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INTERNATIONAL INVESTMENT LAW AND THE PUBLIC LAW ANALOGY: THE FALLACIES OF THE GENERAL PRINCIPLES METHOD

ABSTRACT

Over the past ten years, commentators have drawn an analogy between the international investment regime and domestic public law in order to fill gaps, resolve ambiguities, and understand the nature of the investment regime. One way in which domestic public law may be relevant is if it reflects a general principle of law that is applicable by virtue of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. The practice of international investment tribunals demonstrates, however, that tribunals do not use domestic law according to the 'general principles method'. Instead, investment tribunals' use of comparative law raises various normative and methodological issues that have not yet been thoroughly addressed in the literature. The article identifies and addresses some of those issues.

I. COMPARATIVE PUBLIC LAW AND THE INTERPRETATION OF INVESTMENT TREATIES

The relative novelty of the international investment regime has led authors to draw analogies with a range of other systems, from international commercial arbitration[1] to human rights law,[2] in order to respond to the host of theoretical and practical challenges the regime poses.[3] Of these analogies, perhaps the most interesting is the parallel drawn with domestic public law.[4] Advocates of the analogy argue that investment disputes are "regulatory dispute[s] arising between

[1] See eg *Pope & Talbot Inc. v. Canada* (Merits, Phase 2) (10 April 2001) para. 79. See further, Charles Brower, 'W(h)ither International Commercial Arbitration', (2008) 24 Arbitration International 181; Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration', (2001) 55 International Organization 919.

[2] See eg *Mondev International Ltd v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) paras 143-44. See further, Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008) 136-43; Valentina Vadi, *Analogies in International Investment Arbitration* (CUP 2016) 217-19.

[3] See generally, Anthea Roberts, 'Clash of the Paradigms: Actors and Analogies Shaping the Investment Treaty System', (2013) 107 American J Int L 45. Cf. Martins Paparinskis, 'Analogies and Other Regimes of International Law', in Zachary Douglas, Joost Pauwelyn & Jorge E. Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014).

[4] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008); Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2012); Van Harten (n 2).

the state (acting in a public capacity) and an individual who is subject to the exercise of public authority by the state"[5] in much the same way as public and administrative law disputes relate to the exercise of public authority in domestic legal systems.[6] They argue that this functional similarity means that it is beneficial to look to domestic public law to fill gaps, resolve ambiguities, or understand the nature of the international investment regime.[7]

One of the ways to operationalise the public law analogy is through treaty interpretation.[8] Arbitrators could draw on comparative surveys of domestic public and administrative law in order to guide the interpretation of the vague provisions and broad standards that are invariably incorporated in investment treaties.[9] Proponents argue that the benefits of drawing on comparative public law in this way are manifold: it would enable the investment law regime to benefit from the experience that domestic legal systems have in dealing with analogous legal issues,[10] restrain arbitrators' discretion in interpreting treaties,[11] and enhance the perceived legitimacy of investment arbitration.[12] Yet, despite enjoying growing support in academia and in practice,[13] the use of comparative public law to interpret investment treaties has been criticised on both methodological and practical grounds.[14]

This article argues that much of the debate regarding the use of comparative public law to interpret investment treaties is to a certain extent based on a false premise. One of the central strands of argument adduced in favour of such comparative reasoning is that domestic law is relevant insofar as it reflects a general principle of law that is applicable by virtue of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[15] Practice, however, demonstrates that

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[5] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', (2006) 17 European J Int L 121, 148.

[6] See Stephan W Schill, 'International Investment Law and Comparative Public Law – An Introduction', in Schill (ed.) (n 4) 17; Roberts (n 3) 64-65 (distinguishing between the public action and public interest theories of international investment law).

[7] Roberts (n 3) 46.

[8] eg Stephan W Schill, 'The Sixth Path: Reforming Investment Law from Within', (2014) 11 Transnational Dispute Management.

[9] Schill, 'Introduction' (n 6) 36

[10] *ibid.*

[11] Montt (n 4) 343-44.

[12] Vadi (n 2) 241.

[13] *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) para 13; *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) para 178; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) para 506; *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) paras 111, 129; *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012) para 166; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) para 403; *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) para 576.

[14] José E Alvarez, 'Is Investor-State Arbitration 'Public'?', (2016) 7 J Intl Dispute Settlement 534; see also José E Alvarez, "Beware: Boundary Crossings' – A Critical Appraisal of Public Law Approaches to International Investment Law', (2016) 17 J World Investment and Trade 171.

[15] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

domestic law is commonly used by courts and tribunals as an interpretative aid outside the framework of Article 31 VCLT and outside the formal sources of law enumerated in Article 38 of the Statute of the International Court of Justice (ICJ). Investment tribunals that have drawn on domestic law have done so not because it embodies a general principle of law, but rather because it constitutes a "benchmark" against which investment protection is to be assessed,[16] or provides the "background" for the interpretation of a provision,[17] or because it demonstrates the fairness of a regulatory measure.[18] Indeed, similar uses of domestic law play a role in the reasoning of other international courts and tribunals, particularly in the domains of human rights law and international criminal law. The existing literature fails to address squarely the normative and methodological issues that are raised by the tribunals' actual use of comparative law.

This article is composed of five sections. Section II traces the development of the public law analogy and the debate surrounding the use of comparative public law in the literature, highlighting the centrality of the 'general principles method'. Section III examines the awards of international investment tribunals in order to demonstrate that comparative law has been used either as a means of substantiating a treaty standard, such as the obligation to accord fair and equitable treatment (FET) to investors, or as confirmation for a conclusion made on other grounds. Section IV notes the similarities between the uses of comparative law identified in the preceding section and the practice of the European Court of Human Rights (ECtHR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and domestic courts' use of foreign law. Drawing such parallels highlights the complex normative, methodological, and evaluative considerations that are raised by investment tribunals' use of comparative law. Section V concludes by suggesting that investment lawyers need to step outside of the framework of the VCLT in order to understand and account for the current and future use of comparative law in investment treaty interpretation.

II. THE PUBLIC LAW ANALOGY: RATIONALES, FUNCTIONING, AND LEGAL BASIS

The interpretation of the broad standards and vague provisions that are commonplace in international investment agreements (IIAs) is an issue that is of a relatively recent vintage. Whilst

[16] *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012) para 193.
[17] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) para 404.
[18] *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) para 506.

IIAs were concluded at a moderate pace for the three decades following the first bilateral investment treaty in 1959,[19] it was not until the mid-1980s that the pace of treaty-making picked up significantly, culminating in the creation of a network of over 3,300 IIAs that exist today.[20] As the number of IIAs increased, so too did the number of investment disputes that could make use of the dispute settlement mechanisms contained in those treaties. The first known example of international investment arbitration was initiated in 1987[21] and since then a total of 855 arbitral awards have been initiated, with over 50 new arbitrations initiated each year for the past five years.[22]

The increased activity of the investment law regime put into sharp relief the legal issues that the nascent regime faced. Systemically, increased recourse to investor-state dispute settlement (ISDS) led to questions about the legitimacy of the system, particularly regarding the neutrality and accountability of arbitrators.[23] However, the increased use of arbitration also raised more specific procedural and substantive questions that had until then not arisen. Should, for example, a State that prevails in arbitration have to bear its own costs, or should the losing claimant investor be ordered to cover the respondent State's costs?[24] What standard should be used to determine whether a measure is 'necessary' to protect the state's essential security interests or to maintain public order?[25] Should *amicus curiae* briefs be admitted by investment tribunals?[26] It was in response to these systemic, procedural, and interpretative challenges that commentators and tribunals drew analogies with other legal regimes as a way to conceptualise and to develop international investment law. One way in which they did so was by drawing an analogy with domestic public law.[27]

Roberts identifies two rationales for drawing a parallel between international investment law and public law.[28] The first, termed the 'public action theory', draws on the traditional idea,

