ICSID Review, Vol. 29, No. 2 (2014), pp. 451–473
doi:10.1093/icsidreview/sit051 Published Advance Access March 27, 2014

ARTICLE

Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights

Tania Voon[1], Andrew Mitchell[2] and James Munro[3]

Abstract—Several States have terminated international investment agreements (IIAs) in recent years—some alarmed at unexpected outcomes in certain investor–State cases, and others simply updating their IIAs as they conclude wider economic partnership agreements. States' attempts to extinguish investor rights through the consensual termination of an IIA raise complex legal issues. As a threshold matter, investors are capable of deriving legal 'rights' under an IIA that may interfere with attempts at termination. However, the grant of such rights under an IIA depends on its specific wording and context. Moreover, although a pre-existing treaty breach for which a formal claim has already been brought cannot be affected by a subsequent termination, States parties to an IIA are free to agree to extinguish investor rights that have not yet been exercised, even with respect to a pre-existing breach. In terminating an IIA on the basis of mutual agreement States parties also have (and have been shown to exercise) the power to override so-called 'survival' clauses commonly found in IIAs, thereby excluding all future rights and claims under the treaty. This conclusion is based on fundamental precepts of the law of treaties and is unaffected by any alleged doctrine of 'acquired rights'.

I. INTRODUCTION

In the last five to ten years, States parties have increasingly had reason to terminate their international investment agreements (IIAs), which exist in the form of bilateral investment treaties (BITs) as well as preferential trade agreements incorporating investment provisions. In some instances, pre-existing IIAs have been terminated in conjunction with the conclusion of a new comprehensive trade

[1] Associate Dean (Research) and Professor, Melbourne Law School, The University of Melbourne, Australia. Email: tania.voon@unimelb.edu.au. We gratefully acknowledge the generous financial support provided for this research by the Australian National Preventive Health Agency and the Australian Research Council, as well as the advice and assistance of the McCabe Centre for Law and Cancer. We also thank David Heaton for his excellent research assistance. The opinions expressed here are our personal views as academics and are not necessarily shared by any employer or other entity. Any errors or omissions are ours.

[2] Professor, Melbourne Law School, The University of Melbourne, Australia. Email: a.mitchell@unimelb.edu.au.

[3] PhD (Law) Candidate and Researcher, Melbourne Law School, The University of Melbourne, Australia. Email: munroj@unimelb.edu.au.

agreement including updated investment protections, for example as between Australia and Chile,[4] Peru and South Korea,[5] Chile and South Korea[6] and Peru and Singapore.[7] The European Union (EU) has also expressed its intention to replace the IIAs between its individual Member States and third countries with EU-level agreements, as part of broader preferential trade agreement negotiations.[8] The revised investment provisions tend to be more conservatively drafted by governments alarmed by broad interpretations and unanticipated outcomes in some investment disputes.[9] For example, more modern investment agreements may include additional protections for policy space through the inclusion of an annex on indirect expropriation, or clarifications on the scope of fair and equitable treatment.[10]

Specific disputes may also provide an independent motivation for parties to terminate an IIA. Parties are particularly where these disputes affect important public policy measures that countries may not have expected to be constrained by IIAs,[11] such as Philip Morris' litigation against Australia's tobacco plainpackaging measures[12] and Vattenfall's litigation against Germany's nuclear phaseout.[13] Parties may also decide to terminate an IIA simply because they no longer consider it useful. For example, it has been reported that the Czech Republic has agreed to terminate several IIAs with fellow EU Member States[14] because they were no longer considered necessary after the Czech Republic's accession to the EU. A number of studies in recent years have also found no empirical relationship

[4] Free Trade Agreement between the Government of Australia and the Republic of Chile (signed 30 July 2008, entered into force 6 March 2009) ('Australia–Chile FTA') annex 10-E.

[5] Free Trade Agreement between the Republic of Korea and the Republic of Peru (signed 21 March 2011, entered into force 1 August 2011) ('South Korea–Peru FTA') art 9.17.

[6] Free Trade Agreement between the Republic of Korea and the Republic of Chile (signed 15 February 2003, entered into force 1 April 2004) art 21.4 ('Korea–Chile FTA').

[7] Free Trade Agreement between the Republic of Peru and the Republic of Singapore (signed 29 May 2008, entered into force 1 August 2009) ('Peru–Singapore FTA') art 10.2.

[8] See European Parliament and Council Regulation (EC) 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40, preambular recital 5, art 3; European Commission, 'EU takes key step to provide legal certainty for foreign investors' *News Release* (21 June 2012) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=808> accessed 30 January 2014.

[9] See Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009) 262; Suzanna Spear, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 J Intl Econ L 1037, 1037–45.

[10] See eg Australia–Chile FTA (n 4) ch 10; United Nations Conference on Trade and Development, 'Recent Developments in International Investment Agreements' *IIA Monitor* (August 2005); Spear (n 9) 1037–45.

[11] Spear (n 9) 1037–45; James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 J of World Investment & Trade 928, 929.

[12] Philip Morris Limited, 'Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging' *News Release* (27 June 2011) <http://www.pmi.com/eng/media_center/press_releases/pages/pm_asia_plain_packaging.aspx> accessed 30 January 2014; Philip Morris Limited, 'Written Notification of Claim by Philip Morris Asia Limited to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments' (27 June 2011) <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx> accessed 30 January 2014.

[13] See Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute *Vattenfall v. Germany (II)*', IISD Briefing Note (June 2012) <http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf> accessed 30 January 2014.

[14] Luke Eric Peterson, 'Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments', *Investment Arbitration Reporter* (1 February 2011) <http://www.iareporter.com.ezp.lib.unimelb.edu.au/articles/20110201_13> accessed 30 January 2014.

between IIAs and increased flows of foreign direct investment, undermining the *raison d'être* of IIAs[15] and providing a potential impetus for termination.

A recent report by the United Nations Conference on Trade and Development (UNCTAD) notes the various strategies used by countries attempting to 'balance the rights and obligations of States and investors', including replacing or simply terminating treaties. The report points out that, 'by the end of 2013, more than 1,300 bilateral treaties will be at the stage where they could be terminated or renegotiated at any time'.[16]

Yet the legal implications of terminating or denouncing IIAs are a source of continuing academic and professional debate. At the heart of the debate lies the question whether investors continue to have rights and remedies under IIAs following their termination or denunciation. This question has assumed increased importance as various States have contemplated termination or denunciation of IIAs as a means of ensuring their ability to govern. To date in exploring this issue most literature[17] has focused on the effectiveness of *unilateral* termination or denunciation of an IIA.[18] In this article, we build on that body of literature by considering the largely unexplored area of the impact on investors' rights of termination of IIAs by mutual *consent* of the States parties to the agreement. The legal implications of mutual termination of a treaty are quite different from those of unilateral termination, particularly because it is the will of States acting together that forms the source of legal obligations under a given treaty.

This article begins in Section II by exploring the nature of investors' rights pursuant to international investment agreements. We conclude that such rights may be conferred directly or indirectly by the relevant treaty depending on its terms, but that in general the right to arbitration cannot be said to crystallize until accepted by the investor through the initiation of a claim. Section III of the article then examines whether an investor's right to bring a claim for a *pre-existing* breach of an IIA is capable of surviving a termination by the mutual agreement of the States parties to the IIA. We argue that States parties may through mutual termination extinguish 'unexercised' rights, but not 'exercised' rights (that is, where the investor has already formally initiated a claim). Section IV considers the impact of survival clauses in IIAs on mutual termination, concluding that the law of treaties allows parties to agree to abrogate survival clauses in such circumstances. Section V explores the concept of 'acquired rights' under public international law and suggests that this concept does not limit parties' ability to extinguish investors' treaty-based rights in terminating an IIA by agreement. In our conclusion, Section VI, we offer some final thoughts on how States parties can

[15] See eg Alex Berger, Matthias Busse, Peter Nunnenkamp and Martin Roy, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (2010) Staff Working Paper ERSD-2010-13, World Trade Organization Economic Research and Statistics Division <http://www.wto.org/english/res_e/reser_e/ersd201013_e.pdf> accessed 30 January 2014; Australian Productivity Commission, 'Bilateral and Regional Trade Agreements' *Productivity Commission Research Report* (November 2010) 265–75 <http://www.pc.gov.au/projects/study/trade-agreements> accessed 30 January 2014.

