Introduction

Investment treaty arbitration is nowadays one of the most important dispute settlement mechanisms in international law. Despite having fairly ancient roots, the protection of foreign investors has over the past two decades evolved from a rather peripheral branch of the law, which had attracted little attention in scholarship and practice, to one of the most vibrant areas of research, interest and concern in public international law.

Since the decision of the Arbitral Tribunal in *AAPL* v. *Sri Lanka*,[1] the first tribunal established on the basis of a dispute settlement provision contained in an investment treaty that provided foreign investors direct access to arbitration under the ICSID Convention,[2] investment arbitration has shifted from a relatively private or commercial dispute settlement method to an essentially public international law one. Factually, investment treaty arbitration has become one of the most important dispute settlement mechanisms in international law.

Attempts to characterize investment treaty arbitration as private or public, that is, as a private dispute settlement mechanism essentially regulated by private and commercial law principles, or as a dispute settlement mechanism regulated by public (international) law principles, have thrived since the rise of the use of investment treaty arbitration in the 1990s.[3] In this book, I argue that investment treaty arbitration is a public international law dispute settlement

[1] *Asian Agricultural Products Ltd (AAPL)* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990. All cited cases are available at www.italaw.com unless otherwise indicated.
[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.
[3] See Jan Paulsson, 'Arbitration without Privity', *ICSID Review – Foreign Investment Law Journal*, 10(2) (1995): 232. See, more recently, Anthea Roberts, 'Clash of Paradigms: Actors

mechanism that is fundamentally concerned with the international legal obligations of states under public international law, and is founded on an international treaty containing the consent of states. The main feature of investment treaty arbitration today is the public international law character of the instrument containing the consent of states to arbitration and state obligations granting substantive protection to foreign investors. The dispute is thus one that is directed at the international legal obligations of states and, hence, is a public international law dispute, the settlement of which occurs within the framework of public international law. Secondly, this intrinsic feature, it is argued, is visible from and impacts the procedure applicable to investment treaty arbitration, despite the latter being derived from arbitral rules applicable to the settlement of commercial disputes. While certain of these aspects are already clearly present in contemporary investment treaty arbitral procedure – which both reveals the public international law character of investment treaty arbitration, and at the same time shows the influence that the public international law character of investment treaty arbitration has had on the procedure – others, it will be argued, have yet to be fully incorporated.

My argument that investment treaty arbitration as a public international law dispute settlement mechanism implies that I move away, in this book, from other theories about the nature of contemporary investment treaty arbitration, notably those theories that either characterize investment treaty arbitration as a 'hybrid' legal system or equate it with public/administrative law dispute settlement. While these theories may certainly be of assistance in, for example, questions of interpretation, they do not fully reflect the contemporary nature of investment treaty arbitration.

Disentangling the 'hybridity' of investment disputes

The claim that investment treaty arbitration is a 'hybrid' dispute settlement mechanism results from the use in investment treaty arbitration of elements derived from both public international law and international commercial law and arbitration.[4] The 'hybrid' foundation of investment

and Analogies Shaping the Investment Treaty System', *American Journal of International Law*, 107(1) (2013): 45.

[4] See, generally, Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', *British Yearbook of International Law*, 74 (2004): 151, and Daniel Kalderminis, 'Investment Treaty Arbitration as Global Administrative Law: What this Might Mean in

treaty arbitration is then coupled to the claim that neither international commercial arbitration, private law, public international law nor public law are adequate legal paradigms that cover the settlement of international investment disputes.[5] The 'hybridity' is essentially based on two interconnected features of investment treaty arbitration.

First, international investment law and investment treaty arbitration are characterized by a dual layer of obligations that exist in the investment relations between a foreign investor and a host state. When investors decide to develop their activities in a foreign state, they typically sign an investment contract with the host state. At the same time, and although the contract in itself may contain protection mechanisms for the investors, such as stabilization clauses and access to arbitration, the foreign investor may benefit concomitantly from protection offered under an investment treaty, to which the host state and the home state of the investor are parties.[6] The contract is a private law instrument, which is regulated by private and commercial law – despite some lingering controversy in respect of state contracts that I will further address in Chapter 1[7] – while the treaty obligations are without doubt state obligations regulated by public international law. There are, consequently, two layers of obligations resting on the host state: the contractual obligations towards the foreign investor based on the investment contract; and the public international law obligations based on the investment treaty.

Secondly, the 'hybrid' system of investment treaty arbitration would result from the procedural way in which investment disputes are settled.[8] The majority of investment protection treaties offer foreign investors the possibility of bringing claims for violations of that treaty directly against host states before an international arbitral tribunal. Then, investment tribunals are mandated to establish whether the

Practice', in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), p. 149.

[5] Roberts, 'Clash of Paradigms', p. 49; and Kalderminis, 'Investment Treaty Arbitration as Global Administrative Law', pp. 145–59.

