
Masters and Guardians of International Investment Law

How to Play the Game of Reassertion

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A. Introduction

Any discussion of reassertion of control by Contracting Parties over international investment law must proceed on the basis of certain assumptions about the nature of the legal order within which it takes place. The intellectual framework for this chapter is provided by the mainstream view of public international law, described by James Crawford in the following terms:

[I]nternational law is the product of a process of claim and counterclaim, assertion and reaction, by Governments as representative of States and by other actors at the international level. This implies a diffuse judgment which may take time to arrive at, although where the judgment is widely shared or is formulated by a body recognised as authoritative in the matter, such as the Security Council acting under Chapter VII of the Charter or a competent regional organisation, or a competent court or tribunal, the judgment may be arrived at fairly rapidly and may stick. But it is always the process of articulation and assessment that occurs where rights or interests are engaged at the international level that matters. International law is a form of *praxis* involving diffuse, decentralised but nonetheless observably real authority. At the same time it is a process in which rights are asserted and duties relied on by reference to norms based on express agreement or custom. International law is both a process of assertion and reliance *and* a system of principles and rules: together they constitute the course of international law, confounding those critics who simplistically assert that it can be one (process) or the other (system) but not both.¹

¹ J. Crawford, 'Chance, Order, Change: The Course of International Law', *RCADI*, 365 (2013), 9, 21–22 (emphasis in the original); also V. Lowe, *International Law* (Oxford University Press, 2007), chap. 2.

It goes without saying – but may go even better by being said – that international law is not the only frame of reference for discussion of international investment matters, nor is it necessarily a better frame than others. Much valuable work in the field is done by scholars with a background in international commercial arbitration, international commercial litigation and domestic public law; by scholars of critical-theoretical or inter-disciplinary persuasions; and by economists and political scientists. But the perspective of public international law, articulated with appropriate modesty and with no necessary claim to greater legitimacy, can at the very least usefully complement these voices.²

International investment law is public international law.³ There is nothing conceptually different, innovatory or *sui generis* about it. All of its constituent elements flow from entirely unremarkable and well-known law-making techniques of international law and could constitute *sui generis* only if that concept were to be given a remarkably broad meaning, as including everything that is not identical to pre-existing blueprints. This point may sound like, but is not meant to be, a pejorative one. The manner in which investment protection law is built from its constitutive parts reflects perfectly decent workmanship on the part of treaty drafters, particularly in treaties concluded since 2014. But it is nevertheless the case that neither the particular elements nor the broader systemic structures present any conceptual or *sui generis* challenges to traditional canons of international legal reasoning.⁴

That legal questions posed regarding international investment law pose no conceptual challenges to traditional legal reasoning is a proposition that fully applies to inquiry in relation to reassertion. Assertion of control – whether met by acceptance, acquiescence, indifference or objection – is the usual process by which international law is made. But

² This is a fairly close paraphrase of R. O’Keefe, *International Criminal Law* (Oxford University Press, 2015), vii; see similarly I. Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), v–vii; R. Churchill and V. Lowe, *The Law of the Sea*, 3rd edn. (Manchester University Press, 1999), 2–3.

³ J. Alvarez, ‘The Public International Law Regime Governing International Investment’, *RCADI*, 344 (2011); Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press, 2014), 7 *et seq.*

⁴ M. Paparinskis, ‘Analogies and Other Regimes of International Law’, in Z. Douglas, J. Pauwelyn and J. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), 73, 73; also Y. Radi, ‘In Defence of “Generalism” in International Legal Scholarship and Practice’, *Leiden Journal of International Law*, 27 (2014), 303.

this does not mean that all questions will have easy and straightforward answers or that all challenges will easily fit within familiar patterns of discussion and resolution. Reassertion of control by Contracting Parties in relation to a regime of international law (perceived as) dominated by bodies of international dispute settlement is certainly not unique, and one might point to similar developments in other areas of international law. But it does appear to be in some ways a relatively recent phenomenon, borne out of reflections upon the merits of increased resort to and creation of various judicial and arbitral institutions since the early 1990s. Vaughan Lowe has described this perspective in the following terms:

In the light of history, it may be that the past decade – epitomized by the remarkable focus on the legal aspects of the invasion of Iraq in 2003 and of the so-called ‘War on Terror’, by the crushing weight of the cases (now numbering around 160,000) piling on to the docket of the European Court of Human Rights, and by the emergence of international investment arbitration and international trade disputes as two of the most fecund and febrile areas of legal practice – will be seen as the high-water mark of the litigation of international disputes. It may be that there is an increasing perception that courts and tribunals are not at all well-equipped for dealing with certain kinds of international dispute.⁵

This chapter will explain how the ‘game of reassertion’ should be played and judged in the contemporary legal order.⁶ The argument will be presented in four steps. Before properly engaging with the game of reassertion in investment law, it is useful to consider how similar games have been played in the past. The first part of this chapter therefore introduces examples of assertion in international law that provide a backdrop for the discussion regarding investment law (Section B). The second part will set out the rules of the reassertion game: benchmarks of international law regarding sources, responsibility, and dispute settlement (Section C). The third part introduces the players who seek to reassert: States and, more broadly, Parties (Section D). The fourth part deals with some players and bystanders who may be affected by reassertion, including investors, non-disputing parties and Tribunals (Section E). The overall and rather uninspiring

⁵ V. Lowe, ‘The Function of Litigation in International Society’, *International and Comparative Law Quarterly*, 61 (2012), 209, 210.

⁶ See, on international law and games, R. O’Keefe, ‘Curriculum Vitae: A Prequel’, *Current Legal Problems*, 69 (2016) (forthcoming); also A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015), esp. chaps. 1, 2 and 17.

thesis is that these questions do not call for a re-examination of the conceptual underpinnings of the international legal order. What is needed is (only) a competent application of rules of the game to various situations that, while quite possibly very complex, are by no means unique in their complexity in the broader perspective of international law.

