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## Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration

### Keywords

Arbitration, Comparative Law, Investment, Commercial Arbitration, International Commercial Arbitration, Foreign Investment, International Trade, Public Law

**CRITICAL COMPARISONS:  
THE ROLE OF COMPARATIVE LAW IN  
INVESTMENT TREATY ARBITRATION**

VALENTINA VADI\*

*A rose is a rose is an onion*

Ernest Hemingway, *For Whom the Bell Tolls* (1940)

*Both comparativists and internationalists have mostly neglected the interaction between international law and comparative law. While “[i]nternationalists seem comfortable with power and uncomfortable with culture . . . comparativists are eager for cultural understanding and wary of involvement with governance.”<sup>1</sup> However, this attitude is gradually changing, as comparativists and internationalists have increasingly acknowledged that they “share more than they realize.”<sup>2</sup> This article aims to scrutinize the interplay between international investment law and comparative law. This interaction has four different but related dimensions: comparative investment law, comparative arbitration law, legal doctrine, and treaty interpretation. While authors have extensively studied comparative investment law and comparative arbitration law, which study the different national legislations regulating foreign investment and the arbitral process, investment law scholarship and arbitral tribunals’ use of comparative law has received scarce, if any, attention.*

*While the use of comparative legal reasoning in investment law jurisprudence and legal scholarship seems to offer concrete solutions to emerging conceptual dilemmas and reputed scholars have forcefully argued in favor of it, one may question whether a more critical approach to the use of comparative law should be adopted. It is often assumed that comparative law is a neutral process, but this is*

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1. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 633 (1997).

2. *Id.* at 557.

*not always the case. Problems of perspective are a central element in the comparative law discourse. This study focuses on the interplay between international investment law and comparative law and proposes the adoption of a critical method. Not only would such awareness limit eventual abuses of the comparative method, but it would also favour the coherence of the international legal system as a whole.*

## I. INTRODUCTION

Not many fields of law use comparative law as extensively as international arbitration. International arbitration is a method for settling transnational disputes, involving parties and adjudicators of different nationalities, and requiring the application of different sets of procedural and substantive norms. For its intrinsic characteristics, international arbitration constitutes the *Walhalla* for comparative law experts, and indeed, an eminent arbitrator, Professor Pierre Lalive, has recently recognized that “the main duty of the international arbitrator is to be open to other cultures” and that “[i]n order for international arbitrators to avoid culture clashes, universities should start training law students much more in international and comparative law.”<sup>3</sup> In a previous study he affirmed that “an international arbitration should be decided by a truly ‘international’ arbitrator, i.e. someone who is *more* than a national lawyer, someone who is internationally-minded, trained in comparative law and inclined to adopt a *comparative and truly ‘international outlook.’*”<sup>4</sup>

While many comparative lawyers have therefore analyzed international arbitration through comparative law lenses,<sup>5</sup> investment treaty arbitration has received scarce if any attention. This neglect may be due to several interlinked reasons. First, investment-treaty arbitration is often associated with international arbitration. Second, the boom of investment disputes has only a very recent pedigree. Consequently, only recently have authors analyzed the phenomenon of investment treaty arbitration. Third, given the relative scarcity of legal doctrine, it is logical that comparative law scholars have not had the necessary inputs to start scrutinizing this particular area of public international law.

However, some have highlighted the distinction between investment treaty arbitration and international commercial arbitration.<sup>6</sup> While international

3. Sarah Dookhun, *Q&A with Professor Pierre Lalive*, 3 GLOBAL ARBITRATION REVIEW 5, 3 (2008), available at <http://www.lcil.cam.ac.uk/Media/lectures/pdf/Lalive-QandA.pdf> (emphasis added).

4. Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in RECUEIL DE TRAVAUX SUISSES SUR L'ARBITRAGE INTERNATIONAL 23, 27 (Claude Reymond & Eugène Bucher eds., 1984) (emphasis added).

5. JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION v-vi (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007); JULIAN LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 2-3 (2003); see also Andreas F. Lowenfeld, *Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT'L LEGAL STUD. 163 (1985) (deeming international arbitration as an exercise in comparative procedure).

6. See Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, in PERVERSIVE PROBLEMS IN INTERNATIONAL ARBITRATION 217, 217-19 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006); Jan Paulsson, *International Arbitration is Not Arbitration*, 2 STOCKHOLM INT'L ARB. REV. 1 (2008) available at <http://www.arbitration->

arbitration generally involves private parties and concerns disputes of a commercial nature, investment treaty arbitration involves states and private actors.<sup>7</sup> This “diagonal” dispute settlement mechanism is a major novelty in international law since international disputes have traditionally involved states only.<sup>8</sup> In this sense, investment arbitration represents a successful means to ensure access to justice at the international level. Because of the peculiar character of investment treaty arbitration and the recent proliferation of investment disputes, the role of comparative law in investment treaty arbitration requires an autonomous analysis.<sup>9</sup> This scrutiny is not only theoretically interesting but also concretely useful in light of the increasing criticisms on investment treaty arbitration. Investment treaty disputes mainly involve public law adjudication and may have a deep impact on public welfare. Some authors have pointed out the inadequacies of arbitration, which is historically rooted in private law, to deal with disputes involving public law.<sup>10</sup> This essay aims at exploring the role that comparative law may play in investment treaty arbitration and questions whether the use of comparative law may help solve some aspects of the “legitimacy crisis” of investment treaty arbitration.<sup>11</sup>

The argument shall proceed as follows: First, the characteristics of investment-treaty arbitration shall be highlighted. Second, this contribution will scrutinize some essential features of the comparative method. Only by knowing the merits and limits of the comparative method can interpreters and adjudicators make an appropriate use of it. Third, this study focuses on the interplay between international investment law and comparative law. While several studies have

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icca.org/media/0/12331138275470/siar\_2008-2\_paulsson.pdf; Giuditta Cordero Moss, *Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY-ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 782, 782-84 (Christina Binder et al. eds., 2009).

7. Moss, *supra* note 6, at 784-93.

8. Paulsson, *supra* note 6, at 5-6.

9. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2006 - FROM DEVELOPING AND TRANSITION ECONOMIES: IMPLICATIONS FOR DEVELOPMENT at 29, U.N. Sales No. E.06.II.D.11 (2006), available at [http://www.unctad.org/en/docs/wir2006\\_en.pdf](http://www.unctad.org/en/docs/wir2006_en.pdf). According to the UNCTAD, a total of 226 investment treaty arbitrations had been brought during the period 1987-2006. The number of investor state arbitrations, however, is only approximate, because disputes might be unknown because of the confidentiality requirements. About two thirds of these arbitrations have been filed since the beginning of 2002 alone.

10. Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).

11. 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, 473 (2009) (discussing the “legitimacy crisis” of investment treaty arbitration); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 (2005); M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES LAW 39 (Karl P. Sauvant ed., 2008); Joachim Karl, *International Investment Arbitration: A Threat to State Sovereignty?*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 225, 232-38 (Wenhua Shan et al. eds., 2008); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000).

focused on what may be called comparative investment law,<sup>12</sup> much less attention has been paid to the use of comparative law within investment treaty arbitration. This phenomenon deserves close scrutiny because investment treaty tribunals use the comparative method in their reasoning. Arbitral tribunals refer to the jurisprudence of other international courts and tribunals, the precedents of other investment tribunals,<sup>13</sup> or even to national precedents. The paper will assess the functioning of such a “judicial borrowing” and conclude with some reflections on the important role that comparative law may play in “legitimizing” investment treaty arbitration. By furthering the judicial dialogue among international courts and tribunals, legal transplants may constitute a key element to insert human rights considerations into investment treaty arbitration, and have the potential for ultimately promoting the humanization of international law.

## II. INVESTMENT TREATY ARBITRATION

While international investment law is one of the most ancient areas of public international law, investment treaty arbitration is a recent phenomenon.<sup>14</sup> When the International Centre for the Settlement of Investment Disputes (ICSID) was first established in 1966<sup>15</sup> it was hardly foreseen that it would in due course become one of the most active international tribunals, before which there are now more than 130 cases pending.<sup>16</sup> None could predict that investment treaty arbitration would move “from a matter of peripheral academic interest to a matter of vital international concern.”<sup>17</sup> Most contemporary investment treaties include investor-state arbitration for the settlement of disputes which may arise between the foreign investor and the host state.<sup>18</sup> Under this mechanism, foreign investors may bring

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12. See *infra* Section IV.

13. There is no such rule as binding precedent in international law. See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (stating that a “decision of the Court has no binding force except between the parties and in respect of that particular case.”) [hereinafter ICJ Statute].

14. See *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (Nov. 27, 1985), 3 ICSID Rep. 131 (1995) (upholding the validity of an ICSID clause under Egyptian law); see also ANDREW NEWCOMBE AND LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES—STANDARDS OF TREATMENT 45* (2009) (explaining that the Chad-Italy BIT marked “the true beginning of modern BIT practice” and gives an accurate historical overview).

15. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 1-3, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

16. *List of Pending Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited Sep. 24, 2010).

17. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435 (2009).

18. See David Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN ST. INT'L L. REV. 147 (2004) (arguing that investor-state arbitration has become a standard feature in international investment treaties since the 1980's, and such mechanism has been used increasingly. From 1995 to 2004 ICSID registered four times as many claims as in the previous 30 years and the growth rate appears increasing in the last five years. The ICSID renaissance is probably due to economic globalization and the proliferation of investment treaties. There seems to be a parallel growth in other fora, but data is not available because of the confidentiality requirements. Also, some disputes may be unknown because settled before registration).

claims against the host state before international arbitral tribunals.<sup>19</sup> This development has transformed the landscape of modern investment protection,<sup>20</sup> as customary international law did not confer such a right to individuals.<sup>21</sup> Similarly, Friendship, Commerce and Navigation (FCN) treaties and investment treaties that pre-dated the establishment of the ICSID only provided for State-to-State disputes.<sup>22</sup> In contrast with this traditional paradigm of states as the only subjects of international law and the only ones having the capacity to raise international claims against other states in legal proceedings, modern investment treaties do not require the intervention of the home state in the furtherance of the dispute.<sup>23</sup> Private companies no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.<sup>24</sup>

Suggestively described as “arbitration without privity,”<sup>25</sup> the internationalization of investment disputes guarantees a neutral forum and has thus been conceived as an important valve for adequately recognizing and protecting the assets of foreign investors from expropriation, host state nationalization or other forms of regulation. Through arbitration clauses the host state signatory to the treaty agrees in advance to arbitrate disputes, at the investor’s initiative, over the treaty meaning and application.<sup>26</sup> Such clauses are to some degree necessary to render meaningful the more substantive investment treaty provisions. By themselves, treaty based provisions are meaningless if they are not accompanied by an effective dispute settlement mechanism. As the late Professor Thomas Wälde once held, “it is the ability to access a tribunal outside the sway of the host state which is the principal advantage of a modern investment treaty . . . . The effectiveness of substantive rights is . . . linked to the availability of an effective enforcement . . . . Right and procedural remedy, are, in practical and effective terms, one.”<sup>27</sup>

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19. *Id.* at 153-54.

20. See CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 5 (2007); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 3 (2005).

21. See JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 1-15 (1999); see also Peter Muchlinski, *The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY-ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 341 (Christina Binder et al. eds., 2009).

22. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce, and Navigation*, 42 MINN. L. REV. 805, 805 (1957).

23. See NEWCOMBE & PARADELL, *supra* note 14, at 44-45.

24. See M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 61-84 (2000); Karl-Heinz Böckstiegel, *Arbitration of Foreign Investment Disputes- An Introduction*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 125, 125-31 (Albert Jan van den Berg ed., 2005).

25. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. - FOREIGN INVESTMENT L.J. 232, 256 (1995), available at [http://www.arbitration-icca.org/media/0/12254614477540/jasp\\_article\\_-\\_arbitration\\_without\\_privity.pdf](http://www.arbitration-icca.org/media/0/12254614477540/jasp_article_-_arbitration_without_privity.pdf).