[6] See, generally, Patrick Dumberry, 'International Investment Contracts', in Tarcisio Gazzini and Eric De Brabandere (eds.), *International Investment Law. Sources of Rights and Obligations* (Leiden: Martinus Nijhoff, 2012), pp. 215–44.

[7] See for the claim that state contracts are a particular kind of international legal act, Prosper Weil, '*Droit international et contrat d'Etat*', in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris: Pedone, 1981), p. 562, and Francis A. Mann, 'The Theoretical Approach Towards the Law Governing Contracts Between States and Private Persons', *Revue Belge de Droit International*, 11(2) (1975): 563, 564–5.

[8] Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', pp. 151–290.

host state has violated its treaty obligations and thus engaged its international responsibility under public international law. Such disputes are settled through a form of arbitration that is largely based on the rules and principles of international commercial arbitration.[9] The mandate of the arbitral tribunals and the rules and procedure applicable to the arbitral proceedings are thus a combination of both public international law and international commercial or private law.

These features of investment treaty arbitration, however, do not suffice to qualify investment treaty arbitration as a dispute settlement mechanism that lies in between public international law and commercial or private law, or to disqualify it as an essentially public international law dispute settlement mechanism. The 'hybridity' of investment treaty arbitration may be factually valid as explained above, but the normative claims associated with this 'hybridity' are largely unwarranted. As will be argued, categorizing investment law and arbitration as 'hybrid' fails to take account of the fact that contemporary investment arbitration forms an integral part of public international law, and that (the recognition of) this feature is of paramount importance to the dispute settlement procedure. This book, accordingly, is based on the idea that it is both useful and legally necessary to distinguish between the public international law and private law dimensions of investment disputes and investment arbitration, and considers investment treaty arbitration to be a public international law dispute settlement mechanism. Although there is, indeed, as a matter of principle, nothing 'revolutionary in abandoning the simple dichotomy between public and private international law conceptions of dispute resolution',[10] the characterization of a certain situation as 'hybrid' is generally an easy way out of disentangling a complex web of legal relations and, in the case of investment treaty arbitration, tends to blur the underlying legal relations between foreign investors and host states.

Investment treaty arbitration and public law analogies

International investment law and investment treaty arbitration have much in common with domestic administrative and public law, and, as

[9] See Gus van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', *European Journal of International Law*, 17(1) (2006): 121, 139–45.

[10] Zachary Douglas, *The International Law of Investment Treaty Claims* (Cambridge University Press, 2009), p. 7.

a consequence, proponents of the public law paradigm of investment treaty arbitration, based on the *analogy* between both investment treaty arbitration and public law dispute settlement, have sought to import principles from the latter to the former.[11] However, the analogies made do not imply that investment arbitration should *ipso facto* be equated with administrative of public law litigation[12] or that, because it is generally not accepted in administrative or public law litigation in domestic courts, the principle of party autonomy, for instance, would be incompatible with the settlement of investment disputes.[13]

The public/administrative law analogy without doubt has much merit and may indeed be of assistance to the interpretation of certain substantive obligations of state parties,[14] but too easily discards differences between public/administrative law disputes and investment disputes, and the fundamental consent by states to have investment disputes settled through international arbitration. I do not therefore endorse the qualification of the regime of international investment law as a public law system as defended, *inter alia*, by Gus van Harten.[15]

From a substantive perspective, there is certainly a similarity between investment disputes and public/administrative law disputes. Both are concerned with regulatory acts or measures taken by states, but the *types* of state conduct that may amount to a breach of the state's international investment obligations are different from those that may form the basis for domestic administrative/public law litigation.[16] Secondly, in domestic public/administrative law, such state conduct is tested against different domestic standards that may, depending on the constitutional system, also include international law principles. Investment treaty arbitration, on the other hand, is essentially concerned with assessing the conformity of state conduct with specific public international law standards governing the protection of foreign investors, which are not necessarily the same as those governing domestic public/administrative law disputes.

[11] See for a discussion: Roberts, 'Clash of Paradigms', p. 63.
[12] See, however, Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), pp. 44 ff.
[13] *Ibid*., pp. 130 ff.
[14] See the various contributions in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010).
[15] Van Harten, *Investment Treaty Arbitration and Public Law*, pp. 44 ff. See also Kalderminis, 'Investment Treaty Arbitration as Global Administrative Law', pp. 145–59.
[16] See Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012), pp. 84–5.

Procedurally, investment treaty arbitration resembles more interstate arbitration than administrative or public litigation,[17] not the least because it has developed as an alternative to international dispute settlement as part of a state's exercise of diplomatic protection, which is an intrinsically interstate mechanism. Investment treaty arbitration, in essence, has resulted in the elimination of the procedural limitations of diplomatic protection by removing the requirement to exhaust domestic remedies, and by the prospective consent of states to arbitrate such disputes by giving a direct claims right to foreign investors. But this does not imply that the (formerly interstate) dispute is actually transformed into a public/administrative law dispute on the international level.