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[19] Zachary Elkins *et al.,* 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000', (2006) 60 International Organization 811, 815.
[20] UNCTAD, *World Investment Report 2016,* xii.
[21] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka,* ICSID Case No. ARB 87/3, 27 June 1990.
[22] UNCTAD, Investment Dispute Settlement Navigator, available at http://investmentpolicyhub.unctad.org/ISDS. Accessed 19 June 2018. Note that this dataset includes only information about investment arbitrations that are public.
[23] See for example Van Harten (n 2), 167-75. For a recent elaboration of these criticisms in the context of the European Union's on-going Multilateral Investment Court project, see European Commission Staff Working Document Impact Assessment, 'Multilateral reform of investment dispute resolution', 13 September 2017, 11-15.
[24] eg *ADC Affiliate Ltd. v. Republic of Hungary,* ICSID Case no. ARB/03/16, Award (2 October 2006), para 532.
[25] eg *Enron Creditors Recovery Corp. & Ponderosa Assets L.P. v. Argentine Republic,* ICSID Case no. ARB/01/3 (22 May 2007) paras 322-45; *CMS Gas Transmission Co. v. Argentine Republic,* ICSID Case no. ARB/01/8 (12 May 2005) paras 353-78. Cf. *Continental Casualty Co. v. Argentine Republic,* ICSID Case no. ARB/03/9 (5 September 2008) paras 189-230.
[26] *Aguas del Tunari SA v. The Republic of Bolivia,* ICSID Case no. ARB/03/02 (21 October 2005) paras 15-18. Cf. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case no. ARB/03/19, Order In Response To A Petition By Five Non-Governmental Organizations For Permission To Make An Amicus Curiae Submission (12 February 2007).
[27] Roberts (n 3) 46.
[28] Roberts (n 3) 64-65. Cf Alvarez, 'Is Investor-State Arbitration Public? (n 14), 535-36 (identifying ten reasons why the international investment regime is purportedly 'public').

elaborated in the context of sovereign immunity, that a state can act in both public and private capacities. This creates a "bright-line test" according to which "investment treaty arbitrations are public law disputes because the state acted in its public capacity when entering into the treaty, and, accordingly, liability for treaty breaches should also be understood as public."[29] The seemingly clear distinction between public and private is somewhat muddied when one takes into account the existence of 'umbrella clauses' in many IIAs, which provide (public) treaty protection to (private) contractual obligations.[30]

According to a second theory, termed the 'public interest theory', the basis of the public law analogy rests on the fact that disputes regarding both domestic public law and international investment law may involve adjudicating upon acts that "involve significant matters of public concern that transcend the private rights and obligations of the disputing parties".[31] Whilst there may be disagreement regarding which matters fall within this category, certain investment disputes, such as those related to the environment, human rights, or a State's economy, clearly may have ramifications that go beyond the individual dispute.[32]

A third theory, which I will call the 'functionalist approach', emphasises the functional similarity of the two regimes. According to this theory, international investment law is akin to public law because it imposes restraints on a State's exercise of powers *vis-à-vis* private actors in much the same way that domestic public law imposes restraints on the state's exercise of powers over those within its jurisdiction.[33] As international investment tribunals apply standards that constrain the sovereign actions of a State's legislature, executive, and judiciary, they function in an

[29] Roberts (n 3) 64-65.

[30] *Ibid.,* 65. As Roberts notes, the public v. private distinction is also complicated by the existence of stabilization clauses in contracts, which provide for compensation for certain regulatory acts.

[31] Roberts (n 3) 65. See also William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations', (2010) 35 Yale J Int L 283, 288 ("The arbitrations that we would classify as falling within the public law sphere are those in which the outcome-determinative issue in the arbitration requires a determination of the state's power and legal authority to undertake regulation in the public interest.")

[32] Roberts (n 3) 65. For what might be considered a paradigm example, see *Methanex v. U.S.A.,* Final Award on Jurisdiction and Merits (3 August 2005).

[33] Schill, 'Introduction' (n 6) 17. See also, Van Harten (n 2) 4; Montt (n 4) 12-17; Stephan W Schill, 'Deference in Investment Treaty Arbitration: Reconceptualising the Standard of Review', (2012) 3 J Intl Disp Settlement 577, 587; Van Harten and Loughlin (n 5) 148; Thomas Wälde & Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law', (2001) 50 Intl Comp Law Quarterly 811 ("Comparative constitutional law seems to provide the most suitable analogy and precedent since treaties in effect set up a similar system of higher-ranked controls over domestic law-making…"). See also the Submission of the European Union on 'Possible Reform of investor-State dispute settlement (ISDS)' to UNICTRAL Working Group III, 12 December 2017, UN Doc. A/CN.9/WG.III/WP.145, para. 5 ("These public international law treaties deal with the *sovereign capacity of states to regulate*, by providing certain protections which are enforceable by investors. This creates a situation similar to public or constitutional law, in which individuals are protected from acts of the state and can act to enforce those protections. It is important to recall that the state is acting in its sovereign capacity, both in approving these treaties and as regards the acts challenged.")

analogous manner to domestic courts exercising judicial review over the acts of the executive branch of government.[34]

Regardless which theory is adopted (and whether it is adopted wholesale or piecemeal),[35] the analogy with public law provides the basis for responses to a variety of systemic and substantive challenges that investment law raises.[36] On a general level, it acts as a normative benchmark against which one can evaluate the current system of international investment arbitration and as guidance for the development of the investment regime.[37] For Gus Van Harten, for example, those that adjudicate public law matters should be accountable and independent, and their decision-making should be both open and coherent. The present system of investor-state arbitration squarely fails, in his opinion, to live up to these ideals.[38] For others, such as Stephan Schill and Santiago Montt, the analogy with public law plays a more direct role, providing arbitrators with a repository of solutions to specific issues on which investment treaties are vague, ambiguous, or silent.

One of the challenges that public law has been called upon to address is the interpretation of provisions of a "Delphic economy of language"[39] that invite "an almost infinite range of arguments".[40] The obligation to accord FET – a standard fixture in almost all investment treaties – is the prime example.[41] Whilst the terms 'fair' and 'equitable' provide the interpreter with a significant degree of flexibility to account for the particularities of the case at hand, they have quite correctly been deemed to be "almost devoid of any substantial meaning".[42] Nor do Articles 31 and

[34] Van Harten and Loughlin (n 5) 146-48 (describing the international investment system as "akin to domestic judicial review in that it keeps public authorities within the bounds of legality and provides enforceable remedies to individuals harmed by unlawful state conduct").

[35] I note that some authors recognise that certain elements of the public law analogy are valid, but do not adopt the public law analogy wholesale. Instead, they characterise the investment regime as a public/private hybrid or as a *sui generis* regime; see eg Roberts (n 3) 94; Alvarez, 'Is Investor-State Arbitration Public?' (n 14) 576; Julie Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach', (2014) 54 Virginia JIL 367; Paparinskis, 'Analogies and Other Regimes'; Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', (2003) 54 BYIL 151.

[36] See e.g. Schill, 'Introduction' (n 6) 24 (calling the public law analogy the "standard methodology of thinking about issues in international investment law, both as regards the interpretation of the often vague standards of investment protection and also in addressing concerns about the institutional and procedural structure of investor-state dispute.") See also Stephan W Schill, 'Editorial: Towards a Normative Framework for Investment Law Reform', (2014) 15 J World Investment & Trade 795.

[37] Schill, 'Introduction' (n 6) 26; Van Harten (n 2) chp 7. This is termed comparison on the 'macro' level by Roberts and Vadi; Roberts, (n 3) 47; Vadi (n 2) chps 4 and 5.

[38] Van Harten (n 2) chp 7.

[39] *Lemire* (n 18) para. 246.

[40] Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP 2011) 3.

[41] See e.g. Denmark-Ethiopia BIT, art. 3(1) ("Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment…"); Thailand-Argentina BIT, art. 4(1)(a) ("Investments of investors of one Contracting Party in the territory of the other Contracting Party, and also the returns therefrom, shall receive treatment which is fair and equitable…").

[42] Roland Kläger, 'Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness', (2010) 11 Journal of World Investment and Trade 435, 438. Cf. Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 112-14.

32 of the VCLT provide interpreters with much assistance in interpreting FET.[43] Tribunals have thus been left with precious little to address the "fundamental and practical question that every arbitral tribunal must answer: by what criteria, standard, or test is an arbitral tribunal to determine whether the specific treatment accorded to investments of a particular foreign investor in a given context is or is not 'fair and equitable'?"[44]

A range of methods for the operationalization of the public law analogy have been suggested. At one end of the spectrum is a "methodologically loose" use of comparative law,[45] akin to the 'learning' argument that is commonly invoked by advocates of the use of foreign law by domestic courts.[46] According to this argument, comparative surveys of public law may open arbitrators' eyes to the range of interpretations of IIAs that are available, allowing them to consider how and why certain approaches have been taken in domestic systems and whether such an approach is suitable for the international level.[47] Such use of comparative law entails no obligation to follow the solution adopted by domestic law: "[c]omparative public law thus can be an eye-opener in raising awareness of possible interpretations of investment treaties without controlling that interpretation."[48]

At the other end of the spectrum is a more ambitious use of comparative law, which I term the 'general principles method'. According to this method, the interpreter is obliged, by virtue of Article 31(3)(c) VCLT,[49] to take into account comparative surveys of domestic public law insofar as these elucidate relevant general principles of law within the meaning of Article 38(1)(c) of the Statute of the ICJ.[50] This would allow investment tribunals to concretise both the minimum and maximum levels of protection afforded by IIAs, such as developing "standards [to which] administrative proceedings have to conform under fair and equitable treatment, or develop[ing]