26. Böckstiegel, *supra* note 24, at 126.

27. Thomas Wälde, *The “Umbrella” (or Sanctity of Contract/Pacta sunt Servanda) Clause in*

Importantly, the paradigm shift is significant in a further respect. In investor-state arbitration there is a transfer of adjudicative authority from national courts to arbitral tribunals. In this sense, it has been argued that access to investor-state arbitration shares many characteristics of the direct right of action before human rights courts.<sup>28</sup> However, arbitral tribunals do not only constitute an additional forum with respect to State courts, but also an alternative to the same.<sup>29</sup> Thus, not only can foreign investors seek another decision after an eventual recourse to the national courts, but they are not required to exhaust local remedies prior to pursuing an international legal claim. This is in stark contrast to international human rights treaties which require that claimants exhaust local remedies in the first instance.<sup>30</sup> Even where contracts between an enterprise and a state expressly limit recourse to local dispute settlement options, claimants can directly surmount national jurisdictions and bring investment claims to arbitral tribunals in situations where the investor's home state and the host state have a BIT in place.<sup>31</sup> Under most investment treaties, states have waived their sovereign immunity and have agreed to give arbitrators comprehensive jurisdiction over what are essentially regulatory disputes. Indeed, investment treaty arbitration encompasses the full panoply of the state's regulatory relations with foreign investors. As a result, some have pointed out that investment treaty arbitration would replace judicial organs with private adjudicators in matters of public law.<sup>32</sup>

Since investment arbitration presents characteristics similar to those in a typical international commercial arbitration, these features may become

*Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 1 TRANSNAT'L DISP. MGMT 4, 13 (2004); Karl-Heinz Böckstiegel, *Enterprise v. State: The New David and Goliath? – The Clayton Utz Lecture*, 23 ARB. INT'L 93 (2007) (noting that the traditional David-Goliath relationship between private investors and states has been replaced, at least procedurally, by a level playing field and that in some circumstances, private claimants, as large multinational companies, may well have more resources available than small state being a respondent).

28. See ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 1-10 (2009) (Describing the similarity between the situation of private persons claiming international protection of human rights before the ECtHR, private enterprises hold individual procedural and substantive rights in international investment law); see Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, *Human Rights in INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82-97, 94 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009).

29. See DOUGLAS, *supra* note 28, at 9.

30. Office of the U.N. High Comm'r for Human Rights, *Human Rights Treaty Bodies – Individual Communications*, Procedure for complaints by individuals under the human rights treaties, <http://www2.ohchr.org/english/bodies/petitions/individual.htm> (last visited Oct. 10, 2010).

31. Several recent ICSID cases have upheld jurisdiction to hear treaty claims, notwithstanding the fact that the foreign investor was party to a contract which specified that contract claims would be the exclusive province of a given domestic court. See *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Arg. Republic*, ICSID Case No. ARB/97/3, Annulment Decision, ¶ 119 (July 3, 2002), 41 I.L.M. 1135, 1159 (2002), available at [http://ita.law.uvic.ca/documents/vivendi\\_annulEN.pdf](http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf); *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, (July 17, 2003), 42 I.L.M. 788, 808 (2003), available at [http://ita.law.uvic.ca/documents/cms-argentina\\_000.pdf](http://ita.law.uvic.ca/documents/cms-argentina_000.pdf); *Noble Ventures, Inc. v. Rom.* ICSID Case No. ARB/01/11, Award, ¶¶ 40-62 (Oct. 12, 2005), available at <http://ita.law.uvic.ca/documents/Noble.pdf>.

32. See Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L. Q. 371, 383 (2007).



problematic with regard to regulatory disputes.<sup>33</sup> For instance, the parties determine the composition of the arbitral tribunal.<sup>34</sup> Although the right to choose an arbitrator may be considered the very essence of arbitration,<sup>35</sup> this may be problematic from a public policy perspective. As an author highlights, while “arbitrators . . . are expected to be both independent of the party appointing them and impartial . . . it is usually conceded that without violating in any way this theoretical obligation of independence, the arbitrator may quite acceptably share the nationality, or political or economic philosophy, or ‘legal culture’ of the party who has nominated him—and may therefore be supposed from the very beginning to be ‘sympathetic’ to that party’s contentions or ‘favorably disposed’ to its positions.”<sup>36</sup> In a sense, independence and neutrality very much depend on the personality of the arbitrator.<sup>37</sup>

Confidentiality is another feature of the arbitral process. Hearings are held *in camera* and final awards may not be published, depending on the parties’ will. Even the names of the parties and much less the details of the dispute may not be disclosed.<sup>38</sup> While confidentiality well suits commercial disputes, the same may be problematic in investor-state arbitration. The lack of transparency may hamper efforts to track investment treaty disputes, to monitor their frequency, their settlement and to assess the policy implications that flow thereby.<sup>39</sup> In recent years, some efforts to make investment arbitration more transparent have been undertaken in different fora. In response to calls from civil society groups, the three parties to the North American Free Trade Agreement (NAFTA) - Canada, the US, and Mexico - have pledged to disclose all NAFTA arbitrations and open future arbitration hearings to the public.<sup>40</sup> Similarly, the ICSID Rules provide for the

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33. Blackaby, *supra* note 6.

34. Pierre Lalive, *Conclusions, in* THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS 119, 123 (1991).

35. *See id.*

36. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 506-07 (1997).

37. Arbitrators have clear incentives to adopt a high level standard of conduct because of reputation. *See* Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, TEX. INT’L L.J. 59 (1995).

38. For instance, Article 46 of the 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that unless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award. Arb. Inst. of the Stockholm Chamber of Commerce, Arb. Rules of the Arb. Inst. of the Stockholm Chamber of Commerce art. 46 (Jan. 1, 2010), *available at* <http://www.sccinstitute.com/skiljedomsregler-4.aspx>.

39. Because investment disputes are settled using a variety of arbitral rules-not all of which provide for public disclosure of claims-there can be no accurate accounting of all such disputes. That some portion of the iceberg remains hidden from view should be a matter of concern given the public policy implications of such disputes. Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, INT’L INST. FOR SUSTAINABLE DEV. 15 (2004), *available at* [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf).

40. *See*, NAFTA Free Trade Commission, Joint Statement, Montreal (Oct. 7, 2003), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/Statement.aspx?lang=eng> (last visited Nov. 1, 2010).

public disclosure of the dispute proceedings under their auspices.<sup>41</sup> Increasingly, investment arbitration tribunals have allowed public interest groups to present *amicus curiae* briefs or have access to the arbitral process. These important moves, however, involve the conduct of the proceedings of a limited number of investment disputes. Indeed, the vast majority of existing treaties do not mandate such transparency, which means that most of the proceedings are resolved behind closed doors.

Finally, and perhaps more importantly, awards rendered against host states are, in theory, readily enforceable against host state property worldwide, due to the widespread adoption of the New York and Washington (ICSID) Conventions.<sup>42</sup> The decisions have only limited avenues for revision and cannot be amended by the domestic legal system or a supreme court.<sup>43</sup> Arbitration under the ICSID rules is wholly exempted from the supervision of local courts, with awards subject only to an internal annulment process.<sup>44</sup>

Some important issues arise in this context. On the one hand, it seems that the current framework lacks adequate procedural protection for the public interest. According to some authors, investment treaty law and arbitration would be facing a "legitimacy crisis,"<sup>45</sup> as "private tribunals consider legal issues that impact the international economy, public policy and international relations, but they do so in a vacuum."<sup>46</sup> On the other hand, there is uncertainty over the relevance or irrelevance of norms external to investment law within investment treaty arbitration. Furthermore, notwithstanding the substantive similarity of investment treaty provisions, arbitral tribunals have come to inconsistent decisions on the meaning of international law norms. Inconsistent arbitral awards create legal uncertainty and undermine the coherence of the international legal system.

While developing countries have deemed investment treaty arbitration politically biased against them,<sup>47</sup> emerging economies and industrialized countries

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41. ICSID Convention, Regulations and Rules, Int'l Ctr. For Settlement of Inv. Disputes, at 66 (Apr. 2006), available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

42. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention]; ICSID Convention, *supra* note 15, art. 54.

43. New York Convention, *supra* note 42, art. 6; ICSID Convention, *supra* note 15, art. 53.

44. ICSID Convention, *supra* note 15, art. 53. The ICSID annulment process provides for a very limited review. ICSID annulment committees only have the ability to annul awards and send them back to the tribunal or to a new tribunal for a new decision, but cannot replace the decision with their own. The grounds for annulment are very narrow and concern due process issues: the tribunal was not properly constituted, it manifestly exceeded its powers, there was corruption on the part of a member, there was a fundamental serious departure from a procedural rule, or the award did not state the reasons on which it was based.

45. On the "legitimacy crisis" of investor-state arbitration, see *supra* note 11.

46. Franck, *supra* note 11, at 1521.

47. Shalakany, *supra* note 11. More recently, the Bolivian President Evo Morales affirmed that Bolivia "emphatically reject[s] the legal, media and diplomatic pressure of some multinationals that . . . resist the sovereign rulings of countries, making threats and initiating suits in international arbitration," adding that "The governments of Latin America . . . never win the cases." *Latin Leftists Mull Quitting World Bank Arbitrator*, REUTERS, Apr. 30, 2007, <http://www.reuters.com/article/worldnews/idUSN29>

alike have expressed some concerns about this mechanism. For instance, Australia has not been at ease with the idea of investment-related arbitrations, and the investment chapter of the Australia-US Free Trade Agreement leaves out provisions on investor-state dispute resolution.<sup>48</sup> In the European Union (EU), the compatibility of the current investment law and EU law is highly debated. The criticisms concern alleged discriminatory treatment of investors and a perceived lack of control by the European Court of Justice (ECJ) due to arbitration.<sup>49</sup> Turning our attention to developing countries, Bolivia and Ecuador sent a formal notice to ICSID declaring their withdrawal from the ICSID Convention and their intention to pursue revisions to their BITs in order to direct investors' claims solely to domestic fora.<sup>50</sup> These moves may be due to contingent political reasons.<sup>51</sup> Furthermore, the fear of expensive investment disputes may be an additional reason for withdrawal. However, these moves may also indicate a deeper dissatisfaction with how the system works.

Before addressing these criticisms, two preliminary observations may be made. First, it seems that the emerging criticisms on the functioning of investment treaty arbitration in relation to public goods are evidence of the vitality of the system. The recent boom of investment treaty arbitrations, as well as the willingness of states to participate in the system, explain such vitality. For instance, the EU Member states are willing to maintain the network of BITs that exists between them despite the above-mentioned concerns of the European Commission.<sup>52</sup> Indeed, EU states believe that their investors are better protected

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48. 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 (2006).

49. Opinion of the Advocate General Poiares Maduro, delivered on July 10, 2008, Comm'n of the European Communities. v Republic of Austria, Case No. C-205/06, 2009 E.C.R. I-01301, and Comm'n of the European Communities. v Kingdom of Sweden, Case No. C-249/06, 2009 2 C.M.L.R. 49, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0205:EN:HTML>.

50. International Center for Settlement of Investment Disputes, ICSID News Release, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, May 16, 2007, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>; International Center for Settlement of Investment Disputes, ICSID News Release, *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, July 9, 2009, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

51. For instance, in the case of the US Australia FTA, the parties have shown reciprocal trust of the respective national courts. Andrew L. Stoler, AUSFTA as "Third Wave" Trade Agreement: Beyond the WTO Envelope, Address at the 26th International Trade Law Conference, at 5, (Sept. 23, 2004), available at [http://www.iit.adelaide.edu.au/conf/AGC92304\\_ausfta\\_SpD.pdf](http://www.iit.adelaide.edu.au/conf/AGC92304_ausfta_SpD.pdf). In the case of Bolivia and Ecuador, the withdrawal from ICSID may be due to the nationalization drive in the Andean gas sector which is firmly supported by the poorest indigenous minorities. See Marco E. Schnabl & Julie Bédard, *The Wrong Kind of 'Interesting': The Investment Climate in Latin America Recalls a Certain Chinese Proverb*, NAT'L L.J., July 30, 2007, available at <http://www.arbitralwomen.org/files/publication/1910231238362.pdf>.

52. The European Commission fears that such parallel regime may create legal uncertainty and forum shopping in favour of arbitration. Damon Vis-Dumbar, *EU Member States Reject the Call to*

under the BITs than under EU law alone.<sup>53</sup> Second, the emerging critiques should constitute the steppingstones for the progressive development of the system.<sup>54</sup> These criticisms need to be taken into account to allow the investment treaty system to evolve in a harmonious way.<sup>55</sup> Comparative law is an element that can make it easier for the public good to be taken into account in investment treaty arbitration.