[16] 'International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal', IIA Issues Note No 4 (UNCTAD 2013) 1.

[17] But see Harrison (n 11) 941–9.

[18] See eg 'Denouncing International Agreements—A Way Out of Arbitration?', IIA Issues Note No 2 (UNCTAD 2010); Gisela Bolivar, 'The Effect of Survival and Withdrawal Clauses in Investment Treaties: Protection of Investments in Latin America' in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 162, 168; Antonios Tzanakopoulos, 'Denunciation of the ICSID Convention under the General International Law of Treaties' in Rainer Hofmann and Christian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos Publishing 2011) 75.

best achieve their objectives in undertaking a mutual termination of an IIA, primarily by making clear the parties' intentions with respect to rights and obligations arising under the IIA and the effect of survival clauses.

II. THE NATURE OF INVESTORS' RIGHTS IN INTERNATIONAL INVESTMENT AGREEMENTS

A. *The Direct and Derivative Rights Theories in International Investment Law*

Traditionally, international law was viewed as the province of States, to the exclusion of private actors such as investors. To the extent that individuals were affected, governed or aided by international law, this conception was seen as flowing from duties of States imposed by international law.[19] This strict view of the subjects of international law has been overtaken in recent decades by a recognition that States are no longer the exclusive actors in international law.[20] Non-State actors receive rights to bring claims under public international law in a diversity of disciplines ranging from human rights to criminal law and environmental matters.[21]

In the context of international investment law, the move from a State-centric approach to international law to a more inclusive recognition of non-State actors is reflected in the development of investor–State dispute settlement (ISDS). ISDS was designed in part to counter[22] the political overtones and simplistic approach to more complex transnational relationships of the pre-existing system of diplomatic protection, under which an investor could obtain redress for a host State's conduct only to the extent that it could persuade its home State to take action on its behalf.[23]

The key issue in investment law is not whether investors are capable of receiving rights under international law (for they must certainly be), but whether a given IIA, properly construed, confers rights on investors,[24] and what type of rights those are. In particular, does the IIA confer rights directly on investors, or do investors enjoy merely derivative rights flowing from the host State's duties and the home State's rights under the treaty? Debate exists at a general level as to the rights conferred by IIAs.

McLachlan, Shore and Weiniger, among others, strongly advocate[25] for what they term the 'direct rights theory', under which the substantive rights asserted 'belong to the claimant investor itself' rather than 'to that investor's home State,

[19] See eg Lassa Oppenheim, *International Law: A Treatise* (2nd edn, Longmans, Green & Co 1912) vol 1, 362–64 s 289 (citations omitted); see also Lord McNair, *The Law of Treaties* (2nd edn, Clarendon Press 1961) 322, 336–7.

[20] Hersch Lauterpacht (ed), *International Law: A Treatise* (7th edn, Longmans, Green & Co 1948) 21 s 13a. See also Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992) vol 1, 16 s 7.

[21] See eg Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (adopted 4 November 1950, entered into force 3 September 1953) art 34; Conference of the Parties (COP) serving as the Meeting of the Parties to the Kyoto Protocol, 'Guidance on the implementation of Article 6 of the Kyoto Protocol,' Decision 3/CMP.6 (10–11 December 2010) paras 18–20.

[22] See Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 61–2; Jeswald Salacuse, *The Law of Investment Treaties* (OUP 2010) 11.

[23] *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, paras 78–9; *Mavrommatis Palestine Concessions (Greece v United Kingdom)* [1924] PCIJ Rep Series A, No 2, 12.

[24] Jennings and Watts (n 20) 16, s 7.

[25] McLachlan and others (n 22) 61 para 3.54; 62 para 3.58; 63–5 paras 3.62–3.64.

asserted on behalf of the State by the investor' (the latter being the 'derivative rights theory').[26] Douglas similarly states that '[t]he functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State.'[27] The main argument given in support of the direct rights theory is that it is 'better able to explain the concepts that are created by investment treaty arbitrations'.[28] These concepts include the ability of an investor to succeed in a claim despite the assertions of its home State that the tribunal lacks jurisdiction, the ability of investors to waive their rights to bring a claim, the fact that investors are not required to exhaust domestic remedies before bringing a claim in the absence of a specific treaty provision, and the fact that the calculation of compensation does not take account of the injury to the investor's home State.

This view is buttressed by some investor–State arbitral awards,[29] although the matter is not without controversy even within that sphere.[30] The direct rights theory conceives of ISDS as an exception or contradiction to the system of diplomatic protection, leading to the conclusion that investors themselves obtain rights under IIAs.[31] However, as discussed further below, the text of the relevant IIA may not support the conception of ISDS as contrary to diplomatic protection, and public international law rules concerning treaty creation and interpretation are also not necessarily consistent with the direct rights theory as applied in the context of treaty termination.

B. *The Right to Bring a Claim: Procedural or Substantive?*

A related issue concerns the specific 'right' of an investor to bring a claim that a host State has breached an IIA to an arbitral tribunal pursuant to the dispute settlement provisions of the IIA. According to one description, provision for ISDS of this kind in an IIA constitutes a unilateral offer by each State of consent to arbitration with investors, and therefore further evidence in favour of the direct rights theory.[32] A further consideration is whether investors obtain merely procedural rights to invoke a claim under an IIA (with substantive rights accruing to the States parties), or also direct substantive rights.[33] The latter view aligns more closely with the direct rights theory, although it may depend on the treaty text, as discussed further below.

[26] ibid 61 para 3.53.
[27] Zachary Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration' (2003) 74 B YB Intl L 151, 182.
[28] McLachlan and others (n 22) 63–4 para 3.62.
[29] See *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 141; *Corn Products International Inc v United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008) para 173; *Ecuador v Occidental Exploration and Production Co* [2006] QB 432.
[30] See *The Loewen Group Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003) para 233 (emphasis added).
[31] See eg John Dugard, 'Fourth Report on Diplomatic Protection' (2003) UN Doc A/CN.4/530, para 112; Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 33 para 65; McLachlan and others (n 22) 61–2; Jan Paulsson, 'Arbitration Without Privity' (1996) 10(2) ICSID Rev—FILJ 232, 255–56.
[32] See eg 'Denouncing International Agreements' (n 18); McLachlan and others (n 22) 61 para 3.53, 54 para 3.27.
[33] See Douglas (n 31) 34–5; Kate Parlett, *The Individual in the International Legal System—Continuity and Change in International Law* (CUP 2011) 109–10; Francisco González de Cossío, 'Investment Protection Rights: Substantive or Procedural?' (2011) 26(2) ICSID Rev—FILJ 107, 108–10; *Archer Daniels Midland Company (ADM) and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007) para 173; *Corn Products v Mexico* (n 29) para 169.

If an investor obtains under an IIA merely a procedural right—that is, the right to initiate a claim for breach of the IIA—then the investor will access the benefit of the IIA's substantive provisions only by exercising that procedural right.[34] If the substantive provisions of the IIA are validly terminated before the investor has exercised its procedural right by bringing a claim with respect to a pre-existing breach, the investor may find itself with a procedural right to initiate a claim but no substantive provisions on which to base that claim. The conclusion that an investor obtains both procedural and substantive rights under an IIA incorporating an ISDS mechanism avoids this odd scenario, recognizing that procedural rights are meaningless without substantive rights.[35]

The distinction between procedural and substantive rights of investors under IIAs may be salient in contexts such as the scope of most-favoured-nation (MFN) provisions[36] or the impact of countermeasures on investors.[37] However, in our view, the distinction has limited practical relevance in relation to the mutual termination of IIAs. As discussed below, survival clauses tend to preserve all of the provisions of an IIA, both procedural and substantive, for the benefit of an investor for a certain period after its termination. Further, our overall conclusion in this paper extends to procedural and substantive rights of investors, both of which we regard as capable of extinguishment by the mutual agreement of the relevant States parties to the IIA. Even under municipal law, the right to litigate is not inviolable. As one example, both common and civil law traditions allow the denial of the right to litigate on the grounds of *lis pendens* to avoid parallel proceedings over the same matter.[38] This limitation on the right to litigate under municipal law has, at least to some extent, found application in both investor–State disputes and in public international law more broadly.[39] Nevertheless, as elaborated further in Sections II.E and III below, the sequence of the alleged breach, the purported termination by the States, and the exercise of the right to bring a claim by the investor may be critical in determining the legal implications of the claim.