[43] Roberts (n 3) 51; Kläger (n 44) 438 (stating that a literal interpretation would be "doomed to failure from the outset"). See also *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Aguas v. Argentina,* ICSID Case no ARB/03/19, Decision on Liability, 30 July 2010, para. 202 (stating that the FET obligation is "not judicially operational in the sense that they lend themselves to being readily applied to complex, concrete investment fact situations.").
[44] *Suez, Sociedad General de Aguas de Barcelona S.A.* (n 45) para 202.
[45] Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law', in Samantha Besson & Jean d'Aspremont (eds.), *The Oxford Handbook on the Sources of Law* (2017) 1107-08.
[46] See eg, Justice Breyer in Norman Dorsen, 'A Conservation between U.S. Supreme Courts Justices' (2005) 3 International Journal of Constitutional Law 519, 523; Vicki Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harvard Law Rev 109, 114; Ruth Bader Ginsburg, 'Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2003) 40 Idaho LR 1.
[47] Schill, 'Introduction' (n 6) 26, 33; Montt (n 4) 343-44.
[48] Schill, 'Introduction' (n 6), 26.
[49] Article 31(3)(c) of the VCLT provides: "There shall be taken into account, together with context:…any relevant rules of international law application in the relations between the parties."
[50] Schill, 'Deference' (n 34) 594-95; Montt (n 4) 344.

methods and thresholds for determining when non-compensable regulation turns into a regulatory taking requiring compensation."[51]

For public international lawyers, the clear route of legal reasoning that runs through Article 38 of the ICJ Statute and Article 31 of the VCLT seems to provide an obvious pathway through which comparative law (with its attendant benefits) could be incorporated into investment law jurisprudence. The premise underlying this approach is that IIAs are creatures of international law and thus their implementation, interpretation, and application is controlled by the sources of law and rules of interpretation of public international law. Schill puts this clearly when he states: "given that investment treaty tribunals are constituted under international investment treaties, public international law has a controlling function for how arbitral tribunals can make use of comparative public law. They can only do so to the extent to which the applicable international legal sources leave interpretive leeway to arbitral tribunals."[52]

However, even amongst public international lawyers, the general principles method is contentious. In an article published in this Journal,[53] José Alvarez forcefully criticised the general principles method on both practical and methodological grounds, whilst also more broadly criticising the public law analogy itself.[54]

From a practical perspective, Alvarez argues that the prospects of finding general principles of public law that could be relevant to investment law "would appear to be very scant indeed"[55] as "national public laws regarding property rights are notoriously context-dependent and driven by cultural and other social values."[56] In his view, the heterogeneity of domestic laws was the very basis for the creation of autonomous investor rights in international investment law.[57] Accordingly, Alvarez argues that the drafters of IIAs must have intended treaty terms to have a meaning that is autonomous from national law, an intention that would be undermined by the adoption of the general principles method.

Methodologically, Alvarez notes that it is unclear how many jurisdictions need to be surveyed to induce a general principle, whether one could adopt a convenience sampling method (for example, on the basis of 'legal families'),[58] and how one should account for the context in

[51] Schill, 'Introduction' (n 6) 33.
[52] Schill, 'Deference' (n 34) 594-95.
[53] Alvarez, 'Is Investor-State Arbitration Public?' (n 14) 534.
[54] *Ibid.,* 535, 542-45. Alvarez himself considers to be more appropriately conceived of as a hybridized form of public and private law dispute settlement; *Ibid.,* 540, 576.
[55] *Ibid.,* 565.
[56] *Ibid.,* 565.
[57] *Ibid.,* 566.
[58] For more on the concept of 'legal families', see René David, Camille Jauffret-Spinosi, & Marie Goré, *Les Grands Systèmes de Droit Contemporains* (12th ed, Dalloz 2016); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3rd ed, OUP 1998) ; Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law',

which the domestic law operates.[59] This lack of methodological clarity opens the door to courts and tribunals to conduct superficial comparative surveys of a select group of countries, presenting an opportunity for adjudicators to mask their subjective preferences with "careless comparativism".[60] Such an approach would, in his view, constitute a "considerable expansion of the third source in Article 38 of the Statute of the ICJ"[61] that may "become a politically charged route for a *de facto* (and unauthorized) return to the Calvo Clause."[62]

Alvarez's scepticism regarding the use of general principles in investment law has not gone unchallenged. Commenting on a previous paper published by Alvarez,[63] Alec Stone Sweet and Giacinto della Cananea contend that his analysis constitutes "elaborate wishful thinking"[64] that "fails to explain actual judicial practice".[65] The authors point to the dissemination of proportionality analysis in the courts of the European Union, the European Court of Human Rights, and the World Trade Organization, to demonstrate that general principles have moved freely between domestic and international jurisdictions without being "bound by originalism or the constraints of micro-institutional, comparative analysis" that Alvarez claims should preclude their diffusion.[66]

Stone Sweet and della Cananea are right to identify the core of Alvarez's argument regarding general principles as normative and prescriptive, rather than descriptive, and are also correct to point to the dissemination of certain general principles, such as proportionality, as evidence of the breach of such normative precepts. However, their argument aims to respond to different elements of Alvarez's argument than the present article. Specifically, they aim to show that the intention of States parties to a treaty and inter-regime differences have not in practice precluded the spread of general principles.[67] The authors do not answer the different, but related, question of how investment tribunals use comparative law.[68] As such, whilst Stone Sweet and della Cananea's description of the use of general principles might be valid for the principles that are the

(2016) 57 Harvard Intl L J 111, 134-37; Mariana Pargendler, 'The Rise and Decline of Legal Families', (2012) 60 American J Comp L 1043.

[59] Alvarez, 'Is Investor-State Arbitration Public?' (n 14), 568. Jaye Ellis, 'General Principles and Comparative Law', (2011) 22 European J Intl L 955-58, 962-66.

[60] Alvarez, 'Is Investor-State Arbitration Public?' (n 14) 569.

[61] *Ibid.,* 564.

[62] *Ibid.,* 569.

[63] Alvarez, 'Beware Boundary Crossing' (n 14).

[64] Alec Stone Sweet & Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez', (2014) 46 NYU J Intl L & Pol 911, 943.

[65] *Ibid.*, 916.

[66] *Ibid.,* 943.

[67] *Ibid.*

[68] The authors note in passing that tribunals have "largely refrained" from adducing general principles from comparative surveys of domestic law; *ibid.,* 951.

subject of their study, it does not engage with the methodological and theoretical questions raised by the use of comparative law by tribunals.

Alvarez's criticisms – and the debate surrounding the general principles method more generally – focus on the wrong questions by relying on idealised normative constructions of general principles and presumptions about the use of comparative law. Although the general principles method might strike international lawyers as an obvious (if not somewhat convoluted) method of incorporating comparative law into investment jurisprudence, an examination of the awards in which comparative law has been invoked shows that this is not how tribunals in fact use domestic law. Instead, the way in which tribunals use comparative law raises different theoretical and methodological questions that have not yet been addressed in the literature.

III. Comparative Law in the Case Law of Investment Tribunals

To date, investment tribunals have principally drawn on domestic law in one of two ways. First, in the rare instances in which the use of comparative public law has been linked to general principles of law, its use has not been justified *because* it manifests a general principle of law, but rather because the treaty provision being interpreted is itself *derived from* a general principle of law. Such reasoning is markedly different from the general principles method described above. Second, in a number of cases, comparative public law plays an auxiliary role in the reasoning of the Tribunal, acting to confirm or support a conclusion that has been made on other grounds. Each of these uses raises different theoretical and methodological issues that will be explored in the following section.

A. Fair and Equitable Treatment as Derived from a General Principle of Law

The first strand of case law that draws on comparative public law does so in a way that is notably distinct from the general principles method propounded in the literature. These awards reason that FET is derived from the general principle of good faith, and that, because of this origin, it is justifiable to examine comparative public law in order to substantiate the content of the obligation.

The first instance of this reasoning was the Decision on Liability in *Total v. Argentina,*[69] in which the Claimant argued that Argentina had breached FET by frustrating its legitimate expectations. In its Decision, the Tribunal spelled out in more depth why, in its view, comparative public law was instructive when interpreting the FET obligation:

[69] *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010).