### III. COMPARATIVE LAW AND METHOD

Before exploring the role the comparative method plays in the context of investment treaty law and arbitration, it is worth scrutinizing the main characteristics of comparative law. In a preliminary way, two questions need to be addressed. The first question relates to the essence of comparative law: is comparative law a legal discipline or should it be considered a mere legal method? The second question, which is strictly related to the first, is about the objectives of comparative law. Due to space limits, this section does not purport to exhaustively describe what the comparative method does and what those employing it should do to use it properly. The very existence of comparative law as a legal discipline has been contested because of lack of agreement among scholars on the appropriate use of analogy in legal context. The main assumption of this paper is that the controversial nature of comparative law does not repress its legal nature; by way of contrast, the awareness of its limits and merits may only benefit legal analysis. In this sense, while it is not possible to offer a prescriptive analysis of comparative law — because the same comparative law scholars have different views on the method of comparative law — this section aims to offer some insights on the essence of comparative law, its *modus operandi*, and its purposes.

Comparative law has been defined as “an intellectual activity with law as its object and comparison as its process.”<sup>56</sup> Notwithstanding the apparent clarity of this definition, there has been a fierce debate among scholars with regard to the essence of comparative law. While some authors have qualified comparative law as an autonomous discipline, others have contended that comparative law

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*Terminate Intra-EU Bilateral Investment Treaties*, INV. TREATY NEWS, Feb. 10, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties.aspx>.

53. *Id.* Provisions like the Fair and Equitable Treatment standard do not appear in national legislations or even in EC law. Other provisions, such as those concerning expropriation may be stricter in investment treaties than in national laws. More importantly, investment treaty arbitration is a procedural guarantee that EU law does not provide for. Granting investors an independent right to initiate dispute settlement directly against the host state instead of forcing them to rely either on domestic courts or on inter state dispute resolution is one of the major ‘virtues’ of international investment law.

54. See Anne Van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1 (2008).

55. Francisco Orrego Vicuña, *Carlos Calvo, Honorary NAFTA Citizen*, 11 N.Y.U. ENV'T L. L.J. 19, 32-34 (2002).

56. KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW 2* (Tony Weir, trans., 3rd ed. 1998).

amounted to the mere utilization of the comparative method.<sup>57</sup> Without delving into the depth of the different schools of thought, it seems that nowadays the autonomy of comparative law as a science is established.<sup>58</sup> Not only is comparative law a subject studied in many universities around the world, but some basic texts are almost uniformly adopted worldwide.<sup>59</sup> At the same time, no one could contest the existence of the comparative method as a tool for relating different objects and disciplines. Metaphors and comparisons are essential to comprehend new concepts and organize thought.<sup>60</sup> Therefore, the famous dilemma — whether comparative law is a discipline or a method — is a false dichotomy, because comparative law is an autonomous discipline based on the comparative method.<sup>61</sup> Discourse on method is essential because it clarifies the tools of the discipline and its objectives. More importantly, to keep in mind the co-existence of both discipline and method helps the scholar apply the comparative method to new subject areas, eventually contributing to the expansion of comparative law.

The main characteristics of comparative law originate from the fact that it does not focus on a mere legal system, but on two or more systems of law.<sup>62</sup> This does not necessarily imply that comparative law is a mere theoretical exercise. On the contrary, comparative law often adopts a functionalist approach and may have very concrete outcomes. Comparative law explores how a concrete problem is solved in different jurisdictions and may constitute a useful tool for the construction or amendment of legal systems. Comparative law has an evolutionary or dynamic dimension in that it may stimulate change.

There are two main criticisms against comparative law. The first relates to the scientific rigour of the discipline. Authors highlight that comparative law may be superficial, as it necessarily investigates two or more legal systems rather than focusing on one. Furthermore, authors have questioned whether a lawyer trained in a certain legal system may truly understand another system without pre-judging it according to the legal categories that constitute her legal imprinting.<sup>63</sup> According

57. W.J. Kamba, *Comparative Law a Theoretical Framework*, 23 INT'L & COMP. L. Q. 485, 486-87 (1974), quoting Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40 (1966) (explaining that comparative law “has by common consent the somewhat unusual characteristic that it does not exist”); see Djalil Kiebaev, *Comparative Law: Method, Science or Educational Discipline?*, 7.3 ELECTRONIC J. COMP. L. (Sept. 2003), <http://www.ejcl.org/73/art73-2.html> (discussing the different approaches of comparative law).

58. Comparative law became an autonomous legal discipline at the end of the XIX century. ALESSANDRO PIZZORUSSO, *SISTEMI GIURIDICI COMPARATI* 145 (2d ed. 1998); Marc Ancel, *Comment aborder le droit comparé (A propos d'une nouvelle “Introduction au droit comparé”)*, in *ÉTUDES OFFERTES A RENE RODIERE* 3 (1981).

59. ZWIEGERT & KÖTZ, *supra* note 56, at v (noting that the “*Introduction to Comparative Law* now has more readers outside Germany than inside it”).

60. See ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW - VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY* 11 (2004) (stating that, “Comparison is the essence of understanding”).

61. *Id.* at 1 (explaining that there “is no one single definition of what comparative law and comparative method are.”).

62. *Id.*

63. Ferdinand Joseph Maria Feldbrugge, *Sociological Research Methods and Comparative Law*, in *BUTS ET METHODS DU DROIT COMPARE/AIMS AND METHODS OF COMPARATIVE LAW* 211, 214

to this line of thought, being raised in a certain legal tradition or culture determines certain procedural or substantive choices.<sup>64</sup>

The second criticism relates to the comparative method. It is claimed that depending on the perspective adopted, comparisons may have completely different outcomes. In other words, where one stands on any particular issue is nearly always dependent upon where one sits.<sup>65</sup> In comparing two elements, scholars may confuse the two instead of keeping them separate.<sup>66</sup> Although the idea of a neutral referent or *tertium comparationis* may seem attractive in theory, it may become misleading in practice. An example may clarify the issue at stake. Let us imagine a debate on the shade of color *alpha* which is neither black nor red. Is *alpha* a *red* color with a black glance or is it a *black* color with a red glance? Some may even hypothesize that the essence of *alpha* is violet. Whatever the shade, it is evident that if *alpha* is compared to other red colors, it will look black; while if it is compared to black colors, it will look red. Instead, if *alpha* is compared to black and red colors all together, its shade will appear similar to purple. In conclusion, depending on the particular perspective adopted, the results of the comparative process may be very different.

These criticisms have the merit of showing certain limits and risks of comparative law. The interpreter must be aware of the perspective selected to avoid the risks mentioned above. For instance, with regard to the breadth of the discipline, one may well focus on certain aspects, leaving other aspects to subsequent studies. With regard to the constitutive bias of any legal scholar trained in a certain legal system, this question may have become moot in practice. It is not rare that scholars are trained in two or more jurisdictions and are therefore exposed to more than one legal culture. Globalization has globalized legal careers.<sup>67</sup> The fact that scholars often speak one or more foreign languages facilitates access to

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(Rotondi ed., 1973); Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411, 415 (1985) (referring to the "skeptical assumption that objective comparison is impossible because the comparat[ist]'s vision is totally determined by her specific historical and social experience and perspective").

64. See Richard Kreindler, *Arbitration or Litigation? ADR Issues in Transnational Disputes*, 52 DISP. RESOL. J. 79, 79 (1997); Amanda Stallard, Note, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463 (2002).

65. Similarly, with regard to the International Court of Justice, the "data suggest[s] that national bias has an important influence on the decision making of the ICJ. Judges vote for their home states about 90 percent of the time. When their home states are not involved, judges vote for states that are similar to their home states--along the dimensions of wealth, culture and political regime." Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005).

66. Talking about comparisons, Wittgenstein pointed out the great risk of confusing the prototype with the object of comparison, which we are viewing in its light. LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 14 (G.H. Von Wright ed., Peter Winch trans., 1980).

67. As Tom Ginsburg puts it, "[g]lobalization leads to pressure on legal cultures . . . national legal cultures that were more or less autonomous are now subject to a variety of external pressures because of the growing rate of cross-national interaction." Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1337 (2003).

primary sources. Furthermore, the willingness to understand and to appreciate the particular features of a foreign system should not be perceived as a form of naiveté but as a humble attempt to decipher a certain system and to contribute to the development of comparative law, and possibly of the examined legal systems themselves. With regard to the methodological problem of confusing the *elementa comparationis*, this problem does not exist in comparative law alone, but it appears as soon as analogies are drawn.

In conclusion, to argue that the comparative method is useless because it is a risky enterprise would go too far. The comparative method requires both audacity and carefulness: the mapping of foreign lands requires certain methodological choices and the selection of a particular scale and perspective. What seems important is not the adoption of a particular perspective, but the awareness that the comparative method may lead to different results, and therefore, the perspective adopted needs to be spelled out at the outset.<sup>68</sup> Much more critical work needs to be done.

#### IV. THE INTERPLAY BETWEEN INVESTMENT LAW AND COMPARATIVE LAW

Comparativists and internationalists alike have almost entirely neglected the interaction between international law and comparative law. As Professor Kennedy once put it, “[i]nternationalists seem comfortable with power and uncomfortable with culture, while comparativists are eager for cultural understanding and wary of involvement with governance.”<sup>69</sup> However, this attitude is gradually changing. On the one hand, comparativists have highlighted that the traditional focus of comparative law on national systems is old fashioned and they have argued that comparative law should integrate the most important transnational regimes.<sup>70</sup> On the other hand, internationalists have similarly emphasized that “[t]he internationalist and comparativist share more than they realize.”<sup>71</sup> It is a matter of time, but it may be foreseen that the interplay between international law and comparative law will receive increasing attention. This paper aims to contribute to this emerging area of study by focusing on the linkage between international investment law, which is a sub-system of international law and comparative law. This interaction has four different but related dimensions: 1) comparative investment law; 2) comparative arbitration law; 3) legal doctrine; and 4) treaty interpretation. The following sub-sections highlight these four paths. While the first two dimensions are only briefly mentioned, and reference to the relevant literature is made, the role of comparative law in legal doctrine and treaty interpretation is analyzed in more detail.

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68. See *infra* Section IV.

69. Kennedy, *supra* note 1, at 633. Kennedy also remarked, “For the comparativist, internationalists seem rather vulgar presentists, always wanting lessons and applications and solutions . . . For the internationalist, the comparativist seems a snob or a dilettante . . .” *Id.* at 556-57.

70. Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1119 (2001).

71. Kennedy, *supra* note 1, at 557.

### A. Comparative Investment Law

The national legal frameworks regulating foreign investment may be studied through comparative lenses.<sup>72</sup> This field of enquiry can be called *comparative investment law*, and refers to the study and comparison of the different legal frameworks regulating foreign investment at the national and/or regional levels. A number of authors have investigated comparative investment law.<sup>73</sup> From an international law perspective, however, this approach has only limited merit, because it focuses on national investment codes. While these national codes often reflect and implement international law norms, they maintain a national character as national lawmakers have elaborated on them and national courts have adjudicated them.

### B. Comparative Arbitration Law

Comparative lawyers have studied international arbitration as a paradigmatic melting pot of legal cultures. Professor Ginsburg highlighted that international arbitration constitutes “a place of convergence and interchange wherein practitioners from different backgrounds create new practices.”<sup>74</sup> Others have stressed that the emerging arbitration culture fuses together elements of the common law and civil law tradition.<sup>75</sup> From an international law perspective, these studies provide international law scholars with important theoretical and logical tools for their profession.

72. Some authors have focused on the adoption by national legislatures of models from foreign statutes. See Daphne Barak-Erez, *An International Community of Legislatures?*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 532, 532 (Richard W. Bauman & Tsvi Kahana eds., 2006); Helen Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 INT'L & COMP. L.Q. 659 (2008).

