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UNIVERSITY OF AMSTERDAM

SOURCES OF INTERNATIONAL INVESTMENT LAW:
MULTILATERALIZATION, ARBITRAL PRECEDENT,
COMPARATIVISM, SOFT LAW

Stephan W. Schill

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Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law

Stephan W. Schill

I. Introduction

Since the turn of the millennium, international investment law (IIL) and investor-State dispute settlement (ISDS) have moved from the fringes of international law to its center.¹ In this process, IIL not only adapts to preconceived structures and concepts of public international law, but actively contributes to shaping them. This holds true for areas of general international law, such as the law of treaties or the law of State responsibility, but also for the (formal) sources of international law.² While IIL is based on the conventional sources of international law as laid down in Article 38 of the Statute of the International Court of Justice (ICJ), that is, treaties, custom, and general principles of law, and relies on judicial decisions and writings of publicists too,³ it also displays certain specificities in its particular mix of sources.⁴ In complementing, and partly contrasting, positions in the

¹ For the mainstreaming of investment law see Stephan W. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’, *European Journal of International Law* 22 (2011): 875–908; Stephan W. Schill and Katrine R. Tvede, ‘Mainstreaming Investment Treaty Jurisprudence: The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law’, *The Law and Practice of International Courts and Tribunals* 14 (2015): 94–129.

² This chapter concentrates on the different legal forms in which rights and obligations are cast, but does not address or assess their material content, that is, the substantive rights and obligations that arise under different sources in IIL. For a general overview over the substantive law and its implementation in IIL, see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2012); Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration—Substantive Principles* (Oxford: Oxford University Press, 2007); Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009).

³ Ole K. Fauchald, ‘The Legal Reasoning of ICSID Tribunals’, *European Journal of International Law* 19 (2008): 301–64, 303.

⁴ See Christian J. Tams, ‘The Sources of International Investment Law: Concluding Thoughts’, in *International Investment Law: The Sources of Rights and Obligations*, edited by Tarcisio Gazzini and Eric De Brabandere (The Hague: Martinus Nijhoff, 2012), 319–32.

companion piece in this Handbook by Jorge Viñuales,⁵ this chapter will contribute to the debate about the sources of international law by addressing, in the form of four theses, particularities in the use of sources in IIL that are especially noteworthy from the perspective of a general theory or doctrine of sources of international law. It argues that these specificities are mainly due to the existence of compulsory dispute settlement in the form of ISDS.

After clarifying the definition of IIL and the analytical approach used in the present context (Section II), this chapter addresses the importance of bilateral treaties in IIL and shows that their bilateral form is not opposed to the emergence of a genuinely multilateral regime of IIL that behaves as if it was based on multilateral sources (Section III). Second, the chapter turns to the preeminent importance of arbitral decisions in determining and developing the content of IIL, a fact that is not appropriately captured by the idea that such decisions are only ‘subsidiary means for the determination of rules of law’ (Section IV).⁶ Third, the chapter addresses the increasing influence of comparative law in IIL and its impact on our understanding of sources (Section V). Finally, the chapter will turn to how soft law instruments influence IIL although they are not binding law (Section VI). Section VII concludes.

II. Definition of IIL and Analytical Approach

Before dealing with the sources of IIL themselves, a number of qualifications are needed, as any analysis of the sources of a specific legal field is influenced by certain parameters that influence focus and outcome of an inquiry. In IIL, relevant parameters for an understanding of the field’s sources are: first, the definition of IIL one adopts; second, the sociological or professional vantage point from which one looks at IIL; and third, the institutional context on which one focuses. All three aspects may lead to very different accounts of what passes as a source of IIL and to which extent IIL conforms to the conventional model of international legal sources or diverges from it.

First, as for the definition, the present chapter, unlike Jorge Viñuales, does not understand IIL as the ‘law relating to international (or foreign) investments’, the ‘law relating

⁵ See the chapter by Jorge E. Viñuales in Jean d’Aspremont and Samantha Besson (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press, 2017) (forthcoming).

⁶ Article 38 (1) (d) of the Statute of the International Court of Justice (San Francisco, 26 June 1945, 33 UNTS 993).

to foreign investment transactions’, or the ‘law of foreign investment regulation’,⁷ but defines it as the ‘international law relating to investments’. The present chapter is therefore restricted to dealing with international legal sources concerning (primarily, but not necessarily exclusively) foreign investment relations, whereas Viñuales’ approach encompasses domestic law(s). Certainly, Viñuales is right that domestic and international law together make up the legal framework governing foreign investment relations, both in structuring and implementing foreign investment projects,⁸ and in settling investment disputes.⁹ This notwithstanding, the conceptual difference between international and national legal sources for governing international investment relations remains,¹⁰ not least because the respective lawmaking authority rests with different actors (two or more States instead of intrastate organs) and is expressed through different processes (e.g. treaty-making instead of legislation).

Second, as for the sociological or professional vantage point, the definition of IIL and an inquiry into what is part of its sources has to grapple with the field’s uncertain disciplinary identity, which some approach as an integral part of public international law, while others view it from the perspective of international commercial arbitration, and again others as part of (internationalized) public law.¹¹ Lawyers with a socialization in international commercial arbitration, for example, are likely to delineate the field from the perspective of dispute settlement and include among the sources of IIL all instruments that give rise to investment disputes at the international level,¹² including where the State consented to investment

⁷ See Viñuales (n 5) [XXX]. See for a similarly broad perspective that bridges national and international law, statute, and contract, Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: Oxford University Press, 2013).

⁸ See Viñuales (n 5) [XXX].

⁹ This is true particularly in proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Washington, 18 March 1965, 575 UNTS 159), whose Article 42 (1) stipulates that absent an agreement between the parties, the domestic law of the host state and applicable international law shall serve as applicable law. But it holds true in respect of governing international investment relations more generally. See generally Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Alphen aan den Rijn: Kluwer Law International, 2010); Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford: Oxford University Press, 2013).

