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THE INTERNATIONAL INVESTMENT REGIME AND FOREIGN INVESTOR RIGHTS: ANOTHER VIEW OF A POPULAR STORY

Nicolás M. Perrone

The international investment regime (IIR) continues to be subject of an intense debate. After a first wave of criticism, investment arbitration and awards have shown some changes in areas such as transparency and deference. However, the calls for reform have not ceased; to the contrary, they have exacerbated. Most critical research continues denouncing investment arbitration as a way of settling foreign investment disputes. Those who defend the IIR in turn claim that the use of proportionality can resolve most of the existing concerns in this field.

This article claims that these views overlook a relevant side of this story. Investment arbitration and state authority are the only controversial issues for them and not the scope of foreign investor rights. The authority of foreign investors and host states, however, varies according to the way in which investment tribunals interpret the individual rights at stake. Following this legal realist lesson, this article proposes that property law and theory can serve to illuminate the existing struggle around the IIR. Property is a plural concept which specification depends on the comprehensive view that arbitrators follow when deciding a dispute. In this regard, this article concludes that our understanding of the IIR could benefit from further exploring the interpretation of foreign investor rights.

For the economic historian, the key problems are to explain the kind of property rights that come to be specified and enforced by the state and to explain the effectiveness of enforcement.¹

Douglas North, 1981

I. Introduction

Since the boom of the international investment regime (IIR) in the 1990s, the academic debate has looked at this regime from essentially two perspectives. The first concentrates on how the IIR protects foreign investors, looking mainly at investment arbitration and the role of arbitrators. In 2009, Caron noted that

¹ PhD, London School of Economics and Political Science. Assistant Professor, Universidad Externado de Colombia. I would like to thank Robert Wai for his comments on an earlier draft of this article. As always, all errors remain mine only.

‘critiques of legitimacy – at least in legal scholarship – often are directed to procedural rather than substantive legitimacy.’2 More recently investment scholars have begun to develop a second perspective that focuses on where investment arbitrators should draw the line between legitimate and illegitimate host state behaviour, relying for this on public law and global administrative law approaches. This work has promoted the idea that proportionality can resolve any potential bias in investment awards, shifting the debate to the interpretation of the standards of review. In light of this development, for Roberts, the standards of review in investment treaty arbitration constitute ‘the next battleground.’3

This article argues that these two perspectives overlook an important part of the story paying only limited attention to foreign investor rights and the control of resources. In this part of the story, who interprets is crucial but the essential question is not only where investment arbitrators should draw the line between the private and the public, but also how they draw this line starting from their interpretation of foreign investor rights. In most investment arbitrations, foreign investors assert their investment-related rights against host states, and arbitrators are expected to enforce the treaty protection of these rights against abusive or arbitrary state measures. Most foreign investor rights operate as property rights in the IIR, protecting foreign investors against host government interference.4 But this is not their only function. Legal realists have shown that property and sovereignty are correlative concepts: stronger property rights imply less state sovereignty.5

The core of most foreign investment disputes thus refers to an inherent distributional tension. A view of the IIR that overlooks the specification of foreign investor rights can therefore result in a rather formalist approach to the obligations imposed by this regime.6 According to the principles embedded in the IIR, host governments need to behave in a non-discriminatory and fair manner, compensating foreign investors who suffer an excessive burden for the benefit of the entire host


community. However, as Waldron has shown in his Hamlyn Lecture, a central question in any takings case refers to the scope of the rights.\(^7\) In *Lucas v South Carolina Coastal Council* (1992), for instance, the U.S. Supreme Court had to decide whether Mr. Lucas’s rights included an entitlement to build on his land (or an investment-backed expectation in the language of the court). This question made a very important difference in the outcome of the dispute, and ultimately, in South Carolina’s authority on coastal matters.

Against this background, this article aims to bring attention to foreign investor rights and their interpretation. It argues that investment arbitrators specify the scope of foreign investor rights in ways similar to the specification of private property rights in any constitutional jurisdiction. The IIR operates as a constitutional property system by granting foreign investors the possibility to assert their rights as *trumps* against host state authority when they consider that host states have gone too far affecting their control of resources. But the resolution of these disputes is never easy because property rights are not absolute, and host states always maintain certain authority over the given resources. The lack of regulations prohibiting building, as in the *Lucas* case, does not mean that the individual has a right to build despite future changes in the legal order. First, retroactivity in this context is of little if any use.\(^8\) Second, investment treaties, as any constitutional property clauses, say barely anything about the scope of foreign investor rights, and the applicable legal orders only provide an incomplete definition of ownership.

Thus, investment arbitrators need to engage in the difficult task of interpreting foreign investor rights. Arbitrators have a hard time deciding, for instance, whether Philip Morris has a legal right to use its brands in the packaging of its products despite the new laws passed in Australia or Uruguay. Private property rights are a keystone of any liberal legal order.\(^9\) But their scope and meaning remains open to contestation. The centrality of property does not change the fact that diametrically opposed ideas about property, such as Locke’s contractualist theory or Duguit’s social function of property, continue to have a strong influence on most legal orders. International treaties and contracts can and do serve to clarify the scope of property rights, e.g. regarding the ability to transfer the resources abroad, but these

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commitments neither modify nor remove the prevailing plural and political character of property rights.\textsuperscript{10}

This article is organised as follows. The second section shows that most academic work has concentrated on the IIR as a legal regime aimed to protect foreign investment, overlooking the importance of the scope of foreign investor rights. The following section demonstrates that these rights are essential to foreign investor control of resources and, more generally, to the expansion of foreign investment. The fourth section argues that most foreign investor rights have a proprietary character since they refer to a measure of control over the resources comprising the investment. It shows that the scope of these rights is nevertheless inherently incomplete remaining disputable or even disputed. The fifth section claims that this account is applicable to the IIR. It explains that the doctrines of acquired rights and legitimate expectations are interpretative formulas that serve to specify foreign investor rights. The sixth section, borrowing from constitutional property scholarship, claims that to understand how investment arbitrators specify foreign investor rights, and hence resolve an important part of most investment disputes, it is necessary to concentrate on the normativity that guides the interpretation, in particular, as arbitrators rely on the doctrine of legitimate expectations. This article concludes by suggesting that property law and theory can help to broaden our understanding of the kind of property rights that come to be specified and enforced according to the IIR. This could open a space for debate and change in times when the future of the IIR is under increasing scrutiny.