73. Jean-Yves P. Steyt, *Comparative Foreign Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies* (May 2006) (LLM dissertation, Cornell Law School), available at [http://scholarship.law.cornell.edu/lps\\_LLMGRP/1/](http://scholarship.law.cornell.edu/lps_LLMGRP/1/); L. Yves Fortier, *The Canadian Approach to Investment Protection: How Far Have We Come!*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY- ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 525-43 (Christina Binder et al. eds., 2009); Michael Mikiciuk, *Foreign Direct Investment Success in Ireland: Can Poland Duplicate Ireland's Economic Success Based on Foreign Direct Investment Policies?*, 14 U. MIAMI INT'L & COMP. L. REV. 65 (2006); Amanda Perry-Kessaris, *Finding and Facing Facts about Legal Systems and FDI in South Asia*, 23 LEGAL STUD. 649 (2003); AMANDA J. PERRY, LEGAL SYSTEMS AS DETERMINANT OF FOREIGN DIRECT INVESTMENT: LESSONS FROM SRI LANKA (2001); Amanda J. Perry, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT'L & COMP. L.Q. 779 (2000); Antonio R. Parra, *Principles Governing Foreign Investment, as Reflected in National Investment Codes*, in IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 311 (1993); Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L. Q. 686 (1982).

74. See Ginsburg, *supra* note 67, at 1335.

75. See Christian Borris, *The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 1, 1 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).



### C. Legal Doctrine

In scrutinizing investment law and arbitration, scholars have made use of the comparative method, albeit in an implicit manner. Since scholars belonging to different legal cultures produce international legal doctrine, it is inevitable that this scholarship reflects its multicultural origin and different approaches. Reference to national and regional case law is a constant feature in articles concerning international investment law and this does not necessarily reflect a form of nationalism, as reference is often done to the case law of other countries as well.<sup>76</sup>

This particular interaction between comparative law and investment law scholarship is of particular relevance because in international law, the opinion of legal scholars is deemed to have a certain, albeit subsidiary, legal value. The Statute of the International Court of Justice (ICJ) expressly enumerates “the teachings of the most highly qualified publicists of the various nations” as “subsidiary means for the determination of the sources of law.”<sup>77</sup> On the one hand, as Oppenheim clarified more than a century ago, “the writers on international law . . . have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognized usage has now ripened into a custom, and the like.”<sup>78</sup> On the other hand, international law scholars “have to ascertain the precise meaning of [the written] rules with the help of interpretation.”<sup>79</sup>

With regard to international arbitration, Ginsburg highlighted that “[l]ike the grand civil law tradition, it is scholarly commentary that produces the law and technique of arbitration.”<sup>80</sup> With regard to investment treaty arbitration, the influence of scholarly analysis is of utmost importance. On the one hand, scholars and professors of international law are often selected as arbitrators in investment treaty disputes.<sup>81</sup> Therefore, it may be expected that their academic experience is somehow drawn upon in the settlement of the dispute. On the other hand, both

76. For instance, while the Tecmed Tribunal relied on ECtHR cases, none of the members of the Tribunal were Europeans. See Walid Ben Hamida, *Investment Arbitration and Human Rights*, 4 TRANSNAT'L DISP. MGMT. 5, 14 (2007).

77. ICJ Statute, *supra* note 13, art. 38(1)(d). The ICJ Statute is annexed to the Charter of the United Nations of which it forms an integral part. U.N. Charter, June 26, 1945, 1 U.N.T.S. XVI.

78. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 315 (1908).

79. *Id.* at 315.

80. See Ginsburg, *supra* note 67, at 1341-42.

81. For instance, in *Thunderbird Gaming Corp. v. United Mexican States*, the late Professor Wälde, acting as an arbitrator, stated that the proper analogy in interpreting investment treaties is not to international commercial arbitration or public international law, both of which involve disputants who are seen as equals, but rather to judicial review relating to governmental conduct. Additionally, “[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 disputes of individual citizens’ over alleged abuse by public bodies of their governmental powers.” *Int’l Thunderbird Gaming Corp. v. United Mexican States*, 255 Fed. Appx. 531 (2007) (separate opinion of arbitrator Thomas Wälde, at 13, available at [http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird\\_Dissent.pdf](http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf)).

advocates and arbitrators make reference to the works of scholars in their pleadings and awards respectively.<sup>82</sup> Finally, as an arbitrator has emphasized, “[a]wards are there to be evaluated and criticized –relentlessly criticized — in the interest of improving international legal systems.”<sup>83</sup>

Academics have contributed to the development of international investment law through both *macro-comparisons* and *micro-comparisons*.<sup>84</sup> With regard to macro-comparison, authors have compared international investment law and arbitration to different legal systems. For instance, investment treaty law has been compared to administrative law<sup>85</sup> and other sets of international law.<sup>86</sup>

With regard to micro-comparison, authors have compared specific investment treaty standards to rules belonging to other legal orders.<sup>87</sup> In certain cases,

82. For instance, in his separate opinion to the Thunderbird case, Professor Wälde made reference to Professor Gaillard’s work: “Emmanuel Gaillard, *Jurisprudence du CIRDI*, 2004, at 7.” *Id.* at 13, n.7. In the *Malaysian Historical Salvors SDN BHD v. the Government of Malaysia*, the ad hoc committee cited the work of Professor Christoph Schreuer (citing CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001)) and Yulia Andreeva (citing Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v Malaysia Revisited*, in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* vol. 7, no. 2, at 161 (2008)). *Malaysian Historical Salvors SDN BHD v. Gov’t of Malay.*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶¶ 67, 76 (Feb. 28, 2009), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030\\_En&caseId=C247](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247).

83. Jan Paulsson, *Awards – and Awards*, in *INVESTMENT TREATY LAW CURRENT ISSUES III: REMEDIES IN INTERNATIONAL INVESTMENT LAW, EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW* 97, 98 (Andrea K. Bjorklund et al. eds., 2009).

84. While micro-comparison “has to do with specific legal institutions or problems”, macro-comparison aims to “compare the spirit and style of different legal systems, the methods of thought and procedures . . . for resolving and deciding disputes, or the roles of those engaged in the law.” ZWEIGERT & KÖTZ, *supra* note 56, at 4-5.

85. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 *EUR. J. OF INT’L L.* 121 (2006); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007) (the core argument of the book lies in the accurate analogy between investment treaty arbitration and administrative courts); Gus Van Harten, *A Case for an International Investment Court*, Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper (June 30, 2008).

86. August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 691 (PETER MUCHLINSKI et al. eds., 2008); Christian Tomuschat, *The European Court of Human Rights and Investment Protection*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY* 636 (Christina Binder et al. eds., 2009).

87. The list of possible examples is endless. See NICK GALLUS, *THE TEMPORAL SCOPE OF INVESTMENT PROTECTION TREATIES* 20-21 (2008) (comparing the rule against retroactivity used by investment tribunals to that used by other international tribunals including the International Court of Justice, the Inter-American Court of Human Rights and the European Court of Human Rights); John Y. Gotanda, *Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes*, in *INVESTMENT TREATY LAW CURRENT ISSUE III: REMEDIES IN INTERNATIONAL INVESTMENT LAW, EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW* 77 (Andrea K. Bjorklund et al. eds., 2009); Jürgen Kurtz, *National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 311 (Philippe Kahn & Thomas Wälde eds., 2007) (comparing the doctrinal evolution on national treatment in investment treaty law with that of GATT Article III (4) under WTO law); Sylvie Tabet, *Application de l’obligation de traitement national et de traitement de la nation la plus favorisée dans la jurisprudence arbitrale en matière d’investissement - Nouveaux problèmes à la*

international legal scholarship has advocated a proactive use of comparative law in the course of arbitral proceedings. For instance, an author made reference to a WTO case to critically assess the application of the Most Favored Nation (MFN) to investor state arbitration.<sup>88</sup> In an interesting contribution on the fair and equitable treatment (FET), another author has advocated an extensive use of the comparative method, arguing that only by comparing the FET standard with the national articulations of the Rule of Law, can the meaning of the standard become concrete:

Instead of primarily relying on prior arbitral decisions, an approach that is little helpful in particular when disputes concern novel circumstances, or positing the content of the fair and equitable treatment in an abstract way without sufficient justification, tribunals should use a comparative method that draws on domestic and international law regarding the concept of the rule of law.<sup>89</sup>

Other authors have similarly advocated an extensive use of national precedents with regard to the interpretation of the notion of expropriation. For instance, on the theme of regulatory expropriation and environmental protection, Wälde and Kolo argued that the jurisprudence of the US Supreme Court could represent a valid persuasive precedent for investment treaty tribunals.<sup>90</sup> Since investment treaty tribunals are analogous to administrative tribunals or constitutional courts, the case law of the US Supreme Court would serve as useful guidance for arbitral tribunals.

While these functionalist approaches seem to offer concrete solutions to emerging conceptual dilemmas, and highly reputed scholars have forcefully presented such dilemmas, one may question whether a more critical approach to the use of comparative law should be adopted. While scholarly analysis has made extensive use of comparative law, and has deemed it a panacea for solving interpretative dilemmas, methodology issues have been neglected.

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*lumière de la jurisprudence de l'OMC*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 352 (Philippe Kahn & Thomas Wälde eds., 2007). Perhaps the area of international investment law where the use of analogy has been more expansively adopted is the concept of property. See, e.g., Christoph Schreuer & Ursula Kriebaum, *The Concept of Property in Human Rights Law and International Investment Law*, in *HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER* 743 (S. Breitenmoser et al. eds., 2007); Hélène Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for Regulatory Expropriations of the Property of Foreign Investors*, 11 *N.Y.U. ENV'T L.J.* 148 (2002).

88. See Walid Ben Hamida, *MFN Clause and Procedural Rights: Seeking Solutions from WTO Experience?*, 6 *TRANSNAT'L DISP. MGMT* 1 (2009). See also Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor - State Arbitration: Competition and its Discontents?* (2009) 20 *EUR. J. INT'L L.* 749, 749-71 (2009); Nicholas Di Mascio & Joost Pauwelyn, *Non Discrimination in Trade and Investment Treaties: Two Worlds Apart or Two Sides of the Same Coin?*, 102 *AM. J. INT'L L.* 48 (2008).

89. Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law* 29 (New York University Law School, International Law & Justice Working Paper No. 6, 2006), available at <http://www.ilj.org/publications/documents/2006-6-GAL-Schill-web.pdf> (last visited June 16, 2010).

90. Thomas Wälde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 *INT'L & COMP. L. Q.* 811, 821 (2001).

It is often assumed that comparative law is a neutral process, but this is not always the case. The very selection of the *elementa comparationis* may affect the outcome of a case. For instance, the *Lauder case*<sup>91</sup> and the *CME case*<sup>92</sup>— which were parallel proceedings over the same underlying dispute – had different outcomes because different BITs governed the substantive law and the arbitral tribunals gave different weight to the comparative method. While the *Lauder* Tribunal referred to a human rights case for establishing the expropriation standards,<sup>93</sup> the other Tribunal did not. As an author put it, “one is left to wonder, therefore, whether this would explain how the two tribunals came to . . . opposite decisions.”<sup>94</sup>

Another example may clarify the issues at stake. The ICSID Convention and other arbitral rules leave arbitral tribunals a wide discretion with regard to costs.<sup>95</sup> In the *Thunderbird* case, in deciding how to allocate the costs for legal representation, Professor Wälde argued that “[t]he judicial practice *most comparable* to treaty-based investor-state arbitration is the judicial recourse available to individuals against states under the European Convention on Human Rights; again, states have to defray their own legal representation expenditures, even if they prevail.”<sup>96</sup> By contrast, in the *Europe Cement* case, the Arbitral Tribunal awarded the respondent full costs to “compensat[e] the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims.”<sup>97</sup> Authors have pointed out that “[r]ecently, some tribunals [in investment arbitration] have adopted . . . the principle that the successful party should have its costs paid by the unsuccessful party, *as adopted in commercial arbitration*.”<sup>98</sup> This example clearly shows that

91. *Lauder v. Czech Rep.*, Final Award (Sept. 3, 2001), 9 ICSID Rep. 66 (2001), available at <http://ita.law.uvic.ca/documents/LauderAward.pdf>.

92. *CME Czech Rep. B.V. v. Czech Rep.*, Partial Award, (Sept. 13, 2001), available at <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>; *CME Czech Rep. B.V. v. Czech Rep.*, Final Award (Mar. 14, 2003), 9 ICSID Rep. 121 (2003), available at [http://ita.law.uvic.ca/documents/CME-2003-Final\\_001.pdf](http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf).