> "In determining the scope of a right or obligation, Tribunals have often looked as a benchmark to international or comparative standards. Indeed, as is often the case for general standards applicable in any legal system (such as "due process"), a comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs. Such an approach is justified because, factually, the situations and conduct to be evaluated under a BIT occur within the legal system and social, economic and business environment of the host State. Moreover, *legally, the fair and equitable treatment standard is derived from the requirement of good faith which is undoubtedly a general principle of law under Article 38(1) of the Statute of the International Court of Justice.*"[70]

The *Total* Tribunal proceeded to accept the argument that the doctrine of legitimate expectations was based on the general principle of good faith, and hence "that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions is justified".[71] Acknowledging that "the scope and legal basis of the principle varies" between domestic systems, the Tribunal claimed nevertheless that "it has been recognized lately in both civil law and in common law jurisdictions within well defined limits",[72] citing Argentinian and English court decisions, as well as scholarly writings, as authority. However, when it came to define the scope of the doctrine, the Tribunal relied solely on secondary sources as authority for the proposition that:

> "in domestic legal systems the doctrine of legitimate expectations supports 'the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation'."[73]

Two subsequent arbitral awards have referred to the *Total* Tribunal's Decision as authority for the proposition that comparative public law can assist in the interpretation of FET. In *Toto v. Lebanon,*[74] the Tribunal cited the *Total* Decision as support for the assertion that "[t]he fair and equitable treatment standard of international law does not depend on the perception of the

[70] *Ibid.,* para 111 (emphasis added, citations omitted).
[71] *Ibid.,* para 128.
[72] *Ibid.*
[73] *Ibid,* para. 129. The secondary source from which the quote is drawn from Chester Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts', (2009) 1 Transnational Dispute Management, available at <https://www.transnational-dispute-management.com/article.asp?key=1303>. Brown himself in turn relies on the comparative surveys carried out by Jürgen Schwarze (Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 2006)) and Søren Schønberg (Søren Schønberg, *Legitimate Expectations in Administrative Law* (OUP 2000)) to reach the conclusion that "there is only a modest amount of common ground."
[74] *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012). Note that the Tribunal also cited the *Lemire v. Ukraine* and *Noble v. Romania* Awards (mentioned below) as authority; *ibid.,* fn 129.

frustrated investor, but should use public international law and comparative domestic public law as a benchmark [, a]s was recently also confirmed in *Total S.A. v. Argentina*".[75] On the facts, however, Toto failed to adduce proof that its legitimate expectations had been breached.[76]

The most recent award to refer to comparative public law – and the one that seems to be most closely aligned to the general principles method – is *Gold Reserve v. Venezuela*.[77] That case related *inter alia* the alleged breach of FET under Article II(2) of the Canada-Venezuela BIT by Venezuela. Echoing the justification given in *Total*, the Tribunal stated that "the legal sources of one of the standards for respect of the fair and equitable treatment principles, i.e. the protection of 'legitimate expectations'…are to be found in the comparative analysis of many domestic legal systems."[78] The Tribunal stated that comparative domestic law was relevant by virtue of Article 54 of the ICSID Arbitration (Additional Facility) Rules, which:

> "directs ICSID tribunals to apply 'such rules of international law as may be applicable' unless otherwise agreed by the parties. This reference may be considered to include the 'general principles of law recognized by civilized nations' referred to in Article 38 of the Statute of the International Court of Justice".[79]

The Tribunal continued to cite German, French, English, Argentinian, and Venezuelan law to demonstrate that the concept of legitimate expectations operates to protect the expectations of a private person *vis-à-vis* their legal partner in various legal systems, "in particular when this partner is the public administration on which this private person is dependant."[80]

This strand of case law is open to criticism on several grounds. First, the *Toto* and *Gold Reserve* Awards expressly refer to the Tribunal's Decision in *Total* as authority for their invocation of comparative law.[81] Yet that Award does not bear close scrutiny. The paragraph of the *Total* Decision on which the *Toto* and *Gold Reserve* tribunals rely states that "[t]ribunals have often looked as a benchmark [of what constitutes FET] to international or comparative standards",[82] citing two awards as authority: the first Partial Award in *S.D. Myers, Inc. v. Canada* and the Award in *Genin and others v. Estonia*. However, when one refers back to those awards, there is neither reference to

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[75] *Ibid.,* para 166.
[76] *Ibid.,* para 192.
[77] *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014).
[78] *Ibid.*, para 576.
[79] *Ibid.,* para 575. This is not, in fact, what Article 54 of the Additional Facility Rules provides. Article 54(1)(a) of the Rules provides that, failing the designation of applicable law by the parties, tribunals shall apply "such rules of international law as the Tribunal considers applicable."
[80] *Ibid.*, para 576.
[81] NB the *Gold Reserve* Award incorrectly cites para 11 of the *Total* Award. In fact, para 11 describes procedural aspects of the case; the correct citation is to para 111.
[82] *Total* (n 71) para 111.

comparative public law nor is there any discussion regarding its use to interpret the relevant treaty provisions.[83] Indeed, the *Genin* Award seems, if anything, to be authority for the rather different proposition that domestic law and the FET standard are autonomous, stating that "[w]hile the exact content of [the FET] standard is not clear, the Tribunal understands it to require an 'international minimum standard' *that is separate from domestic law*".[84] The subsequent awards are seemingly oblivious to the fact that the assertion upon which their use of comparative public law is based is nothing but a juristic sleight of hand.

Second, despite the Tribunals' attempts to justify the use of comparative public law to interpret treaty standards, their comparative surveys provide little detail as to how analogous questions are in fact dealt with under domestic law. Indeed, the *Toto* Tribunal failed to cite *any* domestic law, whilst the *Total* and *Gold Reserve* Tribunals used perfunctory surveys of comparative law to demonstrate merely that the doctrine of legitimate expectations is recognised in domestic jurisdictions.[85] As such, it would be correct to say that the comparative surveys adduced failed to shape meaningfully the Tribunals' approach to FET or legitimate expectations, or to determine the outcome of the case.

Third, perhaps the most notable feature of these awards is the absence of any reasoning which claims that comparative public law manifests a general principle of law that is applicable by virtue of Article 31(3)(c) of the Vienna Convention. The Tribunals scarcely enquired into the commonalities that exist between domestic jurisdictions (except the general notion that legitimate expectations are protected), nor did they draw on Article 31(3)(c) of the VCLT as the basis for invoking comparative law. Instead, the reasoning pursued was essentially the inverse of the general principles method: rather than comparative public law constituting a general principle of law and thus being relevant to the interpretation of the treaty, the treaty provision's origins as a general principle of law justified recourse to comparative public law.

This rationale for drawing on comparative law bears a close resemblance to the approach recently adopted by Campbell McLachlan and his co-authors.[86] Whilst the Tribunal in *Total* considered FET to be derived from the general principle of good faith,[87] McLachlan *et al.* consider the obligation to give "modern expression to a *general principle of due process*",[88] which they understand

[83] The *Total* Decision later cites the *Noble* Award as authority for the same; *Total,* fn 106. As noted below, the decision in *Noble* was not based on an analysis of comparative public law, but on the facts.
[84] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para 367.
[85] *Total* (n 71) paras 129-30.
[86] Campbell McLachlan *et al., International Investment Law: Substantive Principles* (2nd ed, OUP 2017).
[87] Although cf *ibid.,* §7.183, where McLachlan *et al.* acknowledge that tribunals have linked the doctrine of legitimate expectations to the general principle of good faith.
[88] *Ibid.,* §7.15.

to be synonymous with the "minimum requirements of the rule of law".[89] Leaving aside the question whether FET is based on good faith, due process, or any other general principle, the authors are right to point out that "the voluntary acceptance of the principle by treaty transforms the question from one of obligation to one of content."[90] In other words, recourse to comparative law becomes necessary to flesh out the content of FET, rather than to establish its character as a rule of law.[91] As such, even if one accepts that FET is derived from a general principle, the methodological criticisms that Alvarez raises in relation to the use of comparative public law are still relevant.

B. Comparative Public Law as Auxiliary Reasoning

The abovementioned awards are exceptional in that they are the only three awards to link the use of comparative public law to general principles of law. Other tribunals have drawn on comparative law as confirmation of a conclusion reached on other grounds.[92] Whilst not dispositive of the tribunals' reasoning, this use of comparative law nevertheless merits close analysis. In particular, the awards raise the following question: does it matter, from the point of view of methodology or principle, that comparative law plays a merely confirmatory role, as opposed to forming the operative part of the reasoning of a tribunal?

