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# Triangular Treaties: The Extent and Limits of Investment Treaty Rights

Anthea Roberts*

*Investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. State A (the host state) agrees to provide certain protections to investors coming from State B (the home state) and vice versa. If the investor considers that these protections have been violated, investment treaties also grant the investor permission to bring an arbitral claim directly against the host state. As a result, the agreement is entered into by the home and host state (collectively, the treaty parties) but the protections are created for the benefit of, and are typically enforced by, an investor from one state against the other state.*

*Investment treaties expressly protect investors against certain unilateral actions by host states, such as expropriation without compensation (first-order questions). It is unclear, however, whether they also protect investors against unilateral actions by home states (second-order questions) and/or collective actions by the treaty parties (third-order questions). These questions are becoming important in a range of existing and emerging controversies, including: whether a home state can settle an investor's claim without the investor's consent; whether a host state can rely on inter-state countermeasures against a home state as a defense in an investor-state dispute; and whether the treaty parties can jointly terminate an investment treaty with immediate effect?*

*To answer these questions, I propose a new triangular framework that draws on principles from public international law, third-party beneficiary doctrines, and public law in a way that captures the unique, hybrid nature of investment treaties. Investment treaties are international agreements between states (hence the need for a public international law premise), but they depart from typical treaties by granting investors enforceable rights instead of simply regulating state-to-state rights and obligations (hence the need for a third-party beneficiary paradigm). Unlike traditional contract law models, however, they involve an agreement by sovereign parties to bestow rights on a non-sovereign entity (hence the need for a public law qualification).*

*This triangular approach focuses our attention on the* interests and intentions *of the treaty parties, rather than the* interests or expectations *of investors. States are not benevolent actors; rather, they grant enforceable rights to investors as third parties in order to effectuate their own goals. Recognizing this requires us to rethink traditional accounts of the two main goals of investment treaties: investor protection and the depoliticization of investment disputes. Drawing on this triangular framework and these revised purposes, I propose default rules for resolving a range of controversies about what rights have been given to investors and what powers have been retained by states, focusing in particular on the under-theorized second- and third-order relationships and the three unresolved controversies identified above.*

## Introduction

Investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. State A (the host state)

* Columbia Law School and London School of Economics and Political Science (anthea.roberts@law.columbia.edu and a.e.roberts@lse.ac.uk). I would like to thank the Leverhulme Trust for funding and the following people for comments on earlier drafts: Julian Arato, Daniel Bahar, Jonathan Bonnitcha, Rick Brooks, Lee Caplan, Lise Johnson, Avery Katz, Jurgen Kurtz, Tom Merrill, Henry Monaghan, Patrick Pearsall, Katharina Pistor, Bob Scott, Jeremy Sharpe, Paul Stephan, and Matt Waxman.

agrees to provide certain protections to investors coming from State B (the home state) and vice versa. If the investor considers that these protections have been violated, investment treaties also grant the investor permission to bring an arbitral claim directly against the host state. As a result, the agreement is entered into by the home and host state (collectively, the treaty parties) but the protections are created for the benefit of, and are typically enforced by, an investor from one state against the other state.

There is a tendency to understand these treaties as creating two bilateral relationships. The first is a treaty relationship between the treaty parties at the inter-state level. The second is a contractual relationship between the investor and host state that governs the arbitral dispute in a particular case after the investor accepts the host state's standing offer to arbitrate.[1] However, this bifurcated approach proves inadequate when it comes to analyzing questions about the relationship between (1) investors and their home states and (2) investors and the treaty parties acting collectively. For that, we need a theory that conceptualizes the triangular relationship between investors, home states, and host states as part of an integrated whole.[2]

The literature and case law to date have focused primarily, though not exclusively, on what I call "first-order" questions about the relationship between investors and host states because these questions are the most likely to arise in investor-state arbitrations. This results in a focus on substantive questions, such as what constitutes indirect expropriation, and procedural questions, such as whether an investor has complied with the jurisdictional requirements to bring an arbitral claim. By contrast, this Article focuses primarily on what I term "second-order" questions, which concern relations between investors and their home states acting individually, and "third-order" questions, which concern relations between investors and the treaty parties acting collectively.[3]

Investment treaties expressly protect investors against certain unilateral actions by host states, such as expropriation without compensation and discriminatory treatment, and permit investor-state arbitration to enforce these obligations. However, it is unclear whether they also protect investors against certain unilateral actions by home states and collective actions by the

1. The ability of investors to accept this offer by bringing an arbitral claim is typically analyzed through the notion of arbitration without privity. *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. 232 (1995); Christoph H. Schreuer et al., The ICSID Convention: A Commentary 190–92 (2d ed. 2009); Christoph H. Schreuer, The ICSID Convention: A Commentary 192, 206 (2001).

2. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 Am. J. Int'l L. 179, 182–84 (2010).

3. I do not use the phrase first-, second-, and third-order relationships to suggest any order of priority between these relationships. I view the relevant framing transaction as the inter-state treaty relationship, which establishes the rules governing each of these investor-state relationships. I refer to the relationship between investors and host states as the first-order relationship because it is the one that has been given the most attention to date given that it arises most frequently in investor-state disputes. However, that does not mean that it is more important than or logically proceeds what I refer to as the second- and third-order relationships.

treaty parties. These questions arise with respect to a range of existing and emerging controversies, including:

- Can a home state bring and settle a class action claim on behalf of its investors against the host state in which they invested, if it acts without the knowledge or consent of its investors?
- Can a host state excuse its treaty violation in an investor-state arbitration on the basis that its action was a lawful countermeasure in response to a previous violation by the investor's home state?
- Can the treaty parties agree to jointly terminate or amend an investment treaty with immediate effect and thereby avoid the ten to twenty year survival clause that typically applies to unilateral terminations?

To answer these issues, we must confront fundamental and unanswered questions about what rights have been given to investors and what powers have been retained by home and host states acting individually and the treaty parties acting collectively.

It may come as a surprise to those unfamiliar with the field that investment treaties do not answer these basic questions. But they do not. On a substantive level, investment treaties impose certain obligations on host states to provide protections to foreign investors and investments, but they do not clarify whether these obligations give rise to substantive rights for the investor, the home state, or both. On a procedural level, investment treaties typically contain two dispute resolution clauses—one permitting investor-state arbitration over investment disputes; and the other permitting state-to-state arbitration over disputes concerning the treaty's interpretation and/or application—but most say nothing about how these two forms of dispute resolution should interact.[4]

Existing approaches to these questions focus on the *nature* of investment treaty rights, i.e., whether investors have been granted rights and, if so, whether these are substantive and/or procedural in nature. Three main possibilities have been mooted:

(1) Investment treaties grant substantive and procedural rights to the treaty parties only, but investors are permitted for the sake of convenience to enforce their home states' substantive rights ("derivative" rights thesis);
(2) Investment treaties grant substantive rights to the treaty parties only, but investors are granted the procedural right to enforce their states' substantive rights ("intermediate" thesis or "contingent" rights); and

4. On both points, see Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 Harv. Int'l L.J. 1 (2014).

(3) Investment treaties grant substantive and procedural rights to investors, giving investors a procedural right to enforce their own substantive rights ("direct" rights thesis).[5]

These approaches are inadequate for conceptualizing the *extent and limits* of investment treaty rights for two reasons. First, they typically focus on what rights investment treaties bestow on investors: are investors granted no rights, procedural rights only, or substantive and procedural rights? However, in order to fully comprehend the architecture of investment treaties and their full allocation of rights and powers, we need to understand both sides of the coin, i.e., what rights have been granted to investors *and* what powers have been retained by states. The extent and limits of the former cannot be conceptualized in isolation from the latter.[6]

Second, and relatedly, existing theories tend to assume that if investors have been granted rights, these are absolute and cannot be limited. For instance, if investment treaties grant substantive and procedural rights to investors, inter-state countermeasures are ipso facto impermissible because they would infringe upon investors' rights. By contrast, if investment treaties do not grant investors such rights, inter-state countermeasures are in theory permissible because the rights remain state-to-state.[7] But the treaty parties can have granted rights to investors that are absolute, conditional, or subject to limitations. Whether or not a right exists is a different question to whether or not that right is immune from all powers of interference.

Instead, I contend that investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. This triangular framework draws on principles from public international law, domestic contract law, and public law in a way that captures the unique, hybrid nature of investment treaties. Investment treaties are international agreements between states (hence the need for a public international law premise), but they depart from typical treaties by granting investors enforceable rights instead of simply regulating state-to-state rights and obligations (hence the need for a third-party-beneficiary paradigm). Unlike traditional contract law models, however, they involve an agreement by sovereign par-

5. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Brit. Y.B. Int'l L. 151, 151–55 (2003); Zachary Douglas, The International Law of Investment Claims 6–10 (2009); Tillmann Rudolf Braun, *Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law*, 15 J. World Investment & Trade, 73, 83–89 (2014). These possibilities have also been framed through the models of agency, human rights, and third-party-beneficiary law. *See* Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 Eur. J. Int'l L. 617, 621–27 (2013).

6. For instance, investment treaties grant investors the right to bring investor-state claims but they also give treaty parties the power to bring state-to-state claims. *See* Roberts, *supra* note 4.

7. *See generally* N. Jansen Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 Geo. J. Int'l L. 233 (2010); Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 Brit. Y.B. Int'l L. 264 (2008).

ties to bestow rights on a non-sovereign entity (hence the need for a public law qualification).

By reconceptualizing investment treaties as triangular treaties, I move the debate away from existing questions about the nature of investment treaty rights (i.e., whether investment treaties grant investors substantive and/or procedural rights) and toward a more nuanced account of the extent and limits of those rights. In doing so, I create a template for treaty negotiators wishing to clarify whether and to what extent investment treaties regulate investor-state relations on the three different levels identified above.

The problem with the investment treaty system is not that treaty parties could not expressly regulate these second- and third-order relationships; it is that they signed more than 3,000 investment treaties without doing so. The question thus becomes what default rules should apply so that investment tribunals can resolve gaps and ambiguities in existing treaties, and treaty parties can have clear and fair background rules against which they can negotiate future treaties. Working from first principles, I develop a theory about how untailored default rules should be formulated from the perspective of "ideal" treaty parties, which I define as states with equal interests as both capital importers and capital exporters. Ideal treaty parties are able to internalize the pros and cons of different investment rules in a way that is likely to produce fair and balanced default rules as judged by the treaty parties collectively.

Adopting the triangular framework is helpful when seeking to define default rules because it focuses our attention on the *interests and intentions* of the treaty parties (as the contracting parties), rather than the *interests or expectations* of investors (as the third-party beneficiaries). States are not benevolent actors; rather, they grant enforceable rights to investors as third parties in order to effectuate their own goals. Recognizing this requires us to rethink traditional accounts of the two main goals of investment treaties: investor protection and the depoliticization of investment disputes. Ideal treaty parties protect foreign investors as a means to the end of promoting foreign investments, which is one element they must consider alongside others in seeking to maximize social welfare. Their goal of depoliticizing disputes is likewise concerned with protecting their interests as home and host states, which involves enabling investor-state claims without necessarily disabling host state actions or preventing joint treaty party actions.

Given their dual interests, ideal treaty parties have an incentive to adopt interior solutions rather than embracing the extremes of complete or no investor protection. They are also likely to have an interest in striking a different balance between investment protection and the preservation of state sovereignty in each of the first-, second-, and third-order relationships identified above. Accordingly, I use my triangular framework and ideal treaty party theory to propose default rules for resolving a range of questions about the extent and limits of investors' rights and treaty parties' powers, focusing in particular on the under-analyzed second- and third-order relationships. I then apply these rules to provide default answers to the three existing and emerging controversies identified above.

## I. The Case for Developing Default Rules

Identifying default rules for investment treaties is important for two reasons. First, they provide a way of interpreting gaps and ambiguities in existing treaties. This is critical because investment treaties are incomplete agreements; they are typically short, broadly worded, and do not address important architectural issues, such as the relationship between investors and home states and the treaty parties respectively. Second, default rules provide the background rules against which treaty parties can negotiate future agreements. This reduces transaction costs by providing a ready-made set of solutions while at the same time respecting party autonomy because treaty parties can contract around these rules if they do not suit their specific interests.[8]

Framing default rules for interpreting existing investment treaties is complicated by the fact that more than 3,000 investment treaties have been signed and they often differ in minor or major ways. For instance, sometimes a capital exporting state is able to get agreement on strong investment protections with few express carve-outs for state sovereignty. Early U.S. investment treaties often fit this model.[9] Other times a capital importing state will only agree to more limited investment protections and refuse to include investor-state arbitration. Early Chinese investment treaties often fit this model.[10] There can be no one-size-fits-all approach to interpretation as states have different interests and bargaining positions, and thus enter into different investment treaties.

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8. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 87 (1989).

9. *See, e.g.*, Text of the U.S. Model Treaty concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984, 4 Berkeley J. Int'l L. 136 (1986), and Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (1994), in Campbell McLachlan QC, Laurence Shore and Matthew Weiniger, International Investment Arbitration: Substantive Principles, Appendix 5, 386 (2007) along with investment treaties largely modeled on their terms, such as the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. No. 103-2 and the Treaty Between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, With Annex And Protocol, Signed At Washington, Jan. 11, 1995, S. TREATY DOC. No. 104-19.

10. *See, e.g.*, Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, July 11, 1988, arts. III, XII; Agreement between Japan and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 1, 1988, arts. 2–4, 11; Agreement on the Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Korea and the Government of the People's Republic of China, Sept. 30, 1992, arts. 2–4, 9.

Nonetheless, it is possible to formulate default rules in the investment treaty system because, while the terms of individual treaties may differ, a lot of commonality exists given that: (1) most investment treaties are based on a relatively small number of model treaties, which have significant similarities in their terms and structure; and (2) most investment tribunals interpret investment treaties by reference to an emerging body of jurisprudence without limiting their consideration to cases arising from the same treaty or from treaties with identical provisions. As a result, the investment treaty system is often bilateral in form but somewhat multilateral in substance, with both common treaty terms and common interpretations frequently developing.[11]

In seeking to develop default rules, two principles guide my approach. First, given the range of states with both different interests and levels of power, and the diversity of potential treaty-party pairings, it is most helpful to develop "untailored default" rules. "Tailored default" rules attempt to provide what the particular treaty parties would have contracted for, whereas "untailored default" rules ask what provisions most treaty parties would prefer most of the time in most of their treaties.[12] Good default rules need to be efficient for a wide range of contracting parties because:

> [P]arties in large economies are heterogeneous. Default rules would be too expensive to create if efficient solutions were party-specific. Then there would need to be as many legal rules as there are sets of contracting parties. The task, then, is to find rules that would be efficient . . . in a wide variety of contexts.[13]

Second, default rules should take seriously the interests of both home and host states in order to reach fair and balanced terms as judged from the collective perspective of both treaty parties rather than the self-interested perspective of a single treaty party. This accords with Jonathan Bonnitcha's recent work developing first-order investment treaty rules from a "general" and "impartial" perspective, which involves considering the costs and benefits of investment treaties in general and from the perspective of all actors, rather than with respect to a single treaty from the perspective of one self-interested actor.[14]

In a world of perfect information and no transaction costs, the Coase theorem suggests that contracting parties will be able to reach efficient outcomes regardless of the initial allocation of property rights.[15] In the real world, however, states face imperfect information about how investment treaty

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11. Stephan W. Schill, The Multilateralization of International Investment Law (2009).

12. Ayres & Gertner, *supra* note 8, at 91–92.

13. Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 598–99 (2003).

14. Jonathan Bonnitcha, Substantive Protection under Investment Treaties: a Legal and Economic Analysis 8 –11 (2014).

15. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 4 (1960); George J. Stigler, *Two Notes on the Coase Theorem*, 99 Yale L.J. 631, 631 (1989).

rights will be interpreted or what effect they will have. In addition to substantial transaction costs in negotiating investment treaties, it is often not politically possible for states to make the sorts of transfers envisioned by the Coase theorem. For these reasons, it is doubtful that the Coase theorem applies.[16]

Instead, states with asymmetrical interests—as clear capital importers or clear capital exporters—have entered into different treaties often reflecting the strength of their relative bargaining power, as shown by the early U.S. and Chinese investment treaties discussed above. These investment treaties may be inefficient because they provide too much investor protection (as is arguably the case with early U.S. treaties) or too little investor protection (as is arguably the case with early Chinese treaties). However, they are signed because they suit the interests of both parties given the inequality of bargaining power against which the negotiation is conducted.

Over time, however, the interests of major states in the investment treaty system have started to converge in a way that is having a distinct impact on the evolution of investment treaty provisions. As José Alvarez has observed, many states are increasingly becoming capital exporters (home states) as well as capital importers (host states) and thus are beginning to more closely approximate entities that find themselves in a situation analogous to Rawls' original position:

> More countries than ever before are, like the PRC [People's Republic of China] and the United States, capital exporters as well as capital importers. The position of such countries in the investment regime might be said to approximate that of the individual in John Rawls' "original position," that is, someone who is placed behind a veil of ignorance and does not know the social or economic position she occupies within society and is therefore incentivized to articulate principles of justice that are fair to all.[17]

For instance, the United States has gone from being primarily concerned with protecting its investors as a home state to also being concerned about protecting its regulatory freedom as a host state. By contrast, China has undertaken the opposite trajectory, having gone from being primarily concerned with protecting its sovereignty as a host state to also wanting to protect its investors as a home state. As a result, more recent investment treaties by both the United States and China seek to balance the interests of home and host states in a way that was not true of their earlier treaties and

16. Bonnitcha, *supra* note 14, at 80–82.

17. José E. Alvarez, The Once and Future Foreign Investment Regime, *in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 607, 634 (Mahnoush Arsanjani, Jacob Katz Cogan, Robert D. Sloane, & Siegfried Wiessner eds., 2010).

that comes closer to maximizing benefits from a joint home and host state perspective.[18]

A similar development can be seen in recent Model Bilateral Investment Treaties (Model BITs). States typically negotiate investment treaties from pre-formulated Model BITs and many states are reluctant to depart from their model. In developing a Model BIT, a state determines what rules it is happy to accept in the absence of knowledge about whether it will have greater interests as a home state or host state in relation to a particular negotiation in the future. A state may still skew its approach if it knows that it is more likely to end up on one side of the equation in most treaty negotiations. However, the situation mimics the veil of ignorance to some extent by encouraging states to develop balanced treaty terms that weigh the gains and costs for both home and host states.