B. How the Game of Reassertion Is Played

Assertion, reaction and reassertion all contribute to making and developing international law. Assertion and contestation of control have provided an influential framework for discussing the relationship between States and international organisations.⁷ Assertion and reassertion of authority by international law-makers over settlers of international disputes is a not uncommon element of this process. How has the game of reassertion been played in international law? By way of more or less random example, one way for that to happen is for international law-makers to assert their authority in line with the position taken by international courts. Significant parts of the law of treaties and State responsibility have been developed in just these terms.⁸ Law-makers may adopt and grant seal-of-approval, through assertion, positions by international courts of questionable persuasiveness. The adoption by State practice of the position of the International Criminal Tribunal for Former Yugoslavia regarding war crimes in non-international armed conflicts may serve as an example for that proposition.⁹ In these and other comparable cases, law-makers and dispute settlers are nudging rules in the same direction. In another example, in relation to the law of the sea and maritime delimitation, Judge Peter Tomka has observed that ‘there is every indication that the lockstep march and practice of States and international judicial and arbitral bodies will continue onward, and

⁷ D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, 2006).

⁸ V. Gowlland-Debbas, ‘The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties’, in C. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 25; J. Crawford, ‘The International Court of Justice and the Law of State Responsibility’, *ibid.*, 71.

⁹ R. Cryer, ‘International Criminal Tribunals and the Sources of International Law’, *Journal of International Criminal Justice*, 10 (2012), 1045, 1051; O’Keefe, *International Criminal Law*, 126–8.

towards greater unity and coherence in the application and interpretation of legal principles'.¹⁰

But lockstep march is not the only possible form that the response by States may take. States may make the decision not to adopt questionable positions taken by courts by way of positive assertion. This may very well happen regarding the customary definition of terrorism suggested by the Special Tribunal for Lebanon.¹¹ States may successfully reassert authority so as to displace or even supersede the position of courts. The reversal of position expressed by the Permanent Court of International Justice regarding flag State jurisdiction in the *SS Lotus* case, first through treaty law and then probably through customary law, is an example of this.¹² States may attempt to reassert authority over positions taken by competent international courts, with the result that reasonable people will disagree about what the best legal position is; certain aspects of use of force¹³ and belligerent reprisals demonstrate how this can happen.¹⁴ States can also direct their disapproval at the particular adjudicator through various means: terminate consent to pending adjudication,¹⁵ refuse to participate in proceedings,¹⁶ withdraw from proceedings and refuse to comply with *res judicata*,¹⁷ criticise the adjudicator and the

¹⁰ P. Tomka, 'The Contribution of the International Court of Justice to the Law of the Sea', in D. Attard et al. (eds.), *The IMLI Manual on International Maritime Law*, Vol. I: *The Law of the Sea* (Oxford University Press, 2014), 618, 642.

¹¹ B. Saul, 'Amicus Curiae Brief on the Notion of Terrorist Acts Submitted to the Appeals Chamber of the Special Tribunal for Lebanon Pursuant to Rule 131 of the Rules of Procedure and Evidence', *Criminal Law Forum*, 22 (2011), 365; O'Keefe, *International Criminal Law*, 160.

¹² V. Lowe and A. Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice', in Tams and Sloan, *The Development of International Law*, 183–4.

¹³ E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly*, 55 (2006), 963, 966, 967, 969–70; D. Bethlehem, 'Principles of Self-Defense – A Brief Response', *American Journal of International Law*, 107 (2013), 579, 581, 583.

¹⁴ Cryer, 'International Criminal Tribunals', 1052–4.

¹⁵ PCA, 'Press Release: Arbitration between the Republic of Croatia and the Republic of Slovenia', 5 August 2015, available at: www.pccases.com/web/sendAttach/1389 (accessed 24 February 2016).

¹⁶ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014–02, Note Verbale from the Russian Federation to the PCA of 27 February 2014, available at: www.pccases.com/web/sendAttach/1315 (accessed 24 February 2016).

¹⁷ M. Nash (Leigh), *Cumulative Digest of United States Practice in International Law 1981–1988*, Book III (Washington, DC: Office of the Legal Adviser, Department of State, 1995), 3326–56.

validity of its decisions,¹⁸ withdraw consent to adjudication of future cases,¹⁹ dismantle the adjudicator²⁰ or even physically attack individual adjudicators.²¹ And, of course, States may reassert authority in a more constructive manner, strengthening rather than weakening adjudicators. The creation of the Appellate Body of the World Trade Organisation (WTO AB) may be read along these lines, and finessing rules of appointments to ensure a higher quality of individual adjudicators provides a narrower example in the European context.²²

In short, the game of reassertion of authority by international law-makers over settlers of international disputes does take place in practice. It will not necessarily be always played when a colourable excuse exists – a degree of tolerable dissatisfaction is built into the act of consent to formalised dispute settlement – and players attempting reassertion need not be successful when the game is played. But if it does happen, a prediction regarding the ‘diffuse judgment which may take time to arrive at’²³ will be difficult to make, particularly if reassertion has just begun or is in the process of being articulated or evaluated. The story of development of the law of the continental shelf may give some sense of the necessary modesty with which an international lawyer on a given day should speculate about future developments.²⁴ The proclamation by US President Truman of 28 September 1945 is usually taken as the starting point of

¹⁸ M. du Plessi, T. Maluwa and A. O’Reilly, ‘Africa and the International Criminal Court’, Chatham House International Law, January 2013, available at: www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf (accessed 24 February 2016).

¹⁹ *Request for Interpretation of Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 19 January 2009, ICJ Reports 2009, 3, para. 15.

²⁰ E. de Wet, ‘The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa’, *ICSID Review*, 28 (2013), 45.

²¹ Less common now than in days past, V. V. Veeder, ‘The Lena Goldfields Arbitration: The Historical Roots of Three Ideas’, *International and Comparative Law Quarterly*, 47 (1998), 747, 781, although a few instances of factually contested unpleasant doings do come to mind; D. Caron and L. Caplan (eds.), *The UNCITRAL Arbitration Rules: A Commentary*, 2nd edn. (Oxford University Press, 2013), 225; ‘Priyatna Abdurraiyid 1930–2015’, *Global Arbitration Review* of 17 June 2015.

²² M. Bobek, *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015).

²³ Crawford, ‘Chance, Order, Change’, 21.

