conferrals by States of Powers on International Organizations: The Case of Agency', 74 *British Yrbk Int'l L* (2003) 291; D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), at ch. 4. The explanation of jurisdiction of international criminal tribunals as based on delegation is an example of an argument that infers agency from the general structure within which particular rights are originally imbedded: Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *J Int'l Criminal Justice* (2003) 618.

49 S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2009), at Pt 2; R. Munday, *Agency: Law and Principles* (2010); P. Watts, *Bowstead and Reynolds on Agency* (2010).

50 Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', 1 *ICSID Rev – Foreign Investment LJ* (1986) 1; for a sceptical view see Paparinskis, 'Limits of Depoliticisation in Contemporary Investor–State Arbitration', 3 *Select Proceedings E Soc Int'l L* (2010) 271.

51 *LaGrand, supra* note 29, at para. 77 (emphasis in the original).

52 See the argument in greater detail in Paparinskis, *supra* note 34, at 334–337; Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law', in T. Broude and Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011), at 268; Paparinskis, 'Investment Treaty Interpretation', *supra* note 18, at 80–85.

53 Douglas, *supra* note 34, at 167–184.

in terms of rights opposable between the investor and the state.[54] If obligations, exceptions, or elements of dispute settlement are borrowed from the WTO, they could provide contextual support for reading investment law in the same inter-state terms as the universal free trade regime. Rights of states to preclude, block, or otherwise influence the investor–state arbitration process may also weigh in the same direction. Finally, if the considerations weighing in favour of direct and delegated rights may be identified with some certainty, then the choice between viewing direct rights through the lenses of human rights or third parties is more complex and would require an inquiry into the broader teleology of the architecture of investment law.

3 The Internationally Wrongful Act of a State

The ILC chose to approach the existence of international responsibility solely from the perspective of attribution and breach, leaving fault and damages to primary rules and injury and invocation to implementation of responsibility. A plausible proposition would therefore be that the determination of the internationally wrongful act of the state is entirely unaffected by the identity of the beneficiary of the obligation.[55] The following sections will explore rules set out in Part One of the Articles from this perspective, suggesting that they are indeed applicable *verbatim* except for certain circumstances precluding wrongfulness where the identity of the beneficiary plays an important role.

A *General Principles, Attribution and Breach*

The rules reflected in Chapters I–IV of Part One may be disposed of relatively briefly. The proposition that attribution and breach are the two necessary and sufficient elements of an internationally wrongful act has been accepted, and the existence of attribution and breach has been determined in line with the largely commonsensical rules expressed in Chapters II–III[56] (it seems that no case has so far addressed issues of responsibility of a state in connection with the act of another state dealt with in Chapter IV). For the present purpose, there are three elements from the investment cases that may raise a normatively questioning eyebrow for a pedantic inquiry.

First, in a number of cases where underlying claims addressed contractual issues, tribunals have mistakenly applied rules of attribution to legal issues outside their proper scope. For example, in the *Nykomb v. Latvia* case decided under the Energy

[54] *Pac Rim Cayman LLC v. El Salvador,* ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections of 1 June 2012, at paras 4.83–4.92.

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

[56] Crawford, 'Treaty and Contract in Investment Treaty Arbitration', 24 *Arbitration Int'l* (2008) 351, at 355–359; Knahr, 'International Investment Law and State Responsibility: Conditions of Responsibility', in Hofmann and Tams (eds), *supra* note 55, at 95. While one tribunal has suggested that damage is a criterion for the breach of primary investment obligations, *Merril & Ring Forestry L.P. v. Canada,* UNCITRAL Case, Award, 31 Mar. 2010, at paras 244–245, the correctness of this view may not be obvious: *Biwater Gauff (Tanzania) Ltd v. Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, at paras 464–467, and in any event the argument is explicitly made within the four corners of the ILC model, casting no doubt on the irrelevance of damages for breach as a matter of general secondary rules.

Charter Treaty, the tribunal seemed to rely on criteria of attribution to establish not only attribution of conduct but also the scope and breach of the contractual obligation.[57] Still, even if one may question the quality of reasoning, the conflation of primary and secondary rules is not influenced by the nature of the beneficiary.[58] International claims regarding contractual breaches were common in inter-state diplomatic protection practice,[59] and, while it would not be implausible to suggest that such contract-related claims are brought by investors that their states would not have espoused themselves, this is a descriptive observation without direct legal significance.

Secondly, some arbitral decisions regarding fair and equitable treatment leave it somewhat unclear whether the international responsibility is based on a certain breach of an international obligation. Some tribunals have decided the case without identifying the content of the rule: for the *Plama v. Bulgaria* tribunal, 'the present case can be decided on the facts, whatever interpretation is made of the FET standard in the ECT';[60] and the *Tokios Tokele v. Ukraine* tribunal 'abstain[ed] from offering the view on the meaning of "fair and equitable treatment"'.[61] To decide a dispute on the basis of facts without attributing particular content to a legal rule is closer to *ex aequo et bono* rather than legal decision-making. Still, this reasoning seems to be caused by the vague formulation of the primary rule rather than by the nature of the beneficiary.[62] In a different sense, the excessive reliance by some tribunals on the legitimate or reasonable expectations of investors led one annulment committee to note that '[t]he obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have'.[63] To identify breach by reference to an investor's expectations under an undetermined system of law rather than binding international obligations would indeed suggest a radical departure from the traditional model of international responsibility. Still, the excessive emphasis on expectations may have had more to do with inelegance of presentation and not a conceptual rejection of the whole edifice of international legal reasoning, and the pedantic objection may be responded to by incorporating non-frustration of expectations as a criterion of the obligation.[64]

[57] *Nykomb v. Latvia*, SCC Case, Award, 16 Dec. 2003, at para. 4.2.c.

[58] Crawford, *supra* note 56, at 362.

[59] Borchard, *supra* note 46, at 281–329.

[60] *Plama Consortium Ltd v. Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 Aug. 2008, at para. 175.

[61] *Tokios Tokelės v. Ukraine,* ICSID Case No. ARB/01/3, Award, 26 July 2007, at para. 123.

[62] The point was tentatively suggested in the inter-state procedural context even before the first investment treaty arbitrations. In *Military and Paramilitary Activities in and Against Nicaragua*, Alain Pellet on behalf of Nicaragua conceded that 'equitable treatment' in the FCN Treaty lacked a precise meaning like national and MFN treatment, but argued that, whatever it meant, the US had breached it: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (Merits), ICJ Pleadings, v, at 205, generally 196, 205–207 (Iran made a similar argument in *Aerial Incident of 3 July 1988 (Iran v. US)*, Memorial of Iran, 24 July 1988, at 182). The Court 'expresse[d] no opinion' 'as to' whether 'the provision for "equitable treatment" in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua': *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (Merits) [1986] ICJ Rep 392, at para. 277. See Paparinskis, *supra* note 21, at 115–120.

[63] *MTD Equity Sdn Bhd. and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/07, Decision on Annulment, 21 Mar. 2007, at para. 67.

[64] Paparinskis, *supra* note 21, at chs 5, 9.

Thirdly, investment tribunals seem somewhat readier than inter-state dispute settlement bodies to accept arguments about *lex specialis* rules of attribution. In the *United Parcel Service v. Canada* case, a tribunal decided that rules of attribution reflected in Articles 4 and 5 of the ILC Articles were inapplicable to monopolies and state enterprises because of the *lex specialis* effect of the detailed primary obligations regarding these issues in the NAFTA.[65] One might respectfully question the correctness of the conclusion. It is not at all clear that primary obligations to engage in certain conduct and secondary rules on the attribution of conduct can logically find themselves in a situation of conflict.[66] The authoritative annulment decisions in the Argentinean cases that reject the right to interpret a primary rule by reference to a secondary rule surely apply in *a fortiori* terms to the prioritizing of a primary rule over a secondary rule.[67] Still, even if the *UPS* tribunal seemed to go against the grain of general practice on the issue at the inter-state level,[68] the nature of the beneficiary was not an explicit part of this legal reasoning. Overall, while not without the odd turn of phrase or contested factual application here and there, the arbitral decisions regarding the basis of responsibility have applied *verbatim* the rules of Part One, just as one might have expected.