This can be seen most clearly in the evolution of the U.S. Model BIT.[19] Early versions of the U.S. Model BIT were extremely investor protective.[20] However, as the United States has come to recognize that it has significant interests as a capital importing state, in addition to its clear interests as a capital exporting state, it has transformed its Model BIT to provide a much more calibrated approach that seeks to weigh investor protection against state sovereignty rather than overly privileging either one.[21] The United States then uses its Model as a basis for negotiations with a wide range of states where its relative interests as a capital importer and exporter are likely to differ, from concluded negotiations with Rwanda and Uruguay to current negotiations with China and the European Union.

Investment treaties also routinely include most-favored-nations clauses that allow investors under one treaty to rely upon any more favorable terms accepted by the host state in any other investment treaty. Thus treaty parties not only have to consider whether they are happy with particular rules in the context of that treaty, but also whether they are happy for investor-friendly protections to be used in the context of any other treaty relationships they form. Thus states have to consider their interests as home and host states in general, not just in relation to that particular treaty, as investors can draw

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18. For a discussion of the evolution of U.S. and Chinese investment treaties, *see* Alvarez, *supra* note 17, at 624–39; Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bargain with Multilateral Implications*, 12 J. INT'L L. & ECON. 457 (2009); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007); Cai Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD INV. & TRADE 621 (2006).

19. José E. Alvarez, *The Evolving BIT*, 4 TRANSNAT'L DISP. MGMT. 1 (2010); José E. Alvarez, *Why Are We 'Re-calibrating' Our Investment Treaties?*, 4 WORLD ARB. & MED. REV. 143 (2010); Kenneth J. Vandevelde, A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests, *in* 2008-2009 Y.B. ON INT'L L. & POL'Y 283 (Karl P. Sauvant ed., 2009).

20. *See, e.g.*, 1984 U.S. Model BIT, *supra* note 9; 1994 U.S. Model BIT, *supra* note 9.

21. *See, e.g.*, 2004 U.S. Model Bilateral Investment Treaty, *available at* http://www.state.gov/documents/organization/117601.pdf, and 2012 U.S. Model Bilateral Investment Treaty, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter 2012 U.S. Model BIT].

upon pro-investment rules from any treaty that is agreed to by the host state.

Building on these developments, I argue that untailored default rules can be developed by considering what terms would have been agreed to by "ideal" treaty parties. I define "ideal" treaty parties as states that have equal interests as both capital importers and capital exporters, both in general and vis-à-vis each other. The dual and equal interests of these states as capital exporters and importers encourages them to internalize the risks and rewards of investment treaties rather than internalizing some of the risks or rewards and externalizing others. This pushes them to adopt fair and balanced provisions, as judged from the perspective of both treaty parties, rather than creating a bias in favor of exporters or importers.

When viewed from a general perspective, investment treaties involve an equal number of capital importers and capital exporters as foreign investors always come from one state and invest in another. When viewed on an individual level, ideal treaty parties replicate and internalize these interests because they represent contracting parties that have dual and equal interests as capital importers and capital exporters. Thus, rules that will be fair and balanced for the system in general should accord with the rules that ideal treaty parties would select for their negotiating position. This perspective is thus helpful in crafting untailored default rules against which specific pairs of treaty parties with asymmetrical interests and unequal bargaining power might wish to contract out.

Treaty parties may depart from default rules by expressly or impliedly contracting around them. Where a particular treaty involves states with asymmetric interests and unequal bargaining power, such departures might be likely. However, we should not assume that departures from this default point have been agreed unless they are express or can be clearly implied. Just because a capital exporting state may have wanted greater protections for its investors in a particular treaty does not mean that a capital importing state did or would have agreed to such terms. Moreover, just because a capital exporter may have had certain interests with respect to that particular treaty does not mean that those terms would generally be in that state's interests across all of its treaties.

## II. How to Model Triangular Treaties

How would ideal treaty parties approach the construction of investment treaties? I contend that they would conceptualize investment treaties as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. To flesh out this claim, I develop a hybrid theory of the extent and limits of investment treaty rights based on: (1) a public international law premise; (2) a third-party-beneficiary paradigm; and (3) a public law qualification.

The hybridity of this approach captures the unique public/private nature of investment treaties that both animates and vexes this immature field. It is consistent with my previous call to develop "between the poles" solutions that draw on a range of existing paradigms, instead of endorsing any single one, including by developing underexplored notions of third-party-beneficiary rights.[22] It also accords with Martins Paparinskis' prediction that, although not prevalent in current theorizing in the investment treaty system, "the law of third parties may be pointing the finger to the future."[23]

### A. *Public International Law Premise*

I adopt a public international law paradigm as my premise because I assume that investment treaties are entered into by sovereign states against background assumptions about the powers of states and treaty parties. This means that, if an investment treaty is silent on a particular issue, it is prima facie appropriate to look to general international law rules, such as customary international law rules on diplomatic protection, treaty interpretation, and state responsibility, to provide secondary rules, fill in gaps, and resolve ambiguities. Treaty parties can expressly or impliedly depart from these principles in their treaties, but the onus rests on those who are attempting to show that such departures were intended or are otherwise justified.

The standard assumption in public international law is that states can exercise diplomatic protection with respect to their nationals. Many of the customary international law rules on this subject are embodied in the ILC's Draft Articles on Diplomatic Protection.[24] Traditionally, states have the power to determine whether to bring a case on behalf of their nationals, how to prosecute the case, whether and on what terms to settle, and what to do with any resulting compensation.[25] This approach makes sense in most areas of international law where individuals have not been granted the power to enforce their own rights or benefits before independent tribunals. However, should the same freedom of the home state with respect to its nationals continue if those nationals have been granted enforceable third-party rights?

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22. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45, 92–93 (2013).

23. Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 Eur. J. Int'l L. 617, 625 (2013).

24. *Draft Articles on Diplomatic Protection with Commentaries*, *in* Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10, at 22–30 (2006) [hereinafter ILC Draft Articles on Diplomatic Protection with Commentaries].

25. Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 44, ¶¶ 78–79, ("[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . . . The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.").

Likewise, the standard assumption in treaty law is that treaty parties are masters of their treaties. As set forth in the Vienna Convention on the Law of Treaties (VCLT),[26] states enter into treaties and define the extent and limits of their treaty obligations. States may influence the interpretation and application of their treaties through subsequent interpretive agreements and practices. States may also amend or terminate their obligations at any time by mutual agreement. This approach makes sense when the treaty contains rights and obligations for the treaty parties only. However, does this standard account require some modification in the investment treaty context given the existence of investors as third-party beneficiaries?[27]

In a similar fashion, the rules for establishing the responsibility of states are generally set out in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts.[28] The Draft Articles on State Responsibility provide guidance on an array of issues, including the circumstances in which states can plead countermeasures as a circumstance precluding wrongfulness.[29] Some of these rules, including those governing countermeasures, are only applicable in relations between states and are "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."[30] Should the same rules apply to investment treaties by way of analogy or should some modifications be adopted?

Investors seeking to invest in risky states are likely to be concerned about two types of sovereign risk: undue interference by the host state, such as expropriation of their property without compensation or discriminatory treatment; and inadequate dispute resolution options, such as having to rely upon local courts that are unwilling or unable to protect investor rights. In order to promote investments as a means to the end of maximizing social welfare, states may be incentivized to create investment treaties that protect against these risks. To this end, states have entered into investment treaties that impose substantive obligations of investor protection on host states (often explained by the goal of "investor protection")[31] and provide for state-to-state and investor-state dispute resolution options to enforce these obligations (often explained by the goal of "depoliticizing investor-state disputes").[32]

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26. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

27. *See* Anthea Roberts, *Subsequent Agreements and Practice: The Battle Over Interpretive Power*, *in* TREATIES AND SUBSEQUENT PRACTICE 95, 101–02 (Georg Nolte ed., 2013).

28. *ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *in* Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, at 43 (2001) [hereinafter Draft Articles on State Responsibility].

29. *Id.*, art. 49.

30. *Id.*, art. 33(2).

31. *See infra* Part III.

32. *See infra* Part IV.

Investors are thus granted protections as third-party beneficiaries and are given the ability to enforce these benefits through investor-state arbitration. To model this movement from a bilateral treaty that creates rights and obligations for the treaty parties only, to a triangular treaty that creates enforceable rights for investors as third-party beneficiaries, it is useful to draw on third-party-beneficiary doctrines that exist under both public international law and domestic contract law.[33]

### B. *A Third-Party-Beneficiary Paradigm*

#### 1. *Focusing on the Treaty and the Intentions of the Treaty Parties*

Before modeling the movement from a bilateral to a triangular treaty structure, two preliminary points should be kept in mind. First, the relevant transaction for determining default treaty rules is the state-to-state treaty: it provides the framework that governs the relationship between the treaty parties and their nationals and foreign investors. As investment treaty interpretive questions often arise in the context of investor-state arbitrations, tribunals and academics have a tendency to focus on the investor's investment in the host state as the relevant transaction. However, this puts the cart before the horse. An investor may have a contract with the host state, but they may not. An investor may have relied upon the investment treaty in making an investment, but they may not. To bring an investment treaty claim, no contract or reliance is required.[34]

Instead, the relevant legal transaction that establishes the *treaty* rights and obligations at issue is the inter-state treaty, not any investor-state contract or relationship based on the investor's reliance. I leave to one side considerations of whether and, if so, how investment treaty rights might be supplemented (or, more controversially, qualified) by contractual rights under an investor-host state agreement. The relationship between treaty and contract rights is highly contentious in practice and underdeveloped in theory.[35] As many investment treaty disputes do not involve investor-state contracts, and as the terms of those contracts are often not public and/or differ tremendously, I exclude them from consideration when determining how to develop untailored default rules for interpreting investment *treaties*.

33. For an example of one other author who has relied upon the third-party-beneficiary paradigm but failed to take seriously the system's public international law premise or the need for a public law qualification, see Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 Santa Clara J. Int'l L. 335 (2013).

34. The only requirements for an investor to bring an arbitral claim under an investment treaty is that the investor (1) is a national of one of the treaty parties and (2) made (or, in the case of some treaties, wished to make) an investment in the other treaty party.

35. *See, e.g.*, Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 168–75 (2d ed., 2012); James Crawford, *Treaty and Contract in Investment Arbitration*, 24 Arb. Int'l 351 (2008); Julian Arato, *Corporations as Lawmakers*, 56 Harv. Int'l L.J. (forthcoming April 2015).

Second, treaty parties will create enforceable rights for third parties *when it is in the interests of the treaty parties to do so*. Accordingly, the relevant question for determining what rights have been granted to third parties is not "what is in the interests of the third party" or "what did the third party legitimately expect?" A third party may have a strong interest in something, but that does not mean that the contracting parties will be incentivized to protect that interest. A third party can only legitimately expect to receive the rights or benefits that the treaty parties, acting jointly, would have had an incentive to bestow. Whether those rights or benefits are sufficient to encourage an investor to invest is relevant to whether the treaty is effective as a matter of fact. Treaty parties will take this into account in determining what protections it is in their interests to grant in order to achieve their goals.

In focusing on the *interests and intentions of the treaty parties*, rather than the *interests or expectations* of investors, we should start from the assumption that the treaty parties will want a level of investment that produces the greatest joint benefit; anything else would lower the overall surplus available to the treaty parties. While it is generally recognized that too little investment would not be jointly desired by the treaty parties, the converse is often not appreciated. Too much investment is also suboptimal from the treaty parties' perspective. Offering unlimited investment protection would encourage too much investment by insuring potential investors against risks and encouraging them to over invest. Thus optimal investment protection from the perspective of ideal treaty parties is likely to require something between no and full investor protection.[36]

In addition, even if the treaty parties intended to protect foreign investors in order to promote foreign investments, we cannot assume that this is their only goal or that they will pursue that goal at all costs. Treaty parties have to balance their interest in promoting foreign investments against a range of other economic and non-economic welfare interests, such as being able to maintain control of their economies in times of crisis or pursue non-economic goals, such as the protection of human health and the environment. Promoting foreign investment is just one element in a complex calculus of maximizing overall social welfare.[37] Hence, our focus shifts from the one-dimensional interests of investor (maximizing investor protection) to the multi-faceted interests of the treaty parties (balancing investment promotion and other welfare goals).

My focus on the treaty parties' intentions and interests accords with scholarly work on third-party-beneficiary doctrines under contract law. For example, Melvin Eisenberg argues that a third-party beneficiary should have the power to enforce a contract if allowing such enforcement would be a

36. *See infra* Part III.A.1.
37. *See infra* Part III.A.2.

necessary or important means of effectuating the contracting parties' performance objectives.[38] According to Eisenberg, "the purpose of allowing suit by a third party is not to ensure that the third party realizes a benefit, but to ensure that the contracting parties' performance objectives are effectuated."[39] Thus it is important to focus on what the treaty parties gain by granting third-party enforcement, as that is key to understanding the extent and limits of such a grant.

Similarly, according to Bob Scott and Alan Schwartz, the central question that pervades third-party beneficiary law is when can a third party (here, the investor) hold contract members (here, the treaty parties) liable for benefits not received or costs incurred. They argue that, ex ante, contract members would want the law to hold that third parties are beneficiaries when permitting third-party enforcement would increase the expected payoffs of the contract members.[40] Again, this shifts the focus from what is in the interests of the investor (absolute or high level investor protection) to what is in the interests of the treaty parties (striking a balance between promoting foreign investments and achieving other social welfare goals).

Of course, the investor and the investor's home state are not entirely independent entities, in contrast to what may occur in private law contracting. Instead, they are defined by a public law relationship between a sovereign and one of its nationals. If an ideal state is understood as having the interest of furthering the welfare of its nationals, this includes their nationals who wish to undertake foreign investments and their nationals who are not foreign investors. Home states—at least ideal ones—should internalize the interests of their investors, though these interests will not be the only factors that motivate them. These states also have to think about the interests of their non-investing nationals, including in situations where the rules they agree to limit their freedom of action as home and host states.

One of the advantages of defining the ideal type in this way is that the interests of all of the relevant actors can be encompassed by focusing on the interests of ideal treaty parties in a way that is not possible under ordinary contract law where an actual or potential third-party beneficiary may be subject to costs or benefits that are not fully internalized by the contracting parties. It is likely, of course, that real states will not fully internalize the interests of all of their nationals due to agency problems. This could be true of their nationals that invest and that do not invest. It could be true of democratic or non-democratic states. Nonetheless, in working out default

38. Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1385 (1992); Melvin A. Eisenberg, Foundational Principles of Contract Law (unpublished book chapter, on file with author).

39. Eisenberg, *supra* note 38, at 1386.

40. Alan Schwartz and Robert E. Scott, *Third Party Beneficiaries and Contractual Networks* (unpublished paper, on file with author).

rules, I define the ideal treaty parties as those that can internalize the interests of their nationals, including but not limited to their investors.

Even if real treaty parties do not fully internalize the interests of all of their nationals, it is still important to focus on the intentions of the treaty parties in determining the extent and limits of investment treaty rights. That is because international law is based on the sovereign consent of states. Unlike in domestic law, no higher legislative authority exists in international law that is able to mandate states to protect the interests of non-state parties, even if doing so would be more fair or efficient. Accordingly, if investors are to have any rights under international law, they will be the rights that states have granted to them through instruments like investment treaties. This situation arguably differs from the human rights sphere where there are arguments that individuals enjoy certain rights by virtue of being human.[41]

2. *Moving from a Bilateral to a Triangular Treaty Structure*

In contract law, contracts were initially entered into by the contracting parties and created rights and obligations for the contracting parties only. Third parties could not enforce the contracts because they were not "in privity" with the contracting parties. Over time, however, domestic courts and legislatures came to recognize that contracting parties may have an interest in entering into contracts for the benefit of third parties and, on occasion, may also have an interest in permitting that third party to directly enforce those contractual terms. This led to the development of various doctrines dealing with the rights of third-party beneficiaries under contract law. Although third-party beneficiary contracts are well accepted and increasingly common as a matter of practice, the doctrines regulating them are significantly under-theorized.[42]

Public international law is on a similar trajectory. Treaties were initially conceived as agreements between states that create rights and obligations for the treaty parties only. Over time, it has become clear that states may wish to enter into treaties that create rights or obligations for third parties, including for third states (which could have been treaty parties) and for individuals and other non-state actors (which could not have been treaty parties). For instance, the VCLT has certain provisions that deal with treaties that create rights or obligations for third states.[43] In international human rights and criminal law, states have created treaty rights and obligations for individuals and, in some cases, have permitted direct enforcement by or against

41. Even if some rights in investment treaties also appear in certain human rights treaties, no credible argument is made that investors have inherent or inalienable rights.

42. Schwartz & Scott, *supra* note 40 ("For many years, third-party-beneficiary law has languished in the backwaters of contract: the subject is rarely taught, has been given only minimal scholarly treatment and has been completely ignored by law and economics scholars.").

43. VCLT, *supra* note 26, arts. 34–37.

individuals.[44] As in contract law, third-party beneficiary doctrines have received little scholarly attention or theorizing under public international law.