²⁴ J. Crawford and T. Viles, ‘International Law on a Given Day’, in K. Ginther et al. (eds.), *Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (Berlin: Duncker & Humblot, 1994).

the process, with contributions from claims by other States, work of the International Law Commission, treaty practice through multilateral law of the sea treaties, treaty delimitation practice, judgments by various international courts and arbitral tribunals and practice of other institutions shaping the law.²⁵ What could one reasonably expect from an international lawyer who was asked to prepare a brief memorandum on issues and developments to be presented in the early morning of Monday 1 October?

A summary of rules on rules would be a good starting point, to know the benchmarks against which developments will be evaluated, with main participants in the law-making process elaborated in greater detail, and educated guesses about their likely conduct ventured (even if they might be better provided by advisers with expertise other than, or additional to law). But the results of the game – structure and content of the regime and particular rules that could emerge – would depend on many considerations: choices by players and non-players of the particular game and related games, (changing) conditions for entry and participation in the game, (changing) powers of players and possible changes in the rules of the game themselves, as well as events and developments in areas outside the game.²⁶ Even if developments are discussed in a short- to midterm perspective, much depends on the underlying and necessarily speculative assumptions about the extent of systemic changes.²⁷ It is extraordinarily hard to get the results right, particularly over an extended period of time. It is not impossible: Eli Lauterpacht's paper on drafting investment treaties from 1962 identified with remarkable perceptiveness many of the key issues that investment law was to face in the next half-century, from technical points such as the definition of investment and ambiguity of some obligations to systemic questions such as obligations of investors and links between legal protection and development.²⁸ But the

²⁵ Churchill and Lowe, *The Law of the Sea*, chap. 8.

²⁶ D. Roughton and C. Trehearne, 'The Continental Shelf', in D. Attard et al. (eds.), *The IMLI Manual on International Maritime Law*, Vol. I: *The Law of the Sea* (Oxford University Press, 2014), 137.

²⁷ Cf. two recent explorations of the crystal ball, with titles that suggest markedly different assumptions about the extent of change, J. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System* (Leiden, Netherlands: Brill, 2015); St Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law* (Cambridge University Press, 2016).

²⁸ E. Lauterpacht, 'The Drafting of Treaties for the Protection of Investment', *International and Comparative Law Quarterly Supplementary Publication*, 3 (1962), 18.

law of unintended consequences makes this hard,²⁹ so an international lawyer may very well prefer to play it safe and limit herself to setting out the rules of the game, powers of players seeking to reassert and powers of other players. The next sections will proceed to do exactly that.

C. Rules of the Game of Reassertion

The rules of the game of reassertion are the same as for the general game of international law. For the purposes of convenience, they will be discussed along the three cross-cutting categories of sources, responsibility and dispute settlement. Sources of international law include treaties, customary law, general principles of international law and possibly unilateral acts. Secondary rules of recognition of customary law are mostly set out in judicial decisions and at the moment are being synthesised by the International Law Commission (ILC).³⁰ Rules of recognition of the law of treaties are mostly set out in the 1969 Vienna Convention on the Law of Treaties (VCLT) (and, when international organisations are involved, its sister convention of the 1986 vintage) and are to a considerable extent (treated as) reflective of customary law. General principles are usually read as involving two different types of legal argument: general principles of *international* law proper³¹ and general principles of *domestic* law, which may be synthesised from commonalities in leading domestic legal systems and *mutatis mutandis* transposed to the international level.³² There is support for the proposition that unilateral acts may

²⁹ In a 1996 paper, Lauterpacht noted that ‘while it is possible to contemplate the changes in standards, it is difficult to foresee the denial to individuals of the procedural competence that has now been so widely conferred on them’: E. Lauterpacht, ‘International Law and Private Foreign Investment’, *Indiana Journal of Global Legal Studies*, 4 (1996–1997), 259, 275–6. In 1997, he was appointed as President of a Tribunal, the award of which, with the benefit of hindsight, was the starting point for the now commonplace critical discussion of investment law; *Metalclad Corporation v. Mexico*, ICSID Additional Facility Case No. ARB(AF)/97/1, Award of 30 August 2000.

³⁰ See the ILC website at: http://legal.un.org/ilc/guide/1_13.htm (accessed 24 February 2016); and P. Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press, 2016).

³¹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, UK: Grotius, 1953); A. Mitchell et al. (eds.), *Good Faith and International Economic Law* (Oxford University Press, 2015).

³² H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Harlow, UK: Longmans, Green & Co., 1927). A study group of the ILA on the use of domestic law principles for the development of international law is considering these matters; see ILA website at: www.ila-hq.org/en/committees/study_groups.cfm/cid/1033 (accessed 24 February 2016).

impose international obligations.³³ Judicial and arbitral decisions, while important in elaborating the content of rules of international law, are not sources of international law (unless law-makers adopt them into treaty or customary law, or special procedural rules exist to such effect). Sources of law are closely related to responsibility for breach of obligations, the rules on which are set out in the 2001 ILC Articles on State responsibility (2001 ILC Articles) (and, when international organisations are involved, its sister Articles from 2011 or perhaps even special secondary rules for certain organisations) and are again to considerable extent, if lesser for the latter Articles, (treated as) reflective of customary law.³⁴ Finally, the basic structural underpinning of international dispute settlement is the necessity for opt-in by disputing parties.³⁵

I would not want to overstate the certainty with which these basic rules may be articulated and applied. The law of State responsibility, set out with considerable authority in the 2001 ILC Articles,³⁶ provides a convenient example for the different shades that uncertainty over rules may cast over the game. Does its essentially inter-State structure affect the manner in which the Articles, or particular parts of the Articles, can be applied to international investment law?³⁷ Is it appropriate to analogise between the position of third States and the position of investors in relation to, say, counter-measures?³⁸ Are rules on attribution of conduct of State-owned corporations accurate and satisfactory for the purposes of

³³ *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Report No. 1974, 253, paras. 46–9; 2006 ILC Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, see ILC website at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf (accessed 24 February 2016).

³⁴ S. Olleson, *State Responsibility before International and Domestic Courts* (Oxford University Press, 2017).