B *Circumstances Precluding Wrongfulness*

Circumstances precluding wrongfulness raise more interesting questions. This section will in turn consider consent, countermeasures, and necessity. A valid consent to the commission of a given act precludes wrongfulness of that act.[69] One might consider the relevance of consent given by two entities: the investor and its home state. Whatever view one takes of the legal nature of the investor more broadly, the primary rule in question may already take into account consent by an individual. The ILC Commentary makes the point by reference to human rights law,[70] and international responsibility in

[65] *United Parcel Service v. Canada*, UNCITRAL Case, Award on the Merits, 24 May 2007, at paras 57–63.

[66] Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration', 25 *ICSID Review – Foreign Investment LJ* (2010) 200, at 209–210, although *contra* and approvingly, Crawford, *supra* note 16, at 130–131. See a discussion of a similar question about a conflict between a primary rule and a secondary circumstance precluding wrongfulness relating to a different primary rule: Paparinskis, 'Equivalent Rules', *supra* note 52, at 274–275.

[67] *CMS Gas Transmission Company v. Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 Sept. 2007, at paras 129–135; *Sempra Energy International v. Argentina*, ICSID Case no ARB/02/16, Decision on the Application for Annulment of the Award, 29 June 2010, at paras 186–209.

[68] The tribunal distinguished a WTO Panel report, *supra* note 65, at para. 61. Interestingly, the President of the *UPS* Tribunal, the ICJ Judge Kenneth Keith, was part of the Court that had decided the *Bosnian Genocide* case (3 months before *UPS*), summarily rejecting the Bosnian argument that the nature of the primary obligation of genocide affected rules of attribution in a *lex specialis* manner: *supra* note 5, at para. 401 (Judge Keith did not comment on issues of attribution: see *ibid.*, Declaration of Judge Keith, at 352).

[69] 2001 ILC Articles, *supra* note 2, Art. 20.

[70] *Ibid.*, at Art. 20, Commentary 10. It should be noted in parentheses that consent is different from a waiver of a right to invoke responsibility. In the former case, wrongfulness of the act is precluded (or perhaps does not even arise in the first place, in light of the close connection between the expression of consent and primary rules), while in the latter case wrongfulness arises but is then waived. It is therefore misleading for the Commentary to Art. 20 to discuss whether an investor could contractually waive diplomatic protection: diplomatic protection is the right to invoke responsibility for breaches where the responsibility is necessarily *not* precluded: *ibid.*

investment law has sometimes been based on duress by the state in concluding contracts with the investor.[71] In these cases, validity of consent operates as an element of primary rules and is unaffected by the nature of the entity invoking responsibility.[72] Moving further and considering the nature of the investor, the direct rights model has been influential in practice. The *SGS v. Philippines* tribunal (with Crawford as one of its members) has stated that '[i]t is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law'.[73] If the investor's rights are direct, then the position of human rights law may usefully be consulted, probably limiting the role of consent to that accepted by the particular primary rule.[74] If the investor engages in delegated diplomatic protection, it cannot exercise consent as a circumstance precluding wrongfulness: primary obligations are owed only to the home state, and the procedural rights of the investor to invoke responsibility arise only when a (properly) wrongful breach has taken place. From the third party perspective, it is plausible to suggest that a third state, capable of possessing a right to consent to a revocation or modification of rights under Article 37 of the VCLT as a matter of primary rules, would *mutatis mutandis* or even *a fortiori* be entitled to provide consent to preclude wrongfulness.[75] The same argument would apply to an investor. For the purposes of consent, the direct rights and agency models would lead in a different direction from the third party rights.

The home state might also wish to exercise consent as a circumstance precluding wrongfulness, for example, in the context of a broader settlement of disputes with the host state or because it does not wish to see a certain issue subject to formalized dispute settlement. If the investor is only an agent of diplomatic protection, then consent would successfully preclude wrongfulness: the primary obligation is owed only to the home state and the investor has no rights before the breach has taken place. If the investor is a right-holder or a third party beneficiary, then consent may be opposable

[71] *Desert Line Projects LLC v. Yemen,* ICSID Case no ARB/05/17, Award, 6 Feb. 2008, at paras 148–194.

[72] See references to classical cases of diplomatic protection that identify the same legal rule: *ibid.*, at paras 172–173. On forced sales see Christie, 'What Constitutes a Taking of Property under International Law?', 38 *British Yrbk Int'l L* (1962) 307, at 324–329.

[73] *SGS v. Philippines, supra* note 30, at para. 154.

[74] E.g., the ECtHR has concluded that a waiver of the right to fair trial is possible: App. No. 5826/03, *Idalov v. Russia,* [GC] (2012) ECHR Judgment of 22 May 2012, at para. 172, if it is unequivocal, given with full knowledge of the facts and with foreseeable consequences, and is attended by minimum safeguards: *ibid.*, at paras 172–173; App. No. 57325/00, *D.H. and Others v. Czech Republic,* [GC] (2007) ECHR Rep 2007, at para. 202; App. No. 21272/03, *Sakhnovskiy v. Russia,* [GC] (2012) ECHR Judgment of 2 Nov. 2010, at para. 90, while waiver of the right to be subject to discrimination on the basis of sex and race is not: App. No. 30078/06, *Konstantin Markin v. Russia,* [GC] (2012) ECHR Rep 2012, at para. 150. It is complicated to derive much from this practice that would not circularly lead back to the particular primary rule in the particular regime. In some cases, it might be possible to restate an argument for preclusion of wrongfulness as an argument in light of a particular primary rule, e.g., articulating an argument of consent that is irrelevant for precluding discrimination as one of the factors for determining likeness in the first place.

[75] On different ways of situating consent in the taxonomy of primary and secondary rules see Ben Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent', in Crawford, Pellet, and Olleson, *supra* note 1, at 439, 440–441, 445–446.

to its home state but not to itself.[76] States may go further and change or reinterpret the primary rule itself, but preclusion of wrongfulness as a technical argument could not become opposable to a third party. The 2006 Softwood Lumber Agreement between Canada and the US leaves the question open but is more consistent with the latter reading (or alternatively very careful drafting), the investors settling the pending claims but not consenting to the lawfulness of any future conduct, and the prospective challenges dealt with at the level of suspension of investor–state arbitration.[77]

A different legal challenge is raised by an attempt by a state to preclude wrongfulness for the breach of an investment treaty by characterizing it as a countermeasure in response to an anterior breach by a home state.[78] The argument against the application of countermeasures may be expressed in a variety of ways, including *lex specialis*, peremptory rules, analogies with humanitarian law, substantive importance of the rights, structure of obligations, and, importantly for the present purpose, nature of rights.[79] The other arguments may be disposed of relatively briefly. First, there is little support for reading investment treaties as special rules that exclude countermeasures in *a priori* terms.[80] Secondly, investment obligations may incidentally overlap with obligations of a peremptory character, but by and large they are dispositive rules, so a general limitation could not be sought there.[81] Thirdly, while there is an argument for relying on the long-established prohibition of property confiscation in wartime to conclude that such countermeasures should be forbidden in peacetime,[82] upon closer reflection the two strands of law have developed autonomously, as appears to have been accepted by the ILC.[83] Fourthly, the exclusion of countermeasures from 'fundamental human rights' in Article 50(1)(b) of the Articles may be read in a number of ways.[84] If the distinguishing factor is the substantive importance of rights, one would first have

[76] Similarly to consent of one state to a breach of a multilateral obligation: *ibid.*, at 446.

[77] Canada–US Softwood Lumber Agreement, available at: www.international.gc.ca/controls-controles/assets/pdfs/softwood/SLA-en.pdf (adopted 12 Sept. 2006), Arts X(1)(a), XI(2).

[78] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v. Mexico,* ICSID AF Case No. ARB/(AF)/04/5, Award, 21 Nov. 2007, at paras 110–180; *Corn Products International, Inc v. Mexico*, ICSID AF Case No. ARB/(AF)/04/1, Decision on Responsibility, 15 Jan. 2008, at paras 144–191; *Cargill, Inc v. Mexico,* ICSID AF Case No. ARB/(AF)/05/2, Award, 18 Sept. 2009, at paras 410–430.

[79] The following sections summarize the discussion in Paparinskis, *supra* note 34, at 317–351.

