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Article

Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach

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Numerous critics question the legitimacy of international investment law and investor-state arbitration, arguing that this field of law and dispute resolution presents a threat to foundational principles of domestic public law, including democracy and the rule of law. Many of these critics therefore demand institutional reform, and some states follow suit, by recrafting international investment treaties and restricting investor-state arbitration. In response to this backlash, this Article proposes to react to the challenges international investment law poses for domestic public law values in a more constructive fashion. Instead of demanding the recrafting of international investment law, or even the abolishment of investor-state arbitration, in order to vindicate public law values, this Article recommends an expansion of public law thinking within the existing structure of investment treaty arbitration itself. To this end, it outlines the conceptual and methodological foundations of a new public law approach to international investment law, which arguably has the potential to enhance the acceptance and legitimacy of international investment law as a whole. The Article suggests that international investment law and investment treaty arbitration should be conceptualized as public law disciplines and integrated into a public law model that transcends territorial borders. Investment treaties should be interpreted, investor-state disputes resolved, and system-internal reform proposed by recourse to public law thinking and a specific public law method, namely comparative public law. Accordingly, problems arising in

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investment treaty arbitration should not be treated in isolation, but rather by drawing on solutions and concepts adopted in other public law systems at the domestic and international level.

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INTRODUCTION

International investment law is perhaps the fastest growing area of international law and dispute settlement today. While it is a field that has emerged in practice essentially only during the past decade,¹ it already faces considerable challenges and serious critiques. From time to time, states, investors, civil society, nongovernmental organizations, and legal scholars of domestic and international law call the legitimacy of international investment law and investment treaty arbitration into question.² Yet, despite growing amounts of literature, international investment law so far has not received sufficient theoretical and doctrinal attention. In practice, international investment law, therefore, is often not well-equipped to counter such criticism.

What is still missing is a comprehensive conceptual and doctrinal framework for the thinking on international investment law as a whole, as well as convincing accounts of its various elements. What complicates matters in particular is the clash between private commercial arbitration and public international 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

1. The protection of foreign investment has had a long tradition as part of the customary international law relating to the protection of aliens; in the past, it was implemented almost exclusively by means of diplomatic protection. In its combination with investor-state arbitration, however, international investment law has fundamentally changed. Although the foundations of this modern development were laid in the late 1950s, it did not develop in practice until the late 1990s. For information on the history of international investment law, see ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 8–9, 20–22, 24–26, 41, 47–57 (2009).

2. See *infra* Part I, in particular notes 20–32 and accompanying text.

misunderstandings about, the structure, functioning, and future direction of the current system of international investment protection. At the same time, both private commercial and public international law approaches face significant limitations in providing a comprehensive framework for the doctrinal reconstruction of international investment law, as aspects of both of these fields blend into each other in the practice of international investment protection.

As part of an endeavor 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 will outline a third approach to international investment law that stresses the differences between commercial arbitration and public international law approaches. This Article will advance an understanding of international investment law as an internationalized discipline of public law, which is concerned with governing the relation between states and private individuals in the times of an emerging global economy. This approach is based on the premise that, rather than only being concerned with backing up private contract-like ordering between foreign investors and host states, international investment law and investor-state arbitration has a broader function in providing a public legal framework for international investment relations between states and foreign investors.

The public function of international investment law consists of establishing principles of investment protection under international law that provide for the protection of property and endorse rule of law standards for the treatment of foreign investors by states. These principles have the purpose of reducing the so-called “political risk” inherent in any foreign investment situation.³ In that sense, the substantive principles of international investment law, therefore, assume a function that is much closer to that of domestic constitutional and administrative law than to private law and commercial contracts negotiated between equals; investment treaty arbitration, in turn, can be understood as more akin to administrative or constitutional judicial review than to commercial arbitration, even though international investment law makes use of the arbitral process to settle disputes between states and foreign investors.⁴ Yet, despite the functional equivalence to domestic public law, international investment law lacks a comparable conceptual and doctrinal clarity.

3. On the notion of political risk and on understanding dispute resolution through arbitration as a form of risk management, see NOAH RUBINS & N. STEPHAN KINSELLA, *INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE* 2–3, 309–64 (2005). On the importance of political risk as a factor for investment decisions, see WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* 34–38 (1997).

4. See *infra* Part III.

To enhance our understanding of international investment law, this Article will suggest a specific method, namely comparative public law. This method can serve as a framework to guide the interpretation of investment treaties, to understand the role and powers of investment treaty tribunals, and to develop suggestions for legal reform. The core idea 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 both the domestic and international level. It relies on the observation that the problems dealt with in investor-state arbitration are not novel as such. Instead, the same problems concerning the relation of private economic actors and governmental power arising in investment treaty arbitration today, including questions of nondiscrimination, the respect for due process, and the protection of property and economic interests against expropriation and other undue government interferences, have already played a role in domestic administrative and constitutional litigation — and partly also in regional regimes and their dispute settlement institutions, such as the European Court of Justice (ECJ) or the European Court of Human Rights (ECHR) — ever since the rise of the modern regulatory state.⁵

With the emergence of a truly global economy, the same problems of public law now surface at the international level. Accordingly, these problems should be viewed in the context of the rich experience of such other, often more advanced, public law systems. Comparative public law thus can serve as a critical tool in analyzing and further developing international investment law and investor-state dispute resolution in ways that are tested and accepted in other public law contexts. This can not only be of practical use in investor-state arbitrations, but ultimately may also help to strengthen the often contested legitimacy of investor-state dispute resolution without requiring a fundamental redesign of the system.

This Article will provide 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 different phenomena of global governance.⁶ Part I will begin by describing the current state of international investment law and investment dispute settlement, and will discuss the various

5. See *infra* Part V. Cf. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 108 (2005) (concluding that, in some instances, international devices such as BITs substitute, rather than compliment, local institutions).

6. See generally INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., 2010) (assessing the principles of international investment law against a comparative public law background). For a similar approach to understand governance at the supranational level by means of a public law approach, see THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy et al. eds., 2010).

critiques of the present system. It will provide an explanation of why new conceptual approaches are necessary in order to remedy the existing dissatisfaction with investment law and arbitration. Thereafter, in Part II, this Article will suggest that, with 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 III will then posit that these approaches should stress the nature of international investment law as a genuinely public law discipline, recognizing differences with classical public international law and commercial arbitration. This is all the more important as the public law dimensions of international investment law are not limited to a specific host state, but rather concern foreign investors and states more generally. Thus, investment treaty tribunals increasingly develop foundational concepts and principles of international investment law in a treaty-overarching manner. Their jurisprudence therefore not only affects the parties to a specific dispute, but also has an effect on outsiders. Accordingly, Part IV will suggest that the rule-concretization and rule-making inherent in this jurisprudential activity has to be seen as an exercise of public authority; investment treaty tribunals thus become actors not only engaged in dispute settlement, but also in global governance. Finally, Part V will introduce comparative public law as a method for guiding and legitimating the interpretation of international investment treaties and as a source of reform. Comparative public law, as Part VI will argue, is particularly important because it can contribute to developing general principles of public law for investor-state relations.

I. INTERNATIONAL INVESTMENT LAW & ITS DISCONTENTS

Opinion on international investment law is divided. From one perspective, it is an unparalleled success story.⁷ Today, about fifty years after Germany and Pakistan concluded the first bilateral investment treaty (BIT),⁸ more than 2700 BITs and numerous investment chapters in free trade agreements,⁹ as well as some regional and sectoral treaties, like the

7. See, e.g., Thomas W. Wälde, *Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy*, 2008–2009 Y.B. ON INT'L INVESTMENT L. & POL. 505, 506 (2009) (“I consider the unexpected, rapid, and extensive development of investment arbitration over the past fifteen years as an unmitigated success.”).

8. Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 6575.

9. See U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], WORLD INVESTMENT REPORT 2010: INVESTING IN A LOW-CARBON ECONOMY, at 81, U.N. Sales No. E.10.II.D.2 (2010) (noting the existence of 2750 BITs and 295 other investment protection agreements at the end of 2009). On the history of international investment law, see Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275 (2000); Kenneth J.

North American Free Trade Agreement (NAFTA)¹⁰ and the Energy Charter Treaty (ECT),¹¹ offer comprehensive protection to foreign investors. In addition, during the past decade, arbitration under international investment treaties has become an important part of international dispute settlement.¹²

Despite some differences between the various international investment treaties, they follow rather uniform principles with regard to their structure, content, and mechanism of dispute settlement. Above all, international investment treaties build on treaty-overarching principles concerning the treatment of foreign investors and thereby establish a largely uniform system of international investment protection.¹³ Thus, the treaties generally grant foreign investors substantive rights, including national and most-favored-nation (MFN) treatment, fair and equitable treatment, and protection against expropriation without compensation.¹⁴ In addition, they allow investors to enforce these rights in arbitral proceedings against host states.¹⁵ Overall, 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.¹⁶

Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005).

10. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA Agreement].

11. Energy Charter Treaty, *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95.

12. See UNCTAD, *IIA Issues Note No. 1: Latest Developments in Investor-State Dispute Settlement*, at 1–2, UNCTAD Doc. UNCTAD/WEB/DIAE/IA/2011/3 (Mar. 2011) (noting that, as of the end of 2010, there have been 390 treaty-based investment disputes).

13. See STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 15–22 (2009) (summarizing the argument presented throughout the book that international investment law emerges as a multilateral system of investment protection on the basis of bilateral treaties); see also *infra* notes 147–157 and accompanying text.

14. UNCTAD, *INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW*, at 31–47, UNCTAD Doc. UNCTAD/ITE/IIT/2005/4, U.N. Sales No. E.06.II.D.1 (2005); see also RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (1995).

15. 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, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], but also pursuant to UN Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 31/98, U.N. Commission on International Trade Law, 31st Sess., supp. No. 17 at ch. V, § C, U.N. Doc. A/31/17 (Apr. 28, 1976), *reprinted in* 15 I.L.M. 701 (1976), as well as in other institutional or *ad hoc* arbitrations. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 222–229 (2008).

