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International Investment Law and Comparative Public Law: Ways out of the Legitimacy Crisis?

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International investment law is not only the perhaps fastest growing area of international law and dispute settlement today, but also a field that faces considerable challenges and criticism from States, investors, civil society, non-governmental organizations, and legal scholars. Yet, international investment law has not yet received sufficient theoretical attention and, therefore, is often not well-equipped to counter such criticism. Despite increasing amounts of academic literature, its theoretical penetration remains incomplete.

What is still missing is a comprehensive framework for the current thinking on international investment law as a whole, as well as convincing accounts of its pieces. What complicates matters in particular is the clash between private commercial arbitration and public law approaches to international investment law and investment treaty arbitration. It is precisely the tension between these two models that is at the origin of much of the criticism of, and misunderstandings about, the structure,

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functioning, and future direction of the current system of international investment protection.

As part of an endeavour to provide a conceptual framework for international investment law, and to increase its acceptance by States, investors, and civil society – and hence its legitimacy – this article outlines a public law approach to international investment law. It also suggests a specific methodology for conceptualizing international investment law, for interpreting international investment treaties and the procedural instruments governing investment treaty arbitrations, for circumscribing the powers and the role of arbitrators in investment treaty disputes, and for suggesting reform to certain features of investment treaty arbitration that distance this form of dispute settlement from the traditional forms of dispute resolution at the domestic and international level, namely by standing courts or tribunals engaging in administrative or constitutional review.

The approach the paper outlines is based on the premise that, rather than only being concerned with backing up private ordering between foreign investors and host states, international investment law has a broader function in providing a legal framework for a public international economic order within which investment relations take place by establishing principles of investment protection under international law that endorse rule of law standards for the treatment of foreign investors. Investment treaty arbitration, in turn, is viewed as a mechanism not only to resolve individual investor-state disputes but also to implement, in reviewing the legality of state conduct, these principles of international investment law. Investment treaty arbitration, therefore, is viewed as more akin to administrative or constitutional judicial review than to commercial arbitration, even though investment law makes use of the arbitral process to settle disputes.

Based on this premise, the core idea of this paper is to tackle problems arising under international investment treaties by means of a comparative public law method, which takes inspiration from the more advanced systems of public law at the domestic and the international level. This conceptualization relies on the observation that, even though international investment law has gained almost ubiquitous purview because of the increasingly wide-spread presence of foreign investors and the impact of virtually any area of public policy-making on investment, the problems dealt with in investor-state arbitration, however, are not novel as such. They have played a role in domestic administrative and constitutional litigation – and partly also in regional regimes such as the European Court of Justice or the European Court of Human Rights – ever since the rise of the modern regulatory state. With the emergence of a truly global economy the same problems of public law now surface at the international level.

Yet, even though international investment law and domestic public law are, to a certain extent, functional equivalents in governing investor-state relations,

international investment law still lacks the conceptual and doctrinal clarity of sophisticated public law concepts developed at domestic and regional levels. The present article therefore proposes the use of a comparative public methodology to enhance our understanding of international investment law. This method does not treat the issues arising under the more than 2,600 bilateral, regional and sectoral investment treaties in isolation, but against the rich experience of more advanced public law systems. Thus, comparative public law can serve as a critical tool in analyzing and in further developing international investment law and investor-state dispute resolution in ways that are tested and accepted in other public law contexts. This cannot only be of practical use in investor-state arbitrations, but ultimately may help to strengthen the often contested legitimacy of investor-state dispute resolution without requiring a fundamental redesign of the system.

The present paper provides an introduction to the conceptual foundations of the approach to link international investment law and comparative public law, which is part of a larger research project to understand the public law implications of phenomena of global governance.¹ In a first step, it points to the reasons why new conceptual approaches are necessary in order to remedy the discontents that have emerged in relation to international investment law and arbitration (Part I). Thereafter, this paper suggests that, institutional reform not being likely, and apparently not desired by the large majority of States, the most promising avenue to increase acceptance, accountability, and legitimacy in international investment relations is via system-internal approaches (Part II). These approaches should stress the nature of international investment law as a genuinely public law discipline, recognizing differences with classical international law and commercial arbitration (Part III). This is all the more the case as the public law dimensions of international investment law are not limited to a specific host state, but concern foreign investors and states more generally. Investment treaty arbitration, thus, increasingly develops into a mechanism of global governance with arbitral tribunals crafting and concretizing treaty-overarching standards of investment protection with prospective effects on host states and investors (Part IV). Finally, comparative public law is introduced as a method for guiding and legitimating the interpretation of international investment treaties and as a source of reform (Part V).

I. International Investment Law and Its Discontents

Opinion on international investment law is divided. From one perspective it is an unparalleled success story. Today, about fifty years after Germany and Pakistan

¹ See S Schill (ed), *International Investment Law and Comparative Public Law*, 2010. For a similar approach to understand governance at the supranational level through a public law approach A von Bogdandy, R Wolfrum, J von Bernstorff, P Dann and M Goldmann (eds.), *The Exercise of Public Authority by International Institutions – Advancing International Institutional Law*, 2010.

concluded the first bilateral investment treaty (BIT),² more than 2,600 BITs, numerous investment chapters in bilateral free trade agreements, as well as some regional and sectoral treaties, like the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), offer comprehensive protection to foreign investors.³ By granting foreign investors substantive rights, including national and most-favoured-nation (MFN) treatment, fair and equitable treatment, and protection against expropriation without compensation, and by allowing them to enforce these rights in arbitral proceedings against host states,⁴ investment treaties aim at establishing institutions necessary for the functioning of market economies and promise increased foreign investment flows, economic growth, and development in both capital-importing and capital-exporting countries.⁵

Furthermore, unlike during the 1970s and 1980s when capital-exporting and capital-importing countries were irreconcilably divided about the establishment of a New International Economic Order, fundamental ideological differences about the desirability of property protection under international law have largely disappeared.⁶ In order to attract foreign investment, investment treaties now span a large amount of investment flows not only between North and South, East and West, but also between developed countries and between developing countries.⁷ Investment treaty protection,

² Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, entry into force 28 April 1962.

³ See UNCTAD, 'Latest Developments in Investor-State Dispute Settlement' (2010) IIA Issues Note No 1, 2–3, available at <http://www.unctad.org/en/docs/webdiaeia20103_en.pdf>, recording an aggregate of 357 treaty-based investment disputes by the end of 2009. On the history of international investment law see KJ Vandeveld, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis JLP 157; R Dattu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24 Ford ILJ 275.

⁴ On the content of investment treaties see, eg, the classic book by R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995). The disputes are settled under a variety of arbitral rules, most importantly under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed 18 March 1965, 575 UNTS 159 (ICSID Convention), but also pursuant to UN Commission on International Trade Law (UNCITRAL) Arbitration Rules, as well as in other institutional or ad hoc arbitrations (see UNCTAD (n 3 above) 2).

⁵ On the relation between foreign investment and economic growth see eg H Hansen and J Rand, 'On the Causal Links between FDI and Growth in Developing Countries' (2006) 29 *World Economy* 21; A Chowdhury and G Mavrotas, 'FDI and Growth: What Causes What?' (2006) 29 *World Economy* 9 (suggesting bi-directional causality between foreign direct investment and growth).

⁶ Some, however, view recent developments in some Latin American countries as a continuation of fundamental disagreement (see n 9 below). Such disagreements, however, by and large appear to be the exception rather than the rule.

⁷ See UNCTAD, *South-South Cooperation in International Investment Arrangements* (2005), available at <http://www.unctad.org/en/docs/iteiit20053_en.pdf>. It is controversial, however, whether BITs have an actual effect on attracting foreign investment. cf, eg, J Tobin and S Rose-Ackerman, 'When BITs Have Some Bite' in RP Alford and C Rogers (eds), *The Future of Investment Arbitration* (2009) 131 and T Büthe and HV Milner, 'Bilateral Investment Treaties and Foreign Direct Investment' in KP Sauvant and L Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) 171 (both finding a positive correlation between BITs and investment flows) with E Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation and Causation', in Sauvant and Sachs (above) 395 (finding no positive relationship).

therefore, has become a truly global phenomenon that limits government conduct vis-à-vis foreign investors in industrialized and developing countries alike.

At the same time, the rise of investment treaties and investment treaty arbitrations, the breadth of some interpretations of investor's rights by some arbitral tribunals, and some significant awards against states, have attracted critical attention from various states as well as from public interest groups and academics of public and international law.⁸ Although these critical voices vary in the specific points they raise, and in the tone in which they raise them, they have fueled a considerable amount of literature intimating that international investment law may be in a veritable 'legitimacy crisis'.⁹ Signs of this crisis are seen in the recent withdrawal of some Latin-American states from investment treaties and the ICSID Convention,¹⁰ in what may be seen as increased reluctance by states to comply with orders and awards of investment tribunals,¹¹ or in the re-crafting of the substance and procedure of investment treaties in ways that reflect concerns about jurisprudential trends in investment treaty arbitration, including by, but not limited to, the United States.¹²

⁸ See only the recently published Public Statement on the International Investment Regime, 31 August 2010, available at http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf.

⁹ See M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in KP Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (2008) 39–45; A Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11' (2005) 25 Nw JILB 279, 282; SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Ford LR 1521; A Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis' (2004) 17 Geo IELR 51; CH Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 Van JTL 37 (2003); CN Brower *et al*, 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arb Int 415; CN Brower, 'A Crisis of Legitimacy' *Nat'l L. J.*, 7 October 2002, B9; see also CN Brower and S Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi JIL 471.

¹⁰ Bolivia withdrew from the ICSID Convention as of 3 November 2007. See 'Bolivia Denounces ICSID Convention' 46 ILM 973 (2007). On 12 June 2009, Ecuador's Congress voted to withdraw from the ICSID Convention. Discussion of withdrawal from the ICSID Convention has also been reported with respect to Nicaragua, Venezuela, and Cuba. See ME Schnabl and J Bédard, 'The Wrong Kind of "Interesting"' *Nat'l LJ*, 30 July 2007. On 30 April 2008, Venezuela communicated to the Netherlands its intention to terminate the Dutch-Venezuelan BIT as of 1 November 2008, see LE Peterson (ed), *Investment Arbitration Reporter* (16 May 2008), available at <<http://www.iareporter.com/Archive/IAR-05-16-08.pdf>>.

¹¹ On non-compliance with investor-state arbitration see L Mistelis and C Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2009) 19 Am Rev Int Arb 319, 354–61; see also C Baltag, 'Enforcement of Arbitral Awards against States' (2009) 19 Am Rev Int Arb 391. Sometimes states also disregard other orders of arbitral tribunals, eg regarding provisional measures.

¹² See G Gagné and J-F Morin, 'The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT' (2006) 9 JI Econ L 357, 363; S Schwebel, 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law' (2006) 3(2) Trans Disp Man 1, 3–7; M Kantor, 'The New Draft Model U.S. BIT: Noteworthy Developments' (2004) 21 JI Arb 383, 385.