[80] 2001 ILC Articles, *supra* note 2, Art. 55; Paparinskis, *supra* note 34, at 345–351. In the leading modern case, countermeasures were applicable even though 'the network of air services is in fact an extremely sensitive system, disturbances of which can have wide and unforeseeable consequences': *Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) 18 *RIAA* 417, at 445, para. 92. Investment tribunals that address countermeasures do not adopt the *lex specialis* position: *supra* note 78 (with the possible exception of one Arbitrator, *Corn Products, supra* note 78, Separate Opinion of Arbitrator Lowenfeld, particularly at paras 3–4).

[81] 2001 ILC Articles, *supra* note 2, Art. 50(1)(d); Paparinskis, *supra* note 34, at 318–319.

[82] Arangio-Ruiz, 'Third Report on State Responsibility', in *Yrbk Int'l Law Commission 1991, Vol. II(1)*, UN Doc A/CN.4/SER.A/1991/Add.1, at para. 111; 2001 ILC Articles, *supra* note 2, Art. 50(1(d).

[83] J. Crawford, *Third Report on State Responsibility,* UN Doc A/CN.4/507 Add.3, at para. 312; Paparinskis, *supra* note 34, at 319–325.

[84] Borelli and Olleson, 'Obligations Relating to Human Rights and Humanitarian Law', in Crawford, Pellet, and Olleson, *supra* note 1, at 1177, 1178–1186.

to consider the appropriateness of an argument by analogy from human rights to investment rights, and then identify the criteria for distinguishing fundamental from non-fundamental rights. Whether one chooses non-derogability or the peremptory nature of the rules as the benchmark, it is questionable whether rules on property protection and fair trial could survive the argument by analogy.[85] Fifthly, if the proper criterion is the impermissibility of countermeasures regarding multilateral obligations – where preclusion of wrongfulness *vis-à-vis* one state could not be opposed to other entities entitled to invoke responsibility – then it is also inapplicable to investment law that, even when expressed in multilateral form, remains of a bilateralizable character.

Reading the rule on human rights as referring to the nature of rights in question provides a more promising perspective. Even though the host state may in principle apply countermeasures to investment obligations, their effect and limits depend on the nature of the investors' rights. Countermeasures are relative in effect and may not be adopted otherwise than in response to a prior breach of international law by the entity to which the obligation is owed. From the perspective of delegated diplomatic protection, the host state owes primary obligations only to the home state, and the investor only invokes responsibility for their breach; consequently, countermeasures can be successfully opposed to the only beneficiary of the obligation and can in principle successfully preclude wrongfulness, provided that other criteria are satisfied.[86] However, if the investor is also the beneficiary of the obligation (whether akin to a third party or as an entity with direct rights), then the precluding wrongfulness of countermeasures, while opposable to one beneficiary (the home state), is not opposable to the other beneficiary (the investor).[87] The ILC's work on countermeasures and human rights in the context of obligations not subject to countermeasures supports the view that in the particular context non-state actors that are beneficiaries of the obligations may be appropriately analogized to third states.[88] For countermeasures, the direct and third party rights lead to a different conclusion from the agency model.

Other aspects of circumstances precluding wrongfulness, despite the controversy surrounding their interpretation and application, do not seem to be affected by the nature of the entity invoking responsibility. The law of necessity is probably the most debated aspect of circumstances precluding wrongfulness, in light of the variety of approaches in the Argentinean cases arising out of the economic crisis. The divergent lines of practice may be summarized in the following terms:

> [a]ccording to the first approach, '[t]he question arising … is not … whether such measures are … justified counter-measures [or necessity] in general international law; the question

[85] Paparinskis, *supra* note 34, at 325–330.

[86] *Archer Daniels Midland, supra* note 78, at paras 110–180. On the substantive and procedural requirements of countermeasures see 2001 ILC Articles, *supra* note 2, Arts 51–53; Iwasawa and Iwatsuki, 'Procedure Conditions' at 1149, O'Keefe, 'Proportionality', at 1157, and Kamto, 'The Time Factor in the Application of Countermeasures', at 1169, all in Crawford, Pellet, and Olleson, *supra* note 2.

[87] *Corn Products, supra* note 78, at paras 153–191; *Cargill, supra* note 78, at paras 420–430.

[88] Paparinskis, *supra* note 34, at 331–334.

is whether the measures in question are, or are not, in breach of the Treaty.'[89] The [Non-Precluded Measure] NPM clauses are then part of the particular primary rules, and the secondary rules of State responsibility regarding circumstances precluding wrongfulness have no direct relevance. The second approach would treat the NPM clause as a secondary rule, implicitly situating the treaty in a relationship of a *lex specialis* secondary rule towards customary law. It would seem to follow from this argument that the *lex specialis* excludes the *lex generalis*, thus the law of necessity would be replaced between the Contracting Parties by the NPM clause.[90] The third approach would treat the NPM clauses as 'inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned'.[91] While the Tribunals do not fully explain their argumentative process, it seems that in a somewhat circular manner they first of all accept the NPM clause to be a *lex specialis* secondary rule replacing the customary law rule, and then use the VCLT Article 31(3)(c) to incorporate the customary law criteria from *lex generalis*.[92]

The debates in and about the Argentinean necessity cases add surprisingly little to the analysis of state responsibility from the perspective of the investor. In most cases, the real legal question dividing the arbitrators is not about the law of state responsibility but about the admissibility and weight of customary law in treaty interpretation.[93] Other cases touch upon questions that have been left open in the Articles themselves: for example, regarding compensation in cases of circumstances precluding wrongfulness, for which Article 27(b) provides a 'without prejudice' clause.[94] It is not entirely clear where the obligation to provide compensation (presumably used in the technical sense of an element of reparation, just as elsewhere in the Articles) could come from in the absence of special primary rules,[95] particularly within a regime premised on responsibility for wrongfulness solely in the presence of a wrongful act.[96] If the absence of prejudice still leads to an obligation to pay compensation, one might wonder about the usefulness of circumstances precluding wrongfulness

[89] *Nicaragua, supra* note 62, Dissenting Opinion of Sir Robert Jennings, at 528, 541; *CMS* Annulment, *supra* note 67, at paras 129–233; *Continental Casualty v. Argentina,* ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, at paras 162–168; *Sempra* Annulment, *supra* note 67, at paras 196–208.

[90] *LG&E v. Argentina,* ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, at paras 245–261; *Patrick Mitchell v. DRC,* ICSID Case No. ARB 99/7, Decision on Annulment, 1 Nov. 2006, at para. 55.

[91] *Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/16, Award, 28 Sept. 2007, at paras 376, 378; *CMS Gas Transmission Company v. Argentina,* ICSID Case No. ARB 01/08, Final Award, 12 May 2005, at paras 315–382; *Enron Corporation & Ponderosa Assets, L.P. v. Argentina,* ICSID Case No. ARB/01/3, Award, 22 May 2007, at para. 334.

[92] Paparinskis, *supra* note 34, at 349–350 (original footnotes reproduced and supplemented); see also Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', 22 *EJIL* (2011) 993, at 1022–1026.

[93] Paparinskis, 'Investment Treaty Interpretation', *supra* note 18, at 93.

[94] *CMS* Annulment, *supra* note 67, at paras 146–147.

[95] In any event, even if the primary rule in question, the responsibility for which has been successfully precluded, requires payment of compensation (most obviously, rules on expropriation), a successful invocation of a circumstance precluding wrongfulness would preclude that aspect of the obligation as well. For the obligation to survive the invocation of circumstance precluding wrongfulness, one would have to identify a separate primary rule that provides compensation in case other primary rules are breached with (a particular type of) precluded wrongfulness.

[96] This question is linked to the broader debate about the coherence of the category of circumstances precluding wrongfulness, and whether one might consider the difference between excuse and justification,

within a regime that, in practice, is almost exclusively concerned with granting compensation. Still, even though the question of compensation for circumstances precluding wrongfulness may be of greater practical importance for responsibility invoked by investors than for responsibility in general, the problem lies in the exposition of the ILC Articles themselves, and the perspective of investors does not provide a direct added value.