One of the first arbitral awards to refer to comparative public law was *Noble v. Romania,*[93] in which the Tribunal was faced with the question of whether judicial insolvency proceedings constituted "arbitrary" or "discriminatory" measures that fell foul of Article II(2)(b) of the US-Romania BIT. As the Treaty gave no definition of arbitrary or discriminatory measures, the Tribunal found the definition of arbitrary treatment given by the International Court of Justice (ICJ) in the *ELSI* case to be instructive; namely, that an arbitrary action was "something opposed to the rule of law…[in the sense that it] is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[94] In light of the jobs at stake, the factual

[89] *Ibid.,* §7.16.
[90] *Ibid.,* §7.19.
[91] *Ibid.* Cf José E Alvarez, 'The Public International Law Regime Governing International Investment', (2009) 344 Recueil des cours 193, 362-63 (stating that the "treatification" of investment protection does not necessarily result in increased precision).
[92] One could also place the Award in *Occidental v. Ecuador* in this category, in which the Tribunal cited comparative public law, alongside WTO law and other international investment awards, as authority for the proposition that the principle of proportionality is relevant for investment disputes. The Tribunal only noted in passing that "[i]t is very well-established law in a number of European countries that there is a principle of proportionality" before analysing proportionality in other investment awards in depth. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), paras 402-09.
[93] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005).
[94] *Ibid.,* para 176, citing *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy),* [1989] ICJ Rep 15, para 128.

insolvency of the company, and the likelihood of debt restructuring, the Tribunal concluded that "there are sufficient grounds not to regard the proceedings as arbitrary"[95] and that "the proceedings were at the time the only short term solution for the 'social crisis'"[96] that had engulfed the town in which the mill was located.

It was only *after* having arrived at this conclusion that the Tribunal referred to comparative law. Harking back to the definition of arbitrariness adopted by the ICJ in *ELSI*, the Tribunal stated that "[s]uch proceedings [i.e. the judicial insolvency proceedings at issue] are provided for in all legal systems and for much the same reasons. One therefore cannot say that they were 'opposed to the rule of law' … [the claimant] was in a situation that would have justified the initiation of comparable proceedings in most other countries. Arbitrariness is therefore excluded."[97] Like the tribunal in *Toto,* the *Noble* Tribunal failed to point to any specific domestic law or comparative law study as authority for its statement.

Comparative public law played a similarly auxiliary role in the reasoning of the Tribunal in *Plama v. Bulgaria.* One argument advanced by the Claimant in that case was that taxes imposed by Bulgaria as the result of debt restructuring breached the FET obligation enshrined in Article 10(1) of the Energy Charter Treaty (ECT).[98] However, as Plama had not referred the matter to Bulgarian tax authorities, as required under Article 21(5) of the ECT, the Tribunal could not "see how this claim gives rise to a violation of Bulgaria's obligations under the ECT."[99] After it dismissed the claim on this procedural ground, the Tribunal nevertheless continued to address Plama's argument under the FET obligation, finding that "no action by Respondent…comes anywhere near to being unfair or inequitable treatment", as the Claimant was, or should have been, aware of the tax implications of the debt restructuring.[100] It was only then, after having rejected Plama's claim on procedural grounds and on the merits, that the Tribunal noted *obiter* that:

> "Respondent produced evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary…[i]t cannot therefore be said that Bulgaria's law in this respect was unfair,

[95] *Ibid.*, para 177.
[96] *Ibid.*, para 177.
[97] *Ibid.,* para 178.
[98] Energy Charter Treaty, 17 December 1994, 2080 UNTS 95.
[99] *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No ARB/03/24, Award (27 August 2008) para 266.
[100] *Ibid.,* paras 267-68.

> inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries."[101]

A final example is the Decision on Jurisdiction and Admissibility in *Lemire v. Ukraine,*[102] in which the Tribunal was called upon to decide if a Ukrainian regulation that required radio stations to play at least 50% Ukrainian music was a prohibited local content requirement under Article II.6 of the US-Ukraine BIT. The Tribunal accepted Ukraine's argument that a State has the right to regulate its affairs for the public good, especially in matters related to culture or language. It noted that other countries, such as France and Portugal, had adopted similar requirements for radio stations and thus that such a measure "cannot be said to be unfair, inadequate, inequitable, or discriminatory, when it has been adopted by many countries in the world."[103] However, the Tribunal went on to state that "this conclusion is really *obiter dicta*" as the Claimant had challenged the measure as a prohibited local content requirement, not as a breach of FET.[104] On the facts, the Tribunal found that the regulation did not have a protectionist purpose and therefore did not breach Article II.6 of the US-Ukraine BIT.

Several points regarding these awards are worthy of note. First, the tribunals' use of comparative law does not live up to the threshold they themselves set. In both *Plama* and *Lemire,* the tribunals stated that an action could not be "unfair, inadequate, inequitable or discriminatory" if it also existed in "many" other countries. Yet those tribunals cited, respectively, no domestic laws and the laws of just two countries. To claim that the measure at issue in those cases is in line with a significant body of domestic practice is therefore mere assertion that is unsupported by evidence. Furthermore, as a matter of principle, it is not evident why the domestic laws of other countries should affect our understanding of what constitutes a discriminatory or arbitrary measure. As has been pointed out in the context of the human rights law, deferring to the majority view of States in relation to a particular issue risks undermining the very rights that the international legal regime was established to protect.[105] In the context of investment law, referring to the domestic laws of "many countries" fails to protect investors' rights if those laws are themselves arbitrary, discriminatory, unfair, or inequitable.

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[101] *Ibid.*, para. 269. The Tribunal went on to reject Plama's claim on another two grounds, noting that Plama had not adduced any evidence showing that it had actually paid the tax and that it had not shown that the tax liability precluded it from obtaining financing to reopen the plant; *ibid.,* para. 271.
[102] *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010).
[103] *Ibid.,* para 506. Note that the *Lemire* Tribunal cited para 269 from the *Plama* Award as authority for this proposition.
[104] *Ibid.*, para 507.
[105] See eg, E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', (1999) 31 NYU JILP 843; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007).

Second, as in the preceding section, none of the awards examined drew on domestic law because it constituted a general principle of law. Rather, in each case, comparative public law was drawn on because it allowed the tribunal to substantiate a standard in the relevant treaty, such as what is "arbitrary" (*Noble)* or "unfair, inadequate, inequitable or discriminatory" (*Plama, Lemire*). The most notable feature of these awards is that the Claimant's argument was dismissed without relying on comparative public law at all, whether on the facts (*Noble, Lemire*) or because of failure to fulfil procedural requirements (*Plama*). Comparative public law did not signal the death knell to the claimant's argument; rather, it provided support for a decision that had already been made on other grounds.

IV. Engaging with Practice

Whilst certain authors claim that tribunals should conduct a survey of domestic law from which they can induce general principles, in reality reference to comparative law is less pivotal to the reasoning of tribunals - and less methodologically rigorous – than the general principles method suggests. Examining the use of comparative law in light of tribunals' practice puts into sharp relief questions of significant theoretical and practical complexity. This section addresses just two of the issues that are raised by tribunals' use of comparative law: first, how might we explain why tribunals use comparative law, and, second, what methodological constraints are incumbent upon its use? This is not intended to be an exhaustive examination of the issues raised by the practice of investment tribunals; rather, it flags areas that have not yet been addressed thoroughly by the literature and may be worthy of further investigation.

A. The Interpretation of Standards

The general principles method purports both to explain why tribunals have recourse to comparative law and to normatively justify such use. From a descriptive standpoint, the cases examined in the preceding section demonstrate that tribunals' use of comparative law cannot be explained by the general principles method. A different – and, in my view, more convincing – explanation can be given by focussing on the object of interpretation.

In each of the awards examined in the previous section, comparative law was adduced in order to interpret a standard.[106] In legal theory, standards are distinguished from rules on the basis

[106] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 131.

of both their form and their function.[107] In relation to form, the distinction drawn is between the relative determinacy of certain legal norms (rules) and the relative vagueness of others (standards).[108] Rules bind "a decisionmaker to respond in a determinate way to the presence of delimited triggered facts".[109] The classic example given is that of a speed limit: if the driver travels faster than the permitted speed, they have violated the law. Standards, on the other hand, are vague legal directives that "collapse decisionmaking back in to the direct application of the background principle or policy to a fact situation".[110] Take, for example, a law requiring drivers to travel "no faster than is reasonable".[111] Instead of referring to a particular speed, an adjudicator must take into account a range of relevant factors (driving conditions, the age and condition of the car, the presence of schools in the vicinity, etc.) to determine the level of risk that is reasonable in the case at hand. The formal difference between rules and standards is admittedly one of degree: they denote two "extremes of a continuous spectrum of 'ruleness', with rules representing the maximum and standards the minimum".[112] Nevertheless, despite the fact that rules are "not infinitely precise and standards not infinitely vague",[113] the distinction is considered to be analytically useful.[114]

Rules and standards are also distinguished on the basis of the function that they play in the legal system. H.L.A. Hart recognised that the use of standards was one method by which a legal system could cater for the inability to anticipate with certainty scenarios that may arise in the future.[115] In his view, standards are adopted when a legislature cannot determine *a priori* the interests that should be privileged in any given situation. In a similar vein, Neil MacCormick describes standards as seeking "to strike a balance that takes account of [an] apparently irreducible

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[107] Frederick Schauer, 'The Convergence of Rules and Standards', (2003) NZLR 303, 305-306 (stating that the distinction between rules and standards has "a wide currency in legal theory"). See also Duncan Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 Harvard LR 1685, 1685-87; Henry M. Hart & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press 1994) 139-41.