II. The International Investment Regime as the Law of Foreign Investment Protection

The simple idea behind the IIR is that foreign investment requires protection against host state actions, and that investment treaties provide this protection. The discourse of the World Bank, for instance, has consistently focused on the need to protect investments and investors.\textsuperscript{11} In a publication dedicated to investment law reform, the World Bank advises:


If a country wants to attract significant levels of private investment and promote itself as a good place to do business, it must protect investments and investors in terms of the acquisition, management, conduct, operation, and sale or other disposition of the investments in the host country. This chapter reviews the fundamental guarantees that investors seek and that, over time, have become synonymous with a good, open, modern investment policy, and thus investment legislation. It should be noted from the outset that all the obligations below are usually also included in a BIT [bilateral investment treaty] or other international agreement and any violation could lead to the activation of the dispute settlement mechanism in such agreements.12

The Organisation for Economic Co-operation and Development (OECD) has also shown a recurring interest in promoting the protection of foreign investment, which dates back long before the unsuccessful negotiation of the Multilateral Investment Agreement in 1998. In the foreword to the well-known commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (The ICSID Convention), Lauterpacht explains that this Convention, sponsored by the World Bank,

carried forward a more general [ initiative] for the protection of international investment that had begun in the Organisation for European Economic Co-operation (now the Organisation for Economic Co-operation and Development) in the late 1950s and that ended in the production in 1962 of the OECD Draft Convention on the Protection of Foreign Property.13

During the 1960s, as Lauterpacht notes, there was a lively debate regarding the conclusion of a multilateral treaty for the protection of foreign investment. The draft of the OECD was an effort in this direction that was, however, never implemented. Describing this negotiation process, Fatouros tells us that ‘[t]he proponents of an

investment code point[ed] out that [this initiative was] the simplest as well as the most effective means to assure the protection of private foreign investment.¹⁴

In the meanwhile, the United Nations was following a quite different approach focussing on a code of conduct for multinational corporations. The philosophy behind this initiative was quite at odds with the view of the World Bank and the OECD. The premise was that foreign investment presented several threats to host countries, and multinational corporations required to be regulated at international level. This project never achieved any legal status. In the 1990s, it was eventually discontinued and the United Nations Centre on Transnational Corporations dissolved and merged into the United Nations Conference for Trade and Development (UNCTAD). Almost immediately, UNCTAD adopted a position similar to the World Bank and the OECD, promoting investment protection and the signature of BITs as a sound policy for development.¹⁵

During the 1990s, the World Bank, the OECD and UNCTAD had a shared view regarding the need of promoting foreign investment protection, and this goal became the central objective of the IIR with the signature of thousands of BITs.¹⁶ As Lester notes, ‘the formal statements of [the IIR’s] purpose often focus on the ‘protection’ of foreign investments, generally from bad treatment by foreign governments.’¹⁷ Investment protection even eclipsed other potential goals within a free market agenda, such as the liberalisation of multinational corporate activities.¹⁸ The literature shows that the free movement of capital was never a major objective of the IIR. Vandevelde points out that ‘BITs do not leave to the market the task of allocating international investment resources.’¹⁹ In the same way, comparing the international trade and investment regimes, Pauwelyn and DiMascio note that

[although they share a common origin (treatment of aliens), trade and investment disciplines have traditionally focused on different but

¹⁷ Simon Lester, ‘Liberalization or Litigation? Time to Rethink the International Investment Regime,’ CATO Institute, Policy Analysis No. 730, 8 July 2013, at 8.
complementary objectives: liberalisation of trade flows, in the case of trade, and protection and promotion of investment, in the case of investment.\textsuperscript{20}

This has not changed even after the convergence of the liberalisation of trade and investment with protection and promotion in most free trade agreements. Investment liberalisation and protection remain divorced in most of the literature.\textsuperscript{21}

This approach is reflected in the opening pages of Dolzer and Schreuer’s \textit{Principles of international investment law};\textsuperscript{22} and is summarized well in the following passage from Thomas Wälde’s Separate Opinion in \textit{International Thunderbird v Mexico}: ‘International investment law is aimed at promoting foreign investment by providing effective protection to foreign investors exposed to the political and regulatory risk of a foreign country.’\textsuperscript{23} Most commentators concur with this view and see the protection of foreign investment against host state actions as constituting the object of investment treaties. This is the opinion of Salacuse,\textsuperscript{24} Vandevelde,\textsuperscript{25} Alvarez,\textsuperscript{26} Lowe\textsuperscript{27} and McLachlan.\textsuperscript{28} It is also consistent with the work of Paulsson, one of the most influential arbitrators, who claims in his book \textit{Denial of Justice in International Law} that the objective of the regime is the ‘protection of property rights.’\textsuperscript{29}

What transpires from the initiatives of international institutions, the treaties, and the corresponding scholarship is that the mission of the IIR is the protection of foreign investment against host state actions. Or in other words, some host state actions are the problem, and international protection is the solution. The entire intellectual edifice built around the IIR appears to be inspired by the idea of

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\textsuperscript{20} Nicholas DiMascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds apart or two sides of the same coin?’ 102 The American Journal of International Law 48 (2008), at 53-4. \\
\textsuperscript{22} Rudolph Dolzer and Christoph Schreuer, \textit{Principles of International Investment Law} (New York: Oxford University Press, 2008), at 3-7. \\
\textsuperscript{23} \textit{International Thunderbird v Mexico}, NAFTA - UNCITRAL, Thomas Wälde’s Separate Opinion, 1 December 2005, at 4. \\
\textsuperscript{25} Kenneth Vandevelde, above n 19, at 489, 492. \\
\textsuperscript{26} José Alvarez, ‘A BIT on Custom,’ 42 International Law and Politics 17 (2009), at 43. \\
\textsuperscript{28} Campbell McLachlan, ‘Investment Treaties and General International Law,’ 57 International and Comparative Law Quarterly 361 (2008), at 372. \\
\textsuperscript{29} Jan Paulsson, \textit{Denial of Justice in International Law} (New York: Cambridge University Press, 2005), at 232.
\end{flushright}
protection against host state arbitrary and abusive behaviour. The investment law literature, for instance, looks at foreign investor rights as a right to protection or to the enforcement of the standards of protection included in investment treaties.\textsuperscript{30} As Wälde notes, ‘investment protection and arbitral jurisdiction constitute a way to make rights effective, to enforce them.’\textsuperscript{31}

The emphasis on foreign investment protection is also present in institutional analyses of the IIR. The premise of these studies is that this regime serves to enforce the protection of foreign investment when domestic institutions, in particular the judiciary, do not guarantee this enforcement.\textsuperscript{32} In a very influential article, Guzman claims that BITs ‘have become the dominant international vehicle through which North-South investment is protected from host country behavior.’\textsuperscript{33} A second related article that Guzman wrote with Elkins and Simmons presents the IIR as an instrument for making commitments credible. In their view, investment treaties constitute an ‘external commitment mechanism.’\textsuperscript{34} Ginsburg pursues a similar line of argument, his work being ‘primarily concerned with one increasingly popular form of international alternative to domestic institutional protection, the Bilateral Investment Treaty (BIT).’\textsuperscript{35} For him, investment treaties are an international institution to ‘enforce promises.’\textsuperscript{36} As we can see, the dominant institutional view is based on the premise that the IIR is a regime for foreign investment protection.\textsuperscript{37} For these commentators, the core of this regime is an alternative mechanism of enforcement – investment arbitration – that makes allegedly uncertain commitments credible.