16. On the relation between foreign investment and economic growth, see, for example, Abdur Chowdhury & George Mavrotas, *FDI and Growth: What Causes What?*, 29 WORLD ECON. 9 (2006) (suggesting bidirectional causality between foreign direct investment and growth); Henrik Hansen & John Rand, *On the Causal Links Between FDI and Growth in Developing Countries*, 29 WORLD ECON. 21 (2006) (examining foreign direct investment and growth in thirty-one developing countries). It is controversial, however, whether BITs have an actual effect on attracting foreign investment. *Compare*

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,”¹⁷ fundamental ideological differences about the desirability of property protection under international law have largely disappeared.¹⁸ In order to attract foreign investment, investment treaties now span a large amount of investment flows not only between North and South, and East and West, but also between developed and developing countries.¹⁹ Investment treaty protection, 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 investors’ rights by some arbitral tribunals, and a number of 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.²⁰ Although

Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 171 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (finding a positive correlation between BITs and investment flows), and Susan Rose-Ackerman & Jennifer L. Tobin, *Do BITs Benefit Developing Countries?*, in THE FUTURE OF INVESTMENT ARBITRATION 131 (Catherine A. Rogers & Roger P. Alford eds., 2009), (same) with Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra*, at 395 (finding no positive relationship). Several more recent studies, however, strengthen the link between investment treaties and investment flows. See, e.g., Matthias Busse et al., *FDI Promotion Through Bilateral Investment Treaties: More Than a Bit?* 146 REV. WORLD ECON. 147 (2010); Yoram Z. Haftel, *Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries*, 17 REV. INT’L POL. ECON. 348 (2010).

17. See RUDOLF DOLZER, EIGENTUM, ENTEIGNUNG UND ENTSCHÄDIGUNG IM GELTENDEN VÖLKERRECHT [PROPERTY, EXPROPRIATION, AND COMPENSATION IN CURRENT INTERNATIONAL LAW] 24–34 (1985).

18. See Thomas W. Waelde, *A Requiem for the “New International Economic Order”: The Rise and Fall of Paradigms in International Economic Law and a Post-Mortem with Timeless Significance*, in LIBER AMICORUM: PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY 771, 778–96 (Gerhard Hafner et al. eds., 1998). One may, however, view recent developments in some Latin American countries, in particular the withdrawal from the ICSID Convention or from BITs, see *infra* notes 22–24, as a continuation of such a fundamental disagreement. Still, such disagreements, by and large, appear to be the exception rather than the rule. Instead, criticism of international investment treaties and their interpretations by arbitral tribunals today is mainly carried out within the system of international investment law by recalibrating obligations under international investment treaties. See José E. Alvarez, *Why Are We “Re-Calibrating” Our Investment Treaties?*, 4 WORLD ARB. & MEDIATION REV. 143 (2010); see also Muthucumaraswamy Sornarajah, *Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law*, 2009-2010 Y.B. INT’L INVESTMENT L. & POL’Y 595, 635–641 (2010) (discussing the reactions of states to international investment law, only one of which is withdrawal from the system).

19. See UNCTAD, SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT ARRANGEMENTS, at 1, UNCTAD Doc. UNCTAD/ITE/IIT/2005/3, U.N. Sales No. E.05.II.D.26 (2005).

20. See, e.g., Gus Van Harten et al., Public Statement on the International Investment Regime,

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.”²¹ Signs of this crisis are seen in the recent withdrawal of some Latin American states from investment treaties and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),²² in what may be seen as increased reluctance by states to comply with orders and awards of investment tribunals,²³ or in the recrafting of the substance and procedure of investment treaties in ways that reflect concerns about jurisprudential

Aug. 31, 2010, <http://tinyurl.com/3qhnjwr>.

21. See Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11*, 25 NW. J. INT'L L. & BUS. 279, 282 (2005); Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51 (2004); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003); Charles N. Brower, *A Crisis of Legitimacy*, NAT'L L.J., Oct. 7, 2002, at B9; Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415 (2003); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 39–45 (Karl P. Sauvant ed., 2008); see also Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (2009).

22. In May 2007, Bolivia denounced the ICSID Convention, and its withdrawal became effective on November 3, 2007. See Letter from David Choquehuanca Cespedes, Foreign Affairs Minister, Bol., to Paul Wolfowitz, President, World Bank, *Cancillería Oficializa la Salida de Bolivia del CIADI* [Ministry of Bolivia Officially Exits ICSID] (May 1, 2007), reprinted in 46 I.L.M. 973 (2007); Press Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), <http://tinyurl.com/57ky25>. In July 2009, Ecuador also denounced the ICSID Convention, and withdrawal from the Convention became effective on January 7, 2010. Press Release, ICSID, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), <http://tinyurl.com/289ct5p>. Discussion of withdrawal has also been reported with respect to Nicaragua and Venezuela. See Marco E. Schnabl & Julie Bédard, *The Wrong Kind of “Interesting,”* NAT'L L.J., July 30, 2007, at S1. On April 30, 2008, Venezuela communicated to the Netherlands its intention to terminate the Dutch-Venezuelan BIT as of November 1, 2008. See Luke Eric Peterson, *Venezuela Surprises the Netherlands with Termination Notice for BIT*, INVESTMENT ARB. REP., May 16, 2008, <http://www.iareporter.com/Archive/IAR-05-16-08.pdf>. Withdrawal from international investment treaties is not limited to Latin America. On August 20, 2009, the Russian Federation notified the Depository of the ECT of its intention to not become a Contracting Party. *Russia, ENERGY CHARTER*, <http://www.encharter.org/index.php?id=414> (last visited May 22, 2011). Pursuant to Article 45(3)(a) of the ECT, such notification ended the provisional application of the ECT to Russia. *Id.* On the notification and its effect on existing disputes, see *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶¶ 36–40, 244–398 (Perm. Ct. Arb. 2009), <http://tinyurl.com/y8vwmppq>.

23. On compliance with investor-state arbitrations and investor perception of state compliance, see Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 354–61 (2008); see also Crina Baltag, *Enforcement of Arbitral Awards Against States*, 19 AM. REV. INT'L ARB. 391 (2008). Sometimes, states also disregard other orders of arbitral tribunals, such as provisional measures.

trends in investment treaty arbitration, including by, but not limited to, the United States.²⁴

Most importantly, the grant of a new exclusive competence to the European Union (EU) in the field of foreign direct investment under the Lisbon Treaty²⁵ may have a significant impact on the whole of international investment law. On the one hand, the EU is currently reviewing its future international investment law policy in light of criticisms and suggestions for reform that the current system of international investment protection has received;²⁶ on the other hand, 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.²⁷

24. See Gilbert Gagné & Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. INT'L ECON. L. 357, 359, 363, 375–81 (2006); Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. INT'L ARB. 383, 385 (2004); Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 519, 521–25 (Christina Binder et al. eds., 2009). Also, countries such as Norway, South Africa, and Australia are currently reviewing, or have already announced restrictions to, their future international investment protection policy. See Peter Muchlinski, *Trends in International Investment Agreements, 2008/2009: Review of the Model Bilateral Investment Treaties of Norway, South Africa and the United States*, 2009-2010 Y.B. INT'L INVESTMENT L. & POL'Y 41 (2010). Just in April 2011, Australia announced that it will no longer include investor-state dispute settlement provisions in future investment treaties. See Dep't of Foreign Affairs & Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, Apr. 2011, at 14 (Austl.), available at <http://tinyurl.com/3w3ungv>.

25. Consolidated Version of the Treaty on the Functioning of the European Union arts. 3(1)(e), 207(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter 'TFEU]. The exact scope of this competence, however, is not yet settled. See Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, 21 EUR. J. INT'L L. 1049, 1057–65 (2010).

26. The European Commission has provided the 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: Towards a Comprehensive European International Investment Policy*, COM (2010) 343 final (July 7, 2010), available at <http://tinyurl.com/3ovz77e>. While the topic is still under consideration, several Member States, as becomes apparent from their position in the Council of the European Union, are wary about the Commission intending to reduce the scope and structure of international investment protection as it has been traditionally enshrined in the investment treaties of Member States. See Press Release, Luxembourg European Council, *Conclusions on a Comprehensive European International Investment Policy*, 3041st Foreign Affairs Council Meeting (Oct. 25, 2010), available at <http://tinyurl.com/63yupkc>. Furthermore, the European Parliament has indicated its interest in changing EU investment treaty practice compared to that of Member States. See European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), EUR. PARL. DOC. P7_TA(2011)0141 (2011), available at <http://tinyurl.com/6abdzat>.

27. Although existing investment treaties between Member States and non-EU Member States will stay in force, Member States are under an obligation to bring their investment treaty obligations into conformity with EU law through renegotiation or termination of incompatible treaties. See TFEU, *supra* note 25, art. 351. A number of cases have already been brought before the European Union courts under this article or its predecessor, ex art. 307 of the Treaty of the European

Host states are particularly concerned about a shrinking of domestic policy space occasioned by vague standards of investment protection, which are interpreted, partly in inconsistent ways, by international arbitrators who exercise significant interpretative powers over the content of investment treaty obligations, and who are de facto even able to restrict the policy choices made by democratically-elected legislators, without themselves enjoying a robust democratic mandate.²⁸ Similarly, nongovernmental organizations criticize the lack of democratic control and accountability of investment arbitrations, the inability of nonparties to influence arbitral proceedings, and the threat that investment protection is accorded preference over competing policy concerns.²⁹ For investors, finally, 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, makes it difficult to assess precisely against which political risk investment treaties offer protection.

Concerns in relation to the current system of international investment protection therefore 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

Community. See, e.g., Case C-118/07, *Comm'n v. Finland*, 2009 E.C.R. I-10889, ¶¶ 18–52; Case C-205/06, *Comm'n v. Austria*, 2009 E.C.R., I-1335, ¶¶ 24–46; Case C-249/06, *Comm'n v. Sweden*, 2009 E.C.R., I-1301 ¶¶ 25–46 (all holding that, before the entry into force of the Lisbon Treaty, the free capital transfer provisions in certain investment treaties of EU Member States were in breach of EU law, thus requiring Member States to renegotiate or terminate such treaties). For more on these cases, see, for example, Nikos Lavranos, *New Developments in the Interaction Between International Investment Law and EU Law*, 9 L. & PRAC. INT'L CTS. & TRIBUNALS 409, 416–24 (2010). Furthermore, according to a new Draft Regulation, Member States can notify the Commission of those investment treaties that they wish to keep in place despite the EU's new competence. 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*, at 4, COM (2010) 344 final (July 7, 2010). Under the Draft Regulation, Member States would be able to continue concluding international investment treaties with non-EU Member States for a transitory period of at least five years, subject to close supervision by the Commission, provided these treaties are in conformity with EU law and do not impede the exercise of the EU's competence on foreign investment. *Id.* at 4–5. Even more complex is the question of whether intra-EU investment treaties are still applicable. While the Commission and some Member States are of the opinion that such treaties cannot be applied anymore, other Member States and investment treaty tribunals continue to apply them. For a comprehensive analysis on the impact of EU law on investment treaty obligations of Member States, see generally Markus Burgstaller, *European Law and Investment Treaties*, 26 J. INT'L ARB. 181 (2009); Angelos Dimopoulos, *The Validity and Applicability of International Investment Agreements Between EU Member States Under EU and International Law*, 48 COMMON MARKET L. REV. 63 (2011); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MARKET L. REV. 383 (2009); Lavranos, *supra*, at 431–36; Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58 INT'L & COMP. L.Q. 297 (2009).