¹⁰ Only because domestic laws (also) govern foreign investment relations, and may even become applicable law in ISDS, they are and remain sources of domestic law, just like the international law governing foreign investment relations, even though it can be directly invoked by investors, remains part of international law and does not change its nature to become a source of domestic law.

¹¹ See Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’, *American Journal of International Law* 107 (2013): 45–94; Schill, ‘W(h)ither Fragmentation’, pp. 878–83.

¹² This encompasses investor-State arbitrations that are conducted under the ICSID Convention, but also non-ICSID arbitrations that are in parts governed by international law through the application of the Convention

arbitration in a domestic statute or in a contract governed by domestic law.¹³ By contrast, a public international law perspective, as taken in the present chapter, focuses on the international law governing the substance of international investment relations, most importantly the law of investment treaties.¹⁴

Finally, institutional context is relevant for an analysis of sources. In this respect, this chapter does not look at the historic debates about sources of IIL,¹⁵ nor does it assess the impact current reform debates may have on the issue.¹⁶ Instead, its focus is on how the substantive international law governing investments is applied at what has to be seen as the center of IIL, namely the network of several thousand bilateral, regional, and sectoral IIAs that promote and protect foreign investment,¹⁷ and that are at the basis of the substantial and ever increasing number of investment arbitration.¹⁸ Although investment disputes under international law are occasionally also settled through interstate arbitration before the ICJ,¹⁹ and in rare cases through investor-State arbitration based on State contracts governed directly by international law,²⁰ these instances of IIL have been, for at least 20 years, relatively

on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (New York, 10 June 1958, 330 UNTS 3).

¹³ See Florian Grisel, 'The Sources of Foreign Investment Law', in *The Foundations of International Investment Law: Bringing Theory into Practice*, edited by Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (Oxford: Oxford University Press, 2014), 213–34.

¹⁴ For a similar perspective see Moshe Hirsch, 'Sources of International Investment Law', in *International Investment Law and Soft Law*, edited by Andrea K. Bjorklund and August Reinisch (Cheltenham: Edward Elgar, 2012), 9–38.

¹⁵ For the importance of the debate about sources in the history of IIL, see Patrick Juillard, *L'évolution des sources du droit des investissements*, vol. 250, Collected Courses of the Hague Academy of International Law (Leiden: Brill/Nijhoff, 1994), 9–215, 21–2.

¹⁶ For a succinct overview over the most recent reform debates, see generally UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015), pp. 119 ff., <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf>, accessed 8 August 2016. See further, inter alia, the contributions in Jean E. Kalicki and Anna Joubin-Bret, eds., *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill, 2015).

¹⁷ The term IIA encompasses bilateral investment treaties, investment chapters in free trade agreements, investment provisions in multilateral agreements, such as the North American Free Trade Agreement (NAFTA) (Washington, 17 December 1992, 32 ILM 289 (1993)), and treaties dealing with foreign investment in specific sectors, such as the ECT as regards the energy sector. By the end of 2015, there was a total number of 3,304 such IIAs; see UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (United Nations 2016), p. xii, <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf>, accessed 8 August 2016.

¹⁸ As of 1 January 2016, a total number of 696 ISDS cases has been reported; see *ibid.*, p. 104.

¹⁹ *Elettronica Sicula SpA (ELSI) (United States v Italy)* (Judgment) [1989] ICJ Rep 15; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits)* [2010] ICJ Rep 639. For examples of interstate arbitrations dealing with investment disputes see Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority', *Harvard Journal of International Law* 55 (2014): 1–70.

²⁰ See Prosper Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, vol. 128, Collected Courses of the Hague Academy of International Law (Leiden: Brill/Nijhoff, 1969), 95–234, 123, 148–88, 190.

peripheral phenomena that are overshadowed by the institutional context of the investment treaty regime and its application in investment treaty arbitration.

As present day IIL, for all practical purposes, is equivalent to the law of investment treaties as interpreted and applied by investment treaty tribunals, other sources, such as custom or general principles, usually only come into play, not as independent sources, but merely in order to concretize and clarify the meaning of the often vague standards of treatment in investment treaties. These include, inter alia, the prohibition of indirect expropriation without compensation or the requirement to treat investors fairly and equitably. Unlike in other fields of international law, the function of sources other than treaties in IIL is primarily one of the content-determination of treaties, not of law ascertainment. Accordingly, it is little surprising that the sources of IIL today are, with some notable exceptions,²¹ rarely a topic for scholarship. Likewise, with the exception of the perennial debate about the relationship between the customary international law minimum standard of treatment and the fair and equitable treatment (FET) standard,²² debates about the determination of vague treaty content in IIL are usually not discussed as an interplay of sources.

III. Multilateralization Through Bilateral Treaties

The first notable feature of IIL relates to the form of bilateral treaties as the main source of law and their relationship to the field's underlying ordering paradigm. Indeed, the doctrine of sources not only serves the function of law ascertainment or content determination in a specific field. The form of dominant sources also reflects a field's underlying ordering paradigm, that is, whether it is structured according to multilateral or bilateral rationales. In fact, the form in which material sources are cast may be an indicator as to whether a field of international law enshrines broadly shared rules that balance the interests of all participating actors and are reflective of multilateralism (which is the case when a field is dominated by multilateral treaties or custom) or whether it is highly fragmented and reflects preferential treatment in *quid pro quo*-bargains that differ greatly across treaties and that usually favor the interests of hegemonic powers who have greater bargaining power in bilateral as compared to

²¹ See the contributions in Gazzini and De Brabandere, eds., *International Investment Law*; Hirsch 'Sources of International Investment Law', Grisel, 'The Sources of Foreign Investment Law'; Juillard, 'L'évolution des sources'.