C. *The Offer to Arbitrate in International Investment Law*

Recent unilateral denunciations of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention')[40] and IIAs have generated significant debate over the 'offer to arbitrate' in international investment law. On one view, such an offer has no legal effect until accepted by an investor[41] (through the initiation of proceedings),[42]

[34] Douglas (n 31) 34–5.

[35] *ADM v Mexico* (n 33) Concurring Opinion of Arthur Rovine, paras 43–5.

[36] Nartnirun Junngam, 'An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference' (2010) 15 UCLA J of Intl L and Foreign Affairs 399, 509.

[37] González de Cossío (n 33) 109–12.

[38] Filip De Ly and Audley Shephard, 'ILA Final Report on Lis Pendens and Arbitration' (2009) 25 Arb Intl 3, 7–13; Campbell McLachlan, 'Lis Pendens' in *International Litigation* (Martinus Nijhoff 2008) 270–82.

[39] See eg Machlan (n 39) 411–13, 458–65.

[40] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention').

[41] See eg Christoph Schreuer, 'Consent to Arbitration' (2005) 2(5) Transnatl Dispute Management 7 (updated February 2007).

[42] cf Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 353, 358.

based on the common law logic of contract, whereby the 'offeror remains the master of its offer' and retains the ability to revoke the offer until it is accepted.[43] On this view, consent to ISDS cannot be legally perfected until both offer and acceptance have occurred, which suggests that the offer alone cannot confer on the investor a legally binding right to arbitration.[44] That is the general view we adopt, given the basis of IIAs in public international law as discussed in the remainder of this article. On another view, an offer to arbitrate in an IIA is legally binding upon the conclusion of the treaty,[45] based on the German law tradition of protecting the offeree while the offer is pending, and constraining the offeror's ability to revoke the offer.[46] A third, related, approach focuses on the binding nature of the offer on the international plane.[47] According to this approach, the offer to arbitrate should ordinarily be considered legally binding because it is either contained in a binding treaty or constitutes a binding unilateral declaration under public international law. The implication of this approach, as well as the ICJ jurisprudence on which is relies, is that a host State's offer to submit to arbitration is binding under public international law[48] regardless of whether the beneficiary is privy to the offer. In practical terms, this vests investors with a legal right to accept such an offer.

D. *The Relevance of Global Public Law and International Human Rights Law*

Some commentators have argued that international investment law forms part of a broader move towards global constitutional law or global administrative law, in the sense that it protects investors from State interference through oversight by arbitral tribunals.[49] Certain features of ISDS are said to:

> subject the regulatory conduct of states to control through compulsory international adjudication to an unusual extent. And it is precisely because of the potential of these internationally generated adjudicative norms and mechanisms to exert a strong disciplinary influence over domestic administrative programmes that investment arbitration should be seen to constitute a powerful species of global administrative law.[50]

From that perspective, IIAs might be more likely to be read as conferring direct rights on investors, which States cannot revoke. Yet the contours of 'global administrative law' still appear vague and unsettled,[51] and its application has been

[43] Michael Nolan and Frederic Caivano, 'Limits of Consent—Arbitration without Privity and Beyond' in M A Fernandez-Ballesteros and David Arias (eds), Liber Amicorum *Bernardo Cremades* (La Ley 2010) 873, 875; Andrés Mezgravis and Carolina González, 'Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked' (2012) 7 Transnatl Dispute Management 1, 5.

[44] Nolan and Caivano (n 43) 875.

[45] ibid 875–86; Mezgravis and González (n 43) 5–10; Harrison (n 11) 943.

[46] Nolan and Caivano (n 43) 876. See also Thomas Wälde, 'Investment Arbitration Under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation' (1996) 12 Arb Intl 429, 435–36.

[47] Nolan and Caivano (n 43) 877–95; Mezgravis and González (n 43) 6–10. See also Michael Nolan and Frederic Sourgens, 'A Preliminary Comment—The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study' (2007) 5 Transnatl Dispute Management 33, 38–9.

[48] See Nolan and Caivano (n 43) 880–90. See also Oscar Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 251.

[49] Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2012) 12, 14, 15, 373.

[50] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) EJIL 121, 122. See also Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1, 2–3.

[51] Van Harten and Loughlin (n 50) 122; Benedict Kingsbury and Megan Donaldson, 'Global Administrative Law' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2008) para 1, <www.mpepil.com> accessed 30 January 2014.

recognized by proponents as involving an 'ambitious and novel understanding of state liability in investment arbitration'.[52] Tribunals may be unlikely to be swayed by this academic discourse in its present form, in the absence of a concrete connection to the applicable law.

In a similar vein, one might argue that developments in international human rights law should be referred to in determining the nature and extent of investors' rights in international investment law, given the existence of certain similarities in the content of these two bodies of law and their structural similarity in protecting individuals from State conduct.[53] A comparison with human rights law might suggest that investors should be regarded as deriving direct rights from IIAs, given the 'irreversible character'[54] of human rights obligations and the fact that human rights treaties 'are not a web of inter-State exchanges of mutual obligations' but rather 'concern the endowment of individuals with rights'.[55] Yet this description of the nature of human rights itself demonstrates a clear distinction with international investment law. The two bodies of law 'have evolved along different normative and institutional paths',[56] and 'the investment treaty obligations of states are not coterminous with their human rights obligations'.[57] International investment law is founded on reciprocity[58] and consent, whereas international human rights law is founded on universality. The characterization of human rights should therefore not play a significant role in determining the nature and revocability of investor rights. Not surprisingly, although some investment tribunals have relied on parallels with human rights,[59] in general they have been reluctant to refer to human rights jurisprudence.[60]

E. *The Primacy of Public International Law*

In our view, despite the special nature of international investment law; the potential analogies to administrative, constitutional or human rights law; and the move away from traditional methods of diplomatic protection, IIAs are still treaties forming a part of public international law and entered into between States parties. Although IIAs may confer some rights on investors, the source of these rights (as well as the

[52] Montt (n 49) 6.

[53] See eg Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 82, 94; Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Dupuy and others, 97, 98–9; Ioana Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms' in Dupuy and others, 310, 335.

[54] Menno Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 EJIL 469, 472. See also Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) ('VCLT') art 60(5); Human Rights Committee, 'General Comment No 26: Continuity of Obligations' (1997) paras 3–5.

[55] Human Rights Committee, 'General Comment No 24: Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant' (1994) para 17.

[56] Hirsch (n 53) 99.

[57] Douglas (n 31) 36. See also *ADM v Mexico* (n 33) para 171.

[58] See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 72.

[59] Reiner and Schreuer (n 53) 94–5; James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 Duke J Comp and Intl L 77, 83–9. See eg *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 200; *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)00/2, Award (29 May 2003) para 116 fns 134, 136 and para 122 fn 140.

[60] Reiner and Schreuer (n 53) 88–90; Hirsch (n 53) 106. See eg *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Decision on Jurisdiction (24 December 1996); *Biloune v Ghana Investments Centre*, UNCITRAL (1989) 95 ILR 183, 202–3; *Grand River Enterprises Six Nations, Ltd et al v United States of America*, UNCITRAL, Award (12 January 2011) para 63.

obligations of States thereunder) lies in the will and consent of the States parties. As such, the States parties have the freedoms granted to them within the confines of public international law to modify or terminate their treaty obligations, taking account of particular circumstances discussed further below, such as where the investor has already exercised their rights to commence arbitration.

In a recent article, Robert writes that a 'public international law paradigm tends to privilege the role of states because it focuses on the system's treaty basis and locates the field within a broader corpus of international rules'.[61] However, the paradigm she is discussing draws on analogies to international trade law and international human rights law, whereas the public international law rules we are applying in this article (eg rules on treaty formation, termination and interpretation) arguably 'apply directly rather than by way of analogy'.[62] Moreover, we aim to contribute to discussion on these issues, keeping in mind the likelihood that States will begin to draw 'more heavily on public international law . . . paradigms in the field's adolescence'.[63]

In any case, the nature of the rights conferred on an investor by a specific IIA, and the point at which an offer to arbitrate contained in that IIA becomes legally binding, must ultimately depend on the specific terms of the IIA properly read in their context and in the light of the treaty's object and purpose, pursuant to the relevant rules of interpretation.[64] The significance of the treaty text in interpreting the meaning and significance of consent to arbitration has been recognized by several commentators[65] and is supported by certain arbitral decisions.[66] In some instances, the treaty provisions themselves will demonstrate whether the conception of ISDS as an exception to diplomatic protection (hence conferring rights directly on investors) is apt in the case of that particular treaty.

