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Introduction

1.1 Investor-state arbitration in context

Investment treaties aim to promote foreign investment by providing legal protection to foreign investors from the abuse of public power by host states. They also empower arbitral tribunals to review and rule upon the legality of government conduct affecting foreign investors and investments. Foreign investors have brought claims against states in relation to a wide variety of areas of government policy, including the devaluation of currency in a financial crisis, the protection of cultural heritage, regulatory controls on drinking water and sewerage services, bans on the marketing of harmful substances, and decisions taken in relation to hazardous waste. High profile pending cases include challenges to tobacco control laws enacted by Australia and Uruguay and to Germany's decision to phase out the use of nuclear power. These cases, among others, illustrate the broad reach of international investment law into all aspects of legislation, government policy and service delivery. They also illustrate that foreign investors have, in recent years, begun to challenge not only individual treatment by host state authorities, but also generally applicable laws and regulations – in many cases, in circumstances where domestic investors do not enjoy the same substantive and procedural rights.

The decisions of investment tribunals can significantly affect the regulatory autonomy of states for several reasons. Investment treaty provisions that set out states' obligations toward foreign investors are typically framed in broad and open-textured language that does not address the relationship between investment protection and the continuing powers of host states to regulate and take other actions to promote public welfare. These vaguely worded provisions give investment tribunals a high degree of discretion in interpreting the obligations of states and, therefore, significant authority to control the exercise of regulatory and

administrative power by states.[1] Investment tribunals have, in a number of cases, found states liable to pay compensation to foreign investors in respect of non-discriminatory measures directed at public welfare objectives.

Successful claims by foreign investors may also affect the willingness of governments to enact or maintain public welfare measures. A finding against a state may incentivize the state to repeal the measure so as not to attract further claims, and the prospect of investor-state arbitration may – although this is difficult to measure – have a chilling effect on the resolve of other states to implement measures incidentally affecting foreign investors or to maintain them in the face of challenges to similar measures adopted by other states.[2] A damages award may divert the state's budget from its own policy priorities and may give rise to new situations of sovereign indebtedness.[3]

Moreover, the current institutional structure of investor-state arbitration does not permit investment tribunal decisions to be appealed against; decisions may be annulled or set aside only on very limited grounds.[4] The effect of this structure, combined with the vaguely worded standards of investment protection, is that tribunals enjoy broad interpretive discretion that is practically immune from review.

At the same time, investment tribunals have been criticized for significant inconsistencies in the way in which they have decided cases, in terms

[1] For example, Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law and the BIT Generation* (2009) 165; Roberts, 'Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States' (2010) 104 *American Journal of International Law* 179.

[2] See e.g. Van Harten, 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 627; Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Brown and Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011) 607; Bonnitcha, *Substantive Protection under Investment Treaties* (2014) 113–33. For example, New Zealand has delayed the passage of its proposed plain tobacco packaging legislation pending the outcome of the *Philip Morris* v. *Australia* dispute. New Zealand Government, 'Government Moves Forward with Plain Packaging of Tobacco Products' (2013).

[3] See e.g. Van Harten, *Investment Treaty Arbitration and Public Law* (2007) 7; Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013) 114.

[4] Awards for claims brought under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) are binding and final and are amenable to annulment on very limited grounds (Articles 49–53). Non-ICSID arbitrations (such as those taking place under UNCITRAL rules) are normally challengeable in domestic courts, but again on limited grounds.

of both the content that they have ascribed to standards of investment protection and the methodologies they have adopted in determining state liability. Although tribunals increasingly rely on previous cases in their decision-making,[5] they continue to generate inconsistent interpretations of the same standards of investment protection[6] and differing conclusions as to state liability in relation to cases with identical or similar fact situations.[7] The decided cases evidence low coherence and, often, little consideration of the systemic implications of decision-making, other relevant areas of international law or the intentions of the treaty parties.[8] This incoherence has resulted in uncertainty both for states, who find it difficult to know whether their conduct will be adjudged lawful, and for investors, who cannot have confidence that recourse to arbitration will be fruitful. These uncertainties also appear to contribute to the law's chilling effect on public welfare regulation.[9]

A prominent example of these concerns is the series of claims against Argentina arising from its 2001–2002 economic crisis, in which foreign investors successfully challenged emergency laws enacted to restore domestic order and economic stability. Tribunals adopted a strict approach to whether Argentina should be liable for financial losses sustained by foreign investors as a result of the crisis and the emergency laws enacted to avert it. Several tribunals found Argentina liable to compensate foreign investors in the electricity and gas sectors for failing to maintain a stable regulatory environment or failing to comply with the

[5] For example, Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 *Fordham International Law Journal* 1014, 1030–47; Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 *Arbitration International* 357, 368, 372–3; Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' in Picker, Bunn and Arner (eds.), *International Economic Law: the State and Future of the Discipline* (2008) 265.