³⁵ A. Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012); G. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press, 2014), 47–50; Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press, 2015).

³⁶ J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 42–4.

³⁷ *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award of 18 July 2014, fn. 10; *Gold Reserves v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, para. 679; *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, paras. 554–61; J. Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility', *ICSID Review*, 25 (2010), 127.

³⁸ K. Parlett, 'The Application of the Rules on Countermeasures in Investment Claims', in C. Chinkin and F. Baetens (eds.), *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, 2015), 389.

investment arbitration?³⁹ Is not there a slight systemic oddity when the seemingly least elaborate rules on reparations, relating to contribution to damage, end up having the greatest effect on quantum in the largest damages awards?⁴⁰ And would responsibility of States and international organisations be subject to special rules when the European Union is in some sense implicated?⁴¹ These are not trivial questions capable of straightforward answers.

Questions of similar complexity may be raised relating to sources and dispute settlement. If the scope of a primary obligation and the criteria for determining its breach are not affected by the nature of the entity invoking responsibility, is it possible for a State to oppose to an investor such interpretative materials that satisfy the criteria of Article 32 VCLT, but that investor could not have had access to?⁴² How is customary law identified in a procedural setting structured so as to preclude the usual method of generation of customary law through inter-State opposition of claims? Is the law of indirect expropriation set out in the Trans-Pacific Partnership (TPP) a codification of customary law, a crystallisation of customary law, an emerging general customary rule, a rule of special custom or nothing more than a (misleadingly described) treaty rule?⁴³ Does one interpret consent expressed in domestic law by reference to (general principles of) statutory interpretation, principles of treaty interpretation, principles of interpretation of unilateral declarations or principles developed relating to comparable regimes of international dispute settlement?⁴⁴ There is ground for reasonable disagreement on what the best answers to these questions are. But the important point is that default

³⁹ Cf. Crawford, *State Responsibility*, 161–6; A. Badia, *Piercing the Veil of State Enterprise in International Arbitration* (Alphen aan den Rijn, Netherlands: Kluwer Law, 2014); J. Dereje, *Staatsnahe Unternehmen* (Baden-Baden, Germany: Nomos, 2016).

⁴⁰ *Yukos*, paras. 1594–637; J. Gill and R. Gupta, ‘The Principle of Contributory Fault after *Yukos*’, *Dispute Resolution International*, 9 (2015), 93.

⁴¹ Cf. P. Eeckhout, *EU External Relations Law*, 2nd edn. (Oxford University Press, 2011), 262–4, with F. Hoffmeister, ‘Litigating against the European Union and Its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organisations?’, *European Journal of International Law*, 21 (2010), 723; P. J. Kuijper and E. Paasivirta, ‘EU International Responsibility and Its Attribution: From the Inside Looking Out’, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford, UK: Hart, 2013).

⁴² See *HICEE B.V. v. Slovakia*, PCA Case No. 2009–11, Partial Award of 23 May 2011, paras. 128–40.

⁴³ See 2015 Trans-Pacific Partnership, Annex 9-B, available at: <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> (accessed 24 February 2016).

⁴⁴ See *PNG Sustainable Development Program Ltd. v. Papua New Guinea*, ICSID Case No. ARB/13/33, Award of 5 May 2015, paras. 259–69.

assumptions about formation and implementation of international law will provide the vocabulary for discussing and answering them.

The final page in the rule book must contain an index of similar games. International investment law is becoming increasingly sophisticated both in its law-making and adjudicative capacities, but on many issues its pedigree is more modest than that of other similar regimes. Flicking through rules for similar games may be at the very least instructive and possibly also legally relevant for filling particular gaps. Reasonable people may disagree about what games are the most similar to international investment law.⁴⁵ The starting point should be that international investment law is part of public international law. Therefore, rules for public law and international commercial arbitration, while descriptively similar in some ways, would not be commonly included in this index (unless particular elements of those games are brought directly into investment law). Once the inquiry is located firmly within public international law, three similar games suggest themselves: the law of human rights, the law of treaties on third parties and the law of inter-State regimes – historically diplomatic protection but increasingly also trade law.⁴⁶ Of course, these are different games with sometimes very different rules, and nothing can replace a careful examination of the particular issue. And comparative reasoning must always try to capture the elusive essence of other regimes without unduly simplifying them.⁴⁷ But casting a glance towards contiguous legal regimes will provide a sense of whether or not there is a trend in international law in relation to resolving particular issues in a particular manner.

⁴⁵ A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', *American Journal of International Law*, 107 (2013), 45; V. Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press, 2015).

⁴⁶ Paparinskis, 'Analogies and Other Regimes of International Law', 73; J. Kurtz, *The WTO and International Investment Law* (Cambridge University Press, 2016). A possibly unappreciated regime of international economic law that provides for a right of an individual to submit a case against a State to arbitration is international tax law; see 2014 OECD Model Tax Convention, Art. 25(5), available at: www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf (accessed 24 February 2016).

⁴⁷ E.g. arguments for proportionality in international investment law that draw upon human rights experience: G. Bucheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015); C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015), should acknowledge the extent of contestation of proportionality in human rights literature; see chapters by Letsas and Verdirame in R. Cruft et al. (eds.), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015); also G. Husctoft et al. (eds.), *Proportionality and the Rule of Law* (Cambridge University Press, 2014).

D. Playing for the Reasserting Team

Contracting Parties – mostly but not exclusively States – will play for the reasserting team. Contracting Parties can do almost everything as law-makers. They can create treaty rules with any content whatsoever, agree on special customary rules among themselves or contribute to general customary law, create special rules of treaty law and State responsibility and create international courts and tribunals. There may be policy arguments for making particular rules, and making such rules may well have broader implications in terms of treaty and responsibility law. But this does not affect the law-making discretion, which is only limited by peremptory rules and third-party rights under international law, issues not usually perceived as being a great concern for investment law. In short, Contracting Parties can draft the rules of the games with great discretion, almost unlimited in principle and almost entirely unlimited in practice.