Thus, according to Crawford:

> a standard bilateral or regional investment treaty is an interstate agreement, to which individual investors are not privy. It is a matter of interpretation whether the primary obligations . . . created by such a treaty are owed to qualified investors directly, or only to the other contracting state(s) . . . . [O]ne might argue that bilateral investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection, and that . . . the rights concerned are those of the state, not the investor.[67]

Schreuer similarly writes:

> Not all references to investor/State arbitration in BITs constitute binding offers of consent by the host State . . . . For instance, the States may promise to accede to a demand by an investor to submit to arbitration by stating that the host State 'shall consent' to arbitration in case of a dispute. If the host State refuses to give its consent, it would be in breach of its obligation under the BIT, but a mere promise to give consent

61 Roberts (n 58) 74.
62 ibid 50.
63 ibid 90.
64 See Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 242.
65 See eg Emmanuel Gaillard, 'The Denunciation of the ICSID Convention' (2007) 237(112) NYLJ 1, 3; Tietje and others (n 18) 28–30.
66 See eg *Plama v Bulgaria* (n 29) para 141; *Corn Products v Mexico* (n 29) para 169; *Methanex Corporation v United States of America*, UNCITRAL, Partial Award (7 August 2002) para 120; *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) para 133.
67 James Crawford, 'The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 9 AJIL 874, 887–8.

will hardly be accepted as amounting to consent. Therefore, in such a situation any remedy must, in the first place, lie with the treaty partner to the BIT.[68]

Numerous additional examples can be found in the text of particular IIAs. For instance, the preambular recital in the IIA between the United States and Uruguay—'[r]ecognizing the importance of providing effective means of asserting claims and *enforcing rights* with respect to investment ... through international arbitration'[69]—suggests that this treaty may confer on investors independent rights to bring arbitral claims under it. This position contrasts with the IIA between India and Mozambique, which appears to provide a role for the investor's home State in determining whether and how an investment dispute may be brought.[70] Similarly, the Australia–United States Free Trade Agreement (FTA) allows an investor's home State to request consultations with the host State on the subject of allowing ISDS to resolve a particular claim and establishing the relevant procedures for the claim.[71]

Some IIAs expressly require host States to consent to the submission of an investment–State dispute to arbitration upon the initiation of a claim.[72] This kind of requirement lends weight to the common law logic discussed above. However, other IIAs omit this requirement[73] or state that the contracting parties' offer to submit to arbitration is 'irrevocable'[74] or that they 'unreservedly and bindingly consent'[75] to an investor's ability to bring a claim. This type of treaty provision lends weight to the second and third approaches discussed above.

A related point is that the procedural frameworks in which ISDS takes place may also affect the conception of investors' rights and the ability of States to withdraw consent. For example, Article 26 of the ICSID Convention allows States to 'require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration'. IIAs that nevertheless 'limit or remove' the obligation to exhaust local remedies might be read as implying that investors have independent rights to avail themselves of ISDS.[76] Pursuant to Article 25(1) of the ICSID Convention, jurisdiction over a particular dispute is contingent on 'consent in writing' by the 'parties to the dispute' (that is, the host State and the investor), and after the parties have granted their consent to submit the dispute to the Centre that consent may not be unilaterally withdrawn.[77] Although the host State

[68] Schreuer (n 41). See also Dolzer and Schreuer (n 64) 242.

[69] Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investments (signed 4 November 2005, entered into force 1 November 2006) preamble (emphasis added).

[70] Agreement between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments (signed 19 February 2009, not yet in force) arts 9.2 and 9.3.

[71] Free Trade Agreement between the Government of the United States and the Government of Australia (signed 18 May 2004, entered into force 1 January 2005) art 11.16.

[72] See eg Agreement between Japan and the Islamic Republic of Pakistan concerning the Promotion and Protection of Investments (signed 10 March 1998, entered into force 29 May 2002) art 10.2.

[73] See eg 2008 German Model Bilateral Investment Treaty, art 13 <http://italaw.com/sites/default/files/archive/ita1025.pdf> accessed 30 January 2014; 2003 Italian Model Bilateral Investment Treaty, art X <http://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf> accessed 30 January 2014.

[74] Agreement between the Government of the People's Republic of China and the Government of Malta on the Promotion and Protection of Investments (signed 22 February 2009, entered into force 1 April 2009) art 9.4.

[75] 2008 German Model BIT (n 73) art 10.2.

[76] See Van Harten and Loughlin (n 50) 124. See also *Achmea BV v The Slovak Republic (formerly Eureko BV v The Slovak Republic)* UNCITRAL, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para 245.

[77] See also the context provided by ICSID Convention (n 40) art 25(2).

would routinely provide its consent by legislation or treaty, the investor would normally be expected to provide its consent after the dispute has arisen.[78] Finally, under the most commonly used arbitration rules in investor–State dispute settlement, deadlines are fixed for the submission of jurisdictional objections relatively early in the proceedings.[79] A purported termination of an IIA forming the basis for a jurisdictional objection to a pre-existing claim would therefore generally need to occur before such deadlines.

III. THE EFFECT OF MUTUAL TERMINATION ON PRE-EXISTING INVESTMENT TREATY BREACHES

We now turn to assess the impact of mutual termination of an IIA on the rights of investors, assuming that the IIA does confer some rights directly or indirectly on investors and that it does contain an offer to arbitrate that is capable of generating at some point a legally binding obligation to submit to ISDS.

A. *The Legal Basis for Mutual Termination*

Article 54 of the Vienna Convention on the Law of Treaties (VCLT)[80] provides for termination of an IIA in accordance with the following general rules:

> The termination of a treaty or the withdrawal of a party 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.

IIA provisions concerning how the treaty may be terminated usually relate only to unilateral termination[81]—that is, termination by one party without the consent of the other. The ability of the parties to terminate by mutual agreement therefore derives from customary international law as reflected in VCLT Article 54(b). Thus, Oppenheim has stated that a 'treaty, although concluded forever or for a period of time which has not yet expired, may nevertheless *always* be dissolved by mutual consent of the contracting parties'.[82]

[78] See *Lanco International Inc v Argentine Republic*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction (8 December 1998) paras 30, 32, 43–4; *Československa obchodní banka as v Slovak Republic*, ICSID Case No ARB/97/4, Decision on Jurisdiction (24 May 1999) paras 37–8.

[79] ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (April 2006); Arbitration Rules of the United Nations Commission on International Trade Law ('UNCITRAL Arbitration Rules') (1976) art 23.2.

[80] VCLT (n 54) art 54(b).

[81] See 2004 Canadian Model Bilateral Investment Treaty, art 52 <italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed 30 January 2014; 2012 United States Model Bilateral Investment Treaty, art 22 <www.state.gov/e/eb/ifd/bit/index.htm> accessed 30 January 2014; 2008 German Model BIT (n 73) art 13; 2003 Indian Model Bilateral Investment Treaty, art 16 <http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp> accessed 30 January 2014. cf Agreement between the Government of the Republic of Korea and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments (signed 6 September 1996, entered into force 16 September 1999) art 12.4.

[82] Oppenheim (n 19) 571 s 537 (emphasis added). See also Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 292.