[6] See e.g., in relation to inconsistent approaches taken by tribunals to the concept of fair and equitable treatment, Kläger, *Fair and Equitable Treatment in International Investment Law* (2011) 86–7; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013) 116.

[7] See Van Harten, *Investment Treaty Arbitration and Public Law*, pp. 122–3; Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 *European Journal of International Law* 749, 771; van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 *Journal of International Economic Law* 507, 514. While these inconsistencies might be attributed in part to textual differences across the body of investment treaties, there is substantial commonality in the obligations and wording of relevant treaty provisions: see e.g. Schill, *Multilateralization of International Investment Law* (2009) 70–1.

[8] Roberts, 'Power and Persuasion', pp. 179, 190–1.

[9] Bonnitcha, *Substantive Protection under Investment Treaties*, pp. 122–7.

claimants' legitimate expectations that the existing regulatory framework would remain in place. Some of these tribunals appeared to take the view that the state's reasons for its actions were irrelevant to the question of liability for breach; others held that the state should have maintained the regulatory regime and adhered to the terms of concession agreements and licences held by these investors in spite of the crisis. These tribunals also took divergent approaches to whether Argentina could escape liability by relying on an exception clause in the Argentina-US Bilateral Investment Treaty (BIT). Argentina is liable for millions of dollars in damages arising from these and other cases, despite strong evidence that several tribunals made serious legal errors in determining liability[10] and despite the widespread criticism that these tribunals adopted an unduly broad interpretation of the state's treaty obligations that did not take Argentina's interests into account, and employed an excessively strict approach to the standard of review.

Recent tribunals have generally taken a more moderate approach to these issues, for example, by holding that an investor can establish a legitimate expectations claim only in more limited circumstances, or that the state has the right to make reasonable changes to the regulatory environment affecting investors. Yet these cases, among others, raise some of the sharpest questions about the relationship between international investment law and the right of host states to regulate and take other action to promote public welfare. These cases also highlight the significant inconsistencies in the way in which tribunals approach the determination of liability under the various standards of investment protection.

As disenchantment with international investment law and investor-state arbitration continues, finding a way to deal with these problems is a crucial issue confronting the discipline. States have adopted various strategies in response to these concerns, ranging from radical to reformist. Argentina has failed to comply with most of the awards rendered against it in relation to the emergency measures it adopted in response to its economic crisis of 2001–2002, only recently settling five of the numerous awards.[11] Some states have terminated bilateral investment treaties[12] or

[10] See e.g. Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 *International and Comparative Law Quarterly* 325, 371. These issues are discussed further in Chapter 4.

[11] Peterson, 'After Settling Some Awards, Argentina Takes More Fractious Path in Bond-Holders Case, with New Bid to Disqualify Arbitrators', *Investment Arbitration Reporter*, 30 December 2013.

[12] See e.g. UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)* (2014) 114.

have denounced the ICSID Convention.[13] Increasing numbers of African, Asian and Latin American states are disengaging from negotiations for new investment treaties.[14] As the numbers of claims filed against them have increased, states that were historically net exporters of capital have changed their approaches to treaty negotiations, seeking to clarify the substantive standards of investment protection and related procedural matters so as to reduce the interpretive discretion enjoyed by tribunals.[15] Commentators have also proposed changes to the institutional architecture of international investment law, such as the establishment of an international investment court[16] or a body that would hear appeals from tribunal decisions.[17] These proposals aim to promote greater consistency in decision-making and to discipline adventurous interpretations of investment treaties in the first instance.

Yet, these recent developments and proposals do nothing to affect the 3200-plus other investment treaties currently in existence for those states who choose to remain part of the system.[18] Amending those treaties would require the consent of those treaty parties and would, naturally, take place on a treaty-by-treaty basis.[19] And although the language of

[13] See UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012) 87; UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan* (2014) 114.

[14] UNCTAD, *World Investment Report 2014*, p. xxiii.