Their powers to tinker with the rules during the game cannot be stated in such categorical terms. Two opinions on the contested question of interpretation by Contracting Parties of treaty rules at issue in pending disputes⁴⁸ may serve as an illustration of this. James Crawford took the view that

the parties to the treaty . . . own the treaty. It is their treaty. It is not anyone else's treaty. In the context of investment treaty arbitration there is a tendency to believe that investors own bilateral investment treaties, not the states parties to them. So, for example, when the NAFTA provides for interpretation of its provisions by a Commission of states parties, this is regarded as somehow an infringement on the inherent rights of investors under the NAFTA. That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question the application of reason as they see fit.⁴⁹

Conversely, one of Crawford's academic and curial predecessors thought that

[t]his is surely against the most elementary rules of the due process of justice . . . It is very sad to see this present betrayal of principles of which the United States has long been the revered author and practitioner.⁵⁰

⁴⁸ See a recent discussion in *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012–17, Award of 24 March 2016, paras. 467–83.

⁴⁹ J. Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention', in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), 29, 31.

⁵⁰ *Methanex Corp. v. US*, UNCITRAL Arbitration, Second Expert Opinion of Sir Robert Jennings of 6 September 2001, 6–7.

That the mere presence of procedural rights for non-State actors will not suspend normal law-making processes under international law must be right. But the feeling of normative unease about an international legal order that would never question the reason of reshaping rules in pending cases is also present. Since both these views cannot be held simultaneously, the interplay of rules, principles and rules on rules should provide a framework for elaborating a compromise solution (perhaps, in the particular instance, drawing a distinction between existence and opposability of particular rules or materials). Once the rules are created, the powers and responsibilities of Contracting Parties will fall to be determined through the interplay of rules on sources, responsibility and particular primary obligations. There are certain things that Contracting Parties may do on their own and more things that they can do collectively, but the precise contours and manner of these things can no longer be determined by a general reference to law-making capacities and instead have to be articulated and implemented through the technical vocabulary of particular rules.

Contracting Parties do not have to but are likely to be States, and this has certain implications. As Vaughan Lowe has put it,

BITs [bilateral investment treaties] do not exist in isolation. They are rooted in the rich compost of municipal and international legal systems; and they can only properly be understood in that context . . . the treaties [should be] considered not as self-sufficient monads but as components in a legal process that moves through overlapping legal orders, national, regional and international.⁵¹

One consequence lies at the plane of domestic law: the persistence of the regulatory powers of the State through the permanent sovereignty over natural resources.⁵² Another one flows from the interaction of investment law and domestic law. There is considerable support for the view that ‘contribution and risk assumption form part of the core elements which characterize an investment’.⁵³ It is not unusual for

⁵¹ V. Lowe, ‘Book Review of *Commentaries on Selected Model Investment Treaties* / edited by Chester Brown’, *ICSID Review*, 30 (2015), 275, 276.

⁵² V. Lowe, ‘Regulation or Expropriation’, *Current Legal Problems*, 55 (2002), 447, 450.

⁵³ *Caratube International Oil Company v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of 21 February 2014, para. 235; also *KT Asia v. Kazakhstan*, ICSID Case No. ARB/09/8, Award of 17 October 2013, paras. 188–223; *Nova Scotia Incorporated (Canada) v. Venezuela*, ICSID Case No. ARB(AF)/11/1, Award of 30 April 2014, paras. 90–7, 105–13; *Poštová Banka, AS and Istrokapital SE v. Greece*, ICSID Case No. ARB/13/8, Award of 9 April 2015, paras. 360–71; *İçkale İnşaat Limited Şirket v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016,

domestic and international legal orders to interact in various ways.⁵⁴ But the deep, perhaps even *sine qua non* enmeshing of domestic law and the particular regime of international law may be worthy of a particular note. The third point relates to international law. International investment law is not clinically isolated from other regimes of international law, which may have consequences on the rights, powers and responsibilities of Contracting Parties both as a matter of international law and on the domestic plane.⁵⁵ These regimes may also provide a procedural, policy and political framework for articulating arguments of reassertion. The fourth point is a rather pedestrian one. Contracting Parties may *ex officio* have access to various institutions, through which they may formally and informally affect how the game is played, be that the United Nations Commission on International Trade Law (UNCITRAL), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), or the ILC.

Analogies from other regimes of international law are, as analogies must be, both similar and different. The richness of other debates should probably caution against excessive simplification of lessons for Contracting Parties of investment treaties. A procedural example is provided by attempts by certain States to reassert authority over the European Court of Human Rights. Is the lesson to take away from, say, the 2012 Brighton Declaration that Strasbourg is nudged in the direction of tightening its rules on jurisdiction and admissibility and getting better

paras. 289–91; *MNSS BV and Recupero Credito Acciaio NV v. Montenegro*, ICSID Additional Facility Case No. ARB(AF)/12/8, Award of 4 May 2016, paras. 189–90; TPP, Art. 9(1), 9-2.

⁵⁴ D. Bethlehem, 'International Law, European Community Law and National Law: Three Systems in Search of a Framework – Systemic Relativity in the Interaction of Law in the European Union', in M. Koskeniemi (ed.), *Legal Aspects of the European Union* (Leiden, Netherlands: Brill, 1997); A. Roberts, 'Comparative International Law: The Role of National Courts in Creating and Enforcing International Law', *International and Comparative Law Quarterly*, 60 (2011), 57; A. Tzanakopoulos and C. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law', *Leiden Journal of International Law*, 26 (2013), 531.

⁵⁵ P.-M. Dupuy et al. (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009); J. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012); F. Baetens (ed.), *Investment Law within International Law* (Cambridge University Press, 2013); V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press, 2014); D. Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford University Press, 2015).

judges, just as international investment arbitration?⁵⁶ Or is the structural difference relating to exhaustion of domestic remedies too significant for any analogies to be drawn? Or does it suggest that the proper way for States to reassert authority over international courts would be to introduce domestic remedies or other forms of interaction with domestic courts into investment law? Or, conversely, is the lesson that excessive integration of domestic and international rules and adjudicators is precisely the problem that needs to be addressed?⁵⁷ Or is the analogy missing the crucial teleological point that it is a very different matter for a Contracting Party to reassert control over a regime justified on utilitarian grounds than over one founded on normative considerations?⁵⁸ But does not such a dichotomy considerably simplify the heated debates about teleology both within investment law and within human rights?⁵⁹ And so on. Such glimpses from contiguous legal regimes should reinforce the modesty with which lawyers draw lessons about the likely dynamic of

⁵⁶ See Council of Europe website at: www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (accessed 24 February 2016). Indeed, NAFTA Federal Trade Commission's (FTC) practice of re-interpretation has been invoked as a possible way for Contracting Parties to reassert control: A. Speaight, 'An Aspect of Strasbourg Court Reform', in *Commission on a Bill of Rights, A UK Bill of Rights? The Choice before Us*, Vol. 1 (2012), 234, 238–42, available at: <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> (accessed 24 February 2016).