\textsuperscript{32} Vaughan Lowe, above n 27, at 51-2.


\textsuperscript{36} Ibid.

\textsuperscript{37} See also Anne Van Aaken, ‘International Investment Law between Commitment and Flexibility: A contract theory analysis,’ 12 Journal of International Economic Law 507 (2009), at 507-538.
The academic characterisation of the IIR is similarly based on foreign investment protection, with investment arbitration as the dominant element. The initial approach to investment arbitration was to liken it to private international law and commercial arbitration. This view suffered an important backlash during the mid-2000s and has now lost support. The second approach, which remains dominant, describes the IIR as a mechanism of judicial review. This view emphasizes the public impact of the enforcement of foreign investment protection but does not move the focus away from protection against host state actions. Van Harten and Loughlin, for instance, argue that ‘[t]he effect of this combination of features, uniquely present in investment arbitration, is to subject the regulatory conduct of states to control through compulsory international adjudication to an unusual extent.’ Several others have characterized the IIR as a form of judicial review, concentrating on the implications behind the enforcement of foreign investment protection. The most important examples are probably Kingsbury and Schill, Montt and Ortino.

In spite of the large consensus that protection from host state behaviour is the leitmotiv of the IIR, there is a perhaps additional question that has created some debate in the literature. This is whether the establishment of a legal mechanism for foreign investment protection is an end in itself or whether there is a higher objective beyond the protection of foreign investment. Salacuse and Sullivan admit that the primary goal of home states with investment treaties was the ‘protection of investments made by their nationals and companies in foreign countries.’ They argue, however, that the IIR advances a more complex purpose: investment treaties represent a ‘Grand Bargain’ according to which host states make ‘a promise of

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protection of capital in return for the prospect of more capital in the future.\textsuperscript{44} Similarly, Roberts asserts that the text of the treaties that make up the IIR often provides little help given continuing debates over whether such treaties exist to protect investors and investments (which might suggest that ambiguities should be resolved in favor of investors) or to promote public welfare by increasing foreign investment (which might require investment protections to be weighed against other policy goals).\textsuperscript{45}

Interestingly, this debate regarding the final end of investment protection shifts the perspective away from foreign investors, who enjoy treaty protection, and back to host states. For most of the literature, the potential benefits that would follow from an increase in foreign investment in host countries justify investment protection.\textsuperscript{46} Host states are in this way presented as the ultimate beneficiary of investment protection, turning foreign investment into a means to host state development. I would like to contradict this, at least partially, because protection can easily be seen as a means to the fulfilment of foreign investor ultimate goal: i.e. the maximisation of their benefits. As Akinsanya notes, ‘[p]rivate investors invest to make profits and not for reasons of benevolence.’\textsuperscript{47} The problem of the view that sees the ultimate goal of the IIR only in host state development is not that foreign investment cannot have positive developmental consequences, but rather that it overlooks foreign investor interests in the IIR. The possibility to launch an investment arbitration is central to remain in control of the ‘economic viability of the investment.’\textsuperscript{48} But it is only relevant to the extent that the scope of the rights is aligned to foreign investor expectations or, returning to the words of the World Bank, to the ‘acquisition, management, conduct, operation, and sale or other disposition of the investments in the host country.’\textsuperscript{49}

\textsuperscript{44} Ibid, at 77.
\textsuperscript{45} Anthea Roberts, above n 38, at 51.
\textsuperscript{46} See Karl Sauvant and Lisa Sachs (Eds.), \textit{The Effect of Treaties on Foreign Direct Investment: Bilateral investment treaties, double taxation treaties, and investment flows} (New York: Oxford University Press), 2009.
\textsuperscript{48} Burlington v Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para 397.
\textsuperscript{49} See above n 12.
III. The International Investment Regime and the Control of Resources

Foreign investors have good reasons to be concerned about the control of resources comprising foreign investments. Host states are among their main rivals. These two actors can behave in a non-adversarial and cooperative way but they can also struggle to control the resources and appropriate the benefits of any given economic activity. An essential feature of this struggle is that host states can affect the control of resources in ways nobody else can. States have the authority to modify the laws and regulations that govern the resources, such as taxation rules. Before the Second World War, foreign investors relied on their home states for ensuring their control of resources. This was possible because their political and economic interests were substantially aligned. In 1935, Staley described a world where ‘diplomacy serve[d] investments’ and ‘investments serve[d] diplomacy.’ Diplomatic protection worked acceptably in this context in spite of the legal fiction that informs this model. The fiction is that foreign investors own the right and effectively manage the resources, but do not control the international-based remedy against host state abuse or arbitrary behaviour. Foreign investors acquire and decide the use of the resources comprising an investment, and home states are expected not to interfere with their private authority. However, only home states can launch a case against host states. As Brownlie has explained, ‘the subject matter of the claim is the individual and his property: the claim is that of the state.’

Diplomatic protection proved ill-suited to the challenges posed by the post-colonial world. The period between 1950s and 1970s were times in which foreign investor control was under the threat of decolonisation and of state interference in the wake

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51 Thomas Andersson, Multinational Investment in Developing Countries: A study of taxation and nationalization (Routledge, New York, 1991), at 23-49.
55 Antonio Parra, above n 11, at 11.
of global corporate expansion. First, many new states perceived multinational corporations as agents of the former colonial powers and a source of continuing foreign domination. Private foreign investors needed to convince host states that they were not part of the old model, and the idea of requesting diplomatic protection from home states was not compatible with this. International business needed to become a ‘stateless’ sector. Second, the interests of multinational corporations started to diverge from those of home states. The world of global value chains and economic globalisation that Reich, and Stopford and Strange describe as a consolidated trend in the 1990s contrasts with the picture provided by Staley back in 1935. In the 1960s and 1970s, scholars began to note that when firms look for diplomatic intervention and protection, home governments demanded costly concessions. These could be modifications to business strategies that favour host states, e.g. more exports from the home nation or less relocation to the host country. State intervention in the economy became more frequent than in the past, and the diplomatic protection model thus presented foreign investors with the dilemma of choosing between home or host state intervention in the control of resources.