States are masters of their treaties in the sense that they are the ones that decide (1) whether to grant third parties enforceable rights or mere benefits and (2) whether to make those rights absolute, conditional, or limited in nature. They are also the ones that decide whether to delegate authority to arbitral tribunals to interpret and apply these treaties. In line with the strictures of public international law, tribunals must interpret the treaty's provisions "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[45] Where the treaty parties have expressly dealt with a point, the tribunal should defer to their decision in order to respect party autonomy. Where the issue remains unaddressed, I contend that tribunals should consider what default rules ideal treaty parties would likely have adopted if they had considered the issue during the negotiations.

*a. Enforceable Rights Not Mere Benefits*

There has been considerable disagreement over whether and when to permit third parties to enforce contracts that have been made for their benefit. Both public international law and domestic contract law seek to distinguish between third-party rights (which are enforceable) and mere third-party benefits (which are not), though how to apply these tests in order to draw this line is not always clear. In the case of investment treaties, the treaty parties have accepted obligations with respect to investor protection without specifying whether these create substantive rights for investors, home states, or both.[46] Without needing to resolve this question, what transforms these obligations into enforceable third-party rights instead of mere benefits is that the treaties expressly give investors the ability to enforce them through investor-state arbitration.

The VCLT recognizes that a right may arise for a third State from a provision of a treaty "if the parties to the treaty *intend* the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto."[47] This rule applies to rights created for third states, rather than for third parties that are non-state actors, so it provides principles that would be applicable here by way of

44. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (granting substantive rights to individuals); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (imposing substantive obligations on individuals); European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 1–18, 34, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 (granting substantive rights to persons and permiting them to bring direct claims against states).

45. VCLT, *supra* note 26, art. 31(1).

46. Roberts, *supra* note 4 at 36–39.

47. *Id.* art. 36 (emphasis added).

analogy only. Unless the treaty provides otherwise, the third state is presumed to have assented to the right unless it indicates to the contrary.[48]

International law distinguishes between treaties that create rights, as opposed to mere benefits, for third states. For instance, where a treaty creates mere benefits for a third state, the treaty parties may amend it at any time because the third party has no enforceable rights in the matter. However, where a treaty confers a right on a third state, the right of a third state "may not be revoked or modified by the parties if it is established that the right was *intended* not to be revocable or subject to modification without the consent of the third State."[49]

In both cases, the focus is on the *intention* of the treaty parties, which accords with the approach that treats the relevant transaction as the interstate treaty and the relevant question as whether it was in the interests of the treaty parties to create enforceable rights for third parties. The intentions and actions of the third party may be relevant in so far as they provide important context for informing the interests and intentions of the treaty parties. However, the test of what rights and obligations have been given depends on the intention of the treaty parties, not the intentions or legitimate expectations of the third party.

Under domestic contract law, contracts are usually assumed to have legal effects between the contracting parties only, but a general exception to privity is recognized for contractual rights that are granted to third-party beneficiaries. As different legal systems adopt different approaches, I do not outline the evolution with respect to third-party beneficiary rights that has occurred in any single state.[50] Instead, I draw on the UNIDROIT Principles on International Commercial Contracts as a helpful distillation of common contract law principles across a variety of national systems. According to the UNIDROIT Principles:

> (1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").
>
> (2) The existence and content of the beneficiary's right against the promisor are determined by the *agreement* of the parties and are subject to any conditions or other limitations under the *agreement*.[51]

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48. *Id.* art. 36.

49. *Id.* art. 37(2) (emphasis added).

50. For instance, in the United States, those discussing third-party-beneficiary rights would likely cite to *Lawrence v. Fox*, 20 N.Y. 268 (N.Y. 1859) and Anthony Jon Waters, A Property in a Promise: A Study of the Third Party Beneficiary Rule, 98 Harv. L. Rev. 1148 (1985), while in the United Kingdom, they would give prominence to Contracts (Rights of Third Parties) Act 1999.

51. International Institute for the Unification of Private Law [UNIDROIT], UNIDROIT Principles of International Commercial Contracts [hereinafter UNIDROIT Principles], art. 5.2.1 (emphasis added).

Again, the focus is on the *agreement* of the contracting parties, not on the interests or expectations of the third party.

Domestic contract law typically draws a distinction between rights that can be enforced by a third party and mere benefits that cannot be so enforced.[52] In some cases, the contract parties may have an incentive to bestow enforceable rights on a third party even if this later limits some of their actions, either individually or collectively. For instance, contracting parties may have an incentive to bestow enforceable rights on a third party if they want that third party to act in reliance upon those rights. That is why, unless the contract provides otherwise, the general rule adopted by the UNIDROIT Principles is that the contracting parties "may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them."[53]

In determining when a third-party beneficiary should be permitted to enforce a contract, Melvin Eisenberg suggests the following principle:

> A third-party beneficiary should have power to enforce a contract if, but only if:
> (I) allowing the beneficiary to enforce the contract is a necessary or important means of effectuating the contracting parties' performance objectives, as manifested in the contract read in the light of surrounding circumstances; or
> (II) allowing the beneficiary to enforce the contract is supported by reasons of policy or morality independent of contract law and would not conflict with the contracting parties' performance objectives.[54]

The first branch of the test reflects the concept that, at its core, contract law seeks to facilitate the power of contracting parties to further their own interests by contracting. Accordingly, under this branch:

> [T]he purpose of allowing suit by a third party is not to ensure that the third party realizes a benefit, but to ensure that the contracting parties' performance objectives are effectuated. Unlike the intent-to-benefit test, which turns on whether the contracting parties had an *other-regarding* intent to benefit the third party, the first branch of the third-party-beneficiary principle turns on whether allowing the third party to enforce the contract will further the *self-regarding* interests of the contracting parties.[55]

52. Commentary on the UNIDROIT Principles of International Commercial Contracts, art. 5.2.1, at 585–86 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009).
53. UNIDROIT Principles, art. 5.2.5.
54. Eisenberg, *supra* note 38, at 1385.
55. *Id.* at 1386.

This means that third-party-beneficiary rules should be conceived of as remedial rather than substantive. The question is not whether the contract creates a substantive right for the third party, but whether empowering the third party to enforce the contract is a necessary and important means of effectuating the contracting parties' performance objectives.

The second branch reflects the fact that contract law may give effect to policy and normative concerns that are independent of the contracting parties' objectives. However, given the primacy of the contracting parties' intentions, a third party should not be permitted to enforce a contract under this branch if doing so would conflict with the contracting parties' objectives. It is less clear whether this branch should cross apply in the international law sphere given that no overarching sovereign exists to authorize the pursuit of other goals over and above those agreed to by states. Nonetheless, even if this prong were to apply, third parties should not be granted enforceable rights in a way that would be contrary to the joint interests of the treaty parties.

Applying these doctrines by analogy, a strong argument can be made that investment treaties should be understood as contracts between A and B (the home and host state) that create enforceable rights for C (the class of investors from A and B investing in B and A respectively). As detailed below, treaty parties have an interest in creating enforceable rights for foreign investors as a means to the end of achieving their own goal of promoting foreign investment in order to increase state development. Investors are not mere beneficiaries of investment treaties; rather, they are a specific, identifiable class of intended third-party beneficiaries with enforceable rights. To understand what makes investment treaties unusual in this regard, it is instructive to draw a distinction between trade and investment treaties.

Investment treaties create benefits for investors like trade treaties create benefits for traders. What distinguishes the two, however, is that investment treaties give investors a right to bring direct claims in order to enforce these benefits. Investment treaties thus create *enforceable third-party rights* for investors while trade law treaties create *mere benefits* for traders. The rationale for this distinction may be linked to the heightened need to protect against sovereign risks that are more acute for foreign investors operating *within* a host state than for foreign traders operating *without*. It also explains why second- and third-order controversies that pervade the investment treaty system, such as settlement of claims, the permissibility of countermeasures, and the effect of joint termination, are non-issues in trade law where the classic state-to-state paradigm prevails.

As Eisenberg suggests, there is no need to go down the existing path of focusing on the *nature* of investment treaty rights, i.e., whether these rights are procedural and/or substantive. As he explains:

> [T]he law of third-party beneficiaries is largely conceived as *remedial*, rather than substantive. The question . . . is not whether the contract creates a "right" in the third party, but whether empowering the third party to enforce the contract is a necessary or important means to effectuating the contracting parties' performance objectives.[56]

It is enough that investment treaties impose investment protection obligations on host states and give both investors and host states a chance to enforce these obligations through investor-state and state-to-state arbitration respectively. In order to achieve their goal of promoting foreign investment to increase development, it may be in the interests of the treaty parties to qualify some of the traditional doctrines relating to diplomatic protection, treaty interpretation, and state responsibility.

*b. Absolute, Conditional, or Limited Rights*

Instead of focusing exclusively on the *nature* of investment treaty rights, this third-party beneficiary approach encourages us to consider the *extent* and *limits* of those rights.[57] The question thus becomes whether these enforceable third-party rights are absolute, conditional, or limited in nature. As the contracting parties, the treaty parties have the power to define what rights are given to investors and what powers are retained by the states. They could choose to retain, dispense with, or impose conditions upon their individual or collective sovereign powers but whether they have done so depends on whether it was in their interests to do so.

To analyze what existing treaty parties have done, and what ideal treaty parties would do, it is necessary to unpack what are often considered to be the two main goals of investment treaties: (1) investor protection and (2) the depoliticization of investor-state disputes. Tribunals and scholars often give a skewed answer to these questions because they focus on the *interests and expectations* of the investor, rather than the *interests and intentions* of the treaty parties. It is also necessary to disaggregate between the three investor-state relationships that define the investment treaty system, namely investors' relationships with the host state, the home state, and the treaty parties acting collectively, as the treaty parties may have an interest in striking a different balance with respect to each.

Before unpacking these goals and disaggregating these relationships, however, it is important to qualify this hybrid approach by drawing on public law principles given that third-party-beneficiary doctrines typically regulate relations between juridical equals (i.e., between states or between

56. Eisenberg, *supra* note 38, at 1386.

57. *Cf.* Junianto James Losari and Michael Ewing-Chow, *A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law*, 16 J. World Trade & Investment 270, 291–97 (Soc'y of Int'l Econ. Law, Working Paper No. 2014/18, 2015) (arguing against conflating the issues of the nature of investment treaty rights and the components of those rights).

private parties), whereas investment treaties are entered into by sovereign states but create enforceable rights for non-state actors (i.e., investors).

### C. *A Public Law Qualification*

Public international law and domestic contract law both structure private law relations between actors that exist on a horizontal plane of equality, i.e., relations between states under public international law or relations between non-state actors under contract law. Even though public international law is public in the sense that it deals with states, it is fundamentally private in nature when it deals with the rights and obligations of states vis-à-vis each other, which is why many of the field's analogies are drawn from private law.[58]

Investment treaties are not private in this sense because they concern horizontal relations between states as equals *and* vertical relations between those states and investors as non-state actors.[59] The fact that the tripartite structure involves a contract between two sovereigns that bestows enforceable rights on non-sovereign actors suggests that public law notions might be useful in qualifying the cross-application of private law contracting principles to the investment sphere. The need for such qualifications is best illustrated by considering the limits of contract law analogies being used in the context of third-party *obligations* as opposed to third-party *rights*.

As a matter of contract law, the promisee and promisor cannot impose an obligation on a third party without the third party's consent because they all exist in a horizontal plane of equality. This represents a classic private law understanding of legal relationships. Yet states can enter into treaties imposing obligations on individuals subject to their jurisdiction without those individuals needing to consent. Examples include treaties dealing with international criminal law or taxation. Treaty parties can do this because the relationship between states and individuals is vertical rather than horizontal as it exists between those that govern (the treaty parties) and those that are governed (individuals subject to the jurisdiction of those states). This represents a classic public law understanding of legal relationships.

Investment treaties involve three public law relationships. The literature has already clearly recognized the need to analyze the investor-*host* state relationship through a public law paradigm (first-order relationship).[60] I contend that we also need to recognize that investors and their *home* states have

58. *See, e.g.*, Hersch Lauterpacht, Private Law Sources and Analogies of International Law (1927).

59. Roberts, *supra* note 22, at 63–64.

60. Gus Van Harten, Investment Treaty Arbitration and Public Law (2007); Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, *in* International Investment Law And Comparative Public Law 3 (Stephan W. Schill ed. 2010); Santiago Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (2009).

a public law relationship that is governed by international rules on diplomatic protection and the home state's domestic law (second-order relationship). In addition, I argue that the vertical nature of the relationship between the treaty parties (as sovereigns) and investors (as non-sovereign) means that the treaty parties can be viewed as a joint sovereign that created the investment treaty and thus presumptively retains certain powers to revoke or amend that treaty (third-order relationship).

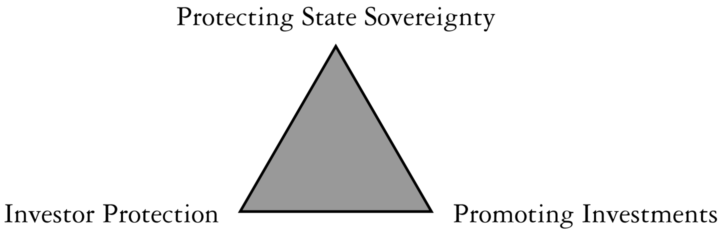
The public law relationships between investors and their home states, and between investors and the treaty parties acting jointly, have the potential to qualify the third-party-beneficiary paradigm in important ways. For instance, it may provide useful qualifications to the notion of when and how ideal treaty parties would likely intend third-party rights to vest, given that non-state actors are not usually able to lock in favorable laws simply by accepting or relying upon those laws in the way that they often can with respect to private law contracts. It might also suggest some limits on the joint power of the treaty parties recognized under traditional public international law models, akin to domestic rules against laws with retroactive effect or expropriations without compensation. These possibilities are considered in more detail below.

## III. Unpacking the Goal of Investor Protection

To understand the extent and limits of investment treaty rights, we first need to better understand what is often taken to be the treaty parties' substantive goal in entering into such agreements: investor protection. There is a tendency within the case law and literature to treat investor protection as: (a) both an end in and of itself, rather than as a means to an end, and as an absolute goal rather than a qualified one; and (b) a uniform concept that can be applied to settle controversies in relations between investors and states in general, without disaggregating how it might apply differently to the three types of investor-state relationships involved in investment treaties. I disagree with both approaches.

When assessed from the perspective of ideal treaty parties, investment protection should be understood as a means to the end of promoting foreign investments in order to increase development, rather than as an end in and of itself. This goal is also not absolute as real treaty parties have, and ideal treaty parties would, seek to balance their interest in promoting foreign investment against their interest in protecting their sovereignty to enable them to pursue other welfare goals, such as protection of health and safety and wealth redistribution through taxation. The balance ideal treaty parties would be likely to strike between investment protection and the preservation of sovereign prerogatives is likely to differ among the three investor-state relationships identified.

### A. *Rethinking the Substantive Goal of Investment Treaties*




#### 1. *Investment Protection as a Means to an End*

Investment protection should be understood as a means to the end of promoting efficient investments and thereby increasing net economic gains of home and host states. It is not an end in and of itself. As Anne van Aaken explains:

> It is not only questionable whether the (only) purpose of IIAs is the protection of investment, but also whether it is actually a purpose at all. As most preambles reveal, the protection and promotion of investment is the means to an end, the end being the maximization of welfare, development, or prosperity of the home and host states.[61]

For home states, an increase in efficient foreign investments will not just benefit their investing nationals; it is also likely to benefit their non-investing nationals because the state's development is likely to be enhanced through increased tax revenues. For host states, promoting such investments means increasing development through the creation of new jobs, the development of new infrastructure, and the enhancement of tax revenues.

To understand why investment protection and increased foreign investment are not goals in and of themselves, consider a situation in which identical investors from the United States and Canada could equally invest in either state. If the investors invest in their homes states, they would receive no investment protection. If the U.S. investor invested in Canada and the Canadian investor invested in the United States, they would receive investment protection. If the goal of investment treaties were to protect investors per se, or simply to increase foreign investment, the second scenario would look like a win-win. However, there has been no net economic gain in the

61. Anne van Aaken, Interpretational Methods as an Instrument of Control in International Investment Law, 108 ASIL Proceedings (2014 forthcoming); *see also* Anne van Aaken & Tobias Lehmann, *Sustainable Development and International Investment Law: An Harmonious View from Economics*, *in* International Investment Law and Policy 317, 329, 332 (Roberto Echandi and Pierre Sauvé eds., 2013) ("the object of the treaty may be investor protection, while the underlying purpose is (sustainable) development;" "The purpose of [investment treaties] must be seen as contributing to the welfare or prosperity of home and host states by means of investment protection and promotion.").

second scenario, so there is little reason to believe that treaty parties would have an interest in protecting and promoting such investments.[62]

Instead, from the perspective of ideal treaty parties, investment protection should be understood as a means to the end of promoting efficient foreign investments in order to maximize net economic gains for the home and host state. This idea of investment protection being a means to an end of promoting economic development and efficient allocations of economic resources is clear in the preambles of many older- and newer-style investment treaties and Model BITs.[63] Investment treaties may achieve this by protecting against hold-up costs, sometimes referred to as the "obsolescing bargain" or "dynamic inconsistency" problem. Two examples serve to illustrate the problem.

One concern motivating investment treaties is that it would be efficient for Investor A to invest in State B because of the potential for higher returns, but that Investor A chooses not to do so because it is concerned about increased sovereign risks in State B. For instance, Investor A might be concerned that after it sinks the money into building its investment, State B might expropriate its investment without paying compensation. This might result in Investor A choosing to invest in State A even though this produces a lower overall surplus. Provisions that protect against expropriation without compensation seek to protect against this concern.