⁵⁷ P. Sands, 'The Government Is Playing a Dangerous Game Trying to Scrap the Human Rights Act', *The Guardian*, 21 October 2015; BIICL, 'Meeting Report: The Death of the Human Rights Act, the Birth of a New Constitutional Settlement?', 2 February 2016, available at: www.biicl.org/documents/882_full_meeting_report_02-02-16_human_rights_-_appg_rol_draft_meeting_2_february_2016_final.pdf?showdocument=1 (accessed 1 May 2016); 'Sub-Committee Publishes Report on British Bill of Rights Proposal', 9 May 2016, available at: www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/news-parliament-2015/hra-report-published/ (accessed 9 May 2016).

⁵⁸ L. Poulsen et al., 'Costs and Benefits of an EU-USA Investment Protection Treaty', April 2013, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf (accessed 24 February 2016).

⁵⁹ See an argument about rule of law and foreign direct investment: BIICL et al., *Risk and Return: Foreign Direct Investment and the Rule of Law*, available at: www.biicl.org/documents/625_d4_fdi_main_report.pdf (accessed 24 February 2016), and a discussion of variety of approaches to foundations of human rights: Cruft, *Philosophical Foundations of Human Rights*. Causes and effects of international investment law are themselves debated in increasingly rich and sophisticated literature; see C. Dupont and T. Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System', *Journal of International Dispute Settlement*, 7 (2016), 3.

future developments and sources of inspiration that law-makers would rely upon. For example, who would have predicted that the European Commission's proposal of a new Investment Court System⁶⁰ would entirely ignore rich European experience regarding selection of judges⁶¹ and instead emulate the structure of the Iran–US Claims Tribunal? It may be banal to say that the power to create includes the power to create odd and surprising things, but it is nevertheless true.

E. Not Playing for the Reasserting Team

The first player not playing for the reasserting team is one with considerable powers within the status quo: the investor. As far as contestation of control goes, the starting point is that investors have to take the rough with the smooth. A reflection upon various regimes of international dispute settlement will show that there is a great diversity of approaches to procedural rights (using that term in the loosest sense) of non-State actors.⁶² There are many regimes that address non-State actors, whether the emphasis is for setting up a framework for their conduct (international humanitarian law and law of the sea), providing benefits (international trade law) or viewing a beneficial state of their affairs as a goal in itself (international criminal law, to some extent environmental law) yet without obviously expressing these rules in terms of procedural rights by non-State actors at the level of international law.⁶³ Even if we live in an

⁶⁰ 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations', available at: http://europa.eu/rapid/press-release_IP-15-5651_en.htm (accessed 24 February 2016).

⁶¹ Bobek, *Selecting Europe's Judges*.

⁶² See generally K. Parlett, *The Individual in the International Legal System* (Cambridge University Press, 2011).

⁶³ This is a sweeping statement in which much hangs on the word 'obviously'. There may be some authority for viewing (some aspects of) trade and humanitarian law as giving rise to individual rights, whether at the domestic or international level: Kurtz, *The WTO and International Investment Law*, chap. 6; C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012); international criminal procedure has developed rights in relation to victims: C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2014), and litigation may play a role in international environmental law: J. Peel and H. Osofsky (eds.), *Climate Change Litigation* (Cambridge University Press, 2015); P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', *Journal of Environmental Law*, 28 (2016), 19. But even if defensible and increasingly important, the procedural rights of non-State actors are not central to these regimes.

age of adjudication,⁶⁴ there is little practice that would suggest that interpretation of legal rules that affect non-State actors, once established, is (increasingly) entrusted to judicial bodies that can hear their claims.

Even regimes most comparable to investment law suggest no obvious systemic tilt or pattern. In the post-First World War international law, States sometimes emphasised the inter-State perspective and created institutions like the US-Germany Mixed Claims Commission, where individuals had no role at all and 'the Government of the United States is the actual claimant.'⁶⁵ Articulating instead the individual-State perspective, States created the Upper Silesia Arbitral Tribunal, where individuals directly brought claims even against their own States of nationality with no interference by any other actor.⁶⁶ Other adjudicative bodies that address injuries to individuals fall somewhere between these extremes, explicitly formulating and qualifying individual rights, usually without prejudice to broader issues of principle. Examples include the (never-operating) International Prize Court, which would have provided rights to States to suppress some but not all claims by their nationals⁶⁷; the Iran-US Claims Tribunal, where 'small claims' were presented by States⁶⁸; the OECD Draft Convention on the Protection of Foreign Property, where individual claims would have been suspended during their State's claims⁶⁹; ICSID Convention, where the opposite rule operates⁷⁰ and many more examples in other tribunals (including at least one case of explicit agency in the United Nations Convention on the Law of the Sea (UNCLOS) rules on prompt release⁷¹). These are different policy choices for different circumstances rather than an elaboration of or contribution to a more general legal proposition.

Once access to international courts has been provided, non-State actors would, of course, be able to operate within a sophisticated framework of international procedural law (where powers to fulfil judicial functions may, but not necessarily will, include inherent powers, whether or not codified in the relevant documents⁷²). But there is not much that

⁶⁴ C. Greenwood, 'International Law in the Age of Adjudication', available at: http://legal.un.org/avl/ls/Greenwood_CT.html (accessed 1 May 2016).

⁶⁵ (1923) 7 RIIA 23, 26. ⁶⁶ (1928) 4 ILR 291.