These circumstances produced an international business voice particularly interested in campaigning for an individual-based regime to ensure foreign investor control of resources. Bankers, executives and lawyers came up with several ideas in the 1950s to replace diplomatic protection with a model more attuned to the interests of the international business sector. Rather than ‘stateless’ corporations, these non-governmental initiatives involved creating an international code and an international dispute settlement forum. There were three important private

proposals: The 1949 International Chamber of Commerce International Code for Fair Treatment of Foreign Investment (state-to-state arbitration, Article 13), The 1948 International Law Association Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (foreign investor-state arbitration, Article 3), and The 1959 Abs-Shawcross Draft Convention (foreign investor-state arbitration, Article VII). In one way or another, these initiatives were aimed at detaching foreign investors from the strings of home states through either state-to-state or foreign investor-state arbitration, increasing their control of the resources comprising investments.

The concrete outcome of foreign investor lobbying was, in the end, two less comprehensive efforts that materialized in 1959 and 1965: the signature of the first BIT between Germany and Pakistan, and the conclusion of the ICSID Convention. These initiatives constitute the basis of the IIR in terms of the structure of this regime and, perhaps more importantly, when it comes to the views regarding foreign investment protection as a means to development. In this respect, many authors found a connection between development and the ICSID Convention.61 Something similar occurs with BITs. These treaties are the outcome of a much broader proposal for a ‘Magna Carta for Private Foreign Investors’ made by Abs in 1957 at a Conference in San Francisco.62 Abs took that opportunity to raise a point made earlier by other commentators, such as Coudert and Lans in 1946.63 According to these authors, developing states would not attract enough private foreign investment to advance their development process unless they implemented mechanisms that ensured the protection of foreign investor property rights.

These claims are still open to debate as there is contradicting evidence on the effects of investment treaties on foreign investment flows, and on the importance of foreign investment for development.64 On the other hand, the significance of these legal rules for foreign investors cannot be contested. Foreign investors were not

going to expand and enjoy the profits of the increasing business opportunities in developing countries unless they acquired the legal means to gain and maintain the control of resources. A historical account of the origins of the IIR where private foreign investors demand certain private property rights as preconditions to carry out their investments is consistent with the dominant view in economic history, economics and the economic sociology of law. In his neoclassical theory of the state, North explains that to facilitate private economic activity, states need to ‘specify and enforce property rights.’ The correct fulfilment of this task would lead to private business and economic growth. Likewise, Ostrom and Schlager consider that individuals require a sufficient level of control over resources to conduct their economic activities. A similar conclusion emerges in Max Weber’s work on the role of law in the rise of capitalism. If the promotion of foreign private investment is in some sense to be equated with the expansion of capitalism beyond national borders, the legal order needs to give foreign investors a mechanism to make economic life more calculable. The expansion of global capitalism requires the law to provide calculability for economic actors regarding their control of resources, which, in turn, implies the specification and enforcement of foreign investor rights.

IV. The Analytical Dimension of Foreign Investor Rights

The analytical dimension of foreign investor rights confirms the relevance of control in foreign investment relations, and sets the basis for understanding the specification of these rights in the context of investment disputes. The property character of foreign investor rights may appear ambiguous at first because, according to the text of investment treaties, assets are the minimum denominator of a foreign investment, not property rights. However, although the concept of assets has no precise legal meaning, its lay definition refers to resources, suggesting that most of the assets

65 Charles Lipson, above n 59, at 4.
66 Douglas North, above n 1, at 21.
67 Ibid.
enumerated in investment treaties represent foreign investor interests over resources.\textsuperscript{71} Leaving aside typical contractual rights, such as debts and the use of umbrella clauses to enforce typical contractual rights, most of the rights included in investment treaties have a property character.\textsuperscript{72} They either grant legal control over a resource, such as a property title over land, or modify or clarify the measure of legal control over resources, e.g. providing exceptions to the general framework applicable to a certain activity.\textsuperscript{73} The tribunal in \textit{Methanex v United States} (2005) emphasizes the importance of control in modern investment disputes as it notes that a ‘restrictive notion of property as a material ‘thing’ is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing.\textsuperscript{74}

Some of the assets listed in investment treaties are typical property rights, such as enterprises, shares, intellectual property rights, and ‘other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.’\textsuperscript{75} Other assets enumerated in the treaties take the form of vested rights, which also have a clear proprietary character. The list of vested rights contained in investment agreements is comprehensive, including ‘licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.’\textsuperscript{76} These rights are intrinsically connected to the control of resources as they serve to clarify the extent of private control over resources.\textsuperscript{77} In this respect, investment tribunals have considered that intangible rights, such as rights under a licence, are included in the notion of investment and therefore subject to protection according to investment treaties.\textsuperscript{78}

\begin{thebibliography}{99}
\bibitem{73} See \textit{El Paso v Argentina}, ICSID Case no ARB/03/15, Award, 31 October 2011, para 432; \textit{Suez and others v Argentina}, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, paras 64, 65-115.
\bibitem{74} \textit{Methanex v U.S.A.}, UNCITRAL – NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Ch. D, para 17.
\bibitem{75} \textit{Article 1, US Model BIT} 2004.
\bibitem{76} Ibid.
\end{thebibliography}
The assets that are more difficult to categorize are concessions, which are sometimes described as contracts. According to the analysis of UNCTAD, for instance, business concessions are ‘rights conferred by law or under contracts.’

Concessions are different from typical property rights because they are more complex sets of rights that often include proprietary rights and contractual commitments. A concession allocates resources, such as a mine or an oil field, to individuals but with more detailed ownership terms than in the case of typical private property rights. Normally, the most important condition is that the resources should be used for the particular purpose defined in the concession, such as the production of minerals or oil. In addition, while the time span for private property is normally unlimited, concessions tend to have a fixed duration.

Now, although concessions may include contractual commitments, such as a tax stabilisation clause, their main purpose is to grant foreign investors a certain measure of control over specific resources. The tax stabilisation clause serves to expand foreign investor control over the resources, e.g. limiting host state tax authority. As Douglas explains, then, ‘it is clear that ‘contractual rights’ in this context should be interpreted narrowly as those contracts that regulate the investor’s rights to property in the host state.

The premise that foreign investor rights have a property character is quite important as it confirms that they govern the use of the resources comprising the foreign investment. In his book The Idea of Property, Penner argues that the most important function of property is precisely to determine how resources ‘will be used.