There are two aspects of necessity that may be of interest for the present purpose. Article 25(1)(b) does not permit the invocation of necessity if the act seriously impairs an essential interest of the state(s) to which the obligation is owed or the international community as a whole. The *Enron v. Argentina* tribunal described investors as beneficiaries of the obligations, and suggested that the essential interest of the claimants would be impaired by invocation of necessity.[97] From the perspective of the investor, the difference between a beneficiary of the obligation (whether akin to a third party or as an entity with direct rights) and an agent may appear at the quantitative level: while even in the latter case, the home state's interests would include the treatment of its investors,[98] mistreatment of a limited number of investors would more easily meet the benchmark of impairing their individual essential interest, rather than that of their states.

As the Annulment Committee in *Enron* noted, impairment by the invocation of necessity addressed by the Tribunal is a different proposition from impairment by the act suggested by the ILC;[99] perhaps the Tribunal was really alluding to the exclusion of necessity by *lex specialis*. In a similar vein, the Tribunal in the *BG v. Argentina* indicated (without deciding conclusively) that necessity might be unavailable to Argentina because it 'may relate exclusively to international obligations between sovereign States'. Since exclusion of necessity by *lex specialis* was considered as an alternative argument,[100] the underlying assumption must have been that (some) secondary rules were *ab initio* inapplicable to the international obligations of states not owed to states. In terms of intellectual pedigree, *BG* seems to go further than even the more radical versions of clinical isolationists (who would simply rely on an expansive notion of *lex specialis)* and probably sees investors' rights as being *a priori* carved out of the international legal order.[101] The reasoning implied in *Enron* and expressed in *BG* would suggest that, if investors' rights are not explained by reference to any

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the conduct of the injured state, or other factors in providing compensation: Paparinskis 'Equivalent Rules', *supra* note 52, at 267; Szurek, 'The Notion of Circumstances Precluding Wrongfulness', in Crawford, Pellet, and Olleson, *supra* note 1, at 427, 436–437.

97 *Enron* Award, *supra* note 91, at paras 338, 342.

98 Unless one follows Douglas' argument that the home state is not injured by a breach of an investment treaty: Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID', in Crawford, Pellet, and Oleson, *supra* note 1, at 815, 816–819.

99 *Enron Corporation & Ponderosa Assets, L.P. v. Argentina,* ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 July 2010, at paras 383–384.

100 *BG Group Plc v. Argentina*, UNCITRAL Case, Final Award, 24 Dec. 2007, at paras 408–409.

101 Perhaps the intellectual precursor for *BG* is Oppenheim, who thought that individual rights before international courts were not properly domestic or international but 'only rights within the organisation concerned': R.F. Roxburgh (ed.), *Oppenheim's International Law: Peace* (1920), at 459.

concepts from traditional inter-state international law, there would be a strong argument for excluding circumstances precluding wrongfulness in *a priori* terms. The underlying assumption seems to understate the openness of the law of state responsibility to non-state actors, as demonstrated by *verbatim* or *mutatis mutandis* application of different rules in other areas, that permits reasonable application or extension by analogy.

4 Content of International Responsibility of a State

Part Two of the Articles, unlike Part One, explicitly deals with responsibility directly accruing to non-state actors by providing, in Article 33(2), a rule of no prejudice. If one were to try to predict the elaboration of the law of remedies from the perspective of 2001, it would be plausible to rely on Article 33(2) to expect careful analysis of whether, how, and to what extent the remedies expressed in Part Two could be applied in the investor–state setting. However, the post-2001 practice has proceeded in an entirely different direction.

Article 33(2) is rarely invoked in the consideration of the content of state responsibility to investors.[102] The rules and principles laid out in Part Two have in most instances been relied on directly and without an obvious acknowledgment that the without-prejudice rule calls for some additional legal justification. For example, a leading monograph on reparation in investment arbitration, while noting possible theoretical problems in applying the rules from the Articles to investment arbitration, proceeds to do so, apparently without mentioning the without-prejudice rule.[103] To consider only a few leading decisions from recent years: the *Gemplus v. Mexico* tribunal relied extensively on the Articles and commentaries on reparation in general and compensation in particular;[104] the *Lemir v. Ukraine* tribunal invoked Article 31(1) for the proposition that 'a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained'[105] and also cited Articles 36 and 39 regarding compensation and contribution to injury;[106] the *Chevron v. Ecuador* tribunal quoted Article 31(2) of the Articles as an authority for

[102] Although see *MTD* Annulment, *supra* note 63, at para. 99. In other cases tribunals have both understated and overstated the legal effect of Art. 33(2). The *ADM* Tribunal omitted the introductory limitation of Art. 33(2) to Part Two and described the without-prejudice rule as applying to all aspects of the law of state responsibility, and in particular to invocation of responsibility: *Archer Daniels Midland, supra* note 78, at para. 118. However, it simultaneously relied on the rules on reparation and compensation from Part Two: *ibid.*, at paras 275, 280–281. The *Wintershall* Tribunal referred to Art. 33(2) regarding invocation and not remedies dealt with in Part Two: *supra* note 37, at para. 112, and again went too far in saying that the Arts contain no rules (presumably including rules of Part One) applicable to investors: *ibid.*, at para. 113.

[103] B. Sabahi, *Compensation and Restitution in Investor–State Arbitration: Principles and Practice* (2011), at 55, generally at 53–60.

[104] *Gemplus SA, SLP SA, Gemplus Industrial SA de C.V. and Talsud S. v. Mexico,* ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/3, Award, 16 June 2010, at paras 11.9–10, 11.12–13, 12.51, 13.79–80, 13.82–83.

[105] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award, 28 Mar. 2011, at para. 147, n. 142.

[106] *Ibid.*, at paras 151, 155, 156, 245.

the 'legal principle as regards the claim for moral damages';[107] the *EDF v. Argentina* tribunal cited the commentary to Article 31 in support of the proposition that '[t]he duty to mitigate damages is a well-established principle in investment arbitration';[108] and the recent US$ 1.7 billion award in *Occidental v. Ecuador* quantified damages on the basis of a 25 per cent contribution to the injury by the investor, in accordance with Article 39.[109] This seemingly representative practice raises the question of how one can square the commonplace invocation and application of the rules of inter-state responsibility from Part Two with the at best neutral attitude called for by Article 33(2) itself for cases of state responsibility to non-state actors. One might suggest a number of possible explanations.

First, the technically accurate explanation (although one doubts whether tribunals are in fact guided by it) would be to rely on the agency approach and to say that investor–state arbitration is not an invocation of state responsibility by the beneficiary of the particular primary rule but a delegated and modified exercise of diplomatic protection. If that is the case, Article 33(2) would not be relevant because the rights would not accrue to the investor at all, but only to the home state. The inter-state rules on responsibility laid out in Part Two of the 2001 ILC Articles would be delegated and apply directly. Of course, the delegation and modification would have changed important aspects of the law, particularly regarding functional control, but one would assume that the right to request all remedies would remain valid unless explicitly removed. In schematic terms, if a rule is formulated as 'if A, then B; but if C, then without prejudice to B', then direct application of B without any additional legal reasoning suggests that the first part of the legal rule set out above is in play. In other words, to the extent that tribunals rely on rules set out in Part Two of the Articles without providing an additional explanation, they implicitly treat the investor as an agent, and its home state as the proper principal on whose behalf the inter-state responsibility is invoked and implemented. (Another, even more far-reaching explanation might view this practice as implicitly supporting the third party rights perspective, drawing on the regime of states and international organizations so broadly as to also rely on their remedies.)

Secondly, certain aspects of the content of responsibility follow automatically from the wrongfulness of conduct even without invocation. Articles 29 and 30 set out the obligations of, respectively, the continued duty of performance and, importantly, of cessation of the continuing wrongful act. Cessation may be very closely related to restitution: as the Commentary notes, '[t]he result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects and premises seized'.[110] The rules

[107] *Chevron Corporation and Texaco Petroleum Company v. Ecuador,* PCA Case No. 2009–23, 27 Feb. 2012, Third Interim Award on Jurisdiction and Admissibility, at para. 4.93.

[108] *EDF International SA v. Argentina*, ICSID Case No. ARB/03/23, Final Award, 11 June 2102, at para. 1302, n. 91.

[109] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Ecuador,* ICSID Case No. ARB/06/11, Award, 5 Oct. 2012, at paras 665–668, 673.