[15] See, e.g. in relation to the evolution in states' approach to negotiating investment treaties, UNCTAD, *World Investment Report 2014*, p. 116; Alvarez, 'The Return of the State' (2011) 20 *Minnesota Journal of International Law* 223, 234–8.

[16] For example, Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1617–25; Van Harten, *Investment Treaty Arbitration and Public Law*, pp. 180–4.

[17] Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 *Vanderbilt Journal of Transnational Law* 37, 91–3; International Centre for Settlement of Investment Disputes Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (2004) 14–16; Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2006) 39 *Vanderbilt Journal of Transnational Law* 39; Tams, 'An Appealing Option? The Debate about an ICSID Appellate Mechanism' (2006) 57 *Martin-Luther-Universität Halle-Wittenburg Beiträge zum Transnationalen Wirtschaftsrecht*; Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013), pp. 349–50, 381–2. See also McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?' (2010) 1 *Journal of International Dispute Settlement* 371 (noting the limitations of an ICSID appeal facility).

[18] At the end of 2014, there were approximately 3268 known BITs and other investment treaties (principally preferential trade agreements with investment chapters) in force: UNCTAD, *Recent Trends in IIAs and ISDS*, p. 2.

[19] See Kingsbury and Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' in Van Den Berg (ed.), *50 Years of the New York Convention* (2009) 5, 9–10.

many newer treaties indicates that tribunals should be loath to interfere with *bona fide* measures adopted to promote public welfare, these provisions generally indicate neither how tribunals should balance public and private interests in their decision-making in disputes concerning regulatory or administrative measures (hereinafter 'regulatory disputes'),[20] nor how intensively they should scrutinize a government's justification for its actions in such cases. This suggests that pending any future reform of investment treaties – either on an *ad hoc* basis or through multilateral efforts[21] – consideration needs to be given to how these concerns may be addressed within the current system of investor-state arbitration itself, without amending treaties or changing institutional structures.[22]

Two issues that have received increasing attention in recent years are the related questions of the appropriate *method of review* (i.e. the technique used by adjudicators to balance competing public and private interests) and the *standard of review* (i.e. the intensity with which the method of review is applied in terms of the scrutiny applied to the justification for the measure advanced by the responding government). Investment tribunals are in need of a workable methodology with which to deal with competing public and private interests in regulatory disputes, and the decided cases demonstrate that tribunals have been grappling with this question. Tribunals have increasingly referred to concepts such as necessity, reasonableness, balancing and proportionality in determining state liability, but they have not generally elaborated upon the methodologies they have adopted or attempted doctrinal justification for their choice of technique, and their approaches have frequently been incoherent.[23] Although a

[20] Van Harten, *Investment Treaty Arbitration and Public Law*, p. 4 (referring to regulatory disputes as those engaging public law considerations); Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law* 45, 65 (describing 'public arbitrations' in international investment law as those that 'involve significant matters of public concern that transcend the private rights and obligations of the disputing parties'); Maupin, 'Differentiating Among International Investment Disputes' in Douglas, Pauwelyn, and Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 468, 490 (describing regulatory disputes as those involving 'ordinary governmental regulatory activities').

[21] UNCTAD has called for a multilateral approach to building consensus on appropriate reforms to investment treaties (though not the negotiation of a multilateral investment agreement): UNCTAD, *World Investment Report 2014*, pp. 130–2.

[22] In this respect, see Schill, 'The Sixth Path: Reforming Investment Law from Within' in Kalicki and Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015) 621, 624–5.

[23] See Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *Law and Ethics of Human Rights* 47, 68. See also Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013) 16–21, distinguishing between

number of tribunals have referred to concepts such as the standard of review, the margin of appreciation and deference to host states, they have only infrequently articulated the rationale for their approaches or the reasons why it might be appropriate for a tribunal to afford a measure of deference in the determination of liability.[24]

Without a coherent, consistent approach to the method and standard of review, states find it difficult to predict the consequences of their actions, foreign investors have little certainty as to the likely prospects of a successful claim, and other interested parties will find it difficult to determine the likely impact of international investment law on public welfare regulation. The question arises, therefore, as to how investment tribunals should approach the method and standard of review. The first port of call must be rules of treaty interpretation, given that the basis for investment tribunals' jurisdiction is the relevant investment treaty.