28. See, e.g., Sornarajah, *supra* note 18, at 618–635; see also sources cited *infra* note 32.

29. Particularly active in the field is the International Institute for Sustainable Development. See *Foreign Investment for SD*, INT'L INSTITUTE FOR SUSTAINABLE DEV., <http://www.iisd.org/investment> (last visited June 28, 2011).

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 also with regard to 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 noninvestment 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 nonparties, even if they are affected, are voiceless.³⁰

Overall, at the heart of the criticism of international investment law is what can be called the “public law challenge.” It relates to the observation that investment treaty arbitration restricts governmental action, and therefore concerns questions of public law, without relying on a dispute settlement mechanism that conforms to core public law values, including democracy, equal treatment, separation of powers, legal certainty and predictability, or in other words, the rule of law.³¹ While arbitration may be acceptable in a commercial context, where deficits in the governing law or in the mechanism of dispute settlement only affect the parties to the dispute, it is not acceptable, in the view of critics, in the public law context, where the legality of a state’s exercise of public power is reviewed under standards crafted by international arbitrators who are appointed by the disputing parties and have no genuine democratic legitimacy.³² International investment law, in this perspective, becomes a threat to state sovereignty, to the integrity of domestic public law and its values, and ultimately to national self-determination.

30. For a similar list of concerns with, or flaws of, the international investment system, see GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 152–75 (2007).

31. See Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 627, 656–57.

32. See VAN HARTEN, *supra* note 30, at 5; see also DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* 225 (2008) (arguing that the protection offered to foreign investors under international investment law “destabilize[s] the functioning of democratic processes, represented by other constitutional rules.”).

II. INSTITUTIONAL REFORM OR SYSTEM-INTERNAL ADAPTATION?

Legal science has reacted to the discontent expressed in relation to international investment law and arbitration by discussing solutions to the manifold challenges this field of international law is facing.³³ Like the number of challenges, the solutions presented are many. 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,³⁴ suggestions for institutional reform abound, ranging from a return to state-to-state dispute resolution,³⁵ via introducing a common appeals body in order to review investment treaty awards,³⁶ to establishing a permanent international investment court.³⁷

Returning to the settlement of investment disputes in interstate relations would allow states not only to jointly control the composition of arbitral tribunals, but also to filter the disputes tribunals entertain. While this solution would allow states to exclude spurious or frivolous claims, it would equally permit them to discard claims for foreign policy reasons. Foreign investors, as a 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.³⁸ A return to diplomatic protection could also repoliticize international investment relations and unmake a central advancement in international investment protection, one that has received praise ever since the ICSID Convention was concluded: the depoliticization of investment disputes.³⁹

Another solution consists of the establishment of a permanent international court for foreign investment disputes.⁴⁰ This would allow states alone to determine the composition of the bench, which arguably

33. See, e.g., *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel et al. eds., 2010) (analyzing the current state of the international investment regime and offering various suggestions to improve the system).

34. See *supra* note 20.

35. The Australia-United States Free Trade Agreement, for example, which also contains an investment chapter, has opted to not include an investor's right to initiate arbitration against the host state. See William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 *VAND. J. TRANSNAT'L L.* 1, 2, 23 (2006).

36. See, e.g., Franck, *supra* note 21, at 1617–25; see also *infra* note 37 and accompanying text.

37. VAN HARTEN, *supra* note 30, at 180–84.

38. See Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION*, *supra* note 33, at 29, 29.

39. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIG.A*, 1 *ICSID REV.* 1, 1 (1986).

40. See VAN HARTEN, *supra* note 30, at 180–84.

would lend such an institution increased legitimacy. As some argue, the tenure of judges of a permanent court could also 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.⁴¹ 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.⁴² For the same reason of ensuring consistency, the introduction of an appellate mechanism has been envisaged in some recent U.S. investment treaties and by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID) in a proposal tabled in 2004.⁴³

The ICSID's proposal, however, has failed to gain the support of a majority of states. Likewise, none of the recent U.S. 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. Thus, 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.

The system of international investment law, therefore, is most likely to continue to face demands for increased transparency, openness, predictability, and fair balance between investors' rights and public interests. In addition, the acceptance by states of the substance of investment treaties will depend on how expansively the limits investment treaties impose on governmental policy space to regulate in the public interest and to further noninvestment-related policies are interpreted. 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 international obligations of states relating to noninvestment concerns, such as human rights or the protection of the environment. Openness toward other subsystems of international law will

41. See VAN HARTEN, *supra* note 30, at 167–75; Van Harten, *supra* note 31, at 643–48. For a view that is less critical in this respect, see Brower & Schill, *supra* note 21, at 489–95.

42. See Franck, *supra* note 21, at 1617–25.

43. ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration 14–16 (Oct. 22, 2004) (discussion paper), available at <http://tinyurl.com/3zw3hcp>; see also CHRISTIAN J. TAMS, AN APPEALING OPTION?: THE DEBATE ABOUT AN ICSID APPELLATE STRUCTURE 5–6 (2006); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 46, 49 (2006).

be an equally important criterion in the evaluation of international investment law.

Unlike what 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 noninvestment concerns can be implemented within the system of international investment protection as it currently stands. Arguably, the reason why system-internal solutions so far are not yet sufficiently robust 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 function arbitral tribunals exercise beyond individual disputes, that is, by concretizing and developing the principles of international investment protection in a treaty-overarching manner.

Connected with this dissonance, it is unclear how to conceptualize international investment law in terms of private and public law thinking. Thus, despite growing scholarly attention to international investment law, the development of a comprehensive framework for this field of law, and the substantive and procedural maxims that constitute it, is still in its infancy. This holds true not only on a broad level, as regards the qualification of international investment law in private or public law terms and its relation with noninvestment-related international law, but also with respect to the content of substantive investment law, including many of the standard investors' rights. After all, conflicting arbitral decisions are due at least in part to the disagreement about the proper interpretation of standard concepts of international investment protection.⁴⁴

Thus, what is perhaps most needed in order to react to the criticisms of international investment law is a conceptual approach that helps 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 leave 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, openness, predictability, and respect for noninvestment concerns.

This Article, which is embedded in a broader research project,⁴⁵ therefore argues and illustrates that achieving the necessary balance between investment protection and other public interests, and addressing demands for transparency, openness, and predictability in investment

44. See SCHILL, *supra* note 13, at 339–55.

45. See INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 6.

arbitration, can be achieved by understanding international investment law's significant public law implications and by conceptualizing it as an internationalized public law discipline. This does not change the nature of international investment law as public international law and does not replace the application of general international law, in particular its method of treaty interpretation,⁴⁶ or deny the relevance of other sources of international law in the area of international investment protection, such as customary international law, which underpins or complements investment treaty provisions.⁴⁷ 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 disputes,⁴⁸ with arbitration, which, even though not unknown in international law to settle state-to-state disputes,⁴⁹ is most widespread as a mechanism to settle disputes between private parties arising in the context of international commercial transactions. This hybridization populates the field with practitioners and academics with quite diverse formative, professional, and ideational backgrounds: the perhaps larger group joining international investment law

46. See Vienna Convention on the Law of Treaties, arts. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. On the embeddedness of investment treaties in international law, see generally Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361 (2008).

47. See, e.g., Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 296–299 (2005) (discussing how customary international law influences the interpretation of fair and equitable treatment contained in investment treaties); see also MARTINS PAPANINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* (forthcoming 2012) (analyzing in depth the connection between fair and equitable treatment and the customary international law minimum standard).

48. The governing law, however, is not necessarily limited to international law. Instead, national law often plays an important role in many investment treaty arbitrations. See ICSID Convention, *supra* note 15, art. 42, ¶ 1; see generally Ole Spiermann, *Applicable Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 89 (Peter Muchlinski et al. eds., 2008) (demonstrating that public international rules are key to the resolution of international disputes).

49. See, for example, the United Nations Convention on the Law of the Sea, art. 287, ¶ 1, Dec. 10, 1982, 1833 U.N.T.S. 397, or Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 25, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1140, which provide for arbitration as an interstate dispute settlement mechanism in the multilateral context. From a historic perspective, see Charles H. Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 265–91 (2008); Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 1992 BRIT. Y.B. INT'L L. 97.

from the side of private commercial law and arbitration,⁵⁰ and a smaller group coming from public international law and interstate dispute settlement.⁵¹ While this combination is mostly fruitful in solving disputes, which are often factually and legally complex, it also results in a 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 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 fact that one party to the dispute is a state matters little.⁵² Accordingly, principles of commercial arbitration, in particular its procedural maxims, are also applicable to investment treaty arbitration.

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

50. For the names and provenance of the law firms most active in large international arbitrations, including investment arbitrations, see Michael D. Goldhaber, *Arbitration Scorecard 2009: One Battleground Isn't Enough*, LAW.COM (June 29, 2009), <http://tinyurl.com/3z9tfqa>.

51. This group comprises numerous professors of international law, judges at international courts, such as the International Court of Justice or the Iran-United States Claims Tribunal, and lawyers who have specialized in interstate dispute settlement. Members of this group include Charles N. Brower, Thomas Buergenthal, James Crawford, Christopher Greenwood, Gilbert Guillaume, Francisco Orrego Vicuña, Stephen Schwebel, Bruno Simma, Brigitte Stern, Peter Tomka, and many others.

52. See Barton Legum, *Investment Treaty Arbitration's Contribution to International Commercial Arbitration*, DISP. RESOL. J., Aug.–Oct. 2005, at 71, 73 (“[F]or 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.”); see also Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 251 (2007) (“Arbitration between states and individuals is an offshoot of private international dispute resolution — the contract-based establishment of tribunals convened to hear commercial disputes.”).

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.⁵³

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.⁵⁴

While it is clear that neither a pure international-law understanding nor a pure commercial-law understanding of investor-state dispute resolution is sufficient in itself to comprehend the specific characteristics of international investment law, it is important to note the fundamental differences between international investment law and, on the one hand, traditional public international law, which serves as the general background law governing interstate disputes, and, on the other, commercial law and arbitration.