Most importantly, the grant of a new exclusive competence to the European Union (EU) in the field of foreign direct investment under the Lisbon Treaty¹³ may have a significant impact on the whole of international investment law. On the one hand, the EU is currently reviewing its own future international investment law policy also in light of criticism and suggestions for reform that the current system of international investment protection has received;¹⁴ on the other, the grant of the new competence puts the future of independent foreign investment policies of the Member States, as well as the continued application of investment treaties already concluded by the Member States, into question.¹⁵ In sum, these developments may result in a certain backlash against international investment law and arbitration,¹⁶ and possibly the emergence of a latent crisis.

¹³ Art. 207(1) and 3(1)(e) Treaty on the Functioning of the European Union. The exact scope of this competence. However, is not settled.

¹⁴ The European Commission has provided first indications of how the Union's future foreign investment policy could look like in a recent communication. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 7 July 2010, Towards a comprehensive European international investment policy, COM(2010)343 final, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf. Currently the topic, however, is still under consideration. Yet, several Member States are wary about the Commission reducing the scope and mechanism of international investment protection as it has been traditionally enshrined in the investment treaties of Member States.

¹⁵ Although existing investment treaties between Member States and non-EU Member States will stay into force, the Member States are under an obligation to bring their investment treaty obligations into conformity with EU law through renegotiation or even termination. This follows from an analogous application of Art. 351 of the Treaty on the Functioning of the European Union. See BVerfGE 123, 267, 421 f.; C Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht Nr. 83, p. 17, available at <http://www.wirtschaftsrecht.uni-halle.de/Heft83.pdf>. See also ECJ, C-205/06, *Commission/Austria*, ECR 2009, I-1335 paras. 24 *et seq.*; C-249/06, *Commission/Sweden*, ECR 2009, I-1301 paras. 25 *et seq.*; C-118/07, *Commission/Finland*, ECR 2009, I-10889 paras. 18 *et seq.* (holding that the free capital transfer provisions in certain investment treaties between EU Member States and non-EU countries were in breach of EU law and requiring Member States to renegotiate or terminate such treaties). Furthermore, according to a new draft regulation, Member States can notify the Commission of those existing investment treaties that they wish to keep in place despite the EU's new competence. After a five year period, however, the Commission, according to the proposal, will attempt to review these BITs and determine whether they can continue to stay in force. According to the draft regulation proposed by the Commission, Member States will also be able to continue concluding international investment treaties with non-EU Member States for a transitory period of at least five years, provided these treaties are in conformity with EU law and do not impede the exercise of the EU's competence on foreign investment. Furthermore, the negotiation and conclusion of investment treaties by Member States will be subject to close supervision by the Commission. See Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 7 July 2010, COM(2010)344 final, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf. Even more complex is the question of whether intra-EU investment treaties are still applicable. The Commission supports the position that they cannot be applied anymore. Arbitral tribunals, however, continue to apply them. See comprehensively on the impact of EU law on investment treaty obligations of Member States T Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 CMLR 383 (2009); H Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58 Int'l & Comp. L. Q. 297 (2009), 297; M Burgstaller, *European Law and Investment Treaties*, 26 J. Int'l Arb. 181 (2009).

¹⁶ See M Waibel *et al* (eds), *The Backlash Against Investment Arbitration* (2010).

Host states are concerned particularly about a shrinking of domestic policy space occasioned, based on vague standards of investment protection, by international arbitrators who exercise interpretative powers over the content of investment treaty obligations and who are *de facto* able to restrict even policy choices made by democratically elected legislators. Similarly, non-governmental organizations criticize the lack of democratic control and accountability of investment arbitrations, the inability for non-parties to influence arbitral proceedings, and the threat that investment protection is accorded preference over competing policy concerns. Investors, finally, are struck by the absence of a predictable jurisprudence, which results above all from the nature of arbitration as a one-off dispute settlement process without institutional mechanisms that can ensure consistency.

Concerns in relation to the current system of international thus investment protection involve several factors: First, the vagueness, or even ambiguity, of investment treaties, which, on the basis of broadly formulated principles of investment protection, restrict state sovereignty without giving arbitral tribunals clear guidance as to the scope of obligations assumed under the treaties; second, the increasing number of conflicting and inconsistent interpretations by arbitral tribunals of standard principles of investment protection, not only under different treaties, but even as regards virtually identical cases brought under the same treaty; third, the fragmentation of international investment law into a cacophony of arbitral decisions and consequently the lack of stability and predictability of the decision-making of arbitral tribunals for both investors and states; fourth, the perception of a built-in bias favoring foreign investors and foreign investments over legitimate non-investment policy choices, such as the protection of public health, cultural heritage, labor standards, or the environment; and fifth, the procedural maxims of arbitration, in particular confidentiality of proceedings, and the idea that dispute settlement under investment treaties constitutes a party-owned process, in which non-parties, even if they are affected, are voiceless.

II. Institutional Reform or System-Internal Adaptation?

Solutions to these concerns are manifold. They focus, above all, on institutional changes to investor-state arbitration as being the most problematic factor. Apart from the radical response to exit the system of international investment protection altogether,¹⁷ suggestions for institutional reform abound, ranging from a return to state-to-state arbitration, via introducing a common appeals body in order to review investment treaty awards, to establishing a permanent international investment court.

Returning to the settlement of investment disputes in inter-state relations would allow states not only jointly to control the composition of arbitral tribunals, but

¹⁷ See n 9 above.

also to filter the disputes tribunals entertain. While this would allow states to exclude spurious or frivolous claims, it would equally permit them to discard claims for foreign-policy reasons. Foreign investors, in consequence, would be deprived of the most important right granted under investment treaties, namely the right to initiate investment arbitration and hold states liable for breaches of investment treaty commitments independent of an intervention by their home state.¹⁸ A return to diplomatic protection could also re-politicize international investment relations and unmake a central advancement investor-state arbitration already was praised for in the 1960s when the ICSID Convention was concluded: the depoliticization of investment disputes.¹⁹

Another solution consists in the establishment of a permanent international court for foreign investment disputes.²⁰ This would allow states alone to determine the composition of the bench and arguably lend such an institution increased legitimacy. Arguably, the tenure of judges of a permanent court also would lead to an increase in the dispute resolvers' independence and impartiality, as tenured judges need not cater to the interests of potential future appointers as arbitrators, some argue, could be perceived to do.²¹ Finally, a standing court would have the advantage of centralizing control of the interpretation and application of investment treaties in a single body, thereby reducing inconsistencies and fragmentation, and increasing the predictability of investment jurisprudence.²² For the same reason, notably ensuring consistency, the introduction of an appellate mechanism has been envisaged in some recent US investment treaties and by the ICSID Secretariat in a proposal tabled in 2004.²³

ICSID's proposal, however, has failed to gain the support of a majority of states. Likewise, none of the recent US BITs so far has introduced an appeals mechanism. Consequently, the prospect of an international investment court or an appeals facility to replace the current system of investor-state arbitration is remote at this point. Irrespective of the benefits of such alternative arrangements for the consistency, predictability, and legitimacy of investor-state dispute settlement, fundamental institutional reforms are unlikely to take place in the foreseeable future.

¹⁸ See S Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in Waibel *et al* (n 16 above) 29.

¹⁹ cf IFI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' (1986) 1 ICSID Rev-FILJ 1.

²⁰ See eg G Van Harten, *Investment Treaty Arbitration and Public Law* (2007) 180–4.

²¹ See G Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law', Chapter 20 below. Less critical in this respect Brower and Schill (n 9 above).

²² See Franck (n 9 above) 1617–25 (discussing the introduction of an Investment Arbitration Appellate Court).

²³ See DA Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes' (2006) 39 Van JTL 39; CJ Tams, 'An Appealing Option? The Debate about an ICSID Appellate Mechanism' (2006) 57 *Beiträge zum Transnationalen Wirtschaftsrecht*, available at <<http://www.telc.uni-halle.de/Heft57.pdf>>.

However, the system of international investment law is most likely to continue to face demands for increased transparency and openness. In addition, the acceptance by states of the substance of investment treaties will depend on the extent to which investment treaties are applied to restrict governmental policy space to regulate in the public interest and to further non-investment related policies. In fact, the extent to which investment treaties limit a state's regulatory powers and subject the exercise of such powers to liability claims by foreign investors may become the litmus test for the future viability of the system. Likewise, international investment law will be pressured by demands to respect non-investment law obligations of states, for example under human rights treaties or treaties protecting the environment. Openness towards these subsystems of international law will be an equally important criterion in the critical evaluation of international investment law.

Unlike the more sweeping critique of international investment law suggests, a balanced relationship between state sovereignty and investment protection, between states and arbitral tribunals, and between investment and non-investment concerns, it is argued here, can be implemented within the system of international investment protection as it currently stands. The reason why system-internal solutions so far are not yet sufficiently robust, arguably is closely linked to the dissonance between the commercial arbitration model, which stresses the function of investment arbitration to settle individual investor-state disputes, and the governance functions arbitral tribunals exercise beyond individual disputes.

Furthermore, despite growing scholarly attention to international investment law, the development of a comprehensive framework for conceptualizing this field of law in its relation to other international law regimes, as well as its implications for regulatory government policy-making, is still in its infancy. This holds true not only on a broad level as regards the relation of international investment law to non-investment concerns and non-investment related international law, but also with respect to the content of substantive investment law, including many of the standard investor's rights. After all, conflicting arbitral decisions are due, not least, to disagreement about the proper interpretation of standard concepts of international investment protection.

Thus, what currently is perhaps most needed in order to react to criticism are theoretical approaches that help parties, tribunals, and commentators to classify, evaluate, and form arbitral jurisprudence in ways that are sustainable for the system and acceptable for the system's environment. Such a system-internal approach, above all, would allow leaving untouched the trust investors have developed vis-à-vis international arbitration as an independent and impartial dispute resolution mechanism, while making necessary concessions towards demands coming from outside international investment law in terms of transparency and openness and as regards respect for non-investment concerns.

This paper and other works already published²⁴ argue and illustrate that achieving the necessary balance between investment protection and other public interests, and addressing demands for transparency and openness in investment arbitration, can be done by understanding international investment law's significant public law implications and by conceptualizing it as a public law discipline within international law. This does not change the nature of international investment law as public international law or replace other doctrinal approaches, such as those stressing the comprehensive application of general international law methods of treaty interpretation, the deeper analysis and use of the customary international law which underpins or complements investment treaty provisions, or the use of principles of systemic integration and techniques of defragmentation. It is rather meant to complement these approaches by making international investment law receptive to comparative public law insights.