93. *Lauder v. Czech Rep.*, *supra* note 91, at ¶ 200 (quoting *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) (1989)).

94. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 84 (2007).

95. ICSID Convention, *supra* note 15, art. 61(2).

96. *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 255 Fed. Appx. 531, ¶ 141 (2007) (separate opinion of arbitrator Thomas Wälde, at 13, available at [http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird\\_Dissent.pdf](http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf)) (emphasis added).

97. *Europe Cement Investment & Trade S.A. v. Republic of Turk.*, ICSID Case No. ARB(AF)/07/2, Award, ¶ 185 (Aug. 7, 2009), available at <http://arbitration.fr/resources/ICSID-ARB-AF-07-2.pdf>. It is worth noting that the sentence is borrowed from an eminent scholar, Professor Schreuer, who similarly wrote that such an award “serves the purposes of compensating the victorious party and of dissuading unmeritorious claims”. *Id.* at ¶ 182. Professor Schreuer’s position on the matter reflects the practice adopted in commercial arbitration, and in several national systems. See, for instance, Article 91 of the Italian code of civil procedure.

98. *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hung.*, ICSID Case No. ARB/03/16, Award, ¶ 532 (Sept. 27, 2006), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648\\_En&caseId=C231](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231) (quoting

depending on which material is selected for comparison, the outcome may be different.

#### *D. Treaty Interpretation*

A *fourth* area of intersection between investment law and comparative law is seen in the increasing cross-fertilization between different international tribunals. This trend may be called “global comparative jurisprudence,” and reflects the fact that international tribunals look to the decisions of other international bodies on related or analogous matters. The reliance of both phenomena on the use of analogy ties judicial borrowing to comparative law. Analogy is a cognitive process which transfers an argument from one particular to another particular. Analogy plays a significant role in comparisons, which are the core element of judicial borrowing. Unlike commercial arbitrators who apply different laws depending on the subject matter of the disputes, investment treaty arbitrators apply a limited number of concepts under public international law. The focus of arbitral tribunals is on both the concepts they are applying and on the decisions of other tribunals.

Indeed, while arbitral tribunals have limited jurisdiction, their authority to engage in judicial borrowing derives from the fluid nature of international law. In international law, Article 38(d) of the ICJ Statute considers judicial decisions as “subsidiary means for the determination of rules of law.”<sup>99</sup> In parallel, systemic interpretation is a customary tool of treaty interpretation.<sup>100</sup> In addition, the consistent interpretation and application of certain treaty norms may consolidate in the *opinio juris* necessary to transform a certain treaty provision into customary international law. Finally, certain investment treaty provisions, such as Fair and Equitable Treatment, present an obvious analogy with equity as a general principle of law under the regime set out in Article 38(c) of the ICJ Statute.

Investment arbitral tribunals have made extensive use of systematic interpretation, referring to the jurisprudence of previous arbitral tribunals, national administrative and constitutional courts on the one hand, and to the case law of regional human rights courts and international courts and tribunals on the other. As arbitrators have made use of comparative arguments albeit implicitly, it seems crucial to map the current dimension of the phenomenon and to propose a more conscious use of the comparative method. The unaware use of the comparative method may determine the abuse of the same, and ultimately lead to undesirable outcomes. Arbitrators risk acting as “bricoleurs” rather than as “engineers” of legal norms:<sup>101</sup> “As engineers, they would sort through the concepts and assemble them into a constitutional design that made sense according to some overarching conceptual scheme. As bricoleurs, though, they . . . use the first thing that happens

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Matthew Weiniger & Matthew Page, *Treaty Arbitration and Investment Dispute: Adding Up the Costs*, 1 GLOBAL ARB. REV. 3, 44 (2006)).

99. ICJ Statute, *supra* note 13, art. 38(1)(d).

100. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

101. The metaphor is borrowed from Lévi-Strauss. Mark Tushnet, *The Possibilities of Comparative Law*, 108 YALE L.J. 1225, 1285-86 (1999).

to fit the immediate problem they are facing.”<sup>102</sup> Since the use of the comparative method in international investment arbitration may have a great impact on the development of international investment law and international law in general, a more conscious use of the comparative method needs to be promoted.

#### V. THE USE OF THE COMPARATIVE METHOD IN INVESTMENT TREATY ARBITRATION

While authors have extensively focused on the impact of comparative law on the procedural aspects of international adjudication,<sup>103</sup> scarce attention has been paid to the impact comparative law may have on the substantive aspects of the same. While notable contributions scrutinized the phenomenon of judicial borrowing in areas such as human rights adjudication,<sup>104</sup> the use of comparative law *per se* in investment treaty arbitration has never been the object of a specific study. Therefore, this is the first attempt to chart the substantive world of investment treaty arbitration through the lenses of comparative law.<sup>105</sup> The following analysis aims at clarifying an ongoing process and its main characteristics. For limits of space, this analysis cannot be exhaustive; further study will be required to complete the mapping of this complex landscape.

In a preliminary way, interpretation is a fundamental part of the implementing process of a treaty. Whatever the conception of the adjudicative function that arbitrators adopt, it is generally accepted that adjudicators are neither mere *bouche de la loi*, nor authentic law makers.<sup>106</sup> In a sense, arbitrators have a *maieutic* role,

102. *Id.* at 1286.

103. See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007). Regarding international arbitration, see Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003); Borris, *supra* note 75; Andreas F. Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 19 (Stefan N. Frommel & Barry A.K. Rider eds., 1999); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 31 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

104. See Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007); Christopher McCrudden, *Judicial Comparativism and Human Rights*, in COMPARATIVE LAW: A HANDBOOK 371 (Esin Orücü & David Nelsen eds., 2007); David Schneiderman, *Property Rights and Regulatory Innovation: Comparing Constitutional Cultures*, 4 INT'L J. CONST. L. 371 (2006); Darren Roseblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007); Sujit Choudhry, *Globalization is Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999).

105. In previous contributions, I have analyzed the merit of judicial borrowing with regard to investment treaty disputes involving cultural elements and intellectual property rights respectively. See Valentina Vadi, *Fragmentation or Cohesion? Investment versus Cultural Protection Rules*, 10 J. WORLD INV. & TRADE 573 (2009); Valentina Vadi, *Cultural Heritage & International Investment Law: A Stormy Relationship*, 15 INT'L J. CULTURAL PROP. 1 (2008); Valentina Vadi, *Mapping Uncharted Waters: Intellectual Property Disputes with Public Health Elements in Investor-State Arbitration*, 6 TRANSNAT'L DISP. MGMT. 2 (2009); Valentina Vadi, *Trademark Protection, Public Health and International Investment Law: Strains and Paradoxes*, 20 EUR. J. INT'L L. 773 (2009).

106. For more on the different conceptions of the adjudicative function, see Ernst-Ulrich Petersmann, *Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3, 9-11

as they give birth to the meaning of treaty provisions, having to identify the applicable rules, clarify their meaning and relate them to the specific facts of the case. According to the International Law Commission, “the interpretation of documents is to some extent an art, not an exact science.”<sup>107</sup> However, to say that adjudicators’ roles are creative would probably be going too far, because it would undermine their legitimacy.

Customary rules of treaty interpretation, as restated in the Vienna Convention on the Law of Treaties (VCLT),<sup>108</sup> provide the adjudicators with the necessary conceptual and legal framework to perform their function to settle disputes “in conformity with the principles of justice and international law.”<sup>109</sup> Customary rules of treaty interpretation are applicable to investment treaties because investment treaties are international law treaties. Furthermore, some investment treaties expressly mention these rules.<sup>110</sup> According to the *general rule of interpretation*, which comprises several sub-norms, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>111</sup>

Although the VCLT does not make reference to cases, these may be considered as “supplementary means of interpretation.”<sup>112</sup> As mentioned above, the ICJ Statute includes cases among the “subsidiary means for the determination of rules of law.”<sup>113</sup> In most cases, as Professor Schreuer highlights, *conversations across cases* take place,<sup>114</sup> and a systemic study of the case law of international tribunals suggests the “tendency to chart a coherent course within international law.”<sup>115</sup> Looking at the arbitral awards, there is not only a sort of *endogenous path coherence* by which arbitrators look at previous arbitral awards, but also an increasingly *heterogeneous path coherence* by which arbitrators look at the jurisprudence of other international courts.<sup>116</sup>

The use of the comparative method in investment treaty arbitration is a frequent phenomenon because investment treaties generally tend to converge and often present similar if not identical wording. Furthermore, international

(P.M. Dupuy et al. eds., 2009).

107. Int’l L. Comm’n, *Draft Articles on the Law of Treaties: Text as Finally Adopted by the Commission on 18 July 1966*, 2 Y.B. Int’l L. Comm’n 218, U.N. Doc. A/CN.4/190.

108. VCLT, *supra* note 100.

109. *Id.* at Preamble.

110. *See, e.g.*, Australia United States Free Trade Agreement art. 21.9(2), U.S.-Austl., May 18, 2004, 118 Stat. 919, *available at* [http://www.dfat.gov.au/trade/negotiations/us\\_fta/final-text/index.html](http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html).

111. VCLT, *supra* note 100, art. 31(1).

112. Supplementary methods of interpretation include, but are not limited to, the circumstances of the conclusion of a treaty and preparatory work. VCLT, *supra* note 100, art. 32.

113. ICJ Statute, *supra* note 13, art. 38(1)(b).

114. Christoph Schreuer & Matthew Weiniger, *Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?*, 5 TRANSNAT’L DISP. MGMT. 3 (2008).

115. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L. Q. 279, 289 (2005).

116. Valentina Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5 TRANSNAT’L DISP. MGMT. 1, 1-16 (2008).

investment law often presents analogies and overlaps with other international law sub-systems, regional law and even national law. Consequently, one may identify three main streams of comparative reasoning. First, arbitrators often refer to previous arbitral awards. Second, arbitrators refer to other international or regional cases. Third, they refer to national cases. The following sub-sections will scrutinize these three streams.

#### *A. Reference to Previous Arbitral Awards*

Investment arbitration tribunals are increasingly making reference to previous arbitral awards. This creates a sort of endogenous coherence (i.e., a coherence which is internal to international investment law). The fact that most countries, especially the industrialized ones, have predisposed Model BITs to streamline and simplify the negotiating process facilitates the process. On the one hand, these treaties often reaffirm rules of customary law. On the other hand, similar treaty provisions are gradually coalescing and becoming part of customary law.<sup>117</sup> This phenomenon has a major, notable consequence: when interpreting and applying investment treaty provisions, arbitral tribunals, albeit selected on a *ad hoc* basis, are substantively applying the “common law” of investment protection, a law which is common to the international community as a whole.

While the rule of *stare decisis*, or binding precedent, does not apply to international arbitration and more generally to international disputes,<sup>118</sup> arbitrators refer to previous awards. In the recent case *Europe Cement Investment & Trade S.A v. Republic of Turkey*,<sup>119</sup> the Arbitral Tribunal considered the possibility of issuing moral damages, making reference to the *Desert Line* case.<sup>120</sup> In the *Feldman Karpa* case, the Tribunal reaffirmed that a tribunal award has no binding force except between the parties and in respect of a particular case. However, “in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believe[d] it appropriate to discuss briefly relevant aspects of earlier decisions . . . .”<sup>121</sup> In the *Saipem* case,

117. See Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128-30 (2003).

118. For instance, previous panel and Appellate Body decisions in WTO dispute settlement constitute non-binding precedent. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 849-52 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 876 (2001). However, the Appellate Body in *US-Stainless Steel*, required panels to advance “cogent reasons” to justify departure from its previous decisions, thus gradually expanding the quasi-binding force of its decisions. See Appellate Body Report, *United States - Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (April 30, 2008), available at [http://www.worldtradelaw.net/reports/wtoab/us-stainlessmexico\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-stainlessmexico(ab).pdf).

119. *Europe Cement Investment & Trade S.A. v. Republic of Turk.*, ICSID Case No. ARB(AF)/07/2, Award (Aug. 7, 2009), available at <http://arbitration.fr/resources/ICSID-ARB-AF-07-2.pdf>.

120. *Id.* at ¶ 178 (citing *Desert Line Project LLC v. Republic of Yemen*, ICSID Case No. ARB/05/07, Award (Feb. 6, 2008), available at <http://ita.law.uvic.ca/documents/DesertLine.pdf>).