Property scholars normally refer to this through the concept of ownership. Waldron explains that the concept of ownership describes ‘a correlation between individual names and particular objects, such that the decision […] about what should be done with an object is taken as socially conclusive.’ The concept of ownership is central to understanding the use of resources as it specifies the ability of the individual owner to choose between a range of uses (e.g. to operate a waste

81 Sergei Paschoke v Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 301-302.
82 Zachary Douglas, above n 30, at 197 (footnote 219).
83 James Penner, above n 77, at 5-6.
The right to enjoy a number of entitlements (e.g. the right to income).[^85]

Although the principle of a private property system is that individuals control the initiative over resources, states have the authority to block or limit some of their plans. In this regard, Katz describes ownership as the ability to ‘set the overall agenda’ for resources.[^86] She explains that states can regulate property by narrowing or expanding these potential agendas, but they cannot block the ability of owners to exercise their ‘parallel agenda-setting authority’.[^87] This distribution of authority can constitute a source of tension between private and public actors.

Private-public disputes regarding the use of the resources can be particularly complex because legal orders rarely define the scope of ownership in a comprehensive and detailed manner. The problem is that ownership derives from a system of pre-established rights, which are disputable or even disputed.[^88] The incomplete character of ownership contrasts with the ideal Coasian world of well-defined property rights.[^89] However, economists such as Barrère and Libecap acknowledge that legal orders cannot define ownership comprehensively,[^90] and Coase himself disagreed with the formulation of the Coase’s theorem and the hypothesis of zero or very low transaction costs.[^91] Thus, the issue is not that states have taken a normative decision in favour of increasing transaction costs or not protecting property rights adequately. Rather, legal orders cannot define all the potential uses of a resource in advance. History is full of examples where resources that were once of little interest, such as oil, became increasingly valuable.[^92] As Waldron affirms,

[^85]: Ibid., at 26-30.
[^87]: Ibid., at 113-4.
what markets can and cannot produce, how efficiently they are producing it (or what social goals they promote or retard in various circumstances) are not always calculable *a priori*. This too varies over time and with circumstances in face of social, economic, ecological, and demographic change.\(^93\)

The fact that ownership is incomplete does not imply, nor should it be read as implying, that the text of the law does not matter. When enforcing private property or foreign investor rights, the job of judges and arbitrators begins with either the constitutional or the treaty text. As Alexander highlights, ‘[j]udicial interpretation of a constitutional property clause turns on many factors, among which is its text.’\(^94\)

Essentially, these clauses describe the same problem, provide the same solution and omit the same information. They describe the problem of abusive state behaviour directed at depriving individuals of their private property or investment, imposing the solution of paying compensation. The similarity in the structure of these clauses extends to what they omit: the scope of the rights in question. Discussing the U.S. Constitution, Michelman asks:

> What can we say by way of defining the ‘property’ rights thus safeguarded by the Constitution, of describing their scope and content in general? What kinds of interests or relations, respecting what kinds of valued objects, fall within the category of protected interests or relations that the Constitution knows as ‘property’? The constitutional text itself does not begin to answer the question.\(^95\)

The work of Alexander and Van der Walt suggests that the beginning of an answer to the question of the scope of property rights resides in civil and private law sources.\(^96\) Judges and arbitrators need to leave the constitution or the investment treaty and look for the content of private property in the rest of the legal order. Since

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\(^93\)Jeremy Waldron, above n 7, at 104-105.
the IIR is an international legal regime, this poses the important question of which civil or private law sources should be applied. The question of the applicable law to investment disputes is quite contentious, but it is important to underscore that no matter which position we follow, no legal order provides a comprehensive definition of the scope of property rights. Sometimes, property rules can seem very precise, as in the case of the right to transfer dividends and capital in investment treaties. However, even in these cases problems of ambiguity and vagueness can arise (e.g. what or how much is a dividend?).

V. The Specification of Foreign Investor Rights and the IIR

The analysis of the previous sections confronts us with the fact that investment arbitrators not only protect foreign investment but also have to specify the measure of control enjoyed by foreign investors. As Paulson has recently suggested, arbitrators need to take sides in issues as significant as ‘the existence of water rights.’97 An important difference between investment arbitration and any other form of international property litigation is that judges under both the American and the European Human Rights Systems count with previous domestic decisions regarding the scope of the rights in question. These tribunals can therefore rely on (or disagree with) these decisions. This is rarely the case in investment arbitration, and arbitrators therefore often have to engage with the interpretation of foreign investor rights from scratch. The situation of arbitrators, then, differs in very little from that of domestic judges. They have to ‘make the implicit rules explicit, to clarify them.’98 There is wide consensus in U.S. American Constitutional Property Law, for instance, that the judicial interpretation and specification of property rights is a necessary and crucial step to resolve a takings case.99 As Rose explains, we

...can only claim that you should be compensated for adverse effects to something that is within your property right. One might start, then, with the question, What ‘takes’ your property? But simply by looking at some cases,

98 Christian Barrère, above n 88, at 143.
one quickly arrives at a more general question, namely, What does your property right include?\textsuperscript{100}

The premise that investment arbitration is key to understanding the scope of foreign investor rights seems to have been overlooked by important scholars in international investment law. In spite of some early comparative work on the IIR and U.S. Constitutional Property Law, particularly within NAFTA, most of the literature has followed a quite different path.\textsuperscript{101} Investment arbitration is said to be essential to the enforcement of investment protection but there is little consideration, if any, of the consequences that arbitral interpretation has on foreign investor rights.\textsuperscript{102} Orrego Vicuña explains that the evolution of the law of investments ‘is not so much related to the nature of the rights but to the role of the individual in the international legal system.’\textsuperscript{103} Douglas points out that ‘[t]he most important thing here is, who interprets, not what is interpreted.’\textsuperscript{104} For him, the IIR is a sub-system of international state responsibility.\textsuperscript{105} More specifically, McLachlan sees the objective of treaty framers as being ‘to enhance the mechanisms for the protection of rights, rather than to extend the rights themselves.’\textsuperscript{106}

This emphasis on the remedy, however, overlooks the most important legal realist lesson regarding the relation between rights and remedies. It is true that foreign investor rights are meaningless without an efficient mechanism of enforcement. Yet, it is also true that the measure of foreign investor control over resources depends on arbitral interpretation because in terms of ‘what can be done,’ as Llewellyn taught us,

\textsuperscript{100} Carol Rose, ‘“Takings” and the Practices of Property: Property as Wealth, Property as “Propriety,”’ in Property and Persuasion (Colorado: Westview Press, 1994), at 50.


\textsuperscript{102} Thomas Wälde, above n 31, at 56.