²² See Newcombe and Paradell, *Law and Practice of Investment Treaties*.

multilateral settings.²³ IIL as a field that is dominated by bilateral treaties, with custom and general principles being (almost exclusively) limited to concretize and serve as interpretative background for treaty norms,²⁴ could therefore be seen as a typical example of a highly fragmented patchwork of bilateral bargains, and hence the anti-thesis to multilateralism.²⁵

Curiously however, IIL can be read as a case in which multilateral structures develop on the basis of bilateral treaties.²⁶ Although the conclusion of multilateral treaties addressing substantive rights and obligations in investor-State relations has repeatedly failed after World War II,²⁷ the large number of bilateral IIAs that has been negotiated in reaction to these failures has not resulted, as should be expected in bilateral settings, in a large amount of variation across treaties. On the contrary, IIAs (even the more recent ones that have engaged in a recalibration of rights and obligations in reaction to the extensive criticism of the field),²⁸ are generally constructed in a remarkably similar fashion concerning their core, consisting of standard clauses and principles of IIL. Thus, a standard set of substantive and procedural protections for covered ‘investments’ and ‘investors’, including provisions on expropriation, national treatment and most-favoured-nation treatment (MFN), FET, full protection and

²³ For a general discussion of the difference between bilateralism and multilateralism, see John G. Ruggie, ‘Multilateralism: The Anatomy of an Institution’, in *Multilateralism Matters: The Theory and Praxis of an Institutional Form*, edited by John G. Ruggie (Columbia: Columbia University Press, 1993), 3–49. See also Bruno Simma, *From Bilateralism to Community Interest in International Law*, vol. 250, Collected Courses of the Hague Academy of International Law (Leiden: Brill/Nijhoff, 1994), 217–376, 233 (‘The antithesis of the bilateralism thus described consists of the assertion of community interest in the development of international law. . .’).

²⁴ See Viñuales (n 5) [XXX].

²⁵ Jorge Viñuales, amongst others, considers that it makes little sense to speak of a regime of IIL; *ibid.*, p. Similarly, Peter T. Muchlinski, ‘Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order”’, *Oñati Legal Series* 1 (2011), p. 1, <http://papers.ssrn.com/sol3/papers.cfm.abstract_id=1832562> accessed 12 April 2016 (describing IIL as an ‘unstructured process of privatized legal entrepreneurship’); Eyal Benvenisti and George W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, *Stanford Law Review* 60 (2007): 595–631, 597–98, 609 ff.

²⁶ For an in-depth analysis of how bilateral investment treaties make up a multilateral regime, see Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009).

²⁷ On the various failed attempts to establish multilateral treaties governing international investment relations in substance, whether as part of the International Trade Organization (ITO) in 1948, the Organization for Economic Co-operation and Development (OECD) in 1967 and 1998, or the World Trade Organization (WTO) during the Uruguay and Doha Rounds, see *ibid.*, pp. 23–64.

²⁸ While States are actively involved in recalibrating investment treaties to provide a better balance between the protection of foreign investors and States’ right to regulate, these modifications do not challenge the basic underlying principles and characteristics of IIAs, but rather adjust the system from within. They increase the complexity of the system, but leave the foundational multilateral features of IIL untouched. See Stephan W. Schill and Marc Jacob, ‘Trends in International Investment Agreements 2010–2011: The Increasing Complexity of International Investment Law’, in *Yearbook on International Investment Law & Policy 2011-2012*, edited by Karl P. Sauvant (Oxford: Oxford University Press, 2013), 141–180, 178–9.

security, free transfer of capital, and rules on ISDS are included, with limited variations in wording, in virtually any IIA.

Moreover, the similarity of IIAs is not a result of chance, but the product of deliberate planning by capital-exporting countries, reflecting the shared objective to promote and protect foreign investments and reduce political risk in particular in countries with weak domestic institutions. For this end, IIAs are based on model treaties that were first developed by a handful of capital-exporting countries (particularly Germany, the Netherlands, the United Kingdom, and the United States) who coordinated their investment policies and IIA programs within the OECD and later promoted by international organizations, such as the United Nations Conference for Trade and Development (UNCTAD), as instruments for development.²⁹ Meanwhile, IIAs are losing their North-South pedigree as investment flows also from developing into developed countries as well as among developing countries, suggesting that acceptable levels of investment protection under international law are in the shared interest of all States.

In addition, the treaties provide for a number of mechanisms that reduce divergence amongst them and increase harmonization in the field. First, MFN clauses regularly included in IIAs contribute to the multilateralization of IIL.³⁰ Within their scope of application, which usually encompasses substantive standards of treatment, but may also apply to questions of dispute settlement,³¹ such clauses ensure that a host State must extend any more favourable treatment it may offer to third States also to the State benefiting from MFN treatment. This prevents that different investment standards apply depending on the investor's nationality, leading to a harmonization and hence multilateralization of IIL. Second, nationality planning through corporate structuring, a practice that has been validated widely by arbitral tribunals,³² allows investors to opt into their preferred IIA rather independently of their own nationality. While only offering protection to nationals of the other contracting State, foreign investors

²⁹ See Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', *International Organizations* 60 (2006): 811–46, 818–19.

³⁰ A typical MFN clause requires a State to 'treat investments and activities associated with investments in its own territory . . . on a basis no less favourable than that accorded to investments and activities associated with investments of nationals of any third country'. See Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments (signed and entered into force 11 July 1988), Art 3 (c).

³¹ On the debate about the scope of application, see Schill, *The Multilateralization*, pp. 121–96.