⁶⁷ Convention (XII) relative to the Creation of International Prize Court, signed at The Hague, 18 October 1907, Article 4.

⁶⁸ Iran-US Claims Tribunal, Claims Settlement Declaration of 19 January 1981, Article III(3).

⁶⁹ Article 7(d). ⁷⁰ Article 27(1). ⁷¹ Article 292(2).

⁷² *ConocoPhillips Petrozuata BV and Others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of 10 March 2014 of 9 February 2016, paras. 20–38.

non-State actors could influence otherwise. As a matter of *lex lata*, whether and what courts to provide is a discretionary decision by law-makers, and the legal toolbox provides sophisticated instruments and policy arguments for a great variety of solutions. It is therefore perfectly justifiable for treaty-makers to reassert their authority through changes in treaty language that would impose particular limitations or conditions on investors' right to bring the claim, as well as to elaborate on or change treaty obligations or include particular exceptions, carve-outs or reservations. If adjudicative bodies have already been created, technical rules of investment law and other regimes of law, as well as certain general principles, could be pressed to crystallise the status quo, but it is uncertain to what extent this would be effective. The analogous regimes only reinforce the point about lack of systemic grain. One might be forgiven for thinking that the normative appeal of human rights would provide a strong argument in contestation. But the correctness of this proposition may be more obvious in debates in some States than in others,⁷³ and the winding down of the individual-State elements of the Southern African Development Community (SADC) Tribunal was ultimately effective, even if not entirely elegant.⁷⁴ Indeed, the arguments for return to diplomatic protection,⁷⁵ or some analogies drawn from international trade law, view formal isolation of non-State actors from international legal process as a worthy goal.⁷⁶

Non-disputing parties (which may include non-disputing Parties) are to some extent like investors as disputing parties, similarly reliant

⁷³ See the separate opinions to the Report of the Commission on a Bill of Rights, in which the opinion entitled 'In Defence of Rights' was signed by a minority of two who voted against the conclusions, available at: <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> (accessed 24 February 2016).

⁷⁴ See SADC website at: www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 24 February 2016); K. Alter et al., 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', *European Journal of International Law*, 27 (2016), 293; J. Sarkin, 'A Critique of the Decision of the African Commission on Human and Peoples' Rights Permitting the Demolition of the SADC Tribunal: Politics versus Economics and Human Rights', *African Journal of International and Comparative Law*, 24 (2016), 215.

⁷⁵ 2015 Brazil–Mozambique BIT, available at: www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR (accessed 24 February 2016).

⁷⁶ Whether informality limits the power of non-State actors or rather removes any formalised limitations is an open question, e.g. the apparent acknowledgement by Ukraine that its tobacco labelling-related claim against Australia was made at the request of the American Chamber of Commerce, see Interfax website at: <http://en.interfax.com.ua/news/general/270076.html> (accessed 24 February 2016).

on the existence of particular international courts and tribunals, and to some extent not alike. Their position within the structure of international dispute settlement is articulated upon the basis of policy considerations, which have been predominantly conceived as relating to public interest. Vaughan Lowe described the development of practice in the following terms, by using the NAFTA case of *Methanex v. US* (where a decision by California on limitations of production and sale of methyl tertiary-butyl ether, adopted on health grounds, was challenged) as a starting point:

[T]he question here is: how should we accommodate the public interest in such cases? It would be unthinkable for the government of the UK or the European Community to be able to adopt measures such as those in question in *Methanex*, and for a legal challenge to them to be heard and decided *in camera*, and for the decision to remain 'confidential'. Should the position be any different where such measures are the focus of an investment dispute heard by an international arbitration tribunal? . . . [W]hat kinds of public interest are appropriate to be put before international tribunals, and who should decide that question? Who should be permitted to make representations in the public interest? . . . And how should the public interest be presented and represented in the proceedings? . . . [D]evelopments in investment tribunals, in the NAFTA and investment treaties, and in the WTO, are part of a clear trend towards increasing what might, somewhat tendentially, be called 'public participation' in private dispute settlement . . . [T]he trend is clear, and is clearly borne out of the concern to promote transparency and what is termed the legitimacy (which seems often to mean little more than the ability to fend off authoritative or organised criticism) of decisions taken by tribunals adjudicating upon disputes which implicate questions of serious public concern.⁷⁷

In one sense, the trend is indeed clear – and reflected in the procedural rules and most of the recent treaty instruments⁷⁸ – this suggests that non-disputing parties could be an important element of reassertion. But, as Lowe himself recognises, '[t]he trend is by no means universal.'⁷⁹ In other regimes of international dispute settlement, such access either does not

⁷⁷ V. Lowe, 'Private Disputes and the Public Interest in International Law', in D. French et al. (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford, UK: Hart, 2010), 8–11; also A. Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge University Press, 2012), 124–7.

⁷⁸ Y. Ronen and Y. Naggan, 'Third Parties', in C. Romano et al. (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), 806, 821–5.

⁷⁹ Lowe, 'Private Disputes and the Public Interest in International Law', 11.

exist at all (the International Court of Justice (ICJ)⁸⁰ and inter-State arbitration) or is apparently applied without overwhelming enthusiasm (Iran–US Claims Tribunal,⁸¹ WTO AB,⁸² and UNCLOS Annex VII⁸³). This may be read as suggesting that the trend in support of public participation in investor-State arbitration is systemically anomalous, and the support that Contracting Parties bestow upon non-disputing parties may be less significant than public declarations suggest (as reflected in the single ratification of the 2014 Mauritius Convention in mid-2016⁸⁴).

The final player of importance in the game of reassertion is in many ways the central one under the status quo: the investment arbitration tribunal. A starting point for thinking about the issue is that international investment arbitration operates as if it were a regime of international dispute settlement and therefore has to be debated in that perspective. International investment arbitration is part and parcel of the contemporary international law of dispute settlement. Cases are often decided by the same individuals who have sat (or may still be sitting) on the bench of ICJ, WTO AB, UNCLOS Annex VII Tribunals, European Court of Human Rights, or the Court of Justice of the European Union.⁸⁵ Counsels are often the same members of *barreau invisible* and use the same vocabulary and precedents.⁸⁶ When tribunals are faced with reassertion, the small print of relevant instruments would guide the engagement, assisted by the comparative backdrop of international dispute settlement.