\textsuperscript{106} Campbell McLachlan, above n 28, at 372.
‘[n]ot only ‘no remedy no right,’ but ‘precisely as much right as remedy.’

Investment awards resolving concrete disputes between foreign investors and host states are in this way ‘devices for generating or specifying the content or meaning of such rights.’

In his work on constitutional rights, Levinson highlights the importance of remedies for the scope of rights in the context of constitutional adjudication. He claims that ‘[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.’

Thus, the main problem with a view that overlooks the effects of the available remedies on foreign investor rights is that ‘one way we understand the meaning and content of a right is by looking at how we protect it.’

In this regard, it is important to distinguish the scope of foreign investor rights from the debate regarding whether foreign investors exercise investment protection as right-holders, beneficiaries or agents, as it has been recently put by Paparinskis.

This debate is highly relevant to decide questions such as countermeasures and waivers. However, the record of investment disputes shows that this is not the question Rose is referring to in her work, and, as Crawford notes, ‘in the majority of the cases it will make no difference to the result.’

To the contrary, the determination of the scope of foreign investor rights is central to any investment dispute because no investor can claim that a host state has taken or affected a right or interest he never owned, and no tribunal can order a compensation without showing a correlation between the deprivation of economic rights and the amount of damages (except, arguably, in the case of moral damages).

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114 Marvin Feldman v México, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para 118, 194; Biwater v Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, chapter VI, C; OKO v Estonia, ICSID Case No. ARB/04/6, Award, 19 November 2007, para 247-8; Merrill v Canada, UNCITRAL, ICSID Administered Case, Award, 31 March 2010, para 133, 219, 244-5.
Most investment law literature addresses the scope of foreign investor rights by looking for the applicable laws to the rights at stake. The premise appears to be that finding the appropriate laws provides an answer to the content of the rights. The relevance of domestic laws in investment disputes remains a controversial topic, but presently many authors recognize the role that these laws play in the specification of foreign investor rights. They distinguish the applicable law to decide on host state liability from the law that determines the scope of foreign investor rights. Douglas is one of the first authors who advanced the thesis that it is necessary to distinguish between the law applicable to the rights comprising the investment and the law applicable to the behaviour of the host state in relation to those rights. He considers that foreign investor rights are essentially proprietary and, following accepted conflict of law rules, the law of the host state should apply to define their scope. Regarding host state behaviour, he notes that the challenged measure or conduct should be assessed according to investment treaties and international law. This reasoning is unquestionable from the point of view of conflict of law rules. The content of foreign investor rights is essentially a matter of the lex rei sitae.

What this view disregards is that ownership is inherently incomplete in every legal order, and that, unless the concrete issue is clarified in a contractual commitment or a vested right, it requires judicial or arbitral interpretation. In his work, Douglas neither acknowledges this issue nor concentrates on how investment arbitrators specify foreign investor rights when domestic laws are incomplete. Unfortunately, Douglas does not consider this point further and does not elaborate on the fact that—according to investment awards and his own work—the existence and content of foreign investor legitimate expectations are governed by the investment treaty and international law.

The solution to the problem of foreign investor rights thus is found not only on domestic laws but also on the doctrine of legitimate expectations. What is at stake with the application of this doctrine emerges from Nikken’s separate opinion in *Suez*.

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116 Zachary Douglas, above n 72, at 41.


118 *Total v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 128; *LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para 130. Douglas, above n 72, at 81.
In his decision, this arbitrator made the thought-provoking point that the standards included in BITs (he refers in particular to FET) should be characterized as liability standards only.\textsuperscript{119} He argues that FET ‘could never lose its essence as a standard of conduct or conduct of the State with respect to foreign investments, which should not automatically translate into a source of subjective rights for investors.’\textsuperscript{120} Nikken asserts that the Vienna Convention of the Law of Treaties does not support the incorporation of the doctrine of legitimate expectations.\textsuperscript{121} In his view, BITs never mention the doctrine of legitimate expectations,\textsuperscript{122} and this silence is consistent with the object of these treaties, which is to protect and promote foreign investment.\textsuperscript{123} In addition, Nikken provides a historical account of the minimum standard of treatment, presenting this standard as a liability rule only.\textsuperscript{124} For these reasons, he finds that ‘BITs contain a list of the States’ obligations regarding their respective investments, not a declaration of rights for investors,’\textsuperscript{125} concluding therefore that the doctrine of legitimate expectations does not arise from investment treaties.\textsuperscript{126}

The doctrine of legitimate expectations may be subject to important criticism, as I have argued elsewhere,\textsuperscript{127} but Nikken’s position ignores that analytically investment arbitration cannot be about determining liability only. Nikken overlooks the point made by Rose, i.e. that any adjudicator facing a takings dispute first needs to determine the scope of the rights allegedly taken. Investment disputes are not only about what host states have done but also about, for instance, whether the foreign investor has a permit or an entitlement to a permit. This question was essential in \textit{TECMED v Mexico} (2003), and one could even wonder whether it was a critical issue to decide the dispute.\textsuperscript{128} In addition, Nikken disregards that international judges and arbitrators have always dealt with the substance of foreign investor rights, whether through the acquired rights or the legitimate expectations doctrines.

\textsuperscript{119} \textit{Suez and others v Argentina}, ICSID Case No. ARB/03/17, Separate Opinion of Pedro Nikken, 30 July 2010.
\textsuperscript{120} \textit{Ibid.}, para 19.
\textsuperscript{121} \textit{Ibid.}, para 3.
\textsuperscript{122} \textit{Ibid.}, para 2, 25.
\textsuperscript{123} \textit{Ibid.}, para 4.
\textsuperscript{124} \textit{Ibid.}, para 12-9.
\textsuperscript{125} \textit{Ibid.}, para 19.
\textsuperscript{126} \textit{Ibid.}, para 21, 38-40.
\textsuperscript{128} See \textit{TECMED v Mexico}, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 88-9, 149.
For a long part of the 20th century the acquired rights doctrine, sometimes referred to as vested rights doctrine, was a central concept for tribunals and scholars dealing with the protection of alien property according to international law. In 1926, the PCIJ declared that ‘the principle of respect of vested rights forms part of generally accepted international law.’ More than sixty years later, little seemed to have changed. In 1988, Asante affirmed that ‘[t]he fundamental premise for the international minimum standard governing the treatment of foreign property is respect for acquired rights.’ According to the literature, the essential purpose of this doctrine was to protect the content of foreigners’ rights in accordance with domestic law. Cheng explains that ‘[t]he effect of this principle of respect for acquired rights is that rights of foreigners which are created under or recognised by the territorial law may not be abrogated unless in virtue of a permissible rule of international law.’ Bouchard similarly concludes that ‘the primary source of the alien’s rights [was] municipal law.’