It does not seem very helpful simply to transpose the rules and regulations applicable to public/administrative law dispute settlement to investment treaty arbitration. Doing so might indeed jeopardize the very basic foundations and characteristics of arbitral proceedings. One should, on the contrary, respect the general intent of states to settle investment disputes through international arbitration rather than through a standing international court or tribunal, and, consequently, respect the inevitable implications that the use of arbitration has on the settlement of investment disputes. There is thus nothing wrong as a matter of principle with the idea that party autonomy generally applies to investor–state disputes, and, as an application thereof, the freedom of the parties to define the law to be applied by the tribunal.[18] Such principles are inherent in the choice of arbitration as the dispute settlement mechanism. It is, therefore, of little usefulness to criticize generally the use of arbitration as a method to settle investor–state disputes and to propose systemic reforms of this procedure. The choice of international arbitration as the method of settling investment disputes should be respected. The question rather is how the public international law character of investment disputes has been incorporated in investment treaty arbitration, which is modelled on international commercial arbitration, and how, in certain areas of the procedure, this incorporation should be effectuated more efficiently. International

[17] As noted by one author, ICSID proceedings are 'conceptually no different to proceedings taking place between two sovereign states, where the law of the arbitration is international law' (Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, 2004), p. 218).

[18] See, however, for a criticism Van Harten, *Investment Treaty Arbitration and Public Law*, pp. 130 ff.

arbitration is not premised on a fixed set of rules and regulations as are national courts and tribunals. There are thus several ways in which the public international law character of international investment disputes has influenced, or has been visible through, the arbitral procedure.

The 'public interest' theory,[19] which broadly forms part of the public law analogy paradigm,[20] is nevertheless of high relevance, since the principles derived therefrom are equally applicable when investment treaty arbitration is viewed from its public international law foundation. Such a theory holds that because of the type of acts of the state that are subjected to scrutiny in investment treaty arbitration, the areas in which the activities of the foreign investor take place, and the importance of the pecuniary compensation usually awarded to foreign investors, investment treaty arbitration has a broader public interest that transcends that of the parties to the dispute only.[21] For example, a foreign investor may feel that a democratically and validly adopted law in the host state unduly affects its private rights under the investment contract, and even breach the state's obligations under the applicable investment treaty. In such situations, the general public interests of the state may, for example, warrant granting non-disputing parties access to the proceedings, militate in favour of conducting open and transparent proceedings, or impose certain conditions on the selection and qualification of arbitrators. Since these considerations are applicable to public international law dispute settlement as well, one may readily consider that, viewed from its public international law foundation, investment treaty arbitration has an important 'public interest', to which I will refer in particular in the second part of this book.

Investment treaty arbitration as public international law

Treaty-based investment arbitrations currently outnumber contract-based arbitrations under the ICSID Convention.[22] The consent to

[19] See, generally, Kulick, *Global Public Interest in International Investment Law*.
[20] Roberts, 'Clash of Paradigms', p. 65. [21] *Ibid*.
[22] The 2013–2 issue of the ICSID statistics reports that an investment treaty formed the basis of consent to establish ICSID jurisdiction in 74 per cent of cases. Investment contracts accounted for 19 per cent of cases, while the national laws of the host state accounted for 7 per cent of cases. See *ICSID Caseload – Statistics*, Issue 2013–2, p. 10, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoad Statistics, accessed 30 August 2013. Similarly, the 2012 Permanent Court of Arbitration (PCA) Annual report states of the eighty-eight arbitrations on its docket in 2012, fifty-four were investor–state arbitrations under bilateral or multilateral investment treaties, or

arbitration which forms the basis of the vast majority of investment tribunals today is provided for in an investment treaty rather than in a contract. While a contract concluded under the municipal laws of a state may provide the basis for an international commercial arbitration claim, investment treaty arbitration is founded on an international treaty, and the consent to arbitration expressed by the state is a sovereign act of the state rooted in a public international law legal instrument. Consent to arbitration expressed in relation to commercial acts is fundamentally different in that both parties to the contract have expressed a clear wish to settle disputes by arbitration instead of by resort to the regular courts and tribunals of the host state, which is not the result of a state acting in the exercise of its functions under general public international law.[23] When involved in international commercial arbitration, the state is in essence acting in a private capacity, whereas a state involved in investment treaty arbitration will do so in a public or sovereign capacity.[24]