B. *The Rebuttable Presumption against Retroactive Treaties*

The law of treaties creates a presumption against treaties having retrospective effects. Article 28 of the VCLT provides:[83]

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

This presumption would apply to a treaty that operates to terminate an existing treaty, as is often the case in mutually terminating investment treaties, as foreshadowed above. More specifically, Article 70(1) of the VCLT creates a presumption against the termination of a treaty operating retrospectively:

> 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:
>
> (a) releases the parties from any obligation further to perform the treaty;
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

These presumptions in Articles 28 and 70(1)(b) may be displaced by a clear indication of the intention of the parties, due to the opening words ['Unless the treaty otherwise provides or the parties otherwise agree' in Article 70(1) and 'Unless a different intention appears from the treaty or is otherwise established' in Article 28]. Thus, the International Law Commission (ILC) commentary to draft Article 28 said:

> There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effects if they think fit. It is essentially a question of their intention.[84]

Other commentators have also emphasized the ability of the parties to determine the consequences of terminating a treaty.[85] Placing to one side survival clauses and 'acquired rights' (discussed below), parties to an investment treaty can therefore choose to end the treaty with retrospective effect. The impact of such a decision on investors' rights with respect to a pre-existing breach of the treaty is likely to depend on whether those rights have been exercised at the time of termination, ie whether the investor has already initiated a formal dispute pursuant to the ISDS mechanism in the IIA (or, put differently, whether the tribunal has already been seized before termination). The investor might not yet have done so, for example, because the investor is pursuing mediation, is unaware of the relevant act or is in the course of exhausting local remedies before it can bring an investment claim. We consider below the implications of unexercised and exercised rights.

[83] VCLT (n 54) art 28.

[84] ILC Draft Articles on the Law of Treaties with Commentaries (1966) (II) YB ILC 211, art 24. See also Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 248.

[85] Hervé Ascensio, 'Article 70—Convention of 1969' in Oliver Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties—A Commentary* (OUP 2011) 1585, 1589 para 6; Jennings and Watts (n 20) 1311 s 657.

C. *Retroactive Extinguishment of Unexercised Rights*

The presumption established under Article 70(1)(b) of the VCLT accords with the default position under public international law, whereby a State's responsibility for an internationally wrongful act (such as the breach of an investment treaty) may continue even after the relevant rule of international law ends or is modified.[86] However, that default position may be altered by the agreement of the parties pursuant to public international law, just as the parties may agree to depart from the presumption against retroactive treaties.

The International Court of Justice (ICJ) in *Ambatielos (Jurisdiction) (Greece v United Kingdom)* stated that a provision bringing a 1926 treaty into force 'might, in the absence of any saving clause, have been regarded as putting the Treaty into full operation so as to completely to wipe out' an earlier 1886 treaty 'and all its provisions, including its remedial provisions, and any claims based thereon'.[87] That conclusion was avoided in *Ambatielos* because of a declaration attached to (and, as determined by the court, forming part of) the 1926 treaty. The declaration specifically provided that the 1926 treaty 'does not prejudice claims on behalf of private persons based on the provisions of the [1886 treaty]', which could continue to be referred to arbitration pursuant to the dispute settlement provisions of the 1886 treaty.[88] Although the Court declined to give retrospective effect to the particular provision at issue in the *Ambatielos* case,[89] it acknowledged that '[s]uch a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation'.[90]

Accordingly, general international law does not prevent States from mutually terminating an investment treaty with retroactive application, including absolving responsibility for past treaty breaches in relation to which an investor has not yet made a claim. The question of whether such breaches could amount to violations of *jus cogens* norms of international law will not generally arise in the international investment law context and is not considered further here.

D. *Retroactive Extinguishment of Exercised Rights*

More problematic is the retroactive extinguishment of *exercised* rights upon mutual termination (that is, where an investor has already initiated a claim—or, perhaps, expressed its consent in writing to arbitration over a particular dispute, as noted above).[91]

ICJ jurisprudence casts doubt on whether, once invoked, jurisdiction can be annulled by way of a subsequent 'extrinsic fact' such as the termination of an IIA.[92] The leading case in this regard is *Nottebohm*.[93] In that case, relying on

[86] See eg ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) 58–9 (7); *Northern Cameroons (Preliminary Objections)* [1963] ICJ Rep 15, 35.
[87] *Ambatielos (Jurisdiction) (Greece v United Kingdom)* [1952] ICJ Rep 28, 43–44.
[88] ibid 36.
[89] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius 1986) vol 1, 387–8.
[90] *Ambatielos (Jurisdiction)* (n 87) 40. See also Fitzmaurice (n 89) 387.
[91] See nn 77–78 and accompanying text.
[92] See eg *Nottebohm Case (Lichtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111, 123; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Preliminary Objections) (Libyan Arab Jamahiriya v United Kingdom)* [1998] ICJ Rep 9, 23–24; *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland) (Jurisdiction of the Court)* [1973] ICJ Rep 3, 14–16.
[93] *Nottebohm* (n 92) 121.

Guatemala's acceptance of the compulsory jurisdiction of the ICJ, Liechtenstein filed a dispute against Guatemala in the ICJ on 17 December 1951. However, Guatemala's acceptance of jurisdiction expired on 26 January 1952.[94] Guatemala argued that the Court had no jurisdiction to consider the matter after this date. The Court rejected this argument, holding that '[a]n extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of jurisdiction already established'.[95] The Court assessed its jurisdiction on the basis of the laws in force when it was seized of the matter.

This Decision seems to suggest that the mutual termination of an IIA *after* a dispute has been brought cannot impugn the IIA Tribunal's jurisdiction. In respect of an International Centre for the Resolution of Investment Disputes (ICSID) arbitration, this conclusion seems consistent with Article 25(1) of the ICSID Convention, as noted above,[96] as mutual termination of an existing dispute may amount to an invalid attempt to unilaterally withdraw consent to jurisdiction with respect to that dispute. However, *Nottebohm* does not directly address retroactivity. For example, Guatemala did not seek to retroactively rescind its consent to jurisdiction as at 17 December 1951. It merely argued that such consent subsequently lapsed. Therefore, while the principle espoused in *Nottebohm* and appearing in subsequent judgments of the Court is a useful starting point, it is by no means determinative.

Further guidance can be sought from the jurisprudence of investor–State tribunals dealing with jurisdictional objections on grounds of bad faith, estoppel, or abuse of process. Investor–State tribunals have recognized the existence in public international law of a doctrine of estoppel,[97] the essential features of which were established in the *Temple of Preah Vihear Case*.[98] Applying this principle, a strong *prima facie* argument could be made that a host State is estopped from relying on a retroactive termination to extinguish jurisdiction in respect of an existing claim. That State has represented through its offer to arbitrate in an IIA that it is willing to be made accountable to investors for contraventions of the IIA through ISDS. An investor that has initiated a claim under the IIA has relied on that representation by bringing the claim. A retroactive termination effectively prejudices that reliance to the detriment of the investor. Although no applicable precedent or jurisprudence provides definitive guidance on this precise question, tribunals have been willing to accept jurisdictional arguments based on estoppel and good faith in other contexts.[99]

Several tribunals have been called on to assess whether a host State can invoke a 'denial of benefits' provision after an investor has brought a dispute. Since these provisions are usually silent on whether they can operate retrospectively in respect

[94] ibid 122.
[95] ibid 123.
[96] See n 77 and accompanying text.
[97] *RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/16, Award (10 December 2010) para 7.1.2; *Petrobart Limited v Kyrgyz Republic*, SCC Case No 126/2003, Award (29 March 2009) 67; *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 159; *Pope & Talbot Inc v Canada*, UNCITRAL (26 June 2000) para 111.
[98] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 101, 143–4 (dissenting opinion of Sir Percy Spender); see also Thomas Cottier and Jörg Paul Müller, 'Estoppel' in Wolfrum (n 51).
[99] See eg *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and Others*, ICSID Case No ARB/07/3, Award (28 December 2009) paras 211–17; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras 94–5; *RSM v Grenada* (n 97) para 7.1.2.

of existing claims, tribunals have looked to notions of fairness, legitimate expectations, and the object and purpose of IIAs, in determining their application.

Three tribunals have held that denial of benefits provisions can operate only prospectively.[100] They found that to hold otherwise would undermine the object and purpose of the treaty to create a 'long-term' framework for the 'promotion and protection' of investments, and could 'lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date'.[101] According to this reasoning, mutual termination of an IIA could not extinguish investors' rights in respect of claims already made, as this would unfairly subvert investors' legitimate expectations.

Conversely, another Tribunal saw 'no valid reasons to exclude retrospective effects' of the denial of benefits provision,[102] reasoning that the very existence of a denial of benefits provision in an IIA puts potential investors on notice that 'the protection afforded by the [IIA] is subject during the life of the investment to the possibility of a denial of the [IIA's] advantages'.[103] Consequently, investors have no legitimate expectation that a denial of benefits provision will not be invoked, including with retrospective effect.