III. International Investment Law as Public Law

Developing a conceptual framework for international investment law is complicated by the fact that this field of law combines public international law as the applicable law to investor-state disputes²⁵ with arbitration which, even though not unknown in international law to settle state-to-state disputes, is most widespread as a mechanism to settle disputes between private parties arising in the context of international commercial transactions. This hybridization has the effect that the field is populated by practitioners and academics with quite diverse formative, professional, and 'ideological' backgrounds: one group joining the field from the side of private commercial law and arbitration, the other coming from public international law and inter-state dispute settlement. While this combination is mostly fruitful in solving disputes, which are often factually and legally complex, it also results in a veritable culture clash of different epistemic communities, because private commercial and public international lawyers often have different perspectives on, and different philosophies about, the role of law, the state, and the function of dispute resolution.

While reality, of course, is more nuanced, painting a black and white picture exemplifies the differences between both groups. From a commercial arbitration perspective arbitrators are responsible only to the parties in solving a specific dispute and subject only to limits agreed by the parties. This thinking is engrained in private law rationales of party autonomy, of party equality, and of ordering affairs by commercial contracts between freely interacting parties. For commercial lawyers, the

²⁴ See S Schill (ed.), *International Investment Law and Comparative Public Law* (2010).

²⁵ However, the governing law is not necessarily limited to international law. Instead, national law often plays an important role in many investment treaty arbitrations. cf ICSID Convention, Art 42(1). See generally O Spiermann, 'Applicable Law' in P Muchlinski *et al* (eds), *The Oxford Handbook of International Investment Law* (2008) 89.

fact that one party to the dispute is a state matters little.²⁶ The thinking of public international lawyers, by contrast, centers more around the specific quality of sovereign states, and the specific responsibility states have for their populations. Furthermore, public international lawyers usually will view the settlement of investor-state disputes as part of the broader framework of international law, which is beyond the control of the parties. While those coming from international commercial arbitration, therefore, tend to stress the *private* nature of dispute settlement in resolving an individual dispute between two parties based on party autonomy and backed by confidentiality, public international lawyers emphasize the embeddedness of investment treaty arbitration in a *public* world order that imposes legality constraints on state conduct. In this perspective, investment treaty arbitration contributes to *public* objectives of the international community at large.²⁷

The resolution of tensions resulting from the interaction of private and public international lawyers in investment arbitration, however, should not result in ideological battles. Both groups contribute specific expertise to international investment law and investor-state dispute resolution: knowledge of international law and expertise in dealing with aspects of international relations and dispute settlement involving sovereigns in the case of public international lawyers; an understanding of international business transactions and business practices and intimate familiarity with arbitral procedure, including expertise in complex fact-finding, in the case of commercial arbitration practitioners.²⁸

Furthermore, neither a pure international law understanding nor a pure commercial law understanding of investor-state dispute resolution are sufficient in themselves to comprehend the specific characteristics of international investment law. Rather, there are fundamental differences with both traditional public international law as the law governing inter-state disputes, and, commercial law and arbitration.

²⁶ See B Legum, 'Investment Treaty Arbitration's Contribution to International Commercial Arbitration' (2005) 60(3) *Dispute Resolution Journal* 71, 73 (noting that 'for most international practitioners today, private international commercial arbitration is the only form of the genre they have ever known. The private arbitration model, thus, has naturally become the default template for all kinds of international arbitration today—including investment treaty arbitration.').

²⁷ See eg TW Wälde, 'The Specific Nature of Investment Arbitration' in P Kahn and TW Wälde (eds), *Les Aspects Nouveaux du Droit des Investissements Internationaux/New Aspects of International Investment Law* (2007) 43, 112 *et seq*; Van Harten (n 20 above) 58 *et seq*; G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *EJIL* 121, 145–50 (stressing the public nature of investment treaty arbitration). See also *Wintershall Aktiengesellschaft v Argentine Republic* ICSID Case No ARB/04/14, Award, 8 December 2008, para 160: 'The ICSID Convention ... combines a public law system of State liability with private arbitration'; *Glamis Gold Ltd v US* UNCITRAL/NAFTA, Award, 8 June 2009, paras 3–9, stating at para 5 that 'Chapter 11 of the NAFTA contains a significant public system of private investment protection'.

²⁸ See CN Brower, 'W(h)ither International Commercial Arbitration?—The Goff Lecture 2007' (2008) 24 *Arb Int* 181, 191–4 (2008).

International investment law differs from traditional public international law in relation to its function. Although, traditional international law contained rules concerning the protection of foreign investment as part of the customary international law minimum standard and of diplomatic protection,²⁹ it remained a law governing the relations between states.³⁰ Disputes about the limits of a state's power over foreign investors were first a matter for the domestic courts of that state, and only subsequently a matter for inter-state dispute resolution, either before an international court, or by means of inter-state arbitration.³¹ Classical international law, therefore, did not directly affect the relations between foreign investors and host states.

Modern investment law, by contrast, is characterized by a private right of action of foreign investors, permitting them to initiate arbitration, mostly for damages,³² directly against the host state in an international forum, resulting, if successful, in a widely enforceable award under the ICSID Convention³³ or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').³⁴ This right of action is based on the state's prospective and generalized consent to arbitrate any matter falling under the scope of application of an investment treaty.

As compared to traditional international law and its system of diplomatic protection, states today retain much less control over dispute settlement and enforcement of investment treaty obligations. While under the system of diplomatic protection states could, to a greater extent, control the types of disputes that were litigated, the introduction of a private right of action for foreign investors to initiate

²⁹ Comprehensively on diplomatic protection, see CF Amerasinghe, *Diplomatic Protection* (2008).

³⁰ The *locus classicus* is *The Mavrommatis Palestine Concessions (Greece v Britain)* Judgment, 30 August 1924, PCIJ Series A, No 2 (1924) 12: 'In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State – i.e. between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. ... It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.'

³¹ See CH Brower, 'The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law' (2008) 18 Duke JICL 259, 265–91 (2008); C Grey and B Kingsbury, 'Developments in Dispute Settlement: Inter-State Arbitration Since 1945' (1992) 63 BYBIL 97.

³² The primary remedy sought by foreign investors is damages for breaches of investment treaty obligations, although other remedies, including restitution of property, or the cessation of unlawful conduct, are possible. See C Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2005) 20 Arb Int 325.

³³ See ICSID Convention, Art 54(1): 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.

³⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958, 330 UNTS 38.

arbitration has brought a fundamental change in this respect. Private enforcement of international investment law, coupled with limited influence of states on the arbitral process, their limited powers to review arbitral awards, and extensive powers of investors to enforce awards worldwide, has resulted in what appropriately has been termed a ‘paradigm shift in international investment law’.³⁵ It has transferred considerable power from states to foreign investors and arbitral tribunals.³⁶

Although international investment law remains firmly embedded in public international law, the introduction of the investor’s right to initiate arbitration transforms international investment law from a subsidiarily applicable body of law into the primary legal framework that directly governs investor-state relations. Functionally, international investment law and arbitration therefore differ from traditional public international law mechanisms in governing the relations between private investors and states.

International investment arbitration also differs fundamentally from commercial arbitration. Certainly, investment treaty arbitration appears similar to international commercial arbitration in several regards:³⁷ it originates, like international commercial arbitration, in the claim by a private party before an arbitral tribunal; it employs procedural rules that are either directly made for commercial arbitrations or tailored after the model of commercial arbitration, regarding, inter alia, the constitution of the tribunal, the rules governing the procedure, the taking of evidence, the rendering of the award, etc.; and finally, awards rendered in investment treaty arbitration can be enforced similarly to those rendered in the context of commercial arbitration.³⁸ The essential procedural features of investment treaty arbitration and international commercial arbitration therefore coincide.

Notwithstanding, investment treaty arbitration differs from international commercial arbitration in several regards, namely the subject matter of the disputes, the relationship of the parties, the nature of the obligations at play, and the nature and scope of the host state’s consent to arbitration.³⁹ First, unlike commercial disputes,

³⁵ C Schreuer, ‘Paradigmenwechsel im Internationalen Investitionsrecht’ in W Hummer (ed), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende* (2002) 237.

³⁶ Foundational *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26 January 2006, Separate Opinion by Thomas Wälde, para 13 (“... while public international law still provides the main principles ... one needs to bear in mind that investment treaties ... deal[] with a significantly different context from the one envisaged by traditional public international law: At its heart lies the right of a private actor to engage in an arbitral litigation against a (foreign) government over governmental conduct affecting the investor. That is fundamentally different from traditional international public law, which is based on solving disputes between sovereign states and where private parties have no standing. Analogies from such inter-state international law have therefore to be treated with caution.”).

³⁷ See Van Harten and Loughlin (n 27 above) 139–40.

³⁸ See nn 33 and 34 above.

³⁹ See Van Harten and Loughlin (n 27 above) 140–5.

investment treaty arbitrations regularly involve questions about the scope and limits of the host state's regulatory powers, including, for example, disputes concerning limits of emergency powers,⁴⁰ regulatory oversight over public utility companies and the tariffs they charge,⁴¹ the control and banning of harmful substances,⁴² the protection of cultural property,⁴³ or the implementation of non-discrimination policies.⁴⁴ Because one of the disputing parties is not a private commercial actor, investment treaty awards thus are more likely to affect the host state's population directly, as the state, in order to comply with its international obligations, must adapt its behavior in order to avoid liability, for example by allowing higher tariffs for basic utilities even if this cuts off access of parts of its population to that utility,⁴⁵ by permitting the use of harmful substances, by repealing general regulatory policies, etc. Investment treaty obligations and decisions by arbitral tribunals on such matters may thus directly affect the social fabric in the host state. As regards subject matter, investment treaty disputes, in other words, often involve public law rather than private law issues. This also explains the repeated demands for increased accountability of arbitral tribunals and for more democratic legitimacy in investment treaty arbitration,⁴⁶ and for more openness and transparency in the proceedings so that the host state's public is informed about its government's conduct and that of arbitral tribunals.

⁴⁰ See eg *CMS Gas Transmission Co v Argentine Republic* ICSID Case No ARB/01/8, Award, 12 May 2005; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic* ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006; *Sempra Energy International v Argentine Republic* ICSID Case No ARB/02/16, Award, 28 September 2007; *Enron Corp and Ponderosa Assets, LP v Argentine Republic* ICSID Case No ARB/01/3, Award, 22 May 2007; *BG Group plc v Republic of Argentina* UNCITRAL, Final Award, 24 December 2007; *Continental Casualty Co v Argentine Republic* ICSID Case No ARB/03/9, Award, 5 September 2008; *National Grid plc v Argentine Republic* UNCITRAL, Award, 3 November 2008.

⁴¹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22, Award, 24 July 2004; *Aguas del Tunari SA v Republic of Bolivia* ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005.

⁴² *Methanex Corp v US* UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *Chemtura Corp (formerly Crompton Corp) v Canada*, NAFTA (pending).

⁴³ *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992; *Glamis Gold v. US* (n 27 above).

⁴⁴ *Piero Foresti, Laura de Carli and ors v Republic of South Africa* ICSID Case No ARB(AF)/07/1 (pending).