[108] Schauer (n 109) 305 (referring to the distinction between "(comparatively) specific rules and (comparatively) vague ones as the distinction between rules (specific) and standards (vague).")

[109] Kathleen M Sullivan, 'The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards', (1992) 106 Harvard L Rev 22, 58. See also Pierre Schlag, 'Rules and Standards', (1985) 22 UCLA L Rev 379, 382-83 (stating that rules have "a hard empirical trigger and a hard determinate response" and standards "a soft evaluative trigger and a soft modulated response").

[110] Sullivan (n 111) 58.

[111] Russell B Korobkin, 'Behavioral Analysis and Legal Form: Rules vs. Standards Revisited', (2000) 79 Oregon L Rev 23. Note that this is not a mere hypothetical example: in the 1990s, Montana had a law requiring drivers to be "reasonable and prudent". The law was later invalidated on the grounds of vagueness; see *State v. Stanko*, 974 P 2d 1132 (1998).

[112] Schauer (n 109) 309. See also Korobkin (n 113) 26.

[113] Schauer (n 109) 309.

[114] See eg Korobkin (n 113) 30; Schauer (n 109) 305.

[115] HLA Hart, *The Concept of Law* (3rd ed, OUP 2012) 130-31. The other option identified by Hart to address this was to delegate to administrative authorities the task of specifying what was required by the law; *ibid.,* 131.

plurality of values",[116] deferring the assessment of the competing values in play to adjudication of particular cases.[117] To illustrate, one might give the example of the standard of due care in Anglo-American negligence law, which only takes definite form when considered by an adjudicator in light of the circumstances of the case at hand. Rules, on the other hand, are characterised by the "fact that certain distinguishable actions, events, or states of affairs are of such practical importance to us, as either things to avert or to bring about, that very few concomitant circumstances incline us to regard them otherwise."[118] One example is the (relatively determinate) crime of murder, which reflects the fact that few countervailing considerations would require balancing against the heinousness of killing.[119] The determinacy of rules allows individuals to know *ex ante* the interests that the legal system will privilege in a certain scenario.

In the context of investment law, the form and the function of FET mark it out as a standard. The obligation is broad and indeterminate, and its adoption defers the evaluation of the myriad different factors that may be relevant to the question of what constitutes "fair and equitable" conduct to particular cases.[120] It acknowledges that the law simply cannot determine *a priori* which interests should take precedence in relation to certain questions.[121] The fact that domestic law has predominantly been invoked to interpret a standard, as opposed to rules, raises the question whether there is something about the form or the function of those norms that justifies – or perhaps necessitates – different interpretative techniques.

Standards are commonplace in international treaties that cover a wide range of subject-matter. A review of the practice of other international courts and tribunals shows that investment tribunals are not alone in interpreting treaty standards by reference to domestic law. The

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[116] Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 167.

[117] Cf. Olivier Corten, 'Motif légitime et lien de causalité suffisant: un modèle d'interprétation rationnel du *«raisonnable»* (1998) *Annuaire français de droit international* 187, 188. Corten argues that the interpretation of 'reasonable' by international courts and tribunals does not automatically depend on *'la seule subjectivité de l'interprète, mais qu'il est susceptible de faire l'objet d'un contrôle par des tiers, et ce à l'aide de jugements de fait, et non par l'affirmation péremptoire de jugements de valeurs'*. This is optimistic - Corten, for example, considers that the second stage in reasonableness analysis is the identification of a 'legitimate reason' for the act under review. Clearly, the qualification of an act as 'legitimate' or not is a subjective act, even if legitimate reasons are enumerated in the treaty provision. *ibid*, 189.

[118] Hart (n 119) 133.

[119] *Ibid.*

[120] Cf *Total,* para. 107 (stating that "it is difficult, if not impossible 'to anticipate in the abstract the range of possible types of infringements upon the investor's legal position'"; quoting Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', (2005) 6 Journal of World Trade 357, 365). See also *Mondev International Ltd. v United States of America,* ICSID Case No. ARB(AF)/99/2 (11 October 2002), para 118 ("a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these."); *Waste Management Inc. v Mexico,* ICSID Case No. ARB(AF)/00/3 (30 April 2004), para 99 ("Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.")

[121] Cf. Robert Y. Jennings, 'State Contracts in International Law', (1961) 37 BYIL 156, 180-81 ("It is perhaps also a mistaken notion to set too much store by the method of establishing minimum international standards by comparative researches into selected municipal laws.")

methodological and normative considerations raised by the use of comparative law is therefore not just limited to the domain of investment law but raises issues of relevance to international law more generally. More importantly, however, the use of domestic law by several international courts and tribunals to interpret standards suggests that it is the character of those norms themselves that leads to reference to domestic law.

Take the European Court of Human Rights (ECtHR), which has developed a long-standing practice of drawing on domestic law to interpret standards incorporated in the European Convention on Human Rights (ECHR), as an example.[122] Commonly referred to as the 'consensus doctrine',[123] the existence of a prevalent approach to a certain issue in the domestic law of member states normally leads the Court to interpret the Convention in line with that approach.[124] This often functions as "the primary determining factor as to whether a right is one protected by the Convention".[125]

The vast majority of cases in which the ECtHR refers to domestic law are related to the interpretation of a standard. In the ten-year period from 1 January 2005 to 1 January 2015, the Grand Chamber of the ECtHR delivered 183 judgments, of which it used comparative law in 60 judgments (33% of judgments).[126] In 44 of these judgments (73.3%), the Court used comparative law to interpret standards, such as what is necessary in a democratic society,[127] constitutes a fair trial,[128] or qualifies as inhuman and degrading treatment.[129] Moreover, like the majority of investment tribunals, the ECtHR does not justify recourse to comparative surveys of domestic law by reference either to general principles of law or Article 31(3)(c) of the VCLT. Instead, the Court's

[122] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.
[123] 'Consensus' is somewhat of a misnomer. Although the actual threshold at which the ECtHR will defer to the prevailing approach amongst states is unclear, the Court "frequently, but not consistently, opts against the existence of consensus, as long as some 6 to 10 States adhere to solutions which differ from the majority view."; Luzius Wildhaber *et al.,* 'No Consensus on Consensus? The Practice of the European Court of Human Rights', (2013) 33 Human Rights LJ 248, 259. The authors also conclude that in 56% of post-1998 judgments that discuss consensus, 60-67% or more of member states are surveyed; in 12.3% of cases, around half of the 47 member states are examined; and in 7% of cases, less than a quarter of the member states. In 24.6% of cases, the new Court adopts the approach of the old Court, and does not explicitly say which countries it has taken into account; *ibid*, 258.
[124] Wildhaber *et al.* (n 129) 250.
[125] John L. Murray, 'Consensus: concordance, or hegemony of the majority?' in European Court of Human Rights, *Dialogue between judges* (Council of Europe 2008) 27.
[126] The sample of judgments examined in this article is limited to the Grand Chamber of the ECtHR as it was unfeasible to survey all judgments of the Court in the same period, which total 11,872 judgments.
[127] See eg, *Demir and Baykara v Turkey*, 12 November 2008, App. No. 34503/97, paras 120-24.
[128] See eg, *Taxquet v Belgium,* 6 November 2010, App. No. 926/05, para 92.
[129] See eg, *Harkins and Edwards v U.K.,* 12 January 2012, App. nos. 9146/07 and 32650/07, para 133.

use of domestic law stems from the idea that the Convention must be interpreted in light of present day conditions to effectively protect Convention rights.[130]

In a similar vein, the International Criminal Tribunal for the former Yugoslavia (ICTY) has used domestic law to interpret standards in its Statute or Rules of Procedure and Evidence (RPE) without justifying such recourse by reference to general principles of law or Article 31(3)(c) VCLT.[131] For example, in its Decision on protective measures for victims and witnesses in the *Tadic* case[132] – one of the first decisions issued by the ICTY– the Trial Chamber was required to decide the balance to be struck between witness and victim protection and the accused's right to a fair trial under Article 20 of the Tribunal's Statute.[133] In determining how to interpret 'fair' in this context, the Tribunal found guidance in the approach taken by domestic legal systems in relation to anonymity and confidentiality of witnesses and victims, using domestic law as support for the proposition that such protection is compatible with the right to a fair trial and as inspiration for the standards to be employed should measures of protection be ordered.[134] More recently, both the Trial and Appeals Chambers in *Strugar* examined domestic law in order to ascertain the correct test for assessing whether the accused was 'fit' to stand trial, and was thus able to effectively exercise his rights under Articles 20 and 21 of the Statute.[135]

The practice of the ECtHR and ICTY demonstrates that investment tribunals' use of comparative law to interpret treaty standards is not exceptional. But it also suggests that the key to explaining why international courts and tribunals refer to comparative law depends at least to a certain extent on the character of the norm being interpreted.