International investment law differs from traditional public international law in relation to its function and the social relations it governs. 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,⁵⁵ it remained a law governing the relations between states.⁵⁶ Disputes about the limits of a state's power over

53. See Thomas W. Wälde, *The Specific Nature of Investment Arbitration*, in LES ASPECTS NOUVEAUX DU DROIT DES INVESTISSEMENTS INTERNATIONAUX/NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 43, 91–106 (Philippe Kahn & Thomas W. Wälde eds., 2007); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 145–50 (2006) (stressing the public nature of investment treaty arbitration); see also *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 160(2) (Dec. 8, 2008), <http://tinyurl.com/23vaelz> (“The ICSID Convention . . . combines a public law system of State liability with private arbitration.”); *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, ¶ 5 (NAFTA Ch. 11 Arb. Trib. June 8, 2009), 48 I.L.M. 1038 (“Chapter 11 of the NAFTA contains a significant public system of private investment protection.”).

54. See Charles N. Brower, *W(h)ither International Commercial Arbitration? — The Goff Lecture 2007*, 24 ARB. INT'L 181, 191–94 (2008).

55. For a comprehensive review of diplomatic protection, see CHITTHARANJAN F. AMERASINGHE, *DIPLOMATIC PROTECTION* (2008).

56. The *locus classicus* is *The Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924, P.C.I.J. (ser. A) No. 2 (Aug. 30). The Permanent Court of International Justice stated, “[i]n 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,

foreign investors were first a matter for the domestic courts of that state, and only subsequently a matter for interstate dispute resolution, either before an international court or by means of interstate arbitration.⁵⁷ 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,⁵⁸ directly against the host state in an international forum — resulting, if successful, in a widely enforceable award under the ICSID Convention⁵⁹ or under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁶⁰ 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.

In consequence, 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 arbitration has brought a fundamental change in this respect. Private enforcement of international investment law, coupled with the 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

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.” *Id.* at 12. Thus, the Court in *Mavrommatis* was describing the traditional theories of espousal and diplomatic protection. See AMERASINGHE, *supra* note 55; see also David J. Bederman, *State-to-State Espousal of Human Rights Claims*, 51 VA. J. INT’L L. DIGEST 3, 4–5 (2011), <http://tinyurl.com/3jkm5zn>.

57. See Brower, II, *supra* note 49, at 265–91; Gray & Kingsbury, *supra* note 49.

58. Although the primary remedy sought by foreign investors is damages for breaches of investment treaty obligations, other remedies, such as the restitution of property or the cessation of unlawful conduct, are possible. See Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT’L 325, 331–32 (2004).

59. See ICSID Convention, *supra* note 15, 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.”).

60. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

investment law.⁶¹ It has transferred considerable power from states to foreign investors and arbitral tribunals.

Although international investment law remains firmly embedded in public international law, the introduction of the investors' 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.⁶²

International investment arbitration also differs fundamentally from commercial arbitration. Despite numerous procedural similarities,⁶³ 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.⁶⁴

First, unlike commercial disputes, 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,⁶⁵ regulatory oversight over public utility companies

61. Christoph Schreuer, *Paradigmenwechsel im Internationalen Investitionsrecht [Paradigm Shift in International Investment Law]*, in PARADIGMENWECHSEL IM VÖLKERRECHT ZUR JAHRTAUSENDWENDE: ANSICHTEN ÖSTERREICHISCHER VÖLKERRECHTLER ZU AKTUELLEN PROBLEMLAGEN [PARADIGM SHIFTS IN INTERNATIONAL LAW AT THE TURN OF THE MILLENNIUM: VIEWS OF AUSTRIAN INTERNATIONAL LAWYERS ON CURRENT ISSUES] 237, 237–50 (Waldemar Hummer ed., 2002).

62. See *Int'l Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL, Separate Opinion of Thomas Wälde*, ¶ 13 (NAFTA Ch. 11 Arb. Trib. Dec. 2005), <http://tinyurl.com/29v9j5o> (“[W]hile 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 . . .”).

63. Such similarities include the initiation of arbitration by a private party, the constitution of the tribunal, the application of procedural rules that are either directly made for commercial arbitrations or tailored after the model of commercial arbitration, see Bjorklund, *supra* note 52, at 251, and the enforcement of awards, see Van Harten & Loughlin, *supra* note 53, at 139–40.

64. Van Harten & Loughlin, *supra* note 53, at 140–45.

65. See, e.g., *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), <http://tinyurl.com/3t4247t>, *annulled* (June 29, 2010), <http://tinyurl.com/43mm8mt>; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Liability (Oct. 3, 2006), 21 ICSID Rev. 203; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 I.L.M. 1205; *Nat'l Grid Plc. v. Argentine Republic*, Award (UNCITRAL Arb. Trib. Nov. 3, 2008), <http://tinyurl.com/2dng3vb>; *BG Group Plc. v. Republic of Arg.*, Final Award (UNCITRAL Arb. Trib. Dec. 24, 2007), <http://tinyurl.com/3qax5zg>.

and the tariffs they charge,⁶⁶ the control and banning of harmful substances,⁶⁷ the protection of cultural property,⁶⁸ or the implementation of nondiscrimination policies.⁶⁹ Because one of the disputing parties is not a private commercial actor, investment treaty awards 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 to that utility for a portion of the population,⁷⁰ by permitting the use of harmful substances, or by repealing general regulatory policies. Investment treaty obligations and decisions by arbitral tribunals on such matters may thus directly affect the social fabric of the host state. In sum, regarding subject matter, investment treaty disputes often involve public law rather than private law issues.⁷¹

Second, 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. Third, 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

66. *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award (July 24, 2008), <http://tinyurl.com/3fh8s7x>; *Aguas del Tunari v. Republic of Bol.*, ICSID Case No. ARB/02/3, Objections to Jurisdiction (Oct. 21, 2005), 20 ICSID Rev. 450.

67. *Chemtura Corp. v. Can.*, UNCITRAL, Award (NAFTA Ch. 11 Arb. Trib. Aug. 2, 2010), <http://tinyurl.com/3b7zz75>; *Methanex Corp. v. United States*, UNCITRAL, Final Award (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005), <http://tinyurl.com/43rfcvz>.

68. *S. Pac. Props. (Middle E.) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992), 3 ICSID Rep. 189 (1995); *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award (NAFTA Ch. 11 Arb. Trib. June 8, 2009), 48 I.L.M. 1038.

69. *Foresti v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), <http://tinyurl.com/42moxm4>.

70. For a discussion on water disputes in international investment law, see Jorge E. Vinuales, *Access to Water in Foreign Investment Disputes*, 21 GEO. INT'L ENVTL. L. REV. 733 (2009).

71. This also explains the repeated demands for increased accountability, democratic legitimacy, openness, and transparency in investment treaty arbitration. See SCHNEIDERMAN, *supra* note 32; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008); Gary H. Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties — A Threat to Democracy or the Dog that Didn't Bark?*, 18 ICSID REV. 1 (2003). The 2006 changes of the ICSID Arbitration 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," ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, in ICSID CONVENTION, RULES AND REGULATIONS, at 99, Rule 48, ¶ 4, ICSID Doc. ICSID/15 (Apr. 2006) [hereinafter ICSID Arbitration Rules]; allowing tribunals to open hearings to the public, *id.* Rule 32, ¶ 2; and accepting amicus briefs, *id.* Rule 37, ¶ 2. For more on these and other changes to the ICSID Arbitration Rules, see Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV. 427 (2006).

host states stand in a hierarchical relationship of super- and subordination. In principle, states, unlike commercial parties, are able to impose unilaterally binding decisions on foreign investors 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 rather involves a unilateral offer by the host state, given in an investment treaty in generalized and prospective form,⁷² that any investor covered by the treaty's provisions can accept by initiating arbitration. Because of the state's public offer of arbitration,⁷³ investment treaty arbitration has been famously termed "arbitration without privity."⁷⁴ It is essentially an adjudicatory process for resolving investor-state disputes that follows a predetermined procedure and involves the application of pre-existing substantive and procedural rules, which are determined by the state's consent to arbitration, much like the rules involved in the case of a state's submission to the jurisdiction of an international or national court exercising judicial review.⁷⁵

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, by choosing no law at all, or by setting evidentiary standards.⁷⁶ Instead, it involves the objective control of legality of the state's conduct under the applicable investment treaty.⁷⁷

72. See Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531 (2002) (describing the specificities of state consent in NAFTA and other modern investment treaties).

73. See Bernardo Cremades, *Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties*, in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY 149 (Robert Briner ed., 2001); Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183 (2001).

74. See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

75. Cf. Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 504–13 (2006) (describing the function and role of arbitrators).

76. See, e.g., Jan Paulsson, *International Arbitration Is Not Arbitration*, STOCKHOLM INT'L ARB. REV., 2008:2, at 1, 14.

77. *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, ¶ 12 (NAFTA Ch. 11 Arb. Trib. Dec. 2005), <http://tinyurl.com/29v9j5o> ("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 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

Accordingly, in view of the prospective consent to arbitration by host states for the benefit of private actors and the subject matter at play — that is, determining the conformity of government conduct with standards contained in an international agreement — there are few functional parallels to commercial arbitration. Instead, dispute settlement under international investment treaties is better analogized to judicial review of governmental conduct under administrative and constitutional law at the domestic level or international judicial review — for example, before the ECJ, the ECHR, or the World Trade Organization (WTO).⁷⁸ Overall, international investment law should therefore more appropriately be viewed as a public law discipline because it imposes restraints on a state's exercise of powers *vis-à-vis* private investors and provides investors access to an independent forum of dispute resolution to implement those restraints.

IV. INVESTMENT TREATY ARBITRATION AS AN EXERCISE OF PUBLIC AUTHORITY

The public law dimensions in international investment law are not limited to restraining the governmental action of a state involved in an investment dispute in the interest of individual rights. They also surface when focusing on the effects that the decision-making of arbitral tribunals has beyond the resolution of a specific investor-state dispute. In particular, arbitral decision-making not only has effects on the host state, thus raising concerns about accountability and legitimacy in relation to the host state's population, but also on investors and states that are neither party to the specific proceedings nor to the investment treaty at issue.

This is the case because investment treaty tribunals concretize and further develop the vague standards of investment protection contained in international investment treaties through their jurisprudence. They do so

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 from commercial arbitration are therefore no suitable guideposts for investment arbitration." (footnote omitted).