⁴⁵ On water disputes in international investment law, see J Vinuales, 'Access to Water in Foreign Investment Disputes' (2009) 21 Geo IELR 733.

⁴⁶ cf B Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Van JTL 775 (2008); see further D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008); GH Sampliner, 'Arbitration of Expropriation Cases under U.S. Investment Treaties—A Threat to Democracy or the Dog that Didn't Bark?' (2003) 18 ICSID Rev-FILJ 1 (2003). The 2006 changes of the ICSID Rules have reacted to the repeated calls for increased transparency in investor-state arbitration, *inter alia*, by requiring ICSID to publish 'excerpts of the legal reasoning of the Tribunal', see ICSID, r 48(4); by allowing tribunals to open hearings to the public, see ICSID, r 32(2); and accepting amicus briefs, see ICSID, r 37(2). On these changes, see A Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules* (2007) 21 ICSID Rev-FILJ 427.

Secondly, investment treaty arbitrations involve obligations of a different nature than those dealt with in commercial arbitration. The rights invoked by a foreign investor do not originate from a freely negotiated contract, but from obligations the host state has assumed under an international treaty with the investor's home state. Thirdly, the relationship between the parties in investment treaty arbitration differs from the relationship of the parties in commercial cases. Whereas commercial relations between private actors are characterized by equality of the parties, foreign investors and host states stand in a hierarchical relationship of super- and subordination. In principle, states, unlike commercial parties, are therefore able to impose unilaterally binding decisions on a foreign investor by administrative order or legislation.

Finally, the host state's consent to arbitration in investment treaty disputes is of a different nature than that given in the commercial context. Arbitral jurisdiction in investment treaty arbitration is not based on contract, but involves a unilateral offer by the host state, given in an investment treaty in generalized and prospective form,⁴⁷ that any investor covered by the treaty's provisions can accept by initiating arbitration. Because of the state's 'public offer of arbitration',⁴⁸ investment treaty arbitration has been famously termed 'arbitration without privity'.⁴⁹ It is essentially an adjudicatory process for resolving investor-state disputes that follows a predetermined procedure and involves the application of pre-existing substantive rules, much like those involved in case of a state's submission to the jurisdiction of an international human rights court or to administrative or constitutional judicial review at the domestic level.⁵⁰ Investment treaty arbitration, in other words, is not classic arbitration where the parties have full control over the resolution of the dispute, for example by choosing the applicable law, or no law at all, or by setting evidentiary standards, etc.⁵¹ Instead, it involves the control of legality of the state's conduct under the applicable investment treaty.⁵²

⁴⁷ On the specificities of state consent in modern investment treaties, see B Legum, 'The Innovation of Investor-State Arbitration under NAFTA' (2002) 43 Harv ILJ 531.

⁴⁸ See B Cremades, 'Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties' in R Briner (ed), *Law of International Business and Dispute Settlement in the 21st Century* (2001) 149; A Bjorklund, 'Contract without Privity: Sovereign Offer and Investor Acceptance' (2001) 2 Chi JIL 183.

⁴⁹ J Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232.

⁵⁰ See SD Franck, 'International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?: The Role of International Arbitrators' (2006) 12 ILSA JICL 499, 503-4.

⁵¹ See generally J Paulsson, 'International Arbitration Is Not Arbitration' (2008) Stockholm International Arbitration Review 1.

⁵² Foundational *International Thunderbird Gaming v Mexico* Separate Opinion by Thomas Wälde (n 36 above) para 12 ("While the forms and procedures of international commercial arbitration are relied upon, one needs, for the application of such rules, to bear in mind that their purpose is to govern the procedure, but not to inject substantive principles, rules and legal concepts used in international commercial arbitration into the qualitatively different investment disputes between a foreign investor and a host state. International commercial arbitration assumes roughly equal parties engaging in

Instead, in view of the prospective consent to arbitration by host states for the benefit of private actors and the subject matter at play, i.e. determining the conformity of government conduct with standards contained in an international agreement, dispute settlement under international investment treaties is better analogized with judicial review of governmental conduct under administrative (and constitutional) law at the domestic level or international judicial review.⁵³

In this perspective, international investment law constitutes a public law discipline, because it imposes restraints on a state's exercise of powers vis-à-vis private investors. Investment treaty arbitration, in turn, is functionally analogous to administrative or constitutional judicial review. In a certain sense, it escapes classifications into pure categories of classical international law, domestic public law, or commercial law and arbitration: it is international law as regards its sources, comparable to administrative or constitutional law in its function to limit government conduct vis-à-vis private investors, and related to commercial arbitration concerning the form of dispute resolution and the professional community it draws on.

IV. Investment Treaty Arbitration and Global Governance

The public law dimensions in international investment law are not limited to the aspect of restraining governmental action in the interest of individual rights. They also surface in respect of the second central function of public law, namely its function to provide legitimacy and accountability for the exercise of public power.⁵⁴ This dimension of publicness becomes apparent if the focus is moved towards arbitral tribunals and the effect their activity has beyond the resolution of a specific investor-

sophisticated transnational commercial transactions. Investment arbitration is fundamentally different from international commercial arbitration. It governs the situation of a foreign investor exposed to the sovereignty, the regulatory, administrative and other governmental powers of a state. The investor is frequently if not mostly in a position of structural weakness, exacerbated often by inexperience (in particular in case of smaller, entrepreneurial investors). Investment arbitration therefore does not set up a system of resolving disputes between presumed equals as in commercial arbitration, but a system of protection of foreign investors that are by exposure to political risk, lack of familiarity with and integration into, an alien political, social, cultural, commercial, institutional and legal system, at a disadvantage. Legal principles for and methodological approaches to examining the factual situation, habits, natural instincts and styles of commercial arbitration are therefore no suitable guideposts for investment arbitration.”).

⁵³ *ibid* para 13 (“... more appropriate for investor-state arbitration are analogies with judicial review relating to governmental conduct—be it international judicial review (as carried out by the WTO dispute panels and Appellate Body, by the European- or Inter-American Human Rights Courts or the European Court of Justice) or national administrative courts judging the disputes of individual citizens’ [sic] over alleged abuse by public bodies of their governmental powers. In all those situations, at issue is the abuse of governmental power towards a private party that did and could legitimately trust in governmental assurances it received; in commercial arbitration on the other hand it is rather a good-faith interpretation of contractual provisions that is at stake. Abuse of governmental powers is not an issue in commercial arbitration, but it is at the core of the good-governance standards embodied in investment protection treaties. The issue is to keep a government from abusing its role as sovereign and regulator after having made commitments.”).

⁵⁴ See A von Bogdandy *et al*, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (2008) 9 German Law Journal 1375, 1380.

state dispute. In particular, arbitral decision-making not only has effects on the host state, thus raising concerns about accountability and legitimacy in relations to the host State's population; rather, investment treaty arbitration also has effects on investors and states that are neither party to the specific proceedings nor to the investment treaty at issue. This perspective illustrates that concerns about accountability and legitimacy in investment treaty arbitration are much broader and concern investment treaty arbitration as a mechanism of global governance.

At first glance, understanding investment treaty arbitration as a mechanism of global governance appears surprising, as unaffected third party investors and states should not be interested, let alone concerned, about arbitral proceedings between wholly unrelated parties. In fact, substantive and procedural investment law is cast in order to avoid effects on non-parties: not only is international investment law enshrined in *bilateral* treaties, but various treaties also adamantly deny any importance of arbitral awards as precedent in future arbitrations.⁵⁵ The reality, however, is different and displays numerous ways in which non-disputing investors and states are affected by arbitrations between wholly unrelated parties, precisely because investment treaty arbitration has developed a strong, albeit persuasive, ie non-binding, system of precedent.

Building on the fact that investment treaty awards, unlike their counterparts in commercial arbitration, regularly become publicly known and quickly accessible via the internet and in print journals,⁵⁶ the awards develop into a focal point around which normative expectations of investors and states, as well as of those acting as counsel and arbitrators, emerge regarding the future decision-making of arbitral tribunals. Those engaged in investment treaty arbitrations, in other words, build up expectations about how investment treaties will be and should be applied and interpreted in the future based on how investment treaties have been applied and interpreted in the

⁵⁵ See NAFTA, Art 1136(1), providing that: 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.' Similarly, ICSID Convention, Art 53(1) provides that: 'The award shall be binding on the parties', meaning *only* binding on them. See *AES Corp v Argentine Republic* ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April 2005, para 23; *SGS Société Générale de Surveillance SA v Republic of the Philippines* ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 97, all holding that the ICSID Convention does not impose the binding authority of earlier ICSID decisions. See also C Schreuer *et al*, *The ICSID Convention: A Commentary* (2nd edn, 2009) Art 53, para 16, noting that in the preparatory works of the ICSID Convention nothing implies the applicability of a *stare decisis* rule.

⁵⁶ Investment treaty awards become public either because the parties agree to that effect, because ICSID publishes excerpts of the reasoning of the award under ICSID, r 48(4), requiring the Centre in the absence of party consent 'to include in its publications excerpts of the legal rules applied by the Tribunal', because non-ICSID awards become public when a party to the arbitration makes a request for them to be set aside or opposes enforcement, or because awards are leaked into the public domain. Awards in commercial arbitration, by contrast, largely remain confidential and thus purely private, although the reasoning of some awards is also published in commercial arbitration reports. Yet, such publications are much less systematic than in investment treaty arbitration.

past.⁵⁷ Significantly, this process of generating normative expectations takes place, to an extent, independently of whether earlier awards concerned the same or a different investment treaty.

Investors and states, in turn, introduce these expectations into arbitral proceedings by actively and comprehensively citing previous arbitral decisions. The parties, in other words, expect that tribunals decide cases not by abstractly interpreting the governing BIT, but by embedding their interpretation into the discursive framework created by earlier investment treaty awards.⁵⁸ Arbitral tribunals, finally, react to this expectation⁵⁹ and, in framing their decisions accordingly, actively engage in building a system of treaty-overarching precedent. This has the effect that arbitral decisions increasingly craft treaty-overarching rules of international investment law and thereby function as a mechanism of global governance.⁶⁰ This is significantly different from commercial arbitration, where the focal point in arbitral decision-making around which normative expectations coalesce usually is the domestic law of a state as understood in the interpretations by domestic courts.⁶¹ In investment treaty arbitration, by contrast, normative expectations are based on arbitral jurisprudence itself.

The impact of arbitral awards can also be seen in some reactions by non-disputing third states. To the extent they disagree with certain lines of arbitral jurisprudence, third states occasionally react to the decision-making of arbitral tribunals by re-crafting investment treaties, even though the decision they disagree with concerned an entirely unrelated treaty.⁶² This is just another facet of states'

⁵⁷ cf on the emergence of expectations in the reference to, application of, and justified departure from precedent also, *Japan—Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 4 October 1996, 14, observing that: 'Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.'