⁸⁰ P.-M. Dupuy, 'Article 34', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice*, 2nd edn. (Oxford University Press, 2012), 585, 603–4.

⁸¹ D. Caron and L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd edn. (Oxford University Press, 2013), 40.

⁸² E.g. *EC-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, Report of the Appellate Body of 22 May 2014, para. 1.15; *US-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/RW, Report of the Appellate Body of 20 November 2015, fn. 68.

⁸³ *Netherlands v. Russia*, PCA Case No. 2014–02, Procedural Order No. 3 (Greenpeace International's Request to File *Amicus Curiae* Submission) of 8 October 2014, available at: www.pccases.com/web/sendAttach/1320 (accessed 24 February 2016).

⁸⁴ See UNCITRAL website at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (accessed 24 February 2016).

⁸⁵ L. Swigart and D. Terris, 'Who Are International Judges?', in K. Alter et al. (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), 619.

⁸⁶ E. Sthoeger and M. Wood, 'The International Bar', in K. Alter et al. (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), 639.

When questions of systemic importance arise, they will often turn on different readings of the function of tribunals⁸⁷: is it to settle the particular disputes? Contribute to friendly relations between parties (or Parties)? Develop law in a particular (presumably progressive) direction? Defend a non-State actor against the arbitrary power of the State (or States, or international organisation(s))? Enlighten the curious reader on all matters on arbitrators' (or arbitrator's) mind? Or something entirely different? These are, of course, questions that fall neatly within the respected pedigree of discussion of the international judicial functions in various international courts and tribunals, which has taken place, with only slight exaggeration, since the beginning of international dispute settlement.⁸⁸ It may be that a generalist international lawyer's perspective could be adopted, taking a step back to reflect upon the function that international law and dispute settlement could be expected to fulfil within this legal regime. Such an examination could possibly lead to modest conclusions about the role of this manner of adjudication. But reasonable people may disagree with this conclusion, and reassertion through creation of stronger international adjudicators – even courts with appellate bodies – will affect the functions that they could be expected to fulfil (with perhaps paradoxical implications for the supporters of these efforts).

F. Conclusion

It is appropriate to conclude this unabashedly black-letter chapter with a modestly conceptual point drawing upon two statements by Christian Tomuschat. First, he suggests that

the ideal of the rule of law, a precept which belongs to the core elements of today's system of international law [means that] the interpretation of legal rules, once they have been established, should be entrusted to judicial bodies, without any interference by political bodies . . . Judicial bodies should not be put under political control. Their findings may not be

⁸⁷ J. Alvarez, 'What Are International Judges For? The Main Functions of International Adjudication', in K. Alter et al. (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), 158.

⁸⁸ O. Spiermann, *International Legal Argument in the Permanent Court of International Justice* (Cambridge University Press, 2005), part 3; H. Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011, first published 1933); V. Lowe, 'The Function of Litigation in International Society', *International and Comparative Law Quarterly*, 61 (2012), 209; G. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press, 2014).

disregarded as soon as they do not correspond to expectations nurtured at the time when the rules concerned were issued.⁸⁹

Secondly,

This does not detract from the power of the legislative authorities concerned to alter the law if they come to the conclusion that some judicial pronouncements have erred in trying to identify the true meaning of a given legal rule. Judges are not the masters of the law they are called upon to interpret.⁹⁰

There is much to approve of in both points that Tomuschat makes, but to follow them simultaneously could lead to an ultimately un-resolvable tension. Is a particular reassertion an inappropriate example of judicial bodies being put under political control? Or is it a praiseworthy case of correction of an error in a judicial pronouncement by the true masters of the law? In legal terms, the answer will be provided by the process and system of international law. But the perspective of the rule of law, itself a much⁹¹ – perhaps even essentially – contested concept,⁹² provides a sense of the manner in which the game of reassertion will be played in international investment law. Questions about the proper relationship between those who make rules and those who settle disputes about rules go to the core of international investment law, as well as international law – and law more broadly.⁹³ Significantly different answers to these

⁸⁹ *Ecuador v. US*, UNCITRAL Arbitration, Expert Opinion of Professor Tomuschat of 24 April 2012, 28.

⁹⁰ *Ibid.*, 29.

⁹¹ Cf. the variety of approaches: 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels', UNGA Res. 67/1, adopted 30 November 2012, UN Doc. A/RES/67/1; and G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *RCADI*, 92 (1957), 1; A. Watts, 'International Law and the Rule of Law', *German Yearbook of International Law*, 36 (1993), 15; I. Brownlie, *The Rule of Law in International Affairs* (Alphen aan Den Rijn, Netherlands: Kluwer, 1998); J. Crawford, 'International Law and the Rule of Law', *Adelaide Law Review*, 24 (2003), 3; A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011); 'Symposium: Are Sovereigns Entitled to the Benefit of International Rule of Law', *European Journal of International Law*, 22 (2012), 313; 'Roundtable: The International Rule of Law', *Ethics in International Affairs*, 28 (2014), 39; R. McCorquodale, 'Defining the International Rule of Law: Defying Gravity?', *International and Comparative Law Quarterly* (2016), 277.

⁹² J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', *Law and Philosophy*, 21 (2002), 137; D. Collier et al., 'Essentially Contested Concepts: Debates and Applications', *Journal Political Ideologies*, 11 (2006), 211, 228–33.

⁹³ See recently J. Finnis, 'Judicial Power: Past, Present and Future', 21 October 2015, available at: <http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf>, and responses thereto, available at: <http://judicialpowerproject.org.uk/category/debates/finnis-responses/> (both accessed 24 February 2016).

complex, diversely describable and open concepts may be given even by perfectly reasonable debaters – should one be able to find them⁹⁴ – and one can only hope that through progressive competition of ideas, a greater coherence of systemic values and refinement of institutions could be achieved.

⁹⁴ Cf. on the one hand, EFILA, website at: www.efila.org, and on the other hand, Corporate Europe Observatory, website at: www.corporateeurope.org (both accessed 24 February 2016).