1.2 Treaty interpretation and the role of comparative law

1.2.1 The relevance of the rules of treaty interpretation to the question of the method and standard of review

Like all treaties, provisions of investment treaties must be interpreted in accordance with the ordinary meaning in their context and in light of the treaty's object and purpose, as required by Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).[25] Article 31(1) is regarded as a single rule comprising various techniques that should all be considered rather than prescribing any particular methodology or the weight to be attributed to the various factors,[26] although the ordinary meaning of the text is the starting point.[27]

the discourse of balancing and the application of proportionality analysis as a method of review.

[24] See Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review' (2012) 3 *Journal of International Dispute Settlement* 577, 579–80: investment tribunals invoke the concept of deference 'as a mantra rather than . . . as part of a theoretical framework structuring the power relations between states and tribunals'.

[25] The VCLT rules of treaty interpretation are regarded as reflecting customary international law on the interpretation of treaties, see e.g. *Avena and Other Mexican Nationals (Mexico* v. *US)*, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia* v. *Malaysia)*, para. 37. The VCLT provisions are not exhaustive of treaty interpretation principles, see e.g. Sinclair, *The Vienna Convention on the Law of Treaties* (1984) 153.

[26] For example, Aust, *Modern Treaty Law and Practice* (2007) 234; Gardiner, *Treaty Interpretation* (2010) 9, 141.

[27] See Territorial Dispute (*Libyan Arab Jamahiriya* v. *Chad)*, para. 41; Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012) p. 42.

However, this approach may pose difficulties in relation to many of the substantive provisions of investment treaties which, as noted above, are drafted in vague and non-specific terms.[28] The ordinary meaning of typical investment treaty protections such as fair and equitable treatment, indirect expropriation and discrimination do little to clarify the substance of these obligations.[29] Even where the text does provide some guidance, such as exception clauses that permit a state to adopt an otherwise non-conforming measure where 'necessary' to promote a particular policy objective, the decided cases demonstrate that there may be a range of possible meanings attributable to the treaty terms and a range of possible approaches that a tribunal could take to the applicable standard of review.[30]

But a treaty interpreter cannot determine the ordinary meaning of a treaty provision in the abstract and must pay attention to the object and purpose of the treaty as a whole.[31] Many investment treaty preambles (a contextual source of interpretation)[32] refer to aims and objectives such as the protection and promotion of investment or the deepening of economic relations between the signatory states. Such references are frequently made in instrumental terms, referring to investment protection and promotion as a means to welfare, development or prosperity of state parties.[33] Even where the object and purpose of an investment treaty are less than clear or the treaty does not refer to non-investment objectives, an argument can be made that the purpose of the regime of

[28] Schill, *Multilateralization of International Investment Law*, pp. 264–5; Roberts, 'Clash of Paradigms', pp. 50–2.

[29] Schill, *Multilateralization of International Investment Law*, pp. 264–5; Kläger, *Fair and Equitable Treatment*, pp. 44–5.

[30] See Burke-White and von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Virginia Journal of International Law* 307, 337–49 (noting the different meanings attributable to the concept of 'necessary').

[31] Gardiner, *Treaty Interpretation*, p. 190. See e.g., on the dominant hermeneutics that animate the process of treaty interpretation (the objective approach, the subjective approach and the teleological approach), Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Yearbook of International Law* 1, 1–2; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 114–15; Shaw, *International Law* (2008), 932–33 (with further references).

[32] The context of the treaty includes its preamble and 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' (Article 31(2) VCLT).

[33] See e.g. the preambles to the US-Argentina BIT and UK-Jamaica BIT. More recent treaties also refer to other objectives such as protecting the environment, see e.g. the preambles to the Australia-Chile FTA and Energy Charter Treaty.

international investment law is to promote the economic development and prosperity of states, and that the promotion and protection of foreign investments are specific manifestations of this broader purpose.[34] The International Centre for the Settlement of Investment Disputes (ICSID) (the body under whose auspices the majority of investor-state arbitrations are conducted) was established by the World Bank with the aim of fostering economic development, and the ICSID Convention preamble refers to 'the need for international cooperation for economic development, and the role of private international investment therein'.[35] At the very least, this broader context indicates that the obligations of host states toward foreign investors should not be viewed solely through the lens of investment protection at the expense of other legitimate objectives.