78. *Id.* ¶ 13 ("[M]ore 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 . . .").

in a highly self-referential arbitral system in which subsequent tribunals make reference to, and draw on the decisions of, earlier arbitral tribunals, and the ways in which they had interpreted the standards in question,⁷⁹ into treaty-overarching principles of international investment law⁸⁰ that affect the expectations and the behavior of investor and states more generally. By concretizing and developing international investment law, investment treaty tribunals exercise public authority beyond a specific dispute. This effect of the decision-making of arbitral tribunals illustrates the challenges about accountability and legitimacy in investment treaty arbitration: They go to the concern that tribunals who derive their mandate from the consent of two disputing parties exercise regulatory powers that go much beyond resolving an individual dispute.⁸¹

At first glance, understanding the activity of investment treaty arbitration as an exercise of global public authority 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 nonparties: 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.⁸²

Reality, however, is different and displays numerous ways in which nondisputing investors and states are affected by arbitrations between wholly unrelated parties, precisely because investment arbitration has

79. For quantitative citation analyses of precedent in investment treaty arbitration see Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals — An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008).

80. See SCHILL, *supra* note 13, at 321–39 (explaining the development of jurisprudence in investor-state arbitration into a highly self-referential system of persuasive precedent).

81. See Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler Öffentlicher Gewalt und ihrer demokratischen Rechtfertigung* [On the Authority of International Courts: A Study of International Public Authority and Its Democratic Justification], 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 1, 26–37 (2010); Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341 (2011); see also THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 6 (introducing more generally the approach to understand phenomena of global governance as an exercise of public authority).

82. See NAFTA Agreement, *supra* note 10, art. 1136, ¶ 1 (“An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”). Similarly, the ICSID Convention provides that, “The award shall be binding on the parties,” meaning *only* binding on them. See ICSID Convention, *supra* note 15, art. 53, ¶ 1. For cases holding that the ICSID Convention does not impose the binding authority of earlier ICSID decisions, see AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Jurisdiction, ¶ 23 (Apr. 26, 2005), <http://tinyurl.com/455c8xc>; Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 97 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005). Furthermore, nothing in the preparatory works of the ICSID Convention implies the applicability of a *stare decisis* rule. See CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY art. 53, ¶ 16 (2d ed. 2009).

developed a strong, albeit persuasive rather than binding, system of precedent.⁸³ Thus, one can find references to earlier investment treaty jurisprudence in virtually every investment treaty decision or award.⁸⁴ 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,⁸⁵ awards, even though they are not binding precedent,⁸⁶ 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 past.⁸⁷ Significantly, this process of generating normative expectations takes place, to a significant 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

83. See also Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse? — The 2006 Freshfields Lecture*, 23 ARB. INT'L 357 (2007).

84. See Commission, *supra* note 79; Fauchald, *supra* note 79. Exceptions, naturally, are cases of first impression. See, e.g., *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, *Objections to Jurisdiction*, ¶ 164 (Aug. 6, 2003), 8 ICSID Rep. 406 (“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.”).

85. 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 Rule 48(4), requiring the Centre, even in the absence of party consent, to “promptly include in its publications excerpts of the legal reasoning of the Tribunal,” ICSID Arbitration Rules, *supra* note 71, Rule 48, ¶ 4; 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 published in commercial arbitration reports. Such publications, however, are much less systematic than in investment treaty arbitration.

86. See SCHILL, *supra* note 13, at 288–92 (with further references).

87. See Marc Jacob, *Lawmaking Through International Precedent*, 12 GERMAN L.J. 1005, 1024–30 (2011). On the emergence of expectations in the reference to, application of, and justified departure from precedent, see, for example Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, at 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (“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.”).

treaty awards.⁸⁸ Arbitral tribunals, finally, react to this expectation⁸⁹ and, in framing their decisions, actively engage in building a system of treaty-overarching precedent. 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.⁹⁰ 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 nondisputing third-party states. To the extent they disagree with certain lines of arbitral jurisprudence, third-party states occasionally react to the decision-making of arbitral tribunals by recrafting investment treaties, even though the decision they disagree with concerned an entirely unrelated treaty.⁹¹ This reaction is just another facet of the expectations of states in

88. *See e.g.*, AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Jurisdiction, ¶ 18 (Apr. 26, 2005), <http://tinyurl.com/455c8xc> (“The argument made by the [investor] on the basis of [prior] decisions, treated more or less as if they were precedent, tends to say that [the] 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.”).

89. *See, e.g.*, El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Jurisdiction, ¶ 39 (Apr. 27, 2006), 21 ICSID Rev. 488 (“The present Tribunal will follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.”).

90. *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. On the concept of *lex mercatoria* see Arthur J. Gemmill & Autumn Talbott, *The Lex Mercatoria-Reduct*, 8:2 TRANSNAT'L DISP. MGMT. (2011).

91. The interpretation of MFN clauses by the tribunal in *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶ 38–64 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002), for example, has encouraged states not party to the decision to include so-called “anti-Maffezini” clauses in their own investment treaties. *See, e.g.*, Central America-United States Free Trade Agreement, Jan. 28, 2004 (draft text), art. 10.4, ¶ 2 n.1, *available at* <http://tinyurl.com/3qh2sdl>. Similarly, broad interpretations of the fair and equitable treatment standard, or of the concept of indirect expropriation, have led several states, including the United States, to introduce more restrictive wording of the respective standard in their more recent BIT practice. The Dominican Republic-Central America Free Trade Agreement, 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” Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., art. 10.5, ¶ 2(a), Aug. 5, 2004, Hein’s No. KAV 7157 (internal quotation mark omitted), *available at* <http://tinyurl.com/3dr9zln>. Likewise, Panama and Argentina exchanged diplomatic notes after the Decision on Jurisdiction in *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Jurisdiction (Aug. 3, 2004), <http://tinyurl.com/3bcnuwv>, in order to clarify that the MFN clause in their BIT did not extend to issues of dispute settlement. *See Nat'l Grid Plc. v. Argentine Republic*, Jurisdiction, ¶ 85 (UNCITRAL Arb. Trib. June 20, 2006), <http://tinyurl.com/697eh3m>. On the interaction between investment treaty arbitration and investment treaty making, see also UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING, UNCTAD Doc. UNCTAD/ITE/IIA/2007/3, U.N. Sales No. E.07.II.D.1 (2007). Alternatively, states may issue binding interpretive statements in order to

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

In fact, when analyzing the reasoning of arbitral tribunals in their decisions and awards, references to arbitral precedent prevail quantitatively,⁹² although arbitral decisions only constitute “subsidiary means for the determination of rules of law.”⁹³ What is more, reference to arbitral precedent also has the largest impact on arbitral decision-making in qualitative terms, in particular when it comes to interpreting and applying the standard substantive investors’ rights contained in virtually all international investment treaties.⁹⁴

For example, in interpreting the standard of fair and equitable treatment, arbitral tribunals regularly rely more on the discussion of applications of this standard in earlier case law than on an independent interpretation of the governing treaty itself. An interpretation of fair and equitable treatment clauses, as well as other standard investors’ rights, that is detached from arbitral precedent, by contrast, is the exception.⁹⁵ The NAFTA award in *Waste Management, Inc. v. United Mexican States*⁹⁶ is a representative example for the prevalent approach in that the tribunal extensively described prior investment awards on fair and equitable treatment in order to extrapolate a definition of this standard. It observed:

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.⁹⁷

What is noteworthy is that the tribunal did not interpret fair and equitable treatment independently by using the methods of treaty interpretation

channel future arbitral jurisprudence in line with their interests. *See, e.g.*, NAFTA Free Trade Comm’n, *Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, *reprinted in* WORLD TRADE & ARB. MATERIALS, Dec. 2001, at 139.

92. Commission, *supra* note 79, at 148.

93. Statute of the International Court of Justice, art. 38, ¶ 1(d), June 26, 1945, 59 Stat. 1055, T.I.A.S. No. 933 [hereinafter ICJ Statute].

94. *See* Kaufmann-Kohler, *supra* note 83, at 368–73.

95. *But see* *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, ¶¶ 598–627 (NAFTA Ch. 11 Arb. Trib. June 8, 2009), 48 I.L.M. 1038 (examining arbitral precedent).

96. *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (NAFTA Ch. 11 Arb. Trib. Apr. 30, 2004), 43 I.L.M. 967.

97. *Id.* ¶ 98.

under international law, but instead 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 *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*,⁹⁸ which concerned a dispute under the BIT between Spain and Mexico, has become the *locus classicus*, which other tribunals have adopted and refined in interpreting fair and equitable treatment provisions in the BITs between Chile and Malaysia,⁹⁹ Ecuador and the United States,¹⁰⁰ and Germany and Argentina.¹⁰¹ The resulting dynamic of generating 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, or national treatment.¹⁰²

Notably, precedent’s authority is at play even in inconsistent and conflicting arbitral awards. Those decisions often deal extensively with conflicting prior decisions, by distinguishing the case at hand based on the facts, or by reducing an earlier holding on a point of law from a rule to a principle that allows for exceptions, or by considering an earlier holding itself as an exception to yet another principle.¹⁰³ Further, even in cases of open conflict with earlier arbitral decisions, 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,¹⁰⁴ but that a certain

98. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), 43 I.L.M. 133.

99. *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶¶ 113–78 (May 25, 2004), 12 ICSID Rep. 6 (2007).

100. *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, ¶ 185 (July 1, 2004), <http://tinyurl.com/427h367>.

101. *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 298–99 (Feb. 6, 2007), 14 ICSID Rep. 518.

102. Typically, textbooks on international investment law, therefore, discuss the standards of international investment protection primarily based on the respective case law. *See, e.g.*, DOLZER & SCHREUER, *supra* note 15; CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); NEWCOMBE & PARADELL, *supra* note 1.

103. *See* SCHILL, *supra* note 13, at 347–52.

104. But compare *RosInvestCo UK Ltd. v. Russian Fed’n*, SCC Case No. V079/2005, Award on Jurisdiction (Oct. 2007), <http://tinyurl.com/5u5ycpx>, observing in a case of open dissent with regard to the interpretation of MFN clauses that “there is no need to enter into a detailed discussion of

interpretation of international investment law is unpersuasive as a general proposition.¹⁰⁵

Cases of open conflict with earlier arbitral decisions 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. Further, numerous arbitrators perceive their own function as aiming to develop a coherent system of international investment protection. The Decision on Jurisdiction in *Saipem S.p.A. v. People's Republic of Bangladesh*¹⁰⁶ 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.¹⁰⁷

[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 clauses 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." *Id.* ¶ 137.

105. This type of reasoning is particularly present in *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, ¶¶ 119–128 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005). See also SCHILL, *supra* note 13, at 341–47, for an in-depth discussion of the same.