However, IIAs rarely (if ever) provide for mutual termination with *retrospective* effects, and routinely include survival clauses under which investors continue to have rights for many years after the termination. As such, investors may have a legitimate expectation that the rights they have exercised in initiating a claim against a host State cannot be retroactively extinguished by that State, as this would lead to 'potential unfairness of a State deciding, as a judge in its own interest, to thwart such an arbitration after its commencement'.[104]

On balance, it seems unlikely that a tribunal would accept the retroactive extinguishment of investors' rights in respect of claims already brought, particularly if this involves demonstrable unfairness or bad faith on the part of the host State.[105]

IV. THE OPERATION OF SURVIVAL CLAUSES UPON MUTUAL TERMINATION

A. *Survival Clauses under the Law of Treaties*

IIAs typically contain a survival clause,[106] which provides that, in the event the IIA is terminated, the rights and obligations continue to apply to protected investments established prior to the date of termination for a certain period, usually between 10

[100] *Plama v Bulgaria* (n 29) paras 159–65; *Veteran Petroleum Ltd v Russia*, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009) paras 514–5. See also *Philip Morris Asia Ltd v Australia*, UNCITRAL, PCA Case No 2012-12, Procedural Order No 4 (26 October 2012) paras 38, 58; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICISD Case No ARB/07/14, Award (22 June 2010) para 225.

[101] *Plama v Bulgaria* (n 29) 162; *Veteran v Russia* (n 100) para 514.

[102] *Ulysseas v Ecuador*, UNCITRAL, Interim Award (28 September 2010) para 173.

[103] ibid.

[104] *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on Jurisdiction (1 June 2012) para 4.83.

[105] See also Bolivar (n 18) 168.

[106] See eg 2003 Indian Model BIT (n 81) art 16; 2012 United States Model BIT (n 81) art 22; 2004 Canadian Model BIT (n 81) art 52; 2008 German Model BIT (n 73) art 13; 2003 Chinese Model BIT, reprinted in Dolzer and Schreuer (n 64) 242, 352–9; United Kingdom Model Bilateral Investment Treaty reprinted in Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) 228–40, art 14.

and 20 years.[107] For example, the Agreement between New Zealand and Hong Kong for the Promotion and Protection of Investments[108] provides in Article 13:

> (1) This Agreement shall remain in force for a period of fifteen years and shall continue in force thereafter unless after the expiry of the initial period of fourteen years, either Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement....
> (2) In respect of investments made prior to the date when the notice of termination becomes effective, *the provisions of Articles 1 to 12 shall remain in force for a further period of fifteen years* from that date.[109]

The inclusion of such a clause arises from the core purpose of IIAs: to attract foreign investment by generating confidence in a country's domestic regimes through protections on the international plane.[110] Survival clauses provide protection for investors who make investments in reliance on the IIA's prohibition of adverse or unfair governmental measures, in the event that the host State subsequently terminates the IIA.

The practical implication of survival clauses is that an investor may initiate an investor–State dispute in respect of a (pre-existing or subsequent) breach of an IIA, even after the host State has terminated the IIA, and even over the objections of host States.[111] Less clear, however, is whether survival clauses apply to the termination of an IIA by the *mutual consent* of the parties. Although some survival clauses indicate implicitly that they apply only to the unilateral mode of termination provided for in the relevant IIA,[112] many on their face appear to cover both unilateral and mutual termination.[113] Article 54(b) of the VCLT provides no guidance on whether a survival clause continues to operate in respect of mutual termination in accordance with the terms of Art 54(b).[114]

This raises the question whether the parties can exclude the operation of a survival clause with respect to mutual termination, even if the survival clause could be read as covering this form of termination. Again, guidance on this question may be found in the VCLT, Article 70(1)(b) of which (as indicated above) establishes a presumption that termination 'does not affect any right... created through the execution of the treaty prior to its termination'. In the drafting of Article 70, a distinction was made between 'executed stipulations' (by which a treaty has 'established or recognised a permanent state of affairs' that cannot be undone by a

[107] 2012 United States Model BIT (n 81) art 22; 2004 Canadian Model BIT (n 81) art 52; 2008 German Model BIT (n 73) art 13. See also Harrison (n 11) 937–8.
[108] Agreement between the Government of New Zealand and the Government of Hong Kong for the Promotion and Protection of Investments, Hong Kong–New Zealand (signed 6 July 1995, entered into force 5 August 1995) ('Hong Kong-New Zealand Agreement') art 13.
[109] (emphasis added).
[110] See Harrison (n 11) 931–3, 93–7; Bolivar (n 18) 168.
[111] *Veteran v Russia* (n 100); *Hulley Enterprises Ltd (Cyprus) v Russian Federation*, PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Yukos Universal Ltd (Isle of Man) v Russian Federation*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009).
[112] Hong Kong–New Zealand Agreement (n 108) art 13.2.
[113] See 2004 Canadian Model BIT (n 81) art 52; 2012 United States Model BIT (n 81) art 22; 2008 German Model BIT (n 73) art 13; 2003 Indian Model BIT (n 81) art 16.
[114] Sinclair (n 84) 183. See also Aust (n 82) 263; ILC Draft Articles on the Law of Treaties with Commentaries (n 84) 249.

breakdown of relations between the parties) and 'executory stipulations' (which create 'an obligation to act . . . on an ongoing and permanent basis').[115] This distinction was used to explain the consequences of termination as follows: 'the termination of a treaty . . . can only affect the continuing obligations, and cannot *per se* affect or prejudice any right acquired under it, or undo or reverse anything effected by any clause of an executed character in the treaty'.[116] However, the application of this distinction is not necessarily straightforward, and the ILC did not incorporate the distinction in its drafting of Article 70.[117] The presumption in Article 70(1)(b) therefore arguably preserves both procedural rights (eg rights to bring a claim) and substantive rights (eg protection from expropriation) established under survival clauses for the period specified,[118] notwithstanding termination by consent.[119]

In any case, Article 70(1) of the VCLT begins with the words '[u]nless the treaty otherwise provides *or the parties otherwise agree*'.[120] Thus, as noted above, the parties to an IIA have the ability to agree to *modify* the presumption in Article 70(1)(b), including by precluding the operation of the survival clause at the time of termination. In order to do so, in terminating the treaty by consent, the parties would need to expressly indicate that the survival clause and any rights and obligations conferred by it are extinguished. By way of analogy, although Article 70(b) of the VCLT may mean that a boundary established by a treaty withstands the termination of that treaty, '[t]his is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent'.[121]

B. *Examples of Abrogation of Survival Clauses upon Mutual Termination*

Numerous examples exist of parties agreeing to terminate their IIAs and revoke the incorporated survival clauses. Australia and Chile terminated their IIA when they negotiated a trade agreement containing an investment chapter including ISDS. In spite of the survival clause providing that the IIA effectively continued for 15 years,[122] Australia and Chile agreed upon termination to amend this period to three years.[123] When Peru consensually terminated its IIAs with South Korea and Singapore,[124] the parties terminated '*all* the rights and obligations derived from the said Treaty' at the date of termination.[125] However, with respect to

[115] Lord Arnold McNair, 'La terminaison et la dissolution des traités', (1928) 22(II) RCADI 463, 496–7, as translated by Ascensio (n 85) 1592 para 12.
[116] Fitzmaurice (n 89) 403 (emphasis added). See also McNair (n 19) 531–2.
[117] Ascensio (n 85) 1592 para 13.
[118] See Mezgravis and González (n 43) 21; Nolan and Caivano (n 43) 891–910.
[119] See Bert Vierdag, 'Some Remarks on the Effect of the Termination of a Treaty Under Article 70 of the 1969 Vienna Convention on the Law of Treaties' in Ige Dekker and Harry Post (eds), *On the Foundations and Sources of International Law* (Asser Press 2003) 179–85; André Nollkaemper, 'Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties' in Dekker and Post, 187–92.
[120] (emphasis added).
[121] *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6, 37 (3 February 1994). See also Ascensio (n 85) 1593 para 14.
[122] Agreement between the Government of Australia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments (signed 9 July 1996, no longer in force) art 12.3.
[123] Australia–Chile FTA (n 4) annex 10-E.
[124] Peru–Singapore FTA (n 7) art 10.20; Peru–South Korea FTA (n 5) art 9.17.
[125] Peru–Singapore FTA (n 7) art 10.20; Peru–South Korea FTA (n 5) art 9.17 (emphasis added).