121. *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/9901, Award on Merits (Dec.



after stating that previous decisions were not binding, the Tribunal held that it had to pay due consideration to earlier decisions of international tribunals:

[The Tribunal] 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.<sup>122</sup>

*B. Reference to the Case Law of Other International Courts and Tribunals*

Arbitrators do refer to the decisions of other international or regional courts and tribunals. This form of judicial borrowing creates heterogeneous path coherence, a dynamic process which may lead to a sort of judicial globalization,<sup>123</sup> or the development of a “common law of international adjudication.”<sup>124</sup> Professor Slaughter, who first identified the twin issues of global community of courts and global jurisprudence,<sup>125</sup> highlights the development of *judicial comity*, a set of principles guiding courts in giving deference to foreign courts “as a matter of respect owed by judges to judges, rather than of the more general respect owed by one nation to another.”<sup>126</sup> Judicial transplant is particularly useful to cope with systemic lacunae of a given legal system. As a comparative lawyer once put it, “transplanting is, in fact, the most fertile source of development” as the “insertion of an alien rul[ing] into another . . . system may cause it to operate in a fresh way.”<sup>127</sup>

With regard to investment arbitration, judicial borrowing has been particularly useful in interpreting and clarifying human rights concepts. As Justice Claire L’Heureux-Dubé of the Canadian Supreme Court once said: “More and more courts . . . are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere.”<sup>128</sup> Cross-fertilization and judicial dialogue have created an important body of global jurisprudence.<sup>129</sup> As

16, 2002), available at [http://ita.law.uvic.ca/documents/feldman\\_mexico-award-english.pdf](http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf).

122. Saipem S.p.A. v. People’s Republic of Bangl., ICSID Case No. ARB/05/7, Award, ¶ 90 (June 30, 2009), available at [http://ita.law.uvic.ca/documents/SaipemBangladeshAwardJune3009\\_002.pdf](http://ita.law.uvic.ca/documents/SaipemBangladeshAwardJune3009_002.pdf).

123. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1103 (2000).

124. See BROWN, *supra* note 103, at 4-5.

125. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 193 (2003).

126. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 67 (2004). For more on judicial comity, see also W. T. Worster, *Competition and Comity in the Fragmentation of International Law*, 34 BROOK. J. INT’L L. 119 (2008-09).

127. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 95, 116 (2d ed. 2003).

128. Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16 (1998).

129. When judges do cite foreign decisions as persuasive authority and they follow similar

Slaughter highlights: “Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to increasingly visible international consensus on various issues – a consensus that, in turn, carries its own compelling weight.”<sup>130</sup> The universal recognition of human rights requires judges to take human rights into consideration in the settlement of disputes “in conformity with the principles of justice and international law,” as prescribed in the preamble of the Vienna Convention on the Law of Treaties.<sup>131</sup>

Investment treaty tribunals have often referred to the decisions of other international courts for guidance. The Iran-U.S. Claims Tribunal has been a useful source of reference for arbitral tribunals.<sup>132</sup> The Tribunal, which was established to resolve the political crisis between Iran and the United States in 1979, has decided *inter alia* claims which arose out of expropriations or other measures affecting property rights. Because of the comparability of the subject matter, arbitral tribunals have referred to its case law with regard to some key issues such as regulatory expropriation. For instance, in *Saipem v. Bangladesh*, the Arbitral Tribunal made reference to a case of the Iran-U.S. Claims Tribunal to hold that a state can expropriate immaterial rights.<sup>133</sup> In his Separate Opinion in the *Thunderbird* case, professor Wälde made reference to the Iran-US Tribunal’s practice with regard to the award of attorney costs.<sup>134</sup>

ICSID Tribunals have extensively referred to decisions of the ICJ<sup>135</sup> and its predecessor, the Permanent Court of International Justice.<sup>136</sup> Indeed, public

reasoning, cross-fertilization evolves in something deeper resembling an emerging global jurisprudence. See McCrudden, *supra* note 104, at 393-94.

130. Slaughter, *supra* note 126, at 78.

131. Ernst-Ulrich Petersmann, *Judging Judges: Do Judges Meet Their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’?*, 1 EUR. J. LEGAL STUD. 1 (2007).

132. The political crisis between Iran and the United States arose when 52 United States nationals were detained at the United States Embassy in Tehran in November 1979 and the United States subsequently froze Iranian assets. The Tribunal was established out of the Algiers Accords of January 19, 1981. The literature on the Iran U.S. Tribunal is extensive. See CHRISTOPHER R. DRAHOZAL & CHRISTOPHER S. GIBSON, *THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION* (2009).

133. *Saipem S.p.A. v. People’s Republic of Bangl.*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 130 (Mar. 21, 2007), available at <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf> (citing Phillips Petroleum Company Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989)).

134. *Int’l Thunderbird Gaming Corp. v. United Mexican States*, 255 Fed. Appx. 531 (2007) (separate opinion of arbitrator Thomas Wälde, at ¶ 140, available at [http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird\\_Dissent.pdf](http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf)) (quoting *Sylvania v Iran*, 8 Iran-US CTR 298, 324 (1985)).

135. For instance, in *Maffezini v. Spain*, the Tribunal referred to the ICJ decision *Rights of Nationals of America in Morocco* (France v. United States) when deciding on the scope of protection of the MFN clause. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on Jurisdiction, ¶¶ 43-50 (Jan. 25, 2000), available at [http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English\\_001.pdf](http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf).

136. *LG&E Energy Corp. v. Arg. Republic*, ICSID Case No. ARB/02/1, Award, ¶ 11 (July 25, 2007), available at [http://ita.law.uvic.ca/documents/LGEEEnglish\\_006.pdf](http://ita.law.uvic.ca/documents/LGEEEnglish_006.pdf). The Permanent Court of International Justice was established by the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946. The work of the PCIJ, the first permanent international

international law can be considered the legal framework or system of which international investment law is a sub-system. Before the inception of investment treaty arbitration, investment treaties provided for an interstate process only; governments therefore had to “sponsor” private claims. Nowadays, recourse to diplomatic protection has become “residual,”<sup>137</sup> and primarily international investment treaties, rather than customary international law alone, now protect foreign investors. Against this background, arbitral tribunals still take into account the case law of the ICJ and PCIJ to clarify the meaning of legal concepts. A notable example relates the nationality issue.<sup>138</sup> In *Soufraki v. United Arab Emirates*, the Arbitral Tribunal referred to the *Nottebohm* case (*Liechtenstein v. Guatemala*) when discussing the question of the nationality of the claimant.<sup>139</sup>

However, other arbitral tribunals refer to the *dicta* of international tribunals as a starting point for further enquiry. For instance, in the *Europe Cement* case,<sup>140</sup> when the respondent alleged that the claimant had abused the process and requested declaratory relief (i.e., a declaration that there had been such abuse), the Arbitral Tribunal stated: “Declaratory relief is a common form of relief in international tribunals in state-to-state cases, but no cases were cited to us of tribunals established under the ICSID Convention. . . or under international investment treaties more generally where declarations were granted as a form of relief.”<sup>141</sup> In conclusion, the Tribunal acknowledged that declaratory relief had been used in the *Corfu Channel Case* and the *Rainbow Warrior Case*,<sup>142</sup> but it also questioned whether previous arbitral tribunals had adopted such declaration. In

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tribunal with general jurisdiction, made possible the clarification of a number of aspects of international law, and contributed to its development. See Antonio S. de Bustamante Y Sirven, *The Permanent Court of International Justice* 9 MINN. L. REV. 240 (1924-1925); OLE SPIERMANN, *INTERNATIONAL LEGAL ARGUMENTS IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY* (2005).

137. While in the seventies, the ICJ in the *Barcelona Traction* case found it “surprising” that the evolution of international investment law had not gone further in the light of the expansion of economic activities in the preceding half century, in the more recent *Diallo* case, the Court has recognized the residual nature of the exercise of diplomatic protection and recourse to the Court in case of investment disputes. These different obiter dicta reflect the recent flourishing of investment treaties and investment treaty arbitration. *Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, at ¶ 89 (Feb 5); *Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, (Preliminary Objections), at ¶¶ 88-91 (Judgment of May 24, 2007), available at <http://www.icj-cij.org/docket/files/103/13856.pdf>.

138. The nationality issue concerns the determination of the nationality of the claimant. See ICSID Convention, *supra* note 15, art. 25.

139. Hussein Nuaman Soufraki v. U.A.E., ICSID Case No. ARB/02/7, Decision on Jurisdiction, ¶ 45 (July 7, 2004), available at [http://ita.law.uvic.ca/documents/Soufraki\\_000.pdf](http://ita.law.uvic.ca/documents/Soufraki_000.pdf).

140. *Europe Cement Investment & Trade S.A. v. Republic of Turk.*, ICSID Case No. ARB(AF)/07/2, Award (Aug. 7, 2009), available at <http://arbitration.fr/resources/ICSID-ARB-AF-07-2.pdf>.

141. *Id.* at ¶ 148.

142. *Id.* at ¶ 148, n.32 (explaining that the “Respondent cited to the Tribunal both the *Corfu Channel Case* (UK v. Albania) (Merits), [1949] ICJ Reports 4, RLA-15 and the *Rainbow Warrior Case* (New Zealand v. France), Award, 30 Apr. 1990, 20 RIAA 215, RLA-42.”).

other words, notwithstanding the persuasiveness of the ICJ decisions, the Arbitral Tribunal was enquiring into further developments of the investment treaty arbitration case law.

Arbitral tribunals have cursorily relied on WTO case law for interpreting investment treaty and NAFTA Chapter 11 provisions. For instance, in *ADF v. United States of America*,<sup>143</sup> the Arbitral Tribunal referred to the *Shrimp Turtle* case and *Hormones* AB reports when applying customary rules of treaty interpretation.<sup>144</sup> In his Separate Opinion in the *Thunderbird* case,<sup>145</sup> Thomas Wälde made the argument that “gambling services, in particular if not typically accompanied by criminal by-products, have to be treated as a fully legitimate investment,” relying *inter alia* on WTO panel and Appellate Body cases.<sup>146</sup>

The case for drawing from these different bodies of law is evident. On the one hand, authors have noted that “international courts essentially do share the same functions” by settling international disputes in accordance with law, and ensuring the proper administration of justice.<sup>147</sup> On the other hand, certain international treaties present an articulated regime that the investment treaties presuppose.<sup>148</sup> For instance, with regard to intellectual property, investment treaties restate or enhance the intellectual property guarantees provided in the WTO Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement).<sup>149</sup> When arbitrators have to interpret *TRIPs-plus* standards, they must first refer to the TRIPs standards. Other authors support such an approach, as it would impede the dilution of multilateral norms while providing predictability.<sup>150</sup> As Hsu points out, such borrowing offers direction in substantive interpretation of treaty language as

143. *ADF Group Inc. v. U.S.*, ICSID Case No. ARB/AF/00/1, Award, (Jan. 9, 2003), available at [http://ita.law.uvic.ca/documents/ADF-award\\_000.pdf](http://ita.law.uvic.ca/documents/ADF-award_000.pdf).

144. *Id.* at ¶ 147 (citing Appellate Body report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 165, 181, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

145. *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 255 Fed. Appx. 531 (2007) (separate opinion of arbitrator Thomas Wälde, available at [http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird\\_Dissent.pdf](http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf)).

146. *Id.* at ¶ 18 (citing to “the WTO Appeals Body decision in *Antigua/Barbuda v US* case of 7 Apr. 2005 ; WT/DS285/AB/R [which] follow[s] on the earlier panel decision.”).

147. Chester Brown, *The Use of Precedents of Other International Courts and Tribunals in Investment Treaty Arbitration*, 5(3) TRANSNAT'L DISP. MGMT. 1, 2 (2008).

148. Christina Pfaff, *Alternative Approaches to Foreign Investment Protection*, 3(5) TRANSNAT'L DISP. MGMT. 1, 15 (2006).

149. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments- Results of the Uruguay Round, 33 I.L.M. 1994. For commentary, see the following texts: DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (2d ed. 2003); CARLOS M. CORREA, *TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT* (2007).