106. *Saipem S.p.A. v. People's Republic of Bangl.*, ICSID Case No. ARB/05/07, *Jurisdiction and Recommendation on Provisional Measures* (Mar. 21, 2007), 22 ICSID Rev. 100.

107. *Id.* ¶ 67 (footnote omitted); see also *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, *Separate Opinion of Thomas Wälde*, ¶ 13 (NAFTA Ch. 11 Arb. Trib. Dec. 2005), <http://tinyurl.com/29v9j5o> ("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." (footnote omitted)). Similarly, see *id.* ¶¶ 129–130 and *M.C.I. Power Group L.C. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, *Annulment*, ¶ 24 (Oct. 19, 2009), <http://tinyurl.com/5rsz64m> ("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.").

In summary, one can observe that investment treaty arbitration affects third parties and their behavior intensely, as the outcome of arbitrations, particularly the reasoning and the interpretation of the principles of international investment law, not only affect future interpretations of similar standards and shape the expectations of investors and states about the decision-making of tribunals, but also affect 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 around which normative expectations of the users of the system develop, arbitrators are in a position to craft, and investors in a position to enforce, a body of “state liability law for foreign investors”¹⁰⁸ that has a deep impact on the exercise of regulatory powers of states.

The body of law thus developed not only shapes the behavior of foreign investors and host states, but also brings about concomitant legitimacy concerns, as the consent of the parties to a specific investment dispute is hardly able to legitimize any farther-reaching lawmaking activity by arbitral tribunals. In order to alleviate such concerns, a public law perspective on international investment law can make a valuable contribution. After all, it is one of the central functions of public law to provide legitimacy and accountability for the exercise of public power.¹⁰⁹

V. INTERNATIONAL INVESTMENT LAW & COMPARATIVE PUBLIC LAW

The present Article 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, and that can help to reinject legitimacy into the process and outcomes of decision-making of arbitral tribunals. The method it proposes is that of comparative public law, which draws parallels between international investment law and domestic public law as well as other regimes of public international law that fulfill a similar function in governing the relations between private actors and states and between states and international dispute settlement bodies.

108. Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 6, at 721, 722.

109. See Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L.J. 1375, 1380 (2008).

This proposal rests on the observation 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 nondiscrimination, government according to the rule of law, and respect for property rights. Accordingly, this Article suggests 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 abuse of governmental powers. At the same time, however, it is important to recognize that international investment law remains an international discipline that is detached from the domestic public law of any one state. That being said, parallels also exist between international investment law and other international regimes. Most importantly, questions concerning the relationship between states and international dispute settlement bodies, in particular regarding the impact of decision-making and the breadth of lawmaking by international courts and tribunals, are frequently considered as forming part of the growing realm of international institutional law in times 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 in 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.

Comparative public law in this context is meant to complement, not to replace, other international legal methods, in particular the accepted methods of treaty interpretation and, where applicable, recourse to customary international law. Given that traditional methods of treaty interpretation — which focus on the meaning of treaty provisions in their context and in the light of their object and purpose — as well as approaches that stress the importance of customary international law face significant limits in applying the vague principles of international investment law in the context of the modern regulatory state, a comparative public law approach is particularly useful as a complementary method.¹¹⁰ Indeed, comparative public law can help to overcome those

110. While disputes concerning state interferences with foreign investments form part of the

challenges and, by drawing on the experience of more advanced and sophisticated systems of public law, provide a perspective for the application and implementation of international investment treaties that is more objective and predictable than solely relying on the judgment of party-appointed arbitrators.

Thomas Wälde prominently advocated for this approach in his Separate Opinion in *International Thunderbird Gaming Co. v. United Mexican States*.¹¹¹ Wälde claimed that the normative background of the protection of legitimate expectations could be elucidated and concretized by drawing on comparative contract law concepts, such as estoppel and *venire contra factum proprium*,¹¹² but above all by recourse to a comparative public law analysis of similar concepts applied in the jurisprudence of the ECJ, the ECHR,¹¹³ and the WTO¹¹⁴ and recognized in “developed systems of administrative law.”¹¹⁵ For Wälde, “[t]he 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 as yet firmly established.”¹¹⁶

A comparative public law approach first must conceptualize standard concepts of international investment law, including national treatment, fair

traditional portfolio of international law with numerous interstate claims commissions having been established in the nineteenth and early twentieth 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. Furthermore, determining the content of customary international law carries significant difficulties because the process of showing state practice supported by *opinio juris* is cumbersome. Likewise, traditional methods of treaty interpretation often are not able to concretize the vague standards contained in 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” without recourse to external considerations and value judgments. Accordingly, interpreting such vague standards will often have the effect that an arbitrator’s subjective perceptions about what is fair and equitable heavily influence arbitral decision-making. Interpretation then becomes primarily an act of rule-concretization and rule-making, not one of cognizance. While every interpretation always contains elements of rule-making, the concern here is how to reduce the discretion of arbitrators by recourse to objective criteria to a level that is acceptable to those affected.

111. *Int’l Thunderbird*, NAFTA Ch. 11 Arb. Trib., ¶ 24 (Separate Opinion of Thomas Wälde) (drawing on a wide range of related concepts under both domestic and international law 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).

112. *Id.* ¶ 27; see also Hector A. Mairal, *Legitimate Expectations and Informal Administrative Representations*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 6, at 413, 421–25.

113. *Int’l Thunderbird*, NAFTA Ch. 11 Arb. Trib., ¶ 27 (Separate Opinion of Thomas Wälde).

114. *Id.* ¶ 29.

115. *Id.* ¶ 28.

116. *Id.*

and equitable treatment, the prohibition of direct and indirect expropriation without compensation, and full protection and security, as public law concepts and draw parallels to the requisite public law concepts used in domestic law and in other international regimes. In a second step, comparative public law can then be used to analyze more specifically how different public law systems deal with comparable situations regarding the power of states to act in relation to private parties. 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 crossregime analysis, drawing, for example, on WTO or human rights law. This can help to address procedural issues in investor-state arbitration, including concerns about openness, transparency, and access by nonparties. In sum, 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 can help (1) concretize and clarify the interpretation of the often vague standards of investment protection and determine the extent of state liability in specific contexts; (2) balance investment protection and noninvestment concerns; (3) ensure consistency in the interpretation and application of investment treaties because the interpretative method would be uniform for all investment treaties; (4) ensure crossregime 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) legitimize existing arbitral jurisprudence by showing to which extent the solutions adopted in investment treaty arbitration are analogous to the ones adopted by domestic courts or other international courts or tribunals; and (6) 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.

A comparative public law perspective on international investment law not only has different purposes, but also varying effects on the interpretation and application of international investment treaties. First, it can have a political function in suggesting changes to the current system of international investment protection.¹¹⁷ Second, 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

117. Gus Van Harten, for instance, bases his call for structural reform of the dispute settlement mechanism by suggesting that a permanent international court be created to resolve investor-state disputes on a comparative public law understanding of independence and impartiality of judges sitting in public law disputes. Van Harten, *supra* note 31, at 643–51.

systems” and to “suggest options better than the ones already tested in the observer’s own space and time.”¹¹⁸ Comparative public law thus can be an eye-opener in raising awareness of possible interpretations of investment treaties without controlling that interpretation.¹¹⁹ Third, comparative public law can have a 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.¹²⁰ Finally, comparative public law can be used to develop general principles of law, constituting, as laid down in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute), a source of international law,¹²¹ which 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.”¹²²

Ultimately, the extent to which comparative public law can affect the interpretation of investment treaties depends on the interpretative leeway the treaties leave. Comparative public law itself is not binding, and the national and international regimes one may draw on do not control the interpretation and application of international investment treaties. Likewise, comparative public law cannot be used to rewrite jurisdictional requirements, the procedural law applicable to arbitrations, or substantive treaty obligations. To the extent that investment treaty obligations leave no room for doubt, in other words, the ambit of comparative public law will be limited to a *de lege ferenda* perspective. To the extent, however, that there is interpretative leeway, in particular regarding the principles of international investment law, comparative public law can affect interpretation more broadly, particularly if it is used to determine the existence of general principles of public law, which are directly applicable

118. William W. Park & Thomas W. Walsh, *Review Essay: The Uses of Comparative Arbitration Law*, 24 *ARB. INT'L* 615, 615 (2008) (reviewing JEAN FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* (2007)).

119. See, for example, *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 144 (NAFTA Ch. 11 Arb. Trib. Oct. 11, 2002), 6 ICSID Rep. 19 (observing with respect to the value of case law by the ECHR for investment treaty interpretation: “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.’” (internal quotation mark omitted)).

120. Cf. Markus Perkams, *The Concept of Indirect Expropriation in Comparative Public Law — Searching for Light in the Dark*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 107, 111, 147 (examining national legal orders to enhance the understanding of general principles of law and of the definition of such terms as “expropriation”).

121. ICJ Statute, *supra* note 93, art. 38, ¶ 1(c).

122. Vienna Convention on the Law of Treaties, *supra* note 46, art. 31, ¶ 3(c).

as a source of international law unless overwritten by a more specific treaty obligation.

VI. INTERNATIONAL INVESTMENT LAW & GENERAL PRINCIPLES OF PUBLIC LAW

Depending on the purpose of comparative analysis, the choice of legal orders to be taken into account will vary. While a single legal order may suffice when suggesting legal reform, a more exacting methodology must be followed when suggesting that certain principles constitute general principles of law in the sense of Article 38(1)(c) of the ICJ Statute. These general principles of law comprise principles generally recognized in domestic law, general principles deriving from international relations, and general principles inherent in every kind of legal order.¹²³ Such general principles of law can be developed by qualified methods of comparative law, taking into account both domestic law and other international legal regimes.¹²⁴

In fact, general principles, while often perceived as a subsidiary source of international law,¹²⁵ have been used frequently by international courts and tribunals in different contexts: to develop the procedural law of international adjudication,¹²⁶ as a source of substantive rights and obligations,¹²⁷ to fill lacunae in the governing law, and to aid interpretation

123. Stefan Kadelbach & Thomas Kleinlein, *International Law — A Constitution for Mankind? An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles*, 2007 GERMAN Y.B. INT'L L. 303, 340–42; *see also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24–26 (1953); ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L'ÉTUDE DES PRINCIPES GÉNÉRAUX DE DROIT [GOOD FAITH IN INTERNATIONAL LAW: CONTRIBUTION TO THE STUDY OF GENERAL PRINCIPLES OF LAW] 24–79 (2000); FABIÁN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 7–72 (2008); Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 53, 53–75 (Frits Kalshoven et al. eds., 1980); Wolfgang Weiss, *Allgemeine Rechtsgrundsätze des Völkerrechts* [*General Principles of International Law*], 39 ARCHIV DES VÖLKERRECHTS 394, 394–431 (2001).