[110] 2001 ILC Articles, *supra* note 2, Art. 33, Commentary 7.

on cessation immediately follow from the primary rules themselves,[111] and apply with the same logical force to obligations where beneficiaries are not states. By (re)characterizing the claim as one for cessation rather than reparation, one can leave aside the question about the remedies available to the investor. The examples provided by the ILC seem pertinent to the investment context, whether regarding the freeing of investors' employees imprisoned during an intimidation campaign (in breach of full protection and security) or the return of unlawfully expropriated property. Indeed, the passage from *Rainbow Warrior* cited in *Enron v. Argentina* regarding restitution related precisely to the '[t]he authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach'.[112] However, the explanation would not be helpful for justifying clearly compensatory remedies.

Thirdly, remedies discussed in Part Two may reflect general principles and customary rules on the responsibility of states and would therefore be applicable also in the investor–state context. The much-cited paragraph from the *Factory at Chorzów* case about restitution and compensation is introduced as '[t]he essential principle contained in the actual notion of *an illegal act*', and restitution, payment equivalent to restitution, and additional damages are explained to be 'the principles which should serve to determine the amount of compensation *due to an act contrary to international law*'.[113] On the face of it, this principle is derived from the illegality of the act rather than the nature of the beneficiary of the obligation, and therefore is applicable with equal force in any context (including investor–state arbitration) where consequences of a breach of international law by a state are considered. Indeed, the Court was conscious, when discussing inter-state responsibility, that the affected German companies in question had claimed restitution[114] before 'private claims arbitral tribunals of a special international character'.[115]

If one were to adopt this approach, it would be necessary to demonstrate that the instances of state practice and judicial decisions that underpin the particular formulae support broader rules, applicable outside responsibility *to* states to all legal situations of responsibility *of* states. The practice and case law relied on in the 2001 ILC Articles do not support any sharp limitation to inter-state claims.[116] The commentaries to the

[111] Corten, 'The Obligation of Cessation', in Crawford, Pellet, and Olleson, *supra* note 1, at 545, 545–546.

[112] *Enron Corporation & Ponderosa Assets, L.P. v. Argentina,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 Jan. 2004, at para 791. It is less obvious that an authority to order specific performance can be based on the continued duty of performance of the primary obligation: *Al-Bahloul v. Tajikistan,* SCC Case No. 064/2008, Final Award, 8 June 2010, at para. 48. Continued duty is not a remedy for the breach but a(n almost superfluous) restatement of the unaffected existence of the primary obligation, without prejudice to the content of the remedy that might be available for its breach.

[113] *Factory at Chorzów, supra* note 27, at 47 (emphases added).

[114] *Ibid.*, at 22–23.

[115] *Ibid.*, at 28; see further citations at *supra* note 27.

[116] Historical materials suggest that the technical exclusion of individuals was due to the scope of the particular project and not meant as a statement of the scope of rules of international law more generally: S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), at 28–29.

articles on restitution,[117] compensation,[118] and interest refer to individual–state disputes on a par with inter-state disputes.[119] At least *prima facie*, the authorities relied on in formulating the rules on compensation, and probably also restitution (but not satisfaction and contribution), are not exclusively derived from inter-state practice and could therefore support the broader reading of their applicability. The practice of the ECtHR[120] and the 2012 judgment of the ICJ on compensation in the *Diallo* case are consistent with the proposition from the opposite perspective, the latter judgment relying *inter alia* on the practice of international courts with individual access 'which have applied general principles governing compensation' to elaborate the rules on compensation in an inter-state diplomatic protection case.[121]

Fourthly, a different way of articulating the argument would employ analogy. The previous approach inquired into the possibly broader scope of the rules expressed in the Articles. The argument by analogy would take this expression of rules as the benchmark for, as it were, a normal and natural regime of responsibility, and would consider whether there is a reason not to apply it beyond inter-state responsibility. In its 2011 Articles on Responsibility of International Organizations, the ILC reproduced effectively identical rules on reparation, noting repeatedly that there were no reasons to depart from the rules on state responsibility.[122] This methodology could be applied, with certainly much greater caution in light of functional differences, to responsibility invoked by investors. For example, Crawford has explained criticisms of restitution in some cases by saying that 'these were, precisely, mixed arbitrations, where the right of eminent domain of the responsible State (and its sovereignty over its natural resources) has to be balanced against the obligations it has assumed for the protection of these resources, whether by treaty or otherwise'.[123] Conversely, the Annulment Committee in the *MTD v. Chile* case (having Crawford as one of its members) noted regarding the rule on contribution to the injury expressed in Article 39 that '[t]here is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals'.[124] From the perspective of the investor, certain comparative considerations (such as, for example, Crawford's argument about restitution that

[117] 2001 ILC Articles, *supra* note 2, Art. 35, Commentary 4, nn. 493, 495, 496, 508.

[118] *Ibid.*, Art. 36, nn. 515, 516, Commentary 6, nn. 520–522, Commentary 19, nn. 547, 549–550, 553, 555–556, 558, Commentary 27, nn. 559–550, 562, 564–566, 570, Commentary 32, nn. 576, 578, 579.

[119] *Ibid.*, Art. 38, nn. 609, 611, Commentary 8, nn. 615, 618.

[120] The ECtHR has relied on *Chorzow,* the Articles, and mixed arbitrations to formulate its remedies, particularly regarding restitution: *Guiso, supra* note 19, at paras 49–54.

[121] *Ahmadou Sadio Diallo (Guinea v. DRC)* (Compensation) [2012], at paras 13, 18, 24, 33, 40, 49, 56, available at: www.icj-cij.org/docket/files/103/17044.pdf; *ibid.*, Declaration of Judge Yusuf, at paras 12–15, available at: www.icj-cij.org/docket/files/103/17048.pdf; *ibid.*, Declaration of Judge Greenwood, at paras 8–9 , available at: www.icj-cij.org/docket/files/103/17050.pdf. Judge Greenwood explicitly approved the Court's drawing upon the experience of human rights institutions, justifying it by the fact that '[i]nternational law … is a single unified system of law', *ibid.*, at para. 8. For the present purposes, *Diallo* supports the view that cases addressing compensation by states (at least for non-material injury, loss of property, and loss of remuneration) have elaborated the same body of law.

[122] 2011 ILC Articles, *supra* note 10, Arts 34–39.

[123] J. Crawford, *Third Report on State Responsibility*, UN Doc A/CN.4/507/Add.1, at para. 143.

[124] *MTD* Annulment, *supra* note 63, at para. 99.

draws upon a mixture of primary and procedural elements) would be equally applicable to all approaches, while others may be affected by the approaches (for example, the logic of the *MTD* committee would seem to depend on the contribution by the beneficiary of the obligation that may not be satisfied if obligations run only on the inter-State level).

For the purpose of exhaustiveness, one also needs to consider the possibility that most of the arbitral awards on remedies (with the rare exceptions that justify the applicability of *Chorzow* or Part Two in terms of the scope of the rule or by analogy) have simply been wrong as a matter of law. If that were to be the case, a further question would relate to the impact of the post-2001 state practice. In terms of law-making, a proposition that is initially erroneous may become a rule of international law if it is accepted and invoked in a widespread and consistent manner as well as – which is of relevance in this instance – not challenged in situations where one might expect challenges to be raised. One might reasonably expect that states, were they to disapprove the extension of rules set out in Part Two to investor–state arbitration, would challenge this practice, particularly in ICSID annulment proceedings but also regarding compliance more broadly. This does not seem to have happened: the widespread and consistent failure of states to challenge the extension of (particular) inter-state remedies, whether by invoking them themselves, complying with them, or even failing to comply with them without a specific challenge, could provide the law-making seal of approval to the possibly suspect elements of practice of the last decade.