Another concern motivating investment treaties is to protect against unequal treatment of domestic and foreign investors. If states provide advantages to national investors over foreign investors, or to some foreign investors over other foreign investors, this may produce inefficiencies within the market. Provisions that require host states to provide equal treatment to foreign and domestic investors (national treatment) and between foreign investors (most favored nations treatment) seek to eliminate these differences in order to allow firms to compete on an equal footing.

The main focus of investment treaties has been on protecting against inefficient underinvestment as a result of these sorts of sovereign risks, i.e., situations in which it would be efficient for Investor A to invest in State B but Investor A fails to do so due to concerns about certain sovereign risks. However, providing too much protection might lead to inefficient overinvestment. In deciding whether to invest, investors must weigh many risks,

62. Bonnitcha, *supra* note 14, at 102.

63. *See, e.g.*, 1984 U.S. Model BIT, *supra* note 9, preamble ("Desiring to promote greater economic cooperation between them, particularly with respect to investment by nationals and companies of one Party in the territory of the other Party; and Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties, Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources"); 2012 U.S. Model BIT, *supra* note 21, preamble ("Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party; Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties").

including the likely availability of natural resources, market stability, currency changes, and reasonable or efficient regulatory changes. Investment treaties are meant to protect against one type of risk—unreasonable or inefficient sovereign actions such as expropriation without compensation or discrimination—rather than providing an insurance policy against all risks.

Protecting foreign investors or promoting foreign investments per se would lead to the risk of overinvestment, which may be just as problematic as the risk of underinvestment. In particular, it might undermine attempts to achieve efficient investments by creating the risk of moral hazard with respect to reasonable and efficient regulatory actions. If an investor knew that it would be protected against any future regulatory changes, even ones that were efficiency enhancing in terms of producing an increase in net economic benefits, this might produce a moral hazard that would encourage the investor to overinvest because doing so would be efficient as judged from the perspective of the investor even though it would be inefficient as judged from the overall perspective of the treaty parties.[64]

Consider a situation in which an investor of State A (Investor A) decides to invest in State B by building a factory that produces a profit of $100 per year but at the cost of pumping out harmful chemicals into State B's air that would cost $200 to remove. From an overall perspective, this would be an inefficient investment because the gains from the investment are lower than the costs. Yet, if Investor A could invest with knowledge that it was not currently required to pay for the costs of such pollution, and State B could not change its environmental regulations to make Investor A pay for the costs of such pollution without having to compensate Investor A, then it would be likely to invest because doing so would be efficient from the perspective of Investor A.

If, on the other hand, Investor A knew that it would be liable to pay the costs of efficiency-enhancing general regulations, then it would have to decide whether it was worth investing given the risk that, if State B changed its environmental regulations, State B would not have to compensate Investor A for any losses the investor incurred as a result. In such a case, Investor A might choose either not to invest or to invest but install newer filters at a cost of $50 in order to prevent the pollution occurring in the first place. Both options would be preferable to providing absolute investment protection and thus incentivizing inefficient overinvestment.[65]

### 2. *Promotion of Foreign Investments as a Qualified Goal*

Sovereign states are not pure profit maximizing entities. Instead, their over-arching goal is better understood as maximizing the welfare of their nationals. States must weigh their interest in increasing foreign investments

64. Bonnitcha, *supra* note 14 at 72–75.
65. *Id.*

in order to maximize their net economic gains against their interest in pursuing other welfare goals, such as protecting health and safety, redistributing wealth through taxation, and protecting their essential security interests. Where some of these concerns can be reduced to a monetary value, they can be included in the above analysis, but others involve an apples-to-oranges comparison that is open to different policy trade-offs.[66] For instance, how should states weigh the economic gains from permitting cigarettes to be sold or nuclear energy to be produced against the risks to human health from both activities?

For this reason, ideal treaty parties would be likely to treat promoting foreign investments as a qualified, rather than absolute, goal. This approach is consistent with interpretive statements adopted in recent investment treaties and Model BITs which provide, for instance, that non-discriminatory regulatory actions by a treaty party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[67] Some of these interpretations are subject to an exception in "rare circumstances," but they differ on what constitutes rare circumstances.[68] It is also consistent with increasing references in preambles to the need to protect foreign investment without compromising other important goals such as the protection of health, safety, and the environment.[69]

The fact that ideal treaty parties would treat investment protection as a qualified, rather than absolute, goal should come as no surprise. On a domestic level, no state protects investments to the exclusion of all other interests. One should not expect the outcome to be different at the international level. Moreover, in addition to being qualified, the goal of promoting foreign investments is likely to be inversely proportional to the treaty parties'

66. Some others who have taken an economics approach to investment treaties similarly separate out these economic and non-economic goals. *See, e.g.*, Bonnitcha, *supra* note 14, at 54–57, 62–65.

67. *See, e.g.*, 2009 ASEAN Comprehensive Investment Agreement, Feb. 26 2009, Annex 2; New Zealand-China Free Trade Agreement, China-N.Z., Apr. 7, 2008, Annex 13 [hereinafter New Zealand-China FTA], *available at* http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php; 2012 U.S. Model BIT, *supra* note 21, Annex B; 2004 Canada Model Agreement for the Promotion and Protection of Investments, Annex B, *available at* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf [hereinafter 2004 Canadian Model BIT].

68. *See, e.g.*, New Zealand-China FTA, *supra* note 67, Annex 13 ("Except in rare circumstances" such as a deprivation of property that is "discriminatory in its effect" or "in breach of the state's prior binding written commitment to the investor"); 2012 U.S. Model BIT, *supra* note 21, Annex B ("Except in rare circumstances . . ." with no further explanation given); 2004 Canadian Model BIT, *supra* note 67, Annex B ("Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith").

69. *See, e.g.*, 2012 U.S. Model BIT, *supra* note 21, preamble ("Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards; Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration; Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights").

goal of protecting their sovereign ability to pursue other welfare goals. In simplified terms, the broader the protections granted to foreign investors, the narrower the sovereignty powers retained by states to pursue other welfare goals and vice versa.

If states are given complete freedom to act, the investment treaty system will not provide sufficient assurances to investors to promote efficient investments. If investors are given absolute protection, this will exceed what is required to promote efficient investment and it would preclude the balancing of investment promotion against other welfare goals. In turn, the onerous nature of these obligations will create incentives for states to exit the investment treaty system and to fail to enter into new investment treaties, thereby undermining investor protection and the promotion of efficient investments in the long term.

Investment tribunals are increasingly recognizing that the goals of investment protection and promotion are important but not absolute. For instance, in *El Paso v. Argentina*, the Tribunal held that "a *balanced interpretation* is needed, taking into account State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[70] Likewise, the Tribunal in *Saluka v. Czech Republic* held that:

> The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a *balanced approach* to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.[71]

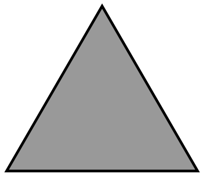
Ideal treaty parties would have an incentive to adopt interior solutions that fall between the extremes of total investment protection and complete preservation of state sovereignty. No single formula exists for determining the precise balance that should be struck between these goals. Again, this should not be surprising. In domestic systems, the balance between the governance needs of states and the property rights or reliance interests of individuals remains contested, as can be seen in ongoing debates about distinguishing regulatory takings from non-compensable regulation, when

70. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶70 (Apr. 27, 2006) (emphasis added).

71. Saluka Investments B.V. (Neth.) v. Czech Republic, UNCITRAL, Partial Award, ¶ 300 (Mar. 17, 2006) (emphasis added).

to apply the presumption against retroactivity, how to deal with changes in regulations that impact upon government contracts, and what counts as a vested right.[72] This same ongoing contestation also plays out in the investment treaty field.

### *B. Calibrating the Balance in Three Investor-State Relationships*




To understand how the inherent tension between investor protection and promotion, on the one hand, and the preservation of state sovereignty, on the other hand, plays out, we must disaggregate between three investor-state relationships, because existing treaty parties have adopted, and ideal treaty parties would be likely to adopt, a different balance with respect to each one.

#### 1. *First-Order Tension*

The first-order tension between investor protection and state sovereignty concerns the relationship between investors and *host states acting unilaterally*. Unlike the second- and third-order relationships, this relationship tends to be expressly addressed by investment treaties.

On a substantive level, host states accept certain obligations to protect foreign investments and investors as a means to the end of promoting foreign investment. For instance, host states typically agree (1) to accord to foreign investors no less favorable treatment than that they accord, in like circumstances, to their own investors (national treatment); (2) to accord to foreign investors covered by the treaty treatment no less favorable than that they accord, in like circumstances, to investors of other states (most favored nation treatment); (3) to accord foreign investors fair and equitable treatment and full protection and security; and (4) not to expropriate a covered investment except for a public purpose, in a non-discriminatory manner, and on payment of prompt, adequate, and effective compensation.

However, these substantive obligations are not absolute. Instead, investment treaties frequently contain clarifications and exceptions designed to

72. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies (2d ed. 2012) (Chapter 11 deals with "Government Forbearance," which seeks to balance the government's sovereign interest in accommodating change and the interest of protecting the reliance interests of private parties, which plays out in various doctrines including government contracting, due process, vested rights, the presumption against retroactive laws, and investment treaties).

protect a meaningful degree of state sovereignty in the form of regulatory autonomy. For instance, some treaties include interpretive annexes providing that non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, either ever or only in rare circumstances.[73] Many treaties include exceptions clauses that exempt from liability actions taken in order to maintain or restore international peace and security or to protect a state's essential security interests.[74] Some provide exceptions for environmental protection and health and safety measures.[75]

On a procedural level, most investment treaties grant investors the ability to bring investor-state claims against the host state to enforce these substantive obligations. Investment treaties often include this measure to ensure that an impartial tribunal exists to enforce the treaty obligations given that not all host states have effective and impartial domestic courts that are capable of policing their own government's actions. In addition, investor-state arbitration was added to the traditional international law remedy of state-to-state arbitration as a way of depoliticizing investment treaty disputes, a goal that is considered in more detail below. These investment tribunals are empowered to interpret and apply investment treaties, including by filling gaps and resolving ambiguities in appropriate cases.

73. *See, e.g.*, 2012 U.S. Model BIT, *supra* note 21, arts. 12, 13, Annex B; United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Annex B, U.S.-Uru., Nov. 4, 2005, *available at* http://www.ustr.gov/sites/ default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf; United States-Australia Free Trade Agreement, U.S.-Aust., Annex 11-B, May 18, 2004, 118 Stat. 919, *available at* www.dfat.gov.au/trade/negotiations/us.html [hereinafter Australia-U.S. FTA]; 2004 Canadian Model BIT, *supra* note 67, Annex B.13(1).

74. *See, e.g.*, 2012 U.S. Model BIT, *supra* note 21, art. 18; 2004 Canadian Model BIT, *supra* note 67, art. 10(4); Colombian Model Bilateral Agreement for the Promotion and Protection of Investments, art. II(3), 2007, *available at* http://italaw.com/documents/inv_model_bit_colombia.pdf [hereinafter 2007 Colombian Model BIT]; Indian Model Agreement for the Promotion and Protection of Investments, art. 12(2), 2003, *available at* http://www.italaw.com/sites/default/files/archive/ita1026.pdf [hereinafter 2003 Indian Model BIT]; Japan-Singapore New-Age Economic Partnership Agreement, Japan-Sing., art. 4, Jan. 13, 2002 [hereinafter Japan-Singapore BIT], *available at* http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf; Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., art. 10.01(2), June 5, 2005, *available at* http://www.commerce.nic.in/trade/international_ta_framework_ceca.asp [hereinafter India-Singapore BIT]; New Zealand-China FTA, *supra* note 67, art. 201(1).

75. *See, e.g.*, Japan-Malaysia Economic Partnership Agreement, Japan-Malay., art. 10, Dec. 13, 2005, *available at* http://www.mofa.go.jp/region/asia-paci/malaysia/epa/content.pdf; India-Singapore BIT, *supra* note 74, art. 54; Korea-Singapore Free Trade Agreement, Sing-S. Kor., arts. 10.7(4), 10.12, 10.18, 2005, [hereinafter Korea-Singapore FTA] *available at* http://www.worldtradelaw.net/fta/agreements/korsingfta.pdf; 2004 Canadian Model BIT, *supra* note 67, art. 10; Panama-Taiwan Free Trade Agreement, Pan.-Taiwan, art. 20.02, Aug. 21, 2003 [hereinafter Panama-Taiwan FTA], *available at* http://www.sice.oas.org/trade/panrc/pan_twn_full_text_e.pdf; New Zealand-China FTA, *supra* note 67, art. 200(2); Japan-Singapore BIT, *supra* note 74, art. 83.

### 2. *Second-Order Tension*

The second-order tension between investor protection and state sovereignty concerns the relationship between investors and *home states acting individually*. While investment treaties expressly protect foreign investors from certain unilateral actions by host states, most do not expressly protect foreign investors from unilateral actions by their home states.

On a substantive level, investment treaties typically do not impose obligations on home states. Obligations with respect to national treatment, most-favored-nations treatment, and expropriation are imposed on both treaty parties but with respect to investors and investments coming from the other treaty party. This means that they are imposed on both treaty parties acting in their capacities as host states, not as home states.

On a procedural level, investment treaties permit an investor from one state to bring an arbitral claim against the other state, i.e., the host state; they do not permit investors to sue their own home state. In this way, the substantive obligations and procedural rights created by investment treaties seem to be primarily geared towards the first-order relationship, not the second-order one.

Despite this, many lawyers and commentators seek to imply limitations on the home state's actions on the basis that (1) the purpose of investment treaties is to protect investors and investment and/or (2) the treaty parties agreed to accept investor-state arbitration in order to "depoliticize" investment disputes and to remove them from the state-to-state realm. These issues are implicated in the first two controversies listed in the introduction.

First, if investors are given a right to bring arbitral claims against host states, is this right immunized from interference by the home state? For example, could the home state agree to settle its investor's claim without the investor's consent? Could the home state pre-empt existing or future investor-state claims by filing its own state-to-state claim covering the same underlying conduct? Or does the investor have a right to bring an investor-state claim that is immunized from interference by its home state? Does it depend on whether the treaty has a clause, like Article 27 in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"),[76] which provides that a home state can no longer provide diplomatic protection after an investor-state claim has been brought? If so, does one rule exist before an investor-state claim is filed and another exist afterwards?

76. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), art. 27(1), Mar. 18, 1965, 575 UNTS 159 [hereinafter Claims Settlement Declaration].

Consider a situation like the Iran-U.S. hostage crisis.[77] This diplomatic crisis erupted when a group of Iranian students took over the U.S. Embassy in Tehran, resulting in fifty-two U.S. diplomats and citizens being held hostage for 444 days in 1979–81. Tensions increased as negotiations did not bear fruit and a 1980 U.S. rescue mission failed, resulting in the deaths of eight U.S. servicemen, one Iranian civilian, and the destruction of two aircraft. On January 20, 1981, the U.S. hostages were released by Iran pursuant to an agreement between the United States and Iran reached through the aid of the Democratic and Popular Republic of Algeria as an intermediary.[78] Under the Agreement, the United States was obligated:

> [T]o terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[79]

The Agreement also called for the establishment of an Iran-U.S. Claims Tribunal, which would arbitrate any claims not settled within six months, resulting in final, binding, and enforceable awards.[80]

Thus, as part of an agreement to resolve the hostage crisis, Iran and the United States created the Iran-U.S. Claims Tribunal and agreed that this body should resolve all claims by U.S. nationals against Iran, and Iranian nationals against the United States. An essential prerequisite for this step was that each state agreed to nullify all domestic claims that had been or might be brought by its nationals against the other state.[81] Would the United States and Iran have had the power to do this if an investment treaty had existed between them giving investors the right to bring investor-state claims? Are such claims effectively immunized from interference by the home state in order to protect investment or depoliticize investment disputes? Does it depend on whether claims had already been filed?

Second, are investors given rights that are immunized from the inter-state relationship between the home and host state? For instance, if an investor brings an arbitral claim against the host state, could the host state claim as a

77. For general background information, see *Iran-U.S. Hostage Crisis (1979-1981)*, THE HISTORY GUY, http://www.historyguy.com/iran-us_hostage_crisis.html#.VNUpwloirzI and *Iran Hostage Crisis*, WIKIPEDIA, http://en.wikipedia.org/wiki/Iran_hostage_crisis#cite_note-1.

78. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), U.S.-Iran, Jan. 19, 1981, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 3 (1983).

79. *Id.* at 3.

80. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), U.S.-Iran, Jan. 19, 1981, arts. I, II, *in* 1 Iran-U.S. Cl. Trib. Rep. 9 (1983).

81. Dames & Moore v. Regan, 453 U.S. 654 (1981) (holding that the President has the power to suspend and terminate claims of American nationals against Iran).

defense that its actions violated the investment treaty but were excused as a lawful countermeasure in response to a previous violation by the investor's home state? Are the rights granted to investors independent of the state-to-state relationship? Or are any rights granted to investors dependent on, and subject to, the ongoing state-to-state relationship? Would it make any difference whether the previous violation was of the investment treaty or of another international law obligation? Would the countermeasure have to have been previously brought before or ruled upon by a state-to-state tribunal?