The idea that standards are interpreted differently is not new. Legal philosophers have argued that deductive reasoning seems particularly inapt to describe how lawyers interpret standards. Philosopher John Wisdom captured this peculiarly legal form of reasoning in a famous essay, stating that:

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[130] *Tyrer v. U.K.,* 25 April 1978, no. 5856/72, para. 31. See further Başak Çali, 'Specialized Rules of Treaty Interpretation: Human Rights', in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 537.

[131] Interestingly, in the process of the drafting of the Report of the Secretary-General on the ICTY, Canada suggested explicitly that 'Reference could be made to appropriate national law, if necessary, for interpretive purposes.' Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General 14 April 1993 S/25594, para 11.

[132] *Prosecutor v Tadic,* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995).

[133] Article 20(1) ICTY Statute ("The Trial Chambers shall ensure that a trial is fair and expeditious…with full respect for the rights of the accused and due regard for the protection of victims and witnesses.")

[134] *Tadic,* Decision (n 139) paras 31-42, 47-48, 55, 60-67, 71.

[135] *Prosecutor v Strugar* (Trial Chamber Decision on Defence Motion to Terminate Proceedings) IT-01-42-T (26 May 2014), paras 29-34; *Prosecutor v Strugar* (Appeals Chamber Judgement) IT-01-42-A (17 July 2008), paras 52-54.

> "In such cases we notice that the process of argument is not a *chain* of demonstrative reasoning. It is presenting and representing of those features of the case which *severally cooperate* in favour of the conclusion, in favour of saying what the reasoner wishes, in favour of calling the situation by the name by which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain…[T]he reasoning is not vertically extensive but horizontally extensive – it is the matter of the cumulative effect of several independent premises, not of the repeated transformation of one or two. And because the premises are severally inconclusive the process of deciding the issue becomes a matter of weighing the cumulative effect of another group of severally inconclusive items against the cumulative effect of another group of severally inconclusive items…It has its own sort of logic and its own sort of end – the solution of the question at issue is a decision, a ruling by the judge."[136]

This description, whilst certainly not valid for all forms of legal reasoning, "captures exactly and vividly the way in which we must bring a plurality of factors together into consideration when…we seek to pass judgement upon the reasonableness of some decision".[137] When interpreting standards, various factors, singularly incapable of supporting a particular conclusion, combine in order to provide (arguably) persuasive reasoning that supports the desired result. In the absence of clearly-defined rules that lend themselves to syllogistic application, such reasoning fulfils the requirement that arbitrators provide a reasoned decision.[138]

The idea that standards are interpreted using 'horizontally extensive' reasoning accords with the practice of the tribunals examined in the preceding section, each of which adduced comparative law as just one element of reasoning – normally alongside the awards and judgments of other international courts and tribunals – in support of its conclusion.[139] To adopt Wisdom's analogy, comparative law plays the role of a chair leg without which the reasoning might be more unstable but would not falter entirely.

The use of comparative law also responds to what some have called the "tyranny of choice".[140] The discretion left to the rule-applier in the case of a standard is not always welcome, and not every decision-maker "has the time, energy, or inclination to engage in the 'from the

[136] John Wisdom, 'Gods' (1945) 45 Proceedings of the Aristotelian Society 185, 194.
[137] MacCormick (n 120) 181.
[138] See Article 48(4), Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 160 ("ICSID Convention").
[139] See eg *Total* (n 71) paras 109-10 (citing other arbitral awards, the judgment of the ICJ in *ELSI* and Judge Higgins' Separate Opinion in *Oil Platforms* in support of its interpretation of fair and equitable treatment*); Gold Reserve* (n 79) paras 569-74 (citing other arbitral awards that recognised the protection of legitimate expectations).
[140] Schauer (n 109) 315-16.

ground up' process that unconstrained discretion and unspecified standards require."[141] As a result, they have a tendency to structure their choice to make it more manageable by, for example, creating 'guidelines' or 'per se rules' that apply to the standard.[142] In the same vein, decision-makers might refer to precedents interpreting the particular standard as a way *inter alia* to structure their reasoning and limit their discretion. In adopting these techniques,

> "[f]or the decision-maker concerned about efficiency, docket-clearing (even in a non-judicial context), allocation of his or her own competence to its highest and best use, and apportioning time between more or less important decisions, a way of narrowing the range of factors to be considered from what might be available under an open-ended "justice" or "reasonableness" standard is highly appealing."[143]

Comparative law is one mechanism by which arbitrators constrain the otherwise unfettered freedom that FET and other standards give them. By referring to comparative law, as well as to arbitral decisions, treaties, and case law of other international courts and tribunals, arbitrators are able to construct some benchmark of fairness and equitableness to which they can adhere, structuring their reasoning and absolving them of the responsibility and burden of substantiating the standard from scratch. This seems to be particularly relevant to international investment regime, in which the neutrality of arbitrators is frequently called into question.[144] By drawing on an external source of law upon which to base their reasoning, arbitrators provide a veneer of objectivity to what would otherwise be a wholly subjective decision.

B. Methodological Diversity

Whilst the general principles method mandates a comprehensive (or at least representative) survey of domestic jurisdictions, the recognition that comparative law plays a confirmatory role in the reasoning of tribunals raises the question whether this does – or should – impact the methodology of the comparative survey that is carried out. A parallel can be drawn with the use

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[141] *Ibid.,* 316.

[142] See also Schlag (n 111) 413 (stating that when we consider how standards are applied in practice "it becomes apparent that these tests merely defer the constraints on judicial decision making to some external source such as precedent…Inflexibility is just as much a part of standards as their supposed flexibility.").

[143] Schauer (n 109) 316.

[144] See for example, Van Harten (n 2) 167-75; Gus Van Harten, 'Arbitrator Behaviour in Asymmetical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration', (2016) 53 Osgoode Hall LJ 540, 545; Filip De Ly, 'Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?', (2005) 6 J World Inv & Trade 59, 60; Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration', (2007) 47 Virginia J Int L 953, 963-66.

of foreign law by domestic courts, which has been the subject of renewed interest following a string of highly politicised judgments delivered by the U.S. Supreme Court in the early 2000s.[145]

One characteristic of the debate regarding the use of foreign law by domestic courts is the recognition that there is a plurality of ways in which such law can be invoked, each of which entails different normative and methodological considerations.[146] Consider the argument that foreign laws are used as a method of "testing [an] understanding of one's own traditions and possibilities by examining them in reflection of others."[147] Where judges are prohibited from publicly discussing pending cases because of concerns regarding neutrality and impartiality, decisions from another jurisdiction might act as a "partial intellectual substitute" for discussion regarding the issues in a case, providing judges with "a testing from outside that may be particularly helpful on the most controversial and apparently value-laden choices."[148] This use of foreign laws does not constitute unjustified deference to the will of "like-minded foreigners",[149] but rather prompts deeper reflection on whether the "current interpretations live up to our own constitutional commitments."[150]

The diversity of uses of foreign law clearly has methodological implications. Take the familiar 'cherry-picking' argument as an example.[151] The cherry-picking argument rests on the assumption that in order to be successful the comparative survey of foreign law conducted must be exhaustive (or at least representative) to meet the expected standard of "scientific rationality

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[145] *Roper v Simmons*, 543 US 551 (2005); *Lawrence v Texas*, 529 US 558 (2003); *Graham v Florida*, 560 US 48 (2010); A*tkins v Virginia,* 536 US 304, 321 (2002). See further, Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Anchor Books 2007) 225-32. Amongst the voluminous literature, see in particular Ganesh Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation' (2009) 32 Harvard Journal of Law and Public Policy 653; Vicki Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harvard LR 109; Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium'* (2005) 119 Harvard LR 129; Ernest A Young, 'Foreign Law and the Denominator Problem' (2005) 119 Harvard LR 148; Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 International Journal of Constitutional Law 519; Steven Calabresi & Stephanie Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision' (2005) 47 William & Mary LR 743; Michael D Ramsey, 'International Materials and Domestic Rights' (2004) 98 AJIL 69; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

[146] One of the most interesting works conducted on the use of foreign law by domestic courts is that of Martin Gelter and Matthias Siems, who conducted an empirical analysis of 636,172 decisions of domestic courts; Martin Gelter & Matthias Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts' (2012) 8 Utrecht LR 88, 89. Gelter & Siems' work surveys the practice of the courts of Austria, Belgium, England and Wales, France, Germany, Ireland, Italy, the Netherlands, Spain and Switzerland. They find a total of 1430 judgments that cite foreign law.