⁵⁸ See eg *AES v Argentina* (n 55 above) para 18 (observing that the investor relied on earlier investment awards 'more or less as if they were precedent [tending] to say that Argentina's objections to the jurisdiction of this Tribunal are moot if not even useless since these tribunals have already determined the answer to be given to identical or similar objections to jurisdiction').

⁵⁹ See eg *El Paso Energy International Co v Argentine Republic* ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006, para 39 (stating that the Tribunal would 'follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent').

⁶⁰ See B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law', IILJ Working Paper 2009/6 (Global Administrative Law Series), available at <<http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf>>.

⁶¹ *Lex mercatoria* as a body of non-national law for international commercial interaction, of course, is an exception in this respect. Here, just as in investment treaty arbitration, normative expectations develop based on decisions of arbitral tribunals without the comprehensive grounding in national law.

⁶² The interpretation of MFN clauses by the Tribunal in *Emilio Agustín Maffezini v Spain* ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras

expectations in the functioning of investment treaty arbitration as an integral system that has governance effects beyond the individual dispute.

The principal means of bringing about treaty-overarching standards of international investment law is arbitral precedent. Although no system of binding precedent exists in investment treaty arbitration,⁶³ one can find references to earlier investment treaty jurisprudence in virtually every investment treaty decision or award.⁶⁴ Indeed, ‘citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate’⁶⁵ not only in quantitative terms; they also reflect the qualitative impact of precedent on subsequent awards, in particular when it comes to interpreting and applying the standard substantive investor’s rights contained in virtually all BITs.⁶⁶

For example, in interpreting the standard of fair and equitable treatment, arbitral tribunals often rely more on the discussion of applications of this standard in earlier case law than on an independent interpretation of the governing treaty itself.

38-64, for example, has had the effect that wholly unrelated states included ‘anti-Maffezini’ clauses in their investment treaties. See Draft of the Central America-United States Free Trade Agreement, Art 10.4(2), note 1, dated 28 January 2004, available at <http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf>. Similarly, broad interpretations of fair and equitable treatment, or of the concept of indirect expropriation, have led several states, including the US, to introduce more restrictive wording of the respective provisions in their more recent BIT practice. The Dominican Republic—Central America-United States Free Trade Agreement, Art 10.5(2)(a), available at <<http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>>, for instance, stipulates—in departing from the broader treaty language in earlier treaties—that ‘fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world’. Likewise, Panama and Argentina exchanged diplomatic notes after *Siemens AG v Argentina* ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, in order to clarify that the MFN clause in their BIT did not extend to issues of dispute settlement, see *National Grid Plc v Argentine Republic* UNCITRAL, Decision on Jurisdiction, 20 June 2006, para 85. On the interaction between investment treaty arbitration and investment treaty making see also UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007), available at <http://unctad.org/en/docs/iteiia20073_en.pdf>. Alternatively, states may issue binding interpretive statements in order to channel future arbitral jurisprudence in line with their interests. See eg NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/dispatch/NAFTA-Interpr.aspx?lang=en>>.

⁶³ See S Schill, *The Multilateralization of International Investment Law* (2009) 288–92 (with further references).

⁶⁴ J Commission, ‘Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence’ (2007) 24 JI Arb 129; OK Fauchald, ‘The Legal Reasoning of ICSID Tribunals—An Empirical Analysis’ (2008) 19 EJIL 301. Exceptions, naturally, are cases of first impression. See eg *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para 164: ‘It appears that this is the first international arbitral tribunal that has had to examine the legal effect of a clause such as Article 11 of the BIT. We have not been directed to the award of any ICSID or other tribunal in this regard, and so it appears we have here a case of first impression’.

⁶⁵ Commission (n 64 above) 148.

⁶⁶ See also G Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 Arb Int 357.

The NAFTA award in *Waste Management v Mexico* is representative in that the Tribunal extensively described prior investment awards on fair and equitable treatment in order to extrapolate a definition of this standard:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.⁶⁷

What is noteworthy is that the tribunal primarily did not interpret fair and equitable treatment independently by using the methods of treaty interpretation under international law, but couched the meaning of the standard in terms of arbitral precedent.

While the cases taken into account in *Waste Management* were exclusively NAFTA awards, most arbitral tribunals deduce the meaning of fair and equitable treatment, and apply it to the case at hand, by relying on any arbitral case law without paying much attention to the governing investment treaty at issue. Thus, for purposes of interpreting fair and equitable treatment the definition of that standard by the tribunal in *Tecmed v Mexico*, which concerned a dispute under the BIT between Spain and Mexico,⁶⁸ already has become a *locus classicus* that other tribunals have adopted and refined, for example, in the application of fair and equitable treatment provisions in BITs between Chile and Malaysia,⁶⁹ Ecuador and the United States,⁷⁰ or Germany and Argentina.⁷¹ This dynamic of generating a treaty-overarching arbitral jurisprudence, however, is not limited to the jurisprudence on fair and equitable treatment. It can be observed in relation to all other standards of treatment, including the prohibition of direct and indirect expropriation without compensation, full protection and security, (MFN) treatment, and national treatment.⁷²

⁶⁷ *Waste Management Inc v United Mexican States* ICSID Case No ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, para 98.

⁶⁸ *Tecnicas Medioambientales Tecmed SA v United Mexican States* ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 154.

⁶⁹ *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case No ARB/01/7, Award, 25 May 2004, paras 113 *et seq.*

⁷⁰ *Occidental Exploration and Production Co v Republic of Ecuador* UNCITRAL, LCIA Case No UN3467, Final Award, 1 June 2004, para 185.

⁷¹ *Siemens AG v Argentine Republic* ICSID Case No ARB/02/8, Award, 6 February 2007, paras 298–9.

⁷² Typically, textbooks on international investment law, therefore, discuss the standards of international investment protection primarily based on the respective case law, see C McLachlan *et al*,

Notably, precedent's authority is even at play in inconsistent and conflicting arbitral awards. Even those decisions, often extensively, deal with conflicting prior decisions, by either distinguishing their case based on the facts or by reducing an earlier holding on a point of law from a rule to a principle or from a principle to an exception.⁷³ Furthermore, even in cases of open conflict, investment tribunals presuppose the existence of a treaty-overarching framework of international investment law, since, more often than not, they frame their disagreement in systemic terms, arguing not that they diverge because their function is restricted to solving a specific dispute,⁷⁴ but that a certain interpretation of international investment law is unpersuasive as a general proposition.⁷⁵ Cases of dissent therefore illustrate that, notwithstanding the disagreement about the interpretation of specific issues, investment tribunals have a deeply rooted perception of the unity of international investment law and of the need for consistency, and perceive their own function as aiming to develop a coherent system of international investment protection. The Decision on Jurisdiction in *Saipem v Bangladesh* is representative in this respect:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards certainty of the rule of law.⁷⁶

International Investment Arbitration—Substantive Principles (2007); R Dolzer and C Schreuer, *Principles of International Investment Law* (2008); A Newcombe and L Paradell, *Law and Practice of Investment Treaties—Standards of Investment Protection* (2009).

⁷³ See Schill (n 63 above) 347–52.

⁷⁴ Differently in this respect *RosInvestCo UK Ltd v Russian Federation* SCC Case No V 079/2005, Award on Jurisdiction, October 2007, para 137, observing in a case of open dissent with regard to the interpretation of MFN clauses: '[T]he Tribunal feels there is no need to enter into a detailed discussion of [earlier] decisions. The Tribunal agrees with the Parties that different conclusions can indeed be drawn from them depending on how one evaluates their various wordings both of the arbitration clause and the MFN-clauses and their similarities in allowing generalisations. However, since it is the primary function of this Tribunal to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions, the Tribunal notes that the combined wording in [the MFN clause] and [the arbitration clause] of the [applicable] BIT is not identical to that in any of such other treaties considered in these other decisions.'

⁷⁵ Schill (n 63 above) 341–7.

⁷⁶ *Saipem SpA v People's Republic of Bangladesh* ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 67. See also *International Thunderbird Gaming v Mexico*, Separate Opinion by Thomas Wälde (n 36 above) para 16: 'While individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected.' See further *ibid* paras 129–30. See also *MCI*

In summary, one can observe that investment treaty arbitration impacts third parties and their behaviour intensely, as the outcome of arbitrations, in particular the reasoning and the interpretation of the principles of international investment law, affect not only future interpretations of similar standards and shape the expectations of investors and states about the decision-making of tribunals, but also impact investment treaty making. In this respect, investment treaty arbitration exercises governance functions at the international level with effects on the entire system of international investment protection. Because arbitral jurisprudence frames the discourse and arguments of later litigants and arbitrators, and constitutes the focal point towards which normative expectations of the users of the system are directed, it puts arbitrators in a position to develop, and investors in a position to enforce, a body of ‘state liability law for foreign investors’⁷⁷ that has a deep impact on the exercise of regulatory powers of states. This body of law, however, not only shapes the behavior of foreign investors and host states, but also brings about concomitant legitimacy concerns. In order to alleviate such concerns, a public law perspective on international investment law arguably can make a valuable contribution.

V. International Investment Law and Comparative Public Law

The present paper not only suggests the desirability of conceptualizing international investment law as a public law discipline, but also proposes a specific method that appears useful in addressing the discontents of states, investors, and civil society. The method it proposes is one of comparative public law, which draws parallels between international investment law and domestic public law as well as other regimes of public international law.

This proposal rests on the assumption that international investment law and arbitration, in establishing a legal framework for investor-state cooperation and in restricting governmental abuse of power, is functionally comparable to constitutional guarantees and administrative law principles at the domestic level that ensure non-discrimination, government according to the rule of law, and respect for property rights. Accordingly, it is suggested that there is a close resemblance between the problems arising in investment treaty arbitration and at the domestic level, namely when individuals are faced with the misuse of governmental powers. Parallels, however, also exist with respect to other international regimes, where questions of the relationship between states and international dispute settlement bodies, the impact of

Power Group LC and New Turbine Inc v Republic of Ecuador ICSID Case No Arb/03/6, Decision on Annulment, 19 October 2009, para 24, observing that: ‘The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of ‘*une jurisprudence constante*’, as the Tribunal in *SGS v Philippines* declared.’

⁷⁷ A van Aaken, ‘Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View’, in Schill (n 24 above) 721, 722.

decision-making, and the breadth of law-making by international dispute settlement bodies are frequently considered as part of the growing realm of global governance.

In consequence, under a comparative public law approach to international investment law parallel problématiques in domestic public law and in other international legal regimes should be studied in order to develop solutions in international investment arbitration that are acceptable to investors, states, and civil society. Comparative public (administrative, constitutional, and international) law, therefore, should become part of the standard methodology of thinking about issues in international investment law, both as regards the interpretation of the often vague standards of investment protection and also in addressing concerns about the institutional and procedural structure of investor-state dispute settlement.