These issues recently came to the fore in a series of investor-state claims brought by U.S. investors against Mexico under the investment chapter of North American Free Trade Agreement ("NAFTA").[82] NAFTA is a free trade agreement between Canada, Mexico, and the United States that includes trade and investment obligations. It also includes a procedure for state-to-state arbitration over trade disputes (Chapter 20) and investor-state arbitration over investment disputes (Chapter 11). The countermeasures question arose in the context of a series of disputes relating to U.S. treatment of Mexican sugar producers and Mexico's treatment of U.S. High Fructose Corn Syrup (HFCS) producers.[83]

Sugar and HFCS are both sweeteners that are used in food and drinks, including soft drinks, so they are in a competitive relationship. U.S. producers of HFCS began expanding into Mexico where they were attempting to displace sugar as the primary sweetener in the Mexican soft drink industry. At the same time, Mexican sugar producers were complaining that the United States was denying them access to the U.S. sugar market in violation of its trade obligations under NAFTA. In an effort to resolve the latter dispute, Mexico attempted to bring a state-to-state claim against the United States under Chapter 20 of NAFTA, but the United States refused to constitute a panel so the dispute went nowhere.

Mexico subsequently imposed a tax of twenty percent on any drink that used HFCS as a sweetener. Three U.S. producers of HFCS responded by filing investor-state claims against Mexico. They argued that the tax amounted to a violation of Mexico's NAFTA investment obligations because it caused the Mexican soft drink industry to switch from HFCS to sugar, thereby destroying their market share. Mexico responded that, if these actions amounted to a violation of its treaty obligations, the wrongfulness of this action was precluded on the basis that the tax was a lawful countermeasure in response to a previous violation by the United States.

82. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2202, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

83. *See* Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award (Nov. 21, 2007); Corn Products Int'l, Inc. v. Mexico, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008); Cargill, Inc. v. Mexico, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009).

Mexico argued that the U.S. investors were merely given a procedural right to enforce the substantive investment treaty obligations that were owed to its home state, the United States. As the substantive obligations were owed on an inter-state level, any breach was also subject to any inter-state defenses, such as lawful countermeasures. The U.S. investors, by contrast, argued that NAFTA created substantive and procedural rights for the investors and depoliticized investment disputes by immunizing them from the home and host state relationship. The U.S. investors were not guilty of previous wrongdoing and their claim should not be compromised based on previous wrongdoing by their home state.

Both controversies require us to conceptualize the relationship between investors and their home states. The first concerns whether investors are *directly* protected against actions by their home states, such as the home state deciding to bring or settle a claim without the investor's consent. The second concerns whether they are *indirectly* protected against actions of their home state, such as a home state's previous treaty violation that might be invoked by a host state as a defense in an investor-state dispute.

### 3. *Third-Order Tension*

The third-order tension between investor protection and state sovereignty concerns the relationship between investors and the *treaty parties acting collectively*. As with the second-order tension, investment treaties typically do not expressly protect investors from joint actions of the treaty parties as opposed to unilateral actions of host states.

On a substantive level, investment treaties typically do not impose obligations on the treaty parties collectively; instead, they generally impose obligations on each treaty party acting individually as a host state. On a procedural level, investment treaties permit investors to bring claims against host states but do not create a framework for investors to bring arbitral claims against both treaty parties for joint actions.

Investment treaties may not allow investors to bring claims against the treaty parties collectively, but do the rights granted to investors immunize them against the joint actions of the treaty parties in any way? Is this required by (1) the substantive goal of investor protection or (2) the procedural goal of depoliticized investment disputes? These questions arise in the third controversy raised above concerning joint termination with immediate effect.

As a matter of public international law, the VCLT provides that treaty parties can terminate a treaty in conformity with the provisions of the treaty or at any time by consent of all of the treaty parties.[84] To provide stability for investors, some of which make long-term investments, most investment treaties include a "survival clause" whereby the treaty's protections continue

84. VCLT, *supra* note 26, art. 54.

to apply to existing investors and existing investments for ten to twenty years after either treaty party terminates. This clearly applies in the event of unilateral termination, but most investment treaties say nothing about what happens if the treaty parties jointly terminate the investment treaty.

Under the first prong of the public international law rule, termination might be permissible but is subject to the survival clause on the theory that joint termination is the equivalent of two unilateral terminations. Under the second prong, however, states would be able to agree to terminate immediately at any time, thereby circumventing the survival clause. Could the treaty parties use this power to jointly terminate investment treaties with immediate, or even retroactive, effect? Or do investors enjoy some immunity from joint terminations on the basis that investment treaties were intended to protect investments and depoliticize investment disputes? Does this depend on whether the rights might be understood to have vested by, for instance, an investment having been made, an investor-state dispute having arisen, or an investor-state claim having been filed?

This issue recently arose when the Czech Republic agreed with some treaty parties to jointly terminate their investment treaties with immediate effect and to amend the survival clauses to ensure that they "shall not further apply."[85] The European Commission has encouraged other EU states to follow suit with respect to intra-EU BITs.[86] Numerous states have also jointly terminated their investment treaties, and abolished or modified survival clauses, when entering into new free trade agreements with investment chapters.[87] Do the treaty parties retain the power to do this? Or have the treaty parties granted investors rights that are somehow immunized from this sort of joint action, at least with respect to rights that might be considered to have vested?

While investment treaties expressly deal with the first-order tension between investment protection and promotion and preservation of state sovereignty, they typically contain no rules dealing expressly with the second- and third-order tensions.

Treaty parties could expressly provide for a balance between investment protection and state sovereignty in their first-order relationship but for complete sovereignty in their second and third-order relationships. For instance, the treaty parties could provide that the home state is able to preempt its investors' claims, even after a claim has been filed. Or they could provide

85. Luke Eric Peterson, *Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protection for Existing Investments*, 4 Investment Arb. Rep. 2 (Feb. 1, 2011).

86. *See* Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, 2012 O.J. (L 351/40) preambular recital 5, art. 3 [hereinafter Transitional Arrangements for Bilateral Investment].

87. For examples, see Tania Voon, Andrew Mitchell & James Munro, *Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties*, 29 ICSID Rev–Foreign Inv. L. J. 451, nn.1–4 (2014).

that the treaty parties are able to jointly terminate the treaty with immediate effect, even when doing so would harm existing investors. Treaty parties might do this if they consider the real ill that investment treaties are seeking to remedy as being the abuse of sovereign rights by host states, such as hold-up costs, rather than any unilateral actions by home states or joint actions by the treaty parties.

Making these powers express would be helpful in protecting against reliance interests. Investors acting with knowledge of such provisions would be able to internalize this risk into their decision-making on whether, how, and at what price to invest. Investors would know that they would have no legal basis for seeking stability of their investment treaty rights against unilateral actions by their home states and joint actions by the treaty parties, even if they had relied upon those rights in making an investment or bringing a claim. Dealing with these issues expressly also minimizes the potential for divergence between the intentions of the treaty parties (as the treaty's drafters) and the interpretations of tribunals (as the treaty's enforcers).

Alternatively, the treaty parties could expressly dispense with or limit their unilateral powers as home states and their joint powers as treaty parties. They could provide that home states cannot usurp their investors' claims after the claims have been filed or that they can do so only in limited circumstances, such as when intervention is necessary to protect their essential security interests. They could provide that both unilateral and joint terminations are subject to a survival clause and that certain provisions, such as the survival clause, are unamendable. As with constitutional amendments, to ensure this outcome the treaty parties would also need to provide that the provision that lists these clauses as unamendable was itself listed as unamendable.

The difficulty comes with how to interpret investment treaties that do not expressly regulate second and third-order investor-state relationships. Did the treaty parties intend to maintain absolute state sovereignty in this regard? Or should some limits be implied in order to give effect to the intentions of the treaty parties or for some other reasons of policy or morality? The substantive goal of investor protection seems primarily, if not exclusively, aimed at regulating the first-order relationship between investors and host states. Accordingly, to answer these questions, it is necessary to consider whether the treaty parties intended to accept certain limitations on their freedom in order to give effect to the purpose of depoliticizing investment disputes.

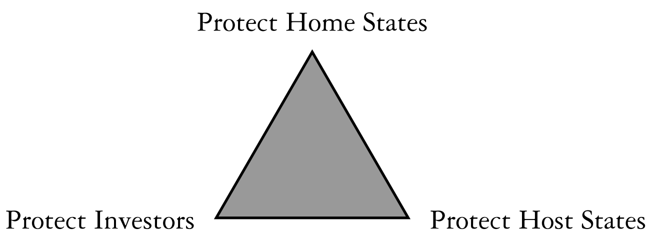
## IV. Unpacking the Goal of Depoliticization

Did investment treaty parties intend to limit their sovereign rights under the second and third-order relationships by accepting investor-state arbitration with the purpose of depoliticizing investment disputes? I contend that the answer is no. To understand why, it is necessary to unpack the goal of depoliticizing investment disputes.[88]

Depoliticization of investment disputes through the introduction of investor-state arbitration is often portrayed as being about protecting investors and immunizing their legal claims from interference by the home state and the underlying treaty party relationship. I argue, by contrast, that the primary goal of depoliticization is about protecting home states by enabling investors to bring claims and thus freeing home states from having to become involved in investor-state disputes. Investment treaties could immunize investors from interference with their claims by home states and the treaty parties. However, as will be explained below, the mere introduction of investor-state arbitration, without more, does not do so.

### A. *Three Understandings of Depoliticization*

The introduction of investor-state arbitration is often explained by the goal of depoliticizing investor-state disputes. However, three different—and sometimes conflicting—justifications have been offered for this goal.




The first explanation focuses on protecting investors: depoliticization protects investors by enabling them to bring direct claims and thus insulating those claims from interference by the treaty parties and the underlying state-to-state relationship. For instance, Vandevelde, one of the U.S. negotiators of investment treaties, explains that inclusion of investor-state arbitration clauses "ensures investors of a neutral mechanism for settlement of investment disputes that is *wholly insulated* from the political relationship between the investor's government and the host government."[89] Likewise, the negotiating history of ICSID provides that the Convention would offer a means of "settling directly, on the legal plane, investment disputes and *insulate*

88. *See also* Martins Paparinskis, Limits of Depoliticisation in Contemporary Investor-State Arbitration, *in* 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW. 271–82 (James Crawford & Sarah Nouwen eds., 2010) (discussing the complexity and over-use of the concept of diplomatic protection).

89. Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 258 (1988). However, Vandevelde concludes that, "[a]t the same time, the BITs eliminate none of the traditional remedies" as investors may still "pursue espousal of the claim by their own governments" and the "BITs also provide for state-to-state arbitration of disputes arising out of the interpretation or application of the agreement." *Id.*

such disputes from the realm of politics and diplomacy."[90] This explanation is invoked in modern commentary and case law. For instance, Lowenfeld in a recent arbitral award stated that the essence of investment treaties is that "controversies between foreign investors and host states are *insulated* from political and diplomatic relations between states."[91]

The second explanation focuses on protecting home states: depoliticization protects home states by enabling investors to bring direct claims and thus stopping home states from having to become embroiled in investor-state disputes. For instance, Vandevelde explains that the United States sought the inclusion of investor-state arbitration to "provide investors with a remedy that would not *depend* upon the involvement of the investor's government in the dispute."[92] He goes on to explain that:

> The situation in which an investor's remedies are *dependent* upon the involvement of the United States government is an unsatisfactory one for both the investor and that government. From the perspective of the United States government, the situation is unsatisfactory because it may complicate or even impede the conduct of foreign policy in the broad national interest.[93]

Permitting investors to bring direct claims against host states benefited investors because they no longer had to rely on their home state to decide whether and how to prosecute their claims, but the real goal was freeing home states from involvement in these disputes. As Daniel Price, one of the U.S. negotiators of NAFTA, explains: by allowing the investor to "litigate its claim directly, the investor's sovereign could distance itself from the dispute"[94] and the investor could "resolve the dispute in a way that did not engage the political organs of the two governments."[95]

The third explanation focuses on protecting host states: depoliticization protects host states by enabling investors to bring direct claims and thus preventing or avoiding host states becoming victims of diplomatic pressure, including through gunboat diplomacy. According to Ibrahim Shihata, the longest-serving Secretary-General of the International Centre for Settlement

90. Int'l ctr. for Settlement of Inv. Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, Volume II-1 242 (1968).

91. Corn Products Int'l, Inc. v. Mexico, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008), Separate Opinion of Arbitrator Lowenfeld, para 1.

92. Kenneth J. Vandevelde, United States Investment Treaties: Policy and Practice 163 (1992) (emphasis added).

93. *Id.* at 22–23.

94. Daniel M. Price, *Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 Can.–U.S. L. J. 107, 112 (2000).

95. Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 421, 427 (2000). Price notes that "[i]nvestors also welcomed this development because it gave them the opportunity to seek redress without being held hostage to their own government's political will or whim. The investor's claim would be decided on the merits and would not be subsumed within a larger political or foreign relations dialogue between its government and the host government."

of Investment Disputes, investor-state disputes in the 19th and early 20th centuries were "highly politicized and led to the frequent exercise of diplomatic protection, sometimes followed by the use of force. Latin American countries in particular were exposed to abuses of diplomatic protection and, at times, to armed intervention and occupation by foreign forces dispatched by the governments of foreign investors."[96] The goal of depoliticization was to protect host states by preventing or limiting uses and abuses of diplomatic protection.[97]

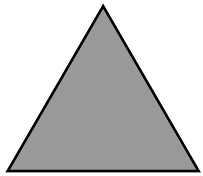
In the typical case, all three justifications overlap, so there will be no need to disaggregate them or determine which one is primary. An investor will be able to bring a claim, which will relieve the home state from having to become involved and the home state will usually have no reason to wish to become involved, and the host state will face one legal claim instead of simultaneous legal claims or simultaneous diplomatic pressure and a legal claim. Understanding and ordering these different justifications becomes important, however, in the atypical case where the three do not overlap. Here, we must understand the different consequences of depoliticization, based on the above rationales, and determine which one was intended in the particular treaty or might be preferred by ideal treaty parties.

### B. *Three Consequences of Depoliticization*

In line with the first justification, a common narrative about depoliticization is that it immunizes investors' rights and claims from interference by the home state and the underlying treaty party relationship. I contend that this understanding is mistaken, both as an account of what existing treaty parties have done and what ideal treaty parties would do. It is clear that the introduction of investor-state arbitration *enables* investors to bring investment treaty claims without having to depend upon their home state for diplomatic protection. There is little evidence to suggest, however, that the insertion of this clause, without more, *disables* home states from engaging in diplomatic protection or bringing international claims or *immunizes* investors or their claims from interference by home states or the treaty parties.

96. Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev.–Foreign Inv. L. J. 1, 1 (1986).

97. Alejandro Álvarez, *Latin America and International Law*, 3 Am. J. Int'l L. 269, 300 (1909); Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration, and International Investment Law*, 44 Geo. J. of Int'l L. 531, 550–52 (2013).




In terms of what existing treaty parties have done, the standard modern investment treaties contain two dispute resolution clauses: one permits investor-state arbitration over investment disputes; and the other permits state-to-state arbitration over disputes about the interpretation and application of the treaty.[98] Most of these treaties contain no mechanism for prioritizing between these forms of dispute resolution, such as a hierarchical ordering that privileges investor or state claims or a sequential ordering that privileges the first claim filed.[99] Some treaty regimes, such as the ICSID Convention, impose limits on the ability of home states to engage in diplomatic protection once an investor has consented to investor-state arbitration.[100]

The standard investment treaty and the ICSID-style clause require separate analysis. Starting first with the standard treaty that permits investor-state and state-to-state arbitration without including any prioritizing mechanism, the introduction of investor-state arbitration should be understood as enabling rather than disabling. The provision *enables* investors to bring legal claims so that the vast majority of investment disputes are settled without involvement of the investor's home state. It does not, however, *disable* home states from exercising diplomatic protection or bringing state-to-state claims if they wish to become involved. Nor does it *immunize* investors or their claims from the underlying treaty party relationship. In this way, it was primarily designed to protect home states rather than host states or investors.

Vandevelde confirms that modern U.S. investment treaties introduced investor-state arbitration but "*eliminate none of the remedies previously available*," in particular, they still provide for "state-to-state arbitration of disputes arising out of the interpretation or application of a BIT, *should the investor's*

98. *See, e.g.*, 2012 U.S. Model BIT, *supra* note 21, arts. 24, 37; German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments arts. 9, 10, 2008, *available at* http://www.italaw.com/sites/default/files/archive/ita1025.pdf [hereinafter 2008 German Model BIT]; 2004 Canadian Model BIT, *supra* note 67, arts. 24, 48; France Draft Agreement on the Reciprocal Promotion and Protection of Investments arts. 7, 10, 2006, *available at* http://italaw.com/documents/ModelTreatyFrance2006.pdf [hereinafter 2006 French Model BIT]; 2007 Colombian Model BIT, *supra* note 74, arts. 9, 10; 2003 Indian Model BIT, *supra* note 74, arts. 9, 10.

99. *See generally* Roberts, *supra* note 4.

100. ICSID Convention, *supra* note 76, art. 27.

*state wish to become involved in a particular dispute.*"[101] Home states favored inclusion of investor-state arbitration to avoid becoming embroiled in *every* investor-state dispute. It does not follow that they intended to *preclude* themselves from involvement in *any* investor-state disputes. The politicization of the system is significantly reduced because investors can bring claims directly without being subject to political whims in *every* case. That does not mean that the home state may *never* pursue state-to-state arbitration in connection with a particular investor or investment.

It is possible for states to enact treaties that simultaneously *enable* investor-state arbitration and *disable* home state exercises of diplomatic protection. For instance, the ICSID Convention provides that, once an investor accepts the host state's offer to arbitrate, a home state may no longer engage in diplomatic protection unless and until the host state fails to comply with the award in that dispute.[102] A similar clause exists in a substantial minority of investment treaties.[103] However, even if a treaty disables home state intervention, this may be to protect host states from having to fight on legal and diplomatic planes with investors and home states respectively or to protect investors by immunizing their claims from the underlying treaty party relationship. One would need to examine the text and drafting history of the treaty to determine which possibility was the case.