124. 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. *See, e.g.*, Kadelbach & Kleinlein, *supra* note 123, at 340.

125. Originally, general principles were included in Article 38 of the ICJ Statute as a source of law in order to avoid a finding of *non liquet* by the Court. *See* Alain Pellet, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 677, ¶ 245 (Andreas Zimmermann et al. eds., 2006).

126. *See* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 53–55 (2007); CHENG, *supra* note 123, at 257–58.

127. *Cf. Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, Award, 18 I.L.R. 144, 149–50 (Gr. Brit.-Abu Dhabi Aug. 28, 1951) (supporting the proposition that contracts of an international character

and the further development of international law.¹²⁸ 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,¹²⁹ numerous dispute 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,¹³⁰ the WTO Appellate Body,¹³¹ the various international criminal tribunals,¹³² the ECJ,¹³³ and the ECHR.¹³⁴ 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, such as filling gaps in the governing law and serving as an aid to treaty interpretation,¹³⁵ but also to determine the mutual rights and obligations of the parties to a dispute.¹³⁶

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. Instead, international law increasingly encompasses, including in international investment law, rules governing the relations between the state and private law subjects. When

may be governed by international law or general principles of law even without specific stipulation); see also CHENG, *supra* note 123, at 29–31.

128. See Weiss, *supra* note 123, at 411–14.

129. See Michael Bothe, *Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte* [*The Importance of Comparative Law in the Practice of International Courts*], 36 ZAÖRV 280, 283–86 (1976).

130. RAIMONDO, *supra* note 123, at 17–35. The International Court of Justice, however, is rather hesitant in drawing on general principles. See Hermann Mosler, *Rechtsvergleichung vor völkerrechtlichen Gerichten* [*Comparative Law Before International Courts*], in INTERNATIONALE FESTSCHRIFT FÜR ALFRED VERDROSS' 80TH BIRTHDAY] 381, 400–05 (René Marcic et al. eds., 1971); Weiss, *supra* note 123, at 417–18.

131. See Weiss, *supra* note 123, at 418–20.

132. RAIMONDO, *supra* note 123, at 73–163.

133. For a comprehensive overview of the subject, see generally XAVIER GROUSSOT, *GENERAL PRINCIPLES OF COMMUNITY LAW* (2006); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* (2d ed. 2006); Armin von Bogdandy, *Founding Principles*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 11 (Armin von Bogdandy & Jürgen Bast eds., 2d rev. ed. 2011).

134. See Mosler, *supra* note 130, at 391–400.

135. See Tarcisio Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 J. WORLD INVESTMENT & TRADE 103, 109–115 (2009) (discussing the use and nature of general principles of law in modern investment arbitration); André von Walter, *Oil Concession Disputes, Arbitration on*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 24–34, <http://tinyurl.com/3nykmtc> (last updated Dec. 2010) (discussing the use of general principles in oil concession arbitrations in the 1950s through 1980s); see also SCHREUER ET AL., *supra* note 82, art. 42, ¶¶ 178–182 (providing an overview on the use of general principles by ICSID tribunals).

136. For recent cases on abuse of rights as a general principle of law, see *Mobil Corp. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/07/27, *Jurisdiction*, ¶¶ 169–285 (June 10, 2010), <http://tinyurl.com/3mmzgrl>. Similarly, on the concretization of the concept of legitimate expectations by recourse to general principles of law, see *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, *Liability*, ¶¶ 128–124 (Dec. 27, 2010), <http://tinyurl.com/3lu67f>.

Hersch Lauterpacht in his 1927 study, *Private Law Sources and Analogies of International Law*, maintained that the “general principles of law are for most practical purposes identical with general principles of private law,”¹³⁷ he wrote at a time when international law was primarily a law coordinating the interactions between equal sovereigns. Meanwhile, the situation has changed radically.¹³⁸ 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 between public authorities and private legal subjects, public law will be an increasingly fertile source of international law.¹³⁹

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.”¹⁴⁰ 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.¹⁴¹ 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

137. H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION* 71 (1927).

138. Note, however, the argument by Giacinto della Cananea that comparative public law has been a classic method of public lawyers reaching back to at least the first half of the nineteenth century, when the bases for modern constitutional and administrative law were developed. Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 39, 49–56.

139. Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57 *AM. J. INT’L L.* 279, 295 (1963).

140. ICJ Statute, *supra* note 93, art. 38, ¶ 1(c) (emphasis added).

141. The qualification in Article 38(1)(c) of the ICJ Statute that a principle must be recognized by “civilized nations” no longer has a discriminatory function in excluding the domestic legal orders of certain countries, which it might have had before. Instead, as Article 2(1) of the UN Charter makes clear, all UN members are equal sovereigns and therefore are recognized as civilized nations. U.N. Charter art. 2, ¶ 1. Notwithstanding, the limitation to the principal legal systems of the world can be justified, for example, in view of Article 9 of the ICJ Statute, 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.” ICJ Statute, *supra* note 93, art. 9. This suggests an equation between civilized nations in Article 38(1)(c) and the principal legal systems mentioned in Article 9; in this sense, see also 1 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 44 (3d ed. 1957); Weiss, *supra* note 123, at 405–06.

systems of common and civil law, as these two traditions have influenced most domestic legal systems worldwide.¹⁴²

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 analyzed are German, French, English, and American 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.¹⁴³ 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. The object and purpose of investment treaties, and the ideational market-friendly context they are embedded in,¹⁴⁴ however, suggests drawing primarily on legal systems that endorse a rights-based approach to ordering the relations between the state and society that are based on rule-of-law thinking and on respect for individual economic rights.

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 to a qualitative study of the legal principles of the principal domestic legal orders or of international relations. In addition, it is not necessary that the same legal rule exists in the principal domestic legal systems, but only 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 toward differences of national legal systems, it must analyze them in a functional perspective and against a sufficiently elevated level of

142. See RAIMONDO, *supra* note 123, at 50–57. While there are also other conceptions of law and distinct legal traditions, common law 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; see also Pellet, *supra* note 125, ¶ 258 n.699 (observing that most domestic legal systems borrow their rules from common or civil law systems).

143. See, e.g., DOLZER, *supra* note 17, at 213–15 (detailing the methodological questions concerning the choice of relevant domestic legal orders in the context of concretizing the scope of the concept of indirect expropriation in international investment law).

144. See Kenneth J. Vandavelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 627 (1998) (“BITs present themselves as quintessentially liberal documents.”); see also Kenneth J. Vandavelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501 (1998) (emphasizing that BITs form part of a movement to liberalize the international economy while leaving states considerable leeway for intervention); Kenneth J. Vandavelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373 (1998) (arguing that BITs represent at least a temporary consensus on a liberal order for international investment relations).

abstraction. Otherwise, a comparative analysis gets lost in particularities and overlooks the common ordering principles that many legal orders, including in public law, share.¹⁴⁵

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 toward the public law systems of the contracting parties.¹⁴⁶ Unlike genuinely bilateral treaties that reflect the result of a *quid pro quo* bargain, however, BITs develop multiple overlaps and structural interconnections, and create a relatively uniform and treaty-overarching regime for international investment protection that is functionally largely equivalent to a multilateral system.¹⁴⁷ This underlying conceptual uniformity, then, should also be reflected in the scope of the comparative method, namely by 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 sense of *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

145. In this sense, as della Cananea rightly points out, “the idea of general principles of law is not necessarily in contrast with the recognition of particularities.” della Cananea, *supra* note 138, at 41.

146. The Iran-U.S. Claims Tribunal, for instance, has mainly relied on the legal orders of the United States and Iran when developing general principles. See Grant Hanessian, “*General Principles of Law*” in the Iran-U.S. Claims Tribunal, 27 COLUM. J. TRANSNAT’L L. 309, 318 (1989); see also Michael Akehurst, *Equity and General Principles of Law*, 25 INT’L & COMP. L.Q. 801, 824–25 (1976) (pointing out the connections between the choice of legal orders when determining general principles and the bilateralism/multilateralism distinction).

147. 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, and national treatment. 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, *supra* note 13, at 15. 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 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.

structure, scope, and content.¹⁴⁸ In particular, most investment treaties provide for the same set of substantive investors' 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 Organisation 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.¹⁴⁹ The reason for the convergence of BITs is arguably that uniform rules are in principle in the interest of all states, because they are necessary to create a level playing field that enables investments to flow to wherever capital is allocated most efficiently.¹⁵⁰

Second, BITs regularly contain MFN clauses that require states to treat investors and their investments equally, independent of nationality.¹⁵¹ 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 more favorable access requirements to investor-state dispute settlement and broader consent to arbitration beyond the substantive standards granted to foreign investors,¹⁵² it is clear that MFN clauses, in principle, level the interstate relations between the host state and third states and push the system of international investment protection towards multilateralism.

Third, investors themselves have ample options to circumvent restrictions that may exist in a specific investment treaty independent of the application of MFN clauses.¹⁵³ 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.¹⁵⁴ Such treaty shopping is possible because BITs regularly protect corporate structures independently of the nationality of the shareholders behind them.¹⁵⁵ The broad options for treaty shopping undermine the

148. See SCHILL, *supra* note 13, at 70–88.

149. See *id.* at 88–93.

150. See *id.* at 93–115.

151. On the scope, effect, and function of MFN clauses, see *id.* at 121–96.

152. See *id.* at 151–73.

153. See *id.* at 197–240.

154. See *id.* at 221–36.

155. See *id.* at 200–21.

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.¹⁵⁶ This is confirmed above all by the ubiquitous use of precedent in investment arbitration.¹⁵⁷

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 should also take into account 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,¹⁵⁸ comparative public law and the development of general principles of international investment law are relevant and appropriate tools in resolving investment treaty disputes. After all, a breach of the international minimum standard itself requires, as expressed in *L.F.H. Neer v. United Mexican States*,¹⁵⁹ “an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”¹⁶⁰ The international minimum standard in question, as Edwin Borchard explains,

[i]s 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

156. *See id.* at 278–361.

157. *See supra* notes 79–108 and accompanying text. 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*. *See* SCHILL, *supra* note 13, at 305–12. 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.

158. NAFTA Agreement, *supra* note 10, art. 1105.

159. *L.F.H. Neer v. United Mexican States*, Opinion, 4 R.I.A.A. 60 (U.S.-Mex. Oct. 15, 1926).