Thomas Wälde prominently advocated this approach in his Separate Opinion in *International Thunderbird Gaming v Mexico*, when drawing, in order to clarify the normative background of the protection of legitimate expectations as part of fair and equitable treatment under Article 1105 of NAFTA,⁷⁸ on a wide range of related concepts under both domestic and international law. The normative background of the protection of legitimate expectations could be elucidated and concretized, he claimed, by drawing on comparative contract law concepts, such as estoppel and *venire contra factum proprium*,⁷⁹ but above all through a comparative public law analysis of similar concepts applied in the jurisprudence of the European Court of Justice, the European Court of Human Rights,⁸⁰ and the World Trade Organization (WTO),⁸¹ and recognized in ‘developed systems of administrative law’.⁸² For Wälde: ‘The common principles of the principal administrative law systems are . . . an important point of reference for the interpretation of investment treaties to the extent investment treaty jurisprudence is not yet firmly established.’⁸³

Comparative public law is particularly useful given that traditional methods of treaty interpretation that focus on the meaning of treaty provisions in their context and in the light of their object and purpose and approaches stressing the importance of customary international law, while immensely important, face significant limits in

⁷⁸ *International Thunderbird Gaming v Mexico* Separate Opinion by Thomas Wälde (n 36 above) para 24.

⁷⁹ *ibid* para 27; see also H Mairal, ‘Legitimate Expectations and Informal Administrative Representations’, in Schill (n 24 above) 413, 421-425.

⁸⁰ *International Thunderbird Gaming v Mexico*, Separate Opinion by Thomas Wälde (n 36 above) para 27.

⁸¹ *ibid* para 29.

⁸² *ibid* para 28.

⁸³ *ibid*.

applying the vague principles of international investment law in the context of the modern regulatory state.⁸⁴

A comparative public law approach consists in conceptualizing and applying standard concepts of investment law, including national treatment, fair and equitable treatment, the prohibition of direct and indirect expropriation, and full protection and security, by drawing parallels with public law concepts used in domestic law and other international regimes. The idea is thus to tackle problems arising under international investment treaties by means of a comparative methodology, focusing on comparative administrative and comparative constitutional law as well as cross-regime analysis, drawing, for example, on WTO or human rights law. Equally, this can help to address procedural issues in investor-state arbitration, including concerns about openness, transparency, and access by non-parties. In summary, the approach of viewing international investment law through a comparative public law lens suggests drawing, in a comparative perspective, on the functions of public law to limit but also to legitimize state action vis-à-vis private actors.

Comparative public law analysis serves several purposes. It helps: (1) to concretize and clarify the interpretation of the often vague standards of investment protection and determine the extent of state liability in specific contexts; (2) to balance investment protection and non-investment concerns; (3) to ensure consistency in the interpretation and application of investment treaties because the interpretative method would be uniform for all investment treaties; (4) to ensure cross-regime consistency and mitigate the negative effects of fragmentation by stressing commonalities and openness of international investment law towards other international regimes, such as human rights and environmental law; (5) to legitimize existing arbitral jurisprudence by showing that the solutions adopted in investment treaty arbitration are analogous to the ones adopted by domestic courts or other international courts or tribunals; and (6) to suggest legal reform of investment treaty making or changes to arbitral practice in view of different, or more nuanced, solutions adopted in other public law systems.

⁸⁴ While disputes concerning state interferences with foreign investments form part of the traditional portfolio of international law with numerous inter-state claims commissions being established in the 19th and early 20th centuries, the jurisprudence of these dispute settlement bodies, while still relevant today, often concerns issues that are not necessarily comparable to those faced by modern regulatory states. Likewise, traditional methods of treaty interpretation often are too vague to guide the application of international investment treaties. In interpreting, for example, fair and equitable treatment provisions, an interpretation of the ordinary meaning may replace the terms ‘fair and equitable’ with similarly vague and empty phrases such as ‘just’, ‘even-handed’, ‘unbiased’, or ‘legitimate’, but does not succeed in clarifying the normative content or in clarifying what is required of a state in specific circumstances. Similarly, the object and purpose of investment treaties to promote and to protect foreign investment is equally vague and hardly able to narrow down the meaning of standards such as ‘fair and equitable treatment’.

A comparative public law perspective on international investment law not only has different purposes, but also varying impact on the interpretation and application of international investment treaties. First, it can have but a political function in suggesting changes to the current system of international investment protection. Gus Van Harten, for instance, bases his call for structural reform of the dispute settlement mechanism and the creation of a permanent court to resolve investor-state disputes on a comparative public law understanding of notions of independence and impartiality of judges in public law disputes.⁸⁵

Secondly, a comparative public law perspective can help arbitrators to become ‘more aware of the spectrum of solutions available to address problems common to several legal systems’ and suggest ‘options better than the ones already tested in the observer’s own space and time’.⁸⁶ Comparative public law thus can be an eye-opener in raising awareness of possible interpretations of investment treaties without controlling that interpretation.⁸⁷

Thirdly, comparative public law can have direct effect on the interpretation of international investment treaties. In particular, it can be relevant in order to ascertain the ordinary meaning states attribute to certain concepts of investment law, for instance in determining the meaning of ‘expropriation’ or of ‘fair and equitable treatment’, and thus serve as an aid to interpretation.⁸⁸

Finally, comparative public law can be used to develop general principles of law that constitute, as laid down in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute), a source of international law that must be taken into account in the interpretation and application of investment treaties pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties as part of the ‘relevant rules of international law applicable in the relations between the parties’.

Ultimately, the extent to which comparative public law can impact the interpretation of investment treaties depends on the interpretative leeway the treaties leave. Comparative public law and the national and international regimes one may draw on do not control the interpretation and application of international investment treaties. It cannot be used to rewrite jurisdictional requirements, the procedural law applicable to arbitrations, or substantive treaty obligations. To the extent that

⁸⁵ See Van Harten (n 21 above).

⁸⁶ WW Park and TW Walsh, ‘Review Essay: The Uses of Comparative Arbitration Law’ (2008) 24 *Arb Int* 615.

⁸⁷ See eg *Mondev International Ltd v US* ICSID Case No ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para 144, commenting with respect to the value of case law by the European Court of Human Rights for investment treaty interpretation, that: ‘At most, they provide guidance by analogy as to the possible scope of NAFTA’s guarantee of “treatment in accordance with international law, including fair and equitable treatment and full protection and security.”’

⁸⁸ cf M Perkams, ‘The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Dark’, in Schill (n 24 above) 107, 111, 147.

investment treaty obligations leave no room for doubt, the ambit of comparative public law will be limited to a *de lege ferenda* perspective. To the extent, however, that there is interpretative leeway, comparative public law can be used broadly.

Depending on the purpose of comparative analysis, the choice of legal orders to be taken into account will vary. In order to suggest legal reform, for example, a single legal order may suffice. When suggesting, however, that certain principles constitute general principles of law, a more exacting methodology must be followed. General principles of law in the sense of Article 38(1)(c) of the ICJ Statute comprise principles generally recognized in domestic law, general principles deriving from international relations, and general principles inherent in every kind of legal order.⁸⁹ Such general principles of law, therefore, can be developed by qualified methods of comparative law, taking into account both domestic law and other international legal regimes.⁹⁰

In fact, general principles, while often perceived as a subsidiary source of international law,⁹¹ have been used frequently by international courts and tribunals in different contexts: to develop the procedural law of international adjudication;⁹² as a source of substantive rights and obligations;⁹³ to fill lacunae in the governing law; and to aid interpretation and the further development of international law.⁹⁴ Even though international courts and tribunals often do not explain the methodology they apply in extracting general principles, and often proclaim the existence of a general principle rather than providing structured comparative law analysis,⁹⁵ numerous dispute

⁸⁹ S Kadelbach and T Kleinlein, 'International Law—A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles' (2007) 50 GYBIL 303, 340, with further references. On general principles of law, see also W Weiss, 'Allgemeine Rechtsgrundsätze des Völkerrechts' (2001) 39 *Archiv des Völkerrechts* 394; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); JG Lammers, 'General Principles of Law Recognized by Civilized Nations' in F Kalshoven *et al* (eds), *Essays on the Development of the International Legal Order* (1980) 53; R Kolb, *La bonne foi en droit international. Contribution à l'étude des principes généraux de droit international public* (2000) 24–81; FO Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008) 7–72.

⁹⁰ In particular, today general principles do not need to be restricted to principles developed in the domestic realm. Instead, in view of the development of international law from a simple tool of coordination of state conduct to an instrument of cooperation through multiple international organizations and the conclusion of numerous international treaties, it is widely recognized that general principles can equally be developed from the principles governing international relations themselves. Kadelbach and Kleinlein (n 89 above) 340.

⁹¹ Originally general principles were included in the Statute of the Permanent Court of International Justice, Art 38(1)(c) as a source of law in order to avoid a finding of *non liquet* by the Court. See A Pellet, 'Article 38', in A Zimmermann *et al* (eds), *The Statute of the International Court of Justice: A Commentary* (2006) para 245, with further references.

⁹² See Cheng (n 89 above) 257 *et seq*; C Brown, *A Common Law of International Adjudication* (2007) 53–5.

⁹³ cf *Petroleum Development Ltd v Sheikh of Abu Dhabi*, Award, 28 August 1951, 18 Int'l L. Rep 14, 149–50 (1961). See also Cheng (n 89 above) 29 *et seq*.

⁹⁴ See Weiss (n 89 above) 411–14.

⁹⁵ See M Bothe, 'Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte' (1976) 36 *Zeitschrift f. ausl. öff. Recht u. Völkerrecht* 280.

settlement bodies have had recourse to such principles, including but not limited to the Permanent Court of International Justice and the International Court of Justice,⁹⁶ the WTO Appellate Body,⁹⁷ the various international criminal tribunals,⁹⁸ the European Court of Justice,⁹⁹ and the European Court of Human Rights (ECtHR).¹⁰⁰ Likewise, in the context of foreign investment disputes, both under investment treaties and under investor-state contracts or concession agreements, arbitral tribunals frequently draw on general principles of law for a variety of purposes, in particular to fill gaps in the governing law and as an aid to treaty interpretation.¹⁰¹

General principles of public law, in particular, are becoming more and more important, given that international law is no longer restricted to governing the relations between states, but increasingly encompasses, including in international investment law, rules governing the relations between the state and private law subjects. While Hersch Lauterpacht in his 1927 study on *Private Law Sources and Analogies of International Law* could still maintain that ‘general principles of law are for the most practical purposes identical to general principles of private law’,¹⁰² given that international law was primarily a law coordinating the interactions between equal sovereigns, the situation today has changed radically.¹⁰³ What Wolfgang Friedmann stated in 1963 all the more holds true today:

The science of international law can no longer be content with the analogous application of private law categories. It must search the entire body of the ‘general principles of law recognized by civilized nations’ for proper analogies. With the growing importance of international legal relations

⁹⁶ Raimondo (n 89 above) 17–35. However, the ICJ is rather hesitant in drawing on general principles. See H Mosler, ‘Rechtsvergleichung vor völkerrechtlichen Gerichten’ in R Marcic *et al* (eds), *Internationale Festschrift für Alfred Verdross* (1971) 381, 400–5; Weiss (n 89 above) 417–18.