³² *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay*, ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012), para. 93; *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012), para. 2.4.5; *Tokios Tokelès v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004), paras. 21 ff.

can use corporate vehicles established in a ‘foreign’ jurisdiction covered by an IIA of their choice in order to afford their investment protection under the ‘foreign’ IIA. This is possible because IIAs often determine corporate nationality based on incorporation and independently of the nationality of controlling shareholders. Nationality planning undermines strict connections between investment protection and nationality and suggests that IIL is better understood as a multilateral regime.

Finally, the dispute settlement mechanisms under IIAs contribute to the multilateralization of IIL. Disputes under the treaties are resolved by arbitrators chosen from a relatively small pool of arbitration specialists that is appointed in a considerable number of cases.³³ While this elite group of arbitrators does not share identical views on all aspects of IIL, they do have a broadly consistent understanding of IIL’s main structural features and substantive principles, thus contributing to a convergence that is typical for a multilateral regime. The multilateralizing effect of ISDS is most easily discerned from the manner in which tribunals interpret IIAs. They do so not in a compartmentalized, IIA-by-IIA fashion, but embed their interpretations within a treaty-overarching framework that is comprised of the entire universe of IIAs. As addressed in more depth in the next Section, tribunals regularly cite and refer to decisions of other tribunals that have previously dealt with similar issues as persuasive precedent, independently of whether the precedent in question was on the same or a similar IIA. Such cross-treaty citation suggests a multilateral conceptualization of the sum of bilateral IIAs.

IIL’s multilateralization, however, should not be understood as leading to absolute uniformity; rather, the point is that the IIL system should be understood and examined as a system functioning on the basis of multilateral rather than bilateral rationales. IIL then constitutes a good example of an area of international law where multilateral structures exist independently of, or may even develop on the basis of, bilateral treaties. It is an example of formally bilateral sources (treaties) taking on characteristics of a substantively multilateral regime. An area of international law where a similar analysis could bear fruit is the proliferating field of free trade agreements,³⁴ but possibly also the area of consular relations, extradition and judicial assistance, and international taxation, where large numbers of bilateral treaties exist that may be understood collectively to form a multilateral regime.

³³ See Sergio Puig, ‘Social Capital in the Arbitration Market’, *European Journal of International Law* 25 (2014): 387–424; Joost Pauwelyn, ‘The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus’, *American Journal of International Law* 109 (2015): 761–805.

³⁴ See Adrian M. Johnston and Michael J. Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’, *World Trade Review* 12 (2013): 621–52.

IV. The Role of Arbitral Precedent

The second notable feature in respect of the use of sources in IIL relates to the role of arbitral jurisprudence. Under Article 38 (1) (d) of the ICJ Statute, judicial decisions are not sources as such, but have the status of ‘subsidiary means for the determination of rules of law’. The same holds true for decisions by investment treaty tribunals, which are not a source in the strict sense, but merely means for determining the content of IIL. Their subsidiary status in the canon of sources should, however, not disguise the fact that arbitral tribunals, and their pronouncements on the rights and obligations in IIL, are becoming the principal reference point for understanding the substance of those rights and obligations. Thus, it is not so much the often vague rules and principles in IIAs that determine the outcome of investor-State disputes, but the way in which these rules and principles have been applied, shaped, and further developed by investment treaty tribunals in past cases. Arbitral precedent, in other words, becomes the principal reference point to determine the content of IIL.³⁵

In fact, the legal authority investment treaty tribunals most often make reference to in their decisions are pronouncements of other investment treaty tribunals. As quantitative citation analyses has found: ‘citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate’.³⁶ Unlike in commercial arbitrations that are held behind closed doors, this development is possible because investment treaty awards are regularly published (online and in print journals) and intensively discussed not only by parties to future investment treaty arbitrations, but also analysed in IIL scholarship. The ways precedent is used by arbitral tribunals, of course, differs and ranges from its cautious use as a ‘source of inspiration’ in treaty interpretation or as an indication of the ordinary meaning of a treaty provision, to cases where precedent further develops IIL or even becomes an instrument of system-wide lawmaking.³⁷

Even though arbitral tribunals do not become tired of emphasizing that arbitral precedent is not binding, they nevertheless attach importance to it up to a point where a *jurisprudence constante* becomes more authoritative as an argument than reference to a

³⁵ On this and the following, see in more detail, including references to arbitral case law, Stephan W. Schill, ‘System-Building in Investment Treaty Arbitration and Lawmaking’, *German Law Journal* 12 (2011): 1083–1110. See also Schill, *The Multilateralization*, pp. 321–61.

³⁶ Jeffery P. Commission, ‘Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence’, *Journal of International Arbitration* 24 (2007): 129–58, 148. See also Fauchald, ‘The Legal Reasoning’, pp. 333–43.

³⁷ On the different uses of precedent in international law generally, see Marc Jacob, ‘Precedents: Lawmaking Through International Adjudication’, *German Law Journal* 12 (2011): 1005–32.

formal source of international law. The statement of the Tribunal in *Saipem v Bangladesh* is representative of a position that has widely taken hold among investment arbitrators:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.³⁸

While precedent, in this view, does not bind later tribunals, it shifts the burden of argumentation by demanding a reasoned justification for departing from established precedent, not least because, as stated by another tribunal, ‘it is a fundamental principle of the rule of law that “like cases should be decided alike,” unless a strong reason exists to distinguish the current case from previous ones.’³⁹ Yet, the more established a precedent becomes, and the more investment treaty tribunals align themselves with a certain line of jurisprudence, the more difficult it becomes for parties and tribunals to meet that burden and to deviate from prior practice.⁴⁰ In consequence, through the process of referencing arbitral precedent, the true meaning of the rights and obligations under IIL is not so much enshrined anymore in what passes as a formal source, but rather in the decisions of investment treaty tribunals. For this reason, almost all textbooks on IIL concentrate on describing and analysing the jurisprudence of arbitral tribunals to illustrate the content of IIL: to understand IIL means knowing the practice of investment treaty tribunals.