Investment tribunals have frequently looked at a treaty's preamble in order to determine its object and purpose. Earlier tribunals often took the view that the sole or dominant purpose of the treaty in question was to maximize the protection afforded to foreign investors and investments, a perspective that strongly influenced their interpretations of states' obligations and one which has been subject to criticism.[36] More recently, however, tribunals have demonstrated a willingness to take into account the object and purpose of the relevant treaty in interpreting its operative provisions in a manner that is more supportive of regulatory autonomy.[37] However, tribunals' approaches have been less than methodologically clear in terms how the rules of treaty interpretation have informed their

[34] Brower, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes' in Sauvant (ed.), *Yearbook on International Investment Law & Policy 2008–2009* (2009) 274, 373–6; Salacuse, *The Law of Investment Treaties* (2010), pp. 112–15; Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 1107, 1138–9; Ortino, 'The Investment Treaty System as Judicial Review' (2013) 24 *American Review of International Arbitration* 437, 440–5.

[35] Lowenfeld, 'The ICSID Convention: Origins and Transformation' (2010) 38 *Georgia Journal of International and Comparative Law* 47, 49–50, 53; Radi, 'Human Rights in Investment Treaty Arbitration', pp. 1138–9.

[36] For example, *SGS Société Générale de Surveillance S.A.* v. *Philippines*, Jurisdiction, para. 116; *MTD Equity Sdn. Bhd. & MTD Chile S.A.* v. *Chile*, Award, para. 104; *Siemens A.G.* v. *Argentina*, Award, para. 81; *CMS Gas Transmission Company* v. *Argentina*, Award, para. 274; *Sempra* v. *Argentina*, Award, para. 300; *LG&E* v. *Argentina*, Liability, para. 124; *Azurix Corporation* v. *Argentina*, Award, para. 372. See e.g. Kurtz, 'On the Evolution and Slow Convergence of International Trade and Investment Law' in Sacerdoti (ed.), *General Interests of Host States in International Investment Law* (2014) 104, 109–10.

[37] See e.g. *Saluka Investments BV (The Netherlands)* v. *Czech Republic*, Partial Award, para. 300; *Joseph Charles Lemire* v. *Ukraine*, Jurisdiction and Liability, paras. 272–3; *Continental Casualty* v. *Argentina*, Award, para. 258.

decision-making.[38] And, in any event, reference to the object and purpose of an investment treaty – beyond suggesting the need for a balanced approach that takes into account the rights of both states and investors – does little to actually concretize states' obligations and is unlikely to provide much assistance to the question of how to balance state and investor interests in the determination of liability.[39] Nor do supplementary means of interpretation, such as the *travaux préparatoires* to the treaty usually assist in this regard,[40] either because they are not available[41] or due to a reluctance on the part of states to produce them in litigation.[42]

1.2.2 The role that comparative law can play

1.2.2.1 The comparative method

Given that the principles of treaty interpretation do not provide much assistance in clarifying how state and investor interests should be taken into account in the determination of state liability, a comparative inquiry into the way in which other legal systems performing functionally similar tasks deal with the question of the method and standard of review may be useful.[43] In recent years, commentators have used a comparative methodology to elaborate on various substantive and procedural issues arising in investor-state arbitration,[44] and several tribunals have employed

[38] See Fauchald, 'The Legal Reasoning of ICSID Tribunal: An Empirical Analysis' (2008) 19 *European Journal of International Law* 301, 322–4.

[39] See Schill, *Multilateralization of International Investment Law*, p. 265.

[40] In terms of Article 32 VCLT (either to confirm the meaning of a provision or to determine its meaning in cases of ambiguity or obscurity of meaning or manifest absurdity or unreasonableness of result).

[41] Kläger, *Fair and Equitable Treatment*, p. 46; Roberts, 'Clash of Paradigms', p. 51, but see Burke-White and von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale Journal of International Law* 283, 296 (noting that the *travaux* to the 1998 US Model BIT suggest that the parties intended that a flexible necessity test be applied in the context of treaty exceptions).

[42] Weeramantry, *Treaty Interpretation in Investment Arbitration*, pp. 183–4 (noting inequality of access to the *travaux* and the likely reluctance of an investor's home state to provide them).

[43] To the extent that the provisions of the investment treaty so permit. Where a relevant treaty provision is clear-cut, comparative law can, however, only assist in terms of providing a normative perspective on what the law should be, rather than as an aid to the interpretation of existing law: see e.g. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 *Virginia Journal of International Law* 57, 89–90.

[44] See e.g. the contributions in Schill (ed.), *International Investment Law and Comparative Public Law* (2010).