⁹⁷ See Weiss (n 89 above) 418–20.

⁹⁸ Raimondo (n 89 above) 73–163.

⁹⁹ See comprehensively A von Bogdandy, ‘Founding Principles’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2010) 11; X Groussot, *General Principles of Community Law* (2006); T Tridimas, *The General Principles of EU Law* (2006).

¹⁰⁰ See Mosler (n 94 above) 391–400.

¹⁰¹ See A von Walter, ‘Oil Concession Disputes’ in R Wolfrum (ed), *Encyclopedia of Public International Law*, online edition, available at <<http://www.mpepil.com>>, paras 24–34, discussing the use of general principles in oil concession arbitrations in the 1950s through 1980s; T Gazzini, ‘General Principles of Law in the Field of Foreign Investment’ (2009) 10 *Journal of World Investment and Trade* 103, on the use of general principles in modern investment arbitration. See also Schreuer (n 55 above) Art 42, paras 178–82, on the use of general principles by ICSID tribunals.

¹⁰² H Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 7.

¹⁰³ Note, however, the argument by G della Cananea, ‘Minimum Standards of Procedural Justice in Administrative Adjudication’, in Schill (n 24 above) 39, that comparative public law has been a classic method of public lawyers reaching back to at least the first half of the 19th century when the bases for modern constitutional and administrative law were developed.

between public authorities and private legal subjects, public law will be an increasingly fertile source of international law.¹⁰⁴

A central question when determining the existence of general principles is which legal orders to include in a comparative survey. Article 38(1)(c) of the ICJ Statute, in this context, speaks of ‘the general principles of law recognized by *civilized* nations’. While connoting certain hegemonic notions of international law, this statement is generally understood nowadays as meaning that a certain principle must exist in the *principal* legal orders of the world.¹⁰⁵ In a pluralist international legal order, this allows drawing on a wide variety of domestic legal orders without *a priori* restrictions. At a minimum, however, comparative research aimed at identifying a general principle will have to encompass representative legal systems of the common and civil law.¹⁰⁶ While there are also other conceptions of law and distinct legal traditions, common and civil law cover a broad spectrum of domestic legal systems in all continents, as these legal traditions have spread from their European roots to many other countries, partly because they were enacted in dependencies or former colonies, but also because in legal reform processes many countries around the world adopted the well-developed public law systems of one of the major civil or common law countries.¹⁰⁷

However, as a matter of practical convention, and in view of difficulties comparative lawyers face in terms of availability of foreign law sources and scholarship, the legal orders most often analysed are German, French, English, and US law. The reason for this choice is not one of legal hegemony, but rather the fact that these legal orders are easily accessible and, above all, have influenced the public law systems of many other countries. Yet, nothing, in principle, prevents one from drawing on legal systems outside this classical comparative canon. On the contrary, including other legal systems enriches and strengthens a comparative public law argument.

Distilling a general principle of law does not require a quantitative study of all, or nearly all, domestic legal orders. Rather, comparative law analysis can restrict itself

¹⁰⁴ W Friedmann, ‘The Uses of “General Principles” in the Development of International Law’ (1963) 57 AJIL 279, 295.

¹⁰⁵ The qualification in Article 38(1)(c) of the ICJ Statute that a principle must be recognised by ‘civilized nations’ today no longer has a discriminatory function in excluding the domestic legal orders of certain countries. Instead, as UN Charter, Art 2(1) makes clear, all UN members are equal sovereigns and therefore recognized as civilized nations. Notwithstanding, the limitation to the principal legal systems of the world can be justified, for example, in view of ICJ Statute, Art 9, which states as regards the composition of the Court that ‘the representation of the main forms of civilization and of the principal legal systems of the world should be assured’. This suggests an equation between civilized nations in ICJ Statute, Art 38(1)(c) and the principal legal systems mentioned in ICJ Statute, Art 9. See Weiss (n 89 above) 405–6; G Schwarzenberger, *International Law* (3rd edn, 1957) Vol I, 44.

¹⁰⁶ See Raimondo (n 89 above) 50–7.

¹⁰⁷ See also Pellet (n 89 above) para 258, note 699, observing that most domestic legal systems borrow their rules from common or civil law systems.

to a qualitative study of the legal principles of the principal domestic legal orders and/or of international relations. In addition, it is not necessary that the same legal rule exists in the principal domestic legal systems, but that a certain principle underlying a legal rule in question is broadly recognized. In consequence, comparative law is not a mechanical quantitative process, but one of abstraction, weighing, and qualitative evaluation. While comparative analysis must not become uncritical towards differences of national legal systems, it must analyze them in a functional perspective and against a sufficiently elevated level of abstraction.¹⁰⁸ Furthermore, the object and purpose of investment treaties suggests drawing on legal systems that depart from a rights-based approach to the relation between the state and society, which is based on the rule of law and respect for individual economic rights.¹⁰⁹

Another aspect concerning the choice of legal systems to examine in the foreign investment context, in particular when aiming at determining the existence of general principles of law, relates to the question of whether to look primarily at the domestic legal orders of the contracting parties to the investment treaty in question or whether to engage in a broader comparative exercise. The form of investment treaties as mostly bilateral treaties suggests looking only towards the public law systems of the contracting parties.¹¹⁰ However, unlike genuinely bilateral treaties, BITs do not stand isolated in governing the relation between two states only, but rather develop multiple overlaps and structural interconnections that create a relatively uniform and treaty-overarching regime of international investment protection.¹¹¹ This particularly holds true as regards the principles of international investment protection that are rather uniform across different bilateral treaties, such as the prohibition of direct and indirect expropriation without compensation, fair and equitable treatment, full protection and security, national treatment, etc.¹¹² This underlying conceptual

¹⁰⁸ In this sense, as della Cananea (n 103 above) 41, rightly points out: ‘the idea of general principles of law is not necessarily in contrast with the recognition of particularities’.

¹⁰⁹ See KJ Vandeveld, ‘The Political Economy of a Bilateral Investment Treaty’ (1998) 92 AJIL 621, 627, arguing that ‘BITs present themselves as quintessentially liberal documents’; see also KJ Vandeveld, ‘Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties’ (1998) 36 Col JTL 501, emphasizing that BITs form part of a movement to liberalize the international economy while leaving states considerable leeway for intervention; KJ Vandeveld, ‘Sustainable Liberalism and the International Investment Regime’ (1998) 19 Mich JIL 373, arguing that BITs represent at least a temporary consensus on a liberal order for international investment relations.

¹¹⁰ The Iran-US Claims Tribunal, for instance, has mainly relied on the legal orders of the US and Iran when developing general principles. See G Hanessian, ‘“General Principles of Law” in the Iran-US Claims Tribunal’ (1989) 27 Col JTL 309, 318, with references to the relevant jurisprudence of the Tribunal. See also M Akehurst, ‘Equity and General Principles of Law’ (1976) 25 ICLQ 801, 824–5, pointing out the connections between the choice of legal orders when determining general principles and the bilateralism/multilateralism distinction.

¹¹¹ On the thesis that international investment law constitutes an essentially multilateral system of law even though it is enshrined in bilateral treaties, see generally Schill (n 63 above).

¹¹² To be clear, the argument is not that BITs are equivalent to a multilateral *treaty*; the argument is rather that the existing investment treaties, whether bilateral, regional, or sectoral, can be understood as

uniformity should be reflected in drawing on public law concepts more generally without limitations to the law of the contracting parties to the governing BIT.

There are several factors suggesting that international investment treaties are not bilateral treaties in the pure sense of the term, ie treaties enshrining preferential *quid pro quo* bargains between two countries, but rather form part of a treaty-overarching system of investment protection, in other words a framework that is multilateral in nature even though it has taken the form of bilateral treaties.

First, international investment treaties generally conform to an archetype. They converge in their wording and have developed a surprisingly uniform structure, scope, and content.¹¹³ In particular, most investment treaties provide for the same set of substantive investor's rights. This convergence is also not coincidental. Rather, the similarities of BITs result from various international processes embedding BITs within a multilateral framework. Thus, BITs can usually be traced back to national model treaties, which, in turn, share a common historic pedigree: most of today's model treaties are inspired by the concerted efforts of capital-exporting countries in the 1960s to establish a multilateral investment treaty within the Organization for Economic Cooperation and Development (OECD). Although alternative model treaties existed, the OECD model became predominant for both the negotiation of treaties between capital-exporting and capital-importing countries and later the negotiation of South-South BITs. The reason for the convergence of BITs is arguably that uniform rules are in principle in the interest of all states, because uniform rules are necessary to create a level playing-field that enables investments to flow to wherever capital is allocated most efficiently.

Secondly, BITs regularly contain MFN clauses that require states to treat investors and their investments equally, independent of nationality.¹¹⁴ MFN clauses therefore multilateralize benefits from a particular BIT and harmonize the protection of foreign investments in a specific host state. While there is controversy in arbitral jurisprudence as to whether MFN clauses encompass, beyond the substantive standards granted to foreign investors, more favorable access requirements to investor-state dispute settlement and broader consent to arbitration, it is clear that MFN clauses, in principle, level the inter-state relations between the host state and third states and push the system of international investment protection towards multilateralism.

part of a treaty-overarching legal framework that backs up an international investment space that forms part of the global economy. The argument is also not that there is complete uniformity, but that there is enough convergence in order to be able to speak of international investment law as one international law discipline, which is made up of uniform investment law principles, which is implemented through rather uniform institutional mechanisms, and which follows rather uniform rationales.

¹¹³ On this point, see Schill (n 63 above) 65–120.

¹¹⁴ On the scope, effect, and function of MFN clauses, see *ibid* 121–96.

Thirdly, investors themselves have ample options to circumvent restrictions that may exist in a specific investment treaty independent of the application of MFN clauses.¹¹⁵ Although BITs are limited *ratione personae* to nationals of the other contracting party, investors can often bring their investment under the scope of application of a more favorable treaty simply by channeling it through a subsidiary in a third state. Such treaty shopping is possible because BITs regularly protect corporate structures independently of the nationality of the shareholders behind them. The broad options for treaty shopping undermine the understanding of investment treaties as expressions of bilateral bargains, because investors can often circumvent the limitations of a specific BIT.