breaches occurring before the termination, investors remained entitled to bring claims for three years from termination.[126]

In terminating the IIA between Korea and Chile through a new preferential trade agreement, the parties stated that the original IIA 'shall no longer be in effect upon the entry into force of this Agreement, as well as all the rights and obligations derived from' it.[127] The original IIA included in Article 12 a survival clause providing for an additional 15 years of operation following termination and a condition that any 'termination of this Agreement shall be effected without prejudice to any rights or obligations accruing or incurred under this Agreement prior to the effective date of such . . . termination'.[128] Article 12 of the original IIA did not survive the termination because the attempt at entrenching rights was superseded by the parties' agreement. Even if the original IIA had not been terminated, this would still be the case, pursuant to Article 30(3) of the VCLT, which states:

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

In summary, nothing in the law of treaties necessitates the operation of survival clauses following the termination of IIAs by consent. Nevertheless, parties need to make clear their intentions regarding the survival clause when terminating an IIA. One report suggests that the Czech Republic takes a double-barrelled approach to neutering survival clauses when terminating its IIAs by consent: the parties not only agree to terminate the treaty, but at the same time agree to amend the survival clause so that it 'shall not further apply'.[129]

These examples suggest that terminations by consent are more likely to occur where the parties to an IIA agree to replace it with another IIA or an alternative trade and investment regime.[130] By contrast, policy-based determinations by governments that IIAs and their dispute procedures are no longer in their interests have thus far tended to result in unilateral action.[131]

V. THE IMPACT OF 'ACQUIRED RIGHTS' ON MUTUAL TERMINATION

The above analysis is based largely on first principles and general precepts of the international law of treaties. The question therefore arises whether any principle of 'acquired rights' in public international law alters that position, such that the

[126] Peru–Singapore FTA (n 7) art 10.20; Peru–South Korea FTA (n 5) art 9.17.
[127] Korea–Chile FTA (n 6) art 21.4 (emphasis added).
[128] ibid arts 12.3–12.4.
[129] Peterson (n 14).
[130] See also Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 27 January 2009, entered into force 1 April 2010) ('Switzerland–China BIT') art 14.
[131] See eg Luke Eric Peterson, 'South Africa Pushes Phase-out of Early Bilateral Investment Treaties After At Least Two Separate Brushes with Investor–State Arbitration', *Investment Arbitration Reporter* (23 September 2012); Luke Eric Peterson, 'Venezuelan Exit From ICSID Raises Questions Both Legal and Financial' *Investment Arbitration Reporter* (21 January 2012); Luke Eric Peterson, 'Ecuador Becomes Second State to Exit ICSID; Approximately Two-thirds of Ecuador's BIT Claims were ICSID-based', *Investment Arbitration Reporter* (17 July 2009); Luke Eric Peterson, 'Australian government commission sees little need for investment protections and arbitration mechanisms in international economic agreements', *Investment Arbitration Reporter* (16 December 2010).

parties to an IIA are restricted in agreeing to extinguish prior rights, obligations, or dispute settlement avenues of investors upon mutual termination of the IIA.

Pursuant to Article 36(1) of the VCLT, a treaty may provide a right to a third State if the parties intend to accord such a right and the third State assents to that right being accorded; however, 'unless the treaty otherwise provides', such assent is 'presumed so long as the contrary is not indicated'.[132] In its commentary on the equivalent of VCLT Article 36, the ILC was 'unanimous in thinking that until the beneficiary State had manifested its assent to the grant of the right, the parties should remain free to revoke or amend the provision without its consent'.[133] Under VCLT Article 37(2), the parties to a treaty providing a right to a third State may not revoke or modify that right 'if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State'.

In his work on the law of treaties, Lord McNair indicated with respect to the rights of third States[134] that 'the parties who concluded a treaty can lawfully terminate it by agreement' assuming that 'they alone are interested in the continued existence and that no third party has acquired an interest in its preservation'.[135] More broadly, McNair stated in a separate article that 'respect of acquired rights' constitutes 'a legal doctrine which can be said to have already attained a large measure of recognition as a general principle of law'.[136]

Writing in the context of international investment law, Harrison goes further, suggesting that the irrevocability without consent of third State rights in relation to treaties between States now extends to treaties between States and international organizations, and between international organizations themselves. Harris postulates that this could 'represent a general principle which is applicable to all third party right holders'.[137] The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTSIO)[138] (to which Harrison refers) does indicate, similarly to VCLT Article 37(2), that a right properly granted to a third international organization under a treaty between such parties '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 organisation'. However, the VCLTSIO is in fact not yet in force, having attained only 30 of the 42 necessary States parties (in addition to 12 international organizations becoming parties).[139] Moreover, unlike the general presumption under VCLT Article 36(1) that the third State assents to a right being accorded, Article 36(2) of the VCLTSIO requires a third organization to positively assent in accordance with its rules to the grant of a right under a treaty in the first place. The ILC indicated that this modification was 'justified by the fact that the international organization has not

[132] VCLT (n 54) art 36(1).
[133] ILC Draft Articles on the Law of Treaties with Commentaries (n 84) 229.
[134] In relation to the vesting of rights in third parties, McNair refers to chapter XVI of his work, suggesting that he was referring to a State: McNair (n 19) 309–21.
[135] ibid 506 (footnotes omitted).
[136] Lord Arnold McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 B YB Intl L 1, 16.
[137] Harrison (n 11) 944.
[138] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (signed 21 March 1986, not yet in force) ('VCLTSIO').
[139] Multilateral Treaties Deposited with the Secretary-General: Ch XXIII—Law of Treaties as at 26 June 2013 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en#1> accessed 30 January 2014.

been given unlimited capacity'.[140] Investors similarly do not have 'unlimited capacity' as subjects under public international law.

These differences between the VCLT as applicable to third States and the VCLTSIO rules that would apply to third organizations reflect underlying differences between States and international organizations, highlighting the difficulties with simply transposing general notions of rights to third parties from one context to another, particularly in the absence of a solid legal basis for doing so. The suggestion that third party rights should be dealt with in the same way regardless of whether the third party is a State, an international organization or, indeed, an investor, also seems at odds with the ILC commentary on an earlier draft of the VCLT, which states that the equivalent of Article 70(1)(b) (discussed above)[141] 'relates only to the right, obligation or legal situation of the States parties to the treaties created through the execution, *and is not in any way concerned with the question of the "vested interests" of individuals*'.[142] Like VCLT Article 37(2), Article 70(1)(b) relates to the preservation of existing rights, including those accorded to third States pursuant to Article 36. The ILC's express exclusion of individuals' rights from Article 70(1)(b) casts doubt over the legitimacy and legality of extending and generalizing VCLT rules on the preservation of third States' rights to individuals such as investors.[143]

In any case, Sornarajah has expressed 'doubt as to whether the doctrine of acquired rights forms a part of international law at all'.[144] Moreover, the inclusion of a survival clause in an IIA might be interpreted as taking the place of and thereby excluding any customary doctrine of acquired rights.[145] Even accepting that such a doctrine exists, the concept of acquired or vested rights 'appears in a number of quite diverse situations'.[146] The boundaries of any such 'general principle of law'[147] are unclear. The notion of acquired rights might prevent states from modifying concessions granted under specific contracts with investors[148] or from modifying rights provided under domestic law.[149] It has also been used in the context of United Nations administrative law[150] and in connection with State succession.[151] Wittich, while describing 'the doctrine of acquired rights' as 'a

[140] ILC Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations with Commentaries ('Draft Articles between States and International Organizations') (1982) II(2) YB ILC 17, 43.

[141] See above s III.B.

[142] ILC Draft Articles on the Law of Treaties with Commentaries (n 84) 265 (emphasis added).

[143] ILC Draft Articles between States and International Organizations (n 140) 42–3.

[144] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 419.

[145] Ascensio (n 85) 1597 para 22.

[146] Ko Swan Sik, 'The Concept of Acquired Rights in International Law: A Survey' in Herman Meijers and Bert Vierdag (eds), *Essays on International Law and Relations in Honour of AJP Tammes* (TMC Asser Institute 1977) 120, 126.

[147] Statute of the International Court of Justice art 38(1)(b)–(c). There is no mention of 'acquired rights' in Bin Cheng, *General Principles of Law as applied by International Court and Tribunals* (CUP 1987).