160. *Id.* ¶ 4.

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.¹⁶¹

A comparative analysis may concretize the interpretation of investors’ 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 investors’ 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 to which administrative proceedings have to conform under fair and equitable treatment,¹⁶² or develop methods and thresholds for determining when noncompensable regulation turns into a regulatory taking requiring compensation.¹⁶³ A step in this direction has now been undertaken by the tribunal in *Total S.A. v. Argentine Republic*,¹⁶⁴ which drew heavily on comparative law, including the domestic law of common and civil law jurisdictions, general international law, human rights law, and EU law, to determine the restrictions the concept of legitimate expectations imposes on a state’s regulatory powers when no specific promises to refrain from regulation exists.¹⁶⁵

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,¹⁶⁶ investment tribunals could, and arguably need to, transpose such findings to the international level as an expression of a general principle.¹⁶⁷ In this

161. Edwin Borcard, *The “Minimum Standard” of the Treatment of Aliens*, 38 MICH. L. REV. 445, 448–49 (1940); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165(2) (1965) (“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.”).

162. See della Cananea, *supra* note 138, at 48.

163. See Perkams, *supra* note 120, at 121–37 (looking at U.S. and German legal systems’ treatment of indirect expropriation).

164. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Liability (Dec. 27, 2010), <http://tinyurl.com/3lu6f7f>.

165. See *id.* ¶¶ 128–134.

166. See Stephan Schill, *Umbrella Clauses as Public Law Concepts in Comparative Perspective*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 6, at 317, 336–40.

167. In a recent case, an ICSID arbitral tribunal placed much emphasis on a state’s ability to regulate its own affairs. See *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Jurisdiction and Liability, ¶ 506 (Jan. 14, 2010), <http://tinyurl.com/3fm4v7s> (“The desire to protect national culture is not unique to Ukraine. France requires that French radio stations broadcast a minimum of 40% of French music, Portugal has a 25–40% Portuguese music quota and a number of other countries

context, comparative public law can serve as a yardstick not only to develop minimum but also maximum standards of investment protection, that is, standards 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 principles of domestic public law.¹⁶⁸ Similarly, public law approaches and concepts illustrate how noninvestment 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.¹⁶⁹

A comparative public law approach to international investment law can also engage in crossregime comparison with other international legal 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.¹⁷⁰ One example in this context is the jurisprudence of the ECHR concerning Article 6 of the European Convention on Human Rights. The rich jurisprudence of the ECHR 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.¹⁷¹ Similarly, comparative recourse could be made to the

impose similar requirements.” (footnotes omitted)); *see also* *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Award, ¶ 269 (Aug. 27, 2008), <http://tinyurl.com/3duq8wh> (“Respondent produced evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary. It cannot be said that Bulgaria’s law in this respect was unfair, inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries.” (citation omitted)); *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 178 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35> (“Such proceedings are provided for in all legal systems and for much the same reasons. One therefore can not say that they were ‘opposed to the rule of law.’” (internal quotation mark omitted)).

168. *See* SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION* 74–82 (2009) (summarizing the normative claim that investment treaty standards should not be understood to go beyond the limits developed countries establish for government conduct in their own domestic legal orders).

169. *See* Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 L. & ETHICS HUM. RTS. 47, 62–65 (2010); Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest— The Concept of Proportionality*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 75, 75–104.

170. *See, e.g.*, URSULA KRIEBAUM, *EIGENTUMSSCHUTZ IM VÖLKERRECHT: EINE VERGLEICHENDE UNTERSUCHUNG ZUM INTERNATIONALEN INVESTITIONSRECHT SOWIE ZUM MENSCHENRECHTSSCHUTZ* [PROPERTY PROTECTION IN INTERNATIONAL LAW: A COMPARATIVE STUDY ON INTERNATIONAL INVESTMENT LAW AND THE PROTECTION OF HUMAN RIGHTS] (2008) (proposing the use of an approach modeled off of human rights protection to international investment law).

171. *See* Ali Ehsassi, *Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 213, 227–29; *see also* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809 (2005) (both drawing parallels between international investment

emerging principles of European administrative law¹⁷² 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.¹⁷³ Furthermore, such crossregime 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,¹⁷⁴ including the appropriate standard of review,¹⁷⁵ issues of openness and transparency,¹⁷⁶ or questions of remedies.¹⁷⁷ In any event, it is important not to forget relevant differences between the different regimes.¹⁷⁸

Overall, comparative public law can affect international investment law and arbitration through various channels and in various aspects, both concerning investor-state dispute resolution and substantive investment law. Comparative public law thus helps to conceptualize international investment law in accordance with its public law implications and to implement it in accordance with general principles of public law. This should not only contribute to make the interpretation of investment treaties more predictable, but also to remedy the legitimacy shortcomings of the exercise of public authority by arbitral tribunals.

law and human rights law in regard of denial of justice).

172. For modern scholarly texts on European administrative law, see, for example, MARIO P. CHITI, *DIRITTO AMMINISTRATIVO EUROPEO* [EUROPEAN ADMINISTRATIVE LAW] (3d ed. 2008); PAUL CRAIG, *EU ADMINISTRATIVE LAW* (2006); DROIT ADMINISTRATIF EUROPÉEN [EUROPEAN ADMINISTRATIVE LAW] (Jean-Bernard Auby & Jacqueline Dutheil de la Rochère eds., 2007); JÜRGEN SCHWARZE, *EUROPÄISCHES VERWALTUNGSRECHT* [EUROPEAN ADMINISTRATIVE LAW] (rev. 1st ed. 2006); and THOMAS VON DANWITZ, *EUROPÄISCHES VERWALTUNGSRECHT* [EUROPEAN ADMINISTRATIVE LAW] (2008).

173. See Jürgen Kurtz, *The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 243, 250–55; see also Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 *EUR. PUB. L.* 563, 575 (2003).

174. See Chester Brown, *Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 659, 681–88 (showing how solutions from domestic law can be applied in arbitral practice because of the flexibility arbitral rules offer to parties and arbitrators to shape arbitral procedure).

175. See William Burke-White & Andreas von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 689 (arguing for the adoption of the margin of appreciation doctrine of the ECHR as the standard of review in investment arbitrations).

176. See Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 787 (concerning issues of transparency and the participation of nonparties).

177. See Irmgard Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 377, 382–405; Borzu Sabahi & Nicholas J. Birch, *Comparative Compensation for Expropriation*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 6, at 755, 755–56, 784–85; van Aaken, *supra* note 108, at 746–52.

178. Cf. Kurtz, *supra* note 173 (arguing that WTO law is often abused and uncritically reflected in investment jurisprudence on national treatment).

CONCLUSION

This Article suggested taking a public law approach to conceptualize and understand international investment law. This approach relies on the understanding that international investment law differs from both international commercial arbitration and classical interstate public international law. Instead, at its core is the right of private economic actors to seek protection against the exercise of public authority by host states. 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, including under various human rights instruments, such as the European Convention on Human Rights. From a functional perspective, international investment law is therefore a public law discipline. At the same time, one has to understand investment treaty tribunals as institutions that themselves exercise public authority in relation to states, foreign investors, and civil society, not only because they review government conduct under international investment treaties but also because they concretize and further develop principles governing investor-state relations contained in such treaties. In consequence, principles of public law also have to apply to the activity of arbitral tribunals themselves.

In terms of methodology, this Article suggested that international investment law should be analyzed 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 elsewhere at the domestic or international level. Against this background, this Article suggested to conceptualize the standards of treatment in international investment treaties in parallel to public law concepts that 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; fair and equitable treatment ensures basic due process for foreign investors and requires adherence to the rule of law; and 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 investments 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.

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,¹⁷⁹ what kind of limits the protection of property imposes on the tax legislator,¹⁸⁰ or how the tensions between the protection of cultural heritage and the right to property are resolved in other public law systems.¹⁸¹ Ideally, this comparative public law approach results in the determination of general principles recognized in the principal public law systems. These principles then can be, and absent a contrary indication in the treaty in question must be, applied as a source of international law when interpreting the standards contained in international investment treaties. At the same time, general principles of public law also have to be applied to the activity of arbitral tribunals themselves. In this context, comparative public law can lead to a better understanding of the role and the powers of investment treaty tribunals in relation to the parties to the dispute and also to clarify the limits and methods of permissible judicial law-making in international investment law.

In sum, the perspective presented in this Article stressed the public law aspects of investment treaties and investment treaty arbitration. It offered a theoretically and methodologically consistent and, in its scope, new approach to international investment law. Engaging in comparative public law analysis, and in the quest to uncover general principles of public law, helps international investment law to benefit from the experience other public law regimes have developed, not only in limiting the exercise of state powers, but also in empowering the state by illustrating the extent of regulatory space they are generally accorded. 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 public law and public law dispute resolution, as well as help arbitral tribunals to understand the basis and limits of their function to exercise judicial review.

Such an approach carries the advantage of being less subjective than approaches focusing solely on treaty interpretation as a means of

179. See Mairal, *supra* note 112, at 425–46.

180. Christian Tietje & Karoline Kampermann, *Taxation and Investment: Constitutional Law Limitations on Tax Legislation in Context*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 6, at 569, 574–96.

181. Federico Lenzerini, *Property Protection and Protection of Cultural Heritage*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 6, at 541, 555–66.

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 general principles of public law. The comparative public law approach not only helps to concretize the vague principles of international investment protection and to make their application more predictable, but aids the development of an appropriate balance between investors' rights and public interests. Furthermore, comparative public law can also offer solutions to how noninvestment public interests and interests of third parties can be embedded procedurally in investor-state arbitration and how investment treaty tribunals should proceed in resolving disputes and in further developing international investment law. All of these objectives should help to put the often harsh criticism of international investment law into perspective and reinject legitimacy into the current system of international investment protection.

A comparative public law approach to international investment law and investment treaty arbitration could help to address several of the discontents with international investment law raised by states, foreign investors, and civil society without modifying the content of existing international investment treaties and without putting the institutional structures of investor-state arbitration into question. After all, in this perspective, international investment law and investor-state arbitration is nothing more than an internationalized discipline of public law, which not only protects private interests against the misuse of governmental powers, but also recognizes that states have a legitimate mandate and an obligation to pursue the public interest. Internalizing this public law thinking in investment treaty arbitration would not only show that international investment law is less of a threat to domestic public law than often perceived by critics, but that it strives for the same fundamental objectives, that is controlling and legitimating the exercise of public authority.