Another aspect of remedies that one might have expected to be elaborated in investment treaty arbitration relates to the coordination of remedies regarding multiple entities injured by the same conduct, famously posed but not resolved by the early *CME* and *Lauder* arbitrations against the Czech Republic.[125] The Articles confirm the permissibility of invocation of responsibility by a plurality of injured states,[126] and it may suggest a broader principle regarding the plurality of injured entities.[127] One might distinguish between responsibility invoked for the breach of the same primary rule (for example, by a corporation and its shareholders under the same treaty) and different primary rules (as was the case with different BITs in *CME*/*Lauder*). In the former case, the double recovery may be precluded by reference to the limit of reparations set by the breach of the particular primary rule, with the plurality of invocations not affecting its scope. The latter case is more complex, and one would have either to articulate special rules regarding situations where multiple primary obligations are breached by essentially the same conduct,[128] or to identify broad inherent powers

[125] *Lauder v. Czech Republic*, UNCITRAL Case, Award, 3 Sept. 2001, at para. 172; *CME v. Czech Republic*, UNCITRAL Case, Partial Award, 13 Sept. 2001, at paras 143, 412, 419.

[126] 2001 ILC Articles, *supra* note 2, Art. 46.

[127] Similarly for international organizations 2011 ILC Articles, *supra* note 10, Art. 47.

[128] *De lege ferenda*, when equivalent obligations are imposed on states by different rules (see Broude and Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms', in Broude and Shany, *supra* note 52, at 1, 5), reparations for the breach of one might fulfil the obligation of reparation regarding the other one, provided that the interests of the beneficiary under the latter are taken into account. The *Pad* case of the ECtHR may be read as supporting this proposition: App. No. 60167/00, *Pad and Others v. Turkey* (2007)

to address abusive procedural conduct designed to ensure double recovery.[129] In any event, the perspective of the investor does not add much, since similar challenges exist in the inter-state law of responsibility for cases of plurality of invocation.[130]

5 The Implementation of the International Responsibility of a State

The form in which the law on invocation of responsibility is expressed in investment treaties, designating the investor as the entity bringing the claim, precludes the direct application of the rules from the Articles. It raises two different kinds of questions: regarding the residual relevance of the rules for the investor–state process, and its operation regarding the rights of the home state. The next sections will discuss the rules expressed in Part Three from both perspectives.

A *Invocation*

In investor–state arbitration, the right to invoke responsibility is dealt with in explicit terms of qualification for the procedural right under the particular treaty. The different perceptions of investors' rights do not seem to be directly relevant for this point: if the investor is the beneficiary of the obligation, it is entitled to invoke responsibility as an injured entity; if the investor is the agent of diplomatic protection, it is entitled to invoke responsibility on behalf of its home state that is an injured state, to the extent that it is (factually) injured. The legal nature of the investor may be relevant at earlier stages of analysis, determining whether wrongfulness for the act can be precluded by consent or countermeasures, or at later stages, considering the home state's right to waive responsibility, but the right to invoke responsibility seems unaffected by differences in perspective. The internationally wrongful act in breach of investment protection obligations (also) injures the home state of the investor. If the investor is a beneficiary of the obligation, then the home state is injured together with the investor. The breach of a primary obligation formulated as an obligation to treat the investor in a certain manner injures both the investor (that is not treated in the prescribed manner) and the state (the investor of which is not treated in the prescribed manner). If the investor is merely an agent, then the state is the sole injured entity that delegates the right to invoke responsibility.

Zachary Douglas has taken a different position: in his view, the breach of the obligations does not injure the home state at all, and therefore it 'has no immediate secondary rights

ECHR 28 June 2007, at para. 65, and a similar solution has been suggested for cases of 'double breach' in trade law: Pauwelyn and Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions', 42 *Cornell J Int'l L* (2009) 77, at 118. The ILC has acknowledged the relevance of interests of the beneficiary regarding remedies, albeit for the breach of the same primary *erga omnes* obligation: see 2001 ILC Articles, *supra* note 2, Art. 48(2)(b).

[129] On abuse of process by separate proceedings see C. Brown, *A Common Law of International Adjudication* (2007), at 240–255, and generally in investment arbitration Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly so', in I. Laird and T. Weiler (eds), *Investment Treaty Arbitration and International Law* (2012), at 11, 27–31.

[130] The 2001 ILC Articles merely call for common-sense coordination of claims regarding the same primary rule: *supra* note 2, Art. 46, Commentary 4.

within the investment treaty regime to challenge the commission of this breach of treaty; instead the new rights arising upon the breach of treaty vest directly in the investor'.[131] It has been suggested elsewhere that this view is not entirely persuasive. If a bilateral treaty is breached by one party, the starting point of analysis is that this act injures (at least) the other party, and multiple considerations support the view that the home state is injured: *inter alia,* the general openness of the law of responsibility to a plurality of injured entities invoking responsibility; the historical development of investor–state treaty arbitration, supplementing the treaties with inter-state dispute settlement without superseding it; and the comparative experience of openness of human rights regimes to claims by home (and other) states.[132] The state's injury may be different in scope, relating to mistreatment of multiple investors or perhaps the adoption of legal rules in breach of the treaty that have not yet been applied to any investors. Consequently, the state may be entitled to seek remedies that differ in scope and content from those sought by the particular investor. An injured state may lose or suspend its right to invoke responsibility. However, that is an entirely different legal proposition from saying that it was not injured in the first place.

B *Admissibility*

Article 44 addresses the rules on admissibility of claims regarding nationality and exhaustion of local remedies, later elaborated in the 2006 ILC Articles on Diplomatic Protection.[133] The perspective of inter-state responsibility can be disposed of relatively briefly: for the purposes of investment treaties, states have explicitly agreed on the definition of nationality that has to be applied, whatever the definition in general international law may be. In investment arbitration, nationality is an issue of jurisdiction rather than admissibility. The rules of invocation of responsibility through diplomatic protection are rather approached from the interpretative perspective, considering whether the customary law of nationality (either technicalities of double and continuous nationality or the general suspicion of claims by nationals against their home states) can influence the interpretation of treaty rules. For example, the *Loewen v. US* tribunal relied on the rule of continuous nationality in diplomatic protection to interpret the NAFTA rule on nationality. The Tribunal justified its reliance on public international law rules by pointing out that this was 'a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states'.[134] While disagreeing with the decision to refer to customary law, Zachary Douglas appears to have accepted the interpretative premise of the Tribunal: '[t]he direct consequence of this theoretical approach in *Loewen* was the application of a (controversial) rule governing the presentation of an international claim by one state to another through the mechanism of diplomatic protection'.[135]

[131] Douglas, *supra* note 14, at 190–191; Douglas, *supra* note 35, at 94–95; Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID', in Crawford, Pellet, and Olleson, *supra* note 1, at 815, 816–819.

[132] Paparinskis, *supra* note 34, at 287–292.

[133] ILC, 'Draft Articles on Diplomatic Protection with Commentaries', in *Report of the International Law Commission on the Work of its 61st Session,* UN Doc A/61/10 15.

[134] *Loewen, supra* note 45, at para. 233.

[135] Douglas, *supra* note 14, at 163; Douglas, *supra* note 68, at 821–828.

The importance attributed to the nature of investors' rights, whether by *Loewen* or Douglas, seems to rest on an anterior premise regarding rules of interpretation: namely, that a treaty interpreter can take customary law into account only in *lex specialis* situations where rules of treaty and custom address the same issues. One might also take a broader view: general customary rules can certainly inform special treaty rules that have been created to replace them, but Article 31(3)(c) of the VCLT would treat rules as admissible also at a higher degree of abstraction, when custom relates to similar but not identical matters.[136] In discussing the application of the law of remedies from Part Two, it was suggested that one can reach not dissimilar conclusions by extending the scope of the rule and by engaging in *mutatis mutandis* analogy. It seems that whether one describes the legal argument as addressing the weight of admissible interpretative materials or as identifying the degree of functional similarities between states and investors, the criteria considered would be similar, and it would be the form of expression, rather than the nature of investors' rights, that would determine the result of the argument (whether of interpretation or analogy).[137]

The law on the exhaustion of local remedies raises a somewhat different challenge. Again, one might relatively easily dispose of the invocation of responsibility by the home state: to the extent that the requirement to exhaust remedies has not been waived (whether by a treaty or in any other manner), the investor has to exhaust remedies in the ordinary fashion of diplomatic protection before the state's claim becomes internationally admissible.[138] The situation is slightly more complicated in investor–state treaty arbitration where domestic remedies are explicitly addressed in ICSID arbitration but not in other procedural rules. Article 26 of the ICSID Convention provides that remedies do not have to be exhausted unless the state explicitly opts in, and the Report of the Executive Directors explains it to be a rule of interpretation.[139] The non-ICSID tribunals have not required exhaustion, and those addressing the issue in greater detail have explained consent to arbitration as a waiver[140] or noted its incompatibility with the operation of fork-in-the-road clauses.[141]

From the perspective of investors' rights, agency of diplomatic protection would require the exhaustion of local remedies, unless explicitly waived. If the investor protects its own rights, the tacit waiver of exhaustion requirement may have been accepted a tad too hastily by the non-ICSID tribunals. The well-known refusal of the *ELSI* Court to

[136] In an Iran–US Claims Tribunal case, Arbitrator Riphagen noted that, even though the IUSCT was not faced with the question of 'diplomatic protection' in the classic public international law sense of that notion, 'it is certainly relevant that even there where international courts and tribunals were faced with the question of the *persona standi* of a state, rather than of an individual, before such international court or tribunal, there is a clear tendency [supporting effective nationality]': *Iran–United States*, Case No. A/18, 5 *IUSCTR* 273, Concurring Opinion of Arbitrator Riphagen, at para. 2.