Most importantly, precedent does not only inform the interpretation of IIAs, but has an impact in creating rights and obligations governing investor-State relations. Investment treaty tribunals, in other words, do not only apply existing sources, but actively make investment law themselves. Tribunals have, for example, declared provisional measures in ICSID arbitrations to be binding, even though Article 47 of the ICSID Convention envisaged

³⁸ *Saipem SpA v People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Provisional Measures (21 March 2007), para. 67.

³⁹ *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012), para. 52 (internal footnotes omitted).

⁴⁰ *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL (NAFTA), Arbitral Award (26 January 2006), Separate Opinion of Thomas Wälde, para. 16 (‘A deviation from well and firmly established jurisprudence requires an extensively reasoned justification’).

them as mere recommendations.⁴¹ Similarly, tribunals have developed the rule to award compound instead of simple interest.⁴² But above all, the role of investment treaty tribunals as law-makers becomes clear when considering how they transform the vague and open-ended principles of IIL, such as FET, full protection and security, indirect expropriation, or national treatment, into concrete rules that limit how the executive, legislator, and judiciary in host States ought to conduct themselves in relation to foreign investors. Most notably, tribunals develop the content of treaty standards in IIL not primarily through the application of methods of treaty interpretation, as enshrined in the Vienna Convention on the Law of Treaties (VCLT),⁴³ or through recourse to customary international law, but by turning to and relying on arbitral precedent as a main source of law ascertainment and content determination.

The NAFTA award in *Waste Management v Mexico* is representative of arbitral practice in this respect; but virtually any other case could be referred to. In that case, the Tribunal extensively described prior investment awards applying FET in order to clarify the standard's normative content. After discussing arbitral precedent at length, the Tribunal concluded:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.⁴⁴

As can be glanced from this quote, the Tribunal's understanding of FET was not derived from an independent application of methods of treaty interpretation but from the understanding of the standard as developed in arbitral jurisprudence. Similar forms of argumentation are not specific to NAFTA, nor is reference to arbitral jurisprudence limited to awards that interpreted the same governing IIA; instead, reference to arbitral precedent is a phenomenon

⁴¹ See Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2009), Art 47, paras. 15–22. For a recent example in arbitral jurisprudence see *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015), para. 582.

⁴² See Grisel, 'The Sources of Foreign Investment Law', pp. 225–33.

⁴³ Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331).

⁴⁴ *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3 (NAFTA), Award (30 April 2004), para. 98.

that can be found in virtually any arbitral award, with respect to virtually any question of IIL and arbitration. What is more, the power of precedent even plays out in cases of conflicting and inconsistent arbitral decisions,⁴⁵ where tribunals, often at length, engage in distinguishing precedent based on the facts of the case, the procedural posture, or the applicable IIA, seek to reconcile irreconcilable results through meta-rules, such as redefining an earlier holding on a point of law from a precise rule to a broader principle that allows for exceptions, or by considering an earlier holding itself as an exception to yet another principle, or suggest that a prior case should be overruled as a matter of principle and with effect for the entire IIL system.

Overall, reliance on precedent illustrates how investment treaty tribunals move from institutions that settle individual investment disputes to makers of IIL. Tribunal decisions, while *de iure* non-binding beyond the individual case, *de facto* determine how investment treaties are interpreted and investment disputes decided. Their practical impact in governing international investment relations and influencing the future behavior of investors and States goes much beyond the limited status accorded to them in Article 38 (1) (d) of the ICJ Statute as ‘subsidiary means for the determination of rules of law,’ even though from a formal perspective, tribunal decisions do no more than determining and concretizing the content of treaty rules within the IIL system.

V. The Use of Comparative Law

The inclusion of compulsory dispute settlement mechanisms in IIL does not only enhance the importance of arbitral precedent, it also has an effect on bringing in instruments into the process of resolving investment disputes that do not form part of the conventional canon of sources. One notable development, in this context, is the influence of comparative law in the interpretation and application of investment treaties. In fact, comparative references to both domestic legal systems and other international legal regimes (as compared to analysis of rules and principles from outside IIL as part of the applicable law) are frequently found in tribunal decisions. While comparative analysis does not make the *droit comparé* into an independent source of IIL, it still gives the ‘foreign’ law a degree of authority for the determination of the content of treaty norms. The use of comparative law comes in different degrees of methodological sophistication.

⁴⁵ See for the following, including references to arbitral jurisprudence, Schill, *The Multilateralization*, pp. 339–55.

At one end of the spectrum, one can observe a simple and methodically loose use of comparative law as mere inspiration for the interpretation of IIL. At the other end, we see a more sophisticated, even if not irreproachable, recourse to comparative law in order to distill general principles of law. An example of a loose use of comparative law is the decision in *Lemire v Ukraine*, which considered, in a rather selective and unsystematic fashion, when determining whether the requirement to radio-broadcast a certain percentage of Ukrainian music was contrary to FET, the use of similar requirements in a variety of domestic legal systems of third-countries.⁴⁶

Often, however, tribunals will attempt to use comparative law in a more methodical fashion. The Tribunal in *Saar Papier v Poland*, for example, made use of the domestic law on expropriation of the two contracting parties to circumscribe the concept of indirect expropriation under the German-Polish bilateral investment treaty.⁴⁷ Arbitral tribunals also regularly refer to comparable norms in other international legal regimes to concretize IIA treaty standards. The Tribunal in *Tecmed v Mexico*, for example, drew on the case law of the European Court of Human Rights and of the Inter-American Court of Human Rights to determine what constituted an indirect expropriation in IIL.⁴⁸ Numerous tribunals have also drawn on WTO law and jurisprudence to concretize the ambit of national treatment,⁴⁹ or the meaning of necessity- and non-precluded measures-clauses in IIAs.⁵⁰

There are, however, also cases where investment treaty tribunals develop more sophisticated and ambitious ways to use comparative law in order to develop general principles.⁵¹ The tribunals in *Total v Argentina* and *Gold Reserve v Venezuela*, for example, drew heavily on domestic legal orders of various common and civil law jurisdictions, in

⁴⁶ *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), para. 506. Similarly, *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005), para. 178; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/02, Award (27 August 2008), para. 269.