It is important to consider for whose benefit a disabling clause has been introduced because that is the party that should have the ability to waive enforcement of the provision. If the disabling clause was intended to protect host states rather than investors, it could be waived by those host states if they preferred to deal with the issue on the state-to-state plane. If the disabling clause was intended to immunize investors' claims, host states could not waive this right even if they preferred to deal with the issue on the inter-state level. References to both justifications can be found in the negotiating history of the ICSID Convention, but the dominant aim in that treaty appears to have been protecting host states rather than immunizing investors' claims.[104]

The Executive Directors' Report to the ICSID Convention explains that: "When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to

101. Vandevelde, *supra* note 92 at 163–64 (emphasis added).

102. ICSID Convention, *supra* note 76, art. 27.

103. For a breakdown of different treaty provisions, see Paparinskis, *supra* note 7, at 284–85.

104. *See, e.g.*, 2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, pt. 1, at 303 (1968) [hereinafter Settlement of Investment Disputes] (explaining that the disabling clause would "serve the best interests of investors, host States and the cause of international co-operation generally" and that this was better than the existing situation of diplomatic protection "which would transform the controversy into a dispute between States, a result more often than not distasteful or embarrassing to all the parties concerned").

espouse his case and that State should not be permitted to do so."[105] Similar explanations are offered throughout the drafting history, including that:

> As a corollary of the principle of allowing an investor direct and effective access to a foreign State without the intervention of his national State it was proposed – and this was an important innovation – that an investor's national State would no longer be able to espouse a claim of its national. *In this way it was sought to ensure that States would not be faced with having to deal with a multiplicity of claims and claimants*. The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.[106]

As Schreuer explains in his Commentary on the ICSID Convention:

> A combination of arbitration and diplomatic protection would lead to undesirable results. The balance of interests between the parties would be upset if the host State, after consenting to international arbitration, remained exposed to diplomatic protection by the investor's home State. In fact, the guarantee against diplomatic protection may constitute a strong incentive for the host State to consent to arbitration. Also the arbitration process between the host State and the foreign investor could be severely hampered by simultaneous efforts to pursue the claim through diplomatic channels.[107]

One of the advantages of adopting a third-party-beneficiary model is that it creates a structure in which treaty parties could expressly enable investor-state arbitration *and* disable home states from engaging in diplomatic protection *and* immunize investors' claims from interference by the treaty parties and their underlying relationship. But the first does not necessarily imply the second, and even the first and second do not necessarily imply the third.

What the treaty parties have elected to do in a particular treaty must be analyzed according to the text and drafting history of that treaty. However, as a default rule for the standard investment treaty, the introduction of investor-state arbitration should be understood as enabling but not disabling or immunizing. With respect to the ICSID Convention and similar treaties,

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105. *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID Rep. 23, 30 (R. Rayfuse ed. 1993).

106. *See* Settlement of Investment Disputes, *supra* note 104, at 372 (emphasis added); *see also id.* at 242, 303, 372, 464 (all making substantially the same point); *id.* at 348 ("What was excluded was the traditional legal right of a State to espouse the cause of one of its nationals through the usual international channels, thus protecting the host State from exposure to the risk of multiple claims.").

107. Christoph Schreuer, The ICSID Convention: A Commentary 416 (2d ed. 2009).

the default rule would be that the provisions should be understood as enabling and disabling but not immunizing.

There is little reason to believe that ideal treaty parties would reach a different default rule. There is no evidence that investors are avoiding making efficient foreign investments because they are concerned about the potential for their home state individually or the treaty parties collectively to interfere with their claims in rare circumstances at some point down the road. Home states have little incentive to give up their ability to take over their investors' claims in extreme situations in order to protect other important interests. The treaty parties have even less incentive to collectively bind their hands to revoke or modify investment treaties that no longer serve their joint interests. Although such unilateral or joint action is unlikely to occur ex post, ideal treaty parties would have little reason to give up such powers ex ante because doing so would involve real costs while giving them few gains.

## V. Application to Current Controversies

Unpacking and retheorizing the goal of depoliticization in this way is useful in applying the triangular theory of investment treaty rights to existing and emerging controversies, such as whether home states can settle their investors' claims, whether host states can invoke countermeasures as a defense, and whether the treaty parties can jointly terminate investment treaties with immediate effect.

### A. *Settlement of Claims*

Can a home state bring and settle a class action diplomatic protection claim on behalf of its investors, including without their knowledge or consent? The answer is yes, though it may face actions for expropriation through its domestic courts.

Starting with the public international law premise, a state is entitled to exercise diplomatic protection on behalf of its nationals. Under the theory of diplomatic protection, an injury to a foreign national was understood to be an injury to that national's home state, thus giving the home state complete discretion over the claim's handling.[108] According to the Permanent Court of International Justice: "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, *a State is in reality asserting its own right*, the right to ensure, in the

108. Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 44, 46, ¶¶ 77–78, 85; Emmerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns 136 (Charles G. Fenwick trans., ed. 1916) (1758).

person of its subjects, respect for the rules of international law."[109] The home state had complete discretion to bring or not to bring a claim on behalf of its investors and to settle that claim on any terms it saw fit.

The standard account should be modified by the introduction of third-party-beneficiary doctrines given that investment treaties are entered into by states but create enforceable rights to investors as third parties. The treaty parties could use this structure to: (1) enable investors to bring direct claims; (2) disable home states from engaging in diplomatic protection; and/or (3) immunize investors' claims from any interference by the treaty parties. They could also make these rights or powers conditional or limited. For instance, the treaty parties could provide that investors do not need the consent of their home state to bring a claim, but that the claim could be halted by the objection of the home state (conditional rights). Or they could provide that home states are generally barred from engaging in diplomatic protection, subject to an exception to protect the home state's essential security interests (limited rights).

How and to what extent the treaty parties have used the third-party-beneficiary paradigm to qualify the traditional public international law approach must be analyzed according to the text and drafting history of the particular investment treaty. With respect to the standard investment treaty, the starting assumption should be that the home states can bring and settle diplomatic protection claims, regardless of opposition by their investors and host states, because investors-state arbitration is enabling not disabling or immunizing. As for the ICSID Convention and treaties adopting a similar provision, the starting assumption should be that home states can bring and settle diplomatic protection claims, but only with the consent of host states if an investor-state claim has already been filed, because investor-state arbitration is enabling and disabling but not immunizing.

To understand why ideal treaty parties would be likely to retain the right of home states to bring and settle claims on behalf of their investors, consider a situation like the Iran-U.S. hostage crisis, discussed above. Imagine if an investment treaty had existed between the United States and Iran. Would it have been in the interests of those states to have created absolute and inalienable rights for investors that the states could not settle in order to resolve a major and dangerous foreign policy crisis? It seems highly unlikely that ideal treaty parties would have wanted to bind their hands in a way that would prevent them from reaching an agreement like the sort reached in this case, even if an investment treaty existed.

109. Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) (emphasis added); *see also* Frank Berman, *The Relevance of the Law on Diplomatic Protection in Investment Arbitration*, *in* 2 Investment Treaty Law: Current Issues 67, 68 (Federico Ortino et al. eds., 2007) (explaining that diplomatic protection involves a "State adopting, in its own right, the cause of its national").

Although investment protection is important, a case such as this shows that investment protection can be at odds with the essential security interests of the home and host states and those states would have little incentive to tie their joint hands in a way that would prevent them from dealing with these crises. It seems entirely possible that an investment treaty might help to solve some of the hold-up costs that might otherwise prevent U.S. investors investing in Iran due to fears of unreasonable unilateral actions by Iran as the home state. However, there is no evidence to support the notion that investors would fail to invest unless they were also protected against these sorts of joint actions.

However, we should not forget the public law qualification. Even if home states could bring and settle diplomatic protection claims without the consent of their investors, that does not mean that they would be immune from political pressure or legal suits based on their vertical public law relationships with their investors. Under public international law, the exercise of diplomatic protection is discretionary, but there are movements towards encouraging (and possibly requiring) home states to take into account the views and wishes of their nationals in deciding whether and how to bring such claims.[110] This is evident from Article 19 of the Draft Articles on Diplomatic Protection, which include the following "recommended practice[s]" for how states should exercise diplomatic protection:

> A State entitled to exercise diplomatic protection according to the present draft articles, should:
> (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
> (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
> (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.[111]

The Commentary treats these recommended practices as instances of progressive development of the law, rather than codification,[112] but notes that there was some debate over whether Article 19(b) represents an existing

110. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 24, art. 19. ("A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation . . . . Today there is support in domestic legislation and judicial decisions for the view that there is some obligation, however limited, either under national law or international law, on the State to protect its nationals abroad when they have been subjected to serious violation of their human rights . . . .").

111. *Id.* art. 19.

112. *See id.* art. 19, commentary at 94–95.

customary requirement,[113] while Article 19(c) is supported by some state practice and considerations of equity.[114]

Even if an investor would not have a claim against its home state under public international law, it could potentially have such a claim under its domestic law, which it might bring before domestic courts, or, in certain jurisdictions, before international tribunals like the European Court of Human Rights.[115] The claim would be that the investor's government wrongly expropriated the investor's treaty rights by, for instance, settling the investor's actual or potential claim for a nominal amount without the investor's consent. The permissibility of such a claim, and its prospects for success, would depend on the public law regime applicable within the particular domestic legal context.

In the United States, for instance, this claim would take the form of arguing that the government engaged in a taking of the investor's treaty claim. Outside of the investment treaty context, claims have been brought by U.S. investors when the U.S. government has settled their claims against foreign states, either without the investors' consent or for less than the investors thought the claim was worth.[116] U.S. courts have treated these legal claims as property but have often been reluctant to find an expropriation on the facts. For instance, in claims arising out of the Iran-U.S. Hostage Crisis, the United States Supreme Court ruled that the U.S. government could extinguish the domestic claims of U.S. nationals without this amounting to an expropriation because the government created the Iran-U.S. Claims Tribunal and gave it jurisdiction to hear these claims.[117]

The existence of an investment treaty right to bring a legal claim, particularly where this right has already been exercised, increases the prospect of

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113. *See id.* at 97 ("In practice States exercising diplomatic protection do have regard to the moral and material consequences of an injury to an alien in assessing the damages to be claimed. In order to do this it is obviously necessary to consult with the injured person. So, too, with the decision whether to demand satisfaction, restitution or compensation by way of reparation. This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law. If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.").

114. *See id.* at 100 ("Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.")

115. An investor might also bring a claim arguing that, by jointly terminating or amending the treaty, the home state violated certain fiduciary obligations owed to its investors. Again, such a claim would be novel.

116. *See, e.g.*, Abrahim-Youri v. United States, 139 F.3d 1462 (Fed. Cir. 1997); Alliance of Descend. of Tex. Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994); Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983), af'd, 765 F.2d 159 (Fed. Cir. 1985).

117. Dames & Moore v. Regan, 453 U.S. 654, 688–90 (1981).

states trying to accommodate the interests of investors by creating an alternative mechanism for redress, like the Iran-U.S. Claims Tribunal. Failing that, these factors make it more likely that domestic courts will treat the claim as a property right and require some level of compensation in the event a taking is found. When refusing to find a taking in the context of other claims, domestic courts have noted that investors might have had claims against foreign states but that they had no forum in which to bring their claims and thus were lucky to have received any settlement amount on account of the government's actions. As investment treaties give investors such a forum, the abrogation of such rights—particularly after a claim has been brought—is more likely to constitute a taking if appropriate compensation is not paid and no alternative forum is created.

### B. *Availability of Countermeasures*

Can a host state rely on inter-state countermeasures in response to a previous wrong by the home state as a defense in an investor-state arbitral claim? The answer is yes, but likely only where the countermeasures have previously been agreed to by the home state or ruled valid by a state-to-state tribunal.[118]

Starting with the public international law premise, State A is permitted to take measures that would otherwise be contrary to the international obligations it owes to State B if those measures were taken in response to an internationally wrongful act by State B. However, the Draft Articles on State Responsibility provide that State A "may *only* take countermeasures against a State which is responsible for an internationally wrongful act,"[119] i.e., State B. As the ILC's Commentary on the Draft Articles explains:

> Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded against the third State.[120]

The Draft Articles on State Responsibility do not address the permissibility of countermeasures vis-à-vis a non-state actor to whom a treaty grants direct rights,[121] so the analysis requires reasoning by analogy in the investment treaty context. The first step is to determine whether investment treaties create rights for investors or not. This is because public international law, like domestic contract law, distinguishes between third parties that

118. For a somewhat analogous approach based on an idea of dependent investor rights, see Losari and Ewing-Chow, *supra* note 57, at 297–99.
119. Draft Articles on State Responsibility, *supra* note 28, art. 49(1) (emphasis added).
120. *Id.* art. 49(1), Commentary (4).
121. *Id.* art. 33(2), Commentary (4).

have enforceable rights and those that are mere beneficiaries. As the ILC's Commentaries explain, the prohibition on countermeasures as a defense to violating the rights of third-party states "does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties."[122] For example:

> [I]f the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. *If they have no individual rights in the matter they cannot complain*. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.[123]

If investors have not been granted rights, they cannot complain about inter-state countermeasures being used to infringe upon their rights. If countermeasures could be used as a defense in a state-to-state claim, they may also be used as a defense in an investor-state claim. On this account, investors in the investment treaty regime are susceptible to countermeasures just as traders in the international trade regime are susceptible to countermeasures because both are mere beneficiaries rather than third-party rights holders. However, as described above, there are good reasons to distinguish between investors and traders: trade treaties do not grant individuals a direct right of action, whereas investment treaties permit investors to bring direct claims against host states to enforce treaty obligations.

Even if we assume that investors have third-party rights, instead of being mere beneficiaries, this does not automatically make investors immune to the defense of countermeasures given the tripartite nature of the treaty relationship. If A, B, and C enter into a treaty where they all grant each other rights, and if B violates its obligations to A, it is permissible for A to rely on countermeasures as a defense against its obligations vis-à-vis B but not vis-à-vis C. This makes sense because all of the rights are separate and independently held. It is not clear, however, that the same analysis should apply where A and B enter into a treaty that gives C a right, as C's right might better be understood as qualified by the initial treaty and contingent to some extent on the ongoing actions of A and B.

Here, the third-party-beneficiary paradigm becomes helpful in qualifying the traditional public international law premise. According to the UNIDROIT Principles, unless the contracting parties agree otherwise, the default rule would be that "[t]he promisor may assert against the beneficiary all defenses which the promisor could assert against the promisee."[124] The

122. *Id.* art. 49(1), Commentary (5).
123. *Id.* (emphasis added).
124. UNIDROIT Principles, *supra* note 51, art. 5.2.4.

beneficiary is given an enforceable right, but it comes subject to defenses that arise from the contractual relationship out of which it was created. As the UNIDROIT Commentary explains: "[a]ll major legal systems allow the promisor to assert against the beneficiary all the defences that the promisor could assert against the promisee," though usually "only defences arising out of the contractual relationship which confers a benefit on the third party will be available to the promisor."[125]

Eisenberg explains the rationale for the rule in the following way:

> Suppose that an empowered beneficiary brings suit against a promisor, and that if the promisee had sued the promisor, the promisor would have been able to raise a given defense, such as lack of consideration or fraud. Can the promisor raise the same defense against the beneficiary? The answer should be and is yes, because by analogy to the third-party-beneficiary principle, generally speaking the promisor should be no worse off if she is sued by the beneficiary than she would have been if she had been sued by the promisee. This rule is uncontroversial.[126]

In the HFCS cases discussed above, Mexico agreed to offer investment protections to U.S. investors, but this is presumptively conditional on the United States offering various benefits to Mexico by way of quid pro quo. These benefits include trade obligations, such as the U.S. opening its markets to Mexican sugar producers, and investment obligations, such as the U.S. not violating investment protections it owes to Mexican investors. If Mexico has not received the quid, it should not be required to pay the quo. That is what the defense of countermeasures is all about. Of course, the defense is limited in various ways, such as requiring notice and proportionality. But, in essence, it applies to reciprocal treaty regimes.

This analysis would suggest that states should presumptively be able to rely upon inter-state countermeasures as a defense in investor-state disputes but that this would be available only in response to wrongful conduct by the other treaty party under the relevant treaty. Countermeasures could potentially play a significant role in free trade agreements, which include a wide variety of investment and trade law obligations, but would be less likely to play a significant role in investment treaties that include investment obligations only and often have asymmetrically situated treaty parties where one is a clear capital importer and the other is a clear capital exporter.

However, this is a default rule only. The treaty parties could expressly or impliedly exclude the availability of countermeasures as a defense in investor-state disputes. In the human rights context, for instance, the Draft Articles on State Responsibility provide that countermeasures cannot be directed

125. Commentary on the UNIDROIT Principles, *supra* note 52, art. 5.2.4 at 602.
126. Eisenberg, *supra* note 38.

against "fundamental human rights."[127] They do not exclude the application of countermeasures to any and all rights granted to non-state actors, including investor rights. Instead, the exclusion is limited to fundamental human rights. This might partly reflect that human rights treaties are more like concurrent unilateral pledges by states to protect persons subject to their jurisdiction than reciprocal, quid pro quo exchanges like investment treaties.[128] It may also reflect the more strongly normative character of "fundamental" human rights.

As a matter of theory, the introduction of investor-state arbitration enables investors to bring direct claims but it does not immunize those claims from the underlying treaty relationship. As a matter of practice, however, investor-state tribunals are permitted to rule upon whether a host state has breached its obligations with respect to a particular investor, but they are not granted jurisdiction to determine the predicate issue of whether the host state's action was a valid countermeasure in response to a previous violation by the investor's home state. If the validity of the countermeasures had been previously agreed by the treaty parties or had been ruled upon by a state-to-state tribunal, then a successful defense might be mounted. Failing that, however, investor-state tribunals have no jurisdiction to rule on this defense.