Contemporary treaty-based investment disputes relate to the international responsibility of states for alleged violations of international legal obligations contained in international legal instruments. The existence of two distinct layers of obligations – a contractual and a treaty level – does not imply that assessing the responsibility of a state for alleged violations of the state's international investment obligations ceases to be an exercise in applying public international law rules and principles. The use of the international commercial arbitration model to settle investment disputes has not altered the fact that in contemporary investment disputes investment tribunals are mandated to assess breaches by states of their obligations under public international law, which are laid down in international treaties granting protection to foreign investors.

national investment laws, with twenty-seven arbitrations and one expert determination being under contracts or other agreements to which at least one party is a state, a state-controlled entity, or an intergovernmental organization (PCA, 112th Annual Report, 2012, p. 12, available at: www.wx4all.net/pca/PCA-annualreport_2012.pdf). PCA Annual Report 2011 states that of the sixty-three investment arbitrations, forty were based on bilateral or multilateral investment treaties, twenty-four on 'contracts or other agreements to which at least one party is a state, state-controlled entity, or intergovernmental organization', and one case under a national investment law (PCA, 111th Annual Report, 2011, para. 3, available at: www.pca-cpa.org/showpage.asp?pag_id=1069).

[23] See also Van Harten, *Investment Treaty Arbitration and Public Law*, pp. 48–9.

[24] See the discussion on state contracts, below, Ch. 1, section 1.3.

Although it is beyond doubt that a state can engage its international responsibility when acting both in its sovereign and commercial capacity, as was recognized by the International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts, the responsibility of a state remains a responsibility under public international law.[25] The tribunal's mandate in investment treaty arbitration thus consists in establishing whether the state has breached its international legal obligations, either through sovereign or commercial acts. While this mandate may thus include an analysis into the contractual relations between foreign investors and host states, this question is, in contemporary investment treaty arbitration, subsidiary or preliminary to the overall enquiry into the international legal responsibility of the host state. In other words, the examination of the international legal responsibility of a state for breaches of its international investment obligations, a matter regulated by public international law and not domestic law, is the principal object of investment treaty arbitration.[26]

My general claim that investment treaty arbitration is essentially a public international law dispute settlement mechanism does not imply that investment treaty arbitration has no private law dimension. Indeed, they are not incompatible and are present in investment treaty arbitration. However, the private law dimension is subsidiary to the public international law dimension, and one cannot equate investment treaty arbitration with a private or commercial dispute settlement method. Clearly, the principal beneficiary of the international instrument granting protection to the foreign investor is the investor itself, and that is why foreign investors are given a direct right of action against a state. This does not suffice to characterize the relation between the foreign investor and the host state as essentially private. As noted by Ian Brownlie in his separate opinion in *CME* v. *Czech Republic*:

> In this context, it is simply unacceptable to insist that the subject-matter is exclusively 'commercial' in character or that the interests in issue are, more or less, only those of the investor. Such an approach involves setting aside a number of essential elements in the Treaty relation. This first element is the

[25] International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', Report of the International Law Commission on the Work of its 53rd Session, Official Records of the General Assembly, 56th Session, Supplement No. 10, UN Doc. A/56/10, November 2001.

[26] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009), para. 2.19.

significance of the fact that the Respondent is a sovereign State, which is responsible for the well-being of its people. This is not to confer a privilege on the Czech Republic but only to recognize its special character and responsibilities. The Czech Republic is not a commercial entity.[27]

The use of the method of international commercial arbitration to settle investment disputes that have a public international law character naturally results in a certain tension between the public international law nature of the dispute – because such disputes are concerned with the assessment of the exercise by a state of its sovereign powers under international law – and the private character of the dispute settlement method.

Equally, there is an opposition between the public and private functions of international dispute settlement. While the private function focuses on the settlement of the dispute between the parties, the public function of dispute settlement has a much broader ambit. Because of the general system of international investment protection, which goes beyond the mere bilateral relations between the host state and the home state of the foreign investor, investment treaty arbitration may influence generally the behaviour of states in the future, and may therefore, in terms of function, be equated with international interstate arbitration and litigation. The public function is inherent in public international law dispute settlement. However, it should be kept in mind that the choice of arbitration as a dispute settlement mechanism comes with certain intrinsic concepts and principles that may not be deviated from at the risk of denaturing the very essence of international arbitration. While it is undoubtedly true that because of the involvement of a state acting in its sovereign capacity international investment tribunals' decisions have a broader impact than awards in international commercial arbitration, this does not imply that international investment tribunals would have to respect the same principles as administrative courts. This book is not concerned, however, with the public function of investment treaty arbitration, but rather with the procedural implications of the public international law foundation of that system, since it is not necessarily the public function of investment treaty arbitration that affects the procedure, but rather its public international law character. The quality of the obligations at stake in investment treaty arbitration determines the public international law

[27] *CME Czech Republic BV* v. *Czech Republic*, UNCITRAL, Final Award, 14 March 2003, Separate Opinion of Ian Brownlie, para. 74.