[148] See eg *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 431. See also *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005) paras 87, 256–7; *International Thunderbird Gaming Corporation v Mexico*, NAFTA/UNCITRAL, Final Award (26 January 2006) para 208; McNair (n 131) 16.

[149] See eg *Robert E Brown Case (United States v United Kingdom)* (1923) 6 RIAA 120; *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award (31 March 2010). See also ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) II(2) YB ILC 31, 32; Sik, above n 146, 127.

[150] See eg Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (Stephens & Sons 1976) vol 3, 418.

[151] See eg *Certain German Interests in Polish Upper Silesia (Merits)* [1923] PCIJ Ser B, No 6; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 432; McNair (n 131) 17; Stephan Wittich, 'Article 70—Consequences of the Termination of a Treaty' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 1207 para 30 (citation omitted).

general principle of law',[152] concedes that beyond such special cases, the 'extension [of the doctrine] to other rights of individuals is highly doubtful'.[153]

The notion of acquired rights in public international law might nevertheless prevent States from eliminating concessions granted under specific contracts with investors or other entities, removing rights provided to investors under domestic law, or expropriating foreigners' property[154] (a matter likely to be separately governed by an IIA while it is on foot). The Tribunal in *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmelteri AS v Republic of Kazakhstan* stated that it is 'well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights'.[155] The Tribunal made this statement in determining that a right granted to an investor by domestic legislation to seek arbitration before an investor–State tribunal could not be abrogated by repealing that legislation before the right was exercised with respect to a pre-existing breach. In reaching this determination, the Tribunal also relied on a form of survival clause contained in the domestic legislation itself.[156]

The *Rumeli* Decision does not provide evidence of a *general* doctrine of acquired rights under public international law that is capable of constraining the modification or extinguishment of rights conferred on investors by a *treaty.* Instead, the general rule would be as indicated above, that States parties are capable of determining the consequences of terminating a treaty between them:

> when two treaties between the same parties succeed each other . . . subject to contrary intention of the parties, the applicability of the rule *lex posterior derogat priori* is generally accepted, and consequently it depends on the later treaty whether and to what extent rights acquired under the previous treaty are to be respected.[157]

Lord McNair reached a similar conclusion:

> In most, but not all, cases the execution of treaty provisions results in the acquisition by the parties or, through them, by their nationals of new rights. These rights receive the additional protection arising from the well-recognized principle of respect for acquired rights, which requires in this case that *in the absence of any provision express or implied from the circumstances of the termination or from any instrument evidencing an agreed termination*, acquired rights remain unaffected by the termination.[158]

This conclusion accords with the fact that domestic systems of law (from which this 'general principle' is supposedly derived at least in part) do not universally prevent acquired rights from being modified.[159] In his survey on the theory of acquired rights and municipal conflicts of law in respect of time, Sik found that 'the principle of non-retroactivity is often justified by reference to respect for acquired rights'.[160] However,

[152] Wittich (n 151) 1208 para 32 fn 72.
[153] ibid 1207 para 30 (citation omitted).
[154] See eg McNair (n 131) 15.
[155] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmelteri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (21 July 2008) para 335.
[156] ibid para 333.
[157] Sik (n 146) 137.
[158] McNair (n 19) 532 (emphasis added; footnote omitted).
[159] Sik (n 146) 121.
[160] ibid 124.

as Sik explained, this does not mean that acquired rights are necessarily inviolable and immune from retroactive laws, even in a domestic context:

> Any respect for the effects brought about by an earlier law can only exist by virtue of the newer succeeding law, and it is therefore a matter of legislative policy whether such respect is in fact granted.[161]

The notion that investors acquire under an IIA rights that cannot be subsequently modified or extinguished by the States that created the IIA would also run counter to basic precepts of public international law. The principle of 'consent' lies at the core of the law of treaties under public international law: States *must* consent in order to be legally bound by a treaty.[162] The corollary is that States parties to a treaty must be capable of together bringing the treaty to an end. This is one of the key principles differentiating the legal consequences of unilateral termination from those of termination agreed mutually by the relevant States. Although the terms of a treaty may regulate and impose on States obligations relating to its termination on a unilateral (ie non-consensual) basis, preventing all the parties to a treaty from agreeing to terminate the treaty would be contrary to the concept of consent on which the law of treaties is founded.

VI. CONCLUSION

Our analysis shows that, as a matter of public international law, neither the notion of 'acquired rights' nor the common inclusion of survival clauses in IIAs poses an inherent obstacle to the termination of IIAs by consent. On the contrary, States parties to an IIA may choose to rescind all investors' past, present and future rights under an IIA (with the exception of exercised rights—that is, claims that are already on foot). However, certain presumptions will generally apply to a termination if not otherwise agreed. In particular, the termination will be presumed to be governed by the existing treaty terms, including any survival clause; not to affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; and not to be retroactive. Thus, to the extent that the IIA confers rights on investors, these may persist unless the parties agree to expunge them.

Parties seeking to terminate an IIA by consent should include certain elements in their termination agreement if they intend to modify these presumptions. The agreement should state that: no provisions of the relevant IIA survive the termination or have any operation after the termination; the survival clause and dispute settlement mechanism have no further effect; all past, present and future rights, obligations and responsibilities of the parties and any rights of any investor of any party arising from the IIA are extinguished, including any recourse to domestic or international dispute settlement fora for treaty breaches arising before or after the termination. Any unexercised rights of investors pursuant to a provision of the original IIA or a doctrine of acquired rights would be extremely

[161] ibid 124.
[162] Jutta Brunnée, 'Consent' in Wolfrum (n 51).

unlikely to survive a termination agreement that explicitly covers these elements. Of course, the eccentricities of individual IIAs may also need to be accounted for.

The conclusions reached in this article are based on public international law rules concerning the creation, interpretation and termination of treaties: rules admittedly developed in an earlier era in which States were at the undisputed centre of all transnational relationships. Traditionally, a public international law perspective has not been central to ISDS, due in part to the narrow background of arbitrators.[163] Consequently, arbitrators have tended to be socialized to adopt a commercial law type template in their decision-making, arising from their training and practice in international commercial arbitration,[164] and they have thus tended to adopt an expansive, investor-friendly approach to questions governing their access to ISDS.[165] These tendencies could be explained in part by the ad hoc nature of ISDS tribunals, creating a system whereby individual arbitrators' career or financial interests are linked to the wider promotion of the ISDS industry and a broader set of claimants being able to trigger use of the system.[166] As noted above,[167] a focus on the object and purpose of IIAs basis as providing stability to 'long-term' investments and 'legal certainty'[168] could also lend support to investors' arguments that they have directly acquired rights under IIAs and that these rights cannot be terminated by the will of the States parties alone.

Against this background, the international law-focused reasoning and conclusions proposed in this article may appear unattractive to arbitrators and contrary to investors' rights and expectations. Where the treaty termination in question is not only mutual (as contemplated here) but also involves replacement of investment protections through a new IIA or similar regime, arbitrators might be more likely to regard the results as fair and reasonable. Nevertheless, the Tribunal in *Eureko v Slovak Republic* rejected an argument that the rights obtained by the investor under the applicable IIA were displaced by subsequent equivalent or similar rights provided under EU law, finding that '[t]he protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law'.[169] As the replacement of an existing treaty may often be designed to increase State regulatory autonomy,[170] a similar reaction by tribunals may be likely even in the case of mutually terminated treaties.

The proper interpretation and application of public international law rules regarding the creation, and termination of IIAs will certainly be influenced by other factors in investment disputes that arise concerning mutual termination of IIAs. These factors will include the political drivers of the States parties involved, the likely aggressive responses of investors, and the disciplinary backgrounds of the chosen arbitrators. We hope nevertheless that the international legal basis of IIAs will be fully understood and addressed in resolving these issues both in abstract debates and in individual disputes.

[163] Roberts (n 58) 83, 87.
[164] ibid 55, 77.
[165] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall L J 211, 237–8.
[166] ibid 220.
[167] See above s III.D.
[168] *Liman v Kazakhstan* (n 100) para 225.
[169] *Eureko v Slovak Republic* (n 76) para 245.
[170] See International Investment Policymaking in Transition (n 16) 1; Roberts (n 58) 78.