Particularly in the context of free trade agreements that include an investment chapter, we should not assume that the express inclusion of investment rights amounts to the implied preclusion of traditional trade law remedies, like authorized countermeasures. Such an approach would allow the inclusion of investor-state arbitration to impliedly undermine one of the key elements of trade treaties. This also brings the public law qualification to mind. Even if a host state is successfully able to plead countermeasures as a defense against an investor-state claim, that does not mean that the investor has no remedy available to it. In trade law, a violation with respect to one product (e.g., cars) can give rise to a right to engage in countermeasures with respect to another product (e.g., bananas). The banana grower must then rely on political pressure against its home state, or legal avenues available through the home state's courts, to put pressure on its state to reverse its position vis-à-vis the car manufacturers. The same would be true here for the investor.

127. Draft Articles on State Responsibility, *supra* note 28, art. 50(1)(b).

128. *See* Roberts, *supra* note 22 at 71 ("Human rights are typically understood as a good in their own right, whereas investor rights might be viewed as a means to the end of increasing foreign investment, rather than an end in and of themselves."); Paparinskis, *supra* note 5 at 623 (suggesting that a human rights framework "fails to capture the structural dynamic of the [investment arbitration] 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."); Roberts, *supra* note 4 at 37–38.

### *C. The Permissibility of Joint Termination*

Can the treaty parties agree to jointly terminate or amend an investment treaty with immediate effect and thereby avoid the ten to twenty year survival clause that typically applies to unilateral terminations? The answer is yes, though compensation might sometimes be required.

Investment treaties typically contain a number of mechanisms to enhance the stability of investment treaty obligations. Many investment treaties contain long initial terms, often remaining in effect for an initial period of ten years or more ("initial term").[129] At the end of the initial period, investment treaties typically provide that a treaty party can terminate the treaty, but (1) this usually requires a notice period, often of one year's duration ("notice provision"); and (2) the treaty's protections continue to apply to investments established or acquired prior to the date of termination for a set period, often ten to twenty years ("survival clause").[130] The U.S. Model BIT provides a relatively standard formulation:

> Article 22: Entry into Force, Duration, and Termination
> 1. This Treaty shall . . . remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.
> 2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.
> 3. *For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination*, except insofar as those Articles extend to the establishment or acquisition of covered investments.[131]

By contrast, investment protections in free trade agreements are often not subject to survival rights. Instead, many permit either treaty party to terminate, often with just six months' notice.[132]

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129. *See, e.g.*, 2007 Colombian Model BIT, *supra* note 74, art. XIII(1); 2006 French Model BIT, *supra* note 98, art. 11; 2008 German Model BIT, *supra* note 98, art. 13(2); 2003 Indian Model BIT, *supra* note 74, art. 15(1); Agreement Between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, China-Ger., art. 15(2), Dec. 1, 2003, *available at* http://arbitrationlaw.com/files/free_pdfs/china-germany_bit_0.pdf [*hereinafter* China-Germany BIT]; Agreement Between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments, N.Z.-Arg., art. 14(2), Aug. 27, 1999, *available at* http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=247273 [*hereinafter* Argentina-NZ BIT].

130. *See, e.g.*, 2004 Canadian Model BIT, *supra* note 67, art. 52.3; 2007 Colombian Model BIT, *supra* note 74, art. XIII (2) and (3); 2006 French Model BIT, *supra* note 98, art. 11; 2008 German Model BIT, *supra* note 98, arts. 13(2) and (3); 2003 Indian Model BIT, *supra* note 74, arts. 15(1) and (2); China-Germany BIT, *supra* note 129, arts. 15(3) and (4); Argentina-NZ BIT, *supra* note 129, arts. 14(2) and (3).

131. 2012 U.S. Model BIT, *supra* note 21, art. 22 (emphasis added).

132. *See, e.g.*, NAFTA, *supra* note 82, art. 2205; Australia-U.S. FTA, *supra* note 73, art. 23.4; Panama-Taiwan FTA, *supra* note 75, art. 21.05; New Zealand-China FTA, *supra* note 67, art. 213(3); Korea-Singapore FTA, *supra* note 75, art. 22.6.

Survival clauses may be understood as provisions on the vesting of investors' rights. If an investor makes an investment and the home or host state subsequently withdraws, the investors' rights continue to apply for another ten or more years. These stability provisions clearly protect against unilateral withdrawal with immediate effect (first and second-order relations), but what about joint termination and amendment (third-order relations)?

Starting with a public international law premise, the standard assumption would be that the general VCLT rules would apply in the absence of a clause on termination or amendment. According to the VCLT, termination may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.[133] Under (a), termination might be permissible but subject to the survival clause on the theory that joint termination is the equivalent of two unilateral withdrawals. Under (b), however, states would be able to agree to terminate immediately at any time, thereby circumventing the survival clause.

In the absence of an amendment clause, the VCLT rule is that "[a] treaty may be amended by agreement between the parties."[134] Thus the treaty parties could agree to amend the substantive provisions of the treaty to move from older-style protections (that are more investor protective) to newer-style protections (which carve out greater protections for state sovereignty).[135] They could also amend the treaty to eliminate these protections altogether or to remove the right of investors to bring investor-state claims. The treaty parties could also eliminate or curtail procedural protections, like the existence and length of the survival clause. The general assumption is that termination and amendment apply prospectively, but the treaty parties can manifest a contrary intention.

The VCLT recognizes some protections for existing rights, providing that: "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: . . . (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[136] However, that provides little comfort to investors because the provision applies to rights of the treaty parties, not rights of third parties like investors. In addition, this default rule is subject to a contrary agreement by the treaty parties, which brings us back to the same third-order problem.

The possibilities of joint termination and amendment are potentially significant in the current transformation of the investment treaty system.

133. VCLT, *supra* note 26, art. 54.

134. VCLT, *supra* note 26, art. 39.

135. On the transition from older-style investment treaties to newer-style ones, *see* Roberts, *supra* note 22 at 78–83 (using the terminology of first- and second-generation treaties).

136. VCLT, *supra* note 26, art. 70(1).

Older-style treaties were typically skewed in favor of investor protection because they were drafted by developed states that were primarily interested in protecting their investors abroad. Now that many developed states have had investor-state claims brought against them, and states have witnessed the sometimes broad and unexpected interpretations given by investor-state tribunals, they have become more sensitive to the regulatory needs of host states. As a result, they are drafting newer-style treaties that seek to recalibrate the balance between investor protection and state sovereignty.[137]

Drafting new treaties going forward does little to redress imbalances in the existing system given that more than 3,000 treaties already exist, many of which are older in style.[138] A number of states are aiming to close this gap through joint termination and amendment.[139] Whereas investment treaty rights vest at the point of investment vis-à-vis unilateral termination, the treaties do not provide a similar rule about vesting vis-à-vis joint termination.

There are good reasons why ideal treaty parties might accept limitations on their powers as home and host states without accepting limitations on their joint powers as treaty parties. The purposes of investment treaties are to provide investor protection in order to promote foreign investment while not overly compromising state sovereignty. If it turns out that increased investment protection does not in fact result in an increase in investment promotion, let alone an increase in home and host state development, we should expect treaty parties to want to be able to revoke their commitments. Or if it turns out that arbitral tribunals interpret vague language in very investor-friendly ways, such that investor protection is systematically privileged over state sovereignty, we should expect treaty parties to want to be able to modify their commitments in order to redress this balance.

There are examples of treaty parties having been found to have created irrevocable rights for non-state actors. In the human rights sphere, treaties can provide that treaty parties may withdraw, and states have withdrawn in such circumstances.[140] But when North Korea attempted to withdraw from the International Covenant on Civil and Political Rights, which is a human

137. *See* Roberts, *supra* note 22 at 78–83.

138. United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014 - Investing in the SDGs: An Action Plan*, xxiii–xxiv (2014).

139. *See* UNCTAD, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, IIA Issues Note (2013), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf; Kathryn Gordon and Joachim Pohl, *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World*, 32–39 (OECD Working Papers on International Investment, 2015), *available at* http://dx.doi.org/10.1787/5js7rhd8sq7h-en. *See also supra* text accompanying notes 85–87.

140. For example, Venezuela gave notice of its denunciation of the American Convention on Human Rights pursuant to Article 78 of the Convention. *See* Gov't of the Bolivarian Republic of Venezuela, Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, Note 000125, 9 ¶ 2 (Sept. 6, 2012), *available at* http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF.

rights treaty with no provision on withdrawal either way, the Human Rights Committee ruled that it could not do so because it had created irrevocable rights for the people of North Korea.[141] According to the Committee:

> The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.[142]

Given the sovereign nature of states, the idea that treaty parties could create irrevocable rights for non-state actors is controversial, particularly where they have not provided so expressly. The UN Secretary General, as the ICCPR's treaty depositary, took a different approach on this issue, holding that North Korea could withdraw but only with the agreement of all of the treaty parties.[143] Whatever the merits of the Human Rights Committee's ruling in the human rights context, there is little reason to transpose this reasoning to investment treaties given that investment treaties are reciprocal, quid pro quo bargains between states that involve rights of a lesser normative quality than human rights.[144] Investors have investment treaty rights if and to the extent granted by states; these rights are not inherent in the notion of being an investor like certain human rights are inherent in the notion of being a human.

## VI. The Possibility and Consequences of Vested Rights

Even if investment treaty rights remain revocable in general, should the third-party beneficiary paradigm be used to qualify the traditional public international law approach, permitting investors' rights to vest at some point and thereby become immutable? The public law qualification suggests that, even if these rights are capable of vesting, they should not be under-

141. *See* General Comment 26 (61), U.N. Human Rights Committee.

142. *Id.*, at ¶¶ 4–5.

143. *See* Notification of Withdrawal from the International Covenant on Civil and Political Rights, U.N. Doc. C.N.467.1997.TREATIES-10 (Depositary Notification) (Aug. 23, 1997) ("withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agree with such a withdrawal").

144. Roberts, *supra* note 22 at 71; Paparinskis, *supra* note 5 at 623; Roberts, *supra* note 6 at 37–38.

stood as vesting at the same point and with the same consequences as in classic private third-party-beneficiary models.[145]

The notion of vested rights is used to protect reliance interests of third parties. Under domestic contract law, "[t]he parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them," unless the contract provides otherwise.[146] According to the Commentary on the UNIDROIT Principles, this rule seeks to strike a balance between "the interest of the contracting parties in being able to revoke or modify the right conferred on the beneficiary and the interest of the beneficiary in not being unfairly deprived of its right."[147]

In contract law, balancing these interests is achieved by "fixing a cut-off point from which the parties' entitlement to modify or revoke the right expires" because the "right ceases to be inchoate and becomes 'vested' or 'perfected.'"[148] The UNIDROIT Commentary notes that major common law and civil law jurisdictions provide that the third party's contractual rights vest upon acceptance, such as by bringing a claim.[149] In addition, some common law jurisdictions also permit vesting based on reasonable reliance, but there is less uniformity on this point.[150]

Under public law, sovereigns generally have the power to change laws prospectively although some states recognize limits on their power to change laws retroactively or to interfere with vested rights. In some states, such as the United Kingdom, the doctrine of parliamentary sovereignty means that the legislature is entitled to pass new laws even where they change the benefits and burdens of individuals subject to its jurisdiction.[151] There is a strong presumption that new laws apply prospectively only, which includes situations where the law is changed prospectively but operates with respect to previously existing facts.[152] However, parliament does

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145. Compare with Sourgens, *supra* note 33 at 371 ("The concept of the vesting of rights means that the contracting parties to the BIT have entirely abrogated their ability to amend, interpret, or affect the rights of investor-beneficiaries once vested through acceptance or reliance.").

146. UNIDROIT, art. 5.2.5.

147. Commentary on the UNIDROIT Principles, *supra* note 52, art. 5.2.5 at 605–06.

148. *Id.* According to Eisenberg, "a modification or rescission should be effective against a third-party beneficiary except to the extent that the beneficiary justifiably relied on the contract before the modification or rescission." Eisenberg, *supra* note 38.

149. *See* Commentary on the UNIDROIT Principles, *supra* note 52, art. 5.2.5 at 606.

150. *See* 17 AM. JUR. 2D *Contracts* §§ 450–51 (2009) (acceptance and reliance in United States); Restatement (Second) of Contracts § 311 (1981) (acceptance and reliance); Contracts (Rights of Third Parties) Act, 1999, c. 31 (acceptance and reliance in England).

151. *See generally Parliamentary Sovereignty,* U.K. Parliament, http://www.parliament.uk/about/how/sovereignty/; *Parliamentary Sovereignty*, Wikipedia, http://en.wikipedia.org/wiki/Parliamentary_sovereignty; and *Ex Post Facto Law*, Wikipedia, http://en.wikipedia.org/wiki/Ex_post_facto_law.

152. On the difference between retroactive and retrospective laws, *see Benner v. Can.* (Secretary of State) (1997), 1 S.C.R. 358 at ¶ 39 (S.C.C.) ("A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective

have the power to enact retroactive laws, though it must usually do so clearly and unambiguously.[153]

In other states, like the United States, constitutional constraints prevent certain retroactive laws from being adopted. The U.S. Constitution prohibits Congress and the states from passing ex post facto criminal or penal laws and prohibits deprivation of property without due process of law.[154] Congress is entitled to change the law prospectively because "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."[155] However, when the legal framework changes the consequences of past actions, it may interfere with vested property rights and thus require certain due process guarantees to be observed or compensation to be paid.

The question in the investment treaty context is whether investors' rights are capable of vesting and, if so, when and with what consequences. Protecting reliance interests of third parties against joint revision by the contract parties is not necessarily at odds with the *intention* of those contracting parties at the time of contracting. Just as a host state might have an interest in binding its hands so as to prevent itself from opportunistically expropriating a foreign investment later, it is possible that treaty parties might have an interest in jointly binding their hands so that they cannot collectively revoke previously granted treaty protections.

However, the incentive of treaty parties to jointly bind their hands in this way is significantly less clear than it is for them to agree jointly to bind their hands unilaterally as host states. Unilateral actions of host states are associated with hold-up costs in a way that joint actions of both treaty parties are not. By contrast, treaty parties are likely to retain an interest in being able to revoke or modify their commitments if the presumed balance of burdens and benefits does not materialize. Even if treaty parties were to agree to bind their hands in limited circumstances, it is not clear that the private law tests of acceptance and reliance should define vesting. Instead, the public law qualification suggests that some changes are required to

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statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted.").

153. There is debate about whether some rule of law limits might apply to retroactive legislation, e.g., with respect to criminal prosecutions. The United Kingdom is party to human rights conventions that prohibit retroactive changes in criminal laws and penalties. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, art. 15, Dec. 16, 1966, 999 U.N.T.S. 171. However, there is some authority for the proposition that this rule is also subject to the principle of parliamentary sovereignty. *See, e.g.*, Case 129/79, *Macarthys Ltd. v Smith*, I.C.R. 785, 789 (1970) per Lord Denning ("If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it—and says so in express terms—then . . . it would be the duty of our courts to follow the statute of our Parliament.").

154. *See* U.S. Const. art. I §§ 9 and 10; amends. V and XIV.

155. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917).

modify the standard third-party-beneficiary contract model in its application in this context.

### A. *Making an Investment?*

"Acceptance" of investment treaty rights through making an investment should not be used as the test for vesting in the investment treaty context. Acceptance is significant in the private law context because it "signifies that there is consensus among the three parties concerning the transfer of rights, that is all parties regard it as efficient."[156] However, if we conceptualize the treaty parties as a joint sovereign that makes the law (i.e., the treaty), the starting assumption would be that the sovereign is entitled to change that law even if this revokes or modifies rights or benefits previously granted to non-state actors subject to that law. An individual cannot lock in a favorable law by notifying the sovereign that it accepts the law because the individual and sovereign do not exist in a horizontal plane of equality.

As for "reliance" on treaty rights in making an investment, one should also distinguish between the possibility of reliance, on the one hand, and actual and reasonable reliance, on the other hand. In terms of actual reliance, social science surveys suggest that investors typically do not know about or rely upon their treaty rights when investing. Early studies from the 1970s and 1980s suggested that business executives often lacked familiarity with ICSID and did not view it as providing adequate safeguards against political risks.[157] More recently, when the European Commission asked European investors in 2000 about the role of investment treaties, half of the 300 respondents had never heard of them and only ten percent had used them in their professional activity.[158] When Yackee surveyed general counsels of large U.S.-based corporations in 2010, the median respondent described him or herself as fairly unfamiliar with investment treaties, with only six percent

156. Aristides N. Hatzis, *Rights and Obligations of Third Parties*, *in* ENCYCLOPEDIA OF LAW & ECONOMICS. VOL. III. THE REGULATION OF CONTRACTS 200, 210 (Boudewijn Bouckaert and Gerrit De Geest, eds., 2000) ("[A]cceptance of rights by the beneficiary should be the point at which these rights are vested. Acceptance signifies that there is consensus among the three parties concerning the transfer of rights, that is all parties regard it as efficient.").

157. John K. Ryans & James C. Baker, *The International Center for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65, 70–71 (1976) (in a small survey of business executives, only sixteen percent of respondents were "familiar" with ICSID and only four percent viewed the ICSID system as providing "adequate safeguards"); James C. Baker, *ICSID: An International Method for Handling Foreign Investment Disputes in LDCs*, 21 FOREIGN TRADE REV. 411, 417–20 (1987) (in a survey of Chief Financial Officers of U.S. multinational companies, only eight percent of respondents believed ICSID provided a "viable avenue" for settling disputes with foreign states and only five percent had a "working knowledge" of ICSID).

158. Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2009/2010, Fig. 2 (2010) (citing the European Commission, Survey of Attitudes of the European Business Community to International Investment Rules, conducted by T. N. Sofres Consulting on behalf of the European Commission, DG Trade (2000)).

reporting having declined to invest based on the absence of an investment treaty.[159]

These statistics may not be representative of all industries or all companies, but they suggest that actual reliance on treaties at the point of making an investment is less widespread than many lawyers assume. These surveys are consistent with studies on the role of political risk analysis in corporate decision making more generally, which find that companies typically do not analyze political risks in an institutionalized or sophisticated manner.[160] They are consistent with much law and society scholarship that finds that formal law plays a minor role in many business decisions,[161] including decisions of whether or not to invest in a foreign market.[162] If an investor is unaware of or did not rely upon its rights, there will be no link between the purposes of investor protection and investment promotion: the investor will have suffered no detrimental reliance if its rights are revoked or modified and the treaty parties will have gained no unfair benefit.

In terms of reasonable reliance, what investors can reasonably expect when investing must be shaped by the terms of the treaty, any representations made to specific investors, and the general public law relationship between treaty parties (as joint sovereigns) and investors (as non-sovereign third-party beneficiaries). If the treaty parties provide that their ongoing collective sovereign prerogatives remain absolute (for example, allowing them to jointly terminate at any time), investors cannot reasonably have relied on the contrary. If the treaty parties provide that their collective sovereign powers are limited (for example, by including an unamendable survival clause that applies to joint termination), investors can reasonably rely upon that clause. Specific representations may also shape expectations.

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159. Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 428–30 (2011).

160. *See, e.g.*, Stephen J. Kobrin, MANAGING POLITICAL RISK ASSESSMENT: STRATEGIC RESPONSE TO ENVIRONMENTAL CHANGE (1982); Stephen J. Kobrin, *Political Risk: A Review and Reconsideration*, 10 J. INT'L BUS. STUD. 67, 68, 74 (1979); Marie E. Wicks Kelly & George C. Philippatos, *Comparative Analysis of the Foreign Investment Evaluation Practices by U.S.-Based Manufacturing Multinational Companies*, 13 J. INT'L BUS. STUD. 19, 24 (1982); Antoine Van Agtmael, *How Business Has Dealt with Political Risk*, FIN. EXECUTIVE 26 Jan. 1976, at 26; *see also* Mark Fitzpatrick, *The Definition and Assessment of Political Risk in International Business: A Review of the Literature*, 8 ACAD. MGMT. REV. 249, 251–53 (1983); Charles Pahud de Mortanges & Vivian Allers, *Political Risk Assessment: Theory and the Experience of Dutch Firms*, 5 INT'L BUS. REV. 303, 317 (1996).

161. *See* Yackee, *supra* note 159, at 433 (citing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1, 9–12 (1963); Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 96 (2003)).

162. Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 109 (2003) ("law plays a minor role in the initial decision to enter a market. . . . Although legal considerations may weigh heavily once a strategic decision is taken, legal concerns are not themselves the driving force in the initial calculation. Instead, other factors play a greater role, such as the importance of access to raw materials, the size and scope of the foreign market, or the geographical position of the target country in relation to other important markets.").

In the absence of express clauses or specific representations, the public international law premise of the treaty system coupled with the joint sovereign nature of the treaty parties means that investors should expect that the balance of benefits and burdens they receive from investment treaties may change over time. Investors cannot argue that, in investing, they had a legitimate expectation that the investment treaty would continue to cover their investment, at least for the period of the survival clause. Given the sovereign nature of states, such an expectation is not "legitimate" and any argument based on it is circular:

> This expectation-based argument . . . is circular. In short, the argument asserts that people have a right to protection merely because either they now expect such protection or they expected such protection when they entered into a transaction; their expectations allegedly create a right and their asserted rights legitimate their expectations. Often this expectation-based argument amounts to nothing more than an assertion that the status quo should be shielded from normal legislative change—an odd claim since people surely expect legislative change.[163]

A number of states have recently rolled back protections in their investment laws, such as by providing that foreign investors may not initiate international arbitration unless the relevant government offers its specific consent.[164] So long as the investment law does not contain a stabilization provision, akin to a survival clause applying to joint termination, investors cannot complain if they invest and the law subsequently changes.[165] The same is true with respect to termination of investment treaty rights by the treaty parties as the joint sovereign. Investors may have legitimate expectations that their investment treaty rights will not be unilaterally terminated during the period of the survival clause, but they can have no legitimate expectation that this applies to joint termination absent an express clause to the contrary.

### *B. Bringing a Claim?*

Should the situation change when a cause of action accrues or a claim is brought? A number of commentators assert that the treaty parties can revoke or modify investment treaties, but only up to the point at which a claim is made.[166] I reject this conclusion, as ideal treaty parties would likely

163. Michael Graetz, *Retroactivity Revisited*, 98 Harv. L. Rev. 1820, 1823 (1985).

164. Luke Eric Peterson, *Growing Number of Governments Are Amending Domestic Investment Laws so as to Preclude Unilateral Recourse by Investors to International Arbitration*, IA Reporter, Sept. 10, 2013, *available at* http://www.iareporter.com.ezp-prod1.hul.harvard.edu/articles/20130910_2/print.

165. Rumeli Telekom A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, July 29, 2008, paras. 332–36; Ruby Roz Agricol LLP v Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award on Jurisdiction, Aug. 1, 2013, paras. 149–68.

166. Voon, Mitchell & Munro, *supra* note 87.

wish to retain the power to terminate the treaty and settle these claims, although they may accept an obligation to pay compensation in certain cases.

When an investor brings a claim, it not only accepts the host state's offer of arbitration, but it relies upon the procedural and substantive rights granted to it by the treaty. The treaty parties have clear and individualized knowledge of the investor's acceptance and reliance at this point. International law generally recognizes that international tribunals have jurisdiction to determine their own jurisdiction.[167] Jurisdiction is typically judged on the facts and law that apply at the point in time that the claim is filed, and there is a presumption that joint termination and amendment have prospective effect only. There is also support under public law for the idea that a property right in the law might vest when a cause of action accrues, a legal claim is filed, or a final judgment is issued.[168]

But, even if we understand investment treaty rights as vesting when a claim is brought, that does not immunize them from interference by the joint treaty parties. In contract law, there is some debate about the consequences of a third party's rights vesting. Some authorities suggest that contracting parties lose their right to modify or revoke a contract after a third party justifiably relies upon that contract.[169] However, others argue that this approach is mistaken, with reliance rather than expectation damages being appropriate:

> If an empowered beneficiary has justifiably relied on a contract, the importance of protecting that reliance outweighs the interests of the contracting parties, but only to the extent of the reliance. . . . The act of bringing suit is simply a special kind of reliance. If an empowered beneficiary has brought suit, the promisor should be liable for the beneficiary's cost of bringing suit, but should otherwise be free to join with the promisee in varying or eliminating the beneficiary's entitlement to any further damages.[170]

Whichever is true in the private law context, the presumption in favor of the ongoing ability of a state to act is clear in the public law context. Even if an individual is viewed as having a vested property right, the sovereign may still modify or revoke that right if it acts for the public good and provides

167. *See, e.g.*, Statute of the International Court of Justice, annex to the U.N. Charter, art. 36(6); ICSID Convention, *supra* note 76, art. 41. Arbitrators coming from a commercial background are also likely to be familiar with the concept of the separability of the arbitration agreement, which allows the arbitration agreement to continue to exist and to found jurisdiction even if the underlying contract is rendered void.

168. Jeremy Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L. Q. 373, 398–400 (2009).

169. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 311(3).

170. EISENBERG, *supra* note 38.

compensation. Whether that compensation should be determined based on reliance damages or expectation damages is an open question. In this way, any expropriation-based doctrine works to preserve sovereignty while creating a liability mechanism to compensate for reliance interests. Just as this applies to a single sovereign in a domestic setting, so too it could apply to joint sovereigns in the treaty setting.

Factors to be considered in determining whether a joint action amounts to an expropriation of a legal claim include the extent of the interference with the individual's property right, the importance of the public interest at stake, and the extent to which the action interferes with the investors' legitimate investment-backed expectations. On this analysis, minor amendments or terminations followed by the substitution of a new investment treaty or a free trade agreement with an investor chapter would be unlikely to constitute an expropriation. However, major amendments or outright terminations with no replacement provisions or compensation mechanisms might amount to an expropriation and thereby require compensation.

This schema may help to explain a number of practices that have developed in the field. For instance, treaty parties have jointly terminated investment treaties while at the same time providing for new protections in free trade agreements. Even where the rights in the second treaty are less favorable to investors than in the first, for instance because they provide the host state with more regulatory freedom or they do not impose a survival clause, we have not seen treaty parties seek to compensate existing investors or investors seek to bring claims.[171] Outside the investment treaty context, we have seen examples of states settling existing and pending claims, but providing for an alternative forum for those claims to be heard and compensated, such as in the Iran-U.S. Claims Tribunal,[172] or exempting claims that have already led to final awards.[173]

Even if an investor's right is considered to have vested, and even if public law notions would suggest that an expropriation of that legal claim has taken place, that does not mean that investor-state tribunals are in a position to award compensation. Investor-state tribunals do not have jurisdiction to review directly the legality of joint terminations and amendments or to impose compensation obligations on the treaty parties for such actions. The treaty parties could give them this power, but to date they have not done so. Accordingly, joint terminations and amendments might ultimately result in domestic law claims being brought by investors against their home states for the expropriation of their legal claims. If so, the permissibility of such

171. *See* Voon, Mitchell & Munro, *supra* note 87.

172. *See* Claims Settlement Declaration, *supra* note 80.

173. *See, e.g.*, Claims Settlement Agreement between the Government of the United States of America and the Government of the Republic of Iraq, Sept. 2, 2010, arts. 2–3, Annex A (providing for extinguishment of all claims against Iraq, including those based on international law, as part of a settlement agreement, but excluding inter alia a claim that had already resulted in a final award), *available at* http://www.state.gov/documents/organization/191781.pdf.

claims and the appropriate measure of compensation will depend on domestic, rather than international, law.

We may see the future development of international law impose limits on the individual actions of home states or the joint actions of treaty parties in order to protect rights of non-state actors, as is starting to occur with provisions like Article 19 of the Draft Articles on Diplomatic Protection.[174] But such limits do not yet exist as a matter of international law. And even if they did, it is arguable that they should be limited to protecting reliance interests rather than providing expectation damages. Investment tribunals may be reluctant to give up their jurisdiction with respect to previously filed disputes. However, the hybrid public/private default rules developed here suggest that this is the course they should adopt if so required by the treaty parties. If they fail to do so, their decisions could be reviewed by national courts for excess of jurisdiction or by annulment committees for manifest excess of powers.

### *C. Protection as a Matter of Fact, Not Law*

Even if standard investment treaties give investors no or limited protections against the collective actions of the treaty parties as a matter of law, three reasons suggest that they are likely to benefit from significant protections as a matter of fact. This further suggests that the failure of treaty parties to constrain their joint actions legally is unlikely to produce any hold-up costs with respect to promoting efficient foreign investments.

First, the investors at issue are often powerful multinational companies that are capable of exercising considerable political influence over their home states. This should make home states reluctant as a matter of fact to agree to joint terminations or amendments or to overtake investors' rights to bring claims without their investors' consent. Even when home states legally override the rights of their investors, we should expect to see them make some provisions to protect the interests of their investors as a matter of policy.

For instance, when the United States and Morocco terminated their investment treaty and replaced it with a free trade agreement, they suspended the substantive and procedural benefits or rights granted to investors under the investment treaty.[175] However, they created an exception that permitted investor-state and state-to-state claims arising under the investment treaty to continue for another ten years from the date of the suspension with respect to existing investments and existing investment disputes.[176] There is no evidence that the United States and Morocco considered themselves le-

174. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 24, art. 19.
175. United States-Morocco Free Trade Agreement (United States-Morocco FTA), art. 1.2.3, June 15, 2004, HR 4842.
176. *Id.*, art. 1.2.4.

gally obliged to continue these protections, but they did so as a matter of policy.

Second, treaty parties will generally have an incentive to amend or jointly terminate a treaty only where they have relatively symmetrical interests as both capital importers and capital exporters. Thus, amendment and joint termination are more likely to occur with respect to treaties between more evenly situated players, as in NAFTA or with intra-EU agreements, than in traditional investment treaties between clear capital importers and capital exporters, like Ecuador-United States or Argentina-United States. It should be no surprise that interpretive agreements have been most common in NAFTA,[177] while the European Commission has suggested joint termination of intra-EU BITs.[178]

Outside of these contexts, investors will continue to have strong protections against their rights being revoked or modified under most investment treaties because of the asymmetry of treaty parties' interests. The permissibility of joint termination and amendment thus works to provide greater flexibility to already powerful states—like the United States and Western European states—that may be understood to exist at the system's core and lesser flexibility to less powerful states—like Argentina and Ecuador—that exist at the system's periphery. This realpolitik analysis mirrors the differential application of law to players at the center and periphery in other fields, like financial regulation.[179]

Third, the bilateral structure of investment treaties makes them particularly sticky when it comes to protecting investors' rights. For a state to ensure that it is protected against older-style investment treaties, it must amend or jointly terminate all of its treaties. This is because (1) some investment treaties have liberal jurisdictional provisions that have been interpreted to permit investors to restructure in order to take advantage of investment protections under multiple investment treaties and (2) many investment treaties contain a most-favored-nations provision that allows investors under one treaty to invoke the most favorable treatment accorded to investors under any other treaty.

Even if a state is in a position of relative symmetry vis-à-vis one treaty party such that amendment or joint termination of an older-style treaty is possible, sophisticated investors may be able to restructure their investments in order to qualify for protection under other investment treaties where the treaty parties' interests are asymmetrical. The chances that a state will be in

177. *See, e.g.*, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001); NAFTA Free Trade Commission, Statement of the Free Trade Commission on non-disputing party participation (Oct. 17, 2003).

178. *See* Transitional Arrangements for Bilateral Investment, *supra* note 86.

179. *See, e.g.*, Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315, 317 (2013) (identifying the way in which law in the financial system tends to apply (1) strictly to less powerful players that exist at the system's periphery and (2) with greater elasticity to more powerful players that exist at the system's center).

a position of relative symmetry vis-à-vis all of its treaty parties is low, which works to protect sophisticated investors. Investors may also be able to import in more favorable provisions from older-style investment treaties into newer-style investment treaties, unless the state has limited the most-favored-nations clause in the newer-style treaties to apply to later-in-time treaties only.[180]

## Conclusion

This Article set out to answer fundamental and unanswered questions in the investment treaty system: what rights have been given to investors and what powers have been retained by the treaty parties acting both individually and collectively?

Instead of accepting the currently polarized positions of investors having no rights or absolute rights, I develop a hybrid theory based on a public international law premise, a third-party-beneficiary paradigm, and a public law qualification. In doing so, I reconceptualize investment treaties as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries. This tripartite structure allows us to conceptualize investors as having been granted rights that are both subject to, and yet potentially qualifying of, certain sovereign powers retained by home and host states acting individually and the treaty parties acting collectively.

Accordingly, instead of focusing on existing debates about the *nature* of investment treaty rights, this Article refocuses our attention on the *extent* and *limits* of those rights. In doing so, it extends the analysis of third-party-beneficiary rights under public international law and contract law. It also grapples with how to apply these rules at the interesting, though difficult, intersection of public and private law at which investment treaties sit. The triangular structure that I propose can be used to impose significant constraints on the individual powers of home states and the joint powers of the treaty parties. However, there is little evidence that existing treaty parties do, or ideal treaty parties would, impose radical constraints with respect to these second- and third-order relationships.

In analyzing these issues, I have argued that traditional theories of the investment treaty system tend to present a skewed understanding of the purposes of investment protections and the reasons for and consequences of introducing investor-state arbitration. The traditional approach focuses only on the left-hand point of each triangle depicted above. The purpose of investment treaties is depicted as investment protection, with the assumption that other goals do not exist or are not as important. The main relationship analyzed is the investor-host state relationship, with the assumption that

180. For an example of this approach, see 2004 Canada Model BIT, *supra* note 73, art. 4, Annex III.

any limitations accepted on state sovereignty in that context cross-apply to other contexts. The purpose of depoliticization is depicted as being intended exclusively or primarily to protect investors with the consequence of immunizing investors' claims from interference by home states and treaty parties.

A key premise of this Article is that, to comprehend the system's essential architecture and the treaty parties' multifaceted purposes, participants must step back in order to get a wider view of each triangle. When doing so, it becomes clear that investment treaties do not seek to protect foreign investors or promote foreign investment per se. Rather, protection of investors is a means to the end of promoting foreign investment, and this is a qualified, rather than absolute, goal. The balance struck between protection and sovereignty may differ depending on whether the relationship being analysed is between the investor and the host state, the home state, or the treaty parties acting collectively. The purpose of depoliticization is primarily about protecting home states and secondarily about protecting host states. Thus, the introduction of investor-state arbitration, without more, enables investors to bring claims but does not disable home states from bringing claims or immunize investors' claims from the underlying treaty-party relationship.

I have used this triangular understanding of the investment treaty system and the hybrid theory of investment treaty rights that it produces to provide answers to a number of controversies that are currently surfacing in treaty practice and dispute resolution, namely the settlement of investors' claims, the permissibility of countermeasures, and the consequences of joint termination. However, this analysis also provides a template for rethinking approaches to a range of other controversies, including whether the expansive approach to defining jurisdiction is in keeping with the purposes of investment treaties, whether investors can contractually waive their substantive and procedural rights under an investment treaty in a way that waives the rights of their home states, and what role national courts should play in reviewing investment treaty awards as opposed to commercial arbitration awards. But these issues must wait for another day.