⁴⁷ *Saar Papier v Poland*, UNCITRAL, Final Award (16 October 1995), paras. 78 ff.

⁴⁸ See *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003), paras. 113–22. Similarly, *Mondev Int'l Ltd v United States of America*, ICSID Case No ARB (AF)/99/2, Award (11 October 2002) paras. 138, 141–4 (concerning immunities of public authorities).

⁴⁹ For further discussion, including reference to case law, see Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016), pp. 79–135; Nicholas A. DiMascio and Joost Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', *American Journal of International Law* 102 (2008): 48–89.

⁵⁰ *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008), paras. 192–5.

⁵¹ More generally on the role of general principles in IIL, see Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment', *Journal of World Investment and Trade* 10 (2009): 103–19; Christoph Schreuer et al., *The ICSID Convention*, Art 42, paras 178–82; Stephan W. Schill, 'General Principles of Law in International Investment Law' in Gazzini and De Brabandere, eds., *International Investment Law*, 133, 142–43, 154–57.

Europe and overseas, in addition to general international law, human rights law, and EU law, to normatively ground and give concrete meaning to the concept of protecting legitimate expectations as a restriction on a State's regulatory powers.⁵² Other tribunals focus predominantly on other international legal regimes in order to ground certain general principles of law. The Tribunal in *Mobil Corporation et al v Venezuela*, for example, engaged in a detailed analysis of the jurisprudence of various international courts and tribunals, including the ICJ, the Permanent Court of International Justice, the WTO Appellate Body, the Administrative Tribunal of the International Labour Organization, and the Court of Justice of the European Union to ground the concept of misuse of law/abuse of rights.⁵³

The difference in how tribunals use comparative law reflects different functions comparative analysis can have. These range from serving as mere instruments of inspiration for the interpretation of vague treaty standards, via the determination of the ordinary meaning States attribute to certain IIL concepts, to developing general principles of law in the sense of Article 38 (1) (c) ICJ Statute, a source of international law that must be taken into account as 'relevant rules of international law applicable in the relations between the parties' in the interpretation of IIAs pursuant to Article 31 (3) (c) VCLT. These different functions notwithstanding, the extent to which comparative law can impact IIL depends on the interpretative leeway the applicable treaty norms leave. Comparative legal analysis does not control the interpretation and application of IIAs as an independent source, or overwrite clear treaty rules, but serves primarily as an instrument to determine the content of vague treaty standards.

What is notable, in this context, is the increasing recourse in comparative analysis to systems of public rather than private law, including in the growing development of general principles of public law by investment treaty tribunals. A case in point, in addition to the examples given above, is the growing use investment tribunals make of proportionality analysis, an argumentative technique to reconcile competing interests, such as investment protection and environmental protection, labor standards, or human rights, that is typical for many systems of public law,⁵⁴ as well as recourse to public law doctrines of deference.⁵⁵

⁵² See *Total SA v The Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010), para. 111; *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014), para. 576.

⁵³ *Mobil Corporation, Venezuela Holdings, BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010), paras 169-85.

⁵⁴ See Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford: Oxford University Press, 2015); Benedict Kingsbury and Stephan W. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Principle of Proportionality' in *International Investment*

Recourse to comparative public law reflects the understanding that IIL constitutes a public law system that is no longer restricted to governing interstate relations, but directly addresses the relations between public and private actors and limits, similar to domestic administrative or constitutional law, how governments exercise authority vis-à-vis private economic actors.⁵⁶

The use of comparative law is not without problems though, as it may distort the content of rights and obligations enshrined in IIAs. Similarly, if comparative analysis aims at the distillation of general principles, there is the danger that the legal orders drawn on are not well understood in their social, legal, and institutional context and are not sufficiently representative, perhaps even Eurocentric, to reflect a globally acceptable solution.⁵⁷ It is because of these methodological challenges that the use of comparative law has raised the criticism of being ‘manipulable according to subjective preferences.’⁵⁸ To avoid such manipulation, and to pre-empt charges of selectiveness and bias, a methodologically rigorous, sophisticated, and critical use of comparative law is necessary. Much work still lies ahead for comparative law scholarship to provide investment treaty arbitration with the necessary tools to engage in sophisticated comparative analyses of the various public law fields touched upon in investor-State arbitration, including, for example, environmental regulation, energy production, or labor and fundamental rights. The methodological challenges notwithstanding, the use of comparative (domestic and international) law is likely to remain a persisting feature in the application of IIL by investment treaty tribunals that constitutes a notable particularity in IIL.

Law and Comparative Public Law, edited by Stephan W. Schill (Oxford: Oxford University Press, 2010), 75–106; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge: Cambridge University Press, 2015).

⁵⁵ Henckels, *Proportionality*, pp. 69 ff.

⁵⁶ See Stephan W. Schill, ‘International Investment Law and Comparative Public Law—An Introduction’, in Schill, ed., *International Investment Law*, 3–38, 17. See also Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2008), p. 5; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart, 2009), pp. 21–2. For the first elaboration on this analogy see the Separate Opinion of Thomas Wälde in *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL (NAFTA), Arbitral Award (26 January 2006), paras 12 ff.