150. Locknie Hsu, *Applicability of WTO Law in Regional Trade Agreements: Identifying the Links*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 449 (Lorand Bartels & Federico Ortino eds., 2006).

arbitral panels would be “able to draw upon the expertise of WTO dispute panels and the Appellate Body in the development of legal concepts and principles” albeit maintaining the possibility to contract away such jurisprudence by setting their own interpretation.<sup>151</sup>

In parallel, arbitral tribunals have made reference to and relied on human rights jurisprudence, to varying degrees, to determine the content of investment law.<sup>152</sup> For instance, in *Lauder v. Czech Republic*, the UNCITRAL Tribunal made reference to the European Court of Human Rights (ECtHR) case *Mellacher v. Austria* to derive the distinction between a *formal* and a *de facto* expropriation.<sup>153</sup> The *Tecmed* Tribunal made reference to an Inter-American Court of Human Rights case, *Ivcher Bronstein v. Peru*, to determine the content of indirect expropriation.<sup>154</sup> In *Saipem S.p.A v. Bangladesh*, the Tribunal cited several cases from the ECtHR for affirming that arbitral awards confer on parties a right to the sums awarded.<sup>155</sup> In the *Biloune* case,<sup>156</sup> the investor argued that the government of Ghana had breached both the investment treaty and human rights obligations, and in the *Euro-Tunnel* case the claimant argued that the obligations of the United Kingdom and France should be read in conjunction with the European Convention on Human Rights and its First Protocol.<sup>157</sup> Also *amicus curiae* may recall non-investment provisions in their briefs.<sup>158</sup> Finally, human rights obligations have also

151. *Id.* at 551-52.

152. Fry, *supra* note 94, at 83.

153. *Lauder v. Czech Rep.*, Final Award, ¶ 200 (Sept. 3, 2001), 9 ICSID Rep. 66 (2001) (quoting *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) (1989)), available at <http://ita.law.uvic.ca/documents/LauderAward.pdf>.

154. *Técnicas Medioambientales S.A. v. United Mexican States*, ICSID Case No. ARB/(AF)/00/2, Award, ¶ 116, n.36 (May 29, 2003) 43 I.L.M. 133 (2004) (quoting *Baruch Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, at ¶¶ 120-24 (Feb. 6, 2001)), available at [http://ita.law.uvic.ca/documents/Tecnicas\\_001.pdf](http://ita.law.uvic.ca/documents/Tecnicas_001.pdf) [hereinafter *Tecmed*].

155. *Saipem S.p.A. v. People’s Republic of Bangl.*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 130 (Mar. 21, 2007), available at <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf> (citing *Stran Greek Refineries and Stratis Andreadis v. Greece*, App. No. 13427/87, Eur. Ct. H.R., ¶¶ 59-62 (1994), available at <http://worldlii.org/eu/cases/ECHR/1994/48.html> and *Brumarescu v. Rom.*, App. No. 28342/95, Eur. Ct. H.R., 10 Hum. Rts. Case Dig. 237-41 (1999), available at <http://worldlii.org/eu/cases/ECHR/1999/105.html>).

156. *Biloune & Marine Drive Complex Ltd. v. Ghana Invs. Ctr. & Gov’t of Ghana*, Award on Jurisdiction and Liability, UNCITRAL, (Oct. 27, 1989), 95 ILR 183..

157. Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals’ Perspective*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY-ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH* 323, 324-25 (Tomer Broude & Yuval Shany eds., 2008). In particular, in the *Euro-Tunnel Case*, the two claimants complained, *inter alia*, about the repeated delays and costs related to the intrusions in their French terminal of illegal immigrants intending to enter in the United Kingdom. Further they complained that the use of the Tunnel by illegal immigrants has led the United Kingdom to impose civil penalties on the concessionaries. *Channel Tunnel Group Ltd. & France Manche S.A. v. Gov’ts of U.K. & Fr.*, Partial Award on Jurisdiction, ¶¶ 107, 110 (Jan. 30, 2007), available at [http://www.pca-cpa.org/upload/files/ET\\_PAen.pdf](http://www.pca-cpa.org/upload/files/ET_PAen.pdf).

158. Hirsch, *supra* note 157, at 325; see, e.g., *Glamis Gold Ltd. v. U.S.*, NAFTA, Non-Party Supplemental Submission: Submission of the Quechan Indian Nation (Oct. 16, 2006), available at

been invoked in the determination of remedies phase.<sup>159</sup> Other cases have made indirect reference to human rights cases. For instance, *Azurix Corp. v. Argentine Republic* indirectly cited human rights jurisprudence by relying on the relevant portions of the *Tecmed* decision.<sup>160</sup> Similarly, the *EnCana* Tribunal cited a domestic arbitration case that quoted a human rights case.<sup>161</sup> While some commentators have highlighted the “reluctance of tribunals to openly and systematically consider the public interest,”<sup>162</sup> others have stressed that arbitral tribunals increasingly rely on human rights cases “in their decisions, not merely in their *obiter dicta*.”<sup>163</sup>

However, arbitral tribunals have generally adopted a cautious approach to the issue.<sup>164</sup> While the *TECMED* Tribunal relied on the proportionality test which has been formulated by the ECtHR,<sup>165</sup> the Arbitral Tribunal in *Biloune* held that its jurisdiction was limited to disputes in respect of the foreign investment and that it lacked “jurisdiction to address, as an independent cause of action, a claim of violation of human rights.”<sup>166</sup> Arbitral tribunals are forums of limited jurisdiction, empowered to hear claims on treaty violations. Similarly, the *Siemens* Tribunal rejected the application of the margin of appreciation doctrine in investment arbitration, holding that “Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty.”<sup>167</sup> In the *Euro-tunnel* case, the Tribunal defined its jurisdiction as arising only from the Canterbury Treaty and the related concessionary contract.<sup>168</sup> Therefore, the Tribunal deemed that its jurisdiction was

<http://www.state.gov/documents/organization/75016.pdf>.

159. See, e.g., *Compañía del Desarrollo de Santa Elena v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, ¶¶ 64-68 (Feb. 17, 2000), available at [http://ita.law.uvic.ca/documents/santaelena\\_award.pdf](http://ita.law.uvic.ca/documents/santaelena_award.pdf).

160. *Azurix Corp. v. Arg. Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 311-12 (June 23, 2006), available at <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.

161. *EnCana v. Ecuador*, London Ct. Int'l Arb., Award, ¶ 176, n.124 (Feb. 3, 2006), available at <http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf>.

162. Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 347, 347 (2008-09).

163. Fry, *supra* note 94, at 81, n.15 (noting that “[a]rbitral tribunals are not throwing in references to human rights cases merely for the sake of appearances.”).

164. Hirsch, *supra* note 157 at 324, 331.

165. *Técnicas Medioambientales S.A. v. United Mexican States*, ICSID Case No. ARB/(AF)/00/2, Award, ¶ 122 (May 29, 2003) 43 I.L.M. 133 (2004), available at [http://ita.law.uvic.ca/documents/Tecnicas\\_001.pdf](http://ita.law.uvic.ca/documents/Tecnicas_001.pdf). The arbitral tribunal made extensive reference to the *dicta* of other international courts and tribunals, including the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights and the Iran-United States Claims Tribunal. *Id.* at ¶¶ 116, 120.

166. For commentary see Hirsch, *supra* note 157, at 329. *Biloune & Marine Drive Complex Ltd. v. Ghana Invs. Ctr. & Gov't of Ghana*, Award on Jurisdiction and Liability, UNCITRAL, (Oct. 27, 1989), 95 ILR 183, 203; *Biloune Case Summary*, *supra* note 156.

167. *Siemens A.G. v. Arg. Republic*, ICSID No. ARB/02/08, Award, ¶ 354 (Feb. 6, 2007), available at <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>.

168. *Channel Tunnel Group Ltd. & France Manche S.A. v. Gov'ts of U.K. & Fr.*, Partial Award on Jurisdiction, ¶¶ 124, 135, 152 (Jan. 30, 2007), available at <http://www.pca-cpa.org/upload>

limited only to claims concerning the alleged violation of the concession contract and/or the Treaty. Accordingly, any violation of other international rules of the European Convention on Human Rights or EC law was beyond jurisdiction. However, the Arbitral Tribunal did not exclude the possibility that violations of the Treaty and the contract could be examined in light of rules of general public international law. As some authors have pointed out, “[i]n other words, even if the direct violation of such rules was beyond its jurisdiction, the evaluation of a violation of the concession contract *in comparison* with these provisions was not excluded.”<sup>169</sup>

International judicial borrowing, that is, borrowing decisions from other international fora in the interpretation of international law, would be compatible with the unity of public international law and would promote its coherence. Judicial dialogue is feasible and possible: informal linkages already exist. Some arbitrators have been professors of public international law or judges in other international fora.<sup>170</sup> More substantially, other subsystems of public international law may provide interpretative guidance to arbitral tribunals.

However, on a cautionary note, it is important to highlight that distinctions exist between the different legal sub-systems. Textual differences need to be taken into account, as interpretation cannot be used to transpose obligations from one field to another, or to create new obligations. For instance, in *Victor Pey Casado v. Chile*, the Arbitral Tribunal made reference to the ICJ *LaGrand* judgment, which found that the provisional measures under Article 41 of the ICJ statute were binding.<sup>171</sup> However, Article 47 of the ICSID Convention contains different wording, as it states that arbitral tribunals shall have the power to “recommend” and not to “indicate” provisional measures.<sup>172</sup> While one may agree that such an

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/files/ET\_PAen.pdf (referencing the jurisprudence of the ICJ, the Permanent Court of International Justice and the International Tribunal for the Law of the Sea Award, at ¶ 135, ¶124, and ¶ 152 respectively).

169. Mathias Audit, *The Channel Tunnel Group Ltd and France-Manche SA v. United Kingdom and France*, 57 INT'L & COMP. L.Q. 724, 728 (2008) (emphasis added).

170. For instance, arbitrators may have served as former Presidents or judges of the ICJ (Bedjaoui, Guillaume, Higgins, Schwebel), former members of the WTO AB (Feliciano, Bacchus), former Judges of the Inter-American Court of Human Rights (Nikken, Cançado Trindade), former President of the UN Security Council (Fortier); or may be academics (Berman, Bernini, Böckstiegel, Brower, Crawford, Dupuy, Giardina, Kauffmann-Kohler, Higgins, Lowe, Stern, Weiler). See, e.g., International Council for Commercial Arbitration (ICCA), ICCA Officers & Members, <http://www.arbitration-icca.org/officers-and-members.html#/officers-and-members/MEMBERS.html> (last visited Sept. 9, 2010); Law.com, Arbitration Scorecard 2007: Top 50 Treaty Disputes, *The American Lawyer*, June 13, 2007, <http://www.law.com/jsp/article.jsp?id=1181639136817> (listing the top 50 2007 arbitration disputes with many of the aforementioned judges and scholars named as the arbitrators).

171. *Victor Pey Casado & President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, ¶ 17 (Sept. 25, 2001), 16 ICSID Rep. 603 (2001), available at <http://ita.law.uvic.ca/documents/Victor-French.pdf> (French version, only available in Spanish or French).

172. See Brown, *supra* note 147, at 4 (criticizing this approach as inappropriate use of precedent, subsequently followed by the arbitral tribunal in *Tokio Tokelés v. Ukraine* (Tokio Tokelés v. Ukr., ICSID ARB/02/18, Procedural Order No. 1, ¶ 4 (Jul. 1, 2003), 20 ICSID Rep. 205 (2005), available at <http://ita.law.uvic.ca/documents/tokios-order1.pdf>)).

interpretation favors the effectiveness of the ICSID Convention, and can be justified by the inherent powers of international courts to grant provisional measures, without a doubt such line of reasoning involves the expansion of the treaty terms beyond the purpose of the treaty makers,<sup>173</sup> clearly contributing to the development and evolution of law, but determining margins of uncertainty. In other cases, arbitral tribunals have followed the literal treaty terms vis-à-vis other jurisdictional trends. For instance, in the *Methanex* case, when the claimant sought to show that it was a producer “in like circumstances” as US domestic producers by arguing that Methanex produced “like products” and relying on related WTO jurisprudence, the Tribunal declined to rely on such jurisprudence, because NAFTA Chapter 11 did not contain the term of art “like product” which is relevant in the interpretation of GATT Article III.<sup>174</sup> In addition, investment law does not incorporate a necessity standard in its disciplines, and in cases of breach its remedies include compensation, not cessation.