In his Fourth Report on State Responsibility, García Amador recognizes the importance of the acquired rights doctrine but also notes that a problem with the application of this doctrine is the determination of the scope of protection, and the nature and content of the acquired rights. This problem emerges quite clearly from the decision in the Oscar Chinn case (1937), where a central issue to be decided by the Permanent Court of International Justice (PCIJ) was precisely the scope of foreign investor ownership. In this case, the court was unable to see in his original position—which was characterized by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes.

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129 German Interests in Polish Upper Silesia Case (Germany v Poland), PCIJ, 1926, Series A, No. 7, at 42.
134 The Oscar Chinn Case (Britain v Belgium), PCIJ, 1937 (Ser. A/B), No. 70, para 88.
This decision could be the result of the mere application of domestic or international laws. As García Amador explains, the content of foreign investor rights can be found in host state laws or, when they exist, in any contractual commitment, permit or license regarding the control of the resources comprising the foreign investment.  

Nonetheless, a closer look at this decision shows that the outcome was mainly a question of interpretation of Oscar Chinn’s rights. The doctrine of acquired rights was internationally recognised during a period in which most states behaved ‘more or less in conformity with the principles derived from the conception of the liberal capitalist state.’ By 1937, however, the lax application of this doctrine appears more in line with the legal developments following the Great Depression: i.e., more state intervention in economic affairs.

It could be argued that this observation on the acquired rights doctrine is no longer relevant to the IIR since few if any investment tribunal uses this concept. Yet, there is something that connects acquired rights with legitimate expectations: these two interpretative formulas serve to specify the scope of foreign investor rights. In this respect, Gaillard is of the opinion that legitimate expectations have replaced acquired rights in the reasoning of investment arbitrators. He claims that:

> The expectation of investors—or, in a context where the plural would appear to give more strength to the formula, ‘the expectations’ of investors—seem to be the cornerstone of the whole system. At the beginning of the 21st century, the expectation of investors thus seems to represent a magic formula similar to that used to express the notion of ‘acquired rights’ at the beginning of the 20th century.

This conclusion has also been reached by other authors. Von Walter affirms that the ‘scope and the extent of the rights associated with an investment may also depend, at

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135 F. García-Amador, above n 133, at 9.
least in part, on the legitimate expectations of the investor.\textsuperscript{139} Grigera Naón similarly explains in his dissenting opinion in \textit{EnCana Corporation v Ecuador} (2005) that ‘[s]uch expectations constitute an interest that, because having an economic, and even pecuniary, value is a form of ownership (or derecho de propiedad) under the Treaty.’\textsuperscript{140}

Lastly, the works of Wälde and Kolo, and Fortier and Drymer describe the legitimate expectations doctrine along the same functional lines of the acquired rights doctrine, i.e. as a formula to specify the scope of foreign investor rights.\textsuperscript{141}

A look at investment awards illustrates the role of investment arbitrators in determining the scope of foreign investor rights through the legitimate expectations doctrine. Referring to \textit{CME v the Czech Republic} (2001), for instance, Wälde highlights that for that tribunal ‘CME had a legitimate expectation that its legal position recognized by the Czech regulator would be maintained and not changed without bona ‘fide’ purpose, to undermine its business, in particular favouring domestic investors.’\textsuperscript{142} The tribunal in this arbitration recognized that the foreign investor had a right to an exclusive position. Arguably, this issue was central to the dispute because with no such a right the conduct of the Czech Republic would have been less arbitrary or even legitimate. The award in \textit{Merrill v Canada} (2010) also illustrates this point as the arbitrators had to decide whether the foreign investor had an expectation of exporting his production or enjoying the export/market price.\textsuperscript{143} Again, the decision in \textit{Merrill v Canada} was in favour of Canada plausibly because the arbitrators found that the foreign investor had no right to enjoy the export price. Moreover, a debate about the scope of foreign investors rights is clearly present in \textit{Lemire v Ukraine} (2010), where the two concurring arbitrators found that the foreign investor had a legitimate expectation that his business ‘would be allowed to expand.’\textsuperscript{144} Against this basis, they considered whether this entitlement was deprived

\textsuperscript{139} André von Walter, ‘The Investor's Expectations in International Investment Arbitration,’ 6(1) TDM 1 (2009), at 6.

\textsuperscript{140} \textit{EnCana Corporation v Ecuador}, LCIA Case No. UN3481, Partial Dissenting Opinion by Horacio Grigera Naón, 30 December 2005, para 17.


\textsuperscript{143} \textit{Merrill & Ring Forestry L.P. v Canada}, UNCITRAL, ICSID Administered Case – NAFTA, Award, 31 March 2010, para 142, 150.

\textsuperscript{144} \textit{Joseph Charles Lemire v Ukraine}, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 371.
of by the behaviour of the Ukrainian government. The dissenting arbitrator in this dispute remarked that a key reason for his dissent was the interpretation of Lemire’s rights. For him, this foreign investor never acquired the entitlement in question.

VI. A Constitutional Property View of Foreign Investor Rights

Overlooking that investment arbitrators play a substantial role in interpreting and specifying foreign investor rights may have some implications for the analysis of international investment law. The main effect is that part of the investment law literature considers foreign investor rights in a formal manner, focusing almost exclusively on host state actions. Accordingly, if we can distinguish arbitrary and abusive host state behaviour from regular activity, we then solve the conundrum of foreign investment disputes. This creates in the literature an apparent belief that getting the enforcement side of the problem right, e.g. through the application of balancing and proportionality, would resolve any issue. approach overlooks that the responsibility of host states also depends on the way in which investment tribunals interpret the rights at stake.

The general lack of interest in foreign investor rights and, in particular, in the way investment arbitrators specify the scope of these rights suggests that we are often at the risk of falling into a formalist trap. The measure of control over the resources is not a natural or trivial question: it is very often a matter of a normative conflict.

The incomplete character of ownership often imposes the task of resolving this conflict on investment arbitrators. The need to make this type of interpretative decisions is common to a constitutional rights framework. As Dworkin remarks, the ‘characterization of the rights is formal, of course, in the sense that it does not

145 Ibid.
146 Joseph Lemire v Ukraine, ICSID Case No. ARB/06/18, Dissent of Dr Jürgen Voss, 1 March 2011, paras vi-vii, 40-60.
147 See Saluka v the Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para 263.
150 Franck Michelman, above n 95, at 1099.
indicate what rights people have or guarantee, indeed, that they have any.\textsuperscript{151} Thus, the most important feature of a constitutional property regime—and of the IIR—is not the provision of clarity regarding the constitutional boundaries of private property rights but the security of whatever the judges consider to be property.\textsuperscript{152} Only after finding that the state has deprived the individual of their rights, a judge or an investment arbitrator may decide to override the state measure because it is imbalanced or disproportionate.