[147] Jackson (n 152) 114. See also, John Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht LR 8, 17.

[148] Jackson (n 152) 119.

[149] *Roper* (n 152) 608 (Scalia J., dissenting).

[150] Jackson (n 152) 127.

[151] See Alvarez, 'Is Investor-State Arbitration 'Public'?' (n 14) 567.

and objectivity."[152] Yet, there is nothing to say that this standard is valid and applicable to the use of foreign law by domestic courts. Rather, it has been rightly recognised as the "mechanical projection" of "the aims of (scholarly) scientific research and corresponding precision required therein into the judicial use of comparative arguments."[153] The breadth and depth of the comparative survey required depends on the exact argument proffered for the use of foreign law.[154] Judges that wish to look to domestic laws simply for inspiration or to use them as a 'sounding board', for example, "need (in fact quite shallow) inspiration or argumentative support, not deep-level contextualised scientific 'truth'."[155] For these judges, there is nothing 'magic' about absolute comprehensiveness: "we can learn from foreign decisions one by one or in clusters or in something approaching a world consensus."[156] That is not to say that the cherry-picking critique has no validity, but rather that its purchase depends on the particular justification proffered for the use of foreign law.

To return to the use of comparative law by investment tribunals, whilst the general principles method would require a representative survey of domestic jurisdictions, there is no reason in principle why this should be the case for other uses of comparative law. Take the idea that domestic law can illuminate the intention of the parties to a treaty, for example.[157] Implicitly, this was the basis on which the Tribunal in *Saar Papier v. Poland* drew on the domestic law of the States parties to interpret a provision of Germany-Poland BIT that prohibited "measures equivalent to expropriation".[158] If one accepts the somewhat dubious premise that Germany and Poland intended to give indirect expropriation under Article 4 of the BIT the same meaning as in their domestic administrative law, there would be no reason to search further than the case law of the two States parties to the treaty.

If comparative law is used as an auxiliary or confirmatory argument for a particular approach, what implications does this have for the methodology? The reason for citing comparative law in support of a particular argument rests on two premises: first, that the public law analogy is valid; and, second, that the jurisdictions cited are analogically relevant, in that they

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[152] Michal Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013) 243.

[153] *Ibid.*, 242.

[154] Waldron (n 152) 175.

[155] Bobek (n 159) 242-43. For an example, see the UK House of Lords' Judgment in *Fairchild v Glenhaven Funeral Services,* [2002] UKHL 22, paras 23-32 (per Lord Bingham); para 168 (per Lord Rodger). See also the U.S. Supreme Court case of *Washington v Glucksberg*, 521 US 702 (1997) 734-35 (Rehnquist C.J., for the Court).

[156] Waldron (n 152) 175.

[157] The *Saar Papier* Tribunal is not alone in using domestic law to discern the intentions of parties; see e.g. Panel Report, *Mexico-Measures Affecting Telecommunications Services* WT/DS204/R (2 April 2004), para 7.110; *Anglo-Iranian Oil Co., Preliminary Objections,* [1952] ICJ Rep, pp 106-07.

[158] *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Final Award (16 October 1995) para 79 ("To interpret the Treaty administrative law practice in Germany and Poland would be helpful.").

uphold the same values as the international investment regime does or should do. The first of these premises does not have implications for *which* domestic laws are cited, but only for whether comparative law is used at all. The second premise, on the other hand, holds the key to the question of methodology for the subsidiary use of comparative law. It makes no difference whether the tribunal cites the laws of 1, 15, or 100 jurisdictions – what matters is the approval of the values embodied by that domestic legal system that is implicit in the citation. The use of comparative law as a general matter in that sense is 'neutral'; the real question is *which* domestic laws should be used. In this context, some authors have criticised arbitrators for adopting Eurocentric approaches, privileging domestic legal systems with which they are familiar over those from other parts of the world.[159]

Intimately linked with this argument is the criticism that arbitrators can obfuscate their subjective biases with comparative law.[160] Yet it is worth pausing to consider why, specifically, it is bad for judges to make such a selection. Judges select all the time. They select precedents,[161] historical sources,[162] and separate or dissenting opinions to use as authority. They select to such an extent that one judge has commented that the "very process of adjudication implies a selection".[163] Adjudicators will undoubtedly select the domestic or foreign law that supports their view; in fact, the selective use of foreign law by domestic judges has been empirically proven.[164] So why, a sceptic might ask, should the selection of domestic or foreign laws be singled out as a particularly egregious manifestation of subjective bias?

The fact that arbitrators do not command a Herculean knowledge of comparative law necessitates selection, but that fact says nothing *in se* about the desirability of the approach that the arbitral tribunal takes. An arbitral panel that invokes the administrative laws of North Korea and

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159 Alvarez, 'Beware: Boundary Crossings" (n 14) 220-222; Schill, 'Sources' (n 47) 1109. See also Ellis (n 61) 955-58.

160 Alvarez, 'Is Investor-State Arbitration 'Public'?' (n 14) 569. Cf. U.S. Senate Committee on the Judiciary, 'Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, September 12-15, 2005', Serial No. J-109-37, 201 "Foreign Law. You can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends ... It allows the judge to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent.") See also Richard A Posner, 'The Supreme Court 2004 Term - Foreword: A Political Court' (2005) 119 Harvard LR 32, 86.

161 Waldron (n 152) 172.

162 Jeffrey S Sutton, 'The Role of History in Judging Disputes about the Meaning of the Constitution' (2009) 41 Texas Tech LR 1173, 1185.

163 Justice Moseneke in Ursula Bentele, 'Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law' (2009) 37 Georgia Journal of International and Comparative Law 219, 239.

164 Ryan C Black *et al*, 'Upending a Global Debate', (2014) 103 Georgetown LJ 1, 43-44; Brian Flanagan & Sinéad Ahern, 'Judicial Decision-Making and Transnational Law', (2011) 60 Int & Comp L Q 1, 23-24. Cf. Comments of G. Kodek of the Austrian Supreme Court in Martin Gelter & Matthias Siems, 'Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 American J of Comp Law 35, 64.

Zimbabwe to justify its understanding of FET is unlikely to convince many people of the desirability of its approach. But it is not the use of comparative law *per se* that is objectionable, but what that domestic law of those jurisdictions (or the comparative survey more generally) stands for. The assessment entails consideration of the fundamental values underpinning the investment regime and whether the domestic jurisdictions live up to those ideals. The question is, ultimately, one of political values. Further work should explore this question.

V. Escaping the Positivist Paradigm

The use of comparative law cannot be explained or dismissed as easily as it has been in the literature to date. The practice of investment tribunals examined in this article demonstrates that comparative law has not been used because it manifests a general principle of law and is thus applicable by virtue of Article 31(3)(c) VCLT. Instead, comparative law has been used to substantiate treaty standards or to confirm an interpretation made on other grounds. In the context of international investment law, the use of comparative law relates mainly to the obligation to accord FET to investors.

The general principles method and the attendant theoretical and methodological problems have to a certain extent diverted attention from the host of issues raised by tribunals' actual use of comparative law. From a descriptive standpoint, the general principles method cannot explain why tribunals use comparative law. A more convincing explanation focusses on the object of interpretation for which comparative law is invoked: standards. Standards, unlike rules, lend themselves to a different, non-deductive form of legal reasoning, in which comparative law can act alongside other factors to justify a particular interpretative approach. In terms of methodology, the general principles method suggests that a comprehensive or representative survey is required, much in the same vein as a comparative law academic would approach inducing a general principle from domestic jurisdictions. Yet there is nothing to say that such an approach is necessary if comparative law is used in other ways. In particular, there is no reason that such a methodology would be required if comparative law is adduced to support a conclusion made on other grounds. Instead, those that wish to evaluate the use of comparative law in such a scenario must engage with the approval that such citation implies.

Whilst this article has attempted to add to the debate regarding the use of comparative law in international investment law, there are still many matters left to address. Two seem to be of particular importance. First, could one argue that the rules of interpretation or the sources of law that are applicable to international investment law have evolved to account for the use of comparative law? Put another way, how does the practice of tribunals examined here fit within a

positive legal framework, if it does at all? Second, what makes referring to a particular jurisdiction normatively preferable or justifiable as opposed to another? This is a question of crucial importance to the evaluation of comparative law in the future. In order to determine whether such use of comparative law is 'bad' or 'good', we have to make a searching enquiry into the values that we want the investment regime to uphold and how those are furthered by referring to domestic jurisdictions. In this respect, one cannot help but agree with Neil MacCormick's observation that 'the whole enterprise of explicating and expounding criteria and forms of good legal reasoning has to be in the context of the fundamental values that we impute to legal order'.[165] That task is both daunting, necessary, and unavoidably subjective.

[165] Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 1.