The problem with judicial borrowing is that it is a very powerful instrument which needs to be handled properly. The major risk consists of adopting an ideology of free decision making<sup>175</sup> and creating anarchy. In the case selection there may be a certain bias, as relying on human rights case law rather than WTO jurisprudence makes a difference in the context of a specific case.<sup>176</sup> Some have pointed out that “the dissimilar architecture of treaties, including objectives, obligations, defenses, and remedies, advises against attempts of outright transposition of rules, methodologies, or solutions. . . .”<sup>177</sup>

### *C. Reference to the Jurisprudence of National Courts*

As consideration of other legal regimes is conceptually possible in investment treaty arbitration, some arbitral tribunals expressly refer to national cases.<sup>178</sup> Is national case law applicable to foreign investment-related disputes? To answer this question, a distinction needs to be made. If the applicable law is that of the host

173. CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 758 (2001) (Professor Schreuer underlined that the “Convention’s legislative history shows clearly that a conscious decision was made *not* to grant the Tribunal the power to order binding provisional measures.” (emphasis added)).

174. *Methanex Corp. v. U.S., NAFTA, Final Award, Part IV, ch. B*, ¶¶ 23-35 (Jan. 15, 2001), available at <http://www.state.gov/documents/organization/51052.pdf>.

175. See, e.g., RAIMO SILTALA, *A THEORY OF PRECEDENT- FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW* 4 (2000) (analyzing free judicial decision making); see also RICCARDO GUASTINI, *LE FONTI DEL DIRITTO E L'INTERPRETAZIONE* (1993) (examining the sources of law and their interpretation under a judicial decision making context).

176. See Ran Hischl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

177. Marcos A. Orellana, *Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 671, 788 (Philippe Kahn & Thomas W. Wälde eds., 2007).

178. See, e.g., *Grand River Enterprises Six Nations, Ltd., et al. v. U.S.*, Decision on Objections to Jurisdiction, ¶ 77, n.34 (July 20, 2006), available at <http://www.state.gov/documents/organization/69499.pdf> (referencing U.S. national cases, *U.S. v. Nancy*, 189 F.3d 954 (9th Cir. 1999) and *Christoph v. U.S.*, 931 F. Supp. 1564 (S.D. GA. 1996), to validate the concept that “a person may “incur” expenses before he or she actually dispense any fund.”).



state, reference to its jurisprudence in order to clarify relevant provisions may be made *ipso jure*.<sup>179</sup> Questions arise with regard to reference to jurisprudence of other national courts.<sup>180</sup> Adopting a functionalist approach, some emphasize that that the issue of regulatory expropriation, and other similar issues identified in investor-state dispute settlement, initially emerged as “constitutional issue[s] in national law.”<sup>181</sup> According to Wälde and Kolo, the debate on regulatory taking in the jurisprudence of the US Supreme Court presents a constitutional character that would make it “particularly apposite to serve as a laboratory — but also as relative precedent — for the interpretative challenges” in international dispute settlement.<sup>182</sup> The functionalist approach is based on the *praesumptio similitudinis*,<sup>183</sup> and holds that “[c]omparative constitutional law seems to provide the most suitable analogy and precedent” to investor-state arbitration.<sup>184</sup>

However, such a functionalist approach reduces the law to a formal technique of conflict resolution denying its political underpinnings. The functionalists deprive legal provisions of their systemic context and “integrat[e] them in an artificial universal typology of ‘solutions.’”<sup>185</sup> Nonetheless, one of the main features of investment arbitration is its detachment or separation from national courts and their potential biases. From an international law perspective, investment treaties do not amount to “constitutional charters”; rather, they institutionalize a limited set of obligations to which sovereign states have voluntarily consented.<sup>186</sup> Also, it may be practically impossible to take the wide variety of national jurisprudence into account. Ideally, an arbitral tribunal should make a thorough survey of comparative law, making use of the scholarly work that has been done on the issue in order to devise the most efficient legal system. But this does not happen in practice. Usually only the laws of a small number of countries are cited.<sup>187</sup> Therefore, it may be difficult to eliminate cultural biases and possible hegemonic thinking. For example, some authors have criticized reference to the

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179. See A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist Versus Dualist Controversies*, 12 EUR. J. INT’L L. 309, 320 (2001).

180. For a seminal study on the importance of comparative law in international law and arbitration, see HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION* (1927).

181. Wälde & Kolo, *supra* note 90, at 821.

182. *Id.* at 847.

183. Konrad Zweigert, *Die “Praesumptio Similitudinis” als Grundsatzvermutung rechtsvergleichender Method*, in BUTS ET METHODS DU DROIT COMPARE/AIMS AND METHODS OF COMPARATIVE LAW 735 (M. Rotondi ed., 1973) (examining the “practice of similitude” as a fundamental assumption of comparative law).

184. Wälde & Kolo, *supra* note 90, at 822.

185. Frankenberg, *supra* note 63, at 411.

186. Gus V. Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 130 (2006).

187. See Nedim Peter Vogt, *The International Practice of Law and the Anglo-Internationalization of Law and Language*, in Festschrift Liber Amicorum Tugrul Ansay 455, 459 (Sabih Arkan & Aynur Yongalik eds., 2006) (scrutinizing “advent of English as the Language of Law within the context of the Anglo-Internationalization of the practice of law . . . .”); see also Frankenberg, *supra* note 185, 442 (“Despite all these claims that the comparatist be open-minded and think supra-nationally, the civil and common law still rule over the comparatists’ world.”).

US jurisprudence because this would be tantamount to rewriting other countries' constitutional culture and experience.<sup>188</sup> Somehow, drawing on the particular constitutional experience of a country would re-politicize investment disputes, against more neutral international canons.<sup>189</sup> Finally, one may question whether this might amount to extraterritorial application of law.

In conclusion, as an eminent comparative law scholar pointed out, “[t]he conscious and limited use of national legal traditions is advantageous in that it enriches international law with useful source materials, analogies and techniques.”<sup>190</sup> However, “preconceptions” are dangerous, and every case would deserve *ad hoc* consideration. More than a century ago, Oppenheim warned that “the science of international law must be careful in the appreciation of such municipal case-law.”<sup>191</sup> If the applicable law is the law of the host state, of course reference may be made to the administrative law and jurisprudence of the host state. Where the applicable law is international law, reference to national cases becomes a more sensitive issue which the arbitrators must decide. In any case, if national precedents as well as international ones may be taken into account for the persuasiveness of their *ratio decidendi*, they are not binding on international arbitrators.

## VI. CONCLUSION

This paper has focused on the use of the comparative method in international investment arbitration. Comparison is a mode of thinking and is consistently used in both literary and legal sources. While poets have the amplest freedom to compare extremely different elements,<sup>192</sup> lawyers need to follow strict rules. In legal systems and investment arbitrations comparisons are consistently being made; the phenomenon is far from new. Why then does it need to be scrutinized? There are two main reasons for doing so. First, it seems that while comparisons are made, they are often done without full awareness of their implications from a systemic perspective. Second, although investment treaty arbitration has become the most common method for settling investor-state disputes, some authors have nonetheless harshly criticized it because of its alleged lack of human rights

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188. E.g., David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada* 46 U. TORONTO L.J. 499 (1996); David Schneiderman, *Constitution or Model Treaty? Struggling over the Interpretative Authority of NAFTA*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 294 (Sujit Choudhry ed., 2006).

189. Kennedy, *supra* note 1, at 606-08.

190. LINDELL V. PROTT, *THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE* 230 (1979).

191. Lassa Oppenheim, *The Science of International Law: Its Tasks and Methods*, 2 AM. J. INT'L L. 313, 336 (1908); *Id.* at 338 (The author added: “I do not deny . . . that the intrinsic value of many such decisions and the convincing arguments which accompany them had their bearing upon courts of other countries and thereby in fact made these cases precedents which are followed by the courts of all or many other countries, but in law and *per se* they are and remain precedents for the judges of their own country only.”).

192. For instance, Shakespeare famously compared the beloved friend to a summer day. WILLIAM SHAKESPEARE, *SONNETS*, SONNET XVIII.

consideration. This paper has questioned whether the mechanism may actually benefit from a wider use of comparative law.

Like any other kind of adjudication, consistent patterns, attitudes, values and opinions characterize investment treaty arbitration. All these elements form what may be called a *legal culture*.<sup>193</sup> The culture of investment treaty arbitration constitutes a sort of melting pot of different legal traditions as it presents mixed characteristics of common law and civil law traditions. While previous studies have focused on the procedural dimension of the phenomenon, this article has focused on its substantive dimension. While other studies have compared the different legal frameworks which regulate foreign investments at the national level, this study has focused on the role of the comparative method in international investment law and arbitration.

After scrutinizing arbitrators' use of comparative law in investment treaty disputes, this paper critically assessed this approach. Arbitrators may use analogies and judicial borrowing; this is part of legal reasoning and it is legitimate to do so, in light of customary rules of treaty interpretation. According to these rules, contextual interpretation is a legitimate tool of interpretation. Furthermore, arbitrators may detect international principles of law through the analysis of relevant jurisprudence of other courts and tribunals. However, they need to pay attention to methodology issues. Judicial borrowing cannot be an uncritical exercise. As many comparative lawyers well know, legal norms express a certain political position,<sup>194</sup> being the outcome of certain historical evolution.<sup>195</sup> The case selection and the selection of the *tertium comparationis* may affect the outcome of the case.

This study highlights the fact that reference to national case law may be problematic in consideration of extraterritorial character of such application and of the risk of re-politicizing investment treaty disputes. National case law becomes relevant where the applicable law is the *lex loci*. By contrast, reliance on persuasive precedents of previous arbitral tribunals may lead to the coalescence of different legal traditions and experiences and to an increased coherence of the system.<sup>196</sup> As Lauterpacht pointed out, “[i]nternational arbitral law has produced a body of precedent which is full of instruction and authority. Numerous arbitral awards have made a distinct contribution to international law by reason of their scope, their elaboration, and the conscientiousness with which they have examined the issue before them.”<sup>197</sup>

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193. See, e.g., LAWRENCE FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15 (1975); Roger Cotterell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13-14 (David Nelken ed., 1997).

194. RENÉ RODIÈRE, *INTRODUCTION AU DROIT COMPARÉ* 4 (1979) (explaining that “les règles de droit n’intéressent pas le comparatiste dans leur expression normative, mais tant qu’elles manifestent une certaine position politique” or as translated from French, “the comparatist is not interested in the rules of law in their normative expression, but as they manifest a certain political position.”).

195. *Id.*

196. McLachlan, *supra* note 115.

197. Paulsson, *supra* note 83, at 97 (citing HERSCH LAUTERPACHT, *THE DEVELOPMENT OF*

In parallel, the increasing reliance on cases of other international courts and tribunals may increase the perceived legitimacy of the system especially in cases in which constitutional dilemmas are at stake. This comparative mood of arbitral panels should not be read as arbitral activism or as articulation of *free law* doctrine, but as an interpretative tool allowed for in customary rules of treaty interpretation.<sup>198</sup> Furthermore, insofar as certain legal principles have become norms of customary law they may be applied to the disputes as applicable law. In conclusion, given the attitude of arbitral tribunals to borrow from the experience of other courts and tribunals and the comparative trend of scholarly analysis, a more conscious use of the comparative method needs to be promoted. Comparisons are not a neutral or objective phenomenon: “[T]he comparativist has to regard herself as being involved: involved in an ongoing social practice constituted and pervaded by law; involved in a given legal tradition . . .; and involved in a specific mode of thinking and talking about law.”<sup>199</sup> Once aware of perspective, arbitral tribunals and interpreters can make conscious use of the instruments of law. Not only would such awareness limit eventual abuses of the comparative method, but it would also favor the coherence of the international legal system. While investment law is closely associated with what arbitrators say it is, the two are distinct: “[P]rior cases provide evidence of the law, but they cannot be conclusive.”<sup>200</sup>

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INTERNATIONAL LAW BY THE INTERNATIONAL COURT 17-18 (1958).

198. Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361 (2008).

199. Frankenberg, *supra* note 63, at 443.

200. Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 73, 80 (Laurence Goldstein ed., 1987).