[137] Paparinskis, 'Investment Treaty Interpretation', *supra* note 18, at 80–86.

[138] *Elettronica Sicula SpA (ELSI) (US v. Italy)* [1989] ICJ Rep 15, at para. 50; *Italy et Cuba* (Sentence preliminaire) (2005), at paras 88–91, available at: http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf; Paparinskis, *supra* note 34, at 300–302.

[139] Report of the Executive Directors of IBRD on the Convention on Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 Mar. 1965), 4 ILM (1965) 524, at para. 32.

[140] *RosInvestCo UK Ltd v. Russia*, SCC V 79/2005, Award on Jurisdiction, Nov. 2008, at para. 153.

[141] *Mytilineos v. Serbia*, UNCITRAL Case, Partial Award on Jurisdiction, 8 Sept. 2006, at paras 220–221.

infer the waiver of exhaustion from submission to adjudication[142] casts some doubt on the general validity of the interpretative rule suggested by the Report in 1965. It also seems odd to treat consent to arbitration as a functional waiver and simultaneously to recognize that it would not affect an explicit requirement of exhaustion under the ICSID Convention: a proper waiver should waive all non-peremptory requirements, in whatever form they are expressed. While the apparent absence of general criticism by states may suggest approval of the practice, in the absence of treaty language incompatible with or removing the requirement of exhaustion one may return to the general question whether it is appropriate to apply exhaustion by analogy.

C *Loss of the Right of Invocation*

The loss of the right to invoke responsibility may be considered on three levels: loss of the home state's right to invoke responsibility for its own injury, loss of the investor's right to invoke responsibility, and the ability of the state to affect the right of its investor to invoke responsibility. It was suggested above that the starting point of the analysis is that the home state is injured by the breach of the investment treaty and is entitled to invoke responsibility. One may approach the issue of loss of the right in a number of ways. Since the right to invoke responsibility is a dispositive right, states may waive or suspend it in accordance with international law, as they have done in Article 27(1) of the ICSID Convention. The tribunal in the *Italy v. Cuba* case suggested in passing that the rule from the ICSID Convention could be applied by analogy more broadly.[143] This view is not entirely persuasive: during the drafting process, the suspension of diplomatic protection was considered to be a treaty innovation; subsequent practice has not generated a broader customary rule;[144] and the proposition that an otherwise valid right under international law may be lost by analogy, rather than by operation of a particular rule, is far-reaching and striking indeed. In a different sense, Article 17 of the 2006 ILC Articles on Diplomatic Protection states that '[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments'. This statement begs rather than answers the question whether it adds anything to the general right to waive the invocation of responsibility by treaty rules. It is more attractive to support the plurality of invocation so as better to achieve the implementation of responsibility.[145] Finally, if one were to adopt the agency approach, it would be necessary to consider whether the principal state retains the delegated right of invocation, and the classical practice on agency could suggest an affirmative answer.[146]

The investor's right to waive its right to invoke responsibility may be considered in two contexts: more generally, as a right to waive treaty rights; and, more particularly, regarding contractual rights and exclusive choice of forum, especially in cases on

[142] *ELSI*, *supra* note 138, at para. 50.

[143] *Italy et Cuba* (2005), *supra* note 138, at para. 65; *Italy et Cuba* (Sentence finale) (2008), at para. 141, available at: http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf.

[144] Paparinskis, *supra* note 34, at III.B.

[145] *Ibid.*, at III.D.

[146] Sereni, 'Agency in International Law', 34 *AJIL* (1940) 638, at 651–652.

umbrella clauses.[147] The cases on umbrella clauses raise special questions about the scope and methods of determination of the underlying contractual obligation. Since the benchmark is set either by the primary obligation of umbrella clauses or by admissibility objections, it does not seem that the perspective of investors' rights would affect the analysis, whether the investor is the beneficiary of the obligation or merely an agent. Indeed, a leading decision on the issue relied on the classical diplomatic protection cases regarding contracts with exclusive jurisdiction clauses.[148]

It seems that no tribunal has so far decided directly the more general question whether an investor can waive a treaty right, even though there are indications both in favour[149] and against such a right.[150] If the investor's rights are direct, one might be inspired by the rules on human rights, and be cautious at least about prospective waivers of rights within the regime created to protect individuals subject to it. Conversely, settlement, reflecting genuine and informed consent and perhaps even taking into account broader systemic implications of the state's conduct, would be possible.[151] If the investor is a beneficiary of treaty rights in favour of third persons, the right of waiver would be perfectly unproblematic. The VCLT regime on the creation of rights in Articles 34, 36, and 37 protects the third state from the creation or modification of rights without its consent but in no way limits the right of the third state to cease benefiting from its rights.[152] Finally, if the investor acts as an agent, one might be tempted to accept its right to waive the procedural rights, both in light of what has been suggested to be the general principle of agency in international law[153] and because the underlying rationale of the regime would be to protect individuals not as subjects but as mere objects of protection.

A narrower question relates to the right of the state to affect the investor's right to invoke responsibility. The changes could favour particular states, for example by limiting or even fully removing the procedural rights, or settling a particular arbitration. However, similar conceptual questions would be raised by more constructive changes, for example, if states want to create an IUSCT-like permanent judicial body to which

[147] See the summary of case law in *SGS Société Générale de Surveillance SA v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 Feb. 2010, at paras 177–181.

[148] *SGS v. Philippines*, *supra* note 30, at paras 150–152.

[149] *Aguas del Tunari SA v. Bolivia*, ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction, 21 Oct. 2005, at para. 118.

[150] *SGS v. Philippines*, *supra* note 30, at para. 154.

[151] ECtHR cases regarding the role of consent in the application of primary human rights obligations, *supra* note 74, that emphasize the necessity for informed consent with foreseeable consequences and procedural safeguards, are applicable *a fortiori* to waiver of claims under settlement, where the Court additionally reviews whether the settlement is based 'on respect for human rights': App. No. 31433/96, *Broniowski v. Poland*, [GC] (2005) ECHR Rep 2005-IX, at paras 33 ff.

[152] 1966 Draft Articles, *supra* note 40, Art. 33, Commentaries 2, 4; D'Argent, *supra* note 40, at 946. Fitzmaurice stated that '[p]rivate individuals and juristic entities may also, in so far as they are concerned, waive, compound or forgo rights, interests, benefits or advantages, reserved or accruing to them under or by reason of a treaty': Fitzmaurice, 'Fourth Report on the Law of Treaties', UN Doc A/CN.4/120, Art. 33, Commentary 2. The ILC has emphasized the connection between the nature of rights and the ability to waive the protection by the Calvo Clause: 2006 ILC Articles, *supra* note 34, Art. 14, Commentary 8.