⁵⁷ See José E. Alvarez, ‘“Beware: Boundary Crossings”—A Critical Appraisal of Public Law Approaches to International Investment Law’, *The Journal of World Investment & Trade* 17 (2016): 171–228; Jaye Ellis, ‘General Principles and Comparative Law’, *European Journal of International Law* 22 (2011): 949–71, 955–8, 968.

⁵⁸ M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: Cambridge University Press, 2010), p. 418.

VI. The Role of Soft Law

Comparative law is not the only non-conventional source affecting the interpretation of investment treaties and the settlement of investment disputes. Also, non-binding soft law instruments, which are created by a variety of different actors, including inter-governmental and international organizations, but also by private, non-governmental bodies, impact IIL today.⁵⁹ Soft law instruments play a particularly important role in the management of investor-State dispute settlement but also influence how different substantive interests are balanced in international investment relations and how IIA treaty norms are interpreted.

A first strand of soft law that finds application in ISDS consists of instruments relating to arbitral procedure. Rather than seeking to impact the substantive rights and obligations in IIL, these instruments are largely managerial in function and deal with mostly technical issues of procedural law. Prominent and well-established examples are instruments adopted by the International Bar Association (IBA), an organization of the legal profession with national bar associations as members, namely the IBA Rules on the Taking of Evidence in International Commercial Arbitration,⁶⁰ the IBA Guidelines on Conflicts of Interests in International Arbitration,⁶¹ and the IBA Rules on Party Representation in International Arbitration.⁶² These instruments are important in concretizing what are at times unclear and vague rules relating to arbitral procedure, namely the rules on the taking of evidence and the avoidance of conflicts of interests of arbitrators and counsel. Notably, soft law instruments, such as the IBA Guidelines, exercise normative authority independently of the disputing parties' consent; instead, they express standards of behavior that those involved as lawyers (counsel or arbitrator) in the settlement of investment treaty disputes follow as a matter of professional best practices. As pointed out by Gabrielle Kaufmann-Kohler:

Even though the law may be soft, even though it need not be incorporated into the parties' contract, soft law exercises a significant influence over the way arbitration

⁵⁹ See in depth Marc Jacob and Stephan W. Schill, 'Going Soft: Towards a New Age of Soft Law in International Investment Law?', *World Arbitration and Mediation Review* 8 (2014): 1–47. See further the contributions in Bjorklund and Reinisch, eds., *International Investment Law*.

⁶⁰ IBA Rules on the Taking of Evidence in International Arbitration (adopted 29 May 2010) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 5 April 2016.

⁶¹ IBA Guidelines on Conflicts of Interest in International Arbitration (adopted 22 May 2004) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 5 April 2016.

⁶² IBA Guidelines on Party Representation in International Arbitration (adopted 25 May 2013) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 5 April 2016.

proceedings are conducted. The IBA Rules of Evidence, for instance, have become standard practice, whether they are referred to expressly or not. Similarly, in all likelihood no arbitrator would make a decision on a delicate disclosure issue without consulting the IBA Guidelines on Conflicts of Interest.⁶³

A second strand of soft law instruments relating to international investment relations aims at rebalancing investment protection and competing rights in response to the criticism that investment law one-sidedly favors the protection of foreign investment at the expense of competing public interests. A particularly important area of soft law that has developed in this context in recent years concerns the area of corporate social responsibility (CSR).⁶⁴ In this field, several soft law instruments have been developed by international organizations, including the UN Global Compact, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the UN Guiding Principles on Business and Human Rights, or the OECD Guidelines for Multinational Enterprises. These instruments aim at counterbalancing investor rights through the codification of obligations investors are expected to comply with independently of their rights under IIAs. Albeit still tentatively, such instruments are starting to be referred to by investment treaty tribunals in order to concretize the otherwise vague standards of treatment in IIAs.⁶⁵

Similar developments can also be seen with respect to other soft law instruments that aim at establishing best practices for certain areas of government policy that also affect foreign investors. One example are the Principles on Promoting Responsible Sovereign Lending and Borrowing, which were developed by UNCTAD and endorsed by the UN General Assembly.⁶⁶ These Principles aim at laying down rights and obligations for both

⁶³ Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity', *Journal of International Dispute Settlement* 1 (2010): 283–99.

⁶⁴ For a general discussion see John G. Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc A/HRC/8/5 (7 April 2008), paras. 51–81 ('The Corporate Responsibility to Respect'); Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013), pp. 6–16.

⁶⁵ See *Hesham T M Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), para. 577. In addition, it is noteworthy that CSR instruments are also being included in recent IIAs; see, for example, Canada-Panama FTA (adopted 14 May 2010, entered into force 1 April 2013), Art 9.17 ('Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.').

⁶⁶ UNCTAD, 'Principles on Promoting Responsible Sovereign Lending and Borrowing (amended and restated as of 10 January 2012)', <http://unctad.xiii.org/en/SessionDocument/gdsddf2012misc1_en.pdf> accessed 30 March 2016; see also UNGA Res 68/304 (9 September 2014) UN Doc A/RES/68/304.

lenders and borrowers in sovereign debt transactions and restructurings and have already been referenced in investment treaty arbitrations.⁶⁷ Other examples that have not yet been invoked in investment treaty arbitrations, but may well be in the near future, are the Principles for Responsible Agricultural Investment, which are developed jointly by various UN organizations and the World Bank inter alia to deal with the issue of land-grabbing,⁶⁸ or the so-called Santiago Principles that lay down general principles and practices relating to sovereign wealth funds.⁶⁹ All of these soft law instruments could help to fill blind spots left by the vague treaty standards contained in IIA and help establish an appropriate balance between the protection of foreign investments and competing non-investment concerns.