Finally, arbitral practice, and in particular the way tribunals interpret investment treaties, suggests that BITs form part of a uniform treaty-overarching framework of investment protection that is based on uniform principles.¹¹⁶ This is confirmed above all by the ubiquitous use of precedent in investment arbitration.¹¹⁷ In addition, arbitral tribunals make use of other methods of treaty interpretation that suggest the existence of a treaty-overarching framework of international investment law, namely interpretation *in pari materia*. This method of treaty interpretation involves interpreting the governing treaty in the light of other treaties with a similar subject matter, potentially including investment treaties between wholly unrelated parties. The use of this method of treaty interpretation suggests that arbitral tribunals perceive that BIT practice in general, not only the BIT practice of one of the contracting parties, forms part of the sources that can be used for guidance in interpreting a specific investment treaty.

For these reasons, it seems inappropriate to limit the comparative public law method to the domestic legal orders of the contracting parties to an investment treaty. Instead, the comparative method is to take into account also other relevant domestic and international public law regimes, ultimately with the purpose of determining the existence of general principles of international investment law that can be applied in investor-State arbitration.

As a source of international law, general principles of public law can influence the interpretation of investment treaties as well as of customary international law. Thus, even in cases where investment treaty concepts are closely tied to the customary international law minimum standard, as is the case with respect to fair and equitable treatment and full protection and security under Article 1105 of NAFTA,¹¹⁸ comparative public law and the development of general principles of international investment law are relevant and appropriate tools in resolving investment treaty

¹¹⁵ On this and the following, see *ibid* 197–240.

¹¹⁶ On this and the following, see *ibid* 278–361.

¹¹⁷ See nn 56–76 above, and accompanying text.

¹¹⁸ See NAFTA Free Trade Commission (n 54 above).

arbitrations. After all, a breach of the international minimum standard itself requires, as expressed in the *Neer* case, ‘an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency’.¹¹⁹ The international minimum standard in question, as Edwin Borchard explains

. . . is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law. Long before article 38 of the Statute of the Permanent Court of International Justice made the ‘general principles of law recognized by civilized states’ a source of common international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice.¹²⁰

A comparative analysis may concretize the interpretation of investor’s rights mainly in two ways. It may enable investment tribunals to deduce institutional and procedural requirements from comparable domestic and international standards for a context-specific interpretation of the investor’s right in question. A comparative analysis of domestic legal systems and their understanding of the rule of law, for example, may be used to develop standards that administrative proceedings have to conform to under fair and equitable treatment,¹²¹ or develop methods and thresholds for determining when non-compensable regulation turns into a regulatory taking requiring compensation.¹²²

Alternatively, comparative public law analysis may also be used to justify the conduct of a state vis-à-vis a foreign investor. If similar conduct, for instance the repudiation of an investor-state contract in an emergency situation, is generally accepted by domestic legal systems,¹²³ investment tribunals could, and arguably need to, transpose such findings to the international level as an expression of a general principle. In this context, comparative public law can serve as a yardstick not only to develop minimum but also maximum standards of investment protection that do not impose restraints on domestic legislators, administrations and the judiciary that are more onerous than those imposed, in a comparative perspective, by the respective

¹¹⁹ *LFH Neer and Pauline E Neer (US) v Mexico*, Opinion, 15 October 1926, 4 UNRIAA 61–2.

¹²⁰ E Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ (1940) 38 Mich LR 445, 448–9. See also American Law Institute, *Restatement of the Law (Second)—Foreign Relations Law of the United States* (1965), 501, § 165(2), stating that: ‘The international standard of justice . . . is the standard required for the treatment of aliens by (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by states that have reasonably developed legal systems.’

¹²¹ See della Cananea (n 103 above).

¹²² See Perkams (n 88 above).

¹²³ cf S Schill, ‘Umbrella Clauses as Public Law Concepts in Comparative Perspective’, in Schill (n 24 above) 317, 336–340.

principles of domestic public law.¹²⁴ Similarly, public law approaches and concepts illustrate how non-investment concerns and the tensions with investment protection they generate are processed and resolved at the domestic level, for instance by applying the concept of proportionality to balance investment protection and competing public interests.¹²⁵

A comparative public law approach can also engage in cross-regime comparison with other international regimes. A particularly promising field for such an approach is the comparative evaluation of the jurisprudence developed by international courts in the human rights context.¹²⁶ One example in this context is the jurisprudence of the ECtHR concerning Article 6 of the European Convention on Human Rights. The rich jurisprudence of the ECtHR could thus be used to further concretize fair and equitable treatment, for example with respect to the timely administration of justice or the right to a fair trial.¹²⁷ Similarly, comparative recourse could be made to the emerging principles of European administrative law,¹²⁸ or the jurisprudence of the WTO Appellate Body in order to concretize standards of good governance host states have to live up to under investment treaties.¹²⁹ Furthermore, such cross-regime comparison can be a fruitful source in developing concepts for the relation between the parties to an investment arbitration and the tribunal, as well as in determining applicable procedural maxims,¹³⁰ for example the standard of review,¹³¹ issues of openness and transparency,¹³² or questions of remedies.¹³³ Yet, relevant differences between the different regimes should not be forgotten.¹³⁴

¹²⁴ See S Montt, *State Liability in Investment Treaty Arbitration* (2009) 21-3, 74-82, summarizing the normative claim that investment treaty standards should not go beyond the limits developed countries establish for government conduct in their own domestic legal orders.

¹²⁵ See B Kingsbury and S Schill, 'Public Law Concepts to Balance Investors' Rights with state Regulatory Actions in the Public Interest—The Concept of Proportionality', in Schill (n 24 above) 75.

¹²⁶ See comprehensively U Kriebaum, *Eigentumsschutz im Völkerrecht - Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (2009).

¹²⁷ See A Ehsassi, 'Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle', in Schill (n 24 above) 213, 227-229.

¹²⁸ See eg J Schwarze, *Europäisches Verwaltungsrecht* (2nd edn, 2005); P Craig, *EU Administrative Law* (2006); J-B Auby and J Duheil de la Rochère (eds), *Droit Administratif Européen* (2007); MP Chiti, *Diritto amministrativo europeo* (3rd eds, 2008); T von Danwitz, *Europäisches Verwaltungsrecht* (2008).

¹²⁹ See J Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO', in Schill (n 24 above) 243. See also G della Cananea, 'Beyond the State: the Europeanization and Globalization of Procedural Administrative Law' (2003) 9 Eur Pub Law 563, 575.

¹³⁰ See C Brown, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law', in Schill (n 24 above) 659.

¹³¹ See W Burke-White and A von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations', in Schill (n 24 above) 689, arguing for the adoption of the margin of appreciation doctrine of the ECtHR as the standard of review in investment arbitrations.

¹³² See A Asteriti and Christian J Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration', in Schill (n 24 above) 787, concerning issues of transparency and the participation of non-parties.

Overall, comparative public law, therefore, can impact international investment law and arbitration through various channels and in various aspects, both concerning investor-state dispute resolution and substantive investment law.

VI. Conclusion

The present paper suggests taking a public law approach in conceptualizing and understanding international investment law. This approach relies on the idea that international investment law differs from both international commercial arbitration and classical (inter-state) international law. Instead, at its core is the right of private economic actors to seek protection against breaches by host states of standards of treatment laid down in international investment treaties. International investment law, therefore, shares core functional similarities with domestic administrative and constitutional review of government conduct at the domestic as well as the international level, in particular under various human rights instruments, such as the European Convention on Human Rights. In terms of methodology, the present paper suggests that international investment law should be analysed from a comparative public law perspective that views issues of state responsibility and investor-state dispute resolution not as isolated phenomena of international investment law, but in context with analogous problems that arise frequently at the domestic and international level.

Against this background, the present paper conceptualizes the standards of treatment in international investment treaties as public law concepts as they appear, often as constitutional standards, in the domestic legal orders of those countries that adhere to liberal market economies: Thus, national and MFN treatment aim at ensuring a level playing field for the economic activity of foreign and domestic economic actors as a prerequisite for competition; the protection against expropriation without compensation guarantees respect for property rights as an essential institution for market transactions; capital transfer guarantees ensure the free flow of capital and contribute to the efficient allocation of resources in a global capital market; fair and equitable treatment ensures basic due process for foreign investors and requires adherence to the rule of law; full protection and security imposes a positive obligation on host states to set in place a domestic legal system with certain instruments necessary for investors to protect their investment against interferences by third parties. Finally, the possibility to have recourse to international arbitration represents a mechanism that allows foreign investors to make host states comply with the public law standards contained in investment treaty obligations.

¹³³ See van Aaken (n 73 above); B Sabahi and N Birch, 'Comparative Compensation for Expropriation', in Schill (n 24 above) 755; I Marboe, 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests', in Schill (n 24 above) 375.

¹³⁴ cf Kurtz (n 126 above), arguing that WTO law is often abused and uncritically reflected in investment arbitral jurisprudence on national treatment.

Once investment treaty standards are identified as specific public law concepts, a more refined comparative public law analysis can concretize the meaning of those concepts in specific contexts. This involves, for example assessing to what extent domestic and international legal systems handle liability for representations made by government officials,¹³⁵ what kind of limits the protection of property imposes on the tax legislator,¹³⁶ or how the tensions between the protection of cultural heritage and the right to property are resolved in other public law systems.¹³⁷ Ideally, this comparative public law approach results in the determination of general principles recognized in the principal public law systems that can be used as a source of international law in interpreting the standards contained in international investment treaties.

The perspective presented in this paper stresses the public law aspects of investment treaties and investment treaty arbitration. It offers a theoretically and methodologically consistent and, in its scope, new approach to international investment law. A quest for general principles of law, and engaging in comparative public law analysis, helps international investment law to benefit from the experience those legal regimes have developed not only in limiting the exercise of state powers, but also in empowering the state by illustrating its regulatory space. This may help to channel the interpretation and application of international investment treaties in ways that are in tune with solutions that are tested and accepted in more mature systems of law and dispute resolution. Such an approach carries the advantage of being less subjective than approaches focusing solely on treaty interpretation as a means of concretizing the broad principles of investment law and can arguably help to make investment law not only more predictable but help to add legitimacy by aligning state liability under investment treaties with general concepts of state liability under other public law systems.

Overall, a comparative public law approach to international investment law and investment treaty arbitration could help to address, as a system-internal approach, several of the discontents with international investment law raised by states, foreign investors, and civil society. It could help to concretize the broad standards of investment protection and to achieve an appropriate balance between investment protection and other public interests based on a uniform and well-grounded comparative law method, to reduce inconsistencies, and to make investment law more predictable. Furthermore, comparative public law can propose ways for arbitral procedure to handle non-investment related public interests procedurally and thereby help to alleviate criticism of investor-state arbitration as an unsuitable mechanism for

¹³⁵ See Mairal (n 79 above).

¹³⁶ C Tietje and K Kampermann, 'Taxation and Investment: Constitutional Law Limitations on Tax Legislation in Context', in Schill (n 24 above) 569.

¹³⁷ F Lenzerini, 'Property Protection and Protection of Cultural Heritage', in Schill (n 24 above) 541.

governance-related dispute settlement. Ultimately, this could contribute to making this area of international law more legitimate and acceptable to states, investors, and civil society alike.