[153] Sereni, *supra* note 146, at 660.

they can transfer the existing treaty claims with some substantive and procedural modifications. The crucial question is whether states can explicitly change (leaving the *sub silentio* change through interpretation aside) procedural rules affecting investors in a manner not provided for by the treaty. The historical materials are insufficiently consistent to suggest a general rule or presumption.[154]

The perspective of investors' rights may again be useful. If the investor's rights are direct, then the basic proposition that a person can waive its own rights but not the rights of a third person would preclude the home state from waiving its nationals' rights. If the investor is a beneficiary akin to a third state, then one needs to consider the somewhat ambiguously expressed rule on revocation or modification of rights in Article 37(2) of the VCLT, probably suggesting a rebuttable presumption that the third state's consent is not required.[155] With all due caution, considering 'the terms or nature of the treaty provision giving rise to the right',[156] the linking of substantive rights (often extending even beyond the temporal validity of the treaty) with compulsory arbitration might go some way to rebutting the presumption and precluding a waiver by the home state. The Softwood Lumber Agreement is again consistent either with these readings or just careful drafting, with the investors settling the pending claims and states suspending investor–state arbitration in prospective terms.[157] Finally, if the investor is an agent, the argument for the residual capacity of the principal to revoke

[154] Some authorities support in unqualified terms the discretionary right of states to waive rights of their nationals: McNair, 'The Effects of Peace Treaties upon Private Rights', 7 *Cambridge LJ* (1939–1941) 379, at 386–391; Fitzmaurice, *supra* note 152, Art. 33, Commentary 2; even if leaving open the particular rationale (for McNair it probably was the assumption that treaties do not grant rights to individuals: A. McNair, *The Law of Treaties* (1961), at 322; see also Fitzmaurice's pleadings on behalf of the UK in the *Reparations* advisory opinion, where he drew a sharp distinction between the benefits that might be received by foreigners and the rights under international law that belonged solely to the government: *Reparation for Injuries Suffered in the Services of the United Nations* (Advisory Opinion) ICJ Pleadings 115–116). Treaties and drafts show a variety of approaches so wide that it is complicated to derive any generalizations beyond the particular agreement: from a right of states to waive claims of nationals at one end of the spectrum (Sohn and Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 *AJIL* (1961) 545, Art. 25); to a limited right of the state to bring claims in the absence of individual claims at the other end (García-Amador, 'Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens', in *Yrbk Int'l Law Commission, 1961, Vol II,* UN Doc. A/CN.4/SER.A/1961/Add.1, at 46 Arts 21–22); with a variety of intermediate positions (right of home states of some claimants to forbid the case being brought: Prize Convention, *supra* note 25, Art. 4(2), (3); broad rights of home states to intervene in different procedural stages in MATs: Blühdorn, *supra* note 44, at 144–145; suspension of diplomatic protection claims during investment arbitration: 'OECD Draft Convention on the Protection of Foreign Property', 7 ILM (1968) 117, Art. 7(d); presentation of 'small claims' by home states in the IUSCT: Claims Settlement Declaration (19 Jan. 1981) 20 ILM (1981) 230, Art. III(3)).

[155] 1966 Draft Articles, *supra* note 40, Art. 33, Commentary 4; D'Argent, *supra* note 40, at 946–947. The grant to an investor of a right to control international law-making processes, even if only in principle, does seem at odds with the broader structure of investment law: Paparinskis, *supra* note 34, at 342.

[156] 1966 Draft Articles, *supra* note 40, Art. 33, Commentary 4. *Contra*, although partly due to an insufficiently clear distinction between (on the one hand) waivers and (on the other hand) the law-making and interpretive role of states as treaty parties: Gourgourinis, 'Investors' Rights *qua* Human Rights? Revisiting the "Direct"/"Derivative" Rights Debate', in M. Fitzmaurice and P. Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (2012), at 147, 177–182.

[157] Canada–US Softwood Lumber Agreement, *supra* note 77.

its authority is at its strongest,[158] although the creation of compulsory arbitration might again limit the residual dispositive rights. It would seem that while the perspective of investors' rights provides an important starting point of analysis, the formulation of the treaty rules may be as important in reversing presumptions or restricting residual dispositive rights.

6 Conclusion

The case study of post-2001 investment arbitration provides an opportunity to examine whether and how the invocation of responsibility by a non-state actor has affected secondary rules of state responsibility. This article has taken the analytical perspective of investors, capable of being perceived as right-holders (by reference to human and consular rights), beneficiaries (by reference to the law of treaties rules on third states), or agents (by reference to diplomatic protection). The shift from the state to the investor as the entity invoking responsibility for the breach of investment treaties seems to have influenced the law of state responsibility in a number of distinct ways. The best way to move forward would be both to appreciate and not to overestimate the importance of the added value brought to the law of responsibility by the non-state actor invoking it: its legal nature is crucial in certain cases but does not replace the necessity for diligent application of traditional techniques of legal reasoning. The technical nature of the process may be seen as the paradoxical proof of how deeply entrenched non-state actors already are within the international legal order. In some cases, the apparent disagreement about the law of state responsibility may properly relate to questions of treaty interpretation and admissibility and weight of customary law in the interpretative process: debates about necessity and nationality fall under this rubric. In other cases, the inter-state law of responsibility applies *verbatim*: most of the rules regarding the basis of responsibility and, somewhat surprisingly, the content of responsibility have been applied in this manner.

The analytical perspective has important implications for different perceptions of investors in yet other cases. If an investor is a holder of direct rights akin to human rights, then its consent will be relevant to wrongfulness only to the extent permitted by primary rules; it will not be affected by countermeasures; it may have a weaker claim to some rules on content of responsibility (restitution) but a stronger claim to others (contribution); prospective waiver of responsibility (by contract) will be problematic; and the home state cannot affect its secondary rights. If an investor is a holder of rights akin to treaty rights of third parties, then it can fully use consent to preclude wrongfulness; will not be affected by countermeasures; perhaps have a claim for all rules on content of responsibility; can waive responsibility; and the home state cannot affect its secondary rights. Finally, if an investor is an agent of delegated diplomatic protection, then its consent is relevant only if provided by the primary rules; it will be affected by countermeasures; will have a strong claim for all inter-state remedies but a weak claim for the rules of contribution; may be required to exhaust local remedies that have not been explicitly waived; will have a strong claim to be entitled to waive

[158] Sereni, *supra* note 122, at 660; *Bowstead and Reybolds, supra* note 49, at 648.

responsibility; and its secondary rights may be affected by its state (also, if a narrow view of interpretation by reference to custom is adopted, there will be a stronger argument for relying on rules of nationality from diplomatic protection).

The taxonomy of different legal regimes that provide the background of ordinariness for investment treaties may further affect the thinking about the place of non-state actors in international law, including the imposition of international obligations and international law-making. For example, if the investor–state regime borrows its structure from the human rights regimes, one may feel cautious about using it to impose international obligations on the entity bearing rights. A systemically more appealing solution would be to articulate possible concerns in terms either of jurisdiction (definition of investment) or admissibility (abuse of process), or primary rules (particular criteria or exceptions). One might respond with a similar intuition if the investor–state regime were to be based on an agency of diplomatic protection: if the primary rules ran solely between states, it would be odd to create a primary rule to bind an actor whose only connection with the regime was to be an agent for the exercise of a secondary right. Conversely, from the perspective of third parties, the imposition of the obligation is entirely unremarkable in conceptual terms, to the extent that the consent is provided in an appropriately expressed form.[159] The analysis of law-making and interpretative capacities of investors as non-state actors might also benefit from a similar taxonomy: for example, the (pleading) practice of an agent of a state or a third consenting party akin to a third state might carry the interpretative weight that the practice of an entity with merely direct rights would not.[160] There are many perspectives from which investment law may be read; the modest point made by this article is that the conceptual challenges faced by the 'brave new world' of investment arbitration may be illuminated by the solutions provided by the regimes that formed the background for its creation.[161]

[159] Cf. VCLT, *supra* note 39, Art. 35; L-Chevalier, 'Article 35', in Corten and Klein, *supra* note 40, at 902, 907–914.

[160] The argument sketched here is different from that presented by Roberts and Sivakumaran who consider, in the particular context of law-making by armed groups, the relevance of state consent, assimilation to states, and the bearing of rights or obligations: *supra* note 20, particularly at 118–125. The argument would both go further (in that the non-state actor would be firmly anchored within the traditional inter-state or third party regimes) and be more limited (in that the investor's law-making rights would be incidental to procedural rights already granted in an explicit manner).

[161] Cf. Crawford, 'Continuity and Discontinuity in International Dispute Settlement', 1 *J Int'l Dispute Settlement* (2010) 3, at 3–4, 24.