Yet, the use of soft law comes with its own problems and challenges, not least since reliance on it can bypass, or undermine, traditional modes of international lawmaking.⁷⁰ Legitimacy concerns are particularly astute when soft law instruments are developed by technocratic expert groups that may share a common professional bias; but also the elaboration of soft law by international organizations can raise questions about representativeness and procedural propriety. These concerns notwithstanding, soft law is part of the instruments used to resolve investor-State disputes, to concretize the meaning of IIA standards, and to integrate IIL with other areas of international law and dispute settlement. Although its use is not as prevalent as that of comparative law in present-day IIL, the growing amount of soft law instruments that bear on investor-State relations is likely going to be reflected in increasing references to these instruments in investment treaty arbitrations in the future, thus ensuring soft law an important place among the instruments taken into account in determining the content of rights and obligations in IIL.

⁶⁷ See *Ambiente Ufficio SpA and others v Argentine Republic*, ICSID Case No ARB/09/9, Decision on Jurisdiction and Admissibility (8 February 2013) Dissenting Opinion of Santiago Torres Bernárdez, para. 330.

⁶⁸ See Inter-Agency Working Group on the Food Security Pillar of the G20 Multi-Year Action Plan on Development, 'Options for Promoting Responsible Investment in Agriculture, Report to the High-Level Development Working Group' (3 June 2011) Annex 1 <http://unctad.org/sections/dite_dir/docs/diae_dir_2011-06_G20_en.pdf> accessed 30 March 2016. See also Lorenzo Cotula, *The Great African Land Grab? Agricultural Investments and the Global Food System* (London: Zed, 2013); Lorenzo Cotula et al., 'Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa' (FAO, IIED and IFAD 2009) <<https://www.ifad.org/documents/10180/a2ea06a0-d0b2-4e99-a9b4-1f23e0491afb>> accessed 30 March 2016.

⁶⁹ International Working Group of Sovereign Wealth Funds (IWG), 'Sovereign Wealth Funds: Generally Accepted Principles and Practices' (October 2008), <<http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>> accessed 30 March 2016 ('Santiago Principles').

⁷⁰ On this concern see, inter alia, Matthias Goldmann, *Internationale öffentliche Gewalt: Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Berlin: Springer, 2015), pp. 394–8.

VII. Conclusion

As the previous discussion shows, IIL displays certain specificities in its use of sources. The reasons for those specificities are arguably closely connected to the existence of compulsory dispute settlement in this sub-fields of international law in the form of investment treaty arbitration. In fact, the existence of investor-State arbitration has not only been a game-changer in transforming IIL from an interstate system of diplomatic protection into a judicialized regime in which affected investors have direct access to pursue claims under international law. Investor-State arbitration has also had significant impact on the use and conceptualization of sources of IIL. Unlike in an interstate system, it is not anymore solely, or even principally, the view of States on, and argumentative practices relating to, sources to ascertain the existence of a specific rule or determine its content.⁷¹ Instead, in investment treaty arbitration, it is arbitral tribunals that determine what counts as a source and how its content is determined.

The existence of a dispute settlement mechanism, in other words, leads to a constructivist approach to sources that is driven by the view of those who resolve the disputes at hand and who, in the course of dispute resolution, develop their own view of the source of international law. This dispute-resolution-centered constructivist approach to sources corresponds to a shift of the center of international law from interstate discourse to the pronouncement of international courts and tribunals.⁷² Similarly, norm production in international law is not anymore an exclusively state-driven enterprise, but shared with international adjudicators. While State consent is still a necessary condition for lawmaking by international courts and tribunals, it is at times reduced to granting competence/jurisdiction to international courts and tribunals, who then engage in norm-production through adjudication on that basis.

For this reason, the choice of decision-makers, their acculturation and interpretative mindset become important criteria for the legal culture and doctrinal reconstruction of a field, including but not limited to its use of sources. In light of the composition of the investment arbitration community, which goes much beyond classical public international lawyers, it is therefore little surprising that investment treaty tribunals draw on a variety of non-conventional sources, in particular references to arbitral precedent, comparative law, or soft

⁷¹ On this view Martti Koskeniemi, *From Apology to Utopia*, 2nd ed. (Cambridge: Cambridge University Press, 2006).

⁷² This follows the legal theory of Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), pp. 297–337.

law instruments, to determine the content of the often vague treaty standards in IIL and motivate their decisions. IIL is therefore a good example to illustrate how the understanding of sources in a specific sub-field of international law depends to a large degree on the practice of the dispute settlement mechanism and its sociological and epistemic embeddedness.

Even within a constructivist approach to the sources of international law in the context of investment treaty arbitration, the question arises of what explains recourse of investment treaty tribunals to the relatively broad array of non-conventional sources discussed in this chapter. Beyond the practicality of responding to the need for guidance in treaty interpretation that tribunals often express in their decisions, drawing on arbitral precedent, comparative law, and soft law, may also be a way for tribunals to embed their decision-making in broadly accepted normative discourses that reflect societal expectations vis-à-vis IIL. Reference to such sources could, in other words, be a way to make decision by investment tribunals more acceptable and legitimate for affected constituencies. At the same time, the epistemic background of arbitrators and their (different) socialization in international law and commercial arbitration may influence the peculiar ‘sources-mix’ in IIL and investment treaty arbitration.

In this perspective, the multilateralization of bilateral treaties, which arbitral tribunals actively participate in, can be seen as a search to legitimize IIL as a universally accepted system, the invocation of precedent as a strategy to legitimize the system by seeking consistency, the use of comparative law as an attempt to align investment treaty jurisprudence with decisions of other domestic and international courts and to benefit indirectly from their legitimacy, and the use of soft-law instruments as a way to embed IIL in an open dialogue with a variety of different actors and constituencies whose activities bear on international investment relations. In this respect, the practice of the use of sources in IIL aligns—despite its particularities—with the function sources have in other fields of international law, namely to provide legitimacy to the governing legal framework and to its application to individual cases.