What is important to underscore then is that the inclusion of a property clause in a constitution or the conclusion of an investment treaty may have many consequences; however, none of them is the creation of well-defined property rights. The constitutional protection of private property, including foreign investment protection according to the IIR, does not say much about the scope of the rights. It could be possible that the adoption of a constitutional property clause or the conclusion of an investment treaty provides the main guidelines for the substantiation of proprietary rights. However, each constitutional property regime and the IIR in particular belong to a long but also extremely plural and culturally diverse tradition of property rights.\textsuperscript{153} Indeed, although private property can be important for a community, such as in the United States, the case law in that country is characterized as a muddle.\textsuperscript{154} From this lack of consistent judicial decisions, it is reasonable to anticipate that the work of investment arbitrators will not be easy: if the judicial decisions in the United States are inconsistent, it is likely that this is the case in most countries and, as the practice shows, it is in investment arbitration. In deciding investment disputes, then, investment arbitrators cannot follow a clear long-standing body of domestic legal antecedents: the reason is that such a body of cases does not exist.

In her analysis of takings decisions in the United States, Rose claims that the reason for the muddle in takings cases is that judges have resolved the normative conflict inherent in property differently.\textsuperscript{155} Her work shows that the main questions concerning expropriation disputes are not doctrinal. This view is shared by Singer, for instance, who argues that the substantiation of ownership depends on the

\begin{footnotesize}
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\item[\textsuperscript{151}] Ronald Dworkin, \textit{Taking rights seriously} (London: Duckworth, 1994), at xi.
\item[\textsuperscript{152}] Carol Rose, \textit{Property and Persuasion} (Colorado: Westview Press, 1994), at 3.
\item[\textsuperscript{154}] Carol Rose, ‘Mahon Reconstructed: Why the Takings Issue is Still a Muddle,’ \textit{57 Southern California Law Review} 561 (1984), at 561-99; Susan Rose-Ackerman, above n 99, at 1697-711.
\item[\textsuperscript{155}] Carol Rose, above n 154, at 594-7.
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normative view about externalities, which historically has been guided by either a classical liberal, a legal realist or a law and economics approach. Ackerman makes a similar claim, noting that 'it is only after resolving certain philosophical issues that one can make sense of the constitutional question, let alone pretend to expound a correct constitutional answer.' Ackerman’s work on constitutional property starts with the premise that judges decide takings cases according to a number of values that summarize their ‘comprehensive view’ in relation to private property and the legal order. He stresses that:

the constitutional text has been conceived as a mandate for the analyst to, first, impute a Comprehensive View to the legal system as to determine the substantive principles of just compensation and, second, work out those compensation rules that will further the Comprehensive View in all litigated cases involving the taking of property rights.

A main task of investment arbitrators is thus to choose between different justifications for private property, such as a Kantian moral rationale or one based on Bentham’s utility or Posner’s efficiency. This choice is central to the outcome of a dispute because it leads the interpreter in quite a clear direction. In a dispute regarding public access to a beach, for instance, arbitrators would arguably arrive to quite opposite decisions depending on their preference for wealth maximisation through foreign investment or the recreation of the local population. For this reason, limiting the debate about foreign investor rights to the doctrinal contours of the doctrine of legitimate expectations, or any other magical formula such as acquired rights, equals to overlook the normative side of the debate altogether. The discussion remains doctrinal, in this sense, to the extent that it focuses on the subjective or objective character of the expectations, or the application of the caveat

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158 Ibid., at 23.
159 Ibid., at 29.
160 Ibid., at 11.
emptor principle to foreign investors.\textsuperscript{162} A discussion about the doctrinal boundaries of legitimate expectations can not reveal the general lines of the interpretation of foreign investor rights because the question investment arbitrators pose, and not only the answers they provide, are shaped by the comprehensive view they follow.\textsuperscript{163} As Waldron explains, the scope of property rights 'is not a matter of independent choice; it is the upshot of the arguments we are convinced by.'\textsuperscript{164}

VII. Conclusion

This article has shown that foreign investors are concerned about not only the protection of private property rights but also the measure of control that these rights provide over resources. Thus far, however, the international investment law literature has paid limited if any attention to the kind of property rights that come to be specified in the context of the IIR. Procedural questions raised by investment arbitration have attracted most of the attention, while the analysis of arbitral interpretation has been limited to the review of host state authority. Little has been said, in favour or against, the scope of foreign investor rights in accordance with investment awards.

Referring to international investment law as the legal order that protects foreign investors from host state abuse or arbitrary behaviour focuses excessively on one side of the story, understating the relevance of foreign investor rights. This article has argued that control is central in foreign investment relations, and that foreign investors are concerned with host state behaviour to the extent that it can affect their expectations regarding the use and benefit of resources. This legal realist perspective suggests that there is a need to expand the existing approach to the IIR, moving from an approach restricted to host state behaviour and responsibility, to a more comprehensive view capable of embracing foreign investor rights and standards of review. In these terms, the relevant questions are both the specification and enforcement of the rights foreign investors enjoy over the resources comprising their investments.

\textsuperscript{162} On the applicability of the caveat emptor principle in international investment law, see Peter Muchlinski, 'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard,' 55(3) \textit{International and Comparative Law Quarterly} 527 (2006), at 527-557.

\textsuperscript{163} Bruce Ackerman, above n 157, at 9.

\textsuperscript{164} Jeremy Waldron, above n 84, at 433.
A characterisation of the IIR that concentrates on foreign investment protection, such as a mechanism of judicial review, overlooks any discussion about the interpretation of foreign investor rights. It is unquestionable that host state behaviour matters to decide an investment dispute. But looking only at this is not enough, and the scope of foreign investor rights is a question of similar importance and complexity. In this regard, it could well be that the present academic efforts to balance the IIR require focusing not only on where investment arbitrators should draw the line between legitimate and illegitimate host state behaviour, but also on how they interpret and specify foreign investor rights. Arguably, a more profound debate about the interpretation and specification of foreign investor rights could shift the interest of the literature towards the justifications for these rights, the comprehensive view that guide investment arbitrators, and the plural character of property. This discussion would inevitably lead the present debate towards property law and theory, opening a space for debate and change in the international regulation of foreign investment. Such a move can only be salutary in times when the IIR is facing increasing discontent.